

Constitutional Law and Public Administration in India

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Week- 02

Lecture-03

Supremacy of the Indian Constitution – I

One of the most important questions is whether the Constitution of India is supreme in public administration? To answer this, one will have to refer to *Indira Gandhi v. Raj Narain*, a case that was decided in 1975 by the Supreme Court of India. A national emergency was declared by the then Prime Minister of India, but this case tells that no person is above law, and the rule of law is important, and the rule of Constitutional law is paramount and most important in all circumstances. This is a landmark case; it is for the first time in the history of independent India that the election of a prime minister was set aside.

It was also the first time a Constitutional amendment was struck down by applying the doctrine of basic structure which was pronounced in the *Kesavananda Bharati* case. And it was also for the first time that the election laws were amended retrospectively to validate the nullified election of the prime minister. Let us understand the background of this case. It's a known fact how the emergency was imposed, but that is not the real problem over here. The real problem was what happened before the emergency was imposed and the facts that resulted in the emergency where a lot of national leaders were arrested, and they could not take part in their regular parliamentary proceedings. This case will tell that even the office of the prime minister is subservient to the principles of the Constitution. General elections were held in 1971 for the 5th Lok Sabha, where Mrs. Indira Gandhi, the then leader of the Indian National Congress was supposed to come to power and was supposed to get a majority in the parliament. The parliament had 518 seats and Mrs. Gandhi's party, the Indian National Congress, won around 352 seats, which is an absolute majority.

The opposition candidate to Mrs. Indira Gandhi was Raj Narain. He was the leader of the Rammanohar Lohia SSP and contested against Indira Gandhi in Raebareli in Uttar Pradesh and was very confident of defeating Mrs. Gandhi and in that confidence, he had taken a victory march as well before the declaration of results. However, later he was disappointed because he could not succeed in the same and the results went in favor of Mrs. Gandhi and he decided to appeal to the court and he requested the court to nullify the election of Mrs. Indira Gandhi. He accused her of adopting corrupt practices during her election campaign.

This was a serious allegation and to substantiate it, he went to the Allahabad High Court where he challenged this and alleged that she had violated the election code that was enshrined in the Representation of People's Act of 1951. It was alleged that in her election campaign, almost all the government machinery was used, including government offices and vehicles. Allegedly, a lot of army and police personnel campaigned for Mrs. Indira Gandhi and that is how she won the election. There were other allegations of corrupt practices because voters were lured to vote for Mrs. Gandhi because liquor and blankets were distributed among voters and hence there was undue influence as well.

By the time this petition was filed in 1971, Mrs. Gandhi had already been declared as having won the rivalry seat in Uttar Pradesh and she had assumed to be the Prime Minister of the country as being the leader of the largest party that had won the Lok Sabha elections. But the Allahabad High Court declared that Indira Gandhi's election to be void. They found that there is substance to Raj Narain's allegation. They found that corrupt practices had been used and the said election should be nullified. Indira Gandhi made an appeal to the Supreme Court of India, and by that time the Supreme Court was on vacation and though she was granted a stay, there was uneasiness in the Indian National Congress. She feared losing her seat as a member of parliament, thereby losing the leadership of the Indian National Congress, thereby losing to be the Prime Minister of the country. To protect her seat, she passed the 39th Constitutional amendment in the parliament. This amendment introduced Article 392A to the Constitution and through which election of the Prime Minister and the Speaker were protected from judicial scrutiny. By literally saying that whatever is going to be held by the Supreme Court cannot be done because the parliament now has the supremacy; it has the sovereignty to determine which is the law of the land. However, this amendment said that if there is going to be any challenge, it will be only a challenge before a committee formed by the parliament itself.

So, judicial review of elections, especially of the Prime Minister and the Speaker was attempted to be barred by this Constitutional amendment. Interestingly, this Constitutional amendment itself got challenged for its validity before the Supreme Court of India. At this point between 1971 and 1973, came the *Keshvananda Bharati* case, which laid down the 'basic structure' doctrine. This case allowed the parliament to amend the Constitution but held that this power is not an absolute power. When it comes to public policy and public administration, the legislature's power is also going to be read along with its duty. It is a restricted power, not an absolute power. So, there can be amendments but cannot amend the entire Constitution; can amend certain parts, but will not be allowed to amend the basic structure of the Constitution.

Power is subject to abuse and absolute power is subject to absolute abuse. And it is very important to look at the limitation of power in public administration. Confining the powers, limiting the powers, and performing the duties in public interest is critical and important. In this case, the Prime Minister at that point of time wanted to protect her seat and made a

law that protects only her interest and was it necessary in public policy was a real question. And hence, the doctrine of basic structure limits the power of the parliament. The 39th amendment took away the supremacy of the judiciary in terms of Constitutional review. The independent and autonomous character of the judiciary is important to bring in an accountable public administration. In the Supreme Court, the 39th Constitutional amendment was challenged. The 39th Constitutional amendment, even if it was brought by the parliament, was not appropriately debated at all. What you would notice is that many of the leaders at that point of time were detained and due to the emergency that was imposed, they could not take part in the debate. There was no adequate application of legislative mind.

Judicial review of legislative and administrative action is the public policy of the land. While many opposition leaders could not take part, the vote in the parliament for the 39th Constitutional amendment was merely a farce. Though both the Houses did make this amendment, the President, assented to such an amendment without even applying his mind.

So, the court held that the election of Mrs. Gandhi should be nullified. It was taken through corrupt practices. And the court also held that the 39th Constitutional amendment is illegal, it is unconstitutional, and it should be struck down, because the judicial review of any such action should not be taken off. And this affects the basic structure of the Constitution. In fact, in the words of Justice Mathew, he said that Article 329A destroys the basic structure of the Constitution. Held that an election dispute should be adjudicated. This is very important for the protection of democracy. A healthy democracy can only function when there is the possibility of free and fair elections. The impugned amendment destroys the possibility and therefore violates the basic structure of the Constitution and added that this amendment violates Article 14. It creates inequality among the members who are elected, for example, Prime Minister and Speaker's election cannot be cautioned or called for judicial review. That is an inequality that was introduced by this amendment. Justice Khanna found that this amendment violates the norms of free and fair election and affects the principles of natural justice. And therefore, the 39th Constitutional amendment must be struck down as being volatile of the Constitution. And they said that it is an important part of public administration in elections. And to that extent, this case clearly lays down the supremacy of the Constitution, supremacy of the judiciary, and why the Constitution should be the guiding light for all kinds of administrative actions of all the three organs of the government. This case clearly reiterates that fact in very clear terms. So. it is a case which goes on to state why the Prime Minister's office, though it is the most important, powerful office, remains to be bound by the principles of the Constitution, by the confines of the Constitution, which clearly has laid down democracy and democratic values as the touchstone of the Constitution of India.

Why is the Constitution of India the guiding light of public administration and public

policy? The case of Triple talaq is an important case to substantiate this point. In 2017, the Supreme Court decided *Shayara Bano v. the Union of India*, which to a larger extent, prevents discrimination of women in marriage. The word public and administration, define what is public is not what is private. Is talaq a private matter? And should it interfere with marriage as a private matter? Marriage is private. But interestingly, the aspects of marriage that affect an individual adversely or impact an individual negatively or influence the right of an individual to dignity, interestingly becomes a matter of public policy and public administration.

Public administration, it is about protecting rights, it is about preventing discrimination, it is about maintaining the dignity of an individual. That is precisely what public policy and public administration should attempt to do. And the Constitution gives the guiding light for the same to an extent. Triple Talaq case, as it is popularly called as, was an issue under the Muslim law, or Mohammedan law, which is a personal law in India, like the Hindu law or the Christian law is. Mohammedan law governs the Sunnis and the Shias and largely it is not codified. When a law is not codified, it lacks interpretation or judicial application of mind. Uncodified laws happen to be custom. And customary practices vary from state to state from situation to situation and customs face a lot of challenges of ethical morality. And Triple Talaq in India developed due to such a kind of customary practice and was a means of giving divorce. It is sometimes called Talaq-e-biddat. The name suggests it is a form of divorce, where a Muslim man pronounces Talaq three times in one sitting. And if he does so, the divorce is confirmed.

Talaq-e-biddat or Triple Talaq is different from Talaq-e-hassan wherein there is a time between which each of these Talaq is pronounced, which gives the husband a time to repent and decide and come back. But in Triple Talaq once the third Talaq is pronounced, it cannot be revoked or taken aback. Now, in case the husband realizes his mistake, or after he has pronounced the Triple Talaq, the process of remarrying the same girl is very complicated. But more than it is complicated, it is quite humiliating. Because the condition is that the girl should marry someone, some other person and get a divorce. And after a period, only then she can remarry the same husband. This clearly looks to be quite a cruel practice that has been developed. And has it impacted many women, per se whose lives have been turned upside down by just the practice of this Triple Talaq. Triple talaq has been a controversial practice or a custom.

And it has left Muslim women to a lot of abuse by their husbands. And this is one of the contributing factors to the declining social economic condition of women in India. Muslim women are usually not financially strong, and husbands tend to use this against them. Now, in the *Shayara Bano* case, what happened was, a lady, who was married for nearly 15 years to a person called Rizwan Ahmed. In 2016, she was divorced through the pronouncement of the Triple Talaq. However, interestingly Triple Talaq also does not require any reason

for giving up the Triple Talaq. She filed a repetition in the Supreme Court challenging the Constitutional validity of the Triple Talaq along with the practice of polygamy. And she argued that this infringes the fundamental rights of women, especially Articles 14, 15, 21 and 25. So, you will notice how the Constitution is a very important document in ensuring that the administration is pro people and pro women as well. So, a lot of organizations joined this petition. But the organizations that opposed the judicial intervention on Triple Talaq said that this is an essential religious practice. And hence, it is protected by Article 25 and the courts should not intervene in this matter and what the Supreme Court did was to form a Constitutional bench for the same and see if Triple Talaq infringes on the fundamental rights guaranteed in the Constitution and should be held to be unconstitutional. There were many arguments that were brought about in the court of law.

What is important is that the court said that public order, morality, and health are very important touchstones of the Indian Constitution and Indian public policy, public order, morality, and health. And hence, any right of religion that is granted the same by Article 25 or anything else is subject to public order, morality, and health. So, the right to religion is not going to be absolute in any sense. And what the court did find is that the form of Triple Talaq has no sanction from the Quran and it is not mentioned in the holy books of the Muslim community. And Triple Talaq has been kind of an evil in theology, which has been banned in many countries already. And taking the shelter of this custom was really a cruel practice. The most important judgment that comes is from Justice Nariman and Justice Uday Lalit, who had similar views. And they declared this Triple Talaq to be unconstitutional because they found that it was manifestly arbitrary in all nature and character. Justice Kurian Joseph said that this lacks the sanction of the Quran.

And hence, once there is a lack of sanctions in the Quran, there is no place for its practice at all. And he thought that it was bad in theology and cannot be good in the eyes of law. Justice Nariman and Justice Lalit said that, Triple Talaq was in a way by which the marital bonds can be broken, and the bills of the husband and the wife cannot do anything. And hence, essentially, this violates Article 14 and at no point of time, the court holds this to be an essential religious practice, and then protects it under the light of the religion.

Following this judgment, the Government of India not only took this case and this judgment very seriously, but they also enacted a legislation which made Triple Talaq a punishable offence through what is known as the Muslim Women Protection of Right on Marriage Act of 2019. Triple Talaq has been declared void as well as illegal. And there is a punishment that can be averted to a person who tries to divorce his wife through Talaq-e-biddat. And they can be punished for 3 months to 3 years of imprisonment. So, this is very important because when there is a conflict between personal law and Constitutional law, personal law that is made or attached with religion, personal law that is in relation to marriage, family,

adoption, guardianship or any other matters, and they are against the public order and morality of the state, then the personal law will have to give way to Constitutional law.

So, personal laws which are not in consonance with the Constitution must be abandoned and such practices, there are such kinds of customs, which infringe the dignity of women in marriage have no place in India. And that is what has been done right now. And despite the controversy attached to this case, it is a settled principle of law that anything that is not permissible by the Constitution or is arbitrary, unfair, and infringes the rights of women, then those must be taken off. So, this case also highlights the principle that the Constitution is supreme and your personal practices, personal laws must be subservient to the Constitution of India.

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Lecture-04

Supremacy of the Indian Constitution – II

Because the Constitution of India is for public administration, one of the interesting issues before the Supreme Court of India recently was on the rights of the LGBTQIA+ community. In 2018, the background was laid down in terms of whether homosexual, consensual, adult sex should be a crime. The court in the matter of providing equality to all kinds of persons, could be transgenders, lesbians and gays held that this is a new kind challenge in terms of public policy. The legislature should take a stance to bring about legislation by looking at this kind of issue in the society which has been there for quite some time. But unfortunately, because the legislature has not been able to address this issue, there is a vacuum or a gap between recognition of these communities, their rights, the kinds of harassment that this community faced due to the existence of some very traditional and colonial law.

The main point of determination in the *Navtej Singh Johar v. Union of India* which was particularly against the Secretary Ministry of Law and Justice. This was a constitutional bench that decided this case. The question was on section 377 of the Indian Penal Code 1860, which was made by the Britishers, which continues to be the foundational criminal law of the land, which actually decides what kind of actions will be considered as criminal offense and thereby provide a punishment. Interestingly, section 377 of the Indian Penal Code punishes a person for unnatural sex, anal sex and other kinds of sex can be brought about in the same section.

It was challenged in the court of law that this section will largely affect the LGBTQIA+ community and that this law is not in favor of public policy. The public administration through the system of police in democracy will become moral policing, when especially adults are involved, and that privacy is brought into question. What the constitution does is to regulate the police state, make the police state a far more humane institution or an agency of the state. So, the use of khaki and the use of uniform must be pro-people, it must be based on the rule of law. And certain sections of the community always fear the police. This is very common in our society that the poorer you are, the more fearful you are of the law. The legal system or courts or police are not something that can be easily accessed to.

In India, does a common man get access to justice? Therefore, the police are not a welcoming institution, and the judiciary is quite a distant institution.

People don't know how to approach these two institutions for justice. And hence, the court was asked this question, should section 377 still be applicable. And the court in this case, held section 377 unconstitutional and decriminalized certain parts of section 377. The Court said it is important that adults having consensual sexual acts, any interference by law and creating an offence regarding the same would be clearly in violation of Article 14, 15, 19 and 21.

Section 377 deals with other kinds of unnatural sex, it could be sex with a minor, or non-consensual sex, and so on and so forth. Under those circumstances, one will have to take due note and consideration. So, the LGBTQIA+ community trying to find some kind of respectability in society to their sexual orientations and holding such kind of adult consensual act to be an offence was something that had to be taken care of. So, it is very important that such kinds of cases speak about the freedom of a particular community, be it the transgenders who are waiting to be respected by a given society, be it the right of a particular community, which is a community that fears to express or speak. The legal system and the public policy must come forward to recognize some of their rights. And that is precisely what the Supreme Court tried to do in this case. What the Supreme Court very clearly holds in the *Navtej Johar* case is that the rule of equality clearly means that all persons should be treated equally irrespective of their sexual orientations. And that is the premise of the constitutional basis of public policy when it comes to the LGBTQIA+ community. However, the current debate about recognizing same sex marriages has its own challenges.

The challenges before the Supreme Court of India were that should it be recognized under personal law, or should it be recognized under special marriage act? And if it is done, so, what kind of repercussions can it have on the rights arising from marriage, especially in terms of adoption, custody, maintenance, divorce, succession, and so on and so forth. So, all of these have been something that one will have to take note of. Following the last point and emphasizing why the reading of the constitution and application of the principles of constitution are so very important for each one of us in this course and to kind of look into the rights of individuals because public administration has this very interesting dilemma about who will decide what is good for the society. Of course, people in power would like to take this call, but where do they draw their line between doing public good or causing public harm.

The recent case of Arnab Goswami, a journalist from the Republic TV, who was arrested in Bombay is a case in point. In India, press freedom has been protected under Article 19(1)(a). Press is considered as one of the strongest pillars of protecting democracy. It is the fourth pillar in democracy apart from what are the three pillars or three organs of

government. So, the press has been protected and has been given a lot of rights. The freedom of the press is paramount and notice that this has been a constitutional principle in India. However, there is an allegation on Arnab Goswami that he wounded some religious sentiments on his channel Republic TV during the show. And this was the reason why he was asked to appear before the police and later he was arrested for the same. So, you will notice that the press have a tendency of, you know, breaching the principles of neutrality at times and they get carried away by making certain bold statements or sensational news that is created. Sometimes this can be impactful. But noticing that in this case, while everything was important, arresting the journalist for making such kind of expressions on his own TV channel was a little bit of a far stretching action of the police. The court in this case came down very heavily on the Mumbai police.

There is a necessity to shield a journalist from the coercive action of the state. And the court did come to the rescue of Arnab Goswami. The kind of threat that the police or the khaki can give becomes a threat for expression of your freedom or your idea. The court while granting the bail very clearly said that what was done in this case, was done in a mala fide manner which infringes on the freedom of speech and expression and the freedom of the press. Arresting a journalist would not be an answer for what the police had done in this matter. So, cases like this very clearly show why the principles of the constitution are very, very relevant and important. And it also shows to a larger extent that it is the benchmark of protection of human rights. It also means to a larger extent protecting the rights of ordinary citizens, because the press is the most important agency that not only gives information, but also holds the government and its agencies accountable for their action.

This very clearly tells why constitutionalism is the way to govern and bring in public administration and determine what is the public policy of the land. Taking this forward and trying to get into the basic premise of the constitution itself we should understand the constitution as it is. And reading the constitution is trying to lay down public administration. So, let's start by reading the Preamble of the Constitution. Notice that the Preamble of the Constitution is the opening part of the Constitution. Nani Palkhivala, an eminent jurist, said that the Preamble is the identity card of the Constitution. The Preamble is the identity card of the Constitution. Interestingly, the American Constitution was the first to begin with the Preamble. Many countries then followed the same. Usually, the Preamble may contain a summary, it may contain a vision document. It could be the objectives of the Constitution as it were. The Indian Preamble was kind of given to us by Pandit Jawaharlal Nehru. This was given by him and adopted by the constituent assembly. The Preamble also has been amended, through the 42nd Amendment, the mini constitution that was introduced in 1976 wherein three words were added to the Preamble- socialist, secular, and integrity. So, that is what has been written as the Preamble. So, three crucial and important words were added. In this slide, is there the word socialist and secular and

integrity. The answer is no, which means, this is the original Preamble and not the Preamble as it stands today. So, as it stands today, these three words play a very important role.

The Preamble states, *“We, the people of India have solemnly resolved to constitute India into sovereign, socialist, secular, democratic republic and to secure to all its citizens, justice, liberty, equality, fraternity....in our Constituent Assembly on the twenty-sixth day of November 1949, do hereby adopt, enact and give to ourselves this Constitution.”* Four things stand out from a first reading of the Preamble. First, it tells the source of authority for this constitution. It states who is the authority and where the source of authority to this constitution is. The Preamble says that the source of authority for this constitution is ‘we the people’.

Two, it clearly says what is the nature of the Indian state or the Indian country. First, our country is sovereign. Second, our country is secular, democratic, and we also declare that we are a polity, which is a republic of its own. Third, what are the objectives of the constitution? What does the constitution attempt to protect, progress and nature? The objective is specific. We want justice, liberty, equality, and fraternity. And finally, that this constitution was adopted on November 26, 1949, and came into effect on January 26, 1950. So, these are the key words. However, each of these keywords has a very important kind of meaning to it. For example, the word sovereign, that is used, sovereign socialist, secular, democratic republic. Now, what does sovereignty or sovereign mean in the actual sense? It very clearly means that India is neither dependent nor dominated by any nation. We are our own nation in whatever sense it is. So, sovereign means that you are an independent state, you have not had any foreign rule, do not have a foreign master, you rule on your own.

So, the country being sovereign, the people being sovereign, which very clearly means there is no one above the power of people to rule. Though international law has to be respected, international law or the United Nations are not something that govern the nation, they are not an authority in that sense. Now, please note, when we talk about sovereignty, we also mean that sovereignty is not only internally, but also externally. So, people can determine what are the best affairs or policies that are to be undertaken and determine how best to implement any of these policies. The people decide sovereignty, they decide among themselves, so good or bad, they must accept it.

It was important in 1949 to say India is a sovereign nation, because we wanted to part away from the British crown and very clearly said that India did not want to have anything to do with the British crown. Though we are a member of the United Nations, we are a very important member of the UN organizations and the UN Charter, India will decide what it is to do on its own territory. That is what sovereign means. So, the government is bound to protect the territory of this land, because it belongs to people.

And the government is bound to decide what is the best policy in the territory of India. No such territory in India now belongs to a foreign ruler. India is entirely a sovereign country. So, be it Arunachal Pradesh, or Goa for some time, which was under Portuguese rule, the entire country now stands to be sovereign, including the state of Jammu and Kashmir. Second, whether we are a socialist country or a capitalist country, is a controversy that is going to go not so easily out. Socialism, when it was brought about in 1976, by the 42nd amendment, it very clearly meant that we wanted our society to have the principles of socialism. You are a socialist in the sense the country does not believe that wealth, our resources shall be concentrated in the hands of only a few individuals. Socialism means the welfare of all and the difference between haves and have not shall be reduced by the state. And it also means that all means of production and distribution of all kinds of material wealth must be done as equally as possible.

Every citizen shall have a contribution in the economy, every citizen should be able to benefit from the economy. And the idea of socialism was to eradicate poverty, to eradicate diseases from society, which means that every person should be able to access the public health care system equally. So, it is not the ones who are able to afford it should alone be able to access it. Socialism is also about the equality of opportunity, which every person should get in public employment. So, to some extent, we were influenced by Marxism and Gandhism.

Leaning heavily towards the Gandhian philosophy, the socialism or socialist pattern of society was introduced in the Indian Constitution. So, socialism also meant that the state shall take responsibility to distribute goods and services equally to all citizens. And for which the government of India did start producing goods and services and providing them to the citizens as well. Even today, through socialism and the public distribution system or what we call as the PDA system, certain essential food rates are also being distributed to the communities and the society. So, socialist very clearly is a matter of public policy. Post liberalization, globalization, and privatization in 1991, the concept of socialism has changed quite dramatically in this country.

Today privatization is possible, liberalization of the economy has already happened, globalization is inevitable. So, socialism has changed. It is very good in terms of saying that the aspirations of the community are not to go either for an entire capitalism or entire socialism. The blend of both these two is what the nation is implementing as a matter of public policy. One other aspect that one would want to bring about at this point of time is the concept of even a public-private partnership.

A lot of these public projects, which were something that was started due to socialism or socialistic patterns of governance, where the state would run even an airport or an airline, have undergone a transformation and that is very important. So, either the airline has been privatized because the state has no business running an airline or learning a loss of making

an airline because the taxpayers' money has unfortunately been getting trained in such kinds of matters. But the airports being under PPP mode or trying to make it privatized so that citizen consumer centric benefits are also brought into place is another dynamic model of socialism that we see today. And to some extent, the idea of profit for private businesses can be controlled and regulated by the system. Or it could be saying that let private and public come together in a partnership in developing infrastructure in this country.

That is also a critical component of the socialist aspect. Please note, the Indian form of socialist governance is not the communist form of socialist governance. Please note, in India, while there is socialist or socialism, it is democratic socialism that is applicable, which means that the community or most of the population will decide the directions of socialism. That is very important. So, it is democratic socialism, it is not communist socialism or any kind of extreme socialism that was philosophy; that was the philosophy of Marx.

Making that kind of distinction, at one point of time, there was so much of strict influence of socialism there was nationalization of banks, (Bank Nationalization Case) But then realized that that may not be the correct model. And hence nationalization was reversed and continues to be revisited quite interestingly by the government from time to time. So, the kind of credentials that the Indian state would want to have is that the private sector is also an equal participant in the growth of the country.

So, it is not an exclusive domain of the state alone. the state is merely not going to participate but is just going to regulate. So, the state always has this obligation of regulation. But should the state also be a participant in that kind of a business or in that kind of goods or service that is to be provided. The state has very clearly made a choice about what is the best public administration, when it comes to extracting resources, distributing and bringing about efficient use of the same resources. So, that is where socialism is relevant.

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Week- 04

Lecture-02

Article 12 Definition of State – II

It is pertinent to understand the definition of state under Article 12 of the constitution through some landmark cases of the judiciary. Some of these are the *Rajasthan State Electricity Board v. Mohan Lal*, a 1967 Supreme Court judgment, *Ajay Hasia v. Khalid Mujib*, 1980 and *R. D. Shetty v. Airport Authority of India* which are the most landmark judgments given by Justice P. N. Bhagwati in understanding Article 12. Article 12 defines state which has four parameters. First, the government of India and the parliament of India is the state. The legislature of each state is also state. local and other authorities within the territory of India is also a state once it has an authority of the state. Finally, understanding ‘other authorities’ as state is interesting and challenging because local authorities are the municipalities, the boards, and the trust. These are local authorities because they do local administration.

The local authorities are the local government and administer local public administration because in a vast democratic country, peculiar landscape and challenges and large number of citizens, the authorities must be divided. In terms of centralization versus decentralization of governance, this becomes a very critical factor. Other authorities may either be included or excluded under Article 12, which is subject to a test, because finally, in case of other authority, the basic distinction is whether such authority is a state authority or a private authority.

If an ‘other authority’ is a state authority, it is covered under Article 12. But not if it is a private authority. An authority is someone who can determine something about you. Like, a father may have authority over his family, or an institution has certain authority to lay down the rules of regulation of admission. And sometimes they say the right of admission is reserved. The question arises, who are these authorities who are accountable under the constitution, who can be held responsible for the protection of the rights of the citizen and who can be exercising public administration while trying to understand authorities under Article 12. Once an authority is an authority of the state or is a state under Article 12, even if you are not an authority, very often the employees seem to be working for the state and are called government employees. The government pays the salary of the public servants.

There is a degree of ownership in creation of that authority by the state or it could be a degree of control that the state exercises as well. So, control and ownership of the entity will determine whether it is to be included within the definition of state or not. And hence, the constitution makes a distinction between public authority and private authority. Public authorities have a different set of accountabilities under the constitution, private authorities have also a set of accountabilities, but they are of a different scale and magnitude. And an authority may be a sovereign body. A sovereign body is the body of the government itself, State, or center. We say the government is sovereign.

When something is supreme, it is said to be sovereign and because they perform core governmental functions which no one else can perform and because they reflect the interest of the citizens. When any entity is a direct reflection of government and governments, they are sovereign bodies. Today we have the concept of a welfare state. A welfare state is a state not only focusing on governance, but at the same time is providing a lot of civic amenities and a lot of facilities. A welfare state can get into production of goods and services, or extraction of mineral resources. It can facilitate and provide water supply by accessing water in the river, building dams, supplying it to canals and trying to give it to citizens.

It is needless to mention that the service of water is not necessarily a core government service of essential sovereignty, but a welfare function. Taking an example of an electricity port, the Rajasthan state electricity was in one line. Now, electricity ports have the power of promoting, coordinating the development of electricity including generation, supply, distribution and transmission. And hence, the state has invested quite a bit in the transmission lines, in the generation lines and so on.

Privatization is largely spoken of in present times, but in 1967 there was no privatization. Today there can be privatization and hence, private power companies will not be determined as state. Whether a public private partnership region should be covered under the definition of a state. The answer is yes, it should be because it is still a public part, though it is partly in the private sector. However, if it is purely private, it is not state but if it is government in some form in which the government has established the state board, or the government funds the state board in terms of the finances, then it is a state. Functionally, most of the electricity boards are directly under a minister in the government. Administratively also, in case of the appointments as many such boards have now become corporations.

A corporation is like a company of which the managing director or the directors are appointed to the government. In all these cases, financially, functionally and administratively, if there is an element of control by the government, whether state or central, these entities shall be considered as state. So, either it is the creationist test, or it is a functional test, that test will determine if these entities are going to be called a state. This

is irrespective of the fact that, the electricity board may not be covered under strict definition of sovereign function of the state.

Again, Article 12 has several components to it. The sovereign entities and the sovereign functions are under Article 12. However, when the term other authority appears in Article 12, all these entities can be covered and they will be regulating or effecting or determining any of the rights of the citizens and they would be held accountable for any of their public functions, public administrations and, the element of good governance that brings in efficiency and effectiveness of the realization of rights. In this context, the *Rajasthan State Electricity Board v. Mohan Lal*, is an important case along with two other landmark decisions.

In the case of *Ajay Hasia v. Khalid Mujib*, the issue was which body or organization is included under the definition of state. As well as about the fact that once you are a state, it opens a whole gamut of judicial review of your actions. So, who can be regulated by the judiciary in terms of their public administration? Any agency that is covered under the definition of state under Article 12 gets easily covered by the writ jurisdictions of the court, by which you can appeal to the Supreme Court directly under Article 32 of the Constitution, finally or can challenge the same under Article 226 of the Constitution in the High Courts.

