Chapter # 4

The Constitutional Protections and Statutory Provisions For Civil Servants

This Chapter deals with all the Constitutional provisions that provides protection to the civil servants and prescribes a framework for administrative behavior. It covers the period since the reign of Government of India Act 1935 to the Constitution of Islamic Republic of Pakistan 1973. Besides the said provisions, all the contemporary enactments related to civil servants have also been discussed in this chapter.

4.1 Constitutional Developments

The adjudicatory institutions of pre-independence era continued to exist in Pakistan. Because of the multifarious activities of our social welfare state, in addition to the old institutions some more tribunals and special courts came into existence. Before partition India was essentially a police state because the British Government, as stated earlier, was hardly interested in improving the welfare of the people. The principle concern of Government was to keep in sight those things that could promote and protect the ultimate interests of the Crown.

With the progress of domestic ideas and institutions, it has now for long been recognized that power should not be concentrated in the hands of one person but should be shared by several persons and be subjected to at least disciplined institutional checks. According to Jackson, (1977: 111) "the period, since the middle of the nineteenth century, has seen a vast growth in the scope of government activities. The traditional view regarding the function of government has changed slowly, now the government is considered to be the guarantor and provider for the principle social needs of the population".

The founders of Pakistan were interested in minimizing the injustices resulting from the exercise of discretionary powers by the colonial style administrators. In order to achieve the goal, Quid-e-Azam Muhammad Ali Jinnah suggested that every possible step should be taken that is helpful in confining the structure of public administration and the discretionary powers are restrained from abuse.

With the attainment of independence, the concept of police state gave way to the concept of welfare state. The Directive Principles of State Policy envisaged in the first address of Quaid-e-Azam and subsequent adoption of the 'Objective Resolution' by the first Constituent Assembly, enjoin upon the state to establish economic and social justice in the country.

After being elected the first president of the Constituent Assembly on August 11, 1947, Quaid-e-Azam delivered his memorable presidential address. The speech very clearly outlined the ideal and concept of Pakistan, the hopes and aspirations of its people and most importantly it portrayed the constitutional structure. Besides its primary duty of maintaining law and order for the protection of life and property of the citizens, Mr.Jinnah asserted that the government must strive to stamp out some of the greatest evils i.e. bribery, corruption, nepotism, jobbery and black-marketing, that had afflicted the society.

Some extracts from Mr. Jinnah's presidential address to the Constituent Assembly of Pakistan.

Address of Quaid-e-Azam

August 11, 1947

Mr. President, Ladies and Gentlemen!

I cordially thank you, with the utmost sincerity, for the honour you have conferred upon me - the greatest honour that is possible to confer - by electing me as your first President. I also thank those leaders who have spoken in appreciation of my services and their personal references to me. I sincerely hope that with your support and your co-operation

we shall make this Constituent Assembly an example to the world. The Constituent Assembly has got two main functions to perform. The first is the very onerous and responsible task of framing the future constitution of Pakistan and the second of functioning as a full and complete sovereign body as the Federal Legislature of Pakistan. We have to do the best we can in adopting a provisional constitution for the Federal Legislature of Pakistan.

Dealing with our first function in this Assembly, I cannot make any well-considered pronouncement at this moment, but I shall say a few things as they occur to me. The first and the foremost thing that I would like to emphasize is this: remember that you are now a sovereign legislative body and you have got all the powers. It, therefore, places on you the gravest responsibility as to how you should take your decisions. The first observation that I would like to make is this: You will no doubt agree with me that the first duty of a government is to maintain law and order, so that the life, property and religious beliefs of its subjects are fully protected by the State.

The second thing that occurs to me is this: One of the biggest curses from which India is suffering - I do not say that other countries are free from it, but, I think our condition is much worse - is bribery and corruption. That really is a poison. We must put that down with an iron hand and I hope that you will take adequate measures as soon as it is possible for this Assembly to do so.

Another thing that strikes me is this: Here again it is a legacy, which has been passed on to us. Along with many other things, good and bad, has arrived this great evil, the evil of nepotism and jobbery. I want to make it quite clear that I shall never tolerate any kind of jobbery, nepotism or any influence directly or indirectly brought to bear upon me. Whenever I will find that such a practice is in vogue or is continuing anywhere, low or high, I shall certainly not countenance it.

Well, gentlemen, I do not wish to take up any more of your time and thank you again for the honour you have done to me. I shall always be guided by the principles of justice and

fairplay without any, as is put in the political language, prejudice or ill-will, in other words, partiality or favoritism. My guiding principle will be justice and complete impartiality, and I am sure that with your support and co-operation, I can look forward to Pakistan becoming one of the greatest nations of the world." (Altavista search, www.pakistani.org)

Before independence the territories that now constitute Pakistan were governed by the Government of India Act 1935, which was a Constitutional instrument then in force (Munir, 1965: 12). On the mid-night of the 14th August 1947, the Indian Independence Act, 1947 was promulgated. Sec-8 (2) of the Act provided that the new Dominions and all the Provinces shall be governed as nearly as may be in accordance with the Government of India Act 1935. Under Section-9 sub-Section-1 the Governor Generals of both the dominions had the powers to make by order such provision as appear to them to be necessary. For the Provinces the Governors were authorized, under Section-9 (2), to exercise the powers of Governor General. Under Section-9 (1) (c) of the 1947 Act they were further empowered for making omissions from, additions to and adaptation and modification of the Government of India Act 1935 in its application to their respective dominions (Act of 1947, Constitutional Document Vol iii 1964). In this way the Government of India Act 1935, with slight modification and necessary adaptation became the first (provisional) Constitution of Pakistan and remained as such until 24th of October 1954, when Mr. Ghulam Muhammad, the then Governor General, dissolved the Constituent Assembly (Khan, 2000:245, Munir 1996:21-22). The Constituent Assembly of Pakistan worked as the Legislature for over seven years i.e. 1947-1954, but it produced no Constitution though the foundation was laid on which a new Constitution could be built.

In 1955, the new assembly was elected and the Constitution of Islamic Republic of Pakistan was promulgated in March 1956. In its general aspects the constitution of 1956 was based on the pattern of the Government of India Act 1935. After the 1956 Constitution came into force, Mr. Iskander Mirza was elected the first President and Ch. Muhammad Ali was appointed as Prime Minister (Munir 1996:32, 36).

By the Presidential Proclamation of 7th October 1958, Mr. Iskander Mirza annulled the Constitution, dissolved the National Assembly, both the Provincial Assemblies and dismissed the Central and Provincial Cabinets. General Muhammad Ayub Khan the then Commander-in-Chief of the Pakistan Army was appointed as the Chief Martial-Law Administrator. On 27th of October 1958, Ayub Khan assumed the Office of President.

Ayub Khan promulgated the 2nd Constitution of Pakistan on Ist March 1962, which came into force on 8th June 1962 when the first meeting of the National Assembly was held at Rawalpindi and Martial Law was abolished. The President and his Constitution of 1962 did not stay even for a decade. His era ended on 25th March 1969, the powers were handed over to General Yahya Khan, the then Commander-in-Chief of Pakistan Army, and the Constitution was once again abrogated.

