

The Scope of Statutory and Non-Statutory Rules to Maintain Constitutional Petitions in Service Matters: A Judicial Perspective

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Abstract

In the past, the courts observed that where the services of a government servant or an employee of a statutory body are terminated, the civil courts have jurisdiction to examine whether their services were validly terminated. In this regard, the primary limitation was that the enforcement of the contract of appointment must not involve the personal service of an employee or servant. The presence of adequate monetary compensation in cases of non-performance of the contract was taken as another limitation. Thus, the courts enforced the contracts in terms of the relevant provisions of the Specific Relief Act, 1877, for which the major determining aspects were the nature of the contract and the existence of some statutory office. In this regard, the question to be determined was whether functions assigned to an employee under a contract have some statutory backing. Subsequently, constitutional protection was extended to the prescribed categories of posts, while excluding the category of employees working in public corporations or entities, who were divested of such protection. To fill this gap, the courts held that if the

terms and conditions of service are statutory, the same can be set aside through constitutional petitions. However, where such terms and conditions were found to be non-statutory or governed by such regulations, instructions or directions, which were meant for the internal use of an institution or body, any violation thereof was held not enforceable through constitutional petitions as the principle of master and servant was applied in such case. The judicial perspective again took another diversion when statutory limitations upon employers were considered as an extended protection to employees, entitling them to maintain their constitutional petitions. Subsequently, to limit such a perspective, the function test was adopted as an approach to consider whether a statutory body is a 'Person' under Article 199 of the Constitution, to maintain a writ petition in service matters. Thus, the function test gradually replaced various limitations for maintaining constitutional petitions as a preferred approach to address the need for statutory rules of service. The development of the case law relevant to maintaining constitutional petitions needs to be studied to assess the judicial perspective for better legal and professional understanding.

Keywords: Civil courts, Specific Relief Act, Constitutional petitions, Statutory body, Judicial perspective

1. Introduction

The constitutional petitions in service matters generally face the primary question as to the nature of service rules. The service rules, if statutory, facilitate the maintainability of such petitions, but where such rules are non-statutory, the same operate as an obstacle to the maintainability of constitutional petitions. The judicial perspective in these cases emphasises prior determination of the nature of such rules. Previously, the judgments on the issue were varying and did not settle upon any uniform criteria. The present article highlights the scope of these rules and the alternative method adopted by the judicial forums to overcome the issue.

2. Objectives of the Research and Research Questions

Mostly, constitutional petitions are declined for lack of understanding by legal professionals as to the actual importance of statutory and non-statutory rules for maintaining such petitions. The study assesses the scope and limitations of such rules and their actual impact on maintaining constitutional petitions. Another objective of the research is to assess what alternative judicial

approaches have gradually evolved to overcome technical hurdles. For this purpose, we need to formulate the following research questions for appropriately studying the problem:

- a) Whether there is any clear distinction between the Statutory and Non-Statutory Rules of Service?
- b) What is the Scope of Statutory and Non-Statutory Rules for maintaining Constitutional Petitions?
- c) Whether the Issue as to the applicability of Statutory or Non-Statutory Rules has been settled, or is there an alternative approach to deal with the issue?

3. Data Sources and Research Methods

The research is mainly based on the data and information obtained from various statutes, case law, related commentaries, citations, and juridical principles. Apart from these sources, to ascertain the latest judicial developments in the area, modern electronic search engines have also been used to access online available material. Thus, the whole exercise is focused on sifting the collected data and compiling it to produce a cumulative narrative.

The research adopts a qualitative approach, as no quantitative data are needed. A qualitative approach is particularly necessary to gain a purposive and meaningful understanding, as it is believed to provide deeper insight into case law, legal issues, and their implications. As analysis is based on historical developments and comparison of statutory and juridical principles emanating from the case law, analytical and comparative approaches are simultaneously applied. Thus, the research is qualitative, doctrinal, descriptive, comparative and analytical to scrutinise judicial interpretations for understanding their consequential impact on the issue at hand.

