Chapter 2

RECRUITMENT AND PROMOTION OF CIVIL SERVANTS IN KENYA AND INDIA: A CRITICAL ANALYSIS

2.1 INTRODUCTION:

The COK as well as the COI have obligated the State to secure to all its respective citizens, “justice, social, economic and political and equality of status and opportunity.” For achieving these Constitutional goals, manpower is needed; therefore it is quintessence to recruit civil servants both at National/Central and County/State levels.

Civil service plays a vital role in the socio-economic development of the nation as well as in the maintenance and improvement of public services. Both in Kenya and India, efforts are continuously being made towards reforming the civil service, [especially in the area relating to recruitment and promotion of civil servants], with the key objective of making it more professional, responsive to national development challenges and efficient in delivery of services.

Hon’ble Dalmas Otieno, Kenya’s ex-Minister of State for Public Service, while affirming the provisions of the draft Constitution,\(^1\) had observed: “the Ministry of public service will not only secure and retain employees with appropriate skills but it will also ensure that the employees are morally and ethically upright to manage….. civil service effectively and

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\(^1\) The draft Constitution was later promulgated on August 27\(^{th}\) 2010 after a successful referendum and under Art.232 it provides for values and principles of public service which hitherto includes: a) high standards of professional ethics; b) Fair competition and merit as the basis of appointment and promotion to civil service; c) Representation of Kenya’s diverse communities while making appointments and promotion; d) Affording adequate and equal opportunities for appointment, training and advancement at all levels of public service of – men and women; members of all ethnic groups and persons with disabilities, \textit{etc}.  

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efficiently”. Likewise, Mr. Kidwaj, a former Chairman of India’s Union Public Service Commission [hereinafter referred to as UPSC] also observed: “An efficient civil service is one of the essential ingredients of our democratic system and one of the best guarantees for sound and effective administration”.

There is no function in Kenyan as well as in Indian civil service administration which is more important than qualitative recruitment. Recruitment is exceedingly important to the administrative structure; for it determines the tone and caliber of public services and on it rests usefulness and relevance of the machinery of the Government to the society.

2.2 CIVIL SERVICE RECRUITMENT AND PROMOTION IN KENYA AND INDIA: SOME HISTORICAL ASPECTS

The history of the PSCs of Kenya and India mandated to oversee recruitment of civil servants, dates back to 1947 and 1885 respectively when the colonial Government set up the Holmes Salaries Commission\(^5\) to review the structure, remuneration and superannuation arrangements of the civil services in East African territories and when the Indians gradually began to demand for a share in running their own administration from the BEIC

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5 The Holmes Salaries Commission recommended that Public Service Commission be set up for each of the East African territories. Holmes, a British civil servant, served as the Chairman of the East African Salaries Commission in 1947, the Colonial Office inquiry into Civil Services of Kenya, Tanzania and Uganda, the 1948 Caribbean Public Services Unification Commission, and the Lord Chancellor's Committee on Office of Public Trustee in 1954. See “Maurice Gerald Holmes”, http://en.wikipedia.org/wiki/Maurice_Gerald_Holmes, [accessed on 14\(^{th}\) March 2011].
which then ruled over India. The BEIC had their own rules and regulations for the recruitment of personnel for manning their services.

As already pointed out, civil servants during the formative stage of British rule in India were categorized into two exclusive groups: *covenanted* and *uncovenanted*. These groups of service evolved to become the ICS which later became the Indian Administrative Service [hereinafter referred to as IAS] after Independence.

The Aitchison Commission, under the chairmanship of Sir Charles Umpherston Aitchison was constituted in 1886 to come up with a scheme for fulfilling the claims of Indians to higher and more extensive employment in public service. The Commission made the following recommendations in its report submitted in 1887:

- The two-tier classification of covenanted and uncovenanted servants to be replaced by a three-tier classification *i.e.*, ‘Imperial’, ‘Provincial’ and ‘Subordinate Civil Services’.
- The maximum age for entry into the civil services to be 23 years.
- The statutory civil service system of recruitment to be abolished.
- The competitive exam not be held simultaneously in England and India, and

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6 During the British rule, the recruitment was based on two major principles: *first*, patronage and *secondly*, Seniority – where the civil servants were appointed basing on their seniority either in the British Civil Service or in the Indian Civil Service - see, “Company Rule in India”, [http://en.wikipedia.org/wiki/Company_rule_in_India](http://en.wikipedia.org/wiki/Company_rule_in_India), [accessed on 12th December 2010].
9 See, Chapter 1, Unit, 1.2.2.
• Certain percentage of posts in the Imperial Civil Service to be filled by promotion of the members of Provincial Civil Service.¹⁰

After the Aitchison Commission, the Islington Commission was appointed in 1912 however its recommendations were not considered by the GOI.¹¹ It was only in 1919 that the provision was made for setting up of a regular Service Commission for recruiting personnel for running the administration and services in the GOI. However, it took the Government about six years to implement the provision and it was only in 1926 that the first Central Service Commission was constituted¹² with the aim of indigenising the civil service.¹³ But the Commission’s limited advisory functions failed to satisfy the people’s aspirations and the continued stress on this aspect by the leaders of the freedom movement resulted in the setting up of the Federal Public Service Commission [hereinafter referred to as FPSC] under the

Government of India Act, 1935.\textsuperscript{14} Under this Act, for the first time, provision was made for the formation of PSC at the Provincial level.\textsuperscript{15}

The Constituent Assembly, after independence, felt the need for giving a secure and autonomous status to PSC both at Federal and Provincial levels for ensuring unbiased recruitment to civil services as also for protection of service interests. With the promulgation of the new Constitution for independent India on 26th January 1950, the FPSC was accorded a Constitutional status as an autonomous entity and given the title ‘Union Public Service Commission’.\textsuperscript{16}

On the other hand, the PCSK was initially set up in 1954 with a mandate ‘to advise on the appointment of candidates to posts in the civil service in cases where the approval of the Secretary of State was not required’.\textsuperscript{17} The remit of the Commission was further widened through the enactment of two Constitutional Amendments in 1964 and 1984. The Constitution of Kenya (Amendment) Act, 1964 allowed the Commission to delegate any of its powers, on such conditions as it deemed fit, to any one or more of its members or to any officer in the public service.\textsuperscript{18} It also


\textsuperscript{15} “Union Public Service Commission (UPSC): Historical Perspective”, http://en.wikipedia.org/wiki/Union_Public_Service_Commission; “History of Civil Service in India”, http://books.google.co.in.books?id=RAON5AW4yUEC&pg=PA168&lpg=PA168&dq=importance+of+civil+service+recruitment+in+india&source=bl&ots=q7xXW0oieD&sig=JJeDRUZWxqGu6JJ4UCVRoEK8&hl=en&ei=oU1vTfxfMcfxrQfCslWDDw&sa=X&oi=book_result&ct=result&resnum=7&ved=0CDMQ6AEwBjgK#v=onepage&q=importance%20of%20civil%20service%20recruitment%20in%20India&f=true, [accessed on 5\textsuperscript{th} January 2011].


\textsuperscript{17} “The Public Service Commission of Kenya Strategic Plan (2009-2012)”, http://www.google.co.in/search?hl=en&client=firefox-a&dws=org.mozilla%3Aen-US%3Aoffical&channel=np&q=composition+of+the+public+service+commission+of+Kenya&oq=com position+of+the+public+service+commission+of+Kenya&aq=f&qai=&aq=0&es_sm=e&gs_upl=1416474l1427195l0l23l23l2l0l0l4l311l4127l0.13.7.1, [accessed on 12\textsuperscript{th} January 2011].

\textsuperscript{18} S.107, the Constitution of Kenya, 1963.
introduced a provision in the Constitution for Parliament to prescribe through enactment, the manner of the exercise of the functions of the Commission, and for any matters incidental or supplementary to the exercise of those functions.\textsuperscript{19} The \textit{Constitution of Kenya (Amendment) Act}, 1984 again expanded the powers of the Commission by bringing the local authorities under its purview.\textsuperscript{20}

With the repeal of the 1963 Constitution and the promulgation of the new Constitution on 27\textsuperscript{th} August 2010, the powers of PCSK have been widened to include among others the power to establish and abolish offices; the power to hear and determine appeals in respect of County Governments’ public service; the power to develop human resources in the public service.\textsuperscript{21}

\textbf{2.2.1 CIVIL SERVICE RECRUITMENT AND PROMOTION: A QUINTESSENCE FOR EFFECTIVE ADMINISTRATION OF KENYA AND INDIA}

Running the administration of vast and diverse countries like Kenya and India requires efficient management of natural, economic and human resources. This is the primary responsibility of the civil servants. The civil servants are taken in the service of respective States by a process called ‘recruitment’.

The core objective of the recruitment process is to obtain quality and talented\textsuperscript{22} employees that can be selected in order to help the Government to achieve its goals and objectives.\textsuperscript{23} In addition, recruitment of civil servants

\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid.
\textsuperscript{21} See Art.234, the \textit{Constitution of Kenya}, 2010. For further details see unit 1.2.1, supra.
\textsuperscript{22} “Purpose of Recruitment Process”, \url{http://www.simplehrguide.com/purpose-of-recruitment-process.html}; “Recruitment”, \url{http://www.agateinfosystems.com/recruit.htm}, [accessed on 16\textsuperscript{th} January 2011].
\textsuperscript{23} “Recruitment”, \url{http://recruitment.naukrihub.com/}; “What are the Objectives of Recruitment?” \url{http://in.answers.yahoo.com/question/index?qid=20100822020717AADq7Is}, [accessed on 22\textsuperscript{nd} February 2011].
helps to create a pool\textsuperscript{24} of prospective employees for the respective Governments so that the management can select the right candidate for the right job from the pool.

Moreover, sound recruitment policies and selection methods determine the effective functioning/running of the Government. If the recruitment policy is faulty, incompetent and inept persons will get into the civil services making the administration permanently weak and inefficient. It is therefore, indispensable for both Kenya and India to have sound and up-to-date recruitment policies that are impartially and effectively implemented.\textsuperscript{25}

In the modern times, due to advancement in technology, administration has become more and more complex. Proper recruitment, as such, ensures placement of right candidates at the right place at the right time.\textsuperscript{26} Equally, it serves as the first step in fulfilling the needs of Government that help to achieve projected goals besides being a major indicator of the degree of employment in the civil service\textsuperscript{27} and value system of the country.\textsuperscript{28}

With the above basic knowledge, let us now find out what meaning has been attributed to the terms ‘recruitment’ and ‘promotion’ under the laws and how the judiciaries of both Kenya and India have interpreted them.

\textsuperscript{24} “Purpose and Importance of Recruitment”, \url{http://recruitment.naukrihub.com/importance-of-recruitment.html}, [accessed on February 2011].

\textsuperscript{25} It should be kept in mind that even the best policies of training and promotion cannot improve the capacity and efficiency of wrongly recruited persons.

\textsuperscript{26} See, “The Importance of Recruitment and Selection”, \url{http://mycareerguide.net/2009/02/the-importance-of-recruitment-and-selection/}, [accessed on 22\textsuperscript{nd} February 2011].

\textsuperscript{27} Sapru R. K., \textit{Civil Service Administration in India}, supra note 10 at 239.

\textsuperscript{28} Kenya and India are wedded to the principles of democracy, socialism and secularism. The national objectives are enshrined in their respective Constitutions.
2.3 MEANING AND PURPOSE OF ‘RECRUITMENT’ AND ‘PROMOTION’ OF CIVIL SERVANTS:

Recruitment and promotion are like two sides of the same coin termed as career. Persons who get recruited, *inter alia*, into the civil services if served as per the requirements have fair chances of getting promoted either after completing the required number of years or by clearing further qualifying exams, *etc*. At this juncture it is pertinent to find out the meaning ascribed to the terms ‘recruitment’ and ‘promotion’.

2.3.1 MEANING OF THE TERM ‘RECRUITMENT’:

The term ‘recruitment’ does not have a standard definition. Recruitment is a process of securing new employees to an organization for filling posts required for the conduct of the work.\(^{29}\) It is a process of finding and attracting capable applicants for employment. The process begins when new recruits are sought and ends when their applications are submitted. The result is a pool of applications from which new employees are selected.

According to Edwin Flippo, “recruitment is the process of searching for prospective employees and stimulating them to apply for jobs in the organisation”.\(^{30}\) In the words of S. L. Goel, “recruitment is the process of exhausting all the sources for finding prospective employees”\(^{31}\) while J. D. Kingsley says, “public recruitment may be defined as that process through which suitable candidates are included to compete for appointments to the public service”\(^{32}\).

\(^{29}\) *Supra* note 27.
The term ‘recruitment’ connotes and clearly signifies enlistment, acceptance, selection or approval for appointment.\(^{33}\) It is not only the entry point of persons in the civil services but also a cornerstone of the whole public personnel structure. The term is, nonetheless, commonly understood as the process by which persons are taken in the services to fill up the vacant posts\(^{34}\); a process of finding and attracting capable applicants for employment.\(^{35}\)

Recruitment is the initial process which may culminate in an appointment\(^{36}\) and it is a common activity both in the private and public administration.\(^{37}\) However, it should be kept in mind that in public administration, recruitment policy is determined by the Constitutional

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\(^{37}\) In India, recruitment system is essentially based on the British pattern. Entrance to civil services is based on merit which is tested by competitive examinations open to all citizens irrespective of religion, sex, caste or creed. Direct recruitment to the administrative and most of the executive services is made on the basis of competitive examinations based mainly on the following: a) civil services preliminary examination (objective type) for the selection of candidates for the main examination; b) civil services main examination (written); and c) interview of those candidates who have qualified in the written test at the final stage of recruitment.
requirements and political outlook. No such limitations are present in the case of private administration.

The purpose of recruitment is two-fold: negative, it tends to score out favouritism and political influence whereby recruitment is done through advertisements either in the press or on a few notices placed on notice boards; positive, it seeks to attract able and qualified candidates to the civil service by approaching them at the source.\textsuperscript{38} A Division Bench of Punjab and Haryana High Court observed that the purpose of recruitment is mainly to make up the deficiency which occurs in the cadre.\textsuperscript{39}

2.3.2 MEANING OF THE TERM ‘PROMOTION’:

The term ‘promotion’ has been diversely defined by several persons. According to Pigors and Myers, “promotion is the advancement of an employee to a better job - better in terms of greater responsibilities, more prestige or status, greater skill and especially, increased rate of pay or salary”.\textsuperscript{40} Promotion, in the words of L. D. White is “an appointment from a given position to a position of higher grade involving a change of duties to a more difficult type of work and greater responsibility accompanied by change of title and usually an increase in pay”.\textsuperscript{41}

According to William G. Torpey, “promotion refers to the movement of an employee from one position to another position having a higher grade

\textsuperscript{38} Sinha V. M., \textit{The Superior Civil Services in India} 34, 1\textsuperscript{st} edn., (Jaipur: The Institute for Research and Advanced Studies, 1985).
\textsuperscript{40} Pigors Paul and Myers Charles, \textit{Personnel Administration: A Point of View and a Method} 281-82, 8\textsuperscript{th} ed., (Tokyo: McGraw-Hill, 1977).
\textsuperscript{41} “Personnel Administration”, \url{http://www.jeywin.com/wp-content/uploads/2010/03/Optional-Public-Administration-7-Personnel-Administration.pdf}, [accessed on 10\textsuperscript{th} February 2011].
or a higher minimum salary. It also involves increased duties and responsibilities for an employee.”  

Promotion, in the context of the 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. Similarly, ‘Promotion’ refers to the conferment upon a person in the public service of an office to which is attached a higher salary or higher salary scale than that attached to the office to which he was last substantively appointed.

In Tarsem Singh, the SCI propounded the meaning of promotion in the following words:

Promotion as understood under the service law jurisprudence means 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.

The meaning of the term ‘promotion’ can also be understood from two angles; for the Government, promotion is a system of indirect recruitment i.e., filling up the higher posts by selecting suitable and competent persons

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44 Pal Samaraditya, Service Law Relating to Government and Public Undertakings, supra note 33 at 450. The higher office or rank or post or scale is generally referred to as the ‘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’.

45 Rule 2 (1), the Public Service Commission Regulations, 2005.

from those who are already in the service. For a Government servant, promotion is an advancement from a lower post, class or status to a higher post, class or service involving higher duties, responsibilities and authority.\(^{47}\) It also means elevation in the status and increase in the salary of an employee\(^{48}\) like for e.g., when a Junior Assistant becomes a Senior Assistant; a Deputy Secretary becomes a Secretary; a Class II servant becomes a Class I servant.

Promotion may mean change in the grade, \textit{i.e.,} from a lower grade to a higher grade in the same class.\(^{49}\) It may also be from one service to another higher service \textit{i.e.,} from County/State services to National/Central services. However, it should be remembered that transfer from one post to another post of the same status or responsibility is not promotion, nor being merely asked to work in a higher post with extra allowance while holding the lower post substantially is not promotion.\(^{50}\) Similarly, annual increment \textit{i.e.,} annual increase in the same salary scale is also not promotion.

According to Fulton Committee, “the right promotion at the right time is an essential part of the process of developing to the full talents of men and women in the service”.\(^{51}\)

\(^{47}\) According to Rule 2(h), \textit{the All-India Service (Performance Appraisal Report) Rules}, 2007, ‘Promotion’ refers to an appointment of a member of the service to the next higher grade over the one in which he is serving at the relevant time.

\(^{48}\) It should be noted that mere increase in salary is not promotion. Promotion must be going up or advancement in rank, status, duties, power, and responsibilities and also increase in salary in the civil service.

\(^{49}\) The word ‘promote’ is derived from the Latin expression \textit{pramovere}, meaning ‘to move forward’. See generally, “Human Resources”, \url{http://www.pvamu.edu/pages/1361.asp}, [accessed on 29\textsuperscript{th} May 2011].


\(^{51}\) United Kingdoms of Great Britain and Northern Ireland, Fulton Committee, \textit{The Civil Service} 40, London: H.M.S.O., 1968. See also, “A New Civil Service Philosophy”, \url{http://www.jstor.org/pss/40739712}, [accessed on 4\textsuperscript{th} March 2011].
In Kenya as well as in India, the system of recruitment by promotion in the civil service is mainly departmental. Promotion from one post to another within a class is in general within the discretion of the departmental authorities provided always that there is a vacancy in the post or service to which the promotion is made. Moreover, as a matter of principle, public interest rather than the interest of individual civil servant should be the ruling consideration in making promotions in the civil service. Besides, the Government should 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 their scale.\(^{52}\) Promotion should as well be based on the principle of mutuality i.e., it must be preceded by an offer and acceptance-express or implied. There cannot be compulsory promotion.\(^{53}\)

Civil Service is a lifetime career service both in Kenya and India. A person opts to work in the service from the date of recruitment till retirement. Promotion therefore, is an integral part of the career service and serves the following purposes:

- A good system of promotion helps to build morale, discipline and efficiency among civil servants.\(^{54}\) Unless the civil service has adequate promotional avenues, it will not be able to attract ambitious, talented and hardworking young men and women.

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\(^{53}\) *Dr. N. C. Singhal v. Union of India*, AIR 1980 SC 1255: (1980) 3 SCC 29 at 39: 1980 Lab IC 710: 1980 (2) SLR 118. [In this case, the Supreme Court observed that there will be no violation of Art.16 of the Constitution of India if a Government servant is offered a higher post by way of promotion and he or she refuses to accept the same for his or her own reasons. Thus, the Central Government was right in offering the said post to a junior Government servant].

• Promotion is a reward to a civil servant which entails a change in his position and status. Chances of promotion not only increase the efficiency and contentment among civil servants but also confers them an opportunity to improve their capabilities and qualifications.

• If there are adequate chances of promotion to higher levels in the Government service, competent and/or skilled persons will be ready to join the services even at lower levels also. This will ultimately increase the efficiency of administration.

• Through promotion, the Government is able to retain the services of its experienced personnel. Man is a growing creature and if his need for recognition and advancement is not adequately addressed and satisfied by the Government, he opts for other institutions where he may be so satisfied. This may lead to shortage of efficient and experienced staff in the Government service.

• A sound promotion policy not only fosters a feeling of belongingness in the Government servants but also contributes to a measure of continuity in policies and practices and leads to building up of traditions and conventions that adds to the goodwill of the Government.

• A right promotion system must be based on the principles of equity and fair play. There should not be favouritism, unjust prejudice, nepotism and corruption while making promotions.

• As the civil servants advance in age, their family needs and responsibilities keep on increasing. Promotion not only gives them an

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opportunity to satisfy their increasing material needs but also motivates them to give their best to the services. This ultimately reduces the chances of malpractices and corruption in the services.

Before considering the provisions regarding recruitment and promotion in Kenya and India and their legal implications, the researcher considers it indispensable to present a comprehensive critical study on the various methods of recruitment and promotion including their merits and demerits wherever necessary.

