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August 28, 1972

SHRI H. R. GOKHALE,
Minister of Law & Justice,
New Delhi.

MY DEAR MINISTER,

I am forwarding herewith the Fiftieth Report of the Law Commission on the proposal to include persons connected with public examinations within the definition of "public servant" in the Indian Penal Code.

The circumstances under which this question came to be considered by the Commission, and the scope of the Report, have been explained in the first paragraph of the Report. Having regard to the nature of the subject, no press communique was issued inviting the view of the public. But, after a preliminary study, a draft Report on the subject was prepared and discussed. After discussion, it was revised, considered again, and finalised.

With kind regards,

Yours sincerely,

P. B. GAJENDRAGADKAR.

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REPORT OF THE PROPOSAL TO INCLUDE PERSONS CONNECTED WITH PUBLIC EXAMINATIONS WITHIN THE DEFINITION OF "PUBLIC SERVANT" IN THE INDIAN PENAL CODE

Introduction.

1. This report deals with a question concerning the definition of the expression "public servant" in the Penal Code. An important judgment of the Supreme Court[1] has brought to light a defect in the scope of the present definition, and we have considered it desirable to examine the matter, and give a report *suo motu*. We shall explain, in detail, the question which is the subject-matter of this report.

Importance of the definition of "public servant" in the Penal Code.

2. As is well known, there are numerous sections of the Penal Code where the expression "public servant" occurs, and the distinction between public servants and other persons is material for various purposes under the Code. Broadly speaking, the distinction becomes important in respect of the following classes of offences:—

(*i*) offences which can be committed *only by* public servants;[2]

(*ii*) offences which can be *aggravated* when committed by public servants;[3]

(*iii*) offences which can be committed *only against* public servants;[4]

(*iv*) offences which are *aggravated* when committed against public servants;[5]

(*v*) offences committed in relation to public servants or their authority, or otherwise connected with them in one way or another.[6]

Analysis of the definition of "public servant".

3. Having regard to the importance of the expression "public servant",[7] the Penal Code, in section 21, contains an elaborate definition, making a lengthy enumeration of various categories

1. *See* paragraph 5, *infra*.

2. *E.g.* Chapter 9, (sections 161 to 171 and sections 217 to 225).

3. *E.g.* section 409.

4. *E.g.* section 186.

5. *E.g.* section 353.

6. *E.g.* Chapter 10 (sections 172—190).

7. Paragraph 2, *supra*.

of public servants, and the categories are mainly (though not exclusively) based on the function discharged by the person concerned.

4. The enumeration in the first eleven clauses of section 21 covers the following functions discharged by the public servant concerned:—

(*i*) functions connected with defence;[1]

(*ii*) judicial or semi-judicial functions or other functions in connection with the administration of justices;[2]

(*iii*) functions connected with the prevention of offences and the maintenance of law and order;[3]

(*iv*) functions connected with the proprietory or financial interests of the state[4] and

(*v*) functions connected with elections.[5]

The last clause[6] of the section is residuary. It will require detailed discussion later.[7]

Supreme Court case.

5. The judgment[8] which has led to the consideration of the problem covered by the present Report may now be dealt with. In that case, the question arose whether a University Examiner is a public servant. The accused in that case was, at the material time, a Senior Lecturer in a Government College in the State of Gujarat. In April, 1964, the accused was appointed Examiner for Physics Practical for 1st year B.Sc. for the Gujarat University. It was alleged that he had accepted Rs. 500/- for showing favour to a candidate, by giving the candidate more marks than he deserved.

The Gujarat High Court held that the accused was not a "public servant", and the Supreme Court dismissed the appeal of the State against the judgment of the High Court.

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1. Section 21, clause second.
2. Section 21, clauses third, fourth, fifth and sixth.
3. Section 21, clauses seventh and eighth.
4. Section 21, clauses ninth and tenth.
5. Section 21, clause eleventh.
6. Section 21, clause twelfth.
7. *See* paragraphs 7 and 11, *infra*.
8. *State of Gujarat* v. *Manshankar Dwivedi*, (1972), 2 S.C.W.R. 13 (13 July, 1972).