In *R.D. Shetty v. Airport Authority of India*, decision delivered by Justice P.N. Bhagwati stated how to test a state and laid down six guiding factors for the same. The first factor is to see whether capital to this entity comes from the government, say the share capital, or any other funding or investment. If for any corporation, cooperative, society, trust or board, if the share capital comes from the state funds, which is the funding of the citizens and the tax-based money, which is in some sense, the chief financial resource or the main financial funding, is coming from the government, or is held by the government, then that entity should be concluded as being the state. In later stages, such an entity can fund it from other factors, but in the base funding or the founders' funding, the share funding, or the first money, must come from the government as we call it if it. Second, very often, the financial assistance of the states will be given to such corporations. So, initially, it will not be funded by the government. It may not be the base funding, the foundation funding, but the state is continuously giving assistance. This could be in the case of a private aided college, in terms of, giving financial assistance to an institution as financial aid or state aid on a year-to-year basis. Now, if this is the case, then these private- aided institutions will not be covered on the state,

But even state aided institutions in any form, be it the salary or be it any other component in which they are getting some financial assistance with the state to meet their expenditure, then those corporations or entities shall also be covered as state under Article 12. If a corporation enjoys some kind of a state monopoly or state is protecting their business as a

monopoly business; if the state is controlling the affairs or the functionality such that it is of a government character or nature of importance, then in those circumstances, notably in pre liberalization-privatization-globalization era, if the government, looks at an entity to do the sole business on behalf of the government, then in those functional characteristics, that corporation will be held to be a state.

It will have the character of the government, despite the fact that the funding has not come. This is where the character and the nature of the organization will matter. Though the funding may come from somewhere else, if the nature of the organization is such that the government is protecting its monopoly status or its status of public importance, and has every character to do government functions, then it will also be considered as a state.

The next character is the deep and pervasive control of the state, meaning core and continuous control. If deep and pervasive control is there in an organization, then such organization shall also be considered as state. The control is not weak. Say, if you are opening a restaurant or an institution or a business, the government has control. But these are just controls. Deep and pervasive control would mean that the control is of continuous character and nature and deep would mean something that is fundamental to the management of that entity itself. A department of government can be transferred to a corporation. This is possible like in the instance when initially the electricity department was there, then it was transferred to corporations for better efficiency.

So, generation companies were made different, distribution companies were made different. So, these were made for better and efficient management. Once the department of the government is split into a corporation it does not lose out the character of being a state. Which is something that must be taken into consideration. These tests were put by R.D. Shetty, who works in the Airport Authority of India. The Airport Authority manages airports in India. Many of these airports have been given for private lease. The Bangalore airport, Bombay and Delhi airports privatization has taken place. Many of the airports are a Public private partnership (PPP) project. Many of the airports are managed by the Airport Authority of India. The Airport Authority of India is a body or agency owned by the Ministry of Civil Aviation which is the nodal agency for establishing airports in India. But it must be remembered that Airports still have a governmental character function.

And being governmental in character, the government may finance it directly or indirectly. Initially, creation is financed, later it may not do that regularly. The Airport Authority of India has started to generate its own money through tickets with the usage of space in airports. This is a monopoly status that is given to the Airport Authority of India as a regulator. It involves private players because that is where efficiency of administration comes in. The question in *R.D. Shetty* was wondering whether the Airport Authority of India is a state because it is a kind of an independent organization, which is independent

functionally and can be autonomous too, functionally. But the purpose of AAI is to perform what the government ought to perform. That is the creation of the airport. It is the central government that has the domain in the constitution for creation of airports and not the state government. So, they need their regulators to manage these efficiently, so to create a corporation or company style of administration it gives an element of functionality. A look at the various aspects reveals a deep and pervasive control of the state.

Whether the Airport Authority of India there is deep and pervasive control of the state, is affirmatively answered. Everyone who works over there is appointed and responsible to the government and they are performing a character which is of public importance, but at arm's length distance. The government wants to have the airport authority a little bit farther from it because it can work efficiently and there is no government regular bureaucratic interference. It can bring in standards, improve services and improve the experience of citizens as well. However, that being the purpose, it will not lose out as being treated as a state under Article 12.

Can someone file a writ petition against an entity which is a state under Article 32 and go to the Supreme Court directly for the enforcement of his or her fundamental rights? If an entity is a state, it is required to follow certain government norms. It cannot go in for a private agreement, must go in for a public recruitment, show transparency, accountability, and ought to follow the principles of natural justice. The principle of good governance applies to an entity which is a state under Article 12. It means corruption must be investigated by the Lokpals and the Lokayuktas and follow the process of tendering. Tendering is very important because that is where transparency and accountability lies.

Participation approach and all these aspects of good governance namely, equity, efficiency, rule of law, become inevitably a rule for the entities like state who are so called local authorities. They are then made responsible to follow the rules of good governance. So, there are implications once an authority is declared a state, which could be application of the Prevention of Corruption Act. Though it applies to any other institution, primarily it applies to the state. Once aid from the government is taken, the authority is a state, and some degree of control from the government also seeps in. There is no prohibition on seeking aid from the government, but the implication is accountability arises under Article 12, irrespective of whether the entity is commercial or non-commercial, once you take aid. Even commercial entities which are established by the state, can be purely for profits. For example, the public sector undertakings, the basic purpose of these is commercial.

Hindustan, ONGC limited, Core India limited, all these are commercial entities and are unlike non-commercial entities. Whether AAI is a commercial entity? It is a semi-commercial entity, though it has so many public welfare functions in terms of establishing these airports, running the airports, creating a kind of a facility for the same. However, all these implications become very critical because while looking at so many other authorities

that must be declared under Article 12 and we bring in a constitutional accountability for that same purpose.

The government can establish companies as well. Under the Companies Act of 2013, the government can register a company as a government company. It is a company in which the government state or central has more than 51% of shares. Today there are so many of these companies in which the shares have been diluted and disinvested. The government may be a major shareholder when it holds 51% very clearly calling such a company a state. But in many cases where the government is a minor shareholder, a test of other authorities will have to be applied. An investor will not be considered as a state. For example, LIC or the Life Insurance Corporation of India, is a state. But if Infosys makes an investment into LIC, it does not mean Infosys is going to be treated as a state. Life Insurance Corporation of India and other entities which are created as a commercial window of the government are held accountable. That indirect accountability can be established with direct accountability is something that will have to be tested from time to time.

Constitutional Law and Public Administration in India

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Week- 04

Lecture-03

Right to Equality – I

The fundamental rights enshrined in the Constitution of India are rights that are core to the principles of any state, and they describe what the state really aspires and stands for in terms of protecting the rights of citizens. These are essential rights, they are inalienable rights, they are rights that cannot be infringed or compromised except in the very rarest of rarest extent, but it can be done only through the procedure established by law and nothing more than that. Fundamental rights under part III of the Constitution of India can be in the outlook of an overview. Article 14 till Article 32 are all fundamental rights and the right to equality stands from Article 14 till Article 18 which talks about abolition of titles. This chapter deals with the right to equality.

Then there is Article 19 that talks about freedoms, and Articles 20 and 22 that talk about the rights of detainees or those who are convicted of offences. Article 21 talks about right to life and personal liberty and one of the new additions to the fundamental rights chapter is the right to education, Article 21A. Article 23 talks about trafficking of human beings and forced labour and the Constitution prohibits it. These are all mostly prohibited kinds of activities. So, they protect a person's rights in a negative context. But rights can have a positive connotation as well. There is the freedom of consciousness in terms of exercising your religion, profession and practice and you also have the freedom to manage religious affairs. Article 25 onwards speaks about the freedom of religion and management of religious institutions or educational institutions by religious entities. Article 29 is about the protection of the interests of minorities. Articles 29 and 30 give minorities even the right to manage their educational institutions. The class of minorities means religious minorities. Religious institutions have a certain degree of autonomy and freedom and protection of rights under the Constitution as well. And hence the very aspect of the secular character of India gets promoted by some of these Articles. The fundamental rights chapter gets closed by Article 32 which is about the Constitutional remedies.

The right to equality under Article 14 to Article 18 are bulky Articles that speak a lot about the rule of equality under the Constitution of India. This whole process is about equality before law and equal protection of the law. Equality before law is a British concept,

whereas equal protection of the law comes from the American Constitution. What Equality before law means, must be understood. It means you are equal before the law, and means the following things. First, it means that there is an absence of any special privilege in favour of any person. Everyone has the right to be treated equally before the law. This is the rule but there are exceptions that are provided in the Constitution itself in terms of certain Constitutional authorities who have been granted certain privileges under the Constitution. While the rule says everyone will be treated equally, it means that there is absence of any special privilege in favour of any person.

Second, all individuals shall be subjected to the ordinary law of the land. So, for certain people, you cannot make certain laws or give them certain kinds of entitlements. This is the normal rule that all persons shall be subject to the ordinary law of the land and every person is below the law, law is above. This is what equal protection of the law would mean. But again, this is the rule; this is an assumption. The Constitution itself makes certain exceptions in terms of scheduled areas. Scheduled areas are the places where there are people living who need certain kinds of protection and hence, while everyone is subject to the general law of the land, there may be special law for that kind of special area. Such law may for example, exclude Indians from buying land in a scheduled area, which is notified and designated as such. So while it is said that everyone is subject to the ordinary law of the land, in special circumstances, there could be special privileges that can be granted, but this is a rule and the exceptions have to be followed as well.

The third connotation of equality before law also means that however rich or high a person is in the economic strata, or however high official power a person is holding, every such person is supposed to be below the law and law is above. Irrespective of whether a person is rich or powerful, he will be subject to the same treatment before the law, and everyone has the right to be treated fairly before the law. This is meant by equality before the law. The concept of equal protection of the law has the following entitlements. First, is equality of treatment under equal circumstances. Equal protection, means, when talking about certain treatment that a person should be entitled to, two people should be treated equally in terms of protection. One person may be accused of a particular kind of crime and there would be someone else who may be a privileged kind of a criminal. Here, both have the duty to claim equal protection of the law in the prison. The state ought to take care of them. So, while we talk about VIP prison and so on, there are concepts where equal protection of the law gets infringed even for an accused. So equal treatment of equal persons. Speaking of equal persons, women and children are not necessarily treated equally, they may have different circumstances as well. So equal protection of the law also means that when the government in public administration receives an application, every applicant is treated equally and there is no aspect of favoritism or nepotism. Every man or woman in the nation has the privilege to be treated equally before the public administration. So, similar applications should be treated similarly, dissimilar applications can be treated dissimilarly.

That is the normal rule. It is always said that there is a very interesting rule in equal protection of the law and that is the 'likes should be treated alike' without any kind of a discrimination. The equality rule is a positive assertion of a right. It expects law to give you a right in terms of what you can positively utilize. Equals cannot be treated unequally. However, likes should be treated alike. These are certain phrases that describe the equal protection of the law principle.

Article 14 lays down that the state shall not deny to any person, equality before the law or the equal protection of law within the territories of India. Article 14, the rule of equality, protection and equal treatment of the law is available to both citizens as well as non-citizens. So, Article 14 is not exclusively for citizens. Also, according to Article 14, the rule of equality applies to all kinds of persons, be it natural persons, legal persons or a juristic corporation like a company, partnership, cooperative society, or a university. It could be a company which is private in nature, or it could be a one-man company. So, if you are a person in the eyes of law, you can demand equality because companies make applications to the government sometimes for licenses and privileges in terms of extraction of coal and other natural resources.

And again, equals must be treated alike. As soon as you are treated unequally, then you feel that your rights are going to be infringed. There is discrimination by the government and hence, such kind of actions, whether administrative or otherwise can be challenged in the court of law as being violative of Article 14. Wherever government discretion is abused, that is an allegation of unequal treatment, and usually it is challenged in the court of law and that is how judicial review of governmental actions, especially on the grounds of discrimination which are generally challenged as in a violation of Article 14.

So, Article 14, is a control on government power and government regulation and it expects the government to be fair in treatment of all treated citizens and the rule is in terms of treating them equally as well. Why should equality be important or what is the need for us to discuss the rule of equality under Article 14 or why should the government look at non-arbitrariness in its public administration? When all members of the population are treated fairly and without any kind of a bias, that is only when democracies can prosper. Democracies cannot have privileges granted to a certain section of the community. That section of the community may be majority community or a minority community, it could be a religious denomination, or it could be a privileged powerful denomination. That is the process and hence, a democratic Constitution expects every member of the population, be it how high or low, economic, social, or other kinds of considerations should not apply, and everyone has the right to be treated equally, fairly and without any kind of a bias from public administration.

That is where the rule of equality plays a very important role and it is one of the basic features of the Indian Constitution. It is so important in terms of upliftment of different

sections of the community, be it those who are economically weaker or socially who are backward. So, in terms of expectation of growth, in terms of expectation of government schemes and policies, equal treatment and providing equal opportunity of treatment becomes very critical in the developmental agenda of the state. Every state must be the guardian of the rule of equality. Take the instance of the farmers being treated unequally by the state. It will result in an agrarian crisis, there will be a shortage of food supply, it can result in farmer suicide, and so on and so forth. Notably, Article 15 also brings in the rule of equality and it says that discrimination, if any, cannot be done on the ground of religion. That is, religion cannot be used to discriminate, religion cannot be a ground to have equality. Secondly race; India has so many races, from the Northeast to Southern India. Can there be discrimination on the grounds of race? Can there be discrimination on the grounds of caste? India is so divided based on caste. Can there be discrimination on the grounds of sex, women treated differently than men? There is an interesting connotation of a principle called equal pay for equal work. So, men cannot be paid more just because they are men, if women are contributing to the same type and the content of work. The economic discrimination on the place of birth as well. The state should not follow this, and this is clearly established under Article 15. But place of birth and other issues can only be accessed by Indian citizens and reasonable restrictions can be imposed on some of these races.

In certain areas in the territory of India, it becomes necessary to impose certain restrictions for the protection of local communities and for reasons of security and strategic interests as the case may be. So, Article 15 and Article 16 are critical. Article 16 guarantees equal opportunity for all citizens in the matter of employment and in the appointment of any office under the state. So, no citizen shall be discriminated against in public employment on the grounds of religion, race, caste, sex, descent and place of birth or residence. However, the question is can the state provide for reservation of appointments or can certain kinds of posts be reserved in favour of the backward class that is not adequately represented in the state service? Yes, the State can do so under the reservation policy and the state is permitted to make a certain percentage of reservation for posts that may favour economically weaker sections of the community. So, generally up to 10% reservation in certain appointments and posts for economically weaker sections of the community is permitted. Please note this is the reservation on economic consideration, not on social consideration. So, today whether reservation is based on a social parameter or economic parameter, the answer could be that it could be on both. The economic reservation angle is a very recent introduction, and it was done through the 103rd Constitutional Amendment that was made in the year 2019. And this is specially called the Economically Weaker Section (EWS) category in public service of the government of India. Up to 10% now is given based on your income, it is based on a person's economic dimension, not social dimension, which was the traditional original reservation rule in terms of backwardness. The backwardness here was on social and caste dimension. This 10% reservation that was

brought about by the 103rd Amendment is on the economic backwardness, not on the social backwardness. So, this has now been provided under Article 16 of the Constitution.

The doctrine of basic structure came up in the case of *Kesavananda Bharati v. State of Kerala*. In 2023, 50 years of the basic structure doctrine was celebrated. Because of this doctrine in 1973, there was a limitation that was imposed on the power of the parliament to amend the Constitution. The Constitution should be a dynamic document, it cannot be a completely static document. However, it cannot be so dynamic that it gives one party in the parliament that has a majority to change the basic dimension or structure of the Constitution. The Constitution should have consistency and uniformity or predictability and should have certain basic values that no government irrespective of whichever ideology or party or thinking that they come from, should have the ability to change the same. Is the rule on equality a basic structure of the Constitution? The answer is in the affirmative. The principle of equality is not in the same way in what is written in Articles 14 and 15 or 16. For example, reservation criteria can change from social to economic and from economic to some other criteria. From 10 percent it can increase to 30 percent. There is some flexibility that can be brought about.

But the core principle of equality, which is there in Article 14 of equal treatment and equal protection, is the basic principle and the basic structure of the Constitution. So, privileges and immunity should be rare, and they should be something that cannot be granted to all from time to time. Protection on the ground of equality is the basic rule of the public administration. So, public administration has to treat equals equally, likes alike. This is the basic foundational rule, and it is part of the basic structure of the Constitution. There cannot be any compromise. And how fairly you treat or apply this equality principle is how fairly you can judge good governance. It is as simple as that.

Constitutional Law and Public Administration in India

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Week- 04

Lecture-04

Right to Equality – II

Nelson Mandela, the leader who fought apartheid in South Africa and fought for rights and equality once stated, that if poverty, injustice, and inequality persist in the world, none of us can truly rest in peace. Poverty, injustice, and inequality is the concern for unrest across the world. Inequality could be social or economical in character or nature. It is only fair for human beings in society to expect that the population is treated fairly and without any bias by the government. It is important that the constitution not only speaks and ensures equality, but also tries to promote the theories of equality along with equity. Now there is a very important distinction between equality and equity.

Equality is a principle where everyone irrespective of whatever background, income or wealth or power you have, shall have the right to be treated equally before the law and are entitled to the equal protection of the law. Equity on the other hand would demand that suppose there is an elder, how much of food an elder should get and how much of food a minor should get, or a child should get. Now elders may have more appetites, the government must provide more, a child may want less. This does not mean that the child and the adult should be treated equally, especially these government schemes. Equity would demand to look into the difference upon your need, equity depends upon your abilities or the circumstances surrounding you and a person will be treated fairly based on his or her needs and circumstances.

Equity demands that sometimes there is a need for special protection for children, which adults do not require. Both components are interwoven in the constitution of India. Some of the important cases that one would want to reflect upon under Article 14 of the constitution, which talks about equality before the law and equal protection of the law is *Kesavananda Bharati v. State of Kerala* case. This is the basic structure doctrine case and *Navtej Singh Johar v. Union of India*, a 2018 case. In *Navtej Singh Johar*, the Court looked at section 377 of the Indian Penal Code. The Indian Penal Code is an 1860 legislation, and it was made by the Britishers at that point of time and did what they thought was right. The Indian Penal Code continued to exist even post-independence. The issue that was taken up in *Navtej Singh* was the issue on the rights of homosexuals. Currently, there is a pending

matter of the Supreme Court of India on the coordination of marriages in the common section on which judgment is expected soon. However, in *Navtej Singh* the issue was on whether consensual sex among adults between the same sex should be treated as unnatural sex under section 377 of the Indian Penal Code. The court said that the right to equality means the LGBTQIA+ community has the right to be treated fairly and equally as any other people or persons in each society. So just because someone belongs to this community, they cannot be discriminated against and there cannot be a law that punishes you for consensual, adult relationships. And hence the court in this case faced the question whether unnatural sex also includes consensual adult homosexuality which was dealt with by Section 377? The Supreme Court said that if the LGBTQIA+ community is punished under section 377, this would breach the right to equality. To some extent today the challenges of modern-day application of the right to equality are quite interesting, considering the two sides of the story in terms of one, what we call as conservatism, which is antithesis to what we call as liberalism. There is a constitutional challenge on balancing both the extreme sides of the society, which could be a generational gap, it could be a gap of thoughts and ideologies, it could be a kind of a social transformation that has been sought in the constitution on the grounds and based on equality.

It is the duty of governments under Article 14 to eliminate disparities that exist in our society. The disparities would be based on say, social convention. One of these disparities could be based on long standing customs, like untouchability or race discrimination. Race discrimination hits the rule of equality quite deep, and it unfortunately still exists in some pockets of the country where the rule of equality will have to be followed. The rule of equality is a natural law theory. There is a theory that every individual expects fair and equal treatment without any kind of discrimination from everyone in the society, but more pertinently and more prominently from the state. So, be it the farmers, street vendors or women in India, every person should enjoy his rights and liberties guaranteed to them with equality status that is guaranteed by the constitution of India. Article 14 does speak about social discrimination; it also talks about economic discrimination. It is the abolishment of social and economic discrimination of the citizens that is attempted by the protection guaranteed under Article 14.

However, the exceptions to equality are to be considered with importance. It is normally and very popularly stated that Article 14 also deals with what is called the rule of law. It is a very important component of good governance. The rule of law is the most important pillar which says that only the law will prevail and not the men who administer the law. It is the rule of law and not rule by men. The popular British jurist A.V. Dicey, brought in the element of rule of law while he was trying to look at issues on equality. According to him, that there are three elements of the rule of law and that rule of law assumes absence of arbitrary power. Arbitrariness is a very important issue in terms of the principles required. If power given to you is exercised in an arbitrary manner, such arbitrariness

means a process where you do not apply the principle of objectivity, you are quite subjective and you tend to choose one or the other just because it is your will and wish. A.V. Dicey says any exercise of arbitrary power shall be punished by law and it shall be something that should be taken quite seriously by law as arbitrariness affects the rule of equality, it is against the rule of law. Secondly, according to Dicey, it is important that everyone should be treated equally before the law, be it citizens or non-citizens, officials, or non-officials, poor or the rich, or high or low. Every person is subject to the law of the land and the law of the land shall apply to everyone equally which is an important aspect. There are also exceptional situations when privileges or immunities can be granted. But any such privilege or immunity should be granted by law and not by men. Third and most importantly, the rule of law principle says that the rights of individuals under the constitution shall be defined and enforced by the courts of law. So, the courts of law have the duty and obligation to implement rule of law. The courts of law are the ones who are going to be the custodian of the fundamental rights. They are the ones who shall protect as well as provide remedies for the infringement of the rights.

The Supreme Court of India, from time to time has held that Article 14 is the basis of rule of law in India. This is the basic feature of the constitution. To any extent, Article 14 cannot be changed, like it was held in the case of *Kesavananda Bharati v. State of Kerala*, that there is something called the basic structure of the constitution that cannot be amended. The right to equality is one of the basic features of the constitution and cannot be subject to any amendment. It is now important to think what a few exceptions to the rule of law and the rule of equality.

Under Article 361, the President of India and the Government of State enjoy certain kinds of amenities. The president and the Governor of the States are the chief executive officers of the respective government. The President of India is the chief executive of the central government, the Governor of any state is a chief executive of the State government. They are called as the first citizens of the State and their respective governments, the President and the governors have been granted with certain privileges and amenities. These privileges or amenities are also granted to certain sections in the community like members of parliament, members of legislative assembly, that they cannot be arrested during the parliamentary sessions or when the sessions of the assembly are taking place. The first example of such privileges or amenities is that when the President and the Governor are in office, that is they are not departed from the tenure and are not former presidents or governors, they are still in office and they shall not be answerable in any court of law in the exercise and performance of their powers and duties in office.

In their personal matters, they will be answerable, but in their official capacity, if they are performing any duties or any functions, then they shall not be answerable in any court of law. Secondly, there shall not be any criminal proceeding against the President or the Governor in any court during the term of their respective offices. There shall not be any

process of arrest or imprisonment of the President or the Governor in the tenure of their office and no civil proceedings shall be instituted during the term of the President and the Governor. These are certain privileges that are granted to the President and the Governor and Article 361A says that no person shall be liable for any civil or criminal proceedings in any court in respect of publication in a newspaper or by radio or television of a substantially true report of any proceedings of either House of the Parliament or the House of Legislature of the State. So, 361 is a privilege and immunity granted to the press people for true reporting of what is happening in the House of Parliament or the House of Legislature.

Under Article 105, no member of the Parliament shall be liable, in any court for anything that was done by the member of Parliament or by any member during any parliamentary committees. They shall not be liable for any of these proceedings before a court of law. Under Article 194 the same privilege is granted to MPs that are granted to the members of legislative assembly. These are certain kinds of exceptions that are there and sometimes there could be certain legislations that can be kept out of judicial review, and they cannot be challenged in the court of law as they are evaluating Article 14, Right to Equality. So, when Article 31c was created as an exception to Article 14, it seems the Supreme Court agreed that sometimes you should allow certain exceptions in the case of land reform movement, in the case of change of right to property and certain legislations may not be able to guarantee those rights as well.

The United Nations agencies, diplomatic missions of different other governments also are granted with certain diplomatic immunities as per international law. Sovereign territories that exist in India or sovereigns of different other countries, be it a ruler, a king, an ambassador, or a diplomat, all of these enjoy immunity from criminal and civil proceedings in the country. So, these are certain examples of where exceptions to the rule of equality are found as privileges and immunities are granted. So, these could be certain kinds of privileged class of individuals who are not going to be treated the same as a normal Indian citizen would be treated in terms of criminal or civil proceedings. These are necessities that are created by international conventions at times. These are necessities to protect the dignity of the office of the president or the governor or the members of parliament or members of legislative assembly so that it is something that is not being misused by opposition parties. Constitutionalism on the growth of these kinds of exceptions have come into existence and the courts have upheld those kinds of exceptions as well.

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Week- 04

Lecture-05

Rights Against Discrimination – I

The Constitution of India guarantees various rights to its citizens, including prohibition on discrimination on the account of religion, race, caste, or place of birth. These rights established by the Constitution are called fundamental rights because they are core values that the citizens of India through their constitution express themselves. The reason why such rights exist in a very negative context and is negatively expressed is because a person cannot be discriminated against on the grounds of religion, caste, race, sex, place of birth. The state should not be discriminating against you. It is a kind of protection against the negativity of the state. The word discrimination here is quite important. There should not be discrimination means that no adverse action or distinction shall be made. Anyone who uses religion, race, caste, sex, or place of birth as a criterion to give favor to or to give something more to one religion over the other, trying to give something more to one race over the other, that will amount to an infringement of Article 15. There is a prohibition against the activities of the state and the state shall not discriminate against religions, race, caste, sexes, male or female or it could be the LGBTQIA+ community as well. The LGBTQIA+ community are looking at their own sexual orientation as a consensual adult relationship. That kind of discrimination on the grounds of sex is something that the Supreme Court in 2018 said while it is a law of equality.

Regarding the aspects of place of birth, India is a huge country and there are 22 constitutionally recognized languages. These languages are only relevant for the way the central employment examinations are conducted or in the way the central government ought to give or notify legislation in certain kinds of languages. Though there are only 22 languages recognized by the Constitution, in India there are more than 1500 languages that are spoken of apart from Hindi or English which is the main language that is generally spoken about. Hindi is spoken by nearly 44% of the Indian population. It is a majority language in that sense. However, because of the diversity of languages in India there is diversity of culture, cuisines, and religion. Because of which, these diversities are divided in different kinds of states. Your place of birth can determine what language you speak, what culture you are, and to a larger extent what kind of activities you are going to

undertake. Hence any discrimination on the ground of place of birth is not acceptable under the Indian constitutional premise. So, place of birth also shall not be the source of any kind of governmental disparity, any kind of governmental distinction or any kind of government favors, the rule being laid down under Article 15 of the Constitution.

It is noticed that all societies have divisions, which may be on social basis, divisions based on educational basis and divisions based on the economic basis, division between illiterates and literates, highly educated versus basically educated divisions. The class of divide does exist in society. Such kinds of divides, though they exist in all forms and kinds of societies, or more so in India, because of the vastness of the country and the different geography or culture that exists in India, the state shall not discriminate. That is the rule and any kind of discrimination is unacceptable and violates the rule of equality as we turn to Articles 14 and 15 of the Constitution. In India, there are many anecdotes which bring out incidents wherein, only a certain caste of women is allowed to draw water from a particular kind of well. There were two wells in many villages, one for the upper caste, one for the lower caste. Coming to upper caste and lower caste, the Harijans or Dalits were called as the lower caste and other castes were given the upper caste status. Most of the caste discrimination in India existed based on what and who was in control of land and who were the working class. The working class were often exploited by the landlords or those who were able to occupy that land. This class distinction existed in so many other countries, which resulted in a lot of political revolutions across the world, including communism to empower the working class. In India, such kind of treatment is unacceptable and no longer tolerable.

Religion can be the basis of discrimination often. Temples may want to discriminate at times. But again, there is a distinction between public and private temples. Private temples can have certain kinds of restrictions, which are reasonable as per public policy, but they should not discriminate among the class of religion and class of religious faith. So that is a common basis for how the state must administer as well. What is protected by Article 15 are the rights and interests of citizens viz, the right to religion in one sense, the right to belief, right of language, right of culture and there is freedom to exercise all these rights without the fear of the state, which will discriminate you or treat you unfairly, just because you have decided to practice your religion, your faith, your language, your belief. The positive connotation of Article 15 is that while it says states shall not discriminate, the positive right that has been attempted to guarantee to the citizen is the right of religion, belief, language, and culture. The positive right that gets to be protected.

It is relevant to understand what religion means in this country, many often do not know the distinction between race and caste. They are not necessarily one and the same. Race is of an ethnic origin, and it could be ethnic origin within a community of religion. It could be an ethnic origin within a caste itself. There are so many races in India. When you compare mainland India to what is there with people from the northeast, we invariably use

the term race. As to caste, there are upper castes, lower castes, scheduled tribes, and so many other caste systems in India. Every religion has two kinds of castes. In Christians, there are Catholics and Protestants. When you look at discrimination based on sex, discrimination against transgenders should also be looked into. That is a challenge and kind of a discrimination that can arise.

Often, we speak of different classes of people in India, say one class of people in one religion as against another class of people in another religion. But advantages that are distributed by state must be given equally and any kind of discrimination will amount to breach of the same. So that is something that needs to be appreciated and understood in terms of what this means. Where discrimination is not permitted, it is important to understand that it is not that in the entire country there would not be the practice of discrimination.

Discrimination may exist in private places, in one's own house, like one may not want a particular religion or religious people to enter into and to exercise one's right to privacy. Discrimination shall not be practiced by the state or by the government and it shall not be practiced in public places, which is the rule. Here, a public place could be a restaurant, a cinema hall, a well with water where people wish to access it because it is not a private well as public wells are for everyone's use or it may be a lake or a pond. This is where no kind of discrimination can exist because these are constitutionally protected public spaces where every person in India, irrespective of religion, race, caste, sex, or place of birth must have equal access to. A public place could also be a parking place; it could be roads or trains. Wherever the state has given certain privileges and forms, discrimination shall not be practiced and that is a clear prohibition of the state. While the state shall not discriminate, people who are licensed by the state or who are given the privileges, the state also has a duty not to exercise these kinds and forms of discrimination. That is how the basis of rule of law exists. While this is the rule, there are also exceptions to the same. The constitution itself provides for certain exceptions and one of the rules are very strong exceptions which are in favor of women and children.