On 20th December 1971, Yahya Khan's Regime came to an end and he handed over the power to the leader of the majority in the National Assembly i.e. Mr. Zulfiqar Ali Bhutto. He assumed the office of President and Chief Martial Law Administrator. Consequently Martial law was lifted and the Interim Constitution of 1972 was promulgated in April 1972. The Interim Constitution was subsequently replaced by a permanent constitution, which was passed by the national Assembly on 10th of April 1973 and came into force on 14th of August 1973 (Khan, 2000:245-247).

The laws of British India existing immediately before the day of independence continued with necessary adaptation as the law of Pakistan. Thus no vacuum was created in the rule of law. Just as their occurred no break in the chain of legal continuity, the pattern of judicial authority, too, remained the same. After independence Pakistan inherited the

British Indian judicial system, so it had to follow the English Common Law. The ordinary courts were called upon to determine and decide all controversies including the issues related to administrative law in accordance with English Common Law. The concept of separate administrative tribunals or courts, at that time, was not recognized by the English Jurists. The renowned English writer Dicey (1939: 203) had very categorically rejected the concept of administrative law and the tribunals. In his own words, "the notion of administrative law, that affairs or disputes in which the Government or its servants are concerned, are beyond the sphere of civil courts and must be dealt with by special and more or less official bodies, is utterly unknown to the law of England and is indeed fundamentally inconsistent with our tradition and customs".

Administrative Tribunals for deciding cases between the Government and the citizens were considered repugnant to the rule of law. The judicial control of administrative action in British India was based upon the principles of English Common Law; therefore all the disputes relating to Public Administration were to be resolved by the Ordinary Law Courts.

The idea of administrative tribunals in Pakistan was propounded by Mr. Justice Cornelius. Since 1959 he was trying to draw the attention of people and the Government to the desirability of introduction of administrative courts at the earliest possible opportunity. Initially the country did not have such like institutions, which had an exclusive jurisdiction to deal with service matters or with the problems that were to be dealt with in the framework of administrative law. However, the law courts in Pakistan did apply the established principles of administrative law, while undertaking judicial review of administrative action. The Superior courts even developed the principles of administrative law in their decisions. There were several principles of administrative law that had been evolved by the superior courts for the purpose of controlling the exercise of administrative power so that it may not lead to arbitrariness.

These principles were intended to provide safeguards to the citizens against the misuse of powers by the instrumentalities or agencies of the state. Among the principles, the

superior courts had developed; one of the most important was the rule of natural justice. The second significant principle was the imposition of a requirement of reasonableness and non-arbitrariness in every action, whether it be of Government or any of its agencies. The third point was the pivotal one, because its observance guaranteed the compliance of forecited principles. This principle laid down that all Governmental or its agencies acts should be with in the prescribed constitutional limits. Regarding this point, Chief Justice of India Mr. Bhagwati (Forward to Massey's, 1995: VIII) observed that "not only the State Government but also every agency and officer of the state is subject to the Constitutional limitation".

As long as the Government's minimum function in Pakistan remained the preservation of domestic order and the defence of national interests and integrity, the citizens were least concerned about the arbitrary exercise of administrative power. The new era of active public administration began when the Government decided to start social development projects. On the one hand the Government's move in this direction, made the public power a necessary tool for the achievement of developmental goals, on the other hand the old rights of citizens came under the edge of a new tool because they were subjected to different kinds of limitations. Thus the situation brought an ordinary citizen into a direct encounter with Government power holders. The provision of social justice, which had become a vibrant ingredient of state policy and the incredible increase in the incidence of encounter, necessitated the establishment of administrative tribunals.

4.2 Constitutional Protections Provided to the Public Servants

As stated earlier the Government of India Act 1935 was a comprehensive legal document, which was given to India by its colonial masters. The same document with some modifications and adaptation was adopted as Provisional Constitution of Pakistan. It served the country from 1947 to 1956. The Act had 321 sections covering almost all the aspects of administrative and social sectors. Some important terms and conditions of service of employees in civil service of the State were provided for and guaranteed in the Act of 1935 (Rehman, 1996: 397).

The following constitutional protections were extended to the civil servants in Pakistan (Government of India Act, 1947, Sec-240):

1/ any person serving in the affairs of the federation appointed by the Secretary of State for India or the Secretary of State in Council, would not be dismissed by any authority subordinate to the Governor General

2/ any such person serving in the affairs of a Province would not be dismissed from the service by any authority subordinate to the Governor of a Province.

3/ any civil servant, not falling in the above categories, would not be dismissed from service by any authority subordinate to one by which he was appointed.

4/ Any civil servant as aforesaid would not be dismissed or reduced in rank until he was given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. However, this protection was not extended to the persons dismissed or reduced in rank on the ground of conduct leading to their conviction on a criminal charge.

On 7th March 1949, the Constituent Assembly of Pakistan took the first step towards the framing of a constitution when it passed a resolution, popularly known as the "Objectives Resolution". The resolution was moved by Liaqat Ali Khan, here are some salient features of the objectives resolution:

- Whereas sovereignty over the entire universe belongs to God Almighty alone and the authority which He has delegated to the State of Pakistan through its people for being exercise within the limits prescribed by Him is a sacred trust;
- This Constituent Assembly resolves to frame a constitution for the sovereign independent state of Pakistan;
- Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed,
- Wherein shall be guaranteed fundamental rights including equality of status, of opportunity and before law, social, economic and political justice and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality;

- Wherein adequate provisions shall be made to safe guard the legitimate interests of minorities and backward and depressed classes;
- Wherein the independence of judiciary shall be fully secured.

After presenting the resolution, Liaqat Ali Khan addressed the Assembly in which some important points of the resolution were further elaborated. Few important extracts from his speech are reproduced hereunder" (Mahmood, 1975: 16-21):

"Sir, I consider this to be a most important occasion in the life of this country, next in importance only to the achievement of independence, because by achieving independence we only won an opportunity of building up a country and its polity in accordance with our ideals. I would like to remind the House that the father of the Nation, Quaid-e-Azam, gave expression to his feelings on this matter on many occasions and his views were endorsed by the nation in unmistakable terms. Pakistan was founded because the Muslims of this sub-continent wanted to build up their lives in accordance with the teaching and traditions of Islam because they wanted to demonstrate to the world that Islam provides a panacea to the many diseases which have crept into the life of humanity today. It is universally recognized that the source of these evils is that humanity has not been able to keep pace with its material developments

Sir, you would notice that the preamble of the resolution deals with a frank and unequivocal recognition of the fact that all authority must be subservient to God. It is quite true that this is in direct contradiction to the Machiavellian ideas regarding a polity where spiritual and ethical values should play no part in the governance of the people and, therefore, it is also perhaps a little out of fashion to remind ourselves of the fact that the State should be an instrument of beneficence and not of evil.

All authority is a sacred trust, entrusted to us by God for the purpose of being exercised in the service of man, so that it does not become an agency for tyranny or selfishness. For this reason it has been made clear in the resolution that the State shall exercise its power and authority through the chosen representatives of the people.

You would notice, Sir, that the Objectives Resolution lays emphasis on the principles of democracy, freedom, equality, tolerance and social justice.

