

**THE DETERMINATION OF SENIORITY FOR THE PURPOSE OF
PROMOTION IN THE SERVICES UNDER THE STATE:
AN ANALYTICAL STUDY**

A Thesis Submitted to the University of North Bengal

**For the Award of
Doctor of Philosophy in Law**

SUBMITTED BY

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CERTIFICATE

I certify that, Mrs. Soma Dey Sarkar, has prepared the thesis entitled "THE DETERMINATION OF SENIORITY FOR THE PURPOSE OF PROMOTION IN THE SERVICES UNDER THE STATE: AN ANALYTICAL STUDY", for the award of Ph.D. Degree of the University of North Bengal, under my guidance. She has fulfilled all the requirements under the UGC Regulations, 2009. Now her Ph.D. thesis is ready for submission. It is an original piece of work and it has not been submitted for evaluation before the examiners for the award of degree of Doctor of Philosophy (Law) of the University of North Bengal or any other University in India and abroad. She has carried out the work at the Department of Law, University of North Bengal.

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DECLARATION

I declare that the thesis entitled "THE DETERMINATION OF SENIORITY FOR THE PURPOSE OF PROMOTION IN THE SERVICES UNDER THE STATE: AN ANALYTICAL STUDY" has been prepared by me under the supervision of Prof. (Dr.) Rathin Bandyopadhyay, Professor, Department of Law, University of North Bengal. I further declare that no part of this thesis has formed the basis for the award of any degree or fellowship previously.

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ABSTRACT

Career development when viewed from organisational standpoint involves 'tracking career paths'. The management (in the form of Government) seeks information to enable it to direct and monitor the progress of employees and to ensure that capable managerial and technical talent is available according to the organisation's needs. In the changing nature of state and the functions of Civil Service and other 'Services under the State', organisational career development has become more important today.

The purpose of career development is to attract and retain men and women of talent and ambition in the government employment. This is ensured by providing equal opportunity for promotion and advancement. Article 16 of the Constitution gives effect to the doctrine of equality in all matters relating to public employment. The equal opportunity for the purpose of seniority, promotion and like matters of employment is available only to the persons who fall substantially within the same class or unit of service.

The seniority principle in government service is widely prevalent as a method of promotion in most countries. The seniority of an employee is required to be determined in a cadre on the basis of relevant principles enunciated either in the statutory rules or in the absence of any rule by administrative instructions, which remain operative in the field. For example, the year of allotment and fixation of seniority in the Indian Administrative Services would be determined under the rules in force at the time of appointment and not at the time of occurrence of vacancy.

The seniority of the Government employees selected through interview or competitive examination or training by a selecting authority shall be determined by the order of merit in which they are selected for appointment. In the absence of statutory rules or administrative instructions the court may evolve a fair and just principle for determination of inter-se seniority of the direct recruits. A post which the rules require to be filled up by direct recruitment, has to be filled up in accordance with the rules existing at the time when the post is advertised for the purpose.

In determining the seniority of promotees, it is laid down by the Supreme Court that the promotees get their seniority only from the date of regular promotion in accordance with rules and within quota. In case of promoted officers the main criteria to be considered for confirmation are (i) availability of substantive vacancy and (ii) suitability for the post. The seniority in the lower grade has no meaning for determining seniority in the higher grade except for determining inter-se seniority of the promotees. In the absence of specific provision in the Service Rules, inter-se seniority of the promotees would be determined on the basis of length of serviced, irrespective of the date of passing the qualifying examination.

The service rendered by an employee on deputation should be counted to entitle him to promotion in the parent department. The service rendered by a deputationist in an equivalent cadre in the parent department cannot be taken away by an executive order, instruction, rule or regulation, while counting his seniority in the deputed post or absorption. However, an officer on deputation is not entitled to promotion in either new or parent department as a matter of right by virtue of his seniority only where promotion is on the basis of seniority-cum-merit.

Normally, the seniority is determined from the date of initial appointment of the direct recruits on the basis of the length of continuous service of the promotees. The direct recruits will rank senior to the promotees when direct recruits are appointed against substantive vacancies and the promotees are appointed on officiating or regular basi thereafter. A direct recruit who comes into service after the promotee who is already unconditionally and without reservation promoted and whose promotion is not shown to be invalid or illegal according to relevant statutory or non statutory rules, should not be permitted by any principle of seniority to score a march over a promotee, because that by itself being arbitrary would be violative of Arts. 14 and 16 of the Constitution. Once the direct recruits and promotees form one class, discrimination between them at the time of further promotion is violative of Arts. 14 and 16 of the Constitution. In other words, after integration of the employees recruited from two different sources into one grade, discrimination for further promotion is not permissible in law. The Supreme Court has laid down the following three important principles regarding fixation of seniority: (i) the normal rule is that seniority should be measured by length of continuous officiating service unless a contrary intention appears from the rules; (ii) the promotees regularly

appointed during a particular period in excess of their quota for want of direct recruits can claim their whole length of service for seniority even against direct recruits who may turn up in succeeding periods; (iii) the promotees who had exceeded their quota would have to be pushed down to accommodate direct recruits coming after their appointment.

The expression “relative seniority” between a promote and a direct recruit shall be determined by the year of appointment or promotion of each in the post, cadre or grade, irrespective of the date of joining, would obviously mean the year of regular promotion and not any ad hoc promotion being made contrary to the statutory rules.

It is well settled that no person can be promoted with retrospective effect from a date when he was not born in the cadre, so as to affect others adversely. The promotees cannot be made senior to the direct recruits when the promotees entered into the said service by promotion after entry of the directly recruited officers in the quota of direct recruits.

The date of entry into the particular service is the safest criterion for fixation of seniority and the departure from this criterion by granting notional seniority from the back date must be based on objective consideration or a valid classification, but such preferential treatment should normally be given by means of statutory rules.

The introduction of roster system is well known to service jurisprudence. When a roster is to be introduced it only means that the available number of vacancies is to be ascertained and recruitment is to be made keeping in view the quota of the promotees and the direct recruits. If recruitment is made strictly according to quota, there will be no difficulty in applying the very rule of quota even while giving confirmation.

A study conducted upon employees of government service in various sectors in West Bengal for assessing and evaluating the above principles of seniority reveals that conflicts between seniority and merit are common trends seen in various public services. A well-defined principle adopted by the Government and Managing Bodies in solving the above problem is the principle of ‘seniority-cum-merit’. It is seen in almost all services that greater reliance is being kept upon the dual principle of seniority-cum-merit and merit-cum-seniority, where the minimum, length or the

years of service (seniority) is fixed and then the fittest and meritorious person who has completed the minimum length of years of services, and vice-versa, is selected for promotion.

PREFACE

The seniority principle in government service is widely prevalent as a method of promotion in most countries. Under this principle, promotion is determined on the basis of the length of service of the employee. In general, an employee who has served longer is eligible for promotion. On the basis of this principle an employee is promoted to a higher grade or class. Seniority is one of the most important matters relating to conditions of service because it has a direct bearing on the question of promotion to the next higher cadre. Therefore, the seniority under the rules is a civil right. The seniority of a civil servant does not depend upon how it is fixed by the concerned authority. It stands automatically determined according to the rules. The constitutionality of seniority rules can be challenged on the grounds of their unreasonableness, justness and fairness. Every government organisation and department is empowered to formulate their own seniority norms based upon the constitutional principle of equality of opportunity under Art. 16 and this makes the study of the subject matter complex. This thesis is the culmination of sincere efforts made to make available relevant literature on the subject of seniority and promotion in Services under the State in a single source.

This thesis has been kept on track and been seen through to completion with the support and encouragement of a number of people.

This feat wouldn't be possible but for the unconditional support and valuable guidance of my supervisor Prof. (Dr.) Rathin Bandyopadhyay, Professor and Head, Department of Law, University of North Bengal. A person with amicable and positive disposition, he has made himself available to clarify my doubts despite his busy schedules and I consider it as a great opportunity to complete my doctoral programme under his able guidance and to learn from his research expertise. I am extremely grateful to him for his valuable guidance, scholarly inputs and consistent encouragement.

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I owe every bit of the successful completion of this thesis to my family for their encouragement who longed to see this achievement come true. My husband, Mr. Alokesh Chakraborty and my daughter, Pratishta, have been my pillars of support. I

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At this moment of accomplishment, I would like to pay homage to my father, Late Paritosh Dey Sarkar and my former supervisor, Late Prof. B.P. Dwivedi who have untimely left for their heavenly abode. Their conviction will continue inspiring me. I dedicate this work to my father and Late Prof. B.P. Dwivedi.

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K

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L

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LIST OF ABBREVIATIONS

- ACR – Annual Confidential Report
AIR – All India Reporter
CAD – Constituent Assembly Debates
CAS – Career Advancement Scheme
HJS – Higher Judicial Service
IAS – Indian Administrative Service
IBR – Indian Bar Review
IFS – Indian Forest Service
ILLJ – Indian Labour Law Journal
IPS – Indian Police Service
JBCI – Journal of Bar Council of India
LDC – Lower Division Clerk
PAR – Performance Advancement Report
SCC – Supreme Court Cases
SCR – Supreme Court Report
U.K. – United Kingdom
U.S.A. – United States of America
UDC – Upper Division Clerk
UGC – Universities Grants Commission
UOI – Union of India
WB – West Bengal

LIST OF TABLES

Table 4.1 - The Secretariat Services

Table 4.2 Revised Pay Scales For Group D Employees

Table 4.3 Categorising Group D Employees D As Per Pay Scale

Table 4.4 Acting Promotion In Peace And Field Concessional Areas

Table 4.5 Year Of Reckonable Commission

Table 4.6 Years Of Reckonable Commissioned Service For Substantive Promotion

Table 6.1 Principles Of Promotion And Seniority In Government Departments And Corporations Within The Territory Of West Bengal

Table 6.2 Principles Of Promotion And Seniority In Defence Services Within The Territory Of West Bengal

Table 6.3 Principles Of Promotion And Seniority In Higher Education (With Special Reference To Career Advancement Scheme) Within The Territory Of West Bengal

Table 6.4 Principles Of Promotion And Seniority Among Employees Of Local Bodies Within The Territory Of West Bengal

LIST OF FIGURES

- Fig. 4.1 Order Of Promotion In General Duties In The Indian Air Force
- Fig. 6.1 Percentage Of Respondents Considered For Promotion Or Promoted To A Higher Rank
- Fig. 6.2 Percentage Of Respondents Considered For Promotion At Due Time
- Fig. 6.3 Percentage Of Respondents Whom Promotion Was Granted According To Seniority
- Fig 6.4 Percentage Of Respondents Whom Promotion Was Granted According To Merit
- Fig 6.5 Respondents Granted Promotion According To Seniority-Cum-Merit Rule
- Fig 6.6 Respondents Granted Promotion According To Merit-Cum-Seniority Rule
- Fig 6.7 Repondents Granted Promotion Or Considered For Promotion More Than Once
- Fig 6.8 Whether First Promotion According To Merit
- Fig 6.9 Whether First Promotion According To Seniority
- Fig 6.10 Whether First Promotion According To Seniority-Cum-Merit
- Fig 6.11 Whether First Promotion According To Merit-Cum-Seniority
- Fig 6.12 Most Recent Promotion Accoring To Merit
- Fig 6.13 Most Recent Promotion According To Seniority
- Fig 6.14 Whether Most Recent Promotion According To Seniority-Cum-Merit
- Fig 6.15 Whether Most Recent Promotion According To Merit-Cum-Seniority
- Fig 6.16 Whether Seniority Calculated By Continuous Length Of Service
- Fig 6.17 Whether Seniority Calculated By Continuous Length Of Officiation In Service
- Fig 6.18 Whether Seniority Determined From Day Of Appointment
- Fig 6.19 Whether Seniority Determined From The Date Of Confirmation
- Fig 6.20 Whether Principle Of Quota Applied

CONTENTS

<i>Abstract</i>	<i>i - iv</i>
<i>Preface</i>	<i>v - vii</i>
<i>List of Cases</i>	<i>viii - xxi</i>
<i>List of Statutes, Rules and Regulations</i>	<i>xxii - xxiii</i>
<i>List of Abbreviations</i>	<i>xxiv</i>
<i>List of Tables</i>	<i>xxv</i>
<i>List of Figures</i>	<i>xxvi</i>
<i>Introduction</i>	<i>1 - 11</i>
CHAPTER – 1: SERVICES UNDER THE STATE: A PREVIEW	12-39
1.1. Overview	12
1.2. The Modern State: Its Meaning, Roles And Functions	13
1.3. The "Welfare Concept Of State" In India	15
1.4. Meaning and Scope of the 'State'	21
under Article 12 of the Constitution of India	
1.4.1. Other Authorities vis- a- vis Instrumentality or Agency	22
of Government under Article 12 of the Constitution of India	
1.5. Services Under the State	29
1.5.1. The State as a Performer of Public Function	30
1.6. A Sum Up	36
CHAPTER 2 - PROMOTION IN PUBLIC PERSONNEL ADMINISTRATION IN INDIA: ITS RATIONAL, CONSTITUTIONALITY AND ROLE OF SENIORITY	40-98
2.1. Overview	40
2.2. The Structure of a Bureaucratic Organisation: A Weberian Concept	40
2.2.1. The Nature of Bureaucratic Hierarchy	43
2.3. Promotion- Meaning, Rationality and Constitutionality	44
2.3.1. Promotion - Its Meaning and Rationales	45
2.3.2. Promotion and Upgradation Distinguished	51
2.3.3. Promotion of Personnel in Services under the State: It's Constitutionality	57
a. Promotion in Services under the State: Article 16 and Its Relevance	60
b. Right to Promotion vs. Right to be Considered for Promotion	63
c. Reservation in Promotion with Consequential Seniority vis-a-vis Article 16	68
i. The Catch-up Rule and the Rule of Promotion with Consequential Seniority	71
ii. The Carry-Forward Rule	75
d. Right to be Considered for Promotion as guaranteed under Article 309 of the Constitution	84
e. Right to Be Considered for Promotion: How Made?	85
2.4. Promotion How Made vis-a-vis the Principle of Seniority	88
2.4.1. Importance of Seniority in Determining Promotion	88
in Public Personnel Administration	
2.4.2. Advantages of the Principle of Seniority	93
2.4.3. Performance Appraisal Report	94
2.5. A Sum-up	96

CHAPTER 3 - FIXATION OF SENIORITY FOR PROMOTION IN SERVICES UNDER THE STATE -AN ANALYSIS OF THE JUDICIAL OPINIONS	99-188
3.1. Overview	99
3.2. Seniority - Meaning, Concept and Constitutionality	99
3.3. Fixation of Seniority - The Underlying Principles	102
3.3.1. Primacy of Statutory Provisions	102
3.3.2. Absence of Rules: Executive Orders	106
3.3.3. Legality of the Statutes, Rules or Executive Order/Instructions Governing Seniority	17
3.4. General Principles Governing the Determination/Fixation of Seniority in Service	109
3.4.1. Length of Service	109
3.4.2. Meaning and Concept of Cadre and its Importance in Computing the Length of Service	119
3.4.3. Computation of Length of Service	123
a. From the Date of Appointment	124
b. From the Date of Continuous Officiation	130
c. From the Date of Probationary Appointment and Date of Examination	133
3.5. Seniority of Direct Recruits	134
3.6. Seniority of Promotees	135
a) When promotions are made irregularly	135
b) When promotion was passed over and given later	136
c) Seniority - when juniors and seniors are still officiating in higher cadre	136
d) Superseded officer cannot regain seniority	137
e) Seniority acquired by selection cannot be altered	137
f) Deemed date of promotion as basis for seniority	137
g) Retrospective promotion must not exceed number of vacancies	137
h) Denial of retrospective confirmation and seniority on retrospective promotion illegal	138
3.7. Inter Se Seniority	138
3.7.1. Inter se Seniority Between Reserved and General Category Candidates	138
a. Seniority of Roster Point Promotee	148
3.7.2. Inter se Seniority Between Candidates Holding Ad hoc Posts and Substantial Posts	151
3.7.3. Inter Se Seniority Between Direct Recruits and Direct Recruits	152
3.7.4. Inter Se Seniority Between Direct Recruits and Promotees	154
a. The Quota-Rota System	162
b. Consultation by the Central Government with the State Government while making Inter Se Seniority	170
3.8. Gradation List and Validity of Combined Seniority List	176
3.9. Delay and Latches in Claiming Seniority	182
3.10. A Sum Up	183

CHAPTER - 4 : PROMOTION OF PUBLIC PERSONNEL BY RULES OF SENIORITY IN VARIOUS SERVICES AND PUBLIC INSTITUTIONS: A BIRD'S EYE VIEW	189-269
4.1. Overview	189
4.2. The All India Services and Other Civil Services	191
4.2.1. The All-India Services Act, 1951 and Rules and Regulations Appurtenant to It	193
a. Regulation of Recruitment and Conditions of Service	195
b. Method of recruitment	195
c. Procedure for Selection and Appointment	203
d. Regulation of Cadres	205
e. Fixation of seniority	205
f. Inter-se Seniority	210
g. Gradation List	211
h. Inter-Cadre Transfer	211
4.2.2. The Civil Services of India	211
a. The Central Secretariat Service	212
b. Performance Appraisal	222
4.3. Judicial Service in India	224
4.3.1. All India Judicial Service	224
a. Appointment, posting and promotion of district judges	227
i. Appointing Authority	227
ii. Appointment by Promotion	228
iii. Consultation with the High Court	236
iv. Power of governor to Frame Rules	238
v. Control over Subordinate Courts	240
4.3.2. Seniority and Appointment of Judges of High Court and Supreme Court	241
4.4. The Defence Services	243
4.4.1. Promotion and Seniority in the Indian Army	244
4.4.2. Promotion and Seniority in the Indian Air Force	246
4.5. Promotion of University Teachers as Laid Down in the Career Advancement Scheme by the Universities Grants Commission	257
4.6. A Sum Up	266
 CHAPTER - 5 : CAREER ADVANCEMENT IN PUBLIC ADMINISTRATION IN LEADING DEMOCRACIES AND ROLE OF THE CONCEPT OF SENIORITY	 270-327
5.1. Overview	270
5.2. Structure in Public Administration in United States of America, Career Advancement and the Role of Seniority Norm	271
5.2.1. Types of Bureaucratic Organisations in the United States of America	272
a. Cabinet Departments	272
b. Independent Executive Agencies and Regulatory Agencies	273
c. Government Corporations	273
5.2.2. Political Patronage versus Merit	274
5.2.3. Legislation of Merit	276
a. Early Efforts to Adopt Merit: The Jenckes Bill	276
b. The Pendleton Act, 1883	276

c.	Other Legislations	278
5.2.4.	The Recruitment Process and the Role of Seniority in the Federal Civil Service System	279
a.	Inside or Outside	280
b.	Performance Appraisal System	280
c.	Internal Promotions	282
d.	Recruitment Procedure	282
e.	Merit Principles	284
f.	Career Advancement	285
g.	Seniority or Merit - The Debate	286
h.	Seniority and the Science of Shoveling	289
i.	Seniority and the First-Class Worker	290
j.	The Scientific Governance of Organisations	291
5.3.	Public Administration in United Kingdom: Promotion and Seniority	293
5.3.1.	The Civil Service Management Code	296
5.3.2.	Promotion in the Civil Service of United Kingdom	301
5.3.3.	Principles of Promotion	302
a.	Appointment of North Cote-Trevelyan Committee	302
b.	The Fulton Committee	303
5.3.4.	Recognition of Seniority for Promotion in Recent Times in United Kingdom	303
5.4.	Civil Service in France	308
5.5.	Public Administration in Germany	311
5.6.	Public Administration in South Africa	314
5.7.	The People's Republic of China	315
5.8.	Public Administration in Canada	319
5.9.	Public Administration in Australia	321
5.10.	Public Administration in Japan	322
5.11.	A Sum-Up	324
CHAPTER - 6 : DETERMINATION OF SENIORITY FOR PROMOTION IN SERVICES UNDER THE STATE WITH SPECIAL REFERENCE TO THE STATE OF WEST BENGAL - AN EMPIRICAL STUDY		328-366
6.1.	Overview	328
6.2.	The Bureaucratic Hierarchy in West Bengal	328
6.3.	Promotion and Seniority Policy of the Government of West Bengal	330
6.3.1.	The Modified Career Advancement Scheme	333
6.3.2.	Seniority Rules in the State Services of West Bengal	334
a.	The West Bengal Services (Determination of Seniority) Rules, 1981	334
i.	Determination of Seniority of direct recruits	334
ii.	Determination of seniority of promotees	335
iii.	Relative seniority of direct recruits and promotees	336
iv.	Determination of seniority of transferees	336
b.	The West Bengal Civil Service (Executive) (Determination of Seniority) Rules, 2008	337
i.	Seniority of Members of West Bengal Civil Service (Executive)	337
6.3.3	Promotion and Seniority Policy in Sub-Ordinate and Higher Judiciary in the State of West Bengal	339

a. Judicial Officers other than District Judges	339
i. Seniority	340
b. Higher Judicial Official in the rank of District Judges	341
i. Seniority of Higher Judicial Officers in the Rank of District Judges	341
ii. Inter-se Seniority	341
6.4. Determination of Seniority in Various 'Services' within the State of West Bengal	342
6.4.1. Approach of the Survey	342
6.4.2. Methodology and Sample Size	342
6.4.3. Determination of Seniority for Promotion in Government Departments and Corporations within the Territory of West Bengal	343
6.4.4. Determination of Seniority in Defence Services within the Territory of West Bengal	345
6.4.5. Determination of Seniority among Teachers of Universities, Colleges and Research Institutions within the Territory of West Bengal	347
6.4.6. Determination of Employees of Local Bodies within the Territory of West Bengal	349
6.5. A Comparative Analysis of the Selected 'Services' under the 'State' within the Territory of West Bengal	351
6.5.1. Right to Promotion or Right to be Considered for Promotion	351
6.5.2. Determination of Promotion According to Seniority or Merit	352
6.5.3. Principles of Promotion Where It is Made More than Once	355
6.5.4. Computation of Seniority in the Selected Service Sector	360
6.5.5. Inter-se Seniority	362
6.6. A Sum-Up	363
CHAPTER - 7 : CONCLUSION AND SUGGESTIONS	367-385
<i>Bibliography</i>	386-392
<i>Annexure</i>	

INTRODUCTION

Seniority has been considered as an element of an efficient bureaucratic organisation. Famous sociologist Max Weber lists “promotion according to seniority or to achievement” as an important component of an efficient bureaucracy. He argued that, entrance into an office “is considered as an acceptance of a specific obligation of faithful management in return for a secure existence”. Employment security then contributes to the objective administration of duties “where legal guarantees against arbitrary dismissal or transfer are developed, they merely serve to guarantee strictly objective discharge of specific office duties free from all personal consideration.” Thus, secure employment, of which seniority is a major component, provides the officer with protection from political interference and encourages loyalty to goals of the organisation. However, the conflict arises when the question of merit comes into play and the issue which requires detailed introspection is whether a balance between seniority and merit is possible. It is true that the principle of seniority is one of the important incidences of employment rules and an invincible aspect which determines the promotion of an employee; but at the same time merit along with efficiency of service personnel cannot be overlooked. Hence, under these circumstances the challenge that lies before the administration and the government is to formulate promotional and seniority rules in such a way so as to loop in the elements of seniority and merit in a balanced manner. The problem that then arises is the disparity in the modes of fixation of seniority for determining promotion. What all seniority rules say is, a seniority list is valid if it does not violate Articles 14 and 16 of the Constitution of India. The whole process is a complex method which depends wholly on the service records of the person in question and roster of the concerned service.

Our Constitution makers have included the principle of welfare state in the Constitution vide the Preamble, Part III and Part IV and the responsibility to look into public welfare squarely falls upon elected representatives of the people. In the present social and economic condition in this post-liberalised era, the role and function of the government has increased by leaps and bounds. Today administration is ubiquitous and impinges freely and deeply in every aspect of an individual's life. The expectation of the people from their government is not only that it will protect its people from external aggression and internal disturbance, but also that it will take care of its citizens from the cradle to the grave. Today, there is demand from the people, that the government must solve the

problems rather than merely define their rights. It is needless to say that the phenomenal growth in science and technology from the twentieth century has further increased the role of governance by leaps and bounds. The multi-dimensional problems with varied social economic and political ramifications cannot be solved except with the grow administration system and its processes. This leaves no doubt that without good and efficient network of administrators, the job of running a modern democracy based on well economy is not only impossible but also unimaginable.

The efficient administration of the government and the successful execution of all policies, schemes or programs or plans of the state or other authorities substantially fall upon the members of the central and the state services or those who are in the service of local or other authorities. It is worth mentioning here that in India, government is the highest provider of jobs to the people. Maximum number of jobs provided by the government is the in the fields of defence, railways, post offices and banks. This tremendous growth in civil services was mainly due to the fact that without a big army of civil servants, it was not possible to realize the dream of the welfare state which is cornerstone of the Indian Constitution.

The public servants are those persons who are not only expected to execute the policies and programmes of the state into action but some of them holding high positions have also a great responsibility even in the matter of taking of policy decisions. It is the service personnel who are appointed to discharge specific duties and responsibilities in connection with the activities relating to the different departments of the state who come in contact with the people directly.

The common man looks forward to these public servants through whom he asks the assistance to solve his day to day problems which he has a right to get from the state. The success of all policies and programmes of the state substantially depends upon its services of the honest and sincere cadre officers is a pre-condition for achieving the aims and objectives of the Constitution.

The bureaucracy, thus, helps the political executive in the governance of the country. The Constitution, therefore, seeks to inculcate in the civil servants a sense of security and fairplay so that he may work and function officially and give his best to the country. With this objective in view, the Constitution makers incorporated specific provisions

relating to services under the State in the Constitution including the Part III of the Constitution vide Article 16.

Time and again it has been reiterated by the Supreme Court that the civil services confer a status to the employees and it is not merely contractual in nature. [Tulsi Ram Patel vs. Union of India (AIR 1985 SC 1416), Roshan lal Tandon vs. Union of India (AIR 1967 SC 1889) and Ram Sahan Rai vs. Sachiv Samanaya Prabandhak (2001) 3 SCC 323]. This follows that in public interest, the following qualities should be present in the personnel constituting the services under the state:

1. Suitability and efficiency
2. Fearlessness and Independence;
3. Honesty and contentment;
4. Obedience and teamwork;
5. Discipline and devotion to work.

To manifest these qualities in the service personnel it is essential to provide them with security of tenure and better conditions of services by way of suitable pay scales, promotional opportunities and retirement benefits and a just and fair treatment towards them. This is where the role of Articles 14, 16 and 309 come into play.

Taking its roots from Article 14, Article 16 ensures equality of opportunity in matters of employment under the state. The equality envisaged in Part III of the Indian Constitution outlaws discrimination in a general way and guarantees equality before law to all persons. Equality of opportunity in matters of employment guaranteed under Article 16(1) extends to promotion also but this does not obviously mean that a civil servant can claim promotion as of right. Where provision is made for filling up the specified number of posts in the higher cadre by promotion, the extent of right of equality guaranteed under Article 16(1), in relation to promotion is, that a civil servant holding the lower post from which promotion is provided, is entitled to have his case considered according to his turn in the seniority. Here comes the thrust area of this Research work where it has been sought to find out the modes of fixation of seniority for the purpose of promotion in the Services under the State.

In a service, when an employee is raised to a higher position or rank or he is advanced to a higher position or rank or is preferred to other employees in respect of honour, dignity, grade or rank, he is said to have been 'promoted'. Promotion, thus, not only covers

advancement to higher position or rank but also implies advancement to a higher grade. In Service Law, the expression 'promotion' has also been understood in a wider sense and it has been held that 'promotion' can be either to a higher pay scale or to a higher position.

Efficiency in administration justifies promotion of civil servants; it is also natural that every civil servant aspires to promotions not only because of higher salary but also with the object of occupying superior posts and positions. A proper promotion policy is a necessary incentive to civil servants. An employee must fall within the prescribed zone of consideration for the case to be considered for promotion. This is because a civil servant has only a right to be considered for promotion. It is, therefore, necessary for the state to reserve sufficient number of posts in the higher cadres for promotion.

There are various methods adopted in the recruitment rules for making promotions out of which seniority-cum-merit and promotion by selection are prevalent rules. Seniority in services is one of the most important factors in making promotions.

Seniority, in service law, connotes the precedence or preference in position of an employee over other employees similarly situated. Black's Law Dictionary says that with reference to job seniority, workers with most years of service is first promoted within range of jobs subject to seniority, and is last laid-off, proceeding so on down the line to the youngest in the point of service. The object of assigning seniority is to facilitate the filling of promotional post. Although under most of the statutory rules or administrative instructions seniority is not the sole factor in granting promotion, e.g., when the rules provide for seniority-cum-merit or merit-cum-seniority or promotion by selection, yet it is difficult to find rules or instructions which completely ignore seniority as a determinant of promotion. While the method of seniority-cum-merit is generally prescribed for promotions in the lower cadres, the method of promotion by selection is adopted in the making promotion to the higher echelons of the services. In the seniority-cum-merit method, seniority is given greater importance than merit and in merit-cum-seniority method; merit is of more importance than seniority. Even in the cases of selection posts, the seniority in the feeder grade from which the selection is to be made can be an important factor because employees of a given seniority are treated in the zone of consideration while granting promotion to the selection posts.

Therefore, the seniority under the rules is a civil right (S.K. Ghosh vs. Union of India). The seniority of a civil servant does not depend upon how it is fixed by the concerned authority. It stands automatically determined according to the rules. However, the constitutionality of seniority rules can be challenged on the grounds of their unreasonableness, justness and fairness.

The preparation of the seniority list by the authority concerned is only a formal affair. If the authority commits any mistake in preparing the seniority list and it is found that it is not in conformity with the rules it has to be corrected. The right for consideration for promotion according to seniority and in preference to a junior in case of seniority-cum-merit and along with a junior in the case of promotion by selection is a part of fundamental right of equality of opportunity in matters relating to employment under State. Therefore, the fixing of seniority is the very foundation for complying with fundamental right guaranteed under Article 16(1) of the Constitution, because without fixation of seniority, there can be no consideration of the case of a civil servant according to his seniority. Article 309 confers this power to legislature or the Governor of a state as the case may be to bestow or divest a right of seniority. There is, however, no vested right to seniority, and the determination of rules relating to seniority are essentially a question of policy, and state may vary the seniority, even with retrospective effect if found necessary in the public interest. However, it must be noted that proper determination of seniority is a service right, and wrongful determination of seniority could be challenged. Yet this challenge cannot be raised after a long period of time.

The multiplicity of functions of the government has led to the diversification of work which in turn resulted in division of numerous departments in administration. However, there is no single rule determining the modes of promotion and seniority. Each department in the Central Government as well as in the State Governments draw their own seniority and promotion rules on the touchstone of Articles 14 and 16. Similarly, all the States have their own seniority rules according to which their civil servants are guided.

Determination of seniority in service jurisprudence is a complex process. Thus, the object of carrying on the study in this area of public administration is to find out various modes to making promotion with respect to seniority of service personnel. It is also the intention of this thesis to find out whether framing of a unanimous law will help in

simplification of the method of computation of seniority. This thesis critically reviews and analyses the literature and data so collected for fixing of seniority in public service and systematically summarises the evidence to date of outputs, uptake, influence, outcomes, and impacts of seniority in career advancement of service personnel.

The title of this thesis itself suggests that the hypothesis is to find various ways and means by which seniority can be fixed for the purpose of various services under the State. It also intends to prove that whether 'seniority' is a possible or plausible way for determining promotion or whether at all it is an efficient method of determining promotion? Having proved that, it moves further to determine the ways and means of fixation of seniority and the different modes of application of seniority in case of services under the State. .

Having framed the hypothesis, the proposed research work aspires to answer the following research questions developed for proving the hypothesis and solving the problem set out in the statement of problem:

1) The first and foremost question which arises for the purpose of my research topic is what are the "Services under the State"? This question may seem unimportant to many but it is worth mentioning here that "services under the state" is the pivot around which the research findings will develop.

2) What is promotion? What are the various methods adopted by the State for the purpose of making promotion?

3) What is seniority?

4) How are promotion and seniority related? What is object of assigning seniority for the purpose of promotion?

5) What are the chief principles upon which seniority for promotions are based?

6) It is a known fact that seniority-cum-merit method for promotion is applicable in the cases of lower cadres of the services. Is it possible to follow the same rule in the upper levels of services also? If yes, how?

7) Promotion in the upper echelons of the service is made through the "promotion by selection" method. What role does seniority play in promotion by selection?

8) How do we balance merit with seniority? What are the rationals behind adopting methods like seniority-cum-merit and merit-cum-seniority? What are the situations when these particular methods can be adopted?

9) What are the various methods of fixation of seniority?

10) Whether length of service rendered by an employee in a particular grade or cadre is the only generally accepted determinative factor for fixing seniority in services?

11) What are the various ways of computing the length of services?

12) What are the other principles other than length of services for determining seniority?

13) Is "inter se seniority of recruits from two or more sources" possible? If yes, how?

14) What is Gradation or Seniority List? What are the methods of preparation of Gradation or Seniority List?

15) When Gradation or Seniority Lists are challenged in the Court of Law, what will be the consequences? Can the Seniority be quashed?

The methodology adopted in completion of this thesis is a combination of Doctrinal and Empirical Methodology. The target group for the survey consists of only Government employees in various departments of the State within the territorial jurisdiction of the State of West Bengal, which include-

- (a) The employees in various Services of the State as defined under Article 12
- (b) The Defence Personnel
- (c) The teaching Faculty under the Career Advancement Scheme in Universities, Colleges and Research Institutes
- (d) The employees in Local Bodies

From each of the above groups 25 respondents have been selected for collection of data. The data has been collected by distribution of a structured questionnaire to the respondents with closed questions. The Questionnaire consists of two parts, vis., Part - A and Part - B.

This research work, also being a doctrinal one, heavily focus, if not exclusively, upon the laws and rules relating to seniority itself as an internal self-sustaining setoff principles which can be accessed through reading court judgments and statutes. Deriving

principles and values from decided case and re-assembling decided cases into a coherent framework in the search for order, rationality and theoretical cohesion will be the fodder for the research work.

The Constitution of India is the chief source upon which the structure of the research work will be based. Articles 14, 16, 309 and 311 are the main provisions which relevant to the research topic. All the laws regulating the determination of various conditions of services including seniority for promotion have to confirm to the constitutional provisions mentioned above. Any law which does not abide by this rule will be declared as null and void and will not have any effect.

There is no mother legislation, other than the Constitution, which commonly deals with rules for determining seniority for promotion for all sorts of services under the state. It is known to all of us that there are innumerable types of employments provided by the State. Every government department has its own laws regulating the conditions of services of the employees. More so, these laws are not always legislated in the Parliament or the State Legislatures; most of them are legislated by delegated legislation. There are various laws and rules drawn by the respective by the various state governments and the departments of the governments which have been mentioned in the bibliography.

Other than the Constitution of India, there are several books, journals, law reporters, commentaries on case laws, etc. which looks into this subject. No book single-handedly deals with the aspect of fixation of seniority for determining promotion. A few of them have been selected for the purpose of study in completion of this research work.

M. Ramajois, *Services under the States*, Indian Law Institute, 2007

This book is a leading authority on the subject of services under the state. It may be read at the most simplest level as a source of overall understanding of civil services law and service jurisprudence. Chapters 7 and 8 deal with promotion and seniority respectively.

Samaraditya Pal, *Law Relating to Public Service*, LexisNexis Butterworths Wadhwa, Nagpur, 3 ed., 2011

Almost all areas of administrative law and service jurisprudence have been covered by this book. The author has relied principally on the case decided by the Supreme Court

and High Court. The book has looked into the constitutional dimensions also – ranging from equal opportunity and employment, cabinet system of government, the procedural safeguards in favour of government employees especially promotional matters, etc.

Muthuswamy, Brinda, et al., *Swamy's Compilation on Seniority and Promotion in Central Government Services*, Swamy Publishers Pvt. Ltd., 2017:

The Rules and orders on Seniority and Promotion, Confidential Reports and allied matters are present in this compilation. This volume brings in one place all the rules and orders found in numerous instructions, decisions and clarifications, most of them of which are not codified. It is a treasure house for all employees as well as professional and researchers for the lucid appreciation of the entitlements to career advancement.

Mohit Bhattacharya, *Public Administration*, Word Press, Kolkata, 2012:

This is a book on 'administrative theories'. Public administration as a specialised field of study has been growing in importance, especially in the developing countries. Since development in these countries is spearheaded by government, governmental functions have increased manifold and new organisational structures have grown up in response to new functions and responsibilities. The discussions in the different chapters are oriented towards broadgauge generalisations. As a developing body of knowledge, the administrative theories have no doubt many imperfections and limitations. This only emphasises the need for more rigorous studies of administrative phenomenon.

To testify the hypothesis of this research in hand, the Researcher proceeded to discuss different issues under various chapters. Apart from the Introduction, the thesis is divided into Seven (7) chapters.

Since the subject matter of the present research work is 'Services under the State', the first chapter elaborates the meaning and scope of the concept. The expansion of the terminology 'State' with reference to article 12 of the Constitution is the basis on which the whole thesis has been developed. In the context of a general approach to studying the 'Services under the State', it has been suggested that it is best to 'start with a broad canvas and take stock of the public service as a whole, narrowing the focus as appropriate.

Since a government organisation is not a monolithic structure and is primarily hierarchical in nature, career development becomes one of the basic considerations in the personnel policy of the government. In the words of Glenn Stahl, the term 'career' denotes "...the progression of an individual in a field of work throughout the employable years of his life. A career in business or in a profession is a commonly understood concept. The aspect of career advancement and its constitutional validity has been the subject matter of chapter two. Special mention of reservation in promotion and its legal and judicial framework has been made in this chapter.

The object of assigning seniority is to facilitate the filling of promotional posts. So, seniority is one of the most important matters relating to conditions of service because it has a direct bearing on the question of promotion to the next higher cadre. Where promotion to the next higher cadre is based on the principles of seniority and merit, the seniority of an official is of utmost importance. Promotion is guaranteed on the basis of seniority, to any official, once he becomes eligible or suitable. Even in cases where promotion is governed by the principles of selection, seniority has its own role to play. Where persons are selected to the next higher post on the basis of merit and suitability, from amongst persons of equal merit, the senior is entitled to be preferred for appointment. Therefore, the seniority under the rules is a civil right. All aspects of seniority and the mode of fixing of seniority in services under the state has been discussed in chapter three of this thesis.

The principles of promotion and seniority so derived from chapters two and three have its application in chapter four. In this chapter, hierarchical structures of a few selected services under the state have been discussed. The chapter looks into the All India Services and other Civil Services, the Judicial Services, the Defence Services in India and Service under Universities, Colleges and Research Institutions under the Career Advancement Scheme of the University Grants Commission, the promotional opportunities in these services and how seniority plays a role in granting promotion in these services.

Chapter five takes into account the service sector in various democracies of the world, their promotional aspects and the role of seniority. Reference to services in developed countries like United States of America, France, Japan, Australia, South Africa, Germany, etc. have been dealt into in this chapter.

To check the authenticity of the theories and facts and to further explore the issues discussed in the abovementioned Chapters, a study has been carried out with the help of primary survey. The survey is conducted by a structured questionnaire and the data received therefrom, have been analysed in Chapter 6.

Finally, the whole research work was rounded off in Conclusion and Suggestions in Chapter 7 of the Thesis.

CHAPTER - 1

SERVICES UNDER THE STATE: A PREVIEW

1.1. Overview

Derived from the Latin word ‘servitum,’ the term “service” has a wide range of meanings and contexts in which it can be applied. For the purpose of this thesis, the meaning of the word is being restricted to mean “a public department or organisation run by the state”. According to the Cambridge Dictionary, ‘service’ means “a government system or private organisation that is responsible for a particular type of activity, or for providing a particular thing that people need.” Again, the Oxford English Dictionary has provided us an arena of meanings including merely “a period of employment with a company or organisation” or “employment as a servant “ to “a system supplying a public need such as transport, communications or utilities such as electricity, water, etc.”

Here, it is of utmost importance to differentiate between ‘employment’ and ‘service’. Although historically, employment law originated in what was termed as the law of master and servant, the modern terminology adopted is that of ‘employer’ and ‘employee’; and contract of employment is used rather than the older phrase ‘contract of service’, save that the latter phrase is still used in *social security and related legislation*.¹ An individual in business on his account is known variously as an independent contractor or a self-employed person, and traditionally it has been said that such a person works under a contract for services rather than a contract of employment or a contract of employment or a contract of service.² For further elucidation, it can be pointed out that an ‘employee’, unless otherwise required, “is an individual who has entered into or works under, or where the employment has ceased, worked under a contract of employment; ‘employment’ means employment under a contract of employment and ‘contract of employment’ means a *contract of service* or apprenticeship, whether express or implied, and, if it is express, whether it is oral or in writing.”³

¹ Halsbury’s Laws of England, Vol. 16, 8 (Butterworths, London, 4th ed. Reissue, 1992)

² Ibid

³ Ibid

Therefore, precisely, all employments are not services but all services are employment. This is because employment is understood in a wider perspective. The context of 'service' on the other hand, brings within its ambit the 'welfare notion of the state' and the role played by the modern state in providing service to the public at large.

1.2. The Modern State: Its Meaning, Roles And Functions

Etymologically, the term 'state' means "the political system of a body of people who are politically organised"⁴. Delving beyond this physical aspect of state would direct us to the functionalities of a state. In the words of the famous jurist John Salmond:

"A State or political society is an association of human beings established for the attainment of certain ends by certain means. It is one of the most important of all the various kinds of society in which men unite, being indeed the necessary basis and condition of peace, order and civilisation. What then is the difference between this and other forms of association? In what does the state differ from such other societies such as a church, a university, a joint stock company, or a trade union? The difference is clearly one of function. The state must be defined by reference to such of its activities and purposes as are essential and characteristic."⁵

The concept of 'State' is a comparatively modern concept which owes its origin to Machiavelli, who expressed this idea in the early 16 century as the power which has authority over men. This was an important idea because it describes the nature of state, not as the end of the state which was a question of political philosophy rather than political sociology or political science.⁶ This peculiar feature of the state has been the focus of attention of many recent thinkers.

Max Weber, the famous German Sociologist, has sought to evolve a sociological definition of state. Weber observes: 'Sociologically, the state cannot be defined in terms of its ends...Ultimately, one can define the modern State sociologically only in terms of

⁴ Bryan A. Garner and H.C. Campbell (ed.), *Black's Law Dictionary*, 1443 (West Publishing Co., Minnesota, 8th ed., 2005)

⁵ Glanville L. Williams (ed.), *John Salmond, Jurisprudence*, 129 (Sweet and Maxwell Ltd., London 10th ed., 1947)

⁶ O.P. Gauba, *An Introduction to Political Theory*, 56 (Macmillan India Ltd., Delhi, 3rd ed., 1995)

the specific means peculiar to it, as to every political association, namely, the use of physical force.”⁷

From this point of view, Weber arrives at the following definition which is widely acknowledged in modern political theory:

“A state is a human community that successfully claims the monopoly of the legitimate use of physical force within a given territory.”

That the State is an organic body was conceptualised by the Greeks and the Stoics applied it to humanity. It was taken over by Christianity and throughout the Middle Ages reined supreme. It was challenged in the time of scientific revolution of the 17th Century, which led to the development of the mechanistic view of the State.⁸ With this ensued the tug of war between the organic and the mechanistic view of the State intercepted by the class theory of state in the middle of the nineteenth century.

The organic theory of the State regarded the state as a natural institution and accordingly one cannot imagine the existence of man as man, i.e., a civilised being, without the existence of state. In sharp contrast to this, the mechanistic theory regarded state as a social institution which gave rise to the doctrine of individualism according prominence to individuals and reducing the state to a mere servant of the individual.⁹ This doctrine sought to curtail the regulatory powers of the state over social and economic processes. The mechanistic theory maintains that there are varying conflicting interests of various groups within society and the state uses its supreme regulatory power to harmonise these interests. Since then, there has been a slow shift from the old ‘atomistic’ view to the new ‘pluralistic’ view of the nature and function of the state thereby ushering the era of welfare state. The welfare state not only regulates the behaviour of citizens in all essential aspects but itself makes provisions for essential goods and services in such a manner that benefits are distributed according to need while the burden is shared according to individual capacity.¹⁰

⁷ H.H. Gerth and C. Wright Mills (tr. and ed.), *From Max Weber: Essays in Sociology*, 77-78 (Routledge, London, 1st ed. 1991)

⁸ Id at 71

⁹ Id at 76

¹⁰ Id at 77

1.3. The “Welfare Concept Of State” In India

The welfare concept of State is not new to the Indian society. The ancient Indians regarded the Indian state as essentially a beneficent institution evolved in prehistoric times for the efficient protection of human life and for the better realisation of its higher ideals.¹¹ From the various observations made in relation to Ancient Indian states, we gather that peace, order, security and justice were regarded as the fundamental aims of the state.¹² The functions of the State were not confined only to defence against foreign aggression, protection of person and property, preservation of peace and order and adjudication, but also extended to promotion of welfare of the people, to increase their wealth by a cooperative effort and to add to their amenities of life. The activity of the state as envisaged by the Mahabharata and the Arthashastra, relates to all the aspects of human life – social, economic and religious. The state was not regarded as a necessary evil, whose coercive activities were to be reduced to the minimum. The activity of the state was to embrace the whole of human life, both here and hereafter. The state was to offer facilities to religious sects to develop on their own lines and foster and inculcate piety, morality and righteousness. It was to improve the social order and to encourage learning, education and art by subsidising learned academics and extending patronage to scholars and artists. It was to establish and maintain rest houses, charity halls and hospitals and relieve the distress due to floods, locusts, famines, pestilences and earthquakes. It was to see that the population is evenly distributed and encourage colonisation of fresh lands. It was to enrich the resources of the country by developing forests, working mines and constructing dams and canals in order to make agriculture independent of rain as far as possible. It was to offer active help to trade and industry, but also to protect the population against capitalistic selfishness.¹³

Therefore, since the ancient period the State has been an instrument of welfare mobilisation in India which has also been reflected in our Constitution.

The Preamble to the Constitution of India has expressly stated that India is a ‘socialist’ democracy. The word ‘Socialism’ was inserted to “spell out expressly the high ideals of socialism”.¹⁴ There is no telling that the aims, objects and functions of a welfare state is

¹¹ A.S. Altekar, *State and Government in Ancient India*, 42 (Motilal Banarsidass Pvt. Ltd., Delhi, 2005)

¹² Id at 47

¹³ Id at 49

¹⁴ As stated in the Statement of Objects and Reasons of the 42nd Amendment Act, 1976.

synonymous to that of a Socialist State. What is meant by ‘socialism’ is explained in the same context but there is no reference to collectivism or nationalisation but mere ‘social justice’. These words are –

“...the objective of socio-economic revolution which would end poverty and ignorance and disease and inequality of opportunity...”¹⁵

Though the original Constitution did not find any mention of the term ‘socialist’, both Pandit Nehru and Ambedkar stood for some form of commitment to ‘socialism’ in the Constitution. While moving the Objectives Resolution, Nehru had inter alia said:

“Well I stand for socialism and, I hope, India will stand for socialism and that India will go towards the constitution of a Socialist State and I do believe that the whole world will have to go that way.”¹⁶

Replying to the debate of the Objectives Resolution in the Constituent Assembly, Nehru said that the first task of the Assembly was “to free India through a new Constitution, to feed the starving people and clothe the naked masses and give every Indian the fullest opportunity to develop himself according to his capacity.” He added that “the greatest and most important question in India is how to solve the problem of the poor and the starving. Wherever we turn we are confronted with this problem. If we cannot solve this problem all our paper constitutions will become useless and purposeless.” Nehru believed that the Constituent Assembly and the Constitution framed by it were to be mere parts of the larger national endeavour. The goal of the national endeavour was a new social order under which the basic needs of the ordinary citizens would be fulfilled; all would enjoy fundamental human freedoms and equality of opportunity.”¹⁷

The text of the Preamble as amended gives almost the highest place of honour to the ‘Socialist’ objective. Nehru once said¹⁸:

“Much can be said about socialism, but I would like to stress one thing. The whole of the capitalist structure is based on some kind of an acquisitive society. It may be that, to

¹⁵ Justice Y.V. Chandrachud, Justice S.S. Subramani, Justice B.P. Banerjee (Ed.), *Durga Das Basu, Commentary on the Constitution of India*, 394 (LexisNexis Butterworths Wadhwa, 8th Ed. Reprint 2012). Also see this Author’s Constitution Amendment Acts.

¹⁶ CAD, Vol. 1, 57-65

¹⁷ Subhash C. Kashyap, *Constitutional Law of India*, Vol. 1, 262 (Universal Law Publishing, 2nd Ed., 2015). Also see CAD, Vol. VII, p. 316-23

¹⁸ Ibid

some extent the tendency to acquisitiveness is inherent in us. A socialist society must try to get rid of this tendency to acquisitiveness and replace it with cooperation.....without this you cannot wholly succeed. Even from the very limited point of view of changing your economic structure, apart from your minds and hearts, it takes time to build up a socialist society. We must realise that the process of bringing socialism to India, especially in the way we are doing it, that is democratic way, will inevitably take place.”

The Constitution (Forty Fifth Amendment) Bill, attempted to define ‘Socialist’ to mean “free from all forms of exploitation – social, economic and political.”¹⁹ However, Socialism is difficult to define; its meaning varies from one person to another and is hardly left with any one connotation.

Explaining the meaning of the term ‘socialist’ in the Preamble with reference to the Statement of Objects and Reasons appended to the Constitution (42 Amendment) Act, 1976, the Constitution Bench in *D.S. Nakara vs. Union of India*²⁰ has brought to the forth the ambition behind the 42 Amendment to the Constitution in the following words:

“The principal aim of a socialist State is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from the cradle to grave. This amongst others on economic side envisaged economic equality and equitable distribution of income. This is a blend of Marxism and Gandhism leaning heavily towards Gandhian socialism.”

In the celebrated case of *Minerva Mills Ltd. vs. Union of India*²¹, the Supreme Court has reflected the spirit and the language of socialism in the following words:

“Now thanks to the rising social and political consciousness and expectations roused as a consequence and the forward looking posture of this court, the under-privileged also are clamouring for their rights and are seeking the intervention of the Court with touching faith and confidence in the Court.”

So interpreted, socialism implies and aims at (i) providing free education to all, (ii) equality in pursuit of excellence in chosen vocation without hindrance of caste, colour,

¹⁹ The Bill was finally adopted without the definition as the 44th Amendment of the Constitution.

²⁰ AIR 1983 SC 130 (para 33)

²¹ AIR 1980 SC 1789

sex or religion and with assurance to the less equipped of a decent minimum standard of life without exploitation, and (iii) economic security in old age for all with a reasonable standard of life, medical aid and freedom from fear and want assured.

Again, in *Kesavananda Bharti vs. State of Kerala*²², the Supreme Court pointed out that:

“it was such a socialist State which the Preamble directs the centers of power – Legislative, Executive and Judiciary- to strive to set up. From a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society is a long march but during this long journey to the fulfilment of goal every State action taken must be directed, and must be so interpreted, as to take the society one step towards the goal.”

It has been further held that the word ‘socialist’ in the Preamble of the Constitution was expressly brought to emphasise that the aim of the Constitution was to establish an egalitarian social order through the rule of law as its basic structure. In *Minerva Mills*²³, the Constitution Bench had considered the meaning of the word “socialism” to crystallise a socialistic state securing to its people socio-economic justice by interplay of the Fundamental Rights and the Directive Principles of State Policies. In *State of Karnataka vs. Ranganatha Reddy*²⁴, a Bench of nine judges held that the aim of socialism is the distribution of material resources of the community in such a way as to subserve the common good. In *Sanjeev Coke Manufacturing Co. vs. Bharat Coking Coal Ltd.*²⁵, in interpreting socialism, Article 39(b) was looped in and held that the broad egalitarian principle of economic justice was implicit in every Directive Principle. The law was designed to promote broader egalitarian social goals to do economic justice to all. Therefore, all State actions should be such as to make socio-economic democracy with liberty, equality and fraternity, a reality to all people through democratic socialism under the rule of law.²⁶

The word ‘socialist’ used in the Preamble must be read from the goals that Articles 14, 15, 16, 17, 21, 23, 38, 39, 46 and all other cognate Articles seek to establish, i.e., to reduce inequalities in income and status and to provide equality of opportunity and facilities. Social justice enjoins the court to uphold the Government’s endeavour to

²² AIR 1973 SC 1461

²³ Id at 21

²⁴ AIR 1978 SC 215

²⁵ AIR 1983 SC 239

²⁶ *Air India Statutory Corporation vs. United Labour Union*, AIR 1997 SC 645

remove economic inequalities, to provide decent standard of living to the poor and to protect the interests of the weaker sections of the society so as to assimilate all the sections of the society in a secular, integrated, socialist Bharat with dignity of person and equality of status to all. The Indian vision of socialism with democracy and human dignity is to be realised by creation of opportunities for the development of each individual. It is not for merging of the individual in the society. The Indian socialist society wants the development of each individual but requires this development to be such that it leads to the upliftment of the society as the whole. The more the talent from backward classes and areas get recognition and support, the more socialist will be the society. Public sector and private sector should harmoniously work. The Indian approach to socialism is derived from the Indian spiritual traditions. Buddhism, Jainism, Vedantic and Bhakti Hinduism, Sikhism, Islam and Christianity have all contributed to this heritage rooted in respect for human dignity and human equality. Indian socialism, therefore, is different from Marxist or scientific socialism. To achieve the goal set down by the Preamble, the directive principles and fundamental rights, the Constitution envisaged planned economy.²⁷

From the above discussion at length, it is clear that the Constitution aims at establishing a welfare State. However, the Constitution makers have avoided the use of the term 'welfare' in Part III of the Constitution. We come across this term only in Article 38²⁸ of Part IV of the Constitution. This article and the succeeding ones in this part of the Constitution specifically show that that the framers of our Constitution did not contemplate a purely 'Police State' but a 'Welfare State' the functions of which should, within the bounds of the Constitution and subject to its limitations, be commensurate with the public welfare.²⁹

In *State of Bihar vs. Kameshwar Singh*³⁰, the Supreme Court had viewed that the ideal that has been set before us in Article 38 by our Constitution makers is to evolve a State which must constantly strive to promote the welfare of the people by securing and

²⁷ Id at 27, p.264. Also see *Samatha vs. State of Andhra Pradesh*, AIR 1997 SC 3297

²⁸ ARTICLE 38 – State to secure a social order for the promotion of welfare of the people – (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 minimise the inequalities in status, facilities and opportunities, not only amongst groups of people residing in different areas or engaged in different vocations.

²⁹ Durga Das Basu, *Commentary on the Constitution of India*, Vol. E, 131(Universal Book Traders, Delhi, 7th Ed., 1994). See also *Lokenath vs. State of Orissa*, AIR 1952 Orissa 42(47)

³⁰ AIR 1958 SC 252

making as effectively as it may a social order in which social, economic and political justice shall inform all the institutions of the national life. In other words, India has to establish an egalitarian social order under the rule of law. *The welfare measures partake the character of sovereign functions.*

Article 38(2) mandates to minimise inequality in status, facilities and opportunities not only among the groups of the people, to secure to them adequate means to improve excellence in all walks of life.³¹ Various provisions of the Constitution are aimed at the ideal of 'equality' held out by the Preamble. While Articles 14-16 deal with particular aspects thereof which are enforceable by an individual as 'fundamental rights' the directive principles of state policies emphasise the duty of the State in this behalf by way of removing inequalities wherever they exist, in respect of status, facilities and opportunities, by positive legislation. The fundamental rights as provided under Part III and the directive principles as envisaged in Part IV of the Constitution, together, aim at establishing the equality of status and opportunity, which is promised by the Preamble, and also to minimise inequalities in income between individuals and group as far as possible.³²

In *State of Himachal Pradesh vs. Umed Ram Sharma*³³, the Constitutional Bench has unanimously agreed that every person is entitled to life as enjoined in article 21 read with Article 19(1)(d) and in background of article 38(2) of the Constitution. Every person has a right under Article 19(1)(d) to move freely throughout the territory of India and he has also the right under Article 21 to his life and that right under Article 21 embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself. There should be road for communication in reasonable conditions in view of constitutional imperatives and denial of that right would be denial of the life as understood in its richness and fullness by the ambit of the Constitution. The Preamble and Article 38 envision social justice under its arch to ensure life to be meaningful and liveable with human dignity. The Constitution commands Justice, Liberty, Equality and Fraternity as supreme values to usher in the egalitarian, social, economic and political democracy.³⁴

³¹ *Chatter Singh vs. State of Rajasthan*, AIR 1997 SC 303

³² *Id* at 29, p.132

³³ AIR 1986 SC 847

³⁴ *Consumer Education and Research Centre vs. Union of India*, AIR 1995 SC 922

Therefore, Article 38 constitutes an important operative part of the promises made in the Preamble to the Constitution to achieve the ideal of a democratic State and to bring about the social and economic revolution of which the founding fathers dreamt. It speaks of promoting the ‘welfare of the people’ which means the State shall take the responsibility of the welfare of the people and its being committed to the objective of building a welfare State. It also speaks of bringing about a ‘social order’ where ‘justice, social, economic and political’ prevails.³⁵ That the fundamental rights as laid down under Part III and the Directive Principles as enumerated under Part IV of the Constitution are complementary and supplementary to one another has been strongly voiced by the Supreme Court in innumerable number of cases. The idea here is of building a true welfare state and of ending economic exploitation and staggering inequalities. Thus, article 38 is the keystone or the core of the Directive Principles. This concern to provide welfare to the people by the state has been worded in the other articles of Part IV of the Constitution.³⁶

1.4. Meaning and Scope of the ‘State’ under Article 12 of the Constitution of India

Article 12³⁷ does not define the term ‘State’; it merely gives an inclusive meaning of ‘State’ with broader goals. The Constitutional philosophy of a democratic, socialist republic mandated to undertake a multitude of socio-economic operations inspires Part IV and so we envision the State entering the vast territory of industrial and commercial activity, competitively or monopolistically, for ensuring the welfare of the people.³⁸ A perusal of Article 12 shows that the definition of State in the said article includes:

- i. The Government of India, Parliament of India,
- ii. Governments of the States and legislatures of the States,
- iii. All local authorities as also “other authorities” within the territory of India or under the control of the Government of India.

³⁵ Subhash C. Kashyap, *Constitutional Law of India*, Vol. 1, 804 (Universal Law Publishing, 2nd Ed., 2015)

³⁶ Articles 39-51

³⁷ ARTICLE 12. Definition – In this part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

³⁸ *Som Prakash Rekhi vs. Union of India*, AIR 1981 SC 212

While initiating a debate on this article in the Draft Constitution in the Constituent Assembly, Dr. Ambedkar described the scope of this article and the reasons why this article was placed in the chapter on fundamental rights as follows:

“The object of the fundamental rights is twofold. First, that every citizen must be in a position to claim those rights. Secondly, they must be binding upon every authority – I shall presently explain what the word ‘authority’ means – upon every authority which has got either the power to make laws or the power to have discretion vested in it. Therefore, it is quite clear, then they must not only be binding upon the Central Government, they must not only be binding upon the Provincial Government, they must not only be binding upon the Governments established in the Indian States, they must also be binding upon District Local Boards, Municipalities, even Village Panchayats and Taluk Boards, in fact, every authority which has been created by law and which has got certain power to make laws, to make rules, or make bye-laws.

If that proposition is accepted – and I do not see anyone who cares for fundamental rights can object to such a universal obligation being imposed upon every authority created by law - then, what are we to do to make our intention clear? There are two ways of doing it. One way is to use a composite phrase such as ‘the State’, as we have done in Article 7; or, to keep on repeating every time, ‘the Central Government, the Provincial Government, the State Government, the Municipality, the Local Board, the Port Trust, or any other authority.’ It seems to me not only most cumbersome but stupid to keep on repeating this phraseology every time we make a reference to some authority. The wisest course is to have this comprehensive phrase and to economise on words.”³⁹

1.4.1. Other Authorities vis- a- vis Instrumentality or Agency of Government under Article 12 of the Constitution of India

Until the year 1967, the Supreme Court was in a dilemma as to whether to give a liberal interpretation to the phrase ‘other authority’ and if so given what would be the widest scope of the term. The year 1967 marked the watershed year and in *Rajasthan State Electricity Board vs. Mohan Lal*⁴⁰, a Constitutional Bench of the Supreme Court held that the expression “other authorities” is wide enough to include within it every authority created by a statute on which powers are conferred to carry out governmental

³⁹ [1948 (Vol. VII), CAD 610]

⁴⁰ AIR 1967 SC 1857

or quasi governmental functions and functioning within the territory of India or under the control of the government of India. Even while holding so Shah, J. in a separate but concurring judgment observed that every constitutional or statutory authority on whom powers have been conferred by law is not ‘other authorities’ within the meaning of Article 12. He also observed that it is only those authorities which are invested with sovereign powers, that is, power to make rules and regulations and to administer or enforce them to the detriment of citizens and others that fall within the definition of ‘State’ in Article 12: but constitutional or statutory bodies invested with power but not sharing the sovereign power of the State are not ‘State’ within the meaning of that article.

The reasons for necessitating the expansion of the definition of the term ‘other authorities’ under Article 12, has been sufficiently justified by Mathew, J. in *Sukhdev Singh vs. Bhagatram Sardar Singh Raghuvanshi*⁴¹ in the following words –

“The concept of State has undergone drastic changes in recent years. Today State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. It has to be mainly viewed as a service corporation. A State is an abstract entity. It can only act through the instrumentality of agency of natural or juridical persons. There is nothing strange in the notion of the State acting through a corporation and making it an agency or instrumentality of the State. With the advent of a welfare State the framework of civil service administration became increasingly insufficient for handling the new tasks which were often of a specialised and highly technical character. The distrust of Government by civil service was a powerful factor in the development of a policy of public administration through separate corporations which would operate largely according to business principles and be separately accountable. The public corporation, therefore, became the third arm of the Government. The employees of public corporations are not civil servants. Insofar as public corporations fulfil public tasks on behalf of the Government, they are public authorities and as such subject to control by Government. The public corporation being a creation of the State is subject to the constitutional limitation as the State itself. The governing power wherever located must be subject to the fundamental constitutional limitations. The ultimate question which is

⁴¹ (1975) 1 SCC 421

relevant for our purpose is whether the Corporation is an agency or instrumentality of the Government for carrying on a business for the benefit of the public”.

From the above, it is to be noticed that because of the change in the socio-economic policies of the Government this court considered it necessary by judicial interpretation to give a wider meaning to the term ‘other authorities’ in Article 12 so as to include such bodies which were created by an Act of legislature to be included in the said term ‘other authorities’. This judicial expansion of the term ‘other authorities’ came about primarily with a view to prevent the Government from bypassing its constitutional obligations by creating companies, corporations, etc. to perform its duties.⁴²

At this stage it is important to refer to the judgment of *Sabhajit Tewary vs. Union of India*⁴³ which was delivered by the same Constitution Bench which delivered the judgment in *Sukhdev Singh* on the very same day. In this judgment the Court noticing its judgment in *Sukhdev Singh* rejected the contention of the petitioner therein that the Council for Scientific and Industrial Research in the said writ petition which was only registered under the Societies Registration Act, would come under the term ‘other authorities’.

Subsequent to the above judgments of the Constitution Bench a three-judge Bench of this Court in the case of *Ramana Dayaram Shetty vs. International Airport Authority of India*⁴⁴ placing reliance on the judgment of this Court in *Sukhdev Singh* held that the International Airport Authority which was created by the International Airport Authority Act, 1971 was an instrumentality of the State, hence came within the term ‘other authorities’ in Article 12. While doing so this Court held:

“Today the Government, in a welfare state, is the regulator and dispenser of special services and provider of large number of benefits. The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kind: leases, licenses, contracts and so forth. With the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of

⁴² *Zee Telefilms Ltd. Vs. Union of India*, (2005) 4 SCC 649 at 675

⁴³ (1975) 1 SCC 485

⁴⁴ (1979) 3 SCC 489

these forms may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, it cannot be said that they do not enjoy any legal protection nor can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure.

The law has not been slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in the Government largess, formerly regarded as privileges, have been recognised as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking government discretion in the matter of grant of such largess. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largess in its discretion or at its sweet will.”

It is in this context that the Bench in *Ramana Dayaram Shetty*⁴⁵ case laid down the parameters or the guidelines for identifying a body as coming within the definition of “other authorities” in Article 12. They are as follows:

1. “One thing is clear that if the entire share capital of the corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.”
2. “Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation of the corporation being impregnated with governmental character.”
3. “It may also be a relevant factor.....whether the corporation enjoys monopoly status which is State-conferred or State-protected.”
4. “Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.”
5. “If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.”
6. “Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference” of the corporation being an instrumentality or agency of Government.

⁴⁵ Ibid

These tests propounded for determining as to when a corporation can be said to be an instrumentality or agency of the Government was subsequently accepted by a Constitution Bench of this Court in the case of *Ajay Hasia vs. Khaled Mujib Sehravardi*⁴⁶.

The expression “authority” as used in Article 12 has a definite connotation. It has different dimensions and, thus, must receive a liberal interpretation. To arrive at a conclusion, as to which “other authorities” could come within the purview of Article 12, we may notice the meaning of the word “authority”.

In his dissenting opinion in Zee Telefilms case, S.B. Sinha, J., opined that the words “other authorities” contained in Article 12 are not to be treated as ejusdem generis.⁴⁷ In the Concise Oxford English Dictionary⁴⁸, the word “authority” has been defined as under:

“1. The power or right to give orders and enforce obedience. 2. A person or organisation exerting control in a particular political or administrative sphere. 3. The power to influence others based on recognised knowledge or expertise.”

Broadly there are three different concepts which exist for determining the questions which fall within the expression “other authorities”⁴⁹:

- i. The corporations and the societies created by the State for carrying on its trading activities in terms of Article 298 of the Constitution wherefore the capital, infrastructure, initial investment and financial aid, etc. are provided by the State and it also exercises regulation and control thereover.
- ii. Bodies created for research and other developmental works which are otherwise governmental functions but may or may not be a part of the sovereign function.
- iii. A private body is allowed to discharge public duty or positive obligation of public nature and furthermore is allowed to perform regulatory and controlling functions and activities which were otherwise the job of the Government.

In *Pradeep Kumar Biswas vs. Indian institute of Chemical Biology*⁵⁰, it was again held that:

⁴⁶(1981) 1 SCC 722

⁴⁷ Id 42 at 694

⁴⁸ The Concise Oxford English Dictionary, 10th Ed., 1999

⁴⁹ Supra n. 47

‘The pictures that ultimately emerge is that the tests formulated in *Ajay Hasia* are not rigid set of principles so that if a body falls within any one of them it must, ex-hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be – whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.’”

The guidelines laid down in *Pradeep Kumar Biswas* are recapitulated here to give a clearer understanding of what would fall within the purview of State under Article 12⁵¹:

1. Principles laid down in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any of them it must ex hypothesi, be considered to be a State within the meaning of Article 12.
2. The question in each case will have to be considered on the basis of facts available as to whether in the light of the cumulative facts as established, the body is financially, functionally administratively dominated, by or under the control of the Government.
3. Such control may be particular to the body in question and must be pervasive.
4. Mere regulatory control whether under statute or otherwise would not make a body a State.

Keeping the above factors in consideration, what is necessary is to notice the functions of the body concerned. A State has different meanings in different contexts. In a traditional sense, it can be a body politic but in modern international practice, a State is an organisation which receives the general recognition accorded to it by the existing group of other States. The expression ‘other authorities’ in Article 12 of the Constitution is “State” within the territory of India as contradistinguished from a State within the control of the Government of India. The concept of State under Article 12 is in relation to the fundamental rights guaranteed by Part III of the Constitution and the Directive Principles of State Policy contained in Part IV thereof. The contents of these two parts

⁵⁰ (2002) 5 SCC 111

⁵¹ *Zee Telefilms Ltd. Vs. Union of India*, (2005) 4 SCC 649 at 679

manifest that Article 12 is not confined to its ordinary or constitutional sense of an independent or sovereign meaning, so as include within its fold whatever comes within the purview thereof so as to instil public confidence in it.⁵²

If the Constitution Bench judgment of the Apex Court in *Sukhdev Singh vs. Bhagatram Sardar Singh*⁵³ and development of law is to be given full effect, it is not only the functions of the Government alone which would enable a body to become a State but also when a body performs governmental functions or quasi-governmental functions as also when its business is of public importance and is fundamental for the life of the people. For the said purpose, we must notice that this court in expanding the definition of State did not advisedly confine itself to the debates of the Constitutional Assembly. It is considered each case on its merit. In *Sukhdev Singh*, Mathew, J. stated that even big industrial houses and big trade unions would come in the purview thereof. While doing so the courts did not lose sight of the difference between the State activity and individual activity. The Supreme Court took into consideration the fact that new rights in the citizens have been created and if any such right is violated, they must have access to justice which is a human right. No doubt, there is an ongoing debate as regards the effect of globalisation and/or opening up of market by reason of liberalisation policy of the Government as to whether the notion of sovereignty of the State is being thereby eroded or not but we are not concerned with the said question in this case. “Other authorities”, inter alia, would be there which inter alia function within the territory of India and the same need not necessarily be the Government of India, Parliament of India, the Government of each of the states which constitute the Union of India or the legislatures of the States.⁵⁴

The term ‘State’ has thus been very widely defined with a view to securing the guarantee of fundamental rights in respect of all possible institutions. The scope of this wide definition has been further expanded by judicial interpretation of the term ‘other authorities’ occurring in Article 12. This expansive interpretation promotes the expansion of administrative law as more bodies become subject to the writ jurisdiction, and it also makes bodies amenable to the restrictions of fundamental rights. This trend also helps in the expansion of judicial control over public enterprises which assume

⁵² Id at 695

⁵³ Supra n. 41

⁵⁴ Supra n. 52

various structural forms.⁵⁵ It is pertinent to mention here that the National Commission to Review the Working of the Constitution (2002) noted that fundamental rights guaranteed by the Constitution are, in the absence of specific constitutional provisions, mainly enforceable against the “State”. The definition of the ‘State’ in Article 12 being an ‘inclusive one’, courts have ruled that where there is pervasive or predominant governmental control or significant involvement in its activity, such bodies, entities and organisations fall within the definition of ‘State’. The Commission has recommended that in Article 12 of the Constitution the following Explanation should be added:

‘Explanation. – in this article, the expression “other authorities” shall include any person in relation to such of its functions which are of public nature.’⁵⁶

1.5. Services Under the State

Therefore, by the various judicial pronouncements, Article 12 has been receiving a purposive interpretation as by reason of Part III of the Constitution a charter of liberties against oppression and arbitrariness of all kinds of repositories of power has been conferred – the object being to limit and control power wherever it is found. A body exercising significant functions of public importance would be an authority in respect of these functions. In those respects it would be the same as is executive government established under the Constitution and the establishments of organisations funded or controlled by the Government.⁵⁷

It is not that everybody or association which is regulated in its private functions becomes a ‘State’. What matters is the quality and character of functions discharged by the body and the State control flowing therefrom. The concept that all public sector undertakings incorporated under the Companies Act or the Societies Registration Act or any other Act for answering the description of State must be financed by the Central Government and be under its deep and pervasive control has in the past three decades undergone a sea change. The thrust now is not upon the composition of the body but the duties and functions performed by it. *The primary question which has to be posed is whether the body in question exercises public function.*

⁵⁵ H.C. Dholakia, *State under Administrative Law*, 358 IBR (JBCI), Vol. 12 (1985)

⁵⁶ *Supra* n. 35 at 391

⁵⁷ *Ibid*

It would be apt to mention here that the phrase '*service under the State*' has direct import to public function. 'Service under the State' would include all those bodies which have employed personnel in fulfilment of the 'public function' and 'public duty'. Public law is a term of art with definite legal consequences.⁵⁸ The concept of public law function is yet to be crystallised. Concededly, however, the power of judicial review can be exercised by this Court under Article 32 and by the High Courts under Article 226 of the Constitution only in a case where the dispute involves a public law element as contradistinction from a private law dispute.⁵⁹ General view, however, is that whenever the State or an instrumentality of State is involved, it will be regarded as an issue within the meaning of public law but where individuals are at loggerheads, the remedy therefore has to be resorted to in private law field. Situation, however, changes with the advancement of State function particularly when it enters in the fields of commerce, industry and business as a result whereof either private bodies take up public functions and duties or they are allowed to do so. The distinction has narrowed down. Drawing inspiration from the decisions of the Supreme Court as also other courts, it may be safely inferred that when essential governmental functions are placed or allowed to be performed by a private body they must be held to have undertaken a public duty or public function.⁶⁰

1.5.1. The State as a Performer of Public Function

What would be a 'public function' has succinctly been stated by Lawrence H. Tribe in the following words:

"18-5. *The 'public function' cases* – When the State 'merely' authorises a given 'private' action – imagine a green light at a street corner authorising pedestrians to cross if they wish - that action cannot automatically become one taken under 'State authority' in any sense that makes the Constitution applicable. Which authorisations have that Constitution-triggering effect will necessarily turn on the character of the decision-making responsibility thereby placed (or left) in private hands. However, described, there must exist a category of responsibilities regarded at any given time as so 'public' or 'governmental' that their discharge by private persons, pursuant to State authorisation even though not necessarily in accord with State direction, is subject to the federal

⁵⁸ *O'Reilly vs. Mackman*, (1982) 3 All ER 680

⁵⁹ Dissenting opinion of S.B. Sinha, J. in *Zee Telefilms case*

⁶⁰ *Ibid*

constitutional norms that would apply to public officials discharging those same responsibilities. For example, deciding to cross the street when a police officer says you may is not a ‘public function’; but authoritatively deciding who is free to cross and who must stop is a ‘public function’ whether or not the person entrusted under State law to perform that function wears a police uniform and is paid a salary from State revenues or wears civilian garb as a volunteer crossing guard....”⁶¹

Performance of a public function in the context of the Constitution would be to allow an entity to perform the function as an authority within the meaning of Article 12 which makes it subject to the constitutional discipline of fundamental rights. Governmental functions are multifacial. There cannot be a single test for defining public functions. Such functions are performed by a variety of means.

Furthermore, even when public duties are expressly conferred by statute, the powers and duties do not thereunder limit the ambit of a statute, as there are instances when the conferment of powers involves the imposition of duty to exercise it, or to perform some other incidental act, such as obedience to the principles of natural justice. Many public duties are implied by the courts rather than commanded by the legislature; some can even said to be assumed voluntarily. Some statutory public duties are “prescriptive patterns of conduct” in the sense that they are treated as duties to act reasonably so that the prescription in these cases is indeed provided by the courts, not merely recognised by them.⁶²

A.J. Harding in his book ‘Public Duties and Public Law’ summarised the said definition in the following terms:

- “1. There is, for certain purposes (particularly for the remedy of mandamus or its equivalent), a distinct body of public law.
2. Certain bodies are regarded under that law as being amenable to it.
3. Certain functions of these bodies are regarded under that law as prescribing as opposed to merely permitting certain conduct.
4. These prescriptions are public duties.”

⁶¹ Ibid. See also Lawrence H. Tribe, *American Constitutional Law*, p.1705

⁶² Supra n. 58

There are, however, public duties which arise from sources other than a statute. These duties may be more important than they are often thought or perceived to be. Such public duties may arise by reason of (i) prerogative, (ii) franchise, and (iii) charter.⁶³

All public and statutory authorities are authorities. But an authority in its etymological sense need not be a statutory or public authority. Public authorities have public duties to perform.

Therefore, the expansion in the definition of the State is not to be kept confined only to business activities of the Union of India or other State Governments in terms of Article 298 of the Constitution but also take within its fold any other activity which has a direct influence on the citizens. In other words, performance of public functions and public duties has a key role to play in according a body, institution or corporation the label of 'service under the state'. For example, the expression "education" must be given a broader meaning having regard to Article 21-A of the Constitution as also Directive Principles of State Policy. There is a need to look into the governing power subject to the fundamental constitutional limitations which requires an expansion of the concept of State action.⁶⁴

Constitutions have to be evolved for welfare of their citizens. Flexibility is the hallmark of our Constitution. The growth of the Constitution shall be organic, the rate of change glacial.⁶⁵ A school would be a state if it is granted financial aid.⁶⁶ An association performing the function of a Housing Board would be performing a public function and would be bound to comply with the (British) Human Rights Act, 1998.⁶⁷ But an old age house run by a private body may not.⁶⁸ A school can be run by a private body without any state patronage. It is permissible in law because a citizen has fundamental right to do so as his occupation in terms of Articles 19(1)(g) and 26. But once a school receives

⁶³ Extracted from *Zee Telefilms Ltd. Vs. Union of India*, (2005) 4 SCC 649 at 714

⁶⁴ *Supra* n. 60, p.700

⁶⁵ See R. Stevens: *The English Judges: The Role in the Changing Constitution* (Oxford, 2002, p.xiii), quoted by Lord Woolf in "*The Rule of Law and a Change in the Constitution*", *The Cambridge Law Journal* 317, 63 (2), (2004)

⁶⁶ *Jiby P. Chacko vs. Principal, Mediciti School of Nursing*, (2002) 2 ALD 827

⁶⁷ *Poplar Housing and Regeneration Community Assn. Ltd. Vs. Donogue*, 2002 QB 48

⁶⁸ *R. vs. Leonard Cheshire Foundation*, (2002) 2 All ER 936

State patronage, its activities would be State activities and thus would be subject to judicial review.⁶⁹

However, it is not enough to enlarge the scope of the State jurisdiction. With the widening of the meaning of Article 12, it also became necessary to expand the limbs of the Government in order to fulfil the dreams of the Constitution Makers and also the teeming millions. The amplitude of the definition of the word 'State' in Article 12, thus, includes services not only under the Government of the States but also under the local authorities or other authorities as broadly construed by courts.⁷⁰ The citizens of India, hence, can claim equality of opportunity in all matters relating to employment guaranteed under Article 16(5) in respect of not only the services directly under the control of government of the Union and the government of the State but also under the other authorities falling within the word 'State' under Article 12.

Having guaranteed equality of opportunity in matters relating to conditions of service directly under the Union and the States, the Constitution has made specific provision in the Constitution itself on matters relating to their tenure and conditions of service. In respect of other authorities other than the services under the Union and the services under the State, the matter is left to be regulated either by statutes or statutory rules or regulations required to be framed by the Government or any other authority on whom the power is conferred by the concerned statutes.⁷¹

For the purpose of this thesis, 'Service under the State' would include the following categories:

a. Service under the Union and the State Governments:

The State is an artificial juristic entity, as has already been discussed previous in this Chapter. Similar to any other juristic entity like companies or corporations, a State can also employ persons to discharge its functions. Since India has adopted a federal constitutional structure and scheme, the executive, legislative and judicial functions of the State are distributed and demarcated by the Constitution between the Union (i.e., Centre) and the States (i.e., the Federated units). The Constitution does not expressly

⁶⁹ *T.M.A. Pai Foundation vs. State of Karnataka*, (2002) 8 SCC 481 and *Islamic Academy of Education vs. State of Karnataka*, (2003) 6 SCC 697

⁷⁰ M. Rama Jois, *Services Under the State*, 16 (Indian Law Institute, New Delhi, 2007)

⁷¹ *Ibid*

define [“Union” or the “State”]⁷² but their meanings are obvious and clear from the very scheme of the Constitution and its various provisions. For example, Part V of the Constitution deals with the Union – its Executive, the Parliament and the Supreme Court whereas Part VI deals with the federating units of the Union, i.e., the States. Again, Article 12 in Part III of the Constitution clearly shows that the concept of State as provided in the Indian Constitution includes two juristic entities: i) the Union, i.e., the Centre; and (2) the States.

The meaning and implication of the expression “employees of the State” or persons employed in “services under the State” has to be understood in this context. It means persons employed by the Union (or less forensically those who are Central Government servants) and persons employed by the State (those who are State Government servants).⁷³

Although the legal status of both the categories are fundamentally similar,⁷⁴ there are special incidents and terms and conditions of service of State employees which differentiate them from employees of statutory corporations and agencies or instruments of the State, e.g. they are covered by the protective provisions of Article 311 of the Constitution whereas the other two are categories in public employment are not.⁷⁵

A special mention of judicial services needs to be made here. Definition of “State” in Article 12 does not say fully what may be included in the word state but, although it says that the word includes certain authorities, it does not consider it necessary to say that courts and Judges are excluded. The word “State” must obviously include ‘courts’ because otherwise ‘courts’ will be enabled to make rules which take away or abridge fundamental rights.⁷⁶ Therefore, judicial services at the Union level, i.e., service in the Supreme Court, the State level, i.e., service in the High Court and the District and Sub-divisional level, i.e., service in the District and Sub-divisional Courts are “Services under the State”.

b. Service under the State (the meaning and scope of State as expanded by various judicial pronouncements) and its Agencies or Instrumentalities –

⁷² See Articles 366 and 367

⁷³ Samaraditya Pal, *Laws Relating to Public Service*, 4(LexisNexis Butterworths Wadhwa, Nagpur, 3rd ed., 2011)

⁷⁴ *Sukhdev Singh vs. Bhagatram*, (1975) 1 SCC 421

⁷⁵ *Supra* 72

⁷⁶ Subhash C. Kashyap, 388 *Constitutional Law of India*, Vol. 1, (Universal Publishing House, Allahabad, 2nd ed. 2015)

As already discussed at length previously in this Chapter, persons serving anybody or institution who can be bracketed within the “agencies and instrumentalities of the State” are actually employees of the State. They, therefore, are employed in “Service under the State”. While explaining the meaning of the term “other authorities” under Article 12, the Supreme Court has, vide its various judgments, has declared Rajasthan Electricity Board⁷⁷, Cochin Devasom Board, Children Aid Society⁷⁸, Life Insurance Corporation, the Oil and Natural Gas Commission⁷⁹, the Delhi Transport Corporation⁸⁰, the Delhi Jal Board, the Airports Authority of India, the Finance Commission, any Universities and Institutes created by the Act of the Legislature and empowered to make statutes⁸¹, ordinances, regulations, the Bar Council of India, Commissioner of Income Tax, Industrial Financial Corporation⁸², the State Bank of India⁸³, etc. as State and so they are services under the State. On the other hand, institutes like Council of Scientific and Industrial Research⁸⁴, Institute of Constitutional and Parliamentary Studies⁸⁵ and societies like Board of Cricket Council of India⁸⁶ have been not held to be agencies or instrumentalities of the State.

c. Service under Corporations directly incorporated by Statutes –

The growth of public undertakings, statutory or non-statutory, is a by-product of an intensive form of government. In order to undertake and fulfil multifarious welfare and service commitments (already discussed under the title **The “Welfare Concept of State” In India** of this Chapter), the Government may choose from amongst the various forms of organisation. The government may undertake to accomplish its objectives either through its own department, or through an autonomous statutory corporation or through a government company registered under the Companies Act.⁸⁷

The adoptions of the Directive Principles of State Policies in our Constitution have furthered the cause of welfare promised to the people of India at independence.

⁷⁷ *Rajasthan State Electricity Board vs. Mohan Lal*, AIR 1967 SC 1857

⁷⁸ *Sheela Barse vs. Secy. Children’s Aid Society*, AIR 1987 SC 656

⁷⁹ *Supra* n. 74

⁸⁰ *Delhi Transport Corporation vs. Mazdoor Congress*, AIR 1991 SC 101

⁸¹ *B.S. Minhas vs. Indian Statistical Institute*, AIR 1984 SC 363

⁸² *Supra* n. 77

⁸³ *Assistant General Manager, State Bank of India vs. Radhey Shyam Pandey*, (2015) 12 SCC 451

⁸⁴ *Sabhajit Tewary vs. Union of India*, AIR 1975 SC 1329

⁸⁵ *Tekraj Vasandi alias K.L. Basandhi vs. Union of India*, AIR 1988 SC 469

⁸⁶ *Zee Telefilms Ltd. Vs Union of India*, (2005) 4 SCC 649

⁸⁷ I.P. Massey, *Administrative Law*, 435 (Eastern Book Co., Lucknow, 6th Ed., 2005)

Directive Principles like those of [Article 39(b) and (c)]⁸⁸ led to the growth of public undertakings as an instrument for the economic structuring of the country because in a public body accountability, freedom of action, public purpose and conscience corporate spirit and concern for the consumer could be legitimately expected.

Looking into various judgments of the Supreme Court and the High Courts a statutory corporation is a 'State' within the definition of the term in Article 12. The key to finding out the answer to question that whether a statutory corporation is a 'State' or not shall be verified by the tests laid down in *Ajay Hasia* and *R. D. Shetty*'s judgments.

The employees of the statutory corporations are appointed by the concerned corporation. Their terms and conditions of service are regulated by the rules and regulations framed by the corporation. Therefore, employees of the corporation are not government servants and consequently not entitled to the protection of Article 311 of the Constitution.⁸⁹ Nevertheless, they are holders of 'Services' under the 'State' and hence, the distinction sought to be made between the protection of Article 311 and Part III has no significance. The fact remains that the employment in public sector has grown to vast dimensions and employees of the public sector often discharge onerous duties as civil servants and participate in activities vital to the country's economy. It is, therefore, right that the integrity and independence of those employed in the public sector be secured as much as the independence and integrity of civil servants.⁹⁰

1.6. A Sum Up

The object and purpose of the state evolved in this country from times immemorial has been that it is the paramount duty of the state to ensure that individuals enjoy wealth (Artha) and every kind of pleasure (kama) without transgressing the law (dharma). The

⁸⁸ Article 39. Certain principles of policy to be followed by the State. – The State shall, in particular, direct its policy towards securing –

- a.)
- b.) That the ownership and control of the material resources of the community are to be distributed as best to subserve 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.)
- e.)
- f.)

⁸⁹ *Supra* n. 87 at 444. Also see *S.L. Agarwal vs. G.M. Hindustan Steel Ltd.*, AIR 1970 SC 1150

⁹⁰ *A.L. Kalra vs. Project and Equipment Corporation*, AIR 1984 SC 361

ideal placed before the state under the Ancient Indian Constitutional Law (Rajdharmā) is that the state must strive for the happiness of the people.⁹¹

Kautilya in his Arthashastra said that:

“In the happiness of his subjects lies the happiness of the ruler; in their welfare, his welfare; whatever pleases him shall not consider as good but whatever pleases his subjects, the ruler shall consider as good.”⁹²

For the efficient administration of the affairs of the state and implementation of the above directive, elaborate administrative set up with as many as twenty five departments were required to be created. Provisions regarding the qualification for the appointment to important posts, for taking disciplinary action against civil servants who are found guilty of misconduct, including provisions to punish individuals who made false complaints against civil servants were also made.⁹³

In the context of a general approach to studying the ‘Services under the State’, it has been suggested that it is best to ‘start with a broad canvas and take stock of the public service as a whole, narrowing the focus as appropriate’.⁹⁴ The categorisation of ‘Services under the State’ could be based on one or more of the following criteria:

- All those who draw their pay and allowances from the Consolidated Fund of India or the Consolidated Fund of the states (government servants in the strict sense of the term) or
- In addition to those covered by the above criterion, include those who draw their pay and allowances from organisations that are funded entirely or substantially out of the above Consolidated Funds or
- Those who perform functions of the ‘state’ independently of the sources of their pay and allowances.

Conceptually, the last point, as mentioned above, is appealing. Adoption of this definition would mean that besides employees of the central and state governments, employees of local bodies (Urban Local Bodies, Zilla Parishads, etc.) energy and water

⁹¹ M.Rama Jois, *Legal and Constitutional History of India*, Vol. 1, 576-77 (N.M. Tripathi Private Ltd., Bombay, 1990)

⁹² Ibid

⁹³ Id. At 650-65

⁹⁴ Mike Stevens, ‘Preparing for Civil Service Pay and Employment Reform: A Primer’, in David Linauer & Barbara Nunberg (eds.), *Rehabilitating Government: Pay and Employment Reform in Africa* (World Bank, 1994)

utilities, most public sector undertakings, statutory bodies like the Employees State Insurance Corporation, etc., would get covered. This is, however, not a perfect definition of 'Services under the State' according to many who criticise this point on the ground that it would also include employees of industrial undertakings, etc., who are not the direct result of state employment. The counter-argument posed to such criticism is that one should include all those who are performing functions, which the 'state' has decided it should perform. This accords with the legal concept of 'state instrumentality' contained in Article 12 of the Constitution of India with the broadening of the article by the judiciary. Starting with a judgment, which only included 'authorities' created by a statute for categorisation of an organisation as 'state', the judiciary moved to a definition, which said that it did not matter whether a body/agency was created by or under statute or was a company, etc. What mattered in deciding whether a corporation/agency was an instrumentality of the government is to see whether:

- The entire share capital of the body is held by the government or
- It receives financial assistance from government or
- It enjoys monopoly status conferred or protected by the state or
- There is deep and pervasive state control of the organisation or
- The functions of the body are of public importance and clearly related to government functions.

Hence, employees of all those agencies of the government against whom fundamental rights can be enforced including the police and members of para-military forces are covered in this definition of 'Services under the State'.

Therefore, in order to fulfil the lofty objectives of the Preamble and the Constitution and for efficient administration of the government and the successful execution of all policies, schemes or programmes or plans of the state or other authorities, a large team of dedicated service personnel, as pointed out in the above paragraph, is essential. They are the persons who are not only expected to execute the policies and programmes of the state into action but some of them holding high positions have also a great responsibility even in the matter of policy decisions. It is the service personnel who are appointed to discharge specific duties and responsibilities in connection with the activities relating to the different departments of state who come into contact with the people directly. Therefore, the services of honest and sincere cadre officers are a pre-condition for

achieving the aims and objects of the Constitution.⁹⁵ Public servants are expected to exercise their powers in discharge of their duties and responsibilities, honestly and sincerely and impartially without fear or favour. With this object in view, the Constitution makers incorporated specific provisions relating to services under the state in the Constitution and various other legislations, rules and bye-laws.

⁹⁵ Ibid

CHAPTER 2

PROMOTION IN PUBLIC PERSONNEL ADMINISTRATION IN INDIA: ITS RATIONAL, CONSTITUTIONALITY AND ROLE OF SENIORITY

2.1. Overview

As an aspect of government activity, administration has been co-existent with every political system as the action part of government for the fulfilment of the objectives set by the political decision-makers. Thus, Ernest Barker defines administration as ‘the sum of persons and bodies who are engaged, under the direction of a government in discharging the ordinary public services which must be rendered daily if the system of law and duties and rights is to be duly served.’⁹⁶ Administration has been defined as a cooperative human effort toward achieving some common goals. Thus articulated, public personnel administration can be found in various institutional settings like a business firm, a hospital, a university, a government department and so on.⁹⁷

2.2. The Structure of a Bureaucratic Organisation: A Weberian Concept

The ideal type of a bureaucratic organisation is a conceptual construction of certain empirical elements into a logically precise and consistent form, a form which, in its ideal purity, is never to be found in concrete reality.⁹⁸ However, the characteristics contained in the ideal type, although transformed and exaggerated in a certain way, correspond more or less to concrete features of existing organisations. Briefly, the main characteristics of the bureaucratic type of organisation are:

- i. High degree of specialisation
- ii. Hierarchical authority structure with limited areas of command and responsibility
- iii. Impersonality of relationships between organisational members
- iv. Recruitment of officials on the basis of ability and technical knowledge

⁹⁶ Ernest Barker, *The Development of Public Services in Western Europe, 1660-1930*, 3 (Oxford University Press, Oxford, 1945)

⁹⁷ Bidyut Chakrabarty and Mohit Bhattacharya (ed.), *Public Administration: A Reader*, 1 (Oxford University Press, New Delhi, 2003)

⁹⁸ Max Weber, *On the Methodology of the Social Sciences*, 90 (Free Press, Glencoe, Illinois, 1949)

v. Differentiation of private and official income and fortune and so on

Now, if one tries to see what lies beyond the above characteristics, how they are linked with one another, one finds a common, all pervasive element; the existence of a system of control based on rational rules, rules which try to regulate the whole organisational structure and process on the basis of technical knowledge and with the aim of maximum efficiency.⁹⁹ Therefore, in the words of Max Weber, bureaucratic administration means fundamentally the exercise of control on the basis of knowledge. This is the feature of it which makes it specifically rational.¹⁰⁰

Weber was interested in a full-blown discussion on bureaucracy as a sociological phenomenon.¹⁰¹ His thought needs to be placed in the more general context of his theory of domination. Domination refers to a power relationship between the rulers and the ruled. In any kind of established authority, there exist a number of beliefs that legitimises the exercise of power in the eyes of the leaders and the led. The other important element in this approach is the notion of the administration apparatus. Domination when exercised over a large number of people necessitates an administrative staff which will execute demands and serve as a bridge between the ruler and the ruled. The beliefs about the legitimation and the administrative apparatus constitute the two important criteria for the Weberian construction of typology of domination.¹⁰²

In designing the legal rational authority system, Weber formulated the following the following structural propositions:¹⁰³

- a. Official tasks are organised on a continuous, regulated basis.
- b. These tasks are sub-divided into functionally distinct spheres, each furnished with the requisite authority and sanctions.
- c. Offices are arranged hierarchically, the rights of control and compliant between them being specified.

⁹⁹ Nicos P. Mouzelis, *The Ideal Type of Bureaucracy, Public Administration-A Reader*, BidyutChakarabarty and Mohit Bhattacharya (ed.), 89 (Oxford University Press, New Delhi, 2003)

¹⁰⁰ Max Weber, *The Theory of Social and Economic Organisation*, 311 (Martino Fine Books, Connecticut, 1947 Reprint 2012)

¹⁰¹ See Nicos P. Mouzelis, *Organisation and Bureaucracy*, Aldine Publishing Company, Chicago, 1975

¹⁰² Mohit Bhattacharya, *Public Administration*, 64-5 (World Press, Kolkata, 8th ed., 2012)

¹⁰³ Id at 66

- d. Official work is conducted according to the rules which are either technical or legal. In either case, trained men are necessary.
- e. The resources of the organisation are quite distinct from those of the members as private individuals.
- f. The holder of an office cannot appropriate the office.
- g. Administration is based on written documents or files. This tends to make the office the hub of the modern organisation
- h. Legal authority systems can take many forms, but are seen at their purest in a bureaucratic administrative staff.

These eight principles of authority informed the organisation of the bureaucratic administrative staff in Weber's view. Following this line of thought, the defining characteristics of the bureaucracy in the most rational form were identified as follows¹⁰⁴:

- a. The administrative staff members are engaged in the discharge of only the impersonal duties of their offices; they are personally free.
- b. There is a clear hierarchy of offices.
- c. Officials are appointed on the basis of a contract.
- d. They are selected on the basis of professional qualifications, ideally substantiated by a diploma gained through competitive examination.
- e. They have a money salary, and usually pension rights. The salary is graded according to position in hierarchy. The official can always leave the post, and under certain circumstances it may also be terminated.
- f. The official's post is his sole or major occupation.
- g. There is a career structure, and promotion is possible either by seniority or merit, and according to the judgment of superiors.
- h. The official may appropriate neither the post nor the resources that go with it.
- i. He is subject to a unified control and disciplinary system.

It needs to be pointed out here that in Weberian formulation, bureaucracy is not to be confused with the civil services. It refers to the sociological concept of rationalisation of collective activities. As a form or design of organisation it assures predictability of behaviour of the organisational members. The bureaucratic form, according to Weber, is the most efficient organisational form for large scale, complex administration that has

¹⁰⁴ Ibid

been developed in the modern world so far. It is superior to any form in decision precision, stability, maintenance of discipline and reliability.¹⁰⁵ As Weber wrote: “The development of the modern form of the organisation of corporate groups in all fields is nothing less than identical with the development and continual spread of bureaucratic administration. This is true of church and state, of armies, political parties, economic enterprises, organisations to promote all kinds of causes, private associations, clubs, and many others. Its development is to take the most striking case, the most crucial phenomenon of the modern Western State...The whole pattern of everyday life is cut to fit this framework. For bureaucratic administration is, other things being equal, always, from a formal, technical point of view, the most rational type. For the needs of the mass administration today, it is completely indispensable. The choice is only that between bureaucracy and dilettantism in the field of administration.”¹⁰⁶

2.2.1. The Nature of Bureaucratic Hierarchy

The principle of office hierarchy, levels of graded authority, a firmly ordered system of super-subordination provides orderliness fostering internal control that can produce outward predictability. Where jurisdiction produces clear division between tasks at any given level, hierarchy produces a vertical division of levels concerned with matters of different scope and importance. Hierarchy is also the control mechanism that holds the division of labour together resulting in a unified policy and program structure. In contrast, with the pre-modern organisations it is not reliably possible for clients to tell who is in charge of what, that is, whose commands are responsible or authoritative in relation to another's. Technically, hierarchical structure allows the creation of a massive administrative structure within which the higher ups can at least claim abstract knowledge of what is going on below, even if millions are involved.¹⁰⁷

Modern theories of bureaucracy, basing on their views on Weber, often use the hierarchy characteristics as one of the most decisive criteria for finding out to what extent an organisation is bureaucratised.¹⁰⁸

¹⁰⁵ Id at 68

¹⁰⁶ Max Weber, *The Theory of Social and Economic Organisation* (tr. A.M. Henderson), 337 (The Free Press, New York, 1964)

¹⁰⁷ Ralph P. Hummel, *Defining Public Administration*, Ed. By Jay M. Shafritz, 125 (Rawat Publications, 2000, reprint 2007)

¹⁰⁸ Supra n. 99 at 90

2.3. Promotion- Meaning, Rationality and Constitutionality

Since a government organisation is not a monolithic structure and is primarily hierarchical in nature¹⁰⁹, career development becomes one of the basic considerations in the personnel policy of the government. In the words of Glenn Stahl, the term ‘career’ denotes “...the progression of an individual in a field of work throughout the employable years of his life. A career in business or in a profession is a commonly understood concept. Sometimes it means devotion to a speciality, sometimes it means a series of employment which are only loosely related to each other. In either case, it usually means some degree of success.”¹¹⁰ The Commission of Inquiry on Public Service Personnel (USA) clearly described the concept of a government career services, as it stated:

“We recommend that the day-to-day administrative work of government be definitely made a career service. By this we mean that steps shall be taken to make public employment a worthwhile life work, with entrance to the service open and attractive to young men and women of capacity and character and with opportunity of advancement through service and growth to posts of distinction and honour.”¹¹¹

Thus, the Commission defined a career as an honourable occupation which one normally takes up in youth with the expectation of advancement and pursues until retirement.