As generally understood, women and children are not necessarily equals. While the rule of equality says that likes should be treated alike, women and children are not included in the likes, they are unlike or different individuals or allies. Women particularly, in terms of their vulnerability to social violence, their exposure to certain kinds of social stigmas and discrimination that existed in Indian society. Whether the state makes special protection for women and children. Women could be in terms of sex; children also could be also in terms of the individuals in human society. So, suppose the state wants to make certain kinds of reservation for women in parliament, whether it is permitted and will it affect Article 15? The answer to it is no. Reservation for women in the local panchayat, will not attract Section 15. So also, reservation for women and children, in bus or public transport will not attract the provisions of article 15. This is essential, but one must justify its essentiality

in terms of public policy with the land. That public policy itself was reflected in the constitution saying any kind of special protection to women and state legislations that protect women and children shall not attract the rule of non-discrimination under Article 15.

Secondly, any kind of provision, which is justified as a special provision under Article 15, can be made for socially and educationally backward classes of citizens by the state. Primarily the test is being socially backward plus educationally backward for the advancement of such kinds of citizens and community. There can be reservation of seats in public education institutions for socially and economically backward sections of the community. Similarly, in the socially backward sections of the community, can we include scheduled caste and scheduled tribes in terms of making certain kinds of reservations for scheduled caste in educational institutions to empower them, especially in those kinds of educational institutions that are aided institutions that are government funded institutions. This excludes minority institutions. Minority institutions are protected against these kinds of provisions. All the institutions may be subject to the aspect of reservation, because that is something as an exception to equality and something that is provided in the constitution as well. An important amendment was brought to the constitution namely, the 103rd amendment in 2019. This amendment created another class of individuals that required be given special protection which is the economically weaker sections of the community called EWS. After this amendment reservation can be provided not only on grounds of social and educational backwardness, in public employment and in institutions of government funding, reservation can be provided based on your backwardness in terms of economic capacity or economically weaker sections of the community as well. This amendment talks about reservation based on a 10 percent limit. What an economically weaker section is to be decided by the law. Of course, there must be an income limit, anything above which may come under the creamy layer of which means that if you do not fall in the economically weaker section category, you will not be entitled to the reservation. The constitutional validity of the 103rd amendment was challenged before the court, but the court agreed to providing reservation based on economic weakness as well. When you talk about the economically weaker section of the community, the benefit of this 10 percent reservation is to be given to individuals or is available only to individuals who are not covered by any of the existing schemes of reservation that is given for SC, ST and OBCs.

The criteria for giving this economically weaker section of the committee reservation applies to persons whose annual gross income is less than 8 lakh rupees, that is 8 lakhs should be the overall income, be it income from salary, agricultural business, profession, and it is for the financial year in which the applicant is making his application. So, anyone who has a gross annual income of less than 8 lakh rupees comes under this scheme. But a person whose family owns or possesses any of the following assets are excluded from the EWS category. So, anyone who has an agricultural land of more than 5 acres, or who has

a residential flat of more than 1000 square feet, anyone who has a residential plot of more than 100 square yards in any municipal area and any residential plot over 200 square meters in a notified municipal area are excluded from the EWS category.

If property is held by a family in different locations or different places or cities, all of them will be clubbed together to calculate the income limit of the normally weaker section of the community quota. Now, families for this purpose would include the person who seeks benefit of the reservation, his or her parents or siblings below the age of 18 years or his children below the age of 18 years. So, this is the combination of families that will be looking at income, property assets and so on. These are excluded from the EWS category. The rest, anyone who has less than 8 lakh annual income can claim this kind of a reservation

When it comes to reservation for the OBC community, the other backward classes, this is different from SC-ST. The exception for reservation for OBC was brought about by the 93rd amendment in 2005. And to give effect to this provision, the central government enacted what is known as the Central Educational Institution, Reservation and Admission Act of 2006, providing a quota of nearly 27% for candidates belonging to the OBCs in all central higher education institutions, including the IITs and the IIPs. The Supreme Court upheld the validity of this Act, but said the Act excluded the creamy layer form. Children who want to get into these higher education institutions and claim the 26% reservation in IITs, IIMs and all central government institutions or universities are under the OBC category. But children of the following category will not get this quota. Children will be brought under the creamy layer rule, if any of their parents have held constitutional posts like the President, the Vice President, judges of Supreme Court, High Court, Chairman and members of UPSC, State Public Service Commissions, CEC, CAG and so on and so forth. Children of Group A or Class I or Group B class of offices in all central and state civil services or any kind of employees of PSUs, banks, insurance organizations or even employees of universities, also in some kind of private employment, will be brought under the creamy layer rule. If you are holding the rank of a Colonel or above in the army or equivalent positions in the Navy and Air Force, your children also will be brought under the creamy layer rule. In the same style, doctors, lawyers, engineers, artists, authors, consultants and so on, are also considered as privileged, and their economic status would have been elevated and hence they are also brought under the creamy layer rule. People who are engaged in trade, business and industry are also brought under the same.

Anyone who owns an agricultural land above a certain kind of limit or a vacant land or a building in certain urban areas are immediately brought under the creamy layer rule. Anyone who has a gross annual income of above 8 lakh rupees or possessing wealth of a similar kind of nature and character, is also the basis on which a creamy layer rule can be established. Now please note, the creamy layer rule was introduced in the year 1993. The initial ceiling of 1 lakh was subsequently raised to 2 lakhs, then 5 lakhs, then it was raised

to 4.5 lakhs in 2008, 6 lakhs in 2013 and finally 8 lakhs in 2017. So, a family with an annual gross income of 8 lakhs or above will be treated as a creamy layer family and a person from it is not entitled to the OBC reservation of 27 percent.

Constitutional Law and Public Administration in India

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Week- 04

Lecture-06

Rights Against Discrimination – II

Article 16 is also part of the doctrine of equality under the Constitution of India. Article 16 declares that no individual shall be disqualified for or discriminated against in any government occupation or position solely based on religious belief, ethnicity, class, gender, ancestry, birthplace, residency, or a combination of these factors. It also authorizes parliament to enact legislations requiring residence in that Union Territory or State before appointment or employment in that Union Territory or State. While domicile or residency may be required for employment in a particular Union Territory or State, no government can discriminate in public employment, which means equal opportunity in public employment is to be given by the Constitution and is to be protected by the Constitution. At the same time, the question of reservation in jobs and position for the backward sections arises. There are four exceptions to the rule of equality in public employment and they are that, one, the Parliament can prescribe residency as a ruling or as a condition for employment of appointment. And as per the public employment requirement as to Public Employment (Requirement as to Residence) Act, 1957, there was till this law was prevalent in 1974. In certain states, this residence requirement can be brought about.

Secondly, the state can provide for reservation for backward classes, who are not adequately represented in the state census. So, reservation in public employment is an exception to the rule under Article 16. Thirdly, a law can provide that the incumbent of any office related to religious denominations, institutions or members of governing body should belong to a particular religion or to a denomination, which means it is not open employment, especially in religious and other denominations. It can be given to those members who are, of a particular caste, family etc. So, these are some things that are applicable to public temples. The state is permitted to make reservation up to 10% of its appointment in favour of economically weaker sections of the community. And that is how certain exceptions come into place under Article 16. Equally, Article 16 has its own set of controversy, especially with the Mandal Commission Report in 1992, where, in 1979 Morarji Desai government appointed the second backward classes commission under the chairmanship of B. P Mandal.

The Commission was appointed under Article 340 of the Constitution to investigate the conditions of socially and educationally backward sections of the community and suggest measures for their advancement. The commission submitted its report in 1980 and identified as many as 3,743 castes as socially and educationally backward in the country. They constituted nearly 52% of the population, but this is 52% excluding SC and STs, that is, scheduled caste and scheduled tribes. The Commission recommended a reservation of 27% in government jobs for these other backward classes, so that a total reservation of all SC, ST and OBC amounts to around 50% of government employment. It was after nearly 10 years in 1990 that Sri V. P Singh government declared reservation of 27% for OBCs. And in 1991, the Narasimha Rao government introduced two changes. One, they set preference to poorer sections among OBCs in the 27%. This is the economic criteria adoption the government brought in and reservation of another 10% of jobs for other economically backward sections of the community were not covered by the existing scheme of reservation. This resulted in the most famous case called the Mandal case of 1992, wherein the scope and extent of Article 16 sub clause 4, which provides for reservation of jobs for backward classes was examined thoroughly by the Supreme Court of India. The court rejected the additional 10% reservation for other economically backward sections of the community, but constitutionally upheld the 27% reservation for OBCs with certain conditions. However, it resulted in a protest called the Mandal Commission protest because a lot of people felt that they were left out from the category of 3743 socially and educationally backward sections of the community. This is the background to Article 14, 15 and 16. However, while talking about the Article 14, 15 and 16, it will be pertinent at this point of time to understand and note that Article 13 of the Constitution very clearly states that there cannot be any law that is inconsistent with or in derivation of fundamental rights and equality is a fundamental right. So, there cannot be a law in deprivation of the same. And hence, many attempts to understand Article 14, 15 and 16 in terms of the rule of equality have been made through our Constitutional history. For example, how do we look at Article 14 in terms of the non-arbitrary rule? Non-arbitrary rule very clearly means that administrative orders have to be reasoned orders. If they are not reasoned, they may amount to be arbitrary in nature and character. So, reasons must be stated why a particular decision is taken by a bureaucrat or an officer in government. And when the reasons are substantial in character, it amounts to good governance. So, public administration is bound by the rule of equality, the rule of non-discrimination and reasons for order are very important. If those reasons are absent, it would amount to a violation of Article 14. There are certain instances or examples of equality principles that must be applied and followed by all government agencies.

If there is a government university or a college, whether it can practice arbitrary admission processes or processes that are not fair or transparent. Generally, the educational department would be duty bound to follow an objective criterion for admission, wherever the demand is more than the number of seats that are available. So, admissions to even

government aided institutions or government supported institutions have to follow a transparent non-arbitrary fair manner of admission process. This condition cannot be compromised that is laid out by the rule of equality and hence there are several issues during the process of admission, and several court cases and challenges that have been taken from time to time. Reservation in educational employment or educational institutions is also provided for under the Constitution and hence the kind of admission through reservation has been challenged on many occasions as being violative of the Constitution. But what is necessary to look into is where arbitrariness comes in. Suppose the government is awarding contracts or what is known as government procurement; and while they award this contract, they are not doing it in a fair transparent manner, and it results in favoritism or nepotism.

The rule of tendering or fair procedure of procurement is not followed, it would be challenged as being arbitrary exercise of power and hence to strike down that kind of executive administrative action, the challenge would be on article 14 saying that the rule of equality, the rule of equal opportunity in public procurement has not been followed. So, anything in terms of regulating public administration, in limiting the power of public administration, in limiting the exercise of arbitrariness, Article 14 has been the Constitutional challenge that has been taken from time to time.

Another example could be allotment of government lands. Sometimes the government makes allotments. For example, there is a developmental authority that acquires land and then divides the land among the citizens, especially in urban areas or in the industrial areas. Whenever the government does allotment of land, it is the instrumentality of the state through any kind of authority or a body or an institution that is representing the government and the government ought to represent the will of all sections of the community and not just one section of the community. So, anything that is done to favor a particular caste, a community, a religion or anyone from a very sensitive political consideration or a background will result in exercise of arbitrary power. Now, these are instances where politicians or political parties or governments of the day engage in vote bank politics or schemes for furthering their own cause. To check such kind of arbitrariness where only one party is favored and the other has been annoyed and disadvantaged because of that kind of a governmental action, The rule of equality becomes the intervening factor for the court to come. One thing that we must understand is that there is always power or huge power in the. Wand without a doubt, with every power comes responsibility.

Lord Acton, a British historian, quoted that power corrupts and absolute power corrupts absolutely. Where there is power, there is obviously some kind of discretion in public administration. And that discretion sometimes is abused, because of the tendency of human beings to be pulled and pushed towards different sides because of so many considerations. The considerations could be family, it could be society, it could be caste, it could be religion, and to a larger extent, it could be empowered through a force or authority of some

superior bodies. So, to check those pulls and actions, the rule of equality has been a very important factor.

There is a tendency of public administration to be biased. The rule of bias is a rule of public administration, it is a rule of public policy which should not be exercised. Now, biases can be of several kinds viz., personal bias towards individuals, subject matter bias, and when someone thinks he is involved or belonging to a town, city, or village, then also there is a tendency to be biased. And when there is some kind of bias, it will result in infringement of the rule of equality. There is clear evidence in our Constitutional history of the biases that have been applied from time to time. Article 14 does to a larger extent in terms of good governance, bringing in what we call as the principles of natural justice that must be followed in public administration.

It is highly necessary to be very objective and follow the natural justice principle in administrative action, ensuring good governance. And anything that is done in contravention of the principles of natural justice would be alleged to be in a mala fide manner, not bona fide. Bona fide means in a good faith, and malafide means in bad faith. The rule of equality very closely touches what we call the doctrine of fairness and the doctrine of good faith. Not only should one act fairly but must behave in a manner that ought to be fair. So, it is not fairness in terms of just the substantive nature of the order, there must be procedural fairness. Fairness has two components namely, the actual fairness and the procedural fairness. Hence, good faith is a principle that applies to all activities of governmental action. And this is the rule that must be applied from time to time. It is often wondered why the rule of equality has the rule of fairness and good faith. It is for the simple reason that very often than not, it comes to notice that certain classes of citizens and communities and society tend to have special treatment sometimes. Caste politics in India is a reality.

And you recognize the caste to be so strong that the leaders and the politicians of the same caste tend to favour their own class of individuals. Because finally, they are looking at being voted again into power. And hence, special treatment to certain castes who have occupied the seat of power has always been the tendency of policymakers sometimes. And this has been more aligned to legislative actions, which have extended to executive actions as well. So, the court has been a very good observant of these kinds of misuse and abuse of power and trying to grant special status and privilege and immunities to certain kinds of individuals in the society.

And that is where the limit has been something that has been checked by the application of Article 14 in the Constitution. There have been many instances of arbitrary actions in the government that have been taken to the court. For instance, suppose you are applying for a passport and you have been denied that passport without any reason, not based on any kind of rule book, rule of law is not followed, but it is the biases of the officer that has been

applied in denying your passport. Can such an action be challenged in the court of law as being violative of Article 14? Absolutely. Similarly, there have been a lot of wrong actions which have been taken by so many agencies in the government, where the application of the principles of fairness, good faith and equality have not been applied.

Can all of these then result in an action as to the violation of fundamental rights? The answer should be found in Article 14. If we look at privileges or resources as being granted by the government. Now, very often they are not because there is political pressure and political compulsions. Issues like water sometimes have been discriminated against. The government allocates water only to certain sections in the community, certain villages, certain privileges, certain people who can afford it sometimes or certain institutions who can afford it and not give it equally to every individual.

Various uses of water are the basic essence of life and any discrimination of the use of water simply cannot be barred under democratic Constitutional values of principle. The underlying principle of Article 14 is that any governmental action must be clear in terms of what objective it tends to serve and any discrimination that the government will attempt to enact or follow will be struck down as being arbitrary and violating Article 14. Going forward, we will witness various governmental initiatives. These could be initiatives that require a certain amount of certainty and a certain amount of uniformity in its application. This is particularly in case of disinvestments or allowing investments or allowing businesses.

A lot of businesses in India may find governmental actions to be arbitrary and favoring only one group of individuals and not favoring or giving equal opportunity to deliver. So, when governments have applied the rule of bias towards businesses or businessmen and trying to promote a certain category of individuals to make profits, those sections of the community have to be checked and the government also has to check its action in applying the rule of fairness in promoting businesses as well.

The rule of equality is about equal pay for equal work and this very clearly brings in gender justice to a larger extent and gender justice is a critical and important component of equality and it is not equality only in educational institutions at the time of admission, it is equality in public employment at the time of joining service; and it could be equality to be treated at the time of promotions as well. So, administrative actions that violate equality come under the scrutiny of the court and any such actions that are based either on a statute or some kind of an administrative executive action which is something that violates the principles of the Constitution are set aside by the courts and the courts have a very clear rule of intervention wherever unequal treatment has been applied, where inequality is practiced, where the actions are poorly unjustified, unconstitutional or tend to be arbitrary. Therefore the so called exclusionary exercise of administrative action are definitely not

something that the courts are going to entity. There are many such instances and cases of intervention by the courts.

This could be in terms of the issues of granting aid to certain kinds of institutions, granting coal licenses and resource licenses. In terms of interpretation of law which sometimes tend to be one-sided or arbitrary, it is quite acceptable as a democratic value, as a Constitutional value that citizens have a legitimate expectation from the government to act fairly. This is a legitimate expectation. Naturally, if you are a person with authority, with authority comes responsibility, with responsibility comes the duty to act fairly and the duty to act in a non-arbitrary manner. The doctrine of legitimate expectation is that any kind of governmental action is non-arbitrary, it is fair, and it is non-discriminatory as well.

Why is the rule of equality so stressed upon and why we speak about it so much in terms of Constitutional values is often questioned? One reason is that India is quite a big nation, it is a big country with a lot of pressure on population, growth, and employment; and government employment is often preferred by citizens as being secure. Government employment has its own privileges. Secondly, in terms of aspiration, there are different state governments and different kinds of activities that happen across the country. India has a vast economic and a social fabric. So, getting into government contracts, getting into government largesse, getting the government to give you licenses is quite huge for people and that is the trajectory of growth in many businesses as well.

So, government is a mechanism for growth, government is a catalyst for growth, and sometimes government is the growth itself. Without the licenses, permissions or without partnerships with the government, businesses cannot flourish. And hence, the government is not only giving employment to citizens directly, but it is also giving businesses an opportunity to make profits and make market conditions quite suitable to the economy. It is widely common that disparity may be practiced. Disparity in terms of who to be employed, when to be employed, disparities in terms of which companies should be allocated what kind of resources etc.

There is a huge amount of disparity in seeking the government grants, because approaching the government in India itself becomes a challenge like who can approach and what can be done so. There is a lot of quid pro quo, unlike a mutual personal favor, and when this happens, this is one form of corruption. Corruption is not only to be named in terms of money exchange. Subjectivity can also creep in from time to time. People's legitimate expectation for the government to act in a fair manner is critical and important. That is something that everyone looks up to in government. It is also noticed that we as citizens have the right to claim equality. And the claim of equality is against illegality. So, any practice of inequality is nothing but illegality. Inequality and therefore illegality violates the principles of the Constitution. It violates the directive principles of state policy, which the states are duty bound to follow. And equality is rooted as the foundation basic feature

of the Constitution for which any kind of compromise is not permitted. This also stems from the fact that the government has the policy discretion to make from time to time.

There are certain policy considerations, and the government may be forced to make certain policy exemptions. Say, tax exemptions, sometimes it must be made for a certain section of the community. So, there are those kinds of parameters that can be justified, obviously, as the exceptions to equality because again, we must accept that the rule of equality is not an absolute rule, exceptions are apparently not only recognized in the Constitution, but also can be justified as reasonable exceptions or reasonable classifications. However, the term here becomes very important. If there is a public policy justification for that kind of reasonable classification, then the courts may allow you to deviate from the absolute rule of equality whenever it is found necessary and whenever it is found intelligible to do so in terms of our practices.

So, speaking of intelligible differentia; this is the rule of law, intelligible differentia can be practiced making the distinction in terms of the classification. If you have an intelligible differential treatment to be given to a group of individuals within that group you want to divide and classify them, then with proper public policy consideration, it can still be done so. So, that also has been merited through various cases that have been pronounced by the court from time to time. Looking at Article 16 of the Constitution of India, one will understand that the rule of equality which is basically laid down by Article 14 is extended to Article 16 of the Constitution as well. However, in Article 16, it is specifically for equality of opportunity in public employment.

The term equal opportunity in public employment is quite subjective in nature and can differ in terms of its interpretation. It is the duty of the state while it tries to ensure equality to remove any forms of discrimination that may exist to create equal opportunity not only to the backward sections of the community, but also to every person who may be seeking public employment. However, Article 16 has been referred to as this article that talks about affirmative action, which means that the state must go and do positive obligation. They must use Article 16 to render social justice. They must provide for a quota, a benefit to a particular section which is considered backward or maybe a minority group. And through affirmative action in public employment, for the elevation of backwardness and to protect the interest of minorities, Article 16 can be used by the state. And hence, Article 16 sometimes is also called positive discrimination. But the word discrimination is not positive in any other sense. So, whenever Article 16 is used, it is used for some kind of affirmative action in providing for some kind of reservation in public employment. Of course, the state in India is a great opportunity for public employment.

So, a lot of people look up to the state services for many reasons because there is security of tenure, there is doctrine of pleasure under the Constitution of India, which states that one can only be removed by the rule of law. And the state provides opportunities and

employment in various sections of governance and public administration. But that is not all. The Constitution and the provisions of Article 16 apply to even public sector undertakings, which are government companies and government corporations. So, a government post is usually some kind of a preferred position for many youths in the country.

It is the duty of the government to make suitable conditions of employment to achieve the purpose of the Constitution. Public employment is not just public employment, we must understand that it is also public service. This is often something that is lost in terms of the loyalty to the state. Public service means that such a person is not a government servant, but you are a public servant. And this means that, when you are going to be taken by the state, you must fulfill certain minimum educational qualifications required for that even post. Certain kinds of post would require physical purposes, mental stability, or a certain sense of moral integrity that must be stated and proved before being inducted into public employment. Also, public employment may differ in terms of its terms and conditions. So, it is not going to be uniform. Central public employment will be slightly on a different term and condition and may differ from state to state. In terms of the period of employment, in certain states, the superannuation is at 58. It has not been extended to 60. In certain states, it has been extended to 62. Whereas central government employees may have 65 as superannuation age. For example, judges of the Supreme Court retire at 65, judges of the High Court retire at 62. So, these are differential employment terms that may exist in public employment.

Equality is not spoken in respect of those terms and conditions. But, there should be equal opportunity. This is specifically what Article 16 speaks about. It is interesting to note that while this clause was applicable in judgments like the *Indira Sawhney v. Union of India* case, a Supreme Court judgment of 1993, it was confined only to initial appointments. The court said that there cannot be reservation in the matters of promotion. However, today, such kinds of reservations have been extended. And that has become a matter of Article 16. Article 16 can be invoked for issues like salary, when equal pay for equal work. Article 16 has also been invoked for leave, provident fund, gratuity, and other purposes, which look at the term equality in its larger context. There are many cases that have been decided under Article 16. However, there is a positive obligation on the state that it cannot discriminate between two individuals, or two classes of individuals based on caste. Caste cannot or should not be the sole criteria of public employment, neither religion, sex, birth, color, etc.

The Constitution also provides for what is called compassionate employment. While the Constitution does not expressly say so, the Constitution has been used to seek compassionate employment. If a person who is in public service or who as a public servant dies during service, compassionate employment is generally provided to a member of the family. But it must be kept in mind that compassionate employment can be claimed as a

matter of right. Hence, the rules and conditions of public employment will be extended to compassionate employment as well.

Coming to the different case studies in which this has been done, most cases of government employment have been challenged under Article 16, including issues of voluntary retirement schemes that have been promoted by certain entities of government from time to time. So, a voluntary retirement scheme is an interesting thing that happened in the 1990s, where to reduce the number of people and the final pay burden of the state, a lot of people were given this offer to retire on their own by giving a golden handshake. And who is entitled to the VRS is a matter of rule and sometimes it is a matter of discretion. And where equality has not been applied, they have challenged the same way for the court of law and the court had to look into the matter as well.

Article 16 can also be invoked in matters of transfers of public servants. It has been often used because very often the rules of transfer are not adhered to. Transfers are generally taken as a punitive action against officers, with ulterior motives. Hence, Article 16 has been used because equality means rule of law that must be followed in all sections of the community. Article 16 has also been used for determining seniority, because it is a very important element of getting very decorated positions in government. So, the decision on seniority list, on promotions and senioritis, all have been taken in, if suppose there is a grievance and have been treated through the mechanisms of invoking the provisions of Article 16 of the Constitution of India. Revision of pay keeps happening with a lot of pay commissions. And sometimes, there is no equal treatment on the revision of pay. Those aspects also have been taken due note under the provisions of the Constitution.

Moving to Article 17, which talks about abolition of untouchability, it is very important to understand that this article tries to clearly state that the practice of untouchability is forbidden. There are also special legislations under which any such practice of untouchability in any sections of the community shall be a pernicious offence. It is a known fact that untouchability unfortunately was a kind of a stigma and a practice in this country for a long period of time. However, the parliament enacted the Untouchability Offences Act of 1955. And the principal object of Article 17 gets reflected under this Act called the Untouchability Offences Act of 1955. Untouchability created several social disabilities, because untouchability meant that a section of the community had to be segregated from another section.

To a larger extent, there were social boycotts, like two different water wells that had to be used. This was nothing but a form of caste discrimination in the country. The living conditions of untouchables during some of the early days were very pathetic. They were denied a lot of basic civil liberties and civil rights. The Constitutional recognition of the ban on the practice of untouchability conveys a very important message of social equity and equality in the country. The term social equity is used because it is important that

resources like water are equitably distributed to all sections of the community, irrespective of their caste, creed or culture. So, that becomes the central point and theme of the rule on untouchability. Importantly the practice of untouchability is an offence, not only of the state or state entities, it is an offence that can be also committed by a private citizen or private individual. And hence, this law under Article 17 that says, the practice of untouchability is forbidden, applies to private individuals as well.

So, as per Article Section 17 everyone irrespective of his caste, race, creed, or place of birth has every reason to be treated equally before the law and has every reason to gain equal protection of the law. The Constitution of India through Article 17 clearly send this message that when it comes to morality, when it comes to health or public order, everyone as a citizen of India has the right to be treated equally. So, the race, the color of your skin, ethnicity, your origin, your backwardness, you're being a tribal, does not matter. So, equality then becomes a very important element of the proposition of law.

Article 18 of the Constitution of India talks about abolition of title, no citizen of India shall accept any title from any foreign state, except with the previous sanction of the government of India. And no title not being of military or academic distinction shall be conferred by the state. No person who is a citizen of India while he holds any office, except without the consent of the President, shall accept any title from any foreign state. No person holding any office of profit or trust under the state shall without the consent of the President accept any present embodiment or gift from any foreign state. So, abolition of title is also very, very important.

However, the government of India comes up with different kinds of awards like Bharat Ratna, Padma Vibhushan, Padma Bhushan, and Padma Shri. These are called the national awards. And these awards are not amounting to any kind of a title within the meaning of Article 18 of the Constitution of India. This was decided in the case of Balaji Raghavan who was the General of India in the year 1996 by the Supreme Court of India. National Awards like Bharat Ratna or Padma Vibhushan, Padma Bhushan, and Padma Shri, are not like suffixes and affixes nor prefixes.

Though these national awards are granted and the person receiving is addressed as, say, Padma Shri etc., they are not really titles. Hence, the reason why there is abolition of title is it has some kind of historical reasons or significance. The in India had this title called the Maharaja or Raj Bahadur or Rai Bahadur. The Diwans had titles, the kings had titles, ministers had titles. These titles are no longer given; a lot of these provinces and territories were brought into mainland India. And it was important to give the declaration that once you have given this territory to India, you no longer are the Maharaja of that kingdom. And that is the reason the abolition of titles becomes very significant.

Constitutional Law and Public Administration in India

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Week- 05

Lecture-01

Right to Freedom – I

Article 19 of the Constitution is about the right to freedom. There are six rights that are protected under Article 19 namely, right to freedom of speech and expression, right to assemble peacefully without arms, freedom to form associations or unions, freedom to move freely across the territory of India, to reside and settle in any part of the country and the freedom to practice any profession or to carry out any occupation, trade, or business. Originally, Article 19 had seven rights, but Article 19(1)(f) does not exist any longer. It was deleted by the 44th amendment to the Constitution in 1978. It was the right to acquire, hold and dispose of property. So, currently these are the six rights which are protected. These are rights that are to be exercised by the citizens against the state. So, the citizens have the right and the state has the duty and obligation to protect these rights. These rights cannot necessarily be exercised against private individuals or private citizens. The right is also available to shareholders or groups of individuals, because they are also included under the term ‘citizens’. Freedoms under Article 19 are only for citizens; they are not available for foreigners and these freedoms are not absolute. Article 19(2) talks about reasonable restrictions on some of these rights.

Freedom of Speech and Expression

The right to express one's views or opinions, beliefs, or conviction freely by word of mouth, writing, printing or through pictures or by any other means, whether digital or non-digital is considered as the right to freedom of speech and expression. The Supreme Court has held that the freedom of speech and expression may include any of these following subsets of rights: First, under the freedom of speech and expression, the citizens have the right to propagate one's view as well as the views of others. There is freedom of the press under Article 19 and the freedom of commercial advertisement and the freedom to tap telephones in the interest of national security. There is the right to telecast, and the monopoly of the electronic media can remain with the government.

The right includes the right to call for a ‘bandh’ by a political party or an organization. Citizens have the right to know or the right to information. Right to know was a

fundamental right, even before the right to information became a statutory right in 2005. The freedom of speech and expression has a positive connotation and includes the freedom to remain silent which is a negative reading of the same right.