2.4 METHODS OF RECRUITMENT AND PROMOTION OF CIVIL SERVANTS: A CRITIQUE

Under Article 234 of the COK and Article 320 of the COI, both the PSCK and UPSC are, *inter-alia*, required to be consulted on all matters relating to recruitment to civil services and posts. The different methods of recruitment followed by these Commissions for selecting candidates for different category of posts are:

- direct and indirect recruitment;
- positive and negative recruitment;
- mass recruitment and individual recruitment.

2.4.1 DIRECT RECRUITMENT:

Recruitment to any civil service may be made from different sources *i.e.*, direct recruitment or by promotion or by absorption/transfer. Hence, the source of recruitment may be either internal or external.\(^{57}\) Direct recruitment

is generally recruitment of ‘candidates from the open market’, as all eligible persons for recruitment are not from the ones already in service.

Direct recruitment is conducted broadly under the following two methods:

- **Recruitment by competitive examination**: Under Chapter II, Part XIV of the COI, one of the core functions of the UPSC is to conduct examinations for appointment to civil services/posts of the Union. Besides, competitive examinations are also held by the Commission under arrangements with the Ministry of Defence for entry to certain Defence Services, through the National Defence Academy, Indian Military Academy, Naval Academy, Air Force Academy and the Officers Training Academy. The Commission usually conducts over a dozen examinations every year on an all India basis. These include examinations for recruitment to services/posts in various fields, such as Civil Services, Engineering, Medical and Forest Services.

- **Recruitment by selection**: Recruitment by selection is generally done by the following methods:

  a) **By interview**: Where the number of applicants is very large, it is not possibly practicable to call for interview all the applicants who fulfill the minimum eligibility conditions prescribed. The Commission, therefore, shortlists the candidates to be called for the...
interview on the basis of certain pre-determined criteria related to the job\(^{62}\);

b) **By recruitment test followed by interview:** In this method, the procedure generally followed is: *First*, an objective-type written and/or practical test to assess the skill of the candidates followed by interview, the final selection being decided by interview aided by the performance of the candidates in the written test and/or practical test.\(^{63}\) *Second*, an objective-type written and/or practical test to screen candidates to be called for interview, the final selection being decided by interview only.\(^{64}\)

### 2.4.1.1 MERITS OF DIRECT RECRUITMENT:

As compared to other methods of recruitment of civil servants, direct recruitment method has the following advantages:

- Direct recruitment is a system which, in accordance with the democratic principles, stands for equal opportunity to all. It therefore, gives an opportunity for all qualified candidates.
- The candidates selected through direct recruitment have no preconceived notions and are as well adjustable to the needs and necessities of time.
- The source or area of selection is considerably wide and the selection board gets an opportunity to select the most capable and competent available persons in the market to the civil service.

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• New ideas and changing technical, administration and socio-political conditions are reflected in the services.65

• Through direct recruitment, it is possible to infuse new blood or young and better qualified persons with imaginative, far-sighted ideas and zeal to work which is not only essential and healthy to the civil service but also to the society at large.

• Direct recruitment is essential for technical jobs where new scientific methods are being tried and where young men have the ability, knowledge and capacity to perform them.

• Direct recruitment inspires the persons already employed in the civil service to keep abreast of the new developments in their area of work since there is heavy competition from the outsiders. This ultimately challenges them to improve their competency through, *inter alia*, additional qualifications.

• Direct recruitment avoids frustrations especially among the fresh graduates given that they are less likely to get higher and lucrative posts in the civil service due to lack of experience.

2.4.1.2 **DEMERITS OF DIRECT RECRUITMENT:**

Even though direct recruitment has served considerably well in most cases of civil service recruitment both in Kenya and India, the following drawbacks have been so far noted in this system:

• Direct recruitment system creates jealousy among the young and old civil servants who consider the young and inexperienced employees recruited to responsible positions a burden. This may ultimately lead to rivalry amongst them.

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65 “Recruitment and Reservation in Services”,
The system curbs the chances of progress for those who are already in the services of the Government. This may eventually create frustration amongst them.

A substantial sum of money is spent in selecting and training the candidates before they embark on their duties since most candidates selected lack confidence and skills in the discharge of their duties.

Employees do not work efficiently and loyally if they have no chance of promotion.\(^\text{66}\)

The employees already in the Government find themselves at a disadvantaged position in an open competition on the basis of theoretical knowledge of University subjects of study. Having left their studies years ago, they find themselves out of reach of the young tucks in that, they cannot put up with the same amount of preparation and memorizing as their counterparts from Colleges and Universities.

There is no guarantee that the fresh blood recruited will possess high character and undisputed integrity. In addition, the State will suffer in case they are unable to maintain employer-employee relationship.

Direct recruitment system promotes migration of competent and experienced employees to other gainful employment, and

In this system of recruitment, the employee’s experience, hard work and efficiency is totally neglected.

\(^{66}\) See, “The Process of Recruitment”, http://books.google.co.in/books?id=bQLff_T-uFAC&pg=PT115&lpg=PT115&dq=merits+of+direct+recruitment&source=bl&ots=KNUHcDUa9a&si g=eV0sAgwA9nUxxQ2qn2xAhNAs0&hl=en&ei=cAXmTa-nHcKmrAeooioCA&sa=X&oi=book_result&ct=result&resnum=7&ved=0CEMQ6AEwB#v=onepage&q&f=false, [accessed on 30\(^{\text{th}}\) April 2011].
2.4.2 INDIRECT RECRUITMENT/PROMOTION:

Civil servants in Kenya and India generally have a chance of promotion before retirement from service. Both the GOK and the GOI have introduced systems whereby promotions in the civil service are based on an individual’s performance. In Kenya, the system commonly referred to as ‘Higher Flier Scheme’ exempts civil servants from serving a minimum of three years in a given job group in order to qualify for promotion. Moreover, the scheme operates alongside the performance contract and helps to eliminate stagnation in the civil service by sifting non-performers who have risen in their position because of the number of years they have served.67

This system also referred to as ‘recruitment from within’ involves filling up of vacant posts in the Government by suitable and experienced candidates who are already in the service of the Government.68 This is mainly to provide incentives and generate efficiency in the service.

2.4.2.1 TYPES OF PROMOTION:

Promotion is generally conducted under the following three methods:

- **Promotion from a lower grade to a higher grade in the same class:** (i.e., from a Junior Assistant to a Senior Assistant, or from a Junior Typist to a Senior Typist, or Assistant Superintendent to Superintendent).

- **Promotion from a lower class/scale to a higher class/scale:** Although the general connotation of promotion in service law is moving up to a

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68 In India, the question of promotion was first discussed during the British Raj in the year 1669 when the principle of seniority was accepted for promotion by the East India Company. The Charter Act of 1793 clearly accepted the principle of 'seniority' for promotions in the civil service. This principle remained in force till the enactment of the *Indian Civil Service Act*, 1861. Although the seniority principle was continued, allowance was also made for merit, integrity, competence and ability in making promotion. Thereafter, the formula of seniority-cum-merit was followed till 1947.
higher post or office thereby implying the existence of a vertical hierarchy of posts in the service, yet there are certain non-vertical movements and non-postwise vertical movements which are considered as promotion. A useful test for determining whether a particular movement is a promotional movement or not would be: Does the movement lead to career advancement whether by way of office or by way of emoluments? If the answer is affirmative to both or either of the situations, then the movement must be considered as promotion.\textsuperscript{69} When one or more of the officers in the same rank and holding posts of equal status move from a lower scale allotted to that rank or post to a higher scale allowed to such rank or post, such movement is referred to as ‘promotion from scale to scale’.\textsuperscript{70} The post remains the same but the pay and emoluments become higher. This is particularly done when there are a number of posts of the same rank and the chances of promotion to the next higher rank or post are bleak because the number of sanctioned posts in the higher rank is far lesser than those in the feeder rank. The criteria to be adopted for such promotion will be provided by certain norms contained either in the rules or the executive instructions or guidelines or even in the contract of service.

- **Promotion from a lower service to a higher service:** It is normally from County/State Service to National/Central Services.\textsuperscript{71}

\textsuperscript{69} C. C. Padmanabhan v. Director of Public Instructions, AIR 1981 SC 64; 1980 Supp SCC 668.
\textsuperscript{70} For example, movement from Class I to Class 11, from Clerical class to Executive class.
\textsuperscript{71} See, “Promotion”, http://www.egyankosh.ac.in/bitstream/123456789/25302/1/Unit-16.pdf; http://books.google.co.in/books?id=pXC8NNwvsFkC&pg=PA321&lpg=PA321&dq=Promotion+from+a+lower+service+to+a+higher+service&source=bl&ots=lgLQ4E4X0&sig=feo8Xmi0HBC2EwCvQDcY7OeS4&hl=en&ei=5zuLTZ23M4aGraexXnDDg&sa=X&oi=book_result&ct=result&resnum=9&ved=0CDYQ6AwCA#v=onepage&q=Promotion%20from%20a%20lower%20service%20to%20a%20higher%20service&f=false, [accessed on 16th February 2011]. Promotions also depend on the extent of tenure. There
2.4.2.2 ESSENTIALS OF A SOUND PROMOTION POLICY:

The civil service which is highly considered as a career service in Kenya and India plays an important role in the developmental process and in raising the standards of living of the people. For the civil servants to be successful in their career, it is imperative that they should undergo a good promotion policy. At the same time, only a fair promotion policy will ensure supply of capable and competent persons for filling up higher positions without any breakdown of services. The following are the essentials of a good promotion policy:

- Promotion policy must be well planned in advance.
- There must be a clear and sound classification of the civil services. All posts or grades in each service or class must be arranged in a hierarchical manner.
- Line of promotion and rules of promotion must be clearly laid down in advance.
- Instead of a single person, it is imperative that a board or a committee be responsible for making promotions.
- A systematically accepted method of promotion must be strictly followed.

can either be “officiating promotion” which may be granted in the exigencies of service occasioned by administrative necessity for discharging duties normally attached to higher posts in absence of officially sanctioned posts, or “ad hoc promotions” which are granted when direct recruitment is held up or a stop-gap arrangements is necessary due to administrative exigencies or to meet emergent or unusual situations. A promotion on an officiating basis will not normally confer upon the promotee a right to hold the post and unless duly registered, an employee is liable to be reverted to the substantive post from which he was given officiating promotion at the end of such promotion. However, the services rendered during the officiating period will be reckoned for determination of seniority in the promoted post.
Employees need to know that promotion is an opportunity and not a right and they must be prepared for competition with others.\textsuperscript{72} 

Seniority should not be given excessive weight. Principles of seniority, merit and efficiency must be combined. Candidate's past performance, service records \textit{i.e.}, Confidential Reports [hereinafter referred to as \textit{CR}] and capability to assume higher responsibilities must be decisive elements. Various other suitable devices like efficiency rating, examination, interviews, \textit{etc.}, must be adopted to test the merit for promotion.\textsuperscript{73}

\subsection{PRINCIPLES OF PROMOTION:}

In any Government service, whether the GOK or the GOI, it is indispensable to ascertain the principles of promotion simply because, the opportunities for promotion in the civil service are normally limited. Since

\textsuperscript{72} There are also certain other aspects which the researcher feels will spice up to a sound promotion system. They include: a) strict judicious selection of young, capable and talented persons with the required educational background and the necessary attributes of character and motivation; b) an employee's confidential reports should facilitate assessment of his or her past performance, personal qualities and the identification of his or her factual potential for the proposed promotion; c) careful training should be imparted to qualified candidates in those aspects of service which cannot be acquired beforehand; d) during the period of probation, selected candidates should be assigned a variety of tasks through which their aptitudes may be tested and after that the candidates may be retained on a career basis or released if found ineligible; e) promotions should be linked to training and professional expertise and should ensure opportunities for growth and development of an individual’s career; f) an open system of promotion should permit the best qualified officers to serve in the higher posts, whether in headquarters or at the field; and g) to avoid any kind of subjectivity, independent promotion boards should be established and a corrupt-free recourse to a system of appeals, where necessary, should be put in place as well. For this purpose, an impartial representative of the head of the department concerned should present any petition related to promotion to the said board.

\textsuperscript{73} W. F Willoughby, a renowned author of a number of public administration books, has laid down the following conditions as a basis of a sound promotion system: a) Adoption of standard specifications setting forth the duties and qualifications required for all promotions; b) The classification of positions into distinct classes, series, grades and services; c) Inclusion of all positions (except those of a policy-making character) into this classifications; d) Adoption of the principle, as far as possible, that superior positions will be filled by promotion from lower positions; e) Adoption of principle of merit in determining the selection of employees for promotion; and f) Provision of adequate means for determining the relative merits of employees eligible for promotion - see, “Personnel Administration”, \textit{http://www.jeywin.com/wp-content/uploads/2010/03/Optional-Public-Administration-7-Personnel-Administration.pdf}, [accessed on 10\textsuperscript{th} February 2011]; “Functions of Principles of Promotion Policy”, \textit{http://www.freemba.in/articlesread.php?artcode=907&stcode=13&substcode=50}, [accessed on 30\textsuperscript{th} May 2011].
the structure of administration in Kenya as well as India is like a pyramid, the number of posts at the lower levels is normally large (see, Level F in Figure I below) and as one ascends, the number of posts become less and less (see, Level EDCB below) and ultimately, the pyramid ends at a single point (see, A, i.e., posts reserved for Chief Executive or Heads of Departments). The result, therefore, as L. D. White notes:

[t]here arises the underlying and irreconcilable conflict in any promotion system… large number of employees, normally ambitious and with the intention of succeeding ....and under heavy economic pressure … face a limited number of higher positions in which vacancies occur at relatively irregular and infrequent intervals. No form of promotion system can solve such a dilemma.\textsuperscript{74}

Hence, the principles of promotion are vital in the study of any administration and should therefore, be based on some well-defined and recognised doctrines.

The following are the major principles of promotion, which may be followed alternatively or in combination:

- Principle of seniority

\textsuperscript{74} “Personnel Administration”, \textit{ibid.}
- Merit principle
- Seniority-cum-merit principle

2.4.2.3.1 PRINCIPLE OF SENIORITY:

The seniority principle is the oldest and still ubiquitous method of promotion both in Kenya and India.\(^75\) The principle which has been a common practice in the civil service in many parts of the world\(^76\) has been regarded as the easiest and the most widely acceptable factor in governing promotions.\(^77\)

According to Dr. Finer, seniority principle “is automatic and it avoids the need for making invidious distinctions between one person and another, of placing the young over the old, [and] of measuring the responsibility for the result of promotion”.\(^78\) Thus, according to this principle, the order of precedence in making promotion is determined by the duration of service,\(^79\) experience and age of an individual employee.\(^80\) For e.g., if employee X has

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75 'Seniority' here means length of service in a particular post or scale or grade.
78 Supra note 74.
80 Where K., C., *The Civil Service in the Constitution* 6, (London: The Atholone Press, 1954). Under S.H.9 of the Kenyan *Code of Regulations*, “Seniority” of civil servants shall be determined as follows: i) as between public officers of the same grade: a) by reference to the dates on which they respectively entered the grade; b) if the public officers entered that grade on the same day, by reference to their seniority on the day immediately preceding that day; and c) if any public officers who entered the same grade on the same day did so by appointment and not by promotion (excluding promotion from a non-pensionable to a pensionable grade), then seniority relative to each other shall be determined by reference to their respective ages: ii) as between public officers of different grades on the same salary scale or the same flat rate of salary, by reference to the dates on which they respectively entered their grades; and iii) as between public officers of different grades on different salary scales, by reference to the maximum point on their salary scale, a flat rate of salary being regarded for this purpose as a salary scale with a maximum point equivalent to the flat rate, provided that, while assessing the seniority of a pensionable public officer, service by himself or any other person in a non-pensionable capacity cannot be taken into account. *See also*, R.2 (1), *supra* note 45.
longer service to his or her credit than employee Y in a given position, then X is eligible for promotion.\(^{81}\)

Seniority principle generally contains the following merits:

- It is simple to apply, objective and offers everyone a chance of promotion.
- Employees get to experience many jobs on the way up the promotional ladder, provided that they stay long enough and openings develop. Jobs can be grouped into different ladders such that experience on one job constitutes good training for the next.
- There is no scope for nepotism or favouritism in its application.\(^{82}\)
- It gives respect and determines the order of precedence according to age and experience which is in conformity with the established practices in the society, and
- It reduces unhealthy rivalry or bitterness in the service thereby promoting harmony and increased morale in the services. A younger person cannot become a boss of the older and more experienced persons.

The principle however suffers from the following drawbacks:

- The principle does not necessarily lead to the selection of the best among those available and eligible for promotion. On the contrary, inefficient and conservative persons may be promoted adversely affecting the over-all performance of the Government services.

\(^{81}\) In India, the First Pay Commission (1947) recommended that the principle of seniority was be adopted for those posts where more familiarity with office work was a necessary requirement; the top posts were to be filled up on the basis of merit while the middle level posts were to be filled on the basis of seniority-cum-merit.

• Seniority does not necessarily coincide with age especially in a grade where the employees are partly recruited directly and partly by promotion. A young person who joined the service at an earlier age may be senior to a person who joined the service late in his or her life and so, the principle may not be able, after all, to prevent younger people being placed over their older counterparts.

• It leads to disheartenment and complacency in service among the more talented officials. In addition, seniority systems tend to reward loyalty and promote cooperation—albeit not excellence.

• Unless the proportion of higher posts to the lower is large, and vacancies in the former arise at regular and uniform intervals, the principle of seniority cannot guarantee every officer to reach higher positions nor can it guarantee any officer to hold a higher position for a reasonable period. Thus, ambitious workers may not be willing to "wait their turn" for higher-level jobs that they want.

• Some employees may not be willing to do certain jobs into which a strict seniority system would propel them. Furthermore, it is a mistake to assume that superior performance in one job will always translate into equivalent success after promotion to a new position. Personnel who move from technical jobs to supervisory ones may not always be skilled in handling the added responsibility and power.

• Seniority principle is not rational and just. Hard work, efficiency and the initiative of the energetic young persons is not rewarded. On the other hand, physically weak, aged and less energetic persons are promoted to higher positions where hard work, alertness and energy are required.
2.4.2.3.2 MERIT PRINCIPLE:

At present, majority of democratic countries in the world including Kenya and India have adopted the merit system of recruitment. The merit principle is a ‘rival’ to the principle of seniority. The principle implies that the most meritorious, best qualified and most competent person should be selected for promotion to the higher post. According to this principle, the order of precedence in making promotions is determined mainly by the qualifications and achievements of employees irrespective of the length of service.

In Kenya as well as India, higher positions in the civil service signify more powers and responsibilities and such positions require competent and hardworking persons. It is therefore, incumbent that only meritorious, qualified, experienced and skilled employees are promoted to such higher positions. Merit, therefore, ought to be the sole criterion for promotion rather than personal or political favouritism.

Merit is, however, a complex concept and includes besides intellectual attainments as revealed by degrees and examinations, several other factors like personality, capacity for leadership, and strength of character. It is therefore, not easy to measure it objectively and several methods for testing

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83 In India, the Second Pay Commission (1959) recommended the principle of merit for filling higher level posts and the principle of seniority-cum-fitness for middle and lower levels in administration. Later, the Administrative Reforms Commission (1969) also recommended the principle of seniority-cum-merit for promotions.
86 “Merit System in Public Employment”, http://books.google.co.in/books?id=yyUh_d_fnisC&pg=PA286&lpg=PA286&dq=merit+principle+of+public+employment&source=bl&ots=ijfD7ytgZx&sig=m3rNF7EiXYpabZfYE08cBDKnm0&hl=en&ei=OXuR7aW3DIyvQOb4ryYAQ&sa=X&oi=book_result&ct=result&resnum=3&ved=0CCUQ6AEwAg#v=onepage&q=merit%20principle%20of%20public%20employment&f=false, [accessed on 5th March 2011].