In order to enhance the morale and efficiency of the public personnel in his/her career, it is highly necessary that the security of tenure and better conditions of service by way of suitable pay scales, promotional opportunities and retirement benefits and a just and fair treatment to public personnel under the State be given. This is of utmost importance to secure honesty, contentment and discipline among the civil servants which form the very foundation for their discharging their duties as expected of them.

A useful principle laid down in ‘Sukraniti’, the great ancient Indian compilation, of the principles to be adopted in the administration of the affairs of the state is as follows:

“Low wages, harsh treatment, insults, abuses and imposition of heavy fines or severe punishments are the causes of unrest among the employees.

¹⁰⁹ See 2.2. of this Chapter

¹¹⁰ Mohit Bhattacharya, *Public Administration*, 189 (World Press, Eighth Ed., 2012)

¹¹¹ Ibid

Satisfied by payment of adequate wages, promoted honourably, cheered up by gentle words and consoled in grief, the employees would never let down or desert master.”¹¹²

This passage emphasises the importance of fixation of proper wages and fair treatment of employees, with sympathy and respect.

2.3.1. Promotion- Its Meaning and Rationales

It is an oft-stated principle that the State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it for the welfare of its employees. The Supreme Court in *Balram Gupta vs. Union of India*¹¹³, observed that, as a model employer the Government must conduct itself with high probity and candour with its employees. In *State of Haryana vs. Piara Singh*¹¹⁴, the Court had clearly stated that the main concern of the Court in matter of employment is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. Similarly, in *Secretary, State of Karnataka vs. Umadevi and Others*¹¹⁵, the Constitution Bench, while discussing the role of the State in recruitment procedure, stated that the Government can make appointments only in accordance with the rules made under Article 309, where they have been made under Article 309, for the State is meant to be a model employer. In *Mehar Chand Polytechnic & Anr. vs. Anu Lamba & Ors.*¹¹⁶, the Court observed that public employment is a facet of right to equality envisaged under Article 16 of the Constitution of India and that the recruitment rules are framed with a view to give equal opportunity to all citizens of India entitled for being considered for recruitment in vacant posts.

Thus, recognised as a model employer, the State is under a duty to provide promotional opportunities, which is a facet of public employment, to its employees.

It has been judicially recognised that “so multifarious are the activities of the State that employment... for the purpose of these activities has by the very nature of things to be in different departments... and inside each department, in many different classes.”¹¹⁷

¹¹² Sukra II, 836-839. See M.Rama Jois, *Legal and Constitutional History of India*, Vol. 1, 188 (N.M. Tripathi Pvt. Ltd., 2nd Ed., 1990)

¹¹³ AIR 1987 SC 2354

¹¹⁴ AIR 1992 SC 2130

¹¹⁵ AIR 2006 SC 1806

¹¹⁶ AIR 2006 SC 3074

¹¹⁷ *All India Station Masters etc. vs. G.M. Central Railways*, AIR 1960 SC 384

Therefore, Promotion, as a condition of service, plays a major role in bringing out the efficiency in public personnel and the expected result that the state wants from them. An employee joins a service in the hope of a satisfactory career of progression. An important factor contributing to the attractiveness of service is the prospect of promotion.

Etymologically, the word 'promotion' is derived from the Latin term 'promotionem'. It is a noun of action from 'promovere', which means to move forward. The word 'pro' means 'forward' and 'movere' means 'to move'.¹¹⁸

Promotion has been explained to be "the action of raising someone to a higher position or rank."¹¹⁹ It also means "advancement of preferment in honour, dignity, rank or grade."¹²⁰ Again, Promotion, in the context of law relating to service, means advancing or raising an employee to a higher office or rank or post than the one the employee was holding or to a higher scale of pay than the one the employee was enjoying immediately before such promotion. The higher office or rank or post or scale is generally referred to as 'promotional post or scale' as the case may be. The office or rank or post from which the employee is promoted is referred to as the feeder post.¹²¹

The Supreme Court in *Tarsem Singh v. State of Punjab*¹²² has defined 'promotion under the service law jurisprudence' as "advancement in rank, grade or both. Promotion is always a step towards advancement to a higher position, grade or honour. Opting to come to a lower pay scale or to a lower post cannot be considered a promotion, it is rather a demotion."

Prof. Pigor and Mayres have defined promotion in the following manner¹²³:

"Promotion is the advancement of an employee to better job, better in terms of greater responsibilities, more prestige, or status, greater skill and specially increased rate of pay or salary."

Promotion is an integral part of the career service. The vacant posts in the public services can either be filled in by fresh recruitment or by promoting the existing lower

¹¹⁸ Rajesh K. Jha(ed.), *Public Personnel Administration*, 120-121 (Pearson, New Delhi, 1st ed.)

¹¹⁹ Concise Oxford English Dictionary, 11th ed., 2008, p.1149

¹²⁰ Webster's Comprehensive Dictionary, International Edition, p.1009

¹²¹ Samaraditya Pal, *Law Relating to Public Service*, 3rd ed., 2011, p.541

¹²² AIR 1995 SC 384

¹²³ Mohit Bhattacharya, *Public Administration*, 193 (World Press, 8th ed. 2012)

cadre employees to the higher positions. This method is called promotion system. In this liberalised era, the retention of many ambitious, capable and talented employees depends to a great extent on the effective promotion system. Promotions are in fact one of the most important aspects of personnel management, meant to keep the employees contented, disciplined, efficient and to help retain men of potential ability in service.¹²⁴

The capacity study appointed by the United Nations commented, “It must be realised that if senior posts are invariably or frequently filled from outside the service, it will prove impossible to retain first class people in the lower ranks, since they will inevitably seek to fulfil their ambitions in other careers which offer better prospects of advancement. Thus, the constraints on efficiency and capacity would be compounded.”

¹²⁵It is difficult to devise a good promotional system. If the promotion is not effected judiciously, there is a danger that it may breed discontent, diminution of incentive and general impairment of morale, which may ultimately affect the efficiency of the organisation.

Therefore, a well-developed promotion policy is very essential for the efficiency of the employees. Promotion is a continuous incentive to efficient working on the part of the employee. The hope of promotion is sufficient to keep the man interested in the job.

W.F. Willoughby in his book ‘Principles of Public Administration’, has pointed out the following as the essentials of a sound promotion system¹²⁶:

1. Adoption of standard specifications setting forth the duties and qualifications required for all promotions in the government service.
2. The classification of these promotions into distinct classes, salaries, grades and service.
3. The inclusion within this classification of all higher administrative promotions except those having a practical character,
4. The adoption, so far as possible, of the principle of recruitment from within for filling up of higher posts.
5. The adoption of principles of merit and seniority in determining the promotion of employees.

¹²⁴ Supra n. 118 at 121

¹²⁵ Ibid

¹²⁶ Id at 194. See also W.F. Willoughby, *Principles of Public Administration* (Publications of Institute for Government Research, Washington 1927)

6. The provision of adequate means for determining the relative merits and seniority of employees eligible for promotion.

In *Union of India v. S.S. Ranade*¹²⁷, the scope and meaning of the word 'promotion' was considered by the Supreme Court. The issue in this case was whether a Commandant (Selection Grade) held a higher rank than a Commandant and consequently entitled to be superannuated at a later age of 58 years instead of 55 years. It was held as follows:

“Undoubtedly, a Commandant who becomes a Commandant (Selection Grade) secures a promotion to a higher pay scale. But it is a higher pay scale in the same post. The use of the word 'promotion' in Rule 6 and the Constitution of a Departmental Promotion Committee for selection of Commandant (Selection Grade) in Rule 7, do not necessarily lead to the conclusion that promotion which is contemplated there is necessarily a promotion to a higher post. Promotion can be either to a higher pay scale or to a higher post.”

Again, following the decision of S.S. Ranade, the Apex Court in *State of Rajasthan v. Fateh Chand Soni*¹²⁸, defined promotion thus:

“in the literal sense the word “Promote” means to advance to a higher position, grade or honour. Promotion not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law also the expression “Promotion” has been understood in the wider sense and it has been held that “Promotion can be either to a higher pay scale or to a higher post.”

It needs no reiteration that 'promotion' as a condition of service, increases efficiency of a Public Personnel. The Supreme Court in *Dr. Ms. O.Z. Hussain v. Union of India*¹²⁹ opined:

“...provision for promotion increases efficiency of the public service while stagnation reduces efficiency and makes the service ineffective. Promotion is thus a normal incidence of service. There too is no justification why while similarly placed officers in other Ministries would have the benefit of promotion, the non-medical 'A' Group scientists in the establishment of Director General of Health Services would be deprived

¹²⁷ (1995) 4 SCC 462

¹²⁸ (1996) 1 SCC 562

¹²⁹ AIR 1990 SC 311

of such advantage. In a welfare State, it is necessary that there should be an efficient public service and, therefore, it should have been the obligation of the Ministry of Health to attend to the representatives of the Council and its members and provide promotional avenue for this category of officers. It is, therefore, necessary that on the model rules framed by the Ministry of Science and Technology with such alterations as may be necessary, appropriate rules should be framed within four months from now on for providing promotional avenue for “A” category of scientists in the non-medical wing of the Directorate.”

The question also came up for consideration in *Ujagar Prints Etc. v. Union of India*¹³⁰ and *Council of Scientific and Industrial Research and Anr. v. K.G.S. Bhatt and Anr.*¹³¹. In the latter decision, the Apex Court held:

“It is often said and indeed, adroitly, an organisation public or private does not ‘hire a hand’ but engages or employs a whole man. The person is recruited by an organization not just for a job, but for a whole career. One must, therefore, be given an opportunity to advance. This is the oldest and most important feature of a free enterprise system. The opportunity for advancement is a requirement for progress of any organization. It is an incentive for personnel development as well.¹³² Every management must provide realistic opportunities for promising employees to move upward. ‘The organization that fails to develop a satisfactory procedure for promotion is bound to pay a severe penalty in terms of administrative costs, misallocation of personnel, low morale and ineffectual performance, among both non-managerial employees and their supervisors’.¹³³

In *State of Tripura v. K.K. Roy*¹³⁴, the Supreme Court considered some of its earlier decisions in matters of promotion and held:

“It is not a case where there existed an avenue for promotion. It is also not a case where the State intended to make amendments in the promotional policy. The appellant being a State within the meaning of Article 12 of the Constitution should have created promotional avenues for the respondent having regard to its constitutional obligations

¹³⁰ AIR 1989 SC 516

¹³¹ AIR 1989 SC 1972

¹³² Flipo Edwin B., Principles of Personnel Management, Fourth Ed., p.246. Extracted from *Food Corporation of India and Ors. v. Parshotam Das Bansal and Ors.*, (2008) 5 SCC 100

¹³³ Udai Pareek, Personnel Management, p.277, extracted from *Food Corporation of India and Ors. V. Parashotam Das Bansal and Ors.*, (2008) 5 SCC 100

¹³⁴ (2004) 9 SCC 65

adumbrated in Articles 14 and 16 of the Constitution of India. Despite its constitutional obligations, the State cannot take a stand that as the respondent herein accepted the terms and conditions of the offer of appointment knowing fully well that there was no avenue for promotion, he cannot resile therefrom. It is not a case where the principles of estoppels or waiver should be applied having regard to the constitutional functions of the State. It is not disputed that the other states in India/Union of India having regard to the recommendations made in this behalf by the Pay Commission introduced the Scheme of Assured Career Promotion in terms whereof the incumbent of a post if not promoted within a period of 12 years is granted one higher scale of pay and another upon completion of 24 years if in the meanwhile he had not been promoted despite existence of promotional avenues. When questioned, the learned counsel appearing on behalf of the appellants, even could not point out that the State of Tripura has introduced such a scheme. We wonder as to why such a scheme was not introduced by the appellants like other States in India, and what impeded it from doing so. Promotion being a condition of service and having regard to the requirements thereof as has been pointed out by this court in the decisions referred to hereinbefore, it was expected that the appellants should have followed the said principle.”

In *Food Corporation of India v. Parashotam Das Bansal*¹³⁵, the Respondents were appointed in the engineering section of the Food Corporation and constituted about one per cent of the corporation’s work force. Since there were no promotional avenues open to them, they were stagnated. It was held by the Supreme Court that when employees are denied an opportunity of promotion for 30 long years on the ground that they fell within a category of employees excluded from promotional prospect, the Supreme Court will have the jurisdiction to issue necessary direction. It was further pointed out that if there is no channel of promotion in respect of officers resulting in stagnation over the years, the Court although may not issue any direction as to in which manner scheme should be formulated or by reason thereof interfere with the operation of existing channel of promotion to the officers working in different departments and officers of the Government but the jurisdiction to issue direction cannot be denied to the Supreme Court of the country.

¹³⁵ (2008) 5 SCC 100

2.3.2. Promotion and Upgradation Distinguished

In order to understand the true meaning and scope of the term ‘promotion’, it is of utmost importance to distinguish between ‘promotion’ and ‘upgradation’. Though ‘promotion’ and ‘upgradation’ might be deemed to be synonymous, there are few points of differences which need be aptly mentioned here. As have already been discussed, promotion is advancement to a higher rank or position or a higher grade; upgradation, on the other hand, is conferment of financial benefits upon a post. The posts are upgraded by raising the scale of pay of the posts. Of course, the nature of the upgraded post would finally depend upon the terms of the upgradation, and in a given case could amount to creation of a situation akin to a promotional post, i.e., where the rules provide for filling up the upgraded posts on criteria similar to those for promotion e.g., seniority or merit or the like. But generally they are distinct concepts.¹³⁶ The distinction has been explained by a Full Bench of the Kerala High Court in *N.G. Prabhu v. Chief Justice (Kerala)*¹³⁷ in the following words:

“Promotion is, ofcourse, appointment, to a different post carrying a higher scale of pay in the service. If, to better the conditions of service of the incumbents in posts in the same category the scale of pay of all the posts in the category is raised, the incumbents would naturally get the higher scale of pay. But in such a case it may not be proper to characterise the event as a promotion to higher posts though a benefit of a higher scale of pay is obtained by all concerned. In other words, if upgradation relates to all the posts in a category naturally, there is no sense in calling it a promotion of all persons in that category. That is because there is no question of appointment from one post to another. Parties continued to hold same posts but get a higher scale of pay. It may be that it is not all the posts in a particular category that are so upgraded, but only a part of it. Normally, the benefit of such upgradation would go to the seniors in the category. They would automatically get a higher scale of pay. That is because though their posts continue in the same category a higher pay scale is fixed for those posts. It is appropriate then to say that the seniors have been nominated to the Higher Grade which has been so created by upgradation. This phenomenon does not differ from case where all the posts are upgraded and, it appears to us that those who get the higher grade cannot be said to have been ‘promoted’ because here again there is no question of appointment from one post

¹³⁶ Ibid

¹³⁷ 1973 (2) SLR 251

to another. They continue to hold the same post, but because of seniority in the same post they are given a higher scale of pay. When a person is nominated to the higher scale of pay from time to time based on seniority it may perhaps loosely be termed as promotion.”

In *All India Employees Association (Railways) v. V.K. Agarwal*¹³⁸, it has been held by the Supreme Court that where the total number of posts remained unaltered, though in different scales of pay, as a result of regrouping and the effect of which may be that some of the employees who were in the scale of pay of Rs. 550-700 will go into higher scales, it would be a case of upgradation of posts and not a case of additional vacancy or post being created to which the reservation principle would apply. It is only if in addition to the total number of existing posts some additional posts are created that in respect of those additional posts the reservation will apply, but with regard to those additional posts the dispute does not arise in the present case. The present case was restricted to all existing employees who were redistributed into different scales of pay as a result of the said upgradation.

The Allahabad Bench of a Tribunal in the case of V.K. Agarwal held as follows:

“The restructuring of posts was done to provide relief in terms of promotional avenues. No additional posts were created. Some posts out of existing total were placed in higher grade to provide these avenues to the staff who were stagnating. The placement of these posts cannot be termed as creation of additional posts. There were definite number of posts and the total remained the same. The only difference was that some of these were in a higher grade. It was a deliberate exercise of redistribution with the primary object of betterment of chance of promotion and removal of stagnation.”

The Union of India challenged the said order of the Tribunal in *Union of India vs. V.K. Sarothia*¹³⁹ and the Supreme Court by a brief order dated 19.11.1998 dismissed the appeal. It held that:

“The finding of the tribunal that the ‘so-called promotion as a result of the redistribution of posts is not promotion attracting reservation’ on the facts of the case, appears to be

¹³⁸ (2001) 10 SCC 165

¹³⁹ (2008) 9 SCC 283

based on good reasoning. On facts, it is seen that it is a case of upgradation on account of restructuring of the cadres, therefore, the question of reservation will not arise.”¹⁴⁰

The concepts of ‘promotion’ and ‘upgradation’ was again considered while explaining the difference between a ‘promotion post’ and a ‘selection post’ in *Lalit Mohan Deb v. Union of India*¹⁴¹. In this case the pay scale of all the Assistants in Civil Secretariat in Tripura was Rs. 80-180 and on the basis of the recommendations of the Second Pay Commission appointed by the Government of India the scales were revised and 25% of the posts were placed in the Selection Grade in the scale of Rs. 150-300 and the rest continued in the old pay scale of Rs. 80-180. For the purpose of filling the Selection Grade posts, a test was held and those who qualified in the said test were appointed to the Selection Grade. The Assistants in the Selection Grade and the Assistants in the old pay scale were doing the same type of work. The Supreme Court observed that “provision of a Selection Grade in the same category of posts is not a new thing” and “a Selection Grade is intended to ensure that capable employees who may not get a chance of promotion on account of limited outlets of promotion should at least be placed in the Selection Grade to prevent stagnation on the maximum of the scale”. One of the rationales behind creation of ‘Selection Grades’ is to bring out greater efficiency from the employees of the State. In *Union of India v. S.S. Ranade*¹⁴² again an element of selection was involved in granting selection grade as there was no automatic promotion to the selection grade pay scale. In this case, similar to *Lalit Mohan Deb*¹⁴³, Selection Grade posts were created entirely for the purpose of granting some relief to those who have very limited avenues of getting promotion to a higher post. Thus, by its very nature, a selection grade post cannot be considered as a higher post for the purposes of Rule. This is because the creation of a selection grade in the same post stands on a very different footing. By its very nature a selection grade provides a higher pay or a higher pay scale in the same post. The beneficiary of a selection grade does not thereby occupy a post which is higher in rank than the post earlier occupied by him. The Supreme Court, looking into the facts of this case, found that the Respondent therein required a promotion which resulted in occupation of a post which was higher in rank than the post earlier occupied, to get the relief of longer service. This Court therefore, held that

¹⁴⁰ Supra n. 129

¹⁴¹ (1973) 3 SCC 862

¹⁴² Supra n. 127

¹⁴³ Supra n. 132

though his promotion to a higher pay scale, which was not sufficient to grant relief to the Respondent therein as his promotion to selection grade did not involve advancement to a higher post.

In *Union of India v. Pushpa Rani*¹⁴⁴, the Supreme Court examining the case law at length, explained the difference between ‘upgradation’ and ‘promotion’ thus:

“In legal parlance, upgradation of a post involves transfer of a post from lower to higher grade and placement of the incumbent of that post in the higher grade. Ordinarily, such placement does not involve selection but in some of the service rules and/or policy framed by the employer for upgradation of posts, provision has been made for denial of higher grade to an employee whose service record may contain adverse entries or who may have suffered punishment. The word ‘promotion’ means advancement or preferment in honour, dignity, rank, grade. Promotion thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law, the word ‘promotion’ has been understood in wider sense and it has been held that promotion can be either to a higher pay scale or to a higher post.

Once it is recognised that additional posts becoming available as a result of restructuring of different cadres are required to be filled by promotion from among the employees who satisfy the conditions of eligibility and are adjudged suitable, there can be no rational justification to exclude applicability of policy of reservation while effecting promotions, more so because it has not been shown that procedure for making appointment by promotion against such additional posts is different from the prescribed for normal promotion.

The policy contained in Letter dated 09.10.2003 has been framed with a view to strengthen and rationalise the staffing pattern. For this purpose, the Ministry of Railways undertook review of certain cadres. The basis of the review was functional, operation and administrative requirement of the Railways. This exercise was intended to improve efficiency of administration by providing incentives to existing employees in the form of better promotional avenues and at the same time requiring promotes to discharge more onerous duties. The policy envisaged that additional posts becoming available in the higher grades as a sequel to restructuring of some of the cadre should be filled by

¹⁴⁴ (2008) 9 SCC 242

promotion by considering such of the employees who satisfy the conditions of promotions by considering such employees who satisfy the conditions of eligibility including minimum period of service and who are adjudged suitable by the process of selection. This cannot be equated with upgradation of posts which are required to be filled by placing existing incumbents in the higher grade without subjecting them to the rigour of selection. It has therefore, to be held that the Railway Board did not commit any illegality by directing that existing instructions with regard to the policy of reservation of posts for SC and ST will apply at the stage of effecting promotion against the additional posts. The Tribunal committed serious illegality by striking down para 14 of letter dated 09/10/2003. Matters relating to creation and abolition of posts, formulation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of employees fall within the exclusive domain of employer. What steps should be taken for improving efficiency of the administration is also the preserve of the employer. Power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated by mala fides. The court has no role in determining the methodology of recruitment or laying down the criteria of selection. It is also open to the court to make comparative evaluation of merit of the candidates. The court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration.”

In *Bharat Sanchar Nigam Ltd. v. R. Santha kumara Velusamy and Others*¹⁴⁵, the question involved is whether rules of reservation will apply to upgradation of posts? In dealing with this question, the Supreme Court made a careful analysis of the principles relating to ‘promotion’ and ‘upgradation’ in the light of the aforesaid decisions and laid down the following principles:

- i. “Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher pay scale without moving to a different post. But the mere fact that both, i.e., advancement to a higher position and advancement to a higher pay scale, are described by the common term ‘promotion’ does

¹⁴⁵ *Bharat Sanchar Nigam Ltd. Vs. R. Santha kumara Velusamy and Ors.*, AIR 2011 SC 3793

not mean that they are same. The two types of promotion are distinct and have different connotations and consequences.

- ii. Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from the lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.
- iii. Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there still a difference between the two. Where the advancement to a higher pay scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation simplicitor can be said to be a promotion in its wider sense that is advancement to a higher pay scale.
- iv. Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation.
- v. Where the process is an upgradation simplicitor, there is no need to apply rules of reservation. But where the upgradation involves selection process and is therefore, a promotion, rules of reservation will apply.
- vi. Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the

other hand, where restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation.”

In the present case in our hand¹⁴⁶, the Biennial Cadre Review scheme did not involve creation of additional posts but merely restructured the existing posts as a result of which 10% of the promotion posts in Grade III were placed in a higher grade to give relief against stagnation. Therefore, the Biennial Cadre Review scheme was an upgradation scheme to give relief against stagnation. It did not involve creation of any new posts. It did not involve advancement to a higher post. It did not involve any process of selection for conferment of the benefit of higher pay-scale. The upgradation was given to the senior most 10% of BCR scale employees in Grade III strictly as per seniority. BCR scheme as per circular dated 16.10.1990 was thus a scheme for upgradation simplicitor without involving any creation of additional posts or any process of selection for extending the benefit.

2.3.3. Promotion of Personnel in Services under the State: It's Constitutionality

Since the 17 century, if not earlier, human thinking has been veering round to the theory that man has certain essential, basic, natural and inalienable rights or freedoms and it is the function of the state, in order that human liberty may be preserved, human personality developed, and an effective social and democratic life promoted, to recognise these rights and freedoms and allow them free play. The underlying idea in entrenching certain basic and fundamental rights is to take them out of the reach of transient political majorities. It, has, therefore, come to be regarded as essential that these rights be entrenched in such a way that they may not be violated, tampered or interfered with by an oppressive government. With this end in view, some written Constitutions guarantee a few rights to the people and forbid governmental organs from interfering with the same.¹⁴⁷

In India, the pressing need to incorporate the fundamental rights in our Constitution was well accepted by the Constituent Assembly and they were embedded in our Constitution under Articles 12 to 35.

¹⁴⁶ AIR 2011 SC 3793

¹⁴⁷ M.P. Jain, *Indian Constitutional Law*, 827-828 (Wadhwa and Co., Nagpur, 5th ed., Reprint 2008)

The ‘Fundamental Right to Equality’ guaranteed under Articles 14 to 18 of the Constitution is “one of the magnificent corner-stones of the Indian judiciary”.¹⁴⁸ The golden thread of principles of ‘equality’ runs through the length and breadth of our Constitution. The Preamble to the Constitution emphasises upon the principle of equality as basic to the Constitution. Recognising this, the Supreme Court has declared equality as one of the basic features of the Indian Constitution.¹⁴⁹ Under the principles of “Right to Equality” enshrined in Articles 14-18, Article 14¹⁵⁰ is the genus, while Articles 15¹⁵¹ and 16¹⁵² are the species.

¹⁴⁸ Thommen, J., in *IndraSawhney v. Union of India*, AIR 1993 SC 477

¹⁴⁹ *M.G. Badappanavar v. State of Karnataka*, AIR 2001 SC 260

¹⁵⁰ Article 14. Equality before law – The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India

¹⁵¹ Article 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth – (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to –

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for the women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

¹⁵² Article 16. Equality of opportunity in matter of public employment – (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union Territory, any requirement as to residence within the State or Union Territory prior to such employment or appointment.

(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.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfulfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with vacancies of the year in which they

The Constitutional right to equality of opportunity and employment in public offices is provided under Article 16 of the Constitution of India. Article 16(1) guarantees equality of opportunity in matters of employment under the State, which includes appointment, promotion, post retirement benefits etc. The guarantee is to each individual citizen and therefore, each citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled¹⁵³. The three principles of Article 16(1) are:

1. Article 16 is merely an incident of Article 14 and both these articles form part of a common system seeking to achieve the same
2. Article 16 applies to all classes of appointments including promotion and selection posts and
3. Article 16 permits a valid classification.¹⁵⁴

The principle of equality of opportunity can be traced back to the Government of India Act, 1935 which provided that “No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India...”.¹⁵⁵ Considering this clause, perhaps, the right to equality of opportunity and prohibition of discrimination on grounds of religion, race, language, caste etc., in the matters of employment rights were included in the Draft Constitution by Dr. B.R. Ambedkar, Dr. K. M. Munshi, K.T. Shah, Harinam Singh and others.

Equality of opportunity is not simply a matter of legal equality, its existence depends not merely as absence of disabilities, but on presence of abilities and opportunity of excellence in each cadre or grade.¹⁵⁶ The concept of equality can have no existence except with reference to matters which are common as between individuals, between

are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

(5) nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination

¹⁵³ Durga Das Basu, *Commentary on the Constitution of India*, Ed. Y.V. Chandrachud, S.S. Subramani, B.P. Banerjee, Eighth Ed. Reprint 2012, LexisNexis ButterworthsWadhwa, p. 1871

¹⁵⁴ *State of Kerala v. N.M. Thomas*, AIR 1976 SC 490

¹⁵⁵ Section 298 (1), Government of India Act, 1935

¹⁵⁶ *Jagdishlal v. State of Haryana*, AIR 1997 SC 2366

whom equality is predicated. Equality in matters of employment can be predicated only as between persons, who are either seeking the same employment or have obtained the same employment. Thus, equality of opportunity in matters of promotion is nothing but equality between members of separate and independent classes.¹⁵⁷

Equality contemplated under Article 16(1) should not be confused with “absolute equality”. Article 16 only speaks of equality of opportunity and not opportunity to achieve equality and is different from equality of results.¹⁵⁸ Articles 16 and 14 also deal with equality and inhibition against discrimination. These articles strike at arbitrariness in State action must be based on valid relevant principles applicable alike to all similarly situate and it must be guided by an extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the anti-chamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and is hit by Articles 16 and 14.¹⁵⁹

a. Promotion in Services under the State: Article 16 and Its Relevance

A very many times it has come for determination before the Supreme Court that whether the scope of Article 16(1) and (2) extends to promotion or is confined to the initial appointment to any post in services under the State. In *General Manager, Southern Railway v. Rangachari*¹⁶⁰ an appeal came up before the Supreme Court where the appellants and respondent both conceded that cases of promotion fell within Article 16(1) and 16(2) though they differed as to whether they were included within Article 16(4). It was immediately noticed that the respondent’s petition postulates the inclusion of promotion in Article 16(1) and (2) for it is on that assumption that he challenges the validity of the impugned circulars. Similarly, the appellants’ defence postulated that Article 16 Clauses (1) and (2) as well as Article 16(4) refer to cases of promotion for it is on this basis that Article 16(4) includes promotion that they sought to support the validity of the impugned circulars. When this appeal was argued before the Constitution Bench on the first occasion it became clear to the Bench that neither party was interested in contending that the guarantee afforded by Article 16 Clauses (1) and (2) is confined

¹⁵⁷ Supra n. 148. Also see *All India Station Masters’ and Asst. Station Mastes’ Association v. General Manager, Central Railway*, AIR 1960 SC 384

¹⁵⁸ *IndraSawhney v. Union of India*, AIR 1993 SC 477

¹⁵⁹ Supra n. 148. Also see *E.P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555

¹⁶⁰ AIR 1962 SC 36

only to initial appointment and does not extend to promotion, and so notice was ordered to be issued to the Attorney General. In response to the notice, the Attorney General had appeared before the Supreme Court and took the same stand as that of the appellants and nobody seemed interested in challenging the inclusion of promotion within Article 16 Clauses (1) and (2).

This equality of opportunity need not be confused with absolute equality as such. What is guaranteed is the equality of opportunity and nothing more. Article 16(1) and (2) allows the State to prescribe reasonable rules for selection to any employment or appointment to any office. Any provision as to the qualifications for the employment or appointment to office reasonably fixed and applicable to all citizens would certainly be consistent with the doctrine of the equality of opportunity. Here it is important to note that though Article 16(1) includes the aspect of promotion to a selection post, all that the provision guarantees is equality of opportunity to all citizens who enter service.¹⁶¹

If the narrow construction of the expression “matters relating to employment” is accepted it would make the fundamental right guaranteed by Article 16(1), illusory. In that case it would be open to the State to comply with the formal requirements of Article 16 (1) by affording equality of opportunity to all citizens in the matter of initial employment and then defeated its very aim and object by introducing discriminatory provisions in respect of employees soon after their employment. Would it, for instance, be open to the State to prescribe different scales of salary for the same or similar posts, different terms of leave or superannuation for the same or similar post? On the narrow construction of Article 16(1) even if such a discriminatory course is adopted by the State in respect of its employees that would not be violative of the equality of opportunity guaranteed by Article 16(1). Such a result could not obviously have been intended by the Constitution. In this connection it may be relevant to remember that Article 16 Clauses (1) and (2) really give effect to equality before law guaranteed by Article 14 and to the prohibitions of discrimination guaranteed by Article 15(1). The three provisions form part of the same constitutional code of guarantees and supplement each other. If that be so, there would be no difficulty in holding that the matters relating to employment must include all matters in relation to employment both prior and

¹⁶¹ Samaraditya Pal, *India's Constitution- Origins and Evolution*, 806 (LexisNexis, Mumbai, 1st ed. 2014 Reprint 2015)

subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment.¹⁶²

Article 16(2) emphatically brings out in a negative form what is guaranteed affirmatively by Article 16(1). It prohibits discrimination of citizens on the grounds of “religion, race, caste, sex, descent, place of birth, residence or any of them”. Discrimination is a double-edged weapon; it would operate in favour of some person and against others; and Article 16(2) prohibits discrimination and thus assures the effective enforcement of the fundamental right of equality of opportunity guaranteed by Article 16(1). The words ‘in respect of any employment’ used in Article 16(2) must, therefore, include all matters relating to employment as specified in Article 16(1). Therefore, in the words of Gajendragadkar, J.¹⁶³:

“...we are satisfied that Mr. Sen is right when on behalf of the Attorney General he conceded that promotion to selection Posts ‘is included both under Article 16(1) and (2). Broadly stated the Bombay and the Patna High Courts support the concession made by Mr. Sen (vide *Pandurang Kashinath More v. Union of India*¹⁶⁴, *Sukhnandan v. State*¹⁶⁵).”

This position was again reiterated by Sarkaria, J. in *Govt. Branch Press v. D.B. Beliappa*¹⁶⁶ who said that:

It is now well settled that the expression ‘matters relating to employment’ used in Article 16(1) is not only restricted to initial matters in any employment under the State. It comprehends all matters in relation to employment both prior, and subsequent, to the employment, such as provisions as to salary, increments, leave, gratuity, pensionary benefits, age of superannuation, promotion and even termination of employment. It is further well established that Articles 14, 15(1) and 16(1) form part of the same constitutional code of guarantees and supplement each other. If my authority is needed for the above enunciation, reference may be made to the observations made by

¹⁶² Ibid

¹⁶³ Supra n. 154

¹⁶⁴ ILR [1958] Bom 1266

¹⁶⁵ (1956) ILR 35 Pat.

¹⁶⁶ AIR 1979 SC 429

Gajendragadkar, J., as he then was, in *General Manager, Southern Railway v. Rangachari*.¹⁶⁷

b. Right to Promotion vs. Right to be Considered for Promotion

From the discussions made as above, it has become clear that the interpretation of the phrase ‘equality of opportunity in State services’ not only includes appointment in the initial stages but includes all other incidences of service including appointment by promotion. However, the question to be pondered over is whether there is at all a fundamental right to promotion under the Constitution of India.

While interpreting provisions of the Constitution and in particular fundamental rights of citizens, it is well to bear in mind certain fundamental concepts. In *McCulloch v. Maryland*¹⁶⁸, Chief Justice Marshall cautioned that we must keep in mind that it is the Constitution that we are expounding. He said that the Constitution was intended to endure for ages to come and had consequently to be adapted to the various crises of human affairs from time to time.

Brandeis, J., wrote “Our Constitution is not a straight jacket. It is living organism. As such it is capable of growth, of expansion and of adaptation to new conditions. Growth implies changes, political, economic and social. Growth which is significant manifests itself rather in intellectual and moral conceptions of material things.” (Brandeis Papers, Harvard Law School).

Similarly, in a beautiful metaphor Mr. J. M. Beck said as follows:

“The Constitution is neither, on the one hand, a Gibraltar Rock, which wholly resists the ceaseless washing of time and circumstances, nor is it, on the other hand, a sandy beach, which is slowly destroyed by erosion of the waves. It is rather to be likened to a floating dock which, while firmly attached to its moorings, and not therefore, at the caprice of the waves, yet rises and falls with the tide of time and circumstances.”¹⁶⁹

Article 14 and Article 16(1) of the Constitution of India are closely connected. They deal with individual rights of the person. Article 14 demands that the ‘State shall not

¹⁶⁷ Supra n. 153

¹⁶⁸ (1819) 4 Wheel (17 U.S. 316). Extracted from the order given by *M. Jagannadha Rao, J., in Ajit Singh and Ors. v. The State of Punjab*, AIR 1999 SC 3471

¹⁶⁹ Ibid

deny to any person equality before law or equal protection of laws'. Article 16(1) issues a positive command that there shall be equality of opportunity in the matters of employment under the State. It has been held repeatedly by the Supreme Court that Sub-clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said Sub-clause particularises the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity" in matters of employment and appointment to any office under the State. The word 'employment' being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, fundamental right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.

Having said so, the question which arises now is whether the right to be considered for promotion is a mere statutory right or a fundamental right.

In *Ashok Kumar Gupta v. State of U.P.*¹⁷⁰ it has been laid down that the right to promotion is only a "statutory right" while the rights covered by Articles 16(4) and 16(4A) are "fundamental rights". Para 43 in *Ashok Kumar Gupta* reads as follows:

'It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or class of posts depends upon the operation of the conditions of service. Article 16(4) read with Articles 16(1) and 14 guarantees a right to promotion to Dalits and Tribes as a fundamental right where they do not have adequate representation consistently with the efficiency of administration...before expiry thereof (i.e., 5 years rule), Article 16(4) has come into force from 17.6.1995. Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right.'

In *All India Administrative Service Association v. Union of India*¹⁷¹, a three-Judge Bench held that an officer serving the state does not have a vested right to promotion. Again in *State of Maharashtra vs. Chandrakant Anath Kulkarni*¹⁷², it was clarified that mere chances of promotion are not conditions of service. If there is reduction in the chances of

¹⁷⁰ (1997) 5 SCC 201

¹⁷¹ 1993 Supp. (1)SCC 730

¹⁷² AIR 1981 SC 1990

promotion of an officer reduces, it does not tantamount to a change in the conditions of service. It was further held in *T.R. Kapoor v. State of Haryana*¹⁷³ by the Supreme Court that where employees are already promoted before the amendment of the Rules, they cannot be reverted back unless specifically provided in the rules. In *K. Jagdeesh v. Union of India*¹⁷⁴, it was held that mere chances of promotion or acquiring eligibility for promotion are not terms of service. However, “right to be considered for promotion” is a term of service. It was decided, thus, in *K. Jagdeesh* that passing of departmental examination is nothing but mere chances of promotion and hence, not a condition of service.

In *State of M.P. vs. Shardul Singh*¹⁷⁵, it was held that conditions of service means all those conditions which regulate the holding of a post by a person right from the time of his appointment to his retirement and even beyond, in matters like pensions, etc. This same view was reiterated in *I.N. Subba Reddy vs. Andhra University*. In any promotional policy, the rule which prescribes the conditions of service include a right of actual promotion or a right to be considered for promotion. This was held in *Md. Shujat Ali v. Union of India*¹⁷⁶, by a constitution Bench. Again, in *Mohd. Bhakar v. Y. Krishna Reddy*, a Constitution Bench comprising of three judges ruled that any provision in Rules regarding promotion which affects the promotion of a person, relates to his conditions of service. In *State of Mysore v. G.B. Purohit*¹⁷⁷, the Supreme Court again held that the rule which merely effects chances of promotion cannot be regarded as varying the conditions of service. Chances of promotion are not conditions of service. This same view was also reflected in another judgment of a Constitution Bench in *Ramchandra Shankar Deodhar vs. State of Maharashtra*¹⁷⁸. Drawing from the judgment of another two Judge Bench in *State of Punjab vs. Kailash Nath*, it was held that there is no doubt that conditions of service may be classified as salary, confirmation, promotion, seniority, termination or tenure. In *Syed Khalid Rizvi v. Union of India*¹⁷⁹, it was held in that no employee has a right to promotion but he has the right to be considered for

¹⁷³ AIR 1987 SC 415

¹⁷⁴ AIR 1990 SC 1072

¹⁷⁵ (1970) 1 SCC 108

¹⁷⁶ AIR 1974 SC 1631

¹⁷⁷ 1967 SLR 753 (SC)

¹⁷⁸ AIR 1974 SC 259

¹⁷⁹ 1993 Supp (3) SCC 575

promotion according to rules. Hence, conditions of service do not include chances of promotion.

It is a settled law, as has been laid down in *S.S. Bola vs. B.D. Sardana*¹⁸⁰ that appointment to a post in accordance with the rules is a condition precedent and no one can claim appointment to a post or promotion, as of right, but has a right to be considered for promotion in accordance with the rules. Appointment by promotion or direct recruitment, therefore, must be in accordance with the rules so as to become a member of the service in a substantive capacity.

In *Jagdish Lal v. State of Haryana*¹⁸¹ it was decided that it is a settled principle of service jurisprudence that conditions of service are not inclusive of mere chances of promotion and a candidate appointed in accordance with the rules can steal a march over his erstwhile seniors in the feeder/lower cadre. On his having satisfactorily completed probation and declaration thereof, he is given seniority in the higher cadre. He becomes a member of the higher cadre from his date of starting discharging duty of the post to which he is promoted unless otherwise determined in accordance with the rules. From that day, he ceases to be a member of the feeder cadre/grade from which he is promoted. The hierarchical promotions to various cadres mentioned hereinabove operate in the same manner and thereby on successive promotions to various cadres/grades, though in the same service, one would steal a march over others, be they general or reserved.

In *Ajit Singh and Ors. v. State of Punjab*¹⁸², it has been held that Article 16(1) provides for a fundamental right to be considered for promotion to every employee otherwise eligible for promotion or who comes within the zone of consideration. If such a person is not considered for promotion there will be a clear infraction of his fundamental right under Article 16(1).

Again, in *Paluru Ramkrishnaiah v. Union of India*¹⁸³, the Apex Court referring to *Ramchandra Shankar Deodhar*¹⁸⁴ held thus:

“In the case of Ramchandra Shankar Deodhar, the petitioners and others allocated Tehsildars from Ex-Hyderabad State had under the notification of the Raj Pramukh

¹⁸⁰ AIR 1997 SC 3127

¹⁸¹ AIR 1997 SC 2366

¹⁸² AIR 1999 SC 3471

¹⁸³ AIR 1990 SC 166

¹⁸⁴ Supra n. 178

dated September 15, 1955 all the vacancies in the posts of Deputy Collector in the ex-Hyderabad State available to them for promotion but under subsequent rules of July 30, 1959, 50 per cent of the vacancies were to be filled by direct recruitment and only the remaining 50 per cent were available for promotion and that too on divisional basis. The effect of this change obviously was that now only 50 per cent vacancies in the post of Deputy Collector being available in place of all the vacancies it was to take almost double the time for many other allocated Tehsildars to get promoted as Deputy Collectors. In other words, it resulted in delayed chance of promotion. It was inter alia, urged on behalf of the petitioners that the situation brought about by the rules of July 30, 1959 constituted variation to their prejudice in the conditions of service applicable to them immediately prior to the reorganisation of the State and the rules were consequently invalid. While repelling this submission the Constitution Bench held that “all that happened as a result of making promotions to the posts of Deputy Collector’s division wise and limiting such promotions to 50 per cent of the total number of vacancies in the posts of Deputy Collector was to reduce the chances of promotion available to the petitioners”. Thus, condition of service indicates only the right of consideration of promotion and not mere chances of promotion.

Again, in the case of *Delhi Jal Board v. Mahinder Singh*¹⁸⁵, it has been held that the right to be considered by the Departmental Promotion Committee is a fundamental right under Article 16 of the Constitution of India, provided a person is eligible and is in the zone of consideration. The sealed cover procedure permits the question of his promotion to be kept in abeyance till the result of any pending disciplinary inquiry. But the findings of the Disciplinary Enquiry exonerating the officer would have to be given effect to as they obviously relate back to the date on which the charges are framed. If the disciplinary inquiry ended in his favour, it is as if the officer had not been subjected to any Disciplinary Enquiry. The sealed cover procedure was envisaged under the rules to give benefit of any assessment made by the Departmental Promotion Committee in favour of such an officer, if he had been found fit for promotion and if he was later exonerated in the disciplinary inquiry which was pending at the time DPC met.

¹⁸⁵ AIR 2000 SC 2767

In *Union of India vs. Hemraj Singh Chauhan*¹⁸⁶, it was recalled that both the State Government as well as the Central Government have the Constitutional obligation to act as model employers, which is consistent with their role in a welfare State. It is an accepted legal position that the right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under Article 16 of the Constitution. The guarantee of a fair consideration in matters of promotion under Article 16 flows from guarantee of equality under Article 14 of the Constitution. Therefore, right to be considered for promotion is a legitimate expectation of any employee from the State, which when violated becomes duty of the Court to resolve it fairly.

c. Reservation in Promotion with Consequential Seniority vis-a-vis Article 16

Public employment is a scarce commodity in economic terms. As the supply is scarce, demand is chasing that commodity. The concept of public employment, unlike right to property is socialistic and, therefore, falls within the Preamble to the Constitution which states that WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC. Similarly, the Preamble mentions the objective to be achieved, namely, justice, social, economic and political. Therefore, the concept of equality of opportunity in public employment concerns an individual, whether that individual belongs to general category or backward class. The conflicting claim of individual right under Article 16(1) and the preferential treatment given to a backward class has to be balanced. Both the claims have a particular object to be achieved.¹⁸⁷

The application of the above concepts in public employment depends upon quantifiable data in each case. Equality in law is different from equality in fact. When Article 16(4) is construed, it is equality in fact which plays a dominant role. Backward classes seek justice. General class in public employment seeks equity. The difficulty comes in when the third variable comes in, namely, efficiency in service. Therefore, it is for the Court to bring stability while providing justice to the backwards, equity for the forwards and efficiency for the entire system. Adding efficiency to equity and justice will pose problem in context of the reservation. This problem has to be examined, therefore, on

¹⁸⁶ (2010) 4 SCC 290

¹⁸⁷ *M. Nagaraj and Ors. v. Union of India and Ors.*, AIR 2007 SC 71

the facts of each case. Therefore, Article 16(4) has to be construed in the light of Article 335 of the Constitution. Inadequacy in representation and backwardness of Scheduled Caste and Scheduled Tribes are circumstances which enable the State Government to act under Article 16(4) of the Constitution. However, as held by the Supreme Court, the limitations on the discretion of the government in the matter of reservation under Article 16(4) as well as Article 16(4A) come in the form of Article 335 of the Constitution.¹⁸⁸

Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and 16(4A) is enabling. The discretion of the State is, however, subject to the existence of 'backwardness' and 'inadequacy of representation' in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in.

A word of caution against excessive reservation was first pointed out in *The General Manager, Southern Railway and Anr. v. Rangachari*.¹⁸⁹ Gajendragadkar, J., giving the majority judgment said that reservation under Article 16(4) is intended merely to give adequate representation to backward communities. A reasonable balance must be struck between the claims of backward classes and claims of other employees as well as requirement of efficiency of administration. The question of the extent of reservation was directly involved in *M.R. Balaji v. The State of Mysore*.¹⁹⁰ It was observed that special provision should be less than 50%, how much less would depend on the relevant prevailing circumstances of each case. In *Indra Sawhney v. Union of India*¹⁹¹ the majority held that the rule of 50% as laid down in M.R. Balaji was a binding rule and not a mere rule of prudence. Giving the judgment of the Court in *Indra Sawhney, Reddy* ., stated that Article 16(4) speaks of adequate representation not proportionate representation although proportion of population of backward classes to the total population would certainly be relevant. He further pointed out that Article 16(4) which protects interests of certain sections of society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonised because they are restatements of principle of equality under Article 14.

¹⁸⁸ Ibid

¹⁸⁹ AIR 1962 SC 36

¹⁹⁰ AIR 1963 SC 649

¹⁹¹ AIR 1993 SC 477

In *Indra Sawhney* again, the Supreme Court held that the 50% rule should be applied to each year otherwise it may happen that the open competition channel may get choked if the entire cadre strength is taken as a unit. However, in *R.K. Sabharwal v. State of Punjab*¹⁹² it was held that the entire cadre strength should be taken into consideration to determine whether the reservation up to the quota-limit has been reached. It was clarified that the judgment in *Indra Sawhney* was confined to initial appointments and not to promotions. The operation of the roster for filling the cadre strength, by itself, ensure that the reservation remains within the ceiling-limit of 50%. However, the Government felt that the judgment of the Supreme Court in *Indra Sawhney* adversely affected the interests of the SCs and STs in services, as they have not reached the required level. Therefore, the Government felt that it was necessary to continue with the existing policy of providing reservation in promotion confined to SCs and STs only and thereby introducing Clause 16(4A) in Article 16 of the Constitution.¹⁹³

Clause (4A) follows the pattern specified in Clauses (3) and (4) of Article 16 emphasises the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. The State has to form its opinion on the quantifiable data regarding adequacy of representation. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4A) applies only to SCs and STs. The said clause is carved out of Article 16(4). Therefore, Clause (4A) will be governed by two compelling reasons – ‘backwardness’ and ‘inadequacy of representation’, as mentioned in Article 16(4A). If the said two reasons do not exist, then the enabling provision cannot come into force.

¹⁹² AIR 1995 SC 1371

¹⁹³ THE CONSTITUTION (SEVENTY-SEVENTH AMENDMENT) ACT, 1995
STATEMENT OF OBJECTS AND REASONS

The Scheduled Castes and the Scheduled Tribes have been enjoying the facility of reservation in promotion since 1955. The Supreme Court in its judgment dated 16th November, 1992 in the case of *IndraSawhney v. Union of India*, however, observed that reservation of appointments or posts under Article 16(4) of the Constitution is confined to initial appointment and cannot extent to reservation in the matter of promotion. This ruling of the Supreme Court will adversely affect the interests of the Scheduled Castes and Scheduled Tribes. Since the representation of the Scheduled Castes and the Scheduled Tribes in services in the States have not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of the Scheduled Castes and Scheduled Tribes. In view of the commitment of the Government to protect the interests of the Scheduled Castes and the Scheduled Tribes, the Government have decided to continue the existing policy of reservation in promotion for the Scheduled Castes and the Scheduled Tribes. To carry out this, it is necessary to amend Article 16 of the Constitution by inserting a new Clause (4A) in the said Article to provide for reservation in promotion for the Scheduled Castes and the Scheduled Tribes.

The State can make provision for reservation only if the above two circumstances exist. Further, in *Ajit Singh (II)*, this Court has held that apart from ‘backwardness’ and ‘inadequacy of representation’ the State shall also keep in mind ‘overall efficiency’.

After the Constitution (Seventy-Seventh Amendment) Act, 1995, the Supreme Court stepped in to balance the conflicting interests. Hence, as was held in *Union of India vs. Virpal Singh Chauhan*, a roster point promotee would not get consequential seniority if he had already got the benefit of accelerated promotion. However, the decisions in the cases of *Virpal Singh* and *Ajit Singh (I)* did not appeal to the Government and was of the view that the concept of ‘catch-up’ rule would adversely affect the interests of the SCs and STs in the matters of promotion with seniority. According to the Government, the decisions in *Virpal Singh Chauhan* and *Ajit Singh (I)* bringing in the concept of ‘catch-up’ rule adversely affected the interests of SCs and STs in the matter of seniority on promotion to the next higher grade. This led to the amending of Clause (4A) again and consequential seniority was given in addition to accelerated promotion to the roster-point promotees. Thus, the Constitution (Eighty-Fifth Amendment) Act, 2001, was nothing but an extension of Clause (4A) of Article 16 and the Constitution (Seventy-Seventh Amendment) Act, 1995 and the Constitution (Eighty-Fifth Amendment) Act, 2001 have to be read together.

i. The Catch-up Rule and the Rule of Promotion with Consequential Seniority

One of the questions raised in *M. Nagaraj* on behalf of the petitioners was whether obliteration of the ‘catch-up rule’ or insertion of the concept of ‘consequential seniority code’, would violate the basic structure of the equality code enshrined in Articles 14, 15 and 16.

The concept of the ‘catch-up’ rule appears for the first time in the case of *Virpal Singh Chauhan*. In the category of Guards in the Railways, there were four categories, namely, Grade ‘C’, Grade ‘B’, Grade ‘A’ and Grade ‘A Special’. The initial recruitment was made recruitment was made Gr. ‘C’. Promotion from one grade to another was by seniority-cum-suitability. The rule of reservation was applied not only at the initial stage of appointment to Grade ‘C’ but at every stage of promotion. The percentage reserved for SC was 15% and for ST, it was 7.5%. to give effect to the rule of reservation, a forty-point roster was prepared in which certain points were reserved for SCs and STs

respectively. Subsequently, a hundred-point roster was prepared reflecting the same percentage. In 1986, general candidates and members of SCs and STs came within Grade 'A' in Northern Railway. On 01.08.1986, the Chief Controller promoted certain general candidates on ad hoc basis to Grade 'A' Special. Within three months, they were reverted and SCs and STs were promoted. This action was challenged by general candidates as arbitrary and unconstitutional before the tribunal. The general candidates asked for three reliefs, namely, (a) to restrain the Railways from filling-up posts in higher grades in the category of Guards by applying the rule of reservation; (b) to restrain the Railway from acting upon the seniority list prepared by them; and (c) to declare that the general candidates were alone entitled to be promoted and confirmed in Grade 'A' Special on the strength of their seniority earlier to the reserved category employees. The contention of the general candidates was that once the quota prescribed for the reserved group is satisfied, the forty-point roster cannot be applied because that roster was prepared to give effect to the rule of reservation. It was contended by the general candidates that accelerated promotion may be given but the Railways cannot give consequential seniority to reserved candidates in the promoted category. It was also contended by general candidates that giving consequential seniority to accelerated promotion constituted conferment of double benefit upon the members of the reserved category and, therefore, violated the rule of equality in Article 16(1). It was further urged that accelerated promotion-cum-accelerated seniority is destructive of the efficiency of administration in as much as by this means the higher echelons of administration would be occupied for entirely by members of reserved categories. This was opposed by the reserved category candidates who submitted that for the purposes of promotion to Grade 'A' Special, the seniority list pertaining to Grade 'A' alone should be followed; that, the administration should not follow the seniority lists maintained by the administration pertaining to Grade 'C' as urged by the general candidates and since SCs and STs were senior to the general candidates in Grade 'A', the seniority in Grade 'A' alone should apply. In short, the general candidates relied upon the 'catch-up' which was opposed by the reserved category candidates.

The Supreme Court gave the following reasons for upholding the decision of the tribunal. Firstly, it was held that a rule of reservation as such is not violative of Article 16(4). Secondly, the Court opined that there is no fixed method of providing reservation. The extent and nature of reservation is a matter for the state to decide having regards to

facts and requirements of each case. It is open to the State to say that while the rule of reservation shall be applied, the candidate promoted earlier by virtue of rule of reservation/roster shall not be entitled to seniority over seniors in the feeder category and that it is open to the State to interpret the 'catch-up' rule in the service conditions governing the promotions. Thirdly, the Court did not agree with the view expressed by the Tribunal in (Virpal Singh Chauhan) that a harmonious reading of Clauses (1) to (4) of Article 16 should mean that a reserved category candidate belonged to general category. It was argued on behalf of the general candidates that all top grades stood occupied exclusively by the reserved category members, which violated the rule of equality underlying Articles 16(1), 16(4) and 14. The Supreme Court opined that the above situations arose on account of faulty implementation of the rule of reservation, as the Railways did not observe the principle that reservation must be in relation to 'posts' and not 'vacancies' and also for applying the roster even after the attainment of the requisite percentage reserved for SCs/STs.

The point which requires special mention here is that the Court has categorically ruled in Virpal Singh Chauhan that the 'catch-up' rule is not implicit in Clauses (1) to (4) of Article 16. Hence, the said rule is not beyond the amending power of the Parliament.

In Ajit Singh (I), the controversy which arose for determination was - whether after the members of SCs/STs for whom specific percentage of posts stood reserved having been promoted against those posts, was it open to the administration to grant consequential seniority against general category posts in higher grades. The affirmative ruling of the High Court was aside on the ground of application of the 'catch-up' rule. Accordingly, the Court took the view that the seniority between the reserved category candidates and general candidates in the promoted category shall be governed by their panel position.

Ajit Singh (II)¹⁹⁴ brought forth the conflict between Virpal Singh Chauhan and Ajit Singh (I) on the one hand and the judgment of Jagdish Lal on the other. While the former two judgments were pronounced following the 'catch-up rule' and favoured the general candidates, the latter judgment favouring the reserved candidates observed that under the general rule of service jurisprudence relating to seniority, the date of continuous officiation has to be taken into account and if so, the roster point promotees were entitled to the benefit of continuous officiation.

¹⁹⁴ AIR 1999 SC 3471

In *Ajit Singh (II)*, three points came up for consideration:

- i. Can the roster point promotees count their seniority in the promoted category from the date of their continuous officiation vis-a-vis general candidates, who were senior to them in the lower category and who were later promoted to the same level?
- ii. Have *Virpal* and *Ajit Singh (I)* been correctly decided and has *Jagadish Lal* been correctly decided?
- iii. Whether the catch-up principles are tenable?

As a result, *Jagadish Lal* was overruled by the judgment of *Ajit Singh (II)*. However, in the context of balancing fundamental rights under Article 16(1) and the rights of reserved candidates under Articles 16(4) and 16(4A), the Supreme Court opined that Article 16(1) deals with fundamental right whereas Articles 16(4) and 16(4A) are only enabling provisions and, therefore, the interests of the reserved classes must be balanced against the interests of other segments of society. As a remedial measure, the Court held that in matters relating to affirmative action by the State does not lead to reverse discrimination.

Considering the above judgments, the Supreme Court Bench in *M. Nagaraja*¹⁹⁵ viewed that the concept of ‘catch-up rule’ and ‘consequential seniority’ are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. it cannot be said that by insertion of the concept of ‘consequential seniority’ the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that the equality code under Articles 14, 15 and 16 is violated by deletion of the catch-up rule. These concepts are based on practices. However, such concepts cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of the parliament. Principles of service jurisprudence is different from constitutional limitations. Therefore, it was rightly pointed out by the Bench that neither the ‘catch-up’ rule nor the concept of ‘consequential seniority’ are implicit in Clauses (1) and (4) of Article 16 as correctly held in *Virpal Singh Chauhan*.

¹⁹⁵ *M. Nagaraj and Ors. v. Union of India and Ors.*, AIR 2007 SC 71

Efficiency in Administration

The question then is: what is the meaning of the phrase “efficiency of administration”? In D.T.C case, it was observed in para 275 that “the term efficiency is an elusive and relative one to the adept capable to be applied in diverse circumstances. If a superior officer develops liking towards sycophant, though corrupt, he would tolerate him and find him to be efficient and pay encomiums and corruption in such cases stand no impediment. When he finds a sincere, devoted and honest officer to be inconvenient, it is easy to cast him/her off by writing confidential reports with delightfully vague language imputing to be ‘not up to the mark’, ‘wanting public relations’ etc. At times, they may be termed to be “security risk” (to their activities). Thus, they spoil the career of the honest, sincere and devoted officers. Instances either way are galore in this regard. Therefore, one would be circumspect, pragmatic and realistic to these actualities of life while ambulating constitutional validity of wide, arbitrary, uncanalised and unbridled discriminatory power of dismissal.

ii. The Carry-Forward Rule

Justice O. Chinnappa Reddy, in *K.C. Vasanth Kumar and Anr. v. State of Karnataka*¹⁹⁶ had stated thus:

Efficiency is very much on the lips of the privileged whenever reservation is mentioned. Efficiency, it seems, will be impaired if the total reservation exceeds 50 %; efficiency, it seems, will suffer if the ‘carry forward’ rule is adopted; efficiency, it seems, will be injured if the rule of reservation is extended to promotional posts. From the protests against reservation exceeding 50 % or extending to promotional posts and against the carry forward rule, one would think that the civil service is a heavenly paradise into which only the archangels, the chosen of the elite, the very best may enter and may be allowed to go higher up the ladder. But the truth is otherwise. The truth is that the civil service is no paradise and the upper echelons belong to the chosen classes area not necessarily models of efficiency. The underlying assumption that those belonging to the upper castes and classes, who are appointed to the non-reserved posts will, because of their presumed merit, ‘naturally’ perform better than those who have been appointed to the reserved posts and that the clear stream of efficiency will be polluted by the

¹⁹⁶ AIR 1985 SC 1495

infiltration of the latter into the sacred precincts is a vicious assumption, typical of the superior approach of the elitist classes. There is neither statistical basis nor expert evidence to support these assumptions that efficiency will be necessarily impaired if reservation exceeds 50 %, if reservation is carried forward or if reservation is extended to promotional posts. Arguments are advanced and opinions are expressed entirely on an ad hoc presumptive basis. The age long contempt with which the 'superior' or 'forward' castes have treated the 'inferior' castes and classes is now transforming and crystallizing itself into an unfair prejudice, conscious and subconscious, ever since the 'inferior' castes and classes started claiming their legitimate share of the cake, which naturally means for the 'superior' castes, parting with a bit of it. Although in actual practice their virtual monopoly on elite occupations and posts is hardly threatened, the forward castes are nevertheless increasingly afraid that they might lose this monopoly in the higher ranks of government service and the profession. It is difficult for the 'superior' castes to understand and rise above their prejudice and it is so difficult for the 'inferior castes and classes to overcome the bitter prejudice and opposition which they are forced to face at every stage. Always one hears the word 'efficiency' as if it is sacrosanct and the sanctorum has to be fiercely guarded. 'Efficiency' is not a mantra which is whispered by the Guru in the Shishya's ear. The mere securing of high marks at an examination may not necessarily mark out a good administrator. An efficient administrator, one takes it, must be one who possesses among other qualities the capacity to understand with sympathy and, therefore, to tackle bravely the problems of a large segment of population constituting the weaker sections of the people. And, who better, than the ones belonging to those very sections? Why not ask ourselves why 35 years after Independence, the position of scheduled castes, etc. has not greatly improved? Is it not a legitimate question to ask whether things might have been different, had the District Administrators and the State and Central bureaucrats been drawn in larger numbers from these classes? Courts are not equipped to answer these questions, but the courts may not interfere with the honest answer these questions, but the courts may not interfere with the honest endeavours of the Government to find answers and solutions. We do not mean to say efficiency in the civil service is unnecessary or that it is a myth. All that we mean to say is that one need not make a fastidious fetish of it. It may be that for certain posts, only the best may be appointed and for certain courses of study only the best may be admitted. If so, rules may provide for reservation for appointment to such posts and

for admission to such courses. The rules may provide for no appropriate method of selection. It may be that certain posts require a very high degree of skill or efficiency and certain courses of study require a high degree of industry and intelligence. If so, the rules may prescribe a high minimum qualifying standard and an appropriate method of selection. Different minimum standards and different minimum modes of selection may be prescribed for different posts and for admission to different to different courses of study and having regard to the requirements of the posts and the courses of study. No one will suggest that the degree of efficiency required of a general medical practitioner. Similarly, no one will suggest that he degree of efficiency is to be altogether discounted. Similarly, no one will suggest that the degree of industry and intelligence expected of a candidate seeking admission to an ordinary arts degree course. We do not, therefore, mean to say that efficiency is to be altogether discounted. All that we mean to say is that it cannot be permitted to be used as a camouflage to let the upper classes in its name and to monopolise the services, particularly the higher posts and the professional institutions. We are afraid we have to id our minds of many cobwebs before we arrive at the core of the problem. the quest for equality is self-elusive, we must lose our illusions, though not our faith. It is the dignity of man to pursue quest for equality. It will be advantageous to quote at this juncture R. H. Tawney in his classic work 'Equality' where he says:

The truth is that is absurd and degrading for men to make much of their intellectual and moral superiority to each other and still more of their superiority in the arts which bring wealth and power, because, judged by their place in any universal scheme, they are infinitely great or infinitely small. The equality which all these thinkers emphasize as desirable is not equality of capacity or attainment but of circumstances, and institutions, and manner of life. The equality which they deplore is not the inequality of the personal gifts, but of social and economic development... Their views, in short, is that, because men are men, social institutions-property rights, and the organization of industry, and the system of public health and education should be planned, as far as possible to emphasize and strengthen, not the class differences which divide but the common humanity which unite them...

Pandit Jawaharlal Nehru, the first Prime Minister of India in his "Independence and After That" (Collection of Speeches 1946-49, Publication division, Government of India, pg. 28), has stated that "social equality in the widest sense and equality of

opportunity for everyone, every man and woman must have the opportunity to develop to the best of his and her ability. However, merit must come from ability and hard work and not because of caste or birth or riches.” This was followed in Air India Statutory Corporation case (supra) in para 53 where it was held that “social equality would develop the sense of fraternity among the members of a social group where each would consider the other as his equal, not higher or lower. A society, which does not treat each of its members as equals, forfeits its right of being called a democracy. All are equal partners in the freedom. Every one of our ninety-four million must have equal right to opportunities and blessings that freedom of India has to offer. To bring freedom in a comprehensive sense to the common man, material resources and opportunity for appointment be made available to secure socio-economic empowerment which would ensure justice and fullness of life to workmen, i.e., every man and woman.” In para 43, it was held that “(I)n a developing society like ours, steeped with unbridgeable, and ever-widening gaps of inequality of status and of opportunity, law is a catalyst, rubicon to the poor etc. to reach the ladder of social justice. What is due cannot be ascertained by an absolute standard which keeps changing, depending upon the time, place and circumstance. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and the opportunities to remove handicaps and disabilities due to which the poor, the workmen etc. are languishing ad to secure the dignity of their person. The Constitution, therefore, mandates the State to accord justice to all members of the society in all facets of human activity. The concept of social justice embeds equality to flavour and enliven the practical content of life. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality.

Efficiency in service attracts the well-known parable that insanity cannot be cured until married and marriage cannot be celebrated till insanity is cured. Unless one is given opportunity and facility by promotion to hold an office or a post with responsibilities, there would be no opportunity to prove efficiency in the performance or discharge of duties. Without efficiency one cannot be promoted. How to synthesis both and give an effect to the Constitutional animation to effectuate the principal of adequacy of representation in all posts or classes of posts in all cadres, service or grade is a nagging question. From that perspective, one is required to examine whether reservation in

promotion is constitutionally valid. The rules of promotion lay down that appointment to the post of Executive Engineer from Assistant Engineer shall be made on the principle of 'seniority subject to rejection of unfitness' and for appointment in higher posts like Superintendent Engineers, merit has to be considered. Even employees from Dalits or Tribes get promoted only on satisfying the above test. Appointment by promotion is a facet of recruitment to a service or cadre/grade/class or classes of posts. In fairness on the part of the appellants/petitioners and their learned counsel, none impugned nor alleged that the private respondents are not meritorious or inefficient. No such evidence is placed on record.

The fundamental requisites to all employees are honesty, integrity and character, apart from hard work, dedication and willingness to apply assiduously to the responsibilities attached to the office or post and also inclination to achieve improved excellence. What Dalits and Tribal employees need is an opportunity and fair chance of promotion to higher posts and offices earmarked for them in the roster where they are not adequately represented. In a clash of competing claims between general category employees on the one hand and Tribals and Dalits on the other, what the authorities need to take into consideration is the aforesaid factors and their service record with an objective and dispassionate assessment. When the authorities have a power coupled with the constitutional duty, the doctrine of full faith and credit under Article 261 gets due acceptance when done truly and sincerely with an honest, objective and dispassionate assessment by the appropriate authority. Their claims need to be considered in that perspective; they should be given promotion, if found eligible, to the posts or classes of posts in the higher cadre, grade, class or category etc. The selecting officer/officers need to eschew narrow, sectarian, caste, religion or regional consideration or prejudices which are deleterious to fraternity, unity and integrity and integration of the nation as unified Bharat. What needs to be achieved by the Dalits and Tribal officers so promoted is that they should, on par with others assiduously devote themselves with character, integrity and honesty in the discharge of the duties of the posts with added willingness and dedication to improve excellence. Thereby the efficiency of administration would automatically get improved and the nation constantly rises to higher levels of achievement. Therefore, it cannot be held that reservation in promotion is bad in law or unconstitutional.

As stated earlier, Article 16 (4A) has come into force w.e.f. 17 June, 1995. The appellants/ petitioners have sought amendment of the pleadings challenging the vires of article 16 (4A) of the Constitution and in fairness on the part of the learned Counsel, they did not press for consideration thereof obviously for the reason that its objects are mentioned in the Statement of Objects and Reasons as under:

“The Scheduled Castes and Scheduled Tribes have been enjoying the facility of reservation in promotion since 1955. In *Indra Sawhney and Ors. v. Union of India and Ors.*, the Supreme Court however, observed that reservation of appointments or posts under Article 16 (4A) of the Constitution is confined to initial appointment and cannot extend to reservation in the matter of promotion. This ruling of the Supreme Court will adversely affect the interests of the Scheduled Castes and the Scheduled Tribes. Since the representation of the Scheduled Tribes and Scheduled castes in services in the States have not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of Scheduled castes and Scheduled Tribes. To carry out the commitment of the government for protecting the interests of the Scheduled Castes and Scheduled Tribes, it is necessary to amend Article 16 of the Constitution by inserting a new clause (4A) in the said article to provide for reservation in promotion for the Scheduled Castes and the Scheduled Tribes.”

It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or a class of posts depends upon the operation of the conditions of the service. Article 16 (4A) read with Articles 16 (1) and 14 guarantees a right to promotion to Dalits and Tribals as fundamental right where they do not have adequate representation consistently with the efficiency in administration. The Mandal's case has prospectively overruled the ratio in Rangachari's case, i.e., directed the decision to be operative after 5 years from the date of judgment; however, before expiry thereof, Article 16 (4A) has come into force from June 17, 1995. Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right. In adjusting the competing rights of the Dalits and Tribals on the one hand and the employees belonging to the general category on the other, the balance is required to be struck by applying the egalitarian protective discrimination in favour of the Dalits and Tribes to give effect to the Constitutional goals, policy and objectives referred to herein before.

In *R.K. Sabharwal and Ors. v. State of Punjab and Ors*¹⁹⁷, the Constitution Bench was called upon to consider whether the reservation in promotion as per the roster was correct in law, and, therefore, constitutional and whether the employees belonging to Scheduled Castes have right to be considered for promotion in their own merits, if so how they are required to be adjusted in the roster prescribed by the Government. The Constitution Bench has pointed out when percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserved points, it has to be taken that the posts shown at the reserved points are to be filled from amongst the members of the reserved categories. The candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand, the reserved category candidates can compete for non-reserved posts. In the event of their appointment to the said posts, their number cannot be added and taken into consideration for working out the percentage of reservation. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said backward class, then the percentage has to be strictly followed. The prescribed percentage cannot be varied or changed simply because some of the members of the backward class have already been appointed or promoted against general seats. The fact that considerable number of members of the backward classes have been appointed/promoted against the general seats in the State may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the backward classes are operative, the same have to be followed. It was further held that the reserved vacancies were required to be filled according to the roster like a running account. When the reserved quota is full in the cadre then application of rule of reservation would be stopped until vacancies as per roster arise and operate. It was also held following Mandal's case that the judgment therein could be operative prospectively from that date, viz., February 10, 1995 and all the promotions which became settled rights due to reservation in promotion could not be unsettled. As seen earlier, 'right to equality', 'equality or status and opportunity', duty to 'improve excellence', 'opportunities and facilities to remove inequality in status' and 'social justice', all should be given their due and full play under rule of law to bring about equality in results to establish an egalitarian social order. It would, therefore, be clear that

¹⁹⁷ (1995) 2 SCR 35

reservation in promotion is constitutionally valid; the posts earmarked for Dalits and Tribes shall be filled up and adjusted with them. The Dalits and Tribes selected in open competition for posts in general quota should be considered appointees to the general posts in the roster as general candidates. The promotions given in excess of the quota prior to the judgment in Sabharwal's case should not be disturbed.

The further question is: whether the judgment in Mandal's case in paragraph 860 (8) by Jeevan Reddy, J. prospectively overruling the ratio in Rangachari's case is a majority judgment? In this connection, we may, at the outset, refer to Article 145 (5) of the Constitution. It postulates that "(No) judgment and no such opinion shall be delivered by the Supreme Court, save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion". It would, therefore, be manifest that unless majority Judges comprised in the bench concur on the opinion or the decision, it would not be a judgment and no such opinion shall be delivered by the Supreme Court. In Mandal's case, on the question of reservation in promotion, eight of the nine Judges participated in the opinion. Of them, Jeevan Reddy, J. spoke for himself, Kania, C.J.I. and Venkatachaliah, J. as he then was Pandian and Sawant, J.J. also agreed with them. There is a considerable debate on Micro Lexicon Surgery conducted by the learned Counsel for the appellants/petitioners drawing a distinction between conclusions and directions contained in paragraph 860 (8) and the language used in the concurrent opinions of Pandian and Sawant, J.J. In support thereof, they have placed strong reliance on the wording used by Sawant, J. in paragraphs 552 and 555 on the conclusions and the absence of concurrence with directions. Pandian, J. has expressly agreed in his conclusions and directions. Equally, there was absence of concurrence by other learned judges. They have also drawn our attention to the dictionary meanings of these words. Having given due consideration, we are of the view that the Micro Lexicon Surgery of the distinction between conclusions and directions leads us nowhere to reach satisfactory solution. One needs to adopt pragmatic approach to understand the conclusions reached and the directions given as part of the judgment in that behalf. Even if rule of strict interpretation is to be applied, as is sought by the learned Counsel, Sawant, J. in paragraph 555 has indicated his concurrence with the conclusions of Jeevan Reddy, J. in paragraph 860 (8) which includes directions concurred therein. We have, to our benefit, the contemporaneous understanding that directions in paragraph 860 (8) given by Jeevan

Reddy, J. is a majority judgment and it gets reinforced from the approval therefore, as followed by the Constitution bench, in R.K. Sabharwal's case. The presiding Judge therein, viz., Kuldeep Singh, J, who was one of the nine judges in Mandal's case, participated in the majority opinion on the issue of reservation in promotion. However, no opinion was expressed on the conclusions and directions of Jeevan Reddy, J. in paragraph 860, the Constitution bench having upheld the rule of reservation in promotion, proceeded to apply the law and worked out the rights of the Dalits in promotion in R. Sabharwal's case. The same do support out conclusion that the Constitution Bench equally understood that the directions contained in paragraph 860 (8) constituted majority judgment. Otherwise, the Constitution Bench in R.K. Sabharwal's case would not have proceeded to consider the rights to promotion of the Dalits and question of giving effect to the roster system and the question of percentage of reservation provided in promotions would not have been given effect. The Constitution Bench in that case would have declared in the light of the majority judgment the reservation in promotions were void ab initio under Article 13 (2), and that, therefore, the question of application of the roster would not have arisen. It is true that there is no positive indication or a finding to that effect in Sabharwal's case but the fact that the presiding Judge therein was one of the members of the 9-Judge Bench in Mandal's case, and that the Constitution bench considered and upheld the right to reservation in promotion to the Dalits and Backward Classes and applied the roster points to such promotions, itself goes to point out and reassure us that prospective overruling of Rangachari's case by Jeevan Reddy, J. is a majority opinion. In that view of the matter, the Micro Lexicon Surgery fails.

The next questions are: whether the prospective overruling of Rangachari's case, to be operative after 5 years from the date of Mandal's case, amounts to judicial legislation? Is it void ab initio under Article 13 (2) of the Constitution? Whether it is violative of the fundamental rights of the appellant-petitioners and whether the exercise of the power by this Court under Article 32 (4) and 142 of the Constitution is inconsistent with and derogatory to the fundamental rights of the appellants-petitioners and, if so, what would be the consequence? It is settled Constitutional Principle that to make the right to equality to the disadvantaged Dalits and Tribes meaningful, practical contents of results would be secured only when principles of distributive justice and protective discrimination are applied, as facet of right to equality enshrined under Article 14 of the

Constitution. Otherwise, the right to the equality will be a teasing illusion. Right to promotion is a method of recruitment from cadre to another higher cadre or class or category or grade of posts or classes of posts or offices, as the case may be. Reservation in promotion has been evolved as a facet of equality where the appropriate Government is of the opinion the Dalits and Tribes are not adequately represented in the class or classes of posts in diverse cadres, grade, category of posts or classes of posts. The discrimination, therefore, by operation of protective discrimination and distributive justice is inherent in the principle of reservation and equality too by way of promotion but the same was evolved as a part of social and economic justice assured in the Preamble and articles 38, 46, 14, 16 (1), 16 (4), 16 (4a) of the Constitution. The right to equality, dignity of person and equality of status and of opportunity are fundamental rights to bring Dalits and the Tribes in the mainstream of the national life. It would, therefore, be an imperative to evolve such principle to adjust the competing rights, balancing the claims, rights and interest of the deprived and disadvantages Dalits and Tribes on one hand and the general section of the society on the other.

d. Right to be Considered for Promotion as guaranteed under Article 309 of the Constitution

“Services under the Union and the States” are provided under Part XVI of the Constitution of India. The scope of this Part of the Constitution is restricted to the framing rules and regulations for the controlling and monitoring the Civil Services who are responsible for carrying on the administration under the direction and control of the elected representatives of the people and in accordance with rules and principles. The power of the appropriate Legislature to frame rules regulating recruitment to public services has been provided in Article 309¹⁹⁸ of the Constitution. ‘Recruitment’ is a comprehensive term and includes any method provided for inducting a person in public service. Appointment, selection, promotion, deputation are all well-known methods of

¹⁹⁸ 309. Recruitment and Conditions of Service of persons serving the Union or the State – Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to the public services and posts in connection with the affairs of the Union or of any State.

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor [***] of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

recruitment.¹⁹⁹ Any rule so framed under Article 309 shall be subject to other provisions of the Constitution.

On the plain reading of the language of Article 309, the proposition that any rule framed under this article has to be confined to recruitment and conditions of service of persons mentioned therein admits of no doubt. In the normal course what falls within the purview of the term “conditions of service” may be classified as salary or wages including subsistence allowance during suspension, the periodical increments, pay scale, leave, provident fund, gratuity, confirmation, promotion, seniority, tenure or termination of service, compulsory or premature retirement, superannuation, pension, changing the age of superannuation, deputation and disciplinary proceedings.²⁰⁰

Thus, the rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively subject to the condition that the existing rule cannot be taken away by an amendment with retrospective effect.

e. Right to Be Considered for Promotion: How Made?

It has become a settled principle of service jurisprudence that there is a right to be considered for promotion of every employee to a higher post subject to eligibility provided he is “within the zone of consideration”. But the question is as to the manner in which his case is to be considered. This is a matter of considerable importance in service jurisprudence as it deals with ‘fairness’ in the matter of consideration for promotion under Article 16.²⁰¹ Let us, therefore, look at the present legal position in this context.

In *Baikunth Nath Das v. Chief District Medical Officer*²⁰², the issue was whether uncommunicated adverse remarks would be violative of ‘fairness’ in considering the appellant for promotion. This case also considered the question of relative strength of old remarks and also relevance of remarks made before an earlier promotion. Jeevan Reddy, J., speaking for the Bench opined that more importance should be attached to record of later years. Adverse remarks made before granting the earlier promotion must be considered to have lost the ‘sting in them’.

¹⁹⁹ Subhash C. Kashyap, *Constitutional Law of India*, Vol. 2, 1795 [Universal Law Publishing, Second Ed. (In 3 Vols.), 2015]

²⁰⁰ M. Ramajois, *Services under the State*, 473 (Indian Law Institute, New Delhi, 2007)

²⁰¹ *Badrinath v. Government of Tamil Nadu and Ors.*, AIR 2000 SC 3243

²⁰² AIR 1992 SC 1020

In *State of Punjab v. Gurdas Singh*²⁰³, there were adverse remarks from 1978 prior to 1984 when the officer was promoted and there were also adverse remarks for the period 18.06.84 to 31.03.85. The compulsory retirement order was passed on 03.09.87. The said order was quashed by the Civil Court on the ground that his record prior to his promotion i.e., prior to 1984 could not have been considered and two adverse entries after 1984 were not communicated and could not be relied upon. Following *Baikunth Nath Das*, the Bench felt that uncommunicated adverse remarks could be relied upon and in that case these entries related to the period after an earlier promotion. That ground alone was sufficient for the case. There is a further observation that an adverse entry prior to earning of promotion or crossing of efficiency bar or picking up higher rank is not wiped out and can be taken into consideration while considering the overall performance of the employee during the whole tenure of service.

The proposition laid down in *Gurdas Singh* needs further explanation in the context of the ruling in *Baikunth Nath Das*. Similar to the position in the latter case, the general principle has been upheld that though adverse remarks prior to an earlier promotion can be taken into account, they would have lost their sting. However, there is a special fact attached to the former case which is the adverse remarks prior to the promotion in relation to his 'dishonesty'. Therefore, in a case relating to compulsory retirement, the 'sting' in adverse remarks relating to dishonesty prior to an earlier promotion cannot be said to be absolutely wiped out.

In *D. Ramaswami v. State of Tamil Nadu*²⁰⁴, the appellant started as a Lower Division Clerk and rose to the position of a Dy. Commissioner of Commercial Taxes. His entire service record contained only one single adverse entry in 1969 which referred to taking money from business people. The inquiry into that complaint ended in his favour, the government dropping the charges in November, 1974. In May, 1975 he was offered the selection post of Dy. Commissioner. In September 1975, he was compulsorily retired. It was held that while his previous record should not be completely ignored, there was nothing in the present conduct casting any doubt on the wisdom of the promotion and there was therefore no justification for needless digging into the past. It was held that the basis of the adverse entry of 1969 was knocked out by the order of the government in

²⁰³ AIR 1998 SC 1661

²⁰⁴ AIR 1982 SC 793

November 1974 and the effect of the entry (of 1969) was blotted out by his promotion as Dy. Commissioner.

In *Badrinath v. State of Tamil Nadu and Ors.*²⁰⁵, having referred to the above judgments, the Supreme Court laid the following principles in relation to ‘right to be considered for promotion’:

1. Under Article 16 of the Constitution, right to be ‘considered’ for promotion is a fundamental right. It is not the mere ‘consideration’ for promotion that is important but the consideration must be ‘fair’ according to established principles governing service jurisprudence.
2. Courts will not interfere with assessment made by Departmental Promotion Committees unless the aggrieved officer establishes that the non-promotion was bad according to Wednesbury Principles or was it mala fide.
3. Adverse remarks of an officer for the entire period of service can be taken into consideration while promoting an officer or while passing an order of compulsory retirement. But the weight which must be attached to the adverse remarks depends upon certain sound principles of fairness.
4. If the adverse remarks relate to a distant past and relate to remarks such as his not putting his maximum effort or so on, then those remarks cannot be given weight after a long distance of time, particularly if there are no such remarks during the period before his promotion. This is the position even in cases of compulsory retirement.
5. If the adverse remarks relate to a period prior to an earlier promotion they must be treated as having lost their sting and as weak material, subject however to the rider that if they related to dishonesty or lack of integrity they can be considered to have not lost their strength fully so as to be ignored altogether.
6. Uncommunicated adverse remarks could be relied upon even if no opportunity was given to represent against them before an order of compulsory retirement is passed.

²⁰⁵ AIR 2000 SC 3243

2.4. Promotion How Made vis-a-vis the Principle of Seniority

The principle of seniority in Public Personnel Administration is a widely prevalent method of promoting personnel in most countries. Under this principle, promotion is determined on the basis of the length of service of an employee. In general, an employee who has served longer is eligible for promotion. On the basis of this principle, an employee is promoted to a higher grade or class.²⁰⁶

2.4.1. Importance of Seniority in Determining Promotion in Public Personnel Administration

A system of promotion is the essence of modern management and, as already pointed out previously, when a person is recruited in an organisation he must be given an opportunity to advance. The object of assigning seniority is to facilitate the filling of promotional posts. It has been seen that, though seniority is not the only factor for granting promotion, as provided under various statutory rules and instructions, there is no denying the fact that seniority is that aspect of employment which cannot be ignored. But the trouble with the seniority system is that it is so objective that it fails to take any account of personal merit. As a system it is fair to everyone except the best ones; an official has nothing to win or lose provided he does not actually become so inefficient that disciplinary action can be taken against him. But, though the system is fair to the officials concerned, it is a heavy burden on the public and a great strain on the efficient handling of public business. The problem therefore is how to ensure reasonable prospect of advancement to all officials and at the same time to protect the public interest in having posts filled by the most able men? The challenge which lies before the administration is to churn out methods that can pose a balance between seniority and merit while making promotional policies.

In his celebrated book 'An Introduction to Public Administration'²⁰⁷, Leonard D. White has very objectively stated the importance of merit and seniority in making promotions. According to him, in public administration, it is in the public interest that superior civil servants should be enabled to move up the promotion ladder as merit deserves and as vacancies occur. Shielding the principle of seniority, he said that seniority can be

²⁰⁶ Mohit Bhattacharya, *Public Administration*, 195 (Word Press Pvt. Ltd., Kolkata, 12th ed., 2012)

²⁰⁷ Leonard D. White, *Introduction to the Study of Public Administration*, (Macmillan Publishing, New York, 4th ed., 1955)

considered as a method of promotion provided it is kept within limits. Employees prefer this rule because an eligible employee who has served longest is automatically awarded the promotion. It is because of the objectivity that characterises seniority and is used to eliminate favouritism or the suspicion of favouritism. White also explained that experience is certainly a factor in the making of a successful employee. Seniority is given most weight in promotions from the lowest to other subordinate positions. As employees move up the ladder of responsibility, it is entitled to less and less weight. When seniority is made the sole determining factor, at any level, it is a dangerous guide. It does not follow that the employee longest in service in a particular grade is best suited for promotion to a higher grade; the very opposite may be true.

Seniority in service is one of the important factors in making promotion. The well-known methods which are adopted in the recruitment rules for making promotions are (1) seniority-cum-merit; (2) promotion by selection. While the method of seniority-cum-merit is generally prescribed for promotions in the lower cadres, the method of promotion by selection is adopted in making promotion to the higher echelons of the services. The question of adopting seniority-cum-merit method or selection method is a complicated administrative problem and had to be decided by the concerned authority. In the seniority-cum-merit method, seniority is of great importance.²⁰⁸

In the case of selection method also seniority has some importance. But it can be safely said that seniority by itself is no basis to make promotion in either of the methods. Dealing with the problem relating to promotion policy, the Supreme Court in *Sant Ram Sharma*²⁰⁹ said that there are various conflicting factors upon which a proper promotion policy is based. The reason behind guaranteeing a promotion by seniority is because of its absolute objectivity. That means that if a post falls vacant it is filled by the person who has served longest in the post immediately below. But the trouble with the seniority is that it is so objective that it fails to take any account of personal merit. As a system it is fair to every official except the best ones; an official has nothing to win or lose provided he does not actually become so inefficient that disciplinary action has to be taken against him. But, though the system is fair to the officials concerned, it is a heavy burden on the public and a great strain on the efficient handling of the public business.

²⁰⁸ M. Ramajois, *Services under the State*, 473 (Indian Law Institute, New Delhi, 2007)

²⁰⁹ *Sant Ram Sharma v. State of Rajasthan*, AIR 1967 SC 1910: 1968 (1) SCR 111

Therefore, the challenge that lies with the administration is to strike a balance between seniority and merit; only then can a proper promotion policy can be ensued.

Generally speaking, a person gets seniority in the promotion, effective from his date of promotion, in the absence of rules to the contrary. Thus, a person promoted earlier would be senior to one promoted later. The Promotion of reserved candidates in excess of the quota as per roster point would be treated as *ad hoc* promotions. Their seniority would be counted only from such time as their promotion against a post created by a future vacancy of a post held by a reserved candidate.²¹⁰

The proviso to article 335 inserted by the Constitution (Eighty-second) Amendment Act, 2000 enables the state to make any provision in favour of the members of the scheduled castes or scheduled tribes for relaxation of qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion in services under the State.

In Capoor, the Supreme Court observed as follows:

We fail to see why administrative machinery which secures for the most meritorious, chances of superseding their seniors, in promotions to higher posts shall have an adverse and not beneficial effects upon the morale of members of State services or upon incentives for better work and efficiency. No doubt care has to be taken that it is so operated as to really secure the choice of the most meritorious by honest and rigorous application of correct and proper tests.

The general principles adopted for appointment by promotion are merit-cum-seniority and seniority-cum-merit.

i. Merit-cum-seniority

When promotion is made by merit-cum-seniority, the qualitative aspects of service, i.e., merit and ability, are more emphasised upon, rather than seniority. In other words, the role and significance of seniority is lesser in such criterion. It is only where merit and ability are approximately equal, that seniority is given some weight. In view of the principle of merit-cum-seniority, Mathew, J., opined that seniority should play a secondary role while considering any officer for promotion. Merit and suitability are the

²¹⁰ *Ashwani Kumar Singh v. UP Public Service Commission*, (2003) 11 SSC 584

guiding principles and it is only when they are ‘roughly equal’ that seniority can be a determining factor.

ii. *Seniority-cum-merit*

The law relating to promotions to be granted on the basis of seniority-cum-merit has been settled by the Supreme Court in various decisions. In *State of Mysore vs. Syed Mahmood*²¹¹, it was held that an officer cannot claim promotion as a matter of right by virtue of seniority alone in situations where promotion is based on seniority-cum-merit. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted.

In the case of *State of Kerala vs. N.M. Thomas*²¹², again, the Supreme Court gave us the meaning of seniority-cum-merit. It propounded the meaning of seniority-cum-merit as giving priority to the senior even though he is less meritorious given the minimum necessary merit requisite for efficiency of administration.

In *B.V. Sivaiah vs. K. Addanki Babu*²¹³, a three-Judge Bench of the Supreme Court considered the question “what is meant by seniority-cum-merit”. It was held that the criterion of ‘seniority-cum-merit’ in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit.

In *Union of India vs. Lt. Gen. Rajendra Singh Kalyan*²¹⁴, the Apex court again held that what is required in seniority-cum-merit is a fulfilment of certain minimum merit or satisfying a benchmark previously fixed, and subject to the fulfilling the said requirement, the promotion is based on seniority.

²¹¹ AIR 1968 SC 1113

²¹² AIR 1976 SC SC 490

²¹³ (1998) 6 SCC 720

²¹⁴ (2000) 6 SCC 698

The question whether minimum qualifying marks could be prescribed for assessment of past performance and interview, where the promotions are to be made on the principle of seniority-cum-merit came up for consideration in *Rajendra Kumar Srivastav vs. Samyut Kshetriya Gramin Bank*²¹⁵. It was observed by the Supreme Court that the principle of seniority-cum-merit, for promotion, is different from the principle of 'seniority' and the principle of 'merit-cum-seniority'. Where promotion is on the basis of seniority alone, merit will not play any part at all. But where promotion is on the principle of seniority-cum-merit, promotion is not automatic with reference to seniority alone. Merit will also play a significant role. The standard method of seniority-cum-merit is to subject all the eligible candidates in the feeder grade (possessing the prescribed educational qualification and period of service) to a process of assessment of a specified minimum necessary merit and then promote the candidates who are found to possess the minimum necessary merit strictly in the order of seniority. The minimum necessary merit necessary for the post may be assessed either by subjecting the candidates to a written examination or an interview or by assessment of their work performance during the previous years, or by a combination of either two or all the three of the aforesaid methods. There is no hard and fast rule as to how the minimum necessary merit is to be ascertained. So long as the ultimate promotions are based on seniority, any process for ascertaining the minimum necessary merit as a basic requirement, will not militate against the principle of seniority-cum-merit. Thus, it is clear that a process whereby eligible candidates possessing the minimum necessary merit in the feeder posts is first ascertained and thereafter, promotions are made strictly in accordance with seniority, from among those who possess the minimum necessary merit is recognised and accepted as complying with the principle of seniority-cum-merit. What would offend the rule of seniority-cum-merit is a process where after assessing the minimum necessary merit, promotions are made according to merit instead of seniority from among the candidates possessing the minimum necessary merit. If the criteria adopted for assessment of minimum necessary merit are bona fide and not unreasonable, it is not open to challenge, as being opposed to the principle of seniority-cum-merit.

The position was again settled in the recent judgment of *Haryana State Warehousing Corp. vs. Jagat Ram*²¹⁶. The Court reiterated the settled position that the criterion of

²¹⁵ (2010) 1 SCC 335

²¹⁶ (2011) 3 SCC 422 at 433-434

seniority-cum-merit is different from the criterion of merit and also the criterion of merit-cum-seniority. Where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted. Seniority-cum-merit means that, given the minimum necessary merit required for efficiency of administration, the senior, though less meritorious, shall have priority in the matter of promotion and there is no question of further comparative assessment of the merit of those who were found to have the minimum necessary merit required for efficiency of administration. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employees. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be considered for promotion on the basis of seniority-cum-merit.

2.4.2. Advantages of the Principle of Seniority

The principle of seniority surely has its own set of advantages which can be summarised as under²¹⁷:

- i. Seniority is objective in its assessment of the employees. There is a general perception that the principle of seniority is relatively free from favouritism, nepotism, communalism and political affiliations. It is considered to be fair and free from biases.
- ii. In this policy, an employee is rewarded for gaining rich experience over the years. It is based on the belief that an experienced person discharges his functions in a more effective manner than his junior without experience.
- iii. It is impartial and universal in its application. It gives a chance to everybody for moving up the official ladder and this motivates the person to work harder.
- iv. It is based on the principle of equity and justice.
- v. Personnel can be promoted automatically. There is no scope for human manipulation.

Therefore, it is for the state to formulate a proper promotion policy and to reserve certain specified quota for promotion. After laying down a proper promotion policy the most

²¹⁷ Rajesh K. Jha (ed.), *Public Personnel Administration*, 13 (Pearson, 1st ed., 2012)

important aspect of the matter is, as observed by the Supreme Court, an honest and sincere evaluation of merit and suitability of civil servants with reference to relevant criteria. Fair evaluation is of crucial importance to administrative efficiency and the morale of public service.

2.4.3. Performance Appraisal Report

The 'fair evaluation' system that has been referred to in the previous paragraph indicates the importance of a Performance Appraisal System. Every organisation has a system of assessment of performance of its employees periodically for determining their output as well as for deciding on their promotion. A Performance Appraisal Report, in a government service, is a key performance indicator in which quantitative gradation of performance is assessed by awarding scores. It, thus, serves a short term purpose of assessing the usefulness of an employee to the organisation, and in the long run determines his potential for elevation to higher levels.

Following are the main features of the PAR system:

1. It is written for each financial year.
2. If PAR for a financial year is not recorded by 31st of December, no remarks may be recorded thereafter and the officer may be assessed on the basis of the overall record and self-assessment for the year if he/she has submitted his/her self-assessment on time.
3. A PAR is also written when either the reporting officer or the officer reported upon relinquishes charge of the post. When more than one report is written during a financial year, each report shall indicate the period to which it pertains.
4. Only one report for a particular period is written during the financial year and there shall be a single reporting, reviewing and accepting authority at each level of assessment which shall be specified in the channel for writing PARs.
5. If more than one person of the same superior level supervises the performance of the officer, the government shall identify the person to report or review well in advance of the relevant assessment year.
6. If the reporting authority has not seen the performance, then, the next immediate authority that has seen it for three months shall write the report. Similarly, the reviewing

authority has also not seen, but the accepting authority has seen it for three months, then he/she shall write the report.

7. If neither the reporting nor the reviewing nor the accepting authority has seen the performance for at least three months, then none of them shall write the PAR and entry, accordingly, shall be made in the self-assessment report.

8. No authority shall write a PAR after he/she demits office.

i. Administrative Reforms Commission of India on Performance Appraisal

a. At the end of each year, the official reported upon should submit a brief resume, not exceeding three hundred words, of the work done by him, bringing out his special achievements. The resume should be submitted to the reporting officer and should form a part of the confidential report. This should be taken into account by the reporting officer while making his report or comments.

b. Only three gradations are to be made, viz., 'fit for promotion', 'not yet fit for promotion', when writing the confidential reports of secretariat officers of the level of under-secretary and above. Further, it has to be indicated whether the officer reported upon has to be indicated whether the officer reported upon has any outstanding qualities which entitle him for promotion out of turn.

c. Good work done during the year should receive prompt appreciation either on a file or in a tour or inspection note. The official concerned should be allowed to quote these in his resume.

ii. Review of the Performance Appraisal Report

A PAR is reviewed in the following manner:

(a) The reviewing authority shall record his/her remarks on the PAR, within the specified time frame.

(b) Where the reviewing authority has not seen, and the accepting authority has seen the performance of an officer for at least three months during the period for which the performance appraisal report is written, the accepting authority shall review the performance appraisal report.

(c) It shall not be competent for the reviewing authority, or the accepting authority, to review or accept any such PAR unless it has seen the performance of an officer for at least three months during the period for which the report has been written, and in every such case an entry to that effect shall be made in the PAR.

(d) It shall not be competent for the reviewing authority or the accepting authority to review any such performance appraisal report, where the authority reviewing the PAR is a government servant after one month of his retirement from service, and in other cases, after one month of the date on which he/she demits office.

2.5. A Sum-up

The constitutional code of equality and equal opportunity is a charter for equals, and hence equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall substantially within the same class.²¹⁸ In terms of article 16 of the Constitution, the employees similarly situated cannot be discriminated. Employees having the same qualifications, thus, must be considered equally for promotion.²¹⁹ However, as a matter of fact, a right to promotion cannot be vested upon an official under Article 16. At the least, he can get be considered for promotion which is guaranteed under the said Article.

It is already seen that the right to a public employment is a constitutional right under Article 16 (1). Promotion, being an aspect of public employment, is also protected by Article 309 and any statutes, rules and regulations or instructions made under it. But the relevant provisions must be conformable to the rights guaranteed in Part III and IV of the Constitution. Article 21 guarantees the right to life which guarantees the right to livelihood, to a many the assured tenure of service is the source, the deprivation thereof must be in accordance with the procedure prescribed by law conformable to the mandates of Articles 14 and 21 as be fair, just and reasonable but not fanciful, oppressive or at vagary. The need for the fairness, justness or reasonableness of the procedure was elaborately considered in Maneka Gandhi case and it hardly needs reiteration.²²⁰

²¹⁸ *Vijay Lakshmi v. Punjab University*, AIR 2003 SC 3331

²¹⁹ *Union of India through Govt. of Pondicherry v. V. Ramakrishnan*, AIR 2005 SC 4295

²²⁰ *Ashok Kr. Gupta vs. State of Uttar Pradesh*; (1997) 5SCC 201

Reservation in appointments or posts in favour of any ‘backward classes of citizens’ is guaranteed under Article 16(4) of the Constitution of India. This is done for those who have not been adequately represented in the Services under the State. However, the clause is only an enabling provision and no right or duty can be read into it. But as held in *State of Kerala v. N. M. Thomas*, it is not an exception to the general principle in Article 16(1) but an emphatic statement of equality of opportunity guaranteed under clause (1) which means equality between employees belonging to the same class and not equality between separate and independent classes of employees. Thus, in the case of the Scheduled Caste and Scheduled Tribes who suffer from socio-economic backwardness, the fundamental right to equality of opportunity justifies separate categorisation for the purpose of “adequate representation in State services.” The Courts have however, held that Article 16(4) has got to be read with Article 335 inasmuch as the latter states that while considering SC and ST claims maintenance of efficiency of administration must be kept in view.

