

Constitutional Law and Public Administration in India

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Article 12 Definition of State – I

It is crucial to understand the different aspects of public administration vis-a-vis the constitution, to begin with fundamental rights. The question on rights is always related to a concept called the correlative duty. Wherever there is a right, there ought to be a remedy. However, wherever there is a right, there is always a duty to protect that kind of a right. Governance or good governance is all about being responsive to the rights and to do the best to protect the same. When you talk about the efficiency of a right in a country, good or bad, it may be average or on the top of it. This is a very powerful way to evaluate the working of a constitution or the rule of constitutionalism. The Constitution is the written document. However, constitutionalism is the experience of the document by the citizens or by the society or the history of the constitution about how it has worked over a period, a decade, or half a decade or for one century and more than that. The Indian constitution is more than 70 years old.

The American Constitution has more than three centuries of history. However, the idea of good governance is a very powerful and emerging idea in terms of making administration far more responsible, far more citizen friendly and caring for the rights of the citizen. Now, a lot of international agencies insist on good governance or the principles of good governance and it has been laid down from time to time, including by the United Nations institutions like the World Bank, UNDP, OECD, and Asian Development Bank. They also have successively insisted on the different parameters and the principles of good governance have always evolved. As we speak in the era of liberalization, globalization, privatization, or good governance could mean entirely something different and in pre-Liberalization, privatization, globalization it could have meant quite different.

However, international agencies look at developing the normative framework of administration in different countries and they expect the states to perform the functions in a manner that promotes the value of efficiency, the value of being not corrupt and the value of encouraging civil society moments. Hence, in a country's growth, while we have parameters like social growth, political mapping is also very important in terms of free and fair elections, gender rights, representation of women in parliament, as well as matters in

terms of the economic parameters of governance, which is the country's GDP, the levels of poverty, income levels, happiness index etc. So, good governance is also about bringing about sustainable human development. Developing the human potential or the potential of a population and its citizens is one of those essential administrations in good governance.

The parameters of governance extend to government agencies, extends to business houses, public policy, and public affairs. Good governance is also an important parameter in terms of administration of justice. Governance is not spoken vis-a-vis only the legislature and the executive. The strength of the judiciary or the kind of autonomy or independence of the judiciary also matters in the evaluation of good governance. Good governance also is in fact a government that also has limits on its power. The limitation or the control of public administration, how far and to what extent there are checks and balances, or the parameters of control of abuse of public administration also define good administration.

It is said that the effectiveness of any system is for one, good management, good administration, and good governance. Also, participation, rule of law, transparency, responsiveness, consensus, orientation, equity, effectiveness, and efficiency and finally accountability are all certain elements that would look at the key attributes to identify and judge good governance. However, all of these get tested when it comes to protection of human rights or protection of fundamental rights in any society, democracy, or country.

When it comes to rights that are enshrined in the constitution, that are protected under the constitution, the effectiveness of governance is brought to the forefront, even in the case of institutions like the Lokayukta. But one of the essential elements of bringing the Ombudsman rule or the rule of watchdog over governance and government is to bring in an agency that can control the state and its bureaucracy or to try and balance public administration. The role of the Lokayukta is to check corruption. The Lokayukta and the Lokpal's role is to bring in efficient administration or a more people centric or people-oriented kind of an approach.

Many of these institutions that have been established in the country have started to contribute towards good governance. That is one effective mechanism of trying to bring in the law. All these elements of good governance only contribute to the protection of individual liberties. They will contribute to the notion of democracy and bring in an element of following the principles of natural justice, which are the cornerstones of any democratic society.

The Constitution of India lays down the principles of natural justice. The principles of natural justice are about the, very fact that you are a human being, you are expected to be treated fairly, you are expected to be treated equally and you are expected to be treated in a non-arbitrary manner and as a human being, because you have granted the right to the

state to administer and govern you. The state cannot unfairly infringe upon your rights. So, the state must protect the ideas of liberty, equality, and fraternity.

