

# **Constitutional Law and Public Administration in India**

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## **Introduction to Fundamental Rights**

The area on Fundamental rights in the Constitution of India is very prominently important in terms of public policy of the land and in the implementation of administration. The topic on fundamental rights is there in Part III of the Constitution of India. The Constitution has certain parts which are integral to the discussion under this chapter and those are fundamental rights, second fundamental duties and third the directive principles of state policy. Each of these would require a lot of attention to understand and have deep insights on the public policy framework in terms of rights which is not only important because when we talk about rights but also when we speak about our duties. No right can emanate without the performance of duties and duties are paramount in democracy in any given society and duties are those kinds of obligations that individuals ought to perform in each situation. So, when we think that rights and duties are important it goes back to the jurisprudence of the law of obligations.

As citizens, human beings, and as individuals staying in a society it is our duty to ensure peace and order and tranquility. It is our duty to protect others interest and others' rights and hence there is an obligation by just the call of justice, equity just by the call of the state, and your duties will be paramount for the protection of your rights. Rights can only be protected if you have done your duties effectively. Rather there are principles in law which say that one who seeks equity or justice must do justice or equity himself. You are only entitled to justice and equity if you have performed your part of the obligation towards justice and equity.

If you are wrong or if you have committed a wrong, then your claim to justice and equity may also be infringed to the extent of the wrong that you have committed. So, duties are very important to the discussion on rights and the directive principles of state policy does lay down the kind of vision document for the states to look at what is the welfare interest of the people in India. The Constitution being the most fundamental document is the document that vastly speaks about many things.

Citizenship rights can also be considered as Constitutional rights which means if you are entitled to claim a citizenship and if that is denied by the state it is in one sense infringement of your rights under the Constitution. Hence what does the Constitution do as the fundamental law, as the governing law, as the foundational law, as the umbrella law, as the most important law that gives public administration the space? The objective for its performance is that it talks about certain kinds of rights which are considered fundamental. When we say certain kinds of rights are fundamental, they are something that cannot be compromised, non-alienable, something that the Constitution holds as supreme and wants to treat it as paramount in terms of protection of human rights. What is mentioned in the Constitution is only a list of rights, but they are not necessarily the only set of rights that are there.

In any legal system not only fundamental rights are defined in the Constitution you could have legal rights and a legal right is something that is given by a statute of the parliament or by an act of the state and that could be simply different than what is so fundamental. So fundamental rights are those that are mentioned in the Constitution; they are treated to be the core, they are treated as the vision of the founders as those rights that citizens and persons should enjoy. By using the word citizens and persons the precise meaning is that there are certain kinds of rights that only citizens are entitled to under the Constitution and there are certain kinds of rights that even a non-citizen is entitled to. The below mentioned fundamental rights are available only to citizens and they are not available to foreigners. Those are the rights that are mentioned in article 15, 16, 19, 29 and 30. The fundamental rights in these 5 articles are only for citizens and foreigners are not entitled to any of these fundamental rights. Article 15 speaks about prohibition of discrimination on the grounds of religion, race, caste, sex and place of birth. Article 16 talks about equality of opportunities in matters of public employment that is only for citizens. Article 19 has 6 freedoms: speech, expression, assembly, association, movement, residence and profession; these are only for citizens.

Article 29 is about protection of language, script and culture of minorities. Only Indian minorities can exercise fundamental rights under article 29. And finally, minority institutions can administer educational institutions under article 30, that is minority citizens who establish those educational institutions can seek the protection under article 30. These are 5 such fundamental rights in Part III of the Constitution that only citizens have a right to. However, in terms of the dynamism of the Constitution of India the rest of the rights that are mentioned in the Constitution in part 3 are available to foreigners as well.

There are 11 such rights that a foreigner in the Indian Constitution can be entitled to. The Constitution is an all-encompassing document. It protects human rights, and it does not necessarily look at protection of citizens' rights. The question is what can a foreigner claim in India as a part of his Constitutional right of the Constitution of India? He can claim equality in terms of equality before law and equal protection of law. He can claim things

like the freedom of consciousness in terms of religion to practice, profess and propagate religion under article 25. He can claim article 21A which has been brought into the Constitution as a recent right on the right to elementary education. And, most importantly a foreigner can claim under article 21, the right to life. Hence, Part 3 deals with both citizens and foreigners and equally tries to give the democratic principles of human rights to all persons under the principles of the Constitution.

