

Safeguards for public servants

The legal position of public servants regarding security of tenure of service is quite vulnerable, but in reality, action against delinquent public servants is notoriously difficult to sustain.

MODERN society is held together by services provided by officials of the state. The public service is the pivot around which the administration of the contemporary state revolves. Every country's economic, social and educational policies are ultimately dependent on the quality and commitment of its public officials.

Article 132(1) of the Federal Constitution defines "public services" to include the armed forces, the judicial and legal service, the general public service of the Federation, the police force, the joint federal-state public service, the public service of each state and the education service.

Employees of statutory bodies, public companies, universities, or any other body or authority established under federal or state law, are not public servants for the purpose of the Constitution.

In relation to public services, a number of basic rules apply.

No security of tenure: All public servants hold office "during the pleasure" of the Yang di-Pertuan Agong or Ruler or Governor. Posts may be abolished. A ministry or service may be closed down or privatised. Parliament may refuse to allocate funds for a service.

Terms of service: The terms of service of a public servant may be altered without his consent despite a written contract of employment. Post-entry requirements like language proficiency, in-house training



Reflecting On The Law

SHAD SALEEM FARUQI
shadsaleem@yahoo.co.uk

courses or the need to pass an examination may be imposed.

Pensions: Article 147 protects pensions, gratuities and other allowances for members of the public service, their widows, children, dependants or personal representatives.

However, these are not absolute rights. The Yang di-Pertuan Agong may reduce or withhold pension if he is satisfied that the public servant is guilty of negligence, irregularity or misconduct.

Right to equality: Under Article 8(1) of the Federal Constitution there is a constitutional right to equality before the law and equal protection of the law. Thus, no gender, religious or unreasonable discrimination can be practised at the time of the application or during the period of service.

Regrettably, Article 8's equality requirement does not apply in the private sector or to Government-linked companies.

Racial quotas: In Malaysia, the issue of race discrimination is complicated. A little known constitutional article - Article 136 - states that all persons of whatever race in the same grade in the service of the

Federation shall be treated impartially.

Difficult issues arise because Article 136 has to be read along with Article 153 which permits reservations and quotas in favour of Malays and the natives of Sabah and Sarawak.

Tun Suffian has suggested that the two articles must be read harmoniously. At entry point, Article 153 permits reservations. Once in service the equality rule in Article 136 should apply to matters of promotion, rewards etc.

Arrears: A civil servant can sue the Government for recovery of arrears or for any other breach of the law of contract.

Tortious claims: In Malaysia, the Government is not above the law. Subject to some exceptions, a civil servant can sue the Government for damages in torts if the Government or a public authority has caused him loss.

Safeguard of Article 135(1): Though civil servants have no security of tenure, they can be removed only after prescribed procedures. Article 135(1) states that no member of the public services (except a member of the armed force) may be dismissed or reduced in rank by an authority subordinate to that which had the power to appoint him.

Natural justice: Under Article 135(2) no public servant may be dismissed or reduced in rank without being given a "reasonable oppor-

tunity of being heard".

The terms "reasonable opportunity of being heard" have generated a wealth of case law. "Hearing" means that the officer concerned should be given a proper and prior notice of the allegations against him. The notice must be adequate in terms and in time.

Subject to some exceptions, the accused should have a full and fair opportunity of stating his case in reply.

He should be supplied with all evidence, information and documents made known to the adjudicator. He should have a right to present witnesses and exculpatory evidence and to cross-examine witnesses on the other side.

Exceptions: The safeguards of Article 135(2) do not apply in some situations such as:

> The laudatory and constitutionalised rule of natural justice does not apply to forms of removal that do not amount to "dismissal" or "reduction in rank".

For example, "dismissal" is distinguishable from "contractual termination", "termination in public interest" or "compulsory retirement".

A reversion to the former post does not amount to reduction in rank provided the public servant was not already confirmed in his new post.

> "The right to be heard" does not imply the right to be heard orally. Hearing can be oral or by way of

written representation.

> Members of the armed forces are not entitled to a hearing.

> There is no need to give a hearing. In reality there are many other ways of dealing with errant civil servants. Some of these ways do not attract the pristine safeguards of Article 135. For example:

> Even prior to a finding of guilt, an officer can be interdicted (ordered not to report for work) on full pay or half pay.

> In several circumstances, an officer can be suspended on no pay.

> Termination under the contract of employment need not be preceded by prior hearing.

> In some circumstances public servants can be prematurely and compulsorily retired. They receive pension but lose their job.

The overall picture is that the legal position of public servants is quite vulnerable. In reality, however, action against delinquent public servants is notoriously difficult to sustain.

Many wrongdoers rely on technical or procedural flaws to obtain judicial review and escape accountability.

Enforcing quality and commitment in public services is not easy and require leadership of the highest order.

> Shad Saleem Faruqi is Emeritus Professor of Law at UiTM and Visiting Professor at USM