We shall deal here only with the points material for the purpose of the present Report. For that purpose, it is necessary to refer to the statutory provisions that came up for consideration.

Section 21, clause ninth, before 1964.

6. Section 21 of the Indian Penal Code (as it stood at the material time, and before the amendments which were made later), contained several clauses. The ninth clause was in the following terms:—

> "*Ninth.—Every officer* whose duty it is, as such officer to take, receive, keep or expend any property on behalf of the Government or to make any survey, assessment or contract on behalf of the Government or to execute any revenue process or to investigate, or to report on any matter affecting the pecuniary interests of the Government or to make, authenticate or keep any document relating to the pecuniary interests of the Government or, to prevent the infraction of any law for the protection of the pecuniary interests of the Government *and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty.*"

Section 21, clause twelfth, before 1964.

7. The twelfth clause of section 21 at the time covered every officer in the service or pay of a local authority of corporation engaged in any trade or industry established by the Central, Provincial or State Government or a Government company.

View taken in the Supreme Court case.

8. The Gujarat High Court held that the context of the whole of the ninth clause[1] indicated that a connection with the Government was necessary, in respect of the performance of a public duty. In this case, though the accused happened to be a Government servant, the particular work in connection with which he accepted the money was not done by him in that capacity. The Supreme Court found no "infirmity" in this reasoning of the High Court.

9. Clause nine of section 21 referred to an "officer", and the person who is to be regarded as an "officer" must hold some office. The holding of "office" implied charge of a duty attached

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1. Paragraph 6, *supra*.

to that office. The person who was remunerated by fee or commission must be an "officer". Therefore, the High Court said, the use of the word "officer", read in the context of the words immediately preceding the last part of clause nine, would indicate that the remuneration contemplated was *remuneration by the Government*. In this case, that was not the position. The Supreme Court expressly approved of this reasoning of the Gujarat High Court. The Supreme Court added—

> "A University Examiner cannot be considered to hold an office in the sense in which that word has been understood and employed in the Ninth clause. It is clear from the provisions of the Gujarat University Act, 1949, that there is no such condition that only that person can be appointed as Examiner who is the holder of an office".

10. As regards the twelfth clause of section 21 (as it then stood) also, the decision[1] that the accused was not holding an office, was conclusive. In the course of the discussion, the Supreme Court also stated that it was a moot point whether a University was a "local authority" as defined in the General Clauses Act.[2]

Amendment of section 21, clause twelfth in 1964.

11. In 1964, the twelfth clause of section 21 was recast, and the new provision was in these terms:—

> "*Twelfth.*—Every person—
>
> (*a*) in the service or pay *of the Government* or remunerated by fees or commission for the performance of any public duty *by the Government;*
>
> (*b*) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 601 of the Companies Act, 1956."

But this amendment would not make a difference as to the position applicable to a University Examiner, because he does not fall either under (*a*) or (*b*) of the above clause.

Amendment recommended in 42nd Report.

12. In the draft section recommended in the previous Commission's Report on the Penal Code,[3] an attempt had been made to make several improvements in the present definition; but the problem with which this report is concerned, would survive

1. Paragraph 9, *supra*.
2. Section 3(31), General Clauses Act, 1897.
3. 42nd Report, page 414, clause 7(n).

even under the revised definition given in that Report. Broadly speaking, the principal criteria regarded as relevant for the purposes of the revised definition of "public servant" are :—

(*a*) being in the service or pay of the Government,[1] a local authority,[2] a public corporation, or a Government company[3];

(*b*) being remunerated by the Government by fees or commission for the performance of any public duty[4];

(*c*) holding certain offices, which may be legislative,[5] sub-legislative,[6] judicial[7] (or ancillary to judicial)[8] or electoral[9];

(*d*) holding an *office* authorising or requiring the *office holder by law* to perform a public duty.[10]

Public duty not enough.