Imposition of pre censorship on newspapers cannot be done, censorship is not permitted. There exists the right of demonstration or picketing, but not the right to strike. Right to strike is not part of Article 19 unless it is a legal strike as declared by the industry. Some of the subsets of rights have evolved over a period through various decisions of the court to mean what freedom of speech and expression mean.

Under Article 19(2), reasonable restrictions on your freedom of speech and expression can be imposed on the grounds of sovereignty of the state, security of the state, integrity of India, friendly relationship with foreign states, public order, decency or morality, contempt of court, defamation and finally incitement of an offense. These are quite like the restrictions that are under the Right to Information Act 2005, especially under Section 8(1)(a).

In *Indian Express Newspaper v. Union of India* (1985), the Supreme Court said that the Constitution ensures the right to the freedom of the press. However, to maintain equity of the distribution of newsprint or newspaper or any other part of what is required for the press to be utilized, some kind of restriction may be imposed by the Newsprint Control Order of 1959. During times when there was shortage of raw material in the state, to see that every press gets equitable distribution of available resources of newsprint, the said order was enacted. It was challenged by Indian Express as being violative of freedom of speech and expression. But the court balanced the interest justifying that, the ownership and control of material resources of the state or the community should be done to serve the common good of every individual. So, it is the greatest happiness of the greatest number. And hence, reasonable restrictions are sometimes necessitated by the security of the state.

Similarly, under the freedom of assembly, citizens can assemble, but it should be done peaceably and without arms. So, peaceful meetings and peaceful demonstrations can be done under freedom of assembly. However, the right to hold public meetings and demonstrations are confined to public land. The right cannot be exercised on private land. No provision in the Constitution allows disorderly nature of riots to take place and once there is a breach of public peace or order, or if anyone in the gathering who has come to the assembly carries any kind of arms, then this right is taken off. The state can impose reasonable restrictions on the right to assemble peacefully because public order and security must be maintained.

Hence, under Section 144 of the Criminal Procedure Code, 1973, a magistrate can restrain the assembly of individuals by passing an order saying that such an assembly is no longer legal; and if the assembled group does not disperse, they will be subjected to law-and-order

sanctions. Your right for a peaceable assembly must not result in injury or safety or any risk of safety or disturbance to other communities. There should not be any infringement of public tranquility. Health and safety of all individuals in the society must be maintained when the right to peaceful assembly is being exercised.

Under Section 141 of the Indian Penal Code, an assembly of five or more persons may become unlawful if the object of such an assembly is to resist the execution of any law or to resist the execution of any legal process; and the same could be declared to be an unlawful assembly. If you are forcefully occupying any kind of a property of any individual or any person, this is forceful or illegal occupation, and such assembly can be declared unlawful under Section 141. If a mischief or criminal trespass is committed, orders can be passed under Section 141 of the IPC. If someone forces another to do an illegal act, a restraining order can be imposed against the former from committing that unlawful act as well. If a decision to threaten any government officer who is exercising his official lawful duty is made, the same would attract Section 141 of the Indian Penal Code.

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Week- 05

Lecture-02

Right to Freedom – II

Freedom of Speech and Expression

Article 19 freedoms are considered essential freedoms because they protect the private rights of citizens and there is always a legitimate expectation of citizens that some of these rights are not alienable. Rights under Article 19 are supreme rights, and they cannot be sacrificed, given away or bailed off. Freedom of speech and expression occupies the top place among these rights because it is a matter of liberty of thought process and expression that is integral to anyone's personality, especially the personality of an individual who resides in any democratic society or in any democratic process. Justice Krishna Iyer has said that this freedom is essential because the power of the state to censor must be regulated. If there is no limit on this power, it would go against the will of the people and against democratic principles. Hence, the freedom of speech and expression is the core of how the government is supposed to behave and states when the government can intervene and when it cannot, especially on the speech and expression provisions.

It is to be understood that freedoms are important and a healthy process in any democratic institution or legal system. The protection of these freedoms is the test of the legal system. The moral and intellectual life of an individual are only enhanced when these freedoms are protected, nurtured, and valued in any legal system. Exercising some of these freedoms helps the citizens to discover truth and that can bridge the trust deficit that exists between the government and its citizens. It ensures pluralism and democratic value, and it creates a sense of self-fulfillment among citizens whenever they exercise their freedom of speech and expression themselves or through print or social media.

India has always nurtured democratic values and been a sovereign nation that has protected the republic's democratic structure; and freedom of speech and expression is the foremost of human rights. It is important to understand when and how the freedom of speech and expression gets infringed and when the courts will have to come into the picture. For example, in *Bennett Coleman Co. v. Union of India*, the Supreme Court has held that newspapers are an integral part of the process of freedom of speech and expression under

Article 19. They exercise the freedom of the press. It is the press which reaches people with information about what is regionally, nationally, and internationally; and if there are any kind of restrictions on the freedom of the press, it violates citizen's freedom of speech and expression. In *Bennett Coleman*, there was a constitutional challenge to the validity of an order passed by the government called the Newspaper (Price and Page) Act of 1956, which empowered the government to regulate the allocation of space for advertisement in newspapers because advertisements were consuming a huge part of the newspaper publication. However, newspapers argued that they sell newspapers at a very subsidized cost and through the revenue of advertisement, they cover the cost of publication of the newspaper. The court held that it would directly impact circulation, because newspapers would then be expensive which in turn would affect the freedom of speech and expression of individuals expecting information from this newspaper.

Another relevant case is *Indian Express Newspaper v. Union of India* of 1985 which looked into the constitutionality of the Newsprint Control order which regulated the supply and distribution of newsprint in the country. This was indirectly attempted to control the press. It was held by the Court that, the Directive Principles of State Policy under Article 39B and 39C requires the state to ensure that the ownership and control of material resources, which includes newsprint as well, are subservient to the common good and it is best served to the common good being reasonable in this restraint. Sometimes the government can justify the interference in newspapers, but interference vis-a-vis the content and circulation of newspapers would violate Article 19(1)(a).

In *Secretary, Ministry of Information and Broadcasting v. The Cricket Association of Bengal*, the Supreme Court held that broadcasting is a means of communication and a medium of speech and expression within the meaning of Article 19(1)(a). This case involved the right of the Board of Control for Cricket in India to grant telecast rights to an agency of its own choice. It was held that the right to entertainment and to be entertained, in this case through broadcasting media, is an integral part of Article 19(1)(a) and if it is exclusively granted to only one agency, it would affect the freedom of speech and expression.

Freedom to assemble peacefully and without arms.

The freedom to assemble is a part of the citizen's social structure and fabric. One can exercise this right peacefully without arms. Time and again, the police may call an assembly that violates the condition of non-violence as an unlawful assembly under Section 144 of the CrPC. The police have the right to intervene in certain matters, but this right takes away the colonial mindset that you need permission every time to assemble.

Freedom to move freely across the territory of India

The freedom to move freely across the territory of India, is a very essential freedom that and any kind of restrictions on assembly, associations and movement are to be evaluated under the constitutional provisions as well. For example, a person suffering from AIDS can be restricted from his movements in the interest of public health. These are called the reasonable restrictions that can be imposed on your freedom. None of these freedoms are available absolutely. Whether an AIDS patient has this risk and vulnerability of spreading the disease of AIDS and therefore restrictions be imposed on his movement? The answer is yes, as decided in the case of *Lucy R. D'souza v. State of Goa*, by the Bombay (Mumbai since 1995) High Court in the year 1990.

According to the Court, movement of AIDS patients is a potential risk for the public community and in public interest such kind of movement can be regulated. Any policy that is laid down that takes away any of these freedoms, will be very reasonable and not arbitrary. The pertinent question is, among all these freedoms, can the political parties call a bandh as a part of their freedom of speech and expression, as a part of assembly, peacefully association union or even movement freely across the territory of India? Bandhs and industrial strikes are entirely different concepts. Industrial strike is a collective refusal by employees under certain working conditions as a part of a collective bargaining process. After giving due notice an industrial strike becomes a legal strike which is permitted.

Bandh on the other hand is political in character and nature and usually tends to shut the public spaces and sometimes essential services. There is a general lockdown of the city or the village or a municipal area. It has a larger impact, and it is assumed that calling of these political bandhs becomes a very frequent practice for the political parties to show their protest. Whether freedom of speech and expression has the element of right to protest? The answer is positive and affirmative. Freedom of speech and expression includes the freedom of protest. But the protest must be peaceful, without arms. However, a bandh with such elements the legislature as well as police would also regulate a bandh which prevents someone from getting gainful employment or gainful work or affects the rights of students to study, it can be held to be illegal. These are aspects of bandh where in the public interest of other citizens of peacefully staying in a society over the political parties right to call a bandh will always be regulated. None of your freedoms can violate things like the guidelines that are issued from time to time in contempt of court.

Contempt of court means causing disrepute to the majesty of the court or the majesty of justice or the institutions of justice. And in case one exercises any of his freedoms unreasonably and arbitrarily and shows or causes contempt of court, then he could be punished for the same. It is important to understand that the freedom of speech and expression includes the right to criticize. A fair comment or a fair criticism is permitted under the constitution. However, if the criticism is of the judge and not the judgment, and if the criticism lowers the dignity of the institution or causes or instigates people from

having faith in the institution of the judiciary, then such kind of matters can be held to be contempt of court.

While the judges are not very hypersensitive, they are amenable to public opinion and if anyone oversteps and criticizes the institution of the judiciary, it may amount to contempt of court. According to one of the reasonable restrictions in Article 19(2) one's freedom of speech and expression cannot be exercised so as to cause contempt of court. Article 19(2) is an important provision, according to which if one exercises freedoms that result in preventing the administration of justice or amounts to obstruction of justice, such kinds of confusion, word or reporting should be avoided. One's personal freedoms cannot be used to defend any kind of obstruction to public justice. Hence it is inevitable to know the reasonable limits in exercising some of these freedoms and only then the constitution stands on your side to protect some of these rights.

It has often been asked whether the freedoms under Article 19 namely, these freedom of speech and expression, assembly, association, resident movement, and profession is available to convicts, accused or under trials. Convicts are not excluded from enjoying these rights, but there are certain kinds of restrictions or guidelines within which the convicts or the under trial or those who are in jail will be forced to exercise. In the popular Auto Shankar case it was held that a convict has the right to write a book within a jail as a matter of freedom of speech and expression, wherein Auto Shankar was, a criminal, a convict on death row who wanted to write a book whether he has the right to do the same. Such a right may not be restricted by any actions of the state.

Under Article 19, while it is said citizens have the right, whether it includes a corporate citizen is to be considered. Corporate citizens are also an important and integral part of the Constitution of India. A literal construction of the word citizen though may not include corporations, corporations through their shareholders can exercise the freedoms or rights under Article 19. The shareholders of a corporation can go to the court on the grounds of violation of their fundamental rights, and they may attach the company along with them as well. Though a company is not a citizen per se, through the elements of the shareholders, the companies can be brought about within the structure of Article 19.

The freedom of movement is critical and important because what is spoken of here is movement across the territory of India. However, certain kinds of restrictions on movement are imposed in places like the Centennial tribal islands in the Andamans and in places like the Northeast, which is a tribal region and a tribal community so as not to disturb such people and community. Another's personal liberty cannot be infringed while you are exercising the freedom of movement. Nevertheless, for a legitimate purpose, such exercise of right is possible. The judiciary does not impose any restrictions on the physical or tangible aspects of your freedom of movement. The executive may have certain justifications to impose restrictions at some point of time, especially to protect scheduled

areas or scheduled tribe areas or areas that are occupied by the army. They are sensitive areas in terms of scientific and technological explorations. Under the Official Secrets Act of 1943, sometimes some of these areas are declared as restricted and prohibited areas and people are not required to go to these places as a matter of their right.

The freedom of the profession or the freedom to practice any profession or carry on any trade or business is also a right under Article 19 (1)(g) is an important fundamental right, especially in terms of the business houses. Citizens have the right to carry on business, earn their income, livelihood and flourish their business in this country which is an integral part of the constitution process. But there could be a process of licensing certain kinds of trade or profession which may be required from you by the state as well as some registration processes. The state cannot prevent a citizen from carrying on any business, but it can impose reasonable restrictions on the ground of public interest. Businesses that are generally dangerous, immoral, or inherently hazardous will not be permitted by the state. For instance, the state of Karnataka recently banned the business of lotteries. Business of lotteries is thought not to be in public morality and has a tendency of promoting gambling or spending a person's savings. And those are the reasons why the business of lottery seems to be a regulated or prohibited activity currently in Karnataka, though it was permitted at some point of time in certain states. So, the right to business is not always allowed at all places and hence, place and time-restriction also can be imposed by the state. And a citizen may be compelled to do business within those times prescribed by the state, to protect public order.

In the famous case of *M/S Ivory Traders and Manufacturers v. Union of India*, the courts did intervene on this matter and held that ivory traders did not have a fundamental right to trade in ivory. As ivory is a protected commodity or product, you had to stop poaching of elephants or tuskers. Otherwise, the ivory trade was a flourishing trade. The Ivory trader's association members argued that the ban on killing tuskers or poaching was going to adversely affect their business and right under Article 19 (1)(g). But the court refused to listen to the Ivory Traders Association, and they said that the trade needs to be closed and suggested shifting to some other trade. So, restrictions on these kinds of trades that are dangerous, immoral and against public interest are those that the government can impose from time to time. And that is something that the courts may be permitted to appeal as constitutionally valid as well. One should understand that Article 19 is an all-encompassing freedom and any kind of restriction on the freedom should be through the process of a law and not just merely by an executive fiat.

The courts have held that it is in the legislature's wisdom to impose reasonable restrictions, but it should not be done in a routine manner. So, the process of lawmaking can be the process of imposing reasonable restrictions. One such case of a law trying to restrict freedom under Article 19 came by the Information Technology Act of 2000. In the case of

Shreya Singhal v. Union of India the two Judge Bench of the Supreme Court in 2005 looked at the regulation imposed by the IT Act on online speech and intermediary liability. Offline speech and online speech have two different connotations; online speech has a larger basis of reaching and you have your constitutionally protected right.

Section 66A of the Information Technology Act of 2000, sets to impose a restriction on these kinds of online content or online speech. Under Section 66A, it would be a punishable offence if a person sends grossly offensive information through a computer resource, which he knows is false, will annoy or cause inconvenience or danger, insult, injury, or criminal intimidation or arouse enmity, hatred, or ill will towards any kind of community. According to section 66A In circumstances in which electronic mail messengers are carried on misleading, deceive, cause vagueness and arbitrary kind of messages, which are sent usually by people, both out of personal ventures and political vendetta, then that online speech can be a punishable offence under Section 66A of the Information Technology Act. Shreya Singhal challenged this and the Supreme Court in a judgment delivered by Justice Nariman struck down Section 66A stating that any kind of standards on the freedom of speech and expression can be imposed only as per Article 19(2) of the Constitution.

No new reasonable restrictions or standards can be imposed by a new law. The new law must be in consonance with the constitutional principle and not against it. Online and offline speech have the right of equal protection under Article 14. Online speeches cannot be treated differently, and online speech cannot be an offence whereas an offline speech on the same matter is something that is not taken cognizance of. According to Justice Nariman such a distinction cannot be made, and in the judgement, he read down Section 66A. Despite this significant judgment in Shreya Singhal's case, the content of fake news, fake messages or trying to instigate a community through online is becoming a major problem in today's times and the courts are dealing with this issue in a slightly different manner. It must be remembered that the *Shreya Singhal* case was only on the point that offline and online speeches cannot have two different standards of restrictions; but must be same and similar and only then there can be an interruption regarding your freedom of speech and expression. So, IT Act, though a law Section 66A that tended to impose restriction on freedom of speech and expression was held to be not valid per se to the extent that it was not equal in terms of offline and online speeches. This was an important intervention by the Supreme Court in which the constitutionality of 66A was tested and the same was set aside.

Trial by media today is a very common process of the freedom of the press which obviously has to some extent been misused and abused by the media. Media end up deciding the guilt of an accused before even a court of law can do the same. We are in 24 into 7 news in the audio-visual content space. There is a lot of appetite for online content, online media and the media tends to sensationalize criminal cases. There is a lot of public curiosity and there is only an upsurge of that curiosity. It is noticed that people would want to predict the

outcome of a case even before the courts can. The journalists are harping on to such kinds of news and making their conclusions and making their final prediction of their outcome. This thirst of sensationalizing news is a major problem right now, though sometimes sensationalizing is a normal human nature and a character or a human desire and sometimes such kinds of media trials are justified under the name of investigative journalism. But do these kinds of media trials have the potential risk of damaging the following? First, a media trial has a huge element that can damage the reputation of an individual who is an accused who is innocent until and unless proven guilty. Media trial essentially infringes the privacy of an individual and it can amount to contempt of court because it has an element of influencing the judge and the outcome of the case simply by what is being reflected in the media and because everyone is in tune with the media.

Everyone is open to media scrutiny and media trials. Currently, the Press Council of India has come up with certain guidelines so that the trial by media does not affect the reputation, privacy, and amount to contempt of court. These are the guidelines that are issued to the press so that while they exercise their freedom, they do not actually violate the rights of others. It is very important that the media acts with responsibility, with a sense of duty and purpose towards the constitution, legal system and towards the rights of other individuals. So, media, has been prohibited from naming the victim of sexual assault and is required to have sensitivity in calling for opinion of individuals and people.

If any media person attempts to influence administration of justice, they could be liable for contempt of court as well. That has been a very recent outcome of the misuse and abuse of Article 19 as well. Finally, if one looks at the aspects of reasonability, one will notice that all freedoms must be exercised in a reasonable manner. The term reasonableness is used on several occasions by the court of law wherein tests and guidelines have been set by the Supreme Court from time to time in saying what should be the state policy in terms of protecting these freedoms as well as imposing restrictions on the freedom. One should notice that your freedom of speech and expression will stop as soon as someone's right to reputation begins.

Your freedom of assembly will stop as soon as it turns violent. Your freedom to form association or union is okay until that kind of an association becomes unlawful. You can reside and settle anywhere in India unless you are infringing on the sensitive cultural heritage of certain tribes in the country or certain state communities in the country. Your practice to any profession or trade or occupation is existing so far, it does not affect public order, public interest, and the prevailing conditions for regulating those kinds of trade. Ultimately the evil of misuse or abuse of your freedom ought to be checked from time to time; there ought to be some kind of restriction from time to time. It is the state which has a right to intervene in both regulating your substantive freedom and the procedural aspects to exercising these kinds of freedom as well. That is the cornerstone of Article 19 of the Constitution of India.

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Week- 05

Lecture-03

Article 20

An important case that warrants discussion under Article 19 as well as Article 21 of the Constitution is the landmark judgment of *Maneka Gandhi v. Union of India*. The importance of this case is attributed to the fact that it was decided post-emergency, which was imposed in India. This was at the time when public administration was slowly changing in terms of the perception and in terms of the application it had in the legal system. Post-emergency, the judiciary started asserting its role in protecting constitutional rights of citizens aiming to curtail executive abuse of power, to restrict the legislative arbitrariness. Hence, the judiciary came up with some landmark decisions, which laid down constitutionalism for the coming decades in this country. One such case that changed the dimension of the constitutional structure in this country is the case of *Maneka Gandhi v. Union of India*. Maneka Gandhi who is the daughter-in-law of Mrs. Indira Gandhi and their relationship was strained. In this background the actions were initiated in the *Maneka Gandhi* case.

According to the facts of this case, Maneka Gandhi was asked to surrender her passport under the Passport Act and handover the passport to the regional passport officer in Delhi, through a process called impounding of the passport, stating the reason as one in public interest, without any substantiation of what that public interest was. She was asked to surrender her passport within seven days from the receipt of a letter that was issued by the regional passport office. Mrs. Gandhi challenged the action as being violative of her right to life, but more importantly, violative of the freedom under Article 19, in terms of the freedom of movement and the freedom of trade occupation in business and the freedom of expression which are enshrined under Article 19, the Constitution of India.

While speaking about infringement of the fundamental freedoms that are there under Part III of the Constitution, it is relevant to mention the fundamental freedoms enshrined in Articles, 14, 19 and 21, namely, what is called the Golden Triangle Rule. Now, can someone challenge any curtailment of his or her personal liberty? Personal liberty is enshrined in Article 21. Which has two components, right to life and personal liberty which cannot be taken away except according to the procedure established by law. It must be

noted that the executive in India prior to the emergency was quite powerful; and so was the legislature because the opposition parties were not that very strong, it was almost a single party system in this country.

And this had led to a kind of a black day in the Indian Constitution by the imposition of emergency in 1975. It is important to realize that the Constitution, the democratic and legal system got in a direction about where and how they can proceed. And this case gave the judiciary a very golden opportunity to lay down some ground rules. Hon'ble Justice M.H. Beg, the then Chief Justice of the Supreme Court and a bench consisting of Justice V. R. Krishna Iyer, Justice V. M. Bhagwati and Justice Y. V. Chandrachud were among the other judges who were there in this case. This case was decided by seven judges in total. And they had to decide the following things. First, is whether fundamental rights are absolute in nature and character or conditional under the Constitution of India. Second, check whether the right to travel is protected under Article 21 and if this is a fundamental right. Third issue to be decided was the connection between Articles 14,19 and 21. Fourth, the scope of procedure established by law. Fifthly, whether Section 10, Sub clause 3C of the Passport Act 1967 is violative of the fundamental rights. And lastly, whether a regional passport officer can impound a passport without adhering to the principles of natural justice. It was argued that the fundamental rights are given to every human being as a natural right, meaning entitled to be enjoyed by reason of birth.

As a country, it is necessary to ensure these rights to every citizen of this country. And fundamental rights have to be absolute in nature and character, which means they should not be compromised for any reason or purpose. The right to travel is a right that every human being must be entitled to, to explore your intellectual capacity, to explore different countries and continents and, to be part of any territory of one's choice, and it ought to be a kind of right that the Constitution must recognize under Article 21. Any confiscation or revoking of a passport, which is the travel document of a person to work out, ought to be reasonable and lawful. And if it is not, then such an action should be challenged under the Constitution and the citizen must have the right to bring a petition under Article 32 of the Constitution of India, which confers a direct right to approach the apex court or the Supreme Court for the violation of your fundamental rights.

The above case also debated largely on the principles of natural justice; that is a government which is democratic in character and nature, and a public administration that must decide about the rights of citizens. Public administration cannot in any way infringe or take away any right that is guaranteed and protected by the Constitution, unless it follows what is called 'procedure established by law.' Now, every such procedure that is established by law shall adhere to the principles of natural justice. When referring to principles of natural justice, it is also said to be the principle of *audi alteram partem*. *Audi alteram partem* means, one must be heard before he is punished or condemned or before his rights are taken away. Passport, therefore belonging to any person, cannot be seized on

the ground of, public interest or public good, unless the law gives the grounds for impounding the same. There was an interesting argument about what is the role of public administration in such matters. In this case it was very important that the courts realize that in India, the executive was still having a colonial hangover and were not being held accountable as public servants. They were not treating the public reasonably and going about exercising their functions in a democratic process.

That is the reason why the court in this case, very clearly held that public administration ought to be reasonable, a principle which is core to public administration and public function. And, if public administration is not regulated, restricted, or controlled, then to a larger extent, this kind of unrestricted power of any authority, which is vague in nature and character, would be abused. This would result in infringement of the rights of the citizens of India, which the court clearly said will not be permitted under the constitution. So, finally the court while restoring the passport of Maneka Gandhi also stated in clear terms that no one can be deprived of his opinion or voice in the constitution. And hence, the freedom of personal liberty is a guaranteed freedom, and every citizen is entitled to enjoy the same under the constitutional principles.

Public administration and public policy will be the only determinant factors of deciding whether any kind of an action which is adverse to the citizen's interest can be taken if so, on grounds that are reasonable in nature and character and not without following what is called as the principles of natural justice. This case is important to the extent that it laid down a very important principle of the constitution of India that public administration must fall within the test of the golden triangle rule. The golden triangle rule has on top Article 21 of the constitution, which protects right to life and personal liberty. On the left angle corner, it has article 14, which is equality before law and equal protection of the law and on the right-angle corner side, it has article 19, which enshrines the six essential freedoms that citizens enjoy under the Constitution of India. This prism or the triangle is the test of public administration that any kind of public policy and public administration cannot violate this golden triangle. And if it does, then it is subject to a challenge in the court of law, and the courts will intervene to protect the rights of the citizens. Moving forward from article 19, Article 20 of the constitution is one of those very important provisions of the Indian democratic legal system.

Article 20 speaks about protection against conviction of offences and is a constitutional protection for convicts who have been sentenced to certain kinds of punishment for offences that they have committed against the state. The constitution of India provides safeguards to people who are accused of crimes which also reveals the moral character that is displayed by the constitution of India. It means, part three of the fundamental rights of the constitution are not only there for citizens who are free and who have been on the right side of the law. The constitution also takes care of accused individuals who have committed

crimes which are offences against the state or the society and are of higher degree and gravity to the extent that they are to be punished by law yet have certain constitutional protections.

There are three constitutional protections under article 20 as being safeguards for those who are accused. First Article 20(1), which calls for *ex post facto* law. The term *post facto* law, is a Latin expression. It clearly says that *ex post facto*, means something that is an afterthought, it punishes actions retroactively, and an act which was legal when it was originally done is criminalized by a law covering that action. So, *ex post facto* law is a law that attempts to impose penalties or convictions on acts that have already happened or are already done. So, when the act happened, the law neither took cognizance of that act, nor treated it as an offence and it also did not prescribe a punishment for the sake. Later, the law wants to take cognizance of such an act and treat it as a crime as well as impose punishments and penalties for the same.

An example in this regard may be the Dowry Prohibition Act of 1961. This law came into force on 20th May 1961, and on this day if any person is found accepting dowry, he shall be punishable under this Act. If dowry is accepted on the 19th of May, it shall neither be an offence nor a crime, because the purpose of the law is always prospective, especially the purpose of criminal law. On the other hand, it may be noted that civil laws can have a retrospective effect, taxation law can have retrospective effect, but not criminal law because in crime you are taking away the liberty of the individual, you are going to imprison him. It is a serious act of the state and hence there should be a protection against the, taking away of the liberty of an individual in a crime. So, *post facto*, law is okay, but *ex post facto* law is definitely not okay. So, the act of accepting dowry is treated to be an offence, a crime for imposition of penalties and punishments. For any act done before such date and year there is a protection under Article 20(1) the person doing such act shall not be prosecuted for the same. *Ex post facto* laws are of three kinds generally under a broad framework. First is a law which declared some act or omission as an offence for the first time. And after commission or completion of the act, the law treats it as an offence. So, once one act is done, immediately the law comes into place and makes that kind of an act or omission correct. So, this is one way in which *ex post facto* law is attempted to be made. Second, a law which enhances the punishment and the penalty. In *ex post facto* law, the offence could have already been taken into cognizance.

But now what is being done is bringing in a law that will enhance the punishment and the penalty. Say, at the time the act was committed the punishment was three months. Then later a law is brought in that has increased that punishment and penalty and this happens from time to time when the parliament or the legislature thinks that the current punishment or the penalty is not amounting to enough deterrence. And hence, the announcement of punishment or penalty is very much required and necessary under the constitution and under the criminal procedure code which usually happens from time to time.

Now, the fact is that an act has already been done by a person. It was an offence, no doubt, but attracting only three months of punishment. Now, should the person be entitled to just that three months of punishment or to the enhanced punishment that has been brought about by a new law, which tends to then be made applicable prospectively generally, but should not be made a retrospective. So, that is also one element of *ex post facto* law that can come into place where the punishments and penalties are enhanced after the commission of that kind of an act or an offence.

The third kind of Ex post Facto law is a law which prescribes a new and a different procedure for prosecution of offence. This may be in terms of tilting the burden of proof on the accused instead of assuming that he is guilty, rather, assuming that he is innocent till proven guilty. There is in place a new procedure for trying this kind of offence. For example, it can be on the list of cases to be tried in the fast-track court. The fast-track court is a special court and may not necessarily bring about a new procedure. But in that you not only bring the fast-track court, but also a new procedure for speedy trial, summary trial. Enough time is not given to the accused and his counsels or the defense counsels to put forward their arguments and cases or cross examine individuals or some other new procedure that is brought into, finish cases early.

Those kinds of *ex post facto* procedural laws can also be something that can be brought about under Article 20(1) and can be tested. Among these three, the first two attract Article 20 sub clause 1 and they are prohibited namely, first, the law in which you declare some act or omission as an offence after the completion of the same. This is prohibited under Article 20 sub clause 1.

Second, is the law in which the punishment and the penalty for acts already being done are enhanced. These two, the Indian Constitution does not permit, and the doctrine of *ex post facto* law will be granted to an accused, and he will be protected against these two actions of the state if they are attempted to be done by the state. The third aspect is about new procedures, but these new procedures are not affecting a person's substantive right. And hence, any kind of a new or a different procedure for prosecution of offense can have retrospectivity. This will ensure speedy trial and thereby a quick disposal of cases, which is to try and finish the trial in a time bound manner. There could be a case management rule in which prescribes the time for how many adjournments can be sought, the times for replies, cross examination, so on and so forth. These are procedures that can be brought and be applied retrospectively and the same cannot be challenged as being violative of Article 20.

So, Article 20 simply says that no person shall be convicted of an offence except for the violation of a law in force at the time of the commission of the Act charged as an offence, nor shall he be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Generally criminal law

tends to have quite strict punishment and the accused must get the benefit of any such law that exists, and he must not be subject to any kind of mistreatment or enhanced punishment from time to time.