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it have so far been suggested. A brief analysis of such methods shall be undertaken hereunder:

2.4.2.3.2.1 METHODS OF ASCERTAINING MERIT:

Earlier, the researcher has pointed out that in most democratic countries including Kenya and India, the appointment/promotion of civil servants is made on the basis of merit and ability as compared to the experience and number of years of service. The questions that therefore arise are as to who should test the merit and what methods of testing and determining merit should be adopted while selecting a person to a higher post? Moreover, it is well accepted that the administration of recruitment by merit principle should be entrusted to a central, impartial, non-political and independent human resource agency, for e.g., the PSCs. But, are these established institutions living up to their legal mandate? To establish that, it is inevitable to first consider the various methods adopted for testing or ascertaining merit. They are:

a) Written Examination: The pertinent and widely accepted basis of promotion is through competitive examinations. The purpose of these examinations is primarily to test the intelligence, memory, knowledge and capacity of the candidates. The value of competitive examinations as a means of selection for promotion varies according to the number of employees who enter the competition. In order to attain qualitative results and to eliminate favouritism and arbitrariness, the exam places

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87 See generally, the sub-topic ‘merit principle’, supra.
88 In Unit 2.3.1 supra, the researcher has outlined a brief study on the methods of testing merit for ‘direct recruitment’ in the civil service, for e.g., recruitment through written examination and interview. These methods are not applicable for testing the merit of a candidate for promotions. It should therefore, be noted that in this Unit, the merit of persons who are already in the service is being tested. They already possess the minimum educational qualifications required for recruitment in the service and have already passed their written and oral tests at the time of their recruitment. Now, their merit is to be tested for promoting them to higher posts. This is a difficult and delicate exercise which must be handled with great care.
every individual on an equal footing, frustrates any attempts to bring backstairs influence to bear and relieves the supervisory staff of burden or responsibility.\textsuperscript{89}

In addition, the exam energises the Government services\textsuperscript{90} by keeping the employees up-to-date with the new developments and facilitating brilliant and hard-working employees to get swift promotions after passing such examinations. Further, the exam is good when the number of candidates from whom selection is to be made is rather large and where specialized knowledge is an important requisite for the posts to which promotions are to be made.\textsuperscript{91} Promotional examinations may be competitive or qualifying in nature.\textsuperscript{92}

The written examination system for promotion however suffers from the following drawbacks:

- the employees normally neglect their routine administrative work because they are, by and large, preoccupied with examinations;
- faithful and devoted employees feel neglected;
- older and experienced employees cannot study and memorise notes for examinations. Less experienced younger employees who are fresh from colleges, normally obtain more marks in written examinations as compared to their older and experienced colleagues; and
- Although these promotional examinations are competitive, but closed \textit{i.e.}, confined to those who are already in the service, they

\textsuperscript{89} Gladden, \textit{op.cit.}, p.88.
\textsuperscript{91} Promotional examinations are generally followed at the lower levels of the public services.
\textsuperscript{92} \textit{Supra} note 74.
result in a lot of jealousy and heart-breaking amongst the skilled competitors.

Written tests are of two types: first, free answer or essay type. This type of examinations is more prevalent in India. The question paper contains a few questions and the candidates have to write fairly long essay type answers in two to three hours. In this method the candidate is tested in regard to his or her general intellectual capacity, factual information, his power of expression, his memory, his caliber of logical analysis and his clarity of thought. This method is especially preferred at higher levels where knowledge, expression and logical thinking are necessary. However, the assessment of essay type examination is difficult and subjective depending upon the caliber of the examiner. It is not objective.

The second type of examination is short answer or objective type. The question paper contains a large number of questions requiring short answers to be given within a prescribed time. Candidates are asked to indicate whether a given statement is true or false, tick mark 'correct' answer out of the given series of answers, fill up the blanks with correct words, match different statements correctly, etc. This type of examination is useful in testing the candidate's factual information and correct knowledge and at the same time his capacity to quick judgment and memory as well. It is cheap, reliable and fair method of testing the ability and capacity of a large number of candidates especially at lower levels. It also leaves no room for the examiner’s subjective judgment.

Sometimes written examinations are designed to test the general knowledge, ability and intellectual caliber of the candidates. In India,
written examinations are held in some compulsory general papers *i.e.*, General knowledge, and General English *etc.* At the same time candidates are also examined in some optional academic papers of their choice mostly drawn from the syllabus of the Colleges or University system. The philosophy behind this type of examination is that intellectual capacity is more important than specialised knowledge in administration. There written examinations are designed to test the candidate's knowledge of the specific subjects related to particular needs of different services or posts. For *e.g.*, for recruitment in Finance Department, knowledge of finance, accountancy, economics *etc.*, is important.

**b) Oral Test or Interview:** Written examinations cannot fully reveal the personality and personal qualities of the candidates. In order to be a successful employee or administrator, a person requires certain qualities like patience, initiative, presence of mind, alertness, power of decision-making, drive, clarity and leadership qualities.\(^9\) All these qualities cannot be comprehensively tested by written examination. Therefore, oral test is necessary to correct the weaknesses and shortcomings of written examination. Personality tests or interviews taken for recruitment to the civil service are generally intended to assess the total personality of the candidate and supplement the results of the written examination besides eliminating unfit candidates. For specialised posts, candidates are normally interviewed by experts in that field and a candidate’s

\(^9\)"Civil Service in India", [http://www.civilserviceindia.com/subject/interview.html](http://www.civilserviceindia.com/subject/interview.html), [accessed on 29\(^{th}\) May 2011].
expertise, skill and knowledge is tested. Simultaneously, the experience and past records of a candidate’s work is also verified.

In recent times, group tests are also becoming common. Group discussions, group meetings and group behaviour tests are organised to test a candidate’s personal qualities i.e., behaviour, quickness, adaptability, leadership qualities, confidence, initiative, etc. Several candidates sit around the table and discuss a given topic. The members of a board observe them but do not participate in the discussion. The arguing capacity of a candidate is judged by this method.\(^4\)

c) **Performance Tests:** There are some jobs in the Government which require skilled and trained persons in particular trade, craft or work, for e.g., mechanics, drivers, stenographers, typists and electricians. In the selection of candidates for such posts, performance tests are conducted. The candidates are asked to perform on the actual work to show how well they can do it. The performance test may be supplemented by written test to assess a candidate’s knowledge of technical terms, tools and methods, etc.

d) **Evaluation of Past Records:** In some Government posts, written examination and/ or interview is not the appropriate means for selecting prospective civil servants. For e.g., specialist and technical posts, legal, medical, engineering and scientific professions are only filled up by assessing the qualification, experience and past records of

\(^4\) “Methods of Ascertain Merit”, [books.google.co.in/books?id=bQLff_TuFAC&pg=PT116&dq=methods+of+ascertain+merit+of+civil+servants&source=bl&ots=KNUH9J1fffdd&sig=eBLEYW51-vvW9-zogkYP0q2KR8&hl=en&ei=N4HiTeukKcjurQJ2qu2RBg&sa=X&oi=book_result&ct=result&resnum=4&ved=0CCwQ6AEwAw#v=onepage&q&f=false], [accessed on 29\(^{th}\) May 2011].
a candidate’s work. The applicants, who fulfill the minimum required qualifications, are asked to produce relevant documents regarding their qualifications, past experience, service record, etc. A board of experts assesses these documents and makes selection after personally meeting and interviewing the candidates.

e) Physical Test: Government servants ought to be in good health. If they are not physically fit, they cannot be able to offer their best in the service. It is therefore, commendable that every person who is promoted or who joins the Government service undergoes a thorough medical examination before appointment. Only after obtaining a certificate of physical fitness, a person should be finally selected. Physical tests are also compulsory for recruitment in the police, armed forces, manual and field services, etc.

f) Psychological Test: In recent times, psychological tests have been introduced in many countries, for instance, China, Hong Kong, India, Japan, Korea, Taiwan, Thailand, and Vietnam to test the intelligence, mental caliber and mental maturity of the candidates to be recruited in higher positions. The aptitude of the candidate is tested by adopting modern psychological tests. This method is however primarily meant to supplement other types of tests. It is not a full-fledged and independent method of selection.

g) Efficiency Rating: Universally, this is one of the oldest methods of testing merit in the civil service. Individual employees’ service records also known by various names i.e., CR, service book, personal record or personal file, etc., are maintained. In the past, these records

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95 Ibid.
were mostly used to locate a person with bad records and to keep him away from promotion. But now-a-days, these records are used to evaluate the relative merits of the employee for the purpose of promotion. This method was first adopted in the USA for rating comparative ability and merit of the employees for the purpose of promotion.\footnote{There are three major systems of efficiency rating. They include: a) Production Records: used to assess the work of a mechanical character such as those of typists, stenographers and machine operators; b) The Graph Rating Scale System: assessment is based on certain categories of traits of an employee’s character such as accuracy, initiative, resourcefulness and dependability. Here, each quality is graded into different classes \textit{i.e.}, ‘excellent’, ‘very good’, ‘satisfactory’, ‘and unsatisfactory’; c) Personality Inventory System: it includes a broad list of traits of human character relevant for employment.}

The service records provide the necessary data on the basis of which evaluation or rating can be done. Every year a CR relating to the overall service-record of each and every employee is prepared and maintained by the concerned Head of the Department or Superintendent or Superior Officer. Assessment on every employee is done on the basis of qualities, traits, performance, output records, evidences, check-lists, \textit{etc}. Qualities or traits like knowledge of work, personality, judgement, initiative, accuracy, willingness to take responsibility, neatness, punctuality, organising ability, or output of an employee are rated as either above average, average or below average. Efficiency rating is a fair and reliable system of rewarding the most efficient and faithful person in the Government service and it helps to eliminate those who are comparatively less competent. It keeps the employees alert and up-to-date. The system however, is not objective. It depends upon the subjective judgment of rating and superior officers who prepare the service records. It is difficult to prepare a good ‘rating form’ which includes all qualities, traits or criteria.
necessary for effective rating. It creates depression especially among sensitive employees who are prone to become nervous and self-conscious.

h) **Personal Judgement of the Head of the Organisation:** This is an old and well respected principle. The determination of merit for promotion may be left to the judgement of Head of the Office or Department concerned who has personal knowledge of the various employees and their work in his organization. Such personal knowledge is, however, possible only in small organisations, and the correct use of discretion depends upon the integrity of the head concerned. This also helps the departmental head to maintain discipline and authority in the Department. It has the advantage of being both simple and comprehensive. However, it is highly subjective and may easily create the impression of favouritism or arbitrariness in promotion among employees. It often leads to unhealthy rivalry and causes considerable ill-will among those who may miss out for promotion. The departmental head is sometimes unable to keep a close touch with his/her subordinates or to form an accurate opinion of their merits and capacities as public or Government organisations are too vast and populous in nature.

In spite of its criticism, this system is provided with certain safeguards. The departmental head might be assisted by a Promotion Board constituted by him from amongst officials of his own Department. This board may review the record of the concerned employee. Moreover, a system of appeals can also be provided. The

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98 This system of promotion is mostly followed in business and industry but is not very common in the civil service. However, some top level executive promotions are made following this system.
actual promotion is in the hands of the Head of the Department concerned but the appeal against wrongful promotions should be heard by some outside agency.

2.4.2.3.3 SENIORITY-CUM-MERIT PRINCIPLE:

Seniority-cum-merit principle (a combination of seniority and merit principle) is one of the major principles of promotion which provides that promotions should be determined on the basis of both the length of service as well as qualification and achievement of the employees. For e.g., a minimum number of years of service (seniority) is fixed and then the fittest and most meritorious person, amongst those who possess the minimum experience, is selected for promotion.

Another way of combining these two principles is by testing the minimum qualification and competence and with all other things being equal, the meritorious and senior-most is preferred for promotion. It is observed that in most countries including Kenya and India, the general pattern of promotion is based on the following:

- promotions to the higher posts are made on the basis of merit principle only;
- promotions to middle level posts are made on the basis of seniority-cum-merit principle;
- promotions to lower level posts, are made on the basis of seniority principle but here also exceptional merit is rewarded.99

2.4.3 POSITIVE AND NEGATIVE RECRUITMENT:

When the PSCK or the UPSC or any other authorized recruiting agency actively searches for the best qualified and most competent candidates for appointment to the Government service, it is referred as

99 See, Unit 4.3 infra for further details.
‘positive recruitment’. On the contrary, ‘negative method of recruitment’ aims at keeping the unqualified and unfit candidates out of the Government services.

In several countries including Kenya and India, positive methods i.e., newspaper advertisements, literature materials, and cinema slides are adopted to attract the best men and women to join Government services. In case the number of applicants is however, much more than the available vacancies then, negative methods of eliminating the unqualified and less competent persons are adopted.

2.4.4 MASS OR INDIVIDUAL RECRUITMENT:

This is a conventional method of recruitment that has been practiced in several countries. When a large number of non-technical, unspecialised posts of general nature are to be filled up, ‘mass recruitment technique’ is adopted. However, when particular posts requiring specialised knowledge, skill or technical know-how and experience are to be filled up, then ‘individual recruitment method’ is adopted.

2.4.5 CRITICAL EVALUATION AND SUGGESTIONS TO THE EXISTING SYSTEMS OF RECRUITMENT AND PROMOTION:

So far the researcher has analysed various methods of recruitment and promotion followed in Kenya and India. It is now quite clear that recruitment and promotion are vital steps in personnel administration. If the recruitment and promotion policies in existence are not effective and up-to-date, then incompetent and unqualified persons will join the civil services leading to poor delivery of public services and/or administration. It is therefore, indispensable that recruitment and promotion policies should be sound and well planned.
However, it is quite unfortunate to note that most appointments and promotions in the civil service especially in Kenya depend on nepotism, tribalism and political patronage.\textsuperscript{100} The office worst affected by these negative values is the Principal Secretary’s office. For a long time, most of the officials recruited into this office have not been career civil servants who have climbed ranks in a Government Ministry/Civil Service. A number of them have been imposed into the office, sometimes even from outside the civil service.

In regard to the existing system of promotion in Kenya and India, the researcher brings to fore the following shortcomings:

- Some Heads of the Departments are deliberately excluding some civil servants from the list of eligible candidates for promotions. Sometimes, staff associations are also neglected by the Heads of Departments.
- There is a poor reporting system. Personal records of the employees are not maintained satisfactorily and impartially.

\textsuperscript{100} For e.g., a report recently released on ethnicity in the civil service by the National Cohesion and Integration Commission, a Commission established under S.15 of the National Cohesion and Integration Commission Act, 2008, shows five communities accounting for 70 per cent of Government jobs. The big five communities that dominate these jobs include: Kikuyu (22.3%), Kalenjin (16.7%), Luhya (11.3%), Kamba (9.7%) and Luo (9.0%). The skewed recruitment into the civil service, which is mainly as a result of personality-based leadership system of governance, cuts across all job groups including those that do not require high educational qualifications - see, Nation Media Group, Ethnicity Rife in Public Jobs – Report, Daily Nation, http://www.nation.co.ke/News/politics/-/1064/1139782/-/7qbrhki/-/index.html, [accessed on 6\textsuperscript{th} April 2011]. See also, Steve Mkawale, Report Shows OP and PM Offices Under Grip of Tribe, The Standard Newspaper, http://www.standardmedia.co.ke/InsidePage.php?id=2000032707&cid=4&ttl=Report shows OP and PM offices under grip of tribe, [accessed on 7\textsuperscript{th} April 2011]; Peter Leftie, Shock of Kenya Ruled by Ethnicity, The East African Standard, http://www.theeastafriicna.co.ke/news/-/2558/1140072/-/o3wqvtz/-/index.html, [accessed on 6\textsuperscript{th} April 2011]; “No Jobs for Small Tribes? Injustice in the Civil Service”, http://corruptioninkenya.wordpress.com/2011/04/page/2/, [accessed on 16\textsuperscript{th} May 2011]; “Kikuyu Dominate Public Service, Says NCIC Report”, http://allafrica.com/stories/201104080208.html, [accessed on 2\textsuperscript{4}\textsuperscript{th} May 2011]; “Jobs: Why Ethnicity is a Factor in Kenya”, http://www.standardmedia.co.ke/InsidePage.php?id=2000047085&cid=4&ttl=Jobs: %20Why%20Ethnicity%20is%20a%20factor%20in%20Kenya, [accessed on 22\textsuperscript{nd} November 2011].
• In Kenya, employees are not properly informed about the vacancies to be filled up by promotions and there is also no clear policy regarding the nature and quantum of posts meant to be filled.

• In some instances, either seniority is given too much importance instead of merit or there is sheer interference from the Executive.

• Absence of systematic promotion machinery makes promotions unjust, arbitrary and disorganized.

• There is no effective and independent system of appeals in cases of injustices in promotions.

• In most cases, promotion is granted on extraneous considerations. There are no suitable criteria to judge merit and these results in unequal opportunities for promotion.

• Tribalism, nepotism and corruption are some of the existing factors denying promotion of female employees to higher cadre in the civil service especially in Kenya.

• There is delayed promotions in most Government Departments, and

• There are many administrative hurdles in the promotion system.

In order to overcome the above shortcomings, the researcher suggests that:

• a suitable and systematic promotion policy must be adopted in respect of each cadre;

• service records must be kept objectively and impartially;

• the top management should avoid giving flimsy or technical grounds to deny the employees' rightful claims for promotion. They should
give up the ethnicity,\textsuperscript{101} caste, class, region, language preferences in promotion;

- effective and independent machinery for evaluation and appeals must be established;
- independent Promotion Boards or Committees must be established in all Government services at all levels;
- purposive qualifying examinations and interviews may be carried out in making promotion at middle level positions;
- in promotion to the higher posts, the merit principle\textsuperscript{102} should be the only consideration to the total exclusion of seniority while in promotion to middle posts, merit should be the determining factor and seniority a secondary one. In promotion to lower posts, seniority should carry weight, but even here care should be taken to ensure that exceptional merit is rewarded by quick promotion;
- while recruiting/promoting civil servants especially in Kenya, rules laid down should be strictly and impartially followed and the Kenya Anti-Corruption Commission, the Community Policing Groups, and officials from the Public Complaints Committee should be involved. This is in a bid to curb corruption that has marred similar exercises in the past. For \textit{instance}, in lower level job groups, recruitment should be conducted on the same day throughout the country and successful candidates notified within 24 hours.\textsuperscript{103}

\textsuperscript{101} Ethnicity has thrived in Kenya mainly because of the excessive discretionary powers given to the top civil servants.

\textsuperscript{102} The Merit Principle should however, represent members of diverse communities in the country and regular reviews should be carried out in each ministry/department to address ethnic inequality.

\textsuperscript{103} In the past, recruitment to civil service in Kenya would be a month-long exercise.
To ensure better performers join the Government service, entry qualifications in all levels or job groups should also be upgraded. This apart, the existing recruitment agencies *i.e.*, the PSCK, UPSC, *etc.*, should adopt scientific, modern and up-to-date methods of testing merit of the candidates for *example* performance contracts.\(^{104}\) From time to time, these methods must be reviewed and the latest up-to-date methods must be adopted. Moreover, all this recruitment agencies should be independent, impartial and non-political as envisaged in the new COK and the COI.

At present, it is crucial that the recruiting and promoting agencies in Kenya and India should strive to promote or recruit an employee who is a good learner - ever ready to acquire new knowledge and ever willing to experiment new ideas; a person who is willing to shoulder responsibility for his or her decision and actions; a person who performs extremely well and has potential and hunger to perform even better, giving the needed motivation, incentives and training; a person who can adjust his individual goals with the organizational objectives and adapt with ease to organizational culture; a person who is quality – cost - competition conscious, and committed to excellence; a person having a broad vision, liberal (non -bureaucratic) attitude and ‘outward looking’ approach; a person who possesses high propensity for inventive ideas and innovative solutions for people's problem; a person who can rightly manage his time, build his team and train his people in the race for winning; a person having a knack of maintaining and developing effective communications and interpersonal relations and a person who is fair in his dealings and just in his actions.

\(^{104}\) Performance contracts should however, include entrenching diversity as a major indicator of performance.
In Kenya especially, efforts should also be made to prevent certain constellation of Ministries, based on their strategic importance, from being staffed by one ethnic group beyond a certain limit. Moreover, accelerated affirmative action is also needed to build the human capital in areas historically marginalised. Because of long periods of marginalisation, some communities *i.e.*, Maasai and Turkana have internalised logic for self-exclusion, even when they are qualified for promotion. Further, for appointments or promotions requiring Parliamentary approval, a memorandum stating how the new appointments or promotions have affected ethnic composition in civil service should accompany the submission of names to Parliament. This should be one of the considerations Parliament needs to focus on rejecting or accepting the nominee.

2.5 LEGAL PROVISIONS REGARDING RECRUITMENT AND PROMOTION IN KENYA AND INDIA:

2.5.1 CONSTITUTIONAL PROVISIONS:

Civil servants in Kenya and India are governed by various instruments which not only regulate the process of recruitment and promotion but also provide for other incidental matters. In Kenya, for *e.g.*, the instruments includes: the COK; the COR; the PSCA; the *Salaries and Remuneration*

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105 This can be better done by adhering strictly to the provisions of the new *Constitution of Kenya* and by coming up with a legislations for affirmative action as already provided for in the Constitution.