Going to fundamental rights, one should understand that when we use the word fundamental it means this is the public policy of the land which is core, which is something that the society claims as very valuable. That is why they are fundamental. They are the founding rights. When India got independence and became a democracy, these were the first set of rights that the Constitution gave to us. Though we can talk about other sets of rights under the Constitution, these were supposed to be the first sets of rights. These were the so-called rights that the constituent assembly and the generation of our founding fathers to the Constitution gave to us. They gave these rights to a generation that they believe would enjoy it and be entitled to the same.

These were rights that our fathers wanted us to enjoy; they wanted us to have the privileges of these kinds of rights. When you look at fundamental rights, the whole value of fundamental rights is something that is derived from the preamble. The preamble is the guiding light. The ideals and the aspirations in the preamble resonate in the way in which fundamental rights have been inscribed in the Constitution and in the way the fundamental rights have been interpreted in the Constitution. For example, some of these fundamental rights deal with socio-economic conditions and are of interest because you are talking of justice under the aspect of the preamble, which is social justice, which is economic justice, which is political justice.

When you deal with social justice, how do fundamental rights deal with the concept of social justice? For example, there are legislations and Constitutional protection against bonded labour. And this is a matter of social justice that you cannot practice bonded labour, you cannot practice social inequality of untouchability or the rule against the practice of untouchability. Social justice is also about gender equality, which is quite prominent in some of the societies still in India or prevalent in India. Fundamental rights actually resonate the ideals of the preamble and to that extent, there are fundamental rights that remove these social inequalities and they give you certain kinds of rights, so that society does not practice those kinds and forms of discrimination.

It is important to understand why the rule on the Constitution becomes core and important and we look at the supremacy of the Constitution in terms of protection of fundamental rights. One would believe and understand that for any kind of political democracy to equate and decide whether the political democracy is thriving, is protected and democratic principles are the way of public administration. Democracy is not only a way in which you

elect your government, but also the way in which public administration is implemented. Every aspect of democracy becomes critical and crucial. So the concept of fundamental rights originates right from the time of Magna Carta and it is about those kinds of rights that you demand from the ruler or the state and you do not think the ruler has the ability to undermine some of these rights.

The rule of law that Magna Carta wrote, insisted that this is what the law is, this is how the rights will be administered. It is not based on what the king says or what the monarch says. Precisely laying down such a rule of law will be the rule of administration, public administration is about the letter of law, the spirit of law, it is not about the whims and fancies of the ruler or the administrator as the case. So fundamental right does come from that kind of an origin. Dicey's writing on what he mentions as rule of law, says three very important things. According to Dicey, when you talk about rule of law against rule of men, there are two interesting distinctions that you have viz., rule of law and rule of men. What is precisely expected from democracies or what they must follow is the rule of law, means that there should be supremacy of law and equality before law, because when you talk about rule of law, you do not discriminate between the color of the person to give your judgment or you do not see who the person is, whether he is rich or poor, but only apply what the law asks you to do so.

Equality before law is a very important principle of rule of law. While you talk about equality as a principle of rule of law, or equality before law before law, it means everyone is going to be treated equal and there is equal protection of the law, which means law must protect everyone equally, irrespective of his income, wealth, status, contacts or whatever. This has become a fundamental right in Article 14. So, a reading of Articles 14 to 18, will reflect the principles of equality as a fundamental right. However, equality before law originates from the principle of rule of law.

The predominance of a legal spirit, where you apply legal mind, legal logic, the sense of justice, the sense of morality, the sense of ethics, is rightly what the principles of rule of law mean. The predominance of legal spirit is so very core and important to how fundamental rights are emerging in modern democracy. The predominance of legal spirit is much spoken about because, the fundamental rights as they were given to the Constitution of India, were never supposed to be static. They were supposed to be quite dynamic. When we say dynamic, it is to be understood in the sense of suppose you say, equality before law. Here what is being written must be practiced. Equality before law may differ from time to time from case to case from generation to generation, and hence, the experiences on equality before law has changed from 1960 to what it is today in 2023. The legal spirit clearly says that law is generally not supposed to be stagnant, or rigid but it keeps changing. A changing law is always a law that is flexible. A changing law adapts to the concept of justiciability, being objective in how the law looks like, but very subjective in terms of its application as the cases. And fundamental rights are supposed to be read by

the judges; they are supposed to be implemented and interpreted by the judges. So, what equality means, has no definition. And to know this, it is ideal to read case laws of the Supreme Court and the High Court of what they meant in specific circumstances. And that clearly brings in the legal spirit.

That also is the way in which rule of law is supposed to be administered vis-a-vis the fundamental rights. Fundamental rights are fundamental to every citizen. When we say every citizen, you ought not to make a discrimination between a local community or a local person. It is sometimes fundamental to civil servants, public administrators, and even to judges. Even a judge may want to exercise the freedom of speech and expression and it is not permitted for him to do so.