Now the second part is the law on double jeopardy which is also a kind of a protection that has been given to an accused. It speaks about the right to an accused in a criminal case or a criminal trial. And is a doctrine which says that no one shall be punished for the same offence twice. The origin of the doctrine of double jeopardy, can be traced to the American jurisprudence, which states that no person should be prosecuted and punished twice for the same offence in any subsequent proceedings. So, Article 20(2) reads as follows " no one could be convicted and punished more than once for the same offence involving the same set of facts. "There is a guarantee against multiple convictions according to the doctrine. In the case of *Venkat Raman v. Union of India*, the Supreme Court of India established this doctrine and dealt with it. However, this doctrine applies to only judicial punishments and not to quasi-judicial or departmental punishments.

So, departmental punishments are brought under the purview of what is called parallel proceedings. A departmental enquiry could be entirely different from your judicial enquiry. But the protection of double jeopardy is only in case of judicial proceedings. So, vis-a-vis the judiciary you cannot be prosecuted twice by a judicial authority. Usually all judicial processes should be clubbed together and a convict should be getting a punishment or a penalty only once for the same set of facts. Suppose a person has been caught at the customs authority or at the seaport or at the airport and in violation of the rules of customs, certain gold has been brought from abroad and the person is found in possession of that kind of a gold which is not supposed to be imported into India. The customs authority will confiscate this kind of gold and take it to a proceeding before criminal court. Once it is taken in a criminal court, the person shall be prosecuted under the criminal law and thereafter cannot be prosecuted again for the same offence by the customs authority in the customs court. This is prohibited as the departmental inquiry is quasi-judicial and the criminal proceeding is judicial. For the same set of facts, a person's act amounting to an offence may attract a civil action, and at the same time a criminal action and a departmental action. Now this will not be considered as double jeopardy. But a criminal court punishing a person twice for the same offence is double jeopardy and there is a protection against the same under the Indian law. The double jeopardy concept under Article 20(2) is also understood with reference to Section 300(1) of the Criminal Procedure Code. Section 300(1) of the Criminal Procedure Code says that someone who has been convicted or prosecuted by any competent court for some offence will not be liable to be prosecuted again till the previous conviction remains in force. So, once a person is convicted for the same set of facts and offences, he cannot be tried again in a court of law. So, he has a protection against the conviction for the second time for the same offence for the same set of facts.

Article 20(3) speaks about prohibition against self-incrimination. The protection that is given against self-incrimination says that no one shall be forced to utter or provide any such information or evidence orally or by any documentary proof, which could be used against that individual that will lead to his own conviction. Self-incrimination means trying to incriminate yourself before a court of law before a police officer or investigating agency and you are leading them to your own kind of a crime. There is protection against self-incrimination and is also available to a person who is a witness, both in terms of oral and documentary evidence. That is a person need not help the authorities in finding his guilt or fault, finding it out is their job. So, the burden is on the authorities to prove the crime and the accused need not facilitate such an investigation or collection of evidence. But any person who has decided to give that evidence or information voluntarily, is not necessarily covered under Article 20(3). It is left to the freedom of such a person to give the same. However, if he does not wish to do it, it is not to be treated as a crime and that is what is very clearly stated in Article 20(3).

For example, if one is being tried for murder, and the police are investigating the offense of murder and they come to you asking whether the other man has committed murder, about your presence at the place of murder, whether you were a witness, so on and so forth. In those cases, you have the right to remain silent, and need not necessarily disclose what has happened unless there are certain cases where the third party owes a duty to cooperate and inform the police. But the accused in the case need not help the police, nor give information and evidence that may lead to his own guilt in a case. Whereas, every other citizen is duty bound to help the police and the legal system and the authorities in detecting crimes, and cooperating with them is a duty that is enshrined in the legal system as well. The Fifth Amendment to the Constitution of the United States of America also has a very similar provision that protects accused against self-incrimination. In India, similar protection is incorporated in the Constitution for the accused allowing them to remain silent and they need not actually facilitate their own finding of guilt.

Constitutional Law and Public Administration in India

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Week- 06

Lecture-02

Right to Constitutional Remedies - II (Article 32 & Article 226)

Wrts are an important tool for enforcing fundamental rights guaranteed under the constitution. There are five writ orders that are issued by the court. These are orders based on the writ petition that is generally filed in either the High Court or the Supreme Court. So, a writ petition is different from a writ order. Writ order is issued based on what has been the individual's plea, whether he has been able to substantiate the same and whether the court has found it necessary to review the petition of the plaintiff and whether the court seems so necessary to intervene in the matter and issue such a writ. Based on all of these, to safeguard the interest of citizens, to control the power of the state, to regulate public administration and to look at the doctrine of separation of power theory, the judiciary is bestowed with the absolute and fundamental power of judicial review and issuing these kinds of wrts to different sectors of public administration under the constitution of India.

In public administration, there is what is called constitutionality of a legislation that is checks and balances rule on the legislative competence or the legislative necessity. The Supreme Court did say that the National Judicial Appointment Commission's bill was unconstitutional, which is called the NJAC bill, because courts have retained their independence and autonomy by holding that the Act of the parliament is unconstitutional. The Act attempted to balance the power of the executive with the power of the judiciary in making appointments of judges to the superior courts, through the National Judicial Appointment Commission's bill. In that sense, the writ jurisdiction is a very broad jurisdiction that may check the power of the parliament.

By the abrogation of Article 370 and Article 35A of the constitution, in which special status to Jammu and Kashmir created by the constitution, was removed. And the same was taken with the Supreme Court. So, the Supreme Court will decide whether the actions of the government are valid or not, whether constitutional or unconstitutional. Similarly, the power of the police is the power of the executive administration. Mandamus is the power within the judiciary itself because judicial review of the judiciary is also an important aspect of public administration. Instead of using the word public administration, the appropriate word would be the administration of justice.

So, these institutions are involved in administration of justice, and hence prohibition and certiorari are the writs that relate to them. In some landmark cases on writs, for example, the writ of certiorari was issued in the *Kharakh Singh v. State of Uttar Pradesh* case, it is a 1963 judgment of the court. It is a very important case, which also speaks about the right to privacy. In certain cases, the courts have intervened in certain matters where they have done a violation of certain errors of fact that they might have committed, or they might have exceeded the jurisdiction, or they might not have followed the principles of natural justice. Judicial and constitutional authorities are supposed to act fairly, and in a non-arbitrary manner and with reasonableness. And they have to provide an opportunity of being heard to the parties and be transparent in their administration. The writ of certiorari has been utilized by the Supreme Court to ensure the same, where either administrative or quasi-judicial authorities have not followed those kinds of principle in terms of administration of justice. In *State of Bihar v Kameshwar Singh*, the Supreme Court held that the writ of prohibition can be utilized to prevent lower courts from time to time from surpassing their jurisdiction. In the *ADM Jabalpur v. Shivkant Shukla* known popularly as the *Habeas Corpus* case, when citizens move the court for the enforcement of their fundamental rights, they can do so, but what happens when some of these constitutional remedies are suspended during emergency? Emergency was imposed in this country in 1975 and 1976. When such a national emergency is imposed by the government, which is a power that rests with the government or with the Union Cabinet under Article 352 of the Constitution of India, the state of emergency can be declared by the President and then some of the rights may have to be suspended in national interest, because emergency is a time when national interest is deemed to have been adversely impacted. Hence, we must make a choice between what can be exercised as fundamental and what cannot be exercised as fundamental. Emergency power impacts part III of the constitution, but how. As a foundation of an individual's existence in each society, an individual wants to develop his intellectual abilities, he must fulfil his spiritual advances, and he must adhere to his responsibility as a citizen within the ambit of law and order and morality and public policy.

The original Constitution gave a certain fundamental right namely, the right to equality, the right to freedom, the right against exploitation and so on. Right to equality is between Article 14 and 18. Right to freedom is between Article 19 and 22. Right against exploitation is Article 23 and 24. And the right to freedom of religion is between Article 25 to 28. Cultural and educational rights are Article 29 and 30. Right to property was there under Article 31. And finally, is the right to constitutional remedies under Article 32. Right to property is now no longer a fundamental right but a legal right under Article 300a of the constitution. Originally, there were seven fundamental rights, now there are six, namely right to equality, right to freedoms, in Articles 19 to 22, right against exploitation, right to freedom of religion, cultural and educational rights, and finally constitutional rights.

One must appreciate that the rule of law clearly says that none of your rights, whether it is fundamental or legal, are going to be absolute or complete or that you can do whatever you want with it. Every right has some scope of what you can do with it. And every right has some limitation of what you cannot do. So, the limitation on rights either can be imposed by the constitution itself, or one can infer it by the law on public administration and how public policy is determined from time to time, because that can be very dynamic. What was public policy in terms of limitations to fundamental rights in 1970 can be different from what it is today. Because there is also what is called this fourth generation of rights. Initially when we got independence from the British colonized kind of rule, we were looking at the first generation of rights called civil and political rights which includes having your democratic government, having your own government, establishing your own policies, etc. These were the initial struggles that our forefathers who adopted and gave us this constitution had to undergo. Then slowly, as the society progresses, the state and country progresses, civil and political rights get a little bit settled and then you have to move on, to look at fair elections, in civil and political rights so that the democratic process is ensured. Then you move forward and have your cultural and economic rights which is the second stage of rights that citizens generally enjoy.

Cultural and social rights or economic rights would mean the right to development, what you can do as a right to business, right of movement, having your own property or house, income, and so on. Cultural rights could mean, you have your faith, religion, language which are protections in the second generation of rights. In the third generation of rights, you come to a stage where you talk about the quality of life, and not just the life, wherein health and environment become very critical. The Courts post 1990 looked at regulating private businesses, stopping their greed and all of these became the third generation of rights.

Today it is a stage of fourth generation rights. Every generational right had its own scope for the right, and their own limitation to the same and the public policy that is laid down by any process of governance. Public policy cannot be uniform in a country like India, which is very diverse in terms of its geography, language, and culture. And it may differ from time to time as well from one generation to another. In fourth generation, rights, you can talk about rights of homosexuals, transgenders, gender equality in places of worship, and endless number of rights. These are the fourth generation of citizens of this country, who demand a different set of rights for their determination, because they know that the country is safe, national security is safe, and that the political process is already done.

Culturally and economically, India is well off post 1991, because of liberalization, privatization, and globalization. So, we need some other rights by which we developed fourth generation rights. In all these rights, some could be fundamental, some could be just legal. These rights are granted in the hope and with the aim and purpose that it will

only do public good. It will serve you better, make you more intellectually developed and the country would progress and become a superpower. There is scientific innovation and a trillion-dollar economy, the fifth largest economy, wherever you want to achieve new progress, multi dimensionally in terms of GDP growth. However, there has always been a limitation that some of the fundamental rights ought to be subservient to the social good, to the social cause, to public order and to public morality.

Morality, in terms of constitutional morality can be spoken about which is the new test of morality today. And then finally, the safety and security of the state which you cannot compromise. So, when it comes to the safety and security of the state, suppose there is a conflict between protecting fundamental rights and safety and security of the state, one would easily conclude that the safety and security of the state would have to be given prominence not fundamental rights. So, fundamental rights not being absolute are to be governed with reasonable restrictions.

The word reasonable is a very important restriction, which will tell you limitations on the exercise of your fundamental rights. But the fact remains that whenever reasonable restrictions are imposed, those that are stated in the constitution are to be implemented. So, when we say public order, what exactly in a given situation is public order due to which your fundamental rights have been curbed, infringed, or abridged would be subjective to that case to the place that it has been invoked or imposed. And hence, those kinds of restrictions are always subject to judicial review.

They will always be subject to the fact of whether those restrictions are justiciable in nature and character. If they are found to be so by the court, it will pass the test of constitutionality. And the fundamental rights may be curtailed or restrained because of the necessity of maintaining public law and order. So, can fundamental rights then be suspended during emergency and which of these rights cannot be suspended was decided by the Supreme Court held in the case of *ADM Jabalpur v. Shivkant Shukla*, called *habeus corpus* case which was in 1976, just after emergency. The dissenting opinion then in this case became the majority opinion in the *Maneka Gandhi* case.

The court did say that Article 21, that is right to life can also be suspended. But in *Maneka Gandhi*, it was held that it cannot be. Right to life at any given cost of whether it is an emergency or not, should not be suspended. And even during an emergency Article 21 will continue to prevail and the state is duty bound to protect that life and not infringe or abridge the same. This has been a very significant ruling in terms of whether the most important fundamental right, Article 21 can be suspended during national emergency. Whether Article 19, the six freedoms that we have under Article 19, freedom of speech and expression movement, business and so on can be suspended during an emergency. The answer is yes because if you refer to Article 358 of the Constitution of India, it specifically provides that the suspension of Article 19 during emergency can take place. So, the

constitution itself says it can be done, but 21 should not be because of the Supreme Court decision in the *Maneka Gandhi* case. So, when can Article 19 be suspended, and during which kind of emergency? When the proclamation of emergency is done, to ensure the security of India or any territory thereof, if it is threatened by any kind of a war or external aggression, then Article 19 can be restricted by the state by making any law to that effect or through executive action necessary in those matters. However, once the proclamation of emergency ceases, then automatically the rights under Article 19 will be restored. So, reading Article 359, one would come to this conclusion that except Article 20 and 21, most of the fundamental rights can be suspended and are stated in Article 359. So, there is a very clear demarcation. Articles 20 and 21 are not to be compromised during proclamation of any kind of an emergency, but rest of the fundamental rights can be affected.

Once the proclamation of emergency which is only, for a certain duration of time of not more than six months, unless reasonably required, ceases, then automatically your fundamental rights get reactivated, and you can exercise your fundamental rights and enjoy the same as well. The 44th Amendment Act of 1978 brought some changes by which suspension of fundamental rights can happen. When a presidential order to that effect is generally issued, it must be presented before both the houses of the parliament. And those are the procedures that are laid down in terms of how this is to be exercised. *ADM Jabalpur* case said Article 21 can be suspended, but then Article 359 very clearly now states that except Articles 20 and 21, no such rights can be suspended. Article 226 speaks about the writ jurisdiction of the High Courts.

The power of the High Court under Article 226 is very similar to the power of the Supreme Court under Article 32 but is far broader and wider. Because High Courts are in every state, and they are benches of the High Court also in different cities. The High Courts are the constitutional courts and not ordinary courts. Hence, they also have an original jurisdiction in accepting writs. A citizen can directly go to the High Court without going to the lower court in case there is a violation of two kinds of rights, one fundamental like under Article 32 and additionally, for the violation of a legal right, established by a statute, or a law of either the State Assembly or the parliament.

So, it is a normal right but not so very fundamental that is mentioned in the constitution. But it still has the power that it shall not be abridged, or infringed and the state has a duty to protect that kind of a legal right. And in case a citizen feels aggrieved or violated, then he can approach the High Court in its original jurisdiction as an aggrieved individual or a party. Article 226 also has been utilized for public interest litigation, of course, because the right to life and hence the dilution of the local standard principle means that anyone who is in public interest can approach and seek the protection of his fundamental or legal right not only for himself, but for someone else in public cause or social interest as provided under

A significant case, *L. Chandrakumar v. Union of India*, was about Article 227. Article 227 is a very significant part of the High Court in what is called the supervisory jurisdiction of all courts within its territory. The High Court of Karnataka or the High Court of Tamil Nadu, called the High Court of Madras which is a High Court in a particular territory, and every other court below it, be it proper judicial court or even a quasi-judicial kind of a court shall come within the supervisory jurisdiction of the High Court. And hence, the High Courts can exercise their powers under Article 227 as well. In *L. Chandrakumar* case it was held that the Parliament or the State Legislature cannot intervene or exclude the jurisdiction of the constitutional courts. The constitutional courts are supreme at any given point of time, and taking away the power of the constitutional courts or limiting the power of the constitutional courts will be completely against the basic feature of the constitution. And this is an integral part of the constitution having Article 32 and 226. So, no tampering, or amendment, or any kind of interference can be done in these two articles.

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Week- 06

Lecture-03

Article 33 - Armed Forces & Fundamental Rights

One of the interesting provisions of the Constitution is in relation to armed forces and fundamental rights. Article 33 empowers the parliament to restrict or abbreviate the fundamental rights of the members of the armed forces, paramilitary forces, police forces, intelligence agencies and analogous forces. The objective of this provision is to ensure that the armed forces or the paramilitary, the police, and the intelligence, discharge their duties and maintain discipline among themselves. And hence, fundamental rights such as freedom of association or any other right of the armed forces or freedom of human speech or expression may be curtailed. And these laws, if made by the parliament, cannot be challenged in any court of law on the ground of intervention of fundamental rights. The exception to fundamental rights is that it is applicable to all citizens of India, except to the members of armed forces, as provided by a statute of the parliament which may restrict these fundamental rights.

The parliament has enacted the Army Act in 1950 and the Navy Act in 1957, the Police Forces Restriction of Rights Act of 1966, the Border Security Force Act and so on. These legislations usually impose a restriction on freedom of speech. For example, freedom to form associations, the right to be a member of a trade union or a political association and the right to communicate with the press and the right to attend public meetings or demonstrations. The armed forces, covers all employees in armed forces including barbers, carpenters, mechanics, cooks, chowkidars, bootmakers, tailors and those who are in non-combat positions as well.

The parliament law enacted under Article 33, can also exclude court martial from the writ jurisdiction of the Supreme Court and High Court. So, Article 32 may not be available as a fundamental right to the armed forces. This is generally called martial law which is very important as to some extent it affects fundamental rights of the armed forces. It usually suspends the writ jurisdiction of the court, and such kinds of law can be imposed in certain parts of the country, but not entirely. While a national emergency is one of the rare phenomena which will affect all citizens, martial law only affects those in the armed forces.

So, while national emergency also suspends certain fundamental rights, martial law suspends it permanently till the time you serve in armed forces or even later than that which depends upon those legislations as well. National emergency is for general citizens and martial law is for the members of armed forces. Fundamental rights sometimes are not required as an absolute rule and certain people and citizens can be exempted from the same and martial law, military law is one such situation where those in the military, those in the police, those serving the government are to exercise caution and their rights are subject to those special laws and cannot be a declaration of rights under general laws.

There are two provisions in the Constitution, Article 19(1)(f) and Article 31, which deals with right to property. Originally right to property was one of the seven fundamental rights guaranteed under Article 19. Now Article 19, has only six rights and this said that every citizen shall have the right to acquire, hold and dispose of property. On the other hand, Article 31 guaranteed to every person, whether citizen or not citizen, the right against deprivation of his property.

So, if the property is acquired or it is deprived, then you have a guaranteed right against such deprivation. Rather, Article 31 said that no person shall be deprived of his property except by authority of law flow. It empowered the state to acquire or requisition the property based on two conditions. One is for public purposes, but based on the payment of compensation. The parliament has tried to amend the right to property several times because this was a bone of contention during initial days of independence, and most of the lands were with private citizens and the government wanted land to develop its governance model.

The government wanted to establish a lot of businesses to promote welfare and other matters between the states. So, the number of constitutional amendments that have touched the right to property include the 1st, 4th, 7th, 25th, 39th, 40th and the 42nd amendments. And there have been a lot of modifications of what this right to property should be. Many of these amendments were challenged in the Supreme Court which expressed its own view on how this right to property can be contravened and how it should not be contravened.

There are multiple litigations because acquisition of property became a very critical factor for both the central government as well as the state government. And the real bone of contention was if your right to property is a fundamental right, your compensation should also be equivalent to the treatment of that right. So, what the state should pay as compensation became a real problematic situation. And hence, by the 44th amendment in 1978, this right to property was abolished and was taken off from Article 19 and Article 31. Instead, a new Article was inserted in the constitution namely, Article 300A under the heading right to property. So, it was not continued as a fundamental right, but was brought in as a constitutional right. This is now a constitutional legal right to property. But it is not part of the basic structure of the constitution. It is not part of the fundamental right. The

implication is that your property today can be regulated, curtailed, abridged or modified. And this can be done through the ordinary law of the parliament. It is no longer a core and fundamental right. While private property is protected under executive and legislative action, there is no absolute protection and the state under a concept called eminent domain can take away your property as well and it is relevant to note that the aggrieved today cannot move under Article 32 to the Supreme Court or can under Article 226 to the High Court for the violation of his right for the simple reason that right to property is no longer a fundamental right. But the aggrieved party can go to the High Court under 226 for violation of a legal right because today right to property continues to be a legal right as well as a constitutional right. So, High Courts can intervene, but the Supreme Court directly cannot intervene.

Because this is no longer a fundamental right, you do not have a guaranteed right for compensation, but the compensation will be determined under the statute. Land acquisition in India has been a bone of contention both for how it is being acquired and what is the kind of compensation being given for land acquisition. And that is why the parliament in 2013 enacted a law called the Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, which replaced the old Land Acquisition Act of 1894. It was a British era law but the four times market value compensation that is promised under the 2013 Fair Compensation law is not practical. And hence that law has stood good on paper but has not been implemented.

The fundamental rights have been appreciated as a very good part of the Constitution, they are the heart and soul of the Constitution. So, the Part III of the Indian constitution has been appreciated by a lot of people and they are very significant because the fundamental rights are the bedrock of democratic systems in our society. The value and the way in which fundamental rights are experienced and enjoyed by the citizens also speak a lot about how the democratic values in the country are.

There is a formidable force of protecting individual liberties under the Constitution and this has only strengthened from time to time. Fundamental rights for this matter help us establish what is called the rule of law, not rule of men. So, rule of law seems to have been strengthened as well, due to the protection and promotion and kind of intervention in case of infringement of fundamental rights. Fundamental rights bring in a status of equality because minorities also have protection, and it checks the absoluteness of government authority or power. Also, fundamental rights are the foundation of justice in our society. Justice which is social as well as economic. Fundamental rights ensure the dignity of the individual talks about respect to individuals and the state also has a duty to the citizens. The fundamental rights provide an opportunity for citizens to take part in the democratic process or the administrative process of the country. However, on the flip side, there have been some observations on what fundamental rights ought to have been and can they be much better than what they are right now.

A lot of people view that fundamental rights are difficult to experience, exercise or even take recourse to any kind of infringement of their fundamental rights in India owing to the reason that the legal system or the judicial system that has been created for redress of these grievances against fundamental rights or for the violation of fundamental rights are unfortunately very expensive. They are very tedious and time consuming. So, while it is good to have these rights and it is good to experience this right, the way the fundamental rights are to be exercised or experienced through the judicial process in terms of right to be enforced or right to be enjoyed, is quite an expensive and tedious process in India. The procedure must be simplified and tuned in more to the common man's needs. Whether you are literate or not, your access to justice must be free, fair, reasonable and it is speedier; otherwise, it fails the whole process of having it in the constitution.

So, these fundamental rights have been subject to dynamic interpretation by the courts of law. The basic kind of architecture of each of these rights is laid down, how it is to be applied in each case varies from time to time and hence, lot of people think that there is no consistency of how these fundamental rights are to be enjoyed. There is no kind of permanency of saying what the right contains. So, if someone must understand freedom of speech and expression, he must go through the several judgments of the Supreme Court from time to time and each judgment actually may have its own contribution to make about what this is. That also has added to the flow of the rights being experienced in terms of justiciability of the rights. The kind of restrictions on fundamental rights, now, if one goes to Article 19(2) and makes one assume that there are too many restrictions.

It is often criticized that these restrictions are narrowed down and kept to its very basic. For example, some of the restrictions under Article 19(2) for instance, are very broad. For example, we say you cannot enjoy any of your freedoms unless, to the extent that it violates the interest of the state or the security of the state or the sovereignty of the country, or it infringes the friendly relation with foreign states. If suppose something from your speech and expression contributes to disruption of public order, violates decency or morality or is in contempt of court or defamation or incitement of an offense it cannot be exercised. In all these circumstances, your right is curtailed to that extent because these are reasonable restrictions on your freedom.

While no right should be absolute, the restrictions on these rights must be to the very minimum basis. For example, the law on defamation, the law on sedition for that matter. Though these laws have their own justifications to remain, they can be misused and people may be tempted to file litigations either false or fake or just to create some kind of process. Likewise, people may be hesitant to explore and experience their fundamental rights because of these restrictions that are present. So, limitations or restrictions under the Indian constitution may at some time be considered as excessive as compared to other countries' constitutions. But this could also be an unfair criticism. Those limitations are very basic

and essential. And over a period, a debate on what should be there and what should not be there can always be taken forward. They have actually withstood the test of times and they have actually brought in a more responsible society that is enjoying its fundamental rights. Another criticism of fundamental rights chapter has been that most of your social and economic rights, say, right to work, for example, or right to employment, or some kind of right to social security or other rights, generally that one seeks to enforce in society are brought through the directive principles of state policy and not directly.

So, when we go to the directive principles of state policy, most of these rights, which are developmental rights, are stated in the directive principles and not in the fundamental rights. So, this could be thought to hamper a citizen's growth and his developmental aspirations to a certain extent, especially in a democracy where one sees a right to development also as those kinds of fundamental rights. It would be necessary to view and review what kind of new dimension of right to development can be added to the fundamental rights chapter. One other observation of the fundamental rights chapter has been that on certain rights, there is literally no clarity, especially when you talk about minority institutions and their right to manage educational institutions. The term minority itself has been a subject matter of a lot of judicial decisions.

The term minority is subject to a lot of political misuse for vote bank politics. And this has been stretched beyond the original idea of the framers of the constitution. In the name of minority protection or minority rights, great disservice has been done to the nation. Those were some of the contentious points that need to be taken into consideration. It is pertinent to look into observations about what fundamental rights should have been and can be and why we should discuss the limitation of fundamental rights.

It is obvious the two other things are one. Certain fundamental rights were suspended during the national emergency which was experienced in 1975 and 1976. This has been a challenge though the courts have said that now certain rights cannot be suspended yet most of the fundamental rights can be. This is a kind of danger zone that we are in. Why they should be suspended, an adequate justification of the same, the existence of a backup provision etc. are things around this matter. When it is used, it will show to what extent citizens' interests are going to be addressed in that.

Preventive detention laws have been mentioned specially under Article 22. Preventive detention laws like TADA, and others have been a matter of interest. The Act of 1950 called the Preventive Detention Act is no longer enforced. Back then there was a maintenance of internal security Act that again is no longer enforced. The conservation of foreign exchange and prevention of smuggling activities act and the National Security Act, 1980, the Prevention of Black Marketing and Maintenance of Essential Supplies and Essential Commodities Act, etc. The Terrorist and Disruptive activities act, TADA, now it is repealed. There is Prevention of illicit traffic in narcotic drugs and psychopathic

substances act of 1988. Prevention of terrorism Act was repealed in 2004, that is POTA. And finally, the Unlawful Activities Prevention Act, (UAPA), which was amended very recently in 1990. UAPA and the National Security Act today are critical legislation that deal with preventive detention. So, preventive detention law is an exception to Article 22, and it is thought that these may at some point of time have to change as well. There is always a scope of improvement and we must always know where it can be improved and how it should be done.

Constitutional Law and Public Administration in India

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Week- 06

Lecture-06

Amendments to the Constitution

There are certain other aspects of the Constitution of India, which in one sense lays down certain aspects of public administration and will also tell us how the Constitution lays down the public policy and public administration, because there are certain parts that are relevant and important to understand how the public policy dimension has been designed, structured and has evolved over a period. Starting with the amendment to the Constitution of India, the Indian Constitution is a written constitution and hence it does provide for amendments.

Amendments are kind of a process in which the constitution is changed over a period. There is a very interesting juristic saying that the constitution must reflect the aspirations of every generation. So, our forefathers who gave us this constitution had a particular type of thought, a process, they had their own ideals and aspirations at that given point of time and the current generation may have its own aspirations and hence the constitution ought to resonate with the aspirations of the current generation and hence we have to say that the constitution must be a reflection of the public society or the public policy of current times.

Generation to generation may determine what the public policy of the constitution should be and hence we can say that the Indian Constitution is a mix of the Constitution in Britain and the Constitution of America. In Britain the constitutional change is very easy as compared to the United States where it is very rigid. The rigidity of the American Constitution is very well known, it is not easy to change the American Constitution whereas it is quite easy to change the British Constitution. So, India adopted a middle path and we have created a kind of a synthesis between rigidity as well as flexibility. We have certain parts of the constitution that are rigid, which should not be touched or amended that is precisely what basic structure theory laid down and certain parts of the constitution which ought to be flexible and they are allowed to be changed from time to time.

The Indian Constitution is one of the largest written constitutions of the world and hence there are so many parts in the constitution that can be changed without touching the basic fabric of Indian society or the Indian public policy. Article 368, in Part XX of the constitution deals with the power of the Parliament of India to amend the constitution and

it also lays down the procedure in which such amendment can be done. In the exercise of the constitution power, the constitution through an amendment can do an addition, or variation or it can repeal any provision of the constitution in accordance with the procedure laid down for that particular purpose. However, as we all know this kind of an amendment to the constitution is not a blanket power, nor an absolute power and it is not a power that can amend the entire constitution or replace every part of the constitution. That unfortunately is not present as the power to amend the constitution.

So, the parliament does not have an absolute power to change the constitution or amend the constitution as stated in the *Kesavananda Bharati* case of 1973, a landmark judgment that lays down the scope and ambit of Article 368. Now the procedure for amending the constitution is as follows and is quite an elaborate procedure. A few things about it are, an amendment to the constitution can be initiated by introducing a bill in either house of the parliament. But such a bill cannot be introduced in the state legislature. So, it is only the central government or the federal government that has the power to change the constitution and the state governments have not been given that power.