Mr. President, it has become fashionable to guarantee certain fundamental rights but I assure you that it is not our intention to give these rights with one hand and take them away with the other. We want to build up a truly liberal Government where the greatest amount of freedom will be given to all its members. Every one will be equal before the law, we believe in the equality of status and justice"

In 1950, Prime Minister Liaqat Ali Khan submitted the interim report of the Basic Principles Committee. The report laid the foundation of the future constitution and provided some guiding principles. The first Constitution was based on the recommendations of the committee, which provided certain protections to the people in services of Pakistan. Those were the following;

i) A member of the civil service should not be dismissed or removed from service by an authority subordinate to that by which he was appointed;

ii) No such person should be dismissed or removed or reduced in rank until he has been given reasonable opportunity of showing cause against the action proposed;

iii) The tenure and condition of the service of Government Servant should not be varied to his disadvantage during his term of office except when it becomes necessary to take action; and

iv) Every member of the civil service shall have the right to appeal against punishment and against altering or interpreting to his disadvantage any rules by which his conditions of service are regulated and also against the termination of his appointment otherwise than upon his reaching the age fixed for superannuation (Haq, Israrul 1983:388).

These recommendations were adopted by the Constituent Assembly in 1954 but the draft Constitution could not be promulgated. However these recommendations were endorsed and adopted by the new Constituent Assembly in 1955.

After nine years of struggle the 2nd Constituent Assembly of 1955, achieved the goal of framing Constitution for the sovereign independent state of Pakistan. The Constitution was prepared on the pattern of the interim constitution, as many provisions of the 1956 Constitution were copied from the Government of India Act, 1935 (Interim Constitution). The major departure from the pattern of interim constitution was the second part of a new constitution. Part II of the 1956 constitution dealt with Fundamental Rights. The text of interim Constitution i.e. the Act of 1935 did not contain a Bill of Rights, because the constitutional experts who drafted the Government of India Act 1935 were reluctant to incorporate such a Bill in the Act. The attention of the framers of 1956 constitution from the very beginning of their assignment in 1947 was engaged by the nature and content of Fundamental Rights.

The Constitution of 1956 laid great emphasis on fundamental rights. Article 4 of the constitution asserted that if any existing law or custom or usage having the force of law on constitution day was inconsistent with any provision of fundamental rights, it would be void to the extent of such inconsistency and similarly no authority in Pakistan whether the Federal Government or Federal Legislature, Provincial Government or Legislature or any local authority, was competent to make any law, regulation or any order which might

be repugnant to any of the provisions of the fundamental rights and if any such law, regulation or order was made, it would to the extent of repugnancy be void. Article 5 of the constitution provided equality before law (Constitution of 1956 Arts-4 and 5).

Mr. Brohi (1958: 309) while commenting on the constitutional provisions regarding the fundamental rights, observed, "These fundamental rights operate like a double edge sword. They not only destroy those portion of existing laws, which are in conflict with these rights but they operate also to render void any State action (whether in the legislative or executive field) which after the coming into force of the Constitution has the effect of taking away or abridging any of the fundamental rights".

The Constitution of 1956 provided double protection to the civil servants. In the first instance, all the provisions for the terms and conditions of service that were provided in the Government of India Act 1935, as mentioned above, were fully incorporated in the constitution (Arts 181, 182) and the 2nd protection was made available to the civil servants of Pakistan under the provisions of fundamental rights.

All the disputes arising from the administrative action or related with service matters, were in the jurisdiction of the ordinary law courts. Under Art 182 (3) (b) of the 1956 Constitution a right of appeal was also provided to a civil servant against the orders punishing him, altering or interpreting to his disadvantage any rule affecting his conditions of service, or terminating his employment otherwise than upon reaching the age fixed for superannuation. These constitutional protections were not available to the civil servants who were employed on temporary basis. The Superior Courts, however, extended some of the protections to the temporary civil servants particularly the requirement for reasonable opportunity of showing cause against proposed action. (Habib Khan v. The Federation of Pakistan, PLD 1954 Sindh 199; Federation of Pakistan v. Mrs. A.V. Isaacs, PLD 1956 SC (Pak) 431; Pakistan v. Golam Moinuddin Ahmed, PLD 1966 Dacca 570 (DB) and Federation of Pakistan v. Shamsul Huda, PLD 1957 Dacca 148)

On October 7, 1958 Martial Law was proclaimed in the country and on 10th of October 1958 the first Order of Military regime was issued, called the Laws (Continuance in Force) Order 1 of 1958. By virtue of which all the laws were continued in force and so did remain the laws for civil servants on the same terms and conditions with the exception of age of superannuation, under Article 6 of the Order (Chaudhary, ND: 284). Most of the constitutional guarantees enshrined in 1956 Constitution were incorporated in the 1962 Constitution. The fundamental rights of individuals were recognized in Articles, 2, 4 and 6. The provisions regarding dismissal or removal from service or reduction in rank were very much the same as were provided in 1956 Constitution. The new Constitution guaranteed reasonable opportunity of showing cause against the proposed action. Similarly the right of appeal was provided to a civil servant against the order punishing or formally censuring or such alteration or interpretation that has affected the terms and conditions of his service or his employment is terminated otherwise than upon reaching the age of superannuation. (Arts 177,178 of 1962 Constitution)

Under Art 179, as per previous practice, the temporary employees in civil service were kept outside the umbrella of constitutional protections. But the Superior courts of Pakistan, following their own precedents, extended some of the rights to such civil servants who were employed on temporary basis. (M.G. Hassan v. Government of Pakistan, PLD, 1970 Lahore 518)

The forecited provisions of the 1962 constitution regarding the services were more or less adopted and incorporated in the interim constitution of 1972 as well. However, the authority to retire a civil servant in the public interest on the completion of 25 years of civil service which was the prerogative of President and Governors of the provinces, it was extended to the "Competent Authority". (Art 220-222 of 1972 Interim Constitution) Before the promulgation of interim constitution in 1972, no such machinery existed in the country that could be exclusively responsible for the settlement of administrative disputes, particularly the problems of civil servants.

It was Art 216 of the interim constitution of 1972, whereby the Federal Legislature was empowered to establish one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of matters relating to the terms and conditions of persons in the service of Pakistan. There was also a clause in the same Article ousting the jurisdiction of all other law courts in the matters to which the jurisdiction of such Administrative Courts or Tribunals extended. Inspite of the great authority given to the Federal Legislature for the creation of such administrative tribunals, no law was passed under the interim constitution regarding the creation of such courts or tribunals and hence Article-216 was not put into effect. (1972 Constitution, Art 216)

4.3 Constitution of 1973

Since the day of independence till the promulgation of interim constitution in 1972, certain important terms and conditions of service of employees in the civil service of the State were provided and guaranteed in the Government of India Act, 1935 and in successive Constitutional instruments. The civil servants took full advantage of these rights and frequently moved the ordinary law courts especially the High Courts in the country for the redressal of their grievances.