In *T. Devadasan v. Union of India*²²¹, the Supreme Court when called upon to pronounce on the constitutionality of the ‘carry-forward’ rule, held the rule ultra vires by a majority of four to one on the ground that the power vested in the State Government under Article 16(4) could not be so exercised as to deny reasonable equality of opportunity in matters of public employment to members of classes other than backward.

The Mandal Commission had in its report recommended 27 per cent reservation for backward classes in view of the limit of 50 per cent imposed by the Supreme Court. In its judgment in *Indra Sawhney v. Union of India*, the Supreme Court decided that there was no reservation in promotion and that the total reserved quota did not exceed 50 per cent except in extraordinary circumstances. To meet this situation, Article 16 (4A) was inserted vide the Seventy-seventh Amendment providing reservation in matters of promotion in services under the State for the Scheduled Castes and the Scheduled Tribes. By adding Clause (4B) to Article 16 it as however clarified that the unfilled reserved vacancies are to be treated as a separate class and are not to be included under the prescribed ceiling of fifty per cent reservation of vacancies of the year. In 2002, Clause (4B) was further amended vide the Eighty-fifth Constitution Amendment Act,

²²¹ AIR 1964 SC 179

2002 to include the principle of ‘consequential seniority’ for the promotees. The Eighty Fifth Amendment came into operation with effect from 17 June, 1995.

Therefore, it can be precisely summed up that promotion based on an equality of opportunity and seniority attached to such promotion are the facets of the fundamental rights guaranteed under Article 16(1) and in matters relating to civil services, under Article 309 of the Constitution.

The seniority rule of continuous officiation is interlinked with the promotional rule based on equal opportunity and the same cannot be delinked.²²² It has been held that when promotional avenues are available, seniority becomes closely interlinked with promotion provided such a promotion is made after complying the principles of equal opportunity stated in Article 16(1). For example, if the promotion is by the rule of “seniority-cum-suitability” the eligible seniors at the basic level as per seniority fixed at that level and who are within the zone of consideration must be first for promotion and be promoted if found suitable.²²³

The PARs, on the basis of which seniority and promotion is made, have had great confidentiality about them. Unless there was something adverse in it the contents of the comments of the reporting officer, reviewing authority and the accepting authority would not be informed to the officer reported upon. However, an opportunity was given to make representation against the adverse remarks if any, but if the officer was graded as satisfactory, average, etc., it was not deemed to be an adverse entry. There has been great confusion about the confidential reports. The officer reported upon was supposed to write his/her own self-assessment report, which was to become the basis for the reporting officer. Sometimes, if the officers wanted to harass they would not write the report itself or grade the officer as satisfactory. Justification was required to be given only of an adverse entry but not for any remarks categorizing the officer as average or satisfactory.

²²² *Jatinder Pal Singh v. State of Punjab*, AIR 2000 SC 609

²²³ Durga Das Basu, *Commentary on the Constitution of India*, Vol. 2, 1929 (LexisNexis ButterworthsWadhwa, Nagpur, 8th ed., Reprint 2012)

CHAPTER – 3

FIXATION OF SENIORITY FOR PROMOTION IN SERVICES UNDER THE STATE –AN ANALYSIS OF THE JUDICIAL OPINIONS

3.1. Overview

It has been already pointed out in the previous chapter that the object of assigning seniority is to facilitate the filling of promotional posts. So, seniority is one of the most important matters relating to conditions of service because it has a direct bearing on the question of promotion to the next higher cadre. Where promotion to the next higher cadre is based on the principles of seniority and merit, the seniority of an official is of utmost importance. According to the principle of seniority, once an official acquires eligibility he becomes entitled to promotion getting a preference to his juniors.²²⁴ Even in cases where promotion is governed by the principles of selection, seniority has its own role to play. Where persons are selected to the next higher post on the basis of merit and suitability, from amongst persons of equal merit, the senior is entitled to be preferred for appointment.²²⁵ Therefore, the seniority under the rules is a civil right.²²⁶ The seniority of a civil servant does not depend upon how it is fixed by the concerned authority. It stands automatically determined according to the rules. The constitutionality of seniority rules can be challenged on the grounds of their unreasonableness, justness and fairness.²²⁷

3.2. Seniority – Meaning, Concept and Constitutionality

The Concise Oxford Dictionary defines a ‘senior’ person as anyone who holds a higher rank or status.²²⁸ According to the Black’s Law Dictionary, ‘seniority’ is ‘the

²²⁴ M. Rama Jois, *Services Under the State*, 529 (Indian Law Institute, New Delhi, 1st ed., 2007)

²²⁵ *Sant Ram Sharma vs. State of Rajasthan*, AIR 1968 SC 1910 at 1916

²²⁶ *S. K. Ghosh vs. Union of India*, AIR 1968 SC 1385

²²⁷ See *R. L. Bansal vs. Union of India*, 1992 (Supp.) (2) SCC 318; *Accountant General vs. S. Dorai Swami*, AIR 1981 SC 783

²²⁸ Catherine Soannes and Angus Stevenson (eds.), *Concise Oxford English Dictionary*, 1310 (Oxford University Press, Oxford, 11th Ed., 2011)

preferential status, privileges, or rights given to an employee based on employee's length of service with an employer.²²⁹ Employees with seniority may receive additional or enhanced benefit packages and obtain competitive advantages over fellow employees in layoff and promotional decisions. It also means the status of being older or senior.²³⁰ In employment law, a seniority system is an arrangement that recognises length of service in making decisions about job layoffs and promotions or other advancements.²³¹

Seniority is best defined as granting of preference in certain personnel actions based on an employee's length of service.²³² Seniority refers to salary increases, promotion and the receipt of other benefits, based on the amount of time in service. Seniority is considered to be a valid principle for personnel actions because years within a position may provide one with superior organisational insight, experience and loyalty.²³³

Many consider seniority an element of an efficient bureaucratic organisation. Weber, the famous sociologist, has listed "promotion according to seniority or to achievement" as an important component of an efficient bureaucracy.²³⁴ He argued that entrance into an office "is considered an acceptance of a specific obligation of faithful management in return for a secure existence." Employment security then contributes to the objective administration of duties "where legal guarantees against arbitrary dismissal or transfer are developed, they merely serve to guarantee strictly objective discharge of specific office duties free from all considerations."²³⁵ Thus, secure employment, of which seniority is a major component, provides the officer with protection from political interference and encourages organisational loyalty to the goals of the organisation. Generally, then, seniority encourages organisational loyalty and commitment to the objective application of laws.

As already said, there can be no right to seniority. Seniority is only a civil right and there is no constitutional right to seniority. Seniority has been upheld in a number of cases as being a civil right which plays a very important role in one's service career. It is settled

²²⁹ Bryan A. Garner (Ed.), *Black's Law Dictionary*, 1393 (Thomson West, U.S.A., 8th Ed., 2004)

²³⁰ *Ibid*

²³¹ Alan L. Saltzstein, "Seniority", in Evam M. Berman, Jack Rabin (eds.), *Encyclopedia of Public Administration and Public Policy*, 1762, (2008)

²³² E. M. Bowman, J. S. West, et al. (eds.), *Human Resource Management in Public Service*, 367 (Sage Publications, Thousand Oaks, C.A., 2001)

²³³ Max Weber, *The Theory of Social Economic Organisation*, 334 (The Free Press, New York, 1947)

²³⁴ H. Gerth and C.W. Mills, *From Max Weber: Essays in Sociology*, 199, 202 (Oxford University Press, New York, 1958)

²³⁵ *Ibid*

as a decisive factor in the upward march. Not only this, once settled, seniority gives certainty and assurance and boosts the morale to do quality work in one's chosen work or calling. Commanding respect among colleagues, instilling confidence and spreading harmony among employees are some of the reasons for application of the principle of seniority and unsettling this may generate bitterness, resentment, hostility among them. This may also lead to loss of enthusiasm to do quality work driving the parties to approach the administration for resolution of this acrimonious situation resulting in many unwanted and unresolved disputes.

Therefore, in the career span of an employee determination of seniority is a vital aspect upon which his future promotion shall be made. Thus, the mandate of Articles of 14 and 16 is that the principles upon which seniority is to be determined must be just and fair.²³⁶

Courts have repeated in a number of occasions that seniority once settled shall not be unsettled but the men in power often violate this ratio for extraneous reasons. This has been reiterated in *H. S. Vankani vs. State of Gujarat*²³⁷, *Union of India vs. S.K. Goel*²³⁸, *T.R. Kapoor vs. State of Haryana*²³⁹ and *Bimlesh Tanwar vs. State of Haryana*²⁴⁰.

In *D. P. Das vs. Union of India*²⁴¹, it was held determination of seniority is a vital aspect in the service career of an employee. His future promotion is dependent on this. Therefore, the determination of seniority must be based on some principles, which are just fair. This is the mandate of Article 14 and 16

It has also been reiterated in *State of U.P. vs. Dinkar Sinha*²⁴² that seniority may not be a fundamental right, but it is civil right. Infringement of the said right would be permissible only if there exist any rules validly framed under a statute and/or the proviso appended to Article 309 of the Constitution of India. But even if on such strict interpretation such civil right cannot be saved then it may amount to arbitrary destruction of the right violating Articles 14 and 16 of the Constitution.²⁴³ The Supreme Court in *Andhra Pradesh Cooperative Oil Seeds Growers Federation Ltd. vs. D. Achyut*

²³⁶ D.P. Das vs. Union of India, (2011) 8 SCC 115

²³⁷ (2010) 4 SCC 301

²³⁸ (2007) 14 SCC 641

²³⁹ (1989) 4 SCC 71

²⁴⁰ (2003) 5 SCC 604

²⁴¹ AIR 2011 SC 2947

²⁴² (2007) 10 SCC 548

²⁴³ *Suresh vs. Yeotmal District Central Cooperative Bank Ltd.*, AIR 2008 SC 2432

*Rao*²⁴⁴, has recognised that seniority confers a valuable right on the employee and his entire future career at times is dependent on such seniority.

Since, seniority can be a determinative factor in consideration for promotion, it also becomes a facet of Article 16.²⁴⁵

It is now well settled that seniority, being an incidence of service, shall be fixed according to prescribed methods by the service rules. In case no such method is prescribed, the length of service is taken into account.

3.3. Fixation of Seniority – The Underlying Principles

Generally, for every Government Department and Institution statutory provisions in the form of Rules or Administrative instructions are made for governing matters of employment including promotion and determination of seniority. Where there are specific statutory provisions which provide for the factors to be taken into consideration and the manner to be adopted in fixation of seniority, then, subject to such provisions or instructions being constitutionally or otherwise valid, seniority has to be fixed in accordance with such provisions or instructions.

3.3.1. Primacy of Statutory Provisions

As in other fields of service law, the first step in resolving a disputed question of seniority is to ascertain whether there are any statutory provisions operating in the field. If statutory provisions exist then they will have primacy. By statutory provisions is meant an Act of the legislature or rules, regulations, orders, notifications etc. issued in exercise of powers conferred by the Act.²⁴⁶

a) Statute

If there is a statute or Act covering the field of seniority then rules whether made under Article 309 or otherwise would be ineffective or invalid.²⁴⁷

²⁴⁴ (2007) 13 SCC 320

²⁴⁵ *Ajit Singh vs. State of Punjab*, AIR 1999 SC 3471

²⁴⁶ Samaraditya Pal, *Law Relating to Public Service*, 451 (LexisNexis ButterworthsWadhwa, Nagpur, 3rd Ed., 2011)

²⁴⁷ *P. S Ashachar vs. State of Karnataka*, 1975 (2) SLR 373

b) *Rules*

While determining the seniority of an employee the Supreme Court has emphasised that rules will have to be followed strictly and not in breach. When a criteria is laid down in the statutory rules, the same will have to be followed. In *H.V. Pardasanie vs. Union of India*²⁴⁸ the primacy of rules has been clearly observed in the following words:

“There is no dispute that in the absence of any special provision regulating determination of seniority, length of continuous service in any particular grade would be the basis for determining seniority in that grade. The legal position is equally settled if a rule prescribes a method of fixation of inter se seniority, the normal practice would not apply and the rule shall prevail, obviously subject to its constitutionality.”

It is for the Government to frame rules in service matters. As already discussed, seniority is an incidence of service and the function of framing the rule squarely fall upon the Government. In *K.S. Vora vs. State of Gujarat*²⁴⁹, Rule 4 of the Gujarat Subordinate Secretariat and Services (Seniority of Assistants) Rules, 1977 on the aspects of seniority is valid. It was held that the common cadre was drawn for the purpose of increasing the efficiency by introducing a spirit of total competition by enlarging the field of choice for filling up the promotional posts and in the interest of discipline too. After a common cadre was formed the general feeling of dissatisfaction on account of disparity of seniority became apparent. In 1977 Rules were introduced in this background to ease the situation. The scheme of this rule protected the rank held by every member of the service notwithstanding alteration of seniority on the new basis.

Thus, it is a settled law that the provisions of statutory rules cannot be modified or altered by executive instructions and it is only in the absence of statutory rules that the executive instructions have relevance. As such even if for the sake of argument it may be accepted that on account of the memorandum to the Cabinet or any other executive instruction the appellant in *Bindeshwari Ram vs. State of Bihar*²⁵⁰, was to be given seniority as claimed by him, it could not be done as in the case of a conflict the statutory

²⁴⁸ AIR 1985 SC 781. See also *S.P. Kapoor vs. State of Himachal Pradesh*, AIR 1981 SC 2181; *Delhi Water Supply and Sewage Disposal Committee vs. R.K. Kashyap*, AIR 1989 Sc 278; *Direct Recruit Class II Engineering Officer's Association vs. State of Maharashtra*, AIR 1990 SC 1607

²⁴⁹ AIR 1987 SC 2348

²⁵⁰ (1989) 4 SCC 465 at 468

provisions contained in this behalf in proviso (iii) of Rule 35 of Bihar Forest Service Rules, 1953 shall prevail.

In *K. Balasubramanian (Ex. Capt.) vs. State of Tamil Nadu*²⁵¹, there was an express provision in the statutory rules providing that seniority shall be fixed on the basis of the date of appointment. By orders dated 16 November 1976 and 15 June 1977, the said principle for fixation of seniority contained in Rule 35 was sought to be altered in respect of ECOs/SSRCOs and the seniority was sought to be fixed on the basis of a different criterion, namely, by treating them as belonging to the year in which they would have been appointed to the posts in their first possible attempt after the date of joining military duty. This was inconsistent with the principle of fixing the seniority contained in Rule 35 of the General Rules and this could only be done by suitably amending the said rules and it could not be done by issuing administrative instructions.

In *Union of India vs. S.S. Uppal*²⁵², it was held that the seniority in respect of candidate who even though were on the panel of selection but appointed only after the amendment came into force has to be determined on the basis of rules in force at the time of appointment.

The judgment of the Supreme Court in *U.D. Lama vs. State of Sikkim*²⁵³, is another important case relating to following of procedure as laid down in the Rules of service. In this case the selection and appointments made in 1982 were dictated by peculiar circumstances. The appointments made were not made strictly in accordance with the Rules but in exercise of the executive power of the state. It is true that some of the respondents appeared in the tests and did not qualify but there is substance in the contention of the respondents that they were entitled to be appointed even without these tests if Rule 4(1)(b) was followed. They were deprived of this chance. Even for Rule 4(1)(b), the instrumentality of Public Service Commission has been set up, the State Government has to undo the wrong that was initially done to these employees by subjecting them to tests which was not warranted by Rule 4(1)(b). Therefore, they should not be made to suffer in the matter of seniority and promotion in any way by failure of the State Government to implement the Rules laid down by it. In these circumstances by directing the new recruits to be treated to have been recruited on the

²⁵¹ (1991) 2 SCC 708

²⁵² AIR 1996 SC 2340

²⁵³ (1997) 1 SCC 111

day the appellants were recruited, the State Government has not done anything contrary or wrong but has really removed the injustice to the respondents by the State Government's failure to recruit them into the Service in accordance with Rule 4(1)(b). They might have also joined through open competition but neither of the two steps were taken or could be taken. In these circumstances, the appellants have really tried to steal a march upon the respondents by being successful in the tests which should not have been held in any event.

It is, thus, settled rules that as far as the Rules governing seniority are constitutionally valid, the employer or the Court has to strictly adhere to the Rules. The Court has to keep in mind the fact that, while interpreting the provisions of a statute, it can neither add, nor subtract even a single word. The legal maxim '*A verbis legis non est recedendum*' means, "from the words of law, there must be no departure". A section is to be interpreted by reading all of its parts together, and it is not permissible to omit any part thereof. The court cannot proceed with the assumption that the legislature, while enacting the statute has committed a mistake, it must proceed on the footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the statute, and it is not open to the court to add or amend, or by construction, make up for the deficiencies, which have been left in the Act. The court can only iron out creases but while doing so, it must not alter the fabric, of which an Act is woven. The Court, while interpreting statutory provisions, cannot add words to a statute, or read words into it which are not part of it, especially when a literal reading of the same produces an intelligible result.²⁵⁴

Therefore, the general rule is that if seniority is to be regulated in a particular manner in a given period it shall be given effect to, and shall not be varied to disadvantage retrospectively.²⁵⁵ If there be a rule to regulate seniority, seniority shall be regulated by the same.²⁵⁶ It is settled law that the service conditions pertaining to seniority are liable to alteration by subsequent changes that may be introduced in the rules and except to the extent of protecting promotions that have already been earned the previous rules; the

²⁵⁴ *Rohitash Kumar vs. Om Prakash Sharma*, (2013) 11 SCC 451; Also see *Nalinakhya Bysack vs. Shyam Sundar Halder*, AIR 1953 SC 148; *Sri Ram Ram Narain Medhi vs. State of Bombay*, AIR 1959 SC 459; *M. Pentiah vs. Muddala Veeramallappa*, AIR 1961 SC 1107; *Balasinor Nagrik Coop. Bank Ltd. Vs. Babubhai Shankerlal Pandya*, AIR 1987 SC 849; *Dadi Jagannadham vs. Jammulu Ramulu*, (2001) 7 SCC 71

²⁵⁵ *D.P. Sharma vs. Union of India*, AIR 1989 SC 1071

²⁵⁶ *Rana Randhir Singh vs. State of U.P.*, AIR 1989 SC 218

revised rules will operate to govern the seniority and future promotion prospects of all the persons in the concerned service.²⁵⁷ If any rule is amended, the amendment shall take effect prospectively. To allow the amendment to have retrospective operation is bound to create problems. The State Government while amending the rule should have taken into consideration the practical problems which would arise as result of retrospectivity.²⁵⁸

3.3.2. Absence²⁵⁹ of Rules: Executive Orders

In the absence of rules relating to seniority or any particular aspect of principles relating to the law governing seniority, the employer is entitled to fill up the gap by an executive order. In *Union of India vs. H.R. Patankar*²⁶⁰, the Supreme Court has said that the Government is competent to make seniority rules where there are no statutory rules or the law is silent on any particular subject. The Government can do this by passing an executive order so as to fill the gap where the seniority rule is silent.

It is well recognised that a new service condition may be brought into effect by an executive order and such condition would remain in force as long as it is not repealed either expressly or by necessary implication by another executive order or a rule made under the proviso of Article 309 of the Constitution or by a statute.

In *Ravi Paul vs. Union of India*²⁶¹, the seniority of the petitioners and other ECOs/SCOs who were absorbed/appointed in the BSF after the enactment of the BSF Act in 1968, is, governed by the provisions of the BSF Act and the Rules made thereunder and in the absence of such rules by the executive orders issued by the Government of India in that regard. The rules regarding seniority of officers in the BSF were made for the first time in 9 December 1978 when the BSF Seniority Rules were published. Till then there was no rule regarding the fixation of seniority of officers in the BSF and the said matter was governed by executive orders only. The seniority of SSCOs who were absorbed/appointed as Assistant Commandant in the BSF on selection by the Special Selection Board during the year 1974-78 is governed by Rule 8(b) of the CRPF rules. The seniority of such officers must be governed by the provisions contained in the BSF

²⁵⁷ *Wing Commander J. Kumar vs. Union of India*, AIR 1982 SC 1064 at 1070

²⁵⁸ *K.V. Subbarao vs. Government of Andhra Pradesh*, AIR 1988 SC 887

²⁵⁹ *Sitaram Jiviyabhai Cavali vs. Ramjibhai Potiabhai Mahala*, AIR 1987 SC 1293

²⁶⁰ AIR 1984 SC 1587

²⁶¹ (1995) 3 SCC 300

Act and the Rules made thereunder and in the absence of rules by executive orders issued by the Central Government in that regard.

3.3.3. Legality of the Statutes, Rules or Executive Order/Instructions Governing Seniority

It is axiomatic that the statute or the rules or executive instructions governing seniority must be valid constitutionally or otherwise. As far as constitutional validity is concerned although, generally speaking, the relevant provision is tested against Articles 14 and 16, yet in some cases they might have to pass the test in the context of other constitutional provisions namely, Article 309 or Article 148 of the Constitution. The rules may be invalid if they transgress the provisions of the Act under which they are framed. Executive instructions/orders might have to be tested against Articles 14 and 16 as well as the provisions of Articles 73 and 162 which delineate the extent of executive powers of the Centre and State respectively.²⁶²

It has been held that the competent authority can lay down any reasonable rule for determining seniority and the Court is not competent to strike down such a rule on the ground that in its opinion another rule would have been better or more appropriate. Therefore, when such a rule is challenged as violating Articles 14 and 16, the only enquiry that the Court could make was whether the rule laid down by the State was arbitrary and irrational so that it resulted in inequality of opportunity amongst employees belonging to the same class.²⁶³

However, the fairness and justness of the rule should not be judged by its impact on any particular individual's fortune. The Court has to take an overall view to determine whether the rule is reasonable, just or fair. The Supreme Court in *Bishan Sarup Gupta vs. Union of India*²⁶⁴ found that although the rule of seniority which allocated 50% of the appointments to direct recruits and 50% to the promotees resulted in a gain for the promotees, yet having regard to the complex background of disputes between the Direct Recruits and Promotees which were sought to be solved by the seniority rule such advantage, on an overall view of the matter, could not be treated as discriminatory. The Supreme Court has also pointed out that in such matters mathematical precision cannot

²⁶² *Reserve Bank of India vs. N.C. Paliwal*, AIR 1976 SC 2345

²⁶³ Ibid

²⁶⁴ AIR 1974 SC 1618

be expected and adoption of a test of such accuracy with a view to ascertaining whether Article 14 or 16 have been violated would not be appropriate.

The rule of severability has been applied in the context of the seniority rules. In *Chandra Mohan vs. State of U.P.*²⁶⁵, in an earlier proceeding in 1966 the Supreme Court had declared R. 17 of the U.P. Higher Judicial Service Rules, 1953 to be void. The second proviso to R.20 of the same rules expressly incorporated R. 17. It was contended that reference to the invalid R. 17 rendered R.20 bad in its entirety. The Supreme Court rejected the contention by holding that the second proviso will not maim or render unworkable the main provision and it was open to the competent authority to determine the seniority in accordance with R.20 without referring to the proviso and supplementing any other valid principle.

In *Prem Kumar Verma vs. Union of India*²⁶⁶, on considering paragraph 303 of the Railway Establishment Manual, which was the provision for determining the seniority of candidates recruited through Railway Service Commission, the Court held that the post which fell vacant prior to the amendment made on 05-05-1990 the seniority of those recruits will have to be determined on the basis of pre-amended paragraph 303, whereas those who were recruited subsequent to 5 May, 1990, their seniority would be determined according to the amended criteria. A conspectus of the aforesaid decision, therefore, unequivocally indicate that the seniority of an employee in the cadre is required to be determined in accordance with the Rules in force unless the subsequent amendment is expressly given the retrospective effect. An employee does have a right of determination of his seniority according to the Rules even if he does not have a vested right to have any particular position in the gradation list. Thus, his right should not be interfered with unless the Rule-making Authority, by virtue of amending the Rules, make it applicable to all existing employees in the cadre, notwithstanding the fact that their seniority had already been determined under the pre-existing Rule.

In *D.P. Das vs. Union of India*²⁶⁷, there was no record to ascertain merit wise position except an Office Memorandum of 1946. On analysing the executive instructions, it was clear that the instruction was not superseded and the same accepts age to be the

²⁶⁵ AIR 1976 SC 1482

²⁶⁶ AIR 1998 SC 2854

²⁶⁷ (2011) 8 SCC 115

determining factor for seniority. It was held that such a basis is not fortuitous and is otherwise just and reasonable.

3.4. General Principles Governing the Determination/Fixation of Seniority in Service

Where there are no rules or administrative orders/instructions for fixation of seniority, the general principles evolved by judicial precedents would be applicable. These principles are considered and treated hereafter as distinct and separate principles.

3.4.1. Length of Service

The problem of determination of seniority has given rise to multiplicity of litigations leading to immense controversy on the method of fixing of seniority. There is no fixed criterion for fixation of seniority as it may vary from Rule to Rule and it has manifested itself predominately in situations or cases where recruitment has been made from more than one sources, i.e., recruitment to a cadre by direct recruitment as well as promotion. In such cases the Courts have had to grapple with the rival claims of the groups who have been recruited or those who have been integrated.

One of the fundamental principles in determining seniority for promotion is by calculating the length of service. Seniority means a longer life in service in comparison with other person. It means “length of service”.²⁶⁸

The law is clear that seniority is an incidence of service and where the service rules prescribe the method of its computation, it is squarely governed by such rules. In the absence of any specific rule the seniority amongst persons holding similar posts in the same cadre has to be determined on the basis of the length of service and not on any fortuitous circumstances.

In *G.R. Luthra vs. Lt. Governor, Delhi*²⁶⁹, the criterion for determination of seniority under the Delhi Judicial Service Rules, 1970, is the length of service rendered by the candidates during the period when they were rendering service either as Direct Judge or as Additional District and Sessions Judge in permanent or temporary vacancies. Rule 6(4) of the Delhi Higher Judicial Service Rules 1970, shows that the respondents and the

²⁶⁸ M. RamaJoi, *Services under the State*, 530 (Indian Law Institute, New Delhi, 2007)

²⁶⁹ AIR 1974 SC 1908

appellants were absorbed in the Delhi Higher Judicial Service from the states of Punjab and Haryana. The length of service rendered by them as Additional District and Sessions Judges is the criterion to fix the seniority.

The length of service criteria has been reiterated and for such purpose the period of ex-cadre service will not be taken into account when relevant rules provided that inter-se seniority has to be determined on the basis of continuous length service.

The question of determination of seniority came up in *A.P. Cooperative Seeds Growers Federation Ltd. Hyderabad, Andhra Pradesh vs. D. Achyut Rao*²⁷⁰. In this case the restructuring of the Federation was concerned, cadre strength of 159 employees was proposed resulting in many of the employees in different categories being rendered surplus. A circular was issued by the appellant Federation on December 12, 2002 recording the fact that a common seniority list of the employees had been prepared for the appellant-Federation and the Regional Unions. The norms laid down in the said Circular were as follows:

- a) The principle adopted for fixing the seniority cadre-wise is on the basis of date of joining of the employee in the previous immediate lower cadre.
- b) In the case of employees who were recruited as Field Officers and where ranking was prescribed during the recruitment, the same ranking is maintained for the seniority in the present cadre.
- c) Wherever employees from various designations have been promoted to a common single care, seniority is fixed, based on the difference in the pay scales of these various designations, i.e., the designation carrying higher pay scale is made senior.
- d) Wherever the date of joining is same, the date of birth is taken into account, i.e., the employee with more age is placed as senior.
- e) This seniority is fixed for the regular/permanent employees only.
- f) This seniority list is subjected to the final settlement of the disciplinary cases/court cases (pertaining to promotions only or these having a bearing on seniority only) pending, if any, against any employee.

²⁷⁰ (2007) 13 SCC 320

This case has another facet also. While the employees were transferred to the Unions much earlier and were granted promotions in due course in the Unions, the question of their seniority inter-se and the principles to be applied in determining seniority were evolved for the first time when the closure of the Unions was being considered necessitating retrenchment of surplus employees. It was at this stage that the cadre strength was first determined and thereafter norms were sought to be evolved in the light of which seniority was to be determined and junior employees in excess of the determined cadre strength to be given the benefit of VRS. It was really a process of working backwards. Rules and norms were sought to be evolved later governing promotions which were granted much earlier without reference to such rules and norms, but which were to determine the inter-se seniority of the employees for the purpose of retrenchment.

The Supreme Court satisfied with the decision of the High Court held that the promotions earlier granted in the Unions and the norms later laid down by the Federation could not be applied to determine the inter-se seniority of the employees of the Federation. The only rule which, in the facts of the case, could be safely applied to determine seniority was to reckon seniority by reference to length of service in the Federation. As a necessary corollary, the date of initial appointment in the Federation was decisive in determining seniority. Therefore, only those rules of seniority shall be said to be fair and reasonable which are determined from the initial date of appointment and not taking dates of promotion into consideration.

In *M.B. Joshi vs. Satish Kr, Pandey*²⁷¹, the rules provided that to qualify for promotion to the post of Assistant Engineer a Sub-Engineer must have eight years of experience as such and who had obtained degree of a graduation in the course of such service. The controversy was whether seniority amongst diploma-holder Sub-Engineers who acquired the degrees of graduation in engineering during the period of service qualifying them for promotion in eight years to the post of Assistant Engineer, was to be determined from their date of appointment to the post or from the date of acquiring the required educational qualification. It was held by the Supreme Court that, where there are no specific rules governing seniority in any employment, it will be determined from the date of appointment of an employee.

²⁷¹ AIR 1993 SC 267

In a number of judicial decisions, the Supreme Court has highlighted that determination of seniority has to be made on the basis of length of service and not on any coincidental or fortuitous incident.

In *S.K. Ghosh vs. Union of India*²⁷², the Supreme Court has held that seniority of officers appointed to a higher grade by selection is determined by the date of appointment in that grade and once that is done it cannot be disturbed on account of the readjustment of their seniority in the lower grade. The total length of service for the purpose of determining seniority is a well-known concept and cannot be said to be arbitrary. The common cadre which came into existence in 1974 was for the purpose of increasing the efficiency by introducing a spirit of total competition by enlarging the field of choice for filling up the promotional posts and in the interest of discipline too. After a common cadre was formed, the general feeling of dissatisfaction on account of disparity of seniority became apparent. The 1977 Rules were introduced in this background to ease the situation. The scheme of this rule protected the rank held by every member of the service notwithstanding alteration of seniority on the new basis. In spite of the protection of rule regarding the post they held, the rules brought about a change in the inter se seniority by adoption the date of initial recruitment and the length of service became the basis for re-fixing the seniority. Total length of service for such purpose is a well-known concept and could not be said to be arbitrary. It has also been held in *Nirmal Kumar Chaudhury vs. State of Bihar*²⁷³ that seniority would ordinarily depend upon length of service subject to of course the rules holding the field and this is a well-settled rule in service jurisprudence.

In *K. Deenadhyan vs. State of Tamil Nadu*²⁷⁴, it was held that seniority should be based on the length of effective service. The date of confirmation in a post then loses its relevance.

The judgment in *D.K. Mitra vs. Union of India*²⁷⁵, is of relevance here. The following points were upheld in this case:

²⁷² AIR 1968 SC 1385

²⁷³ AIR 1988 SC 394

²⁷⁴ (1980) Supp SCC 170

²⁷⁵ AIR 1985 SC 1558

- a. Where the persons were promoted to the permanent post on the officiating basis, they would be treated at par with those appointed to permanent posts in substantive capacity for the purpose of fixing seniority.
- b. The seniority is related to the length of service except such service which is not a period of fortuitous, stop gap or ad hoc appointment
- c. The inter-se seniority depends on the date of entry into the grade. Where the seniority is fixed according to the rules on the length of service in that grade, it is implied that the service to be counted from the date of entry into the service. It does not matter much when the seniority list was prepared.

This case was concerned with seniority in Clerical Services in the Armed Forces as provided under the Armed Forces Head Quarters Clerical Services Rules, 1968. The said Rules, inter alia, provided that the seniority in the service shall be determined on the basis of date of confirmation. However, before this rule came into being, length of service was the basis by which seniority in the cadre was determined. The Rules, no doubt, provide that all persons substantially appointed to a grade shall rank senior to those holding officiating appointments in the grade. But the Rules have no retrospective effect. It could not impair the existing rights of officials who were appointed long prior to the Rules came into force. The memorandum clearly laid down that the length of service should be the guiding principle of arranging the inter-se seniority of officials. The employees appointed before 1968 being governed by those memoranda had the right to have their seniority determined accordingly before the rules came into force. That being their right, the Rules cannot take away to their prejudice. If seniority is to be regulated in a particular manner in a given period, it shall be given effect to, and shall not be varied to the disadvantage retrospectively.

Again, the Army Instruction 241 of 1050 provided for seniority of civilian employees in lower cadre. The instruction refers to the order contained in para 2 of the Ministry of Defence Office Memorandum No. 0240/6362/0-12 dated 1 September, 1949 which was published as an annexure to the instruction. The instruction is that the rule for determining seniority amongst Assistants recently devised must be followed as a model. The model was that in any particular grade seniority as a general rule, be determined on the basis of length of service in that grade as well as service in an equivalent grade

irrespective of whether the latter was under the Central or Provincial Government in India or Pakistan.²⁷⁶

In *State of Uttaranchal vs. Dinesh Kr. Sharma*²⁷⁷, the Supreme Court has clearly held that the seniority is to be reckoned not from the day when the vacancy arose but from the date on which the appointment is made to the post. There this Court was interpreting Rules 17 and 21 of the U.P. Agriculture Group B Service Rules, 1995 and Rule 8 of the U.P. Government Servants Seniority Rules, 1991. The Court disapproved the stance taken by the High Court that the directions should have been given not from the date of appointment but with retrospective effect when the vacancy arose. The following observations in Para 34 are speaking and would close the issue:

“Another issue that deserves consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining seniority irrespective of the fact when the persons are recruited. This cannot be allowed as no retrospective effect can be given to the order of appointment under the Rules nor is such contention reasonable to normal parlance.”²⁷⁸

Thus, the contention of the respondent to consider his promotion and seniority from the time when the vacancy had arisen, i.e., 1995-96, was rejected by the Hon’ble Court.

In *Wing Commander J. Kumar vs. Union Of India*²⁷⁹, the question to be considered was whether the principle for determination of seniority laid down in the impugned Rule 16 is just, fair and reasonable or whether it is arbitrary and violative of Articles 14 and 16 of the Constitution, as contended by the appellant.

The R & D Organisation has in its cadre service officers who were taken initially on tenure basis from the Army, the Air Force and the Navy and were later on permanently seconded into the DRD & 1/ R & D cadre on their being found suitable and willing. The contention of the appellant is that on such permanent secondment into the R & D, the inter seniority of the officers should be reckoned only with reference to the dates of their selection for such permanent secondment. It is the further plea of the appellant that since at the time of permanent secondment the

²⁷⁶ *A. Janardan vs. Union of India*, AIR 1983 SC 769

²⁷⁷ 2006 (13) SCALE 246

²⁷⁸ *Jagdish Ch. Patnaik vs. State of Orissa*, (1998) 2 SCR 678

²⁷⁹ (1982) 2 SCC 116

officer concerned has to certify in writing that he is relinquishing all his claims of seniority etc., in his parent service, no weightage can thereafter be given to the rank or seniority which the person inducted had earned in his parent service prior to the date of his permanent secondment. The Supreme Court did not find it possible to accept this contention. Officers from the three Services holding different ranks are inducted into R & D Organisation from time to time depending upon the needs of the Organisation, and if the appellant's contention is to be accepted, it would lead to serious anomalies and manifest injustice by upsetting the norms of seniority and rank structure which is the basic fabric on which the Armed Forces of the country are built. The unreasonable consequences that will flow from the acceptance of the appellant's arguments will be clearly seen from the following simple illustration :

Suppose, in the year 1974, on a particular date, when two-officers are working in the Air Force-one as a Wing Commander and the other in the-higher rank of Group Captain-the Wing Commander is permanently seconded to the R & D Organisation and, later, the Group Captain is also permanently seconded to the R & D in 1975. If the principle advocated by the appellant is to be accepted, the Group Captain will become junior to the Wing Commander by virtue of the latter's earlier induction into the R & D despite the fact that he had not been even considered for secondment to the R & D at the time when the Wing Commander was taken.

According to the Supreme Court Bench, it is found that the appellant's contention that the secondment to the R & D is based on a "selection" is incorrect, the basic premise on which the appellant has found his plea that the date of secondment should be the determinative factor for reckoning seniority in the R & D cadre, falls to the ground.

Since officers from different sources are taken into the R & D for meeting the discipline-wise requirements arising in the Organisation from time to time and they are brought into a common pool on such permanent secondment, it is inevitable that a reasonable principle has to be evolved for fixation of their inter seniority within the R & D cadre. The fixation of the seniority on the basis of the ranks held by them in the different branches of the Armed Forces would not be reasonable or fair, because substantive ranks above Major/equivalent in the three Wings of the Armed Forces are conferred by different Selection Boards at different times and under varying circumstances and conditions depending upon the vacancies arising at the different levels in the distinct services from

time to time. It is pointed out in the counter-affidavit filed on behalf of the Union of India (Respondent No. 1) that the promotional chances of officers belonging to the three distinct Wings of the Armed Forces to posts above the rank of Major/equivalent vary widely and dependent upon fortuitous circumstances which may obtain in relation to the distinct services at any relevant point of time. We find there is force in this submission. In all the three Services, the promotions up to and inclusive of the rank of Major/equivalent are time-scale promotions based only on fixed length of service. In the Air Force and the Army, the ranks of Major and Sqn. Leader, respectively, are attained on an officer putting in 13 years' service. In the Navy, the time-scale period for promotion to the equivalent rank of Lt. Commander is said to vary between about 10 and 13 years. But, what is important to notice is that "the promotion to the rank of Major/equivalent is based only on length of service and not on any "selection". For posts higher than that of Major/equivalent, promotions in all the three Services would depend upon the occurrence of vacancies in the particular branch or group in the concerned Service, the schemes of expansion that may be taken up from time to time in the particular Service or branch and also the extent of stagnation that may be caused to officers at lower levels by reason of the officers who are young in age occupying posts in the immediate higher levels, etc. When due regard is had to all the aspects and circumstances, narrated above, it will be seen that the principle adopted under the impugned rule of reckoning seniority with reference to a date of attainment of the rank of substantive Major/equivalent strikes a reasonable mean as it ensures to all the service officers in the R & D the fixation of seniority in the integrated cadre giving full credit to the length of service put in by them in their respective parent services. A similar seniority rule formulated by the State of Maharashtra in a somewhat like situation, when an integrated cadre consisting of personnel drawn from different sources was formed in the State of Maharashtra for administering the Rationing Scheme, was recently upheld by this Court in R.S. Makash and Ors. The following observations contained in that judgment are apposite in the present context:

When personnel drawn from different sources are being absorbed and integrated in a new department, it is primarily for the Government or the

executive authority concerned to decide as a matter of policy how the equation of posts should be effected. The courts will not interfere with such a decision unless it is shown to be arbitrary, unreasonable or unfair, and if no manifest unfairness or unreasonableness is made out, the court will not sit in appeal and examine the propriety or wisdom of the principle of equation of posts adopted by the Governments.

In enunciating the principle incorporated in the impugned rule, the rule-making authority has adopted as the base for reckoning seniority the highest common factor applicable in respect of time scale promotions in the three services, namely the rank of Major/ equivalent and thereby ensured to the service officers seconded to the R & D Organisation a just and equitable treatment. The rule provides for the reckoning of the seniority of the seconded officers by taking into account the length of their service in the parent service, for which the date of attainment of the rank of substantive Major/equivalent would furnish a safe index. In our opinion, the said principle cannot be said to be arbitrary, unjust or unreasonable and the contention to contrary put forward by the appellant will, therefore, stand rejected.

It is no doubt true that in the Navy, promotions to the rank of Lt. Commander which is equivalent to that of Major in the Army may be attained by an officer within a slightly shorter period of Service, namely, between 10 and 13 years whereas, in the Army and the Air Force, the promotion to the rank of Major/equivalent is given only on completion of 13 years of service. The slight disparity in the promotion prospects between the Navy and the other two Services will not, however, affect the reasonableness of the impugned rule because it is impossible to achieve perfect arithmetical precision in such matters where officers drawn from different sources are to be integrated into one common cadre and a rule for fixing their inter seniority is formulated. Further, it is seen from the counter-affidavits of Respondents J. to 3 that out of about 160 permanently seconded officers of the R & D Organisation, the large majority are from the Army, a considerable section of the balance is from the Air Force and only less than 10 officers have come from the Navy.

It is also relevant to notice in this context that it is specifically provided in Rule 4 of the impugned rule that the intake of service officers to fill appointments in the R & D Organisation will ordinarily be at Major/equivalent level. Under Rule 5, officers in higher ranks should be considered for permanent secondment only in exceptional

cases and when such a course is adopted, it will be subject to the condition that their seniority in the R & D cadre will be fixed as stipulated in Rule 16. The incorporation of the aforesaid provisions which operate as a safeguard against large scale induction of officers above the substantive rank of Major/equivalent further fortifies the conclusion arrived at by us that the adoption of the date of substantive Major/equivalent as the criterion for fixing inter se seniority in the R & D cadre was logically fair, just and reasonable.

Seniority ordinarily reflects length of service in a particular cadre or grade. It is generally regulated by service rules or in the absence of rules by executive orders. By and large, such rules provide for determining seniority with reference to the date of appointment but there are instances where rules provide for determining seniority with reference to date of confirmation. Normally, when a person is promoted or placed in a higher grade his seniority is determined with reference to the date of such promotion or placement unless the relevant rules provide to the contrary. Seniority in the lower grade has no meaning for determining inter se seniority of promotees.²⁸⁰

Granting of Maternity Leave and Child Care Leave with no loss of Seniority

The maternity leave of women employees in the government sector was increased from 135 days to 180 days with effect from 1 September, 2008. In addition to this they are also eligible to receive paid leave of two years during their career for “taking care” of their two children without affecting their seniority. Termed as ‘child care leave’, women can avail this in addition to the maternity break. Consequent upon the recommendation of the Fifth Pay Commission for introduction of the ‘Child Care Leave’ in favour of the female State Government Employees, the Government of West Bengal may grant CCL for a maximum period of two years subject to the following conditions:

- During the period of such leave, the female employees shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.
- it cannot be granted during the probation period except in case of certain extreme situations.

²⁸⁰ *Yashbir Singh vs. Union of India*, AIR 1988 SC 662

3.4.2. Meaning and Concept of Cadre and its Importance in Computing the Length of Service

It has already been pointed out that seniority is a comparative concept between the employees who are equally circumstanced. It follows that the length of service must be rendered in the same cadre or grade except in cases relating to transfer.

In service jurisprudence, the term 'cadre' has a definite legal connotation. In the legal sense, the word 'cadre' is not synonymous with the 'Service'. F.R. 9(4) defines the word 'cadre' to mean the strength of a service or part of a service sanctioned in a separate unit. For example, the post of Director, which is the highest post in the Directorate, is carried on a higher grade or scale, while the posts of Deputy Director are borne in a lower grade or scale and, therefore, constitute two distinct cadres or grades. It cannot be said that the establishment of the Directorate constituted the formation of a joint cadre of the Director and the Deputy Director because the posts are not interchangeable and the incumbents do not perform the same duties, carry the same responsibilities or draw the same pay.

In Railway services, the term 'cadre' denotes strength of service sanctioned as an independent unit. The expression 'cadre' has been enlarged to include the posts sanctioned in different grades as posts in a particular establishment (e.g. the railways are sanctioned with reference to grades). Even temporary, work charged, supernumerary and shadow posts created in different grades constitute part of cadre. There is no reason why a restricted meaning should be given to cadres for implementing the roster.²⁸¹

'Cadre' also means the unit of strength of a service or a part of it as determined by the employer. Service rendered in one cadre cannot be considered to determine the seniority in another cadre unless the privilege is granted under the rules.

Cadre post is defined in Rule 2 of the Higher Judicial Service Rules according to which it means a post specified in the Schedule and includes temporary post. Temporary post thus cannot be considered to be as ex cadre post. It was held in *O.P Singla vs. Union of India* that holders of post of Additional District and Sessions Judge is a cadre post. It

²⁸¹ *Union of India vs. Pushpa Rani*, (2008) 9 SCC 242

does not create any misunderstanding within the rule that such posts are temporary or permanent.

Once a cadre is formed by recruiting persons from different departments of Government, there would normally be no justification for discriminating between them by subjecting one class to more onerous terms in matter of promotional chances. Different tests should not be prescribed for determining their respective promotional opportunities and that too solely in reference to the source from which they are drawn. In *S.L. Sachdev vs. Union of India*²⁸², the duties, functions and responsibilities of all the Upper Division Clerks (UDC) in the new organisation are identical. They are all in the same cadre and draw the same pay in the same grade. So different tests should not be laid for their promotion.

In *Ram Singh Malik vs. State of Haryana*²⁸³, the appellant was appointed as Deputy Director (Feed and Fodder) on ad hoc basis in his own pay scale. While he was so continuing, an advertisement was issued for recruitment to a temporary post of Deputy Director (Feed and Fodder) in Haryana Veterinary Service Class I in the Animal Husbandry Department and the appellant was selected by the Public Service he was appointed by direct recruitment in the said post in the scale pay of Rs. 1200-50-1500-60-1860. The appointment letter clearly indicated that he will be governed by the Haryana Veterinary Service Class I Rules, 1930 and will be on probation for a period of two years. On 2 June, 1987, the scale pay of the post was revised from Rs. 1400 to Rs. 2100 with effect but there had been a further revision of the pay scale in the scale of Rs. 3000 to Rs. 4500, but instead of granting the revised pay scale the appellant was given the pay scale of Rs. 1400 to 2100. The appellant made yet another representation but his grievances not having been redressed he filed a writ petition. When the tentative seniority list was published in the year of 1992 of the officers in Class I, the appellant's name was not shown whereas names of the Respondents nos. 2 and 3 had been shown even though they were junior to the appellant.

Before the learned Single Judge, the state of Haryana took the stand that the post of Deputy Director (Feed and Fodder) is a non-veterinary ex-cadre post in the Animal Husbandry Department, and the appellant, who is a graduate in Agricultural Science cannot claim parity with the graduates holding Class I posts in the Haryana Veterinary

²⁸² AIR 1981 SC 41

²⁸³ (2002) 3 SCC 182

Service. It was further stated that the post of Deputy Director (Feed and Fodder) carried a pay scale lower than that of other posts in Class I Haryana Veterinary Service. The very inclusion of the post of Deputy Director (Feed and Fodder) which the appellant was holding on the basis of his selection, pursuant to the advertisement issued in the non-veterinary cadre and in a lesser scale of pay under the statutory Rules reaffirms the conclusion that the post of Deputy Director (Feed and Fodder) was an ex-cadre post. Even otherwise, with effect from the coming into force of the Haryana Veterinary (Group A) Service Rules, 1995, the said post of Deputy Director (Feed and Fodder) has unequivocally been shown to be a post in the non-veterinary cadre and at a lesser scale pay.

Confusion could arise by reason of the Supreme Court judgment in *Union of India vs. Pratap Narain*²⁸⁴, regarding the necessity of the service being rendered in the cadre because of certain observations which, taken out of context, could be said to have made a distinction between 'cadre' and 'ex-cadre' irrelevant. But on a proper reading of the judgment as a whole it will be clear that the Court was only clarifying the effect of its earlier judgment in *Narendra Chadha vs. Union of India*²⁸⁵, and expressed its unhappiness that members of the same service, i.e., Indian Statistical Service, who had brought the inter se seniority dispute between promotees and direct recruits to the Court in *Narendra Chadha*, were again trying to rake-up the same dispute which had been finally settled by the Court in 1986. *Pratap Narain* merely says that the Court in *Narendra Chadha* did not use the expression 'cadre post' and 'ex cadre post' in the judgment and if it intended to do so it would have done so in clear terms instead of using language which clearly covered all employees who were working in the Grade IV posts in regular or officiating capacities.

It is the application of the same principle which is the basis for the normal rule that a person promoted to a higher grade gets his seniority in that grade according to the date of promotion subject always to his being found fit and being confirmed in the higher grade after the period of probation (if any) is over.²⁸⁶ It has been observed by Wanchoo, J.,

²⁸⁴ AIR 1995 SC 1363

²⁸⁵ AIR 1986 SC 638

²⁸⁶ *Mervyn Continho vs. Collector of Customs*, AIR 1967 SC 52

‘There is no question in such a case of reflecting in the higher grade the seniority of the grade from which promotion is made to the higher grade.’²⁸⁷

In *Mervyn Cotinho* the challenges were directed against the method of fixing the seniority of the officers in the grade of Principal Appraisers in the Customs Department. The Principal Appraisers were appointed by promotion from the grade of Appraisers, the promotion being by selection and five years of experience as Appraisers was the minimum qualification. The method adopted by the Department was that they put a Direct Recruit in the feeder grade of Appraiser though he was promoted to the promotional grade of Principal Appraisers later, above a promotee Appraiser who was promoted to the Grade of Principal Appraiser on an earlier date. The Supreme Court held that this method clearly denied equality of opportunity because in such a case, the seniority in the grade of Principal Appraiser had to be determined according to the date of continuous appointment in that grade irrespective of whether the person promoted to that grade from the Appraiser’s Grade was a Direct Recruit or a Promotee.

Mervyn Cotinho was followed in the same year by another Constitutional Bench in *Roshan Lal vs. Union of India*²⁸⁸. The adoption of such a criterion has been euphemistically labelled by the Supreme Court as carrying the ‘birth mark’ into the higher grade.

Similarly, the revision of seniority in the feeder grade cannot in any way, affect the order of seniority in the promotional grade. In *S.K. Ghosh vs. Union of India*²⁸⁹, the recruitment rule provided that the appointment to the grade of Director of Postal Services was to be made by selection from amongst the officers of the Senior time Scale of the Indian Postal Service, Class I. The petitioners had been appointed to the promotional post of Directors. Thereafter, the department re-fixed the seniority in the feeder class i.e., the senior time scale, Class I, on the ground that the seniority earlier fixed in respect of the grade was the result of a mistake. After such re-fixation in the feeder grade of Senior Time Scale, the department proceeded to re-fix the seniority of the petitioners in the promotional grade of Directors. The Court held that even if there were justification for revising the inter-se seniority of the petitioners in the time scale of Class I service, that revision could not in any way affect their order of seniority in the

²⁸⁷ Id at 56

²⁸⁸ AIR 1967 SC 1889

²⁸⁹ AIR 1968 SC 1385

grade of Directors to which they had been promoted on the basis of selection in accordance with rules. The Court further observed that the seniority in the grade of Directors of Postal Services was not dependent on the inter se seniority in the junior time scale and any alteration in the seniority in the latter could not form the basis for revising the seniority in the former grade.

This same principle was adopted when the Supreme Court held that the service rendered by redeployed surplus staff in a previous cadre is not entitled to any credit for reckoning seniority in the cadre to which they deployed.²⁹⁰

Similarly, the Supreme Court in a series of judgments has held that generally ad hoc service will not be counted towards seniority.²⁹¹ In *Arjun Ravi Das vs. Secretary, Minor Irrigation Dept.*²⁹², it was held that service rendered on ad hoc basis prior to regularisation cannot be reckoned for assigning seniority. Where appointment is made on ad hoc basis without following the rules, the period of appointment cannot be counted towards reckoning seniority. Where the Public Service Commission appointed candidates who were already in service when ad hoc appointees were regularised and the latter having studiously avoided facing any examination, it was held that the ad hoc appointees could not be placed above PSC-appointed candidates.

3.4.3. Computation of Length of Service

In calculating the length of service the authorities can prescribe different points of time from when the service can be computed. It is an accepted truth that the length of service is a justified mode of determining seniority; however, the principles for computing such length will necessarily depend on varying circumstances. Particularly, the major problem that the Courts have to face is the time or date from which the length of service has to be determined.

The Supreme Court in the case of *Ashok Gulati vs. B.S. Jain*²⁹³ laid down the following proposition relating to determination of seniority:

²⁹⁰ *V.K. Dubey vs. Union of India*, (1997) 5 SCC 81

²⁹¹ *M.K. Shanmugam vs. Union of India*, (2000) 4 SCC 476; *State of Punjab vs. Gurdeep Kumar Uppal*, (2003) 11 SCC 732; *State of Punjab vs. Ashwani Kumar*, (2008) 12 SCC 572

²⁹² 2005 (2) SLR 6

²⁹³ AIR 1987 SC 424

“The date from which seniority is to be reckoned may be laid down by rules or instructions:

- On the basis of the date of appointment
- On the basis of confirmation
- On the basis of regularisation of service
- On the basis of length service
- On any other reasonable basis”²⁹⁴

a. From the Date of Appointment

The date of appointment is, normally, the starting point of computation of the length of service. In *Pramod K. Pankaj vs. State of Bihar*²⁹⁵, it has been held that in the absence of statutory provisions or rules, seniority is to be reckoned from the date of appointment. In *G.R. Luthra vs. Lt. Governor, Delhi*²⁹⁶, the appellant Luthra was appointed as a temporary Additional District and Sessions Judge on 25 November, 1967 against one of the temporary posts by the Government of India whereas the three respondents had been appointed as temporary Additional Judges on dates prior to 25 November, 1967. However, Luthra was confirmed on 2 October, 1970 as District Judge whereas one of the respondents was confirmed as District Judge on 22 February, 1971. The Supreme Court held Luthra’s claim for seniority over the respondents was not sustainable by reason of the earlier appointment of the respondents. The Court observed:

‘To determine seniority according to confirmation in permanent posts is to wipe out the length of service rendered by the candidates.’²⁹⁷

Since one of the modes of computing length of service is to compute it taking the date of appointment into consideration, therefore, it is apt that the proper and exact meaning of ‘date of appointment’ be discussed over here. Thus, date of appointment implies the day when an employee takes entry into the service. In other words, date of appointment means date of substantive appointment also. It is now clear that seniority of an employee cannot be granted even before the cadre is born, i.e., before the vacancy has

²⁹⁴ Ibid

²⁹⁵ (2004) 3 SCC 723

²⁹⁶ (1975) 3 SCC 258

²⁹⁷ Ibid

been declared. So, “late comers” cannot steal a march over early arrivals who are already in regular queue.

In this context, it may be useful to note what the expression “date of appointment” implies. The Supreme Court in *Amarjit Singh Ahluwalia vs. State of Punjab*²⁹⁸ has observed that:

“First let us see what the words ‘date of order of appointment’ mean. Are they synonymous with ‘date of appointment’? We think not. An order of appointment may be of three kinds. It may appoint a person with effect from the date he assumes charge of the post or it may appoint him simpliciter without saying as to when the appointment shall take effect. Where the order of appointment is of first kind, the appointment would be effective only when the person appointed assumes charge of the post and that would be the date of appointment. It would be then that he is appointed. But in a case of the second kind, which is the one with which we are concerned since the order dated 8 April, 1964 appointed respondents Nos. 3 to 19 to PCMS Class I ‘with immediate effect’, the appointment would be effective immediately irrespective as to when the person appointed assumes charge of the post. The date of his appointment in such a case would be the same as the date of the order of appointment.”

That rule for determination of the seniority of an employee is to be counted from the date of appointment and not from the date of his confirmation was held in the case of *The Direct Recruit Class II Engineering Officers’ Association vs. State of Maharashtra*²⁹⁹. On the other hand, if the initial appointment is made only on an ad hoc basis and not made as a stop-gap arrangement, the length of officiation cannot be taken into count.

In *C.K. Antony vs. B. Murleedharan*³⁰⁰, it has been reiterated that a direct recruit to the cadre of Assistant Conservator of Forest can count seniority only with effect from the date of his appointment as a probationary Assistant Conservator. A person who has been appointed to a service or post temporarily or provisionally as a stop-gap arrangement, can never be considered as one, who has been appointed to that post or service.

²⁹⁸ AIR 1975 SC 984

²⁹⁹ AIR 1990 SC 1607

³⁰⁰ AIR 1998 SC 3136

In *Bhupendra Nath Hazarika vs. State of Assam*³⁰¹, the question was whether the appointment was made according to the Assam Police Service Rules, 1966. It was observed by the Supreme Court that where recruitment is regulated by the statutory rules, the recruitment must be made in accordance with those rules and if any appointment is made in breach of the rules the same would be illegal and the persons so appointed have to be put in a different class and they cannot claim seniority. The rule of fixing seniority on basis of total length of service does not apply to such appointees. The other significant aspect is that power has been conferred on the Governor to consider the previous service of an incumbent and fix a deemed date of appointment for the purpose of seniority by adopting a specific method. As far as the first part is concerned, the tribunal as well as the high Court has not accepted the stipulation that in the present case seniority should not be determined on the basis of the date of appointment as the same has been made in flagrant violation of the rules and the Supreme Court had concurred with the same. As far as the computation of the previous service is concerned, the learned single Judge as well as the Division Bench, after adequate ratiocination, has expressed the view that the appointments had been made in contravention of the rules, the question of conferment of the benefit under the second proviso to rule 18(1) did not arise. In the consideration of the Supreme Court Bench, when the infrastructure is founded on total illegal edifice, the endeavour to put forth a claim for counting the previous service to build a pyramid is bound to founder.

The matter of 'continuous service' came up in *D.P. Sharma vs. Union of India*³⁰². It has been held by this court that it is the General Rule that if seniority is to be regulated in a particular manner in a given period, then the same shall be given effect to and not be varied to disadvantage retrospectively. In this case also the earlier criteria for determination of seniority were length of continuous service whereas the subsequent Rules provided for determination of the seniority on the date of confirmation. This Court held that the subsequent Rules cannot impair the existing rights of officials who were appointed long prior to coming into force of the Rules. Those officials had right of determination of their seniority in accordance with the pre-existing memoranda which provided for reckoning length of continuous service. This has also been held in *P.*

³⁰¹ AIR 2013 SC 234

³⁰² AIR 1989 SC 1071

*Mohan Reddy vs. E.A.A. Charles*³⁰³ that an employee has an existing right of getting his seniority determined in the cadre according to the rules in force on the date of appointment.

In the Constitution Bench decision of the Supreme Court in *B.S. Yadav vs. State of Haryana*³⁰⁴, while considering the case for drawing up of the seniority list of judicial officers, the High Court was directed by the highest court of the country to re-frame the inter-se seniority list according to the principle of continuous service in a cadre post for determining seniority, whereas under the Rules prior to that date the guiding factor for determination of seniority in the cadre was on the basis of date of confirmation allotted to the employees.

In *P.D. Aggarwal vs. State of U.P.*³⁰⁵, certain temporary Assistant Engineers had been appointed in consultation with the Union Public Service Commission and had been rendering service since 1956. The Rules for seniority was Rule 23 of the U.P. Service of Engineers (Building and Roads Branch) Class II, Rules. That Rule stood amended in the year 1971. This Court held that on the basis of the provision of Rule 23 it was before the amendment made in 1971, the temporary Assistant Engineers are legally entitled to have their seniority reckoned from the date of their being members of the service no matter whether they are holding posts which remained as temporary for years together.

The Supreme Court has time and again reiterated that seniority cannot be reckoned from the date of occurrence of vacancy ignoring the relevant provisions in the rules and so persons who had been promoted against vacancies of an earlier recruitment year were to rank senior to those promoted against vacancies of subsequent recruitment years. Candidates promoted to higher post would be senior to candidates recruited in the same year and in the same batch.³⁰⁶

In *Director General Central Reserve Police Force v. Cpl. Sunil Singh*³⁰⁷, Respondent No. 1 in both the cases i.e., writ petitioners before the High Court had initially joined service as Airmen in the Indian Air Force. An advertisement was issued by the Union Public Service Commission in May, 2010 inviting applications for filling up of Group

³⁰³ AIR 2001 SC 1210

³⁰⁴ AIR 1981 SC 561

³⁰⁵ AIR 1987 SC 309

³⁰⁶ *Mohd. Raisul Islam vs. Gokul Mohan Hazarika*, (2010) 7 SCC 560

³⁰⁷ AIR 2017 SC 4039

‘A’ post of Assistant Commandment in the Central Reserve Police Force. Admittedly, the respondents (i.e., the original writ petitioners) had applied for this post but it now stands established on record that they had not sought permission of their higher authorities before submitting the application. It is not disputed that the relevant time the original writ petitioners had not completed 7 years of service in the Air Force. It is also not disputed that as per Air Force Order No. 14 of 2008 and Air Force Order No. 4 of 2012, a person employed in the Air Force must seek permission of the higher authority before applying for any post and is not eligible for applying for a civil post before completing 7 years of service in the Air Force.

The respondents – original writ petitioners were successful in the written examination and were selected. It was only thereafter that they apprised the higher authorities in the Air Force that they had applied for a civil job. After appearing in the interview they were selected but the Air Force did not relieve them on the ground that they could not have applied for civil employment without permission of the competent authority and before completion of 7 years of service in the Air Force.

The writ petitioners filed petition in the High Court. The High Court in the case of Cpl. B.S. Siddha, held that the original writ petitioner was guilty of making a mis-statement that he had sought prior permission. However, taking into consideration the future of the petitioner and the fact that 7 years of service had been completed by that time, the petitioner was permitted to join the civil post. The Air Force was directed to issue Discharge Certificate and relieve the petitioner within a period of 6 weeks from the date of the order and the petitioner was directed to undergo basic training in the Para Military Forces. Thereafter, the Court also directed that late joining of the petitioner will not affect his seniority which will be reckoned as per his merit along with other batch mates. In the case of Cpl. B.S. Siddhi’s judgment (supra), a similar direction was issued.

The appellants herein are aggrieved only by the last portion of the judgment whereby the seniority of the original writ petitioners is to be reckoned as per the merit in the batch in which they were selected.

Having considered the case, the Supreme Court was of the view that the writ petitioners could not have been granted this relief. Admittedly, they had applied for the civil employment without informing their superior authorities. It is also admitted that they had not completed 7 years of service in the Air Force at the relevant time. Cpl. B.S. Siddha had joined the Air Forces an Airman on 27.12.2006 and completed 7 years on

26.12.2013. as far as Cpl. Sunil Singh is concerned he joined the Air Force on 27.12.2005 and completed 7 years on 26.12.2012. Therefore, obviously they could not apply for the job in the year 2010 and could not have appeared in the Examination which was conducted in the year 2012. No doubt by the time they were selected, one of them completed 7 years of service but as far as Cpl.B,S. Siddha is concerned he had not even completed 7 years of service. The writ petitioners were given relief on compassionate and equitable basis and since that portion of the judgment has not been challenged before us, we refrain from commenting on the same. However, the writ petitioners who were not eligible when they applied for the post and have been given benefit by the High Court by treating their case compassionately cannot claim seniority from the date when they were not even eligible. Their seniority may be fixed by considering them to be the senior most in the batch in which they underwent training.

In *Union of India vs. C. Jayaprakasan*³⁰⁸, the question that came up was whether the date of entry or continuous length of service shall be the criteria for determining seniority. In the said case, it is undisputed that the post of Chargeman B is a promotional post under the Railway Administration and Chargeman A is still further from Chargeman B, and the post of Boiler Supervisor is a promotional post to Chargeman A. In that view of the matter, until and unless it is established that Respondent 1 was either promoted to Chargeman A earlier than Respondent 2 or that Respondent 2 was erroneously promoted to the post of Chargeman A, the question of Respondent 1 gaining seniority over Respondent 2 does not arise. In the absence of any specific rule holding that the continuous length of service would be the basis for seniority in a particular grade, entry into the grade is the normal rule for promotion. Applying that rule, Respondent 2 having come to the grade of Chargeman A on 20-3-1980 and Respondent 1 having come to that grade only on 27-12-1983, the said Respondent 1 cannot be held to be senior to Respondent 2. Similarly, Respondent 2 having come to the cadre of Boiler Supervisor On 1-1-1984 and Respondent 1 having reached that grade only during the pendency of the matter before the Tribunal, he also cannot claim seniority in the cadre of Boiler Supervisor over Respondent 2. In this view of the matter the Tribunal was wholly unjustified in setting aside the gradation list of Boiler Supervisor which had been prepared by the Railway Administration and which was the subject-matter of the challenge before the Tribunal. According to the Supreme

³⁰⁸ (2010) 15 SCC 752

Court, the Tribunal, in this case, committed error in interfering with the determination of seniority made by the Administration in the cadre of Boiler Supervisor.

b. From the Date of Continuous Officiation

The underlying object behind adoption of the principles of calculating seniority from the date of appointment and date of continuous officiation, is nothing but recognition of actual service rendered. Courts have to face claims and counter claims while counting seniority as, in several situations, appointment implies substantive appointment as opposed to officiating appointment. So, Courts have adopted a harmonious approach and have had to reconcile and resolve competing claims of computation based on continuous officiation and the date of appointment.

There does exist a few fine lines of difference between officiating service or appointment and substantive appointment or service.

In its ordinary corollary, the term ‘officiating’ is used when an official holds two posts simultaneously; one post permanently or substantially and the other post not permanently. The latter is a post in the higher rank and the official has to retain a lien on his substantive post till his confirmation.

Officiating appointment or officiating service, generally speaking, refers to that period of service which is rendered by an employee prior to his substantive induction to the cadre to which a post in which he is officiating belongs. By and large such induction takes place upon confirmation. Officiating service or appointment, in the majority of the cases, relates to a person who is already in employment and who has been appointed to discharge the functions of another post (very often a higher post) pending his regular substantive appointment. It denotes a sense of continuity and permanency unlike temporary or stop-gap or emergency appointments which are of short duration.

In *N.K. Chauhan vs. State of Gujarat*³⁰⁹, it has been held that he who has actually served longer benefits better in the future. Hence, it is the actual service rendered, whether officiating or otherwise, that is to be the yardstick for measuring the length of service for calculating the seniority of an employee. The Court held that seniority, normally, is measured by length of continuous, officiating service – the actual is easily accepted as the legal.

³⁰⁹ AIR 1977 SC 251

The matter for continuous officiation came up for consideration in *S.B. Patwardhan vs. State of Maharashtra*³¹⁰, which is considered to be the leading judgement where it was recognised officiating service as mode of computing length of service and the concept of confirmation receded to the background being labelled as “one of the inglorious uncertainties” in service. Three years prior to Patwardhan, Justice Ray had spoken in the same line in *G.R. Luthra*, where he had pointed out that to determine seniority according to confirmation in a permanent post is to wipe out the length of service rendered by the candidates on initial appointment. The judgement delivered in Patwardhan was more explicit and emphatic and brought into sharp focus the unreasonableness and unfairness of ignoring officiating service when there was no qualitative difference between such service and the post-confirmation service, i.e., when duties, functions and responsibilities were similar and the officiating service was rendered against a post in the cadre and there was no irregularity or illegality in the appointment. The decision in Patwardhan was subsequently followed by a number of cases including those of *Baleshwar Dass vs. State of U.P. and Delhi Water Supply*³¹¹ and *Sewage Disposal Committee vs. R.K. Kashyap*³¹². The Supreme Court in *Narendra Chadha* went a step ahead to allow promotees to continue in that post, even if the promotion was not made according to rules, if they held the post for a long number of years and in such situation the entire period of officiation was to be counted for seniority. While making the decision in *Narendra Chadha*, the Supreme Court referred to the judgement in *D.R. Nim vs. Union of India*³¹³, to the effect that when an officer has worked for a long period of time in a post and had never been reverted, it could not be held that the officer’s continuous officiation was a mere temporary or stop-gap arrangement even though the letter of appointment might have said so.

However, the above situation was not followed for too long as in the year 1987, in *Ashok Gulati vs. B.S. Jain*,³¹⁴ the Supreme Court adopted a restrictive approach. It clearly declared that although continuous service whether temporary or permanent in a particular grade or post could be reckoned for computing the length of service, no system of service jurisprudence could give credit to those who are employed on an ad hoc basis de hors the rules for very short periods at a time. The decision in *Ashok Gulati*

³¹⁰ AIR 1977 SC 2051

³¹¹ AIR 1981 SC 41

³¹² AIR 1989 SC 278

³¹³ AIR 1967 SC 1301

³¹⁴ AIR 1987 SC 424

was squarely based on the express terms of the appointments which clearly stipulated that the appointments were purely temporary, necessitated on account of the non-availability of regularised selected candidates conferring no claim for future appointments and the appointments were liable to be terminated at any time without any previous notice in terms of R. 10(A)(i)(1) of the Madras State and Subordinate Services Rules.

The decision in Direct Recruits case came as a relief to those serving in officiating capacity which finally nailed the coffin. In this judgement the Supreme Court had given a number of propositions of which the first two is relevant in this matter. Propositions (A) and (B) extracted from the Direct Recruits case discloses an attempt on the part of a five-judge Bench of the Supreme Court and seeks to encapsulate in clear and specific terms the rules for taking into account the officiating services in computing the length of service. If these propositions are considered in the backdrop of the previous decisions it can be very well inferred that this judgement is a concoction of the previous decisions of Patwardhan, Ashok Gulati and Narendra Chadha.

Therefore, in order to have officiating service in the reckoning, it must be continuous. Here 'continuous' means that there should be no break of service nor temporary reversion to the substantive post.

In *S.L. Chandrakishore Singh vs. State of Manipur*³¹⁵, it has been observed by the Supreme Court that seniority itself based upon length of service is an acquired right of an employee which entitles him for consideration for further promotion. It is generally regulated by Service Rules. Such rules normally provided for determining seniority with reference to the date of appointment to the class, category and grade to which the appointment is made. It is determined only on the basis of length of service. Such length of service may be on the basis of the difference of continuous officiation or on the basis of the difference of substantive appointment in the cadre or grade or service which may be reckoned from the date of confirmation on the basis of regularisation. It is now well settled that even in cases of probation or officiating appointments which are followed by a confirmation unless a contrary rule is shown the service rendered as officiating appointment or on probation cannot be ignored for reckoning the length of continuous officiating service for determining the place in the seniority list. Where the first appointment is made by not following the prescribed procedure and such appointee is

³¹⁵ AIR 1999 SC 3616

approved later on, the approval would mean his confirmation by the authority shall relate back to the date on which his appointment was made and the entire service will have to be computed in reckoning the seniority according to the length of continuous officiation.³¹⁶

c. From the Date of Probationary Appointment and Date of Examination

In computing the length of service the period during which the employee is under training or probation is to be reckoned. This follows from an appreciation of the true nature of probationary appointment. As pointed out by the Supreme Court in *High Court of Punjab and Haryana vs. State of Haryana*³¹⁷, confirmation of an officer on successful completion of appointment and that such a meaning of confirmation would make appointment a continuing process till confirmation.

In *Rohitash Kumar vs. Om Prakash Sharma*³¹⁸, the Service Selection Board (CPOs) 91, selected 154 persons to be appointed as Assistant Commandants (Direct Entry), and they were then sent for training in two separate batches. Batch No. 16 consisted of 67 officers who joined the training on 1-2-1993, while Batch No. 17 consisted of 87 officers who joined the training on 2-7-1993. They could not be sent for training in one batch, even though they had been selected through the same competitive examination, due to administrative reasons i.e., character verification, etc. Respondent 1 who was promoted from the feeding cadre joined his post on 15-3-1993. Thus, it is evident that he was placed in the promotional cadre prior to the commencement of the training of Batch No. 17 on 2-7-1993. The Single Judge dealing with Rule 3 of the Border Security Force (Seniority, Promotion and Superannuation of Officers) Rules, 1978, held that:

“A perusal of the above makes it apparent that in the case of the officers who have been promoted, their seniority is to be determined on the basis of continuous appointment on a day in which they are selected or promoted to that rank. In case of direct entrants their inter se seniority is to be determined on the basis of aggregate marks obtained by them. inter se seniority of the officers is to be determined according to the date of their continuous appointment in the rank. Proviso to the Rule is clear. It is specifically mentioned that in case of direct entrants, the date of appointment shall be the date of commencement of their training course at the Border Security Force Academy.”

³¹⁶ Ibid

³¹⁷ AIR 1975 SC 613

³¹⁸ (2013) 11 SCC 451 at 461

It was further observed by the Supreme Court that if the settled legal proposition is referred to hereinabove, no other interpretation is permissible. The language of the said Rule is clear. There is no ambiguity with respect to it. The validity of the Rule is not under challenge. In such a fact situation, it is not permissible for the Court to interpret the rule otherwise. The said proviso will have application only in a case where officers who have been selected in pursuance of the same selection process are split into separate batches. Interpreting the Rule otherwise would amount to adding words to the proviso, which the law does not permit. If the contention of the appellants is accepted, it would amount to fixing their seniority from a date prior to their birth in the cadre.

In *State of M.P. vs. Ram Kinkar Gupta*³¹⁹, the respondent was appointed on probation on 10 January, 1980. It was necessary for every probationer to pass a departmental examination during his probation period for confirmation. The respondent was granted an extension of one year for completing the probation and within that extended period he passed the requisite departmental examination on 19 January, 1984. Seniority of the respondent should be fixed from the date of passing of departmental examination and not from the date of joining.

The rules may also provide the date of passing an examination as the determining criterion for inter-se seniority in the promotional grade. In such a situation the fact that some were enjoying higher pay scale or higher responsibilities was irrelevant.

3.5. Seniority of Direct Recruits

The principles on which the seniority of Direct Recruits are based can be summarised as under:

- i. Where the seniority rules require the fixation of the seniority of direct recruits on the basis of the recommendation of the public service commission or the selecting body, the arrangement of names in the order of merit by such authority by itself constitutes recommendation regarding the seniority. The appointing authority has to fix seniority of the officials directly recruited in the same order; it cannot determine the seniority in any other manner. Seniority is not determined by mere fortuitous reporting for duty earlier and the date of joining report; seniority would be determined on the basis of the ranking

³¹⁹ (2000) 10 SCC 77

done by the Selection Board and as arranged in the roster³²⁰. Where the selection process has ranked the candidates, merely because a person ranked higher had a later date of joining, within the stipulated period or extended period of joining granted by the authorities, cannot change the seniority based on the performance in the selection board. A mere delay in joining, particularly when it was for eight days and for reasons beyond the candidate's control cannot change his seniority.³²¹

ii. But where the rules provide that if the direct recruit fails to report for duty within the prescribed time, he has to take seniority from the date of joining the duty. By not joining duty within the prescribed time he loses his seniority on the basis of the select list.³²²

iii. The seniority of direct recruits is always determined on the basis of the select list prepared by the public service commission or any recruitment committee or authority appointed for the purpose. The circumstances under which the seniority arranged in the manner could be varied is on the basis of the date of confirmation. This may happen on account of a person who has secured a higher rank in the list of selected candidates not completing the period of probation satisfactorily or not fulfilling the conditions of confirmation, within the time allowed and his period of probation is extended. In such cases, the person though placed lower in the list of selected candidates by completing the period of probation satisfactorily and also fulfilling other requirements (such as passing of departmental examination) within the time allowed gets confirmed earlier, the seniority gets altered and the person so confirmed becomes senior.³²³

3.6. Seniority of Promotees

a) When promotions are made irregularly

The seniority of persons promoted to the higher cadre is normally according to the date of promotion. But where promotion are made irregularly and out of turn without considering the cases of seniors or on the basis of a provisional seniority list, the seniority of the persons promoted on officiating basis is the same as their seniority in the substantive cadre. Where a seniority list made subsequently is held to be invalid and the earlier seniority list affirmed by a state administrative tribunal, and has attained finality,

³²⁰ *Chairman, Puri Gramaya Bank vs. Ananda Chandra Das*, (1994) 6 SCC 301

³²¹ *P. Srinivas vs. M. Radhakrishna Murthy*, (2004) 2 SCC 459

³²² AIR 1989 SC 1071

³²³ Ibid

any order of the courts in subsequent proceedings permitting the raising of a distinct cause of action relating to the seniority order in its implementation, cannot allow the petitioner to challenge the validity of the earlier seniority list before the tribunal. The earlier order of the administrative tribunal would operate as *res judicata* on the petitioner.

The court has ordered the payment of cost for wrongful denial of seniority to the aggrieved party. Where due to a writ petition filed by the respondent, she was promoted as principal and the appellant wrongly reverted from that post, and it was subsequently held that the respondent was not entitled to the post by way of seniority, the court had ordered the respondent to pay Rs. 5000 to the appellant for this wrongful denial of promotion.

b) When promotion was passed over and given later

Similarly, in cases where the case of a senior official is not considered for promotion as on the date when his immediate junior is promoted, on account of the pendency of departmental enquiry or on account of the senior official being on deputation or such other reason, as senior official though promoted later will retain his seniority in the substantive cadre as also in the higher cadre, i.e., the seniority of an officer promoted later unless he was superseded has to be fixed in the higher cadre just above the junior official though promoted earlier.

c) Seniority – when juniors and seniors are still officiating in higher cadre

Where the rules provide that though the senior official gets promoted later and junior official promoted earlier on account of his passing departmental examination earlier, the seniority in the higher cadre has to be fixed according to the seniority in the substantive cadre, as long as the junior promoted earlier has not been confirmed, the senior official promoted later gets his seniority in the higher cadre above his junior promoted earlier. But the position will be different when the rules specifically provide that the senior stopped at the qualification bar and superseded by his junior with the requisite qualification becomes junior so promoted. In such a case junior promoted to the higher cadre becomes senior to his erstwhile senior whom he superseded permanently.

d) Superseded officer cannot regain seniority

When senior officers are considered unfit for promotion and the junior officers are promoted the latter acquire seniority. To revise the seniority position after the erstwhile seniors have acquired the qualification or eligibility for promotion would result in disruption of seniority of all persons who had been regularly promoted and it would introduce utter uncertainty for an indefinite period of time regarding the ranking of officers in higher category. Therefore, seniority once acquired by a junior officer by supersession of his senior cannot be allowed to be upset subsequently. Even if the senior is subsequently promoted he cannot regain the seniority. Even if subsequently the junior so promoted is reverted for want of post, etc., he still ranks senior in the lower cadre above his erstwhile senior and will have preference for promotion when occasion arises once again.

e) Seniority acquired by selection cannot be altered

Where a promotion is made on selection based on the merit and suitability of the officers in the lower cadre, a person selected and appointed earlier gets seniority over the persons selected later. In such a case, even a revision of seniority in the lower cadre cannot be taken as the basis for altering the seniority of persons who are selected and appointed.

f) Deemed date of promotion as basis for seniority

The appointing authority has the power to retrospectively promote the seniors by giving deemed dates of promotion and to adopt the said date for fixing seniority of promotees, where junior officials are promoted ignoring the claims of senior officials wrongly on account of wrong fixation of seniority or other reasons.

g) Retrospective promotion must not exceed number of vacancies

In a review of promotions which had ignored just claims of retrospective promotion, these should be limited to the then existing vacancies. If there were no vacancies, then the only course open to the appointing authority is to review the entire position and revert the juniors or give them a later date of promotion, and give earlier deemed dates of promotion to the seniors. The appointing authority cannot resort to any method of rectifications which results in larger number of promotions than warranted by the actual

promotional vacancies. Any such retrospective promotion measure which affects the seniority of others subsequently appointed is illegal.

h) Denial of retrospective confirmation and seniority on retrospective promotion illegal

When a wronged senior is promoted with retrospective effect from the date of the promotion of his juniors there is no justification for the state to deny him confirmation and seniority from the said date. A retrospective promote is also entitled to be confirmed in preference to his junior and to be placed in the seniority list above the junior promoted earlier. This accords with the result if the normal process of promoting the senior was not infringed in the first place.

3.7. Inter Se Seniority

The term 'inter se' is a Latin phrase meaning 'among other things'. As far as the determination of seniority is concerned, this term has occupied a special place in the study of service jurisprudence. The problem of inter se seniority arises when the question of determination of seniority comes up in circumstances where service personnel to a cadre have been appointed or recruited from two or more sources. Disputes of inter se seniority also arise between reserved and general category candidates and service personnel who hold ad hoc and substantial positions. In this section we will discuss inter se disputes under three sub-heads vis.-

- i. Inter se seniority between reserved and general category candidates
- ii. Inter se seniority between candidates holding ad hoc and substantial posts
- iii. Inter se seniority between direct recruits and promotees.

3.7.1. Inter se Seniority Between Reserved and General Category Candidates

It has been the rule that seniority of reserved candidates who have been promoted to a general candidate shall be made from their date of joining on their promotion and this seniority cannot be wiped out even after the promotion of the general candidate. The matter of inter se seniority between reserved and general category candidates came up for consideration in the leading judgment of *Ajit Singh Januja vs. State of Punjab*.³²⁴

³²⁴ AIR 1996 SC 1189

The controversy which has been raised in the present appeals is: whether, after the members of Scheduled Castes/Tribes or Backward Classes for whom specific percentage of posts have been reserved and roster has been provided having been promoted against those posts on the basis of 'accelerated promotion' because of reservation of posts and applicability of the roster system, can claim promotion against general category posts in still higher grade on the basis of their seniority which itself is the result of accelerated promotion on basis of reservation and roster? The learned counsel, appearing for the appellants, took a clear and definite stand that they have no grievance or objection if members of the Scheduled Castes or Backward Classes, for whom reservation has been made and roster has been prescribed even in the promotional posts, get accelerated promotions against those posts. But the question is: whether, on this basis such 'accelerated promotees' from lower grade to higher grade in service can claim promotion against the general category posts in still higher grade of service merely because they had been promoted before the general category candidates, who were senior to them in the lower grade and have been promoted later in their turn? In other words, is the benefit of extra seniority obtained by a reserved category candidate by earlier promotion under the reservation policy to the reserved post, also available to him for competing with his otherwise senior general category candidate, who got promoted to the same cadre later only because of the reservation policy, for promotion to a general category post also in the next higher grade.

The High Court has relied on circulars dated 19.7.1969 and 8.9.1969 for purpose of holding that even after the percentage reserved in a cadre is filled and the roster is complete, the members of the Scheduled Castes and Backward Classes can be promoted against general category posts on basis of seniority. It may be mentioned that the aforesaid circulars do not refer anything about reservation in promotional posts or in respect of roster to be maintained in the form of a 'running account'. It appears that it was by oversight that for purpose of coming to the conclusion aforesaid reference has been made to those circulars. However, the circular which is relevant in this connection is No. 1494-SWI-74/8105 dated 4.5.1974, which had been challenged by the appellants before the High Court. The relevant whereof is as follows:

"...at present reservation for Scheduled Castes and Backward Castes is applicable in promotions to and within class III and IV only. Since these castes/classes are poorly

represented in various higher services in the State Government, it has been under the active consideration of the State Government that some reservation in promotions within higher services as well should be made for them. It has now been decided that except in the case of All India Services, 16% of the posts to be filled by promotion to or within Class I or II services under the State Government should be reserved, subject to the following conditions:

- (a) The persons to be considered must possess the minimum necessary qualifications, and
- (b) They should have a satisfactory record of service.

(2) In a lot of 100 vacancies occurring from time to time, those falling at serial numbers mentioned below should be treated as reserved for the members of Scheduled Castes:

1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87, 94 and so on. Vacancies falling at serial numbers 26 and 76 should be treated as reserved for members of Backward Classes.

(3) The reservation prescribed shall be given effect to in accordance with a roster to be maintained in each Department. *The roster will be implemented in the form of a running account from year to year...* ”

Before examining the grievance of the appellants regarding the members of Scheduled Castes and Backward Classes, who have been given ‘accelerated promotions’ because of the policy of reservation and applicability of the roster system, being considered against general category posts in still higher grade, it will be proper to point out that the aforesaid circular dated 4.5.1974 shall be deemed to be invalid, so far it says that the reservation prescribed shall be given effect to in accordance with a roster to be maintained which will be ‘implemented in the form of a running account from year to year’ because of the judgment of the Supreme Court Constitution Bench in R.K. Sabharwal vs. State of Punjab. The Constitution Bench has clearly and categorically said that the ‘running account’ is to operate only till the quota provided under the instruction is reached and not thereafter. Once the prescribed percentage of posts is filled thereafter the roster does not survive. As such there is no question of implementing the roster in the form of ‘running account’ from year to year as provided in the circular dated 4.5.1974.

In view of the judgment of this Court in the case of R.K. Sabharwal that a member of Scheduled Castes or Backward Classes who enters in service by process of direct

recruitment and is appointed on his own merit belongs to a class different from the class who are appointed at the initial stage or are promoted thereafter, applying the principle of reservation and system of roster, the appellants now cannot make any grievance if a member of Scheduled Castes or Backward Class, who has entered into service on his own merit having competed with general category candidates, is considered and promoted in the higher grade on the posts which are in the general category because of his seniority or merit. The rub is as to whether the members of the Scheduled Castes or Backward Class who have been appointed/promoted on basis of the policy of reservation and system of roster can also claim to be promoted against general category posts in higher grade on basis of their 'accelerated promotions'. The appellants have also no objection if accelerated promotions in still higher grade posts are given to such appointees/promotes applying the roster system i.e. against the posts reserved for them till the period of five years fixed by this Court in the case of *Indra Sawhney vs. Union of India* expires. But whether such appointees/promotes can claim promotion against general category posts in the higher grade, on basis of their seniority in the lower grade having been achieved because of the accelerated promotion or appointment by applying the roster.

In R.K. Sabharwal's case, this Court has treated the members of the Scheduled Castes or Backward Classes in two categories, i.e. those who are appointed or promoted having competed with general category candidates on merit and those who are appointed/promoted on basis of reservation and roster. For those who have competed on merit, it has been held that their number is not to be taken into consideration while working out the percentage of reservation. In respect of those members of Scheduled Castes and Backward Classes, who have been appointed/promoted on the basis of reservation or roster, it has been said in clear and unequivocal terms that the 'running account' shall stop after the quota provided under the instructions is reached and the roster cannot be operated thereafter. In other words, there is no question of promoting further number of such candidates, who have been appointed/promoted on the basis of reservation and roster.

If the contention of the respondents is accepted as has been done by the High Court that such appointees/promotes can be considered against posts meant for general category candidates merely because they have become senior on basis of accelerated promotions,

then according to the Supreme Court Bench, that exercise shall amount to circumventing the judgment of the Constitution Bench of this Court in the Sabharwal's case, because for all practical purposes the promotions of such candidates are being continued like a running account although the percentage of reservation provided for them has been reached and achieved. Once such reserved percentage has been achieved and even the operation of the roster has stopped, then how it will be permissible to consider such candidates for being promoted against the general category posts on the basis of their accelerated promotion, which has been achieved by reservation and roster.

Regarding the matter of inter-se seniority between reserved candidates and general candidates, Mr. Justice B.P. Jeevan Reddy, speaking for the Court, in *Union of India vs. Virpal Singh Chauhan*³²⁵, observed in the following words:

“Hence, the seniority between the reserved category candidates and general candidates in the promoted category shall continue to be governed by their panel position. We have discussed herein before the meaning of the expression “panel” and held that in case of non-selection posts, no “panel” is prepared or is necessary to be prepared. If so, the question arises, what did the circular/ letter dated August 31, 1982 mean when it spoke of seniority being governed by the panel position? In our opinion, it should mean the panel prepared by the selecting authority at the time of selection for Grade C. It is the seniority in this panel which must be reflected in each of the higher grades. This means that while the rule of reservation gives accelerated promotion, it does not give the accelerated- or what may be called, the consequential- seniority.”

It was also said:

“It is true that this case presents a rather poignant turn of events. Of the thirty-three candidates being considered for eleven vacancies, all are Scheduled Castes/Scheduled Tribes candidates. Not a single candidate among them belongs to general category. *The learned Counsel for the respondent is justified in complaining that appellants have failed to explain how such a situation has come about. Not only are the juniors stealing a march over their seniors but the march is so rapid that not only erstwhile compatriots are left far behind but even the persons who were in the higher categories at the time of entry of Scheduled Castes and Scheduled Tribes candidates in the service have also*

³²⁵ AIR1996 SC 448

been left behind. Such a configuration could not certainly have been intended by the framers of the Constitution or the framers of the rules of reservation. In the absence of any explanation from the authorities, the best we can do is to ascribe it as faulty implementation of the rule of reservation. In other words, not only have the Railways not observed the principle that the reservation must be vis-à-vis posts and not vis-à-vis vacancies but they had also not kept in mind the rule of seniority in the promotion posts enunciated in the Railways Board's circulars referred to supra. Yet another principle which the authorities appeared to have not observed in practice is that once the percentage reserved for a particular reserved category is satisfied in that service category or grade (unit of appointment) the rule of reservation and the roster should no longer be allowed. Because of the breach of these three rules, it appears that the unusual situation complained of by the general candidates has come to pass. The learned Counsel for general candidates is right that such a situation is bound to lead to acute heart-burning among the general candidates which is not conducive to the efficiency of administration."

Once the quota is full and roster has stopped for members of the Scheduled Castes and Backward Classes in respect of whom reservation has been made and roster has been prescribed then their case for promotion to still higher grade against general category posts have to be considered not treating them as members of the Scheduled Castes or Backward Classes "on any crutch". They cannot be promoted only on basis of their 'accelerated seniority' against the general posts. In R.K. Sabharwal's case it was said that the candidates belonging to Scheduled Castes who compete on their own merit along with general category candidates then they are not to be counted within the percentage of reservation made for such candidates in the service, because they have competed with the general category candidates on their own merit. The same principle which has been enunciated by the Constitution Bench in the aforesaid case shall be applicable whenever a member of Scheduled Castes or Backward Classes has got accelerated promotion to a higher grade and is to be considered for further promotion to a higher grade against general category posts. The accelerated promotions are to be made only against the posts reserved or roster prescribed. There is no question of that benefit being available when a member of Scheduled Castes or Backward Classes claims promotion against general category posts in the higher grade. It need hardly be pointed out that such candidates who are members of the Scheduled Castes or Backward Classes

and have got promotion on basis of reservation and application of roster before their seniors in the lower grade belonging to general category, in this process have not superseded them, because there was no inter se comparison of merit between them. As such when such seniors who belong to general category, are promoted later it cannot be said that they have been superseded by such members of Scheduled Castes or Backward Classes who have been promoted earlier. While considering them for further promotion against general category posts if the only fact that they have been promoted earlier being members of Scheduled Castes or Backward Class is taken into consideration, then it shall violate the equality clause and be against the view expressed not only in the case of R.K. Sabharwal by the Constitution Bench, but also by the 9 Judges Bench in the case of IndraSawhney where it has been held that in any cadre reservations should not exceed beyond 50%. The 50% posts already being reserved against which promotions have been made then any promotion against general category posts taking into consideration that they are members of the Scheduled Castes or Backward Classes, shall amount to exceeding the limit fixed in the case of IndraSawhney (supra).

In the Indra Sawhney's case in respect of the question regarding providing reservation in promotion, it was said by B.P. Jeevan Reddy, J with whom it appears seven out of nine Judges of the Constitution Bench have agreed while one Hon'ble Judge did not express any opinion on that question:

“We see no justification to multiply 'the risk', which would be the consequence of holding that reservation can be provided even in the matter of promotion. While it is certainly just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, it would be a serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of a separate category apart from the mainstream a vertical division of the administrative apparatus. The members of the reserved categories need not have to compete with others but only among themselves. There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured. This in turn is bound to generate a feeling of despondence and 'heart-burning' among open competition members. All this is bound to affect the efficiency of administration. Putting the members of backward classes on a fast-track would necessarily result in leap-

frogging and the deleterious effects of 'leap-frogging' need no illustration at our hands. At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service, efficiency of administration demands that these members too compete with other others and earn promotion like all others no further distinction can be made thereafter with reference to their "birth-mark", as one of the learned Judges of this Court has said in another connection. They are expected to operate on equal footing with others. Crutches cannot be provided throughout one's career. That would not be in the interest of efficiency of administration nor in the larger interest of the nation. It is wrong to think that by holding so, we are confining the backward class of citizens to the lowest cadres. It is well known that direct recruitment takes place at several higher levels of administration and not merely at the level of Class IV and Class III. Direct recruitment is provided even at the level of All India Services. Direct recruitment is provided at the level of District Judges, to give an example nearer home. It may also be noted that during the debates in the Constituent assembly, one referred to reservation in promotion; it does not appear to have been within their contemplation."

It cannot be disputed that the first promotion to such candidates was given without judging him on principle either seniority-cum-merit or merit-cum-seniority in the lower grade. It was given by applying principle of reservation and roster, the impugned circular dated 4.5.1994 quoted above itself says that it had been decided that the 16% of the posts are to be filled up by promotion to Class I and Class II services under the State Government, have been reserved for members of the Scheduled Castes and Backward Classes subject to the conditions (a) the persons to be considered must possess the minimum necessary qualifications, and (b) they should have a satisfactory record of service. Thereafter the roster has been fixed in different grades for their accelerated promotions. In this background, while considering them for promotion to general category posts in still higher grade posts, the fact that they had been promoted earlier on basis of the policy of reservation and applying the roster system cannot be overlooked. It cannot also be overlooked that at the first promotion from the basic grade, there was no occasion to examine their merit or suitability for purpose of their promotion. The only requirement prescribed is that they should possess the minimum necessary qualifications and they should have satisfactory record of service. In actual working, it can be demonstrated by an example. In grade 'C', which is the grade of initial entry in the

service, there are 10 posts. On basis of roster, the reserved category candidates are at serial nos. 2, 6, and 10 whereas general category candidates are at serial nos. 1, 3, 4, 5, 7, 8 and 9. On basis of reservation and roster system, the reserved category candidates at Sl nos. 2 and 6 are promoted to grade 'B' first. Thereafter, Sl. Nos. 1, 3, and 4 are promoted who belong to general category. In grade 'A' which is still the higher grade, there are only 3 posts, out of which one is reserved for members of the Scheduled Castes. The candidate who had been promoted on basis of reservation to post at Sl. no. 2 will be promoted before general category candidates at Sl. Nos. 1, 3, and 4 to one of the 3 posts on basis of reservation. Now so far the two remaining posts in grade 'A' are concerned are meant for general category candidates. But if the principle of 'running account' is applied and only the earlier promotion of the candidate who was at Sl. no. 6 is taken into consideration, then he shall be promoted to grade 'A' against the second, out of three posts although the quota of reservation and roster is complete with the promotion of the reserved category candidate at Sl. No. 2 against one of the three posts. So out of the three posts in grade 'A', two shall be filled up by reserved category candidates beyond the limit of reservation and without any roster being available. In this process, the merit of the reserved category candidate at Sl. No. 6 has not been considered. It need not be pointed out that but for the principle of reservation and roster, he could not have been promoted earlier than candidates at Sl. Nos. 1, 3, and 4 in grade 'C'. In this background, can it not be said that he has been promoted to the second post in grade 'A' because he is a member of Scheduled Caste, although the post was to be filled up from amongst general category candidates.

The Constitution Bench in R.K. Sabharwal has said in clear and unambiguous terms that after the quota is over and roster points are full, then the 'running account' of roster shall stop and there is no question of promoting beyond the posts which had been reserved. In the said judgment, it has been said in respect of members of Scheduled Castes that if they are appointed/promoted on their own merit, then such candidates shall not be counted towards the percentage of reservation fixed for them. On the basis of same logic, whenever members of the Scheduled castes are to be considered for promotion against posts which are not reserved for them, then they have to be selected on merit only. They cannot claim that as they had been promoted earlier from grade 'C' to grade 'B' on basis of reservation and roster in this process they have superseded the candidates

belonging to the general category and even for promotion against general category posts in grade 'A' only requirement shall be satisfactory record of service.

The Supreme Court Bench concurred with the view in *Union of India v. Virpal Singh Chauhan*³²⁶ that seniority between the reserved category candidates and general candidates in the promoted category shall continue to be governed by their panel position i.e. with reference to their inter-se seniority in the lower grade. The rule of reservation gives accelerated promotion, but it does not give the accelerated 'consequential seniority'. As already pointed out above that when a scheduled caste/tribe candidate is promoted earlier by applying the rule of reservation/roster against a post reserved for such scheduled caste/tribe candidate, in this process he does not supersede his seniors belonging to the general category. In this process, there was no occasion to examine the merit of such scheduled caste/tribe candidate vis-à-vis his seniors belonging to the general category.

As such it will be only rational, just and proper to hold that when the general category candidate is promoted later from the lower grade to the higher grade, he will be considered senior to candidate belonging to the scheduled caste/tribe who had been given accelerated promotion against the post reserved for him. Whenever a question arises for filling up a post reserved for scheduled caste/tribe candidate in still higher grade, then the general category candidate who has been promoted later shall be considered senior and his case shall be considered first for promotion applying either the principle of seniority cum merit or merit cum seniority. If this rule and procedure is not applied, then result will be that majority of the posts in the higher grade shall be held at one stage by persons who have not only entered in service on basis of reservation and roster but have excluded the general category candidates from being promoted to be posts reserved for general category candidates merely on ground of their initial accelerated promotions. This will not be consistent with the requirement or the spirit of Article 16 (4) or Article 335 of the Constitution.

According to the Bench, the Full Bench was not justified in saying the case of *Jaswant Singh v. the Secretary to Govt. of Punjab*³²⁷ that non-consideration of Scheduled Castes candidates against general category posts on basis of their prior promotion will be hit by

³²⁶ ibid

³²⁷ AIR 1991 SC 362

Articles 14, 15 and 16 of the Constitution. That view shall be deemed to be against the pronouncement of this Court by the nine Judges Bench in the case of IndraSawhney as well as the view expressed by the Constitution Bench in the case of R. S. Sabharwal.