4. Significance of the Study and its Limitations

The constitutional petitions in service matters are usually dismissed on the pretext that the rules governing the petitioners' services are non-statutory or lack valid legal backing. The case law on the interpretation of statutory and non-statutory rules of service makes it difficult for the legal fraternity to assess what actually constitutes a statutory or non-statutory rule. This ticklish

situation necessitates studying and analysing the related reported judgments on the point to assess their outcome for appropriately answering the research questions.

As the research analyses various reported judgments of the superior courts, the divergence in judicial development may only be assessed and resolved in the light of the settled or latest view adopted through the most recent or relevant case law and judgments. Lastly, the objective and subjective legal and judicial factors affecting the judicial determination are assessed to appropriately understand the legal implications involved in drawing the distinction between the statutory and non-statutory rules of service for maintaining constitutional petitions before the superior courts.

5. Answering the Research Questions

5.1. The distinction between the Statutory and Non-Statutory Rules of Service.

A statutory instrument generally means a legislative, not an executive, document made by the rule-making authority in exercise of its statutory powers. The rule-making authority exercises the delegated legislative power in such a case. Statutory rules are distinct from purely executive and administrative instructions.¹ In a case, the contention that the Establishment Division's letter could not override statutory rules nor could it stultify the petitioner's exercise of option pursuant to such rules was held to be without substance.² However, in another case, the instructions through memoranda by the Government were considered as statutory rules if they are precisely expressed and are capable of being applied generally.³ This initial varying interpretation of statutory rules led to uncertainty as to their actual nature, extent, scope or application. Gradually, the interpretation and application of the statutory or non-statutory rules became more precise and relevant.

Initially, the superior courts of British India held that where the services of a Government servant or of an employee of a statutory body are terminated, the civil courts have jurisdiction to go into the question whether their services have validly been terminated or not. This jurisdictional assumption was based on the statutory principles that contracts for the non-

¹ Subedar Muhammad Asghar v. Mst. Safia Begum & another, PLD SC 435 (1976)

² Masud Ahmad v. Pakistan, PLD SC 195 (1976)

³ Faizullah Khan v. Government of Pakistan, PLD SC 291 (1974)

performance of which compensation in money is an adequate relief,⁴ or which run into such minute or numerous details or are so dependent on the personal qualifications or volition of parties or are of such nature that their material terms could not be specifically performed, cannot be enforced.⁵

Amongst the initial cases on the point, the Lahore High Court held that the court can grant a declaration that the order of removal of a civil servant is wrongful, void and inoperative. On appeal against such judgment, the Federal Court held that such a civil servant is not entitled to the declaration as prayed for and that the proper remedy for him is a suit for damages for wrongful dismissal. However, on further appeal, the Privy Council upheld the view of the Lahore High Court and granted a declaration to the civil servant as prayed for in the suit.⁶ In another case of removing a managing agent through an ordinary resolution against the mandate of the articles of association, it was held that the decree did not amount to enforcing a contract of personal service between the company and its managing agent and the removal was declared illegal.⁷

After partition, the ordinary remedies of a declaration or damages before the civil courts were replaced by constitutional remedies, whereby protection was extended to public servants under the 1956 Constitution,⁸ for which it was mandatory to show that public servants belonged to any of the categories of posts prescribed by Articles 180 or 181. An identical protection was also afforded through the 1962 Constitution.⁹ Initially, the superior courts exercised considerable judicial restraint and were unable to extend the scope of mandamus to restoration to offices in private corporations. Thus, the post of a Commercial Manager of a Cooperative Bank was held as one of a contractual nature, falling within the category of employment that has nothing to do with the true character of a statutory or corporate office.¹⁰ However, in a subsequent case where the Secretary of a Cooperative Society was removed, it was held that exercising administrative functions in a considerable township is a statutory function as

⁴ Specific Relief Act, 1877, § 21(a) (Pak.)

⁵ Specific Relief Act, 1877, § 21(b) (Pak.)