After becoming the President, Mr. Z.A.Bhutto reiterated the fulfillment of his pledge, which he had made during election campaign for extensive administrative reforms to cut down the powers and privileges of the bureaucrats. For this purpose a high-powered committee was appointed in 1972, chaired by Khursheed Hassan Mir, Federal Minister without Portfolio. The members of the committee were Mr Ghulam Mustafa Jatoi, Minister for Political affairs and Communications, Mr Justice Faizullah Khan Kundi, Chairman Federal Public Service Commission and Mr Vaqar Ahmed, Federal Secretary, Establishment Division (The Administrative Reforms Cell, Establishment Division report, March 1975: 9).

The Committee submitted a report with considerable number of recommendations, but here only two amongst these are selected for discussion because of their relevance with the present study. Mr. Khan (2000:255) has pointed them out;

1/ Constitutional safeguards and guarantees were to be abolished and terms and conditions of service of the civil servants were to be brought under the legislatures' control through ordinary legislation and

2/ Administrative Tribunals were to be set up as forums where Government officials could get their grievances redressed.

Most of the recommendations, including the aforementioned two, were accepted by the Government and subsequently they were incorporated in the constitution of 1973. All the constitutional protections that were guaranteed to the civil servants against arbitrary and wrongful dismissal or removal from service or reduction in rank, in previous constitutions were with drawn. No provision regarding such guarantees to the civil servant was included in the whole text of the constitution. Instead of giving constitutional protections to the civil servants, the power of determining the terms and conditions of civil servants was delegated to the parliament and provincial assemblies.

In the light of the above recommendations two completely new provisions were inserted in the Constitution of 1973. The first of these was Article 212, which permitted the appropriate legislature to establish administrative tribunals with exclusive jurisdiction in certain matters, explained in the said article. The second was Article 240 where by the terms and conditions of persons in the service of Pakistan were to be determined by the Act of Parliament and the Provincial Assemblies and similarly the safeguards were, also, to be provided by the Acts of forecited entities.

Prior to adoption of 1973 Constitution, the Constitutional protections regarding the terms and conditions of civil servants were provided by the Constitutional instruments, as mentioned earlier but the present Constitution made a clear departure from all the previous constitutions. Under the provision of new Constitution, terms and conditions of

services of persons in the service of Pakistan were declared to be controlled by the Parliament and Provincial Assemblies.

Article 240 of 1973 Constitution deals with the service matters. It lays down as such: "Subject to the Constitution, the appointments to and the conditions of service of persons in the service of Pakistan shall be determined:

a) In the case of the services of the Federation, posts in connection with the affairs of the Federation and All-Pakistan Services, by or under the Act of Majlis-e-Shoora (Parliament): and

b) In the case of the services of a Province and posts in connection with the affairs of a Province, by or under the Act of Provincial Assemblies.

Explanation: - In this Article "All-Pakistan Service" means a service common to the Federation and the Provinces, which was in existence immediately before the commencing day or which may be created by Act of Parliament".

The words of the said article made it quite clear that if a person is in the service of Federation, his appointment to the service and his terms and conditions of service has to be regulated by the Act of Parliament and similarly if a person is serving in connection with the affairs of a Province, his appointment to the service and the terms and conditions of his service shall be regulated by the Act of Provincial Assembly.

Justice Munir, (1996:1348) while elaborating the forecited Article added that any terms and conditions of service which are provided in this law shall have binding force both on the Government concerned and the government servant. Any infringement of the terms and conditions of service is open to challenge before the administrative tribunals, set up under article 212 (1) (a) of the 1973, Constitution.

Alongside the Constitutional provision for enactment of separate laws for the civil servants, the Constitution of Pakistan, also, vested certain rights in the public servant as against the state and their employer. Article 4 of the 1973 Constitution, which corresponds to Article 2 of 1962 Constitution, furnishes every citizen of Pakistan

wherever he may be within Pakistan with a Constitutional guarantee that he will not be called upon to do something or refrain from doing anything unless there is a valid law in existence to that effect nor any action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. This Article provides the guarantee to its citizens that rights shall not be invaded upon except by law.

Article 25 of the 1973 Constitution goes a step further in providing the equality before law. Justice Munir (1996: 195,403) elaborates that the fundamental principle involved in the equality of all citizens before law is that every law must have universal application for all citizens. The essence of the protection guaranteed under this Article is that State action must not be arbitrary but must be based on some valid principle.

The Constitution of 1973 provides double benefits to the civil servants and the private employees against their employer, first they enjoy the protection under Part II of the Constitution that deals with Fundamental Rights and secondly they get relief under the special laws related to them. This situation made it practically impossible for the courts of law to cope with such a considerable increased number of suits in the field of public administration. Even if all the law courts of the country, including Superior Courts, are put to the task of disposing these cases, they will not be able to dispose them off in a reasonable time. Administrative Tribunals are therefore, best suited to adjudicate in such cases. According to Basu (1990: 360), "Administrative adjudication brings to the individual citizen cheap and timely justice. The judicial procedure, in the ordinary courts, is costly, dilatory and cumbersome. It is beyond the means and understanding of the common man in a poor country where poverty and ignorance are predominant".

4.4 Pleasure of the Crown and the Civil Servant

Soon after independence the Government of India Act, 1935, governed the services of Pakistan; virtually we inherited a colonial service structure where, an employee of the Government was on the pleasure of the Crown or the Governor-General. The award of

salary for service or the remuneration for labour was not considered to be a right but a bounty of the Crown. This concept was completely different from the injunctions of Islam as well as from the principles of basic human rights. Even than the colonial service structure was adopted with all its merits, demerits and deep-rooted evils. For quite a long time, no steps were taken to reform the service structure so as to bring it in conformity with Islamic injunctions and the principles of Fundamental Human Rights. Therefore, the pleasure of either the Crown or the President is still in practice.

Prior to the promulgation of a Constitution in 1973, the services of Pakistan were regulated under Article 240 (1) of the Government of India Act, 1935. The article says, " Except as expressly provided by this Act, every person who is a member of civil service of the Crown in Pakistan, holds office during His Majesty's pleasure".

In 1956, when Pakistan received its first permanent Constitution, Article 180 of the Constitution was embodied with the same concept of His Majesty's pleasure. It was as follow: Article 180 (a) "Every person who is a member of defence service or of a civil service of the Federation, or of an All Pakistan Service. or holds any post connected with defence, or a civil post in connection with the affairs of the Federation, shall hold office during the pleasure of the President, (b) a person connected with the affairs, of a Province shall hold office during the pleasure of Governor" (Constitution of 1956, Art 180).

Pakistan introduced its second Constitution in 1962, regarding the services; the old material was reproduced in Article 176. Clause (a) of Article 176 says, "a person who is a member of All Pakistan service, or any of the defence service of Pakistan or of a civil service of the Centre, or who holds a post connected with defence or a civil post in connection with the affairs of the Centre, shall hold office during the pleasure of the President". Clause (b) a person connected with the affairs of the Province shall hold office during the pleasure of Governor" (Constitution of 1962, Art 176).

The Constitution of 1973 is unique in this respect that it has not contained the prerogatives of pleasure, yet this pleasure is still available in the Civil Servant Act, 1973.

Section 4 of the said Act while explaining the tenure of office of civil servant provides that "Every civil servant shall hold office during the pleasure of the President".