Hence, it was held in this case that non consideration of Scheduled Caste candidates against general category posts on the basis of their prior promotion is not hit by Articles 14, 15 and 16. By virtue of the principle of seniority-cum-merit, if any scheduled class candidate becomes eligible, they can compete with the general candidate for those posts which are not reserved and claim promotion. This right has been protected under Articles 14 and 16(1) and 16(2) even when the total number of Scheduled Caste members in the cadre is holding posts more than prescribed percentage.

a. ***Seniority of Roster Point Promotee***

In the case of *M.G. Badappanavar vs. State of Karnataka*³²⁸, the matter of seniority of Reserved category (roster point) promotees vis-a-vis general category promotees had been raised. In this case, the initial recruitment of the general candidates and the reserved candidates was as Junior Engineers (later on came to be called Assistant Engineers) and then the next promotion was to the post of Assistant Executive Engineers and then to the post of Executive Engineers. At both these levels there has been a roster operating. Beyond Executive Engineer's post there is no roster. The appellants and the respondents (reserved candidates) were recruited as Junior Engineers and the appellant general candidates were senior to one or the other of the reserved candidates at Level 1. The reserved candidates thereafter got promotion as per roster points from Level 1 to Level 2 (Assistant Executive Engineers). From Level 2, the roster promotees were promoted again to Level 3 as Executive Engineers by way of further roster. The senior general candidates got promoted as per Rules – either by seniority at basic level or by selection – and reached Level 3. By that time the reserved candidates were still at Level 3. But they were promoted to Level 4 treating them as senior to the general candidates. This was done taking into account the fact that the reserved candidates reached the category of Executive Engineers earlier than the general candidates. While deciding this

³²⁸ (2001) 2 SCC 666

case, the Supreme Court Bench heavily relied upon the judgments of *Indra Sawhney vs. Union of India*³²⁹ and *Ajit Singh (II) vs. State of Punjab*³³⁰.

The Supreme Court in *Indra Sawhney* case held that if creamy layer among backward classes were given same benefits as backward classes, it will amount to treating equals unequally. Equality is a basic feature of the Constitution of India and any treatment of equals unequally or unequals as equals will be violation of the basic structure of the Constitution of India. Therefore, if seniority is given to the roster point promotees it will violate the equality principle which is part of the basic structure of the Constitution of India. Even Article 16(4A) cannot therefore, be of any help to the reserved candidates. That is the legal position under the Constitution of India.

According to *Ajit Singh II*, if by the date when reserved candidates were promoted as Superintending Engineers, the general candidates had already reached the said level by normal promotion system, then the general candidates must be treated as Executive Engineers as senior to the reserved candidates. The general candidates had a right under Articles 14 and 16 to be considered for promotion as Superintending Engineers as seniors to the reserved candidates. This was unfortunately not done. After *Ajit Singh II* this had to be rectified. Therefore, in accordance with *Ajit Singh II* the seniority lists in the category of Executive Engineers has to be first reviewed, treating the general candidates as seniors to such of the reserved candidates provided the senior general candidates reached Level 3 (Executive Engineers) before the reserved candidate concerned was promoted as Superintending Engineer. After reviewing the seniority and re-fixing the same at the level of Executive Engineer, the promotions to the category of Superintending Engineer have to be reviewed next. While considering the promotions of the reserved candidates at Level 1 (Junior Officers later called Assistant Engineers) and at Level 2 (Assistant Executive Engineer), the principles laid down in *R.K. Sabharwal* case have to be kept in mind, as explained in *Ajit Singh II*. Once the promotions at the level of Superintending Engineers are reviewed, the further promotions to the post of Chief Engineer or equivalent posts or posts higher up have also to be reviewed.

However, in *Ajit Singh II* reversions were directed not to be made in respect of reserved candidates promoted on the basis of roster-point seniority before 1-3-1996. In other

³²⁹ (2000) 1 SCC 168

³³⁰ (1999) 7 SCC 209

words, notwithstanding the review of seniority at various levels starting from level of Executive Engineer and the consequent downgradation of seniority, if any, at that level, any promotion of a reserved candidate to the post of Superintending Engineer which took place before 1-3-1996, contrary to principles now laid down in Ajit Singh II should not be disturbed. In Ajit Singh II the Supreme Court also explained what was the meant by the prospectivity of Sabharwal w.e.f. 10-2-1995. That has to be also borne in mind.

In view of the above general directions, it is not necessary to go into individual facts and seniority etc. details of which were placed before the Court by way of various charts.

Some general candidates who have since retired, were indeed entitled to higher promotions while in service. If Ajit Singh II is to apply, they would get substantial benefits which were unjustly denied to them. The decision in Ajit Singh II is binding that the seniority lists and promotions be reviewed as per the directions given above, subject of course to the restriction that those who were promoted before 1-3-1996 on principles contrary to Ajit Singh II need not be reverted and those who were promoted contrary to Sabharwal before 10-2-1995 need not be reverted. This limited protection against reversion was given to those reserved candidates who were promoted contrary to the law laid down in the above cases, to avoid hardship.

Though their seniority is revised at level of Executive engineer or above and though they might not have been promoted if the law laid down by the Supreme Court in Ajit Singh II and Sabharwal were applicable to them at the relevant time, still for purposes of their retiral benefits, the said benefits shall be computed on the basis of the posts factually held by them at the time of retirement and on the emoluments actually drawn by them and not on the basis of the result of any review that is now directed.

So far as the general candidates are concerned, their seniority will be restored in accordance with Ajit Singh II and Sabharwal and they will get their promotions accordingly from the effective dates. They will get notional promotions but will not be entitled to any arrears of salary on the promotional posts. However, for purposes of retiral benefits, their position in the promoted posts from the notional dates - as per the judgment – will be taken into account and the retiral benefits will be computed as if they were promoted to the posts and drawn the salary and emoluments of those posts, from the notional dates.

3.7.2. Inter se Seniority Between Candidates Holding Ad hoc Posts and Substantial Posts

The question of inter-se seniority between candidates holding ad hoc posts and substantial posts came up in the case of *M.P. Palanisamy vs. A Krishnan*³³¹. In this case the Government of Tamil Nadu, being in dire need of teachers, appointed some teachers who had the necessary qualifications under Rule 10 (a)(i)(l) of General Rules of T. N. P. S. C. on ad hoc basis. The ad hoc appointees were not selected by T. N. PSC and were appointed prior to 1986. The T. N. PSC started taking steps to fill posts of P. G. Assistants (Higher Secondary School teachers) and appointed teachers selected by it, in 1986. The ad hoc appointees, however, were subsequently regularised by the Govt. by G. O. Ms. dated 12-12-1988 on a condition that they would not be entitled for monetary benefits and would have to take their seniority below the last candidate selected by TNPSC in the examination. The conditional regularisation was accepted without demur. It was only when the Director of School Education prepared a Panel of candidates for the post of Higher Secondary Head Masters, which did not include the names of P. G. Assistants appointed under Rule 10(a)(i)(l), the question of inter-se seniority was raised by ad hoc appointees. They claimed that all those T. N. P. S. C. appointed P. G. Assistants should be ranked junior to the P. G. Assistants appointed under Rule 10(a)(i)(l), as the TNPSC appointed P. G. Assistants had acquired qualification after their appointments whereas the ad hoc appointees were qualified when they were appointed and had put in service without breaks. Therefore, though the act of the State Government in regularizing them was correct, the provision that their seniority will be below those who were selected by TNPSC in 1986, is not correct.

Held, it is true that when a candidate is appointed under Rule 10 (a)(i)(l) of T. N. P. S.C. Rules on ad-hoc basis and is subsequently regularized, then ordinarily, his seniority has to be reckoned from the date when he was first appointed, provided he has all the necessary qualifications for the job. But though the appellants had the necessary qualifications at the time of their initial appointment under Rule 10(a)(i)(l) and though they were subsequently regularized also, the regularization was conditional regularization, which was done way back in 1988. The condition regarding the seniority was explicit in the said regularization. This regularization was all along accepted by the present appellants. The appellants had earlier challenged only the first condition regarding the appointment and chose not to

³³¹ AIR 2009 SC 2809

challenge the second condition. They could not thereafter turn back and challenge the second condition in the second or third round of litigation.

It is clear from the first proviso to R. 23(a)(i) of T. N. State and Subordinate Service Rules that in case of an ad-hoc employee, he cannot claim any seniority to the junior-most person already in service. All the TNPSC selected P. G. Assistants were already in service, when the question of regularization of the P. G. Assistants appointed under Rule 10(a)(i)(l) came for consideration. Therefore, the stance of the Government in providing the second condition for regularising their services was absolutely correct and by mere subsequent regularization, that too without taking any examination under TNPSC or undergoing any recruitment process and facing general competition from the other candidates, the ad-hoc P. G. Assistants could not be held seniors to those, who were already in service. In a recent decision in *K. Madalaimuthu and Anr. v. State of T.N. and Ors.*³³², the Supreme Court again reiterated the principles of fixation of seniority in case of the persons, who were temporarily appointed according to seniority Rules. This Court Relying upon decisions in *V. Srinivasa Reddy v. Govt. of A.P.*³³³, as also, *State of T.N. v. E. Paripoornam*³³⁴ and *L. Chandrakishore Singh v. State of Manipur*³³⁵, the Supreme Court came to the conclusion that the High Court had erred in holding that the temporary appointees under Rule 10(a)(i)(l) were entitled to the seniority right from the date of their first appointment and not from their regularisation. Therefore, the general principles of seniority, i.e., ad hoc candidates cannot get their seniority right from their date of appointment, will apply and their seniority shall be calculated from their time of regularisation.

3.7.3. Inter Se Seniority Between Direct Recruits and Direct Recruits

Conflict among direct recruits can also arise in relation to their seniority. The appeals filed in *S. Sreedhar Reddy vs. Government of Andhra Pradesh*³³⁶ mainly relate to inter se seniority of the Station Fire Officers (in short “SFOs”) who were the direct recruits. The facts of this case need mention to appreciate the controversy involved in the appeals. In the year 1993, the appellants and the private respondents were appointed as SFOs by

³³² 2006 (6) SCC 558

³³³ 1995 Supp. (1) SCC 572

³³⁴ 1992 Supp. (1) SCC 420

³³⁵ (1999) 8 SCC 287

³³⁶ AIR 2017 SC 626

direct recruitment, which is multi-zonal post, after passing the test conducted by the Andhra Pradesh State Level Police Recruitment Board. By virtue of that examination, 59 candidates were selected in the Multi Zone – I and Multi-II. The said post is covered by the Andhra Pradesh Fire Subordinate Service Rules issued under the G.O.Ms No. 568, Home (Prisons-A) Department, dated 24-11-1992. According to Rule 12 of the Rules, an SFO appointed through direct recruitment must pass three tests, namely, i) Accounts Test for Subordinate Officers Part-I; ii) Andhra Pradesh Fire Service Manual; and iii) A certificate course of competence in wearing and instructions on Breathing Apparatus, within the period of probation which, in turn, described in Rule 9 of the Rules. A provisional seniority list was issued by the Department where the appellants were placed below the private respondents based on a select list ranking. In the light of these facts, the question before the High Court was whether Rc. No. 83/E1/2001 dated 22.05.2012 which created two classes amongst SFOs for determination of their inter se seniority, namely, one class which cleared the tests in time and the other class which cleared the tests late, was legally justifiable and, if so, whether it was in confrontation with the Rules for giving effect to it for determination of their inter se seniority. Having perused the relevant Rules, the Supreme Court was of the view that the A.P. Fire Subordinate Service Rules and the A.P. State and Subordinate Service Rules do not empower the State to make the classification as was sought to be done by the State for determining the inter se seniority of SFOs in this case. In the opinion of the Court, taking into account the three undisputed facts mentioned above and the Rules governing the probation and the seniority, there was neither any justifiable basis for creation of such classification nor it satisfied the requirement of the Rules which governed determination of their inter se seniority. In other words, firstly, when the respondents successfully cleared their probation, secondly, when the respondents cleared two tests, thirdly, when the Government itself exempted the respondents from appearing in the third test, and lastly, when Rules did not provide for creation of two classes between the employees working in one Cadre (SFO), then in the view of the Supreme Court, there was no justification on the part of the Government for determination of inter se seniority by making classification.

3.7.4. Inter Se Seniority Between Direct Recruits and Promotees

Conflicts in relation to seniority in service between Direct Recruits and Promotees have been showing their fangs perennially. There is plethora of cases where the Supreme Court has dealt with the dispute between inter-se seniority between direct recruits and promotees. In the words of Y.V. Chandrachud, C.J., in *O.P. Singla vs. Union of India*³³⁷, “there are many decisions bearing upon the familiar controversy between promotees and direct recruits and this will be one more. Perhaps just another.” There will hardly be anybody who shall dispute this apt description by Justice Chandrachud in respect of litigations between promotees and direct recruits. In the case of *O.P. Singla*, the Supreme Court was concerned with the question of inter se seniority between promotees and direct recruits in the Judicial Service of Delhi. The Court considered the above question in light of the provisions in Delhi Higher Judicial Service Rules, 1970. Having regard to the provisions contained in rule 2(d), the majority decision in para 21 of the Report held as under:

“21. ...This Rule shows that the two conditions must co-exist in order that a person can become a ‘Member of the Service’. Firstly, his appointment has to be in a substantive capacity and secondly, the appointment has to be to the Service, that is to a post in the Service. Persons who hold posts bearing designations similar to the designations of posts comprised in the Service cannot, for that reason alone, become members of the service. It is only when they are appointed in a substantive capacity to a post in the Service, that they become members of the Service.”

Rules 3(d), 4, 5, 7, 8 and 9 of the 1963 Rules leave no manner of doubt that a person can become a member of the Senior Branch of the Superior Judicial Service only if his appointment has been made to a post in the service. If there is no vacancy to be filled in by promotion in the cadre of Senior Branch Service, there is question of any appointment being made to the service. The membership of service is limited to the persons who are appointed within the cadre strength by direct recruitment and by promotion.

³³⁷ AIR 1984 SC 1595

Again, a five-Judge Bench of the Supreme Court in *Direct Recruit Class II Engineering Officers' Association vs. State of Maharashtra*³³⁸ was concerned with a question of seniority in service between the direct recruits and promotees amongst Deputy Engineers in the State of Maharashtra. The Court considered the decisions of this Court, including *S.B. Patwardhan vs. State of Maharashtra*³³⁹ and *Baleshwar Dass vs. State of U.P.*³⁴⁰ and in paragraph 47 of the Report summed the legal position of. Clauses (A), (B) and (C) of paragraph 47 are relevant for the present purpose which read as follows:

“(A) once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not from the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix ratio for the recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.”

In *Rudra Kumar Sain vs. Union of India*³⁴¹, a Five-Judge Bench of the Supreme Court was again concerned with the inter se seniority between the promotees and direct recruits in the Delhi Higher Judicial Service. The contention was whether the guidelines and directions given by the Court in O.P. Singla have been followed or not. The Court considered the 3 terms “ad hoc”, “stop-gap” and “Fortuitous” in the context of the service jurisprudence and in para 20 of the Report held as under:

“20. In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long

³³⁸ AIR 1990 SC 1607

³³⁹ AIR 1977 SC 2051

³⁴⁰ AIR 1981 SC 41

³⁴¹ AIR 2000 SC 2808

period, then such an appointment cannot be held to be “stop-gap or fortuitous or purely ad hoc.” In this view of the matter, the reasoning and basis on which the appointment of the promotees in the Delhi Higher Judicial Service in the case in hand was held by the High Court to be “fortuitous/ad hoc/stop-gap” are wholly erroneous and, therefore, exclusion of those appointees to have their continuous length of service for seniority is erroneous.”

In *Brij Mohan Lal*, a three judge Bench of this Court observed that the Court had foreseen the possibility of the closure of the Fast Track Courts Scheme. The Court noted, inter alia, in the following manner:

“... that the service in FTCs will be deemed as service of the promoted judicial officers rendered in the parent cadre. However, no right would accrue to such recruits promoted/posted on ad hoc basis from the lower judiciary for regular promotion on the basis of such appointment. For direct recruits, continuation in service will be dependent on review by the High Court and there could be possibility of absorption in the regular vacancy if their performance was found to be satisfactory...”

In *Debabrata Dash vs. Jatindra Prasad Das*³⁴², the dispute was regarding inter se seniority between direct recruits and promotees under Rules 7, 8 and 9 of the Orissa Superior Judicial Service Rules, 1963 and Rules 4 and 7 of the Orissa Judicial Service (Special Schemes) Rules, 2001. The respondents in this case were member of the Superior Judicial Service (Junior Branch) who was promoted on ad hoc basis to senior branch for posting to Fast Track Court. The question for determination was whether the promotees could claim seniority over the direct recruits in the cadre of senior branch. The brief facts of this case reveal that 72 posts of ad hoc Additional District Judges were created under the 2001 Rules to meet its objective were not part of the cadre strength of Senior Branch Service in 1963 Rules nor by creation of these posts under the 2001 Rules, the cadre strength of the Senior Branch of service got increased. The respondent’s promotion as an ad hoc Additional District Judge pursuant to which he joined the post of ad hoc Additional District Judge, is traceable wholly because the writ petitioner was adjudged suitable on the touchstone of the 1963 Rules, it cannot be said that he was given appointment to the ad hoc Additional District Judge under the 1963 Rules, as there was no vacancy to be filled by promotion in cadre strength of Senior Branch of the

³⁴² AIR 2013 SC 1700

service under the 1963 Rules on that date. When appellant's direct recruits were appointed as Additional Judges, no vacancy to be filled by way of promotion to the Senior Branch of the service was available either in the cadre or in the ex-cadre. When no vacancy was available against which the respondent could have been brought into cadre then his claim for seniority in the cadre over the appellants would not arise. It is clear from the Rules 3(d), 4, 5, 7, 8 and 9 of the 1963 Rules that a person can become a member of the Senior Branch of the Superior Judicial Service only if his appointment has been made to a post in the service. If there is no vacancy to be filled in by promotion in the cadre of Senior Branch service, there is no question of any appointment has been made to the service. The membership of service is limited to the persons who are appointed within the cadre strength by direct recruitment and by promotion. As such until the vacancy occurred in the cadre of Superior Judicial Service (Senior Branch) which was to be filled up by promotion, the service rendered by the respondent in the Fast Track Court cannot be deemed to be service rendered in the Superior Judicial Service, Senior Branch, then, he continued to be a member of the parent cadre, i.e., Superior Judicial Service (Junior Branch). It was held that this period cannot be counted for holding that respondent was senior to appellants.

Referring to the Direct Recruits Class II Engineering Service Association case, the Supreme Court in the case of Debabrata Dash observed that the essence of the direction in Proposition (A) is that the seniority of an appointee has to be counted from the date of his appointment and not according to the date of confirmation once a recruit is appointed to a post according to rules. In other words, where initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority. The writ petitioner's appointment as an ad hoc Additional District Judge is not traceable to the 1963 Rules. The simple reason leading to this consequence is that there was no vacancy available which was to be filled up by promotion on that date in Superior Judicial Service (Senior Branch)

In *Indian Administrative Service (S.C.S.) Association, U.P. vs. Union of India*³⁴³ the 1st petitioner in the Writ Petition is an Association representing the officers of the "State civil Service of U.P. and petitioner Nos. 2 to 17 are its members. Some of them

³⁴³ 1993 Supp (1) SCC 730

and Bihar State Officers are the appellants in the two appeals respectively. On January 19, 1984, the association represented to the Govt. of India requesting to remove wide disparity prevailing in different States of promotional avenues from the State Civil Services to All India Administrative Service. The officers from Andhra Pradesh and Kerala, on completion of 8 to 9 years of service are becoming qualified for promotion to All India Administrative Service, while the officers from States like Uttar Pradesh and Bihar would get chance only after putting 24 to 27 years of service. The Estimate Committee of Seventh Lok Sabha to in its 77th Report highlighted the injustice. A committee of senior Secretaries constituted by the Union Govt, recommended, after due consideration, to evolve equitable principles of comparable seniority from different States for promotion to Indian Administrative Service. Pursuant thereto the Central Govts. proposed to amend the Indian Administrative Service (Regulation of Seniority) Rules, 1954, for short 'the Seniority Rules'. In the meantime, the Rules were repealed and replaced by I.A.S. (Regulation of Seniority) Rules 1987 which came with effect from November 6, 1987 for short 'New Seniority Rules'. The first respondent issued Circular letter dated September 9, 1986 to the State Govt. indicating amendments for fixation of seniority of officers promoted from State civil Services' to I.A.S. to give weightage over and above 4 years in the assignment of year of allotment as per the existing relevant rules, namely, four years for the first 12 years State service with additional weightage of one year for every two to three years' completed service subject to a maximum of five years. After receiving suggestions or comments from State Governments, the Central India exercising the power under Sub-section (1) of Section 3 of All India Service Act, 1951 for short, 'the Act' amended the New Seniority Rules, 1987 which amendment was published in the gazette of India on February 3, 1989 for short the 'First Amendment Rules'. The proviso there to was made limiting its operation prospectively from February 3, 1989, Putting the proviso and its prospective operation in issue, the appellants from U.P. in civil Appeal No. of 1992 [S.L.P.(C) No. 13823 of 1991] filed Original Application No. 18 of 1989 in the Central Administrative Tribunal, Allahabad at Lucknow Circuit Bench, contending that they were promoted in 1980 onwards but by limiting its application to November 6, 1987, they were discriminated. Bihar Officers questioned the Rule in O.A. No. 136 of 1989 before the C.A.T. at Patna. Therein the appellants though found to be entitled to the total

weightage of 9. years since their juniors were given 1983' as the year of allotment, by operation of proviso, to Rule 3(3)(ii) of the First Amendment Rules were given 1983 as the year of allotment. Thereby, they were denied 3 years' weightage"

A plain and fair reading of the Sub-rules manifests the Central Government's intention that "the year of allotment of a direct recruit officer shall be the year following the year in which the competitive examination was held". If any such officer was permitted to join probationary training with direct recruit officers of a subsequent year of allotment, then he shall be assigned that subsequent year as the year of allotment. In determining the seniority of a promotee officer in assigning year of allotment, the service rendered in the State Civil Service upto 12 years as Dy. Collector, or equivalent posts, weightage of 4 years shall be given. If he has completed twelve years of service, he shall also be given the benefit of a weightage of one year for every completed three year' of service in the cadre. This shall be subject to a maximum of five years. In its calculations, fractions are to be ignored. The weightage shall be computed from the year of appointment of the officer to the service. The offending proviso limits the operation of Rule 3(3)(ii)(a) and (b) that such an officer shall not be assigned a year of allotment earlier than the year of allotment assigned to the officers senior to him in that select list or appointed on the basis of an earlier select list. Under Rule 3(3)(iii) also, though not relevant for the purpose of the case but serves as an analogy, that the year of allotment of an officer appointed by selection shall also be given the year of allotment in the same manner as adumbrated in Sub-rule 3(3)(ii) and its effect also was circumscribed under the proviso that he shall not become senior to another. non-State Civil Service Officer already appointed to the service. It is, therefore, clear that the New Seniority Rules were to be operative from November 6, 1987 and the First Amendment Rules from February 3, 1989 with the result that in assigning the year of allotment, full weightage of 9 years' eligible service was given to the promotee State Civil Service Officers. However, the senior officer to him/her appointed from the State Civil Service earlier in the same select list or one above him in the previous select list shall remain senior to him. Thereby the proviso averted the effect of pushing an officer who gained entry into IAS service by application of rule of weightage in 3(3)(ii) of the rules down in seniority. It is settled law that ability, merit and suitability are the criteria to select an officer of the State Civil Service for inclusion in the select list for promotion under

regulation 9 of the IAS Promotion Regulations -1955 read with Rule 9 of the IAS Recruitment Rules 1954. In that behalf no change was brought about. A junior officer who thus superseded a senior State Civil Officer became entitled to carry his year of allotment and became senior to him in the cadre of IAS. But for the proviso, the operation of Rule 3(3)(ii), the senior officer would have been saddled with the disability to be pushed down in seniority which would have nullified and frustrated the hard earned earlier promotion and consequential effect on seniority earned by dint of merit and ability. Moreover, the entry into the service is from different streams and predominantly by direct recruitment and promotion. The direct recruit gets his year of allotment from the succeeding year of his recruitment. The direct recruit officer appointed earlier to 1988 also would be adversely affected in their seniority.

The chief question that came up for determination is: Whether the proviso is violative of Article 14 and Article 16(1) of the Constitution of India. Undoubtedly all the promotees from the State Civil Service constitute a class preceding or succeeding the first Amendment Rules? It was observed by the Supreme Court that the purpose of temporary truce carved out by the proviso is self-evident. By dint of merit, ability and suitability a junior officer could steal a march over the senior officers in the State Civil Service and get entry into the Indian Administrative Service earlier to the senior officers and thus becomes a member of the Indian Administrative Service. Thereby he becomes senior in service. The senior State Civil Service (Officer, who was superseded and subsequently became qualified for inclusion in the select list, after the New Seniority Rules or the First Amendment Rules came into force, indisputably would be junior in I.A.S. cadre to his erstwhile junior officers in State Civil Service. If he gets the benefit of the free play of the First Amendment Rules, it would have the inevitable effect of depriving the promoted erstwhile junior officers of the benefit of early promotion and he would be pushed down and would again become junior to him in the Indian Administrative Service. The proviso aims that the State Service senior officer, though had varied length of services, but because of late promotion to Indian Administrative Service, would receive and forego proportionate weightage of past service for a short period till the rules fully become; operational, The first amendment rules doubtless provided the remedy to remove existing discriminatory results by giving graded weightage to a maximum of 9 years and would track back the year of allotment anterior to the date of inclusion in the select list under the

Recruitment Rules read with Promotion Regulations. The proviso intended to protect the seniority of the officers promoted/appointed earlier than the appellants and its effect would be that till Rule 3(3)(ii) fully becomes operational graded weightage was given to the promotees. In other words, it prevented to get seniority earlier to the date of to/her appointment to the Indian Administrative Service. Equally it intended not to let endless chain reaction occur to unsettle the settled interests in seniority. These compulsive circumstances denied the benefits of full 9 years' weightage to officers promoted during 1987 to 1992. The discrimination, though is discernible, but inevitable to ensure just results. In other words, the proviso prevented unequal to become equals. The contention of Sri P.P. Rao, therefore, that invidious discrimination was meted out to senior officers and that they are similarly circumstances are devoid of force.

It is clearly held by the Court that it is an equally settled law that in an affirmative action the court can strike down a rule which offends the right to equality enshrined in Article 14 and 16(1) of the Constitution or ultra vires the Constitution. But at the same time in a given situation like the one arose in *D.S. Nakara v. Union of India and B. Prabhakar Rao v. State of A.P.*, this Court extended parity in an affirmative action by reading the rule down without doing violence to the language or injustice to others. The application of the First Amendment Rule has the inevitable and insidious effect of doing injustice to the direct recruit/promote Officers or officers promoted earlier to Feb. 3, 1989 and the proviso avoided such unjust results. Giving retrospective effect or directing to apply the rule to all the seniors irrespective of the date of promotion to I.A.S. cadre would land in or lead to iniquitous or unjust results which itself is unfair, arbitrary and unjust, offending Article 14 of the Constitution. To avoid such unconstitutional consequences the proviso to Rule 3(3)(ii) of the First Amendment Rule was made. The doctrine of kicking down or picking up, put forth in *Union of India v. P.K. Roy*, equally cannot be extended to the facts of the case. But for the proviso the operation of Rule 3(3)(ii) would be inconsistent with Section 3(1A) of the Act. Equally though the doctrine of reading down is a settled principle of law and its application to the facts of the case would lead to injustice to the officers promoted earlier to the appellants. A writ of mandamus commanding the respondents to give full benefit of weightage of Rule 3(3)(ii)(a) & (b) of the First Amendment Rules would amount to direct the executive to disobey the proviso which is now

held to be *intra vires* of the Constitution. In the light of the above discussion no directions could be given to the Central Govt. to amend the Rules, therefore, we have no hesitation to hold that though Govt. of India has power to amend the New Seniority Rules by First Amendment Rules prospectively giving weightage of total 9 years' service to promote officers of State Civil Service in assigning a year of allotment, no direction or mandamus could be issued commanding the Central Govt. to disobey the proviso or to apply the rules retrospectively to all the officers even to work out monetary benefits as contended by Sri Vaidyanathan. His further contention that the First Amendment rules would be applied with effect-from the date of the New Seniority Rules or date of intimation of the proposed First Amendment Rules to the State Governments for limited retrospectivity also cannot be acceded to for the same reasons.

a. The Quota-Rota System

When recruitment to service is to be made from two or more sources, the statutory provisions or administrative instructions governing such recruitment must fix a quota in respect of each of the sources according to which such recruitment is to take place. For example, if recruitment to a cadre is to be made by direct recruitment from the open market and also by promotion from in-service candidates, a quota specifying the number of direct recruits and the promotees might be fixed. The quota might have reference to the number of vacancies e.g., when it says that 50 per cent of the vacancies will be filled up by direct recruitment and 50 per cent of the vacancies will be filled up by promotion; or, it might refer to the total strength of the cadre at a given point of time e.g., it might say that the recruitments shall be made in such a manner so as to ensure that the total strength of the cadre is distributed equally amongst direct recruits and promotees at any given point of time. The Supreme Court has held in peremptory terms that it is mandatory to apply rota and quota rule in determining seniority where the same is provided for under the Rules. Rota and quota must necessarily be reflected in the seniority list and any seniority list prepared in violation of rota and quota is bound to be negated.

The principles laid down in the case of *Direct Recruits Class II Engineering Officers Association vs. State of Maharashtra*³⁴⁴, in relation to the application of the quota rule in determination of inter se seniority, can be aptly discussed over here. The guidelines laid down in the case are as under:

“(c) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment to the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(d) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so, the inference is irresistible that the quota rule had broken down.

(e) Where the quota rule had broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(f) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

(g) The quota for recruitments from different sources may be prescribed by executive instructions, if the rules are silent on the subject.

(h) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.

(i) *** *** ***

(j) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinised for finding out any possible error. It is not in the interest of service to unsettle a settled position.”

³⁴⁴ AIR 1990 SC 1607

The principles of quota and rota are intertwined but it is not inevitable that in all cases of the application of quota, the “ROTA” rule will be invoked. For example, if there are vacancies and direct recruitment is not made in subsequent years and these deficient vacancies are filled in by promotees, then later on the direct recruits cannot claim deemed dates of appointment for seniority in service with effect from the time according to the rota or turn. Seniority will depend upon the length of continuous officiating service and cannot be upset by lateral entry of direct recruits from the open market save to the extent to which any excess promotee may have to be pulled down. This was observed in *N.K. Chauhan vs. State of Gujarat*³⁴⁵.

The brief and quick survey of decided cases and the submissions considered in the judicial evincible yield the following conclusions:

- a. the quota system does not necessitate the adoption of rotational rule in practical application. Many ways of working out quota prescription can be devised of which rota is certainly one.
- b. While laying down a quota for filling up vacancies in a cadre from more than one source, it is open to government subject to tests under Article 16 of the Constitution of India to choose a year or other period or vacancy by vacancy basis to work out the quota among the sources. But once the Court is satisfied, examining for constitutionality the method proposed, there is invalidity. Administrative technology has fair play in choosing one or the other of the familiar processes of implementing the quota rule. The Court cannot strike down the particular scheme because it is unpalatable to forensic taste.
- c. Seniority is normally measured by length of continuous officiating in service, the actual is easily accepted as the legal. This does not preclude a different prescription, constitutional tests being satisfied.
- d. A periodication is required in this case to settle rightly the relative claims of promotees and direct recruits. In the case in hand, 1960-62 forms period A and 1963 and onwards forms period B. Promotees were regularly appointed during A in excess of their quota for want of direct recruits (reasonable sought but not seemed and because carrying longer would injure the

³⁴⁵ AIR 1977 SC 251

administration) can claim their whole length of service for seniority even against direct recruits who turn up in succeeding period.

- e. Promotees who have been fitted into vacancies beyond their quota during the period B, the year being the regarded as unit must suffer survival as invalid appointees acquiring new life when vacancies in their quota fall to be filled up. To that extent they will step down rather than pushed down as against direct recruits who were later but regularly be appointed within their quota.

In the case of *H.V. Pardasani vs. Union of India*³⁴⁶, the Supreme Court has held that the inter-se seniority of direct recruits and promotees which is determined according to quota-rota is valid. The question which came up for consideration in this case was whether seniority between direct recruits and promotees in the grade of Section Officer can be determined according to the principle of quota-rota. The Supreme Court pointed out the importance of quota saying that where both categories of personnel are employed viz, direct recruits as well as promotees, it is of utmost necessity that a scheme based upon quota be prescribed. Such schemes are not arbitrary and neither are they contrary to Articles 14 and 16 of the Constitution. However, the Court had cautioned that while applying the principle of seniority by quota, it has to be seen that in case of direct recruits who are senior to the promotees are not considered for promotion to higher post, if they do not fulfil the eligibility criteria specified in the rule framed by the rule-making authority. Therefore, the rule-making authority may, according to the nature of the post, prescribe certain qualifications for any post. Academic excellence is not sufficient always. In addition to this, other factors like experience over certain number of years in service and holding a post of a certain level are relevant. This is necessary because it gives them the ability to deal with several files, handle and tackle problems like extracting work from subordinated and serving their superiors. Justifying promotion on the basis of seniority, the Court further opined that academic brilliance and excellent performance in competitive examinations can only supplement an officer's ability but to enhance his capability he needs experience which can be gathered only by discharging his duties and responsibilities attached to a post. Therefore, recruitment by way of promotion to a post requires minimum number of years of service in the lower post. The experience gained therein equips an official to take up greater

³⁴⁶ AIR 1985 SC 781

responsibilities in the higher post. In other words, the number of years that an official spends in the discharge of his duties has a direct nexus to the “object of enlisting experienced officers of proven merit with consistent good record over sufficiently long period to man the higher posts by way of promotion”.

In *Devendra Prasad Sharma vs. State of Mizoram*³⁴⁷ the petitioner was promoted as Inspector of Police on July 10, 1973 and was further promoted as Deputy Superintendent of Police on April 8, 1982. The contesting respondents were directly recruited as Deputy Superintendents on March 25, 1982. Their inter-se seniority is regulated by Rule 25 of the Mizoram Police Service Rules, 1986. Rule 25 reads as under:

25. Seniority - The Administrator shall prepare a list of members of the Service arranged in order of seniority as determined in the manner specified below:

(i)(a) Persons recruited on the results of the competitive examination in any year shall be ranked Inter se in the order of merit in which they are placed at the competitive examination on the results of which they are recruited, those recruited on the basis of an earlier examination being ranked senior to those recruited on the basis of a later examination.

(b) The relative seniority inter-se of persons recruited by selection shall be determined on the basis of the order in which their names are arranged in the list prepared under Rule 13, those recruited on the basis of an earlier selection being ranked senior to those recruited on the basis of a later selection.

(ii) The seniority of members of the Service appointed at the initial Constitution of the Service in accordance with the provisions of part VI of these rules shall be determined by the Administrator in consultation with the Board.

Provided that in the case of persons appointed under Sub-rule (i) of the Rule 15, if two or more persons belonging to the same parent service or Department are thus appointed, they shall be ranked inter se in the order of their relative seniority in the parent Service or Department as the case may be.

³⁴⁷ AIR 1997 SC 2248

(iii) The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quotas of vacancies reserved for direct recruitment and promotion under Rule 5.

In the matter of fixation of the inter se seniority under Rule 25(iii), the relative seniority of direct recruits and of promotees has to be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quotas of Vacancies reserved for direct recruitment and promotion under Rule 5. The Division Bench has pointed out in the impugned order the position as under :

Clause (ii) of Rule 25 quoted above clearly stipulated that the seniority of the service appointed at the initial Constitution of the service shall be determined by the administrator in consultation with the Board. Since all the respondents have been appointed as members of the service at the initial Constitution of service their seniority has to be determined by the Administrator in accordance with the said rules.

It was observed by the Court that the statutory Rule 25(iii), as indicated above, clearly postulates that the inter se seniority of the direct recruits and the promotees has to be determined in accordance with quota and rotation. Accordingly, seniority was rightly determined as per the respective dates of appointment. Therefore, the rotation has to be considered as per the date of appointment and in accordance with the vacancy under the rules. Otherwise, the rule of rota-quota unduly gets disturbed.

When the claims for promotion to the post of Addl. Superintendent of Police had come up for consideration, in the meeting held by the DPC on October 6, 1988, the petitioner was found to be unfit and contesting respondents were found to be fit as per the proceedings indicated in the judgment of the High Court. As a consequence, the petitioner could not claim right to promotion at that time on the basis of the assessment made by the DPC or to seniority over those promoted as per their commendation of the DPC. The petitioner may be found fit at a later stage of selection but he cannot get seniority over the persons who were found fit in the meeting held in October 6, 1988 and promoted on October 20, 1988 and have already got promoted to higher post i.e. Addl. Superintendent of Police. The seniority in lower

post loses its significance.

The question whether it would be appropriate that the rule of quota is applied not only at the time of appointment but also at the time of confirmation came up in a catena of cases. In *Paramjit Singh vs. Ram Rakha*, it was held that where recruitment to a service or a cadre is from more than one source, the controlling authority can prescribe quota for each source. It is equally correct that where the quota is prescribed, a rule of seniority by rotating the vacancies can be a valid rule for seniority. But as pointed out earlier if the rule of seniority is inextricably intertwined with the quota rule and there is enormous deviation from the quota rule, it would be unjust, inequitable and unfair to give effect to the rota rule. In fact as held in *O.P. Singla* case giving effect to the rota rule after noticing the enormous departure from the quota rule would be violative of Article 14. Therefore assuming that quota rule was mandatory in character as pointed out earlier, its departure must permit rejection of rota rule as a valid principle of seniority.

Referring to the above case, the High Court of Punjab and Haryana has observed that quota rule is linked up with seniority rule because, not the date of entry in service determines the seniority but the date of confirmation determines seniority and, therefore, quota rule is inextricably intertwined with the seniority rule and any delinking would render the seniority rule wholly unreasonable. And other view would lead to the most undesirable result wholly unintended by the framers of the rule. It must be remembered that after recruitment, members of the service, though drawn from two different sources - direct recruits and promotees - constitute a single integrated cadre. They discharge identical functions, bear similar responsibilities and acquire an equal amount of experience in the respective assignments.

In appeal to this case, the Constitution Bench said that where recruitment is from two sources and the seniority in the cadre is determined according to the date of confirmation, to accord utmost fair treatment a rotational system has to be followed while giving confirmation. The quota rule would apply to vacancies and recruitment has to be made keeping in view the vacancies available to the two sources according to the quota. If the quota rule is strictly adhered to there will be no difficulty in giving confirmation keeping in view the quota rule even at the time of confirmation. A roster is introduced while giving confirmation ascertaining every time which post has fallen vacant and the recruit from that source has to be confirmed in the post available to the

source. This system would break down the moment recruitment from either source in excess of the quota is made. In fact a strict adherence to the quota rule at the time of recruitment would introduce no difficulty in applying the Rule at the time of confirmation because vacancies would be available for confirmation to persons belonging to different sources of recruitment. The difficulty arises when recruitment in excess of the quota is made and it is further accentuated when recruits from one source, to wit, in this case direct recruits get automatic confirmation on completion of the probationary period while the promotees hang out for years together before being confirmed.

Concurring with the judgment delivered in Paramjit's case, in the case of *M.S. Sandhu vs. State of Punjab*³⁴⁸, the Supreme Court made it clear that it was not laying down that rule of quota and rota cannot co-exist. Service rules, in a particular case may specifically provide the co-existence of quota and rota. There may also be a situation where service rules be interpreted as such. That is a very important comment made by the Constitution Bench after taking note of the ratio in Paramjit Singh's case. After taking note of this ratio on the harmonious interpretation of the Rules in question, rather than stating that such an interpretation was impermissible or wrongly given, the Constitution Bench clarifies that there may be circumstances where such an interpretation would be permissible and validity of the rules would be tested in the total setting of facts. That was precisely done by the Bench in Paramjit Singh's case.

It was also made clear that what the Court meant was that quota should be co-related to the vacancies which are to be filled in. Who retired and from what source he was recruited may not be very relevant because retirement from service may not follow the quota rule. A roster had to be introduced which was to continue while giving confirmation. Introduction of roster only postulates ascertainment of available number of vacancies and proceeding to make recruitment keeping in view of the quota.

³⁴⁸ AIR 2014 SC 2394

b. Consultation by the Central Government with the State Government while making Inter Se Seniority

In *Indian Administrative Service (S.C.S.) Association, U.P. vs. Union of India*³⁴⁹, it has been thereby made clear that Section 3(1) of the All India Services Act, 1951, empowers the Central Govt. to make any rule regulating the recruitment and the conditions of service of All India Service, which include amendment from time to time, but the rider it engrafted is that the power should be exercised "after consultation with the Governments of the States concerned". It is already held that by operation of Sub-section (2) of Section 3 of the Act, the rules or regulations are statutory in character. The meaning of the word 'consultation' was considered in catena of cases. This Court in *Union of India v. Sankalchand Himatlal Sheth*³⁵⁰ held that the word "consult" implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct or at least a satisfactory solution. In order that the two minds may be able to confer and produce a mutual impact it is essential that each must have for its consideration full and identical facts which can at once constitute both the source and foundation of the final decision. In that case the question related to the transfer of a High Court Judge from one High Court to another. In that context this Court considered whether sounding of the Chief Justice of India without meaningful consultation would be proper, discharge of the constitutional obligation by the President. In that context the principle of law laid was that the respective view point of the Govt. and the Chief Justice must be known to each other and both were to discuss and examine the merits of the proposed transfer. The meaning of the word "consultation" was evaluated in that backdrop. This court approved the dictum laid by K. SubbaRao, J., as he then was, in *R. Pushpam v. State of Madras*³⁵¹.

In *State of U.P. v. Manbodhan Lal Srivastav*³⁵² the word "consultation" in Article 320 of the Constitution of India was considered by a Constitution Bench. It was held that the word "consultation" did not envisage mandatory character for consultation, but the Constitution makers allowed the discretion to the

³⁴⁹ 1993 Supp (1) SCC 730

³⁵⁰ AIR 1977 SC 2328

³⁵¹ AIR 1953 Mad. 392

³⁵² AIR 1957 SC 912

appointing authority to consult the Public Service Commission. But the executive Govt. cannot completely ignore the existence of the Public Service Commission or to pick up and choose cases in which it was or may not be consulted. However, prior consultation was held to be not mandatory for removal of a Govt. servant as the Central Govt. has not been tied down by the advice of the U.P.S.C. This court did not extend the rule of consultation to making the advice of the Commission on those matters binding on the Govt. In the absence of a binding character, this Court held that non-compliance of Article 320(3) (c) would not have the effect of nullifying the final order passed by the Govt. of removal of the Govt. servant from service. In *U.R. Bhatt v. Union of India*, the Supreme Court held that the absence of consultation of the Public Service Commission or any irregularity in consultation under Article 320 does not affect the ultimate decision taken by the authority under Article 311 of the Constitution. In *Ram Gopal Chaturvedi v. State of Madhya Pradesh*³⁵³ the same view was reiterated. In *N. RaghavendraRao v. Dy. Commissioner, South Kanara, Mangalore*³⁵⁴, words "prior approval" of the Govt. in construing the proviso to Section 15(7) of S.R. Act of the words of varying the conditions of service the Constitution Bench held that "prior approval" would include general approval to the variation in the conditions of service within certain limits indicated by the Central Govt. Same view was reiterated by another Constitution Bench in *Mohd. Sujat Ali and Ors. v. Union of India*.

In *Chandramouleshwar Prasad v. Patna High Court*³⁵⁵ construing the word 'consultation' in Article 233 of the Constitution, another Constitution Bench in the context of removal of a District Judge by the Governor on the recommendation of the High Court, held that 'consultation' or 'deliberation' is not complete or effective unless the parties thereto, i.e. the State Govt. and High Court make their respective, points of view known to each other and discuss and examine the relative merits of their views. If the one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation. In that case it was held that the absence of any

³⁵³ AIR 1970 SC 158

³⁵⁴ AIR 1965 SC 136

³⁵⁵ [1970] 2 SCR 666

consultation with the High Court rendered the order of removal dated October 17, 1968 passed by the State Govt. illegal.

In *Narain Sankaran Mooss v. State of Kerala*³⁵⁶, the facts were that the State Govt., exercising the power Under Section 4(1) of the Electricity Supply Act, cancelled the licence of the appellant without consulting the Electricity Board. The question was whether cancellation would be ultra vires of the power. While examining that question, this Court considered whether consultation was mandatory or directory, and held that the revocation of the licence trenches into the right to carry on business guaranteed under Article 19(1)(g) of the Constitution, therefore, when the Act prescribes prior consultation of the Electricity Board such condition was incorporated to prevent abuse of power and to ensure just exercise of the power. Section 4 of the Electricity Supply Act enjoins, in public interest, to consult the Board before revocation of the licence. Consultation provided an additional safeguard to the licensee and when revoking the licence the Govt. acts in two stages. Before and after the explanation was received and when the Govt. considered the explanation, it is mandatory that it should consult the Electricity Board and non-consultation rendered the order as void. Consultation of the Board was, therefore, held to be a condition precedent for making order of revocation.

In *Hindustan Zinc Ltd. v. A.P. Electricity Board and Ors.*³⁵⁷, the revision of tariff was effected without consulting the Consultative Council. The Supreme Court held that the revision of tariff was a question of policy Under Section 78A of the Indian Electricity Supply Act. The failure of the Board to consult the Consultative Council whether rendered the revision of tariff invalid. It was held that the consequence of non-compliance of Section 16 was not provided and the nature of the function of the Consultative Council and force of its advice being at best only persuasive, it cannot be said that the revision of tariff, without seeking the advice of the Consultative Council, rendered the revision of tariff itself invalid. On the other hand the Board after revision of the tariff has to place the revised tariff on the table of the House or Houses of the State Legislature and such statement is open to discussion therein, the Board is bound to take into consideration such modification, if made, or any comments made on such statement by the State

³⁵⁶ AIR 1965 Ker. 253

³⁵⁷ AIR 1991 SC 1473

Legislature. Under those circumstances it was held that the non-compliance of Section 16(5) did not render the revision of tariff invalid.

In *Rollo and Anr. v. Minister of Town & Country Planning*, Section 1(1) of the Towns -Act, 1946 envisages the Minister of Town & Country Planning after consultation with the local authorities, if satisfied that it is expedient in the national interest that any area of land should be developed as a new town by the Corporation established under the Act, he may make an order designating that area as a site or the proposal of the new town. On October 7, 1946 press notice was issued giving the date of meeting of the representatives of the local authorities and the Minister explained in the meeting what he had in his mind in arriving at the boundaries of the area. Objections were raised and public enquiry was held. But actual explanation was not sought from any local authorities. In those circumstances contention was raised that there was no consultation as adumbrated Under Section 1(1). Repelling the contention, the House of Lords held that in the meeting the local authorities clearly were informed of the general nature of the proposal, the areas suggested, its size and what the Minister wished and intended to do. Discussion was followed'. Minutes were prepared and press notice was issued stating what had happened. In those circumstances it was held that there was consultation and the requirement was complied with. The ration of Morris, J. in *Elecher and Ors. v. Minister of Town &Country Planning* was approved. The same view was reiterated in *Sinfield and Ors. v. London Transport Executive*.³⁵⁸

In *Derham and Anr. v. Church Commissioners for England*, the Judicial Committee was to consider the question of consultation with Church Commissioners for effecting the union of benefices Under Section 3(1) of the Pastoral Reorganisation Measures, 1949 which postulates of "consultation so far as is practicable". Construing the language, it was held that a meeting was held explaining the proposed scheme, the members of the Church though opposed the scheme, it was approved. As such it was held that the action was valid and there was proper; consultation.³⁵⁹

³⁵⁸ Extracted from *Indian Administrative Service (S.C.S.) Association, U.P. vs. Union of India* cited at 1993 Supp (1) SCC 730

³⁵⁹ Ibid

In *Port Louis Corporation v. Attorney General of Mauritius*, the local Govt. of Mauritius was empowered under the Local Government Ordinance, 1962 by Section 73(1) to alter the boundaries of any town, district or village, after consultation with the local authorities concerned. The Governor and Council of Ministers in May 1963 had in their minds to alter the boundaries of Port Louis, so that the villages surrounding Port Louis Township would be embraced within and would enlarge the area of the town of Port Louis. The Minister by a letter asked the views of the local authorities, enclosing the details of the proposed alteration and the map. Majority Councillors had resigned on the ground that they had no mandate to express any views. On subsequent nomination, those councillors raised certain points and asked for information, which was duly complied with. Further information was called for, but the Minister neither refused to extend time nor supplied information. The Governor in Council had issued a proclamation extending the boundaries of Port Louis. Action was initiated by the local authorities for declaration that the proclamation was ultra vires, null and void in so far as it related to the extended boundaries of the town of Port Louis, contending that there had been no consultation as required by Section 73(1) of the Ordinance. The Judicial Committee construing the word "after consultation" in that setting held that the local authorities had received a clear proposal. The failure to supply information by detailed answers to their questions would not render the proclamation as invalid.. Accordingly upheld the action as affirmed by the Supreme Court of Mauritius.³⁶⁰

The result of the above discussion leads to the following conclusions³⁶¹ :

(1) Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds between the proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in that behalf is mandatory.

³⁶⁰ Ibid

³⁶¹ Ibid

(2) When the offending action effects fundamental rights or to effectuate built in insulation, as fair procedure, consultation is mandatory and non-consultation renders the action ultra vires or invalid or void.

(3) When the opinion or advice binds the proposer, consultation is mandatory and its infraction renders the action or order illegal.

(4) When the opinion or advice or view does not bind the person or authority, any action or decision taken contrary to the advice is not illegal nor becomes void.

(5) When the object of the consultation is only to apprise of the proposed action and when the opinion or advice is not binding on the authorities or person and is not bound to be accepted, the prior consultation is only directory. The authority proposing to take action should make known the general scheme or outlines of the actions proposed to be taken, be put to notice of the authority or the persons to be consulted, have the views or objections, taken them into consideration, and thereafter, the authority or person would be entitled or has/have authority to pass appropriate orders or take decision thereon. In such circumstances is amounts to an action "after consultation".

(6) No hard and fast rule could be laid, no useful purpose would be served by formulating words or definitions nor would it be appropriate to lay down the manner in which consultation must take place. It is for the Court to determine in each case in the light of its facts and circumstances whether the action is "after consultation"; "was in fact consulted" or was it a "sufficient consultation".

(7) Where any action is legislative in character, the consultation envisages like one Under Section 3(1) of the Act, that the Central Govt. is to intimate to the State Governments concerned of the proposed action in general outlines and on receiving the objections or suggestions, the Central Govt. or Legislature is free to evolve its policy decision, make appropriate legislation with necessary additions or modification or omit the proposed one in draft bill or rules. The revised draft bill or rules, amendments or additions in the altered or modified form need not again be communicated to all the concerned State Governments nor have prior fresh consultation. Rules or Regulations being in legislative in character, would tacitly

receive the approval of the State Governments through the people's representatives when laid on the floor of each House of Parliament. The Act or the Rule made at the final shape is not rendered void or ultra vires or invalid for non-consultation.

3.8. Gradation List and Validity of Combined Seniority List

It has already been discussed how seniority plays a major role in the promotion of an employee. Now, as and when an employee acquires his/her eligibility, s/he will be considered for promotion and it is at this stage that the role of seniority list comes into play. It is important that an employee is made known his exact position in the cadre vis-a-vis other employees. An employer also must readily locate the precise seniority position of an employee at any given point of time. An invariable practice has therefore developed of publication of a gradation or seniority list showing the respective seniority placements of the employees. Such gradation lists are prepared and published from time to time according to the frequency as stipulated in the service rules.

A gradation list has to be prepared in accordance with the principle of seniority laid down either statutorily or by executive instructions or rules, and normally the validity of such a list is required to be judged by reference to such principles of seniority have been laid down the same can be implied from the inter se seniority fixed in a gradation list.

Since it is permissible for an employer to have a large number of employees in the service performing diverse duties to create different categories of such employees holding equal status posts or equated posts and grouping and re-grouping, it follows that the seniority of the employees after such grouping or regrouping must be reflected in a combined seniority list.

The question of validity of a combined seniority list came to the forefront in a series of Supreme Court judgments in the Reserve Bank Cases. In *Reserve Bank of India and Ors. Vs. C.N. Sahasranaman and Ors*³⁶², the three petitioners in the court below namely Shri C.N. Sahasranaman, Shri R. Raman and Shri S.D. Peshkar who were the three staff members in the employment of the appellant Reserve Bank of India are respondents to this appeal. Intervention has been permitted by the Court during the course of the proceedings by the All India Reserve Bank Employees' Association, the recognised

³⁶² AIR 1986 SC 1830

union who represented the majority of the workmen, and the All India Reserve Bank Workers Organisation who represented the minority of the workers both of whom have been made party-respondents. The other interveners are All-India Reserve Bank Employees Federation at Hyderabad and All-India Reserve Bank Staff Association. The majority recognised union as well as the last mentioned union are supporting the stand taken by the appellant bank.

In order to appreciate the controversy in this case, it was highlighted before the Court that since the inception of the bank, separate department-wise and group-wise seniority for promotion to the cadre of officers and non-officers were maintained by the bank.

In 1972, following with recognised union, a combined seniority list was maintained as a result of the settlement and the two circulars A.C. Nos. 8 and 9 both dated 13th May, 1972. These are two annexures being Annexures 'A' and 'B' to the special leave petition to this Court which are in the Paper Book of this appeal, Annexure 'A' deals with the scheme for combined seniority list and switchover from non-clerical to clerical cadre. It is not necessary to set out in extenso the detailed scheme. In this scheme all employees in Class III non-clerical cadre substantively in the categories that have been listed as groups I, III, IV and V in the annexure who were graduates or had passed both parts of Institute of Bankers Examination would be eligible to exercise an option in accordance with Sub-clause (a) or (b) of Clause 2 to be transferred, automatically and without any screening, to posts in the clerical cadre and also to vacant and other posts than purely stop gap or short term nature, subject to Sub-clause (b) mentioned in the scheme. Combined seniority scheme introduced by the Reserve Bank to equalise opportunity of confirmation and promotion of class under the optee scheme came up for consideration by this Court in *Reserve Bank of India v. N.C. Paliwal*³⁶³. There the Court noted that at every center of the Reserve Bank of India, there were five departments, the General Department and four Specialised Departments. There was a separate seniority list for the employees in each Department at each center and confirmation and promotion of employees was only in the vacancies arising within their Department at each center. There were two grades of clerks in each Department, namely, Grade I and Grade II. The pay scales

³⁶³ AIR 1976 SC 2345

of Grade I and Grade II clerks in all the departments were the same and their conditions of service were also identical. There was automatic promotion from Grade II to Grade I. It is not necessary to set out in details the consequences. But it may be mentioned that this optee scheme gave rise to dissatisfaction amongst the employees in the General Department and they claimed equal opportunities for having combined seniority but justified a separate seniority list on the ground that work in each Department was of a special nature and their interchangeability was undesirable and hard to achieve. As a result of the recommendations of the National Tribunal, however, the Reserve Bank introduced the optee scheme 1965 as a first step towards equalisation of "opportunity. Under the scheme, the option to go over to the specialised Department was confined to confirmed Grade II clerks and officiating Grade I class in the general department. If he exercised option, he was eligible to be selected. If he was selected, he would be entitled to be absorbed only as Grade II clerk in one of the specialised departments with the result that if he was an officiating Grade I in the General Department at the time of the exercise of the option, he would lose the benefit of officiation in Grade I in the general department as also the monetary benefit of Rs. 15. His seniority in the cadre of Grade II clerks in the specialised department in which he was absorbed would be determined on the basis of his length of service calculated from the date of his recruitment if he was a graduate when he joined service, or from the date of his graduation if he became a graduate whilst in service.

The petitioners in that case and some others were, at the time of introduction of the Optee Scheme, confirmed Grade II clerks in the general department and some of them were officiating in the general department as Grade I clerks. They exercised the option under the Optee Scheme and were absorbed substantively as confirmed Grade II clerks in one or the other of the specialised departments. The clerks, other than the petitioners were, in due course, in order of seniority, promoted as officiating Grade I clerks in their respective specialised departments. But before the turn of the petitioners for promotion came, a new Scheme was introduced on 13th May, 1972 as a result of continuous agitation by the employees for full equalisation of opportunities between the general department and the specialised departments. The scheme was known as the Combined Seniority Scheme, and it superseded the Optee Scheme. It consisted of two parts as mentioned hereinbefore. One part provided for the integration of the clerical staff of the General Department with the clerical staff of

the Specialised Departments, this is annexure 'A' of the present Paper Book and the other which is annexure 'B' in the present Paper Book for the integration of the non-clerical staff with the clerical staff in all the Departments. The Combined Seniority Scheme gave an option to the non-clerical employees to be transferred to posts in the clerical cadre, but in the interest of efficiency, prescribed a qualification that only those employees in non-clerical cadre would be transferred who were either graduates or had passed both parts of Institute of Bankers' Examination. For determining their seniority vis-a-vis those in the clerical cadre, the Combined Seniority Scheme adopted the rule that 1/3 of their total non-clerical service until 7th May, 1972 (the date on which agreement was reached at between the Bank and its employees on the terms of the Combined Seniority Scheme) or the date of acquiring the qualification should be taken into account.

Allowing the appeal from the High Court and upholding the validity of the Combined Seniority Scheme, the Supreme Court held that assuming that the Reserve Bank was State under Article 12 of the Constitution and therefore, subject to Articles 14 and 16 of the Constitution, by the mere introduction of the Optee Scheme, no promise or assurance could be spelt out on the part of the Bank not to take any steps towards integration of other employees not covered by the Optee Scheme. The Reserve Bank, could not, on any principle of law or by any process of implication, be held bound to hold its hands in the matter of further integration, until the petitioners were promoted in the Specialised Departments. The only object of the Optee Scheme was to equalise the promotional opportunities of Grade II clerks in the General Department with those of Grade II clerks in the Specialised Departments by giving an option to the former to be absorbed in the latter. The object was carried out as soon as the petitioners and other Grade II clerks in the General Department opted to be transferred to the Specialised Departments. Then they became Grade II clerks in the specialised departments having the same promotional opportunities as the original Grade II clerks in the specialised departments. There was no assurance given by the Bank that the promotional opportunities available to Grade II clerks in the Specialised Departments would not be diminished. This Court in the said decision was of the view that the Combined Seniority Scheme did not affect the promotional opportunities of all Grade II clerks in the Specialised Departments, irrespective of whether they were original or transferee Grade II clerks. It did not discriminate

between transferee Grade II clerks and original Grade II clerks. There was no breach of the principle that the promotional opportunities of transferee Grade II clerks should be equal to those of original Grade II clerks. The fact that some of the Grade II clerks, junior to the petitioners, had become Grade I clerks in the general departments, and so could be equated only with Grade I clerks in the specialised departments was a wholly fortuitous result, according to this Court. This Court noted that it might cause heart-burning amongst the petitioners that they were still continuing to be Grade II clerks but whenever services were integrated, some hardship was bound to result as a necessary consequence of integration. This Court further held that Reserve Bank did not undertake that it would not take any steps for bringing about total integration of the clerical services until all the transferee Grade II clerks were promoted. The Bank was entitled to introduce the Combined Seniority Scheme at any time it thought fit and its validity could not be assailed on the ground that it was introduced at a time when some of the transferee Grade II clerks still remained to be promoted and so was discriminatory against them. The fact that some transferee Grade II clerks had already obtained promotion as Grade I clerks in the Specialised Departments by the time the Cabinet Seniority Scheme was introduced, was all part of the exigencies of service and in law no grievance could be made against it.

The integration of different cadres into one cadre could not be said to involve any violation of the equality clause, according to this Court. Therefore, the first part of the scheme for combination stands affirmed by this Court in *N.C. Paliwal's* case.

In *Reserve Bank of India v. N.C. Paliwal and Ors.*, (supra), at page 385 of the report, it was observed, inter alia, as follows:

The Association Continued to agitate for acceptance of its demand and ultimately, as a result of negotiations, an agreement dated 7th May, 1972 was arrived at between the Reserve Bank and the Association by which the demand of the Association was substantially conceded and the principle of a combined seniority list was accepted by the Reserve Bank. The petitioners and some other employees were, however, not members of the Association and they refused to accept the terms of this agreement and hence the Reserve Bank issued a Circular dated 13th May, 1972 introducing a Scheme for combined seniority list and switched over from non-clerical to clerical cadre with effect from 7th May, 1972. This Scheme was substantially in the same terms as the

agreement dated 7th May, 1972 and we shall hereafter, for the sake of convenience, refer to this Scheme as the Combined Seniority Scheme.

It may be mentioned as was placed before the Court that before a combined list at the center was introduced, the provision was based on department-wise seniority at each center and the working of the Reserve Bank department-wise had been explained in the Paliwal's case by this Court at pages 380 and 381 of the report. It may be mentioned that the Circular AC-9 dated 13th May, 1972 which was issued as mentioned before following the statutory settlement dated the 7th May, 1972 under Section 18(1) of the Industrial Disputes Act, 1947 was upheld in Paliwal's case at page 380-382. This Circular was not challenged before the Bombay High Court. The resulting position is that the centerwise seniority is the established position and whatever promotions have to be effected must be based on the centerwise seniority, according to the appellant. The other part of the Circular i.e. Circular AC-8 dated 13th May, 1972 only laid down certain procedural aspects of promotion from clerical to non-clerical (Officer cadre) and even if any part of Circular AC-8 was set aside, it would not substantially affect the stand of the appellant Bank that the promotions are and would be made on the basis of combined seniority. It is the case of the Bank that the principle of centerwise seniority was evolved after considerable discussion and debate with all the concerned interests, viz. who were represented by the recognised union, i.e. the All-India Reserve Bank Employees' Association and all the viewpoints, according to the Bank, were considered by the National Tribunal and this Court had, as mentioned hereinbefore, in the two decisions on two different occasions, upheld the validity of the combined seniority scheme; namely *All India Reserve Bank Employees' Association v. Reserve Bank of India*, at page 57 and *Reserve Bank of India v. N.C. Paliwal*, (supra) at pages 380-382.

Indeed in the last mentioned case at page 394, the validity of the combined seniority list has been subsequently upheld by the Court.

The controversy in this appeal lies within a narrow area but it has been urged against a vast compass and necessarily would require examination of some aspects which are strictly not germane to the present issue.

It was further emphasised from the point of view of justice and fairness that for a large majority of employees of the Bank, the maintenance of centerwise seniority

was essential. If Class III clerical and non-clerical staff are treated as an All-India cadre, both the employees as well as the Bank would find themselves in a difficult position because the employees will render themselves to be freely transferable from one area to another and particularly for those employees who are being transferred outside Bombay, Calcutta and Delhi, may find it extremely difficult, according to the Bank, to get housing accommodation (as the Bank would not be in a position to offer housing accommodation to all its employees). In such a situation, it was submitted, it would become a problem of discipline for enforcement of transfer made if the same is refused by the employees. It was, therefore, in those circumstances that taking a pragmatic view the Bank had so far not insisted on establishing an All-India cadre as far as the non-officer staff was concerned. To add to the problem of accommodation, there would be the problem of children's education at the new centers. The integration of various centerwise grades into one All-India grade would also pose considerable administrative problems.

3.9. Delay and Laches in Claiming Seniority

Inordinate delay and laches in challenging Seniority or Seniority List may be a ground for refusing relief. Although it is a general principle that the Courts in exercise of their discretion are reluctant to grant relief on the ground of inordinate delay or laches, the application of this principle in matters relating to seniority in particular has been stricter than in relation to many other areas. It has been held by the Supreme Court that Seniority should not be disturbed or unsettled after a lapse of time.

In *Dr. Akshya Bisoi vs. All India Institutes of Medical Science and Ors.*³⁶⁴, the petitioner Professors of the All India Institute of Medical Sciences were placed below the respondent Professors in the merit list. The seniority list reconsidered on different dates and maintained by Governing Body as per recommendation of selection committee and policy decision of 1997. The petitioners proceeded against the seniority list after 12 years without affording explanation for the delay. It was held by the Supreme Court that no relief could be granted to the petitioners. Placing reliance on *State of Uttaranchal Vs*

³⁶⁴ AIR 2018 SC 1022

*Shiv Charan Singh Bhandari*³⁶⁵, where the Ld. Chief Justice, after adverting to the settled position of law in that regard, observed thus:

“27. We are absolutely conscious that in the case at hand the seniority has not been disturbed in the promotional cadre and no promotions may be unsettled. The respondents choose to sleep like Rip Van Winkle and got up from their slumber at their own leisure, for some reason which is fathomable to them only. But such fathoming of reasons by oneself is not countenanced in law. Anyone who sleeps over his right is bound to suffer.”

“28. Remaining oblivious to the factum of delay and laches and granting relief in contrary to all settled principals and even would not remotely attract the concept of discretion. We may hasten to add that the same may not be applicable in all circumstances where certain categories of fundamental rights are infringed. But, a stale claim of getting promotional benefits definitely should not have been entertained by the Tribunal and accepted by the High Court.”

Therefore, referring to the above case, it was held that the delay on their part in seeking recourse to their legal remedies must weigh against them. At this stage it would be manifestly unfair to unsettle the inter se seniority between the three Professors in the CTVS department by reopening the recommendation made by the Selection Committee in 2005. In holding that, an unexpected delay on the part of the petitioners would disentitle them to any relief. There has to be an element of repose and a stale claim cannot be resuscitated.

3.10. A Sum Up

Therefore, the discussion in this chapter brings us to the conclusion that seniority is one of the attributes of regular service. The value of the right of seniority is the right for consideration of one's case for promotion to a higher post. In such cases, seniority taken into account is the seniority in the grade immediately below the promotional post or in the grade which is described as the grade from which promotions are to be made. It proceeds upon the basis that the comparison for purpose of seniority is between equals or those that are in the same grade or equated grades. Therefore, seniority is a concept which involves a comparison between the length service in the same grade and not the

³⁶⁵ (2013) 12 SCC 179

overall length of service in different grades. Where the rules provide for the computation of the length of service from the date of appointment, it cannot be modified by executive instructions. In calculating the date of appointment, it is the date of substantive appointment that marks the date of entry into the service. Thus, a regular appointment at a later date cannot relate back to an earlier date of ad hoc appointment. Seniority has to be determined from the date of regular appointment under the rules and not from the date of ad hoc or stop gap appointment made earlier to a post earmarked for direct recruitment.

The inter se seniority of persons joining on the same date has also been a matter of dispute. Disputes relating to inter se can arise among direct recruits or direct recruits and promotees or direct recruits and ad hoc promotees or direct recruits and roster point promotees. The courts have held that inter se seniority of candidates would depend on rules governing the same. In the absence of rules, executive instruction could be issued to fill the gap. In the absence of executive instructions, the courts may have to evolve principles of fairness and justness, keeping in mind the prevailing practise to deal with the facts in a given case.

The five-Judge Bench of the Court in *Direct Recruit Class II Engineering Officers' Association vs. State of Maharashtra* has clarified that once a person is appointed to a post according to rules, his seniority has to be counted from the date of his appointment and not according to the date of confirmation.

The expression 'date of appointment' is different from 'date of order'. Where appointment order makes it clear that the date of appointment is the date on which a person assumes charge, then the order of appointment is treated as the order of appointment and the date of appointment is the date from which the person assumes charge. However, where the appointment order states that the person is appointed with immediate effect, the date of appointment is made on the date the order is made and the appointment takes immediate effect and does not depend on whether the person assumes charge or not.

Seniority is always calculated from among the persons holding similar posts with similar status. Mere length of service under the government is never the basis of seniority. The general principles applicable for seniority are as follows:

- i. The first condition for fixing seniority between the officials is that they must be holding the posts in the same cadre or grade. A casual labourer is in employment but is not holding a post until he is regularised. Appointment upon regularisation is a fresh appointment. Further, if rules do not indicate that past service will count towards seniority, then such past service would not be so considered.
- ii. Seniority is to be fixed as between persons who hold similar status i.e., officiating or substantive. Officiating normally means that a person has been appointed to discharge work in a post (usually a higher one) where he/she has not been substantially appointed. Normally a person officiates in a post when he performs the duties of a post in which another person holds the lien; however, in certain cases a person may be appointed to officiate in a vacant post on which no other government servant holds lien. Generally, when a person is appointed to a post, seniority is calculated from the date of appointment and not from the date of confirmation; this rule is not applicable where initial appointment is ad hoc in nature. This is because upon successful completion of probation and confirmation, there is no fresh appointment that takes place, and the appointment is completed upon being appointed on probation. However, where initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till regularisation of his service as per the rules, this officiating period will be counted. Thus, probationary period or the 'in-service period' or the period of officiation could also be calculating towards seniority.
- iii. Persons holding permanent or substantive appointment are always treated as seniors to persons holding appointments on temporary or officiating basis. The period of deputation would also count towards seniority provided that he performs his duty satisfactorily.
- iv. As among the persons who are confirmed or substantively appointed, the date of confirmation or substantive appointment is the basis for seniority.
- v. From among persons holding temporary or officiating appointments, the length of service in the cadre or grade is normally the basis for fixation of seniority. Where a non-cadre officer is officiating for more than six months in a Indian Forest Service cadre post without requisite approval of the central government, the court has held that the officiating appointment is of a fortuitous nature, and such officiating period cannot count towards his calculating his seniority in the service.

vi. In the case of persons who are recruited through a competitive examination, the inter se seniority is determined on the basis of the rank assigned by the Public Service Commission conducting the examination.

The manner of fixation of seniority as between direct recruits and promotees has given rise to several disputes relating to seniority. The disputes have arisen, firstly, for the reason that direct recruits are not made regularly by the appointing authorities; secondly, the disputes relate to the fixation of quota between direct recruits and promotees and the recruitment made in disregard of the quota rule. Persons promoted even against the direct recruitment vacancies are continued for several years. Thereafter, when direct recruitment is made, direct recruits naturally claim seniority in accordance with quota rules. The promotees regard this as humiliation. All this can be avoided by making direct recruitment promptly every year as and when vacancies arise. But this does not seem to be a preferred policy with the governments in India; a factor which contributes to the burgeoning service jurisprudence.

Basic Principles Relevant for Fixation of Seniority of Direct Recruits and Promotees

- a. Obedience to quota rule: The rules of recruitment often fix specific quota for direct recruitment and promotion. The quota cannot be violated at the will and pleasure of the appointing authority. Vacancies must be classified as 'direct recruitment' and 'promotional' vacancies and recruitment must be made from the respective source.
- b. Clear Vacancies for Permanent and Temporary posts should be Classified: Generally, in respect of each cadre, permanent as also temporary posts are sanctioned. Permanent posts are sanctioned without the limit of time. Temporary posts are sanctioned for a specified period and continued from time to time. The rules of recruitment which prescribe the qualification and the method for recruitment to any cadre are applicable to both permanent and temporary posts. This being the position, the quota prescribed as between the direct recruitment and promotion cannot be confined to permanent posts. It applies to temporary posts as well. However, the classification of vacancies must be of clear vacancies, and not fortuitous one like leave or deputation.
- c. Fixation of quota when only permanent posts are included in the cadre strength: When cadre is required to be filled up by direct recruitment and promotion and it

consists only of permanent posts, in calculating the quota, only the permanent posts should be taken into consideration

The method of fixing seniority

The method of fixing seniority of direct recruits and promotees in compliance with the recruitment rules fixing the quota and the rules of seniority requiring the fixation of seniority from the date of appointment have been clearly laid down by the Supreme Court in Subraman which is as follows:

- i. The seniority of a civil servant in the cadre concerned will be counted from the date of initial appointment or officiation (on promotion) or probation (on direct recruitment) provided the initial appointment is within the quota;
- ii. The quota rule applies to vacancies in all posts, permanent or temporary included in the sanctioned strength of the cadre, except vacancies which are purely fortuitous or adventitious;
- iii. The validity of appointment from one source does not depend upon the making of appointment from the other source; direct recruits could be validly appointed against direct recruitment vacancies without waiting for promotion and vice versa and so long as the appointment is within quota, the appointee is entitled to calculate seniority from that date. This rule should be distinguished in cases where the rota system of appointment is applicable. Thus, where persons are appointed on a rota basis and are drawn from different registers, such as direct recruits and recruits from other sources, their seniority would count from their date of order of appointment and not from the date of individual appointment.
- iv. If the direct recruits are appointed against promotional vacancies, or promotees are appointed against direct recruitment vacancies, their appointment must be adjusted against clear vacancies becoming available thereafter at any time, and for purpose of seniority it is the date on which the appointment is adjusted against a vacancy available for that source which counts for seniority and not the date of appointment made in violation of the quota.
- v. Once the seniority of direct recruits and promotees when they are on officiation or probation are fixed according to the date of appointment, thereafter the source from which they are recruited is not relevant for purposes of confirmation which has to be

made strictly according to seniority fixed in compliance with the quota rule and the date of appointment.

Finally, before fixing the seniority of the employees, the principles of natural justice require that opportunity should be given to them to make representations. But what would be a fair, just and rational principle will vary according to the facts and circumstances of the case and particularly the historical background of the integration.

CHAPTER 4

PROMOTION OF PUBLIC PERSONNEL BY RULES OF SENIORITY IN VARIOUS SERVICES AND PUBLIC INSTITUTIONS: A BIRD'S EYE VIEW

4.1. Overview

Human resource management in Public Institutions has been all about organising the personnel inducted in each of the Departments of these institutions. This has been one of the major issues which have posed numerous challenges in the Courts of law. Position classification has been an important aspect of personnel administration. It involves classification of employees and identifying their position in an administrative set up. The concept has been defined in many ways. By classification is meant the grouping of positions on the basis of similarity of duties and qualification requirements. Marshall E. Dimock has defined it as the systematic sorting and ranking of position in a hierarchy according to comparative difficulty and responsibility. According to L.D. White, "In its final form, a classification plan consists of a number of classes adequate to enable a place to be found for each existing position arranged in orderly fashion with respect to each other, and supplemented by a set of rules and regulations for its administrations, interpretation and amendment."³⁶⁶

In any personnel system, services have to be classified on the basis of the variety of work and different grades and kinds of equipment required for different kinds of grades of work. In this respect, the classification of governmental position is recognised as indispensable to a career service whether based on merit or seniority or both. According to Glenn Stahl, "The foundation of a job oriented career system is a position-classification plan. Such a plan is a prerequisite for any system that regards the nature and content of each position as central to good organisation and to motivation based on the work to be performed." Thus, position-classification is the organisation of all jobs in

³⁶⁶ Mohit Bhattacharya, *Public Administration*, 173 (World Press, Kolkata, 8th ed. 2012)

an enterprise into groups or classes on the basis of their duties, responsibilities and qualification requirements.³⁶⁷

The prevailing bases for position classification are educational qualifications of the incumbents, competence on the job, level of responsibility attached to the job, length of service, rank and personal status of the employee, etc. The precise mix of these depends on a country's administrative value system and culture. There are two well-known systems of classification of positions, viz., rank qualification and duties classification.

a. Rank Qualification – Here the basis of qualification is the rank and personal status of the incumbent rather than the precise duties inherent in the post. In India, we find this system of position-classification in the All India Services. This system is advantageous in the sense that it is easier to understand and promotes mobility by facilitating transfers and it encourages career opportunities. It also attracts competent and promising personnel and at the same time prefers generalists to specialists. However, it violates the principle of equal pay for equal work leading to low morale in the service. Also it overlooks the claims of merit as the basis of holding a particular position, the system being somewhat ascriptive. Moreover, it is not conducive to the formulation of scientific standards on which selection of personnel, training, transfer, posting, promotion, career development may be organised.

b. Duties Classification – Traditionally, the object of 'duties classification' has been to provide 'equal pay for equal work'. In this system, the emphasis is on individual positions in the hierarchy. Each position represents certain well-defined duties and responsibilities; the latter two terms signifying the work assigned to a position and the matters for which an employee is held accountable. A position must remain differentiated from its occupant. The different criteria for evaluation of jobs for purpose of determining their class are: (a) nature of occupational fields, (b) complexity and difficulty in performing duties, (c) scope of responsibility and (d) knowledge and skill needed to do the job.

According to Glenn Stahl, there are four steps in the development of a position classification system: (a) analysing and recording the duties and other distinctive characteristics of the position to be classified (job analysis and description), (b) grouping the positions into classes upon the bases of their similarities, (c) writing such standards

³⁶⁷ Id at 174

or specifications for each class of positions as will indicate its character positions to the class and in recruitment and examination, and (d) installation by allocating individual positions to the classes thus described.³⁶⁸

The present chapter elaborates the position classification under various public institutions and the rules relating to the modes as to how the personnel climb up the ladder of the service taking 'seniority' into consideration. In this chapter, some of the departments of the government service and public institutions have been intentionally chosen for the purpose of elaborate study. Each of the department in the service has been categorised according to hierarchy of its grades and Rules and Regulations have been discussed, according to which personnel is promoted in the upper grades with reference to seniority norms.

4.2. The All India Services and Other Civil Services

There are three categories of the services under the Constitution:

- (a) Services under the Union
- (b) Services under the States
- (c) The All India Services (the IAS, the IPS and the IFS)

Article 309 of the Constitution of India lays down that statutes enacted by the appropriate legislature may regulate the recruitment and conditions of service of the employees as employed under the Services of the State.

Similarly, Article 312 says that parliament may by law regulate the recruitment and the conditions of service of persons appointed to the All India Services. The present research is more concerned with Article 312 of the Constitution.

In the pre-independence period, two services called (i) the Indian Civil Service (ICS) and (ii) the Indian Police Service (IPS) were in existence in India. The Indian Independence Act, enacted by the British Parliament and the promulgation of India (Provisional Constitution) Order, 1947, brought the end of the tenure of the members of these services, contractual as well as statutory. The Viceroy of India issued a proclamation on 30-4-1947 to the effect that as a consequence of transfer of power to the Indian government the tenure of service under the crown comes to an end and that the continuance of persons either in the service of the Indian government or of any state government is left to the desire of the officer concerned and to the decision of the government concerned to continue them in service. The

³⁶⁸ Id at 175

continuance of service of officers was contemplated only in respect of such of the previous servants who had intimated their desire for the continuance of their services under the new government and whose offer in this respect was accepted.³⁶⁹ The effect of the provisions of the notification dated 30-4-1947 and the subsequent offer made by the Government of India to the individual officers concerned was that the discontinuance of service could be brought about by the option of either a member of the service or by the government but the continuance of the service was a matter which depended upon the mutual consent of both the individual servant and the government concerned. The Government of India gave the option to the officers of the ICS and the members of the IPS to continue in the service and out of the persons who exercised their option the government accepted the option of such of the officers whom it thought fit and suitable to continue in service.

Even prior to the independence of the country, in a conference held under the chairmanship of Sardar Vallabhbhai Patel, a decision had been taken to create two all India services such as Indian Administrative Service and Indian Police Service to replace the former Indian Civil Service and Indian Police Service. It was further decided that the recruitment to these two services should be made through Federal Public Service Commission on the basis of annual competitive examination. In the very same meeting, a further decision had been taken that the maximum of 25% of the cadre posts in All India Services should be thrown open to the state civil service officers and state police officers of outstanding merit. In pursuance of the aforesaid decision, the two all India services were formed and they were put on statutory basis under the Indian Civil Administrative Service Cadre Rules, 1950.³⁷⁰ As a result, even prior to the commencement of the Constitution, there were two all-India services, viz.. IAS and the IPS. On adoption of Constitution of India on 26 January 1950, these services were recognized under clause (2) of article 312 of the Constitution. In addition, such members of the former ICS and IPS who had been appointed by the secretary of state in council before independence who continued to serve under the government of India were also given protection regarding their conditions of service vide article 314.³⁷¹ Subsequently, the Parliament passed the All India Services Act, 1951.

³⁶⁹ M. Rama Jois, *Services Under the State*, 393 (Indian Law Institute, New Delhi, 2007)

³⁷⁰ *GudurKishan Rao vs. Sutirtha Bhattachaarya*, (1998) 4 SCC 189. See also *State of Madras vs. Raja Gopalan*, AIR 1955 SC 817; *Taraknath vs. State of Bihar*, AIR 1968 SC 1372bid

³⁷¹ *R. P. Kapoor vs. Union of India*, AIR 1964 SC 787 (However, Article 314 was omitted by the Constitution (Twenty-Eighth) Amendment, Act, 1972)

4.2.1. The All-India Services Act, 1951 and Rules and Regulations Appurtenant to It

The recruitment and conditions of services in respect of the All-India Services, vis., Indian Administrative Service, Indian Police Service and the Indian Forest Service, are regulated by the All India Services Act, 1951, and Rules and Regulations made under it. The Constitution has made special provision for the constitution of All-India Services as a service common to the Union and the States, in addition to the services under the respective state government. Article 312 of the Constitution makes specific provision for the creation of the All-India Services by parliament if the council of states has declared by not less than two-thirds of the members present and voting that it is necessary in the national interest that in respect of a particular service an All-India cadre of officers should be constituted, Parliament can do so.

As a result, by exercising the powers conferred under Article 312, the All India Services Act, 1951 was enacted by the Parliament. Before enacting the said law, the necessity of the resolution of the Council of States as required by the under Article 312 was dispensed with by the President of India in exercise of his powers of removal of difficulties under Article 392. Dispensing with the necessity of resolution of the Council of States for the Constitution of All- India Services was within the competence of the President and therefore, it was competent for the Parliament to have enacted the said law without the resolution of the Council of States. The said Act came into force on and from 29 October, 1951 and the Statement of Object of the Act states that the purpose of the enactment of the Act was to “regulate the recruitment, and the conditions of service of persons appointed, to All-India Service common to the Union and the States.”

Section 3 of the said Act empowers the Central Government to make rules for the regulation of recruitment, and other conditions of service like promotion, seniority, retirement benefits, etc. of persons appointed to an All-India Service after consultation with the concerned State Governments including the Government of the State of Jammu and Kashmir.³⁷² Henceforth, all rules, regulations and by-laws made in relation to the

³⁷² Section 3 of the All India Services Act, 1951: **Regulation of recruitment and conditions of service**–
(1) The Central Government may, after consultation with the Governments of the State concerned, [including the State of Jammu and Kashmir [and by notification in the official Gazette] make rules for the regulation of recruitment, and the conditions of service of persons appointed to an All-India Service.

[(1A) The power to make rules conferred by this section shall include the power to give retrospective effect from a date not earlier than the date of commencement of this Act, to the rules or any

All-India Services shall may be made in the touchstone of the Section 3 of the All-India Services Act, 1951. In exercise of the power under Section 3 of this Act, the recruitment rules, the cadre rules, the promotion and seniority rules, the All-India Service (Conditions of Service- Residuary Matters) Rules, 1960 have been made the central Government. The cadre rules enable the central government to determine the strength and composition of the cadre in each state by framing regulations and in exercise of such power, the Cadre Strength Regulations, 1955 have been framed by the central government and not only the total authorised strength of the cadre for each state has been indicated but also it indicates the number of posts for different categories of posts within the cadre. Thus, the Act, rules and regulations are a complete set of provisions dealing with different aspects of the service conditions to the Indian Administrative Service and the entire scheme contained in these rules and regulations have to be borne in mind while deciding the issues involved in this case.³⁷³

Apart from the Indian administrative service and Indian police service, three more All-India Services were created, by the All-India Services (Amendment) Act, 1963, namely:

- (i) The Indian Forest Service
- (ii) The Indian Medical and Health Services
- (iii) The Indian Service of Engineers (Irrigation, Power, Building and Road)

After this amendment to the All-India Services Act, recruitment rules have been framed for purposes of recruitment to the Indian forest service. Under these rules, initial recruitment regulations to the Indian Forest Service were also framed in the year 1966 and recruitments have been made.³⁷⁴

Though the rules have been framed for regulating recruitment to the Indian Medical Services, the recruitment to this service has not yet taken place and the said service has not come into existence. Nor has the Indian Service of Engineers been constituted; the relevant rules have not been even framed.

of them but no retrospective effect shall be given to any rule so as to prejudicially affect the interests of any person to whom such rule may be applicable.]

³⁷³ Supra n. 370

³⁷⁴ *A.K. Kraipak vs. Union of India*, AIR 1970 SC 150

a. Regulation of Recruitment and Conditions of Service

Article 312, which is a special provision regulating recruitment and conditions of service relating to All-India Services, confers on parliament to make law regulating recruitment and conditions of service of persons appointed to the All India Services. While there is reference to all-India service in articles 310 and 311, there is no reference to it in article 309. Therefore, matters relating to recruitment and conditions of service in relation to all-India services have to be regulated differently than those under Article 309, by legislation by parliament.

Repugnancy between the All-India Services Act and state enactments

It is for the Parliament to control and regulate the conditions of service of all those persons who are appointed to the All India Services. This can be done by enacting laws as envisaged under Article 312 of the Constitution of India. Therefore, disciplinary proceeding against members of all-India services being a matter relating to conditions of service, it can be regulated only by law made by parliament or the rules framed there under. Any law made by the state legislature, which deals with the institution of disciplinary proceedings against members of all-India service, which is repugnant to the discipline and appeal rules, framed under the All-India Services Act, cannot operate against the members of the All India Services.³⁷⁵

b. Method of recruitment

In exercise of the powers conferred by the All India Services Act, 1951, the Government of India has framed the following rules for appointment to the All India Services:

1. IAS (Recruitment) Rules, 1954
2. IPS (Recruitment) Rules, 1954
3. IPS (Recruitment) Rules, 1966

Besides, in exercise of the powers conferred by the above three rules, the Government of India has enacted another set of regulations for appointment to the IAS, the IPS and the IPS by different modes. For example, different modes of appointment to IAS are as follows:

³⁷⁵ *State of Jammu & Kashmir vs. M.S. Farooqui*, AIR 1972 SC 1738

1. Direct recruitment
2. By promotion from the State Civil Services
3. By selection from outside the State Civil Services

The appointment to IPS and IFS is made by direct recruitment and promotion only.

The direct recruitment to IAS, IPS and IFS is governed by the following three regulations respectively:

1. IAS (Appointment by Competitive Examination) Regulations, 1955
2. IPS (Appointment by Competitive Examination) Regulations, 1955
3. IFS (Appointment by Competitive Examination) Regulations, 1966

i. Appointment By Direct Recruitment

Before a person is appointed to the IAS, the IPS and the IFS by direct recruitment through competitive examination conducted by the UPSC, he/she is required to satisfy the following six conditions:

1. He/she must be an Indian national.
2. He/she must be having only one spouse living at the time of appointment.
3. He/she must not be below 21 years of age and above 30 years of age on the first day of August for IAS and IPS and the first day of July for IFS in the year in which the examination is supposed to be held. However, there is an age relaxation of five years in case of SC/ST officers and of three years in case of OBCs in the upper-limit.
4. Educational qualification: For IAS and IPS the candidate must hold a Bachelor's degree of any university or its equivalent as laid down in the notification. In case of IFS, the candidate must hold a Bachelor's Degree with at least one of the subjects, namely, Botany, Chemistry, Forestry, Geology, Mathematics, Physics, Statistics and Zoology, or a Bachelor's degree in Agriculture, or in Engineering of any University.
5. Medical fitness

6. Character and antecedents

7. Non-indulgence in malpractices, which include applying pressure, submitting fabricated documents, making incorrect statements, copying in examinations, using unfair means in examination, misbehaving in examination hall, etc.

ii. Appointment by Promotion

Promotion to IAS from the State Civil Services is governed by two sets of rules: (1) IAS (Recruitment) Rules, 1954 and IAS (Appointment by Promotions) Regulations, 1955. After the vacancies have been determined in terms of the IAS (Fixation of Cadre Strength) Regulations 1955, a quota for direct recruitment and by promotion and selection is fixed in the following manner:

1. 66% per cent of the vacancies by direct recruitment
2. 33¹/₃ per cent of the vacancies by promotion and selection
 - (a) 85 per cent of 33¹/₃ per cent are earmarked for promotion of candidate from State Civil Services; and
 - (b) 15 per cent of the 33¹/₃ per cent are earmarked for recruitment by selection from gazetted officers serving under the State Governments.³⁷⁶

The procedure as laid down in rules can be described under the following sub-heads:

(a) List of Suitable Officers

First of all, a list of suitable officers borne on the State Civil Service cadre is prepared in the order of seniority and fitness of the officers who have not crossed the age of 54 years and whose record is otherwise clean. However, a member of the State Civil Service whose name appears in the select list in force immediately before the date of the meeting shall be considered for inclusion in the fresh list even if he/she has, in the meanwhile, attained the age of 54 years. Also, if a member of the State Civil Service who has attained the age of 54 years on the 1st January of the year in which the Select Committee shall meet shall be considered if he/she was eligible for consideration on the 1st April of the years or of any of the years immediately preceding the year in which such meeting is

³⁷⁶ Rule 9, IAS (Recruitment) Rules, 1954

held ^but could not be considered as no meeting was held during such preceding year or years. In order to select candidates from this list a Select Committee is constituted.

(b) Select Committee

Under regulation 3, there shall be constituted a State Cadre or a Joint Cadre as specified in column 2 of the Schedule a Select Committee consisting of the Chairman of the Union Public Service Commission (UPSC) or where the Chairman is unable to attend, any other member of the Commission representing it and other members specified in the corresponding entry of column 3 of the said Schedule. In Andhra Pradesh, for example, the other members of the committee than the Chairman are as follows:

- (i) Chief Secretary to the Government of Andhra Pradesh.
- (ii) Commissioner of Land Revenue/any other Commissioner to be nominated by the State Government.
- (iii) Principal Secretary or Secretary to the Government of Andhra Pradesh in the Revenue Department to be nominated by the State Government,
- (iv) Any other Commissioner or Secretary to the Government in the supertime scale of pay of the service or above to be nominated by the State Government.
- (v) Two nominees of the Government of India not below the rank of a Joint Secretary.

The chairman or the member of the UPSC shall preside at all meetings of the committee, at which he is present. However, the absence of a member, other than the Chairman or member of the Commission, shall not invalidate the proceedings of the committee if more than half the members of the Committee had attended its meetings.

(c) Estimate of Vacancies

The number of vacancies for promotion, existing as on 1st January of any year, are only considered for promotion in that year. The anticipated forthcoming vacancies of the year, in which selection is made, are not counted for the purpose. Thus, it is very clear that only the vacancies that have occurred prior to 1 st January of the year are filled up in the current year for promotion.

(d) The Reserve

Previously, there used to be a reserve of 20 per cent of the estimated vacancies or two vacancies whichever is higher. But, consequent upon the amendment in these regulations, the provision for maintaining a reserve has been deleted with effect from 1 January 1998.

(e) Presumption of a List of Suitable Officers

Regulation 5 of the Indian Administrative Services (Appointment by Promotion) Regulations, 1955 and the Indian Police Service (Appointment by Promotion) Regulations, 1955, lays down the details of the procedure for preparation of the Select List for promotion in the Indian Administrative Services and the Indian Police Service. Members of State Civil Service who are found suitable for promotion are shortlisted and a selection list is drawn accordingly. This list is prepared by the Select Committee which shall ordinarily meet at least once annually.

(f) Zone of Consideration

For preparing the tentative select list, members who are elected from the State Civil Service, shall be considered in the order of their seniority. The total number of member selected must be three times the number of estimated vacancies. If the total number of selected officers is less than three times the maximum permissible size of the select list, then the committee has to consider all the eligible officers.

(g) Minimum Qualifying Service

A minimum of not less than eight years of continuous service (whether officiating or substantive) in the post of Deputy Collector or in any other post or posts declared equivalent thereto by the State Government as the minimum qualifying service for promotion to IAS provided that in respect of any released Emergency Commissioned or Short Service Commissioned Officers appointed to the State Civil Service, eight years of continuous service as required under the preceding proviso shall be counted from the deemed date of their appointment to that service, subject to the condition that such officers shall be eligible for consideration if they have completed no less than four years of actual continuous service, on the 1st of April of the year in which the committee

meets, in the post of Deputy Collector or in any other post or posts declared equivalent thereto by the State Government.

(h) Integrity Certificate

On the basis of the recommendations of the Committee on the Prevention of Corruption, it has been decided that an integrity certificate should be recorded by the Chief Secretary to the State Government, who is the sponsoring authority in respect of all eligible officers whose cases are placed before the Select Committee for consideration.

The Select Committee should also consider the question of suitability of the officers with reference to their integrity and should specially record in their proceeding that they were satisfied from the remarks in the confidential reports that there was nothing against their integrity.

i. Classification of Selected Officers

Regulation 5 of the Indian Administrative Services (Appointment by Promotion) Regulations, 1955 and the Indian Police Service (Appointment by Promotion) Regulations, 1955, lays down the details of the procedure for preparation of the Select List for promotion in the Indian Administrative Services and the Indian Police Service. It states that each Select Committee shall ordinarily meet every year and prepare a list of such members of the State Civil Service or State Police Service as are held by them to be suitable for promotion to the Service. The number of members of the State Civil Service or State Police Service to be included in the list is to be determined by the Central Government in consultation with the State Government concerned and shall not exceed the number of the substantive vacancies as on the first day of January of the year in which the meeting is held in the posts available for them under Rule 9 of the Recruitment Rules.³⁷⁷

The Select Committee shall classify the eligible officers as 'outstanding', 'very good', 'good' or 'unfit' as the case may be, on an overall relative assessment of their service records.

This list is prepared by including the required number of names. The names are classified as 'outstanding' followed by 'very good' and 'good'. Within each of the

³⁷⁷R. 5(1), Indian Administrative Services (Appointment by Promotion) Regulations, 1955 and Indian Police Service (Appointment by Promotions) Regulations, 1955

categories again, the names of the officials are arranged according to their seniority in the State Civil Service.

However, the name of any officer so included in the list, shall be treated as provisional if the State Government withholds the integrity certificate in respect of such officer or any proceedings are contemplated or pending against him/her or anything adverse against him/her has come to the notice of the State Government.³⁷⁸

The list so prepared shall be reviewed and revised every year. It remains valid until the proceedings of the new Select Committee for a succeeding year are approved by the UPSC. In other words, the list is valid only for one year or till such time a new Select Committee finalizes its proceedings. The review and revision can also take place earlier than one year. These select lists are used for making substantive appointments to the cadre posts as well as appointments to IAS.

The State Government shall then forward this list to the UPSC along with:

- (i) records of all members of the State Civil Service included in the list;
- (ii) record of all members of the State Civil Service who are proposed to be superseded by the recommendations made in the list; and
- (iii) the observations of the State Government on the recommendations of the Select Committee.

The State Government shall also forward a copy of the list to the Central Government for obtaining its observations on the recommendations of the Select Committee. After the UPSC accords its approval to the list, the Government of India issues appointment order and allots them to the cadre of the state concerned and also fixes their seniority in accordance with Regulation of 1987.

If in the opinion of the Central Government, it is necessary or expedient so to do in public interest it may not appoint an officer included in the select list. This decision shall be made in consultation with the UPSC.

³⁷⁸ R. 5(4) and 5(5), Indian Administrative Services (Appointment by Promotion) Regulations, 1955 and Indian Police Service (Appointment by Promotions) Regulations, 1955

While preparing the Select List for promotion it is necessary that the cases of members of the State Civil Services or the State Police Service shall be considered in the order of seniority in that service and the number for consideration shall be three times the number referred in R. 5(1).³⁷⁹

Generally, a member who has attained the age of fifty four years shall not be considered to be included in the Select List; but, if he will be considered for inclusion in the List if, on the first day of January of the year of preparation of the Select List of the preceding years, he was eligible for consideration.³⁸⁰

There should be a rational nexus between the facts considered and the conclusions reached. Only in this way, opinions or decisions recorded can be shown to be manifestly just and reasonable.³⁸¹

The same rules as noted above apply to appointment by promotion to Indian Police Service (IPS) and Indian Forest Service (IFS) as well. The only difference is that the feeder category in case of IPS consists of the State Police Service officers and other categories declared equivalent by the Government of India and in the case of IFS the State Forest Service officers and any service in such Central Civil Posts, Class I and II connected with Forestry, as may be approved by the Central Government for the purpose of these rules. As already stated above, there is no appointment by selection to IPS and IFS.

To conclude, it can be stated that in the service law of the All India Services relating to appointments, the possibility of any intervention by the external forces is unlikely in case of direct recruitment. However, in case of promotion, there is a possibility, in a lesser degree, to manipulate the system. This can be achieved by: (i) not convening the Select Committee for a couple of years in a row; and (ii) initiate disciplinary enquiries against the feeder category officers on fictitious grounds and later on dropping the charges after the Select Committee meeting is over.