106 Section E of the Code deals with various aspects of civil service employment *i.e.*, it makes provision for job groups applicable in the public service, categories of appointment, salary structures of civil servants, powers of appointment and procedures to be followed, reporting of vacancies, overseas recruitment, form of application, record of previous employment and qualifications, medical examination of candidates, general conditions of employment, letters of appointment, date of appointment, appointment of pensioners, employment of non-Kenya citizens, appointment on probation to the pensionable establishment, age of admission to pensionable establishment, confirmation in appointment and admission to pensionable establishment, procedure of confirmation in appointment, appointment on agreement terms or temporary terms, address of an officer's next-of-kin, certificate of service, certificate of long service for members of support staff, testimonials and commendatory letters, schemes of service, promotions, dates of promotion, release of officers selected for promotion in other ministries, transfer of officers from one ministry or department to another, transfers to and from the civil service of Kenya and secondments of officers to statutory boards or similar organisations, and subordinate service.
Commission Act, 2011; the Public Officers Ethics Act, Cap 183; the Official Secrets Act, Cap 187\(^\text{107}\); the Public Holidays Act, Cap 110; the Pensions Act, Cap 189; the Employment Act, 2007; the Work Injury Benefits, Cap 236; the Penal Code, Cap 63; the Prevention of Corruption Act, Cap 65; the Financial Regulations, Exchequer and Audit Act, Cap 412; the Presidential and Parliamentary Elections Act, Cap 7; and the Professional Associations / Complaints Committees. Besides the above mentioned instruments, there are also other watchdog institutions that regulate the civil service, \textit{i.e.}, the Office of the Controller and Auditor General, the Public Accounts Committees, the Public Investment Committees, the Inspector of State Corporation and the Kenya Police Anti Corruption Unit.

Recruitment and promotion to the civil service and other incidental matters in India are governed by the following instruments: the COI; the Administrative Tribunals Act, 1985; the All India Service Act, 1951; the Commission of Inquiry Act, 1952; the Official Secrets Act, 1923; the Public Servants (Inquiries) Act, 1850; the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959, the Central Civil Services (Leave) Rules, 1972; the Central Civil Services (Temporary Services) Rules, 1965; the All India Services (Discipline and Appeal) Rules, 1969; the Central Services (Joining Time) Rules, 1979; the Administrative Tribunals (Procedure for Investigation of Misbehaviour or Incapacity of Chairmen, Vice-Chairmen and Other Members) Rules, 2000; the All India Service (Performance Appraisal Report) Rules, 2007; the Central Civil Service (Conduct) Rules, 1964; the Supplementary Rules; the Fundamental Rules, et

\(^{107}\) For \textit{e.g.}, S.3 of the Act prohibits civil servants from allowing any other person to have possession of any official document issued for his use alone, or communicate to any other person any code word so issued. This is primarily meant to provide for the preservation of State secrets and State security.
Besides the already mentioned instruments, most States in India have enacted various Rules and Regulations to supplement the Central Acts.\textsuperscript{108}

The new constitutional dispensation in Kenya has spectacularly scattered the half-century heritage of unfettered impunity more especially in matters related to recruitment and promotion of civil servants. The entrenchment of Parliamentary vetting as a basic requirement for all appointments to senior public office has caused a seismic shift and ushered Kenya to a whole new governance paradigm.\textsuperscript{109} The COI however, does not prescribe Parliamentary vetting as a pre-condition for such recruitment or promotion to the civil service.

The new COK sets the tone by providing a slate of national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law; or makes or implements public policy decisions relating to recruitment and promotion of civil servants.\textsuperscript{110} They include patriotism, rule of law, participation of the people, human dignity, equity, inclusiveness, equality, non-discrimination, protection of the marginalised, good governance, integrity, transparency and accountability focused on sustainable development. In addition, men and women have also the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.\textsuperscript{111}

\textsuperscript{108} In Kenya, the Constitutionally newly created County Governments are yet to exercise their powers in the form of passing rules for regulating civil service recruitment and promotions within their respective Counties.

\textsuperscript{109} The requirement for Parliamentary vetting is premised on a new governance regimen that celebrates democratic constitutionalism and the rule of law as the central unifying public philosophy for Kenya. The Constitution provides that the Parliamentary Committees shall vet the nominated candidate(s) against set criteria and make recommendations to the appropriate Assembly. Members of the House shall then debate the recommendation and vote to either approve or reject the nomination. If approved, the President proceeds to appoint, if rejected, the nominee is “returned to sender” - see, Art.124, supra note 21.

\textsuperscript{110} See Art.10, \textit{ibid}.

\textsuperscript{111} Art.27 (3), \textit{ibid}.
Moreover, Chapter six of the new Constitution sets a bar for integrity in leadership which is quite essential for recruitment and promotion of civil servants. Sub-clause (a) of Clause (1) of Article 73 defines authority assigned to a State officer as a public trust to be exercised in a manner that brings honour to the nation and dignity to the office and promotes public confidence in the integrity of the office. The Article further sets the guiding principles of leadership and integrity, which include selection on the basis of personal integrity, competence and suitability....and objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, or other improper motives or corrupt practices.\textsuperscript{112} While recruiting, they are required to exercise their powers in a manner that should represent the diverse communities in Kenya in the civil service. These provisions directly and indirectly refer to authorities empowered to recruit persons to civil service.

Further, Chapter thirteen of the COK is the most significant Chapter that deals with matters related with civil service. The Chapter outlines the values and principles of public service which include fair competition and merit as the basis of appointments and promotions.\textsuperscript{113} In addition, it provides that all appointments and promotions shall be made after affording adequate and equal opportunities at all levels to men and women, members of all ethnic groups and persons with disabilities.\textsuperscript{114} Besides, the Article provides that the PSCK shall not only appoint and confirm persons to hold or act in

\begin{footnotesize}
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\item \textsuperscript{112} Art.73 (1) (b), \textit{ibid.}
\item \textsuperscript{113} Art.232 (1) (g), \textit{ibid.}
\item \textsuperscript{114} Art.232 (1) (i), \textit{ibid.}
\end{itemize}
\end{footnotesize}
offices of the State\textsuperscript{115} but also develop human resources in the public service.\textsuperscript{116}

Similarly, the County Governments in Kenya are responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for establishing and abolishing offices in public service and appointing persons to hold or act in those offices and confirming their appointments.\textsuperscript{117} Further, the Constitution also empowers Parliament to establish a Court with the status of a High Court to hear and determine disputes relating to employment and labour relations.\textsuperscript{118}

The Transitional and Consequential Provisions in the Sixth Schedule moreover provide that whenever the Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under the new Constitution, the President shall, subject to the \textit{National Accord and Reconciliation Act}, 2008, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.\textsuperscript{119}

The COI as well guarantees not only equality of opportunity for all citizens in matters relating to public employment or appointment to any office under the State\textsuperscript{120} but also restrains the State from discriminating against any citizen on grounds of religion, race, sex, place of birth, \textit{etc.},

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\textsuperscript{115} Art.234 (2) (a), \textit{ibid.}
\textsuperscript{116} Art.234 (2) (f), \textit{ibid.}
\textsuperscript{117} Art.235 (1), \textit{ibid.}
\textsuperscript{118} Art.162 (2) (a), \textit{ibid.}
\textsuperscript{119} Art.29 (2), the Sixth Schedule, \textit{ibid}. There is no express provision in the \textit{Constitution of India} that requires the Prime Minister to consult the President while making senior appointments to the civil service unlike under the \textit{Constitution of Kenya}.
\end{flushright}
while recruiting persons to any office under the State. At the same time, Part III of the Constitution also allows the State to reserve seats or posts for appointment 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. In general, Article 16 of the COI constitutes an important step towards ensuring that recruitment is based on the principle of merit.

The State is also permitted to make provisions for reservation in matters of promotion, with consequential seniority, to any class of posts in the services under the State in favour of the Scheduled Castes or Tribes which, in the opinion of the State, are not adequately represented in the services under the State. Further, Part XIV of the COI empowers the Central and State Governments to regulate recruitment and conditions of service of persons appointed to the public services and posts through an Act of the appropriate legislature. The President and Governors of States or persons appointed by them respectively are also vested with powers to make rules regarding recruitment and conditions of services of persons appointed to such services and posts till the time an Act of the appropriate legislature comes into force.

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122 The reservation policy is not expressly provided for in the *Constitution of Kenya*. The Constitution rather promotes fair competition and merit as the basis of all appointments to the civil service.
123 Art.16 (4), supra note 120. The year 1933 constitutes an important step in the development of British Policy of reservation in the services on racial and caste considerations. By a Resolution of the 9th July 1934, the Government of India declared that, in respect to the depressed classes, it would take all reasonable steps in order to secure for them a fair degree of representation in the public service. *See, Government of India, Home (Establishment) File No. 14/17-B/33, para 3.*
124 Art.16 (4A), infra. This provision was appended by the *Constitution (Seventy-Seventh Amendment) Act*, 1995, [w.e.f., 17th June 1995]. Keeping in view of this provision, the percentage of reservations in the services has been fixed at 15% for the Scheduled Castes and 7.5% for the Scheduled Tribes for direct recruitment on all-India basis.
125 Art.309, the *Constitution of India*, 1950.
126 The Rules framed under Art.309 of the Indian Constitution are judiciable and action taken by the administration under these rules can be examined by the Courts. On the other hand, the new *Constitution of Kenya* does not empower the President and Governors of Counties or persons appointed by them.
Moreover, the COI provides that if the Council of States declares by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, the Parliament may by law provide for the creation of one or more all-India services [including an all-India judicial service] common to the Union and the States to regulate the recruitment, and the conditions of service of persons appointed, to any such service.

Furthermore, the COI bestows a duty upon the UPSC and the State Public Service Commission [hereinafter referred to as SPSC] to conduct examinations for appointment to the services of the Union or State respectively. Besides, the UPSC, if requested by two or more States, may assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required. The Commissions shall also be consulted in all matters relating to methods of recruitment to civil services and for civil posts, the principles to be followed in making appointments and promotions to civil services or posts and the suitability of candidates for such appointments or promotions.

respectively to make rules regarding recruitment and conditions of services of persons appointed to civil services and posts.

127 This portion was inserted by the Constitutional (Forty-second Amendment) Act, 1976, sec.45, w.e.f., 3rd January 1977.
128 Art.312 (1), supra note 125.
129 Art.320 (1), ibid. Unlike the Constitution of India, there is no express provision in the Constitution of Kenya authorizing the Public Service Commission of Kenya to conduct competitive examinations for appointment to the National or County Civil Services.
130 Art.320 (2), ibid.
The Commissions, however, need not be consulted while making reservations of appointments or posts, under Article 16(4), in favour of any backward class of citizens which, in the opinion of the Government, is not adequately represented or while taking into consideration, under Article 335, the claims of the Scheduled Castes or Scheduled Tribes in making appointments to the Central Services.

The Forty-Second Constitutional Amendment led to the establishment of tribunals by Parliament for adjudication of disputes and complaints relating to recruitment and conditions of service of persons appointed to public service under the Central, State or any other Local Authority, or Corporation owned or controlled by the Government. Moreover, the Constitution provides that the law made by Parliament may for these purposes specify the jurisdiction and procedure of these tribunals and exclude the jurisdiction of all Courts, except that of the Supreme Court under Article 136, with respect to service matters falling within the purview of these tribunals.

133 Art.320 (4), ibid.
134 Ibid.
135 Art.323A, ibid.
136 Ibid. The Administrative Tribunals Act, 1985 is a legislation enacted based on Art.323A, the Constitution of India. Any Tribunal set up under the Act, for the resolution of service disputes or complaints; the jurisdiction of the High Court and not of the Supreme Court of India in regard to such matters is taken away and vested in the Tribunal. See, Kendriya Vidyalaya Sangathan v. Subhash Sharma, (2002) 4 SCC 145; S. P. Kumar v. Union of India, AIR 1987 SC 386; (1987) 1 SCC 124; (1987) 2 ATC 82; 1987 Lab IC 222; (1981) 1 LLJ 128; Union of India v. Deep, AIR 1993 SC 382; (1992) 4 SCC 432. Contra, State of H.P v. Pawan Kumar Rajput, (2006) 9 SCC 161. [In the rather case, the Supreme Court of India overruled the earlier cases and held that all decisions of Tribunals whether created under Art.323A or 323B of the Constitution will be subject to the High Court’s writ jurisdiction under Art.226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls. Hence, no appeals from the decisions of a Tribunal will lie directly to the Supreme Court of India under Art.136 without moving first the High Court under Art.226/227 simply because the jurisdiction conferred upon the High Courts and the Supreme Court under Art.226/227 and Art.32 respectively, is part of the inviolable basic structure of the Constitution. Therefore, the power of judicial review cannot be ousted by any Constitutional or Statutory provision]. See also, L. Chandra Kumar v. Union of India, AIR 1997 SC 1125; (1997) 3 SCC 261; Ashish Kumar Roy v. Union of India, AIR 1999 Cal 242; Commissioner of Entertainment Tax v. Mitra Cinema, AIR 2000 Cal 247.
2.5.2 LEGAL PROVISIONS GOVERNING RECRUITMENT AND
PROMOTION IN KENYA/INDIA AND THEIR JUDICIAL
INTERPRETATIONS:

As already cited above, there are various Acts, Rules and Regulations
made under the provisions of the COK and COI that govern the civil service
recruitments and promotions in Kenya and India.\(^{137}\) Such Rules are statutory
in nature and their main objective is to ensure appointment/selection of the
best suitable candidate for a particular post by prescribing relevant
experience, educational qualifications, appropriate method of recruitment
keeping in view the duties and responsibilities attached to the post operating
in an organisation. The Rules are an effective and extremely important tool
for ensuring fair process of recruitment or selection in accordance with
Constitutional provision.\(^{138}\)

Rules passed by the GOK or the GOI in that regard, are subject to
scrutiny by the respective State legislatures or established Commissions. In
Kenya for \textit{e.g.}, apart from the ‘Constitutional Implementation Oversight
Committee’,\(^{139}\) the ‘Commission for the Implementation of the
Constitution’\(^{140}\) and the ‘Attorney General’\(^{141}\) are also tasked to facilitate
and oversee the development of legislations and administrative procedures
required to implement the Constitution.

Likewise, Parliament and the State legislatures in India have separate
committees on subordinate legislations which scrutinize the rules passed by
the Government and ensure that they are consistent with the provisions of
the Constitution and various Acts of Parliament or State legislature. These
\(^{137}\) See, Unit 2.5.1, \textit{supra}.
\(^{138}\) “Recruitment Rules”, \url{http://www.upsc.gov.in/rr/rr_english.pdf}, [accessed on 16\textsuperscript{th} February 2011].
\(^{139}\) Art.4, the \textit{Transitional and Consequential Provisions}, the Sixth Schedule, \textit{supra} note 21.
\(^{140}\) Art.5, \textit{ibid}.
\(^{141}\) S. A.11, the \textit{Code of Regulations}, 2006.
committees may recommend amendments, repeal or alteration of the rules which are inconsistent with the provisions of the Constitution.\footnote{At the Union level, the Department of Personnel and Administrative Reforms is entrusted with the work of scrutinizing of the draft rules as well as amendments thereto. References are received from various Departments/Ministries relating to framing of recruitment rules for various services/posts. \textit{See, India, Department of Personnel and Administrative Reforms, Ministry of Home Affairs Report 5, New Delhi, (1981).}}

However, if within a short time a specific work is to be initiated, the Government cannot wait for the framing of recruitment or promotional rules and then appoint the personnel for the purpose. In such situation, following procedure is prescribed to be adopted:

\textbf{2.5.2.1 ABSENCE OF RECRUITMENT RULES:}


In \textit{Todarmal Jiva Jadav},\footnote{\textit{Todarmal Jiva Jadav v. Kanda Port Trust}, 1992 (2) SLR 188 (Guj). [In this case, on finding that there were no Statutory Regulations or Rules or any Administrative or Executive Instructions governing the question of appointment to the post of Chief Engineer, past practice which were established from the materials on record of appointing the senior most Superintendent Engineer was held to be a policy adopted by the authority and on such basis the non-promotion of the senior-most Superintendent Engineer to the post of Chief Engineer was held to be illegal]. \textit{See also}, \textit{N. Suresh Nathan v. Union of India}, AIR 1992 SC 564: 1992 Lab IC 351 (SC): 1992 Supp (1) SCC 584: 1992 SCC (L&S) 451.} it was also held that in absence of any rules, if there is a particular practice operating for some time in matters relating to promotion, then such practice will govern the claims for promotion made by the employee. However, the draft rules not approved by the authorities competent to frame the rules cannot be considered to be effective. But if the draft rules have been approved by the competent
authority, then it can be argued that such rules can be considered as Executive Instructions even though they have not been published or gazette.\textsuperscript{146}

2.5.2.2 RECRUITMENT AND PROMOTION RULES MUST BE VALID:

The recruitment or promotion rules framed either under Article 232 of the COK or Article 309 of the COI must be valid \textit{i.e.}, they shall have to stand the test of Article 27 of the COK and/or Articles 14 and 16 of the COI, subject to Article 16(4) read with Article 335 of the COI.\textsuperscript{147} Once the rules are framed, there cannot be any breach and the Government and any other established authority must strictly follow the same and any breach of the rules will invite judicial interference.\textsuperscript{148} In addition, the rules must be interpreted in a manner which is in consonance with legislative Acts,\textsuperscript{149} \textit{i.e.}, if the provisions relating to promotion are contained in a Statute, then any rules framed in the exercise of powers conferred by the Statute in relation to promotion and which are inconsistent with the statutory provisions will be void on the general principle that the rule making authority cannot act in derogation of the provisions of the Statute.\textsuperscript{150}


Moreover, when a right to be considered for promotion is conferred by Statutory Rules, the same cannot be taken away by an administrative order which is in the nature of a suggestion to the Government to exclude from consideration for promotion by transfer.\textsuperscript{151} Furthermore, where the mode of recruitment is statutorily limited to direct recruitment, any promise to the existing employees that the post will be filled up by promotion, cannot give rise to a claim based on promissory estoppels.\textsuperscript{152}

\textbf{2.5.2.3 THE AMENDMENT OF RECRUITMENT AND PROMOTION RULES:}

The GOK, GOI, County and or State Governments are empowered to frame rules for recruitment and promotion. They can as well amend the same whenever necessary. However, the amended rules must not be \textit{ultra vires} the respective Constitutions. The Statutory Rules and even the Executive Order passed can either be prospective or retrospective. During the selection process, if the recruitment rules are varied/amended, the Selection Committee of the PSC is mandated to follow the amended version.\textsuperscript{153} The State Government can amend the rules retrospectively but that shall be mentioned expressly and that there should be no difficulty in harmonious


\textsuperscript{153} \textit{See, State of MP v. Raghuvir Singh Yadav, (1996) SCC 151:} JT 1994 (5) SC 235: 1994 (5) SLR 176: (1994) 69 FLR 636. \textit{[In this case, recruitment to the post of Inspector, Weights and Measures Department, had began. The written examinations were also held and the interview cards were issued for \textit{viva voce}. At that stage, the State Government revised the requisite qualifications to be a “Degree in Science with Physics or, Degree in Engineering or Technology or, Diploma in Engineering” instead of “Degree in Arts or, Commerce or, Science or, Engineering or, Diploma in Engineering”. The Apex Court of India held that there is nothing wrong and the Government has its right to withdraw earlier notifications and issue fresh ones on the basis of the amended rules].} \textit{See also, S. Prakash v. K. M. Kurian, (1999) 5 SCC 624: AIR 1999 SC 2094.}
construction.\textsuperscript{154} Thus, a retrospective amendment of a rule which took away the vested rights of general category candidates to be considered for promotion by affecting seniority was held to be violative of Articles 14 and 16 of the COI\textsuperscript{155}.

It is imperative that the review of the recruitment and promotional/service rules is taken up at regular intervals in order to make them relevant to the rapidly changing needs of the Government.

The COR is the main instrument that regulates the functioning of the civil servants in Kenya. Under the provisions of the Code, the PSCK is charged with recruitment and promotion of civil servants.\textsuperscript{156} Besides, the Code provides that the Commission may delegate to any Board any of the functions of the Commission relating to the examination or interview of, or investigation of any circumstances affecting candidates for appointment,\textsuperscript{157} promotion or transfer to any public office as defined to be within the scope of the Commission.\textsuperscript{158}

Moreover, the COR as well as the \textit{Public Service Commission Regulations}, 2005 [hereinafter referred to as \textit{PSCR}] stipulates that the PSCK should be informed of all vacancies arising in the Ministries/Departments and all local advertisements in respect of such vacancies falling within the

\textsuperscript{156} \textit{See Ss A.6 and B.2, supra note 141 and R.9, supra note 45. Besides, such recruitment or promotion should be fair and free from corruption. The Kenya Anti-Corruption Commission is empowered under S.7 (b) of the \textit{Anti-Corruption and Economic Crimes Act}, Cap 65 to investigate the conduct of any person that, in the opinion of the Commission, is conducive to corruption or economic crime. \textit{See also, Ss.39, 46, 62, 63, and 64, Cap 65 for further details.}
\textsuperscript{157} Appointments to the civil service are divided into the following main categories: a) permanent and pensionable, b) permanent without pension benefits, c) appointments on local agreement, d) temporary appointments, and e) casual, hourly or daily paid appointments.
\textsuperscript{158} \textit{See, S.B.3 (3), supra note 141. See also, S.4, infra note 160.}
The Secretary to the Commission is the only authorised authority to issue and publish all local advertisements. Hence, no advertisements in respect of such posts will be issued by Ministries/Departments without prior authority of the Commission.