In the Provincial legislation, the Civil Servant Acts of Sindh and Baluchistan vide Section 4 of each Act; it is provided that every person in civil service of the Province shall hold office during the pleasure of the Government. In the NWFP Civil Servant Act the pleasure of the Governor is mentioned. The Punjab Civil Servant Act, surprisingly, does not provide such provision, whereby the Provincial civil servant holds office during the pleasure of Government or Governor.

The provision of Pleasure is, no doubt, voilative of the Articles 4 and 8 of the Constitution of 1973. As Mr. Mehboob (2000: 222) writes, "it abridges the right of a servant to serve freely according to law of the land with sense of security, dignity and honor". Articles 4 and 8 of the Constitution read as under: Article 4 (1) "To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every person for the time being within Pakistan." Clause 2 (a) of the same Article provides that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. Clause 2 (c) further says that no person shall be compelled to do that which the law does not require him to do".

Article 8 (1) – "Any law, or any custom or usage having the force of law, in so far as it Is inconsistent with the rights conferred by this Chapter, (Fundamental Rights), shall to the extent of such inconsistency, be void. (2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void". (Constitution of 1973, Arts 4 and 8)

The fore cited Federal and Provincial civil service statutes, to the extent of section 4, are inconsistent with the fundamental rights guaranteed in the Constitution of 1973. The question then arises, keeping in view the inconsistency of the said provision, why this provision of pleasure has not been repealed from the Statute books? Justice Munir (1996:

229) answers the question, he says, " it will not be correct to say that the laws in conflict with the Constitution became void ab initio or were struck off or effaced from the Statute books or ceased to be in force with coming into force of the Constitution. They became void in the sense that in the decision of a particular case which brought them into conflict with a fundamental right, they were to be ignored and disregarded."

The Honourable Judges of the Supreme Court of Pakistan made similar comments in the case of Abul Ala Maudoodi Vs Government of West Pakistan. It was held that such provisions, of any Statute, are not a nullity, though by reason of their repugnancy with the Constitution they remain unenforceable (PLD 1964, SC 673). So the Courts do not annul or repeal a Statute if it finds it to be inconsistent with the Constitutional provisions, it simply refuses to recognize such statutory provisions, says Munir, J (op cite, 229) and the judgment is, always, against the party who is relying upon such Statutory provision.

Some forty years ago A. R. Cornelius, Chief Justice had pointed out the significance of judicial review. He said "it is practically universal in all civilized countries to allow judicial review when fault is found with the administrative action" (1964: 8). In Pakistan, the High Courts did have the Constitutional jurisdiction or writ jurisdiction e.g. the Government of India Act, 1935 (Amended in 1954) under Article 223-A the High Courts were empowered to issue writs, in the Constitution of Islamic Republic of Pakistan, 1956, Article 170 the same pattern was adopted as was employed in the Act of 1935. In the Constitution of 1962, the framers of the Constitution conferred this extraordinary jurisdiction under its Article 98.Realizing the necessity and importance of judicial review the Government of Pakistan, once again, decorated the Constitution of 1973 with a provision, in its Article 199.

Article 199 of the present Constitution provides as follow:
Art 199 (I) Subject to the constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law;
(1) (c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or

performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II.

Despite the fact that Article 212 clause (2) of the existing Constitution has ousted the jurisdiction of High Courts but in a case of I. A. Sherwani and others Vs Government of Pakistan the Supreme Court observed that a combined reading of Art 212 (2) and Section 4 of the Service Tribunal Act, 1973 will make it abundantly clear that the jurisdiction of the courts including Constitutional jurisdiction of the High Courts is excluded only in respect of the cases in which the Service Tribunal has the jurisdiction under Section 4 (1). It must, therefore, follow that if the Service Tribunal does not have jurisdiction to adjudicate upon a particular type of grievance, the jurisdiction of High Court remains intact (I.A Sherwani v. Government of Pakistan, SCMR 1991: 1041).

In another case the High Court of Lahore held that it is a wrong notion to consider that bar of jurisdiction under article 212 (2) is absolute and jurisdiction of all courts including High Courts is totally ousted (Muhammad Azhar v. General Manager (operation) Power WAPDA, PLD 1990 Lahore, 352). Lahore High Court, while commenting upon the jurisdiction of High Court, in cases of civil servants, maintained that "the High Court would come to the aid of victims of administrative tyranny, to scrutinize the matter and in a deserving case was prone to give relief to the oppressed and victimized person" (PLC 1992 CS 117).

4.5 Special Laws for Civil Servants

Pakistan has a sizeable number of civil servants, not because the government is the biggest provider of jobs to its people but, in fact without having a good size of civil servants the dream of a Welfare State could not be realized, the dream that the founder of Pakistan Quaid-e-Azam Muhammad Ali Jinnah saw and shared it with the people in his speech of 1947 to the first Constituent Assembly and the same was repeated by Liaqat Ali Khan while presenting the "Objectives Resolution" in the Constituent Assembly.

Civil services play a crucial role in the administration of a country; particularly in a state like Pakistan it has to play a more important role because it is the duty of civil servants to execute the policies and the programmes of government. Civil Servants are, therefore, expected to be effective, independent, dynamic and committed but it is unfortunate that the image that was portrayed in the minds of general masses has gone down. Today the general impression is that civil servants have become, political, usable and pliable.

Article 240 of the Constitution required the competent legislature to make special laws for the regulation of terms and conditions of a civil servant and to introduce a new service structure in the country. This requirement was fulfill by the introduction of an ordinance, called the Civil Servants Ordinance, (XIV) of 1973. Later on the same was replaced by an Act of Parliament, without any change. The new enactment was titled as the "Civil Servants Act, 1973".

Prior to the adaptation of Constitution of 1973, the protections regarding the terms and conditions of service were provided by the Constitution but under the present constitutional scenario the terms and conditions of services are governed by ordinary law.
The preamble of the Civil Servant Act, 1973 is as under.
"Whereas it is expedient to regulate by law, the appointment of persons to, and the terms and conditions of service of persons in the service of Pakistan, and to provide for matters connected therewith or ancillary thereto.
It is hereby enacted as follows:
Section-1 of the Act says, "This Act may be called the Civil Servants Act, 1973".

1- It applies to all civil servants wherever they may be.

2- It shall come into force at once.

The Act consists of the legal provisions for the appointment of persons in the service of Pakistan and for the terms and conditions of their service. The Act is not an exhaustive legislation because it does not repeal any legislative measure provided the procedure so adopted, prior to the enactment of this Act, is not inconsistent to it. This tendency shows that its provisions shall succeed whenever there is any inconsistency between the

provisions of this Act and those of earlier enactment, if any former legislative measure is not inconsistent with any of its provisions or as such is not covered by the present Act, such measures shall continue to have legal effect. Section 25 (2) of the Civil Servants Act provides that any such rules, regulations or orders in respect of the terms and conditions of service of civil servants duly made or issued by a competent authority, which were in effect before the commencement of this Act shall, in so far as such rules, orders or instructions are not inconsistent with the provisions of this Act, be decreed to be rules made under this Act.

