

Constitutional Law and Public Administration in India

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Week- 01

Lecture-02

Background, History & Framing of the Constitution of India – I

Before we go forward and understand the Constitution of India, the right way of saying it is the Constitution of India, not the Indian Constitution. Nevertheless, whenever we use that interchangeably, we are referring to the Constitution of India. The Constitution is the basic framework that is required to bring about public administration in countries across the world. And hence, countries which are governed by a single party system like the Communist Party of China may also have a constitution. India being the largest democracy of the world also has a Constitution. So the Constitution becomes the fundamental law of governance for countries and the Indian Constitution was one such attempt that was made before we became an independent republic. Understanding the different types and characters of a Constitution gives us an idea about why we have a Constitution like we have right now.

Constitutions were generally enacted like the Indian Constitution. We enacted it, we gave it to ourselves. There was a drafting committee, a constituent assembly and it was brought into effect. We say that the Constitution of India is an enacted Constitution, however you will notice that in certain other countries the Constitution is an evolved Constitution. The best example for an evolved Constitution is the British Constitution because it has evolved over a period of more than five centuries and it should get the credit for the parliamentary form of democracy that it gave to the world. Evolution is a very interesting process of change because you do not have an enacted Constitution per se, but you believe that the Constitution evolves over a period about how the governance structure in the country should be made through experiences and through several other instruments that frame the fundamental law of man.

Britain has an unwritten Constitution. It is through precedent, practice, custom and through evolution of times they understand the Constitutional process in Britain. Could India have adopted a Constitution that could have evolved through the kind of experiences of the country? The answer is no, because we have to gain independence from the British and we have to look to the government to rule and to enact the different legislation that is required,

and the Constitution should have been the framework for the power structure that had to be brought into force at that point of time.

The Indian Constitution did take at least a year to get finalized and hence it was a year of evolution for the Constitution to come into place. Historically, when you apply the way in which the Constitution comes into place this is the distinction between an enacted Constitution and an evolved Constitution. The Indian Constitution is a written Constitution and it is one of the largest written Constitutions in the world. Nevertheless, written Constitutions also go by what we call as interpretation rules as well.

We have what is known as statutory interpretation or Constitutional interpretation. We have so many doctrines as to the way the written Constitution should be read into and the written Constitution has its own advantages. Sometimes it may have its own disadvantages because the written Constitution seems to be rigid. An unwritten Constitution gives you all kinds of flexibility. Evolution of a Constitution is so critical and important because every generation has its own aspirations as to what should be the basic framework of governance and how the Constitution should look like. So, the Constitution has to be evolutionary in character though not revolutionary but nevertheless written Constitutions tend to be rigid like the American Constitution is so rigid and changes to the American Constitution are very rare though it is a very short Constitution and you will notice that the structure of the written Constitution can be balanced with the rigidity and flexibility. For example, in India though we have written the Constitution the basic structure doctrine brings in the structural balance of rigidity versus flexibility. While we say that you cannot totally change or amend the Constitution entirely because the basic structure has to remain the same but the flexibility is required because the Constitution once drafted has to undergo some kind of a change that is an inevitable part of the journey. Change is very important. Law cannot be constant and Constitutional law is the fundamental law. It cannot be constant and the difficulties that arise over a period of time or the experiences that are gained over a period of time must unequivocally be reflected by the Constitution.

Constitutions tend to be flexible but not entirely. They need some form of rigidity that is the best rule forward or the thumb rule forward. Because tampering with the Constitution time and again or too easily, then the very significance of having the Constitution as the basic norm of the foundation and law to govern gets entirely disturbed. So, a balance between rigidity and flexibility is usually what is being attempted in most of the countries, but some countries do get into a very rigid framework and amendments to the Constitution are hardly possible.

The basic structure doctrine in India is a very celebrated doctrine. We just completed 50 years of this doctrine recently and it is very important to understand that basic structure doctrine is visible in India and how this doctrine has probably influenced the world over in terms of the balance of the rigidity versus flexibility structure.

