

Constitutional Law and Public Administration in India

Prof. (Dr) Sairam Bhat

Centre for Environmental Law, Education, Research and Advocacy (CEERA)

National Law School of India University, Bengaluru

Week- 03

Lecture-01

Union & Its Territory – II

The Constitution of India lays down provisions regarding the Union and the State Governments. Articles 239 to 241 in part VIII of the Constitution deals with Union Territories. Union territories in India are not necessarily characterized by a uniform administrative system but are stated in the Constitution of India. For example, the state of Jammu & Kashmir became the Union territories of Jammu, Kashmir and Ladakh. The other Union territories in India are Puducherry, Lakshadweep, Chandigarh, Andaman & Nicobar and Dadra Nagar Haveli & Daman and Diu.

The Union government is totally and solely responsible for the Union territories. It makes legislation, if necessary, creates the finance and the budget structure. The services are also determined by the Union government. The Union government may also appoint an administrator in these Union territories. When it comes to the name of an administrator again there is no uniformity. For example, in New Delhi which is now a state but earlier a Union territory the head or the administrator was called a Lieutenant Governor. That is left to how the government in the Union would want to decide. That is what is defined in the Union territory. Also, there is a difference between a state and Union territory. The States have a state legislature. The Union territories do not have a state legislature. There is a separate election for the constitution of the state government through the members of legislative assembly or through the legislative council, if there is one in a State. This is absent in a Union territory. Union territories are centrally governed and the president, through the aid and advice of the Lieutenant Governor or the administrator in that place, takes care of all aspects including police, public health, and others. But because there is the 7th schedule of the constitution, very often they are not.

Anything that is done in the state government is entirely the prerogative of the state government. They are completely and independent in governance of their territorial land and to the extent of the subjects that are granted to the state. The state governments enjoy autonomy, that is independence in the legislative process and executive process within the respective State. There are differences between the Union territories also. For example, between Union territories that are island nations and Union territories that were earlier

colonies under French viz. Puducherry or Portuguese Government viz. Daman and Diu, because of the kind of aspiration such places or territories have.

There are special provisions for the administration of certain kinds of territories in India. For example, Delhi is a special territory or National Capital Territory. It has a State Legislature as well. Delhi has strategic importance and is the place where the Union government has its offices. Hence it was considered inappropriate for the State government to make law for offices administered by the Union of India. As both Governments territorially exist in the same place Delhi enjoys a special status. Moreover, the State had no autonomy in matters regarding police and other forms of public order, and civil servants which are generally given to States, because in Delhi these subjects are kept within the powers of the Union government.

After the constitution was amended a 69th time, a special provision namely Art 239 AA was inserted to treat the territory of Delhi as a special territory and the elected legislative assembly in Delhi has jurisdiction on subjects and areas like say public health, education and others, the Delhi government does not have jurisdiction on police. This has been a judicially contentious issue between the Union and the State. At present the Lieutenant Governor in Delhi is the president's nominee in administering and deciding aspects relating to public order, police, land, and the conditions of civil servants.

The Administration takes a dual form in the territory of Delhi, partially by the Union government, and partially by the state government. The aid and advice of the Delhi cabinet with accountability to the Central Government and Delhi Chief Minister, whose accountability lies to the popular opinion which is tendered to the Lieutenant Governor is the consequence of the dual administration in Delhi. The Union of India has the responsibility to ensure that the federal structure of the country is preserved to ensure cultural, geographic, and economic stability of the States.

Union territories are usually small territorial areas, generally easy to manage, except in case of Union territories like the Andaman and Nicobar and Lakshadweep, which consists of many islands. These islands, as Union territories, will have a capital eg. Port Blair is the capital of the Andaman and Nicobar Islands and Daman is the capital of Daman and Diu. Lakshadweep, a Union Territory has a capital. The critical issue is where the administration of the executive and the Lieutenant Governor or the administrator of this place would be seated and where the administration of public policy will be done. In Andaman and Nicobar Islands, it is a critical issue because where the administration comes from, this place becomes also very important because the place must be accessible, and understand the cultural, ethical and ethnic issues among different islands because many of these islands are unique in having their kind of system. Many Islands have their indigenous communities and people, and therefore a different food habit and cultural habit, that requires a certain level of sensitivity in public administration. E.g. Port Blair is in the southern islands of

Andaman and Nicobar. Nicobar Islands are a different set of islands and Andaman Islands are a different set of islands and Port Blair is the capital for both these islands.