A brief summary of the Act is as under;

Chapter-2 of the Act (From Section 3-22) deals with terms and conditions of service of civil servants. Section-3, clarifies in its Sub-section-1 that the terms and conditions of service of a civil servant shall be as provided in this Act and the rules. But the situation, in majority cases, was not that as enunciated by the Act. The High Courts in different times took serious note of the practice that the public administrators in certain cases alter the terms and conditions of service according to their own wishes. In this regard a case before the Peshawar High Court is worth mentioning. Dr Aslam Mehmood was appointed as Associate Professor against a permanent vacancy, in the University of Peshawar. Subsequently in super session of the previous order, the University Authority issued another order making the appointment against a temporary vacancy. The order was questioned in the Hugh Court, where it was declared as null and void (PLJ 1980 Peshawar 29). Another case of the same nature is reported in PLD 1980 Lahore 337.

Consequent upon the observations of Superior Courts, in 1994, Sub-section 2 was added to Sec-3, which provided somewhat protection from the abuse of law or misinterpretation of law. It says that the terms and conditions of service of any person to whom this Act applies shall not be varied to his disadvantage.

This law i.e. Civil Servants Act, 1973 broadly lays down the terms and conditions of service of the Federal Civil Servants, e.g. Section-4 deals with tenure of service; Sec-5 explains the mode of appointments to all Pakistan services. Sec-6 speaks of probation

period, which starts on initial appointment on regular basis. Sec-7 says that on satisfactory completion of probation period, the person so appointed becomes eligible for confirmation. Sec-8 determines the seniority of civil servants. Sec-9 lays down some guiding principles for promotion. Sec-10 prescribes the conditions for posting and transfer. Sec-11 gives a detail of the circumstances in which the service of a civil servant may be terminated without notice. Sec-12 discusses the conditions of reversion to lower post, when a person is appointed on adhoc, temporary or officiating basis. Sec-12A, this section deals with the removal of certain civil servants who were appointed or promoted during the period from 1st January 1972 to the 1st day of July 1977. This section was included in the Act by Civil Servants (Amendment) Ordinance, 1980. Sec-13 prescribes the age limit for retirement, which is the sixtieth year of his age. Sec-14 explains the circumstances where a retired civil servant could be re-employed in the Government service. Sec-15 under this section the conduct of a civil servant is to be regulated by rules made or instructions issued by the Government or a prescribed authority. Sec-16 enunciates that a civil servant is to be liable to the prescribed disciplinary action and penalties in accordance with the prescribed procedure. The prescribed procedure has been laid down in the Government Servants (Efficiency and Discipline) Rules, 1973. Sec-17 declares the entitlement of a person to Government salary, when he is appointed in accordance with the rules. According to Sec-18 a civil servant is entitle to leave, in a manner prescribed in the Leave Rules. Sections-19, 20 and 21 deal with the issues of pension and gratuity, provident fund, and benevolent fund etc respectively.

Section-22 of the Act provides the right of appeal, representation or review to the aggrieved civil servant against an order relating to the terms and conditions of his service. It also fixes the time limit for such appeal, representation or review, which is thirty days from the date of receiving the order.

Being an Act of Parliament this is applicable only to the servants of the Federal Government. The Act is a composite document that encompasses almost all the aspects of service structure.

In furtherance of the Constitutional directives under Art-240, all the four Provinces enacted their own laws for the Provincial civil servants. The Provincial Governments while enacting their statutes followed the Federal Statute, with no major change. The Government of NWFP was the first, which promulgated an ordinance on 22nd Oct 1973, it came into force immediately. This was called the NWFP Civil Servants Ordinance, 1973 and later on an Act of NWFP Provincial Assembly, known as the NWFP Civil Servant Act, 1973, replaced it. It was made effective from 12th of November 1973.

In the Province of Sindh, the initiative was taken by promulgating an Ordinance for the regulation of terms and conditions of civil servants, connected with the provincial affairs. The ordinance was titled as Sindh Civil Servants Ordinance 1973 that was subsequently repealed by an Act of Sindh Provincial Assembly, called the Sindh Civil Servants Act 1973. It became effective from 5th of December 1973.

The Government of Balochistan, too, in line with the other provinces, complied with the Constitutional directives and promulgated an Ordinance on 15th of November 1973. An Act of Balochistan Provincial Assembly, called the Balochistan Civil Servants Act, 1974, later on repealed this Ordinance. It came into force on 12th March 1974.

In the Province of Punjab, the Punjab Civil Servants Ordinance, 1974 was promulgated and it came into effect from 6th March 1974. After two months of its promulgation the ordinance was replaced by an Act of Provincial Assembly of Punjab, called the Punjab Civil Servants Act, 1974. It was enforced from 4th of June 1974.

Proper implementation of laws and rules, only, can make certain the achievement of desired objectives. The last section of the Civil Servants Act, 1973 i.e. Sec 25, authorized the President or in his behalf any person authorized by him, to make such rules as appear to him to be necessary or expedient for carrying out the purposes of this Act. In exercise of the powers conferred by Sec 25 of the Act, the President made some rules, called the 'Government Servants (Efficiency & Discipline) Rules, 1973, which came into force on

18th of August, 1973. These rules are applicable to the civil servants, serving in the affairs of the Federation of Pakistan.

The Government Servants (Efficiency and Discipline) Rules, 1973 regulates the conduct of a civil servant as enunciated by the Civil Servants Act in sections 15 and 16. These Rules provide the grounds on which a civil servant may be penalized; Rule-3 gives a detail of these grounds. Rule-4 explains the kinds of minor and major penalties, which are to be awarded after the establishment of any ground, prescribed in previous Rule. Rule-5 lays down the procedure for inquiry and Rule 6 provides the procedure that is to be observed by the Inquiry Officer or Inquiry Committee. Rule-7 deals with the powers of Inquiry Officer and Inquiry Committee. Rule-8 says that the procedure of inquiry under Rule-5 shall not be applied in cases where the accused is dismissed from service or reduced in rank, on the ground of conduct, which has led to a sentence of fine or of imprisonment. Rule-9 explains the procedure of inquiry against officers lent to Provincial Government or to a Local Authority. Rule-10 is about the right of appeal, which is already given under Section- 22 of the Civil Servants Act.

The Provincial Civil Servants Acts, also, had identical provisions authorizing their respective Governors/ Governments to make such rules, as were necessary for making the Service statutes effective. So following the federal Government's move, all the Provinces made rules for efficiency and discipline on the pattern of Federal Rules, which were/are applicable to the persons connected with the Provincial affairs.

The Governor of NWFP, in the exercise of powers conferred upon him by Sec-25 of the NWFP Civil Servants Act, 1973 made the rules called NWFP Government Servants (Efficiency & Discipline) Rules, 1973. These rules are applicable to all civil servants of the Province regardless of their status and nature of service, permanent and temporary.

The Government of Sindh, under Sec-26 of the Sindh Civil Servants Act, 1973 made rules, called the Sindh Civil Servants (Efficiency & Discipline) Rules, 1973.

Punjab Civil Servants (Efficiency & Discipline) Rules, 1975 were issued by the Governor of Punjab on 13th of March 1975 in the exercise of powers conferred by Sec-26 of the Punjab Civil Servants Act, 1974.