Finally, the title of the Constitution is also based on what kind of government it creates. So, usually Constitutions tend to create a federal government. Federal government does not mean that it has only a single government. A unitary kind of a Constitution creates a single government like in Britain. Britain has a unitary form of government in its unwritten Constitution whereas India has a federal government but we also have a state government and we also have very local governments. So, the Constitution in India has a three tier system of governance. Britain is a small country so it can have one law. India is a big country and hence we may need three tiers or levels of governance. Once there are three levels of governance, the Constitution inevitably gets longer because the Constitution is the document that defines and lays down the powers of the government. That is one of the functions of the Constitution. So, please note the Indian Constitution has to state what the central government can do and cannot do. What a government cannot do means what is not being stated as its power it cannot probably exercise it. The 73rd and 74th amendments to the Constitution lay down the powers and functions of local governments. Interestingly, even in the local governments we have a three tier system of governance as well. Thus, a unitary Constitution is a single government Constitution so it can state the basics in short.

What should the Constitution contain and what functionalities does the Constitution perform? It tells the legislature that is supposed to make the law, the executive that is supposed to implement the law or effectively bring about public administration and the judiciary to interpret the law, which should adjudicate disputes among citizens and among various other stakeholders. The Constitution prescribes the form of the judiciary, the form of the legislature. Hence, the Constitution is a prescriptive production and it lays down the form, the structure, the powers of governance and government functionality.

Second, the Constitution is not only about government but also about who the government governs. Of course it is the people, it is the citizens, it is the community, it is the society that is what the government is supposed to do and that is what the government is actually formed for and it is the purpose of the government to actually govern its people. That is what statehood is, it is the country, it is the society and hence the rights to the citizen vis-a-vis the government. Because the government does not have legitimacy unless the people recognize it. So, legitimacy of any Constitution comes from the recognition of its people in terms of the power of the government that is being created. So the people centric approach to the Constitution will make the Constitution speak about fundamental rights. In the world, both internationally as well as nationally, there are different rights that citizens have to have. We are human beings and human beings are entitled to human rights. Human rights can be divided generally into some kind of rights that are completely natural to you. As soon as you are born as a human being, you must have the right to life. These are nature given rights and the Constitution must remain the same.

But, some of these rights can be just legal rights. A legal right is something that is given to you by the statute but a fundamental right is generally given to you by the Constitution

because the Constitution is a fundamental law and hence if the Constitution gives you certain rights, they are considered very fundamental; they are considered very essential. So Constitutions usually speak about what are the fundamental, something that are non-compromisable, something that can not be eliminated, something that requires the highest amount of protection and least amount of interference from the government. And fundamental rights are also something that is stated in most. It not only talks about government and its governance but also on whom the people matter that the government is supposed to administer on.

Some of the Constitutions also talk about the direction of policy making in the country. For example, in India Part IV of the Constitution, talks about the Directive Principles of State Policy. It speaks about the kind of direction the state must take when it makes legislation. So, you will notice that it is important because very often than not we have always said that the Constitution is supposed to be a vision document, it is supposed to be a futuristic document, it is supposed to tell you where the nation must progress or what is the aspiration of the people of the nation. And hence what kind of state policies must be driven to achieve those aspirations and what kind of legislations are permissible and not permissible, can also be laid down by a constitution.

Interestingly, the legislation is not as per the Constitutional vision or the basic premise of the Constitution. Generally, Constitutional courts may hold a legislation that does not resonate with the aspirations of the Constitution or which is against the vision or basic principles of the Constitution, to be violative of Constitutional norms and hence the legislations can be held to be unconstitutional as well. So the test of the Constitution for any legislation is a must; the Constitutionality is a must. Similarly, Constitutionality of any administrative action is supposed to be tested because the function of the Constitution is also to limit the power of the government.

So, while you talk about the form of the government, the powers of the government are also to limit what they can do and what they should not do. As soon as the Constitution gives certain kinds of powers to the three organs of the government, it has to anticipate the kind of risk as well. Maybe they are going to be abused or maybe there is going to be overuse of the powers and limiting the power is something that the Constitution must also decide and lay down. Most people would not want the central government to enter the state government's domain; that is the limit of government. So the Constitution must define the role for each other, both federally at the state and also at the local level.