After the advertisements have been issued and published, it is imperative for the candidates applying for employment to complete the prescribed application Form PSC.2 or Form PSC.2A in respect of serving officers which contains, among other things, a complete record of any employment, public or private, that the applicant may have had. Candidates need to account for the whole period of their previous employment and all particulars furnished by them need to be supported by satisfactory documentary evidence. It is therefore the duty of the Authorized Officers when making promotion which fall within their authority, or in making recommendations for new appointments, to ensure that a candidate’s record of previous employment is satisfactory in all respects.

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159 See, Ss.B.12 and E.4(1), supra note 141. See also, Rules.10 and 12, supra note 45, S.76, the Employment Act, 2007. [When reporting the vacancies, Authorized Officers/Heads of Department should enclose a statement of the qualifications required for the posts in question and the duties/responsibilities which the successful candidates will be expected to perform].
160 The Secretary and all other members of the Commission are required under Ss.8 and 9 of the Public Officers Ethics Act, 2003 to carry out their duties to the best of their ability and in a way that maintains public confidence in the integrity of their office and above all, ensure that the services they offer are provided honestly and efficiently.
161 S.E.22, supra note 141 also requires an officer to complete a next-of-kin Form G.P. 25 on first appointment with their complete names and addresses. In case of any changes in particulars, the officers are required to notify their Heads of Department/Authorized Officers of the same.
162 S.E.6 (1), supra note 141.
163 ‘Authorised Officer’ in this context means, the Principal Secretary who exercises supervision over the Ministry concerned or over the Ministry in which the civil servant concerned holds an office, as the case may be; or in the case of a Department which is not assigned to any Minister, the Head of that Department; or in the case of the Kenya National Audit Office, the Controller and Auditor-General.
164 S.E.7 (1), supra note 162.
Similarly, intervals between one period of employment and another must be satisfactorily explained.\textsuperscript{165} In addition, a candidate on first recruitment must provide copies of the national identity card, birth certificate, PIN card, certified academic and professional certificates, and passport size photograph. Original documents may be produced as and when required for verification.\textsuperscript{166}

It should be noted as well that, the PSCK does not accept applications for Government employment except in response to its advertisements. Consequently, any such application that may be received by a Government Department should not be forwarded to the Commission except in connection with existing vacancies in the Department.\textsuperscript{167} However, under delegated powers, the Ministries/Departments may receive and process applications for initial employment in Job Groups ‘A’ to ‘H’ in accordance with existing regulations governing applications.\textsuperscript{168}

Moreover, the Code makes it mandatory for the PSCK’s authority to be sought before proceeding with any recruitment from outside Kenya.\textsuperscript{169} The Commission will grant such authority on the advice of the Principal Secretary/Director of Personnel Management where it has been established that there are no local candidates with the requisite qualifications to meet the staffing needs.\textsuperscript{170} Likewise, the Commission is mandated to conduct exams

\textsuperscript{165} Any information given regarding the intervals of employments must be true and correct otherwise a person will be liable under S.129 of the Penal Code, Cap 63 for giving false information.

\textsuperscript{166} Ss.E.6 (1) and E.7 (2), supra note 164. A person impersonating or producing fake documents for recruitment will be liable for punishments under Ss.384, 385, 386 and 387, \textit{ibid}.

\textsuperscript{167} S.B.14 (1), supra note 141.

\textsuperscript{168} See, S.B.14 (2) and E.2 (3), \textit{ibid}.

\textsuperscript{169} See, S.E.5, \textit{ibid}. See also, the terms and conditions applicable for recruitment of non-citizen under S.O of the Kenyan \textit{Code of Regulations}.

\textsuperscript{170} See, S.B.6 (1) and S.O.1, \textit{ibid}. See also, Ss.83 and 84, the Employment Act, 2007. Recruitment from outside Kenya will also be subject to the following conditions: a) that the candidate is prepared to accept an appointment on local agreement terms except where otherwise provided in the agreement; b) that the Government of the country to which the candidate belongs raises no objection to his recruitment; and c) the candidate complies with the provisions contained in the Immigration Act, Cap 172 i.e., S.4, S.7, S.20, etc.,
for promotion from one grade to another. The guidelines of the examinations conducted by the Commission are issued from time to time.\textsuperscript{171}

In regard to promotion of civil servants, the COR and the PSCR lay emphasis on merit, seniority, experience, official qualifications and ability as reflected in work performance, as the basis for promotion.\textsuperscript{172} Besides, all recommendations made to the PSCK for promotion of an officer should state whether the officer recommended is the seniormost officer in the Department or grade eligible for promotion. Otherwise, detailed reasons should be given in respect of each person in the same Department or grade over whom it is proposed that the person recommended will supercede if promoted. All promotions made under delegated powers must be processed through the appropriate Ministerial/Departmental Human Resource Management Advisory Committee.\textsuperscript{173}

The COR further provides that the date of an officer’s promotion will be the date of the PSCK’s letter authorizing the promotion, or the date of the

\textsuperscript{171} See S.B.9, supra note 162.

\textsuperscript{172} See R.13, supra note 45. See also, S.22, supra note 160. In addition, the Administrative Officers and Clerical Officers are required under the Code of Regulations (S.P.24 and S.P.26 respectively) to pass the ‘Administrative Officers Examination’ and ‘Proficiency Examinations’ respectively administered by the Public Service Commission of Kenya before being promoted to the next grade. The pass mark in each paper is determined by the Public Service Commission of Kenya. Likewise, under S.P.27 of the Regulations, the occupational tests for telephone operators must be conducted by the Public Service Commission of Kenya before the operators are promoted to the next grade. On the other hand, S.3 of the National Cohesion and Integration Act, 2008, S.8 of the Public Service Commissioners’ Code of Conduct and Ethics, Cap 183 and S.5 (3) of the Employment Act, 2007 provides that no employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment. Similarly, S.7 of the National Cohesion and Integration Act provides that all public establishments shall seek to represent the diversity of the people of Kenya in the employment of staff. Thus, no public establishment under the Act shall have more than one third of its staff from the same ethnic community.

\textsuperscript{173} See, Ss.B.15 and S.E.27, supra note 162.
occurrence of a vacancy, whichever is later. This regulation applies whether
the post is filled after advertisement or without advertisement, or whether
the post to which the officer is being promoted is in the Ministry in which he
is serving or in another Ministry or whether the officer is on an official
course of instructions or annual or vacation leave on the date of the PSC’s
letter.\textsuperscript{174}

It is also provided that an officer who is selected for promotion to a
Ministry other than that in which he is serving, will be released to take up
his appointment on transfer within a period of two months from the date of
the letter authorizing the promotion and if an officer’s promotion takes effect
before his transfer, salary at the full rate attached to his new appointment
will be payable by the retaining Ministry from the date of his promotion
until his transfer, except where an officer who is promoted to a post in a
different Ministry/Department while attending a training course, the new
Ministry will be required to pay his full emoluments in the normal way.
However, where an officer fails to take up a promotion in a different
Ministry/Department, he shall be deemed to have declined the promotion
which shall then be rescinded.\textsuperscript{175}

In regard to recruitment and promotions of persons with disability, the
\textit{Persons with Disabilities Act, 2003} and the \textit{Persons with Disabilities
(Access to Employment, Services and Facilities) Regulations, 2009} also lay
emphasis on every public service entity to identify and ring-fence, for
priority employment and promotion of persons with disabilities without
discrimination, jobs which match their knowledge, skills and abilities and
this will be done so as to attain the statutory requirement of at least 5%
employment of persons with disabilities in the public service. On the other hand, the Appropriate Government in India is obliged to appoint in every establishment such percentage of vacancies not less than 3% for persons with disability of which 1% each shall be reserved for persons suffering from: a) blindness or low vision; b) hearing impairment; c) locomotor disability or cerebral palsy, in the posts identified for each disability. However, the Appropriate Government may, having regard to the type of work carried on in any Department/Establishment, by notification subject to such conditions, if any, exempt any establishment from such reservation.

Moreover, every public service entity shall ensure that job vacancies and other communication relating to their recruitment and promotion are publicized in a format which is accessible to persons with different disabilities including using established Government channels, in print, in large print, in braille, on radio, on the internet and including providing the job application materials in a range of formats.

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176 See, Ss.10 and 11, the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009; Ss.12 to 17, the Persons with Disabilities Act, 2003. See also, S.47, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

177 S.33, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Where in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, S.36 of the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009 provides that such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability. See generally, Sonika v. LIC Housing Finance Limited, Case No: 933/2001; Chief Commissioner, Disabilities v. Central Water and Power Research Station, Ministry of Water Resources, Case No. 2669/2002; Anjali Arora v. National Thermal Power Corporation, C.W.P. No. 7120 of 2002; Govt., of NCT of Delhi v. Bharat Lal Meena, CWP No. 2490 of 2002; Govt., of NCT of Delhi v. Surinder Singh, CWP No. 2461 of 2002; Chief Commissioner v. High Court of Madhya Pradesh, Case No. 2630/2002; Chief Commissioner, Disabilities v. Central Water and Power Research Station, Ministry of Water Resources, Case No. 2669/2002; Mr B. S. Gurum v. Ministry of Environment & Forests, Case No. 2767/2003; Mr B. S. Gurum v. Ministry of Environment & Forests, Case No. 2767/2003; Chief Commissioner, Disabilities v. Uttaranchal Forest Hospital Trust, Case No. 2587/2002/262; Mr. V. P. Singkhania v. Banking Division, Indian Banks' Association (IBA) and Reserve Bank of India (RBI), Case No. 2791/2003; Chief Commissioner, Disabilities v. Uttaranchal Forest Hospital Trust, Case No. 2587/2002/262.

178 See, S.9, the Public Service Commission Code of Practice on Mainstreaming Disability, 2010.
It is also the duty of every ‘public service entity’\(^{179}\) to make adjustments in the work place/work station conducive to maximizing the ability of the candidate to perform the job\(^{180}\) and to encourage persons with disabilities to apply for promotion especially where they may be reluctant to do so because of impairment or other barrier arising from their disabilities or perceived barriers in their working environment.\(^{181}\) The public service entities are also required to institute measures to enable candidates with disabilities to participate and perform at interviews and selection process on an equal basis with other candidates including permitting them to use assistive and support devices and signs.\(^{182}\)

In order to preserve sanctity and efficiency in the civil service, the COR provides that a candidate must undergo a medical examination before recruitment\(^{183}\) and that a candidate with a record of conviction in a Court of law or a candidate who has resigned or whose appointment in the civil service has been terminated for any reason, should not be engaged or re-engaged without prior consultation with the Authorized Officer of the Ministry/Department or Head of the organization in which he was employed.\(^{184}\) However, the fact that a candidate has been convicted or dismissed will not necessarily bar him from re-employment in the civil service and each case will be considered on its own merits having regard to all the circumstances involved.\(^{185}\)

\(^{179}\) ‘Public service entity’ includes a Government Ministry or Department, Commission, Committee, Council, Local Authority, State Corporation or any other public body.

\(^{180}\) S.9 (3), \textit{supra} note 178.

\(^{181}\) S.13, \textit{ibid}.

\(^{182}\) S.10 (3), \textit{ibid}.

\(^{183}\) See, Ss.M.1 (2), S.E.8 and O.21, \textit{supra} note 162. The medical examination is meant to determine whether the candidates to be recruited are fit to serve in civil service in Kenya. \textit{See also} Fundamental Rule 10.

\(^{184}\) See, Ss.E.7 (3) and E.7 (4), \textit{ibid}.

\(^{185}\) S.E.7 (5), \textit{ibid}.
Before assuming duty, it is vital that any person recruited to any office be given an appropriate letter of offer of appointment which must be duly signed. Instructions for payment of salary cannot be issued until such letter has been signed. The COR emphasises that any officer who authorizes such payments will be held responsible for any loss to the Government. Moreover, an offer of appointment may be withdrawn if the candidate does not signify in writing his acceptance of the offer of appointment or agreement within two months from the date it is sent.

The recruitment made from within Kenya will take effect only from the date of assumption of duty or where the person is resident in a place other than that to which he is posted, from the date of leaving his place of residence to take up his duties, provided the Authorized Officer is satisfied that he travelled by the most direct route and reported for duty on the first working day of his arrival to take up the appointment. However, an appointment made from outside Kenya will normally take effect from the date of departure for Kenya, provided that the Authorized Officer is satisfied that the officer travelled by the most direct route to take up the appointment and reported on the first working day after arrival.

It is the policy of the Government not to re-employ its own pensioners or those of other administrations where there are citizens with the appropriate qualifications available. However, the COR provides that where

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186 S.10 (2) of the Employment Act, 2007 also provides that such a letter or contract of service shall state the name, age, permanent address and sex of an employee; the name of the employer; the job description of the employment; the date of commencement of the employment; the form and duration of the contract; the place of work; the hours of work; the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits; the intervals at which remuneration is paid; and the date on which the employee’s period of continuous employment began, taking into account any employment with a previous employer which counts towards that period and any other prescribed matter.

187 Ss.E.9 and E.10, supra note 141. See also, S.101, supra note 165.

188 Ss.E.9 and E.10, supra note 162.

189 S.E.11 (1), ibid.

190 S.E.11 (2), ibid.
it is essential to recruit a pensioner, employment will be on temporary terms of service and before such recruitment, it must be satisfied that the post to be filled is a critical one and the only suitable candidate available to fill it is a pensioner and it is essential to secure his services. Approval of such employment shall be granted by the PSCK on the recommendation of Principal Secretary/Director of Personnel Management.

Where vacancies exist in the permanent and pensionable establishment, the COR as well as the PSCR provides that candidates recruited to fill such vacancies should, with the approval of the appropriate authority i.e., the Authorised Officer or the Head of Department, be appointed on probation to the permanent and pensionable establishment and not on temporary terms with a view to learn their work and to test their suitability for the post. At least four months before the expiry of the probationary period, the Authorized Officer is obliged to consider, in the light of the reports on the officer’s conduct and capabilities, whether or not the officer is suitable for confirmation.

Under Section J.4 of the COR officers appointed to act in a higher post are entitled to be paid acting allowance at the rate of fifteen percent of their substantive basic salary.

191 Where an officer to whom a pension has been granted under S.12 of the Pensions Act, Cap 189 is appointed to another office in the civil service, the payment of his pension, or any part thereof, may, with his consent, if the President thinks fit, be suspended during the period of his re-employment.
192 See, S.E.13, supra note 188. While forwarding such recommendations to the Public Service Commission of Kenya, S.17, supra note 160, requires the Permanent Secretary or the Director of Personnel Management, as the case may be, not to practice nepotism or favouritism.
193 S.E.20, ibid, provides that an appointment on temporary terms will only be confined to those cases where the service of an officer would not normally be required beyond a period of twelve months or where a candidate does not qualify for appointment to the particular vacancy other than on temporary terms under the service regulations or where the establishment is of a temporary nature.
194 See, R.14, supra note 45.
195 See, Ss.E.14 and E.17, supra note 162.
In addition, such officers and the PSCK are to be notified of the date of cessation of acting appointment and the date of the officer’s reversion to their substantive grades. The PSCK is obliged not to approve acting appointments to take effect from a date earlier than three months prior to the date on which the recommendation is submitted to the Commission. Further, the Commission is also obliged not to approve the acting appointment of an officer in a post to which he has already been promoted.

On first appointment, while travelling by public transport to a duty station that is outside the place of residence of a newly recruited officer, the COR provides that such officer is entitled to receive fare at the rates which will be determined by the GOK from time to time. Similarly, such officer shall be provided with a Government vehicle to transport his luggage to the duty station. However, in the absence of a Government vehicle, the officer will be eligible for a baggage allowance.

It is the Government policy on training to continually upgrade core competencies, knowledge, skills and attitudes of civil servant. Training of civil servants is aimed at addressing identified performance gaps. Hence, all civil servants are required to undergo at least five days training in a year.

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196 R.17, supra note 45, also provides that the regulations and procedures which apply to appointments and promotions shall as well apply, where appropriate, to all acting appointments exceeding a period of one month subject to such instructions as the Public Service Commission of Kenya may from time to time issue. See generally, Parshotam Lal Dhingra v. Union of India, AIR 1958 SC 42: 1958 SCR 828: (1958) 1 LLJ 544.

197 The members of the Public Service Commission of Kenya are prohibited under S.11 of the Public Service Commissioners’ Code of Conduct and Ethics, Cap 183 from asking or accepting any property or benefit of any kind for themselves or for any person on account of anything to be done or omitted to be done by them in the discharge of their official duties in relation to recruitment or promotion of civil servants.

198 Similar arrangements shall also be followed in cases of acting appointment made under the ‘delegated powers’.

199 See, S.K.2, supra note 162.

while newly recruited or transferred officers must be inducted within three months of joining the new organizations. The expenditure for the approved courses is met by the GOK.

Section 4 of the *Indian Administrative Service (Recruitment) Rules*, 1954 [hereinafter referred to as *IASRR*] provides that recruitment to the civil service shall either be by:

- competitive examination; or;
- promotion of a [substantive] member of a State Civil Service, or;
- selection, in special cases from among persons, who hold in a substantive capacity gazetted posts in connection with the affairs of a State and who are not members of a State Civil Service.

However, in emergency cases, the Central Government may after consultation with the State Government concerned and the UPSC, adopt such other method of recruitment to the civil service apart from the above mentioned. In addition, the method of recruitment to be adopted for the purpose of filling up any particular vacancy and the number of persons to be recruited by each method shall be determined by the Central Government in consultation with the UPSC and the State Government concerned.

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201 S.P.2 (4), *ibid*.
202 See, Ss.P.9 and S.P.16, *ibid*. The expenses include: a) fees for approved courses and related examination fees; b) the cost of transport and traveling to and from the institution at which the course is held; c) pre-departure medical examination, passport, visa, vaccination and inoculation fees, d) an officer who wishes to relocate his/her family while undertaking a course may be granted, prior to his/her departure on course, free transport, in accordance with Section K, the *Code of Regulations* for his/her spouse and children (where applicable) and luggage (up to transfer limits) to their preferred destination within Kenya. Free transport to his/her duty station, on a similar basis, may be granted on the officer’s return at the end of the course, *etc*. 
203 It should be noted that through ‘direct recruitment method’, competitive examinations for persons willing to join the Kenyan civil service at higher levels are not conducted.
204 The initial appointments of persons recruited to the service under clauses (b) and (c) shall be in the Senior Time Scale of pay.
205 Introduced vide MHA notification No.17/4/5/6-AIS (III) dated 14-5-56.
Moreover, the Central Government, in consultation with the UPSC shall determine the intervals at which the competitive examination for recruitment to the civil service shall be held. Such examinations are conducted by the Commission in accordance with such regulations as the Central Government may pass from time to time, in consultation with the Commission and State Governments concerned.\(^\text{207}\)

The IASRR further emphasizes that a person can only be eligible for recruitment to the Indian civil service if he/she is a citizen of India or belongs to such categories of persons as may, from time to time, be notified by the Central Government.\(^\text{208}\) However, any person who having a living spouse, enters into another marriage shall not be eligible for appointment to the civil service, except where the personal law applicable to such a person and the other party permits such union.\(^\text{209}\)

The IASRR also stresses that the Central Government may, on the recommendations of the State Government concerned and in consultation with the Commission and in accordance with such regulations as the Central Government may make, after consultation with the State Governments and the Commission, from time to time, recruit not only to the civil service persons by promotion from amongst the substantive members of a State Civil Service\(^\text{210}\) but also any person of outstanding ability and merit serving in connection with the affairs of the State and who is not a member of the State Civil Service concerned, but who holds a gazetted post in a substantive capacity.\(^\text{211}\) However, the number of persons recruited shall not, exceed 33.3

\(^{207}\) R.7, the *Indian Administrative Service (Recruitment) Rules*, 1954.
\(^{208}\) R.5, *ibid.* Inserted w.e.f., 5.4.66 vide MHA Notification No.1/1/66-AIS (I), dated 12.8.68.
\(^{209}\) Substituted vide DP&T Notification No.1/1/71-AIS-A, dated 6.3.71.
\(^{210}\) R.8 (1), *supra note* 207.
\(^{211}\) R.8 (2), *ibid.* Added vide MHA Notification No.13/10/57-AIS (III)-A, dated 29.7,1958. The persons recruited may be for a substantive or an officiating capacity either to a permanent or temporary post.
per cent of the number of senior posts under the State Government, Central Deputation Reserve, State Deputation Reserve and Training Reserve in relation to that State or to the group of States, in the Schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955 provided that the number of persons recruited under Sub-rule (2) of Rule 8 shall not, at any time, exceed 15 per cent of the number of persons recruited under Rule 8.212

Moreover, it is vital to note that recruitment through Employment Exchanges in India is governed by the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959. The Act requires the employers in any public sector establishment to notify the Employment Exchanges of any vacancy before filling up any vacancy in any employment in the establishment.213 Besides, the Act requires the employers in the public sector to furnish such information or return as may be prescribed in relation to vacancies that have occurred or are about to occur in that establishment to Employment Exchanges as may be prescribed.214

The recruitment or appointment made should however, be legal215 and have prospective effect. Such an appointment should never be made retrospectively except where the rules permit relaxation of conditions

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212 R.9, ibid.
214 S.5, ibid. See, Union of India v. N. Hargopal, AIR 1987 SC 1227 where the nature of the obligation imposed upon the employers by reason of S.4 of the Act was considered exhaustively. The Supreme Court of India held that the Act did not oblige any employer to employ only those persons who had been sponsored by the Employment Exchanges although it imposes an obligation on the employer to notify the vacancies to the Employment Exchanges. See also, James Jesudas v. Malabar Cements Ltd., 1996 (3) SLR 228; Kartick Chandra Ghosh v. State of West Bengal, 1986 (II) CHN 378; Mritunjoy Sarkar v. Director General of Police, 1988 (3) SLR 632 at 640; Raj Kumar v. Shakti Raj, AIR 1997 SC 2110: (1997) 9 SCC 527. [In the rather two case, the Apex Court of India endorsed that posts should not only be notified and the names from the Employment Exchange be called for but wide publicity in the media inviting application should also be given].
thereof216 or where there is absence of statutory provisions conferring such power.217

It is also essential to note that a civil post or a permanent post in the Government may be occupied substantively by only one person at the time.218 Any appointment made to the said post should not be cancelled without complying with the rules of natural justice219 and without according an appointee thereof an opportunity of hearing where the Statutes so provides.220 However, an appointment is liable to be set aside if:

- it is obtained on the basis of bogus and forged records221, or by committing fraud222, or by false declaration in an application223;
- it is made in violation of Statutory Regulations or even Administrative Instructions224;
- the recommendation on the basis of which it was made was unauthorized225;

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218 Fundamental Rule 12.
• the candidate did not possess the requisite qualifications, or where there is mass malpractice;
• willful suppression of information which is adverse to the candidate and which are required to be given in the prescribed form under the rules and would come within the purview of moral turpitude, etc.