Second, an amendment can be introduced either by the government through its minister, or it can be introduced by a private member who is a member of the parliament, who is not part of the government. And the introduction of this kind of an amendment bill does not require the prior permission of the president. The bill must be passed in each house that is Lok Sabha and Rajya Sabha by a special majority sometimes and sometimes by a simple majority, or sometimes by a special majority and ratification of one half of the state legislature, that is three processes. Sometimes it will require a two thirds majority as the case or special majority. Simple majority is more than half what is known as. Such a kind of a bill to amend the constitution cannot be done through a joint sitting of both the houses. It shall be passed in each house separately. And in case there is a disagreement between both the houses, then in an ordinary bill, a joint session of both the houses can be called in. But for a constitutional bill, no such provision of holding a joint sitting of both the houses is provided for. There is a requirement that the president's assent is required. The president must give his or her assent and in case the president withdraws his or her assent, then the bill cannot be sent back to the president once again.

So, the constitution would stand amended once the president gives such an assent. The role of both the houses and the president is critical in bringing about any such constitutional amendment. There are three ways in which the amendment process in the constitution can be brought about. One is by a simple majority of both the houses. Some of the provisions of the constitution may be amended through a simple majority can be for example, establishment of a new state or admission into a new state.

So, formation and alteration of the boundaries of the state can also be done by a simple majority. Quorum in a parliament can also be decided, salaries and allowance of the

members of the parliament can also be decided by the simple majority rule. Privileges of the parliament and its members, sometimes use of English language in the parliament was also passed through simple majority. Conferment of more jurisdiction of the Supreme Court and not otherwise can also be done by the simple majority. Recognizing official languages was done through a simple majority. Citizenship, defining Union territories, Fifth schedule, Sixth schedule of the constitution etc. Were also done through simple majority.

Most of the other provisions of the constitution require a special majority. A special majority means two-third of the members of each of the houses must agree. Two-thirds of the total membership means that the total number of members comprising the house irrespective of the fact that there were any vacancies or absentees. So, it is not two-thirds of those who are present, but two-thirds of the number of members in the house.

So, absentees and vacancies cannot be looked into to decide two-thirds. It is two-thirds of the total membership. That is very critical to bring in the rule of special majority and special majority usually requires a voting. It would require voting after the third reading of the bill in the parliament. And this must be provided through the various procedures and groups of the house. This two-thirds majority applies to fundamental rights, it could apply to the directive principle of state policy. And it provides, to all the provisions which are not covered by the first and third category. So, usually two-thirds majority will be insisted upon.

When is the special majority and the ratification of half of the state legislatures required? There are constitutional powers that are granted to the states, that are certain provisions in the constitution that determine center state relationship. And hence, unless more than half of the state legislatures have given their consent, the formality of amending the constitution will not be completed. To get the ratification of half of the states, now 28 states, 14 states will have to agree to this kind of an amendment being processed by the constitution. There is no time limit that is fixed.

The states may agree within six months or six years, but nevertheless, unless that kind of a consent is given, the amendment bill does not come into operation at all. So, the following provisions would require not only a simple majority of the Lok Sabha, Rajya Sabha and the assent of the president, it also requires the ratification of half of the state legislatures. They are the following. First, election to the office of the president and manner of the same. This, if it must change from the existing structure in the constitution, will require a simple majority and half of the state legislatures' consent. Extent of the executive power of the union or the state, changes in Supreme Court and High Court, distribution of legislative powers between the union and the state, especially in terms of the 7th schedule of the constitution, something like the goods and service tax concept etc. anything as per the 7th schedule will be covered here. Representation of states in the parliament, especially in the

Rajya Sabha and the amendment process itself in Article 368, all of these would require the consent of at least half of the states. So that is how the amendment to the constitution can come into place. The amendment process under 368 has its own advantages and sometimes does not fit into the very role of what critics would want the amendment process to be.

What have critics said about the amendment process or procedure to the constitution is that while India in its constitution has balanced between rigidity and flexibility, sometimes it would be required that the joint sitting of both the houses of the parliament need to be brought in, because this is the only way in which deadlocks on certain crucial aspects can be resolved. So, it was important that the procedure for amendment could have a joint sitting, because sometimes the party in majority is a party that is having majority only in the Lok Sabha, not in the Rajya Sabha. Therefore, it may disturb the public policy vision of the ruling party because it requires that kind of majority in both the houses independently. So, it is ideal to allow for a joint sitting was one of the criticisms that was brought into place. If one views Article 368, it is more or less, like a procedure, that every legislation in the parliament is enacted or brought into existence.

There is no special treatment to an amendment process. An amendment to the constitution will be like an ordinary bill or should it be something different, or should have been brought as a procedure is another criticism as to Article 368. While one has looked at the judicial review of the amendment to the constitution, one would come to this conclusion that Article 368 and the wordings in it have left an ample scope for the judiciary to intervene and test the constitutionality of every amendment, either on the procedural aspect or on the substantive aspect. The judicial review has often been kind of a superseding power to Article 368, thereby, giving legislative competence, a second door than the judicial wisdom.

Trying to strike a balance between flexibility and rigidity, Article 368 does not give any kind of a special power to the legislature or any exclusive power to the legislature to amend the constitution. The legislature represents the will of the people and represents the aspirations of the society, because that is through direct voting or franchise that these people are brought to the parliament. The criticism about the amendment procedure under 368 is that the states have no role at all in deciding the framework of the constitution.

States cannot introduce any bill or proposal to change the constitution on their own, unless they are part of a coalition in the government, and they play a role regarding the same. One benefit of the US Constitution is because the United States is a union of states, and there are two constitutions there, the states can also make a proposal to change the public policy dimension in their own state by bringing a change to the constitution. But that is not possible in India, because states do not have their own constitution and neither can they

contribute and participate in reflecting a constitution that is required as per public policy of the times. So that is one final criticism as to the process and procedure of 368.

The Constitution is a very organic, dynamic and vital document that decides the lives of people. It should be like a living and breathing document, solid, permanent and at the same time, it should result in showing the kind of flexibility that is required to draw the rights of people and the duties of the state. And hence, there must be enough sense of accountability of the ruling party and the government of the day, there must be a sense of transparency in the decision-making process. Rule of law and not rule of men should be something that the constitution should be able to fulfill from time to time. One of the aspects of the Constitution is that it is flexible. However, certain parts of the constitution are rigid, meaning these parts have been given a special status called the basic structure of the basic features of the constitution. And these features cannot be changed or be amended at all. And the law has continued to stay the same.

We can see how constitutionalism grew from the constitution. Constitutionalism means the working of the constitution, and this has been over a period of years. One of the first cases that was decided in 1951, in case of *Shankari Prasad v. Union of India* wherein the first constitutional amendment that was brought in 1951 was challenged. The First Amendment to the Constitution curtailed the right to property under Article 31 of the Constitution. And hence the first amendment to the constitution itself was challenged. The Supreme Court had stated that the power of the Parliament to amend the Constitution includes Part III as well. Article 13 provides a definition of law which includes any ordinance, order, byelaw, rule etc. So, the word that was used in Article 13, includes only ordinary law and not constitutional amendments. And therefore, the parliament can abridge and take away any fundamental rights by enacting the Constitutional Amendment Act and as such, a law will not be void under Article 13. The court held that the constitutional amendment law is not ordinary law, and it is not covered under Article 13. So, it can abridge fundamental rights, but any other law cannot abridge fundamental rights. That is the law, which is defined in Article 13, it can include rules, regulations, ordinance, notifications, orders and bylaws, they cannot abridge your fundamental rights.

A constitutional amendment abridges the fundamental rights as held in *Shankari Prasad v. Union of India* in 1951, because that is not covered under Article 13; this is a higher law and fundamental rights can be affected by the amendment of the constitution, it can be abridged. And hence the court said, it will not intervene with the parliamentary power. So it meant that in 1951, just after independence and constitution being adopted, the parliamentary supremacy was established by the court and the court said the parliament and the legislature are supreme, they can change the constitution as they wish and whichever part they wish. So, amendment power was absolute.

And in 1967, in *Golaknath v. State of Punjab*, the Supreme Court reversed its earlier decision. From 1951 till 1967, 17 amendments to the constitution were already brought into place. This procedure of amendment was used to amend the constitution from time to time and making it over flexible would have resulted in diluting the constitution and the principles of the constitutionalism of the fundamental law of the land and treating the constitution like any other bill or act was happening during those days. The Supreme Court in the *Golaknath* case in 1961 ruled that fundamental rights are given a very important position in the constitution and hence, the parliament cannot abridge or take away these fundamental rights. So, they said the constitutional amendment is also included under Article 13 under the definition of law and hence, such a law can be held to be void by the Supreme Court in a judicial review, as the same law may decide to abridge the fundamental rights of citizens. So any law that is in violation of fundamental rights is void to the extent it is unconstitutional to that extent and hence the *Golaknath* case held that amendment to the constitution is a law that is covered under Article 13 of the constitution of India.

Once the *Golaknath* case was pronounced in 1967, the supremacy enjoyed by the parliament was reduced, namely the supremacy to decide about public policy in the constitution, whatever is required. So, the parliament reacted by bringing in the 24th Amendment Act in 1971. It amended Article 13 and Article 368 and declared that the parliament has the power to abridge or take away fundamental rights under Article 368 totally and as such, the Constitutional Act will not be law under Article 13. So, the parliament reacted very strongly to the *Golaknath* case superseded this case by bringing a new amendment to the constitution which is called the 24th Amendment to the Constitution. This amendment said that the Parliament has all the powers including taking away fundamental rights and the same cannot be included in Article 13. They neutralized whatever the Supreme Court decided in the *Golaknath* case.

The *Kesavananda Bharati* case was a very important turning point, wherein the issue was whether parliament is supreme or the Supreme Court is supreme and the Supreme Court had to lay down certain restrictions or limitations on the parliamentary power. A constitutional bench in the *Bharati* case, said that the parliament is empowered to change fundamental rights. However, it said that there is something called the basic structure and you cannot always allow parliamentary supremacy over the constitution because such supremacy will result in abuse of power. It will allow too much discretion to the parliament. So, certain parts of the constitution should not be touched at all, and the parliament should have some kind of conscience. Parliament must affirm their faith in the basic structure theory. They must say these are the parts that shall continue to remain and some of these parts can be changed. So, the case on the *Bharati*, judges allowed the parliament to decide but they said, decide everything else except the basic structure. The court decided to give the power to decide fundamental rights but without touching the basic features of the constitution.

In 1975, in *Indra Nehru Gandhi v Raj Narain*, the 1975 very famous case where Raj Narain challenged the election of Indira Gandhi. It is a very popular turning point in the Indian constitution. Raj Narain said that Indira Gandhi had not won fairly in her elections. In that case the Supreme Court invalidated the 39th Constitutional Amendment to the Constitution which was brought in by Indira Gandhi to say that the election to the prime minister or the speaker of the Lok Sabha is outside the jurisdiction of the court itself. So, if there are any election disputes to the elections of the prime minister of the Lok Sabha then the courts cannot intervene at all. So, a new provision in the constitution itself was added through what is known as the 39th amendment act. Now the court here then had to step in because the rule of law was completely dislodged here. Rule of law says everyone is equal before law. This is the basic feature of the rule of law. Everyone is equal. Despite or despite your status, however high you are, you are equal before the law, equal before the courts of law, equal before the justice provision. Here, the prime minister put herself as being beyond the ordinary scrutiny or supervision of law. So, at this point of time the supreme court had to intervene, they had to step in, and they said that this provision was beyond the amending powers of the parliament. The parliament could not bring such an amendment, and this violated the basic structure of the Constitution. In *Indira Gandhi v. Raj Narain*, the court held that the basic structure of the constitution is rule of law. Rule of law is important. Equality before law and equal protection of law is the basic feature of the constitution. You cannot assume a role of being a superhuman and not being subject to the scrutiny and supervision of law. The basic structure or feature of the constitution was slowly elaborated, explained, and brought into existence through this case.

The basic structure theory was laid down in the *Kesavananda Bharati* case, but it was expanded in later cases to say what basic structure of the constitution meant. So, in 1976, the parliament passed the most major amendment to the constitution called the 42nd Amendment. And this act amended article 368 and declared that there is no limitation on the constituent powers of the parliament and no amendment can be questioned in any court of law on any ground including those dimensions of fundamental rights. So, one of the amendment features of the 42nd amendment was to reiterate parliamentary supremacy on the amending powers and reiterating the powers of 368 as being absolute power with the parliament of India and the Supreme Court or any court could not intervene on those grounds was laid out.

However, in the Supreme Court in a case called the *Minerva Mills* case of 1980, they invalidated this provision in the 42nd Amendment and the Supreme Court said that excluding judicial review is not something that is possible by the constitution amendments. Judicial review is a basic feature of the constitution. So, the judiciary can question anything and everything and that cannot be taken away at all. The court applied the basic structure theory in the *Minerva Mills* case and reiterated court supremacy to decide the constitutionality of any legislation or any constitution amendment bill as the case may be.

So, in 1980, things slowly started settling down about who is supreme, the parliament or Supreme Court.

It was very clear by this time that the Supreme Court was winning the battle in trying to protect the constitution and the document of the constitution to protect rights in the constitution, to protect citizens interest in the constitution and also to lay down a new principle of constitutionalism saying that judicial review and rule of law is the basic structure of the constitution. So, the court in the *Minerva Mills* case very clearly says that amending power always is a limited power and it must be exercised when only there is an absolute need for the same. They say that any power that is granted, even amending power if is given to enlarge the scope or ambit then that would be a misuse of the power itself. And if absolute power is given to the parliament to do anything with the constitution, this power would lead to a destruction of the basic tenets of the constitution; the same being with political parties who are unfortunately driven by a lot of ideologies and thoughts.

There are a lot of clamors to individual leaderships. And sometimes this tends to be abused by the political leadership. And hence, a limited power means maximum governance, a limited power means uncorrupt government. A limited power is very important to protect the rights of the people. A Government that has restrictions and limitations will also do good governance. A lot of development has happened on the basic feature. With many cases, one would say that the basic structure or the basic feature of the constitution has been decided by the court of law. And they have added to what this basic structure means. The basic structure of the constitution means rule of law; it also means supremacy of the judicial review process. And that was very clearly laid down. The sovereignty of the country is a basic structure, democracy is a basic structure. Republicanism is the nature of Indian politics. India is a republic, which is not going to have someone as the king or the throne or the monarch in our nation. So, that is a basic feature. So, a presidential form of government is not going to be a choice with the king in place. President is a position that is there in the constitution, and it must be respected as it is.

Free and fair elections are a basic structure. Federalism is a basic structure. Secularism is a basic structure. So, federalism, secularism, democracy, unity and integrity of the nation, social justice and judicial review are all basic structures of the constitution. These six aspects were laid down in the most famous case called *S.R. Bommai* case of 1994. Which also was a very important turning point in our constitutional history. In *L Chandra Kumar* in 1997, the power of the High Court and the Supreme Court under Article 226 and 232 was held as the basic structure of the constitution. The importance of equality has always been reiterated as basic structure. Freedom and dignity of the individual has been accepted as the basic structure of the constitution. Access to justice is also a basic structure. The welfare state is also a basic feature of the constitution of India. So, through various decisions, the basic structure has been laid down from time to time. And one of the latest cases on basic structure that was pronounced was in 2014. It is called the *Madras Bar*

Association v. Union of India, where judicial review and the power under 226 and 32 were reiterated by the courts. So, it is now very clear that the basic structure theory is part of the Indian constitution. It has emerged as one of the most important pillars of constitutional democracy that has very clearly clarified how there ought to be a balance between the power of the parliament and judicial review.

The judiciary is the custodian of the constitution. This very theory called the basic structure theory reiterates that and holds it to its firm position. And the judiciary has been able to check and balance the power of the parliament and the legislature. That is precisely what checks and balances theory is. And through the basic structure theory, we kind of find out how the Indian constitution becomes a very robust public policy document. So, whatever is the basic feature of the constitution is the public policy of this land which cannot be compromised, which cannot be amended, which cannot be abused, which cannot be at any stage, resulting in abridging the fundamental rights of the citizens.

Constitutional Law and Public Administration in India

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Week- 07

Lecture-02

Introduction to Union & State Legislatures

A very important aspect of the Indian Constitution is the legislature of Union and States. India is a parliamentary democracy. The preamble of the Indian Constitution says India is a sovereign, socialist, secular, democratic, republic country. The Constitution of India is the supreme law of the land. Article 1 of the Constitution says India, that India or Bharat shall be a Union of States. India is a Union of States. This shows that there is a legislature for the states as well as a legislature for the centre.

India is the largest, most populous democratic state in the world. Democracy has existed in India since independence. The preamble states, that we the people of India, having solemnly resolved to constitute India into a sovereign, socialist, secular, democratic, republic, it is very important that we have sovereign status in the international aspect. India is a socialist country as a matter of principle. India is also secular as a matter of principle. It exhibits democratic values by conducting free and fair elections in a timely manner.

The term republic means the head of the state is elected by the government and is not a monarchy. It aims to secure to all its citizens, justice- social, economic, and political, liberty of thought, expression, faith, belief, and worship. It also provides equality of status and opportunities in many areas and promotes among them all the fraternity of the individual, and the dignity of the individual. Unity and integrity of the nation also assumes a very important position in India. Though India is a union of states, none of the states shall have the power to secede from the mainland. India is a powerful federation of states.

On the 26th day of November 1949, this constitution was adopted for the country. The preamble of the constitution which is of great significance shows how the legislature becomes more prominent. The term 'socialist' was inserted by the 42nd amendment in 1976, because India is a welfare state and socialism was made a principle, a policy by the government. The constitution also states that it is a secular state which means that India does not have a state religion. It does not follow any religion as a state religion. It respects and promotes every religion prevalent in the country.

All these words of the preamble aid in the interpretation to the Constitution. Preamble is the preface of the constitution. It contains the ideals and principles of the Constitution. It provides an interface between the different functionaries of the constitution namely, legislature, executive and judiciary. Whenever there must be any interpretation, various decisions of the supreme court have resorted to the preamble for its interpretation. The preamble reflects the purpose and objectives that the constitution makers sought to achieve. For example, though the word socialist was not present, initially it was an inherent principle of the executive and legislature. Whenever a policy has to be made, socialist principles have to be adopted by the government. The directive principles of the state policy had already mentioned the principles of socialism in its law making.

The Supreme Court in its judgement said that preamble is the most precious part of the constitution. It is the soul of the constitution and key to the constitution. It is a jewel set in the constitution. It shows the importance of preamble in the interpretation and understanding of the constitution. The very important case of *Berubari Union* in 1960, in a presidential reference under Article 143(1), was on the implementation of the Indo-Pakistan agreement related to Berubari Union. Article 3 of the Constitution gives power to the parliament to secede or to give any part of the country to a foreign territory. Through this case, the court said that the preamble is key to open the mind of the makers. In a very significant ruling, the supreme court has said that preamble was not a part of the constitution, and it can only help in interpretation of the constitution; but this observation was later changed by an important case called the *Kesavananda Bharati* case in 1973. In this case, the Supreme Court held that preamble is part of the constitution. It is a source of power to understand the constitution and thus it deviated from the *Berubari Union* case stating that it is a very important part of the constitution, and it is one of the basic structures of the constitution.

In the preamble, when we look into the word democratic, a free and fair election is a necessity. Universal adult franchise is adopted by the government where Indian citizens above the age of 18 have the right to vote by means of free and fair elections. The general elections to the central government and to the state government is held once every five years. The responsibility of holding and conducting the elections is of the Election Commission of India. The term of Lok Sabha or the Vidhana Sabha is for five years unless dissolved earlier for many reasons. Here, people send their representatives through elections, which are direct to the Lok Sabha or indirectly to the Rajya Sabha.

Both Lok Sabha and Rajya Sabha constitute the parliament. These members of parliament represent the people. They are the voice of the people. Universal adult franchise means any citizen of India who has attained the year of 18 irrespective of his caste, creed, sex, gender, race or ethnicity has the power or right to cast the vote unless he is disqualified by a legislation in this regard. The age of voting was brought down to 18 from 21 through the 61st Amendment of 1988 thereby making the participation in electoral politics more

inclusive in nature and including more youngsters to be participants in the democratic process.

Most of the provisions of the Indian Constitution are borrowed from the Government of India Act of 1935. We have been following the system of parliamentary democracy which the United Kingdom has been following for many years. Parliamentary democracy means a system of democratic governance where parliament is responsible to the people. Legislature is directly responsible to the people through elections. India governs on the principle of republic form of government where the citizen chooses their representative. Republic means the head of the government is not a monarch or a king or an authority by inheritance. He is elected by the people through an indirect method called representation by means of single transferable vote. The parliament is the highest law-making body in India. In India, the President is the nominal executive and the Prime Minister is the real executive. This is also followed in the parliamentary democracy of the United Kingdom. In the UK, the President becomes the nominal executive but has many constitutional powers, but the real executive is the Prime Minister. Article 74 provides for the Council of ministers headed by the Prime Minister who aids and advises the President in its functions.

Whoever gets the majority, whichever party, or the coalition of the party secures the majority seats in the Lok Sabha and forms the government. The other ministers in the parliament are appointed by the President on the advice of the Prime Minister. This is another important philosophy called Collective Responsibility. The Prime Minister and the Council of Ministers are collectively responsible to the Parliament. The minister who is an executive should also be part of the legislation.

This is another important deviation from the strict principle of separation of powers. The separation of powers theory says that there shall be a strict separation between legislature, executive and judiciary. But in Indian parliamentary democracy there is separation of powers between executive and judiciary but there is no strict separation of powers between legislature and the executive because whoever is a minister should primarily be a member of the parliament, that is either the Lok Sabha or the Rajya Sabha. Ministers are the members of the parliament and the members who are elected to the parliament only can become the ministers. The President dissolves the Lok Sabha on the recommendation of the Prime Minister, So, in principle, the executive has the power to dissolve the legislature.

Another important aspect of India's model of parliamentary democracy is that the executive is responsible to the legislature. The ministers are responsible and answerable to the legislature. They are answerable to the questions posed in the legislature. Even though the Indian Parliament is based on the British model, India has a republican system where the President is elected. Great Britain has a monarchy, and the United Kingdom has an unwritten constitution, but India has the lengthiest written constitution in the world. The difference between the Indian system and the British system lies in the fact that, despite

both countries having republic systems, India has a republic, but the United Kingdom has monarchy. India chose the republic system of government where the head is not a monarch but is elected by the people.

Unlike the limited role of monarch, the President of India has many responsibilities. The written constitution in India specifies the roles and responsibilities of the President. It says that all the power and authority of the sovereign independent India shall vest in the head of the state who is the President of India. In the United Kingdom, the monarchy reigns but he does not rule. The unelected monarch is the head of the nation. He is in a representative role for the sovereign acts of the elected government. His main functions include appointing the Prime Minister and all other ministers. He can open and address the new sessions of Parliament. He gives royal assent to the bills passed by the Parliament signifying that they all have become the law.

After the independence in 1947, India became a member of the Commonwealth. The Commonwealth is a voluntary association of the former colonies of the United Kingdom. After gaining independence they become the members but are sovereign nations. They are mere associations. Article 1 of the constitution gives us a clear picture of what kind of democracy India has. India follows federalism. In federalism, the national government is responsible for the broader governance of the nation while the states are autonomous, having powers to rule the respective provisions in the state. Both the national government and state and the center have the power to make law. The states have a certain level of autonomy and independence in certain areas from each other. But significantly, the national government enjoys certain strong centralizing powers over the local government. And that is the specific reason why India inserted the word 'shall be a union of states.'

The Indian form of federalism is called quasi-federalism because India has a strong central government. For example, the United States has a federal government, but the state's governments have greater autonomy than the central government. However, the framers of the Indian Constitution adopted another version of the federalism where the union and state governments have the powers to make law in their own spheres of administration but significantly the central government has more advantage over law making powers due to the centralizing tendencies or the centralizing characteristics of the union of states and that is why it is called quasi-federalism.

Because India was formed as a federation after the princely states came into the sovereignty of the central government, the physical integrity was absolute and therefore the states have no right to secede from the union. Indian constitution has what is called asymmetrical federalism which means that India has the unitary state with the federal characters. In a very important observation, in the words of Sir Ivor Jennings, 'India is a federation with strong centralizing characters'.

Constitutional Law and Public Administration in India

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Week- 07

Lecture-03

Union & State Legislatures – II

In India the functions of the parliaments are very important and are broadly defined under the legislative functions. The essential function of the legislature is lawmaking either by the central government or by the state government. The next important function is the executive function. India does not have a strict separation of theory between the legislature and the executive and therefore, the executive belongs to the legislature. The financial functions are mostly the budgetary aspects of the government, that is the income and expenditure of the government, the grants given to the states and so on. These form the financial functions. The judicial functions are impeachment proceedings for the supreme court judge, which is in the form of a judicial function. All the powers and functions of the Parliament are derived from the Constitution of India.

The source of power to the legislature whether it is the central government or state government is the Constitution of India. The union legislature as per Article 79 of the Constitution, that is, the Parliament shall consist of the Lok Sabha or house of people and the Rajya Sabha that is the council of states. The Lok Sabha is called the lower house, the Rajya Sabha is called the upper house, and the head of the government is the President. The President has a very important function of providing the legislative aspects and is the executive functionary in the government. The Presidential assent is required for the bills which are passed in Lok Sabha and Rajya Sabha to become an Act or a legislation.

The central legislature consists of two houses and each house must meet within six months of its previous sitting. Since the essential function of the legislature is law making, there shall be a timely sitting between the upper house and the lower house. A joint sitting of two houses can be held in certain states where it requires more discussion and voting. A bill can become an Act or a law or a legislation only when it is passed by both houses of the Parliament by a simple majority or by two-thirds majority which requires it during the amendment. All the subjects in the union list are exclusively for the union legislature to legislate.

The central legislature has its own sphere of law making and the union list provides the areas of law making for the central legislature. In a democracy the term of Parliament is mentioned as five years, it means the term of majority by the ruling party if it obtains the confidence of the parliament. It rules the nation. The Parliament can be dissolved well before five years, or it can rule up to five years. The term of Lok Sabha unless dissolved earlier is five years noticeably from the date of its first meeting.

During the proclamation of emergency, that is national emergency, the term may be extended which is provided in the Parliament for a period not exceeding one year. In any case, not six months after the proclamation has ceased to operate. So, these are the provisions which are made in the Constitution so that, when an emergency is declared the term of emergency must be prescribed. The maximum strength of the Lok Sabha is 550 members inclusive of both union states and the union territories. 30 members represent the states, 20 members represent the union territories.

Previously the two members from the Anglo-Indian community were nominated by the President for the Lok Sabha, but that provision has been removed by a Constitutional amendment in 2020. The representation by the states to the Parliament has been made distributed in a sense that the ratio between the number of states allotted to each state depends upon the population of the state and therefore more populous countries have more representatives in the Parliament and less populous countries have less representatives in the parliament. That is also a matter of debate, as to the representation which has been overtaken by the majority population countries than the states with lesser population. Rajya Sabha is always in a continuous session. It means that it is not dissolved as in Lok Sabha because the members of Rajya Sabha are not elected directly by the people.

The Constitution provides that Rajya Sabha has 250 members. It is not subject to dissolution and one third of its members retire every second year. The term of Rajya Sabha is 6 years. The 12 members from 250 members shall be nominated by the President having special knowledge or experience in respect to the matters of literature, science, art, and social service. Elections to the Rajya Sabha are indirect. It is called the proportional representation by means of single transferable vote. So, this is also followed in the election of the President. Article 52 of the Constitution says that there shall be the President of India who is the executive head of the government. The qualifications to become the President of India is that he must be a citizen and must have completed the age of 35 years.

He should be qualified to be elected to become the member of the house of the people. He must not hold office of profit under the government of India or government of any state for the obvious reason that he shall be unbiased and shall not be dictated by terms other than the Constitution. Article 55 clause 3 of the Indian Constitution specifically talks about the Presidential elections. The system of Presidential election is proportional representation by means of single transferable vote. The voting takes place in a secret ballot system.

Important functions of the President, the legislative function powers of the President are he summons and prorogues the parliament. Whenever a new government is elected the session of the Parliament is conducted by the President. He has the power to summon the parliament. He has the power to dissolve the Lok Sabha only on the aid and advice of the prime minister and the council of ministers. He can summon a joint sitting of Lok Sabha and Rajya Sabha whenever the situation arises.

He addresses the Indian Parliament at the commencement of the first session or every session of the parliament. He nominated 12 members to the Rajya Sabha. He consults the election commission on the disqualification of the members of parliament. The election commission also has a very important role to play along with the President of India in the disqualification of the members. He recommends or permits the introduction of certain types of bills to be made into Acts or legislation. In a very significant feature, the President can also promulgate ordinance when none of the houses either Lok Sabha or Rajya Sabha are in session and there is a situation that a legislation is very pertinent. Under such circumstances the President can promulgate an ordinance. Another important feature of the President's power is Article 111 of the Constitution when a bill is sent for the Presidential assent. He can either reject the bill or return the bill or withhold the bill at his mercy. This is called the veto power of the President. The President cannot exercise the veto power for the money bills.

The President is bound by the Constitution to pass the money bill because the nation runs with the budget and with the income and expenditure which must be smooth flowing in the country, and therefore the veto power cannot be extended to the budgetary provisions or the money bills of the country. He lays the following reports for the parliaments namely, the controller and auditor general report, the union public service reports, the finance commission reports etc. which are few of the reports that is laid before the Parliament under the name of the President. As to the diplomatic powers of the President, the international treaties or agreements approved and assented by the Parliament must have the assent of the President. He represents India in an international forum and affairs.