The status of Union Territory is important because the Ministry for administration of the Union Territories is the Ministry of Home Affairs, which decides matters related to the Union Territories. States on the other hand are headed by the Chief Minister who is an elected person of a popular party to administer the State Government. States have a Governor, who is a representative of the Union Government, whose role is nominal. Union Territories are headed by an administrator that is appointed by the President of India.

Friction between Union and State Government affects development of democracy like in the case of Delhi. In the case of *NCT v. Union of India* in 2018, a constitutional bench, looked at the purposive construction of the Delhi Act. The 69th amendment to the constitution gave the Union Government a say in the administration of the state., without affecting the autonomy of the state government. Delhi is a unique model in India. But since it does not have a full state's role in the appointment of civil servants, transfer of civil servants, the condition of service of civil servants is not with the state government so they do not become accountable for their performance to the State.

The independence of the Lieutenant Governor of Delhi in matters in which the union government has powers on and in terms of trying to coordinate with the state government, the court has said that the Lieutenant Governor is bound by the aid and advice of the council of ministers in Delhi, which is generally elected by the Delhi Assembly, and he must exercise his powers in such aid and advice only. The Delhi government will have all powers which are there in the state list of the 7 schedules, except 3 subjects, and the LG as a governor in any state must approve the bills and give that kind of autonomy to the Delhi government. So, the National Capital Territory of Delhi can never attain full status and autonomy as a state under the constitutional scheme. In such cases the co-operative model of federalism approach works best. The sub-national or state governments need independence and autonomy, but not at the cost of the strategic affairs and security. The LG is more a facilitator or a person who joins hands in partnership with the state government. Article 239 AA of the constitution gives a clear idea of this exceptional rule of Delhi being a limited state.

The Parliament also has absolute power in reorganization of states and is another dimension of Union and its territories as to the way in which it must be administered. There is much centralization of the Union in India and the constitution has deliberately allowed the Union and the central government or the federal government the strength and the kind of constitutional powers, it is required to ultimately decide in national interest or in the interest of the nation. This kind of unity of diversity of states is something that the constitution always wanted to strengthen and advocate forward. The diversity among the states is not

an absolute rule to secede from India nor a rule to exercise public policy which is in contravention of national public policy.

There are several provisions in the constitution where the central public policy must be the dominant public policy in public administration. So, it is national governance, that is national public policy that public administration is bound to follow. Wherever there is a conflict between national public policy and the public administration as against state public policy and public administration, the purposive rule of interpretation, the rule of subsidiarity recognizes the state public policies, but it must be subservient to the national public policy. This cannot be compromised and the constitution has strengthened these dimensions from time to time.

It is also important for one to understand that international law also governs the territory of India. Looking at the territory of India on land and extending it to the sea, the United Nations Convention on the Law of the Sea, called the UNCLOS has stated what area of the sea can be considered as territorial waters. In studies on law and public policy, it is important to understand a few terminologies like, 'territorial sea', 'contiguous zone.' The definition of these terms given in UNCLOS determine what kind of law applies on sea. For example, we say the union laws will apply to the territory of India. To understand what is territory of India, one must look at horizontal territory and vertical territory.

Whether Indian law will apply in the sea as well is a question that can often arise and hence these terms and terminologies become clear, and the kind of process of public policy in these areas or in these sea territories. For example, there is a lot of movement of ships. For example, if the territory is by road, the law can apply on road and the movement of vehicles can be checked, and probably search and seize contraband and other substances. Whether the same can be done on sea or whether the Indian administration or public administration operate on sea, to what extent, up to and to what limit can we consider the sea to be the territory of India. Also, the question arises as to where does the sovereignty of the state extend to in sea, in airspace. UNCLOS clearly defines the term 'territorial sea' and as a place of 12 nautical miles from the baseline.

Territorial Sea is a place where a coastal state like India being a coastal state even in the islands can extend its sovereignty towards. In an interesting episode, the Italian Marines shot two fishermen. The question was, did they shoot in the territorial waters of India and therefore be amenable to the law of the land in India? If it was beyond territorial waters, maybe they would be amenable to the law in Italy. This brings to light that the territorial sea is the jurisdiction of a particular country and foreign ships will have to comply with the law of the land. Foreign ships can include merchant ships, as well as military, though there is something called the right of innocent passage. So, if you do not disturb the law of the land and if you are not infringing the law of the land, you can still use these territorial waters and territorial sea.