⁶ The High Commissioner for India & another v. I. M. Lall, AIR PC 121 (1948)

⁷ Ram Kissendas Dhanuka & others v. Satya Charan Lal & others, AIR PC 81 (1950)

⁸ Constitution of the Islamic Republic of Pakistan, 1956, arts. 180–181

⁹ Constitution of the Islamic Republic of Pakistan, 1962, arts. 176–177

¹⁰ The Lahore Central Cooperative Bank Limited v. Pir Saifullah Shah, PLD SC 210 (1959)

distinguished from the functions in the office of Commercial Manager of a Cooperative Bank.¹¹ In another case, the post connected with the defence, and a civil post was held as a category of posts exclusive of each other. In this case, a person holding a post connected with the defence and enrolled under the Army Act, 1911, but eligible for promotion to the Central Service, was found not entitled to the constitutional protection and the Government was held to have rightly terminated the services of such an employee even without an enquiry.¹²

Likewise, it was held in another case that a person holding a civil post for the affairs of the Centre or of a Province under the Constitution is distinct from a person holding an ordinary post in the administration of the Statutory Corporations and the Municipal Committees established under the ordinary laws. In this case, a Municipal Committee constituted under an Ordinance was held to be distinct and separate from the Government, which does not function as a department of the Government. Its servants, being not civil servants, were held could not hold a civil post in connection with the affairs of the Province within the meaning of Article 177 of the Constitution of Pakistan, 1962.¹³ Thus, the distinction between the statutory and non-statutory rules of service, which was previously not very clear, gradually started to develop on the premise of holding a civil post in connection with the affairs of the Centre or Province or holding any other ordinary post in the Statutory Corporations or Municipal Committees.

Under the Constitution of 1973, to deal with the cases relating to the terms and conditions of service of the servants of the Federation or of a Province, the special administrative tribunals of exclusive jurisdiction were established.¹⁴ The private entities or individuals were considered distinct from government or semi-government functionaries. Their activities, although regulated by state laws, are not the functions related to the Federation or a Province.

Thus, where a public limited company, not being the creation of the statute, had limited governmental control through regulations, the same was not held to be a person amenable to a writ.¹⁵ Similarly, where the rules were neither framed by the Federal Government nor under

¹¹ The Managing Committee of Model Town Cooperative Society Limited v. Kh. Muhammad Iqbal, PLD SC 179 (1963)

¹² Pakistan v. Muhammad Ayub Khan, PLD SC 661 (1965)

¹³ Dr. Abdul Hafeez v. Chairman, Municipal Corporation Lahore & others, PLD Lahore 1251 (1967)

¹⁴ Constitution of the Islamic Republic of Pakistan, 1973, art. 212

¹⁵ Salahuddin v. Frontier Sugar Mills & Distillery Limited, PLD SC 244 (1975)

any statute but by the Board of Directors exercising the powers conferred on them under the Articles of Association of a private limited company, it was held that such rules could not be termed as statutory rules.¹⁶ Hence, it was settled that a person, including a body corporate, is a person for the Federation only if the entrusted functions are the State functions or if the control of the organisation substantially vests in the hands of the Government. Perhaps, the judicial trend had silently and simultaneously adopted the functional test as well as the constitutional course.¹⁷

Subsequently, a somewhat clear view was taken by holding that the case of an employee whose conditions of service were regulated or governed by the statutory rules stood on a different footing from the case of an employee whose conditions of service were regulated by the service code which are mere instructions issued for the guidance of its officers for their internal use and were held as directory in nature not to be enforceable through constitutional petitions.¹⁸

The distinction between statutory and non-statutory rules became apparent in the Principal Cadet College Kohat's case, when it was held in categorical terms that for the rules to be called statutory rules, the same should be made or approved by the Government, failing which they will be considered as mere instructions or non-statutory.¹⁹ However, the Federal Government's approval or framing is not the exclusive factor, and the area of their efficacy or nature determines their true status. Thus, the rules regulating management or internal control through instructions were considered non-statutory, whereas the rules that had a broader area of efficacy or were complementary to the statute in an important matter were held as statutory.²⁰

5.2. The Scope of Statutory and Non-Statutory Rules for maintaining Constitutional Petitions.

Apart from differentiating the statutory and non-statutory rules of service, their scope to maintain constitutional petitions was also strengthened by holding that violation of statutory