Several functions of the government can be laid down in the Constitution. How should the government execute these schemes, ideas of welfare? Because most states would want to call them welfare states. So how can the Constitution lay down the same? The doctrine of Separation of Powers says that the legislature is only supposed to do legislation. They are

separate and they have to only stay in their domain. The executive is only supposed to implement the law and the judges are supposed to interpret the law.

So unless the three organs are separated, they will be in conflict with each other and that is not a healthy Constitution at all. The Constitution must demarcate the role that each of the functionaries under the Constitution must perform very clearly so that they know precisely what they are supposed to do. However, the strict doctrine of separation of power which says that the legislature only should make the law is unfortunately not adhered to, though the Constitution does attempt to do it. Suppose there is a Venn diagram with three circles. One is Executive, one is Legislature and the third is Judiciary. All three circles overlap a little, because the legislature sometimes does adjudication, the judiciary makes the law many times and the executive also makes legislations which we call as delegated legislation. Today the executive lawmaking is quite enormous because parliament makes only the substantive law. The procedural laws which are in the form of rules, regulations, bylaws, notifications etc. are all made by the executive. So, this is a dedicated power, part of parliament to the executive to make the law.

So it is not a strict separation of powers. Each organ can go a little bit in the other space, while respecting the basics, functioning of the other order. For example, on many occasions, the Supreme Court has refused to enter the policy domain of the government saying that that is the domain of either the executive or the legislature. So, the Supreme Court has said we will refrain, this is left to the legislature and to the executive and hence we will not entertain or interfere with that.

Is there a link between public administration and the Constitution and why is this course trying to bring an interface between the two?

Public administration is not private administration; it is administration vis-à-vis what you do outside the domain of your home, in the society, it affects individuals in the society, it affects the community. So, the three organs of the government are into public administration. The legislature is supposed to make the law for the public- how they make the law, how they administer it, what is their vision for administration, is it a top-down approach or is it a bottom-up approach are also part of public administration. Public administration is nothing but a process of an organized management of state. There are state agencies, there are state departments, there are state ministries and there are so many departments of the government as well. Police is a very important agency made for maintaining law and order in the society. Please note, the Constitution's main vision is to maintain peace, tranquility, and harmony in the society, where every person is able to achieve his own intellectual growth and his ability to express himself creatively or otherwise. Public administration reflects the spirit of the Constitution.

Please note that the government does not have a face of its own. Legislature means the prime minister, the cabinet, the party in power, the opposition. Legislature means the parliament, Lok Sabha, Rajya Sabha, all combined together. So, when we say government, it is about people who administer the governance, it is the Constitution which makes the Constitution work through the Constitutional bodies. So, when you talk about public administration, we are talking about this Constitution that has created the functionality of certain bodies and how they would actually affect the general public economically, socially, culturally and all spheres of government. When we talk about all spheres of public life, the Indian Constitution has evolved over a period of time. How does a citizen feel safe in public life? So, that becomes very important and a relevant factor considering that it took more than half a century to take away the colonial legacy of the police power of the state. Are the police accountable to the people at large? So, public administration and police governance is important and the Constitution lays down what should these state bodies perform, how should they go about the process of management, regulation and control and that is also the main purpose of the Constitution. So, state power activity of the executive authorities is what public administration is all about. State has power, there is an executive organ of the state that is supposed to carry on its function and the whole discussion about the executive function of the government is usually called public administration.

But public administration is not just of the executive organs, it is also about the legislative and judicial organs. Because when we talk about the executive authority of the state, appointment of judges, transfer of judges is also an executive function, it is not a judicial function. So, public administration in the judiciary is also critical and important. So, keeping the definition of public administration and relating it to the functionality of the Constitution, is the simplest definition we have. It is a kind of a public power activity debate, public to power. So, power is there in the Constitution, it has been given to certain state bodies, how does this power get exercised in the public? That is precisely what is the activity under public administration.