13. It would be noticed, that the mere performance of a "public duty" is not regarded as the sole criterion, even under the revised definition.[11] Though a public duty could be regarded as implicit in categories (*a*) and (*c*) above, and is expressed in categories (*b*) and (*d*) above, certain other conditions are also indicated. This is because the expression "public duty" is itself imprecise.[12]

Need for amendment in respect of University and other public examinations.

14. This being the position, it is obvious that if the case of a University Examiner to be covered, an amendment would be needed. The question, therefore, to be considered is, whether such an amendment is required on the merits. We are inclined to answer this question in the affirmative. We would add that in case of examiners at other public examinations[13] also the position should be the same.

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1. 42nd Report, page 414, clause 7(a) (ii), earlier half.
2. 42nd Report, page 414, clause 7(n) (iii), latter half.
3. 42nd Report, page 414, clause 7(n) (iv).
4. 42nd Report, page 414, clause 7(n) (ii), latter half.
5. 42nd Report, page 414, clause 7(n)(i).
6. 42nd Report, page 414, clause 7(n) (iii).
7. 42nd Report, page 414, clause 7(n) (v).
8. 42nd Report, page 414, clause 7(n) (vi), and 7 (n) (vii).
9. 42nd Report, page 414, clause 7(n) (viii).
10. 42nd Report, page 414, clause 7(n) (ix).
11. Paragraph 12, *supra*.
12. *See* discussion in the 42nd Report, page 23, paragraph 2.33.
13. *See* paragraph 17, *infra* for the suggested clause.

Excellence ought to be the criterion for success in public examinations;[1] and mercenary or other extraneous considerations should not be allowed to operate. Further, a person who undertakes work connected with such examinations, is expected to maintain the purest standard of integrity, and if he has failed to do so, the State is justified in applying the sanctions of the criminal law against him. Otherwise, those who can afford to pay and who have no scruples will have a lead over others.

It is irrelevant that the examinations are conducted by bodies which do not form part of Government hierarchy. In the duties which such bodies perform, at least in respect of public examinations, the public is as much interested as it is in the duties performed by the normal run of Government servants. Not much argument, we hope, is needed to support the point that public confidence in the purity of standards in these examinations should be maintained, and, if necessary, the criminal law ought to be invoked for the purpose.

It is obvious that public examinations affect a large number of persons, both as examinees and as examiners. Success or failure in the examination may influence the whole career of a man, not only in the initial profession which he takes up, but also, at later stages, in a profession or service which he has already entered. Complaints are often voiced about corrupt practices indulged in by examiners at such examination, and the law should be made comprehensive enough to enable action to be taken if the complaints are found to be true. The stakes are large. Welfare of a substantial section of the community is at issue. Hence, the matter ought to be provided for by appropriate provision in the general criminal law of the country.

Recommendation in 42nd Report as to private employees.

15. We may, in this connection, note that the Law Commission has, in its Report on the Code,[2] already recommended the insertion of a provision punishing private employees who take bribes. Now that the question has arisen as regards persons who are not in "employment", we think that opportunity should be taken to extend the law to them also.

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1. For an illustrative list of relevant Central Acts, *see* Appendix 1.

2. 42nd Report (Penal Code), page 300, paragraph 17.54 and page 486, suggested new section 420B.

The new section recommended as to private employees in that Report is as follows:—

'420B, *Employee taking bribe in respect of employer's affairs or business.*—Whosoever, being employed by another, accepts or obtains or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification, other than legal remuneration, as a motive or reward—

(*a*) for doing or forbearing to do any act in relation to his employer's affairs or business; or

(*b*) for showing or forbearing to show, in the exercise of his functions, favour or disfavour to any person in relation to is employer's affairs or business,

shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Explanations.—(1) The word "gratification" is not restricted to pecuniary gratification, or to gratifications estimable in money.