¹⁶ Umer Atta-ur-Rehman Khan v. Ministry of Energy through Secretary/Chairman, NESPAK, PLC (CS) Lahore 1126 (2021)

¹⁷ Constitution of the Islamic Republic of Pakistan, 1973, art. 199(5)

¹⁸ Muhammad Yousaf Shah v. Pakistan International Airlines Corporation, PLD SC 224 (1981)

¹⁹ Principal Cadet College Kohat v. Muhammad Shoaib Qureshi, PLD SC 170 (1984)

²⁰ Muhammad Zaman & others v. Government of Pakistan, SCMR 571 (2017).; Pakistan Defence Officers Housing Authority v. Mrs. Itrat Sajjad Khan & others, SCMR 2010 (2017); Shafique Ahmed Khan v. NESCOM through Chairman, Islamabad, PLD SC 377 (2016)

rules attracts constitutional jurisdiction. However, violation of the regulations, instructions or directions issued for internal use of any entity, institution or body is not enforceable through a constitutional petition.²¹ In other words, it was fairly settled that in case of statutory rules of service, a constitutional petition is maintainable, but where the rules are not statutory, such petitions are not maintainable.

As to the applicability of statutory or non-statutory rules of service, initially some conflicting views came from various High Courts,²² but such conflict was eventually settled in RTH Janjua's case.²³ In this case, a somewhat strict view was taken by holding that for the servants of a statutory corporation or a registered company, the constitutional protection that is generally available to civil servants is not available. Even the principle of master and servant was also held as not available to sue for damages for wrongful dismissal, and the constitutional petition of *certiorari* or *mandamus* was further held as not available in that case to such servants.²⁴

Interestingly, at some stage, based on the differentiation of statutory and non-statutory rules of service, their scope was identified by holding that even for an employee of a corporation, the rules of service may be either statutory or non-statutory. So, where the relationship of an employee and a corporation was regulated through statutory rules, it was held that such an employee may bring an action for reinstatement, but where such a relationship is regulated by non-statutory provisions, then the principle of master and servant shall apply, and the employee shall have the remedy of damages and not reinstatement.²⁵

The position became clearer in a subsequent case when the question regarding the availability of remedies to the employees of corporations under statutory and non-statutory rules of service was raised. It was held that apart from the category of employees, which fulfilled the constitutional requirement²⁶ and had the exclusive remedy before the Service Tribunals, other categories of employees are working in corporations with statutory or non-statutory rules of service. Thus, for the employees of corporations or bodies with statutory rules, the remedy shall

²¹ Principal Cadet College Kohat v. Muhammad Shoaib Qureshi, PLD SC 170 (1984)

²² Anwar Hussain v. The Agricultural Development Bank of Pakistan and others, PLD SC 194 (1984)

²³ PLD SC 146 (1974)

²⁴ RTH Janjua v. National Shipping Corporation, PLD SC 146 (1974)

²⁵ Raziuddin v. Chairman, PIAC, PLD SC 531 (1992)

²⁶ Constitution of the Islamic Republic of Pakistan, 1973, arts. 240 & 260.

lie before the High Courts. But the employees with non-statutory rules would be governed by the master and servant relationship and shall approach the civil court, whereas the category of workers and workmen may approach the labour court.²⁷

From the above discussion, it seems evident that it was a consistent judicial view that where the rules or regulations of service are framed by the statutory bodies under the statute, then, in the absence of any other adequate remedy, violation of such rules can be enforced through constitutional jurisdiction. But if the rules are the instructions for internal use and non-statutory, the same would attract the master and servant principle.²⁸ It appears that the principle, which was initially available in cases of personal service, was indiscriminately applied to the cases of employees of autonomous bodies, institutions or corporations, which silently curtailed the scope of remedies available to these employees.