In regard to promotion, it is the Government’s prerogative to promote a civil servant and the employee has only a right to be considered for promotion under Articles 27 and 232 of the COK and Article 16 of the COI and not a right to be promoted. However, this right is only available if he falls within the prescribed zone of consideration.

In Chandrakant Anant Kulkarni and S. S. Bola the SCI has also reiterated that no employee has a right to promotion, but an employee has a right to be considered for promotion in accordance with the existing rules. The right to be considered for promotion is a part of the conditions of

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229 See, T. R. Kapur v. State of Haryana, AIR 1987 SC 415: 1986 (Supp) SCC 584. See also, General Manager, Southern Railways v. Rangachari, AIR 1962 SC 36: 1962 (2) SCR 586: 1961 (2) SCJ 424,[in this case, it was observed that the right to be considered for promotion is one of the matters relating to employment or appointment within the meaning of Art.16(1) of the Constitution of India]; Ajit Singh v. State of Punjab, AIR 1999 SC 3471: 1999 SCC (L&S) 1239: (1999) 7 SCC 209,[in this case it was observed that there will be a clear violation of Art.16(1) if a person is not considered for promotion]; Todarmal Jiva Jadav v. Kandla Port Trust, 1992 (2) SLR 188 (Guj),[in the latter case, it was held that a departure from an established previous practice in the matter of consideration for promotion would also amount to unfair discrimination and a denial of promotion in disregard of such previous practice would be violative of Art.14 and 16 of the COI].
service but the chances of promotion are not part of the conditions of service. Therefore, a rule merely affecting the chances of promotion cannot be considered as varying the conditions of service.\textsuperscript{233}

Ordinarily, the Courts or Tribunals do not interfere with the assessments made by the Departmental Promotion Committees [hereinafter referred to as \textit{DPC}] in regard to merit or fitness of a candidate for promotion. But, there may be rare cases where the Court may interfere with such assessments if it is either proved to be \textit{malafide} or is found based on inadmissible or irrelevant or insignificant and trivial material and if an attitude of ignoring or not giving weight to the positive aspects of one’s career is strongly displayed, or if the interference drawn are such that no reasonable person can reach such conclusions, or if there is illegality attached to the decision.\textsuperscript{234}

The procedure and guidelines to be followed in the matter of promotion of civil servants against whom disciplinary or Court proceedings are pending or whose conduct is under investigation have been reviewed carefully by the SCI.\textsuperscript{235} At the time of consideration of the cases of civil servants for promotion, details of civil servants in the consideration zone for promotion falling under the following categories should be specifically brought to the notice of the DPC:

- civil servants under suspension;
- civil servants in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending; and

\textsuperscript{233} \textit{Ibid.}
\textsuperscript{234} See, \textit{Badrinath v. State of Tamil Nadu}, AIR 2000 SC 3243, 3253: (2000) 8 SCC 395. See also, \textit{Tata Cellular v. Union of India}, AIR 1996 SC 11 where the Supreme Court of India accepted the Wadnesbury ruling and held the grounds for judicial review of administrative actions to include: a) Illegality, b) Irrationality, and c) Procedural impropriety.
• civil servants in respect of whom prosecution for a criminal charge is pending.

However, it should be noted that an employee falling within the zone of consideration cannot be denied promotion by the DPC merely because some disciplinary criminal proceedings are pending against him or preliminary investigation is in progress.236

The above mentioned preposition is illustrated by the SCI decision in *R. N. Mishra*.237 In 1976, a preliminary inquiry was initiated to inquire into allegations of misconduct against the respondent. In 1977, he was promoted to a higher post while the preliminary inquiry was in progress. After due inquiry, the State Government in 1986 inflicted on him the penalty by way of withholding his two increments. He challenged the order arguing that by his position in 1977, the allegations of misconduct against him stood condoned by the State Government and as such, the penalty imposed on him was without jurisdiction. The SCI rejected the contention and observed that “….an employee who is required to be considered for promotion, despite the pendency of the preliminary or contemplated inquiry against him, is

**Footnotes**

236 See, *New Bank of India v. N. P. Sehgal*, AIR 1991 SCW 565: (1991) 2 SCC 220. The assessment of the Departmental Promotion Committees, including ‘those unfit for promotion’, and the grading awarded by it, is required to be kept in a sealed cover. The cover will be superscribed, “findings regarding suitability for promotion to the grade/post of ……in respect of Shri……..not to be opened till the termination of the disciplinary case or criminal prosecution against Shri ……” On conclusion of the disciplinary case or criminal prosecution which results in dropping of allegations against the civil servant, the sealed cover shall be opened. In case the employee is exonerated, the due date of his promotion will be determined with reference to the position assigned to him in the findings kept in the sealed cover and with reference to the date of promotion of his next junior on the basis of such position. Such employee may be promoted, if necessary, by reverting the juniormost officiating person and with reference to the date of promotion of his junior. However, whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion and if so to what extent, will be decided by the appointing authority by taking into consideration all the facts and circumstances of the disciplinary proceedings/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so. If any penalty is imposed on the employee as a result of the disciplinary proceedings or if he is found guilty in the criminal prosecution against him, the findings of the sealed cover shall not be acted upon. His case for promotion may be considered by the next Departmental Promotion Committees in the normal course and having regard to the penalty imposed on him.

promoted, having been found fit, the promotion so made would not amount to condonation of misconduct which is subject matter of the inquiry”.  

It is however, necessary to ensure that the disciplinary case or the criminal prosecution instituted against any employee is not unduly prolonged. The concerned appointing authorities should review comprehensively the case of any employee whose suitability for promotion to a higher grade is kept in a sealed cover on expiry of six months from the date of convening the first DPC which had adjudged his suitability and kept its findings in the sealed cover. Such a review should also be done subsequently every six months. The review should, inter alia, cover the progress made in the disciplinary proceedings or criminal prosecution and the further measures to be taken to expedite their completion.

In spite of the six monthly review referred to above, there may be some cases, where the disciplinary case or the criminal prosecution against the civil servant is not concluded even after the expiry of two years from the date of the meeting of the first DPC. In such a situation the appointing authority may review the case of the Government servant, provided he is not under suspension, to consider the desirability of giving him ad-hoc promotion keeping in view the following aspects:

- Whether the promotion of the officer will be against public interest?
- Whether the charges are grave enough to warrant continued denial of promotion?
- Whether there is any likelihood of the case coming to a conclusion in the near future?

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238 Ibid.
• Whether the delay in the finalisation of proceeding, departmental or in a Court of law, is not directly or indirectly attributable to the civil servant concerned; and

• Whether there is any likelihood of misuse of official position which the civil servant may occupy after _ad-hoc_ promotion, which may adversely affect the conduct of the departmental case or criminal prosecution?

It is also imperative for the appointing authority to consult the Central Bureau of Investigation and take their views into account where the departmental proceedings or criminal prosecution arose out of the investigations conducted by the Bureau. In case the appointing authority concludes that it would not be against the public interest to allow _ad-hoc_ promotion to the servant concerned, his case should be placed before the next DPC held in the normal course after the expiry of the two year period to decide whether the officer is suitable for promotion on _ad-hoc_ basis. Where such a servant is considered for _ad-hoc_ promotion, the DPC should make its assessment on the basis of the totality of the individual’s record of service without taking into account the pending disciplinary case or criminal prosecution against him.

After a decision is taken to promote the said servant on an _ad-hoc_ basis, an order of promotion may be issued making it clear in the order itself that the promotion is being made on purely _ad-hoc_ basis and the _ad-hoc_ promotion will not confer any right for regular promotion and the promotion shall be valid until further orders. It should also be indicated in the orders that the Government reserves the right to cancel the _ad-hoc_ promotion and revert at any time the said servant to the post from which he was promoted.
If the civil servant concerned is acquitted in the criminal prosecution on the merits of the case or is fully exonerated in the departmental proceedings, the *ad-hoc* promotion already made may be confirmed and the promotion treated as a regular one from the date of the *ad-hoc* promotion with all attendant benefits. However, if the concerned servant is not acquitted on merits in the criminal prosecution but purely on technical ground and the Government proposes either to take up the matter to a higher Court or to proceed against him departmentally, or if such servant is not exonerated in the departmental proceedings, the *ad-hoc* promotion granted to him should automatically be brought to an end.\(^{239}\)

It is as well imperative to note that an order of promotion or appointment is subject to judicial review on the grounds of illegality, non application of mind or principles of natural justice, *mala fide*, etc.\(^{240}\) However, in the reviewing process, the Courts shall give due weightage to the opinion of experts or other bodies on whose recommendation the appointment is made. In addition, the SCI, while elucidating the scope of judicial review in matters relating to appointment, has observed that “[w]hen the selection is made by the Commission aided and advised by experts having technical experience and high academic qualifications in the specialist fields, probing teaching/research experience in technical subjects, the Courts should be slow to interfere with the opinion expressed by the experts unless there are allegations of *mala fide* against them….\(^{241}\)

\(^{239}\) Similar procedure outlined above should be followed in considering the claim for confirmation of an officer under suspension, *etc*. However, a permanent regular vacancy should be reserved for such an employee when his case is placed in sealed cover by the Departmental Promotion Committees.

\(^{240}\) *Jagtar Singh v. Director, Central Bureau of Investigation*, JT 1993 (2) SC 703; 1993 Supp (3) SCC 49; 1993 (2) SLR 539; (1993) 2 LLM 55. For further details on judicial review of service matters, *see*, Chapter 5, infra.

\(^{241}\) *Dr. M. C. Gupta v. Dr. Arun Kumar Gupta*, (1979) 2 SCC 339; (1979) SCR 853; 1979 Lab IC 296.
If a promotion or an appointment is erroneously given, benefits which have been earned may not be taken away although the appointment or promotion is quashed.\textsuperscript{242} Likewise, where the appointment is declared illegal the Courts may, where the illegal appointment has operated for a long period, direct that the actual experience gained by the incumbent be taken into account for that post if he applied in response to a fresh recruitment process.\textsuperscript{243}

\section*{2.6 Qualifications/Eligibility Criteria for Recruitment and Promotion of Civil Servants in Kenya and India:}

One of the main problems in the recruitment and promotion systems of modern civil service in Kenya and India is laying down proper qualifications/eligibility to suit the needs of the diverse tasks of administration.\textsuperscript{244} Broadly there are two types of qualifications required to recruit or promote civil servants: general qualifications, \textit{i.e.}, employee’s civil status, domicile, sex, age \textit{etc.}, and special qualifications, \textit{i.e.}, educational qualifications, \textit{etc.}

\subsection*{2.6.1 Nationality:}

The COK as well as the COI explicitly provide not only that every person is entitled to all the rights and freedoms set forth in the respective Constitutions without discrimination of any kind (such as race, colour, sex, health status, language, religion, marital status, dress, national or social origin, birth or other status, political or other opinion, \textit{etc.}) in public

\textsuperscript{242} State of Rajasthan v. R. Dayal, (1997) 10 SCC 419: 1997 SCC (L&S) 1631. See also, Bhagwan Singh v. State of Punjab, (1999) 9 SCC 573 where it was held that when a Court finds an appointment invalid, it should set it aside prospectively so that all earned emoluments are protected.

\textsuperscript{244} Ordinarily, the rationale underlying the prescription of qualifications in most Statutes or Rules is to prevent poor or unqualified persons to be appointed to a post in the civil service which requires the performance of responsible duties.
employment opportunities but also that persons appointed to the civil service must necessarily be citizens of Kenya and India respectively.\textsuperscript{245} The \textit{Indian Administrative Service (Recruitment) Rules}, 1954 also provides that no person shall be qualified for appointment to the service unless such a person is a citizen of India or belongs to such categories of persons as may, from time to time, be notified by the Central Government.\textsuperscript{246}

Moreover, for the IAS and the Indian Police Service [hereinafter referred to \textit{IPS}], a candidate must be a citizen of India and for other services, a candidate must be either: a) a citizen of India, or b) a subject of Nepal, or c) a subject of Bhutan, or d) a Tibetan refugee who came over to India before 1st January, 1962 with the intention of permanently settling in India, or e) a person of Indian origin who has migrated from Pakistan, Burma, Srilanka, East African countries of Kenya, Uganda, the United Republic of Tanzania, Zambia, Malawi, Zaire, Ethiopia and Vietnam with the intention of permanently settling in India. However, a candidate belonging to categories (b), (c), (d) and (e) shall be a person in whose favour a certificate of eligibility has been issued by the GOI and shall not be eligible for appointment to the Indian Foreign Service [hereinafter referred to as \textit{IFS}]\textsuperscript{247}.

Similarly, the COR prohibits recruitment of foreigners except in cases where it has been established that there are no local candidates with the requisite qualifications to meet the staffing needs.\textsuperscript{248} The Principal Secretary/Director of Personnel Management is obliged to seek the PSCK’s

\textsuperscript{245} See Arts.12, 27(3), 55, 56 and 78, \textit{supra} note 21 and Art.16, \textit{supra} note 125. It is argued that Government jobs especially higher level jobs should be manned by citizens only. This is keeping with the sense of national character, self respect and check on leakage of national secrets. Citizens are presumed to own much more allegiance to their nations as compared to aliens. \textit{See also}, “Eligibility”, \url{http://career.webindia123.com/career/competitive_exams/upsc_exams/civil_service_exam/eligibility.htm}, [accessed on 13\textsuperscript{th} May 2011].

\textsuperscript{246} R.5, \textit{supra} note 207.

\textsuperscript{247} Wasim Khan, \textit{Indian Civil Service}, India Daily Times, \textit{supra} note 12.

\textsuperscript{248} \textit{Supra} note 170.
authority before proceeding with any such recruitment from outside Kenya.\textsuperscript{249}

\textbf{2.6.2 AGE LIMIT:}

It is presumed that persons who join the civil service should have energy, vigour and confidence in labour. Hence, there are various rules or norms that provide for the minimum and maximum age limit for appointment to the civil service. In Kenya, for \textit{e.g.}, the COR provides that any appointment to the pensionable establishment should normally be restricted to officers who will be in a position to complete ten years’ service required to qualify for the grant of a pension before reaching the age of compulsory retirement. However, where special circumstances may occur that may justify variations in the application of the said general principle, such cases should be submitted for consideration to the Principal Secretary/Director of Personnel Management before recruitment.\textsuperscript{250}

Likewise, a candidate for recruitment to the ICS must have attained the age of twenty one and must not have attained the age of thirty years on 1st August, of the year of examination.\textsuperscript{251} The upper age limit prescribed may however be relaxed up to a maximum of:

\begin{itemize}
  \item five years if a candidate belongs to a Scheduled Caste or a Scheduled Tribe;
\end{itemize}

\begin{footnotes}
\textsuperscript{249} \textit{Supra} note 169.
\textsuperscript{250} S.E.16, \textit{ibid}.
\end{footnotes}
• three years in the case of candidates belonging to Other Backward Classes who are eligible to avail of reservation applicable to such candidates;

• five years if a candidate had ordinarily been domiciled in the State of Jammu and Kashmir during the period from the 1st January, 1980 to the 31st day of December, 1989;

• three years in the case of defence service personnel disabled in operations during hostilities with any foreign country or in a disturbed area and released as a consequence thereof;

• five years in the case of ex-servicemen\(^{252}\) including Commissioned Officers and ECOs/SSCOs who have rendered at least five years military service as on 1st August of the year of examination and have been released; i) on completion of assignment including those whose assignment is due to be completed within one year from 1st August of the year of examination otherwise than by way of dismissal or discharge on account of misconduct or inefficiency, or ii) on account of physical disability attributable to military service, or iii) on invalidment;

• five years in the case of ECOs/SSCOs who have completed an initial period of assignment of five years military service as on 1st August of the year of examination and whose assignment has been extended beyond five years and in whose case the Ministry of Defence issues a certificate that they can apply for civil employment and that they will be released on three month's notice on selection from the date of receipt of offer of appointment; and

\(^{252}\) The term ex-servicemen will apply to the persons who are defined as ex-servicemen in the Ex-servicemen (Re-employment in Civil Services and Posts) Rules, 1979 as amended from time to time.
• ten years in the case of blind, deaf-mute and orthopedically handicapped persons.\textsuperscript{253}

The date of birth of a civil servant is very significant in the service matter as different service benefits flow taking into account the date of birth both during the tenure of service and after retirement. Besides, the date of birth determines the age beyond which employment and re-employment is barred. Therefore, any candidate seeking Government employment in Kenya as well as in India must produce sufficient documents to prove the date of birth prior to appointment. In Kenya, for \textit{e.g.}, a candidate is required to produce a birth certificate, national identity card, certified academic and professional certificates, \textit{etc.}, that contain his/her date of birth.\textsuperscript{254}

Similarly, the date of birth accepted by the UPSC or the SPSC is that entered in the Matriculation or Secondary School Leaving Certificate or in a Certificate recognised by an Indian University as equivalent to Matriculation or an extract from a Register of Matriculates maintained by a University, which extract must be certified by the proper authority of the University or in the Higher Secondary or an equivalent examination certificate. These certificates are required to be submitted only at the time of applying for the civil services (main) examination. Document relating to age like horoscopes, affidavits and service records are generally not accepted.\textsuperscript{255}

\textbf{2.6.3 EDUCATIONAL QUALIFICATIONS:}

The COR an instrument that regulates civil service recruitment and promotion in Kenya does not specifically prescribe fixed minimum

\textsuperscript{253} It is vital to note that a physically handicapped candidate will only be considered to be eligible for appointment only if he/she (after such physical examination as the Government or appointing authority may prescribe) is found to satisfy the requirements of physical and medical standards for the concerned services/posts to be allocated to the physically handicapped candidates by the Government.

\textsuperscript{254} For further details, \textit{see} S.E.16 (2), \textit{supra} note 141.

\textsuperscript{255} For further details regarding age limit, \textit{see}, Chapter 4, \textit{infra}. 
educational qualifications for candidates seeking Government employment for all job groups. However, it clearly stipulates that where an appointment to a civil post is conditional on possession of specific educational, professional or other qualifications, the originals of the relevant certificates should be obtained from the candidate before he is engaged and examined to verify their authenticity to ensure that he possesses the qualifications stipulated for the appointment or the equivalent. The Ministry of Education and other approved examining bodies may be consulted in case of doubt regarding the authenticity and equivalence of the certificates produced by the candidate. Besides, certified copies of all relevant documents are required to be retained in the personal file of the candidate for record upon appointment.

In regard to promotion, the COR also provides that while selecting candidates for promotion, regard shall be given to the merit and ability as reflected in the work performance and results as well as seniority, experience and official qualifications of the concerned candidate.