In 1983, the Government of Balochistan framed rules under Sec-25 of the Balochistan Civil Servants Act, 1974, called the Balochistan Civil Servants (Efficiency & discipline) rules, 1983. They came into force on 5th May 1983.

In 1977, the President in exercise of the powers conferred by Section-25 of the Civil Servants Act, 1973, made some other rules for the civil servants, called the Civil Servants (Appeal) Rules, 1977. These Rules prescribe the procedure of appeal for Federal civil servant. As per previous practice, all the Provinces introduced their own Rules of appeals for the Provincial civil servants.

4.6 The Removal from Service (Special Powers) Ordinance, 2000

The preamble of the Ordinance says that in view of the prevailing circumstances it is expedient and necessary and in the public interest and further for good governance to provide for measure, inter alia, dismissal, removal etc of certain persons from Government service and corporation service as hereinafter stated;

Whereas it is necessary to provide for speedy disposal of such cases and for matters connected therewith or ancillary thereto;

And whereas the President is satisfied that circumstances exist which render it necessary to take immediate action, the President is pleased to promulgate the Ordinance, called 'The Removal from Service (Special Powers) Ordinance, 2000.

The above-mentioned Ordinance is a repetition of the Efficiency and Discipline Rules, 1973 with some modifications. For example, in Rule-2 of the E & D Rules, authority means 'the President' or a person authorized by him whereas in the present Ordinance,

Section 2, competent authority stands for the 'Chief Executive' or a person authorized by him. Section-3 of the Ordinance enunciates the grounds for penalty, they are the same as are provided in the Rule-3 of 1973 Rules with exception of one addition that is, if a person is found to have been appointed or promoted on extraneous grounds in violation of law and the relevant rules may be compulsorily retire from service or reduce him to lower post. In this Section, another Sub-section is included, which provides that the dismissal or removal from service or premature retirement from service under Sub-section-1 shall not absolve the person concerned from liability to any punishment to which he may be liable for an offence under any law committed by him while in service.
Rule-7 of E & D Rules is reproduced in Section-6 of the present Ordinance, with the deletion of Sub-rule 2 of Rule-7. Rule-7 (2) of the Rules 1973 enunciates that the proceedings under these rules shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Pakistan Penal Code, 1860.

According to the Ordinance of 2000 the inquiry proceedings shall not be deemed to be judicial proceeding. The procedure to be followed by the Inquiry Officer or the Committee is totally different from that provided in Rule-6 of the 1973 Rules. There, an elaborated procedure is fixed for Inquiry Officer or Committee, but in the present Ordinance, under Section-7 the procedure for inquiry is provided in these words, "The Inquiry Committee shall, subject to any rules made under this Ordinance, have power to regulate its own procedure, including the fixing of place and time of its sitting and deciding whether to sit in public or in private, and in the case of corporate Committee, to act notwithstanding the temporary absence of any of its members".

Section-9 of the Ordinance deals with the time limit of representation or review. It provides that the aggrieved person may prefer a representation to the Chief Executive or such officer authorized by him, within fifteen days from the date of communication of the order. In Rule 5 (4) of the Civil Servants (Appeal) Rules, 1973, this period is Thirty days.

4.7 Ordinance, 2000: Expectations and Apprehensions

The Removal from Service (Special Powers) Ordinance, 2000, as amended from time to time, was promulgated with the main object of good governance and for speedy disposal of disciplinary matters. The objects may be that as mentioned in the preamble of the Ordinance, nevertheless the fraternity of civil servants is in a doldrums situation. On the one hand, if, they expect positive results from the Ordinance, simultaneously they do fear the misuse of these rules. There are some points in the present piece of legislation that create a sense of uncertainty and insecurity amongst the people who are to be governed by this legal instrument. Few examples are mentioned bellow.

Section-3 of the Ordinance provides that where, in the opinion of the competent authority, a person in Government or Corporation service is:--

(a) Inefficient, or has ceased to efficient for any reason;

(b) Guilty of misconduct; or

(c) Corrupt, or may reasonably be considered as corrupt.

After inquiry by the Inquiry Officer / Inquiry Committee appointed under Section 5, the competent authority may by order in the official gazette dismiss or remove such person from service, compulsorily retire him from service or reduce him to lower post or pay scale, or impose one or more minor penalties as prescribed in the Government Servants (Efficiency and Discipline) Rules 1973. It is provided that no such action shall be taken except after informing him of the reasons thereof and giving him an opportunity to show cause within 15 days as to why such action should not be taken against him. Under Section 15 of the Ordinance, the Federal Government may, by notification in the official gazette, make rules for carrying out the purposes of this Ordinance but the Federal Government has not yet made the said rules.

As the rules envisaged under Section-15 of the Ordinance have not been made by the Federal Government, different Government departments / corporations are applying the provisions of the Ordinance in different manner according to their own sweet will. Many

lawyers and some government servant, informed the researcher that in some offices the Ordinance is being used to victimize the officials / officers who are somehow not in good books of the officers who control the administrative affairs.

According to the observations of Ahmed (2002: 41) by introducing amendment in the Civil Servants Act, 1973 and the Ordinance of 2000, it has been provided that no suit, prosecution or other legal proceedings shall be taken against the competent authority or an officer or authority authorized by it for anything which is in good faith done or intended to be done under the Act, the Ordinance or the rules, instructions or directions made or issued thereunder. It has further been provided that no order made or proceedings takes shall be called in question in any Court and no injunction shall be granted by any Court in respect of any decision made, or proceedings takes in pursuance of any powers conferred by or under the Civil Servants Act, 1973 or the rules made thereunder. In this way the "competent authority" has been given unlimited and unrestrained powers to proceed against the persons in Government or corporation service. The only remedy that is available to aggrieved employees at departmental level is a representation / review under Section-9 of the Ordinance. Appeal to the Federal Service Tribunal is the last recourse.

The right of representation or review under Section-9 is available against orders passed by competent authority under Section-3 of the Ordinance and no remedy is available against order of suspension under Section-4 of the Ordinance. It is pertinent to point out that jurisdiction of the High Court under Article 199 of the Constitution would be available to suspend or set aside order which is unfair, unjust as well as contrary to the principles of natural justice. In a similar case of suspension under Section-4 of the Ordinance, recently, the Supreme Court has granted leave to appeal to examine the question (2001 SCMR 1945).

While giving such unconditional powers to the competent authority, no parallel checks against the illegal exercise of powers have been provided by the statute. Nor any safeguards have been provided to the accused persons against mala fide actions. In a

situation where an accused feels that the action taken against him is not based on good intention, he cannot be satisfied with the departmental representation as no instant relief in the form of suspension of impugned orders is available to them. As far the appeal in the Federal Services Tribunal is concerned, it takes years in conclusion.