³⁷⁹ R. 5(2), Indian Administrative Services (Appointment by Promotion) Regulations, 1955 and Indian Police Service (Appointment by Promotions) Regulations, 1955

³⁸⁰ Proviso to R. 5(2), Indian Administrative Services (Appointment by Promotion) Regulations, 1955 and Indian Police Service (Appointment by Promotions) Regulations, 1955;

³⁸¹ *Union of India vs. M.L. Kapoor*, AIR 1974 SC 87

c. Procedure for Selection and Appointment

i. Selection by merit with due regard to seniority

According to Regulation 5 of the IAS Promotion Regulations, all eligible candidates have to face competitive as well as comparative test so that their names may be included in the list of selected candidates. It is not about merely securing a minimum pass marks at an examination. The power to choose the best available talent from amongst the eligible candidates is vested in the selection committee. By assessing the service record of an employee the determination of eligible candidates is made by the Selection Committee. Merit is the governing factor for inclusion in the select list and not seniority. But in making the selection, seniority must play its due role and it should be one of several factors affecting assessment of merit, as comparative experience should be.³⁸² There should be a certain number of marks allotted for purpose of facilitating valuation of each year of experience gained in the service. After the completion of the selection of candidates for inclusion in the list is completed in the above manner the rest of the matter, namely, the arrangement of names has to be in the order of seniority in the said civil service.³⁸³

Thus, a member of the state service can be appointed to the IAS or IPS only if his name appears in the select list. Merely because vacancies exist in the quota allotted to the promotees for appointment among the members of the state civil service, it does not entitle a person to be appointed to the Indian Administrative Service or to the Indian Police Service from the date when the vacancies became available. No member on the select list can claim as of right to be appointed to the Indian Administrative Service. He has the chance of appointment as long as his name remains in the list. Persons included in list II under the IPS scheme as extended to PEPSU had no right to be absorbed in the IPS. All that the scheme provided was that if they were found fit within five years they would be absorbed in the All-India service cadre. They had no right to continue even if the posts become unavailable owing to the return of senior officer.³⁸⁴

³⁸² Regulation 5(2) of the Indian Administrative Service (Appointment by Promotions) Regulations, 1955 and the Indian Police Service (Appointment by Promotions) Regulations, 1955

³⁸³ *K.D. Vasudeva vs. Union of India*, SLR 1971 P & H 487; *Sukhdev Prasad vs. Union of India*, SLR 1971 P & H 895

³⁸⁴ *Gurudev Singh vs. State of Punjab*, SLR 1971 SC 164

i. No right of appointment to senior scale

An officer in the junior scale of IAS has no right to be appointed to senior post as soon as he joins his service. He may be appointed to the senior post only if he is found suitable having regard to the length of service, experience and performance in the junior scale. According to rule 9(1) of the Indian Administrative Service Cadre Rules, a senior cadre post may be filled up by a non-cadre officer if there is no suitable officer available for filling the vacancy. Similar provision is found in para 3 of the memorandum regarding the constitution of the IAS. The cadre officer, therefore, has no right to fill the vacancy if he is not found suitable. The filling up of the vacancy by non-cadre officer under rule 9 does not infringe any right of the cadre officer, nor does it amount to withholding of promotion within the meaning of rule 3 of the All-India Services (Discipline and Appeal) Rules.³⁸⁵

ii. Retrospective appointment impermissible

Neither in the All-India Service Act nor under any of the rules framed there under is there any provision authorizing the central government to make appointment of officers from the select list from a date earlier than the actual date of passing the orders. In the absence of such powers, it is not competent for the central government to ante-date the appointment.

iii. Joint cadre for IAS for the Union Territories

On the coming into force of the Constitution Seventh Amendment Act, 1956 with effect from 1 November, 1956, the President had the power to adopt the laws for the purpose of bringing the provisions of any law in force in India in respect of the union territories. Further, the new clause (58) introduced into section 3 of the General Clauses Act, states that the word 'state' shall as respects any period after the commencement of the Constitution Amendment Act means 'a state specified in the first schedule to the Constitution and shall include a union territory'. Therefore, it was competent for the President to constitute a joint cadre of IAS for union territory under the provisions of All-India Services Act, 1951. All-India Services Act as also rule 4(5) of the Indian

³⁸⁵ A.P. Saxena, Supra n. 384

Administrative Services Recruitment) Rules providing for constitution of joint IAS for the union territories is *intra vires* the Constitution.³⁸⁶

d. Regulation of Cadres

i. State Cadre

The services, namely, the IAS, the IPS and the IFS, have a unique feature - though they are called All India Services, after one's selection, he/she is allotted to a particular State or Union Territory, which is called a State Cadre. The allotment and future mobility to other cadre and posts are regulated by the respective rules as under:

1. The IAS (Cadre) Rules, 1954
2. The IPS (Cadre) Rules, 1954
3. The IFS (Cadre) Rules, 1966

Under these rules, apart from three regulations, namely, the IAS (Fixation of Cadre Strength) Regulations, 1955, the IPS (Fixation of Cadre Strength) Regulations 1955 and the IFS (Fixation of Cadre Strength) Regulations 1966, All India Services (joint Cadre) Rules, 1972 also govern the allocation of All India Service officers to joint cadres.

ii. Constitution of Cadre

According to Cadre Rules, there shall be constituted for each State or a group of states an Indian Administrative Service Cadre that shall be referred to as a State Cadre. At present, there are 24 such cadres for each of the three All India Services, of which, 21 are State Cadres and the remaining three joint cadres.

e. Fixation of seniority

After a person is appointed to IAS either by way of direct recruitment or promotion or selection, he/she needs to be given a year of allotment which constitutes his/her seniority. This procedure is regulated by the IAS (Regulation of Seniority) Rules, 1987, the IPS (Regulation of Seniority) Rules 1998 and the IFS (Regulation of Seniority) Rules, 1997 as the case may be.

³⁸⁶ *Union of India vs. Prem Kumar Jain*, AIR 1979 SC 1856

i. Seniority of Direct Recruits

The year of allotment of a direct recruit officer shall be the year following the year in which the competitive examination was held. If an officer joins probationary training a year later then he/she shall be assigned that subsequent year as the year of allotment. Rule 3(3) provides that the year of allotment of a direct recruit officer shall be the year following the year in which the competitive examination was held.

The Indian Administrative Service (Regulation of Seniority) Rules, 1954 was repealed and replaced by the Indian Administrative Service (Regulation of Seniority) Rules, 1987, which came into force from November 6, 1987. Rule 3 (3)³⁸⁷ of the Indian Administrative Service (Regulation of Seniority) Rules, 1987 lays down new principles for assignment of year of allotment. They are as follows:

(i) The year of allotment of a direct recruit officer shall be the year following the year in which the competitive examination was held provided that if a direct recruit officer is permitted to join probationary training under rule 5 (1) of the IAS (Probation) Rules, 1954, with direct recruit officer of a subsequent year of allotment, then he shall be assigned that subsequent year as the year of allotment.³⁸⁸

ii. Seniority of Promoted Officers

The year of allotment of a promoted officer shall be determined with reference to the year for which the meeting of the Select Committee was held and also with reference to the length of continuous service rendered by him in the feeder category up to the 31st December immediately before the year of Select Committee meeting." When an official has rendered his service for 21 years, he/she shall be awarded a weight of one year for every completed three years of service. Beyond the period of 21 years another weight of one year for every completed two years shall be given subject to a maximum of three years provided that he/she shall not be assigned a year of allotment earlier than the year of allotment assigned to an officer senior to him in that select list or appointed to the service on the basis of an earlier select list.

Under rule 3 of the IAS (Regulation of Seniority) Rules, 1954 the assignment of year of allotment to a member of the service by the central government is final. A decision of

³⁸⁷ Indian Administrative Services (Regulation of Seniority) Rules, 1987, Indian Police Services(Regulation of Seniority) Rules, 1988, Indian Forest Services (Regulation of Seniority) Rules, 1997

³⁸⁸ R. 3(3)(i)

the central government assigning the year of allotment cannot be interfered with unless the decision is found to be capricious or arbitrary.³⁸⁹

A promotee shall not be assigned a year of allotment earlier than the year of allotment assigned to an officer senior to him in that select list or appointed to the service on the basis of an earlier select list.

(ii) The year of allotment of a promotee officer as well as an officer appointed by selection shall be determined in the following manner:

(a) In the case of a promotee officer, for the service rendered by him in the state civil service upto twelve years, in the rank not below that of a deputy collector or equivalent, he shall be given a weightage of four years towards fixation of the year of allotment. Same is the position even in the case of an officer appointed by selection that he shall be given a weightage of four years towards fixation of the year of allotment for the first 12 years of gazetted service.

(b) Beyond the period of twelve years, a weightage of one year is awarded to an official for every completed three years of service. This is however, subject to a weightage of maximum of five years. In this calculation, fractions are to be ignored. The weightage mentioned in these clauses [i.e., sub-clause (b) of clause (ii) of Rule 3 (3), and sub-clause (b) of clause (iii) of Rule 3 (3)] shall be calculated with effect from the year in which the officerconcerned is appointed to the service.

In the case of a promotee officer, he shall not be assigned a year of allotment earlier than the year of allotment assigned to an officer senior to him in that select list of appointment to the service on the basis of an earlier select list, and in the case of an officer appointed by selection, he shall be not become senior to another non state civil service officer already appointed to the service. Further, that he shall not be allotted a year earlier than the year of allotment assigned to an officer already appointed to the service in accordance with sub-rule (1) of rule 8 of the Recruitment Rules, whose length of class I continuous service in the state civil service is equal to or more than the length of class I continuous service of the former in connection with the affairs of the state.

³⁸⁹ R. 3(3)(ii)

The year of allotment, in terms of these new principles, can be assigned only to those officers appointed to the service after the commencement of these rules (i.e., New Seniority Rules, 1987). But, the year of allotment of an officer in service at the commencement of these rules shall be the same as has been assigned to him or may be "assigned to him by the central government in accordance with the orders and instructions in force immediately before the commencement of these rules.

It appears from rule 3 (3) (b) and rule 4 (4) of the Indian Police Services (Regulation of Seniority) Rules, 1954, that the order in the select list is irrelevant for the purpose of determining the year of allotment and is relevant in determining the seniority, only if the year of allotment of the officers is the same and their date of appointment is also the same. Since the order in the select list is dependent on the seniority in the state service, it follows that the seniority in the state police service is irrelevant for the purpose of determining the year of allotment and is relevant for the purpose of determining seniority only if the year of allotment and the date of appointment of two or more officers are the same. It must, therefore, necessarily follow that an officer who is a junior to another in the state police service, but starts continuous officiation in a senior post from a date earlier than the other may frog - leap and gain seniority by the consequential assignment of an earlier year of allotment.³⁹⁰

Assigning Year of Allotment by the Date of Continuous Officiation

According to the IPS (Regulation of Seniority) Rules, the only basis for the purpose of assigning year of allotment to the members of the service, is the date of continuous officiation in a senior post. The date of appointment to the service constitutes the basis when the date of commencement of continuous officiation in senior post of more than one officer is the same. When the date of appointment of more than one officer is also the same the order in which the names are arranged in the select list constitutes the basis. Whatever be the reason if an officer junior to another in the state service begins to officiate in a senior post earlier than his senior; he is entitled to the assignment of year of allotment on the basis of such continuous officiation. There is nothing in the rules, which deprives the officer the benefits of continuous officiation in a senior post on the ground that an officer senior to him in the state service did not officiate in a senior post from an earlier date.

³⁹⁰ *Harjeet Singh vs. Union of India*, (1980) 3 SCC 205

According to the rules regulating fixation of seniority of the IPS, officers recruited in three different methods are categorised into three separate groups and under the scheme of the seniority rules, officers in group-I are senior to group-II and officers in group-II are senior to group-III. An officer falling in group-III cannot claim seniority over officers in group-II on the ground that his continuous officiation in a senior post was longer. On the same basis, officers recruited to group-II cannot claim seniority over those recruited to Group-I.³⁹¹

Year of allotment - Indian Forest Service

According to rule 3(2)(C) of the Indian Forest Service (Regulation of Seniority) Rules, 1968, the year of allotment in respect of an officer appointed by promotion shall be the same as of the junior most officers recruited to the service in accordance with rule 7. Therefore, the year of allotment made in respect of a person recruited by promotion having due regard to the above rule is valid. In order that the period of officiation should count for purpose of seniority, the post in which the officer was officiating must be a cadre post. If it is found that the post against which the officer officiated was not a cadre post, the officiation against such post does not count for seniority.³⁹²

Further, since the question of year of allotment for the direct recruits and also for the promotees to the Indian forest service are regulated by the statutory rules of all India services relating to the Indian forest service and the central government is the statutory authority to determine such year of allotment, any petition filed before the CAT raising dispute regarding year of allotment, even before such determination of year of allotment by the central government, is said to have been misconceived and premature.

A special proviso has been included in the IPS seniority Rules regarding the assignment of seniority of the officers of the Nagaland Cadre. In relation to the State of Nagaland, the year of allotment and the seniority of officers appointed to the service at the time of the initial constitution of the State Cadre shall be determined by the Central Government in the following manner:

“The year of allotment and seniority shall be determined ad-hoc, in consultation with the Union Public Service Commission and the State Government, after taking into account

³⁹¹ *Tribhuvannath Bhargava vs. Union of India*, SLR 1977 (1) Del 291

³⁹² *A.S. Ananthasubramonian vs. State of Kerala*, SLR 1978 (1) Ker 72

the length of Service and the responsibilities of posts held by the officer as reflected in pay or nature of duties, or in both:

The year of allotment of an officer so arrived at shall be limited to the year to which his immediate senior in the Nagaland State Police Service, who is selected to the Indian Police Service Cadre of Nagaland, at its initial constitution has been allotted.”³⁹³

iii. Arbitrary date cannot be fixed

In assigning the year of allotment it is not open for the central government to fix an arbitrary date and say that service rendered prior to the said date would not be approved by the second proviso to rule 3(3) (b) of the IPS Seniority Rules, 1954. This is true for the other two All-India Services as well. The period of officiation of a particular officer has to be considered and approved or disapproved by the central government in consultation with the commission considering all the relevant facts. But the central government cannot pick out an arbitrary date and say that a period prior to the date would not be deemed to be approved by the government within the second proviso.

f. *Inter-se Seniority*

i. Inter-se Seniority of the Officers

While discussing the position of an officer in relation to his promotion and seniority, the matter of relative seniority between the direct recruits and the promotees has cropped up time and again. The inter-se seniority of the officers serving the Indian Police Service, who are assigned the same year of allotment, shall be in the following order and in each category the inter-se seniority shall be determined in the following manner:

- a. Direct recruit officers shall be ranked inter-se in the order of merit as determined in accordance with Rule 10 of the Indian Police Service (Probation) Rules, 1954;
- b. Promotee officers shall be ranked inter-se in the order in which their names are arranged by the Commission for the purpose of appointment to the Service by promotion.³⁹⁴

For the officers of the Indian Administrative Services, the inter-se seniority of the officers who are assigned the same *year of allotment* shall be determined in the following manner:

³⁹³ R. 4A, Indian Police Service (Regulation of Seniority) Rules, 1988. Added vide notification No. 14014/16/86-AIS dated 27-01-1989 (GSR No. 58E dt. 27.01.1989)

³⁹⁴ R. 4, Indian Police Service (Regulation of Seniority) Rules, 1988

1. Direct recruit officers shall be ranked inter-se in the order of merit as determined in accordance with rule 10 of the Indian Administrative Service (Probation) Rules, 1954;
2. Promotee officers shall be ranked inter-se in the order in which their names are arranged by the Commission for the purpose of appointment to the Service by promotion,
3. Officers appointed by selection shall be ranked inter-se in the order in which their names are arranged by the Commission for the purpose of appointment to the Service by selection.

g. *Gradation List*

There shall be prepared every year for each State Cadre and Joint Cadre a gradation list consisting of the names of all officers borne on the cadre arranged in order of seniority.

h. *Inter-Cadre Transfer*

The seniority of an officer appointed through direct recruitment, promotion or selection will be decided by the year of allotment given to him/her in home cadre and it will not change in spite of his/her transfer to another state. However, the officers shall be ranked inter-se with their respective categories in the state to which they are transferred.

4.2.2. The Civil Services of India

The Civil Services at the Centre are organised into four groups, viz. Group 'A' (which includes All India and Central Services), Group 'B', Group 'C' and Group 'D'. The Central Civil Services, Group A, Group B, Group C and Group D shall consist of the services and grades of services specified in the Schedule provided in the Central Civil Services (Classification, Control and Appeal) Rules, 1965³⁹⁵. This classification broadly is based on the rank, status and degree of responsibility attached to the posts. Group 'A' posts carry higher administrative and executive responsibilities and include senior management positions in Ministries/Departments and field formations. The junior level of Group 'A' along with Group 'B' constitute the middle level in the government. Group 'C' staff perform certain supervisory as well as operative tasks and also renders clerical assistance. Group 'D' posts are meant for carrying out routine duties and other supporting functions. The functions performed by the Group B, C and D officers and staff are varied and range from general administration, to specialized and technical

³⁹⁵ Rule 5, The Central Civil Services (Classification, Control and Appeal) Rules, 1965

functions. There are also intra group variations in each of these categories depending on the ministry, department, organization they are working for and this is reflected in different designations and functions within each group.

The Department of Personnel and Training is the coordinating agency of the Central Government which is concerned with the formulation of policy and the watchdog of the Government ensuring that certain accepted standards and norms, as laid down by it, are followed by all ministries/departments in the recruitment, regulation of service conditions and posting transfers and deputation of personnel as well as other related issues. It solely controls the cadres of the Indian Administrative Service and the Central Secretariat Service. The Department is supervised and controlled by the Ministry of Personnel, Public Grievances and Pensions.

In performing its duties, the Department issues guidelines for the benefit of all Ministries/Departments and it monitors the implementation of these guidelines. It also advises all organisations of the Central Government on issues of personnel management. At a more immediate level, the Department has the direct responsibility of being the cadre controlling authority for the IAS and the three Secretariat Services in the Central Secretariat. The Department also operates the Central Staffing Scheme under which suitable officers from All India Services and Group 'A' Central Services are selected and then placed in posts at the level of Deputy Secretary/Director and Joint Secretary. The Department also deals with cases of appointment to posts of Chairman, Managing Director, full-time functional Director/Member of the Board of Management of various Public Sector Undertakings/Enterprises, Corporations, Banks and financial institutions. It deals with the assignment of Indian experts to various developing countries. It is also responsible for formulation and coordination of training policies of the All India and Central Services and providing support for the capacity building of the State Government Officials.

a. The Central Secretariat Service

Prior to 1947, the Indian Civil Service (known as the 'ICS') was the implementing agency for executing the policy directions of Government. At that time there were secretariat offices, whose origins can be traced back to 1919, when the Imperial Secretariat Service came into being as one of the off-shoots of the Llewellyn-Smith Committee, set up on the eve of the Montague-Chelmsford Reforms. The Committee

envisaged a Secretariat Organization in the nature of a pyramid, the apex of which was the "Secretary" and at the base was a body of "Assistant Secretaries" (today known as Section Officers). After Independence, the Secretariat Offices' evolved into the Central Secretariat Service (CSS), which is spread across various Ministries/Departments.

On the role of the CSS the First ARC commented: "At present the higher Services in the Civil Service are ab initio field Services. Their initial deployment is in the field offices of the Central and State Governments. The work relating to policy formulation claims the administrator's time only from about the middle part of his career. There is no class division per se between the policy-formulator and the executive. The system is so designed that the same set of personnel do executive and policy work at different times. The exception is the Central Secretariat Service which forms a large component in the present pattern of staffing of headquarters organisation of the Central Government, though it has not been designed for any executive work."³⁹⁶

Today, the general administration services in the Central Secretariat, which provide support and continuity to the Central Government Secretariat set up, essentially in the Union Ministries, are as under:

Table 4.1 - The Secretariat Services³⁹⁷

Service	Grade	Strength	Total
Central Secretariat Service	Senior Selection Grade (Director) Group A	110	8423
	Selection Grade (Deputy Secretary) Group A	288 (including in-situ)	
	Grade I (Under Secretary) Group A	766	
	Section Officer	2353	
	Assistant	4906	
Central Secretariat	Senior Principal Private Secretary Group A	58	7117

³⁹⁶ Refurbishing of Personnel Administration – Scaling New Heights, Second Administrative Reforms Commission, Tenth Report, November, 2008

³⁹⁷ Retrieved from <http://persmin.nic.in/dopt>

Stenographer Service			
	Principal Private Secretary Group A	107	
	Private Secretary	1390	
	Stenographer Gr. C (PA)	2776	
	Stenographer Grade D		2786
Central Secretariat Clerical Service	Upper Division Clerk (UDC) Lower Division Clerk (LDC)	5535 5580	11115

The CSS provides the permanent bureaucratic set up in the Union Government. Its officers have been selected through the Civil Services Examinations, as well as the all-India graduate level Assistants Grade Examinations, conducted by the UPSC and the SSC respectively.

While the CSS is a general administration service, there are many ministries/ departments, attached and subordinate offices that have large cadres of their own doing specialised and technical functions. These are in the field of taxation, policing, audit, accounts, archaeology, meteorology etc.

The CSS provides a strong framework for the Secretariat of the Union Government, as well as a delivery system for policy formulation, continuity in policy administration, monitoring & review of the implementation of policies/schemes and a coherent institutional memory, which are germane to good governance. In the fast changing socio-economic scenario, CSS officers have to be suitably equipped to meet the emerging challenges. Some of these challenges include speedier decision making process, adapting to modern technological changes, business process re-engineering etc.

i. Recruitment at Group B Level

There is no direct recruitment at present at the Group B (Gazetted) level for either the general administration services or for the specialised services and employees reach this level only by promotion. This is the cutting edge or the visible face of the government

for most cadres. For example, the Group B Officers for the Taxation Department are the Income Tax Officer, Excise and Customs Superintendent and Customs Appraisers (these were earlier recruited directly, however, the practice has recently been discontinued). Group B Officers for the postal service is the Postmaster Group B and that for the accounts services, it is the Senior Accounts Officer.³⁹⁸

In the General Administration set- up, the key Group B officer is the Section Officer and here also the earlier practice of recruiting them directly has been discontinued. Since all these officers, as mentioned earlier, function at the cutting edge level and have frequent interface with the civil society, it is necessary to ensure that the most suitable persons hold these posts. The Administrative Reforms Commission, in this context, has recommended that each Department, dealing with both the general as well as specialised services, set up Committees to examine what changes are required in the system of recruitment and promotions to these posts. Prima facie, the Commission is of the view that in order to infuse fresh thinking, a certain percentage of vacancies (say 25% every year) at the level of Section Officer as well as for other specialised Group B posts, should be filled through 'Direct Recruitment'.³⁹⁹

Each Department, dealing with both the general as well as specialized Services (Group B), may set up committees to examine what changes are required in the system of recruitment and promotions to these posts. Prima-facie the Commission is of the view that in order to infuse fresh thinking, a certain percentage of vacancies (say 25% every year) at the level of Section Officer as well as for other specialized Group 'B' posts, should be filled through 'Direct Recruitment',

The Estimates Committee of Parliament in its 47th Report (1967-68) recommended the setting up of a Service Selection Commission for taking over recruitment to lower category of posts from the UPSC. Subsequently, the First Administrative Reforms Commission (ARC) also recommended the setting up of a recruitment board. Accordingly, the Staff Selection Commission was constituted in 1977. The Staff Selection Commission has a nationwide network of nine Regional/Sub-Regional Offices. The Regional Offices are located at Allahabad, Bangalore, Chennai, Guwahati,

³⁹⁸ Second Administrative Reforms Commission, Tenth Report on Refurbishing of Personnel Administration – Scaling New Heights (November, 2008)

³⁹⁹ Ibid

Kolkata, Mumbai and New Delhi and two Sub-Regional Offices are located at Chandigarh and Raipur.

Initially recruitment for Group C (non-technical) posts was being done by the Staff Selection Commission. Afterwards the Staff Selection Commission was also entrusted with the recruitment for Group "C" (non-technical) and Group 'B' (non-gazetted - both technical and non-technical) posts in various Ministries/Departments of Government of India, their attached and subordinate offices except those for which recruitment is made by the Railway Recruitment Boards.

i. *Promotions*

The promotion of different categories of Group B and Group C officials is governed by their respective Cadre and Recruitment Rules. The procedure for promotion from LDC to UDC, UDC to Assistant, Assistant to Section Officer and Section Officer to Under Secretary is described below.

a. *Promotion from LDC to UDC*

Promotional avenues are open to the regularly appointed LDCs in Union Ministers / Departments to the post of UDC. The promotion from LDC to UDC is mainly from two streams, one by seniority and the other by qualifying in the Limited Departmental Competitive Examination. In both cases the Departmental Promotion Committee process the Confidential Report Dossier to assess the suitability of the candidate for promotion.⁴⁰⁰

b. *Promotion by Seniority*

LDCs working in the Government of India who have rendered not less than 8 years of approved and continuous service in that grade, have successfully completed their probation period and have either passed the typing test or have been exempted from it are eligible for promotion by seniority to the post of UDC. Promotions are based on an assessment of their Annual Confidential Reports by the DPC for the last 5 years as well as their vigilance clearance. Promotions are made on availability of vacancies in cadre

⁴⁰⁰ Ibid

on the basis of seniority in the select list. In case a person is not considered fit for promotion, the reasons for this are to be recorded in writing.⁴⁰¹

c. *Promotion from UDC Grade to Assistant Grade*

There are two streams for filling up posts of Assistants; one is through direct recruitment by the Staff Service Commission and the second is through promotion of UDCs. In the case of promotion, officials to be promoted should have completed regular and continuous service of not less than 8 years and should be cleared from the vigilance angle. An UDC's performance is assessed by the DPC through the ACRs for the last 5 years. Promotion is made depending on the availability of vacancies in a Cadre. Such appointments are made in order of seniority in the select list except when for reasons to be recorded in writing, a person is not considered fit for such appointment. Presently, the ratio of intake through the two streams is 50:50.⁴⁰²

d. *Promotion from Assistant Grade to Section Officer Grade*

Promotional avenues are open to regularly appointed Assistants in the Union Ministries/Departments to the post of Section Officers. Promotions are given to Assistants from two streams, one by seniority and the other by qualifying in the Limited Departmental Competitive Examination.

1. Promotion by Seniority

Any regularly appointed Assistant who has rendered not less than 8 years approved and continuous service in the Assistant Grade and has successfully completed die probation is eligible for promotion by seniority to the post of Section Officer. The official to be promoted should be clear from the vigilance angle. The official is assessed on the basis of his/her Annual Confidential Reports for die last 5 years. The promotion is made depending on the availability of vacancies in a Cadre. Such appointments are made in order of seniority in the select list except when for reasons to be recorded in writing, the person is not considered fit for such appointment.⁴⁰³

i. The Central Secretariat Service Section Officers' Grade Limited Departmental Competitive Examination

⁴⁰¹ Ibid

⁴⁰² Ibid

⁴⁰³ Ibid

In pursuance of the Central Secretariat Service Rules, 1962, Government of India in the Ministry of Personnel, Public Grievances and Pensions conducts the Central Secretariat Service Section Officers' Grade Limited Departmental Competitive Examination through the Union Public Service Commission. Any regularly appointed Assistant with not less than 5 years approved and continuous service in the Assistant Grade is eligible to appear in the Examination. The UPSC holds Departmental Examinations for promotion from Assistant Grade of the Central Secretariat Service and equivalent in other Services like Railway Board Secretariat Service and Armed Forces Head-quarters Service. On qualifying the examination, the performance of the successful candidates is assessed from their Annual Confidential Reports for the last five years. On the basis of marks obtained by candidates in the written examination and evaluation of ACRs, a merit list of successful candidates is drawn with the recommendation for their appointment as Section Officers.⁴⁰⁴

e. Promotion from Section Officer Grade to Under Secretary Grade

Rule 3 of the Central Secretariat Service Rules, 1962 provide that vacancies in the grade of Under Secretaries (Grade I of CSS) shall be filled by promotion of regular officers of the Section Officers Grade who have been in the service for a minimum of 8 years in that grade. The promotions are made through a duly constituted DPC which considers the candidature of Section Officers by assessment of their Annual Confidential Reports of last 5 years and clearance from the vigilance angle.

From the above it is evident that in case of promotions from LDC to UDC and Assistant to Section Officer, an element of 'Limited Departmental Competitive Examination' is present to provide promotional avenues for deserving officials. However, in case of promotion from UDC to Assistants there is no such provision. This deprives meritorious deserving candidates (UDCs) of a chance for an early promotion. Therefore, the Commission is of the view, that the posts of Assistant in CSS should be filled in the ratio of 40 per cent by promotion from UDCs of CSCS Cadre, 40 per cent by Direct Recruitment and 20 per cent through Limited Departmental Competitive Examination.⁴⁰⁵

⁴⁰⁴ Ibid

⁴⁰⁵ Ibid

i. Seniority of officers holding posts / grades in grades merged in pursuance of recommendations of Sixth Central Pay Commission

Which provides that where all the posts in one or more pre-revised scales are merged with a higher pre-revised scale and given a common replacement scale / grade pay / pay scale, the suitability of the incumbents need not be assessed for granting them the higher replacement scale / grade pay / pay scale. There is also no need for the incumbents to complete any minimum eligibility service in the earlier scale of pay. There will be no change in the inter se seniority of the incumbents in the merged scale which shall be decided based on the general instructions on the subject.

The Sixth CPC in its recommendation contained in sub-para, (vi) of Para. 2.2.13 of the above mentioned Memorandum has stated that the seniority of Government servant will depend on the grade pay drawn. This will invariably be more for a higher level post. References have been received from Ministry of Railways/ Ministry of Defence, etc., regarding fixation of seniority of officers after merger of pay scales in pursuance to recommendation of Sixth Central Pay Commission. The recommendation of Sixth CPC has been accepted on 29-8-2008 and the merger of pay scale(s) of the post has been made effective with effect from 1-1-2006. The issue of seniority has been further examined and it has been decided in consultation with UPSC and Department of Legal Affairs that seniority of officers holding post in grades which have been merged in pursuance to recommendation of Sixth Central Pay Commission will be determined as follows:—

i. The status of a Government servant as on 29-8-2008 including those who have earned promotion between 1-1-2006 to 29-8-2008 will be protected as appointment / promotions are made as per the provisions of statutory Recruitment Rules applicable to the post / grade. The merger of the pay scale(s) of the post(s) as recommended by Sixth CPC have been made effective with effect from 1 -1 -2006; the seniority of Government servant which existed on 29-8-2008 (date of acceptance of recommendation of Sixth CPC) will be maintained, i.e. the holder of post having higher pay scale or post which constituted promotion post for the posts in the feeder grade, will rank en bloc senior to those holding posts having lower pay scale or the posts in feeder grade.

ii. Where posts having different pay scales prior to Sixth CPC recommendation and now after merger have come to lie in the same Pay Band with same Grade Pay, the inter se seniority of all the employees will be fully maintained with employee in a higher pre-

revised pay scale being placed higher vis-à-vis an employee in a lower pay scale. Within the same pre-revised pay scale, seniority which existed prior to revision would continue.

iii. Where recruitment for the posts in different pre-revised pay scale(s) was initiated separately for each posts, prior to acceptance of recommendation of Sixth CPC, i.e. prior to 29-8-2008 but selected individual joined duty on or after 30-8-2008 in the revised pay scale(s) against the posts which have been granted same Grade Pay, such officers will be assigned seniority en bloc below those officers who were in position as on 29-8-2008.

iv. The availability of officers nominated on the basis of panel of promotion given by DPC or selection list given by Selecting Authority will be decided as on 29-8-2008. In case an officer from the panel given by DPC or selection list given by Selecting Authority has joined on or prior to 29-8-2008, then status of all the officers included in panel given by DPC or selection list will be protected and all officers will be considered available and their seniority determined by following the basic principle of seniority i.e. order of panel given by DPC or merit list given by Selecting Authority. In case all the officers included in the panel given by DPC or selection list given by Selecting Authority joins after 29-8-2008 then the seniority of such officers within a grade, will be determined by placing them below all available officers as on 29-8-2008 but maintaining their inter se seniority in order of panel of DPC or merit list given by selecting authority. All the cases of determination of seniority except merged MTS posts will be decided accordingly. The issue of determination of seniority of merged MTS (erstwhile Group 'D') posts would be taken up separately.

ii. Seniority of officers holding posts / grades in grades merged in pursuance of recommendations of Sixth Central Pay Commission

The following guidelines laid down by the Department of Personnel and Training are to be followed in determination of seniority of grade(s) merged in pursuance to recommendation of Sixth Central Pay Commission.

The erstwhile Group 'D' (now merged MTS Grade) having different designation as sanctioned in different Ministries / Departments had following pay scale(s):

Table 4.2 Revised Pay Scales for Group D Employees

SL No.	Pre-revised Pay scales	Revised Pay scales (in Rs.)
1.	2,550-55-2,660-60-3,200	
2.	2,610-60-3,150-65-3,540	
3.	2,610-60-2,910-65-3,300-70-4,000	PB-1 5,200-20,200 1,800
4.	2,650-65-3,300-70-4,000	
5.	2,750-70-3,800-80-4,590	

The issue of seniority of merged MTS Grade (erstwhile Group 'D' post) has been examined in consultation with UPSC. The post(s) in the erstwhile Group 'D' for the purpose of determination of seniority, can be grouped into five different categories as under:

Table 4.3 Categorising Group D Employees D As per Pay Scale

Sl No.	Pre-revised Pay scale of the Post (in Rs.)	Category
1	2,750-70-3,800-80-4,590	Category - I
2	2,650-65-3,300-70-4,000	Category - II
3	2,610-60-2,910-65-3,300-70-4,000	Category - III
4	2,610-60-3,150-65-3,540	Category - IV
5	2,550-55-2,660-60-3,200	Category - V

The determination of seniority of merged grade will be regulated as per following guidelines:—

- i. As on 29-8-2008, holders of posts in Category-I will be en bloc senior to the holder of posts in Category-II, similarly holder of the posts in Category-II will be senior to holder of the posts in Category-III and so on.
- ii. While merging the different grade(s), the inter se seniority in a post which existed as on 29-8-2008 is to be maintained.
- iii. Within same category, where different stand-alone posts have been merged, inter se seniority will be determined based on length of continuous officiation in the post.
- iv. Only the regular service in the grade is to be counted for determination of service and ad hoc service, if any, is to be ignored.

v. Seniority is to be determined based on the substantive post held by the employee irrespective of the fact that such employee has been allowed financial upgradation to the next higher grade under ACP Scheme or any other scheme.

vi. In case of employees who joined an erstwhile Group 'D' post either by promotion or direct recruitment between 1-1-2006 to 29-8-2008, inter se seniority will be determined as per guidelines laid down in this Department's O.M. of even number, dated 13-9-2012.

b. Performance Appraisal

The Performance Appraisal for each group of officers in various Ministries/Departments/ Attached and Subordinate Offices is done on the basis of their Confidential Reports and in the case of Group C technical staff, detailed assessment of their technical functions is obtained and made. The Confidential Reports of the Central Secretariat Services are analysed below.

The Confidential Report proforma at the level of Section Officers/Desk Officers, Under Secretary, Deputy Secretary and Director is common and comprises of 5 parts. Part I seeks personal details, Part II stipulates that the officer give a brief description of duties, the target, objective and goals that were set for the officer, and the areas of priority in work. Achievements on the targets, objectives and goals are to be indicated by the officer. Reasons for shortfalls or commendable higher achievements are also to be indicated by the officer. Part III and IV are required to be filled up by the Reporting Officer who has to assess the officers performance on 15 points which inter alia include nature and quality of work, quality of output, knowledge of sphere of work, and analytical ability communications skill, attitude to work, initiatives, ability to supervise, inspire and motivate, inter-personal relations and team work, relations with public, integrity and health, etc. the Reporting Officer is also required to write a few lines on some key areas of assessment. Part V entails a Reviewing Officer to comment whether he/she agrees with the Reporting Officer and also give general remarks with specific comments about the work of the officer including his/her grading.

There is urgent need to streamline the proforma to make it more focused and also to ensure that the main criteria for assessment should be whether the officer reported upon has achieved his/her targets, objectives and goals. The present proforma is far too

descriptive and the qualities on which the Reporting Officer is required to comment are far too many and often overlap. A better option may be to devise an appraisal form giving the Reporting Officer multiple options on the level of performance against which he/she would indicate numerically the level at which the reported upon officer has performed.

The confidential Report proforma for Assistants and Clerks is divided into four parts which are somewhat similar to those for Section Officers/Desk Officers etc. as indicated in the earlier paragraph. For reasons mentioned above, it is considered necessary that the proforma may be revised to capture in a more precise manner the nature of duties the staff member performs and whether these have been completed within the specified time frame etc. It is also felt that instead of asking for a descriptive account of the staff member on each count it may be advisable to give to the reporting officer multiple options on the level of performance against which he may indicate the level at which the officer reported upon has performed. The Commission is of the view that the proforma of the Confidential Report should also include a column wherein the area/field of interest of the official reported upon (i.e. Health, Information Technology, Finance, Transport, Defence, etc.) is indicated, which may be considered for his/her future postings.⁴⁰⁶

It is common knowledge and has also been brought to the notice of the Commission that there is often considerable delay on the part of Reporting and Reviewing Officers in completing their assessments in the prescribed proforma. It is necessary that the entire process of reporting reviewing and accepting the ACRs is completed within 3 months from the end of the financial year for which the Report is to be recorded. In case of any delay, the Cadre Authorities must, not only take an adverse view, but also action against the Reporting/Reviewing authority which is responsible for the delay. To facilitate this process, a mechanism of acknowledging the receipt of the ACR proforma at various stages may be adopted, which should contain on the first page itself the details of when the ACR was submitted with the self-appraisal to the Reporting Officer, the date when the Reporting Officer gave his/her comments and forwarded the ACR to the Reviewing officer and so on.

⁴⁰⁶ Ibid

4.3. Judicial Service in India

4.3.1. All India Judicial Service

Article 312 (1) was amended by the Constitution (Forty-Second Amendment) Act providing for the constitution of All-India Judicial Service. Clauses (3) and (4) read:

(i) The all-India judicial service referred to in clause (1) shall not include any post inferior to that of a district judge as defined in article 236.

(ii) The law providing for the creation of the all-India judicial service aforesaid may contain such provisions for the amendment of chapter VI of part VI as may be necessary for giving effect to the provisions of that law and no such law shall be deemed to be an amendment of this Constitution for the purposes of article 368.

In view of clause (3), all-India judicial service would only consist of the cadre of district judges. At present the recruitment to the cadre of district judges is made by direct recruitment and promotion on the recommendation of and in consultation with the high court respectively as provided in article 233. Under article 235 the full administrative control over the district judges is also vested in the high court. For creating an all-India service consisting of the cadre of district judges, amendments to articles 233 and 235 becomes necessary to designate the appointing authority and the controlling authority. Therefore, clause (4) is also added to article 312 to enable parliament to make necessary amendments to chapter VI of part VI (articles 233 to 237) of the Constitution by an ordinary legislation on the lines of articles 3 and 4 of the Constitution. Such legislation would prevail over chapter VI of part VI insofar it relates to the cadre of district judges.

Though article 312 was amended in the year 1976, steps have not been taken to constitute the service. The introduction of official language of the state concerned as the language to be used in courts appears to be one of the hurdles, for, unlike the sufficiency of a limited knowledge of the regional language for administrative officers, discharging the functions of district judge, original as well as appellate, one must be proficient in the regional language. However, serious attempts now seem afoot for the constitution of All-India Judicial Service.

In Chapter VI of Part VI of the Constitution, special provisions for regulating recruitment and conditions of service of persons appointed to judicial services in the

states have been made. The legislature, by making appropriate legislation, as has been empowered by Article 309, can regulate the recruitment and conditions of service of the service personels under the Government. Until provision in that behalf is made by the appropriate legislature, power is conferred on the President or the Governor concerned, as the case may be, or his nominee is given the power to regulate by rules the recruitment and conditions of service of persons appointed to public services. The judicial service also falls within the meaning of the expression 'public services'. The recruitment and conditions of service of persons appointed to judicial service fall within purview of article 309. Apart from article 309, in entry 41 of state list in Seventh Schedule, the topic 'State public service - State public service commission' is included. Therefore, the state could legislate in respect of all matters concerning the members of judicial service. Further, the power to make law, on the topic 'administration of justice' and the constitution and organization of all courts except the Supreme Court and the high court, was exclusively vested in the State legislature by virtue of articles 245 and 246 read with entry 3 of list II of the Seventh Schedule, before the 42 Amendment to the Constitution. After the amendment, both the state legislature and Parliament have the power to make law on the above topic subject to the provisions of articles 245, 246 and 254. (vide the concurrent list entry 11-A). Under entry 3 of list II as it originally stood and entry 11-A of list III after the amendment, the appropriate legislature could legislate in respect of all matters concerning subordinate courts and members of judicial service. But having regard to the importance of judicial service, the founding fathers of the Constitution have taken care to introduce certain special provisions in chapter VI of part VI of the Constitution.

The provisions relate to:

- (1) The appointing authority, the minimum qualification and method of recruitment to the cadre of District Judges [vide article 233];
- (2) The appointing authority and provision for consultation regarding recruitment rules to the cadre of judges other than District Judges [vide article 234];
- (3) Control over the district courts and subordinate courts and in respect of posting, promotion and grant of leave to members of judicial service [vide article 235];

(4) The definition of the words 'District judge' and 'judicial service' [vide article 236]; and

(5) Bringing all the magistrates under the control of the high court to ensure their independence [vide article 237],

To the extent special provisions are made in chapter VI of part VI of the Constitution, the power of the appropriate legislature and also the rule-making power of the President or the Governor concerned, as the case may be, stands curtailed, as that power is subject to the provisions of the Constitution. The scope of specific provisions contained in articles 233 to 237 of the Constitution is discussed in detail under the relevant headings.

The constitutional scheme aims at securing independent judiciary, which is the bulwark of democracy.⁴⁰⁷ Incidental to the requirement of maintaining such independence of the judiciary, it is of importance that the members of the judicial services should not work under apprehension of retaliatory action by the police and the executive whatever forms such action might assume.⁴⁰⁸

Further, justification for such special provisions and differential treatment to members of judiciary was given by the apex court, in *All India Judges Association (II) v. Union of India*⁴⁰⁹, as follows:

“The judicial service is not service in the sense of employment. The Judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the State power are the Ministers, the Legislators and the Judges, and not the members of their staff who implement or assist in implementing their decisions' The council of ministers or the political executive is different from the secretarial staff or the administrative executive, which carries out the decisions of the political executive. Similarly, the

⁴⁰⁷ *A.C. Thalwal vs. High Court of H.P.*, (2000) 7 SCC 1

⁴⁰⁸ *U.P. Judicial Officer's Association vs. Union of India*, (1994) 4 SCC 687

⁴⁰⁹ (1993) 4 SCC 288

Legislators are different from the legislative staff. So also the Judges from the judicial staff. The parity is between the political executive, the Legislators and the Judges and not between the Judges and the administrative executive. In some democracies like the USA, members of some State judiciaries are elected as much as the members of the legislature and the heads of the State. The Judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of the other services. The members of the other services, therefore, cannot be placed on par with the members of the judiciary, either constitutionally or functionally.”

a. *Appointment, posting and promotion of district judges*

Article 233 of the Constitution of India, which deals with the appointment, posting and promotion of district judges, has been reproduced as under:

“Article 233: (1) Appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years as advocate or a pleader and is recommended by the High Court for appointment.”⁴¹⁰

This article contains specific provisions relating to the appointment of district judges in respect of the following matters:

- (i) Appointing authority;
- (ii) Mode of recruitment: Promotion and direct recruitment-Qualification and procedure thereof;
- (iii) Consultation with the high courts

i. Appointing authority

The Governor of the state is the authority empowered to appoint to the cadre of district judges either by direct recruitment or by promotion. This being a specific constitutional provision, the power to make appointment cannot be conferred on any other authority, by law or rules made under article 309. There is no substance in the contention that the

⁴¹⁰ This article corresponds to S. 254(1) and (2) of the Government of India Act, 1935

view that the Governor is the appointing authority leads to subservience of the judiciary, and undermines the independence of the judiciary. Article 233, which requires the Governor to make promotions to the cadre of district judges in consultation with the high court and direct recruitment on the recommendation of the high court provide sufficient safeguards against such consequence.⁴¹¹ The Governor, who is the appointing authority, almost carries out a ministerial function of appointing recommended candidates both by the public service commission and the high court at the grass root level and also has to appoint only those candidates who are recommended by the high court for appointment at the apex level of the district judiciary.⁴¹² The power to make appointment or to order dismissal or removal of a member of judicial service is an executive function required to be exercised by him in accordance with the rules of business framed under article 166. Thus, it needs to be exercised on the aid and advice of the council of ministers in accordance with the provisions of the Constitution.⁴¹³

ii. Appointment by Promotion

After the coming into force of the Constitution, the high court is the authority, which has the power of making promotion in respect of persons belonging to the state judicial service holding any post inferior to that of a district judge. There is no requirement that the high court should consult the public service commission in accordance with the provisions of article 320(3(c)).

(a) Qualification and Procedure

Article 233(1) provides for appointment of district judge by way of promotion. Though the article is silent about the cadre of service from which promotion is required to be made to the cadre of district judges, article 233(2) providing for appointment by direct recruitment states that any person who is not in the services of the union or of the state, should be an advocate or pleader of seven years standing; to be eligible for appointment by direct recruitment. However, there is no requirement that seven years standing should be in any particular high court. If total practice of an advocate before various high courts is seven years or more, such a person is qualified for direct appointment. On reading clauses(1) and (2) together, it is clear that promotion to the cadre of district judges is required to be made from among persons in the service of the union or of the state.

⁴¹¹ *M.M. Gupta vs. State of J & K*, SLR 1983(1) SC 160

⁴¹² *State of Bihar vs. Bal Mukund Shah*, (2000) 4 SCC 640

⁴¹³ *Shamsher Singh vs. State of Punjab*, AIR 1974 SC 2192

Article 236 (2) defines the expression "judicial service" to mean a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge. If this definition, instead of appearing in Article 236, is placed as a clause before article 233 (2), there cannot be any dispute that "the service" in article 233 (2) can only mean the judicial service. The circumstances that the definition of "judicial service" finds a place in a subsequent article does not necessarily lead to a contrary conclusion. The fact that in article 233 (2) the expression "the service" is used whereas in articles 234 and 235 the expression "judicial service" is found is not decisive of the question whether the expression "the service" in article 233(2) must be something other than the judicial service, for, the entire chapter is dealing with the judicial service. Thus, though the article has not specified the service from which promotion can be made, the word 'service' used in the article means only 'judicial service'. That is how the word 'service' in the context of the word 'promotion' to the cadre of district judges and also in the light of the definition of the expression 'judicial service' contained in article 236(b) has to be understood.⁴¹⁴

The Constitution has not prescribed any procedure to be followed for promotion in judicial services. It only states that the Governor, in consultation with the High Court, can promote a judge to a higher rank. However, subject to articles 233, 234 and 235, the President or the Governor, is empowered to frame rules in this regard. In *State of Kerala v. M.K. Krishnan Nair*, the apex court, while upholding Kerala Civil Judicial Service Rules, 1973 and Kerala Criminal Judicial Service Rules, 1973, has held that rules providing for bifurcation of state judicial services with different avenues of promotion do not violate Articles 14 and 16 of the Constitution of India.

In *All India Judges Association (III) vs. Union of India*⁴¹⁵, the apex court has directed that the existing two sources of recruitment, viz., promotion and direct recruitment to be replaced by three sources: (i) direct recruitment to 25% of the posts from advocates by competitive examination both by written and viva-voce, (ii) promotion to 50% of the posts on the basis of merit-cum-seniority for which high court should prescribe a test to assess the candidate's legal knowledge and efficiency with adequate knowledge of case law, and (iii) promotion to remaining 25% of the posts strictly on the basis of merit through limited departmental competitive examination from civil judges (senior

⁴¹⁴ *Chandramouleshwar Prasad vs. Patna High Court*, AIR 1970 SC 370

⁴¹⁵ (2002) 4 SCC 247

division) with not less than 5 years service. While directing the high courts to frame rules for this purpose, the apex court observed:

“The subordinate judiciary is the foundation of the edifice of the judicial system. It is, therefore, imperative that it should become as strong as possible. The weight on the judicial system essentially rests on the subordinate judiciary. While the Supreme Court has accepted the recommendation of Justice Shetty Commission, which will result in the increase in the pay scales of the subordinate judiciary, it is at the same time necessary that the judicial officers become more efficient. There has to be certain minimum standards, objectively adjudged, for officers who are to enter the higher judicial service as Additional District Judges and District Judges. While Justice Shetty Commission is right in recommending that the recruitment to the higher judicial service i.e., the District Judge cadre from amongst the advocates should be 25% and the process of recruitment is to be by competitive examination, both written and viva-voce, it is necessary that there should be an objective method of testing the suitability of the subordinate judicial officers for promotion to higher judicial services. Furthermore, there should also be an incentive amongst the relatively junior and other officers to improve and compete with each other so as to excel and get quicker promotion.”

Confirmation of persons appointed to be or promoted to be district judges is clearly within the control of the high court. When persons are appointed to be district judges or persons are promoted to be district judges the act of appointment as well as the act of promotion is complete and nothing more remains to be done. Confirmation of an officer on successful completion of his period of probation is neither a fresh appointment nor completion of appointment. Such a meaning of confirmation would make appointment a continuing process till confirmation. Confirmation of district judges is vested in the control of the high courts for the reason that if after the appointment of district judges, the Governor will retain control over district judges until confirmation there will be dual control of district judges. Thus, the order of confirmation of district judges and session's judges is to be passed by the high court.⁴¹⁶

As the control over subordinate courts including the district courts vested in the high court by virtue of Article 235, is effective and full control, the power to take decision regarding confirmation of district judges must be held to be vested in the high court.

⁴¹⁶ *High Court of Punjab & Haryana vs. State of Haryana*, (1975) 1 SCC 843

Confirmation of judicial officers promoted to higher cadres by the high court is also vested in the high court. Any rule, which confers such authority on any outside authority, is invalid.

The above position has been consistently reiterated by the Supreme Court in various cases decided so far.

In Registrar, *High Court of Gujarat v. C.G. Sharmait*⁴¹⁷, was held that automatic confirmation cannot be claimed as a matter of right, where in terms of rules the confirmation order can be passed only if there is a vacancy and work is found to be satisfactory which are pre-requisite for confirmation, on the ground that the probationer is allowed to continue even after the expiry of probationary period.

In *H.F. Sangati v. Registrar General, High Court of Karnataka*⁴¹⁸, the apex court has, however, taken the position that the order of discharge passed by the state government on a reference from high court after the administrative committee of the high court had considered all the relevant material and formed an opinion that as to his unsuitability which opinion was accepted by the full court was in accordance with rule 6 of Karnataka Civil Service (Probation) Rules, 1977 and was neither stigmatic nor punitive. Hence, affording opportunity, or holding of departmental enquiry before passing such order was not necessary.

b. According of selection time scale

When according to the rules regulating the conditions of service of district judges, a selection time scale is sanctioned which is required to be given to such number of senior most district judges as specified in the rules, the giving of such pay scale does not involve any promotion. The high court, therefore, cannot withhold the selection time scale of pay to a district judge who is entitled according to the rules.

In *High Court of Judicature for Rajasthan v. P.P. Singh*⁴¹⁹ where a committee of two judges appointed by chief justice of high court recommended names of officers of HJS for grant of selection scale on the basis of criteria different from that laid down by the full court, but which was subsequently approved by the court, it was held, in such

⁴¹⁷ (2005) 1 SCC 132

⁴¹⁸ (2003) 3 SCC 117

⁴¹⁹ (2003) 4 SCC 239

circumstances the recommendations of the committee became the decision of the court. Hence, it was competent for the Governor to act upon it.

c. *Power to Fix Seniority*

Under articles 233, 234 and 235 the power of the Governor in respect of judicial service extends only to three matters, viz., appointment, posting and promotion of district judges and appointment of Members of the subordinate judiciary. In respect of all other matters relating to judicial service the power is vested in the high court. Though it is the high court that is empowered to fix seniority of the judicial officers, it is the Governor who frames the rules regulating seniority. Therefore, the high court is under a duty to fix seniority of judicial officers in accordance with the rules framed by the Governor.⁴²⁰

In view of the fact that there has been a constant discontentment among the members of the higher judicial service in regard to their seniority in service due to which, for over three decades, a large number of cases have been instituted in order to decide the relative seniority between promotees and direct recruits, the apex court, in *All India Judges Association (III)* has directed the high courts to suitably amend and promulgate seniority rules on the basis of the roster principles as approved by it in *R.K. Sabharwal v. State of Punjab* as early as possible with a hope that as a result thereof there would be no further dispute in the fixation of seniority. It was, however, specifically directed that the existing relative seniority of the members of higher judicial service has to be protected and the roster has to be evolved for the future.

Effect of provisions in law relating to reorganisation of states: Any provision contained in any law effecting reorganisation of states which confers power on the central government to fix the seniority of members of judicial service, has overriding effect on the power conferred on the high court under articles 233, 234 and 235 and therefore has to prevail. This is for the reason that under articles 3 and 4, Parliament is given the power to make incidental and ancillary provision while enacting any law effecting reorganisation of states, and the provisions of such law are to be treated as amendments to the Constitution.

⁴²⁰ *State of Bihar vs. Madan Mohan*, AIR 1976 SC 404

Claim for filling up the posts only by promotion

The claim by a member of judicial service that all the posts of district judges should be filled up only by promotion and only in the absence of eligible officers' direct recruitment could be resorted to is plainly untenable. There is nothing to support any such contention as sought to be made out. In *Orissa Judicial Service Association v. State of Orissa*, where promotees challenged the direct recruitment to superior judicial service on the ground that it adversely affects their chances of promotion from subordinate judicial service, the apex court, while negating the contention as untenable, has held that: "Article 233 of the Constitution as well as the statutory rules framed under Article 309, viz.. Rule 5 of Orissa Superior Judicial Service Rules provide for recruitment to the Senior Branch of service by direct recruitment from the members of the Bar. The constitutional mandate cannot be challenged merely because it may to certain extent adversely affect the chances of promotion of the Junior Branch of judicial service". The issue was once again raised in *Delhi Judicial Service Association v. Delhi High Court* where promotees filed writ petition seeking mandamus for filling up certain posts in Delhi Higher Judicial Service by promotion only, the apex court held that the question no longer remains res Integra, the same, having been raised and answered in Orissa Judicial Service Association case.

However, where a large number of vacancies in direct recruitment quota in superior judicial service has remained unfilled for a long time and sufficient number of candidates were not available, appointments made in such vacancies by promotion to save judicial works in the district from suffering could not be said to be fortuitous, though such appointment would not confer seniority over the direct recruits of the same year.⁴²¹

iii. Appointment by Direct recruitment

(a) Qualification and procedure

Direct recruitment is prescribed as one of the modes of appointment to the post of district judges. Clause (2) of article 233 prescribes the qualification for direct recruitment to the cadre of district judges. A person to be eligible for such appointment should have been an advocate or pleader for not less than seven years. A person who had

⁴²¹ D. Ganesh Rao vs. State of Jharkhand, (2005) 8 SCC 454

been an advocate for seven years, but had become a member of state service other than judicial service, is qualified for appointment by direct recruitment. Law officer of central or state government, public corporation or of a body corporate, enrolled as an advocate under exception to rule 49 of the Bar Council of India Rules and practising before courts and tribunals are also eligible to be considered for appointment to the higher judicial service. A person practising in any of the courts within the territory of India is eligible for such appointment. Thus, any rule requiring that the candidates for direct recruitment to the service must be advocates who had practiced in the high court of that particular state or courts subordinate thereto is violative of article 14 and 16 of the Constitution. The Governor is required to make the appointment by direct recruitment of a person who is recommended by the high court. In other words, the recommendation of a person to be appointed as district judge is the very foundation for the exercise of power of appointment by the Governor. The Governor cannot appoint a person as a district judge, unless recommended by the high court though the Governor may not appoint a person recommended. In other words, there is no compulsion on the Governor to appoint a person recommended though he cannot appoint a person not recommended for appointment by the high court. A recommendation made by the high court to appoint a person as district judge is not binding on the Governor and does not confer any right on the candidate so recommended.⁴²²

(b) Members of judicial service not eligible for direct recruitment:

Article 233 prescribes two sources and methods of recruitment to the cadre of district judges: (i) from services, i.e., judicial service by promotion; (ii) from amongst members of the bar by direct recruitment. In case of candidates who are not members of judicial service they must have been advocates or pleaders for not less than seven years and they have to be recommended by the high court before they may be appointed as district judges, while in the case of candidates who are members of judicial service the seven years rule has no application but there has to be consultation with the high court. Such members of subordinate judicial service cannot seek direct recruitment to higher judicial service under article 233 (2) even though they may otherwise have prior seven years standing at Bar. Any other construction would lead to anomalous and absurd

⁴²² *Mani Subrat Jain vs. State of Haryana*, AIR 1977 SC 276

consequences such as junior member of the subordinate judicial service superseding senior members of the judicial service with long records of meritorious service.⁴²³

However, in view of the direction of the Supreme Court issued in *All India Judges Association (III)*, suggesting for the third of recruitment by promotion to 25% of the posts strictly on the basis of merit through source limited departmental competitive examination from civil judges (senior division) with not less than five years service, the above argument that permitting the members of judicial service to seek direct recruitment would lead to anomalous and absurd consequences such as junior member of the subordinate judicial service superseding senior members of the judicial service has lost its cogent force.

(c) Quota for direct recruitment

The Constitution of India though provides direct recruitment as one of the sources of appointment to the cadre of district judges, has not prescribed any fixed quota for it. Different states have different quota system for direct recruitment. In *Delhi Judicial Service Association v. Delhi High Court* provisions dealing with direct recruitment as well as promotion, with a rider that direct recruitment shall not exceed one third of total number of posts were held to be not violative of articles 14, 16 and 233 (2) of the Constitution. In *Sri Kant Tripathi. State of U.P.*, it was, however, held that the prohibition contained in the rules against raising of quota for direct recruitment for making up the shortfall in previous recruitment, beyond 15% of the cadre strength, does not compel the high court to recruit 15% of the vacancies by direct recruitment at every recruitment.

In cases where quota is not fixed under the rule, such statutory rules can be supplemented by administrative instructions and the state government in consultation with the high court is competent to prescribe quota/or two sources of recruitment to the service by administrative orders but it would be desirable and proper to prescribe the quota for recruitment to the service in the rules themselves. Absence of statutory provisions in the rules fixing the quota for the two sources of recruitment, results into a state of uncertainty leading to suspicion and litigation. However, in order to bring uniformity in this regard, the apex court, in *All India Judges Association (III) v. Union of*

⁴²³ *Satyanarayan Singh vs. State of Rajasthan*, (2001) 6 SCC 89

India relying on Justice Shetty Commission's recommendation, has directed that the quota for direct recruitment shall be fixed at 25% of the posts in the cadre of district judges.

iii. Consultation with the high court

1. Object of consultation with the high court

The provision for consultation with the high court is incorporated since the high court is expected to have superior knowledge in regard to the suitability of a person belonging either to the judicial service or to the bar to be appointed as a district judge. The duty to consult with the high court is so integrated with the exercise of the power to appoint a district judge that the power can be exercised only in consultation with the high court. "Consultation" with the high court in this article means on the recommendation of the high court.

The object underlying this provision is to secure and maintain independence of the subordinate judiciary. The high court would be the best judge of the requirements of proper and efficient judicial administration.

2. Manner of consultation with the high court

The consultation required under this article is of utmost importance. Though consultation does not mean "concurrence", it postulates an effective consultation, which involves exchange of mutual viewpoints of each other and examination of the relative merits of the other point of view. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. Although normally the recommendations made by the high court for any amendment in the rule should be accepted by the state government, but, if in any particular case, the state government for good and weighty reasons, find it difficult to accept the recommendation of the high court and the state government communicates its view to the high court, the high court must reconsider the matter. The high court as well as the state government must approach the question in a detached manner for achieving the true objective of framing rules, which would secure appointment of proper persons to judicial service of the state for proper and efficient administration of justice. If the matter is thus approached, there should not be any difficulty. While considering the recommendations of the high court the state government would proceed on the basis that in such matters

the opinion of the high court is entitled to the highest regard. There must be a full and complete consultation while making appointments as well. If the high court recommends 'A' to be appointed a district judge while the Governor is of the opinion that 'B's claim is superior to that of A, it is incumbent on the part of the Governor to consult the high court in regard to its proposal to appoint B and not A. If the Governor is to appoint 'B' without obtaining the views of the high court in respect of B's claim vis-a-vis the claim of A for appointment, the appointment cannot be said to be in compliance with article 233. Consultation with the high court is not an empty formality. It must be full, complete and effective, the high court being appraised of the entire proposal and its view obtained. It is not open to the government to appoint a person as district judge by promotion unless recommended by the high court. Therefore, the appointment of district judges made disregarding the recommendations made by the high court without further consultation with reference to the contrary view entertained by the government are unconstitutional and invalid. Such an attitude on the part of the executive is sure to undermine the independence of the judiciary. However, order passed by those officers after their appointment till their appointments are set aside should be regarded as valid.

3. Consultation must be with the full court

Every high court consists of a chief justice and such other judges who have been appointed as judges of that high court as a whole. Any rules of recruitment to the cadre of district judges which provide for constitution of a selection committee appointed under the rules and providing that the high court has to recommend from out of the list prepared by such committee would be a travesty of the constitutional provision. Such a procedure does not amount to consultation with the high court nor an action on its recommendation. The consultation in such a case would be really a consultation with the selection committee subject to a kind of veto to be exercised by the high court, which may be accepted or ignored by the Governor. Such rules are invalid being contrary to the provisions of article 233. Such consultation is invalid even if all the members of the selection committee are judges of the high court. The view that the consultation should be with the full court is considerably shaken by the rulings of the Supreme Court in *Tripathi* where it was held that the administrative power vested in a body of persons can for effective exercise of such power be exercised by some of them acting on behalf of

all. In *Yoginath D. Bagde v. State of Maharashtra*⁴²⁴, the division bench of the Supreme Court has, however, expressed its reservation that the view expressed by the constitution bench, in *Tripathi* that the control can be exercised by the committee also, warrants reconsideration in view of the concept of 'wider consultation'.

But, recently the principle laid down in *Tripathi* was endorsed by the three-judge bench of the Supreme Court in High Court of Judicature for *Rajasthan v. P. P. Singh*. In this case it was held that even where the rules required for holding of the meeting of the full court, the chief justice has the requisite jurisdiction to constitute a committee for the purpose of considering the case of eligible judicial officers, and once the report of the committee is placed before the full court and approved by it, the recommendation of the committee would become the decision of the court. It was further held that a meeting of judges having requisite quorum as contemplated under rule 29 would amount to meeting of full court satisfying the requirement of rule 5 for consulting all the judges and non-attendance of some of them at the meeting would not vitiate its resolution.

iv. Power of the Governor to Frame Recruitment Rules

Article 233 prescribes the minimum qualification for appointment of district judges. According to article 233 the qualification required is that the person should have (i) seven years practice as an advocate or (ii) been a member of 'judicial service' under the union or state. But it may be necessary to prescribe other qualifications or disqualifications. It is competent for the legislature or the Governor in exercise of his powers under proviso to article 309 to prescribe other qualifications such as minimum or maximum age limit for appointment subject to article 233 and other provisions of the Constitution, after consultation with the high court. Article 309 is a general provision which prescribes rules for recruitment and conditions of service of those persons who are appointed to public service under the union and the state. The members of judicial service are appointed to public service and, therefore, subject to the provisions of articles 233, 234 and 235. It is for the President or the Governor, as the case may be, to frame rules of recruitment and conditions of service for judicial service. However, if no recruitment rules have been framed, the high court would be the sole authority to decide the criteria concerned on which promotions should be made. It could adopt either

⁴²⁴ (1978) 2 SCC 102

the method of promotion by selection on merit-cum-seniority basis or the method of seniority-cum-merit.

In *State of Bihar v. Bal Mukund Sah*⁴²⁵, the apex court has held that creation of cadres and creation of posts in the cadre comprised in the judicial service of the state can be resorted to by the Governor in the exercise of his rule making power under article 309 or for that matter by any appropriate legislation by the state authorities under the very same article. But once the cadre of district judges and subordinate judiciary are constituted by the aforesaid authorities the posts backed up by suitable budgetary provisions are created and are accordingly made available to be filled in the cadres concerned, the process of creation comes to an end. Thereafter, when in the created posts borne on any judicial cadre, whether at the district level or at the subordinate court level, any vacancies arise by retirement or otherwise non-availability of incumbents due to any other reason, question of filling up of those available vacancies would arise. Such available vacancies of sanctioned posts have to be filled in only after following the procedure laid down by articles 233 and 234 of the Constitution and cannot be subject to any other procedure. Thus, proceeding further, while dealing with the question of power of state legislature to legislate in respect of reservation of vacancies for SCs/STs/OBCs while recruiting district judges and other judicial officers, the court has observed:

While Article 309 deals with recruitment and conditions of service of persons serving the union or the state, recruitment to a particular category of services viz., judicial service of the state has been excepted from the purview of article 309 by the overriding provisions of articles 233 and 235. Reservation of available vacancies is not a stage anterior to recruitment or appointment to such vacancies on the already sanctioned posts in the cadre and therefore, it falls within the scope of Articles 233 and 234. Neither the legislature has power to legislate under Article 309 nor Governor has power to make rules under proviso to Article 309 in that regard bypassing the high court. Recommendation of the high court under Article 233 (2) and consultation with the high court under Article 234 are sine qua non for direct recruitment of district judges at the apex level and other judicial officers at the base level respectively of the state judicial service. High courts role under Articles 233 and 234 is pivotal and meaningful and not merely formal. Article 309 as also Article 245 are subject to other provisions of the

⁴²⁵ (2000) 4 SCC 640

Constitution and hence have to be read subject to Articles 233 and 234 which constitute a complete code.

Thus, the power of the Governor to frame recruitment rules under the proviso to article 309 has to be exercised in conformity with articles 233 and 234 of the Constitution.

v. *Control over subordinate courts*

Article 235 vests the control over subordinate courts in the high court. This is one of the most important provisions designed to insulate the subordinate judiciary against executive interference, and securing its independence at all levels. While the power to make initial appointment of persons to judicial service is vested in the Governor, in respect of all other matters, such as promotions, transfers and postings, sanction of leave, disciplinary proceedings and imposition of penalties, the appropriate power is exclusively conferred on the high court. Even in such matters in which the Governor may make a decision, the decision cannot be taken save in consultation with the high court. The consultation is mandatory and the opinion of the high court is binding on the state government. Such control and consultation are not a matter of mere formality; they are the constitutional power and privilege of the high court, also its obligation, and cannot be diluted by sheer inaction or failing to act when the high court must act. Thus, the members of judicial service are thereby given full protection to enable them to be fearless and independent in the discharge of their duties.

The combined effect of articles 233, 234 and 235 as regards the power vested in the Governor and the high court in relation to the administrative control over the subordinate courts as interpreted by the Supreme Court in various decisions referred to in this chapter can be summarised as follows:

(i) The power to make first appointment either by way of promotion or by-direct recruitment to the cadre of district judges is vested in the Governor, but the appointment has to be made in consultation with and on the recommendation of the high court respectively (article 233).

(ii) The power to make appointments to the cadre of district judges vested in the Governor does not include the power to confirm the service on completion of probation. Confirmation of persons appointed to be or promoted to be district judges is clearly within the control of the high court.

(iii) The power to make first appointment to the initial recruitment cadre of subordinate judicial service is vested in the Governor. The appointment has to be made in accordance with rules framed by the Governor in consultation with the high court and the public service commission (article 234).

(iv) The power to make promotion from the initial recruitment cadre of subordinate judicial service to higher posts below their cadre of district judges is vested in the high court.

(v) The power to impose major penalties such as dismissal, removal, compulsory retirement or reduction in rank against all members of judicial service including district judges is vested in the Governor, but in view of the effective control over them having been vested in the high court, the high court alone is competent to initiate and hold disciplinary proceedings and the penalties could be imposed only in accordance with the recommendation of the high court.' Similarly, the power to adjudge as to whether a member of judicial service should be retired after he has put in the prescribed age or qualifying service and to recommend his retirement under the relevant rule providing for such retirement is vested in the high court. In other words, only formal order of removal or retirement from service of a member of judicial service is required to be issued by the government on the recommendation or advice by the high court. Therefore, in substance and effect the recommendation or advice is peremptory.

(vi) The power to impose all penalties other than major penalties against all members of judicial service including district judges is vested in the high

(vii) All other matters relating to administrative control over the members of judicial service except those, which are specifically conferred on the Governor, are vested in the high court.

4.3.2. Seniority and Appointment of Judges of High Court and Supreme Court

The word 'promotion' is a misnomer while discussing the matter of appointment of Judges of Supreme Court and High Courts. Neither the Constitution nor any other Law, Rules or Regulations has used the term 'promotion' of the Judges at the higher echelons of Supreme Court and High Courts. However, it is a relevant matter for discussion here and we can take appointment to be synonymous to promotion. It can also be pointed out

that an appointment includes within its purview a promotion too(as discussed in previous chapters).

Article 124 provides for the establishment of the Supreme Court with a Chief Justice and 30 other Judges. The Supreme Court Judges are to be appointed by the President “after consultation with such of the Judges of the Supreme Court and of the High Courts as the President may deem necessary”. The proviso to the article says that in case of appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted. The only obligation for the Government was thus to consult the Chief Justice and other judges. Significantly, the appointment was not required to be made ‘in consultation’ but ‘after consultation’. In actual practice, during the early couple of decades of the Constitution, after receiving the opinion of the Chief Justice, the Cabinet deliberated on the matter and advised the President in regard to persons to be appointed. The President acted on the advice. In case of the Chief Justice, the senior-most judge was usually appointed. The convention, however, was ignored when in the 70s, a couple of Chief Justices were appointed superseding their more senior colleagues.⁴²⁶

It was held in *S.P. Gupta vs. Union of India*⁴²⁷, that consultation must imply exchange of views after examining merits, but that it did not mean concurrence. However, this case was overruled in 1993 in the *Supreme Court Advocates-on-Record Association vs. Union of India*⁴²⁸. In this case, the Supreme Court practically took over the power of the appointment of judges in its own hands. As a safeguard, it mandated the Chief Justice associating two of his senior-most colleagues in the selection process. The procedure for appointment was revised in the light of this judgment in 1994 to the effect that the decisive view in the matter of the appointment of judges shall be that of the Chief Justice and in case of a vacancy in the office of the Chief Justice, the senior-most Judge would be appointed unless the retiring judge reported that he was unfit. However, following the government’s reservations in regard to certain recommendations made by the Chief Justice in the matter of appointment of Judges to the Supreme Court, the matter again became highly controversial and the President made a reference to seek the advisory

⁴²⁶ Subhash C. Kashyap, *Constitutional Law of India*, Vol. 2, 1122 (Universal Law Publishing, Gurgaon, Haryana, 2nd ed., 2015)

⁴²⁷ AIR 1982 SC 149

⁴²⁸ AIR 1994 SC 268

opinion of the Supreme Court under Article 143 of the Constitution.⁴²⁹ The Court confirmed the position in the 1993 judgment but provided some more safeguards. The Chief Justice had to consult four senior-most judges of the Supreme Court and if two of the four disagreed on some names, it could not be recommended. This was known as the 'collegium system'. In effect, decisions were to be taken by consensus where the Chief Justice and at least three judges of the four had to agree.

The Memorandum showing the Procedure for Appointment of the Chief Justice of India and Judges of the Supreme Court made in pursuance of Article 124(2) read as follows:

“Appointment to the office of the Chief Justice of India should be of the senior-most Judge of the Supreme Court considered fit to hold the office. The Union Minister of Law, Justice and Company Affairs, would at the appropriate time, seek the recommendation of the outgoing Chief Justice of India for the appointment of the next Chief Justice of India.

Whenever, there is any doubt about the fitness of the senior-most Judge to hold the office of the Chief Justice of India, consultation with other judges as envisaged in Art 124(2) of the Constitution would be made for appointment of the next Chief Justice of India.

After receipt of the recommendation of the Chief Justice of India, the Union Minister of Law, Justice and Company Affairs will put up the recommendation to the Prime Minister who will advise the President in the matter of appointment.”⁴³⁰

4.4. The Defence Services

The Defence Service in India has three wings: (i) the Army, (ii) the Air Force and (iii) the Navy and the recruitment and conditions of service of the Defence Personnel are guided by the Army Act, the Air Force Act and the Navy Act. Besides these legislations, the Coast Guards have a separate set of legislations governing their conditions of service.

⁴²⁹ The Third Judges Case, (1998) 7 SCC 739

⁴³⁰ Para 2 of The Memorandum showing the Procedure for Appointment of the Chief Justice of India and Judges of the Supreme Court

4.4.1. Promotion and Seniority in the Indian Army

The Indian Army has a pyramidal structure having most of the officer's vacancies at the bottom and a few at top. According to Major General (Retd.) G.D. Bakshi, the Indian Army has inherited highly functional and effective training methodologies and system for developing its military leadership.⁴³¹ Major Gen. Bakshi also said that India has inherited the Regimental System from the British and it has continued to produce motivated and well bonded units that are effectively led and managed. The Career Management System in the Indian Army is driven primarily by the Annual Confidential Report (ACR) rendered on the officers.⁴³² This carries out a qualitative evaluation of the officer's performance and potential on a nine-point rating scale. Various qualities are tested out and rated on a scale of 1 to 9. The ACR also includes a pen picture and recommendations for promotion and future employment.⁴³³

Promotions in the Indian Army are of two kinds:

- (i) Time scale - where an officer is entitled to promotion because he has put in a given number of years in the service. Presently, promotions from Lieutenant to Captain to Major to Lieutenant Colonel are purely time-scale, subject to clearing promotion exams and training courses;
- (ii) Selection - promotion to the rank of Colonel is both by time-scale and selection. Selection for Colonels (Selection Grade) is done by considering all eligible Lieutenant Colonels' performance.

Those officers who do not get selected are promoted as Colonels (Time Scale) after specified service. Promotions from Colonel (Selection Grade) to Brigadier to Major General to Lieutenant General to General are purely on performance up to and preceding rank.

For the first thirteen years, in the Indian Army, the promotion is time-scale. On commissioning, eligible candidates are posted in the rank of Lieutenant. After two years of service the eligible personnel is ranked as a Captain and six years from then, he can be promoted as a Major. Commissioned officers of the Indian Army get promotions

⁴³¹ G.D. Bakshi, *Promotion System in the Army: Dealing with Peacetime Atrophy*, Vol.4 No. 4, Perspectives, October, 2010

⁴³² Ibid

⁴³³ Ibid

based on their years of reckonable commissioned service. The following Tables will elucidate the process of promotion in the Indian Army.

i. Rank, Structure And Promotions

a. Types of Promotion

Table 4.4 Acting Promotion in Peace and Field Concessional Areas

Acting Promotion in Peace and Field Concessional Areas	
Substantive Promotion	Time-Scale (up to Lt. Col.), Selection Grade (Col. And Above
Local Rank	Local ranks appropriate to the appointments held may be granted to the officers if considered necessary in terms of DSR, Para 88

b. Years of Reckonable Commissioned Service for Acting Promotion⁴³⁴

Table 4.5 Year of Reckoning

Rank to Which Acting Promotion is made	Total Minimum Service as Commissioned Officer	Remarks
Captain	1 year	-----
Major	4 years	3 years in Fd
Lt. Col.	7 years	With minimum service of one year in the rank of substantive Major
Col.	8 years and 6 months	With minimum service of two years in the rank of Major & above
Brig.	12 years	With minimum service of three years in the rank of Lt. Col. & above
Major General	20 years	-----
Lt. General	25 years	-----

⁴³⁴ SAI 1/S/74 read in conjunction with AO 329/69

c. *Years of Reckonable Commissioned Service for Substantive Promotion (other than AMC/ADC)*⁴³⁵

Table 4.6 Years of Reckonable Commissioned Service for Substantive Promotion

Rank	Maj. Arms/Service	Vet. Offrs.	MF	SL
Capt.	2	1	2	2
Maj.	6	7	6	6
Lt. Col.	13	17	13	13
Col(TS)	26	-	26	26
Col(Seelction)	15	15	15	15
Brig.	23(22)			
Maj. Gen.	25(24)			
Lt. Gen	28			
Gen.	No Restriction			

4.4.2. Promotion and Seniority in the Indian Air Force

The Regulation for the Air Force are issued under the authority of the Government of India and supersede the “Regulation for the Royal Indian Air Force – (rules) – reprint 1942 ” and “Regulations for the Indian Air Force – Instructions by His Excellency the Commander-in-chief in India, Reprint 1945”. Air and other Officers Commanding are responsible to ensure that these regulations are strictly observed and that local instructions or orders that may be issued from time are in no way inconsistent with these regulations.

These regulations do not supersede or cancel any administrative and departmental regulations. Orders and instructions which are currently in force and which govern certain special categories of officers and men or else contain special provisions of a purely administrative nature and are therefore not repugnant to the spirit of these regulations. Such orders and instructions are supplementary to and in amplification of these regulations.

⁴³⁵ Retrieved from <https://indianarmy.nic.in/writereaddata/documentsPS010113.pdf>

i. Composition of the Air Force

The air force consists of commissioned and enlisted personnel who have undertaken a definite liability for service and comprises⁴³⁶ :-

- a) The Regular Air Force;
- b) The Regular Air Force Reserve;
- c) The Auxiliary Air Force.

*ii. Control*⁴³⁷

- a) The supreme command of the armed forces (of which the air force is a component), is vested in the President of India.
- b) The Chief of the Air staff is responsible to the President through the Central Government for the administration and organisation of air force.

*iii. Lower Formations*⁴³⁸

- a) The lower formations consist of wings, stations or units placed normally under the functional and administrative control of commands, some specialist units are, however, placed under the direct control of Air Headquarters.
- b) At a station where more than one unit is located, the station commander will act as the coordinating authority. The responsibility for exercising functional and administrative control over such units and for providing administrative services to them will be as laid down in the formation orders issued in respect of each unit by Air Headquarters.

vi. Exercise of Command

Generally, the officer posted as the commanding officer of any unit or formation assumes the command of such unit of formation. However, when two officers are holding the same higher rank and the same substantive rank with effect from the same date, the A.O.A (in respect of units directly under Air Headquarters) and A.O.C-in-C.(in respect of units his command) will decide as to who is to be deemed senior for assuming temporary command.⁴³⁹

⁴³⁶ Regulation for the Air Force under the Defence Service Regulations, 3rd January, 1968

⁴³⁷ Reg. 7

⁴³⁸ Reg. 10

⁴³⁹ Reg. 27

v. Relative Seniority of Regular Officers ⁴⁴⁰

a) Officers holding substantive ranks will be senior to officers holding corresponding ranks.

b) Relative seniority of officers holding the same substantive rank (without any higher acting rank) will be determined by the respective dates of appointment or promotion to that rank. Where two officers of the same rank have been gazetted to such rank with effect from, the same date, their relative seniority will be determined by the order in which their names appear in the current air force list. ⁴⁴¹

Forfeiture of seniority, if any, will be taken into consideration in determining relative seniority.

c) Relative seniority of officers holding the same higher acting rank but different substantive ranks will be determined by the substantive ranks held.

d) Relative seniority of officers holding same higher acting rank and same substantive rank will be determined by the date of promotion to the higher acting rank, where the dates of appointment or promotion to substantive rank is the same. Where the dates of appointment or promotion to the substantive rank are different, relative seniority will be determined by those dates.

vi. Retired/Released, officers Re-employed

a) A retired/released officer who is re-employed as an officer in the rank in which he was serving at the time of retirement / release and will retain the seniority in the substantive rank which he held at the time of retirement / release and will take command and precedence with other officers of the regular air force in accordance with that rank and seniority. b) A retired / released officer who is re-employed in a substantive rank lower than that in which he was employed on the active list will take seniority from the date he held that rank substantively prior to retirement / release and will take command and precedence with other officers of the regular air force in accordance with that rank and seniority. ⁴⁴²

⁴⁴⁰ Reg. 28

⁴⁴¹ Reg. 29

⁴⁴² Reg. 92

vii. Reserve Officers

a) Except as provided in sub-para (b) officers of the air force reserve (regular air force reserve and air defence reserve) will rank junior to all regular officers of the same rank.

b) When called up for service with the regular air force, officers of the air force reserve (regular air force reserve and air defence reserve) will take command and precedence with regular officers as if they had been appointed in the regular air force in the reserve rank from the date of their being called up; or, if they are promoted whilst called up, from the date of such promotion.⁴⁴³

*viii. Auxiliary Air Force Officers*⁴⁴⁴

a) Except as provided in sub-para (b) officers of the auxiliary air force are to rank as junior to officers of the regular air force of the same rank.

b) When any portion of the auxiliary air force has been called up for service under clause (c) of section 25 of the Reserve and Auxiliary Air Force Act, 1952, officers of that portion of the auxiliary air force will take command and precedence with officers of the regular air force with whom they are serving as if they had been appointed to the regular air force in their auxiliary air force rank from the date of their being called up for service, or, if they are promoted whilst called up for service, from the date of such promotion.

c) Officers other than those mentioned in sub para (b) will take command and precedence in the auxiliary air force according to the dates of their appointment in their respective ranks in the auxiliary air force. When officers are appointed to the same rank on the same date, their relative seniority will be determined by the order in which their names appear in the air force list.

ix. Inter se Seniority – The Reserve and the Auxiliary Air Force Officers

Officers of regular air force reserve, air defence reserve and auxiliary air force will take command and precedence among themselves in accordance with Rule 36 of the Reserve and Auxiliary Air Force Act Rules, 1953.⁴⁴⁵

⁴⁴³ Reg. 93 of Section 5. Section 5 deals with 'Instructions for Officers of Particular Branches'.

⁴⁴⁴ Reg. 94 under Section 1 of the Regulations for Air Force under Defence Service Regulation. Section 1 deals with Appointment to Commission

The Appointment of Officers in the Air Force service can be made under the following ways:

- i. Short Service Commission
- ii. Permanent Commission
- iii. Temporary Commission

A short service commission may be granted to a candidate from civil life or a serving airman in G.D. Technical and Met. Branches of the air force for the periods indicate below:-

- a) **G.D. Branch:** For a period of 4-5 years extendable to 10 years on successful completion of training.
- b) **Technical Branch:** From the date of commencement of training at the Technical Training College up to the date of expiry of the probationary period subsequent to successful completion of training.
- c) **Met.Branch:** From the date of commencement of the specialised met. Training up to the date of expiry of the probationary period subsequent to the successful completion of training.

A permanent commission may be granted in any of the branches of the air force, other than medical and dental, to-

- a) A candidate from civil life or a serving airman on successful completion of training.
- b) To an officer holding short service commission.

A temporary commission may be granted to an officer of the Army Medical Corps/Army Dental Corps on secondment to the air force for the period of secondment. This commission will be superimposed on the commission in Army Medical Corps/Army Dental Corps.⁴⁴⁶

x. Date of Commission

The Date of Commission in the Air Force service is important for the purpose of calculation of seniority of promotion in the service. The effective date of commissioning

⁴⁴⁵ Reg. 95 under Section 1.

⁴⁴⁶ Reg. 96 under Sec. 1

will be the date promulgated in the Gazette of India. Officers granted permanent commission in the technical branch will be granted an ante date of two years counted backwards from the date of successful completion of training for the purposes of seniority, pay and promotion provided they possess the requisite technical qualifications prescribed for the purpose, or, in the case of airmen, had rendered before commissioning six years in the air force as airman.

The initial appointment to commission except in the technical and meteorological branches will be in the rank of Flying officer on probation and will be confirmed after the prescribed period of satisfactory service with retrospective effect.

xi. Order of Promotion in General Duties in the Indian Air Force

Promotion in the General Duties Branch of the Indian Air Force occurs in the following order:

Figure 4.1 Order of Promotion in General Duties in the Indian Air Force



The Promotional Scheme for the General Duties Branch from the Pilot Officer to the Air Marshall are as under

a. Pilot Officer to Flying Officer⁴⁴⁷

A pilot officer will be eligible for promotion to the rank of flying officer provided he-

1. Has completed one year's commissioned service as a general duties officer;

⁴⁴⁷ Reg. 111 of Sec. 3. Section 3 deals with Promotions of General Duties Branch of the Air Force

2. Has been recommended as in all respects suitable for advancement by his commanding officer; and
3. Is medically fit for duties of his branch.

*b. Flying Officer to Flight Lieutenant*⁴⁴⁸

A flying officer will be eligible for promotion to the rank of flight lieutenant provided he-

1. Has completed four years' service in the substantive rank of flying officer;
2. Has been recommended as in all respects suitable for advancement by his commanding officer;
3. Is medically fit for duties of his branch; and
4. Has passed the prescribed promotion examination.

*c. Flight Lieutenant to Squadron Leader*⁴⁴⁹

A flight lieutenant will be eligible for promotion to the rank of squadron leader provided he-

1. Has completed six years' service in the substantive rank of flight lieutenant as general duties officer;
2. Has been recommended as in all respects suitable for advancement by his commanding officer;
3. Is medically fit for duties of his branch, and
4. Has passed the prescribed promotion examination of the Defence Services Staff College Course.

*d. Squadron Leader to Wing Commander (Time Scale)*⁴⁵⁰

1. A Squadron leader who is not promoted as substantive wing commander (selective) will be eligible for promotion to the substantive rank of wing commander on a time scale basis provided he-

- (i) has completed 24 years' commissioned service before attaining the age of

⁴⁴⁸ Reg. 112 of Sec. 3

⁴⁴⁹ Reg. 113 of Sec. 3

⁴⁵⁰ Reg. 114 of Sec. 3

48;

- (ii) has been recommended as in all respects suitable for advancement by his commanding officer, and
- (iii) is medically fit for duties of his branch.

a. Officers who are promoted as substantive wing commanders (time scale) will be borne on a separate list and will not be shown against the regular vacancies of wing commanders. If, however, such an officer was, on the date of such promotion, acting as wing commander he will continue to be held against an authorized appointment of wing commander.

Substantive promotion to the rank of Wing Commander and above to fill the vacancies in the authorized establishment is made by selection subject to the following conditions⁴⁵¹:

a. *Squadron Leader to Wing Commander*

- i. Has served for a minimum period of three years in the substantive rank of squadron
- ii. Has been recommended as in all respects suitable for advancement by his commanding officer; and
- iii. Is medically fit for duties of his branch

b. *Wing Commander to Group Captain*

- i. Has served a minimum of four years in the substantive rank of wing commander;
- ii. Has been recommended as in all respects suitable for advancement by his commanding officer; and
- iii. Is medically fit for duties of his branch

c. *Group Captain to Air Commodore*

- i. Has served a minimum of three years in the substantive rank of group captain;
- ii. Has been recommended in all respect suitable for advancement by his air officer commanding-in-chief; and
- iii. Is medically fit for duties of his branch

d. *Air Commodore to Air Vice Marshall*

⁴⁵¹ Reg. 115 of Sec. 3

- i. Has served a minimum of three years in the substantive rank of air commodore;
- ii. Has been recommended in all respect suitable for advancement by his air officer commanding-in-chief; and
- iii. Is medically fit for duties of his branch

xii. Promotions of Officers in Ground Duty Branches other than Medical and Dental

a. Flying Officer to Flight Lieutenant⁴⁵²

A flying officer will be promoted to the rank of flight lieutenant provided that he:

- 1. Has completed four years in the substantive rank of flying officer or six years' total commissioned service;
- 2. Has been recommended as in all respects suitable for advancement by his commanding officer;
- 3. Is not placed in medical category Ap.Bp.,and
- 4. Has passed the prescribed promotion examination or staff college course.

b. Flight Lieutenant to Squadron Leader⁴⁵³

A flight lieutenant will be eligible for promotion to the rank of squadron leader provided that be-

- i. Has completed seven years in the substantive rank of flight lieutenant or thirteen years' commissioned service;
- ii. Has been recommended as in all respects suitable for advancement by his commanding officer;
- iii. Is not placed in medical category
- iv. Has passed the prescribed promotion examination or staff college course.

c. Squadron Leader to Wing Commander (Time Scale)

Conditions are the same as in Reg. 114.

Substantive promotion to the rank of wing commander and above to fill vacancies in the authorized establishment will be by selection subject to the following conditions⁴⁵⁴:

⁴⁵² Reg. 122

⁴⁵³ Reg. 123

⁴⁵⁴ Reg. 125 of Section 4

a) Squadron Leader to Wing Commander

- i) Has served a minimum of three years in substantive rank of squadron leader;
- ii) Be recommended as in all respects suitable for advancement by his commanding officer;
- iii) Be medically fit for all duties of his branch.

b) Wing Commander to Group Captain

- i) Has served a minimum of four years in the substantive rank of wing commander;
- ii) Has been recommended as in all respects suitable for advancement by his commanding officer;
- iii) Be medically fit for all duties of his branch.

c) Group Captain to Air Commodore

- i) Has served a minimum of three years in the substantive rank of group captain;
- ii) Be recommended for promotion by his air officer commanding-in-chief;
- iii) Be medically fit for all duties of his branch

d) Air Commodore to Air Vice Marshal

- i) Has served a minimum of three years in the substantive rank of air commodore;
- ii) Be recommended as in all respects suitable for advancement by his air officer commanding-in-chief;
- iii) Be medically fit for all duties of his branch

xiii. Promotion Examination

An officer who fails to qualify in the promotion examination before completing the prescribed period of qualifying service will be deemed to have passed the promotion examination on the first day of the examination which he qualifies and will be promoted from that date.⁴⁵⁵

A flying officer or flight lieutenant who does not qualify or is not recommended for time scale promotion to the next rank even after the completion of one year from the expiry of the prescribed qualifying period will be subjected to periodical review by the Chief of

⁴⁵⁵ Reg. 131 of Sec. 5

the Air Staff and is to be warned that failure to qualify within a year will involve the consideration of his retention in the service.⁴⁵⁶

*xiv. Reckonable Service for Promotion*⁴⁵⁷

a) For substantive promotion (by time scale) service will reckon from the date of an officers' permanent commission, or the date of seniority for promotion fixed on grant of that commission, including any ante date for seniority and promotion granted under the rules in force from time to time. Periods of service forfeited by sentence of court martial or by summary award under the air force act will not, however, reckon as service for promotion. The period of absence without leave will also not reckon for promotion.

b) The following periods are reckonable as provided above (a) :

- i) Periods during which furlough rates of pay are drawn,
- ii) Periods of captivity at P.O.W. rates of pay.

c. Reckonable service as defined in sub paras (a) and (b) above is also applicable for qualifying limits for promotions to higher ranks.

d. An officer who has lost service qualifying for substantive promotion under the rules in consequence of his having been granted leave without pay, will, if otherwise qualified, be promoted to the next higher rank, but without the pay and allowances thereof with effect from the date on which he would have qualified by service if he had not been granted leave without pay. On completion of the prescribed period of qualifying service on full pay the officer will become entitled to the pay and allowances of his higher rank.

vii. Medical Fitness

Medical fitness plays a crucial role in the determination of seniority and granting of promotion to the officers in the Air Force. A general duties branch officer of the rank of squadron leader or below who is medically unfit or is in a lower medical category at the time he is due for substantive promotion, but is subsequently declared medically fit, will be promoted to the higher substantive rank from the actual date he became due for promotion and not from the date of attaining, the required medical standard. Cases of

⁴⁵⁶ Reg. 132 of Sec. 5

⁴⁵⁷ Reg. 133 of Sec. 5

officers due for promotion to the rank of wing commander and above, but who are in a lower medical category and are recommended for promotion, are to be referred to the medical authorities and their advice sought regarding their fitness to perform the duties in the rank to which they are being promoted. Only when, an officer due for promotion to the rank of wing commander and above, is recommended by the medical authorities for the grant of higher substantive rank and the other conditions laid down for promotion are fulfilled, he will be granted the substantive promotion from the due date and not from the date of attaining the requisite medical standard provided that he was filling on the date an appointment carrying the acting rank to which he is granted substantive promotion.⁴⁵⁸

4.5. Promotion of University Teachers as Laid Down in the Career Advancement Scheme by the Universities Grants Commission

India holds an important place in the global education industry. India has one of the largest networks of higher educational institutions in the world with 850 universities (as of April, 2018)⁴⁵⁹ and 42,026 colleges.⁴⁶⁰ A total of 35.7 million people were enrolled in higher education institutes in 2016-2017. The aim of the government to raise its current gross enrolment ratio to 30% by 2020 will also boost the growth of the distance education in India. As of 2014-2015, a total of 14,73,255⁴⁶¹ teachers have been employed by the universities under various states.

The present system of higher education dates back to Mountstuart Elphinstone's minutes of 1823, which stressed on the need for establishing schools for teaching English and the European sciences. Later, Lord Macaulay, in his minutes of 1835, advocated "efforts to make natives of the country thoroughly good English scholars". Sir Charles Wood's Dispatch of 1854, famously known as the Magna Carta of English Education in India, recommended creating a properly articulated scheme of education from the primary school to the university. Subsequently, the universities of Calcutta, Bombay (now Mumbai) and Madras were set up in 1857, followed by the University of Allahabad in 1887.

⁴⁵⁸ Reg. 134 of Sec. 5

⁴⁵⁹ <https://www.ibef.org> visited on 8/07/18 at 20:00

⁴⁶⁰ *ibid*

⁴⁶¹ <https://data.gov.in> visited on 8/07/2018 at 20:30

The Inter-University (later known as the Association of Indian University) was established in 1925 to promote university activities, by sharing information and cooperation in the field of education, culture, sports and allied areas.

The Report of the Central Advisory Board of the Education on Post-war Educational Development in India, also known as the Sergeant Report, recommended the formation of a University Grants Committee. As a result, the UGC was formed in 1945 to oversee the working of the three Central Universities of Aligarh, Banaras and Delhi, in 1947, the Committee was entrusted with the responsibility of dealing with all the existing Universities.

The UGC was, however, formally established only in November, 1956 as a statutory body of the Government of India through an Act of Parliament for the coordination, determination and maintenance of standards of university education in India.⁴⁶²

In view of the object for the establishment of the UGC, the Committee has been vigilant and remained updated about the performance of the teachers. For the purpose of 'maintenance of standards of university education' the UGC had promulgated the Career Advancement Scheme to look into the matter of promotion of university teachers.

a. Career Advancement Scheme

The promotion of teachers of University under the Career Advancement Scheme (CAS) is made in the following manner⁴⁶³:

- A. Assistant Professor (Stage 1 / Entry Level) to Assistant Professor (Stage 2/ Senior scale)
- B. Assistant Professor (Stage 2/ Senior Scale) to Assistant Professor (Stage 3)
- C. Assistant Professor (Stage 3) to Assistant Professor (Stage 4)
- D. Assistant Professor (Stage 4) to Professor (Stage 5)
- E. Professor (Stage 5) to Professor (Stage 6)

⁴⁶² Object of the University Grants Commission Act, 1956

⁴⁶³ The University Grants Commission (Minimum Qualifications for Appointment of Teachers and the Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education) (4th Amendment), Regulations, 2016 vide UGC Notification No. F.1-2/2016(PS)/Amendment. The UGC framed these regulations

i. Promotion of Assistant Professor (Stage 1/ Entry Level) to Assistant Professor (Stage 2/ Senior scale):

An Assistant Professor (Stage 1 / Entry Level) will be eligible for placement in Assistant Professor (Stage 2/ Senior scale) provided he/she has:

- a. Completed 04 (four) years of Continuous service as Assistant Professor after regular appointment and possesses a Ph.D degree in the concerned or an allied / relevant discipline; or
- b. Completed 05 (five) years of Continuous service as Assistant Professor after regular appointment and possesses an M.Phil. / L.L.M / M.Tech / MD etc. or equivalent relevant degree; or
- c. Completed 06 (six) years of Continuous service as Assistant Professor after regular appointment if he / she do not possess an M.Phil or Ph.D degree or a Master's Degree in the relevant professional course.
- d. Participated in one Orientation programme and one Refresher Course / Research Methodology Course of 2/3 weeks duration, or engaged in other appropriate continuing education programmes of comparable quality as may be specified or approved by the UGC.
- e. Attained minimum API scores using PBAS scoring proforma developed by the university (see relevant table in the application form).
- f. Completed 01(one) year's regular service as a member of the CUHP faculty and has been confirmed upon successful completion of probation.

Promotion of Assistant Professor (Stage 1 / Entry Level) to Assistant Professor (Stage 2/ Senior scale) will be made on the recommendations of a Screening cum Evaluation Committee, consisting of the following:

- a. The Vice-Chancellor as the Chairperson of the Selection Committee ;
- b. The Dean of the concerned Faculty ;
- c. The Head of the Department / Director of centre.
- d. One subject expert in the concerned subject nominated by the Vice-Chancellor from the University panel of experts.

Three members of the Committee including one subject expert shall constitute the quorum.

Promotion will be due from the date of eligibility or date of appointment in the University whichever is later.

ii. *Promotion of Assistant Professor (Stage 2/ Senior Scale) to Assistant Professor (Stage 3):*

An Assistant Professor (Stage 2/ Senior Scale) will be eligible for placement in Assistant Professor (Stage 3) provided he / she has:

- a. Completed 05 (five) years of service in the Assistant Professor (Stage 2/ Senior Scale).
- b. Participated in one Course / Programme of 2/3 weeks duration from amongst the categories of Refresher Courses, Methodology workshops, Training Programmes, Teaching-Learning-Evaluation Technology Programmes, Soft Skills Development Programmes, and Faculty Development Programmes.
- c. Attained minimum API scores using PBAS scoring proforma developed by the University (see relevant tables in the application form).
- d. Completed 01 (one) year's regular service as a member of the CUHP faculty and has been confirmed upon successful completion of probation.

Promotion of Assistant Professor (Stage 2/ Senior Scale) to Assistant Professor (Stage 3) will be made on the recommendations of a Screening cum Evaluation Committee, consisting of the following:

- a. The Vice-Chancellor as the Chairperson of the Selection Committee;
- b. The Dean of the concerned Faculty;
- c. The Head of the Department / Director of Centre.
- d. One subject expert in the concerned subject nominated by the Vice-Chancellor from the University panel of experts.

Three members of the Committee including one subject expert shall constitute the quorum.