However, if there is a threat to the national security of the state or India or the coastal state, then such kind of innocent passage can be suspended. That is how international law operates on territorial waters. Foreign ships entering territorial waters need permission, licenses, and they need to comply. If they engage in any kind of illicit trafficking or smuggling or any threat to the coastal countries, the extended innocent passage rule will not be applicable. So, the 12 nautical miles into the sea are Indian territory. Whatever is in the sea, the subsoil, the seabed belongs to India exclusively.

Another term is 'contiguous zone'. The contiguous zone can be defined as a kind of a belt which extends to 12 nautical miles from the outer limits of the territorial sea, and not 12 nautical miles from the baseline. This is an additional 12 nautical miles. The contiguous zone is 12 nautical miles beyond the territorial sea. And here is where the states can control these kinds of areas to prevent any kind of an action or violation of their own land. This is known as the right to chase, to stop any kind of illegality being committed on sea. The right of chase into the sea could be for the infringement of the laws and customs or for any financial, security or strategic fraud, or for the violation of immigration laws as well. So, nearly 24 nautical miles is where the territorial law can extend for the purpose of protection of the rights of the coastal state. This is how international law provides for governance of the territory of India. The 24 nautical miles can include the right of the coastal state to prohibit dangerous substances, goods, something that is damaging public health or environment, like oil spill or any other kind of illegal fishing in the contiguous zone.

Then, there is an area known as the Exclusive Economic Zone [EEZ]. It is a belt of water extending up to 200 nautical miles from the baseline of the coastal state. These 200 nautical miles include the territorial sea and contiguous zone. The EEZ is the area in which the coastal state has the economic right to do fishing, mining, oil exploration and marine research. The coastal state has this jurisdiction to protect 200 nautical miles for preservation and conservation of natural resources and the marine environment.

The next area is called continental shelf. It is an area which does not exceed more than 350 nautical miles and is the place where the coastal state has exclusive right for exploring and exploiting its natural resources. From 200 nautical miles to 350 nautical miles, lies the continental shelf for economic activity. Drilling and exploration of some oil, offshore windmills, are all considered to be within the continental shelf.

Final area to consider is the high sea. The High seas are beyond the exclusive economic zone and open for all states. In the high seas, there is freedom of navigation, freedom over the vertical airspace, freedom to construct artificial islands, if necessary, freedom of fishing and freedom of scientific research. The high sea can be considered as a kind of a common heritage of mankind. It belongs to everyone, but it should not be some kind of acquisition

or be captured by anyone. That is the concept UNCLOS lays. Everyone has a right in the high seas, in so far as he respects the coastal countries rights as well.

The high seas are usually a problem for slave trade and sea pirates, and a lot of illegal trafficking, unauthorized broad casting, and others crimes. If there is a crime committed on the high sea, every coastal country that is using the high sea can intervene and act. There can be international cooperation as well. So, for up to 350 nautical miles as your continental shelf and 12 nautical miles as territorial waters, it also means that this is the territory of India, that is, the extended territory of India. And hence, when there is a horizontal extension of territory, anything above that, which is called the airspace or vertical territory, it is also the territory of India or the Union.

Generally, under international law, airspace territory is divided into several classes, like class A airspace and class E airspace. And though the International Civil Aviation Organization, defines vertical territory of a state in air, this does not have a very firm international convention. The vertical territory of the Union of India is also its sovereign airspace of sovereign territory. Hence, what happens on the vertical space is also the domain of the Indian law. So, India can decide who can use its airspace and who cannot. The sovereign airspace can be defined as ranging anywhere between say 30 kilometers to around 160 kilometers. Anyone using the same or wishing to fly over India is also flying over its territory. Anything above 80 kilometers is beyond airspace, and becomes outer space. Anything below 80 kilometers is generally considered as airspace which is under the territorial land and the sovereignty of that state. This division is being made for the management of territorial aspirations, laws, security, and other purposes in international law. The horizontal territory and the vertical territory are equally important. Extended territory and actual territory are also critical and important. Because when it comes to defining the territory, it is public administration that matters.

As a public administrator, or as someone who defines public policy, only when the concept of territory is clear, and where is the applicability of public administration, then only decisions can be made accordingly. Only then it is possible to decide, which areas should be looked into, to prohibit certain kinds of activities. If it becomes necessary to look at restriction of movement or activities in some areas, then it is important to know what is the territoriality to which that restriction should apply. In public administration, it may become necessary to define certain places where you want to issue certain warnings for military and other purposes or controlled areas, for which it is inevitable to the territorial application of that kind of an area. All the above aspects become crucial in public administration and while defining public policy.