So even for those who are on the side of the government, fundamental rights become important, which is the country's political process or a political system. While reading any country's Constitution, particularly the chapter on fundamental rights, you can understand the political process of that country. You understand the public administration as it were in that country. It provides an insight of how public administration is chartered into. It is equally important to understand that fundamental rights are not only about individuals. It is not only about what we call natural persons. Some of these fundamental rights can also be given to legal persons (corporations, companies and the like) or juristic personalities. So fundamental rights are available even to them. Therefore, not only natural persons enjoy fundamental rights. The rule of law also looks at the limitation of rights. It is important to remember that neither the rule of law nor fundamental rights are absolute rights. There is always a limitation to what these rights are. Every right is a qualified limited right sometimes. Every right also comes with a duty, and so none of these are absolute rights because the rule of law always looks at limitations of rights. Your rights are not absolute. There ought to be reasonable restrictions. These rights must be exercised with a reasonable sense of responsibility. And there has to be a balancing of rights, if necessary, because time and again there can be a conflict between two fundamental rights and hence the balancing of rights may also be required. So, if there is a conflict between freedom of speech versus right to religion, the right to religion will have to be subservient to freedom of speech. That conflict is also something that rule of law may attempt to regulate upon because the rule of law is also about the interpretation of law sometimes. It is about the interpretation of fundamental rights.

Fundamental rights can be positive, as well as negative. Some fundamental rights can give you a negative right and some may give you a very positive right. These kinds of fundamental rights are supposed to be available against the state mostly. However, it is not only against the state or the government, but it can also be against private individuals and private actions as well. So who is supposed to protect these rights and who is supposed to be held accountable for the violation of these rights, is not limited only to the state, it can be also available against private companies and private individuals as well.

These fundamental rights can be suspended, and this has been a part of a major Constitutional debate whether fundamental rights exist during a national emergency. Except for articles 20 and 21, your fundamental rights can be suspended during a national emergency. Sometimes national emergency is given prominence and fundamental rights may not be given prominence. However, Articles 20 and 21 are very important because 21 speaks about the right to life and 20 speaks about your rights in case you are arrested. Article 19 is about your six freedoms which can only be suspended if the emergency is declared war. It is not a general national emergency. If there is war or external aggression, which results in a national emergency, even article 19 can be suspended, it is not automatic and it has to be suspended by the government. Under the chapter on fundamental rights, you can also deal with some of these violations of fundamental rights. You can approach the courts under article 32, of the Constitution which is also a fundamental right. So, going to the court for the infringement of any of the other rights is also a fundamental right under the Constitution. And that is an interesting concept under the Constitution of India.

Our fundamental rights are the basic structure of the Constitution, so can it be changed? It has been in the past. There was the fundamental right to property that now is taken off. Hence, there have been changes to fundamental rights. A new fundamental right called right to elementary education has been added. Fundamental rights are part of basic structure and some progressive change in fundamental rights can happen. This is something that the judiciary can always evaluate and see. In the protection of fundamental rights, the judiciary plays a very critical role. The judiciary is the institution that is expected to do justice, expected to settle disputes, and pronounce the law of the land. It is expected to also to lay down the public policy and to state the limits of public administration, it is expected to compensate for the infringement of rights, it is expected to govern the limitation of the other two organs of the government. Under the doctrine of separation of power, no strict separation anyhow is followed, but the judiciary is expected to regulate the legislature and the executive in case they enter something unconstitutional. So, an independent judiciary is core to the protection of fundamental rights. And in India, like no other country, we have realized the importance of the judiciary and its role in upholding rule of law, in upholding the fundamental rights, in laying down the foundational principles of democratic process. Even if you are being influenced by your life or liberty, it can only happen through the democratic process and not through anything else. Thus, a strong judiciary would bring in the predominant spirit of law and rule of law in this country. India has experienced that quite well in the way and way fundamental rights have been interpreted. Just as a preliminary example, one would look at Article 21 and how the judiciary has looked at just the definition of life under Article 21. It has played a very significant role in looking at arbitrary actions of the state, establishing the supremacy of the Constitution and protecting fundamental rights. So, you need a guardian angel for protection of fundamental rights. And in most countries, especially in countries like India, the guardian angel for the protection of fundamental rights or protection of any kind of human right happens to be

the judiciary. Stronger judiciary means a stronger element of protection of rights, a stronger judiciary means a stronger element of protection of democratic principles which is quite very important as well.