Promotion will be due from the date of eligibility or date of appointment in the University whichever is later.

iii. *Promotion of Assistant Professor (Stage 3) to Associate Professor (Stage 4):*

An Assistant Professor (Stage 3) will be eligible for placement in Associate Professor (Stage 4) provided he / she has:

- a) Completed 03(three) years of service in the Assistant Professor (Stage 3).
- b) Attained minimum API scores using PBAS scoring proforma developed by the University (see relevant tables in the application form).
- c) Participated in one Course / programme of minimum one week duration from amongst the categories of Refresher Course, Methodology Workshops, Training Programmes, Teaching – Learning – Evaluation Technology Programmes, soft skills Development Programmes, and Faculty Development Programmes.
- d) Completed 01 (one) year's regular service as a member of the CUHP faculty and has been confirmed upon successful completion of probation.
- e) The Candidate will submit three best publications which will be got evaluated from three outside subject experts before the interview. Each publication shall be evaluated out of 100 marks by each outside subject expert.
- f) The outcome of evaluation of the publications by the experts shall be placed before the Selection Committee while finalizing the outcome of selection as per the provisions stipulated in Table – II (A) of Appendix – III of UGC Regulations on Minimum Qualifications for Appointment of Teachers and other Academic staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education, 2010.

Promotion of Assistant Professor (Stage 3) to Associate Professor (Stage 4) will be made on the recommendations of the Selection Committee, consisting of the following:

- a) The Vice-Chancellor to be Chairperson of the Selection Committee;
- b) The nominee of the Visitor;
- c) Three experts in the concerned subject / field nominated by the Vice-Chancellor out of the panel of names approved by the EC;
- d) Dean of the school;
- e) Head of the Department / Director of the Department / Centre.
- f) An academician representing SC / ST / OBE / Minority / Women / Differently - abled categories, if any candidates representing these categories is the applicant,

to be nominated by the Vice – Chancellor, if any of the above members of the selection Committee do not belong to that category.

At least four members, including two outside subject experts, shall constitute the quorum. Promotion will be due from the date of eligibility or date of appointment in the University whichever is later. The experts for evaluation of publications shall be other than the expert of Selection Committee.

iv. Promotion of Associate Professor (Stage 4) to Professor (Stage 5):

An Assistant Professor (Stage 4) will be eligible for placement in Professor (Stage 5) provided he / she has:

- a) Completed 03(three) years of service in the Associate Professor (Stage 4).
- b) A Ph.D. degree in the concerned or an allied / relevant discipline.
- c) Attained minimum API scores using PBAS scoring proforma developed by the University (see relevant tables in the application form).
- d) Completed 01 (one) year's regular service as a member of the CUHP faculty and has been confirmed upon successful completion of probation.
- e) The Candidate will submit five best publications since he/ she was placed in the Assistant Professor (stage 3), which will be got evaluated from three outside subject experts before the interview. Each publication shall be evaluated out of 100 marks by each outside subject expert.
- f) The outcome of evaluation of the publications by the experts shall be placed before the Selection Committee while finalizing the outcome of selection as per the provisions stipulated in Table – II (A) of Appendix – III of UGC Regulations on Minimum Qualifications for Appointment of Teachers and other Academic staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education, 2010.

Promotion of Associate Professor (Stage 4) to Professor (Stage 5) will be made on the recommendations of the Selection Committee, consisting of the following:

- a) The Vice-Chancellor to be Chairperson of the Selection Committee;
- b) An academician who is the nominee of the Visitor;

- c) Three experts in the concerned subject / field nominated by the Vice-Chancellor out of the panel of names approved by the relevant statutory body of the University Concerned;
- d) Dean of the faculty, wherever applicable.
- e) Head of the Department / Director of the Department / Centre.
- f) An academician representing SC / ST / OBE / Minority / Women / Differently - abled categories, if any of candidates representing these categories is the applicant, to be nominated by the Vice – Chancellor, if any of the above members of the selection Committee do not belong to that category.

At least four members, including two outside subject experts, shall constitute the quorum. Promotion will be due from date of eligibility or date of appointment in the University whichever is later. The experts for evaluation of publications shall be other than the experts of Selection Committee.⁴⁶⁴

v. Promotion of Professor (Stage 5) to Professor (Stage 6):

A Professor (Stage 5) will be eligible for placement in Professor (Stage 6) provided he / she has:

- a) Maximum of 10(ten) years of teaching and research experience.
- b) Attained minimum API scores using PBAS scoring proforma developed by the University (see relevant tables in the application form).
- c) Has postdoctoral research of high quality / Has received awards / honours / recognitions / patents and IPR on products and processes developed / technology transfer achieved / Has additional research degree like D.Sc., D.Litt., LID etc.
- d) Completed 01 (one) year's regular service as a member of the CUHP faculty and has been confirmed upon successful completion of probation.

Promotion of Professor (Stage 5) to Professor (Stage 6) will be made through assessment process through Expert – Committee evaluation. No separate interview will be conducted for this category. Promotion will be due from the date of eligibility or date of appointment in the University whichever is later.

⁴⁶⁴ A professor already appointed under direct recruitment will not be eligible for consideration under the Career Advancement Scheme (CAS).

b. Screening Committee for Promotion

There shall be a Screening Committee for screening and verification of the claims of incumbents for promotion under **Stage 3 to Stage 4 and from stage 4 to Stage 5**. The Committee shall comprise.

- i. Pro-vice-Chancellor or a Professor nominated by the Vice- Chancellor
Chairman
- ii. Dean of the concerned school...Member
- iii. Head / Director of the concerned Department / Centre Member⁴⁶⁵

c. Counting of Past Service

Previous service, whether national or international, as Assistant Professor, Associate Professor or Professor, or equivalent, in a University, College, national laboratory, or any other scientific / professional organization, e.g. CSIR, ICAR, DRDO, UGC, ICSSR, ICMR, DBT, etc. should be counted for direct recruitment or promotion under CAS of a teacher in the various stages of Assistant Professor, Associate Professor, as the case may be provided that:

- a) The essential qualifications for the post held were not lower than the qualifications prescribed by the UGC for the Assistant Professor, Associate Professor, or Professors, as the case may be.
- b) The post is/was in an equivalent grade / scale of pay or pre-revised scale of pay as the post of Assistant Professor, Associate Professor or professor.
- c) A candidate already in service has applied through proper channel.
- d) The post was filled in accordance with the prescribed selection procedure as laid down by the UGC / State Government / Central Government / Concerned Institutions, for such appointments.
- e) The previous appointment was not as guest lecturer for any duration, or ad hoc or in a leave vacancy of less than on year's duration. Ad hoc or temporary service of more than one year's duration can be counted provided that:
 - i) The period of service was of more than one year duration.
 - ii) The incumbent was appointed on the recommendation of a duly constituted Selection Committee.

⁴⁶⁵ In case Dean / Head / Director is a candidate for promotion under CAS, the Vice Chancellor shall nominate any other Professor in his / her place.

iii) The incumbent was selected to the permanent post in continuation to the ad hoc or temporary service, without any break.

f) No distinction should be made with reference to the nature of management of the institution where previous service was rendered (private/local body/ government) for counting past services under this clause.

A teacher who wishes to be considered for promotion under CAS may submit in writing to the University with three months in advance of the due date, that he / she fulfils all qualifications under CAS and submit to the University the Performance Based Appraisal System proforma as evolved by the University duly supported by all credentials as per the API guidelines set out in these Ordinance. In order to avoid delays in holding Selection Committee meetings in various positions under CAS, the University should immediately initiate the process of screening / selection, and shall complete the process within six months from the date of application.

The Screening cum Evaluation Committee on verification / evaluation of API score secured by the candidate through the 'PBAS' methodology designed by the university as per the minimum requirement specified in the application form shall recommend to the Executive Council of the University about the suitability for the promotion of the candidate(s) under CAS for implementation.

All the selection procedures outlined above, shall be completed on the day of the Selection Committee meeting, wherein the minutes are recorded along with PBAS scoring pro-forma and recommendation made on the basis of merit and duly signed by all members of the Selection Committee in the minutes.

Candidates who do not fulfil the minimum score requirement under the API scoring system proposed in the Ordinance or those who obtain less than 50% in the expert assessment of the selection process will have to be re-assessed only after a minimum period of one year. The date of promotion shall be the date on which he / she has successfully got re-assessed.

CAS promotion being a personal promotion to the incumbent teacher holding a substantive sanctioned post, on superannuation of the individual incumbent, the said post shall revert back to its original cadre. If a candidate applies for promotion on completion of the minimum eligibility period or date of confirmation, whichever is later

and is successful, the date of promotion will be from that of minimum period of eligibility or date of confirmation whichever is later. If, however, the candidates find that he / she fulfils the eligibility conditions at a later date and applies on that date and is successful, his / her promotion will be effected from the date of application fulfilling the criteria. If the candidate does not succeed in the first assessment, but succeeds in the eventual assessment, his / her promotion will be deemed to be from the later date of successful assessment.

d. Inter-se seniority between the direct recruited and teachers promoted under CAS

The inter-se seniority of a direct recruit shall be determined with reference to the date of joining for the teachers promoted under CAS with reference to the date of eligibility as indicated in the recommendations of the selection committee of the respective candidates. The rules and regulations of the respective Central / State Government shall apply, for all other matters of seniority.

4.6. A Sum Up

"To enquire into the best form of government in the abstract, as it is called, is not a chimerical, but a highly practical employment of scientific intellect; and to introduce into any country the best institutions, which, in the existing state of the country, are capable of, in any tolerable degree, is one of the most rational objects, to which practical effort can address itself."

Thus, Personnel administration has acquired a lot of significance, especially during the past three decades in both the government and the private sectors. In examining the various public institutions, their structure and conditions of service, especially promotional aspect, it is revealed that each of the service is based on a 'cadre' system. The service conditions of the staff are regulated and governed by a number of rules, regulations, directives and instructions.

The most important aspect of all public institution is recruitment. Recruitment of the personnel can be done in two ways: direct recruitment and promotion. Under the direct recruitment system, the candidates are chosen by direct selection and are appointed to the posts. Under the system of recruitment by promotion, employees working in the lower positions are promoted to the higher level positions. In analysing the Rules, Regulations, Instructions and Government Orders of various public institutions in India,

it is found that both of these methods of recruitment are in vogue. Hence, certain percentage of employees is appointed through direct recruitment and some through promotion. As already seen, in this chapter as well as in the previous chapters, promotion is an important ingredient of personnel administration and plays a vital role in efficiency of the employees.

On attainment of independence, the Government of India made changes in the structure of the civil service. It created the All India Services, the Central Services and the State Services. According to the new Constitution of India, which came into effect on 26 January, 1950, only two All India Services were recognised, i.e., the Indian Administrative Service and the Indian Police Service. In 1966, the Indian Foreign Service became a part of the All India Service. The IAS replaced the Indian Civil Service and the Indian Police was redesignated as the Indian Police Service in 1951. The All India Services Act was passed in 1951. According to this Act, the union government formulated new rules and regulations to govern the conditions of service of the All India Services. In order to deal with the subjects that are mentioned in the union list, the central services and the central secretariat services were created. The central services grouped under Classes A and B are filled through a combined examination conducted by the UPSC along with the All India Services. Each central service is governed by their own cadre, functions and service rules and regulations.

Generally, 50% of the junior time scale posts are filled by direct recruitment and the remaining are filled through promotions from the respective feeder services. For the posts above the junior time scale level, the method of promotion is used based on the recommendations of the Departmental Promotion Committees. The central civil service is generally divided into Group A, Group B, Group C and Group D. It is to be borne in mind that 33% of the posts to the All India Services are filled by promotion from the state services.

On analysing the rules and regulations governing the promotion system of the All India Services and the Central Civil Services, it is seen that promotion is made according to the principles of seniority, merit as well as seniority-cum-merit. Under the principle of seniority, the length of service is calculated in determining the seniority, in a particular post or scale or grade. The employer who has longer length of service gets the promotion earlier. This principle suits well in the highly hierarchical-based society in

India. It is highly democratic as every person is bound to become senior one day or the other. Age and length of service are given preference. For computing the length of service, a 'year of allotment' is assigned in the All India Services. The four principles governing the assignment of 'year of allotment' are:

(i) The year of allotment of the junior-most among the officers recruited to the service by direct recruitment.

(ii) The year from which the claimant officer officiated continuously in a senior post from a date earlier than the date of commencement of like officiation by the junior-most direct recruit of the year.

(iii) The promotee shall be deemed to have been officiating continuously in a senior post even prior to his inclusion in the select list if the period of such officiation is approved by the central government in consultation with the UPSC.

(iv) The deemed continuous officiation in a senior post shall have its genesis on the date from which he continues to hold without any break or reversion a senior post, otherwise than as a purely temporary or local arrangement.

These conditions have to be satisfied for getting a year of allotment even though a person has been working for long in a post, which is equivalent to a cadre post. The service rendered in such a post cannot be taken as the basis for fixing year of allotment unless the post is declared as such, with the approval of the central government by the state government. Further the continuity of service is another important aspect. Once the continuity is disrupted, the claim breaks down. Service for long years becomes uncountable if there had been break however short it may be. The fact that the gap was bridged by counting the period of break, as period of joining duty for other purposes does not cover up the legal ingredient of continuity of service.

However, the question which arises here is: "Are all persons who are promoted by seniority, are fit for promotion?" Thus, the tussle between seniority and fitness arises.

A well-defined principle adopted by the Indian Administration in solving the above problem is the principle of 'seniority-cum-merit'. It is seen in almost all services that greater reliance is being kept upon the dual principle of seniority-cum-merit. It is seen, that in this process, the minimum, length or the years of service (seniority) is fixed and

then the fittest and meritorious person who has completed the minimum length of years of services, is selected for promotion.

In India, on evaluation of various public institutions, their performance and rules and regulations governing the employees, it is seen that the general pattern of promotion is based on certain fixed lines. First, promotions to the highest posts are made on the basis of merit principle only; secondly, promotions to the higher and higher-middle level posts are made on the basis of seniority-cum-merit; and finally, promotions to lower posts are made on the basis of seniority.

CHAPTER – 5

CAREER ADVANCEMENT IN PUBLIC ADMINISTRATION IN LEADING DEMOCRACIES AND ROLE OF THE CONCEPT OF SENIORITY

5.1. Overview

Civil Service, all over the world, is that body of government officials who are employed in civil occupations that are neither political nor judicial. In most countries, the term refers to employees selected and promoted on the basis of merit and seniority system, which may include examinations.

The concept of civil service has evolved over time. This is also true for the roles and responsibilities undertaken by the civil servants in the present time. Originally, the members of the royal family did the work of the government. Then, with the development of the cabinet system, the ministers discharged these functions. But with the introduction of the democratic element in the governance of monarchies and other forms and also with the change from the negative state to the positive state it has brought about vast extension in public business, which compelled the ministers to recruit persons for assistance, who came to be known as civil servants. Again, with the growth in the population and with more participants of people in the governance and the governments becoming more responsive to people, the public business became too large to handle. This vast extension in public business forced the ministers not only to appoint more people to assist but also to leave to his officials all but the largest decisions on major policy. This situation traces the growth in the powers of the civil servants and it explains how their importance has gone up over a period of time.

The credit for setting up an organised civil service for the first time should go to the Bourbons. The idea was further spread by Napoleon who formalised the system of Prefects and created the three 'grand corps' which further extended the functions of the civil services and gave them higher position in society. It is perhaps this ancestry that has made the civil service in France the best organised, the best trained and the most

respected of such organisations. It is not by chance that two of the five Presidents of the Fifth French Republic have been eminent civil servants.

No state of any extent can be ruled without a bureaucracy, but organisation of any size have been few until the modern-era. Administrative institutions usually grow out of the personal servants of high officials as in the Roman Empire. This developed a complex administrative structure, which is outlined in the *Notitia Dignatatum* and the work of John Lydus, but as far as we know appointments to it were made entirely by inheritance or patronage and not on merit, and it was also possible for officers to employ other people to carry out their official tasks but continue to draw their salary themselves. There are obvious parallels here with the early bureaucratic structures in modern states, such as the Office of Works on the Navy in 18th century England, where again appointments depended on patronage and were often bought and sold.

The imperial bureaucracy of China which can be traced back to the Qin Dyansty is one of the oldest examples of a civil service system which is based on merit. Military appointments, specifically, were made solely on merit. However, after the fall of the Qin Dynasty, the Chinese bureaucracy regressed to a semi-merit system known as the nine-rank system. The eventual Tang dynasty decreasingly began to rely on the aristocratic recommendations and more and more on promotion based on written examinations. The Chinese Civil service became known to Europe in the mid-eighteenth century and influenced the development of European and American System.

This Chapter, particularly, reflects on the gradation of public administration in some of the developed countries in relation to their career advancement schemes and promotion and the role of seniority or merit in such schemes. The countries that have been taken into consideration are United States of America, United Kingdom, Canada, France, Germany, South Africa, Australia, Japan and China.

5.2. Structure in Public Administration in United States of America, Career Advancement and the Role of Seniority Norm

Bureaucracies are complex institutions designed to accomplish specific tasks. This complexity and the fact that they are organisations composed of human beings, can make it challenging for us to understand how bureaucracies work.

5.2.1. Types of Bureaucratic Organisations in the United States of America

In the United States of America, the government comprises of four general types of bureaucratic organisations: cabinet departments, independent agencies, regulatory agencies and government corporations.

i. Cabinet Departments

There are currently fifteen cabinet departments in the federal government. Cabinet departments are major executive offices that are directly accountable to the president. They include the Departments of State, Defence, Education, Treasury and several others. Occasionally, a Department will be eliminated when government officials decide its tasks no longer need direct presidential and congressional oversight, such as happened to the Post Office Department in 1970.⁴⁶⁶

Each cabinet department has a head called a secretary, appointed by the president and confirmed by the Senate. These secretaries report directly to the president, and they oversee a huge network of offices and agencies that make up the department. They also work in different capacities to achieve each department's mission oriented functions. Within these large bureaucratic networks are a number of undersecretaries, assistant secretaries, deputy secretaries, and many others.

Individual cabinet departments are composed of numerous levels of bureaucracy. These levels descend from the department head in a mostly hierarchical pattern and consist of essential staff, smaller offices and bureaus. Their tiered, hierarchical structure allows large bureaucracies to address many different issues by deploying dedicated and specialised officers. For example, below the secretary of state are a number of undersecretaries. These include undersecretaries for political affairs, for management, for economic growth, energy, environment and many others. Each controls a number of bureaus and offices. Each bureau and office in turn oversees a more focused aspect of the undersecretary's field of specialisation. For example, below the undersecretary for public diplomacy and public affairs are three bureaus: educational and cultural affairs, public affairs and international information programs. Frequently, these bureaus have more specialised departments under them. Under the bureau of educational and cultural

⁴⁶⁶ The Bureaucracy: How is it structured? Available at - <https://courses.lumenlearning.com/american-government/chapter/understanding-bureaucracies-and-their-types/> visited on 23-06-2018

affairs are spokesperson for the Department of State and his or her staff, the Office of the Historian and the United States Diplomacy Center.⁴⁶⁷

ii. Independent Executive Agencies and Regulatory Agencies

Like cabinet departments, independent executive agencies report directly to the president, with the heads appointed by the president. Unlike the larger cabinet departments, however, independent agencies, are assigned far more focussed tasks. These agencies are considered independent because they are not subject to the regulatory authority of any specific department. They perform vital functions and are a major part of the bureaucratic landscape of the United States - providing information or services. Some prominent independent agencies are Central Intelligence Agency (CIA), which collects and manages intelligence vital to the national interests and the National Aeronautics and Space Administration (NASA) charged with developing technological innovation for the purpose of space exploration.

The independent regulatory agency emerged in the late nineteenth century as a product of the push to control the benefits and costs of industrialisation. The first regulatory agency was the Interstate Commerce Commission (ICC), charged with regulating that most identifiable and prominent symbol of nineteenth-century industrialism, the railroad. The other regulatory agencies, such as Commodity Futures Trading Commission, which regulates U.S. financial markets and the Federal Communications Commission, which regulates radio and television, have largely been created in the image of the ICC. The Securities and Exchange Commission (SEC) illustrates well the potential power of such agencies. The SEC's mission has expanded significantly in the digital era beyond mere regulation of stock floor trading.

iii. Government Corporations

Agencies formed by the federal government to administer a quasi-business enterprise are called government corporations. They exist because the services they provide are partly subject to market forces and tend to generate enough profit to be self-sustaining, but they also fulfil a vital service the government has an interest in maintaining. Unlike a private corporation, a government does not have stockholders. Instead it has board of directors and managers. The most widely used government corporation is the U.S. Postal

⁴⁶⁷ Available at – <https://www.state.gov/r/pa/ei/rls/dos/436.htm> visited on 6-6-2016

Service. Once a cabinet department, it was transformed into a government corporation in the early 1970s. Another widely used government corporation is the National Railroad Passenger Corporation, which uses the trade name Amtrak.

5.2.2. Political Patronage versus Merit

Throughout much of the nineteenth century, federal workers were a valuable political asset. Patronage was the currency of the political exchange. The right to place the local party faithful into relatively high-paying federal jobs, making them postmasters or customs officers, was coveted by members of the House of Representatives, senators, cabinet members, and local political bosses. The president, who had the constitutional power to staff executive branch positions, traded these positions to members of Congress, local bosses, and other politicians in exchange for their support on legislation and in re-election.⁴⁶⁸ Patronage jobs were known to be temporary, subject to the political fortunes of each worker's benefactor and political party. Not only was patronage an integral part of party politics in the United States, but it was viewed as a mean of democratising the government. Anyone, with the right political connections could obtain a government job, at least for a short while.

Nevertheless, in the late nineteenth century, with the enthusiastic support of the president Congress voted to restrict the number of patronage positions that were available. With the enactment of the Pendleton Act⁴⁶⁹ on 16 January 1883, the process was established by which patronage was to be give way gradually to the merit-based employment. By 1904, only twenty one years after the Pendleton Act was passed, over 50 per cent of the total federal civilian labour force was under the merit provisions⁴⁷⁰.

The shift from patronage to merit in the federal government represented a major institutional change in the hiring and administration of the federal labour force. This shift to merit is commonly portrayed as a victory by reform groups over an unwilling Congress.⁴⁷¹ According to this view, civic minded reformers objected to the inefficiencies and corruption alleged to be inherent in a system of patronage, and they

⁴⁶⁸ Ronald N. Johnson and Gary D. Libecap, *The Federal Civil System and the Problem of Bureaucracy: The Economics and Politics of Institutional Change*, 12 (The University of Chicago Press, Chicago, 1994)

⁴⁶⁹ 22 Stat. 403

⁴⁷⁰ U.S. House of Representatives, 1976

⁴⁷¹ See, Paul P. Van Riper, *History of the United States Civil Service* (Row, Peterson and Company, Illinois, 1958)

worked to deny the re-election of the members of Congress who were supporters of the Spoils system and to replace them with members sympathetic to reform. Although reform groups played a role in mobilising opposition to patronage, we find an explanation that solely emphasises exogenous pressures for institutional change in organisation of the federal labour force incomplete.

The overriding factor that changed the way in which federal politicians viewed patronage was the growth in the size of the federal labour force. Commensurate increases in the number of patronage positions raised the costs of negotiating and administering the distribution of the spoils and of monitoring the performance of patronage employees.⁴⁷²

5.2.3. Legislation of Merit

a. Early Efforts to Adopt Merit: The Jenckes Bill

The most serious effort in Congress to adopt a merit system for hiring of federal employees was made by Congressman Thomas Jenckes of Rhode Island.⁴⁷³ The Jenckes Bill, which was prototype for the Pendleton Act called for the use of competitive examinations for entry into the federal civil service for all positions, except those top level offices named by the president and confirmed by the Senate. The Civil Service Commission was to monitor the selection process. In support of his bill, Jenckes argued that introducing a merit system would ‘save congressmen and executive officers countless hours wasted listening to office seekers’.⁴⁷⁴

Jenckes was a member of the Joint Select Committee on Retrenchment after the Civil War and also believed that a merit system improving government efficiency would allow for a reduction in taxes: “Let us seek to obtain skill, ability, fidelity, zeal and integrity in the public service, and we shall not be called upon to increase salaries or the number of offices. It is safe assert that the number of offices may be diminished by one-third and the corresponding reduction of salaries for discontinued offices, if a, healthy system of appointment and discipline be established for its government”.⁴⁷⁵

⁴⁷² Supra n. 470

⁴⁷³ Ari Hogenboom, *Outlawing the Spoils: A History of the Civil Service Reform Movement, 1865-1883*, 10 (University of Illinois Press, Illinois, 1968)

⁴⁷⁴ Id at 28

⁴⁷⁵ Congressional Globe, 39th Cong., 2nd Sess., 838-39

Jenckes and other civil service reformers looked to Great Britain, where merit-based reforms were being implemented at the time. Indeed, later in 1879, as the campaign for the civil service reform continued, Dorman Eaton of the National Civil Service Reform League, the chief Architect of the Pendleton Act, wrote the Civil Service in Great Britain (1880) to extol the rewards of civil service reforms in Britain and their likely beneficial effects in U.S.A.

Despite the growing support for some type of merit system for the federal workers, Jenckes Bill would have resulted in massive cuts in the number of patronage positions. Jenckes failed to through the bill in the House.

b. The Pendleton Act, 1883

After the failure of the Jenckes Bill in 1867, there were various attempts to create a merit-based system for hiring federal workers. The Jenckes Bill was reintroduced in 1868, 1870 and 1871 but it did not pass. Between 1871 and 1874, there was a short lived Civil Service Commission authorised by a rider to an appropriations bill and supported by President Grant. The statute authorised the president to establish rules and regulations for the hiring of the federal workers to best promote the efficiency of government through the use of criteria that stressed knowledge and ability rather than political ties.

A permanent institutional structure for merit hiring did not come until the Pendleton Act was passed in 1883. The original Pendleton bill was submitted to Congress by Senator George Pendleton of Ohio in December 1880. It followed the earlier Jenckes bill, creating a strong Civil Service Commission to administer a merit system. Some constitutional issues were raised, and the bill was withdrawn and replaced by one carrying provisions drafted by the members of the New York Civil Service Reform Association and the National Civil Service Reform League. The new bill was reintroduced by Pendleton on 10 January 1881. Although the Committee recommended passage, no action was taken by the Congress during that session. Action awaited the new president.⁴⁷⁶

The assassination of President Garfield in July 1881 reignited the spoils system as an explosive campaign issue. The New York Civil Service Reform Association took advantage of public revulsion over the assassination to the campaign for the passage of

⁴⁷⁶ Supra n. 470 at 31

the Pendleton Act, and the legislation was reintroduced by Pendleton on 6 December 1881. Congressional debate emphasised the efficiency and economy that would come about with a merit system and broad public demand for civil service reform. Even so, no action was taken on the bill. During the summer of 1882, reform groups continued to lobby Congress and generate voter support for enacting the Pendleton bill.⁴⁷⁷

Although political pressure was building for the adoption of some type of merit reform legislation, shifts in the political fortunes of the two parties help explain the exact timing of the passage of the Pendleton Act, 1883. Democrats took control of the House in March 1883, and Republicans began to fear that they would lose the 1884 presidential election since the election of Lincoln. The debate in the Senate over Pendleton Act occurred over the period from 12 December 1882, when it was passed by the Senate; the House vote took place on 4 January 1883.⁴⁷⁸ The bill was voted upon during the lame-duck second session of the Forty Seventh Congress, which was controlled by the Republicans. It provoked considerable debate in the Senate. In the words of Senator Warner Miller of New York' "No party can hope to manage the patronage of this government in its present magnitude and maintain itself before the people. The people demand efficiency in the officers. They only ask of the Postal Department that it shall take their mails and that it shall deliver them in the least possible time with the fewest possible mistakes".⁴⁷⁹

One of the major objectives of the Pendleton Bill was the separation of the federal employees into two groups: classified (merit) and unclassified (patronage). As predicted not all federal employees were placed within the merit system. When the law was implemented, 2573 positions were placed in the classified customs service, 5699 in the classified postal service and 5652 in the classified departmental service in Washington, D.C.⁴⁸⁰ Senior officials, appointed by the president, with the advice and consent of the Senate, were not covered by the act.

⁴⁷⁷ Adelbert Bower Sagesar, *The First Two Decades of the Pendleton Act: A Study of Civil Service Reform*, Volume 34-35, 47-52 (University of Nebraska, Kearney, 1935)

⁴⁷⁸ Id at 57-59

⁴⁷⁹ Congressional Record, 47th Cong., 2nd sess., 284

⁴⁸⁰ U.S. Civil Service Commission, Annual Report, 1889, 15

c. Other Legislations

Three relatively recent key elements called the relevance and viability of central human resource management agencies and functions into question. The first was the application of the Civil Rights Act, 1964 to state and local governments by the Equal Employment Opportunity Act, 1972. Following the passage of the latter legislation, there was a great deal of introspection by central personnel agencies, civil service systems, government managers and citizens about relevance of traditional hiring practices and their results as seen in the composition of the U.S. workforces. Numerous charges of unfair recruitment, testing and performance appraisal techniques were brought to light through law suits, consent decrees and the like. Government agencies now forced to defend their respective personnel systems, were obligated to prove their techniques' viability and validity in cases where adverse impact on protected groups was detected. Traditional practices such as the rule of three (hiring restricted to the top three candidates for a position as measured by a civil service examination) and written tests based on scanty or non-existent job analyses came crashing down. When personnel managers were required to justify their methods, in many cases these methods were found to be sorely lacking. This increased scrutiny forced personnel agencies to rethink time-honoured practices and to become acquainted with more readily defensible, sophisticated psychological methodologies: validated assessment centres often replaced written tests, broad banding of test scores replaced strict rules of one or three, performance appraisal systems moved from trait-based systems toward more job-related and interactive measures. In this way, implementation of the Equal Employment Opportunity Act, 1972 helped professionalise and energise a once dormant field. Conversely, it also laid down the groundwork for a more serious questioning of the role that central personnel agencies had in managing modern organisations.⁴⁸¹

The seeds of this questioning began to show evidence of fruition in the Civil Service Reform Act, 1978 (CSRA), the second major event that helped shape the current environment of public human resource management. Whereas the Equal Employment

⁴⁸¹ Stephen E. Condrey (ed.), *Handbook of Human Resource Management in Government*, 3 (John Wiley & Sons, San Francisco, 2005)

Opportunity, 1972 eventually disclosed tried-but-not-true personnel practices, response to the CSRA initiated a steady call to decentralise personnel functions and decisions.⁴⁸²

Enacted during the Carter administration, the Civil Service Reform Act sought to bring businesslike procedures to the federal government, most notably through a merit pay experiment for federal mid-level managers. Espoused as a proven private sector technique, merit pay sought to link managerial performance to compensation, eliminating time-in-grade step increases (which, ironically, were first designed to be associated with individual performance). Although time has proved the federal government's merit pay experiment a failure, merit pay and more important, a view of the private sector as a model for public sector human resource management diffused and continues to diffuse to many state, city and county government organisations.

Merit pay, like many of the provisions of the Civil Service Reform Act, was born out of the idea of that government bureaucracies and the public personnel administrators that had great influence in controlling them had become insulated from executive and political input and control. With the advent of the Reagan administration and a coinciding era of cutback management, government organisations at all levels began to question bureaucratic structures and processes. Organisations were instructed to do more with less and to become more efficient, effective and accountable to executive and public oversight and control. Soon government organisations were called on to reinvent themselves. In many instances, reinvention focused on personnel practices; this, for example, was the case for National Performance Review. Headed by Vice President Al Gore, the National Performance Review called for decentralising many federal human resource management functions and encouraged the empowerment of managers to act with discretion rather than purely through applying rules and regulations.⁴⁸³

5.2.4. The Recruitment Process and the Role of Seniority in the Federal Civil Service System

The central task of recruitment is to “generate a sufficient pool of applicants to ensure that there are enough people available with the necessary skills and requirements to fill

⁴⁸² Ibid

⁴⁸³ A. Gore, *The New Job of the Federal Executive*, *Public Administration Review*, 1994, 54(4), 317-21

positions as they arise.”⁴⁸⁴ Despite its obvious importance to the success of any organisation, government has a poor track record as an effective recruiter.

a. *Inside or Outside*

A critical consideration in the recruitment process is the *inside* or *outside dilemma*. Should the organisation give preference to internal candidates, intentionally seek an outsider (a process termed lateral entry), or declare an open search in which all candidates will be given an equal chance to compete? There is no specific answer to this question. Most organisations have a strong tendency to favour internal candidates over external ones, regardless of their relative qualifications. This predisposition is clearly understandable, given the realities of organisational life. Elevating internal candidates maintains the morale of the other workers by supporting the belief that through dedicated service, they will be rewarded with promotions. And since any promotion will set off a ripple effect in which other workers move up their respective career ladders, a large number of employees can be pleased with just one vacancy. Other arguments for internal recruitment include the facts that it is cheaper, quicker and safer.⁴⁸⁵

The inside or outside dilemma is tempered somewhat by the requirement in many merit systems that all applicants be considered. Recruitment is technically an open process that does not exclude anyone. It is widely known, however, that public agencies commonly make no real effort to attract outside applicants. Many selections have already been made before the job announcements are written or vacancies advertised.

b. *Performance Appraisal System*

A performance appraisal is designed to structure the assessment process positively. By formally focussing a manager’s attention solely on the objective, job-related criteria for assessing performance, an appraisal provides the manager with the means of making appropriate decisions that rationally contribute to the organisation’s and the individual’s effectiveness and well-being. The purpose for which performance appraisal can be employed are numerous. However, they may be grouped into two broad categories –

⁴⁸⁴ J. Hamman and U. Desai, *Current Issues and Challenges in Recruitment and Selection*, in S.W Hays and R.C. Kearney (eds.), *Public Personnel Administration: Problems and Prospects*, 90 (Prentice Hall, New Jersey, 1995)

⁴⁸⁵ Steven W. Hays and Jessica E. Sowa, *Staffing the Bureaucracy: Employee Recruitment and Selection*, in Stephen E. Condrey (ed.), *Handbook of Human Resource Management in Government*, 107 (John Wiley & Sons, San Francisco, 2005)

judgmental and developmental. Although both developmental and judgmental appraisals have enhanced productivity as their goal, they approach it in two quite distinct fashions.⁴⁸⁶

Development focuses on an individual's potential rather than on his/her current level of skills and capacities. Hence, it is essential in such assessments to consider the question, potential for what? Whether viewed from an organisational or an individual perspective, the goal toward which this potential, or growth, is directed needs examination. The organisational need for developing an individual's potential? The human resource aspects of an organisation's strategic planning process should provide the answers to these questions. If an organisation is to provide an employee with enhancement skills and abilities, it is important that the organisation perceive what reward it expects in return.⁴⁸⁷

Judgmental purposes follow the management systems, or command-and-control, model of authority. In fact, the existence and adequacy of a reward structure are important subsidiary questions regarding the effectiveness of appraising for judgmental purposes.⁴⁸⁸ Among public sector agencies, the organisational reward structure has proved on important limitation on judgmental purposes, such as the making of the decisions of regarding promotions and merit pay.

Merit pay is especially in vogue, with man public sector jurisdictions seeing it as a means of enhancing productivity and at the same time cutting costs. However, the reality is somewhat different in that governments regularly refuse to really pay for enhanced productivity.

Promotion entails both developmental considerations (what additional competencies does this individual need, and how can they be provided for?) and pay considerations, yet it is distinct decision. Although the criteria used in assessing performance for pay and in assessing performance for promotion overlap, they also differ. It is suggested that a separate appraisal for promotion may be appropriate.

⁴⁸⁶ Dennis M. Daley, *Designing Effective Appraisal Systems*, in Stephen E. Condrey (ed.), *Handbook of Human Resource Management in Government*, 107 (John Wiley & Sons, San Francisco, 2005)

⁴⁸⁷ Ibid

⁴⁸⁸ J.L. Perry, *Merit Pay in the Public Sector: The Case for Failure of Theory*, Review of Public Personnel Administration, 1986, 7(1), 57-69

c. Internal Promotions

Most municipalities give first consideration to current municipal employees when positions become available within the municipality. Some civil service laws require seniority rights to be respected when making promotions.⁴⁸⁹ However, in many jurisdictions promotion decisions are discretionary, and employees have no vested rights to a promotion⁴⁹⁰. Even when internal promotion is not required by law, recruiting internally is desirable because it provides the opportunity for employees to grow within the organization and it improves worker morale. Transferring a current employee to another position within the municipality also ensures that the skills and abilities of employees will not be unnecessarily wasted; and familiarity with the workplace can significantly reduce the time necessary to train an employee for the new position.⁴⁹¹

A denial of a promotion by a municipal employer can result in a violation of the employee's constitutional rights if the failure to promote was the result of wrongful discrimination, or was in retaliation for the employee's exercise of First Amendment rights, whistle-blowing, making complaints of wrongful discrimination, or for filing a worker's compensation claim.⁴⁹²

d. Recruitment Procedure

Job posting—Some municipal charters have specific regulations governing the posting of job announcements; however, absent such regulation, it makes sense to give existing employees first priority at position openings, by posting an announcement of a job opening in places accessible to all qualified employees for five working days before the announcement is made to external sources.

Employee job interest—Regular, full-time employees requesting consideration for job openings should be required to submit an application to the hiring body or individual named in the job posting. If, after serious consideration of current employees' qualifications, the position is still unfilled, then outside recruitment should be considered.

⁴⁸⁹ *Wilson vs. Los Angeles County Civil Service Comm'n*, 229 P.2d 406 (Cal. Dist. Ct. App. 1951)

⁴⁹⁰ *Rutherford vs. City of Portland*, 494 A.2d 673 (Me. 1985)

⁴⁹¹ Deborah L. Markowitz, *A Practical Guide to hiring and Firing Public Employees*, 29(2), *The Urban Lawyer*, 295 (Spring 1997)

⁴⁹² *Montoya vs. City of Colorado Springs*, 770 P.2d 1358 (Colo. App. 1989); *Hopkins vs. City of Midland*, 404 N.W. 2d 744 (Mich. Ct. App. 1987)

Resume files—The supervisor requesting the hire may review current applicant files which contain applications and resumes of individuals who have applied for similar positions previously. The supervisor may then contact any qualified individuals.

Job advertising—Some state and local laws require municipalities to advertise in order to fill job openings. However, whether or not this is the case in your municipality, once a city or town decides to advertise, it must conform to equal opportunity employment requirements. Alternative modes of dissemination must be available to ensure that disabled individuals have equal access to the job information. To be complete, job notices should specify the name and the office of the person from whom applications are to be obtained, the name and office of the person to whom completed applications are to be returned, and the deadline for filing an application.

Employment agencies and search consultants—Many municipalities use professional employment specialists when ordinary advertising methods do not attract a qualified candidate or when a nationwide or regional search is desired.

The municipality must be very careful when selecting an employment agency or search consultant since the municipality will be held liable in the event that the agency or consultant violates any of the equal opportunity employer requirements.

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d. Merit Principles

It is important at *the* outset to draw a clear distinction between merit principles and civil service or merit systems. There are six merit principles established by Congress in the Intergovernmental Personnel Act. Congress established as national policy:

That the quality of public service at all levels of government can be improved by the development of systems of personnel administration consistent with such merit principles as-

- (1) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment;
- (2) providing equitable and adequate compensation;
- (3) training employees, as needed, to assure high-quality performance;
- (4) retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected;
- (5) assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, colour, national origin, sex or religious creed and with proper regard for their privacy and constitutional rights as citizens; and
- (6) assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office.

It is essential that a collective bargaining system established in the public service assure that the public interest is protected by specifically safeguarding those

⁴⁹³ Supra n. 493

principles. This does not mean civil service systems established to implement the merit principles should be held inviolate and pure and not be changed in any respect when a collective bargaining system is installed.⁴⁹⁴

e. Career Advancement

Promotions of career employees can be another problem area. If recognition is not given to faithful service and the values of organization knowledge and continuity of staff contacts, the morale and effectiveness of an organization may be diminished. This is a strong argument for promoting from within whenever possible. At the same time, if avenues for bringing in new talent from outside the organization are closed, the career service may become inbred and result in organizational stagnation.

The methods used for selecting employees for promotion also are critical factors in organizational effectiveness and employee morale. Where promotions are made on a non-merit basis, employees may criticize the practice as denying them fair consideration.

Most civil service systems provide competitive promotions. Some employee organizations favour promotion primarily on the basis of seniority. Jerry Wurf, president of the American Federation of State, County and Municipal Employees, has made statements in support of merit principles in public employment. However, with regard to promotion, he has indicated:

Promotion on the basis of merit and fitness is necessary, but the rules must be negotiable. Seniority must be the key determination for distinguishing between qualified applicants. Among professional employees perhaps seniority alone is not always enough for distinguishing between candidates for a job—although it remains an important consideration.

This is an area that presents some potential for conflict between collective bargaining and the competitive merit principle—it is of the utmost importance that promotion systems treat, employees fairly, respond promptly to management needs and further the public's interest in effective, efficient service. This calls for a proper balancing of seniority and demonstrated competence. It should be noted that seniority can and does

⁴⁹⁴ Douglas I. McIntyre, *Merit Principles and Collective Bargaining: A Marriage or Divorce*, 37 (2), *Public Administration Review*, 187 (March – April 1977)

play a significant role with respect to many employee benefits without raising any issue with merit concepts.⁴⁹⁵

f. Seniority or Merit – The Debate

Those familiar with the history of public personnel administration in the United States know that the debate over whether taking certain personnel actions on the basis of seniority violates the merit principle has been going on for a long time. However, the value of seniority in personnel practices was formally written into the 1964 Civil Rights Act through S. 703(h). It provides that an employer is empowered to induce different terms and conditions or privileges of employment in a bona fide seniority or merit system. However, the terms and conditions so imposed shall not be discriminatory in nature so as to intentionally discriminate on the basis of race, colour, religion, sex or national origin.

Equally long-standing is a self-interested power struggle over seniority between organised labour and management.⁴⁹⁶ The reality of seniority systems in the public sector, of course, is not the issue. Formally and informally, they exist in many jurisdictions on all levels of government, many having been agreed to in negotiated contracts. Unions have been consistent in their demands for seniority as a decision rule that reduces management's arbitrary power over workers and their organizations by establishing a standard that is at once objective and tightly connected with union membership. For public employee unions such as American Federation of State, County, and Municipal Employees (AFSCME), the seniority rule is put forward as a way of making decisions when application of merit standards and mutually acceptable methods and procedures do not yield clear-cut choices, especially regarding promotion actions.⁴⁹⁷ In other areas, and most especially in reductions in force, organized labour is not so willing to finesse the issue in order to avoid a direct confrontation with merit, and seniority is raised from the status of a tie-breaker to a virtually absolute rule. In all cases, the unions' self-interest is obvious, as is that of individual employees who stand to benefit. Public management's position is equally transparent, and workers who are disadvantaged by existing seniority systems (including more recently hired women and

⁴⁹⁵ Ibid

⁴⁹⁶ Lloyd G. Nigro, *Scientific Management: Seniority and Productivity in the Public Sector*, Vol. 10, No. 1, *Public Productivity Review*, 73 (Autumn, 1986)

⁴⁹⁷ Ibid

minorities) may be expected to challenge them on grounds that they violate merit or other "basic" principles.⁴⁹⁸

Seniority systems in the public sector are the products of a very real competition among organized interests. There are winners and losers in this competition, but mostly there is compromise and adjustment. What, however, has been the impact on productivity? For a variety of reasons, including disagreements over definitions and criteria, as well as massive methodological problems, there is very little solid evidence upon which to base a judgment as to seniority's effects on productivity.⁴⁹⁹ Needless to say, more or less convincing arguments defending and condemning seniority have been set forth. To the degree that one is willing to accept the proposition that the merit principle and merit systems are designs for productivity in the public sector, seniority rules are suspect. However, it is unreasonable to evaluate real seniority systems in terms of the standards set by the theory or concept of merit (a criticism often levelled against economists who "assume" a perfect market). In fact, however convincing the logic of merit, its operating technologies (selection devices, performance evaluation methods, incentives, job designs, and so forth) are demonstrably imperfect. Critics of public personnel management, including labour leaders, find many sources of inefficiency and ineffectiveness in the operations of merit systems, which have little if anything to do with seniority.⁵⁰⁰ Those who urge a general rejection of seniority, on the grounds that it is incompatible with productivity, should be required to make their case in more than just logical terms, which require accepting questionable assumptions and causal relationships.

Those who oppose seniority on the grounds that it undermines productivity have very little convincing empirical evidence to call upon. It is relatively easy to demonstrate that seniority systems have a very negative effect on minorities and women who are "last hired, first fired" when reductions in force take place, but productivity, however defined, is another matter. Why, then, the confidence or certainty with which proponents of merit enter into battle with advocates of seniority? The answer, is believed to be found in the

⁴⁹⁸ Jerry Wurf, *Merit: A Union View*, Vol. 34 No. 5, *Public Administration Review*, 431-434 (Sep. – Oct., 1974)

⁴⁹⁹ Steven W. Hays and T. Zane Reeves, *Personnel Management in the Public Sector*, 282-316 (Allyn and Bacon, Boston, 1984)

⁵⁰⁰ Hays and Reeves, *Personnel Management*; Lewin and Horton, "The Impact of Collective Bargaining."

fusion of the civil service reform and scientific management movements that took place during the first quarter of the twentieth century.⁵⁰¹

The New Moral Order

Advocates of civil service reform and scientific management proposed to sweep away what they believed were old, self-serving, and inefficient ways of running organizations and to replace them with a new (more productive) order. For civil service, the elimination of spoils and machine politics, the installation of merit systems, and economy-oriented administration were major elements in a program of governmental reform. Neutral competence, technical expertise, and professionalism were important features of the strategy for implementation and legitimation. Scientific management was to add an extremely influential normative dimension to a public administration that was in the process of structuring itself intellectually around the politics-administration dichotomy—the moral as well as the instrumental primacy of scientific knowledge and rationally structured cooperation in the workplace.⁵⁰²

From the perspective of scientific management, seniority rights are unnecessary, and the concept of seniority is an anachronism. Accordingly, arguments to the effect that seniority is a necessary protection against a potentially (if not actually) exploitative management, or that it contributes to productivity by allowing experience to develop, are holdovers of an old-fashioned way of thinking about organizational knowledge and labour-management relations. No one was more convincing on this point than Frederick Winslow Taylor. By contemporary standards, Taylor was refreshingly candid, and unwilling to compromise his positions. Nevertheless— as chairman of the Special Committee of the House of Representatives to Investigate the Taylor and Other Systems of Shop Management soon discovered—on certain issues, Taylor could be an extremely difficult man to pin down. Taylor's testimony, prompted by the hostile chairman, offers much to those trying to trace the normative roots of the debate over seniority in public employment.⁵⁰³

⁵⁰¹ Martin J. Schiesel, *The Politics of Efficiency*, 111-148 (University of California Press, Berkeley, 1977)

⁵⁰² *Supra* n. 499

⁵⁰³ *Ibid*

g. *Seniority and the Science of Shoveling*

In prepared testimony before the Committee, Taylor stated, "[S]hovelling is a great science compared with pig-iron handling."⁵⁰⁴ While Taylor's use of the term *science* does not meet today's standards, this phrase communicates scientific management's radical denial of worker experience and self-taught technique as sources of organizational productivity. The science of a trade—and, ultimately, the science of productivity—is the province of management. In words not designed to smooth the ruffled feathers of tradesmen and their unions, Taylor asserted: "[T]he science which underlies each workman's act is so great and amounts to so much that the work-man who is best suited to actually doing the work is incapable, either through lack of education or through insufficient mental capacity, of understanding this science."⁵⁰⁵ Having kicked the legs out from under the commonly held notion that doing the work has in itself any relation to understanding how to do it efficiently, Taylor does not leave the worker unattended: "[T]he man who is fit to work at any particular trade is unable to understand the science of that trade without the kindly help and cooperation of men of a totally different type of education, men whose education is not necessarily higher but [of] a different type from his own."⁵⁰⁶

Under scientific management, worker experience and judgment were to be largely replaced by the results of careful observation and experimentation. For the individual worker, trial and error were to be eliminated and replaced by training as the method of improving productivity and wages. As an organizationally meaningful attribute of the individual, seniority disappears—as the chairman discovered in the following exchange with Taylor:

Chairman: Is it not true that under the old system, in determining the length of time that it would take to produce a certain piece of work, ... it was based upon the observation of some man relative to that work over a long period of time, and would not that be just as scientific and just as arbitrary as the method [scientific management] employed in securing this 20 to 27 percent [time]?

⁵⁰⁴ Frederick Winslow Taylor, *Scientific Management*, 50 (Greenwood Press, Westport, Connecticut, 1972)

⁵⁰⁵ *Ibid*

⁵⁰⁶ *Ibid*

Taylor: No, sir.⁵⁰⁷

Taylor went on to reject the idea that experience is in any way equivalent to scientific management as a means to increased productivity. Although he admitted that from time to time workers may discover so-called trade secrets, Taylor dismisses them, because they are usually developed in isolation from the rest of the work process, and they are not shared. Workers do not have the time, money or education needed to develop a science. Management, on the other hand, should have these resources and is obliged to use them to raise organizational output, to select and develop first-class workers, and to increase their wages as productivity improves. In the Taylor system, there is no need for seniority rules (and unions) to protect workers from a self-interested management, because "under scientific management it becomes both the habit and pleasure of those people who are on the management side to try to help their men rise to the highest class of work for which they are fitted."⁵⁰⁸

h. Seniority and the First-Class Worker

Taylor was well aware that he faced a committee created in large part because of the union opposition to efforts to use scientific management techniques at federal arsenals. Therefore, he came prepared to answer two questions particularly relevant to the seniority issue. The first questions had to do with contentions that Taylorism was nothing more than an elaborate speed-up, designed to increase productivity at the expense of the physical and mental health of the worker, who would quickly burn out and be discarded by management. In response to this line of questioning, Taylor first sought to convince the committee that scientific management had the workers' long-range interests at heart. He stated that "one of the first requirements of scientific management is that no man shall ever be given a job which he cannot do and thrive under through a long term of years." Taylor went well beyond this premise to make the point that traits such as seniority should logically have nothing to do with a worker's status or pay because (1) they were simply another way of institutionalizing the practice of "soldiering," or output restriction and (2) under scientific management, the first-class worker would always be equitably rewarded. In a long and sometimes amusing series of exchanges with the chairman and other members of the committee, Taylor was forced to

⁵⁰⁷ Ibid

⁵⁰⁸ Ibid

deal with the suspicions generated by the centrality of the first-class worker to his program.

The chairman first asked Taylor what happens under scientific management to men who are not first-class in their jobs. The following exchange took place:

Taylor: No man who can work and won't work has any place under scientific management.

Chairman: It is a question of a man who is not a first-class man in any one particular line, according to your definition.

Taylor: I do not know of any such line of work. For each man some line can be found in which he is first class... There is no one kind of work, however, that suits all types of men.

Thus, if scientific management is being fully used (and Taylor could find few examples), the second-class worker is self-made: He is able but unwilling. The first-class worker does not need a seniority system; the unproductive second-class worker is protected by one. It is worth noting the importance of the claims made about the technological power or capacity of scientific management. In Taylor's day, organized labour was more than willing to challenge his claims regarding the capacities of scientific management, and it continues to question the capacities of public sector merit systems to produce only first-class workers who have no need for seniority systems. Finally, the nature of organizational governance under scientific management is put forward by some as a major reason why seniority and other protections are unnecessary. For others, the values inherent in Taylorism make such protections absolutely imperative.⁵⁰⁹

i. The Scientific Governance of Organisations

Taylor made a determined effort to answer charges that scientific management could be used by selfish owners and unscrupulous managers to manipulate and exploit workers. Rather than the traditional solution of setting one interest against the other (union versus management), Taylor urged the objective rule of "science":

⁵⁰⁹ Supra n. 499

“The man at the head of the business under scientific management is governed by rules and laws which have been developed through hundreds of experiments just as much as the workman is, and the standards which have been developed are equitable; it is an equitable code of laws that has been developed under scientific management, and those questions which are under other systems subject to arbitrary judgment and are therefore open to disagreement have, under scientific management, been the subject of the most minute and careful study in which both the workman and the management have taken part, and they have been settled to the satisfaction of both sides.”

The unilateralism of scientific management meshes well with that of the merit principle. In both, the worker may trust the system, because the rules and laws are made by an objective (impartial) third party: a civil service commission, or a group of managers and workers, following the methods of science. Historically, the union response has been straightforward: Civil service commissions and personnel departments, however benevolent they might be, are creatures of management, and scientific management is nothing more than an elaborate rationalization for absolute control by management. Seniority systems stand as eloquent testimony to organized labour’s preference for negotiated as opposed to legislated and "discovered" rules of the workplace.

Taylor's impatience with negotiation and compromise was revealed in his response to a question having to do with the worker's role in the processes of rule adjudication and change:

[W]hen a workman is given an instruction card asking him to do work in a particular way that until he has attempted to do that work in that way, until he has followed his instructions as they are written, that no protest on his part will be received. In other words, that you do not want to -furnish a man with an instruction card which represents the careful result of years of standardization and of definite laws that have been developed and then without any trial of the method on his part have him start a debating society.

Taylor was quite accurate in his assertion that the core of scientific management is a "mental revolution" through which management and worker will cooperate because they must follow the "non-negotiable" rules of "science." Likewise, the merit principle is set

above the process of negotiation and debate. As ways of thinking about the management of organizations and the enhancement of productivity, they are *correct*.⁵¹⁰

5.3. Public Administration in United Kingdom: Promotion and Seniority

In United Kingdom's (unwritten) Constitution recognises three 'Estates' or independent power bases with the Central Government:

- Parliament,
- The Executive, and
- The Judiciary

The Executive comprises of the government and the Civil Servants. Judges, magistrates and those employed by the Parliament are thus, not civil servants. Nor are the police, the armed forces and those employed in the National Health Service and by Local Authorities.⁵¹¹

Civil Servants are those who are employed by the 'Crown', excluding those who are employed by the Queen herself. The following categories will enlighten about the various types of Public bodies and their employees in the United Kingdom.

1. Those Employed by the Parliament

This first category of public body is comprised of Parliament itself, and the bodies which report direct to Parliament, including the National Audit Office, the Parliamentary Ombudsman and the Electoral Commission.

2. Civil Servants

The second category of public body is comprised mainly of those who work for government departments which report to Ministers (who are always Parliamentarians).

As civil servants are employed by the Crown and not by individual departments, they can be transferred between departments without formality and without losing employment rights. This not only facilitates the free flow of staff between departments, but also greatly facilitates reorganisations within central government. Indeed it is quite

⁵¹⁰ Supra n. 510 at 79

⁵¹¹ Available at <https://www.civilservant.org.uk/information-definition.html> visited on 23-06-2018

common for large numbers of civil servants to find themselves working for an entirely different department at only a few hours' notice.⁵¹²

There are around 45 executive Agencies which constitutionally remain an integral part of their parent department. However, they generally implement established policies so it makes sense for them to be run semi-independently from their department's head offices. Most Members of Parliament who wish to raise constituency matters with such Agencies are content to correspond directly with their Chief Executives, rather than through ministerial intermediaries.

But problems can arise when an agency uses its management freedom in a way which Ministers believe impacts on established policies, especially in highly political areas such as those within the responsibility of the home Office. The Prison Service was accordingly made into an Executive Agency, but then the decision was reversed when the performance of the Service was subsequently criticised. And then there were problems at the Border Agency when the Agency's managers sought simultaneously (a) to manage the scrutiny of ever increasing numbers of travellers and (b) to cut staff by relaxing border controls in ways which were not approved by Ministers.⁵¹³

3. Non-Ministerial Government Departments

Some civil servants do not report to the Ministers but work for a number of non-ministerial Government Departments (NMGDs), whose detailed status varies considerably from one to another.

- Senior officials in HM Revenue and Customs work closely with Ministers and its key policies are set each year in the Finance Act. However, neither Ministers nor Parliament can interfere in day to day taxation decisions.
- The Serious Fraud Office is another 'independent government department, operating under the superintendence of the Attorney General'.
- Most NMGDs are bodies which are even more independent of Ministers – such as the Charity Commission, the Competition and Markets Authority, Ofsted and the Economic Regulators.

⁵¹² Ibid

⁵¹³ Ibid

- The Food Standards Agency is a particularly special case in that it is a NMGD which was created by merging two large parts of the Departments of Health and what was then the Ministry of Agriculture, Fisheries and Food. The aim was to reassure the public that the decisions about food safety would in future be taken by an eminent and independent body free of political control.

A large number of civil servants also work in the Developed Administrations in Scotland, Wales and Northern Ireland.

4. *Other Public Servants*

There are a wide variety of other public bodies which do not generally employ civil servants. The main categories are:

- The Non-Departmental Public Bodies (NDPBs), often known as Quangos (Quasi Autonomous Non-Governmental Organisations)
- The National Health Service
- The Armed Forces
- Public Corporations
- Local Authorities

5. *The Civil Service*

The civil service has no separate constitutional responsibility. The constitutional and practical role of the civil service in Great Britain is to help the Government of the United Kingdom, the Scottish Executive and the National Assembly for Wales formulate policies, carry out the decisions and administer public services for which they are responsible.

The UK Civil Service commissioners derive their responsibilities to maintain the fundamental principle in recruitment to the Civil Service of selection on merit on the basis of fair and open competition, including the approval of appointments by recruitment to the most senior levels in the Civil Service; and ii) to hear and determine appeals under the Civil Service Code.

The Public Administration in United Kingdom is entirely subject to the law but there is no specific Civil Service Act or legal provision that prescribes specific duties or rights to

public role and responsibilities of civil servants. It was revised in 1999 to take account of the devolution. The Code includes an independent line of appeal to the Civil Service Commissioners on alleged breaches of the Code.

5.3.1. The Civil Service Management Code

The Civil Service Management Code was issued under the authority of Part I of the Constitutional Reform and Governance Act, 2010 under which the Minister for the Civil Service has power to make regulations and give instructions for the management of the Civil Service, including the power to prescribe the conditions of service of civil servants. This Code, on which the recognised trade unions have been consulted, sets out regulations and instructions to departments and agencies regarding the terms and conditions of service of civil servants and the delegations which have been made by the Minister for the Civil Service under the Civil Service (Management Functions) Act, 1992 to ministers and office holders in charge of departments, the First Minister in the Scottish Executive and the Welsh Assembly Government, together with the conditions attaching to those delegations. For convenience, the term “departments and agencies” has been used in the context of delegation throughout the Code. It includes the Scottish Administration and the Welsh Assembly Government. Where departments and agencies are given discretion to determine terms and conditions, the Code sets out the rules and principles which must be adhered to in the exercise of those discretions. It does not of itself set out terms and conditions of service. In the case of agencies, the presumption is that functions delegated to Ministers and office holders will, in respect of agencies, be exercised by Agency Chief Executives, but the precise extent to which Ministers and office holders may wish to allow the exercise of their powers of the Chief Executives is a matter for them to determine.

Ministers and office holders in charge of departments, the First Minister of the Scottish Executive and the Welsh Assembly Government have been given the authority:

- a. To prescribe the qualifications (so far as they relate to age, knowledge, ability, professional attainment, aptitude and potential, health and coping with the demands of the job) for the appointment of home civil servants in their respective departments; and

- b. To determine the number and grading of posts outside the Senior Civil Service in their respective departments and the terms and conditions of employment of civil servants in so far as they relate to the following:
 - i) Classification of staff, with the exception of the Senior Civil Service;
 - ii) Remuneration, with the exception of the Senior Civil Service;
 - iii) Allowances;
 - iv) Expenses;
 - v) Holidays, hours of work and attendance;
 - vi) Part-time and other working arrangements;
 - vii) Performance and promotion;
 - viii) Retirement age, with the exception of the Senior Civil Service;
 - ix) Redundancy;
 - x) Re-deployment and lateral transfer of staff within Civil Service

Section 1 of the Code deals with Appointment and Recruitment. Section 1.1.1 says that within the framework laid down by the Constitutional Reform and Governance Act, 2010 and the Recruitment Principles issued by the Civil Service Commission, departments and agencies have authority to:

- a. Determine their practices and procedures for retirement of staff to the Civil Service; and
- b. Prescribe qualifications for appointment to positions in their organisation relating to age, knowledge, ability, professional attainment, aptitude, potential, health and coping with the demands of the job.

Section 1.5 talks about Fast Stream Development Programme. The Fast Stream Development Programme provides training and development for people with the potential to achieve rapid promotion off the programme (in accordance with the department's own grading procedures) and to progress to the Senior Civil Service. It comprises:

- Central Departments (formerly referred to as the Home Civil Service)
- Diplomatic Service
- Science and Engineering Fast Stream
- Clerkships in Parliament

- Technical Development Officers

All of them together are collectively known as the Graduate Fast Stream. Entry to the Graduates Fast Stream is by open competition. There is a separate In-Service Fast Stream competition for serving civil servants which gives access to the Central Departments or the Ministry of Defence branch of the Science and the Engineering Fast Stream.

The policy of the Equal Opportunities in the Civil Service has been laid down in Section 2 of the Code. The Civil Service equal opportunities policy provides that all eligible people must have equality of opportunity for employment and advancement on the basis of their suitability for the work. There must be no unfair discrimination on the basis of age, disability, gender, marital status, sexual orientation, religion or belief, race, colour, nationality, ethnic or national origin, or (in Northern Ireland) community backward working pattern, employment status, gender identity (transgender), caring responsibility, trade union membership. The Departments and agencies must comply with equal opportunities legislation and with Codes of Practice issued under such legislation. They must also regard to the provisions of the Civil Service Programmes for action to achieve equality of opportunity for people of ethnic minority origin, for women and for disabled people, to the Department for Work and Pensions guidance on age discrimination, and (Northern Ireland) to the guidance on the website of the Equality Commission for the Northern Ireland.

The Senior Civil Service of the United Kingdom comprises of the most senior staff in departments and agencies may determine which posts are included in the Senior Civil Service, provided that they have a job weight (JESP) score of at least 7, and which staff will fill them.⁵¹⁴ Responsibility for management of the Senior Civil Service is principally a matter for departments and agencies. However, some terms and conditions are determined centrally.

The Senior Leadership Committee (SLC) advises the Head of the Home Civil Service on the senior staffing position across the service as well as on individual appointments. The “Top 200” posts are listed by the Secretary of SLC and made available to departments and agencies. In general, they should meet the following criteria:

⁵¹⁴ Section 5 of The Civil Service Management Code

- The post has a job weight (JESP) score of 19 or more;
- The pay of the present incumbent of the proposed pay range is in the top three pay bands; and
- The post reports directly to the Head of the Department (or Second Permanent Secretary as appropriate) or is the Head of the Department or Agency.⁵¹⁵

The Departments and agencies in the Civil Service of the United Kingdom have the sole authority in matter of gradation and classification of the Staff. They can determine the number and grading of posts and the classification of their own staff outside the Senior Civil Service subject to the condition that the Departments and agencies must develop arrangements for the grading of posts which are appropriate to their business needs, are consistent with the Government's policies on the Civil Service and public sector pay, and observe public spending controls.⁵¹⁶

Apart from Permanent Secretary, there are no central grades in the Senior Civil Service. Departments and agencies have discretion to place into pay bands within the broad framework laid down by the Cabinet Office and classify them as they wish.⁵¹⁷

The Departments and the agencies also have the authority to determine 'personal review'⁵¹⁸ arrangements for their own staff outside the Senior Civil Service, subject to the following conditions:

- The means of rating overall performance must be capable of contributing to the organisation's arrangements for making decisions on performance-related pay.
- The performance review systems and reporting arrangements must be capable of clearly identifying performance which is unsatisfactory or unacceptable.
- The design and development of departmental and agency systems for personal review must take account of any principles of good practice issued by Cabinet Office in consultation with departments and agencies.⁵¹⁹

⁵¹⁵ Section 5.2. of the Civil Service Management Code.

⁵¹⁶ Section 6.1.1. and 6.1.2 of the Civil Service Management Code

⁵¹⁷ Sections 6.1.3 and 7.1. of the Civil Service Management Code

⁵¹⁸ The term 'personal review' covers both the appraisal of performance and assessment of individual potential.

⁵¹⁹ Section 6.2 of the Civil Service Management Code

The performance of all the members of the Senior Civil Service is managed by departments and agencies, within a central framework determined by, and available from, the Cabinet Office.

Along with the above powers, the Departments and agencies have authority to determine promotion and lateral transfer arrangements for their own staff.⁵²⁰ The departments and agencies must ensure that:

- All promotions and lateral transfers follow from a considered decision as to the fitness of individuals, on merit, to understand the duties concerned;
- The design and development of their promotion and lateral transfer systems reflect any guidance and principles of good practice issued by the Cabinet Office in consultation with departments and agencies;
- Their own promotion and lateral transfer procedures are clearly set out in departmental and agency staff handbooks;
- Promotion of staff on fixed term appointments is in accordance with the Civil Service Commission's Recruitment Principles.
- They obtain approval from the Senior Leadership Committee before promoting staff into a Top 200 post or moving staff from one post to another within the group.⁵²¹

The Ministers and office holders in charge of departments, the First Minister of the Scottish Executive and the Welsh Assembly Government have a responsibility to ensure that the conditions laid down in Section 6.4. are met. The Heads of the Departments and Agency Chief Executives are responsible for the promotion and lateral transfer arrangements for their staff. Ministers (which includes Scottish Ministers and the First Secretary and Assembly Secretaries of the Welsh Assembly Government) will have a legitimate interest in a small number of posts, outside the Top 200, for example because the post-holder will work directly to them. In filling such posts by promotion or lateral transfer, the Head of Department or Agency Chief Executive is responsible for recommending to the Minister suitable individuals for consideration, selected according to the conditions as provided above.

⁵²⁰ Section 6.4.1 of the Civil Service Management Code

⁵²¹ Section 6.4.2 of the Civil Service Management Code

5.3.2. Promotion in the Civil Service of United Kingdom

Promotion is an important process in the Civil Service of the United Kingdom, as it is in all graded services. It covers both, advancement between grades within the same class as well as between different classes. A civil servant has career prospects within the class to which he is recruited, but transfer to other classes is usually considered exceptional. This situation is certainly modified within the scheme of Treasury Classes: for example, since the war the Clerical Officer's normal promotion outlet has led directly to the Executive Officer grade. The promotion process is part of the greater problem of placement within the Service, the problem so allocating the available personnel that the most efficient result is obtained through the minimum use of existing abilities. Such a result would also have the inestimable advantage of affording the highest satisfaction to the individual officials involved and thus, would considerably enhance the general morale.

The promotion system in the British Civil Service is considerably influenced by the personal rank scheme of organisation which assigns to the several ranks or levels of the hierarchy a wide range of duties of equal responsibility but varying techniques, and the promotion requirements of such a system are bound to be much more complicated and less easily assessed than under the alternative position classification scheme under which posts are determined by detailed analysis, competence for which can be more specifically prescribed as a minimum requirement for appointment or promotion. Under the classified scheme vacancies can be more readily available to those prove their competence, and promotion will not be very different from recruitment. The individual tends to specialise and may have a wide range of similar posts in many quarters open to him, but has diminished prospects of advancement in his own branch. The organisation gains from the inflow of new blood but loses through the loss of invaluable experience.⁵²²

In the words of E. N. Gladden, distinguished author, there are advantages and disadvantages of both the approaches but the general adoption of one should not completely exclude the use of the other. Organisation in personal ranks enhances the integrated-service element, while organisation in classified posts places the emphasis on unit autonomy. Thus, the classified post type is widely used in the highly de-

⁵²² E. N. Gladden, *Civil Services of the United Kingdom: 1885-1970*, 113 (Frank Cass & Co. Ltd, London, 1967)

concentrated local Government Service in Britain and can be useful for promotion between departments, or in such organisations as the Post Office where Head Postmanships are filled partly in this way from specified Post Office grades, whose members regard this as one of their accepted avenues of promotion.

5.3.3. Principles of Promotion

Historically, in all grade services, the practice of arbitrary selection is at an early stage tempered by the emergence of an order of precedence – based upon privilege, heredity, prestige of office and possibly relative power – in accordance with which certain rights, including consideration for other official positions, are decided. Seniority has always been accepted as an important attribute, as indeed it is if merely, as a measure of the experience of the individual official, and promotion in accordance with the seniority list of a grade has for long been a common practice in the Civil Service as elsewhere. Where selection by this method was rigid it led inevitably to the placing of incompetents in high positions and at a time when officials could retain their posts indefinitely, this was a serious drag upon the civil service's general efficiency. It was not surprising, therefore, that under such conditions patronage had a certain virtue in allowing the alternative of direct recruitment from outside in place of routine advancement from within.

a. Appointment of North Cote-Trevelyan Committee

In the middle of the 19 century, when W.E. Gladstone became the Prime Minister of England, he appointed a committee headed by Sir Charles E. Trveelyan and Stafford H. NorthCote to examine the whole matter of appointment of civil servants and whether to continue the patronage system. The NorthCote –Trveelyan Committee recommended conducting open competitive examinations as the centralised way of entrance to civil service. Accepting the recommendations, Gladstone appointed a Civil Service Commission, which was alone empowered to admit persons to civil service, and gradually by its regulation the civil service was divided into several grades or divisions, each of which with the exception of professional and technical appointments – doctors, lawyers, engineers and the like – has its own competitive examination devised to select the best candidates at various stages of their educational careers.⁵²³

⁵²³ Mohammed Ali Rafath, *Bureaucracy and Politics: Growth of Service Jurisprudence in All India Services*, 23 (Rawat Publications, New Delhi, 2012)

The Trevelyan-NorthCote Report, 1853/4, condemned the system of patronage and advocated selection by merit. Each subsequent enquiry supported this view and a dictum of the Plyfair Commission, 1875, is well worth quoting. They wrote: ‘A personnel should be promoted, not because those above him are unfit but because he is the best man for the place. If this course be pursued, no man is branded as unfit, and it would not at all follow that the senior man, passed over for one promotion, might not be the fittest man for the next.’⁵²⁴

To some extent, the principle was tempered for the more junior grades; in which case it was widely agreed that seniority should be given more weight. The general practice was to follow the seniority list, but not slavishly, so that an officer adjudged not suitable for the highest post, could be ‘passed over’. In the main, the seniority principle was supported by the staff who felt that it was the one method not open to favouritism and other underhand influences.

b. The Fulton Committee

In the year 1966-67, the British Government appointed another committee under the chairmanship of Lord Fulton to review the working of the civil service and to re-examine the framework of recruitment designed by the NorthCote Committee. After the lapse of a century, the Fulton Committee had the historic task of rescuing the British Civil Service. The Fulton Committee recommended the setting up of a separate Civil Service Department responsible for the central management of the civil service and also abolition of all classes and adoption of a single unified grading structure covering the totality of the civil service. Further, in order to cultivate high degree of professionalism and provide training in administration and management, a Civil Service College should be set up. The Committee also stressed the importance of career management, expansion of lateral entry programme and interchange of personnel between public administration and private administration.⁵²⁵

5.3.4. Recognition of Seniority for Promotion in Recent Times in United Kingdom

The notion of seniority is not particularly relevant to the U.K. Civil Service in recent times. Promotion is based on merit following fair and open competition and pay is

⁵²⁴ Reported in the Report of the Royal Commission on Civil Service, 1929-31, 79 (Tomlin)

⁵²⁵ Supra n. 524 at 25

related to performance against a set of defined objectives, rather than linked to individuals' length of service. Therefore, a person joining one U.K. Government Department from another - and who is an established Civil Servant – would have his/her seniority recognised for the purpose of calculating his/her pay and pension. Hence, seniority depends largely on previous length of service as an established Civil Servant. The legal nature of any other previous employment relationship would not, therefore, be relevant. However, in some circumstances, an individual who commenced work in the Civil Service on a casual contract could have their length of service recognised if they were later employed on a permanent basis.

Most Civil Servants in U.K. are generalists and formal qualifications are not a prerequisite for selection for most jobs or grades. In other cases – for example the Fast Stream graduate recruitment scheme and specialist posts (e.g., lawyers, scientists) – the formal qualification is more likely to be a condition of recruitment. In view of this, an individual's seniority is not enhanced by his/her qualifications, although specialist staff with relevant skills or professional qualifications may have those recognised through an enhanced salary scale or receipt of an allowance.

There are no centrally defined regulations which govern the recognition of both seniority and professional experience applicable throughout the Civil Service in U.K. The Cabinet Office has overall responsibility for Civil Service issues, but as already discussed earlier, under the Civil Service Management Code, Human Resource Management issues such as pay, promotion, grading and recruitment are delegated to individual Government Departments.

It is worth mentioning here that the Commission for Public Service Appointment in United Kingdom had conducted an Audit of Recruitment and Selection Activity regarding Internal Promotions and Recognition of Service (Seniority) in the Civil and Public Service and had submitted a report entitled 'Transforming Public Services' in 2010 which was published in 2013⁵²⁶. The report states under "People and Leadership" that:

"Higher levels of service delivery and performance are achieved as staff are incentivised and motivated by merit based promotion and the most appropriate person is encouraged

⁵²⁶ Available at www.cpsa.ie/en/Publications/Audits-of-Recruitment-and-Selection-Activity/Internal-Promotions/Appendix-1.html visited on 23-6-2018

and supported to move into a position that best meets their capability and the organisation's needs.”

The Commission's mission is “To support the provision of excellent services by fostering a flexible public appointments process which upholds the principles of probity, merit, equity and fairness in recruitment and selection and related services.”

A key focus for the Commission is on ensuring that high quality and effective recruitment and selection procedures are practiced by Office Holders so that the best people are recruited and selected on merit. This objective supports the continuing development of a high performance culture in the Public Service advocated by the Taskforce on the Public Service.

The requirement placed on all Office Holders to promote on the basis of merit is clearly provided for in legislation. The Commission's emphasis on merit, transparency and fairness is provided for in Section 23 of the Public Service Management (Recruitment and Appointments) act, 2004.

The Commission for Public Services Appointment initiated this thematic audit into the use of ‘seniority’ for internal appointments on promotion to ascertain precisely the extent of its use. In undertaking this audit the Commission is keen to understand the reasons why the Department and Offices continued to use ‘seniority’ and examined the changes required to support and encourage Departments and Offices to comply with their obligations under the Public Service Management (Recruitment and Appointments) act, 2004.

As already pointed out in this chapter, that a significant proportion of promotions in the Public Service were awarded on the basis of ‘Seniority/Suitability’. This means that a candidate with the longest service in the eligible grade is promoted as long as s/he is deemed fit or ‘suitable’ for promotion to the position in question. This means that as long as the candidate with the longest service period is not found unsuitable, s/he is promoted without recourse to a competitive merit-based job related assessment. The seniority/suitability method of promotion typically does not provide for any merit based competitive element. The Commission is aware that this approach is also viewed as providing promotional opportunities to ‘good offices’ who experience difficulties when faced with an interview, to the extent that s/he will not apply.

It is seen that the proportion of promotions that are awarded on the basis of seniority/suitability by the departments and offices have reduced considerably. However, the progress is slow. The “Report of ad hoc Group, Sustaining Progress Civil Service Modernisation Competitive Promotion Systems, February 2004” states “Under Sustaining Progress, the aim is to ensure that all or almost all promotions are competitive and merit-based within a reasonable period” and “In view of the commitments in Sustaining Progress and the need to move towards the best HR practice (which incorporates 100% competitive assessment methods), the Group considered that Departments should take immediately steps to improve existing processes.” In the recently ratified Public Sector Agreement 2010-2014 one of the union’s commitments is for ‘merit based promotions’ and office holders should move quickly and ensure that this is agreed and implemented with immediate effect. That the ‘length of service’ or ‘seniority’ is still a determining factor for the appointment and internal promotion in a considerable number of departments has become a major issue of concern for the Commission. The ‘Seniority/Suitability’ to making appointments falls short of the requirements sets out in the 2004 Act and the Commission’s Codes of Practice.

In conducting the audit by the Commission, a Survey was undertaken upon as many as 37 Organisations and the responses received were 100%. Out of the surveyed organisations, 49% of the organisations use seniority/suitability to make permanent appointments on promotion. It was found out that in determining suitability, under the Performance Management and Development System used in the Civil Service, Civil Servants are subject to an annual review their performance. Their manager must rate their performance and assign a score between 1 (unacceptable) and 5 (outstanding). To be eligible for promotion, a Civil Servant must receive a rating of 3 (fully acceptable) or higher.

In addition to this, the majority of offices and departments supplement this evaluation of suitability with either one or a combination of the following:

- a. Supervisor Assessments – Many organisations use written assessments completed by the first and second line managers to determine suitability for promotion.
- b. Assessment by Head of Office – In a small number of organisations the head of Office has responsibility for determining suitability for promotion. While a number of candidates may be evaluated by the Head of Office, of those deemed

suitable, the promotion is offered to the candidate with the longest service in the grade.

- c. Consistory – A number of organisations convene a group of senior managers to discuss and decide on candidates' suitability. Often this involves evaluation of written assessments by the applicants' line managers. Again, while a number of candidates may be evaluated by the consistory, of those deemed suitable, the promotion is offered to the candidate with the longest service in the grade.
- d. Interview – In some organisations a small group of the most senior candidates are interviewed against defined criteria/competencies applicable to the higher grade.
- e. Sub-panel from competitive process – In some cases a separate seniority/suitability panel is formed following a competitive process. This involves an agreed percentage or number of the most senior staff members, deemed suitable following the competitive process, also being placed on another panel that is formed in order of seniority. Candidates are offered appointment from these panels in order of an agreed sequence within the Department/Office.
- f. Competitive process restricted to most senior staff – Some of the Organisations surveyed hold a competitive process, whereby the candidate pool is restricted to the most senior staff members in the relevant grade. A panel is formed in order of merit.

Some respondents advised that while they do not award promotions on the basis of seniority/suitability, their internal appointments systems allow for additional credit, i.e., score, for length of service in competitive merit based processes. In such cases all other element of appointment process is competitive and merit based.

Thus, it is found that promotion is an important career developmental goal for many staff and is viewed as a legitimate area for engagement with staff. The Public Service Agreement 2010-2014 states “The Parties agree that in order to ensure a high performing high productivity Public Service, appropriately skilled from the outside the Public Service will be recruited to secure scarce and needed skills at all levels. Merit-based promotion will be the norm.”

5.4. Civil Service in France

France is a republic with a strong presidency. The civil service in France includes a large workforce. In France, the teachers including university professors and lecturers are classified as civil servants, which is not the case in countries like India and United Kingdom.

As in India, France has adopted a vertical classification of its civil service. All civil servants are clubbed in four categories – A, B, C and D – corresponding to the level of responsibility entailed and basic academic requirements postulated for entering a particular corps. Category D, as group D in India, is the lowest in the administrative hierarchy and includes janitor, cleaners, etc. Category C includes skilled and semi-skilled workers, clerical personnel, typists, etc. and is superior to category D. Category B includes first-line supervisors comprising administrative secretaries, higher executive officers, etc. the topmost civil servants engaged in policy making and supervision are grouped in category A, which includes the ENA and the EcolePolytechnique graduates on one side, and other graduates sometime civil and the attaches.⁵²⁷

France, similar to the civil service in India, is a stratified and fragmented system. The higher civil service in France comprises three components – administrative generalists, technical generalists, and scientists. The French Public Administration would not permit the generalists to move freely all over the administration system. In departments, which are of a technical and scientific nature, France observes the policy of manning middle and senior level positions by ‘scientific generalists’. These are civil servants who have undergone a common course of instruction at the state run technical ‘Grand Ecole’ (EcolePolytechnique) and a spell of specialisation in technical schools called ‘Ecoles D’ Applications’ (which are separate from EcolePolytechnique).

Though France has over 1500 corps all are not of the same level of gravity or significance. They are known as the Grands Corps de L Etat which consist of the following:

- Corps du Conseild’etat
- Corps de Inspection General des Finances
- Corps des Cour des Comptes

⁵²⁷ Supra n. 525 at 33

- Corps Diplomatique
- Corp des Prefectoral
- Corps des mines
- Corps des ponts et Chaussées
- Corps des Ingeneurs des Telecommunications

The structure of the French civil service is characterised by its fragmentation, due to several factors. Firstly, the large number of hiring bodies (ministries, local governments, health facilities, branch offices, establishments publics) and the existence of three different sections of civil service (State, Local governments, Health). Secondly, within the State civil service strictosensu (i.e., with tenure), corps, grading and hierarchy are precisely defined and strengthen the esprit de corps, while contract employees belong to another structure.⁵²⁸

The current French civil service system is based on four civil service laws. Together these form the general civil service statute. The statute consists of a basic law providing for the rights and obligations of all civil servants as well as of three laws that relate to the three civil service groups. These laws concern the French State Civil Servants (la Fonctionpublique de l'Etat), the public servants working in regional and local government (la Fonctionpubliqueterritoriale) and the public servants working in the public hospitals, in particular nursing staff (la fonction public hospitaliere). Civil service law consists further mostly of government decrees.⁵²⁹

The central legal text that organises the career of civil servants in France is the Civil Service General Statute (CSGS). The CSGS applies to all civil servants. It embodies the rights and obligations of civil servants and emphasises the concepts of career and hierarchy. Furthermore, particular statutes have also been developed for each corps. Dispositions include details about categories, classes and steps, promotion, performance evaluation disciplinary, etc. for the corps. Only few particular statutes derogate to the rules of the General Statute.

⁵²⁸ Id at 34

⁵²⁹ Labour relations in Belgian, French, German and Dutch public services (2001)

a. Promotion in the French Civil Service

The Civil servants in France start their career as trainees (stagiaires), generally for a period of of year. At the end of this probation and on-the-job training period, if they properly filled their duties, they are granted confirmation (titularisation) and tenure.

In the course of their career, civil servants may access to superior grades, corps or jobs; or within the same grade or corps, they may take up different jobs. *In all cases, they are guaranteed to climb the steps within a grade, on the basis of seniority.* Civil servants are given a grade within the corps hierarchy. As a rule and a practice, grade (assigned to the individual and confers him/her rights) and job (the function) are different and independent from each other. The career system is valued as protection against political changes.⁵³⁰

The system of career progression within the civil service is based on automatic mechanisms and merit-based selection. There is step progression and class progression. Step progression, as provided under particular statutes which define the minimum seniority required, though flexibility may apply. The process of progression occurs automatically. In most corps, time spent in a step can either be shortened, as a good performance reward, or increased, as a sanction of bad performance. Class progression consist of civil servants who wish to be promoted in the superior grade are registered, each year, in the promotion roster, in order of merit, as agreed within the corps. Merit appreciation is at the discretion of managers, with the joint administrative committee as an appeal court. Some corps can also require a professional exam. Finally, an internal competitive exam can be necessary to access the last class of a corps. As a general principle, class progression means change of job.

For civil servants who wish to change corps, they may opt for mobility procedures such as secondment (detachement) or reassignment out of one's administration (mise a disposition); in practice only, civil servants of Category A use these. There is always the possibility to pass an internal competitive exam, such as the entry exam to civil service schools.⁵³¹ In recent times, the importance of seniority of in career development has been considerably reduced in favour of merit.

⁵³⁰ The World Bank – French Civil Service Management (2005)

⁵³¹ Ibid

The uniqueness of the French Civil Service is that the Senior Civil Servants, who are rather known as, High Level Civil servants, enjoy special conditions that are different from the rest of the civil servants. Though they do not have a legally define status, these high level positions are exceptional and have a special social status, and in particular, they enjoy special conditions in relation to their recruitment and entry, assignment of posts and benefits. The Senior Civil Servants are recruited by a more centralised process than general civil servants. Performance appraisal takes place annually, the Assessment Interview is held between the Programme Manager and the Senior Civil Servant, or at the very top level. There are three core elements in the appraisal: Indicator-based objectives; Operational quality of the service and the Capacity of the Director and the Assessment carried out by the hierarchical leaders.

In France, there are over 5000 senior civil servants in the Central Administration (around 16% of which are female civil servants). Since 2005, career initiatives and the elimination of the 50 years old age limit makes it easier to recruit senior executives via the “tour exterieur”. This procedure, which is open to Category A civil servant with at least eight years of service, is specifically designed to take account of professional experience. Mobility obstacles between the three branches of the civil service have also been removed so that local government and hospital civil servants seconded into the civil administrator’s corps may move there permanently after 2 years of service.

5.5. Public Administration in Germany

Germany’s administrative system is to a large extent framed by the country’s constitutional principles. These are- as far as the public sector is concerned – federalism which defines the state (Lander) as members of the Federation yet retaining a sovereign state power of their own and local self-government which mainly operates on two levels, that of the local authorities and of counties. Due to these prevailing constitutional principles, German public administration is considerably varied and complex. This framework has given rise to a whole variety of subnational peculiarities which diverge more or less in their administrative cultures. Nevertheless, the core elements of the

German civil service are relatively uniform for the public servants at all levels of the Government.⁵³²

The employment of civil servants is governed by legislation, which include the right to determine the legal status of all public servants according to Article 75, paragraph 1. Basic Law, as part of the general legislation (“Rahmengesetzgebung des Bundes”) and to make decisions relating to pay and pensions for civil servants according to Article 74a, paragraph 1 of the Basic Law, as part of concurrent legislation.

Employment in the public service is based on a contract of employment under private law. Most of these conditions are set out in collective agreements negotiated between the public employers and the responsible trade unions. In Germany, three types of employment exist in the performance of public tasks⁵³³:

- i. Statutory civil servants (Beamte), judges and soldiers;
- ii. Contract staff employed under private law (Angestellte); and
- iii. Wage earners (Arbeiter)

Article 33(5) of the Basic Law stipulates that the traditional principles of the professional civil service, i.e., the ranks of professional civil servants as opposed to public employees without civil servant status, should be taken into account when adopting law. They are the standard for all federal and state provisions on civil servants. The principles have emerged in the course of the development of the public service. They are a core of structural principles of the professional civil service which were acknowledged as binding by the Weimar Constitution and which have been respected ever since. The constitutional reform of 2006 revised Article 33(5) of the Basic Law to read that the law governing the public service “shall be regulated and developed with due regard to the traditional principles of the professional civil service.” The previously applicable principles of civil service continue to apply and determine the core values of the professional civil service. A provision under the civil service law cannot violate these principles, but legislators have some discretion to adjust the provisions of civil service law to new challenges and developments in society. The traditional civil service principles include the principle of life tenure, maintenance principle, the principle of

⁵³² Civil service in Germany. Characteristics of Public Employment and Modernisation of Public Personnel Management. Unpublished paper presented at meeting “Modernisation of State and Administration in Europe: A France-German Comparison” (2004)

⁵³³ UN International Profiles of national public administration: Germany and Civil Service in Germany

merit, the career principle, neutrality on party politics, the prohibition of strikes and the employer's duty of care.⁵³⁴

a. Promotion in the German Civil Service

The German career system for civil servants is divided into four standard career structures which are the administrative class (hohererDienst), the executive class (gehobenerDienst), the clerical class (mittlererDienst) and the sub-clerical-class (einfacherDienst). Each career class consists of five grades, each with a rising pay scale within the "Salary Regulation A". The main characteristic of the "Salary Regulation A" is increments on the basis of a seniority allowance. In contrast to the salary system of "Regulation A", top positions in the civil service - which are related to the leading grades in the administrative class - are remunerative according to a special "Salary Regulation B" which does not contain any increments for seniority, i.e., income is irrespective of the officer's age or length of service. In keeping with the basic principles of a merit-based career system, entrance for civil servants to the civil service classes is strictly linked to certain formal qualification requirements.⁵³⁵

Each of the four civil service career groups consists of four grades or offices (Amt) that can be reached through promotion.⁵³⁶ The second and the third grades are normally automatically attained after a certain period regardless of performance level; the performance principle, thus, is actually often replaced by the principle of *anciennity*. Furthermore, as a rule, every applicant has to enter the initial grade in her or his respective career group, irrespective of professional experience gathered in the private sector.⁵³⁷

Promotions are granted according to aptitude, qualifications and professional achievements, that is, performance. In most cases, they entail a change of post. Before

⁵³⁴ The Federal Public Service: An Attractive and Modern Employer, Federal Ministry of the Interior, Germany

⁵³⁵ Civil Service in Germany: Characteristics of Public Employment and Modernisation of Public Personnel Management, Unpublished paper presented at meeting 'Modernisation of State and Administration in Europe: A France-German Comparison' (2004)

⁵³⁶ This uniformity had been criticised by the civil service reform commission in 1973, too. The classical conception is that each rank/grade corresponds to a specific "office" in the hierarchy; also, grades are related to official titles. Empirically, though, offices within career groups and even between career groups are often difficult to distinguish in terms of job requirements. In this respect, the grading system of employees is more precise and elaborate, thanks to union bargaining.

⁵³⁷ Hans-Ulrich Derlien, *German Public Administration: Weberian Despite "Modernisation*, Krishna K. Tummula (ed), Comparative Bureaucracy (In Press)

the promotion is granted, the civil servant works in the higher post on probation. Since civil servants are assigned to established posts, promotion requires that a suitable higher post is available.

Performance appraisals of civil servants include an assessment of professional achievements, aptitude and qualifications. In order to gain an informative, objective and consistent picture of civil servants' performance, criteria for the performance appraisals are set out in the guidelines. Performance appraisals are carried out regularly at least every three years or on specific occasions. In order to improve the consistency of performance appraisals, guidelines for assessment grades were established in the federal service in 1997 (quota arrangement). Appraisals serve as the basis for proper personnel decisions and personnel development measures; they thus constitute an important instrument of human resource management. In the framework of defined promotion procedures, qualified civil servants have the possibility to move up the next career path. To this end, they must successfully pass the selection procedure.

The public service essentially depends on the knowledge of its staff. They must be willing to constantly acquire new knowledge to be able to deal with ever changing laws and regulations. So training and qualification are essential to keep the public service up to the mark. Therefore, training is provided by both external and internal institution and the Federal Academy of Public Administration in Bruhl is the central advanced training institution for the federal administration. In addition, each ministry has tailored strategies for advanced training and personnel development.⁵³⁸

5.6. Public Administration in South Africa

In order to achieve a public service which is "representative, coherent, transparent, efficient, effective, accountable and responsive to the needs of all" in the Republic of South Africa, the White Paper on Transformation of the Public Service was released in November, 1995. This White Paper was a coherent guide that informed, managed and drove the transformation process. The goals set out in the Paper were further entrenched in the Constitution 1996. The White Paper advocated the "Batho Pele" which means People First, initiative in 1997.

⁵³⁸ Id at 53

The Public Service Act, 1994⁵³⁹, comprised of 44 sections and 3 Schedules providing for the organisation and administration of the public service, and the regulations of conditions of employment, terms of office, discipline, retirement and discharge of its members. The other binding instrument within the Public Service is a resolution of the Public Service Co-ordinating Bargaining Council (PSCBC), which binds employer alike when agreed to by majority of the trade unions represented by the PSCBC. The Act, the Regulations and the Collective Agreements together make up for the Public Service Management Framework.

b. Promotion in Public Service

The Public Service Act, 1997 and the new public service regulations introduced a new performance management system. The new system is that it establishes clear links between the objectives of the institution and individual work objectives. The new performance management system bases promotion and career advancement on performance, rather than on seniority or qualifications.

5.7. The People's Republic of China

Since 1993, the Chinese Government has taken significant steps to reform the country's civil service system, which is still evolving, service in the public sector carries with it considerable prestige in China and central ministries are staffed with highly competent employees. As a significant outcome of the administrative reform, a civil service system was ushered in 1993. The State Council promulgated the Provisional Regulations on Civil Servants only recently which came into force in October 1993. The civil service system that China has promoted nationwide includes a series of specific sub-systems, such as the categorisation of posts, recruiting through open exams, annual performance appraisals, exchange of posts and dismissal of incompetent officials.⁵⁴⁰

It is stipulated that the governments at all levels recruit civil servants through open and fair competition rather than by appointment. Nearly, all provinces, municipalities and autonomous regions have recruited civil servants through open examination and merit appraisal.

⁵³⁹ No. 103 of 1994, Government Gazette, 03-06-1994, Vol. 348, No. 15791, pp 1-75

⁵⁴⁰ UN – Profile of National Administration (2000)

a. Law of the People's Republic of China for Public Servants

On April 27, 2005, President Hu Jintao by an Order No. 35 promulgated the “Law of the People’s Republic of China on Public Servants” which was adopted at the 15 Meeting of the Standing Committee of the Tenth National People’s Congress of the People’s Congress of the People’s Republic of China. The law came into effect from January 1, 2006. The Law was enacted in accordance with the Constitution and for the purpose of regularising the administration of public servants, safeguarding their lawful rights and interests, improving supervision over them, building up a contingent of public servants with high quality, promoting a diligent and clean government and enhancing its efficiency.⁵⁴¹ Public servants in China are workers who perform official duties according to law, are members of the administrative establishment of the State, and whose salaries and welfare benefits are paid by the government. This law shall be applicable to the duties and rights as well as the administration of public servants. Where there are other provisions contained in the laws governing the election, appointment and removal of, and the supervision over, the leading persons among public servants, and the duties and rights and the administration of judges, procurators, etc., those provisions shall be applicable.⁵⁴² It has been specifically mentioned under Article 4 of this Law that in application of the public servant system, Marxism, Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of ‘Three Represents’ shall be upheld as the guidance, the basic line for the primary stage of socialism shall be implemented, the cadre line and the policy of the Communist Party of China shall be carried out, and the principle that cadres are under the administration of the Party shall be adhered to.

The State administers public servants by grouping them in different categories in order to improve administrative efficiency and raise the level of scientific management.⁵⁴³

The department in charge of the public servants at the central level shall be responsible for the comprehensive administration of public servants nationwide. The local departments in charge of public servants at or above the country level shall be responsible for the comprehensive administration of public servants within the areas under their respective jurisdictions. The department in charge of public servants is conducted by such department at a lower level. The departments in charge of public

⁵⁴¹ Article 1 of the Law of the People’s Republic of China on Public Servants

⁵⁴² Article 3

⁵⁴³ Article 8

servants at various levels shall direct the administration of public servants conducted by various organs at state level.⁵⁴⁴

The State practices the system of categorised posts among public servants. The posts held by public servants shall, according to the nature and characteristics of the post and administrative needs, be categorised as comprehensive administration, professional skills and administrative law enforcement. Where separate administration is required for a post due to its specific characteristics, the State Council may, in accordance with this Law, set up an additional category for such post. The scope covered by the different categories of posts shall be prescribed by the State separately.⁵⁴⁵

The State establishes an order of posts held by the public servants on the basis of categories of such posts.⁵⁴⁶ The posts of public servants are divided into leading and non-leading posts. The levels of the leading posts include: chief and deputy at the Central level, chief and deputy at the Provincial level and ministerial level, chief and deputy at the department and bureau level, chief and deputy at the township and section level. The non-leading posts are set up at or below the department and bureau level.⁵⁴⁷ The leading posts under the category of comprehensive administrative shall be established in accordance with the Constitution, relevant laws, levels of the posts and institutions. The non-leading posts under the category of comprehensive administration include: inspector, deputy inspector, analyst, associate analyst, senior section member, junior section member, section member and office clerk. The order of posts for the public servants under the categories other than the category of comprehensive administration shall be prescribed separately by the State in accordance with this Law.⁵⁴⁸

The government departments shall set up specific posts for the public servants thereof in accordance with the established functions, institutional echelons, limits of the authorised size, the member of posts and structural proportion, and define the official duties and responsibilities as well as the qualifications for holding a post.⁵⁴⁹ The posts of public servants shall correspond with the relevant ranks. The corresponding relations between the posts and ranks of public servants shall be defined by the State Council. The posts

⁵⁴⁴ Article 10

⁵⁴⁵ Article 14

⁵⁴⁶ Article 15

⁵⁴⁷ Article 16

⁵⁴⁸ Article 17

⁵⁴⁹ Article 18

and ranks of public servants provide the basis for determining their salaries and other benefits. The rank of a public servant shall be determined on the basis of the post he holds, his political integrity and professional competence, his achievements in work, and his educational qualifications and seniority. A public servant remaining at the same post may be promoted in rank according to State regulation.⁵⁵⁰

b. Promotion in the Civil Service

Promotion of state civil servants must adhere to the principle of both political integrity and ability, and appointment on merits, and lay stress on work accomplishments. State civil servants can be promoted one grade at a time in accordance with the order for promotion. Individual civil servants who display outstanding political integrity, ability and work performance may skip over one grade in promotion. But the decision must be reported to departments concerned for approval as stipulated.⁵⁵¹

Assessment of public servants shall be conducted in compliance with the limits of authorised administration, and in an all-round way, covering their political integrity, ability, diligence, achievements and incorruptibility, with special attention paid to actual achievements in work.⁵⁵² The assessment of public servants shall be divided into routine and regular assessments. Regular assessments shall be made on the basis of routine assessment. Regular assessment of the public servants who are non-leading members shall be made annually. The public servants themselves shall firstly, give their summaries in light of the duties and representatives of their posts and relevant requirements. After listening to the opinions from the masses, the leading person in charge shall make a proposal concerning the grades of the assessment, and then the leading person of the department or an authorised appraisal committee shall decide on the grades of the assessment. The regular assessment of the leading persons shall be conducted by the department in charge in accordance with relevant regulations.⁵⁵³

The provisions regarding promotion and demotion of public servants are specifically provided under Chapter VII of the Law of the People's Republic of China for Public Servants. A public servant to be promoted to a higher office shall meet the requirements and qualifications in terms of ideological and political quality, work capability,

⁵⁵⁰ Article 19

⁵⁵¹ UNESCAP – Country Report on Local Government System – China (2001)

⁵⁵² Article 33 of the Law of the People's Republic of China for Public Servants

⁵⁵³ Articles 34 and 35, Law of the People's Republic of China for Public Servants

educational level and work experience. Promotion of public servants to higher posts shall be done level by level. For a public servant who is especially excellent or there is a special need for work, he may be promoted by breaking conventions or by skipping one level in accordance with relevant regulations.