In India, on the other hand, a candidate desiring to join the civil service must hold a degree of any University incorporated by an Act of the Central or State Legislature, or other educational institutions established by an Act of Parliament or declared to be deemed as a University under Section 3 of the University Grants Commission Act, 1956, or possess an equivalent qualification thereto. In exceptional cases, the UPSC may treat a candidate...

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256 S.E.7 (2), supra note 254.
257 Ibid.
258 See, S.E.27 (2), ibid.
259 In some cases, the Courts are faced with the problem of deciding as to whether the qualifications possessed by the candidate is equivalent to what is prescribed or advertised in spite of some semantic differences between the two. For e.g., in Ramesh Chandra (Dr.) v. State of Rajasthan, 1978 (1) SLR 154 (Raj), the Court held that since the prescribed rules for appointment required a candidate to hold a Degree in Science, the appellant, being in possession of a Veterinary Science Degree was therefore eligible to
who does not possess any of the foregoing qualifications as a qualified
candidate provided that he has passed examination conducted by other
institutions, the standard of which, in the opinion of the Commission,
justifies his admission to the examination.260

Similarly, candidates who are intending to appear or who have
appeared at an examination the passing of which would render them
educationally qualified for the Commission’s examination but have not been
informed of the results will also be eligible for admission to the Preliminary
Examination.261 However, such candidates will be required to produce proof
of passing the requisite examination with their application for the Main
Examination failing which they will not be admitted to the Main
Examination.262 Candidates possessing professional and technical
qualifications which are recognised by Government as equivalent to
appear for the Emergence Recruitment Examinations. See also, Dr. Ram Sevak Singh v. Dr. U. P. Singh,
AIR 1998 SC 737; (1999) 2 SCC 189; 1999 SCC (L&S) 538, where M.Ed., was held to fulfill the requisite
qualification of Master’s Degree; “Civil Service Examinations”, http://indian-naukri.com/notice-for-civil-
services-examination-2011-upsc-cs-exam-notice-2011-cs-exam-date/, [accessed on 25th May 2011];
“(UPSC) Minimum Educational Qualifications: Civil Service Exams in India”; http://www.upscportal.com/civilservices/UPSC/Minimum-Educational-Qualifications-Civil-Service-Exams-
on 18th April 2011].

261 Candidates who have also passed the final professional M.B.B.S. or any other medical examination but
have not completed their internship by the time of submission of their applications for the civil services
(main) examination, are also provisionally admitted to the examination provided they submit along with
their application, a copy of certificate from the concerned authority of the University/Institution that they
had passed the requisite final professional medical examination. In such cases, the candidates will also be
required to produce at the time of their interview original degree or certificate from the concerned
competent authority of the University/Institution that they had completed all requirements (including
completion of internship) for the award of the degree.
262 Every candidate who is otherwise eligible is permitted three attempts at the civil service examinations.
However, candidates belonging to Other Backward Classes (OBC) are permitted seven attempts and there
is no limit to the number of attempts for the Scheduled Castes (SC) and Scheduled Tribes (ST) candidates
who are otherwise eligible. Moreover, an attempt at a Preliminary Examination is deemed to be an attempt
at the examination and any candidate who actually appears and/or who appears but is disqualified in any
one paper in the Preliminary Examination, shall be deemed to have made an attempt at the examination.
See, “UPSC Examinations”, http://job.dreamvision-soft.com/blog/2011/02/18/upsc-civil-services-pre-
examination-2011/, [accessed on 3rd May 2011]; “UPSC Examinations”,
http://way2freshers.com/jobs/governament/upsc-civil-services-examination-2011-notification.html,
[accessed on 15th May 2011].
Professional and technical degree are also eligible for admission to the Main Examination.

2.6.4 EXPERIENCE:

Experience is one of the key ingredients to obtain a better desired Government job in Kenya as well as India. In selecting candidates especially for recruitment or promotion, regard is given to merit as well as experience of an aspiring candidate. However, recruitment rules in India very often require the candidates to have certain experience. But whether experience is a mandatory requirement or not would depend on the facts and circumstances of a case.

In Council of Scientific and Industrial Research, the advertisement inviting applications for the post of Senior Technical Assistant specified the following qualifications; “...M.Sc., Degree in Chemistry, Physics, Chemical Engineering or in allied field of technology, preferably by research with 2 to 3 years’ experience of Industrial Intelligence, Survey and Production, Pilot Plant Work, or Research Development, etc”. The SCI held that, in the facts and circumstances of the case, the requirement of experience was not mandatory but was only a factor for preference.

The SCI has also held that when in addition to qualification experience is prescribed, it will only mean acquiring experience after obtaining the necessary qualification and not before obtaining such qualifications. On the other hand, clubbing of experience of different posts may be permissible. Hence, where the prescription was ten years experience

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263 See, S.E.27 (2), supra note 141. See also, R.13, supra note 45.
265 Ibid.
266 Indian Airlines Limited v. S. Gopalakrishnan, (2001) 2 SCC 362: (2001) 1 CLR 588. See also, P. K. Ramachandra Iyer v. Union of India, 1983 (3) SLR 495 where the Supreme Court of India also observed that experience to be of value and utility must be obtained after the educational qualifications and not while acquiring post-graduate qualifications.
as Master of Foreign Going Ship or in Pilot-Age Dredging in a major Port Trust, it would be permissible to club the experience gained by the candidate partially as a Master and partially in Pilot-Age so as to make the total period of ten years, particularly when the Government had consistently understood and applied the clubbing rule.267

Moreover, the SCI in M. C. Gupta268 has held that a teaching experience from a foreign University of repute (for e.g., State University of New York, Buffalo) would be considered as fulfilling the requisite experience and for that purpose, it is permissible for the selection committee to rely on certificates of the said University authorities.

Experience however, cannot be a substitute for educational qualifications prescribed by the rules.269 As a factor of promotion, it would therefore, connote the practical knowledge or skill gained by the aspirant for promotion in some work over a certain number of years in service which has some bearing or relationship with the functions of the promotional post.270 Moreover, experience for a specified period need not be continuous271 and any employee on deputation or by way of transfer or holding post in another cadre is not entitled to claim experience in the ex-cadre posts as experience for the purpose of promotion.272

2.6.5 **HEALTH REQUIREMENT:**

Various rules and regulations set forth require that a candidate must undergo a medical examination prior to recruitment\(^\text{273}\) and a selection for appointment thereof, is often made subject to the candidate being found medically fit to join the service and any candidate found medically unfit will automatically be disqualified. Hence, when the medical examination of the candidate revealed that he had serious defect in his eyes, the SCI set aside the writ issued by the High Court allowing the candidate to join the service in spite of being found medically unfit.\(^\text{274}\)

Moreover, candidates must be physically fit according to physical standards for admission to civil services.\(^\text{275}\) To be considered against the vacancies reserved for physically disabled persons in India, a person should have disability of forty per cent or more. Besides, such candidates shall be required to meet one or more of the following physical requirements which may be necessary for performing the duties in the concerned services/posts:

<table>
<thead>
<tr>
<th>Code</th>
<th>Physical requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>F</td>
<td>1. Work performed by manipulating (with Fingers);</td>
</tr>
<tr>
<td>PP</td>
<td>2. Work performed by pulling and pushing;</td>
</tr>
<tr>
<td>L</td>
<td>3. Work performed by lifting;</td>
</tr>
<tr>
<td>KC</td>
<td>4. Work performed by kneeling and crouching;</td>
</tr>
<tr>
<td>B</td>
<td>5. Work performed by bending;</td>
</tr>
<tr>
<td>S</td>
<td>6. Work performed by sitting (on bench or chair);</td>
</tr>
<tr>
<td>ST</td>
<td>7. Work performed by standing;</td>
</tr>
</tbody>
</table>

\(^{273}\) See, Ss.M.1 (2), S.E.8 and O.21, *supra* note 141. The medical examination is meant to determine whether the candidates to be recruited are fit to serve in civil service in Kenya. *See also* Fundamental Rule 10.


W  8. Work performed by walking;
SE  9. Work performed by seeing;
H  10. Work performed by hearing/speaking;
RW  11. Work performed by reading and writing.
The functional classification is however simultaneous with other requirements of a concerned service/post as indicated below:

<table>
<thead>
<tr>
<th>Code</th>
<th>Functions</th>
</tr>
</thead>
<tbody>
<tr>
<td>BL</td>
<td>1. Both legs affected but not arms;</td>
</tr>
<tr>
<td>BA</td>
<td>2. Both arms affected: a) impaired reach, b) weakness of grip;</td>
</tr>
<tr>
<td>BLA</td>
<td>3. Both legs and arms affected;</td>
</tr>
<tr>
<td>OL</td>
<td>4. One leg affected (Right or Left): a) impaired reach, b) weakness of grip, c) ataxic;</td>
</tr>
<tr>
<td>OA</td>
<td>5. One arm affected (Right or Left): a) impaired reach, b) weakness of grip, c) ataxic;</td>
</tr>
<tr>
<td>BH</td>
<td>6. Stiff back and hips (cannot sit or stoop);</td>
</tr>
<tr>
<td>MW</td>
<td>7. Muscular weakness and limited physical endurance;</td>
</tr>
<tr>
<td>B</td>
<td>8. Blind;</td>
</tr>
<tr>
<td>PB</td>
<td>9. Partially blind;</td>
</tr>
<tr>
<td>D</td>
<td>10. Deaf;</td>
</tr>
<tr>
<td>PD</td>
<td>11. Partially deaf.(^\text{276})</td>
</tr>
</tbody>
</table>

2.6.6 MISCELLANEOUS REQUIREMENTS:

Apart from the above mentioned requirements, there are other miscellaneous requirements necessary to be considered prior to appointment, *i.e.*, the personal qualifications of a candidate *i.e.*, a candidate with better personality, presence of mind, capacity to understand and adjust himself or

herself to diverse environments, etc. Moreover, a candidate must possess executive ability, tact, resourcefulness, integrity, energy, faithfulness and capacity to get along with others. He or she should be a leader of men, and imbued with a sense of public interests. Besides, a candidate must be adjudged suitable for the post.277

2.7 AGENCIES FOR RECRUITMENT AND PROMOTION OF CIVIL SERVANTS:

For efficient and apt functioning of any democracy, establishment of institutions or agencies for the recruitment and promotion of civil servants is indispensable. It is imperative as well that after their establishment, such agencies are manned by people of better skill and irreproachable integrity so that selection to various civil posts can be immunized from all sorts of extraneous factors like political pressure or personal favouritism. To achieve these objectives, the COK278 as well as the COI279 provides for the establishment of the PSCs that are autonomous and independent bodies that ensure fair and impartial selection of candidates for recruitment and promotion.280

The new Constitutional dispensation in Kenya provides for the creation of a PSC that will have a key role of establishing and abolishing offices in the public service as well as appointing, confirming, promoting and disciplining officers.281 Similarly in India, the PSCs occupy an important

278 See, Art.233, supra note 21.
279 See, Art.315, supra note 125.
280 Apart from the Public Service Commission, recruitment to civil posts may also be made by the Selection Committees duly constituted for the purpose through an executive order.
position in the Constitutional scheme. They are independent Constitutional bodies created for impartial consideration of service matters of Government employees.\textsuperscript{282} Chapter II of Part XIV of the COI provides for the creation of PSCs both for the Union\textsuperscript{283} and the States as well as a Joint State Public Service Commission.\textsuperscript{284}

\textbf{2.7.1 COMPOSITION, POWERS AND OBLIGATIONS OF THE PUBLIC SERVICE COMMISSION IN KENYA AND INDIA: A CRITICAL EVALUATION}

The PSCK and the UPSC are the main agencies in Kenya and India respectively that monitor recruitment, promotion, discipline, \textit{etc.}, of civil servants. The PSCK under the new Constitution consists of a Chairperson, a Vice-Chairperson\textsuperscript{285} and seven other members appointed by the President with the approval of the National Assembly.\textsuperscript{286} Besides, the PSCK\textsuperscript{287} consists of a Secretary\textsuperscript{288} who is the Chief Executive Officer of the

\begin{footnotesize}
\begin{enumerate}
\item The Union Public Service Commission is the recruiting agency to the All-India Services and the Central Civil Services- Class I and Class II employees. The responsibility for staffing the lower service posts rests with the departments concerned. \textit{See,} Maheshwari S. R., \textit{Indian Administration} 284, \textit{6th} ed., (New Delhi: Orient Longman Private Ltd., 2005).
\item Art.315, \textit{supra} note 125, envisages three categories of Public Service Commissions, \textit{i.e.}, a) the Union Public Service Commission that serves the needs of the civil services of the Union, b) a Joint Public Service Commission that serves two or more States, and c) State Public Service Commission that serves the needs of the State. While Union Public Service Commission and State Public Service Commissions are Constitutional bodies, a Joint Public Service Commission is created by an Act of Parliament.
\item Art.250, \textit{supra} note 21, also provides that the members of the Commission shall elect a Vice-Chairperson from among themselves at the first sitting of the commission and whenever it is necessary to fill a vacancy in the office thereof. However, the Chairperson and Vice-Chairperson of a Commission shall not be of the same gender.
\item Art.233 (2), \textit{ibid.} The Chairman and the Members of the Union Public Service Commission, on the other hand, are appointed by the President on the advice of the concerned Minister [Arts.315 (1) and 316(1), \textit{supra} note 284]. \textit{See also,} S.6, the \textit{Public Service Commission Act, 2012}; “Union Public Service Commission”, \texttt{http://www.winentrance.com/general_knowledge/polity/union-public-service-commission.html}, [accessed on 15\textsuperscript{th} April 2011].
\item Art.253, \textit{supra} note 285, stipulates that the Public Service Commission of Kenya is a body corporate with perpetual succession and a seal and is capable of suing and being sued in its corporate name.
\item Art.233, (5), \textit{ibid. See also,} S.16, \textit{infra} note 291.
\end{enumerate}
\end{footnotesize}
Commission and who is appointed by the Commission for a term of five years and is eligible for re-appointment once.289

The COI however, does not fix the number of members of the UPSC. That task has been left to the Central Government. Thus, the President may by regulation, determine the number of members of the Commission and their conditions of service subject only to the restriction that their conditions of service cannot be varied to the disadvantage of a member after his appointment.290

To supplement the provisions of the COK, the PSCA was recently passed which candidly lays down the qualifications for appointment as Chairperson, Vice-Chairperson, Secretary and Member of the Commission.291 It is now categorical that only a citizen of Kenya who meets the requirements of leadership and integrity in Chapter Six of the COK and who holds a degree from a University recognized in Kenya with at least fifteen years of professional experience or six years experience in top level management in either the public or private sector can be appointed as a Chairperson or Vice-Chairperson of the PSCK.292 For one to be eligible for appointment as a Secretary or Member of the Commission, a person must as well be a citizen of Kenya who meets the requirements of leadership and

289 Art.233 (6), ibid. Part 2 of Chapter 13 of the Constitution of Kenya does not fix a period under which the Chairman and the Members of the Public Service Commission of Kenya shall hold office. However, Art.250(6) of the Constitution, provides that the Chairperson and the Members of the Commission shall be appointed for a single term of six years and shall not be eligible for re-appointment. Likewise, the Members of the Union Public Service Commission holds office for a term of six years or until they attain the age of sixty-five years. Moreover, the members are prohibited under the Constitution of Kenya as well as the Constitution of India from holding any other office or employment for profit, whether public or private. See also, State of Mysore v. R. V. Bidab, AIR 1973 SC 2555: (1974) 3 SCC 337 where the Supreme Court of India also reiterated that the Chairman shall hold office for six years or until the age of superannuation, whichever is earlier; “Constitutional Sitting of the UPSC”, http://www.indianofficer.com/forums/2884-constitutional-sittings-union-public-service-commission.html, [accessed on 28th March 2011].
290 Art.318, supra note 125. The Union Public Service Commission as on May 25th 2011 consists of a Chairman and ten other members.
291 S.7, the Public Service Commission Act, 2012.
292 S.7(1), ibid.
integrity in Chapter Six of the COK and who holds a degree from a University recognized in Kenya with at least ten years of professional experience.\textsuperscript{293} The procedure for appointment of these officers is laid down in the First Schedule of the PSCA.

A person is however, not eligible under Part 2 of Chapter 13 of the COK for appointment as a member of the Commission if he/she has, at any time within the preceding five years, held office, or stood for election as a Member of Parliament or of a County Assembly or of the governing body of a political party, or has at any time, been the holder of a State office or an office in any political organisation that sponsors or supports, or has at any time, sponsored or supported, a candidate for election as a Member of Parliament or of a County Assembly.\textsuperscript{294} But, no qualifications are prescribed for the membership of the UPSC except that, as nearly as may be, one half of members should be persons who have held offices for at least ten years either under the GOI or that of a State.\textsuperscript{295} The provision envisages that experienced, fit and well versed persons with the internal exigencies of the public service are given adequate representation on the Commission and

\textsuperscript{293} S.7(2), \textit{ibid}. Sub-Clause (d) of Clause (2) of S.16 of the Act further states that a person seeking to be appointed as a Secretary to the Public Service Commission of Kenya must, at least, have five years experience in a leadership position at senior management level in a public service or private sector organization.

\textsuperscript{294} Art.233 (3), \textit{supra} note 21. A person is however eligible, under Clause (4) of Art.233 of the Constitution, to be appointed as a Member of the Commission after two general elections for Parliament have been held since the person ceased to be a candidate for election as a Member of Parliament or of a County Assembly, or had ceased to be holder of an office in any political organisation that sponsors or supports a candidate for election as a Member of Parliament or of a County Assembly. \textit{See generally, “Independent Commissions”, \url{http://www.mzalendo.com/2010/08/02/independent-commissions/}, [accessed on 5th April 2011].}

\textsuperscript{295} Proviso to Art.316 (1), \textit{supra} note 125. \textit{See also, “Union Public Service Commission”, \url{http://en.wikipedia.org/wiki/Union_PUBLIC_Service_Commission}, [accessed on 12th April 2011]; “Mizoram Public Service Commission”, \url{http://mpsc.mizoram.gov.in/?q=constitutional-provision}, [accessed on 15th April 2011]. Generally, officers belonging to the I.A.S., I.P.S., I.F.S., Engineers serving the Union and officers of the Armed Forces who have retired or are on the verge of superannuation are appointed as members of the Commission.
therefore, blindness of a person congenital or otherwise cannot by itself be a disqualification for appointment as a member of the Commission.\textsuperscript{296}

The President, under Chapter II of Part XIV of the COI is empowered to appoint an Acting Chairman of the Commission if the office of the Chairman falls vacant or if the Chairman is unable to discharge his functions due to absence or some other reason.\textsuperscript{297} The Acting Chairman function till the Chairman is able to resume his duties or the person appointed as Chairman enters on the duties of the office.\textsuperscript{298}

Under Article 319 (c) of the COI, a member of the UPSC is eligible to be appointed as the Chairman of either the UPSC or SPSC. Under this provision, it is apparent that members, in the hope of being appointed the Chairperson of the UPSC or the SPSC, might try to please the Executive. In addition, if a member is in the good books of the executive, it is quite simple for the executive to arrange for his appointment as the Chairperson of either the UPSC or the SPSC after the expiry of his/her term in the Commission. This will ultimately endanger the independence of the UPSC. The researcher suggests that, if the reputation and independence of the Commission is to be maintained, there should be a Constitutional amendment to prohibit the

\textsuperscript{296} Jai Shankar Prasad, Advocate v. State of Bihar, AIR 1993 SC 1906: (1993) 2 SCC 597: JT 1993 (2) SC 356. [In this case, the Supreme Court of India has also explained the expression “as nearly as may be one half” in the proviso to Art.316(1) of the Constitution of India to mean that the proportion of service members need not be exact but an approximation and in any event, the provision is not mandatory].


\textsuperscript{298} Art.316 (1-A), supra note 295. See also, “Uttarakhand Public Service Commission”, http://ukpsc.gov.in/files/Documents/website.pdf, [accessed on 24\textsuperscript{th} April 2011]; “Union Public Service Commission”, http://books.google.co.in/books?id=EAmh90f44IC&pg=SA31-PA25&dq=functions+of+upsc&source=bl&ots=BuVQ4xAs9_&sig=E2chCceO2BzQcL7kueBD7gGvSNc&hl=en&ei=vTmTfrcH8_xrQiQo_&sa=X&oi=book_result&ct=result&resnum=9&ved=0CFQQ6AEwCDgK#v=onepage&q=functions%20of%20upsc&f=false, [accessed on 12\textsuperscript{th} February 2011].
members, like the Chairman\textsuperscript{299}, from any further employment under the Government of India or of a State.

Similarly, Article 250 (6) of the COK provides that the Chairperson and the members of the PSCK shall be appointed for a single term of six years and shall not be eligible for re-appointment. The new Constitution however, does not state whether the members of the Commission are barred from any other employment under the GOK or the County Assembly after the expiry of their terms. Moreover, the Article does not state the maximum age limit for the appointment to the civil service. These anomalies need immediate attention/rectification.