(2) The words "legal remuneration" are not restricted to remuneration which any employee can lawfully demand, but include all remuneration which he is permitted by his employer to accept.

(3) "A motive or reward for doing".—A person who receives a gratification as a motive or reward for doing what he does not intend or is not in a position to do or has not done, comes within these words.

Exception.—This provision does not extend to a case in which the employee is a public servant acting as such.'.

Persons employed in connections held by the Government.

16. We are, further, of the view that opportunity should be taken to insert a specific provision as to persons employed in connection with examinations held by the Government, if remunerated. If they are not full time Governmet servants, a question may arise whether they are doing a "public duty" and it is better to avoid doubts on the subject.

Recommendation.

17. In the light of the above discussion, we recommend that the following clauses and Explanations should be inserted in section

21 of the Indian Penal Code.[1] The new clauses could be inserted before the last clause :

'(viii-a) any person in the service or pay of a public body which holds an examination for the purpose of granting any degree, or any person remunerated by such a public body for the performance of any work in connection with any such examination;

(viii-b) any person in the service or pay of a private body which holds an examination for the purpose of granting any degree, being a degree approved or recognised by the Government or by a public body, or any person remunerated by such a private body for the performance of any work in connection with any such examination;

(viii-c) any person remunerated by the Government for the performance of any work in connection with any examination held in connection with employment in a public post or for the purpose of grant of any certificate.

Explanation 1.—The expression "public body" includes—

(*a*) a University, a Board of Education or other body established under a Central, State or Provincial Act or constituted by the Government;

(*b*) a local authority.

Explanation 2.—The expression "degree" includes a diploma, certificate or other academic distinction or title, or any document entitling the holder thereof to practice any profession.

Explanation 3.—The expression "private body" means body which is not a public body.'.

Honesty a debt to the profession.

18. We should conclude by quoting the fine Elizabethan language with which Francis Bacon begins his preface to his Maxim of the Law[2]—"I hold every man a debter to his profession; from

1. The numering of the clauses and Explanations will have to be changed to fit in with section 21 as ultimately revised in the Bill that may be introduced to implement the 42nd Report of the Law Commission.

2. Bacon, Preface to Maxims of the Law, quoted by Sir Owen Dixon, "Professional Conduct" (Inaugural lecture to the Law Students of the University of Melbourne in 1953), The Jesting Pilate, 129—134.

which as men of course do seek to receive countenance and profit, so ought they of duty to endeavour themselves, by way of amends, to be a help and ornament thereunto. This is performed in some degree by the honest and liberal practice of a profession when men shall carry a respect not to descend into any course that is corrupt and unworthy thereof, and preserve themselves free from the abuses wherewith the same profession is noted to be infected; but much more is this performed if a man be able to visit and strengthen the roots and foundation of the science itself; thereby not only gracing it in reputation and dignity but also amplifying it in perfection and substance".

Before we part with this Report, it is our pleasant duty to place on record our warm appreciation of the assistance we have received from Mr. Bakshi, Secretary of the Commission, in dealing with the problem covered by the Report. As usual, Mr. Bakshi first prepared a draft which was treated as the Working Paper. The draft was considered by the Commission point by point and its conclusions recorded and, in the light of the decisions, Mr. Bakshi prepared a final draft for consideration and approval. At all stages of the study of this problem, Mr. Bakshi took an active part in our deliberations and has rendered very valuable assistance to the Commission.

P. B. GAJENDRAGADKAR	*Chairman*
V. R. KRISHNA IYER	*Members*
P. K. TRIPATHI	
S. S. DHAVAN	
P. M. BAKSHI	*Secretary*

NEW DELHI ;
The 28th August, 1972

APPENDIX—1

Selected Central Acts relating to bodies authorised to hold examinations or to recognise or approve degrees and other academic distinctions.