Where a public servant is promoted to a leading post, the following procedures shall be used⁵⁵⁴:

- i. On the basis of democratic recommendation, deciding on the candidate for review;
 - ii. Arranging for review, studying and setting forth proposals for the post to be assigned to, and deliberating on them within a certain scope, where necessary;
 - iii. Discussing and deciding on the candidates within the limits of authorised administration; and
 - iv. Completing formalities for appointment in accordance with relevant regulations.
- For promotion of a public servant to a non-leading post, the procedures specified in the preceding paragraph shall be followed *mutatis mutandis*.

When there is a vacancy for a leading post at or below the level of the chief of the department or bureau or for a non-leading post at or above the level of associate analyst and other corresponding levels, a candidate for such a vacancy may be selected openly from among people in the community.⁵⁵⁵

5.8. Public Administration in Canada

Canada has a vibrant public service system that strives for excellence, that is representative of Canada's diversity and that is able to serve the public with integrity and in their official language of choice. The public service has contributed to the building of Canada, and will continue to do so in future while delivering services of highest quality to the public.

a. The Public Service Employment Act, 2003

The Public Service Employment Act, 2003 received the assent of the Crown on 7 November, 2003, with the object of establishing of employment in the public service.

⁵⁵⁴ Article 44

⁵⁵⁵ Article 45

The Preamble to the Act recognises that the Government of Canada is committed to a public service that embodies linguistic duality and that it is characterised by fair, transparent employment practices, respect for employee efficient dialogue and recourse aimed at resolving appointment issues.

Appointment to the public service of Canada is done on the basis of merit. Appointments by the Commission of Public Service to or from within the Public Service shall be made on the basis of merit and must be free from political influence.⁵⁵⁶ An appointment is made according to merit when⁵⁵⁷:

- a. The Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the Deputy Head, including official language proficiency; and
- b. The Commission has regard to
 - i. Any additional qualification that the deputy head may consider to be an asset for the work to be performed, or for the organisation, currently or in future,
 - ii. Any current or future operational requirements of the organisation that may be identified by the deputy head; and
 - iii. Any current or future needs of the organisation that may be identified by the deputy head.

Promotion in Public Service in Canada is made through an assessment. In making an appointment or promotion, the Commission may use any assessment method such as a review of the past performance, and accomplishments, interviews and examinations that is considers appropriate to determine whether a person meets the qualifications.⁵⁵⁸ Thus, seniority alone is not the deciding factor in matters of promotion of the employees. The Act defines promotion as the assignment to an employee of the duties of a position for which the maximum rate of pay is more than the maximum rate applicable to the employee's substantive level immediately before the assignment of the duties, by an amount equal to or greater than

- a. The smallest increment on the pay scale for the new position, if it has more than one rate of pay; or

⁵⁵⁶ Section 30(1), Public Service Employment Act, 2003

⁵⁵⁷ Section 30(2)

⁵⁵⁸ Section 36, Public Service Employment Act, 2003

- b. 4% of the maximum rate of pay for the previous position. If the new position has only one rate of pay.

5.9. Public Administration in Australia

The Public Service System of Australia aims to serve the Government, the Parliament and the Australian Public efficiently and effectively. The recruitment and the conditions of service of the Australian Public Service Employees is provided under the Public Service Act, 1999. This piece of legislation defines the powers, functions and responsibilities of Agency Heads, the Australian Public Service Commissioner and the Merit Protection Commissioner and to establish rights and obligations of the Australian Public Service.

a. The Public Service Act, 1999

Employment Principles of the Australian Public Service

The APS is a career based public service that⁵⁵⁹:

- i. Makes fair employment decisions with a fair system of review;
- ii. Recognises that the usual basis for engagement is an ongoing APS employee;
- iii. Makes decisions relating to engagement and promotion that are based on merit;
- iv. Requires effective performance from each employee;

i. ...

ii. Provides workplaces that are free from discrimination., patronage and favouritism;

iii. ...

A decision relating to engagement is based on merit if all eligible members of the community were given a reasonable opportunity to apply to perform the relevant duties. The suitability of the candidates are assessed by a competitive selection process. The assessment is basically a qualitative assessment whic depends on the capacity of the candidate to perform the relevant duties and on the relative capacity of the candidates to

⁵⁵⁹ Section 10A, Public Service Act, 1999

achieve outcomes related to the relevant duties. This is the primary consideration in making the decision.

5.10. Public Administration in Japan

Japan, heavily influenced by the Chinese models in so many other areas, also adopted a Chinese style bureaucracy as early as the Nara Period (710-794). Bureaucratic organisations emerged in various time periods and geographical areas throughout the country's history. A series of steps taken during the early years of the Meiji government provided the ground work for developing a truly modern national bureaucracy. The model for Japan in much of its government organisation, and especially in its national bureaucracy, was Bismarck's Prussia. By implication this made it, as well, a relatively close approximation of Max Weber's ideal bureaucracy. Under a small core of oligarchs, the national bureaucracy was designed to be an instrument that would take the lead in the nation's modernisation and industrial development. A strong legalistic basis underpinned bureaucracy activity.⁵⁶⁰

The Tokyo Imperial University was created for the explicit purpose of training skilled servants. The Civilian and Military bureaucracies were separated and put on a par. Both were given explicit mandates to serve the emperor and the nation, rather than region or class. Careers in the bureaucracy were accorded security and hence the civil service became a permanent career. Written rules assigned separate responsibilities to different offices.⁵⁶¹

a. The National Public Service Act, 1947

Japan's contemporary bureaucracy is structurally similar to many of its counterparts in Western Europe although it is typically smaller than any other. It is highly meritocratic and typically staffed with the nation's most talented individuals.

The National Civil Service Law titled the National Public Service Act, 1947, provides for the main legal outlines of Japan's national bureaucratic service. In addition, Japan has an extensive local governmental service and about 100 public corporations. Together these three employ over 5 million full-time employees (komuin).

⁵⁶⁰ T.J. Pempel, *Bureaucracy in Japan*, Vol. 25 No. 1, Political Science and Politics, (March 1992)

⁵⁶¹ Ibid

In the early 1990s, there were 12 main ministries (sho) in the Japanese national government. Along with the Prime Minister's Office (Soifu) these form the principal administrative organs of the national government. In addition, there are a number of agencies and commissions, such as the National Archives, the Science Council of Japan, the Department of Imperial Household, the Tax Administrative Agency, the Immigration Service Agency and the like which are collectively referred to as "external organs".⁵⁶²

Each of the 12 main ministers and most important agencies are headed by a minister, with the assistance of one or occasionally two, vice ministers. These top two to three individuals are almost invariably elected parliamentarians and the only politically appointed and responsible officials in a ministry or agency; below them are members of the appointed civil service. The most senior civil servant in each agency is administrative vice-minister, in charge of oversight of all administrative matters within his ministry. Below him stretch a limited number of clean lines of hierarchy. Each ministry is typically divided into six to twelve functionally arranged bureaus (kyoku), and these in turn are either sub-divided into departments (bu) or divided directly into sections (ka).⁵⁶³

Responsibility for overseeing the national civil services in regard to recruitment, promotion compensation and adjudication of disputes lies with the National Personnel Authority, a semi-autonomous body somewhat analogous to the U.S. Civil Service Commission.⁵⁶⁴

b. Career Advancements

Most members of the national bureaucracy remain with a single government agency during their entire careers. Advancement tends to be principally a function of seniority, and groups of individuals hired together tend to be promoted together, with some allowances for different demonstrations of ability or lack thereof. Individuals rarely remain in a single position for more than two or three years, and transfers are designed, among other things, to assure that all senior officials will be broadly familiar with most of an agency's or ministry's complete functions.

The promotion and transfer of officials shall be made by an appointer, based on the personnel evaluation, from among persons who are found to have the ability to perform

⁵⁶² Ibid

⁵⁶³ Articles 2 – 8, National Public Service Act, 1947

⁵⁶⁴ Article 3

the standard duties of the standard government position of the classified job ladder pertaining to the position to be filled and aptitude required for the position to be filled. In cases where an appointer demotes an official, he/she shall appoint the official, based on the personnel evaluation of the said official, to a government position which the said official is found to have ability to perform the standard government position of the classified job ladder pertaining to the position to be filled and aptitude required for the position to be filled. With regard to the promotion, demotion and transfer of an official who has not had personnel evaluation due to circumstances such as having been dispatched to an international organisation or a private enterprise, etc., notwithstanding the provisions of the preceding two paragraphs an appointer may promote, demote or transfer the said official, based on demonstrated abilities other than those demonstrated by personnel evaluation, to a government position in consideration of the ability of the said official to perform the standard duties of the standard government position of the classified job ladder pertaining to the position to be filled and aptitude required for the position to be filled.⁵⁶⁵

Technically, all promotions in civil service are governed by civil service regulations and are not subject to interference by political parties or other partisan considerations. In point of fact, all promotions at the level of bureau chief and above are subject to additional cabinet and LDP scrutiny. As a result, the actual promotion of the individuals to top positions in the bureaucracy is by no means devoid of political sensitivity.

5.11. A Sum-Up

Conflicts between seniority and merit are common trends seen in all national public service systems. The concept of seniority, is frequently viewed negatively in the American context because of perceived conflicts with three other principles of personnel action: merit, political direction and equal employment. Merit is generally defined as the attempt to make employee competence the major criteria affecting employee decisions. Advances obtained by seniority are believed to favour those with lower qualifications for the position over those hired or promoted through comprehensive testing or analysis of skills and accomplishments. Political direction refers to the link between the aims of political leaders and bureaucratic response. The conflict gets aggravated when employees are unionised and when collective bargaining and negotiation influence

⁵⁶⁵ Suprs n. 564

personnel decisions. Union members generally want seniority to influence policies related to promoted and layoff of employees. Merit principles would encourage promotion and layoffs based on performance or objective testing. Union often support application of the merit principle in the hiring of employees but seek to limit its application in promotion and layoffs. Concerns for seniority also conflict with the interests of political leaders. When the spoils system predominated hiring, pay, promotion was determined by the party in power. Thus, unless an employee was politically active and the party was victorious, job security was unlikely. The advent of civil service in U.S.A., of course, limited the extent to which those in power could control appointments. The aim was a bureaucracy guided by those with extensive knowledge and experience in the managing of government. However, the value of seniority in personnel practices was formally written into the 1964 Civil Rights Act through S. 703(h). This provision was placed in the act in response to supporters of seniority. The reference to intentional discrimination and the use of the term “bona fide” were added as a compromise between those who believed that the seniority provision would curtail the ability of excluded groups to challenge employment policy and those who advocated seniority. The presence of S. 703(h) within the legislation designed to enhance the employment rights of excluded group has led to a series of challenges often reaching the Supreme Court. Thus, seniority remains a guiding principle of American personnel policy. Its strict application conflicts with concerns of merit, political direction and equal employment. It stands for stability and continuity against those who want to change employment policy to reflect political and social change.

It is seen in the chapter that closed career systems make appointments through promotion from within the civil service. position-based systems allow more open access, with lateral entry relatively common. Merit criteria in both systems include academic qualifications. To apply for a “general qualification” post, applicants can have any type of university degree, while “specific qualifications” posts require a particular degree (in economics, engineering, law, etc.). Career systems generally accompany this with criteria that specify seniority or length of time in other posts.

The arrangements to ensure that pure political appointments are constrained vary across the OECD. In the United States of America, the numbers are constrained by a simple formula - 10% of all senior executive service appointments (approx. 800) and specified

positions at the “executive schedule” level (approx. 550). In the United Kingdom, numbers are constrained by custom and practice that dictate that “very few” politically appointed advisers are feasible. In France, numbers are limited by hard constraints in the budgets available to ministers to hire within those cabinets. In Germany, there are no pure political appointments.

In most OECD countries, political appointments tend to be concentrated at upper levels of management, or among “sensitive” posts (the secretarial staff of a minister). This contrasts with the reality of parts of the developing world, where political affiliation may be the primary selection criteria for posts throughout the organisational hierarchy. The trend, however, is towards an administrative career based on merit. Civil service laws that require merit-based selection and promotion have been approved or are under discussion in a number of countries.

Closed career systems (France and Japan are clearest examples in the OECD) make appointments through promotion from within the civil service. Position-based systems (Commonwealth OECD countries and USA) allow more open access to positions. But although position-based systems allow lateral entry this rarely implies towards recruitment to mid-and-top-level management positions from outside government. There remains a strong bias against such recruitment in most countries, although some have seen more lateral mobility within government, possibly as a consequence of more centralised regulation of the recruitment procedure.

During the past century, most industrialised countries have created a professional, merit-based civil service system and have consolidated the regulation and supervision of public personnel management through formal institutional arrangements. Traditionally, this has entailed a delicate relationship between three key organisational actors: the independent commission, the central personnel office, and line agencies. Under the independent commission, the central personnel office is part of the executive and accountable to the government (i.e., not independent). It takes responsibility for personnel management activities that are not carried out by the commission. Generally, these activities include position creation and classification, staff training and professional development, determination of terms and conditions of employment and formulation of disciplinary code, salaries and benefits. The degree of personnel

management responsibilities assumed by line agencies initiate selection processes, make requests for salary increases, etc.

Many countries have a significant number of hybrid appointments in which merit, defined by meeting explicit and contestable criteria, is accompanied by subjective political judgments. By contrast with 'pure' political appointments, in which serving members of the government make hiring and firing decisions, in hybrid appointments merit is a necessary but insufficient condition for appointment. Hybrid appointments are generally made at the upper management levels. The Canadian system for appointing Deputy Ministers (equivalent to Permanent Secretaries or Secretaries General) exemplifies the process. These appointments are made by the Prime Minister and have no security, appointments (and dismissals) being made "at the pleasure" of the Crown. These appointments are not purely political because it would be inconceivable (and a source of public outrage) for the PM to make an appointment disregarding the advice of the Clerk to the Privy Council.

There are two problems to be solved in hybrid appointments:

- Attracting the best, given that merit is not a sufficient criterion for appointment and so the best might be deterred by the threat of apparently arbitrary political dismissal
- Balancing two conflicting sets of recruitment criteria

The most common solution is a 'pool system' which places the candidates in a pool upon satisfying the merit criteria. Those in the pool are then considered for political selection or appointment according to seniority. In France, pool management is undertaken by providing a job guaranteed in the career civil service to all discretionary appointees, so that their dismissal will be effectively cushioned. In Germany, approximately 140 most senior positions are all hybrid appointments effectively managed under a pool system. Civil servants who are dismissed from a hybrid position are retained in the pool as "ruhestand" (resting). They receive an allowance but not a pension on the basis that they may be reappointed at any time.

CHAPTER – 6

DETERMINATION OF SENIORITY FOR PROMOTION IN SERVICES UNDER THE STATE WITH SPECIAL REFERENCE TO THE STATE OF WEST BENGAL – AN EMPIRICAL STUDY

6.1. Overview

West Bengal, a state in India, is located in the eastern part of the country. It is bounded to the north by the state of Sikkim and the country of Bhutan, to the north-east by the state of Assam, to the south by the Bay of Bengal, to the south-west by the state of Odisha, to the west by the state of Jharkhand and Bihar and to the north west by the country of Nepal.⁵⁶⁶ Area-wise, West Bengal, ranks 14 among all the twenty-nine states in India. It can therefore, be inferred that the state of West Bengal, touching the Himalayas in the north and the Bay of Bengal to its south, is a large state for whose efficient governance a large number of public servants and government employees are required. In the light of the previous chapters relating to the concept, theory, problems, statutory norms and rules and various other aspects of promotion and seniority in Services under the State, it becomes essential to check the authenticity of the facts and to further explore the issues raised hereinbefore. Therefore, a study has been taken up to test the variables derived and to determine the efficiency of the promotion system based on seniority in the Government sector in the state of West Bengal.

Therefore, the Rules of seniority and promotion for various services under the State has been briefly discussed before delving into the study of the data collected for the purpose of the empirical study.

6.2. The Bureaucratic Hierarchy in West Bengal

The bureaucratic hierarchy in the administrative set-up of West Bengal may conveniently be classified for study into three levels – the top level, the middle level and the operational level. The three levels together constitute a department. The head of a

⁵⁶⁶ Robert E. Huke and D.M. Sen, West Bengal, State, India, retrieved from https://www.britannica.com/place/West_Bengal, visited on 22.07.2018 at 23:27

department is a minister who is assisted sometimes by one or more ministers. The top level is the secretariat, which is styled as the 'Home Secretary', the Judicial Secretary', etc. Members of Secretariat with higher pay are termed as 'Commissioners' such as the 'Finance Commissioner', the 'Education Commissioner', the 'Agriculture Commissioner' etc. Generally, the responsibility of larger secretariats are given to the Commissioners. As the term indicates, a Secretariat is to assist a Minister-in-Charge of the department, i.e., a Secretariat is the Secretariat of a Minister.

The Constitution of India prescribes the eligibility criteria of a Minister. It states that there shall be a Council of Ministers with the Chief Minister as the head to aid and advice the governor in exercise of his function as the head of the State.⁵⁶⁷ It is the responsibility of the Governor to appoint the Chief Minister and his Council of Minister on the advice of the Chief Minister. It is, therefore, evident, that the Vidhan Sabha of West Bengal is the competent authority in selecting a minister; the role of the Chief Minister in the matter of the appointment of ministers is no less effective. The Governor merely approves the appointment made by the legislatures.

These constitutional shibboleths do not, however, unfold the real mechanism. The political party that holds majority in the legislative assembly exercises effective authority in the selection of ministers from amongst their members elected to their legislature. That is, an individual's aspiration to become a minister is largely dependent upon his political importance. These Ministers, it is said in the Constitution, are collectively responsible to the legislative assembly as heads of the administrative departments of government.⁵⁶⁸

Similar to the political executives, the career personnel of the regularly constituted service of the Government are of different ranks and grades. They are hierarchically placed in the organisational matrix. The ministers, in discharging their functions, require the assistance of a large number of service personnel with whom they are directly or indirectly related.

⁵⁶⁷ Article 163(1)

⁵⁶⁸ Article 164(2)

6.3. Promotion and Seniority Policy of the Government of West Bengal

The Personnel and Administrative Reforms and E-Governance Department is entrusted with the task of providing human resources to the various establishments of the government of West Bengal from the Secretariat to the block level in appropriate positions as well as spearheading all E-governance related activities in West Bengal.

In consonance with the above major task, it also carries the onerous responsibility of managing the IAS, WBCS (Exe.) and West Bengal Secretariat Service Cadres in all respects. Apart from placement of officers and staff, this department is also concerned with service matters and career prospects of the members of the aforesaid cadres in a holistic manner.

In a Statement on Promotion Policy made in 1981⁵⁶⁹, it was stated that the Government is in full consonance with the view that there should be scope for promotion for all categories of employees and, in general, no employee should end his/her career where he began because of the lack of avenues of promotion.

Several measures taken to implement this policy of the Government are as under:

- i. With respect to state services, including State Health Services, State Civil Services and State Engineering Service, the posts available in scales 18 and 19 are to be filled through promotion. The principle of merit-cum-seniority is applicable for recruitment in such posts..
- ii. With effect from 1 April, 1981, following the recommendation of the Pay Commission, the quota of posts of Assistant Engineers filled by promotion of sub-assistant Engineers was raised from 30% - 40% for each departmental cadre. It was stated that henceforth, 15% of the total cadre strength of executive Engineers in each departmental cadre was decided to be filled by promotion from the rank of sub-assistant engineers; a minimum period of 10 years of satisfactory service as assistant engineer is constituted as the eligibility for such promotions.
- iii. In the case of subordinate services and junior services, the expansion of the scope for promotion was considered by raising the existing promotion quotas. The quota for

⁵⁶⁹ Statement of Policy vide Finance Department, No. 5916(62)-F, Government of West Bengal, April 20, 1981

promotion from subordinate service to junior services was refixed in the range of 60-75%. The quota for promotion from subordinate to State services and from junior services to corresponding state services was fixed at 40%. These promotions are available only to those personnel who have continuously and satisfactorily served for 15 years in their respective cadres.

iv. The scope for advancement has been significantly expanded at the Group 'C' and 'D' Levels. The criteria for promotion in these levels is seniority and satisfactory open performance report of the service holders. As announced on May 27, 1981, State Government employees on the revised scales of 1- 13 who have not earned any promotion even after 18 years of continuous satisfactory services were fitted into their next respective higher scales.

v. It has been decided that the prospects for advancement will be further enlarged for the lower grade employees according to the following provisions:-

- a. For all level and categories of Group 'D' employees, one-third of the posts will be carried on to the next higher scale next to the basic scales, and will be filled by selection on the basis of completion of 15 years of satisfactory service on the basic scales;
- b. Group 'D' employees who have passed school final examination will be offered promotion to the level of lower division assistants; 10 % of the posts of the lower division assistants will be kept reserved for this purpose. Posts such as duftaries, record suppliers, duplicating machine operators, etc carried on scales 2-4 will be filled only by promotion from Group 'D' employees
- c. A Group'D' employee, starting on scale 1 and earning no promotion (movement from scale 1 to scale 2 after 18 years of continuous service not being considered as promotion) even after 27 years of service, will be allowed to move from scale 2 to scale 3 without any change in post, designation or duties and other service conditions.
- d. Drivers, who have started from scale 5, will, after 15 years of satisfactory service, be eligible for fitment into scale 6; 1/3 of the total number of posts of drivers will be carried to higher scales.
- e. 1/3 of total posts of all technical and non-clerical personnel on scale upto 6 may similarly be set aside for such fitment; the eligibility in all such cases will again be a minimum of 15 years of satisfactory services.

- f. Typists and telephone operators are carried on three scales; scale 6 is the basic scale, while scales 9 and 11 are higher scales respectively. The ratio between the three scales are 5:4:1. Continuous satisfactory service for 10 years in the basic scale is constituted as the eligibility for movement to scale 9 and scale 11.
- g. For stenographers and personal assistants, the basic scale is scale 9 and the higher scales are scale 13 and 16. The ratio of distribution of the posts between the three scales will be 4:3:3.
- h. In case of sub-assistant engineers, surveyors, draftsmen and other diploma holders, one-third of the total posts will be on the higher scale as in other cases. The eligibility for movement to the higher scales will be 15 years of satisfactory service.
- vi. The ratio of posts of lower division assistants to those of upper division assistants is fixed at 1:1 for the Secretariat of the Directorates and of the regional offices.
- vii. The West Bengal Government has accepted in principle the Pay Commission's recommendations that all lower division assistants in the Secretariat be brought together in a combined cadre and similarly, the upper division assistants, section officers and Registrar to be brought in common pool.

Since vacant posts are filled up by promotion in a quarterly system by the Personnel department, the posts are filled up by the appointing authority, subordinate to the Governor, from the date(s) on which the posts fall vacant in order to give the employees the benefit of promotion with effect from the date(s) on which they are entitled as per the norms of seniority-cum-merit.⁵⁷⁰

A question which has now arisen is that whether the employees of Secretariat Department who are so promoted to the posts from the date of occurrence of vacancies may be allowed retrospective fixational benefits consequent upon such promotion to higher posts.

On careful perusal of the matter, the following principles of promotion have been fixed:

- i. In case of normal promotion to the common cadre posts in the Secretariat in respect of which the appointing authority is an authority subordinate to that of the

⁵⁷⁰ Memorandum No- 4982-F, Finance Department, Audit Branch, Government of West Bengal, dated 17th June 2005, Kolkata.

Governor, the posts may be filled up from the dates of occurrence of the vacancies and their pay in the promotional posts may be fixed from such date(s) of promotion.

- ii. In respect of the posts in the Secretariat for which the appointing authority is the Governor, normal promotion will take effect from the date of assumption of charge.
- iii. In case of non-functional promotion to the posts which have been created in consequence of application of promotion policy circulars, Career Advancement Schemes, 1990 and Modified Career Advancement Schemes, 2001, in terms of which scale/higher scale is awarded from the date of eligibility/occurrence of the vacancy regardless of the date of issue of the order for filling up the vacancy, retrospective fixational benefit consequent upon such non-functional promotion may be allowed.

6.3.1. The Modified Career Advancement Scheme

The Fourth Pay Commission, in its 2 Part, Volume I of the Report, suggested a Modified Advancement Scheme.⁵⁷¹ The Government of West Bengal had decided to extend the benefit of his modified Career Advancement Scheme, after evaluation of norms of attendance, integrity, performance, efficiency and ability for different categories of employees. The provision of the career Advancement Scheme introduced vide Finance Department No. 6075-F, dated the 21 June, 1990, has been modified by this Modified Career Advancement Scheme.

The required length of completion of 10 years of service, as prevalent now, under the existing order for movement to the first higher scale will be reduced to 8 years, and the movement to the higher scale will be reduced to 16 years in place of the existing 20 years. The government employees in scale Nos. 1-12 on completion of a further 9 years of continuous and satisfactory service, and after fulfilling the 'norms' mentioned earlier, will move to the scale second-next above the first higher scale, provided the concerned Government employee has not got benefit of promotion or advancement to a scale similar to or above the third higher scale before 25 years of service. While computing the requisite length of service in all these cases, the length of service rendered in the revised scale as well as in the corresponding unrevised scale under the previous W.B.S. (R.O.P.A.) Rules, has been taken into account.

⁵⁷¹ Vide Memorandum No. 10620-F, Finance (Audit) Department, Government of West Bengal, dated 19th December, 2000

6.3.2. Seniority Rules in the State Services of West Bengal

a) The West Bengal Services (Determination of Seniority) Rules, 1981

The West Bengal Services (Determination of Seniority) rules, 1981⁵⁷² which came into force on the 11 March, 1981 apply to all Government servant except –

- (1) Members of the All India Services ;
- (2) Members of the West Bengal Higher Judicial Service ;
- (3) Members of the West Bengal Civil Service (Judicial) ;
- (4) Members of the West Bengal Civil Service ;
- (5) Members of the West Bengal Police Service .

i. Determination of Seniority of direct recruits

The relative seniority of all persons appointed directly through competitive examination or interview or training or otherwise shall be determined by the order of merit in which they are selected. The appointments shall be made on the recommendation of the Commission or selecting authority. All those who are appointed as a result of an earlier selection will be deemed to be senior to those appointed on the result of a subsequent selection. In case, where appointment of persons initially made otherwise than in accordance with the relevant recruitment rules is subsequently regularised in consultation with the Commission, where necessary, seniority of such persona shall be determined from the date of regularisation and not from the date of appointment. The inter-se-seniority amongst such persons shall, however, depend on the date of appointment of each such person in the department or office concerned.

Further if any person selected for appointment to any post dose not join within two months of the offer of appointment, his seniority shall count from the date on which he joins the post unless the appointing authority for reasons to be recorded in writing condones the delay.⁵⁷³

⁵⁷² Vide Notification No. 1882-F, Audit Branch, Finance Department, Government of West Bengal

⁵⁷³ R. 3 of the West Bengal (Determination of Seniority Rules, 1981

A list of candidates for the purpose of selection for appointment shall be prepared in all case by the selecting authority, when there will be recruitment in a single process of selection of more than one person.

Where the inter-se-seniority amongst several persons has not been determined prior to the coming into force of these rules, such seniority shall, on the coming into force of these rules, be determined on the basis of actual date of their joining. When the date of joining of all such persons is the same, seniority shall be determined on the basis of date of birth, person retiring earlier being adjudged as senior. When the date of birth is the same, seniority shall be determined on the basis of total marks obtained by each in the examination, passing of which is the qualification prescribed for recruitment to the particular post, cadre or grade.

In so far as the determination of relative seniority of persons selected either by the Commission or by other selecting authority for appointment to different posts in the same grade with different qualifications such as posts of assistant Professors in History, Economics, Physics, Chemistry, etc. is concerned, seniority shall be determined from the date of joining.

*ii. Determination of seniority of promotees*⁵⁷⁴

(1) Seniority of persons appointed on promotion to any post, cadre or grade shall be determined from the date of joining such post, cadre or grade.

(2) When there will be appointment in a single process of selection of more than one person, the relative seniority of persons so appointed shall be determined according to the order of selections for such promotion.

(3) Persons appointed on the result of an earlier selection shall be senior to those appointed on results of a subsequent selection.

(4) Where promotions to a post, cadre or grade are made from one post. Cadre or grade, the relative seniority of the promotes, from different posts, cadre or grades shall be according to the order of merit determined by the Commission or the selecting

⁵⁷⁴ R. 4

authority, if such posts, cadres or grades do not come within the purview of the Commission.

A list of candidates for the purpose of selection for promotion shall be prepared in all cases by the selecting authority when appointments are made on promotion in a single process of selection of more than one person.

Where the inter-se-seniority amongst several persons has not been determined prior to the coming into force of these rules, such seniority shall, on the coming into force of these rules, be determined on the basis of date of joining. When the date of joining of such persons is the same, seniority in the promotion post, cadre or grade shall follow the seniority in the lower feeder post, cadre or grade.

iii. *Relative seniority of direct recruits and promotees*⁵⁷⁵ –

(1) The relative seniority between a promotee and a direct recruit shall be determined by the year of appointment or promotion of each in the post, cadre or grade irrespective of the date of joining.

(2) The promotees shall be en-bloc senior to the direct recruits of the same year.

iv. *Determination of seniority of transferees*⁵⁷⁶

(1) The relative seniority of persons appointed by transfer to a post, cadre or grade from the feeder post, cadre or grade of the same department or office or from other departments or offices of the Government shall be determined by the order of selection for such transfer.

(2) When such transfers involve two or more persons selected from different departments or offices on the same occasion, the appointing authority for such appointment on transfer shall indicate the order of merit of the selected persons in each case.

(3) The relative seniority between a promotee, a transferee and a direct recruit shall be determined by the year of promotion or transfer or recruitment, promotees being en-bloc senior to the direct recruits of the same year.

⁵⁷⁵ R. 5

⁵⁷⁶ R. 6

b) The West Bengal Civil Service (Executive) (Determination of Seniority) Rules, 2008

In order to determine and regulate the inter-se seniority of the members of the West Bengal Civil Service (Executive) as constituted under Rule 3 of the West Bengal Civil Service (Executive) Recruitment Rules, 1978 and Rule 2 of the West Bengal Services (Unification of State Services) Rules, 1979, the West Bengal Civil Service (Executive) (Determination of Seniority) Rules, 2008 was made by the Governor of West Bengal.⁵⁷⁷

i. Seniority of Members of West Bengal Civil Service (Executive)

The relative seniority of members of the West Bengal Civil Service (Executive) is determined according to the following provisions:

1. The members of the erstwhile West Bengal Civil Service (Executive) before 1 March, 1974 on the basis of the competitive examinations held by the Commission in the years 1970 and 1972 and to the erstwhile senior scale of the unified Service on the basis of the competitive examination held by the Commission in the year 1973 and 1974 shall be senior to the members who, immediately before the 1 April, 1970, by virtue of the provisions of the West Bengal Services (Unification of State Services) Rules, 1979. However, the members of the erstwhile West Bengal Junior Civil Service promoted to the erstwhile West Bengal Civil Service (Executive) in the years 1971 and 1972 shall be senior respectively to the members recruited to the erstwhile West Bengal Civil Service (Executive) on the basis of the competitive examinations held by the Commission in the years 1970 and 1972. The members of the erstwhile West Bengal Civil Service (Executive) in the year 1973 shall be senior to the members recruited directly in the Senior scale of the West Bengal Civil Service (Executive) on the basis of the competitive examination held by the Commissioner in the year 1973.

Further, the members of the Service who were members of the erstwhile West Bengal Junior Civil Service immediately before 1 April, 1970 but were not promoted to the erstwhile West Bengal Civil Service (Executive) in the years 1971, 1972 and 1973, shall be immediately junior to the members of the erstwhile West Bengal Junior Civil Service immediately before the 1 April, 1970.

⁵⁷⁷ Vide Notification No. 3279-P&AR (WBCS)/1D-146/99 pt. dated 3rd September, 2008

2. The members recruited to the erstwhile West Bengal Junior Civil Service after the 1 April, 1970 but before the 1 March, 1974 or to the erstwhile junior scale of the unified Service on the basis of the competitive examination held by the Commission in the years, 1973 and 1974 shall be junior to such members of the erstwhile West Bengal Junior Civil Service immediately before the 1 April, 1970.
3. The members of the Service in the erstwhile junior scale recruited directly during the years 1975, 1976, 1977 and 1978 on the basis of the competitive examination held by the commission during the years 1973 and 1974.
4. The relative seniority of the direct recruits shall be determined by the order of the merit list of the examination held by the Commission in which they are selected for appointment to the service, members appointed on the result of subsequent years of examination.
5. The seniority of the promotees shall be determined according to their “year of allotment” and the relative seniority of promotees shall be determined by the order in which they are selected for appointment to the service on the recommendation of the Commission, members appointed on the result of an earlier selection being senior to the members appointed on the result of a subsequent selection. The “year of allotment” in context to the West Bengal Civil Service (Executive) is – (a) in case of direct recruits and promotees, the year in respect of which vacancies are reported to the Commission; and (b) in case of Special Recruits, the year in which the Commission’s recommendations are forwarded to the Government.
6. The relative seniority of special recruits shall be determined by the order in which they are selected for appointment to the Service on the recommendation of the Commission, members appointed on the result of an earlier selection being senior to the members appointed on the result of a subsequent selection.
7. The members of the Service recruited on the basis of the examination held by the Commission in the year 1978 in accordance with the provision of the sub-rule (3) of R.4 of the recruitment rules, shall be junior to the direct recruits of that year.
8. The relative seniority between a promotee, a special recruit and a direct recruit shall be determined according to the respective year of allotment, promotees of a year of allotment being en-bloc senior to the special recruits and the direct recruits of the same year, and the special recruits of an year being en-bloc senior to the direct recruits of the same year – irrespective of their date of joining.

9. The provision of the West Bengal Services (Determination of Seniority) Rules, 1981, to the extent those are not inconsistent with the provisions mentioned in the above paras shall also apply for the purpose of determination of the relative seniority of the members of the service.

6.3.3. Promotion and Seniority Policy in Sub-Ordinate and Higher Judiciary in the State of West Bengal

In exercise of the power conferred upon by the proviso to Article 309 of the Constitution and in supersession of all previous notifications on the subject matter, the Governor, in consultation with the High Court at Calcutta under Article 233 of the Constitution or, as the case may be, in consultation with the Public Service Commission, West Bengal, and High Court at Calcutta under Article 234 of the Constitution, made the West Bengal Judicial (Conditions of Services) Rules, 2004. These rules are divided into two parts; Part I of these rules applies to the Judicial Officers (sub-ordinate judiciary) other than District Judges and Part II applies to the Higher Judicial Officers in the rank of District Judges.⁵⁷⁸

a. Judicial Officers other than District Judges

The Judicial Officers other than District Judges of the West Bengal Judicial Service include the following posts forming the cadre⁵⁷⁹ -

- Civil Judge/ Judicial Magistrate/ Metropolitan Magistrate/ Municipal Magistrate/ Magistrate of Juvenile Board
- Chief Metropolitan Magistrate/ Additional Chief Metropolitan Magistrate/ Chief Judicial Magistrate/ Additional chief Judicial Magistrate/ Senior Civil Judge/ Assistant sessions Judge/ Sub-Divisional Judicial Magistrate/ Senior Municipal Magistrate/ The Judge, Presidency Small Causes Court/ The Registrar, District Judges Court.

The gradation of the above posts for the purpose of Assured Career Progression (ACP) is as follows⁵⁸⁰:-

- Civil Judge (Junior Division) at entry level
- Civil Judge (Senior Division) at intermediary level

⁵⁷⁸ Notification No- 262-J. L- Dt. 28th September, 2004.

⁵⁷⁹ Rule 6, West Bengal Judicial (Conditions of Services) Rules, 2004

⁵⁸⁰ Rule 7, West Bengal Judicial (Conditions of Services) Rules, 2004

The grade of Civil Judge (Junior Division) at entry level shall consist of the following sub-heads⁵⁸¹:

- Civil Judge
- Civil Judge, Grade II
- Civil Judge, Grade I

The grade of Civil Judge (Senior Division) at intermediary level shall consist of the following sub-heads⁵⁸²:

- Senior Civil Judge
- Upper Senior Judge
- Superior Senior Judge

The appointment by way of selection through promotion in the posts mentioned in R. 6 (1)(b) from the posts mentioned in R.6 (1)(a) shall be made on the basis of merit-cum-seniority by the High Court. Such appointment by way of selection through promotion shall be made on the 1 day of January of the year in which selection is to be made.

*i. Seniority*⁵⁸³

The relative seniority inter-se of the Judicial Officers other than the District Judges appointed to the post mentioned in Clause (a) of sub-rule (1) of Rule 6 in the service against the vacancies occurring in any particular year, shall be determined according to the order of merit upon the result of examination conducted by the Commission.

The relative seniority inter-se of Judicial Officers other than the District Judges appointed to the posts mentioned in R. 6 (1)(b) shall be according to the order in which their name appear in the merit list approved and issued by the High Court.

The relative seniority inter-se of persons appointed under the West Bengal Civil Service (Judicial) before coming into force of these rules, shall be governed by the West Bengal Civil Service (Judicial) (Determination of Seniority) Rules, 1961 for the time being in force.

⁵⁸¹ Rule 7(2), West Bengal Judicial (Conditions of Services) Rules, 2004

⁵⁸² Rule 7(3) , West Bengal Judicial (Conditions of Services) Rules, 2004

⁵⁸³ Rule 12, West Bengal Judicial (Conditions of Services) Rules, 2004

b. Higher Judicial Official in the rank of District Judges

The Cadre of the Higher Judicial Officers in the rank of District Judges includes the following posts viz. District Judge, District Judge in selection grade and District Judge in Super Time Scale.

Appointment of District Judges, as mentioned above, are made by:

1. Direct recruitment from the Bar
2. By selection through promotion on the basis of merit-cum-seniority and on passing of a suitability test from amongst the Judicial Officers as mentioned in R. 6 (1)(b)
3. By promotion strictly on the basis of merit through limited competitive examination of Judicial Officers as mentioned in R. 6 (1)(b)

The number of vacancies in this cadre to be filled by direct recruitment and by promotion shall not be more than 25 percent in each criteria of the total permanent strength and such recruitment shall be made annually as far as possible.

i. Seniority of Higher Judicial Officers in the Rank of District Judges

The seniority of higher Judicial Officers in the rank of District Judges shall be determined according to:

1. Date of continuous officiation in case of officers promoted to the posts as referred to in R. 24 (1)(a)
2. The date of order of appointment in the case of direct recruitment to the above mentioned posts
3. The date or order of select to posts as referred in Rule 24 or such date as specified by the High Court

ii. Inter-se Seniority

In cases when the date of officiation of the higher Judicial Officers in the rank of District Judges and the date of joining or appointment of the direct recruit in the same cadre is same, the inter-se seniority of the District Judges shall be fixed according to the 40 point roster as determined by the High Court from time to time.

The inter-se seniority amongst the higher Judicial Officers in the rank of District Judges promoted by an order of the same date or amongst direct recruits appointed by an order of the same date, shall follow the order in which their names have been recommended by the High Court.

6.4. Determination of Seniority in Various ‘Services’ within the State of West Bengal

6.4.1. Approach of the Survey

The study has been carried out with the help of primary survey. In consonance with the object for pursuing this study, the service holders within the territorial jurisdiction of the State of West Bengal have been targeted for conducting the survey and collection of data for this purpose. The target groups for the survey consist of only Government employees in various departments of the State within the territorial jurisdiction of the State of West Bengal, which include-

- a. The employees in various Services of the State as defined under Article 12
- b. The Defence Personnel
- c. The teaching Faculty under the Career Advancement Scheme in Universities, Colleges and Research Institutes
- d. The employees in Local Bodies

6.4.2. Methodology and Sample Size

The methodology adopted for the survey in hand is both stratified and purposive sampling. The universe selected for the purpose of study is the employees under the Service under the State. The universe has been divided into four strata as above-mentioned in 6.4.1.. From each of the stratum, respondents have been randomly and purposively selected for collection of the data. A total number of Twenty-Five (25) respondents from each of the above target groups, which adds upto a Hundred (100) respondents, have been randomly and purposively selected for the purpose of the survey.

The data has been collected by distribution of a structured questionnaire to the respondents with closed questions. The Questionnaire⁵⁸⁴ consists of two parts, vis., Part - A and Part – B. Part – A deals with personal information of the respondents. Part – B of Questionnaire deals with the professional details which is relevant for the purpose of the data analysis. The Questions numbering from 1 to 5 are not relevant for the study as they

⁵⁸⁴ The Questionnaire is provided under Annexure I of the Thesis.

give us information about the nature of occupation and the details of the institution in which they are employed. Further, it has been found out on conclusion of the survey, that all the respondents upon whom the survey was conducted, hold posts substantial in nature and there was no such case where they held adhoc or temporary posts. Therefore, responses provided for Question No. 6 and 7 are not being tabulated in the Tables provided herein. It is worth mentioning here that Question No. 29, where the personal opinion of the respondents regarding the promotional system based on seniority has been asked, there has been no response from the respondents; hence, this question has not been included in the Tables represented here. Since the respondents for the purpose of this survey were selected with the objective to find the basis of seniority, therefore, the direct recruits were intentionally avoided. Hence, 100% of the respondents were promotees and none of them are holding any post by direct recruitment.

The data so collected are represented in the form of Tables and Graphs as provided herein below in this Chapter.

6.4.3. Determination of Seniority for Promotion in Government Departments and Corporations within the Territory of West Bengal

Among the employees of the State in West Bengal who had responded to the questionnaire, all of them have either been promoted or considered for promotion at some point of time in their career. 84% of them revealed that they have been promoted or considered for promotion in due time. 40% of the respondents said that they have been promoted to the next higher post on the basis of seniority only and 20% of them said that their promotion was purely made according to merit only. 64% said that their promotion was made according to seniority-cum-merit and 28% opined that their promotion was made according to merit-cum-seniority. According to 72% of the respondents, they have been considered for promotion or promoted more than once. Question no. 15 has been divided into several other questions. This question takes into consideration of a respondent's initial and the most recent promotion, if anyone has been promoted or considered for promotion more than once. In response to the question that whether merit was taken into consideration while making the first promotion, 28% of them said that merit was taken into consideration in making their promotion. 40% of them said that seniority was the basis of making their promotion. 68% of the respondents' promotion was made according to seniority-cum-merit in the first instance

and 28% said that merit-cum-seniority played a major role in making their first promotion. In making their most recent promotion, 16% of the respondents responded that promotion was made according to merit, 48% said that seniority was taken into consideration, 52% of their promotion was made according to seniority-cum-merit and 28% said that their promotion was made according to merit-cum-seniority.

Table No. 6.1

Principles Of Promotion And Seniority In Government Departments And Corporations Within The Territory Of West Bengal

Serial No.	Questions	Responses of Government Departments	
		Yes (%)	No (%)
6	Whether post is of substantial nature?	100	0
7	Post is ad-hoc/temporary/officiating	0	100
8	Considered for promotion/promoted to a higher rank	100	0
9	Considered for promotion in due time	84	16
10	Promotion according to seniority	40	60
11	Promotion according to merit	20	80
12	Promotion according to seniority-cum-merit	64	36
13	Promotion according to merit-cum-seniority	28	72
14	Promoted/considered more than once	72	28
15 a	1st promotion according to merit	28	72
15 b	1st promotion according to seniority	40	60
15 c	1st promotion according to seniority-cum-merit	68	32
15 d	1st promotion according to merit-cum-seniority	28	62
15 e	Most recent promotion according to merit	16	84
15 f	Most recent promotion according to seniority	48	52
15 g	Most recent promotion according to seniority cum merit	52	48
15 h	Most recent promotion according to merit-cum-seniority	28	72
16	Current position by direct recruitment	0	100
17	Current position by promotion	100	0
19	Seniority calculated by continuous length of service	100	0
20	Seniority calculated by continuous length of officiation in service	32	68
21	Seniority determined from day of appointment	100	0
22	Seniority determined from day of confirmation	8	92
23	Determination of merit by interview	36	64
24	Determination of merit by written exam	40	60
27	Principle of quota applied	100	0

The next set of questions deals with the mode of determination of seniority for promotion. All the respondents said that seniority for the purpose of promotion was calculated by the continuous of service. 32% said that continuous length of officiation was taken into consideration for calculating seniority, 100% respondents' seniority was determined from the day of appointment and only 8% of their date of confirmation was taken into consideration. Where merit is a criteria for determining seniority, 36% said that merit is adjudged by interview and 40% of them said that written examination determines the merit.

In case of inter-se seniority, preference was given to either to the promotees (according to 28%) or both direct recruits and promotees (72%). For deciding inter-se seniority, the principle of quota is applicable in 100% of the cases. However, the ratio of quota fixed for direct recruits to promotees varies from service to service. 28% said that the ratio of direct recruits to promotees is 1:1; in 40% of the cases the quota fixed is 1:4; in 16% of the cases the ratio is 1:3. The ratio is 1:2 in 12% of the respondents and 4% viewed that the ratio is 1:5.

6.4.4. Determination of Seniority in Defence Services within the Territory of West Bengal

In defence services, no promotion is made solely on the basis of seniority or merit. Merit-cum-Seniority plays a deciding role in matters of promotion in this sector. This has also been proved by the survey conducted upon the defence personnel. All the respondents of this sector have been either considered for promotion or have already been promoted. 92% of them have been promoted in their due time. 36% reported that promotion is determined by seniority and promotion of 48% of them has been made upon merit only. 56% of the respondents seniority-cum-merit was considered while making promotion and 36% said that merit-cum-seniority was taken into consideration while making a promotion.

In cases where promotion has been made more than once, the questions which were raised before the respondents were regarding promotion made in the initial stage of the service and promotion made at the most recent time. 44% said that while making the first promotion, merit was taken into consideration; 32% respondent's first promotion was made by seniority; 48% and 32% of the respondent's initial promotion are made by

seniority-cum-merit and merit-cum-seniority respectively. According to 36% respondents, their most recent promotion has been made by merit; 24% said that their seniority was taken into account; 56% of the responses revealed that promotion was made on the basis of seniority-cum-merit and 32% of their promotion made on the basis of merit-cum-seniority.

Table No. 6.2

Principles Of Promotion And Seniority In Defence Services Within The Territory Of West Bengal

Serial No.	Questions	Responses of Defense Departments	
		Yes (%)	No (%)
6	Whether post is of substantial nature?	100	0
7	Post is ad-hoc/temporary/officiating	0	100
8	Considered for promotion/promoted to a higher rank	100	0
9	Considered for promotion in due time	92	8
10	Promotion according to seniority	36	64
11	Promotion according to merit	48	52
12	Promotion according to seniority-cum-merit	56	44
13	Promotion according to merit-cum-seniority	36	64
14	Promoted/considered more than once	76	24
15 a	1st promotion according to merit	44	56
15 b	1st promotion according to seniority	32	68
15 c	1st promotion according to seniority-cum-merit	48	52
15 d	1st promotion according to merit-cum-seniority	32	68
15 e	Most recent promotion according to merit	36	64
15 f	Most recent promotion according to seniority	24	76
15 g	Most recent promotion according to seniority cum merit	56	44
15 h	Most recent promotion according to merit-cum-seniority	32	68
16	Current position by direct recruitment	100	0
17	Current position by promotion	0	100
19	Seniority calculated by continuous length of service	92	8
20	Seniority calculated by continuous length of officiation in service	56	44
21	Seniority determined from day of appointment	84	16
22	Seniority determined from day of confirmation	8	92
23	Determination of merit by interview	28	72
24	Determination of merit by written exam	52	48
27	Principle of quota applied	100	0

While calculating the seniority of the respondents of this category, it was found that of 92% of their seniority is determined by continuous length of service; 56% of them were promoted taking into consideration their continuous length of officiation; 84% of their

seniority was calculated from their date of appointment and calculation of seniority from the date of confirmation was done in 8% of them.

For those who were promoted by merit, 28% said that their merit is determined by an interview and 52% of them had to undergo a written examination for determining the merit.

Taking into consideration of the inter-se seniority among the direct recruits and promotees, 40% revealed that promotees are given preference and for 60% both direct recruits and promotees were provided equal opportunity for promotion.

The principle of quota is applied in matter of promotion in this category; 36% said that the quota fixed for promotion is in the ratio of 1:1 for direct recruits and promotees, 32% said that the quota fixed is 1:3 and the ratio of 1:4 is fixed for 4% of the respondents. 28% of the respondents had refrained themselves from answering this question.

6.4.5. Determination of Seniority among Teachers of Universities, Colleges and Research Institutions within the Territory of West Bengal

The Career Advancement Scheme introduced by the Universities Grants Commission is the basic principle on which promotion of teachers of Universities, Colleges and other research institutions are made.

92% of them were promoted or considered for promotion in due time; the view of the rest was that there was that as and when a faculty member acquires the necessary API (Academic Progression Index) he/she becomes eligible for promotion and can be accordingly promoted.

8% of the teachers said that they were promoted on the basis of seniority only and 32% of them were promoted based on merit only. 24% respondent teachers were promoted according to seniority-cum-merit while 72% of the promotion have been made by merit-cum-seniority.

84% of the respondents were promoted more than once. Among them, the initial promotion made according to merit was 52%; initial promotion made according to seniority was for 12% respondents; seniority-cum-merit and merit-cum-seniority of 16% and 60% respondents respectively have been considered for promotion. In case of the most recent promotion, for 32% respondents merit was taken into consideration and for

16% of them seniority was considered; seniority-cum-merit and merit-cum-seniority was considered in 28% and 68% teachers respectively.

Table No. 6.3
Principles Of Promotion And Seniority In Higher Education (With Special Reference To Career Advancement Scheme) Within The Territory Of West Bengal

Serial No.	Questions	Responses of University and Colleges	
		Yes (%)	No (%)
6	Whether post is of substantial nature?	100	0
7	Post is ad-hoc/temporary/officiating	0	100
8	Considered for promotion/promoted to a higher rank	100	0
9	Considered for promotion in due time	92	8
10	Promotion according to seniority	8	92
11	Promotion according to merit	32	68
12	Promotion according to seniority-cum-merit	24	76
13	Promotion according to merit-cum-seniority	72	28
14	Promoted/considered more than once	84	16
15 a	1st promotion according to merit	52	48
15 b	1st promotion according to seniority	12	88
15 c	1st promotion according to seniority-cum-merit	16	84
15 d	1st promotion according to merit-cum-seniority	60	40
15 e	Most recent promotion according to merit	32	68
15 f	Most recent promotion according to seniority	16	84
15 g	Most recent promotion according to seniority cum merit	28	72
15 h	Most recent promotion according to merit-cum-seniority	68	32
16	Current position by direct recruitment	8	92
17	Current position by promotion	100	0
19	Seniority calculated by continuous length of service	84	16
20	Seniority calculated by continuous length of officiation in service	12	88
21	Seniority determined from day of appointment	84	16
22	Seniority determined from day of confirmation	12	88
23	Determination of merit by interview	8	92
24	Determination of merit by written exam	60	40
27	Principle of quota applied	100	0

While determining the seniority of the respondents, it was found that seniority for promotion, was fixed by calculating - (i) the continuous length of service of 84% of the respondents; (ii) the continuous length of officiation in service of 12% respondents; (iii) from the day of appointment of the respondents in 84% cases; and (iv) from the date of confirmation in 12% cases.

In cases of deciding the merit of the respondents, 8% of them had to face an interview board and of the rest 92% respondents, merit was calculated according to the confidential reports. No written examination is held for the respondents for determining the merit.

Regarding the inter-se seniority, 12% of the promote respondents were given preference and 88% said that preference is given to both direct recruits and promotees. For promotion of the all the respondents, the principle of quota is applied. The ratio which is fixed for recruitment in a particular grade among the direct recruits and promotees varied from respondent to respondent. 80% of them said that the ratio fixed is 1:1, 16% said the ratio is 1:2 and 4% viewed it to be 1:3.

6.4.6. Determination of Employees of Local Bodies within the Territory of West Bengal

For quite sometime, local bodies and employees of local bodies were kept outside the purview of the definition of 'State' as provided under Article 12. However, now it is a settled discourse that employees of local bodies are considered as employees of the 'State'. On conducting the survey upon the selected employees of pre-selected local bodies, the following findings emerged –

- a. 48% of the employees were promoted in due time, while promotion 52% of them were delayed;
- b. 8% of the respondents were promoted solely on the principle of merit or seniority;
- c. Promotion of 52% respondents was made according to seniority-cum-merit and 16% were promoted by merit-cum-seniority;
- d. 46% of the respondents were promoted more than once. Among them, none of their first promotion was solely on merit, while 76% of them were promoted by seniority only. In making the initial promotion, 56% employee-respondent were promoted by seniority-cum-merit and none of them promoted by merit-cum-seniority. In relation to the most recent promotion, 12% were promoted according to merit only, 76% according to seniority only, 56% according to seniority-cum-merit and none of them according to merit-cum-seniority.
- e. Seniority of all (100%) the employee-respondent was fixed by calculating the continuous length of service and for none of them, the continuous length of officiation

was taken into account. Seniority was determined from the date of appointment for the respondents (100%) and not from the date of confirmation.

f. While determining the merit, 4% had to face the interview and 20% of them had a written examination.

g. In cases of inter-se seniority, preference was given to promotees (12%) or both direct recruits and promotees (88%).

Table No. 6.4
Principles Of Promotion And Seniority Among Employees Of Local Bodies Within The Territory
Of West Bengal

Serial No.	Questions	Responses of Local Bodies	
		Yes (%)	No (%)
6	Whether post is of substantial nature?	100	0
7	Post is ad-hoc/temporary/officiating	0	100
8	Considered for promotion/promoted to a higher rank	72	28
9	Considered for promotion in due time	48	52
10	Promotion according to seniority	8	92
11	Promotion according to merit	8	92
12	Promotion according to seniority-cum-merit	52	48
13	Promotion according to merit-cum-seniority	16	84
14	Promoted/considered more than once	56	44
15 a	1st promotion according to merit	0	100
15 b	1st promotion according to seniority	76	24
15 c	1st promotion according to seniority-cum-merit	56	44
15 d	1st promotion according to merit-cum-seniority	0	100
15 e	Most recent promotion according to merit	12	88
15 f	Most recent promotion according to seniority	76	24
15 g	Most recent promotion according to seniority cum merit	56	44
15 h	Most recent promotion according to merit-cum-seniority	0	100
16	Current position by direct recruitment	36	64
17	Current position by promotion	64	36
19	Seniority calculated by continuous length of service	100	0
20	Seniority calculated by continuous length of officiation in service	0	100
21	Seniority determined from day of appointment	100	0
22	Seniority determined from day of confirmation	0	100
23	Determination of merit by interview	4	96
24	Determination of merit by written exam	20	80
27	Principle of quota applied	92	8

h. In 92% of the cases among the respondents, the principle of quota was applicable. Among the direct recruits and promotees, 28% of the respondent viewed that the quota

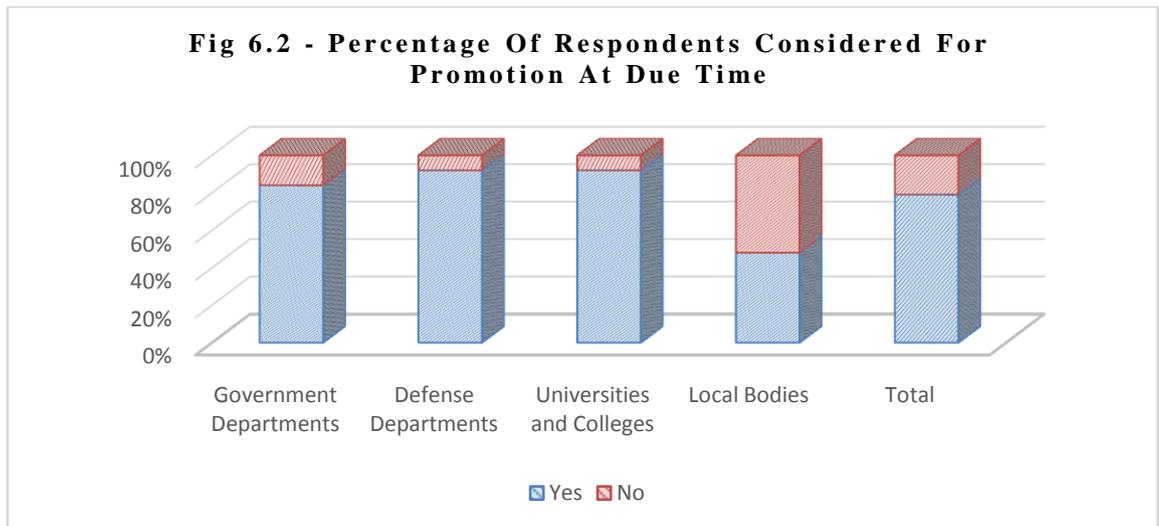
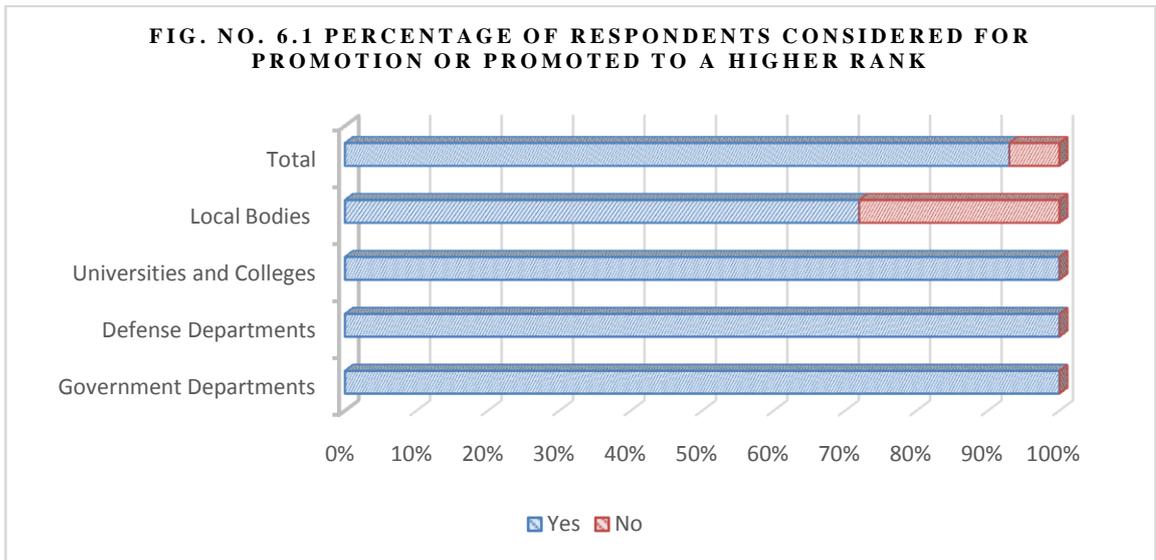
fixed for their promotion is 1:3, ratio of 1:2 was fixed for 24% respondents, 1:4 for 16% respondents; 1:5, 5:1, 1:8 and 3:5 for 4% respondents each. 8% respondents said the quota system was not applicable for them.

6.5. A Comparative Analysis of the Selected ‘Services’ under the ‘State’ within the Territory of West Bengal

On a perusal of the overall response of the questionnaires and on analysing the data of all the selected government sectors, i.e., the Government Departments, the Defence Sector, the Higher Education Sector with reference to the teachers of the Universities, Colleges and Research Institutions under the Career Advancement Scheme of the UGC and the employees of Local Bodies, the position of the scheme of career advancement and the importance of seniority in doing so, can be summed up and the following observations may be derived:

6.5.1. Right to Promotion or Right to be Considered for Promotion

It has already been discussed in detail (Chapter- 2) that there is no right to promotion. However, there is a right to be considered for promotion and such right cannot be denied to any employee serving the government. Fig. No. 6.1 reveals that other than the employees of the local bodies, all the employees from the other sectors have been either promoted or considered for promotion for atleast once. It can be derived that 90% of government employees get the opportunity of career advancement. However, whether promotion takes place on due time has a varied result. Fig. No. 6.2 shows the difference of opinion in this matter. The figure shows that in local bodies takes the longest time to provide promotion. 52% of them viewed that promotion did not take place on due time. In Government departments 16% of them were not promoted in due time. 92% in defence sector and higher education sector were promoted on time.



6.5.2. Determination of Promotion According to Seniority or Merit

The well known procedures of making promotions are according to seniority or merit or seniority-cum-merit or merit-cum-seniority. On compiling the data, it is found out that all the above-mentioned procedures are equally important for making promotion of employees of the government. Fig. Nos. 6.3, 6.4, 6.5 and 6.6 show that in none of the sectors, promotion is made on the sole criteria of seniority or merit.

Fig 6.3 Percentage Of Respondents Whom Promotion Was Granted According to Seniority

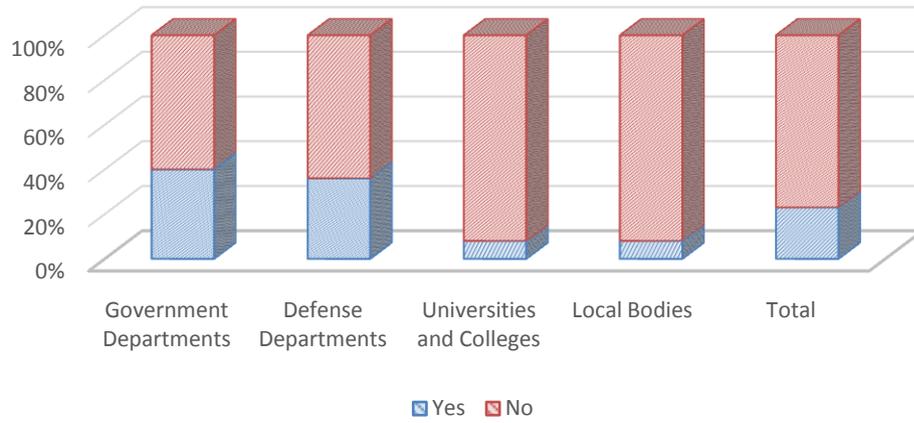


Fig 6.4 - Percentage Of Respondents Whom Promotion was Granted According to Merit

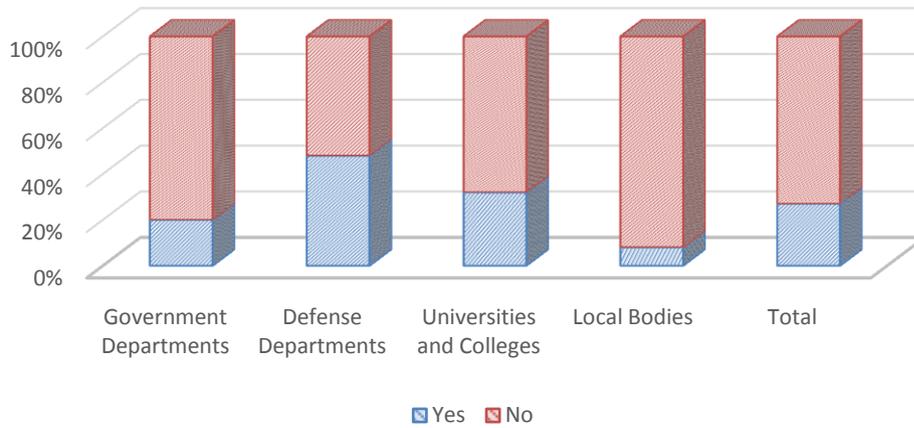


Fig 6.5 - Respondents Granted Promotion According to Seniority-cum-Merit Rule

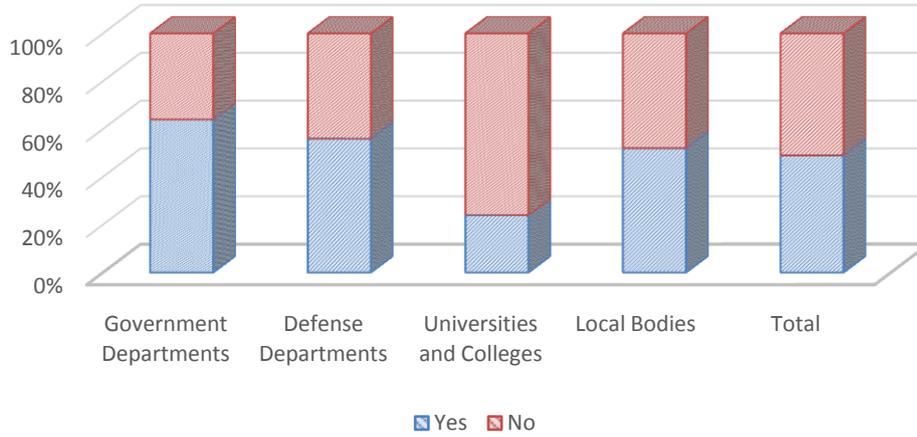
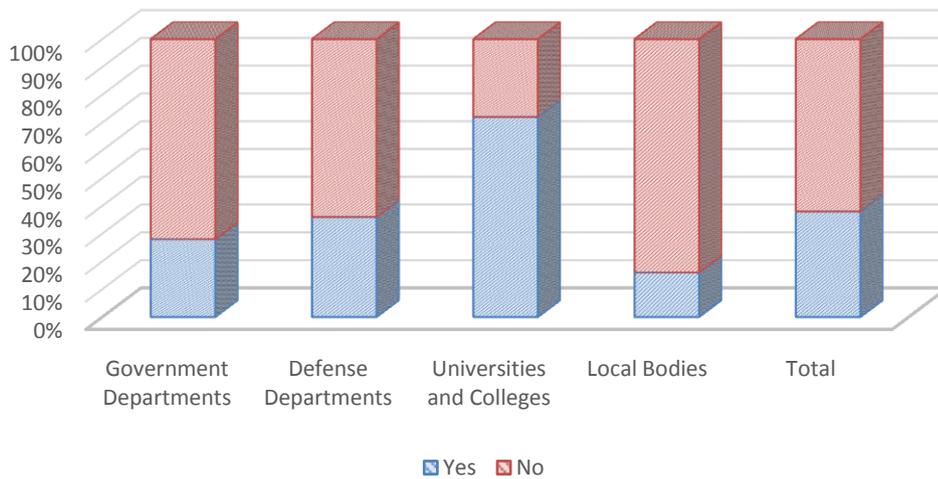


Fig 6.6 - Respondents Granted Promotion According To Merit-cum-seniority Rule

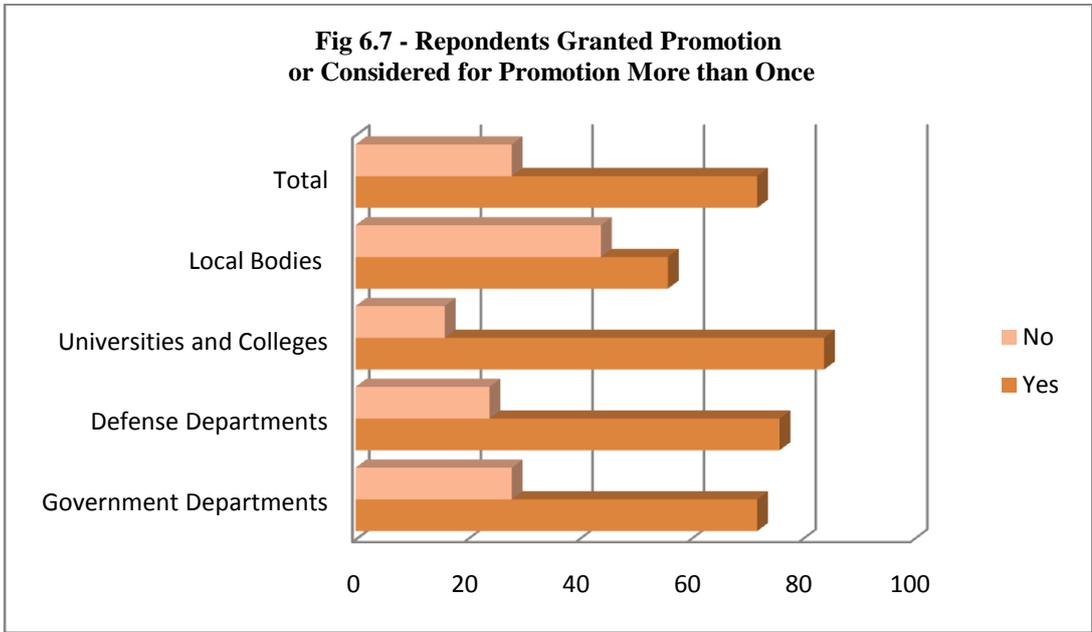


Special mention of Fig. Nos. 6.5 and 6.6 is required here. It will be seen that in all the sectors, promotion is made either according to seniority-cum-merit or merit-cum-seniority. Fig. No. 6.5 shows that while making promotion, among all the sectors adopting the method of seniority-cum-merit, in Government Departments give highest preference to seniority to merit (64%) followed by the employees of the local bodies (52%) in comparison to the other sectors. It is also seen that while promoting teachers of

Universities, Colleges and Research Institutions, by applying the method of merit-cum-seniority, highest preference is given to merit in comparison to the other sectors.(Fig. No. 6.6) This is followed by the Defence Sector where the defence personnel is promoted by merit-cum-seniority giving preference to merit over seniority.(Fig. No. 6.6)

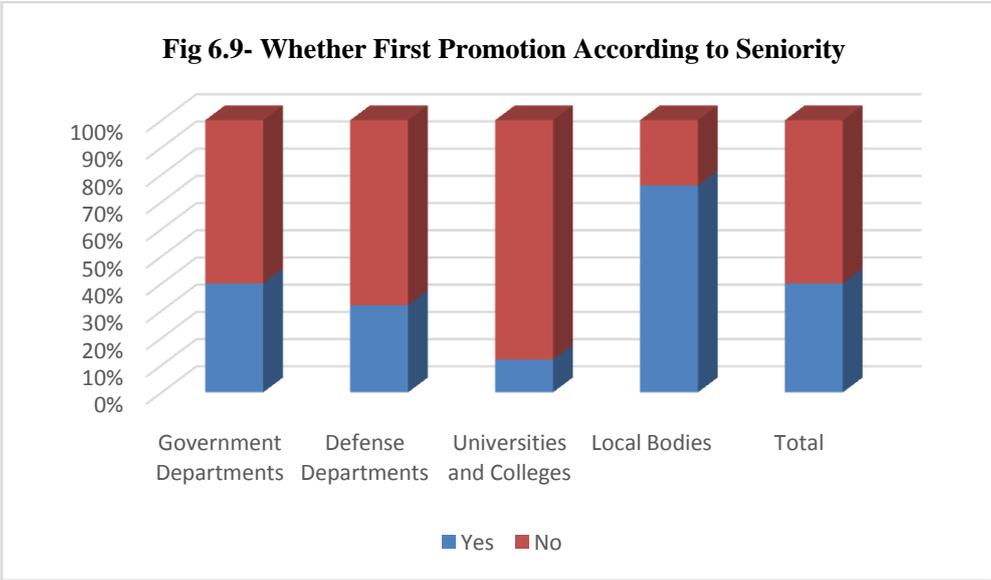
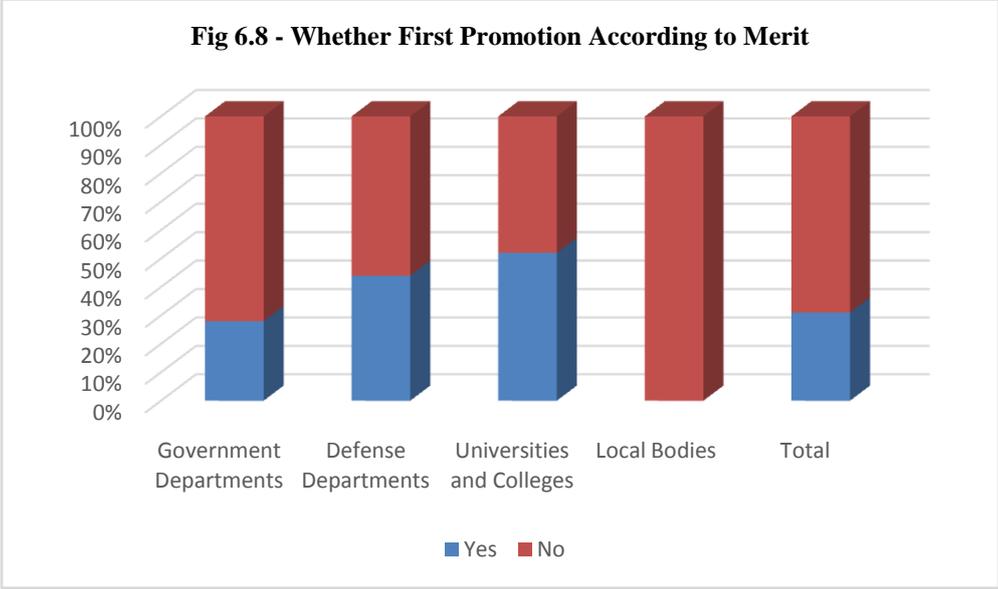
6.5.3. Principles of Promotion Where It is Made More than Once

During the career span of an employee, there may be number of occasions when he/she may be promoted. In this chapter, the initial and the most recent occurrence of the promotion of the respondents have been taken into consideration. The intention of adopting such method is to find out whether there is any change in the trend of principles of promotion. It has already been pointed out that promotion is not made on the sole criteria of seniority or merit. Where only seniority is considered, performance appraisal plays a very important role. On analysing the data collected, it can be inferred that as an employee moves up the ladder of service more and more importance is given to merit. Where an employee is promoted for the first time on the principle of seniority or seniority-cum-merit, his promotion for the next higher cadre or grade may be made on the basis of merit-cum-seniority. However, it is important to note that there are no circumstances where seniority has been avoided.



From the above Fig. No. 6.7, it can be deduced that the majority of the respondents have been promoted or considered for promotion more than once.

Fig. Nos. 6.8, 6.9, 6.10 and 6.11 show that initial promotion is made according to seniority or seniority-cum-merit, in which situation both seniority and merit is taken into account but seniority is given more importance. It is seen that while making the first promotion in the government department, 28% of the total respondents were promoted according to merit, in the defence sector promotion of 44% of the respondents were made considering their merit, in higher education 52% and none were promoted in local bodies by merit in the first instance.



On the other hand, Fig. No. 6.10 shows that on an average, majority of the initial promotions are made according to seniority-cum-merit and in Fig. No. 6.11, it is shown that lesser number of respondents were initially promoted by the application of the principle of merit-cum-seniority. It is to be noted that none of the employees of the local bodies were promoted applying this principle.

Fig 6.10- Whether First Promotion According to Seniority-cum-Merit

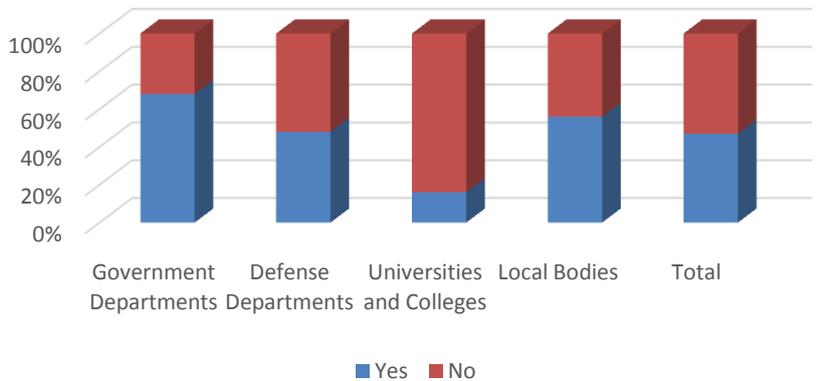
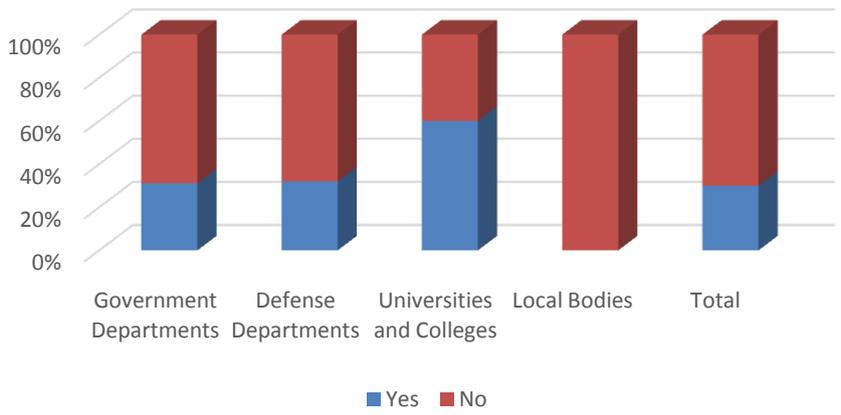


Fig 6.11 - Whether First Promotion According to Merit-cum-Seniority



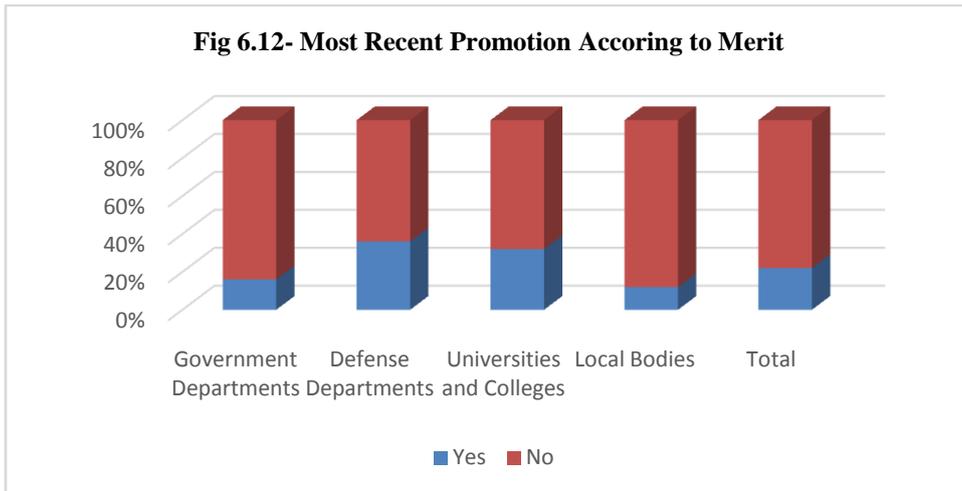
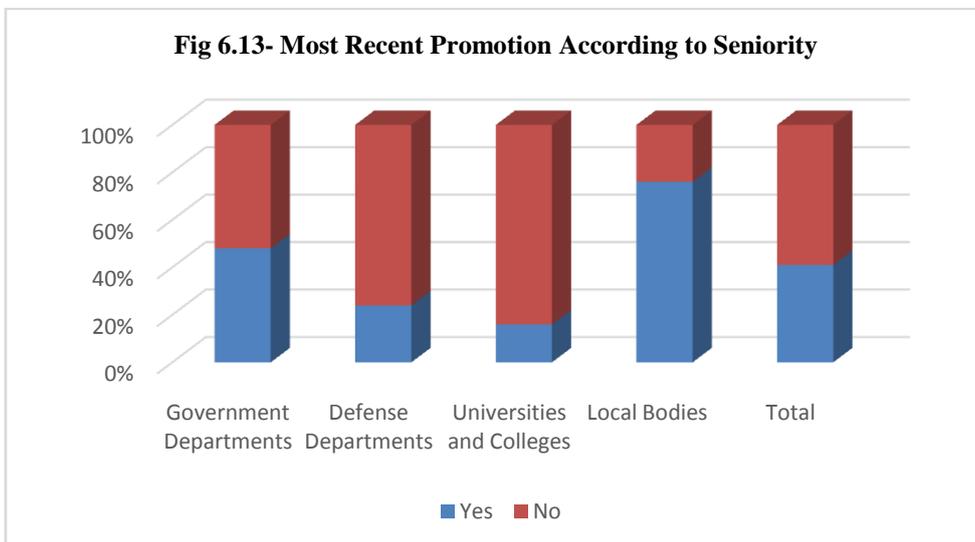


Fig. No. 6.13



It is seen that the principle of seniority plays a major role in promoting respondents of Government Departments and Local Bodies, whether it is made at the initial stage or in later stages of the services.(Fig. No. 6.13 and Fig. No. 6.9)

Fig 6.14 - Whether Most Recent Promotion According to Seniority-cum-Merit

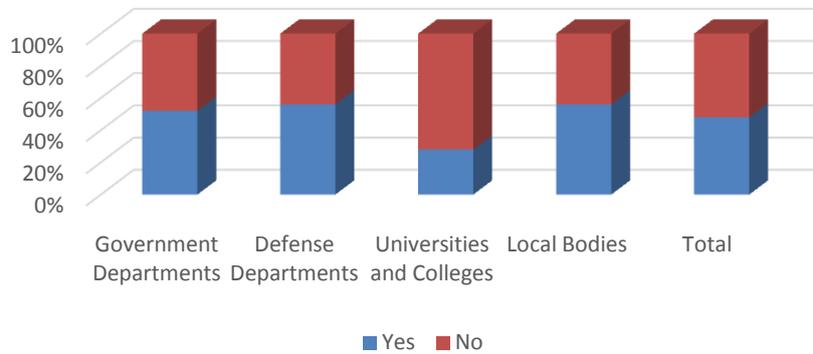
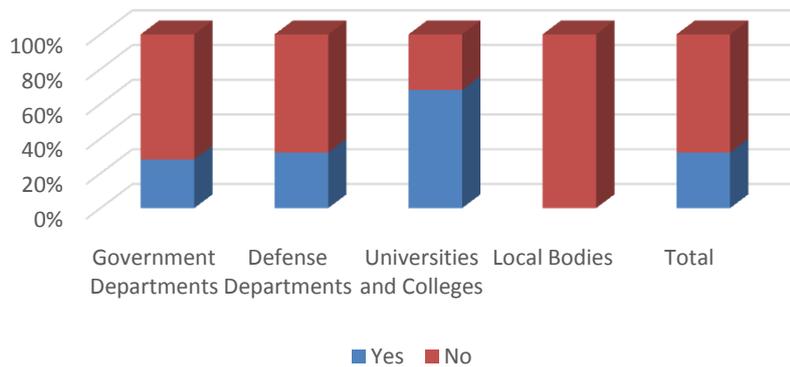


Fig 6.15 - Whether Most Recent Promotion According to Merit-cum-Seniority



As the respondents moved upwards in the service, it can be seen that the element of merit gets more importance than seniority in some of the services. In Fig. No. 6.15, it is seen that as high as 68% of the respondents in higher education is promoted according to merit-cum-seniority in later stages of service. Combining all the services together, it is found out that 32% of the total respondents have been promoted by merit-cum-seniority in the later stages of their services. On the other hand, combining all the services together, it is found that considering the first promotion of the respondents, promotion made according to merit-cum-seniority is 30% (Fig. No. 6.11)

6.5.4. Computation of Seniority in the Selected Service Sector

There are certain methods of computing seniority for advancing an employee in the ladder of service. The basic tenets for fixing seniority are based on continuous length of service or continuous length of officiation. Again while calculating the continuous length of service, either the date of appointment or the date of confirmation is taken into consideration.

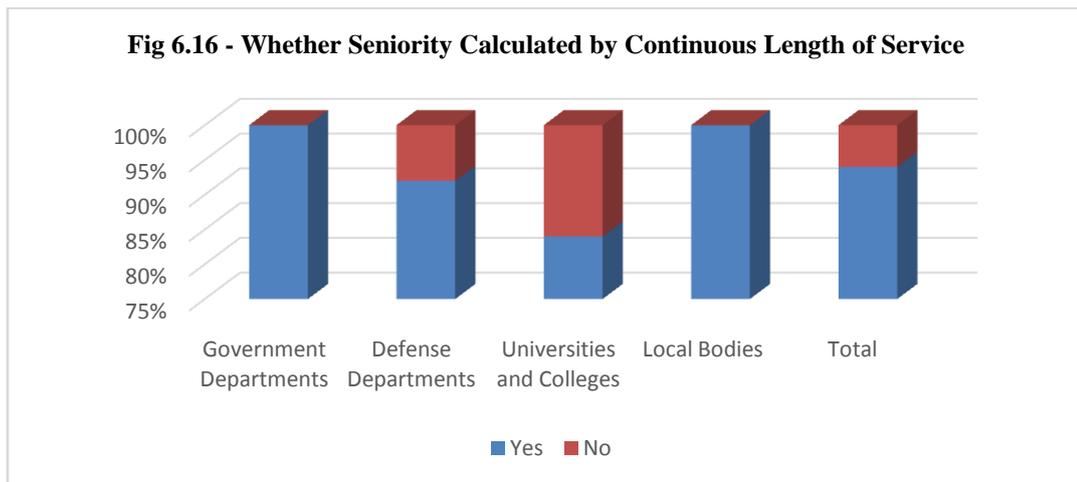
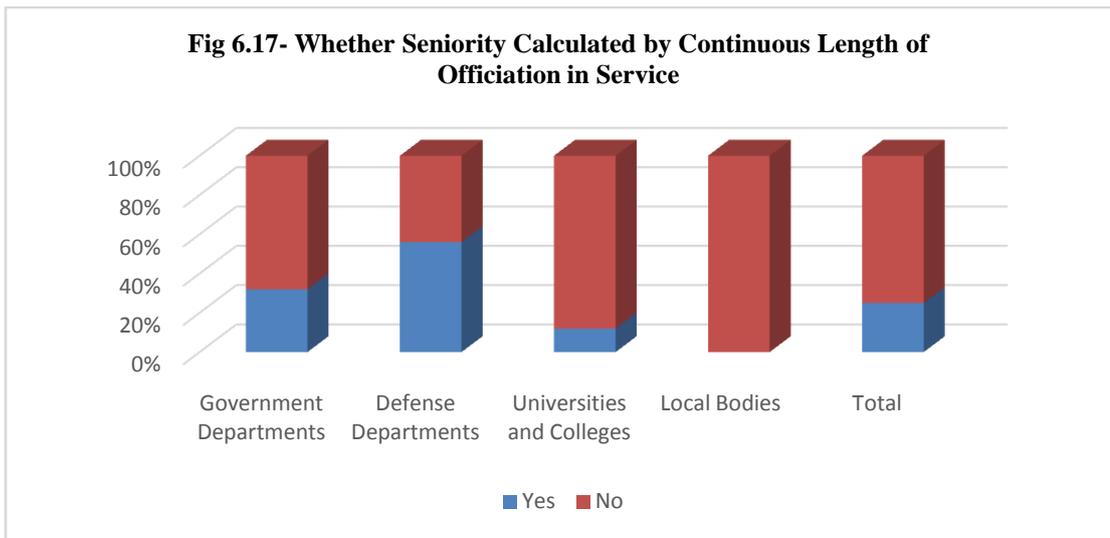
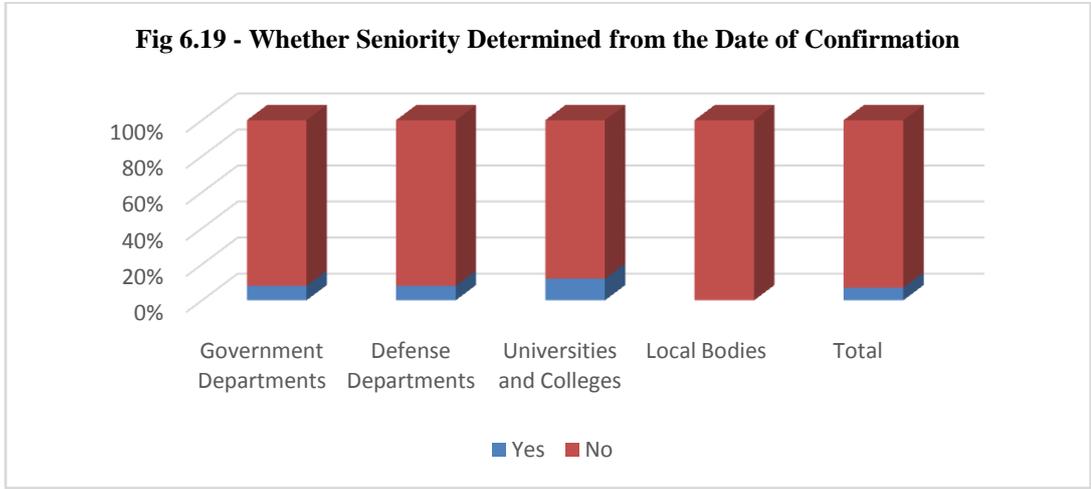
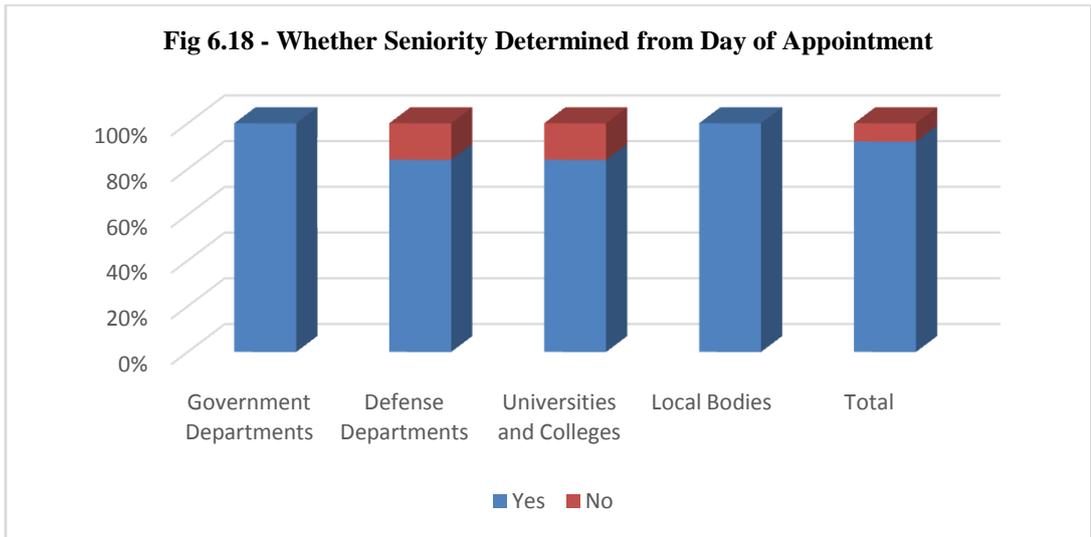


Fig. No. 6.16 shows that in all the four selected sectors seniority is calculated by the continuous length of service. While seniority of all the respondents in the Government Departments and employees in local bodies is calculated by length, 92% respondents in Defence Service and 84% in Higher Education Sector have been promoted by calculating their continuous length of service. Seniority for promotion also takes into consideration the length of continuous officiation. Fig. No. 6.17 represents the number of respondents whose continuous length of officiation have been taken into account in making their promotion. Highest number of respondents from the defence service has been promoted by calculating their length of officiation (56%). In local bodies, the officiation period is not considered for calculating their seniority.



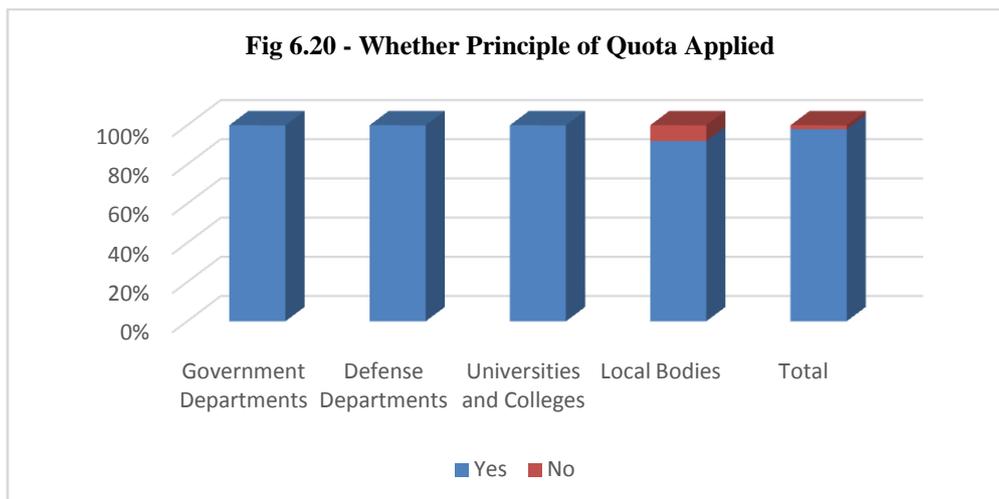
In calculating the continuous length of service or continuous length of officiation, the date of appointment or the date of confirmation holds relevance.



It is seen that the continuous length of service of all the respondents in the Government Sector is calculated from the date of appointment (Fig. No. 6.18). For 8% of the Respondents from Government Departments, length of service and officiation is calculated from the date of confirmation. The length of service or officiation of 84% of the Defence Personnel (respondent) were calculated from the date of appointment and for 8%, it was calculated from the date of confirmation. (Fig. Nos. 6.18 and 6.19). For calculating the length of service of Higher Education Sector, date of appointment of 84% teachers were considered and 12% teachers reported that their date of confirmation was considered. Among the employees of local bodies, their length of service is calculated from their date of appointment (Fig. No. 6.18)

6.5.5. Inter-se Seniority

In all circumstances of promotion, the conflict between the direct recruits and promotees is but common. When such kind of conflict arises the solution lies in promoting the employees by applying the principle of inter-se seniority. In inter-se seniority, preference is given either to the direct recruits or promotees or both of these categories are provided with equal opportunity of advancement. On conducting the survey, it is seen that in all the four sectors, majority of them were of the opinion that equal opportunity is given to both the promotees and direct recruits. In cases of 72% respondents from Government Departments, 75% respondents from Defence Sector, 88% respondents from employees from Higher Education Sector and Local Bodies viewed that both direct recruits and promotees received equal opportunity for promotion. The principle of quota has been applied in all the sectors for making inter-se seniority.(Fig. No. 6.20)



6.6. A Sum-Up

To testify the propositions laid down in the previous chapters in various sectors of the ‘State’, an empirical study has been conducted. The universe for the empirical study has been fixed to be employees serving the ‘State’. The universe is purposively segregated into four sectors which include the Government Departments, Defence Service Sector, Teachers employed by Universities, Colleges and Research Institutes under the Career Advancement Scheme and Employees in Local Bodies. The sample size in each sector is twenty-five and the method adopted for drawing the samples is stratified sampling and purposive sampling. A closed questionnaire had been prepared which was distributed among the respondents for collection of data. The survey has been carried on only upon those employees who hold substantial posts in the ‘services under the State’.

The Findings –

The result of the survey can be summarised as under –

- a. The only process by which a person in government service would be appointed to a higher post is by direct recruitment or by promotion. When it is shown that a person has been appointed to a higher post otherwise than by direct recruitment, then the appointment could be only by way of promotion. There is a right to be considered for promotion and such right cannot be denied to any employee serving the government.
- b. Promotion of any government employee can be made either by way of considering his/her merit, seniority, merit-cum-seniority or seniority-cum-merit.

Conceptually, seniority-cum-merit and merit-cum-seniority must be treated differently. In the former, greater emphasis is placed on seniority even though it is not the determinative factor, while in the latter merit is the determinative factor.

c. It is seen that sectors in the Higher Education and the Defence majorly apply the principle of merit-cum-seniority for promoting their employees. On the other hand, in the Government Departments and the Local Bodies the principle of seniority-cum-merit is prevalent for promoting their employees.

d. While the method of seniority-cum-merit is generally prescribed for promotions in the lower cadres, the method of promotion by merit-cum-seniority and selection is adopted in making promotions to the higher echelons of the services.

e. Before, effecting a promotion, the seniority of every employee has to be considered and be fixed accordingly. Unless, the seniority is fixed, it is impossible to consider the case of employees for promotion. This is because, whatever be the mode of consideration for promotion, be that by seniority-cum-merit or by selection, the promotion process cannot avoid the principle of seniority.

f. For calculating seniority of an employee, continuous lengths of service and officiation of the employees are taken into account. In both these situations, i.e., lengths of service and officiation, the computation is made from the date of appointment or from the date of confirmation. It has been seen that the calculation of seniority from the date of appointment is the generally accepted norm. Calculating seniority from the date of confirmation of the employment takes place in rare circumstances.

g. A cadre consists of employees from lower cadre by way of promotion as well as by way of direct recruitment. In such circumstances conflict arises when the question for further promotion crops up. The solution lies in making promotion by inter-se seniority. It is found that the relative seniority of direct recruits and of promotees is determined according to the rotation of vacancies between promotees which again is based upon the quota of vacancies reserved for direct recruitment and promotion. The survey so conducted revealed that except in Local bodies, all the other sectors determine the inter-se seniority by allotting quota fixed for the direct recruits and the promotees.

h. The rules of recruitment often fix specific quota for direct recruitment and promotion and this quota rule cannot be violated at the will and pleasure of the appointing authority. Vacancies are classified as 'direct recruitment' and 'promotional' vacancies and recruitment is made from the respective source.

i. There is no uniform rule for fixing the ratio for allotting vacancies for the direct recruits and promotees. It varies from service to service and department to department. Also the fixing of the ratio for the direct recruits and promotees will largely depend upon the requirement of the department or cadre in the service. In the survey conducted for the purpose of this research work, a range of ratio came forth in which the direct recruits and the promotees have been allotted. For 38% respondents, a ratio of 1:1, for direct recruits and promotees, was fixed for determining inter-se seniority, ratio of 1:2 for 13% respondents, 20% respondents were promoted considering a ratio of 1:3 and 15% of them were promoted in the ratio of 1:4.

It can, therefore, be safely deduced that the rule of seniority for promoting a person to a higher cadre in any 'service' under the 'state' cannot be avoided. Whether a promotion is made by way of merit or by selection or by merit-cum-seniority or by seniority-cum-merit, until and unless an employee has spent a certain period of time in the cadre, he will not be considered for promotion. The logic behind this is that there is a positive correlation between the length of service in the same job and the amount of knowledge and the level of skill acquired by an employee in an organisation. The other reason being that promotion is also based on the custom that the first in the employment should be given the first chance in all benefits and privileges.