2.7.2 REMOVAL OF A MEMBER FROM THE PSC:

The Chairperson, Vice-Chairperson and Members of the PSC are expected to show absolute integrity, transparency and impartiality in exercising the powers and duties as provided for in the Constitution. If there is failure on their part or if they commit any act which is not befitting the honour and prestige as members of the Commission, they are bound to be removed from office.\textsuperscript{300}

A member of the PSCK may be removed from office only for serious violation of the Constitution or any other law, including a contravention of Chapter Six of the COK. In addition, a member may be removed for gross misconduct, whether in the performance of the member’s or office holder’s functions or otherwise, or because of incompetence or bankruptcy or physical/mental incapacity to perform the functions of office.\textsuperscript{301}

\textsuperscript{299} Art.319 (a), \textit{ibid}, stipulates that the Chairman of the Union Public Service Commission is not eligible for any further employment either under the Government of India or Government of State on ceasing to hold office.

\textsuperscript{300} See generally, \textit{Ram Kumar Kashyap v. Union of India}, \textit{infra} note 307.

\textsuperscript{301} Art.251 (1), \textit{supra} note 21.
The COI on the other hand, provides that the Chairman or a Member of the PSC can be removed only by an order of the President on the ground of misbehaviour. Such an order shall however be passed after the President makes a reference to the SCI, and the Court after holding an inquiry, reports to the President that the person concerned ought to be removed from office. In addition, the President of India is constitutionally empowered to remove the Chairman or a member of the PSC without reference to the SCI if he/she is:

- adjudged insolvent, or
- engages during his/her term of office in any paid employment outside the duties of his office, or
- in the opinion of the President, unfit to continue in office by reason of infirmity of mind and body.

302 For select few references made to the Supreme Court of India, see, In Re: Smt. Sayalee Sanjeev Joshi, (2007) 11 SCC 547; In the matter of: Ref. under Art.317 (1), AIR 1983 SC 996; (1983) 4 SCC 258; Ref. Punjab Public Service Commission, (1990) 4 SCC 262, [the questions referred to the Supreme Court of India in this case was: a) whether the respondent-member slapped the Lady Chairperson of the Commission, and b) whether he should be removed from office? The Supreme Court answered in affirmative and pointed out that the person occupying the high public office should maintain irreproachable behavior and a certain minimum standard of code of conduct. The Court also held that the issue of misconduct of a member of the Commission does not come to an end even after the expiry of his/her term]; Reference under Art.317(1) of the Constitution of India, regarding enquiring and report on the allegations against Sh. M. Megha Chandra Singh, Chairman, Manipur Public Service Commission, 1994 Supp (2) SCC 166: (1994) 2 JT 63; In Singh, Re, (1997) 3 SCC 216: AIR 1997 SC 906; Ref. Sher Singh, Member, State of Haryana, P.S.C., AIR 1997 SC 906; In R/O. Dr. Ram Ashray Yadav v. State of Bihar, Public Service Commission, AIR 2000 SC 1448: (2000) 4 SCC 309; Sayalee Sanjeev Joshi (Smt.) Member, Maharashtra Public Service Commission, In Re, (2007) 11 SCC 547: AIR 2007 SC 2809; Chairman, Chhattisgarh Service Commission, (2009) 8 SCC 41, [it was held in this case that any favour shown to a candidate is certainly an act of misbehavior].


305 The Supreme Court of India has held in Jai Shankar Prasad v. State of Bihar, AIR 1993 SC 1906: (1993) 2 SCC 597, that the infirmities referred to in Art.317(3) of the Constitution of India must be such as
The Chairman or a member of the PSC may also be deemed guilty of misbehavior and removed from office, for the purpose of Clause (1) of Article 317, if he/she is concerned or interested in a contract or agreement made by or on behalf of the Central or State Government, or participates in any way in the profit thereof or in any benefit or emoluments arising there from, otherwise than as a member of an incorporated company.\textsuperscript{306}

However, it is to be noted that, since the PSC is a Constitutional creation, the principles of service law that are ordinarily applicable in instances of dismissals of Government employees cannot be extended to the proceedings for the removal and suspension of the members of the PSC.\textsuperscript{307} Similarly, the principles of criminal jurisprudence are not applicable to the proceedings under Article 317(1) of the COI. In criminal law, the charge should be proved beyond reasonable doubt and an accused cannot be convicted on the basis of probability. Under the service jurisprudence, a person may be found guilty even on the charge being proved on the basis of preponderance of probabilities unlike in criminal jurisprudence.\textsuperscript{308}

A person desiring the removal of a member of the PSCK is however, required by law to present a petition to the National Assembly of Kenya setting out the alleged facts constituting the ground(s) violated.\textsuperscript{309} The Assembly shall then consider the petition and, if it is satisfied that there is any lapse on the part of the member, it shall send the petition to the

to disable the member from efficient discharge of his/her duties. The infirmity must also be post-appointment. Therefore, the Court ruled that a blind University Professor who was appointed as a member of the State Public Service Commission could not be removed on the ground of infirmity because his infirmity was pre and not post-appointment.

\begin{itemize}
\item \textsuperscript{306} Art.317 (4), \textit{supra} note 125.
\item \textsuperscript{307} \textit{Ram Kumar Kashyap v. Union of India}, AIR 2010 SC 1151.
\item \textsuperscript{308} \textit{In Re. Mehar Singh Saini, Chairman, HPSC}, 2008.
\item \textsuperscript{309} Art.251 (2), \textit{supra} note 21.
\end{itemize}
President[^310] who may suspend the member pending the outcome of the complaint.[^311] The President shall thereafter appoint a tribunal consisting of:

- a person who holds or has held office as a judge of a superior Court, who shall be the Chairperson;
- at least two persons who are qualified to be appointed as High Court judges; and
- one other member who is qualified to assess the facts in respect of the particular ground(s) for removal.[^312]

The tribunal shall subsequently investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.[^313] A person suspended is however entitled to continue to receive one-half of the remuneration and benefits of the office while suspended.[^314]

The procedural safeguards cited above are mainly meant to protect the PSC members from undue political pressures or personal favouritism and vendetta so that the Commission is able to discharge its Constitutional obligations without fear or favour.[^315]

[^310]: Art.251 (3), ibid.
[^311]: Art.251 (4), ibid. The President of India is also empowered under Art.317 (2) of the Constitution of India to suspend the Chairman or any other Member of the Public Service Commission in respect of whom a reference is made to the Supreme Court of India.
[^312]: Art.251 (5), ibid.
[^313]: Art.251 (6), ibid.
[^314]: Art.251 (7), ibid.
[^315]: See, Ram Kumar Kashyap v. Union of India, (2009) 9 SCC 378. See also, Ravinder Pal Singh Sidhu v. Punjab Public Service Commission, AIR 2003 SC 788: (2003) 2 SCC 147: 2003 SCC (L&S) 143. The safeguards/provisions in the Constitution of Kenya as well as the Constitution of India that ensure the independence of the Public Service Commission and that immunize the Commissions from the Executive influence include: a) restriction on varying the conditions of service to the disadvantage of a Member after his appointment; b) fixed tenure of the Members; c) removal of the Members only after a verdict of the Tribunal or Supreme Court; d) restrictions on their re-employment after retirement from the Commission; e) Charging of all the expenses including salaries of the Commission on the consolidated fund; f) The Members of the Commission are subject only to the Constitution and the law and are independent and not subject to direction or control by any person or authority; g) A Member of a Commission is not liable for anything done in good faith in the performance of a function of office, etc.
Article 251 of the COK provides that the President shall appoint a tribunal to investigate any matter concerning a member of the PSCK. It may result that the tribunal so appointed will not be independent in that politics may play a center stage. A member who does not sway to the tunes of the Executive or the ruling party may maliciously be removed to create room for pro-executive members. The politicians for personal and party reasons may try to influence the members of the tribunal to suit their desires. Therefore, it is better to refer matter to the Supreme Court of Kenya for its opinion instead of a tribunal.

2.7.3 POWERS AND FUNCTIONS OF THE PUBLIC SERVICE COMMISSION IN KENYA AND INDIA:

As laid down under Part 2, Chapter 13 of the COK, Section 11 of the PSCA and Section B of the COR, the powers and functions of the PSC are as under:

a) The PSCK is empowered to establish and abolish offices in the public service and to appoint, control, discipline, remove and or confirm persons to hold or act in those offices.\(^{316}\)

b) The PSCK promotes the values and principles referred to in Articles 10 and 232 of the COK throughout the public service.\(^{317}\) It also

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\(^{316}\) The Public Service Commission of Kenya is however, not empowered to appoint a person to hold or act in any office of the personal staff of the President or a retired President, except with the consent of the President or retired President thereof [Art.234 (4), supra note 314]. See generally, “Independent Commissions”; \url{http://www.mzalendo.com/2010/08/02/independent-commissions/}, [accessed on 5th April 2011].

\(^{317}\) For e.g., a) high standards of professional ethics; b) efficient, effective and economic use of resources; c) responsive, prompt, effective, impartial and equitable provision of services; d) involvement of the people in the process of policy making; e) accountability for administrative acts; f) transparency and provision to the public of timely, accurate information; g) affording adequate and equal opportunities for appointment, training and advancement at all levels of the public service of men and women, the members of all ethnic groups and persons with disabilities; h) promoting patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; i) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; and j) good governance, integrity, transparency and accountability and sustainable development. See generally,
evaluates and reports to the President and Parliament on the extent to which such values and principles are complied with in the public service.

c) The PSCK is conferred with the power to develop human resources, recruit its own staff and ensure that the public service is efficient and effective.

d) The Commission reviews and makes recommendations to the National Government in respect of conditions of service, code of conduct and qualifications of officers in the public service.

e) The Commission may conduct investigations on its own initiative or on a complaint made by a member of the public. It also monitors and evaluates the organisation, administration and personnel practices of the public service.

f) The PSCK has the powers necessary for conciliation, mediation and negotiation of service disputes.

g) The Commission has powers to summon any person or State organ to provide to it any information that may be necessary for the proper performance of its functions.

h) It is the duty of the Commission to formulate policies necessary for the achievement of its mandate and to provide strategic direction, leadership and oversight to the secretariat.


318 Art.234 (2) (f), supra note 314.
319 Art.252 (1) (c), ibid.
320 Art.234 (2) (e), ibid.
321 Art.252 (1) (a), ibid. A complaint to a Commission may be made by any person entitled to institute Court proceedings under Art.22 (1) and (2) of the Constitution of Kenya.
322 Art.234 (2) (d), ibid.
323 Art.252 (1) (b), ibid.
324 S.12, supra note 291.
325 S.11, ibid.
i) The Commission conducts examinations and interviews, appoints special Boards as it may consider necessary for the proper discharge of its functions as set out in the relevant Laws and Regulations.\textsuperscript{326}

j) The PSCK hears and determines appeals in respect of County Governments’ public service and performs any other functions and exercises any other powers conferred by a national legislation.\textsuperscript{327}

The COK further bestows upon the PSCK other functions which include the following:

- nominating persons to the Judicial Service Commission and Salaries Remuneration Commission\textsuperscript{328};
- recommending persons to be appointed as Principal Secretaries\textsuperscript{329}; and
- receiving petitions for the removal of the Director of Public Prosecutions and recommending appointment of a tribunal to investigate the complaints raised against the Director.\textsuperscript{330}

It is the duty of the UPSC to conduct examinations for appointment to the services of the Union.\textsuperscript{331} The main object of holding the examination is to

\textsuperscript{326} S.B.3, supra note 162.
\textsuperscript{327} Under Art.234 (5) of the Constitution of Kenya, the Public Service Commission of Kenya may delegate, in writing, with or without conditions, any of its functions and powers to any one or more of its members, or to any officer, body or authority in the public service. Apart from the listed powers and functions, the Service Commissions Act, Cap 185 also vests the Public Service Commission of Kenya with the following powers: a) compulsory retirement of persons on reaching superannuation age or at any time at which an officer can be called to retire under the pension legislation; b) retirement on grounds of ill health/public interest; c) retirement on abolition of office or reorganization of Ministry/Department; d) interdiction and suspension; e) power to recover the cost of any loss or breakage caused by default or negligence; f) power to reprimand (including severe reprimand); g) power to defer/withhold/stop increment; h) power of reduction in rank or seniority, etc, see S.G.31, supra note 162.
\textsuperscript{328} Arts.171(2) and 230(2)(b), supra note 21.
\textsuperscript{329} Art.155(2)(a), ibid.
\textsuperscript{330} Art.158(2) (3) and (4), ibid.
test the capacity of the candidate and to have an idea whether a particular candidate is fit for the proposed appointment or not.\textsuperscript{332} In addition, it is the duty of the Commission and not of the Government to announce the subjects, schemes or syllabus of the examination.\textsuperscript{333} The Commission may, if requested by two or more States, assist the States in framing and operating schemes for joint recruitment for any service for which candidates possessing special qualifications are required.\textsuperscript{334}

Chapter II, Part XIV of the COI lays down the advisory functions of the PSC. The Commission is to be consulted on:

a) all matters relating to methods of recruitment of civil services and for civil posts.\textsuperscript{335} These provisions are however directory and not mandatory and any appointment by the Governor without consulting the Commission would not be invalid\textsuperscript{336};

b) the principles to be followed in making appointments to civil services and posts, in making promotions and transfers from one service to another and on the suitability of candidates for such appointments,

\textsuperscript{332} Kesava v. State of Mysore, AIR 1956 Mys 20. [In this case the Supreme Court of India also held that in addition to the results of the examination, other considerations may also be kept in view in making the appointments, e.g., the viva voce test].

\textsuperscript{333} R. Venkatachalapathy v. Joint Secretary to the Government, 1988 (3) SLR 79 (Mad-DN).

\textsuperscript{334} Art.320 (2), supra note 125.


promotions and transfers.\textsuperscript{337} Therefore, it is the duty of the PSC to consider and get it satisfied as to which of the candidates has fulfilled the required qualifications specified in the advertisement.\textsuperscript{338} It is however, the Government which is competent to lay down the qualifications. Where no special qualifications or any prescribed standard of efficiency over and above the eligibility criteria is provided by the rules, it would not be for the Commission to improve any extra qualifications/standards supposedly for maintaining minimum efficiency. Hence the Commission cannot fix any cut-off marks in respect of reserved category candidates which results in candidates otherwise qualified for interview to be rejected\textsuperscript{339};

c) all disciplinary matters affecting a person serving under the Government in a civil capacity including memorials or petitions relating to such matters\textsuperscript{340};

d) any claim by or in respect of a person in Government service in civil capacity that any costs incurred by him in defending proceedings instituted against him in respect of acts done or purported to be done in execution of his duty should be paid out of the consolidated fund of India\textsuperscript{341};

\textsuperscript{337} Supra note 132.
\textsuperscript{340} Art.320 (3) (c), supra note 125. See generally, Pradyut Kumar v. Chief Justice, Calcutta High Court, AIR 1956 SC 285: 1955 (2) SCR 1331 where the Supreme Court of India held that the phrase “all disciplinary matters affecting a person” in the article is sufficiently comprehensive to include any kind of disciplinary action proposed to be taken in respect of a particular person; State of Uttar Pradesh v. Manbodhan Lal Srivastava, AIR 1957 SC 912: 1958 SCR 533; U. R. Bhatt v. Union of India, AIR 1962 SC 1344: 1962 (1) LLJ 656; Ram Gopal v. State of Madhya Pradesh, AIR 1970 SC 158: (1969) 2 SCC 220, [the Apex Court of India observed in the rather three cases that Art.320 (3) (c) of the Constitution of India is not mandatory since it does not provide for the contingency as to what will happen in the event of non-compliance with the provision. Besides, it doesn’t either expressly or impliedly provide that non-compliance will invalidate the final order of the Government].
\textsuperscript{341} Art.320 (3) (d), ibid.
e) any claim for the award of a pension in respect of injuries sustained by a person while in a Government service, in a civil capacity, and any question as to the amount of any such award.\textsuperscript{342}

The President of India may refer any matter to the PSC and it is the duty of the Commission to advise the President on such matters. The President is however empowered to frame regulations specifying the matters in which either generally or in particular class of cases, it is not necessary to consult the Commission.\textsuperscript{343} Such regulations are to be laid before each House of Parliament for not less than 14 days after they have been drafted. The regulations are subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament may make during the session in which they are so laid.\textsuperscript{344}

The PSC need not be consulted in the following cases:

a) while making reservations of appointments or posts in favour of any backward class of citizens which, in the opinion of the Government, is not adequately represented\textsuperscript{345};

b) while taking into consideration, under Article 335, the claims of the Scheduled Castes and Scheduled Tribes in making appointments to the Central services\textsuperscript{346};

c) under the Proviso to Article 320(3) where the President may make regulations specifying the matters in which either generally or in any particular case, it will not be necessary to consult the PSC.

\textsuperscript{342} Art.320 (3) (e), \textit{ibid}. See also, S.B.1 of the \textit{Code of Regulations} on the advisory functions of the Public Service Commission of Kenya to the President.

\textsuperscript{343} Proviso to Art.320 (3), \textit{ibid}.

\textsuperscript{344} Art.320 (5), \textit{ibid}.

\textsuperscript{345} See, Arts.320 (4) and 16(4), \textit{ibid}.

\textsuperscript{346} Art.320 (4), \textit{ibid}.
The Parliament of India is empowered by law to entrust additional functions to the Commission regarding services of the Union, Public Institutions, or a Corporation created by law.\(^{347}\) Such additional functions can be entrusted on the Commission only by way of legislation and not by way of a departmental arrangement between the Government and the Commission.\(^{348}\)

Further, the Commission is required to present every year to the President, a report of the work done by it.\(^{349}\) The report, together with the Government’s memorandum explaining the cases where the Commission’s advice was not accepted and the reasons for such non-acceptance, is to be laid before each House of Parliament.\(^{350}\) If however, the Government accepts the recommendations of the Commission, it is not required to record the reasons and lay them before Parliament since the reasons will be already in the recommendations.\(^{351}\)

Similarly, Chapter Fifteen of the COK also specifies that the PSCK shall as soon as practicable, after the end of each financial year, submit a report to the President and to the Parliament on the work done by it.\(^{352}\) The President or the National Assembly or the Senate may however, require the Commission to submit a report on a particular issue at any time. Such reports shall be published and publicized.\(^{353}\) This constitutes a safeguard against arbitrary action on the part of the Executive in rejecting the Commission’s advice.

\(^{347}\) Art.321, \textit{ibid}.
\(^{349}\) Art.323 (1), \textit{supra} note 125.
\(^{352}\) Art.254, \textit{supra} note 21.
\(^{353}\) \textit{Ibid}.
The role of the PSC has also been explained by the SCI\textsuperscript{354} in the following words:

\[T\]he duty of the PSC is confined to holding the written examination, \ldots \textit{viva voce} test and arranging the order of merit according to the marks among the candidates who have qualified as a result of the written and \textit{viva voce} tests. Thereafter, the PSC is required to publish the result in the Gazette and apparently, make the result available to the Government. The PSC is not required to make any further selection from the qualified candidates and is, therefore, not expected to withhold the names of any qualified candidates. The duty of the PSC is to make available to the Government a complete list of qualified candidates arranged in order of merit. Thereafter, the Government is to make the selection strictly in the order in which they have been placed by the Commission as a result of the examination.

\textbf{2.7.4 REMUNERATION:}

Chapter fifteen of the COK and Part XIV of the COI \textit{inter alia} provides that the remuneration and benefits payable to members of the PSC shall be a charge on the Consolidated Fund.\textsuperscript{355}

Moreover, the COK as well as the COI stipulates that the conditions of service, remuneration and benefits payable to, or in respect of, the members of PSC shall not be varied to the disadvantage of the members.


\textsuperscript{355} See, Art.250 (7), Art.254, supra note 21, and Art.322, supra note 125. The remunerations paid to the members of the PSCK are determined by the Salaries and Remuneration Commission.
during their term of office. This provision is entirely meant to free the PSCs from Parliamentary pressures.

2.8 SUMMARY:

The historical perspectives, meaning, purpose and the importance of civil service recruitment and promotion has painstakingly been pointed out. The qualifications and agencies for recruitment and promotion, the methods and legal provisions regarding recruitment and promotion in Kenya and India and the criticism leveled thereof, is now well documented.

We will now turn to the next Chapter and critically evaluate various legal provisions enacted by competent authorities both in Kenya and India to regulate various aspects relating to the conditions of service of civil servants regarding pay [more especially the principle of ‘equal pay for equal work’], dearness allowance, leave including its kinds and conditions of eligibility. This apart, social security measures in the form of retirement benefits, medicare, maternity benefits, employment of children of those dying in harness, etc., intended to provide income security and alleviate poverty will also be incorporated.