The President is the commander in chief of the defence forces of India. He appoints the chief of the army, chief of the navy and chief of the air force. Through the Ordinance making power of the President under Article 123, he promulgates an ordinance on the recommendations of the union cabinet and gets the Presidential assent to become an Act. Another major function of the President is the Presidential proclamation of emergency. There are three kinds of emergency in India, one is national emergency under Article 352, President's rule or the state's emergency in Article 356 and the financial emergency in Article 360.

As to the executive powers of the President, the administrative Action by the government that is the Indian government must be taken or undertaken in the name of the President.

The President seeks the administrative information from the union government which is also termed as the aid and advice or otherwise normal administrative information must be provided to the President by the union government. He has the power to declare any area as a scheduled area with respect to the scheduled castes and scheduled tribes. The financial powers of the President to recommend distribution of taxes between the Union and the states.

He introduces the money bill in the parliament. He lays the union budget before the Parliament and demands grants through the finance commissions. He lays the provisions for the contingency fund of India. The President constitutes the finance commission every five years. Though these powers are all nominal it is very pertinent that these powers are exercised under the name of the President. The President also holds judicial powers. He has the powers for the appointment of the chief justice of the Supreme Court or high court judges. He also has the power to seek advice from the Supreme Court.

However, the advice is not binding but there are instances where the advice has been received by the President. He has a pardoning power under Article 72 against the punishment for an offense but is an executive power, and is independent of the judiciary, but does not sit in appeal. So, this is one of the discretionary powers of the President. The Supreme Court in its various decisions has mentioned that even the executive can aid and advise the President on these matters.

The prime minister and the council of ministers who are the real executive of the country also have important functions. The prime minister is appointed by the President from among the members of the party which has secured the highest majority in the general election. This is called the simple majority. In the seat of 550, whoever gets the simple majority, that party or the coalition of parties becomes the government. The prime minister shall hold the office for a term of 5 years or until he enjoys the confidence or the majority in the locus of the party. The Council of ministers is headed by the prime minister, and he aids and advises the President in the exercise of office functions. The council of ministers is collectively responsible to the parliament. This is one of the features that has been inherited from the parliamentary democracy of the United Kingdom. The prime minister communicates to the President all decisions of administration, all decisions of the cabinet, all decisions of the council of ministers and legislations.

The council of ministers comprises cabinet ministers, ministers of state, or the deputy ministers. The state legislature is the same as the central legislature. It has the legislative assembly. Not every state has the legislative council or the upper house. Few states have legislative councils and as the President is prominent in the central legislature. The governor Acts as the Constitutional head in these states.

The government in states resembles that of the union. In Article 168 of the Constitution of India, it says that the state legislature consists of the governor. So, it categorically states that the governor is the executive head of the state. There are two houses in the states of Andhra Pradesh, Bihar, Maharashtra, Karnataka, Tamil Nadu, Telangana, and Uttar Pradesh. Few states have the Vidhan Parishad or the upper house. The Parliament has the power by law for an abolition of the existing legislative council. The Parliament can make the state government either bicameral or a unicameral legislature. It can either have one house called the house of people or the Vidhan Parishad, that is legislative assembly, or it can make bicameral legislature having two houses. The proposal is to be supported by the resolution of the legislative assembly of the concerned state. If any concerned state says that it must have a Vidhana Sabha and Vidhana Parishad bicameral legislature, then it can make a proposal to the central government.

Under the Seventh schedule, the union list, state list and the concurrent list, there are different spheres of legislative making power by the Parliament and the state legislature. The power to create legislative councils in the states is vested with the central government. The governor under the Constitution also has legislative functions, executive functions, and judicial functions. Under Article 153 of the Indian Constitution, there shall be a governor for each state. A person can be appointed as a governor of two or more states when there is a situation, and the necessity demands. The governor of state is appointed by the President for a term of five years, and he holds the office during the pleasure of the President. The qualification to become the governor is that he must be above the age of 35 years, and he is the executive head of the state, and all the powers are vested in the governor. The governor has important Constitutional functions too. Appointment of chief minister is the prime function of the governor. He can send a report to the President about the failure of a Constitutional machinery in a state and recommend the governor's rule in the state as it has happened in the various states and the various decisions by the supreme court have laid down certain principles to be followed by the governor to recommend the governor's rule in states. The decisions of the supreme court are binding on the governor. On the matters relating to the assent of the bill passed by the legislature, the governor has the powers to send it to the President for his assent. As the prime minister and the council of ministers for the Union, the states also have the chief minister and the council of ministers. The term of the assembly is five years unless it is dissolved earlier for various other reasons. The council of ministers is collectively responsible to the legislative assembly of the state.

The chief minister is appointed by the governor and the governor appoints the other ministers on the aid and advice of the chief minister. So, the function of aid and advice is a very prominent function by the executive to the governor. The powers and functions of the governors during the state emergency or what is called as the governor's rule is a very important aspect of the state governance. The governor's rule forms a major centralizing tendency of the Indian parliamentary system where during the governor's rule of the state,

the central government rules the state government and all the law-making areas in the state list can be made by the Indian government.

It is relevant to understand the process of law making in the Parliament or in the state legislatures. All the legislative proposals must be brought in the form of a bill before it becomes an Act. Because the basic function of the Parliament is to make law or legislation, it becomes the law only after approval of both houses of the Parliament and then the assent of the President of India. Now if we look into the important steps, the bill is first introduced either in Lok Sabha or Rajya Sabha depending upon the nature of the bill. It must be approved in both houses of the Parliament depending upon the nature of the bill.

Then it goes to the President for his assent. After the Presidential assent, it goes into the gazette notification and after a gazette notification, it becomes an Act or a legislation. Now we understand that the bill must be introduced in any of the houses. The decision of the speaker cannot be questioned in any court of law and the speaker can certify any bill whether it is money bill or a financial bill or bills any other than the money bill. This is a significant feature because whichever the origin of the house depends upon the nature of the bill. A bill when it is laid down in the parliament, passes through different stages. It is called the first reading, the second reading and the third reading. This is a very important function of the Parliament where the deliberation for the bill takes place and all the members of the parliament, ideally participate in the discussions of the Parliament regarding the bill for any suggestions, amendments, or any criticisms of the government.

The money bill sent to Rajya Sabha has to be sent to Lok Sabha within 14 days with or without recommendations, but the Rajya Sabha do not have much powers in the money bill as that money bill is the sole and the primary authority of the legislation and this is why the decision of the speaker becomes more important and it cannot be questioned in any court of law. He can decide what is the nature of the bill whether it is money bill or any bill other than the money bill. Now Article 110 of the Constitution defines what is a money bill.

A money bill can be introduced in Lok Sabha only in Lok Sabha. It must be passed by a simple majority of all the members present and voting in the Lok Sabha. After passing from the Lok Sabha, it goes to the Rajya Sabha for its recommendations. The Rajya Sabha can withhold the bill for a period of 14 days. It can make certain suggestions and return the bill to the Lok Sabha. The Lok Sabha has the authority to accept the suggestions or reject the suggestion and then when the Rajya Sabha sends the bill for its reconsideration the Lok Sabha has the absolute authority to decide on it and therefore after the recommendations sent to the Rajya Sabha whether the Lok Sabha accepts the recommendations or suggestions from Rajya Sabha it is sent back.

The Lok Sabha is the authority to accept the recommendations or suggestions and return the bill within a time of 14 days. The government nature of money bills is that all money bills are finance bills, but all finance bills are not money bills. A Finance bill is regarding the financial management of the country. It deals with the government taxes, government expenditures, government borrowings, revenues, etc. The annual financial statement called the budget deals with the financial planning of the government and is passed as a finance bill. The finance bill is introduced in the Lok Sabha and is passed by the parliament. After the assent of the President, it becomes the finance Act. Article 117 talks about the finance bill. A financial bill deals only with financial matters, but it is different from the money bills. Financial bills contain provisions that are pertaining to the taxation and expenditure in addition contain law relating to the other matters. The financial bill does not require prior recommendation by the President to be laid down in the parliament. It can be introduced only in the Lok Sabha. The Rajya Sabha has complete authority to reject or amend the bill as it does with the ordinary bill. The bill must be passed within 75 days of its introduction. The Indian Constitution of Article 117 clause 1 and 117 clause 3 talks about the finance bill. And that is where the nature of the bill assumes a very important role in the Parliament whether it is a money bill, finance bill or any bill other than the money bill. Now, there are bills other than the finance bill. An ordinary bill may be introduced in either house of the parliament. It must be passed by both houses by a simple majority. Article 107 and 108 of the Constitution explains what ordinary bills are. Any bill that is inherently not related to financial matters is an ordinary bill. And therefore, the role of speaker has a lot of significance in such situations.

It is the speaker of the Lok Sabha who has the authority to certify a bill as a money bill. The Constitution states that if any question arises whether a bill is a money bill or not, the decision of the speaker of the house of the people shall be final and this cannot be questioned in any court of law, or this question cannot be a subject matter of judicial review. Article 110 clause 3 of the Constitution categorically states its power. Money bills are legislations for in an example of money bills. The money bill for making Aadhaar. The Aadhaar Act of 2016 was taken to the supreme court for its categorization of money bills. In this case the lower house rejected the suggestions of the upper house, and the bill was certified as a money bill by the speaker. There was resistance since the upper house does not have any power in the money bill, and the Rajya Sabha wanted certain amendments to the Aadhaar Act. This case was pertaining to *Jairam Ramesh v. Union of India* where the question arose as whether the speaker was right in his function to declare Aadhaar Act as the money bill.

Coming to the law-making procedure, as to the passing of the bill there must be an adequate quorum in the house, that is the adequate number of members of Parliament must be present in the house. It is a duty of the presiding officer to either adjourn or suspend the meeting if the adequate quorum is not present. Because the law making requires passing of the bill

either through a simple majority or through two thirds majority and therefore an adequate number of people representation must be there in the parliament. After the bill is passed by the respective houses it is sent to the other house.

The nature of the bill decides the house in which it originates. If it is a money bill it must be only in the Lok Sabha. If it is any other bill, it can be in the Rajya Sabha and therefore when once it is passed in one house it must be sent for discussion in the other house. If there is any recommendation or amendment by the other house it is sent back to the house from where it originated for consideration. In case of a deadlock between two houses the President or the governor can summon the joint session of the Parliament where it is presided by the speaker to resolve by the simple majority.

Now when there is a joint session of the Parliament the voting is always a simple majority. For example, in the cases of dowry prohibition Act of 1961, the prevention of terrorism Act of 2002 joint sessions were held to resume the functioning of the Parliament for this bill. The assent of the President and governor is very important to make it a law. As per Article 111 the bill after consideration of the Parliament is sent to the President for his assent. Under Article 200 the governor is the Constitutional authority to give his assent for the bills to be passed as an Act.

However, Article 255 states that the prior recommendations by the President or the governor wherever stipulated is not compulsory for an Act of Parliament or the state legislation but the consent of the President or governor is mandatory. Certain functions of the governor and President require the recommendations by them to be laid down in the Parliament but not in all cases. But in certain circumstances where it is laid down by the President it is also important that the final consent of the President or governor is mandatory. In all legislations in all bills to be passed like Acts or legislation even though the prior recommendation is not compulsory the final consent is compulsory by the President or the governor. It is a mandatory Constitutional requirement. When the President or the Governor is convinced that the bill violates any Article of the Constitution it can be returned to the house for consideration. If the bill is assented to then it gets published in the official Gazette of India and it becomes an Act. Sometimes in the state legislatures the governor may refer the bill to the President anticipating clash between the central law or the Constitution and the decision of the President is final as per Article 200 and 201. So, there are many such instances where the provisions of certain state legislatures have been recommended to the President by the governor for its essence which involves the national interest.

The law-making procedure in the case of a finance bill which deals only with financial matters is technically different from the money bill. It has the provisions of taxation, expenditures and in addition contains any other matters relating to finance. So, the finance bill does not require a prior recommendation by the President, or the governor and it can

be introduced only in Lok Sabha. The Rajya Sabha has complete authority to amend or reject the bill as it can be the ordinary bill.

The bill must be passed within 75 days of its introduction. Whereas a money bill is a provision related to tax on government expenditures from the consolidated fund of India and this type of bill can only be introduced in Lok Sabha or lower house on the recommendations of the President or the parliament. A money bill introduced in Lok Sabha is passed to the Rajya Sabha after it is passed in Lok Sabha. The Rajya Sabha does not have any power to amend the bill. A money bill should be returned to the Lok Sabha within 14 days of its passing to the Rajya Sabha if not the bill shall be considered as passed in Rajya Sabha. After deliberation it can be sent to Lok Sabha by the Rajya Sabha, but the Lok Sabha is not bound to make changes and after the bill is sent back to Rajya Sabha it must accept the bill as it is.

So, it clearly shows that Rajya Sabha has no powers in case of money bills and the Lok Sabha is the supreme authority in case of money bills. A similar procedure is found in the state legislature of where bicameralism is followed in the states. Now what are the sessions and functions of the Parliament and state legislature? Under the Constitutional scheme of the Indian legislature for a bill to be enacted as law, both houses of the Parliament must pass it. In the state legislature both houses wherever bicameralism is present must pass it. Now schedule 7 of the Constitution divides the subject matter of the state's law-making power between the state and the centre.

The law-making process is divided into various categories. It starts from the research. Any Act before becoming an Act or a legislation must have complete research and drafting of the bill by the respective ministry and must be introduced in the house for discussion and vote. Each member of the respective house is expected to take part in the discussion of the bill, make changes through debate and pass it by voting. A debate is an essential quality of the Parliament and every member irrespective of the party to which they belong they must debate and pass the bill. The bill becomes a law when it is assented to by the President or the governor. Now there is also something called a pre-drafting phase. The very first step towards formulating a policy is a pre-drafting phase where the legislatures recognize the areas where the legislation is required, or a problem is to be solved. This can be through survey investigations or opinions of the citizens or the pressure groups. So, all these considerations will be taken and then they will be made into a bill having certain recommendations from various peers.

The minister who oversees the ministry initiates a plan on behalf of the government. A draft bill is published in the public domain for consideration whenever whether it is a policy or an Act to be made the government or the concerned ministry publishes the draft bill for public consultation in the public domain. A pre-legislative consultation means the draft of the bill is published before it is introduced in the Lok Sabha or the state legislation so that

the public can interact with the government. This procedure was introduced in the year 2014. It was based on the recommendations of the National Advisory Council of in 2013 and National Commission to review the working of the Constitution. As to the lawmaking procedure the Ministry of Law and Justice has made a provision for every ministry to publish the draft of the bill where the reasons for the introduction of such a bill, the financial requirements and explanation of the terms in simple language must be made by the concerned ministry.

Though this is not mandatory, the procedure prescribes that it is required as a matter of public consultation. The publication is supposed to be open for 30 days and accept the feedback and opinions from the public, especially the relevant stakeholders. After collecting the feedback, the ministry examines the socio-economic-political implications and takes suggestions from different departments including the Attorney General's advocate generals and other experts. Now the Constitutional aspects of the bill and every other aspect of the bill is to be examined and studied with the help of the Ministry of Law and Justice.

So, all these changes suggestions are submitted to the cabinet. An important example of the pre legislative consultation is the biodiversity amendment bill which was made into Act in 2023. It had a pre legislative consultation because of the nature of activity involved. Also, the wildlife protection amendment bill of 2022, the transgender rights bill of 2016, the Karnataka police bill of 2011, the freedom of information bill of 2004 which was passed as an RTI Act all had the pre legislative consultations. The cabinet forms a major role in the law-making procedures when the cabinet discusses the need for the policy proposed by the minister involved. It approves in the cabinet what is called the cabinet decision. After the bill has been approved by the various experts it is sent into the administrative ministry. The origin of the house of the bill is important if it is a money bill it is only introduced in Lok Sabha, if it is any other bill in the Rajya Sabha. So, the legislative council of the states wherever has a bicameral legislature also follows the same procedure.

The Ministry of Parliamentary affairs has the authority to decide when a bill is to be introduced in the parliament, that is it takes note of such bills which is money bill or any other bill, but this function is different from that of the authority of the speaker who decides the nature of the bill. The cabinet committees are formed, and they are all the extra Constitutional bodies which facilitate the examination of any policy related to the coordination of the different ministries. In 1861 the first cabinet committee was formed as an Indian council which introduced a portfolio system and established the executive council of governor general. Looking into the history this was renamed as cabinet secretariat and the executive council was called the cabinet secretary.

So, these are all under the cabinet secretariat government of India business rules of 1961 secretarial assistance to cabinet and cabinet committees' rules of businesses. These are all

the rules which the cabinet committees follow. The different cabinet committees prevalent in India are the standing committee and the ad hoc committee. The standing committee is a permanent committee where many of the bills have been discussed and an ad hoc committee is one which is constituted for a specific purpose only. The ad hoc committees are constituted from time to time and dissolved after fulfilling their objectives whereas the standing committees are permanent bodies. The membership of these committees varies from 3 to 8 or has different numbers of members. They are usually headed by the prime minister and include other than those that require technical knowledge.

The different cabinet committees are:

- a. Cabinet Committees on Economic Affairs (this is a standing committee; it's a permanent committee)
- b. Cabinet Committee on Parliamentary Affairs
- c. Cabinet Committee on Political Affairs
- d. Cabinet Committee on Security
- e. Cabinet Committee on Investments
- f. Cabinet Committee on Employment, Skill and Development etc.

The political affairs committee deals with the domestic and foreign policies, and this is the cabinet committee which decides on the areas of foreign policies, political affairs, and domestic affairs in the matters of politics. Appointments committees make decisions on the higher-level appointments like the office of the secretariat, public enterprises sectors, banks and other financial institutions.

The parliamentary affairs committee manages the government business within the parliament. The economic affairs committee directs the government's influence and coordination. The main function of the cabinet committee is to resolve the challenges that may be faced during the formulation of the policy or the Act. So, it is understood very well that the law-making power is a sovereign power of the government whether it is the central legislature, or the state legislature and it is called the inherent Constitutional powers to make the legislation.

Constitutional Law and Public Administration in India

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Week- 08

Lecture-01

Union Executive

In India, there are three organs of the government. The legislature, the executive, and the judiciary. In a layman's understanding, the legislature is responsible for making the laws of the state. Once the laws are made by the state, the executive is responsible for implementing the laws framed by the legislature. The Indian judiciary safeguards the laws that have been made by the legislature. The Indian judiciary takes care of the interpretation and the adjudication of the law. And therefore, it is also known as the guardian to the Indian Constitution.

But, these three organs do not have a complete watertight compartment in the government setup. The three organs, though different, come together in certain circumstances, while their duties are being delivered to the citizens of the country. Article 52 of the Indian Constitution tells us who all are covered under this union executive. The first is the President of India, then we have the Vice President of India, and then we have the Council of Ministers with the Prime Minister as the head which aids and advises the President on various matters in which the President seeks clarification.

The executive also extends to the officers of the Government of India, to the officers of the state government, and who are in the various roles to execute the policies of the government to execute the various instances of the Government of India at various levels. These are primarily the face of the executive, but the entire body of the executive runs through all the officers that are there in the Government of India, who are carrying out the duty on behalf of these people to serve the citizens of our country. It is well understood that earlier states used to be a police state, and therefore the only function of the executive was to implement laws.

How is the executive relevant in the contemporary era? When we need to answer this question, we need to understand that the executive in the initial days was only confined to a few things, that it only had the police function, and therefore it was known as the police state. But in the present time, the notion of state has changed from police state to a welfare state and the function of the executive has also changed. Today, India is not only a police state,

it is a welfare state. India does not only take care of the law and order, however, it also takes care of the needs of the people in order to provide them a good environment, clean drinking water, various kinds of facilities, we take up the road transport, we take up the metro transport in various cities, railways, aeroplanes, or aircrafts, airports, these are some things that the state is developing for the welfare of the citizens, and therefore it has shifted from a police state to an executive state. So while answering a question like this, we need to mention what it was, how a police state is different from an executive state, and this difference needs to be brought into light. And today, the function of the executive is not only limited to the implementation of laws, but it can also make laws.

It runs an administration of the state also, and it also performs judicial functions. how does it do it? And how does it make a law? There is something called an ordinance that can be made under the constitution of India. Ordinances are not made by the legislators, ordinances are generally made by officers of the government, because they need to tackle some law-and-order situation, or they need to implement some scheme at an immediate time. For instance, there is a natural disaster, and the natural disaster requires a very quick response, and the quick response requires an ordinance to be passed. , it is quite impossible to assemble all the members of the legislative assembly or the Indian parliament together to pass a law.

Therefore, that officer will pass an ordinance that is required to undertake or to bring in control of the scenario that has arisen. So, in this manner, the executive also plays the role of framing a law. , that is a different thing that this ordinance needs to be passed by the legislature. But in a sense, there are no watertight compartments. So, the executive, the legislature and the judiciary, go hand in hand while rendering the services for the citizens of this country.

They also adopt and serve in the judicial functions of the country. Let's see this with an example of an IAS officer. A district collector also holds the charge of the district magistrates in some districts in India. So, the district magistrate also becomes a judicial authority in which he hears the grievances of the people, on various issues. For example, in a few districts in Orissa, there is the sub collector who is the first authority to hear a dispute arising out of a revenue matter.

If a land has been grabbed by some land mafias in a mala fide intent or in the bad spirit of law, the first appeal or the first case that will be filed will be before the tehsildar. And whatever order the tehsildar passes will then come before the sub collector and the sub collector, mind you, is an IAS officer. So, the sub-collector will discharge the duty as a judicial officer and then will say how this matter is bad in law or not bad in law when both the parties will appear before the revenue court. And after the sub collector's judgment, the matter will go to a revenue court. So, therefore, this is how the intricate web of executives is there in our country.

Coming to the union executive with the President. The President has dual functions, and the President is also the commander in chief of India's defence forces. The President is the titular head of the executive and all the executive function of the state is taken on his name. Therefore, all the contracts that are entered by the government will be entered on behalf of the President of India by the representative of the Presidents.

And he is also a crucial part in the legislative making or in the legislative process of the country. No bill that has been drafted and has been debated and finally approved by the legislature can become an act without the assent of the parliament or without the assent of the President of India. So, once the parliament passes the bill, once the bill has been passed by the parliament by both the houses of the parliament, it is the President who will eventually sign. Recent three bills that have been included that will be replacing the Indian Penal Code, the Criminal Procedure Code and the Evidence Act, all these three bills, all these three acts that are currently being replaced with the Nyaya Sanhita bills and which have become a law are something that has been given an assent, which has been signed by the President of India.

In the landmark case of *Ram Jawaya Kapoor v State of Punjab*, the Supreme Court held that the executive functions comprise the whole corpus of authority to govern other than that which is involved in the legislative functions of parliament and the judicial functions of the courts. In simple terms, it means that an executive function is one which is other than legislative and judicial functions. Please note, even in the Indian parliament, there is an executive function going on. When you see the Indian parliament, there will be a table just below where the speaker sits and that is where the bureaucrats sit. They take a note of all the proceedings that happen in the house.

They take a note of all the debates that are governed or that are shared in the house, the different kinds of debates and ideas, ideologies, the criticism, the presentation of every bill, everything is categorically noted down by the bureaucrats who sit there and this is also an executive function that happens in the legislative house of the Indian parliament. As it is mentioned in this case law, everything that takes place in a court of law as well. Other than the judge passing the judgment, the procedure involved in the court of law, wherein an application is filed and the same is passed by the registry, the registry will approve it. Everything will be termed as an executive function. So, with this, let us see the President's role and the qualifications to become the President of India.

Only a citizen of India can be the President of India and if one intends to be a President of India, he, his or her age must not be less than 35 years and he must be qualified as an MP or an MLA to be a member of the Lok Sabha. , these are the only criteria that are required to be a President of India and even a normal citizen like you and I, once we cross the age of 35 years and if we are an Indian citizen and we qualify to be a member of either house of the parliament, we can put in our application to be the President of India. In a quick

trivia, after Pranab Mukherjee's tenure got over, some 27,000 applications were sent to the Rashtrapati Bhavan as applicants to be the President of India. More so, even a rickshaw waala had put in an application to become the President of India.

So, these are the only three criteria that are required to be the President of India. The term of the office of the President is five years and he is eligible for re-election and therefore Rajendra Prasad was re-elected as the President of India. His removal from office is to be in accordance with the procedure prescribed under Article 61 of the Constitution of India and he may by writing under his hand, give it to the Vice-President his resignation.

So, this is with regards to who can become a President, what is his term of office, his eligibility and how is he to be removed and on his own will, yes, he can be removed if he puts the resignation to the Vice-President of India in writing under his own hand. And the President of India is elected by the members who are members of an electoral college. Who are the members of this electoral college? They are first elected members of both houses of parliament that is Lok Sabha and Rajya Sabha and legislative assemblies of the state. It is legislative assemblies because some states have a legislative assembly and they also have the upper house, Vidhan Sabha, and Vidhan Parishad; and in accordance with the system of proportional representation by means of a single transferable vote, all these people they put in votes in a ballot box and then they are counted.

Political parties also back Presidential candidates and that is why most of the applications get rejected and only a few eventually come to be the President of India in the election, in the final elections. So, all members of both the houses of the parliament of all the state legislatures, it can be of the legislative assembly or the legislative council, all of them will put one vote each and whoever wins will become the President of India. And to secure uniformity among the state inter-se as well as the parity between the states as a whole, suitable weightage is given to each vote that means every MP MLA or a member of the Rajya Sabha or a legislative council or that we say the Vidhan Parishad has only one value in the vote that is casted by them. So, this is with regards to the qualification of the President, who can be the President, how the resignation works, who can vote for the President of India and how is the voting system to be elected as the President of India.

What are the powers of the executive? Article 53 of the Indian Constitution, it categorically states the executive power of the union is vested in the President and is exercised by him either directly or through officer's subordinate to him in accordance with the constitution. He is also the supreme commander of the defence forces of the union that also vests with him. So, whenever there is a war that needs to be declared, the same needs to be declared in the name of the President or the President needs to declare that India shall be going to war. The President can promulgate ordinances when both houses of parliament are not in session. Ordinances are laws that needs to be brought into place to tackle a particular

scenario. The President can also make recommendations for introducing financial and money bills and give assent to bills.

Every bill before becoming an Act needs to be signed by the President of India. The President can grant pardons to some prisoners if they bring in an application before the President, reprise, respite or remission of punishment or suspense and remits or commutes sentences in certain cases. And under Article 75, the prime minister also shall be appointed by the President and other ministers shall be appointed by the President on the advice of the prime minister. Therefore, whenever we see a new government taking over, it is the President who reads out the oath first, then the prime minister reads out and then the prime minister gives a list to the President that these will be the council of ministers in my cabinet and then the President calls upon each of the minister to take an oath that is solemnly served by the President of India.

When there is a failure of the constitutional machinery in a state, the President can assume to himself all or any of the functions of the government of that state. How does the President function as a lone power when the constitutional machinery of a state goes into turmoil? There are cabinet secretaries, there are officers in the Indian administrative service and various services and these officers who are the permanent executives, they come and aid the President of India. There are two kinds of executives as well, the temporary executive and the permanent executive. Every political leader is a temporary executive and IAS officer, or a government servant is a permanent executive. So, a permanent executive will come in the aid and assistance of the President of India in case of a constitutional machinery failure.

The President can proclaim emergency in the country if he or she is satisfied that a grave emergency exists whereby security of India or any part of its territory is threatened whether by law or external aggression or armed rebellion. The President can declare an emergency on the written aid and advice by the council of ministers. While we have seen this case, please note in *Ram Jawaya Kapoor* case, the Supreme Court held that though the executive power is vested with the President, he is only a formal or a constitutional head of the executive. The real power is vested in the council of ministers on whose aid and advice the President exercises his function. And in the case of *UNR Rao versus Indira Gandhi* in 1971, the Supreme Court held that the harmonious reading of articles 74(1), 75(2) and 75(3) is that the President must exercise his powers on the aid and advice of the council of ministers.

Does this mean that the President does not have any real power? Well, the answer can be a no and a yes. When we had Giani Zail Singh as the President of India, he had exercised pocket veto. When a bill is sent to the President of India, he is bound to sign that bill to become an Act. But what if the President does not like the contents of the draft bill? He can send it back to the legislature to be reconsidered. However, there is a power vested

with the President of India that if he does not like a particular bill, he can reserve that particular bill and keep it within himself, that is pocket veto in a sense or in literal terms, it means he will take the bill and keep it in his pocket and he will not give his assent and no one can force him to give his assent. So this is a power that is vested with the President of India and Giani Zail Singh had done this with the post office bill when it was introduced way back then.

Coming to the second most important executive in terms of ranks in the Indian government which is the Vice President of India. The Vice President is elected by an electoral college representing or consisting members of both houses of parliament in accordance with the system of proportional representation by means of a single transferable vote. The criteria are: he must also be a citizen of India not less than 35 years of age and eligible for election as a member of the Rajya Sabha. His term of office is five years, and he is also eligible for reelection. His removal from office needs to be in accordance with the procedure prescribed in article 67B. The Vice President is also the ex-officio chairman of the Rajya Sabha and acts as the President when the latter is unable to discharge his functions due to absence, illness, or any other cause or till the election of a new President to be held within six months when a vacancy is caused by death, resignation, or removal or otherwise of the President of India. While acting so, he ceases to perform the function of the chairman of the Rajya Sabha. And the eldest MP becomes the chairman of the Rajya Sabha in such a scenario.