In some cases the competent authority issues the show cause notices and orders are passed just on the basis of replies submitted by the accused to such show cause notices, without following the proper procedure. In some cases, even, charge sheet, accompanied by statement of allegations, is not issued. On certain occasions the appointment of Inquiry Officer / Inquiry Committee is not made in conformity with the statutory provisions and quite often the reasonable opportunity of hearing to such person as envisaged in Section-5 of the Ordinance is not provided. When the competent authority passes any order without observing the procedure laid down by the Ordinance, the order passed by such authority cannot resist judicial scrutiny. The Superior Courts of Pakistan have already set aside the punishments where the proceedings were conducted in contravention of the principles and procedure laid down to regulate the inquiry proceedings.

While criticizing the prevailing practice in the public organizations, Ahmed (2002: 42) observes that under Section-9 of the Ordinance an aggrieved person is required to submit representation / review within 15 days after the order is passed by the competent authority under Section 3. The Establishment Division taking notice of non-observance of the prescribed procedure issued Office Memorandum No. 5 / 4 / 94 /Rev / D-3 dated 19.9.2001 directing that certain essential documents must be sent with the summary of appeal / representations submitted under Section-9 of the Ordinance. The documents include (i) charge sheet, (ii) reply of the accused to the charge sheet, (iii) inquiry report, (iv) show cause notice and (v) reply of the accused to the show cause notice.

In a situation, as stated above, where the proceedings are commenced with the issuance of a show cause notice and order is passed by the competent authority on the basis of reply of the accused to the show cause notice, there will be no charge sheet, no reply of

the accused to the charge sheet and no inquiry report. It is to be noted that the issuance of show cause notice comes at the fourth stage after charge sheet, reply to charge sheet and inquiry report which steps are to be taken prior to the issuance of show cause notice but, as stated above, the proceedings under the Ordinance are started in some department / corporations with the issuance of show cause notice which is not lawful.

Upon the complaints of civil servants in the appellate forums, the observations of the Superior Courts and the substantial reversal of orders passed by the competent authority on the basis of such proceeding, where the proceedings were conducted in violation of the principles and procedure laid down to regulate the inquiry proceedings, the Establishment Division issued another Office Memorandum No. 13 / 2 / 2000-D-2 dated 21.9.2001 explaining the procedure to be followed while taking action under the Ordinance.

The procedure as laid down in the Office Memorandum is: -

(1) When it has come to the notice of competent authority that a person has ceased to be efficient or is involved in misconduct or corruption etc., warranting action under Section 3(1) of the Ordinance, the competent authority shall take a decision and accord its approval to the initiation of proceedings if in its opinion a case is made out against the accused.

(2) Where the competent authority decides to hold an inquiry, formal order of appointment of Inquiry Officer / Inquiry Committee shall be issued. In that case, the prescribed procedure of inquiry as laid down in Sub-section (1) (2) and (3) of Section 5 shall be followed.

(3) Formal order of inquiry containing charges / statement of allegations shall be framed by the competent authority and communicated to the accused by the Inquiry Officer / Inquiry Committee.

(4) The Inquiry Officer / Inquiry Committee shall require the accused to put in written defense within the prescribed period.

(5) The Inquiry Officer / Inquiry Committee shall ensure that the procedure laid down in Section-5 of the Ordinance is strictly adhered to; the statements of the witnesses are recorded on oath in presence of the accused; the accused is allowed to cross-examine the witnesses produced against him and that the findings and recommendations of the Inquiry Officer / Inquiry Committee are recorded after due analysis and appreciation of the evidence on record.

(6) If, on receipt of inquiry report, the competent authority is of considered opinion that a penalty prescribed under Section-3(1) of the Ordinance is to be imposed upon the accused, he will issue a show cause notice along with copy of inquiry report to the accused informing him of the action proposed to be taken against him and the grounds of such action. On receipt of reply of the accused to the show cause notice, the competent authority may pass such order, as it may deem proper in accordance with the provisions of the Ordinance. The competent authority will, of course, be legally bound to give an opportunity of hearing to the accused before inflicting any punishment under the Ordinance as it is an established principle of law and equity that no one can be condemned unheard.

As stated earlier that show cause notice is to be issued by the competent authority after the termination of inquiry proceedings and submission of inquiry report by the Inquiry Officer / Inquiry Committee. But as opposed to the normal procedure the action by the competent authority under the Ordinance is initiated by issuance of show cause notice. Such hurried and unwise actions are against the spirit and object of the Ordinance. On the one hand, such unlawful action creates insecurity and harassment amongst the persons in Government / corporation service and resultantly the office work suffers and, on the other hand, such actions taken in violation of principles and procedure laid down by the law cannot survive judicial scrutiny and are struck down causing heavy loss to public exchequer in the shape of wastage of time and spending huge money as litigation

charges. If the public administrators who are responsible for initiation of proceedings under the Ordinance display incompetence in not following the prescribed procedure, they are also covered by the term "inefficient" used in Section-3(1) of the Ordinance, and are liable for action under the same provisions of law. The powers vested in the "competent authority" under the ordinance are no doubt, very vast and impose equally high duty on them to exercise such powers with due prudence, care and good conscience. They have also to ensure that such powers are not misused against persons who are disliked for some extraneous considerations.

It has also been noticed that in some cases the matters which had already been inquired into and closed by the respective department or the accused was prosecuted in the Court of competent jurisdiction and acquitted of the charges years ago, have again been reopened and proceedings initiated against the accused on the same charges under the Ordinance. Such proceedings initiated against the accused on the same charges under the Ordinance, amount to double jeopardy and are against the protection given by Article 13 of the Constitution which provides that no person shall be prosecuted or punished for the same offence more than once. The matter decided and closed under the then prevailing law been given retrospective effect. In order to charge a person to be "corrupt or may reasonably be considered as corrupt", the requirement of law as laid down in Section 3 (1) (iii) of the Ordinance is that "he has a persistent reputation of being corrupt". It has come to notice that in certain cases the show cause notice is issued and proceedings under the Ordinance are initiated on the charge of corruption where there is only one incident of alleged corruption against the accused. The object of legislation is to charge a person for corruption under the Ordinance if he has persistent reputation of being corrupt; otherwise the proceedings can be taken under the normal law. Such hasty and ill advised actions are more against the spirit of the Ordinance than in compliance with the Ordinance or for the achievement of the objects of the Ordinance.

The purpose of framing these rules was to bring in conformity the functional and behavioral attitude of civil servant with the norms of Constitution and Statutes. The first object of the above-mentioned rules was to regulate the departmental action against the

civil servants of Federation and the Provinces in respect of lapses and irregularities in the performance of their duties. The second object was to envisage the manner in which they should generally conduct themselves. Third, as a routine practice, in the Government departments, inordinate delays occur in finalization of departmental inquiries that result in loss to Government and create indiscipline among the civil servants. Such delays, quite often, result in prolonged mental agony to the accused if he ultimately turns out to be innocent. Forth, correct the competent authority due to misunderstanding of the statutory provisions does not often observe procedure hence these procedural lapses constitute miscarriage of justice to the accused civil servant.

It seems appropriate to conclude with a well-documented principle of drafting law, that 'law should be clear and not clever'. Some provisions of modern legislation are clever not clear; they may suit the colonial minded bosses but may not go well with democratic arrangement. The people, who are to be governed by this modern legislation, do expect some thing good but at the same time, there is also an apprehension about the misuse of this legislation in the hands of autocratic and despotic administrators.