1. THE ADVOCATES ACT, 1961

Section 7.—The functions of the Bar Council of India shall be :

(*i*) to recognise Universities whose degree in law will be a qualification for enrolment as an advocate and for that purpose to visit and inspect Universities.

Section 24 (1) (d) (v).—Provides that a person shall be qualified to be admitted as an advocate if he fulfils the following conditions:—

(*v*) any other class of persons who by reason of their legal training or experience are declared by the Bar Council of India to be exempt from the provisions of this clause.

Section 25.—An application for admission as an advocate is to be made to the State Bar Council within whose jurisdiction the applicant proposes to practise.

Section 26.—The State Bar Council refers every application for admission as an advocate to its enrolment committee.

2. THE INDIAN MEDICAL COUNCIL ACT, 1956

Sections 11 *and* 12.—Provide for recognition of medical qualifications granted by Universities of medical institutions in India or in countries with which there is a scheme of reciprocity provides in the schedules.

Sections 13 *and* 14.—Provide for recognition of medical qualifications in some other special cases.

3. THE POST-GRADUATE INSTITUTE OF MEDICAL EDUCATION AND RESEARCH, CHANDIGARH, ACT, 1966

Section 23.—The Institute has power to grant medical degrees, diplomas and other academic distinctions and titles under this Act.

Section 24.—Recognition of medical qualifications granted by statute under the Indian Medical Council Act, 1956.

4. THE DENTISTS' ACT, 1948

Section 11.—This section provides that an application to the council for recognition of qualifications by an authority which grants such qualifications, the Council after enquiry may declare that such qualification shall be recognised dental hygiene qualification for the purposes of the Act.

Section 12.—The Council may prescribe the period and nature of an apprenticeship or training and other necessary conditions before a person can be registered as a dental mechanic under this Act.[1]

5. THE PHARMACY ACT, 1948

Section 12.—The Central Council has to approve the courses of study and *examinations* which is conducted by any authority in a State.

6. THE BANARAS HINDU UNIVERSITY ACT, 1915

Section 11.—The Academic Council shall be the academic body of the University and subject to the Act, statutes and ordinances shall have charge of the organisation of instruction in the University and the Colleges, the courses of study and the examination and discipline of students and the conferment of ordinary and honorary degrees.

7. THE ALIGARH MUSLIM UNIVERSITY ACT, 1920

Section 25(1).—The Academic Council shall be the academic body of the University and shall, subject to the Act, statutes and ordinances have the control and general regulation of and be responsible for the maintenance of standards of instruction and for the education, examination, discipline and health of students and for the conferment of degrees (other than honorary).

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1. The Rajya Sabha has recently passed the Dentists' (Amendment) Bill, 1972, which seeks to vest in the Union Government the power to recognise dental qualifications and to provide for the appointment of visitors for the inspection of dental institutions, and to empower the Dental Council of India to prescribe standards of professional conduct, etiquette and a code of ethics for dentists in order to bring about uniformity in these rules.

8. The Delhi University Act, 1922

Section 23.—The Academic Council shall be the academic body of the University and shall, subject to the Act, Statutes and Ordinances, have the control and general regulation and be responsible for the maintenance of standards of instruction, education and examination with the University, and shall exercise such other powers and perform such other duties as may be conferred or enforced by the Statutes. It can advise the executive council on all academic matters.

9. The Visva Bharati Act, 1951

Section 24.—The Shiksha Samiti (Academic Council).... shall have control and general regulation and be responsible for the maintenance of standards of instruction, education and examination within the Court, and shall have such other duties as conferred or imposed by the Statutes and has the right to advise the executive council on all academic matters.

10. The Indian Statistical Institute Act, 1959

Section 4.—The Institute may hold such examinations and grant such degrees and diplomas in statistics as may be determined by the Institute from time to time-

11. The Institute of Technology Act, 1961

Section 15.—Subject to this Act, Statutes and Ordinances and Senate of an Institute shall have the control and general regulation and be responsible for the maintenance of standards of instruction, education and examination in the Institute and shall exercise such other duties as are conferred or imposed by the Statutes.