However, to overlook merit absolutely in appointment and promotion in any 'State Service' will tend to infest the hierarchical structure of any 'Services' under the 'State' with nepotism and red-tapism. Hence, a combination of both seniority and merit can be considered as the basis for promotion satisfying both the 'State' mechanism for organisational effectiveness and the employees and their associations for respecting the length of service and experience. A balance between seniority and merit is required to be struck which can be done in the following ways:-

a. Merit-cum-seniority

In this kind of selection, firstly, a minimum period of service rendered by the employee is taken into consideration and then these employees are shortlisted. Thereafter, merit is taken as the sole criteria for selecting the employee from the eligible candidates.

b. Minimum Merit and Seniority:-

In contrast to the earlier method, the minimum requirement of merits taken into consideration and employees are selected for promotion based on their seniority only from those who are shortlisted as eligible.

CHAPTER 7

CONCLUSION AND SUGGESTIONS

“In the happiness of his subjects lies the happiness of the ruler; in their welfare, his welfare; whatever pleases him shall not consider as good but whatever pleases his subjects, the ruler shall consider as good.”

---Kautilya in Arthashastra

Administration, as a group effort to accomplish some specific objectives, is a generic process and is ubiquitous. Experts have been critical about the neo-liberal thought of modern state which overemphasises the ‘market’ and has failed to appreciate the critical role of public institutions in the maintenance and development of society. In their recent edition of ‘The New Public Service: Serving, Not Steering’⁵⁸⁵, Denhardt and Denhardt have succinctly put the central role of government as ‘service’. It has been emphasised by them that ‘government should not be run like a business; it should be run like a democracy’. Public interest and democratic citizenship are the hallmarks of the government. As the sense of service and community would be expanding, public employees would be having better self-estimation and sense of dignity and self-respect. They would be reconnected with the citizens. As the public servants would be inviting citizens to participate in the governance process, there will emerge a new culture of co-governance with the administrators and the citizens working together for the common good of the society. This new attitude and new involvement – co-governance - has led to expansion and multiplicity of function of the government.

In fulfilling this dream of forming a co-operative and welfare government, one cannot imagine an administration without a big band of service personnel. In India, the government is the biggest provider of jobs to the people which includes the civil services, the defence services and jobs in the public sector undertakings. According to an estimate, in India, civil services engages about 6.5 million employees at all levels within the Central and State Government. Being the biggest employer in the country, there is a tremendous pressure on it not only to ensure that it provides equal

⁵⁸⁵ Denhardt and Denhardt, *The New Public Service: Serving, Not Steering* (Routledge, New York, 4th ed., 2015)

opportunities to all sections of society but also the service delivery mechanism of the government remains efficient and effective in order to meet the demands of governing such a large and diverse population.

Thus, the government has been termed as being a ‘model employer’ and it is required to act fairly giving due regard and respect to the rules framed by it for the welfare of its employees. The Supreme Court in *Balram Gupta vs. Union of India*⁵⁸⁶, observed that, as a model employer the Government must conduct itself with high probity and candour with its employees. In *State of Haryana vs. Piara Singh*⁵⁸⁷, the Court had clearly stated that the main concern of the Court in matter of employment is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. Similarly, in *Secretary, State of Karnataka vs. Umadevi and Others*⁵⁸⁸, the Constitution Bench, while discussing the role of the State in recruitment procedure, stated that if rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules, for the State is meant to be a model employer. In *Mehar Chand Polytechnic & Anr. vs. Anu Lamba & Ors*⁵⁸⁹, the Court observed that public employment is a facet of right to equality envisaged under Article 16 of the Constitution of India and that the recruitment rules are framed with a view to give equal opportunity to all citizens of India entitled for being considered for recruitment in vacant posts.

At this junction, personnel administration plays a very important role. Personnel administration has been defined as ‘a code of the ways of organising and treating individuals at work so that they will each get the greatest possible realisation of their intrinsic abilities, thus attaining maximum efficiency for themselves and their group, and thereby giving to the enterprise of which they are a part, its determining competitive advantage and its optimum results’. It has been seen that institutions which have been successful in developing their pupil, have become successful organisations/institutions. The general experiment is that a successful manager is one who gets people to work with him, not because he has power over them but because he is the kind of leader for whom the subordinates want to do their best. Personnel administration or human resource management is a staff function whose basic purpose is to help the organisation

⁵⁸⁶ AIR 1987 SC 2354

⁵⁸⁷ AIR 1992 SC 2130

⁵⁸⁸ AIR 2006 SC 1806

⁵⁸⁹ AIR 2006 SC 3074

achieve its goals. Within the broad framework of strategy, policies and structure of the organisation the personnel function is discharged through a number of processes such as recruitment, selection, placement, training, promotion and career management, compensation and other related activities.

Career development is one of the basic considerations in the personnel policy of the government. In the words of Glenn Stahl, the term 'career' denotes "...the progression of an individual in a field of work throughout the employable years of his life. A career in business or in a profession is a commonly understood concept. Sometimes it means devotion to a speciality, sometimes it means a series of employment which are only loosely related to each other. In either case, it usually means some degree of success. The purpose of career development is to attract and retain men and women of talent and ambition in the government employment. In order to establish government career service and to attract the best talent in the service, it is essential to provide equal promotional opportunities and advancement. There should be suitable outlet for career development opportunities to continuously attract new talents and to create enthusiasm in the existing personnel. In order to enhance the morale and efficiency of the public personnel in his/her career, it is highly necessary that the security of tenure and better conditions of service by way of suitable pay scales, promotional opportunities and retirement benefits and a just and fair treatment to public personnel under the State be given. This is of utmost importance to secure honesty, contentment and discipline among the civil servants which form the very foundation for their discharging their duties as expected of them.

Therefore, Promotion, as a condition of service, plays a major role in bringing out the efficiency in public personnel and the expected result that the state wants from them. An employee joins a service in the hope of a satisfactory career of progression. An important factor contributing to the attractiveness of service is the prospect of promotion.

W.F. Willoughby in his book 'Principles of Public Administration', has pointed out the following as the essentials of a sound promotion system⁵⁹⁰:

⁵⁹⁰ W.F. Willoughby, *Principles of Public Administration* (Publications of Institute for Government Research, Washington 1927)

- a. Adoption of standard specifications setting forth the duties and qualifications required for all promotions in the government service.
- b. The classification of these promotions into distinct classes, salaries, grades and service.
- c. The inclusion within this classification of all higher administrative promotions except those having a practical character,
- d. The adoption, so far as possible, of the principle of recruitment from within for filling up of higher posts.
- e. The adoption of principles of merit and seniority in determining the promotion of employees.
- f. The provision of adequate means for determining the relative merits and seniority of employees eligible for promotion.

The constitutional code of equality and equal opportunity is a charter for equals, and hence equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall substantially within the same class.⁵⁹¹ In terms of article 16 of the Constitution, the employees similarly situated cannot be discriminated. Employees having the same qualifications, thus, must be considered equally for promotion.⁵⁹² It has been time and again repeated that there is no right to promotion; but only a right to be considered for promotion.

It is already seen that the right to a public employment is a constitutional right under Article 16 (1). All matters relating to employment include the right to continue in service till the employee reaches superannuation or his service is duly terminated in accordance with just, fair and reasonable procedure prescribed under the provisions of the Constitution or the rules made under proviso to Article 309 of the Constitution or the statutory provision or the rules, regulations or instructions having statutory favour made there under. But the relevant provisions must be conformable to the rights guaranteed in Part III and IV of the Constitution. Article 21 guarantees the right to life which guarantees the right to livelihood, to a many the assured tenure of service is the source, the deprivation thereof must be in accordance with the procedure prescribed by law conformable to the mandates of Articles 14 and 21 as be fair, just and reasonable but not fanciful, oppressive or at vagary. The need for the fairness, justness or reasonableness of

⁵⁹¹ *Vijay Lakshmi v. Punjab University*, AIR 2003 SC 3331

⁵⁹² *Union of India through Govt. of Pondicherry v. V. Ramakrishnan*, AIR 2005 SC 4295

the procedure was elaborately considered in Maneka Gandhi case and it hardly needs reiteration.⁵⁹³

Clause (4) in Article 16 empowers the State to make special provision for the reservation of appointments or posts in favour of any 'backward classes of citizens' which in the opinion of the State are not adequately represented in the services under the State. However, the clause is only an enabling provision and no right or duty can be read into it. But as held in *State of Kerala v. N. M. Thomas*,⁵⁹⁴ it is not an exception to the general principle in Article 16(1) but an emphatic statement of equality of opportunity guaranteed under clause (1) which means equality between members of the same class of employees and not equality between members of separate and independent classes. Thus, in the case of the Scheduled Caste and Scheduled Tribes who suffer from socio-economic backwardness, the fundamental right to equality of opportunity justifies separate categorisation for the purpose of "adequate representation in State services." The Courts have however, held that Article 16(4) has got to be read with Article 335 inasmuch as the latter states that while considering SC and ST claims maintenance of efficiency of administration must be kept in view.

In *T. Devadasan v. Union of India*⁵⁹⁵, the Supreme Court when called upon to pronounce on the constitutionality of the 'carry-forward' rule, held the rule ultra vires by a majority of four to one on the ground that the power vested in the State Government under Article 16(4) could not be so exercised as to deny reasonable equality of opportunity in matters of public employment to members of classes other than backward.

The Mandal Commission had in its report recommended 27 per cent reservation for backward classes in view of the limit of 50 per cent imposed by the Supreme Court. In its judgment in *Indra Sawhney v. Union of India*, the Supreme Court decided that there was no reservation in promotion and that the total reserved quota did not exceed 50 per cent except in extraordinary circumstances. To meet this situation, Article 16 (4A) was inserted vide the Seventy-seventh Amendment providing reservation in matters of promotion in services under the State for the Scheduled Castes and the Scheduled Tribes. By adding Clause (4B) to Article 16 it as however clarified that the unfilled reserved vacancies are to be treated as a separate class and are not to be included under

⁵⁹³ *Ashok Kr. Gupta vs. State of Uttar Pradesh*; (1997) 5SCC 201

⁵⁹⁴ AIR 1976 SC 490

⁵⁹⁵ AIR 1964 SC 179

the prescribed ceiling of fifty per cent reservation of vacancies of the year. In 2002, Clause (4B) was further amended vide the Eighty-fifth Constitution Amendment Act, 2002 to include the principle of 'consequential seniority' for the promotees. The Eighty Fifth Amendment came into operation with effect from 17 June, 1995.

Therefore, it can be precisely summed up that promotion based on an equality of opportunity and seniority attached to such promotion are the facets of the fundamental rights guaranteed under Article 16(1) and in matters relating to civil services, under Article 309 of the Constitution.

This also brings us to the two principles upon which the eligibility criteria for promotion can be fixed, vis., seniority and merit.

Seniority is one of the attributes of regular service. The value of the right of seniority is the right for consideration of one's case for promotion to a higher post. In such cases, seniority taken into account is the seniority in the grade immediately below the promotional post or in the grade which is described as the grade from which promotions are to be made. It proceeds upon the basis that the comparison for purpose of seniority is between equals or those that are in the same grade or equated grades. Therefore, seniority is a concept which involves a comparison between the length service in the same grade and not the overall length of service in different grades. Where the rules provide for the computation of the length of service from the date of appointment, it cannot be modified by executive instructions.⁵⁹⁶ In calculating the date of appointment, it is the date of substantive appointment that marks the date of entry into the service. Thus, a regular appointment at a later date cannot relate back to an earlier date of ad hoc appointment. Seniority has to be determined from the date of regular appointment under the rules and not from the date of ad hoc or stop gap appointment made earlier to a post earmarked for direct recruitment.

The inter se seniority of persons joining on the same date has also been a matter of dispute. Disputes relating to inter se can arise among direct recruits or direct recruits and promotees or direct recruits and ad hoc promotees or direct recruits and roster point promotees. The courts have held that inter se seniority of candidates would depend on rules governing the same. In the absence of rules, executive instruction could be issued

⁵⁹⁶ *K.Balasubramaniam (Ex-Capt.) vs. State of Tamil Nadu*, (1991) 2 SCC 708

to fill the gap. In the absence of executive instructions, the courts may have to evolve principles of fairness and justness, keeping in mind the prevailing practise to deal with the facts in a given case.⁵⁹⁷

The five-Judge Bench of the Court in *Direct Recruit Class II Engineering Officers' Association vs. State of Maharashtra*⁵⁹⁸ has clarified that once a person is appointed to a post according to rules, his seniority has to be counted from the date of his appointment and not according to the date of confirmation.

The expression 'date of appointment' is different from 'date of order'. Where appointment order makes it clear that the date of appointment is the date on which a person assumes charge, then the order of appointment is treated as the order of appointment and the date of appointment is the date from which the person assumes charge. However, where the appointment order states that the person is appointed with immediate effect, the date of appointment is made on the date the order is made and the appointment takes immediate effect and does not depend on whether the person assumes charge or not.⁵⁹⁹

Seniority is always calculated from among the persons holding similar posts with similar status. Mere length of service under the government is never the basis of seniority. The general principles applicable for seniority are as follows:

- i. The first condition for fixing seniority between the officials is that they must be holding the posts in the same cadre or grade. A casual labourer is in employment but is not holding a post until he is regularised. Appointment upon regularisation is a fresh appointment. Further, if rules do not indicate that past service will count towards seniority, then such past service would not be so considered.
- ii. Seniority is to be fixed as between persons who hold similar status i.e., officiating or substantive. Officiating normally means that a person has been appointed to discharge work in a post (usually a higher one) where he/she has not been substantially appointed. Normally a person officiates in a post when he performs the duties of a post in which another person holds the lien; however, in certain cases a person may be appointed to officiate in a vacant post on which no

⁵⁹⁷ *Bimlesh Tanwar vs. State of Haryana*, (2003) 4 SCC 65

⁵⁹⁸ AIR 1990 SC 1607

⁵⁹⁹ M.RamaJois, *Service under the State*, 531 (Indian Law Institute, New Delhi, 2007)

other government servant holds lien. Generally, when a person is appointed to a post, seniority is calculated from the date of appointment and not from the date of confirmation; this rule is not applicable where initial appointment is ad hoc in nature. This is because upon successful completion of probation and confirmation, there is no fresh appointment that takes place, and the appointment is completed upon being appointed on probation. However, where initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till regularisation of his service as per the rules, this officiating period will be counted. Thus, probationary period or the 'in-service period' or the period of officiation could also be calculating towards seniority.

- iii. Persons holding permanent or substantive appointment are always treated as seniors to persons holding appointments on temporary or officiating basis. The period of deputation would also count towards seniority provided that he performs his duty satisfactorily.
- iv. As among the persons who are confirmed or substantively appointed, the date of confirmation or substantive appointment is the basis for seniority.
- v. From among persons holding temporary or officiating appointments, the length of service in the cadre or grade is normally the basis for fixation of seniority. Where a non-cadre officer is officiating for more than six months in a Indian Forest Service cadre post without requisite approval of the central government, the court has held that the officiating appointment is of a fortuitous nature, and such officiating period cannot count towards his calculating his seniority in the service.
- vi. In the case of persons who are recruited through a competitive examination, the inter se seniority is determined on the basis of the rank assigned by the Public Service Commission conducting the examination.

The manner of fixation of seniority as between direct recruits and promotees has given rise to several disputes relating to seniority. The disputes have arisen, firstly, for the reason that direct recruits are not made regularly by the appointing authorities; secondly, the disputes relate to the fixation of quota between direct recruits and promotees and the recruitment made in disregard of the quota rule. Persons promoted even against the direct recruitment vacancies are continued for several years. Thereafter, when direct

recruitment is made, direct recruits naturally claim seniority in accordance with quota rules. The promotees regard this as humiliation. All this can be avoided by making direct recruitment promptly every year as and when vacancies arise. But this does not seem to be a preferred policy with the governments in India; a factor which contributes to the burgeoning service jurisprudence.

Basic Principles Relevant for Fixation of Seniority of Direct Recruits and Promotees

a. Obedience to quota rule:

The rules of recruitment often fix specific quota for direct recruitment and promotion. The quota cannot be violated at the will and pleasure of the appointing authority. Vacancies must be classified as 'direct recruitment' and 'promotional' vacancies and recruitment must be made from the respective source.

b. Clear Vacancies for Permanent and Temporary posts should be Classified:

Generally, in respect of each cadre, permanent as also temporary posts are sanctioned. Permanent posts are sanctioned without the limit of time. Temporary posts are sanctioned for a specified period and continued from time to time. The rules of recruitment which prescribe the qualification and the method for recruitment to any cadre are applicable to both permanent and temporary posts. This being the position, the quota prescribed as between the direct recruitment and promotion cannot be confined to permanent posts. It applies to temporary posts as well. However, the classification of vacancies must be of clear vacancies, and not fortuitous one like leave or deputation.

c. Fixation of quota when only permanent posts are included in the cadre strength:

When cadre is required to be filled up by direct recruitment and promotion and it consists only of permanent posts, in calculating the quota, only the permanent posts should be taken into consideration

The method of fixing seniority

The method of fixing seniority of direct recruits and promotees in compliance with the recruitment rules fixing the quota and the rules of seniority requiring the fixation of seniority from the date of appointment have been clearly laid down by the Supreme Court in Subraman which is as follows:

- i. The seniority of a civil servant in the cadre concerned will be counted from the date of initial appointment or officiation (on promotion) or probation (on direct recruitment) provided the initial appointment is within the quota;
- ii. The quota rule applies to vacancies in all posts, permanent or temporary included in the sanctioned strength of the cadre, except vacancies which are purely fortuitous or adventitious;
- iii. The validity of appointment from one source does not depend upon the making of appointment from the other source; direct recruits could be validly appointed against direct recruitment vacancies without waiting for promotion and vice versa and so long as the appointment is within quota, the appointee is entitled to calculate seniority from that date. This rule should be distinguished in cases where the rota system of appointment is applicable. Thus, where persons are appointed on a rota basis and are drawn from different registers, such as direct recruits and recruits from other sources, their seniority would count from their date of order of appointment and not from the date of individual appointment.
- iv. If the direct recruits are appointed against promotional vacancies, or promotees are appointed against direct recruitment vacancies, their appointment must be adjusted against clear vacancies becoming available thereafter at any time, and for purpose of seniority it is the date on which the appointment is adjusted against a vacancy available for that source which counts for seniority and not the date of appointment made in violation of the quota.
- v. Once the seniority of direct recruits and promotees when they are on officiation or probation are fixed according to the date of appointment, thereafter the source from which they are recruited is not relevant for purposes of confirmation which has to be made strictly according to seniority fixed in compliance with the quota rule and the date of appointment.
- vi. Finally, before fixing the seniority of the employees, the principles of natural justice require that opportunity should be given to them to make representations. But what would be a fair, just and rational principle will vary according to the facts and circumstances of the case and particularly the historical background of the integration.

The seniority rule of continuous officiation is interlinked with the promotional rule based on equal opportunity and the same cannot be delinked.⁶⁰⁰ It has been held that when promotional avenues are available, seniority becomes closely interlinked with promotion provided such a promotion is made after complying the principles of equal opportunity stated in Article 16(1). For example, if the promotion is by the rule of “seniority-cum-suitability” the eligible seniors at the basic level as per seniority fixed at that level and who are within the zone of consideration must be first for promotion and be promoted if found suitable.

Every organisation has a system of assessment of performance of its employees periodically for determining their output as well as for deciding on their promotion. A Performance Appraisal Report, in a government service, is a key performance indicator in which quantitative gradation of performance is assessed by awarding scores. It, thus, serves a short term purpose of assessing the usefulness of an employee to the organisation, and in the long run determines his potential for elevation to higher levels.

Personnel administration has acquired a lot of significance, especially during the past three decades in both the government and the private sectors. In examining the various public institutions, their structure and conditions of service, especially promotional aspect, it is revealed that each of the service is based on a ‘cadre’ system. The service conditions of the staff are regulated and governed by a number of rules, regulations, directives and instructions.

The most important aspect of all public institution is recruitment. Recruitment of the personnel can be done in two ways: direct recruitment and promotion. Under the direct recruitment system, the candidates are chosen by direct selection and are appointed to the posts. Under the system of recruitment by promotion, employees working in the lower positions are promoted to the higher level positions. In analysing the Rules, Regulations, Instructions and Government Orders of various public institutions in India, it is found that both of these methods of recruitment are in vogue. Hence, certain percentage of employees is appointed through direct recruitment and some through promotion. As already seen, in this chapter as well as in the previous chapters, promotion is an important ingredient of personnel administration and plays a vital role in efficiency of the employees.

⁶⁰⁰ *Jatinder Pal Singh v. State of Punjab*, AIR 2000 SC 609

On attainment of independence, the Government of India made changes in the structure of the civil service. It created the All India Services, the Central Services and the State Services. According to the new Constitution of India, which came into effect on 26 January, 1950, only two All India Services were recognised, i.e., the Indian Administrative Service and the Indian Police Service. In 1966, the Indian Foreign Service became a part of the All India Service. the IAS replaced the Indian Civil Service and the Indian Police was redesignated as the Indian Police Service in 1951. The All India Services Act was passed in 1951. According to this Act, the union government formulated new rules and regulations to govern the conditions of service of the All India Services. In order to deal with the subjects that are mentioned in the union list, the central services and the central secretariat services were created. The central services grouped under Classes A and B are filled through a combined examination conducted by the UPSC along with the All India Services. Each central service is governed by their own cadre, functions and service rules and regulations.

Generally, 50% of the junior time scale posts are filled by direct recruitment and the remaining are filled through promotions from the respective feeder services. For the posts above the junior time scale level, the method of promotion is used based on the recommendations of the Departmental Promotion Committees. The central civil service is generally divided into Group A, Group B, Group C and Group D. It is to be borne in mind that 33% of the posts to the All India Services are filled by promotion from the state services.

On analysing the rules and regulations governing the promotion system of the All India Services and the Central Civil Services, it is seen that promotion is made according to the principles of seniority, merit as well as seniority-cum-merit. Under the principle of seniority, the length of service is calculated in determining the seniority, in a particular post or scale or grade. The employer who has longer length of service gets the promotion earlier. This principle suits well in the highly hierarchical-based society in India. It is highly democratic as every person is bound to become senior one day or the other. Age and length of service are given preference. For computing the length of service, a 'year of allotment' is assigned in the All India Services. The four principles governing the assignment of 'year of allotment' are:

(i) The year of allotment of the junior-most among the officers recruited to the service by direct recruitment.

(ii) The year from which the claimant officer officiated continuously in a senior post from a date earlier than the date of commencement of like officiation by the junior-most direct recruit of the year.

(iii) The promotee shall be deemed to have been officiating continuously in a senior post even prior to his inclusion in the select list if the period of such officiation is approved by the central government in consultation with the UPSC.

(iv) The deemed continuous officiation in a senior post shall have its genesis on the date from which he continues to hold without any break or reversion a senior post, otherwise than as a purely temporary or local arrangement.⁶⁰¹

These conditions have to be satisfied for getting a year of allotment even though a person has been working for long in a post, which is equivalent to a cadre post. The service rendered in such a post cannot be taken as the basis for fixing year of allotment unless the post is declared as such, with the approval of the central government by the state government. Further the continuity of service is another important aspect. Once the continuity is disrupted, the claim breaks down. Service for long years becomes uncountable if there had been break however short it may be. The fact that the gap was bridged by counting the period of break, as period of joining duty for other purposes does not cover up the legal ingredient of continuity of service.

However, the question which arises here is: “Are all persons who are promoted by seniority, are fit for promotion?” Thus, the tussle between seniority and fitness arises. This tug-of-war between seniority versus merit has shown its fang again in the recent case of *Supreme Court Advocates-on-Record Assn. vs. Union of India*⁶⁰² famously known as the NJAC case. While applauding the postulate of ‘seniority’ in appointment of Supreme Court and High Court Judges under Section 5(2) of the NJAC Act, J.S. Khehar, J., has shown his concern that consideration of Judges on the basis of their seniority, by treating the same as a primary consideration, would adversely affect the present convention of ensuring representation from as many State High Courts as is

⁶⁰¹ *Anil Kumar vs. State of Assam*, AIR 1975 SC 1061

⁶⁰² (2016) 5 SCC 1

possible for appointment of Judges. However, seniority which has been supplemented and enmeshed with 'ability and merit' has been identified to be the most ideal approach that can be seen to have been adopted.

Conflicts between seniority and merit are common trends seen in all national public service systems. The concept of seniority is frequently viewed negatively in the American context because of perceived conflicts with three other principles of personnel action: merit, political direction and equal employment. Merit is generally defined as the attempt to make employee competence the major criteria affecting employee decisions. Advances obtained by seniority are believed to favour those with lower qualifications for the position over those hired or promoted through comprehensive testing or analysis of skills and accomplishments. Political direction refers to the link between the aims of political leaders and bureaucratic response. The conflict gets aggravated when employees are unionised and when collective bargaining and negotiation influence personnel decisions. Union members generally want seniority to influence policies related to promotion and layoff of employees. Merit principles would encourage promotion and layoffs based on performance or objective testing. Union often support application of the merit principle in the hiring of employees but seek to limit its application in promotion and layoffs. Concerns for seniority also conflict with the interests of political leaders. When the spoils system predominated hiring, pay, promotion was determined by the party in power. Thus, unless an employee was politically active and the party was victorious, job security was unlikely. The advent of civil service in U.S.A., of course, limited the extent to which those in power could control appointments. The aim was a bureaucracy guided by those with extensive knowledge and experience in the managing of government. However, the value of seniority in personnel practices was formally written into the 1964 Civil Rights Act through S. 703(h). This provision was placed in the act in response to supporters of seniority. The reference to intentional discrimination and the use of the term "bona fide" were added as a compromise between those who believed that the seniority provision would curtail the ability of excluded groups to challenge employment policy and those who advocated seniority. The presence of S. 703(h) within the legislation designed to enhance the employment rights of excluded group has led to a series of challenges often

reaching the Supreme Court.⁶⁰³ Thus, seniority remains a guiding principle of American personnel policy. Its strict application conflicts with concerns of merit, political direction and equal employment. It stands for stability and continuity against those who want to change employment policy to reflect political and social change.

A well-defined principle adopted by the Indian Administration in solving the above problem is the principle of 'seniority-cum-merit'. It is seen in almost all services that greater reliance is being kept upon the dual principle of seniority-cum-merit. It is seen, that in this process, the minimum length or the years of service (seniority) is fixed and then the fittest and meritorious person, who has completed the minimum length of years of services, is selected for promotion.

In India, on evaluation of various public institutions, their performance and rules and regulations governing the employees, it is seen that the general pattern of promotion is based on certain fixed lines. First, promotions to the highest posts are made on the basis of merit principle only; secondly, promotions to the higher and higher-middle level posts are made on the basis of seniority-cum-merit; and finally, promotions to lower posts are made on the basis of seniority.

However, there are two problems to be solved in hybrid appointments:

- Attracting the best, given that merit is not a sufficient criterion for appointment and so the best might be deterred by the threat of apparently arbitrary political dismissal
- Balancing two conflicting sets of recruitment criteria

The most common solution is a 'pool system' which places the candidates in a pool upon satisfying the merit criteria. Those in the pool are then considered for political selection or appointment according to seniority. In France, pool management is undertaken by providing a job guaranteed in the career civil service to all discretionary appointees, so that their dismissal will be effectively cushioned.

To testify the propositions laid down in the previous chapters in various sectors of the 'State', an empirical study has been conducted. The universe for the empirical study has been fixed to be employees serving the 'State'. The universe is purposively segregated

⁶⁰³ N.M. Riccucci, *Women, Minorities and Unions in the Public Sector* (Greenwood Press, New York, 1990)

into four sectors which include the Government Departments, Defence Service Sector, Teachers employed by Universities, Colleges and Research Institutes under the Career Advancement Scheme and Employees in Local Bodies. The sample size in each sector is twenty-five and the method adopted for drawing the samples is stratified sampling and purposive sampling. A closed questionnaire had been prepared which was distributed among the respondents for collection of data. The survey has been carried on only upon those employees who hold substantial posts in the 'services under the State'.

The Findings –

The result of the survey can be summarised as under –

- a. The only process by which a person in government service would be appointed to a higher post is by direct recruitment or by promotion. When it is shown that a person has been appointed to a higher post otherwise than by direct recruitment, then the appointment could be only by way of promotion. There is a right to be considered for promotion and such right cannot be denied to any employee serving the government.
- b. Promotion of any government employee can be made either by way of considering his/her merit, seniority, merit-cum-seniority or seniority-cum-merit. Conceptually, seniority-cum-merit and merit-cum-seniority must be treated differently. In the former, greater emphasis is placed on seniority even though it is not the determinative factor, while in the latter merit is the determinative factor.
- c. It is seen that sectors in the Higher Education and the Defence majorly apply the principle of merit-cum-seniority for promoting their employees. On the other hand, in the Government Departments and the Local Bodies the principle of seniority-cum-merit is prevalent for promoting their employees.
- d. While the method of seniority-cum-merit is generally prescribed for promotions in the lower cadres, the method of promotion by merit-cum-seniority and selection is adopted in making promotions to the higher echelons of the services.
- e. Before, effecting a promotion, the seniority of every employee has to be considered and be fixed accordingly. Unless, the seniority is fixed, it is impossible to consider the case of employees for promotion. This is because, whatever be the mode of consideration for promotion, be that by seniority-cum-merit or by selection, the promotion process cannot avoid the principle of seniority.

- f. For calculating seniority of an employee, continuous lengths of service and officiation of the employees are taken into account. In both these situations, i.e., lengths of service and officiation, the computation is made from the date of appointment or from the date of confirmation. It has been seen that the calculation of seniority from the date of appointment is the generally accepted norm. Calculating seniority from the date of confirmation of the employment takes place in rare circumstances.
- g. A cadre consists of employees from lower cadre by way of promotion as well as by way of direct recruitment. In such circumstances conflict arises when the question for further promotion crops up. The solution lies in making promotion by inter-se seniority. It is found that the relative seniority of direct recruits and of promotees is determined according to the rotation of vacancies between promotees which again is based upon the quota of vacancies reserved for direct recruitment and promotion. The survey so conducted revealed that except in Local bodies, all the other sectors determine the inter-se seniority by allotting quota fixed for the direct recruits and the promotees.
- h. The rules of recruitment often fix specific quota for direct recruitment and promotion and this quota rule cannot be violated at the will and pleasure of the appointing authority. Vacancies are classified as 'direct recruitment' and 'promotional' vacancies and recruitment is made from the respective source.
- i. There is no uniform rule for fixing the ratio for allotting vacancies for the direct recruits and promotees. It varies from service to service and department to department. Also the fixing of the ratio for the direct recruits and promotees will largely depend upon the requirement of the department or cadre in the service. In the survey conducted for the purpose of this research work, a range of ratio came forth in which the direct recruits and the promotees have been allotted.

It can, therefore, be safely deduced that the rule of seniority for promoting a person to a higher cadre in any 'service' under the 'state' cannot be avoided. Whether a promotion is made by way of merit or by selection or by merit-cum-seniority or by seniority-cum-merit, until and unless an employee has spent a certain period of time in the cadre, he will not be considered for promotion. The logic behind this is that there is a positive correlation between the length of service in the same job and the amount of knowledge and the level of skill acquired by an employee in an organisation. The other reason being

that promotion is also based on the custom that the first in the employment should be given the first chance in all benefits and privileges.

However, to overlook merit absolutely in appointment and promotion in any 'State Service' will tend to infest the hierarchical structure of any 'Services' under the 'State' with nepotism and red-tapism. Hence, a combination of both seniority and merit can be considered as the basis for promotion satisfying both the 'State' mechanism for organisational effectiveness and the employees and their associations for respecting the length of service and experience. A balance between seniority and merit is required to be struck which can be done in the following ways:-

- *Merit-cum-seniority*

In this kind of selection, firstly, a minimum period of service rendered by the employee is taken into consideration and then these employees are shortlisted. Thereafter, merit is taken as the sole criteria for selecting the employee from the eligible candidates.

- *Minimum Merit and Seniority*

In contrast to the earlier method, the minimum requirement of merit is taken into consideration and employees are selected for promotion based on their seniority only from those who are shortlisted as eligible.

Far reaching changes in the global economy have made it imperative for the governments all over the world to improve the quality of their governance structures. The Government of India has developed monitoring and evaluation systems for its development programs, supported by a well-planned institutional framework. It also has a performance appraisal mechanism for its employees. However, it is time to move from measurement of input usage for programs and appraisal of process compliance to assessment of outcomes and impacts through a well designed system of performance management. It is somewhat strange that in a country like India, which for centuries has been managed by large bureaucracies, there is till date no extant competency framework for the recruitment, training and promotion of government servants which is explicit to the employers or employees. When it comes to promotions, the departmental promotion committees base their recommendations on the grades earned by officers in their Annual Confidential Reports/Performance appraisal reports over the past 5-10 years. If one

were to study the formats of the Annual Confidential Reports, there is certainly a mention of the attributes considered important for a government servant, but nothing about the specific competencies necessary for the job for which the performance is assessed.

With the increasing importance of the principle of seniority-cum-merit in recruitment and promotion, performance management in its broader perspective has to be understood. It involves understanding and acting on the performance issues at each level of organisation, from individuals, teams and departments to the organisation itself. These issues include leadership, decision making, motivation, encouraging innovation and risk taking among others.

One thing is clear that competencies with respect to different assignments need to be identified and codified. If we are to proceed in a systematic manner, this must begin with documentation of the job descriptions and responsibilities of different sets of employees. To do a particular job/task effectively, certain competencies are required. These need to be mapped against the job/tasks that employees are expected to do.

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Annexure - I

THE DETERMINATION OF SENIORITY FOR THE PURPOSE OF PROMOTION IN SERVICES UNDER THE STATE: AN ANALYTICAL STUDY

QUESTIONNAIRE

PART A

GENERAL INFORMATION

1. Name-
2. Father's Name/Husband's Name
3. Date of Birth
4. Address for Communication
5. Mobile No.
6. Category- (i) General-..... (ii) S.C./S.T..... (iii) OBC
7. Religion
8. Nationality
9. Educational Qualification

PART B

1. Occupation -
2. Organisation/Institution -
3. Date of Recruitment in the Organisation/Institution
4. Post/Designation presently Held
5. Post/Designation held at Initial Recruitment/Appointment
6. Whether the post held is of substantial in nature? YES.../NO.....
7. Whether post held is adhoc or temporary or officiating in nature? YES..../NO.....
8. Whether Considered for Promotion or Promoted to a Higher Rank – YES...../NO.....
9. If No. 6/7 is 'YES', then whether considered for promotion at due time – YES..../NO.....
10. Whether promotion was made according to Seniority? YES...../NO.....
11. Whether Promotion was made according to Merit? YES...../NO.....
12. Whether Promotion was made according to Seniority-cum-Merit? YES...../NO.....
13. Whether Promotion was made according to Merit-cum-Seniority? YES...../NO.....
14. Whether you were promoted/considered for promotion more than once? YES...../NO.....
15. If No. 12 is 'YES', then:
 - (a) Whether First Promotion Calculated According to Merit? YES...../NO.....
 - (b) Whether First Promotion Calculated according to Seniority? YES...../NO.....
 - (c) Whether First Promotion was calculated according to Seniority-cum-merit? YES..../NO.....

(d) Whether First Promotion was calculated according to Merit-cum-seniority?

YES...../NO.....

(e) Whether Most Recent Promotion Calculated According to Merit?

YES...../NO.....

(f) Whether Most Recent Promotion Calculated According to Seniority?

YES...../NO.....

(g) Whether Most Recent Promotion Calculated According to Seniority-cum-merit? YES...../NO.....

(h) Whether Most Recent Promotion Calculated According to Merit-cum-seniority? YES..../NO.....

16. Whether holding the current position/designation by Direct Recruitment?

YES..../NO.....

17. Whether holding the current position/designation by Promotion? YES..../NO.....

18. When is the next promotion due?

19. If Promoted by Seniority, whether Seniority Calculated by continuous length of Service? YES...../NO.....

20. If Promoted by Seniority, whether Seniority Calculated by continuous length of officiation in Service? YES...../NO.....

21. If promoted by seniority, whether seniority is determined from the day of appointment? YES..../NO.....

22. If promoted by seniority, whether seniority is determined from the date of confirmation? YES..../NO.....

23. If Promoted by Merit, whether determination of merit done by interview? YES...../NO.....

24. If Promoted by Merit, whether determination of merit done by written examination? YES...../NO.....

25. If Seniority-cum-merit/Merit-cum-Seniority Applicable, Mode of Determination of the Same

26. In Case of Inter-Se Seniority, Preference was given to – (i) Direct Recruits

(ii) Promotees

(iii) Both

27. Whether Principle of Quota/Rota Applicable? YES...../NO.....

28. In Inter-se Seniority, Quota Fixed for the Direct Recruits:Promotees in the ratio of –

29. Your opinion about the Promotion System in Your Department -

.....
.....
.....
.....
.....

Signature of the Respondent

.....

ANNEXURE - II

THE ALL-INDIA SERVICE ACT, 1951 ACT NO. 61 OF 1951

29th October, 1951.

An act to regulate the recruitment, and the conditions of service of persons appointed, to All-India Service common to the Union and the States.

Be it enacted by parliament as follows :-

1. **Short title-** This act may be called the All-India Services Act, 1951.
2. **Definition** – In this Act, the expression “an All-India Service” means the service known as the Indian Administrative Service or the service known as the Indian Police Service, ¹ [or any other service specified in section 2A].
² [2A. **Other All-India Services.**] – with effect from such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf, there shall be constituted the following All-India Services and different dates may be appointed for different services namely :-
 1. The Indian Service of Engineers (Irrigation, power, Building and Roads);
 2. The Indian Forest Service;
 3. The Indian Medical and Health Service.]
3. **Regulation of recruitment and conditions of service** – (1) The Central Government may, after consultation with the Governments of the State concerned, ³ [including the State of Jammu and Kashmir ⁴ [and by notification in the official Gazette]] make rules for the regulation of recruitment, and the conditions of service of persons appointed to an All-India Service.

[(1A) The power to make rules conferred by this section shall include the power to give retrospective effect from a date not earlier than the date of commencement of this Act, to the rules or any of them but no retrospective effect shall be given to any rule so as to prejudicially affect the interests of any person to whom such rule may be applicable.]

[(2) Every rule made by the Central Government under this section and every regulation made under or in pursuance of any such rule, shall be laid, as soon as may be after such rule or regulation is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive aforesaid, both Houses agree in making any modification in such rule or regulation or both Houses agree that such rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the

case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.]

4. Continuance of existing rules – All rules in force immediately before the commencement of this Act and applicable to an All-India Service shall continue to be in force and shall be deemed to be rules made under this Act.

Annexure - III

THE INDIAN ADMINISTRATIVE SERVICE (REGULATION OF SENIORITY) RULES, 1987

1.1 Short title and commencement:-

1(1) These rules may be called the Indian Administrative Service (Regulation of Seniority) Rules, 1987.

1(2) They shall come into force on the date of their publication in the official gazette.

2. Definitions.- In these rules, unless the context otherwise requires,-

2(a) 'Cadre' means the Indian Administrative Service Cadre constituted in accordance with rule 3 of the Cadre Rules;

2(b) 'Cadre Rules' means the Indian Administrative Service (Cadre) Rules, 1954;

2(c) 'Cadre Schedule' means the Schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955;

2(d) 'Commission' means the Union Public Service Commission;

2(e) 'competitive examination' means the examination referred to in rule 7 of the Recruitment Rules;

2(f) 'direct recruit officer' means an officer appointed to the service through a competitive examination in accordance with rule 7 of the Recruitment Rules;

2(g) 'gradation list' means the gradation list prepared under rule 5 of these rules;

2(h) 'officer' means a member of the Service;

2(i) 'officer appointed by selection' means an officer appointed to the service in accordance with the provisions of the Indian Administrative Service (Appointment by Selection) Regulations, 1956;

2(j) 'promotee officer' means an officer appointed to the Service in accordance with the provisions of the Indian Administrative Service (Appointment by Promotion) Regulations, 1955;

2(k) 'Recruitment Rules' means the Indian Administrative Service (Recruitment) Rules, 1954;

2(l) 'Select List' means the Select List prepared in accordance with the Indian Administrative Service (Appointment by Promotion) Regulations, 1955;

2(m) 'senior post' means a post included and specified under item I of the Cadre of each State in the Cadre Schedule, and when held on the senior scale of pay of the Services by a direct recruit officer, means a post specified under items 1, 2 and 5 of the said Schedule and also a post temporarily added to the Cadre under the second proviso to sub-rule (2) of

rule 4 of the Cadre Rules;

2(n) 'Service' means the Indian Administrative Service;

2(o) 'State Cadre' and 'Joint Cadre' have the meanings respectively assigned to them in the Cadre rules;

2(p) 'State Deputation Reserve' means a deputation reserve specified in item 5 of each State in the Cadre Schedule;

2(q) 'State Government concerned', in relation to a Joint cadre, means the Joint Cadre Authority.

(3) Assignment of year of allotment:-

3(1) Every officer shall be assigned a year of allotment in accordance with the provisions hereinafter contained in these rules.

3(2) The year of allotment of an officer in service at the commencement of these rules shall be the same as has been assigned to him or may be assigned to him by the Central Government in accordance with the orders and instructions in force immediately before the commencement of these rules.

3(3) The year of allotment of an officer appointed to the Service after the commencement of these rules shall be as follows:-

3(3)(i) the year of allotment of a direct recruit officer shall be the year following the year in which the competitive examination was held;

Provided that if a direct recruit officer is permitted to join probationary training under rule 5(1) of the IAS (Probation) Rules, 1954, with direct recruit officers of a subsequent year of allotment, then he shall be assigned that subsequent year as the year of allotment.

3(ii) The year of allotment of a promotee officer shall be determined with reference to the year in which the meeting of the Committee to make selection, to prepare the select list on the basis of which he was appointed to the Service, was held and with regard to the continuous service rendered by him in the State Civil Service not below the rank of a Deputy Collector or equivalent, up to the 31st day of December of the year immediately before the year in which meeting of the Committee to make selection was held to prepare the select list on the basis of which he was appointed to the Service, in the following manner:-

- a. for the service rendered by him upto twenty one years, he shall be given a weightage of one year for every completed three years of service, subject to a minimum of four years;
- b. he shall also be given a weightage of one year for every completed two years of service beyond the period of twenty one years, referred to in sub-clause (a), subject to a maximum of three years.

Explanation: For the purpose of calculation of the weightage under this clause, the fractions, if any, are to be ignored:

Provided that he shall not be assigned a year of allotment earlier than the year of allotment assigned to an officer senior to him in that select list or appointed to the service on the basis of an earlier select list:

(iii) the year of allotment of an officer appointed by selection shall be determined with reference to the year in which the meeting of the Committee to make the selection to prepare the select list, on the basis of which he was appointed to the service, was held and with regard to the continuous service rendered by him in a post equivalent to the post of Deputy Collector or a higher post, upto the 31st December of the year immediately before the year in which the meeting of the Committee to make the selection was held to prepare the select list on the basis of which he was appointed to the service, in the following manner:-

- a. for the service rendered by him upto twenty one years, he shall be given a weightage of one year for every completed three years of service, subject to a minimum of four years;
- b. he shall also be given a weightage of one year for every completed two years of service beyond the period of twenty one years, referred to in sub-clause (a), subject to a maximum of three years.

Explanation: For the purpose of calculation of the weightage under this clause, the fractions if any, shall be ignored:

Provided that he shall not be assigned a year of allotment earlier than the year of allotment assigned to an officer senior to him in that select list or appointed to the Service on the basis of an earlier select list:

Provided further that he shall not be allotted a year earlier than the year of allotment assigned to an officer already appointed to the service in accordance with sub-rule (1) of rule 8 of the recruitment rules, whose length of Class I continuous service in the State Civil Service is equal to or more than the length of Class I continuous service of the former in connection with the affairs of the State.

Explanation: The length of the relevant Class I continuous service in either case shall be with reference to the 31st day of December of the year immediately before the year in which the meeting of the Committee to make selection was held to prepare the select list on the basis of which appointments were made in the respective cases.

4. Inter-se seniority of the officers who are assigned the same year of allotment:- The inter-se seniority of the officers appointed to the Service shall be in the following order and in each category the inter-se seniority shall be determined in the following manner:-

- i. direct recruit officers shall be ranked inter-se in the order of merit as determined in accordance with rule 10 of the Indian Administrative Service (Probation) Rules, 1954;
- ii. Promotee officers shall be ranked inter-se in the order of their dates of appointment to the Service.
Provided that if the date of appointment of more than one officer is the same, their inter-se seniority shall be in the order in which their names are arranged in the Select List on the date of appointment to the Service;
- iii. officers appointed by selection shall be ranked inter-se in the order in which

their names are arranged by the Commission for the purpose of appointment to their Service by selection.

5. Gradation List:- There shall be prepared every year for each State Cadre and Joint Cadre a gradation list consisting of the names of all officers borne on that cadre arranged in order of seniority.

6. Fixation of seniority of officers transferred to another cadre:- 6(1) If a direct recruit officer is transferred from one cadre to another in public interest, his year of allotment shall remain unchanged and his inter-se position among the direct recruits having the same year of allotment in the cadre to which he is transferred shall remain the same as determined in accordance with rule 10 of the Indian Administrative Service (Probation) Rule, 1954.

6.(2) If a promotee officer or officer appointed by selection is transferred from one cadre to another in public interest, his year of allotment shall remain unchanged and he shall be ranked inter-se with promotee officers or officers appointed by selection, as the case may be having the same year of allotment in the cadre to which he is transferred with reference to the date on the basis of which he was assigned the year of allotment under these rules.

6.(3) If an officer is transferred from one cadre to another at his request he shall be assigned a position in the gradation list of the cadre to which he is transferred below all the officers of his category borne on that cadre who have the same year of allotment:

Provided that in the case of a direct recruit officer transferred from one cadre to another at his request, his seniority in the list prepared under rule 10 of the Indian Administrative Service (Probation) Rules, 1954 shall remain unaffected for the purposes of the said list.

Seniority of officers appointed under sub-rule (3) of rule 4 of the Indian Administrative Service (Recruitment) Rules, 1954.-

Notwithstanding anything contained in any of the provisions of these rules, the seniority of officers appointed to the service in accordance with the provisions sub-rule (3) of rule 4 of the Indian Administrative Service (Recruitment) Rules, 1954 shall be determined in accordance with such principles as the Central Government may, after consultation with the State Governments and the Commission, from time to time, determine.

7. Interpretation:- If any question arises as to the interpretation of these rules, it shall be referred to the Central Government for decision.

8. Repeal and Saving:-

9(1) The Indian Administrative Service (Regulation of Seniority) Rules, 1954 and all other rules corresponding to the said rules in force immediately before the commencement of these rules are hereby repealed.

9(2) The seniority of the officers appointed to the Service prior to the coming into force of these rules shall be determined in accordance with the Indian Administrative Service (Regulation of Seniority) Rules, 1954 in force on the date of their appointment to the service;

Provided that any order made or action taken under the rules so repealed shall be deemed to have been made or taken under the corresponding provisions of these rules.

Annexure - IV

Government of West Bengal
Finance Department
Audit Branch

No. 1882-F.

Calcutta, the 11th March, 1981.

NOTIFICATION

In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor is pleased to make the following rules :--

Rules

1. **Short title and commencement** - (1) these rules may be called the West Bengal Services (Determination of Seniority) rules, 1981.

(2) They shall come into force on the 11th March, 1981.
2. **Application** – These rules shall apply to all Government servant except –
 - (1) Members of the All India Services ;
 - (2) Members of the West Bengal Higher Judicial Service ;
 - (3) Members of the West Bengal Civil Service (Judicial) ;
 - (4) Members of the West Bengal Civil Service ;
 - (5) Members of the West Bengal Police Service ;
3. **Determination of Seniority of direct recruits** – The relative seniority of all persons appointed directly through competitive examination or interview or training or otherwise shall be determined by the order of merit in which they are selected for such appointment on the recommendation of the Commission or selecting authority, persons appointed on the result of an earlier selection being senior to those appointed on the result of a subsequent selection.

Provided that where appointment of persons initially made otherwise than in accordance with the relevant recruitment rules is subsequently regularized in consultation with the Commission, where necessary, seniority of such persona shall be determined from the date of regularization and not from the date of appointment. The inter-se-seniority amongst such persons shall, however, depend on the date of appointment of each such person in the department or office concerned.

Provided further that if any person selected for appointment to any post does not join within two months of the offer of appointment, his seniority shall count from the date on which he joins the post unless the appointing authority for reasons to be recorded in writing condones the delay. Note – (1) A list of candidates for the purpose of selection for appointment shall be prepared in all cases by the selecting authority, when there will be recruitment in a single process of selection of more than one person.

(2) Where the inter-se-seniority amongst several persons has not been determined prior to the coming into force of these rules, such seniority shall, on the coming into force of these rules, be determined on the basis of actual date of their joining. When the date of joining of all such persons is the same, seniority shall be determined on the basis of date of birth, person retiring earlier being adjudged as senior. When the date of birth is the same, seniority shall be determined on the basis of total marks obtained by each in the examination, passing of which is the qualification prescribed for recruitment to the particular post, cadre or grade.

(3) In so far as the determination of relative seniority of persons selected either by the Commission or by other selecting authority for appointment to different posts in the same grade with different qualifications such as posts of assistant Professors in History, Economics, Physics, Chemistry, etc. is concerned, seniority shall be determined from the date of joining.

4. Determination of seniority of promotes –

- (1) Seniority of persons appointed on promotion to any post, cadre or grade shall be determined from the date of joining such post, cadre or grade.
- (2) When there will be appointment in a single process of selection of more than one person, the relative seniority of person so appointed shall be determined by the order in which they are selected for such promotion.
- (3) Persons appointed on the result of an earlier selection shall be senior to those appointed on results of a subsequent selection.
- (4) Where promotions to a post, cadre or grade are made from one post. Cadre or grade, the relative seniority of the promotes, from different posts, cadre or grades shall be according to the order of merit determined by the Commission or the selecting authority, if such posts, cadres or grades do not come within the purview of the Commission.

Note 1. A list of candidates for the purpose of selection for promotion shall be prepared in all cases by the selecting authority when appointments are made on promotion in a single process of selection of more than one person.

Note 2. Where the inter-se-seniority amongst several persons has not been determined prior to the coming into force of these rules, such seniority shall, on the coming into force of these rules, be determined on the basis of date of joining. When the date of joining of such persons is the same, seniority in the promotion post, cadre or grade shall follow the seniority in the lower feeder post, cadre or grade.

5. Relative seniority of direct recruits and promotees –

- (1) The relative seniority between a promotee and a direct recruit shall be determined by the year of appointment or promotion of each in the post, cadre or grade irrespective of the date of joining.
- (2) The promotees shall be en-bloc senior to the direct recruits of the same year.

6. Determination of seniority of transferees –

- (1) The relative seniority of persons appointed by transfer to a post, cadre or grade from the feeder post, cadre or grade of the same department or office or from other departments or offices of the Government shall be determined by the order of selection for such transfer.
- (2) When such transfers involve two or more persons selected from different departments or offices on the same occasion, the appointing authority for such appointment on transfer shall indicate the order of merit of the selected persons in each case.
- (3) The relative seniority between a promotee, a transferee and a direct recruit shall be determined by the year of promotion or transfer or recruitment, promotees being en-bloc senior to the direct recruits of the same year.

7. **Service benefits** - with effect from the date of coming in to force of these rules, for the purpose of service benefits available on the basis of seniority, such seniority shall mean the seniority determined under these rules.

Annexure - V

DoP&T Rules for Seniority for Promotion Central Civil Services

I

Order effective from 4th November, 1992

[Government of India, Department of Personnel and Training, Office Memorandum No. 20011/5/90-Estt. (D), dated the 4th November, 1992]

Seniority to be determined by the order of merit indicated at the time of initial appointment.— The seniority of Government servants is determined in accordance with the general principles of seniority contained in M.H.A, O.M. No. 9/11/55-RPS, dated the 22nd December, 1959 (See Section II). One of the basic principles enunciated in the said OM is that, seniority follows confirmation and consequently permanent officers in each grade shall rank senior to those who are officiating in that grade.

2. This principle has been coming under judicial scrutiny in a number of cases

3. in the past; the last important judgment being the one delivered by the Supreme Court on 2-5-1990, in the case of Class II Direct Recruits Engineering Officers' Association v. State of Maharashtra. In Para. 47 (A) of the said judgment, the Supreme Court has held that once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

4. The general principle of seniority mentioned above has been examined in the light of the judicial pronouncement referred to above and it has been decided that seniority may be delinked from confirmation as per the directive of the Supreme Court in Para. 47 (A) of its judgment, dated 2-5-1990. Accordingly, in modification of the General Principle 3, proviso to General Principle 4 and proviso to General Principle 5 (/) contained in O.M. No. 9/11/55-RPS, dated the 22nd December, 1959 and Para. 2.3 of O.M, dated the 3rd July, 1986, it has been decided that seniority of a person regularly

appointed to a post according to rule would be determined by the order of merit indicated at the time of initial appointment and not according to the date of confirmation.

5. These orders shall take effect from the date of issue of this Office Memorandum. Seniority already determined according to the existing principles on the date of issue of these orders will not be reopened even if in some cases seniority has already been challenged or is in dispute and it will continue to be determined on the basis of the principles already existing prior to the date of issue of these orders.

(ii) If the aforesaid date is same than date of completion of the qualifying service in the feeder-to-feeder grade.

(iii) Inter se seniority of the officers from each feeder grade will be maintained.

2.3 Seniority of SC/ST Government servants on their promotion by virtue of rule of reservation roster

SC/ST Government servants on their promotion by virtue of rule of reservation roster will be entitled to consequential seniority also. In other words, the candidates belonging to general/OBC category promoted through a later DPC will be placed junior to the SC/ST Government servants promoted through earlier DPC, even though by virtue of the rule of reservation.

Clarification on reservation roster vis-à-vis seniority:

In case of promotion, vacancies meant and reserved for SC/ST are determined through the roster points in the reservation roster. It is clarified that the said reservation roster / points are meant only for identifying the vacancy that goes to a particular category of officer and in no way acts as a determinant for fixation of seniority of the officer in a panel recommended by the DPC. According to O.M., dated 8-2-2002, the DPC is to grade an officer as 'fit' or 'unfit', and the feeder grade seniority of the officers assessed as fit would be maintained in the promoted grade.

Relative seniority of Direct Recruits and Promotees

2.4 The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between available direct recruits and promotees which shall be

based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules.

particular year, rotation of quotas for the purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees. In other words, to the extent direct recruits are not available, the promotees will be bunched together at the bottom of the seniority list below the last position up to which it is possible to determine seniority, on the basis of rotation of quotas with reference to the actual number of direct recruits who become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year (and to subsequent years, where necessary) for taking action for direct recruitment for the total number of vacancies for direct recruits and promotees as determined according to the quota for that year. The additional, direct recruits selected against the carried forward vacancies of the previous year would be placed en bloc below the last promotee (or direct recruit as the case may be), in the seniority list based on the rotation of vacancies for that year. The principle holds good for determining seniority in the event of carry forward, if any, of direct recruitment or promotion quota vacancies (as the case may be) in the subsequent year.

Illustration.— Where the Recruitment Rules provide 50% of the vacancies of a grade to be filled by promotion and the remaining 50% by direct recruitment, and assuming there are ten vacancies in the grade arising in each of the years 1986 and 1987 and that two vacancies intended for direct recruitment remain unfilled during 1986 and they could be filled during 1987, the seniority position of the promotees and direct recruits of these two years will be as under—

19861987

1.PI9.PI

- | | |
|-------------|--------|
| 2.D1 | 10. D1 |
| 3.P2 | 11. P2 |
| 4.D2 | 12. D2 |
| 5.P3 | 13. P3 |
| 6.D3 | 14. D3 |
| 7.P4 | 15. P4 |
| 8.P5 | 16. D4 |
| | 17. P5 |

18. D5

19. D6

20. D7

Inter se seniority of direct recruits and promotees— instructions thereof.— The undersigned is directed to refer to the subject mentioned above and to say that the fundamental principles of inter se seniority of direct recruits and promotees in Central Civil Services / posts were laid down in the Department of Personnel and Training (DoP&T) O.M. No. 9/11/55-RPS, dated 29-12-1959 which provided, inter alia, that the relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees, which shall be based on the quotas of vacancies reserved for direct recruitment and promotion respectively, in the Recruitment Rules.

2. The carrying forward of unfilled slots of a vacancy year, for being filled up by direct recruits of later years, was dispensed with through modified instructions contained in DoP&T, O.M. No. 35014/2/80-Estt. (D), dated 7-2-1986 which provides that rotation of quotas for purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees. The unfilled direct recruitment / promotion quota vacancies would be carried forward and added to the corresponding direct recruitment / promotion quota vacancies of the next year (and to subsequent years, where necessary) for taking action for the total number of direct recruitment / promotion according to the usual practice. Thereafter, in that year, while seniority will be determined between direct recruits and promotees, to the extent of the number of vacancies for direct recruits and promotees, as determined according to the quota for that year, the additional direct recruits / promotees selected against the carried forward vacancies of the previous year, would be placed en bloc below the last promotee / direct recruit, as the case may be, in the seniority list, based on the rotation of vacancies for that year.

3. All the existing instructions on seniority were consolidated by DoP&T through a single O.M. No. 22011/7/86-Estt (D), dated 3-7-1986.

4. In view of divergent stance taken by different Ministries / Departments on interpretation of 'available direct recruits and promotees' in the context of OM, dated 7-2-1986, the DoP&T had issued O.M. No. 20011/1/2006-Estt. (D), dated 3-3-2008, which provided that the actual year of appointment, both in the case of direct recruits and promotees, would be reckoned as the year of availability for the purpose of rotation and fixation of inter se seniority.

5. The matter has been examined in pursuance of Hon'ble Supreme Court Judgment on 27-11-2012, in Civil Appeal No. 7514-7515/2005 in the case of TV. R. Parmarv. Uol and others in

consultation with the Department of Legal Affairs and it has been decided, that the manner of determination of inter se seniority of direct recruits and promotees would be as under:

(a) DoP&T O.M. No. 20011/1/2006-Estt. (D), dated 3-3-2008 is treated as non-existent / withdrawn ab initio;

(b) The rotation of quota based on the available direct recruits and promotees appointed against the vacancies of a Recruitment Year, as provided in DoP&T, O.M., dated 7-2-1986 / 3-7-1986, would continue to operate for determination of inter se seniority between direct recruits and promotees;

(c) The available direct recruits and promotees, for assignment of inter se seniority, would refer to the direct recruits and promotees who are appointed against the vacancies of a Recruitment Year;

(d) Recruitment Year would be the year of initiating the recruitment process against a vacancy year;

(e) Initiation of recruitment process against a vacancy year would be the date of sending of requisition for filling up of vacancies to the recruiting agency in the case of direct recruits; in the case of promotees, the date on which a proposal, complete in all respects, is sent to UPSC / Chairman-DPC for convening of DPC to fill up the vacancies through promotion would be the relevant date.

(f) The initiation of recruitment process for any of the modes viz., direct recruitment or promotion would be deemed to be the initiation of recruitment process for the other mode as well;

(g) Carry forward of vacancies against direct recruitment or promotion quota would be determined from the appointments made against the first attempt for filling up of the vacancies for a Recruitment Year;

(h) The above principles for determination of inter se seniority of direct recruits and promotees would be effective from 27-11-2012, the date of Supreme Court Judgment in Civil Appeal No. 7514-75157 2005 in the case of N.R. Parmar v. Union of India.

(i) The cases of seniority already settled with reference to the applicable interpretation of the term availability, as contained in DoP&T, O.M., dated 7-2-1986 / 3-7-1986 may not be reopened

7. As the conferment of seniority would be against the Recruitment Year in which the recruitment process is initiated for filling up of the vacancies, it is incumbent upon all administrative authorities to ensure that the recruitment process is initiated during the

vacancy year itself. While requisition for filling up the vacancies for direct recruitment should be sent to the recruiting agency, complete in all respects, during the vacancy year itself, the timelines specified in the Model Calendar for DPCs contained in DoPT, O.M. No. 22011/9/98-Estt. (D), dated 8-9-1998 and the Consolidated Instructions on DPCs contained in O.M. No. 22011 /5/86-Estt. (D), dated the April 10,1989 should be scrupulously adhered to, for filling up the vacancies against promotion quota.

[G.I., Dept. of Per. &Trg., O.M. No. 20011/I/2012-Estt. (D), dated the 4th March, 2014.]

NOTE.— The seniority of direct recruits and promotees is delinked from the vacancy / year of vacancy. The seniority / inter se seniority of direct recruits and promotees in a particular year is fixed with reference to the availability of the candidates / officers after completion of all pre-appointment formalities and rotation of quota is applicable only among the available direct recruits and promotees. If no direct recruit is available in a particular year, all the promotees are bunched together in accordance with their position in the DPC recommendation. Similarly if no promotee is available in a particular year, available direct recruits are bunched together. In other words, complete rotation of quota is feasible only in an ideal situation where adequate / proportionate number of direct recruits and promotees become available in a year for rotation as per the quota prescribed in the Recruitment Rules.

2.4.2 Clarification on 'year of availability' in fixation of relative seniority of promotees and direct recruits.— It is directed to refer to this Department's consolidated instructions contained in O.M. No. 22011/1/2008-Estt. (D), dated 11-11-2010 laying down the principles on determination of seniority of persons appointed to services / posts under the Central Government and to state that a large number of references have been received seeking clarifications on 'year of availability' in fixation of relative seniority of promotees and direct recruit officers who had joined service in the different calendar year but in the same financial year.

2. The issue has been examined in consultation with UPSC. The model calendar (time schedule) for DPCs as contained in this Department's O.M. No. 22011/9/98-Estt. (D), dated the 8th September, 1998 suggests time frame for conducting / completing formalities for DPC meeting / promotions.

As per this O.M., Ministries / Departments that are following financial year, i.e., 1^a April to 31^aMarch of next year for completion of confidential reports (now APARs) should get the select panel approved for the next financial year by 31stMarch of the previous financial year.

Similarly, those Ministries / Departments, which follow calendar year for completion of confidential report (now APARs) i.e., 1st January to 31st December, should get the select panel approved by 31st December of the preceding Calendar Year.

3. It is hereby clarified that the year of availability for the purpose of relative seniority of direct recruits / promotees would be same as prescribed in the model calendar for DPCs, i.e.,

(i) 1st April to 31st March of the next year where confidential reports (now APARs) are completed financial year-wise.

(ii) 1st January to 31st December where confidential reports (now APARs) are completed calendar year-wise.

[GL, Dept. of Per. & Trg., O.M. No. F. No. 20011/1/2006-Estt (D), dated the 3rd April, 2012.]

2.4.3 Starting point in the recruitment roster for the purpose of inter se seniority of officers through Direct Recruitment, Promotion, Absorption, etc.

The starting point in the roster should be that mode of recruitment prescribed in the Recruitment Rules for which the selection process had been completed first. For this purpose, the date of the completion of the selection process will be determined as follows:—

Direct Recruitment	Date of completion of selection process
(a) Through examination conducted by UPSC or any other authorities	Date of publication / announcement of results
(b) Through interviews conducted by UPSC or any other authorities	Date of Commission's letters containing their recommendation.
Promotion	
(a) Where UPSC is associated	Date of UPSC's letter containing their recommendations ratifying the promotion
(b) Where UPSC is not associated or its concurrence is not required.	Last date of DPC meeting

(c) Limited Departmental Examination.	Date of announcement of results.
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2.4.4. A new roster will have to be started in the following cases: (i) From the date the Recruitment Rules are notified in the Gazette.

(ii) When there is an amendment to the Recruitment Rules which changes the percentage allotted for the various modes of recruitment.

[G.I., Dept. of Per. & Admn. Ref., O.M. No. 28011/6/76-Estt. (D), dated the 24th June, 1978.]

2.4.5 In order to help the appointing authorities in determining the number of vacancies to be filled during a year under each of the methods of recruitment prescribed, a Vacancy Register giving a running account of the vacancies arising and being filled from year to year may be maintained in the pro forma enclosed (Pro forma on Page 14).

2.4.6 With a view to curbing any tendency of under-reporting / suppressing the vacancies to be notified to the concerned authorities for direct recruitment, it is clarified that promotees will be treated as regular only to the extent to which direct recruitment vacancies are reported to the recruiting authorities on the basis of the quotas prescribed in the relevant Recruitment Rules. Excess promotees, if any, exceeding the share falling to the promotion quota based on the corresponding figure, notified for direct recruitment would be treated only as ad hoc promotees.

3. Seniority of Absorbees

3.1 The relative seniority of persons appointed by absorption to a Central service from the Subordinate Offices of the Central Government or other departments of the Central or a State Government shall be determined in accordance with the order of their selection for such absorption.

3.2 Where such absorbees are effected against specific quotas prescribed in the Recruitment Rules, the relative seniority of such absorbees vis-a-vis direct recruits or promotees subject to the provision of Para. 3.4 below shall be determined according to the rotation of vacancies which shall be based on the quotas reserved for absorption, direct recruitment and promotion respectively in the Recruitment Rules. Where the vacancies in any quota or quotas are carried forward, the principles stated in Para. 2.4.1 will apply, mutatis mutandis in determining inter se seniority of the appointees.

3.3 The principle laid down in Para. 3.1 above will not present any difficulty where recruitment by absorption is made singly and at intervals but it will be found wanting in cases where two or more persons are selected from different sources on the same occasion and the selection is spread over a number of days.

It will, therefore, be necessary for the authorities responsible for approving appointments by absorption to indicate the inter se order of merit of the selected persons in such cases.

Where a person is appointed by absorption in accordance with the provisions in the Recruitment Rules providing for such absorption in the event of non-availability of suitable candidate by direct recruitment or promotion, such absorbee shall be grouped with direct recruits or promotees, as the case may be. He shall be ranked below all direct recruits or promotees, as the case may be, selected on the same occasion.

3.4 Seniority of persons absorbed after being on deputation

3.4.1 In the case of a person who is initially taken on deputation and absorbed later (i.e., where the relevant Recruitment Rules provide for "deputation / absorption"), his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has, however, been holding already (on the date of absorption) the same or equivalent grade on regular basis in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from—

— the date he has been holding the post on deputation.

(or)

— the date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department,
whichever is earlier.

3.4.2 The fixation of seniority of an absorbee in accordance with the above principle will not, however, affect any regular promotions to the next higher grade made prior to the date of such absorption, in other words, it will be operative only in filling up of vacancies in higher grade taking place after such absorption.

3.4.3 In cases in which absorbees are not strictly in public interest, the transferred officers will be placed below all officers appointed regularly to the grade on the date of absorption.

3.4.4 It is also clarified that for the purpose of determining the equivalent grade in the parent department, the criteria contained in Office Memorandum No. 14017/27/75-Estt. (D), dated

the 7th March, 1984, which lays down the criteria for determining analogous posts, may be followed.

3.5 Seniority of persons who are transferred and absorbed directly without being on deputation

In the case of a person who is initially taken on deputation and absorbed later, would be applicable also for persons who are transferred and absorbed directly without being on deputation i.e. where the Recruitment Rules provide recruitment through absorption. The matter has been considered and it has been decided that, in such cases also the provision as contained in the O.Ms, d 29-5-1986 and 27-3-2001 would be applicable i.e., the date he has been holding post on deputation or the date from which he has been appointed on the regular basis to the same or equivalent grade in his parent department, whichever is earlier

Seniority—Technical Resignation and Lien

On technical resignation, seniority in the post held by the Government servant on substantive basis continues to be protected. However, in case of Government servant deciding to rejoin his substantive post, the period spent in another department which he had joined after submitting his Technical Resignation will not count for minimum qualifying service for promotion in the higher post.

[G.I., Dept. of Per. & Trg., O.M. No. 28020/1/2010-Estt. (C), dated the 17th August, 20 — Para. 2.6.]

4. Seniority in Special Types of Cases

4.1 In the case of such ex-TB or ex-Pleurisy, ex-Leprosy patients, as have been declared non-infective and medically fit for Government service, on re-employment in the same posts from which they were discharged, the actual previous service rendered by them should be counted for seniority. The seniority of such persons re-employed in other posts will be fixed in consultation with the Department of Personnel and Training.

4.2 Seniority of officers who have been recommended for promotion by a DPC during the currency of a penalty

An officer who has been recommended for promotion by a DPC despite imposition of a minor penalty on him/her, will be promoted on the basis of the recommendation of the said DPC, only after expiry of the penalty and his/her seniority would be fixed according to his/her position in that panel.

[G.I., Dept. of Per. &Trg., O.M. No. 20011/2/92-Estt. (D), dated the 3rd November, 1995.]

4.3. Fixation of seniority of a Government servant reverted to a lower post / grade/service as a measure of penalty and subsequently promoted to a higher post

4.3.1 An order imposing the penalty of reduction to a lower service, grade or post or to a lower time-scale should invariably specify—

- (i) the period of reduction, unless the clear intention is that, the reduction should be permanent or for an indefinite period;
- (ii) whether on such re-promotion, the Government servant will regain his original seniority in the higher service, grade or post or higher time-scale which had been assigned to him prior to the imposition of the penalty.

4.3.2 In cases where the reduction is for a specified period and is not to operate to postpone future increments, the seniority of the Government servant may, unless the terms of the order of punishment, provide otherwise, be fixed in the higher service, grade or post or the higher time-scale at what it would have been but for his reduction.

4.3.3 Where the reduction is for a specified period and is to operate to postpone future increments, the seniority of the Government servant on re-promotion may, unless the terms of the order of punishment provide otherwise, be fixed by giving credit for the period of service rendered by him in the higher service, grade or post or higher time-scale.

4.3.4. If a Government servant is reduced as a measure of penalty to a lower service, grade or post or to a lower time-scale, the authority ordering the reduction shall specify —

- (a) the period for which the reduction shall be effective;
- (b) whether, on restoration, the period of reduction shall operate to postpone future increments and, if so, to what extent; and
- (c) whether the Government servant shall regain his original seniority in the higher service, grade or post or time-scale on his restoration to the service, grade or post or time-scale from which he was reduced.

[G.I., Dept. of Per. &Trg., Notfn. No. F. No. 6/2/2013-Estt. (Pay-I), dated the 2nd January, 2015.]

4.4 Fixation of seniority of a person who has been transferred to a lower post under FR-ISA

When the Government employee is transferred to a lower post on his own request under FR 15 (a) (2), it neither, identifies itself as a case of penal action on the employee nor as a case of transfer to a lower post in public interest. As the person already stood promoted to the next higher grade, in case of his/her reoccupying the lower post at the top of the seniority (original

position), would affect adversely not only the existing officers in the grade, but would apparently nullify the very purpose of his/her transfer to the lower post. As such, an officer seeking transfer to a lower post under FR-15, at his own request, would be placed below all officers appointed regularly to the lower grade on the date of transfer.

4.5 Seniority of persons appointed on compassionate ground

It has now been decided that the person appointed on compassionate ground in a particular year may be placed at the bottom of all the candidates recruited / appointed through direct recruitment, promotion, etc., in that year, irrespective of the date of joining of the candidate on compassionate ground.

[G.I., Dept. of Per. &Trg., O.M. No. 14014/02/2012-Estt. (D), dated the 16th January, 2013 — Para. 16.]

4.6 Fixation of inter se seniority of the staff rendered surplus and redeployed on different occasions but in the same office

4.6.1 The surplus employees are not entitled for benefit of the past service rendered in the previous organization for the purpose of their seniority in the new organization. Such employees are to be treated as fresh entrants in the matter of their seniority, promotions, etc.

4.6.2 When two or more surplus employees of a particular grade in an office are selected on different dates for absorption in a grade in another office, their inter se seniority in the latter office will be same as in their previous office provided that—

(f) no direct recruit has been selected for appointment to that grade in between these dates; and

(if) if there are no fixed quotas for direct recruitment and promotion to the grade in question in the new office and no promotee has been approved for appointment to that grade in between these dates.

4.6.3 When two or more surplus employees of a particular grade in an office are simultaneously selected for redeployment in another office in a grade, their inter se seniority in the particular grade, on redeployment in the latter office, would be the same as it was in their previous office.

4.6.4 The above orders would not be applicable in respect of personnel who are appointed on the recommendations of the UPSC to posts / services, recruitment to which is made through the Commission. Seniority of surplus officers appointed on the recommendations of the Commission will be decided on merits in consultation with the Commission.

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Volume 7

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Contents

Articles	Page No.
1. Rights of Workers and Role of World Trade Organisation: An Overview <i>Dr. Abhijeet Deb & Arjun Chowdhury</i>	1
2. Parliamentary Ombudsman of Finland: An Overview <i>Dr. Partha Pratim Paul</i>	11
3. Enforcement of Right to Development under the Constitution of India and the Role of Indian Judiciary: The Challenges Ahead <i>Dr. Om Prakash Sharma</i>	32
4. The Holy Fast to Death and Moral Questions <i>Dr. Rabindra kr. Pathak</i> ¹ *	51
5. The Crisis of Hung Parliament vis-a-vis the Power of President: A Critical Analysis <i>Vinod Sharma</i>	60
6. H.P. Electricity Board Ltd. v. Mahesh Dahiya <i>Tanmay Sen</i>	76
7. Third Genders in India and the Journey towards Social Inclusion: A Study with Reference to the NLSA Judgment <i>Lalit Kumar Roy & Tanmay Sen</i>	81
8. Right to be Promotion vs the Right to be Considered for Promotion: The Constitutional Mandate <i>Soma Dey Sarkar</i>	90
9. Punitive Anti Patient-dumping Laws in Medico-legal Cases: The Need of the Hour <i>Aratrika Chakraborty</i>	102
10. Juvenile Crimes in West Bengal: A Comparative Study with National Data <i>Debasree Saha</i>	115
11. An Analysis of the Right to Information in International Perspectives <i>Devendra Kumar Singh</i>	129
12. Medical Negligence and Compensation in India: Recent Trends <i>Manish Kumar Singh</i>	140

8

Right to be Promotion vs the Right to be Considered for Promotion: The Constitutional Mandate

Soma Dey Sarkar¹

INTRODUCTION

Since a government organisation is not a monolithic structure and is primarily hierarchical in nature², career development becomes one of the basic considerations in the personnel policy of the government. In the words of Glenn Stahl, the term 'career' denotes "...the progression of an individual in a field of work throughout the employable years of his life. A career in business or in a profession is a commonly understood concept. Sometimes it means devotion to a speciality, sometimes it means a series of employment which are only loosely related to each other. In either case, it usually means some degree of success."³ The Commission of Inquiry on Public Service Personnel (USA) clearly described the concept of a government career services, as it stated:

"We recommend that the day-to-day administrative work of government be definitely made a career service. By this we mean that steps shall be taken to make public employment a worthwhile life work, with entrance to the service open and attractive to young men and women of capacity and character and with opportunity of advancement through service and growth to posts of distinction and honour."⁴

Thus, the Commission defined a career as an honourable occupation which one normally takes up in youth with the expectation of advancement and pursues until retirement.

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 2. See 2.2. of this Chapter
 3. Mohit Bhattacharya, Public Administration, 189 (World Press, Eighth Ed., 2012)
 4. *ibid*

In order to enhance the morale and efficiency of the public personnel in his/her career, it is highly necessary that the security of tenure and better conditions of service by way of suitable pay scales, promotional opportunities and retirement benefits and a just and fair treatment to public personnel under the State be given. This is of utmost importance to secure honesty, contentment and discipline among the civil servants which form the very foundation for their discharging their duties as expected of them.

A useful principle laid down in 'Sukraniti', the great ancient Indian compilation, of the principles to be adopted in the administration of the affairs of the state is as follows:

"Low wages, harsh treatment, insults, abuses and imposition of heavy fines or severe punishments are the causes of unrest among the employees.

Satisfied by payment of adequate wages, promoted honourably, cheered up by gentle words and consoled in grief, the employees would never let down or desert master."⁵

This passage emphasises the importance of fixation of proper wages and fair treatment of employees, with sympathy and respect.

PROMOTION- ITS MEANING AND RATIONALES

It has been judicially recognised that "so multifarious are the activities of the State that employment... for the purpose of these activities has by the very nature of things to be in different departments... and inside each department, in many different classes."⁶Therefore, Promotion, as a condition of service, plays a major role in bringing out the efficiency in public personnel and the expected result that the state wants from them. An employee joins a service in the hope of a satisfactory career of progression. An important factor contributing to the attractiveness of service is the prospect of promotion.

MEANING OF PROMOTION

Etymologically, the word 'promotion' is derived from the Latin term 'promotionem'. It is a noun of action from 'promovere', which means to move forward. The word 'pro' means 'forward' and 'movere' means 'to move'.⁷

Promotion has been explained to be "the action of raising someone to a higher position or rank."⁸ It also means "advancement of preferment in

5. Sukra II, 836-839. See M.Rama Jois, Legal and Constitutional History of India, Vol. I, 188 (N.M. Tripathi Pvt. Ltd., 2nd Ed., 1990)

6. All India Station Masters etc. vs. G.M. Central Railways, AIR 1960 SC 384

7. Ed. Rajesh K. Jha, Public Personnel Administration, 120-121 (Pearson, First Ed.)

8. Concise Oxford English Dictionary, Eleventh Ed., 2008, p.1149

honour, dignity, rank or grade.”⁹ Again, Promotion, in the context of law relating to service, means advancing or raising an employee to a higher office or rank or post than the one the employee was holding or to a higher scale of pay than the one the employee was enjoying immediately before such promotion. The higher office or rank or post or scale is generally referred to as ‘promotional post or scale’ as the case may be. The office or rank or post from which the employee is promoted is referred to as the feeder post.¹⁰

The Supreme Court in *Tarsem Singh v. State of Punjab*¹¹ has defined ‘promotion under the service law jurisprudence’ as “advancement in rank, grade or both. Promotion is always a step towards advancement to a higher position, grade or honour. Opting to come to a lower pay scale or to a lower post cannot be considered a promotion, it is rather a demotion.”

Prof. Pigor and Mayres have defined promotion in the following manner¹²:

“Promotion is the advancement of an employee to better job, better in terms of greater responsibilities, more prestige, or status, greater skill and specially increased rate of pay or salary.”

PROMOTION AND ITS RATIONALITY

Promotion is an integral part of the career service. The vacant posts in the public services can either be filled in by fresh recruitment or by promoting the existing lower cadre employees to the higher positions. This method is called promotion system. In this liberalised era, the retention of many ambitious, capable and talented employees depends to a great extent on the effective promotion system. Promotions are in fact one of the most important aspects of personnel management, meant to keep the employees contended, disciplined, efficient and to help retain men of potential ability in service.¹³

The capacity study appointed by the United Nations commented, “It must be realised that if senior posts are invariably or frequently filled from outside the service, it will prove impossible to retain first class people in the lower ranks, since they will inevitably seek to fulfil their ambitions in other careers which offer better prospects of advancement. Thus, the constraints on efficiency and capacity would be compounded.”¹⁴ It is difficult to devise a good promotional system. If the promotion is not effected judiciously, there

9. Webster’s Comprehensive Dictionary, International Edition, p.1009

10. Samaraditya Pal, *Law Relating to Public Service*, Third Ed., 2011, p.541

11. AIR 1995 SC 384

12. Mohit Bhattacharya, *Public Administration*, 193 (World Press, Eighth Ed. 2012)

13. *Supra* n. 19 at 121

14. *ibid*

is a danger that it may breed discontent, diminution of incentive and general impairment of morale, which may ultimately affect the efficiency of the organisation.

Therefore, a well developed promotion policy is very essential for the efficiency of the employees. Promotion is a continuous incentive to efficient working on the part of the employee. The hope of promotion is sufficient to keep the man interested in the job.

W.F. Willoughby in his book 'Principles of Public Administration', has pointed out the following as the essentials of a sound promotion system¹⁵:

1. Adoption of standard specifications setting forth the duties and qualifications required for all promotions in the government service.
2. The classification of these promotions into distinct classes, salaries, grades and service.
3. The inclusion within this classification of all higher administrative promotions except those having a practical character,
4. The adoption, so far as possible, of the principle of recruitment from within for filling up of higher posts.
5. The adoption of principles of merit and seniority in determining the promotion of employees.
6. The provision of adequate means for determining the relative merits and seniority of employees eligible for promotion.

In *Union of India v. S.S. Ranade*¹⁶, the scope and meaning of the word 'promotion' was considered by the Supreme Court. The issue in this case was whether a Commandant (Selection Grade) held a higher rank than a Commandant and consequently entitled to be superannuated at a later age of 58 years instead of 55 years. It was held as follows:

"Undoubtedly, a Commandant who becomes a Commandant (Selection Grade) secures a promotion to a higher pay scale. But it is a higher pay scale in the same post. The use of the word 'promotion' in Rule 6 and the Constitution of a Departmental Promotion Committee for selection of Commandant (Selection Grade) in Rule 7, do not necessarily lead to the conclusion that promotion which is contemplated there is necessarily a promotion to a higher post. Promotion can be either to a higher pay scale or to a higher post."

Again, following the decision of *S.S. Ranade*, the Apex Court in *State of Rajasthan v. Fateh Chand Soni*¹⁷, defined promotion thus:

15. Id at 194. See also W.F. Willoughby, *Principles of Public Administration*, Publications of Institute for Government Research, 1927.

16. (1995) 4 SCC 462

17. (1996) 1 SCC 562

“in the literal sense the word “Promote” means to advance to a higher position, grade or honour. Promotion not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law also the expression “Promotion” has been understood in the wider sense and it has been held that “Promotion can be either to a higher pay scale or to a higher post.”

It needs no reiteration that ‘promotion’ as a condition of service, increases efficiency of a Public Personnel. The Supreme Court in *Dr. Ms. O.Z. Hussain v. Union of India*¹⁸ opined:

“...provision for promotion increases efficiency of the public service while stagnation reduces efficiency and makes the service ineffective. Promotion is thus a normal incidence of service. There too is no justification why while similarly placed officers in other Ministries would have the benefit of promotion, the non-medical ‘A’ Group scientists in the establishment of Director General of Health Services would be deprived of such advantage. In a welfare State, it is necessary that there should be an efficient public service and, therefore, it should have been the obligation of the Ministry of Health to attend to the representatives of the Council and its members and provide promotional avenue for this category of officers. It is, therefore, necessary that on the model rules framed by the Ministry of Science and Technology with such alterations as may be necessary, appropriate rules should be framed within four months from now on for providing promotional avenue for “A” category of scientists in the non-medical wing of the Directorate.”

The question also came up for consideration in *Ujagar Prints Etc. v. Union of India*¹⁹ and *Council of Scientific and Industrial Research and Anr. v. K.G.S. Bhatt and Anr.*²⁰. In the latter decision, the Apex Court held:

“It is often said and indeed, adroitly, an organisation public or private does not ‘hire a hand’ but engages or employs a whole man. The person is recruited by an organization not just for a job, but for a whole career. One must, therefore, be given an opportunity to advance. This is the oldest and most important feature of a free enterprise system. The opportunity for advancement is a requirement for progress of any organisation. It is an incentive for personnel development as well.²¹ Every management must provide realistic opportunities for promising employees to move upward. ‘The organisation that fails to develop a satisfactory procedure for promotion

18. AIR 1990 SC 311

19. AIR 1989 SC 516

20. AIR 1989 SC 1972

21. Flipo Edwin B., *Principles of Personnel Management*, Fourth Ed., p.246. Extracted from *Food Corporation of India and Ors. V. Paarshotam Das Bansal and Ors.*, (2008) 5 SCC 100

is bound to pay a severe penalty in terms of administrative costs, misallocation of personnel, low morale and ineffectual performance, among both non-managerial employees and their supervisors'.²²

In *State of Tripura v. K.K. Roy*²³, the Supreme Court considered some of its earlier decisions in matters of promotion and held:

"It is not a case where there existed an avenue for promotion. It is also not a case where the State intended to make amendments in the promotional policy. The appellant being a State within the meaning of Article 12 of the Constitution should have created promotional avenues for the respondent having regard to its constitutional obligations adumbrated in Articles 14 and 16 of the Constitution of India. Despite its constitutional obligations, the State cannot take a stand that as the respondent herein accepted the terms and conditions of the offer of appointment knowing fully well that there was no avenue for promotion, he cannot resile therefrom. It is not a case where the principles of estoppels or waiver should be applied having regard to the constitutional functions of the State. It is not disputed that the other states in India/Union of India having regard to the recommendations made in this behalf by the Pay Commission introduced the Scheme of Assured Career Promotion in terms whereof the incumbent of a post if not promoted within a period of 12 years is granted one higher scale of pay and another upon completion of 24 years if in the meanwhile he had not been promoted despite existence of promotional avenues. When questioned, the learned counsel appearing on behalf of the appellant, even could not point out that the State of Tripura has introduced such a scheme. We wonder as to why such a scheme was not introduced by the appellant like other States in India, and what impeded it from doing so. Promotion being a condition of service and having regard to the requirements thereof as has been pointed out by this court in the decisions referred to hereinbefore, it was expected that the appellant should have followed the said principle."

In *Food Corporation of India v. Parashotam Das Bansal*²⁴, the Respondents were appointed in the engineering section of the Food Corporation and constituted about one per cent of the corporation's work force. Since there was no promotional avenues open to them, they were stagnated. It was held by the Supreme Court that when employees are denied an opportunity of promotion for 30 long years on the ground that they fell within a category of employees excluded from promotional prospect, the Supreme Court will have the jurisdiction to issue necessary direction. It was

22. See Uday Pareek, *Personnel Management*, p.277, extracted from *Food Corporation of India and Ors. V. Parashotam Das Bansal and Ors.*, (2008) 5 SCC 100

23. (2004) 9 SCC 65

24. (2008) 5 SCC 100

further pointed out that if there is no channel of promotion in respect of officers resulting in stagnation over the years, the Court although may not issue any direction as to in which manner scheme should be formulated or by reason thereof interfere with the operation of existing channel of promotion to the officers working in different departments and officers of the Government but the jurisdiction to issue direction cannot be denied to the Supreme Court of the country

RIGHT TO PROMOTION VS. RIGHT TO BE CONSIDERED FOR PROMOTION

From the discussions made as above, it has become clear that the interpretation of the phrase 'equality of opportunity in State services' not only includes appointment in the initial stages but includes all other incidences of service including appointment by promotion. However, the question to be pondered over is whether there is at all a fundamental right to promotion under the Constitution of India.

While interpreting provisions of the Constitution and in particular fundamental rights of citizens, it is well to bear in mind certain fundamental concepts. In *McCulloch v. Maryland*²⁵, Chief Justice Marshall cautioned that we must keep in mind that it is the Constitution that we are expounding. He said that the Constitution was intended to endure for ages to come and had consequently to be adapted to the various crises of human affairs from time to time.

Brandeis, J., wrote "Our Constitution is not a straight jacket. It is living organism. As such it is capable of growth, of expansion and of adaptation to new conditions. Growth implies changes, political, economic and social. Growth which is significant manifests itself rather in intellectual and moral conceptions of material things." (Brandeis Papers, Harvard Law School).

Similarly, in a beautiful metaphor Mr. J. M. Beck said as follows:

"The Constitution is neither, on the one hand, a Gibraltar Rock, which wholly resists the ceaseless washing of time and circumstances, nor is it, on the other hand, a sandy beach, which is slowly destroyed by erosion of the waves. It is rather to be likened to a floating dock which, while firmly attached to its moorings, and not therefore, at the caprice of the waves, yet rises and falls with the tide of time and circumstances."²⁶

25. (1819) 4 Wheel (17 U.S. 316). Extracted from the order given by M. Jagannadha Rao, J., in *Ajit Singh and Ors. v. The State of Punjab*, AIR 1999 SC 3471

26. Extracted from the order given by M. Jagannadha Rao, J., in *Ajit Singh and Ors. v. The State of Punjab*, AIR 1999 SC 3471. See also J.M. Beck, *Constitution of the United States, Yesterday, Today and Tomorrow*, Oxford University Press, 1924

Article 14 and Article 16(1) of the Constitution of India are closely connected. They deal with individual rights of the person. Article 14 demands that the 'State shall not deny to any person equality before law or equal protection of laws'. Article 16(1) issues a positive command that 'there shall be equality of opportunity for all citizens in the matters relating to employment or appointment to any office under the State'.²⁷ It has been held repeatedly by the Supreme Court that Sub-clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said Sub-clause particularises the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity" in matters of employment and appointment to any office under the State. The word 'employment' being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, fundamental right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.²⁸

Having said so, the question which arises now is whether the right to be considered for promotion is a mere statutory right or a fundamental right.

In *Ashok Kumar Gupta v. State of U.P.*²⁹ it has been laid down that the right to promotion is only a "statutory right" while the rights covered by Articles 16(4) and 16(4A) are "fundamental rights". Para 43 in *Ashok Kumar Gupta*³⁰ reads as follows:

'It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or class of posts depends upon the operation of the conditions of service. Article 16(4) read with Articles 16(1) and 14 guarantees a right to promotion to Dalits and Tribes as a fundamental right where they do not have adequate representation consistently with the efficiency of administration...before expiry thereof (i.e., 5 years rule), Article 16(4) has come into force from 17.6.1995. Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right.'

In *All India Administrative Service Association v. Union of India*³¹, in paras 14 and 15, a Bench of three Judges had held that no one has a vested

27. *Supra* n. 54

28. *Ajit Singh and Ors. v. The State of Punjab*, AIR 1999 SC 3471

29. (1997) 5 SCC 201

30. *ibid*

31. 1992 (3) SCALE 126

right to promotion or seniority but an officer has an interest in seniority acquired by working out the rules. It was further held in *T.R. Kapoor v. State of Haryana*³² by the Supreme Court that 'unless it is specifically provided in the rules, the employees who are already promoted before the Amendment of the Rules, cannot be reverted and their promotion cannot be recalled'. In *State of Maharashtra v. Chandrakant Ananth Kulkarni*³³ another three Judge Bench of the Apex Court held that "Mere chances of promotion are not conditions of service, and the fact that there was reduction in the chances of promotion did not tantamount to a change, in the conditions of service." In *K.Jagdeesh v. Union of India*³⁴, it was held that "right to be considered for promotion is a term of service. But mere chances of promotion are not; so also the eligibility for promotion. Passing of the departmental examination is nothing but mere chance of promotion.

Similarly, in *A.K. Bhatnagar v. Union of India*³⁵ and *Akhil Bharatiya Soshit Karmachari Sangh v. Union of India*³⁶ it has been held that no member of the service has a vested right to promotion or seniority but an officer has an interest in seniority acquired by working out the rules. In *Md. Shujat Ali v. Union of India*³⁷, a constitution Bench had held that a rule which confers a right of actual promotion or a right to be considered for promotion is a rule prescribing conditions of service. In *Mohd. Bhakar v. Y.Krishna Reddy*³⁸, a Bench of three Judges had held that the rule which merely affects chances of promotion cannot be regarded as varying the conditions of service. In *State of Mysore v. G.B. Purohit*³⁹, a Bench of two judges had held that rule which merely affects chances of promotion cannot be regarded as varying the conditions of service. Chances of promotion are not conditions of service. In *Syed Khalid Rizvi v. Union of India*⁴⁰, it was held in para 31 that no employee has right to promotion; the only right is that he is entitled to be considered for promotion according to the rules. Chances of promotion are not conditions of service which are defeasible in accordance with the rules.

This has been reiterated again in *S. S. Bola and Ors. v. B. D. Sardana and Ors.*⁴¹ again that no one has a vested right to promotion or seniority but an

32. AIR 1987 SC 415

33. (1981) 4 SCC 165

34. (1990) ILLJ 495 SC

35. MANU/SC/0514/1991 at p. 11. Extracted from www.manupatra.com on 04/05/2018 at 3.40 p.m.

36. (1981) 1 SCC 246

37. AIR 1974 SC 1631

38. SLR 1970 SC 768

39. 1967 SLR 753 (SC)

40. 1993 Supp (3) SCC 575

41. AIR 1997 SC 3127

officer has an interest to seniority acquired by working out the Rules. It would be taken away only by operation of law. Right to be considered for promotion is a rule prescribed by conditions of service. A rule which affects the promotion of a person relates to conditions of service. The rule is merely affecting the chances of promotion does not amount to change in the conditions of service.

In *Jagdish Lal v. State of Haryana*⁴² it was decided that it is a settled principle of service jurisprudence that mere chances of promotion are not conditions of service and a candidate appointed in accordance with the rules can steal a march over his erstwhile seniors in the feeder/lower cadre. On his having satisfactorily completed probation and declaration thereof, he is given seniority in the higher cadre. He becomes a member of the higher cadre from his date of starting discharging duty of the post to which he is promoted unless otherwise determined in accordance with the rules. From that day, he ceases to be a member of the feeder cadre/grade from which he is promoted. The hierarchical promotions to various cadres mentioned hereinabove operate in the same manner and thereby on successive promotions to various cadres/grades, though in the same service, one would steal a march over others, be they general or reserved.

In *Ajit Singh and Ors. v. Union of India and Ors.*⁴³, it was held that that the right to equal opportunity in the matter of promotion in the sense of a right to be 'considered' for promotion is indeed a fundamental right guaranteed under Article 16(1).

In *Ramchandra Shankar Deodhar v. State of Maharashtra*⁴⁴, referring the case of *G.B. Purohit's Case*⁴⁵, held that a rule which merely effects chances of promotion cannot be regarded as varying a condition of service. Similarly, in *Reserve Bank of India v. C.N. Saharanaman*⁴⁶, the Supreme Court observed that the right to promotion should not be confused with mere chance of promotion. Though the right to be considered for promotion was a condition of service, mere chances of promotion were not.

Again, in *Paluru Rmkrishnaiah v. Union of India*⁴⁷, the Apex Court referring to *Ramchandra Shankar Deodhar*⁴⁸ held thus:

42 AIR 1997 SC 2366

43 AIR 1999 SC 3471

44 AIR 1974 SC 259

45 Supra n. 84

46 AIR 1986 SC 1830

47 AIR 1990 Sc 166

48 Supra n. 89

“In the case of Ramchandra Shankar Deodhar⁴⁹, the petitioners and others allocated Tehsildars from Ex-Hyderabad State had under the notification of the Raj Pramukh dated September 15, 1955 all the vacancies in the posts of Deputy Collector in the ex-Hyderabad State available to them for promotion but under subsequent rules of July 30, 1959, 50 per cent of the vacancies were to be filled by direct recruitment and only the remaining 50 per cent were available for promotion and that too on divisional basis. The effect of this change obviously was that now only 50 per cent vacancies in the post of Deputy Collector being available in place of all the vacancies it was to take almost double the time for many other allocated Tehsildars to get promoted as Deputy Collectors. In other words, it resulted in delayed chance of promotion. It was inter alia, urged on behalf of the petitioners that the situation brought about by the rules of July 30, 1959 constituted variation to their prejudice in the conditions of service applicable to them immediately prior to the reorganisation of the State and the rules were consequently invalid. While repelling this submission the Constitution Bench held:

“All that happened as a result of making promotions to the posts of Deputy Collector’s division wise and limiting such promotions to 50 per cent of the total number of vacancies in the posts of Deputy Collector was to reduce the chances of promotion available to the petitioners. It is now well settled that though a right to be considered for promotion is a condition of service, mere chances of promotion are not. A rule which merely affects chances of promotion cannot be regarded as varying a condition of service.”

Again, in the case of Delhi Jal Board v. Mahinder Singh⁵⁰, it has been held that the right to be considered by the Departmental Promotion Committee is a fundamental right under Article 16 of the Constitution of India, provided a person is eligible and is in the zone of consideration. The sealed cover procedure permits the question of his promotion to be kept in abeyance till the result of any pending disciplinary inquiry. But the findings of the Disciplinary Enquiry exonerating the officer would have to be given effect to as they obviously relate back to the date on which the charges are framed. If the disciplinary inquiry ended in his favour, it is as if the officer had not been subjected to any Disciplinary Enquiry. The sealed cover procedure was envisaged under the rules to give benefit of any assessment made by the Departmental Promotion Committee in favour of such an officer, if he had been found fit for promotion and if he was later exonerated in the disciplinary inquiry which was pending at the time DPC met.

49. *ibid*

50. AIR 2000 SC 2767

CONCLUSION

The Constitution, unlike other Acts, is intended to provide an enduring paramount law and a basic design of the structure and power of the State and rights and duties of the citizens to serve the society through a long lapse of ages. It is not designed to meet the needs of the day when it is enacted but also the needs of the altering conditions of the future. It contains a framework of mechanism for resolution of constitutional disputes. It also embeds its ideals establishing an egalitarian social order to accord socio-economic to accord socio-economic and political justice to all sections of the society assuring dignity of person and to integrate a united social order assuring every citizen fundamental rights assured in Part III and the directives in Part IV of the Constitution.

The fundamental requisites to all employees are honesty, integrity and character, apart from hard work, dedication and willingness to apply assiduously to the responsibilities attached to the office or post and also inclination to achieve improved excellence. Efficiency in service attracts the well-known parable that 'insanity cannot be cured until married and marriage cannot be celebrated till insanity is cured'. Unless one is given an opportunity and facility by promotion to hold an office or a post with responsibilities, there would be no opportunity to prove efficiency in the performance or discharge of the duties. Without efficiency one cannot be promoted. How to synthesise both and give effect to the Constitutional animation to effectuate the principle of adequacy of representation in all posts or classes of posts in all cadres, service or grades is the nagging. It would thus, be clear that right to promotion is a statutory right. It is not a fundamental right. On the other the right to be considered for promotion is the constitutional mandate. Given the efficiency factor, a personnel shall have the right to be considered for promotion.