The test of good governance and principles of natural justice that are expected to be put across are present in Article 14 of the Constitution of India. It is there in Article 19 as well as in Article 20. There is something known as the Golden Triangle Rule. This interesting triangle has Article 14, Article 19, and Article 21, which has a place on the top, which is about right to life. This right to life is the most essential right that ought to be protected. And any kind of infringement of right to life can only be done according to procedure established by law, so says the written Constitution of India.

Article 21 is the heart and soul of the Constitution of India. And the bedrock or the foundation on which the right to life is based is inherent in Article 14, which talks about equality before law and the equal protection of the law. The concepts of equality before the law and equal protection of the laws heavily emphasize the foundations of the Constitution and the protection of that assumes a great amount of significance.

Article 19 is about those very essential freedoms that are to be enjoyed as a natural human person. The freedoms in Article 19 include the speech and expression freedom, the movement freedom and the assembly and association freedoms. The golden triangle is of an essential creation of jurists who believe that if public administration and good governance ought to be made a rule, and it has to be made a practice in every form of public life, in the bureaucracy and in the government, then there ought to be absolute respect to this golden triangle rule. And any violation of this constitutional protection must result in adequate remedies.

These remedies exist under Article 32 of the Constitution as well. Very often than not, good governance, vis-a-vis, a lack of application of the principle of natural justice will result in infringement of various rights. It will result in arbitrary exercise of power. And so, keeping a check on the executive, a check on public administration, is the role of the judiciary through the protection of or issuance of rights under Article 32. It could be the through writ of mandamus, certiorari, prohibition, co-warranto and the right of habeas corpus.

These are the essential orders of the court that try to limit the authorities, limit their power, check the abuse and misuse of the same power. So, good governance means an absolute abundance of the principles of natural justice. It must be kept in mind that, though the principles of natural justice are a rule, it has certain exceptions where it cannot be absolutely followed. These principles work like sticks that are to be used in public life and public administration, so that the constitutional rights or fundamental rights that are granted to the citizen are protected from time to time. In the noted Shankar Shukla case, Neel Bhatti and *DK Basu* cases and the judiciary has time to time clearly laid down the emphasis of

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In the *DK Basu* case, the court gave an important dimension of criminal justice. Because unfortunately, custodial deaths in India were quite frequent and to a larger extent, showed the abuse and misuse of police power. Custodial death today is considered as a blatant and naked violation of human rights. And it is the duty of the police, whatever the issue, or case maybe, even if it may be a medical emergency or other issue, to ensure the care and protection of a person once he is in the custody of the police, and to ensure that his rights are not infringed in any other form, despite the fact that he may be an accused, or a convict, even guilty of a particular offence. To a larger extent by limiting the police power, the *DK Basu* case has laid down guidelines. And these guidelines are under the Constitution of India because they are coming from the apex court or the Supreme Court of India, and so they are considered the law of the land. So, the duty of care by the police is not only towards free citizens, but also towards the accused, towards the prisoners, towards those who are convicts, or who have violated a given law. But that does not take away the fact that the constitution also recognizes the rights of an accused. So, accused also have fundamental rights against custodial death and custodial torture, a kind of a British colonial legacy that continues to be in the police system with, methods of torture being like first degree, second degree, third degree. These methods are normally resorted to by the police to extract information or a truth. Sometimes they look at confession, so that they can collect the evidence and so forth. What the Supreme Court does from time to time is to make the power structure in this country also responsive, and responsible, and the judiciary plays an important role in this regard.

Thus, we see how in terms of good governance, the principles of natural justice and how constitutionalism has evolved in India. India notably has a very high rural population which has been dependent upon agriculture. Agriculture, though looks now to be decently profitable, it has not been so for a long period of time. So, people in the rural areas are considered far more, not very affluent in terms of money or money power.

They are also mostly not so literate, despite changes evolving in India. Once the literacy rate is down in the country, there is a possibility of abuse of power by the government. So, good governance becomes very critical and important when it comes to the vulnerable sections of the community who cannot read and write. This is a real emphasis of good governance. So, the test for good governance comes from those who do not know the law and do not have access to the country's justice system. That is precisely when good governance becomes the most critical part in society. However, because of technology, mobile cameras, and so on, to a larger extent, that accountability that is required has slowly started to come in. Those are some very important mechanisms of how we are dealing with the constitution.