12. The Haryana and Punjab Agricultural Universities Act, 1970

Section 23.—The Academic Council shall be in charge of the academic affairs of the University and shall.....superintend, direct and control and be responsible for the maintenance of standards of instruction, education and examinations and other matters connected with the obtaining of degrees and shall exercise such other duties as may be prescribed.

13. THE MERCHANT SHIPPING ACT, 1958

Section 79(1).—The Central Government or a person duly authorised by it in this behalf shall appoint persons for the purposes of examining the qualifications of persons desirous of obtaining certificates of competency under section 78 which provides for various grades of certificates of competency.

Section 79(2).—The Central Government or the authorised person shall grant to every applicant who is duly reported by the examiners to have passed the examination satisfactorily and to have given satisfactory evidence of his sobriety, experience and ability and general good conduct of beard ship, such certificate of competency as the case requires:

Provided that where the Central Government has reason to believe that the report has been unduly made, it can require a re-examination of the applicant or a further inquiry into his testimonial and character.

14. CHARTERED ACCOUNTANTS ACT, 1949

Section 15.—The duties of the Council include :

(*a*) the examination of candidates for enrolment and prescribing of fees;

(*b*) the regulation of the engagement and training of articled and audit clerks;

(*c*) the prescribing and qualifications for entry in the Register;

(*d*) the recognition of foreign qualifications and training for purposes of enrolment;

(*e*) the granting or refusal of certificates of practice under the Act; and

(*f*) the removal or restoration to the Register of names.

APPENDIX—2

Reference in a few recent Central Acts to treat certain officers as public servants within the meaning of section 21, Indian Penal Code.

1. THE TEXTILE COMMITTEE ACT, 1963

Section 16.—Officers and employees of the Committee to be public servants.

2. THE GOLD CONTROL ACT, 1965

Section 35.—The Administrator and any person authorised by him or the Central Government and performing any functions in the implementation of this Act shall be deemed to be public servants. This Act is repealed by the Gold (Control) Act, 1968 (Section 116).

3. THE PAYMENT OF BONUS ACT, 1965

Section 27(3).—Every inspector shall be deemed to be a public servant.

4. THE PRESS COUNCIL ACT, 1965

Section 21.—Every member of the Council and every officer appointed by the council shall be deemed to be public servants.

5. THE BEEDI AND CIGAR WORKERS (CONDITIONS OF EMPLOYMENT) ACT, 1966

Section 6(3).—Every chief inspector and inspector shall be deemed to be public servants.

6. THE CIVIL DEFENCE ACT, 1968

Section 19.—Authorised persons and members of the corps to be public servants.

7. THE GOLD CONTROL ACT, 1968

Section 7.—Provides that the Administrator, a Gold Control Officer and any person authorised by the Administrator or the Central Government and performing any functions under this Act shall be deemed to be public servants.

8. THE INSECTICIDES ACT, Act, 1958

Section 20(2).—Every Insecticide Inspector shall be deemed to be a public servant.

9. THE REGISTRATION OF BIRTHS AND DEATHS ACT, 1969.

Section 26.—All Registrars and Sub-Registrars shall while acting or purporting to act in pursuance of this Act be deemed to be public servants.

10. THE KHUDA BAKSH ORIENTAL PUBLIC LIBRARY ACT, 1969

Section 25.—Officers and employees of the Board to be public servants.

11. THE MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, 1969

Section 63.—Every member of the Commission, the Director and the Registrar and every member of the staff of the Commission to be public servants.

12. THE BANKING COMPANIES (ACQUISITION AND TRANSFER OF UNDERTAKING) ACT, 1970

Section 14.—Every custodian of a corresponding new bank deemed to be a public servant.

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8. THE INSECTICIDES ACT, Act, 1958

Section 20(2).—Every Insecticide Inspector shall be deemed to be a public servant.

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