At this stage, the judicial trend took another turn based on the statutory intervention where the rules of service were non-statutory. So, where disciplinary matters of employees were regulated by the non-statutory rules but statutory intervention in the shape of an Ordinance was found to have been made, i.e. something higher than statutory rules, it was held that such employees may file a constitutional petition to seek enforcement of their rights guaranteed under Article 4 of the Constitution of Pakistan, 1973.²⁹ In other words, where the service of an employee was found as regulated by the terms of the statute and the rules framed thereunder, it was held that master and servant principle or of the master's pleasure to hire or fire the servant is not applicable due to the presence of statutory fetters to the free working or application of the principle, and the constitutional petitions are maintainable in such case.³⁰

In another case where the matter was governed by the 'Efficiency & Discipline Rules' which were duly adopted, it was held that in the presence of statutory rules governing the service conditions of an employee, the master's pleasure stands surrendered to the extent that the matter is governed by such rules.³¹ Likewise, where Lahore Development Authority was a statutory

²⁷ Muhammad Mubeen-us-Salam and others v. Federation of Pakistan through Secretary, Ministry of Defence and others, PLD SC 602 (2006)

²⁸ Pakistan Electric Power Company v. Syed Salahuddin and others, SCMR 991 (2022); Syed Nazir Gillani v. Pakistan Red Crescent Society and another, SCMR 982 (2014)

²⁹ Pakistan Defence Officer's Housing Authority and others v. Lt. Col. Syed Jawaid Ahmed, SCMR 1707 (2013)

³⁰ Akbar Ali Bokhari v. State Bank of Pakistan etc., PLD Lahore 234 (1977)

³¹ Evacuee Trust Property Board v. Muhammad Nawaza, SCMR 1275 (1983)

body, and its employees were proceeded against under an Act, the same was held to be a statutory intervention in the disciplinary matter, irrespective of the fact that the service regulations of the Authority were non-statutory, and the constitutional petition was held as maintainable.³²

To be more precise on the scope, the presence of statutory rules of service offered constitutional protection to an employee, but where the rules were non-statutory, the proposition attracted the applicability of the master and servant principle, in which case usually the remedies under the Constitution were declined. However, the principle was held not applicable if some law or statutory rule intervened and placed fetters upon the freedom of parties on matters of contractual terms,³³ or statutory intervention was made in the service terms and conditions; then, subject to the non-availability of other alternative remedy, a constitutional petition was held as maintainable.³⁴

5.3. Whether the Issue as to the applicability of Statutory or Non-Statutory Rules has been settled, or is there an alternative approach to deal with the Issue?

From the foregoing discussion, it is apparent that the superior courts frequently faced the issue of assessing the applicability of statutory or non-statutory rules in constitutional petitions relating to service matters. Such a position was also an indirect result of the situation where a statutory provision was initially included in the Service Tribunals Act, 1973 to provide a remedy to a particular class or category of employees or servants working under public corporations, companies or entities and which category was distinct from the category or class of persons working for the Federation or of a Province and enjoying the constitutional protection.³⁵ However, such statutory inclusion was subsequently held unconstitutional,³⁶ and was omitted from the statute, thereby creating a gap when the employees or servants working under such public corporations, companies or entities were divested of their legal remedies or forums in cases of their arbitrary removal from service.

³² Haroon-ur-Rashid v. Lahore Development Authority and others, SCMR 931 (2016)

³³ Anwar Hussain v. The Agricultural Development Bank of Pakistan and others, PLD SC 194 (1984); Kamran Ahmad v. Water and Power Development Authority through Chairman and three others, PLC Lahore 332 (2014)

³⁴ Pakistan Defence Officer's Housing Authority and others v. Lt. Col. Syed Jawaid Ahmed, SCMR 1707 (2013)

³⁵ Service Tribunals Act, 1973, § 2-A, as inserted in 1997 and subsequently omitted.

³⁶ Muhammad Mubeen-us-Salam and others v. Federation of Pakistan through Secretary, Ministry of Defence and others, PLD SC 602 (2006)

The frequent judicial determination regarding statutory and non-statutory service rules and application of the master and servant principle in cases of non-statutory rules of service paved the basis for adopting an alternative approach. Thus, the 'Function Test' silently evolved to fill the gap and proceeded on the premise of whether a statutory body, public corporation, company or an entity is a 'Person' under Article 199 of the Constitution. This approach required the courts to firstly assess the functions entrusted to an organisation or person as are indeed the State functions exercised in sovereign or public power; the extent of Government control; and lastly, the State funding. In the presence of these conditions, the constitutional petition was held as maintainable against such a person or organisation.³⁷ Thus, a subtle shift was made to firstly assess the functions of the employer for maintaining constitutional petitions in service matters, which to a limited extent restricted the judicial applicability of the master and servant principle, as the principle had silently eliminated the scope of remedies available to the employees of autonomous bodies, institutions and public corporations.