Coming to the concept of 'State', Article 12 of the constitution defines the term state. This is important in understanding part III of the constitution for the reason is that fundamental rights are supposed to be governed by the state and they are supposed to be protected by the state. Citizen versus state is not necessarily versus, the concept is the duty of the state is always towards the citizen. And this is where the whole relationship of the state and the citizen arises. So, article 12 establishes and lays the foundation of that kind of relationship.

When citizens are to be exercising their fundamental rights, when they are enjoying those kinds of freedoms or rights that are enshrined in the constitution, then it becomes an obligation of the state to protect it. But the important factor here is, who is the state? A reading of Article 12 shows that the state is no doubt the government, but it is not just the government in terms of the legislature or executive. It can be certain local bodies or local authorities. Why the concept of state is important, and why we should understand the state in the context of Part III of the constitution is relevant.

The reason is that it is the state that makes law through the legislative body. The legislature in India is at the central government, it is at the state government, and it can be at the local government as well. There are three tiers of this government, and they can make a law. Infringement of fundamental rights is not only through executive action, but it can also happen through enactment of a law, which the executive then has to follow. So, it starts from the parameters of a law that is tested based on whether it is constitutional or whether it is unconstitutional.

How is a law unconstitutional? When any such law that is made by the state infringes directly or indirectly on the fundamental rights, such a law can be struck down as being unconstitutional. Hence, once it is unconstitutional, the executive does not have the duty or obligation to implement it. When you look at what is law, the state can make different kinds and varieties of law. Under Article 13 of the constitution, law includes any Act, rules, regulations, and even orders from time to time that are issued, or byelaws, so on and so forth. So, law is not just an Act, or a rule alone. All other forms are also considered law for the purpose of the constitution and for the purpose of the system.

This means, while the Parliament or the state assembly makes Acts, the rules, regulations, notifications, orders, byelaws, and regulations are generally made by the executive, i.e. the public administration. So, public administration in India also contributes to lawmaking. And these are called delegated legislations. So, legislation is an Act. The legislation allows for the executive to make rules, and this is how the delegation happens. The rules will then further delegate in terms of regulations or orders and that is the basis of how delegated legislations are brought about. In India the strict separation of power theory is not followed, which means the legislature alone is not expected to make law and you do not expect the executive to always implement the law. The executive also has a role in lawmaking and through delegated legislation.

Notably, in India or in most jurisdictions, it is delegated legislation that becomes the major chunk of role-making. Because Acts are very few and Act is substantive law just defining what is there in it. How the Act must be implemented later i.e. the procedure of putting the Act into force is in the form of delegated legislation. So, that is where a large amount of law is created, and largely public administration comes into force. When the state is going to be defined, it is not only the legislature that makes Acts, but the executive that also makes these rules or regulations that also must be included in terms of testing, whether that rule, regulation or byelaw is constitutional or not.

The courts will test it because an Act may look fine. But suppose there is a local public officer or a public servant who then passes an order in which there is an infringement of rights. The question is whether that order infringes a person's rights. They should not be allowed to do so. And then the challenge can be brought about. So, the state includes all these agencies, which can be tested under part III of the constitution, which is about protection of fundamental rights.

The 1992 amendment to the constitution, which brought in the 73rd and 74th amendment, established local authorities. These are kind of constitutional bodies; they are not necessarily attached to the state or the central government. They are constitutional bodies supposed to be autonomous and independent, and constitutionally they are. These are agencies like the municipality. These can also be the panchayats or other trusts and boards. These are local authorities in the sense that a municipality or a panchayat can also make certain kinds of regulations. And whenever they make it, they are making it as a state under article 12. The constitution imposes on the state duties to protect fundamental rights, have a citizen centric approach, duty for governance and a duty to follow the principles of natural justice. These are the duties of the state, and these duties then are towards the citizen in a constitutional dimension.