Subsequently, this view got its affirmation in the Aitchison College's case,³⁸ wherein Aitchison College was held as amenable to the constitutional jurisdiction while applying the function test and observing that the Provincial Government's control in the Board of Governors of the College has effectively established that the College is a 'Person' under Article 199(5) of the Constitution, against which a constitutional petition is maintainable. Considering the aforesaid view, the apex court subsequently laid down a three-pronged test,³⁹ which has categorically applied the function test to firstly, assess the functions of an organisation or person as actually are the State functions exercising some sovereign or public power; secondly, the extent of control of such an organisation by the Government; and lastly, its financial control through State funding.

Presently, the issue as to the applicability of statutory or non-statutory rules has been settled through an alternative approach of the 'Function Test' and by determining whether a statutory body is a 'Person' under Article 199(5) of the Constitution. The test mandates considering the functions of an organisation, company or entity judicially before determining the statutory or

³⁷ Salahuddin and two others v. Frontier Sugar Mills and Distillery Limited, Tokht Bhai and ten others, PLD SC 244 (1975)

³⁸ PLD SC 326 (2002)

³⁹ Pakistan International Airline Corporation and others v. Tanweer-ur-Rehman and others, PLD SC 676 (2010)

non-statutory rules of service. If the functions involve public authority, statutory or public duties and not for private gain, that organisation, company or entity is amenable to judicial review.⁴⁰

6. Conclusion

The above discussion leads us to conclude that in cases of terms and conditions of servants working for the Federation or of a Province, tribunals of exclusive jurisdiction established under the Constitution offered adequate protection to such servants. The debate of statutory or non-statutory rules was initially for that class of employees who were working under various autonomous bodies, public corporations, companies or institutions and were not covered under the category of civil servant. In cases of statutory terms and conditions of service, an employee had the remedy of a constitutional petition. But if such terms and conditions were non-statutory or governed by such regulations, instructions or directions which were meant for internal use of an institution or body, any violation thereof was held as not enforceable through a constitutional petition, and in such case the master and servant principle was applied. By holding so, the Superior Courts have not only filled the gap left unattended by the legislature after omission of Section 2-A in the Service Tribunals Act, 1973 but also successfully afforded an alternative remedy to such class of employees who had statutory rules and were earlier deprived of the remedy of appeal as a result of statutory omission.

As regards the master and servant principle, its applicability is dependent upon the presence of non-statutory rules of service and absence of control of an employer over an employee. It appears that the principle, which was initially applicable to personal service, is now frequently applied to the employees of autonomous bodies, institutions and corporations to divest them of their constitutional remedies. But the principle is gradually losing its significance, and now it is not applicable where statutory fetters or interventions existed to the free working of an employer, in which case, the constitutional petitions are held as maintainable irrespective of statutory or non-statutory rules of service.

⁴⁰ Kamran Ahmad v. Water and Power Development Authority through Chairman and three others, PLC (CS) Lahore 332 (2014)

The judicial determination based on the control of an employer over an employee and the applicability of the master and servant principle on such basis restricted the scope of remedies available to the employees of autonomous bodies, institutions and corporations. However, the courts have now evolved an alternative approach to assess the nature of functions of an institution, body or corporation, whether being a 'Person' under Article 199 of the Constitution or not, and to subsequently proceed to determine the presence of the statutory or non-statutory rules of service for maintaining constitutional petitions. In such a case, the applicability of the principle of master and servant depends upon prior determination of whether an employer fell within the definition of a 'Person' under Article 199 of the Constitution, and whether the rules of service are statutory or not. Lastly, strict constitutional adherence has not only paved the way towards judicial determination on a firm constitutional and legal basis but also strengthened the rule of law by safeguarding the fundamental rights of the citizens.