There's only one person in the history of India who has served three positions. that is the President of India, the Vice President and the Chief Justice of the Supreme Court, Justice Hidayatullah. In case the President dies without a Vice President in office, the Chief Justice assumes the charge of the President of India and if the Chief Justice is not there, the acting Chief Justice or the senior most charge of the Supreme Court becomes the President of India. With this, we come to Article 74 of the Indian Constitution, that is the spirit of the executive in India. There is a council of ministers headed by the prime minister to aid and advise the President in the exercise of his functions.

The prime minister is appointed by the President who appoints other ministers on the advice of the prime minister and the council is collectively responsible to the Lok Sabha. It is the duty of the prime minister to communicate to the President all decisions of the council of ministers relating to administration of affairs of the union and proposals for legislation and information relating to them. The council of ministers comprises ministers who are members of the cabinet, ministers of state and independent charge and ministers of state and deputy ministers. So, all these people will be the cabinet ministers and they are the part of the executive. Is it so that the executive can do whatever and they will not be liable? No, the executive shall be liable for their acts.

Under Article 75(3), which is collective responsibility, it means that the council of ministers are responsible to the house of the people, that is the Lok Sabha, not as individuals but as collective ministers. The principle of collective responsibility is both the cause and effect of the cabinet functioning, which means that the cabinet decisions bind all cabinet ministers irrespective of their opinions and ideologies. And under Article 75(3), the principle of collective responsibility applies only when the house of people is in existence and not when it is dissolved or procured. In the year 1998 or 1997, when Atal Bihari Vajpayee was the Prime Minister of India, he had given a speech that his government failed to secure the majority by a mere one vote and therefore they had to leave, his entire government must resign. This is collective responsibility.

When your government loses the faith of the people, of the house of the people, you must resign. And then we have the emergency provision, which is quite unique. We have taken the emergency provision from the Constitution of Germany. Part XVII of the Constitution of India from Articles 352 to 360 deals with the emergency provisions. The Constitution envisages three types of emergencies.

First is a national emergency. Second is a state emergency and the third is a financial emergency. The former two have been implemented. The second, the state emergency has been implemented numerous times by various states, which is also called the failure of the constitutional machinery in a state, wherein the governor takes charge of the functioning of a state from the chief minister and the MLAs of that state. Mr. Manmohan Singh, as finance minister who was led by the Prime Minister P V Narasimha Rao, was on the verge of a financial emergency, but he sold or he kept the Indian gold in reserve and secured the Indian finances.

So, we have never had a financial emergency. We have only had a national emergency once during the tenure of Indira Gandhi, when she had imposed a nationwide emergency. The emergency provisions are under Article 352 of the Constitution, which talks about the proclamation of emergency. And under Article 352, one, if the President is satisfied that a grave emergency exists, whereby the security of India or any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he can proclaim a declaration to that effect to the whole or any part of India. The word external aggression has been added, armed rebellion has been added. The proclamation shall be issued only when a written communication for the same is conveyed by the President, by the union cabinet, that is the Prime Minister and other ministers of the cabinet.

The President cannot on his own proclaim an emergency. With regards to the state emergency, Article 355 imposes a twofold duty on the centre to protect every state against external aggression and internal disturbance, and to ensure that the government of every state is carried on in accordance with the provisions of the Constitution. And under Article 356, one, if the President on receipt of a report from the governor of a state or otherwise is

satisfied that a situation has arisen in which the government of a state cannot be carried out in accordance with the provisions of this Constitution, he may proclaim a state emergency.

So, the governor of a state writes to the President and then a state emergency is imposed on a particular state. In the northeast, especially Meghalaya is one of the states where this, the President's role has been imposed in quite a lot of time, wherein the governor takes charge along with the bureaucrats or the chief secretary in that state. And recently, this has happened in the state of Maharashtra. The governor plays a very critical role during his tenure, that is, he writes a report to the President, he or she writes a report to the President of India every fortnight, that is every 14 days, updating the President as to how the state. In the *ADM Jabalpur* case, the Supreme Court said during the national emergency that certain fundamental rights stand suspended like the writs of habeas corpus. There was only one judge, Justice H.R. Khanna, who said that this right or this fundamental right cannot be taken away from individuals.

And in the year 1975, the PM declared a national emergency under Article 352, suspending fundamental rights of Article 14, 19 and 21. The SC upheld the suspension of fundamental rights, but the only judge to give a dissenting opinion was Justice H.R. Khanna. And the Supreme Court in *Puttaswamy* case overruled the *ADM Jabalpur* case and upheld the fundamental rights. So what Justice H.R. Khanna in 1975 was reversed somewhere after the 2020s. In *S.R. Bommai v. Union of India*, a landmark case in matters of proclamation of state emergency in which the Karnataka High Court held that the Presidential proclamation of state emergency is justifiable in the court of law.

And in this case, it is the matter of the governor's rule. So, if the state machinery fails to function the governor can take over. Financial emergency, 360, financial emergency, hasn't been imposed or proclaimed in India till date. Article 123 of Part V of the Constitution deals with the legislative powers of the President and talks about the President's power to promulgate ordinances during recess of parliament. So when both houses of the parliament are not in session, and if the President is satisfied that circumstances exist which rendered necessary for him to take immediate action, he may promulgate an ordinance.

An ordinance promulgated under this article shall have the same force that an Act of the parliament, but it ceases to have force of the expiration of six weeks from the date of the reassembly of the parliament. Executive privilege, being the head of the state, the President at the centre and the governor at the state enjoy quite a lot of privileges. And Article 361 talks about these privileges and is observed as the President is not answerable to any court for exercise and performance of the powers and duties of his office or any act done or purporting to be done in exercise and performance of those powers and duties. So, a President cannot be summoned by any court and no criminal proceedings whatsoever can be instituted or continued against the President or the Governor of a state in any court

during his term of office. Once he admits his office, the proceedings can be initiated again. And no process for the arrest or imprisonment of the President or Governor shall be issued from any court during his term of office. So, no court can summon the President or the Governor. That is the role of the union executive

Constitutional Law and Public Administration in India

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Week- 08

Lecture-02

State Executive

Speaking of State Executive, India has a parliamentary system of governance at the centre, and a similar structure has been envisaged by the constitution for the states as well. The state executive comprises four actors: the Governor, the Chief Minister, council of ministers and the Advocate General. So, the provisions related to state executive are contained in part VI of the constitution and the relevant articles are articles 153 to 167.

Article 153 says that there shall be a Governor for each state. The Governor is the executive head of the state like the president is, in the case of the union executive. At the Centre, in addition to the President there is also a post of Vice President. When it comes to the state executive, there is no such post such as vice Governor. There is only one post of Governor. The Seventh Constitutional Amendment of 1956 made it possible to appoint the same person as the Governor of two or more states. E.g., the same person can be appointed as the Governor of Karnataka, as well as the Governor of Rajasthan along with being the Governor of Orissa.

What makes the Governor's post special is that he is not elected directly or indirectly. Rather, he is appointed by the president under article 155. So, this might lead to a certain assumption that since he is appointed by the president, he is employed by the central government. That would be a wrong assumption. Just because he is appointed by the president, he is not an employee of the central government and this has been clarified by the court in the case of *Hargovind Pant v. Raghukul Tilak*, which is a 1979 case. So, the post of Governor is an independent constitutional office.

It is not subordinate to the central government. So, in the draft constitution, the makers wanted the Governor to be an elected official. However, there were certain reservations about the same. Why is there a post of Governor? Because we need an impartial head in the state. So, if the Governor is also an elected official, which means that he will have a party affiliation, which automatically makes him not impartial. Secondly, there is already an elected head in the state, which is the Chief Minister. If you have another elected head, that could lead to a lot of clashes. Thirdly, it does not make much sense to spend public

money on the election of an executive nominal head. These were some of the reservations that were there with respect to making the Governor an elected official. So, we discarded the American system wherein, Governors were directly elected by the people and instead, adopted the Canadian system where the Governor of a province is appointed by the Governor general.

As to the qualifications of Governor, there are no educational qualifications mentioned, whether he should have a certain level of education or done this degree. Only two things are mentioned. He should be a citizen of India and he should be above 35 years of age. Certain other conditions mentioned are that he should not be a member of parliament or any state legislative assembly or any state legislative council; and he should not hold any office of profit. What amounts to office of profit is something that the central government and the state governments can decide from time to time. Essentially, the Governor should be not having any other sort of a commitment. His only commitment should be towards the state or the states that he is appointed as a Governor for. And the emoluments, the allowances and the privileges of a Governor is decided by the Parliament. If he is appointed as a Governor for two or more states, then all his expenses will be distributed among these states.

There are certain conventions followed while appointing the Governor. Conventions are general practices which are followed and are not provided under the constitution. The first is that, usually an outsider is appointed as the Governor which means if a Governor is to be appointed in the state of Kerala, usually someone who is not from Kerala will be appointed as the Governor of Kerala. This is to ensure that such person will be free from any influence of local politics. Secondly, the president usually consults the Chief Minister before appointing the Governor.

A person who is appointed as a Governor of a state will not be liable for any decisions taken in his name. And very importantly, he can claim immunity from criminal proceedings. This does not mean that a Governor can commit any kind of a crime and get away with it. It only means that if he is in office, if he is holding the post of a Governor, no criminal proceedings can be initiated against such a person. In such a case, what can be done are: Firstly, he will have to be removed from the office, that is from the post of Governor, then criminal proceedings can be initiated against him. If there is an accusation of murder against a Governor, this is a procedure that must be followed. But there is no such bar with respect to civil proceedings. Hence, even while a person is in office as a Governor, civil proceedings can be initiated against him, but he can claim criminal immunity from criminal proceedings during his term.

The provisions as to the term of a Governor is provided under Article 156. A Governor is appointed for a period of 5 years. However, this is subject to the pleasure of the president. This phrase, the pleasure of the president, is important and means that the president has the

power to remove a person appointed as a Governor at any given time without giving or without providing any reasons for doing so, which becomes a matter of controversy. This is because the president, once he is elected as the president, is bound to act on the aid and advice of the council of ministers under Article 74. So, in effect, it is a central government that is appointing and removing Governors. It is not like the president himself is taking such decisions. It is always on the aid and advice of the council of ministers.

In 1989, when the National Front government led by VP Singh came to power, then President R. Venkataraman sent a message to all the Governors back then asking for their resignations. Later in 1991, when the Narasimha Rao government came into power, they removed several Governors appointed by the VP Singh government. So, the Supreme Court in *BP Singhal v. Union of India*, which was a petition challenging the removal of four Governors from Uttar Pradesh, Gujarat, Haryana, and Goa, observed that the president in effect, the central government has the power to remove a Governor at any time without giving any reason and even without providing this person or granting this person an opportunity to be heard. There is no such condition laid down by the constitution that before removing a person who was appointed as a Governor, an opportunity shall be granted to such person to make a case as to why he should not be removed. If the president says so, the Governor shall be removed. That is the procedure. However, the court has observed that this power cannot be exercised in an arbitrary, capricious, or unreasonable manner. The power of removing Governors should only be exercised in rare and exceptional circumstances for valid and compelling reasons. So, even though the president is not required to provide any reason for his decision of removing a particular Governor, it shall not be unreasonable. It shall only be exercised in rare and exceptional circumstances only when there is a valid and compelling reason to do so. And the court also observed that, just because a Governor is at variance with policies and ideologies of the central government, just because the Governor, might have a different political lineage or he is leaning towards a different kind of a political party or an ideology, a person shall not be removed from the post of Governor.

So, a change in central government is not a sufficient ground for removal of Governors is what the court has observed in this case. Several commissions over the years have also tried to bring a change to this particular provision, to bring more accountability, to bring more stability to the post of Governor. So, the Sarkaria Commission of 1988 recommended that the Governor must not be removed before the completion of their five-year tenure, except in rare and compelling circumstances. The Venkatachaliah Commission of 2002 similarly recommended that ordinarily Governors should be allowed to complete their five-year term. If they must be removed before completion of their term, the central government should do so only after consultation with the Chief Minister of the state in which this Governor is appointed. The Punchhi Commission of 2010 on center-state relations suggested that the phrase 'during the pleasure of the president' should be deleted from the

constitution. Several suggestions have been made over the years. However, none of these were incorporated and the provision remains the same in the constitution.

The Governor under the constitution has different powers, executive powers, legislative powers, financial powers, and judicial powers. But the Governor does not have any kind of military power like the president. The president is the supreme commander of the armed forces. Coming to executive powers, all executive actions in the state are formally taken in the name of the Governor. All administrative actions and executive actions are taken in the name of the Governor. And the Governor has the power to make rules in the way such orders or other instruments which are made and executed in his name will be authenticated. That is one of the powers of the Governor. Governor also has the power to make rules for convenient transactions of businesses in the state. So, in the state, there are several types of activities that must be taken care of.

There are agricultural activities, transport, electricity, there are many portfolios of ministerial activities. So, the Governor can make rules with respect to convenient transactions of such businesses, and he can also make rules for the allocation of such businesses among the ministers in the state. The Governor appoints the Chief Minister and other ministers, and this is provided under Article 163. However, once the Governor appoints the Chief Minister, the rules become sort of reversed and the Governor would not be able to take any decision without the assistance and aid of the Chief Minister. The Governor also appoints the Advocate General of a state and determines his remuneration. The Governor also appoints the state election commissioner and determines the conditions and services and tenure of office of state election commissioner. So, the State Election Commissioner of the State Election Commission looks after the election to the Panchayat and municipal and various other local body elections within a state. The Governor also appoints the chairman and members of the state public service commission. He has the power to appoint. He does not have the power to remove the chairman or the members. That power lies with the president. The Governor can also seek any information relating to the administration of the affairs of the state and proposals for legislation. In the state there might be different kinds of proposals for different types of legislation. So, ultimately once the bill is passed by the legislative assembly or the council, it goes to the Governor for assent just like how a bill goes to the president from the parliament for assent. So, he can seek any information regarding the affairs of the state or such proposals for legislation. He can also require the Chief Minister to submit for consideration to the council of ministers any matter on which a decision has been taken by one of the ministers, but it has not been considered by the council of ministers.

The Governor can also recommend the imposition of constitutional emergency in a state. This is a very important power. So, presidential rule cannot be imposed in a state unless a proposal to that effect saying that the constitutional machinery in the state has failed is made by the Governor to the president. And during the period of such presidential rule, the

Governor enjoys extensive executive power as an agent of the president. The Governor also acts as the chancellor of universities in the state, and he also appoints vice chancellors in such universities. Akin to the President's power under the union executive, wherein the president has the power to summon or prorogue each house of the parliament; the Governor also has the power to summon or prorogue each house of the state legislature.

Summoning is the act of calling upon members of the house for a session, whereas the power of prorogue is the power to bring such a session to an end. So, the Governor has the power to commence his session of the state legislature as well as to bring it to an end. The Governor also has the power to dissolve the state assembly. This is a very important legislative power that the Governor has. Dissolution of the state would be because of multiple reasons. It could be an unconstitutional way of functioning of the state assembly, emergency, war. There could be various reasons. Both these powers, the power to summon, prorogue and dissolve the state assembly is provided under article 174 of the constitution.

The Governor also has the power to address the state legislature at the commencement of the first session after each general election and the first session of each year. So, the first session of the state legislature after the election will be addressed by the Governor. Similarly, the first session of each year will also be addressed by the Governor. The next power of the Governor is regarding sending messages to state legislatures regarding pending bills. So, this power is very similar to that of the president under article 86.

A Governor can send messages to either house of the state legislature with respect to a bill that is pending in the legislature and he also can send messages for other reasons as well. The next power of the Governor is the power to appoint any member of the state legislative assembly to preside over its proceedings when the offices of both the speaker and the deputy speaker fall vacant to perform the duties of the speaker. So, if the offices of both the speaker and the deputy speaker of the state legislative assembly are vacant, then the Governor can appoint any of the members from the state legislative assembly to perform the duties of the speaker. Similarly, he can appoint any member of the state legislative council to preside over its proceedings when both the offices of the chairman and the deputy chairman fall vacant. Continuing with the legislative powers of the Governor, in the union executive the president has the power to nominate 12 members to the Rajya Sabha. These are members of excellence in various fields such as arts, literature, sciences, etc. The Governor of a state also has the power to nominate one-sixth members of the state legislative council. So, if the state legislative council has 60 members, 10 of those members will be nominated by the Governor. The Governor can also nominate one member to the state legislative assembly from the Anglo-Indian community.

A very important power that the Governor has is with respect to the disqualification of members of the state legislature. The Governor decides on the question of disqualification of a member from the state legislature in consultation with the election commission. The

next legislative power is with respect to passing off bills. So once a bill is passed by the state legislature, it will go to the Governor and the Governor has three options. One, he can give assent to the bill. Second, he can withhold his assent to the bill. Third, he can return the bill, but he won't be able to return the bill if it's a money bill. So that's a limitation to the legislative powers of the Governor. If he feels that an amendment shall be introduced in that particular bill, with such comments, he can return the bill. And if there are such comments, then the house or the state legislature is supposed to reconsider that bill accordingly. After this, suppose he sends back the bill, the bill is once again passed by the legislature with or without such amendments. At the second stage, the Governor does not have the option to not give the assent. He'll have to give the assent. But there are some situations in which the Governor can reserve the bill for the consideration of the president. And one of such instances where he must do this mandatorily is, if the bill passed by the state legislature endangers the position of the state high court.

And the most important legislative power of the Governor is that he can promulgate ordinances when the state's legislature is not in session. These ordinances must be approved by the state legislature within six weeks from its reassembly and he can also withdraw an ordinance at any time. Moving on to the financial powers of the Governor, he'll ensure that the annual financial statement which is a state budget is laid before the state legislature. Secondly, as per Article 199, money bills can be introduced in the state legislature only with the prior recommendation of the Governor.

No demand for a grant can be made except on his recommendation. Grants are financial aids. So, there are several activities in a state and you would require some sort of financial aid or a grant for these activities. None of those grants can be made except on the recommendation of the Governor. The Governor can also make advances out of the contingency fund of the state to meet any unforeseen expenditure. Contingency funds come into relevance when there is a natural calamity or a disaster. So, the Governor can make advances out of the contingency fund to meet such unforeseen expenditure. The Governor also constitutes a finance commission every five years to review the financial position of the panchayats and the municipalities. These are the financial powers of the Governor.

Just like the President of India, the Governor also has the power to grant pardon, reprieve, respites, or remissions. He can also suspend, remit, or commute the sentence of any person convicted of any offence, but he does not have any power to pardon death sentence. Only the president can do so, and the president can even pardon sentences given by military courts, but the Governor cannot. Another judicial power of the Governor is that he is consulted by the president while appointing the judges of the concerned state high court and the Governor makes appointments, postings, and promotions of the district judge in consultation with the state high court. He also appoints persons to the judicial services of the state other than the district judge in consultation with the state high court and the state public service commissions. A Governor can make a report to the president whenever he

is satisfied that a situation has arisen in the state in which the government of the state cannot be carried on in accordance with the provisions of the constitution and can recommend presidential rule in that state. So, this is the emergency power conferred upon the Governor.

Under Article 163 of the constitution, there shall be a council of ministers headed by the Chief Minister in each state. So, the qualifications to be a Chief Minister are firstly he shall be a citizen of India, secondly, he should be 25 years of age or above and should be a member of either house or state legislature. The powers and functions of the Chief Minister. The Chief Minister is considered as the real executive head of the state and holds absolute power.

This is the same as in the case of the president and the prime minister. The Governor here is considered as a nominal executive head whereas the Chief Minister is considered as a real executive head. He is the working head of the state, and he presides over meetings of the council of ministers and ensures the principle of collective responsibility. So he communicates all decisions of the council of ministers, administrative affairs and proposals of legislation to the Governor when called for. He is a channel of communication between the Governor and his ministers. So essentially, he is the middleman. Whatever decisions the council of ministers have taken, he will inform that to the Governor and whatever the Governor wants to communicate to the council of ministers, he will communicate that to the council of ministers. The Chief Minister is also consulted for appointment of state high court judges and the state public service commission.

The next part of the state executive is the council of ministers. The council of ministers in the state is constituted and functions in the same way as the council of ministers at the center. The Chief Minister is appointed by the Governor whereas the council of ministers are also appointed by the Governor but on the advice of the Chief Minister. So only those persons who are recommended by the Chief Minister can become part of the council of ministers. The qualifications to become a council of minister, firstly is that he shall be a citizen of India, secondly, he shall be of 25 years of age or above. He should be a member of either house of the state legislature. However, non-members can be appointed in the council of ministers provided they must become a member of legislature within 6 months and if they fail to do so then this person will have to forfeit his office.

Council of ministers with the Chief Minister as the head is there to aid and advise the Governor in the exercise of his functions. The council of ministers formulate and shape policies. There are different kinds of policies in the state. There is health policy, there are education policies, and different kinds of policies. So, these policies are formulated and shaped by the council of ministers. They also initiate legislation. Whenever legislation is passed by a state, most of them are initiated by the council of ministers. The council of ministers also coordinates the work of various government agencies. The public administration of a state is guided, directed, and controlled by the council of ministers.

The last part of the state executive is the Advocate General. He is the highest law officer in the state. This post corresponds to the attorney general of India. The Advocate General is appointed by the Governor. He must be a person who is qualified to be the judge of a high court. In other words, he must be a citizen of India and must have held a judicial office for 10 years or have been an advocate of a high court for 10 years. The constitution does not fix any term of office of the Advocate General. It also does not provide any procedure or grounds for the removal of the Advocate General from his office. It only says that he holds office during the pleasure of the Governor.

Constitutional Law and Public Administration in India

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Week- 08

Lecture-03

Introduction to the Indian Judiciary

The Indian judiciary is an important organ of government. There are three organs of the government, and the judiciary is the critical organ of the government, which is in place to adjudicate disputes, and to tell the government the final opinion of law that is required. Sometimes the judiciary may be required to determine whether the formation of the government is constitutional or not. And hence, the judiciary is the critical component in any democratic system. The Indian judicial system is borrowed from the American judicial system.

The basis of the establishment of the Supreme Court of India comes from the Government of India Act of 1935, which had what is known as the Federal Court of India, then we called it the Supreme Court of India. The Supreme Court of India replaced the British Privy Council. The Privy Council used to hear all appeals coming from all kinds of forums and courts in India and the Privy Council was then the most superior council. However, that all changed when the Supreme Court was inaugurated on January 28, 1950. So, the constitutional articles 124 to 147, which is Part V deals with the organization, independence, jurisdiction, powers, procedures of the Supreme Court. The parliament is authorized to regulate it. If you compare the Indian judiciary to the American judiciary, there are certain interesting features in the American judiciary. In the United States, there is no single system of court. They have what is known as the Federal Judiciary and the State Judiciary. The Federal Judiciary is supposed to be responsible for implementation and adjudication of federal laws.

The State Judiciary is there to implement and adjudicate state laws. This system of courts that is there in the US is called the double system of courts. Whereas in India, there is a hierarchy between the higher courts and the lower courts or also called subordinate courts. We have a single system in which the district court is accountable to the high court and all high courts are accountable to the Supreme Court. And the high courts that are established in different states have the constitutional authority to not only interpret and adjudicate central laws, but also state laws.

So, it is not like these state courts are independent and they are only there to adjudicate state legislations. That is the system existing in the United States. Though India is, a federal country like the United States, our judiciary is a unified judiciary, and we have one system of fundamental law and justice. This one system of fundamental law and justice is also very important because the principles of justice, the principles of legal interpretation are unified in India. They will be applied uniformly across all high courts and all district courts because that is where you have what is known as the law of precedence.

So, the law of precedent or precedence as it is, is a law where the lower courts are bound to follow the judgments and the interpretations of the higher court. So, there is that uniformity, there is that consistency of how law will be interpreted, and any judgment order or direction of the Supreme Court of India is also considered the law of the land and it must be followed by all courts in that unified system. So, it is one judicial system with one judicial institution that is accountable and responsible in India. If you see, the most important process in the Supreme Court of India, which is the apex court of highest court of India is about the composition and its appointments. In 2019, the Union increased the number of Supreme Court judges from 31 to 34.

This is the sanctioned strength of the Supreme Court, it is 34. It was followed by the enactment of what is known as the Supreme Court number of judges amendment Act of 2019. The original strength of the Supreme Court was just 8 with one Chief Justice and seven judges. Today, we have 33 judges and one Chief Justice, and the parliament has been increasing progressively the number of judges from 8 it increased to 10 in 1956 to nearly 13 judges in 1960 to 17 judges in 1977 and to 25 judges in 1986. And finally, the number to 30 was brought about in 2008 and 33 in 2019.

That is the composition that we have in terms of the sanctioned strength of the Supreme Court. Supreme Court is a big body with 34 judges, 33 judges and one Chief Justice. So, it is a big institution. The judges of the Supreme Court are appointed by the President and the Chief Justice is appointed by the President after consultation with the judges of the Supreme Court and the High Court as it deems necessary. And the other judges are appointed by the President after consulting the Chief Justice.

This consultation process is very important and there is a lot of controversy regarding this consultation. This controversy becomes necessary for us to declare and debate because in what is known as the first judges' case that happened in 1982, there were three such cases, first, second and third judge's case. In the first judges' case, the court held that this consultation process on appointment of judges, is not like a consultation just for the namesake and is not a lip service.

It is not just a consultation to send a file and take deemed approval. So, in the first judges' case in 1982, the word consultation itself was to be interpreted by the court and the court

said that consultation is not meaning like concurrence, it only implies exchange of views. So, in 1982, the judiciary allowed the executive some kind of freedom. They said that if consultation is done by mere exchanging of views and names of the judges between the government and the judiciary, between the president and the judiciary, then the consultation process is almost complete. And it does not mean concurrence.

Neither vote nor consent is mandatory. So, it just means exchange of views. This was what was held in the first judges' case in 1982. However, in 1993, when the second judges case came about, the court in 1993 reversed the 1982 judgment in the first judges case stating that the word consultation means concurrence, which means if the judges of the court do not concur, then there is no question of appointment at all. It ruled in 1993, that the advice tendered by the Chief Justice of India is binding on the president in the matters of appointment of judges and this advice is mandatory. The court now has come up with what is known as a collegium system. And it is important that if you go to the third judges' case of 1998, the court said the consultation process by the Chief Justice must consult at least four senior most judges of the Supreme Court. And if out of four senior most judges two do not agree or have an adverse opinion, then that decision should not be sent to the president at all. So, the collegium system took upon itself the discretion to decide about appointment of judges.

The executive must follow the advice of the collegiate system. The executive can make some remarks, but once the judiciary sends the file back, it is binding on the executive to issue the appointment order. The collective consultation process in the judiciary itself has been established, that the Chief Justice just cannot decide on his own. He cannot merely seek advice or merely send the file, he must get the concurrence, he must get the consent. And this is compulsory consent.

The third judges' case that was decided in 1998 very clearly held that if the Chief Justice does not follow this process of consultation or concurrence from the other four judges who form the collegium system, then what the Chief Justice has sent to the government is not binding. And there is a norm that ought to be fixed of this consultative process and the judges have a say in the same as a collective body or institution. So, the kind of collegium of judges who want to recommend the names of judges is something that is very clearly laid out in terms of the appointment process. In 2014, the 99th Constitutional Amendment Act was brought into place.

This is a very significant development in the appointment of judges, wherein in 2014 through the 99th Amendment to the Constitution, the National Judicial Appointment Commission Act was attempted to be brought in force. This Act called the National Judicial Appointments Commission Act wanted to replace the collegium system of appointment. It wanted to bring in a body called the NJAC, that is National Judicial Appointment Commission wherein, the executive branch of the government and the judicial branch both

would form a part of this commission and then would make recommendations on appointment of judges. So, instead of the collegium system, which is an exclusive body of judges, the NJAC wanted to balance the equations between the judiciary and the executive and bring in a fair bit of accountability in terms of who shall be recommended for appointment of judges. However, the Supreme Court in 2015 declared the NJAC Act as unconstitutional and void.

And the earlier collegium system was retained by the Supreme Court on the ground that the NJAC may infringe what is known as the most important principle of the judicial system in India called the independence of the judiciary. Judicial independence is a basic structure of the Constitution that cannot be amended or changed and that is something essential, was held in this case. And this verdict was delivered by constitutional bench and very clearly the attempt of the government to rationalize the process of appointment of judges in terms of an executive decision making was held to be unconstitutional and void. And that is how the system has been brought into place.

And it has been a long kind of a process, a process from where the executive at one point of time had the complete say on appointments to a time when the judges wanted to branch out their independence. So, there was a transition phase, then there was a complete independence to judiciary, which completely gave control. And hence, once the judicial appointment of judges, judges appointing themselves came into place, they broadened the democratic process, they helped the collegium system of four judges to advise and with the Chief Justice to form a process to recommend the appointment of judges to a time when the government wanted to come back with the NJAC law. We continue with the process that in India, judicial independence in judges' appointment is continuing to be in place. Constitutionalism clearly means that appointment of judges is completely with the consultation of the judges, it is with the concurrence of judges and without the concurrence of the judges and the collegium, appointment of judges cannot be made.

So, it is not that the president or the government thinks what is deemed necessary, it is what the judges think and deem it as necessary. On the appointment of the Chief of the Supreme Court or as we call the Chief Justice of India, he is given this designation, not that he is the Chief Justice of the Supreme Court of India, he is the Chief Justice. Now, this also has got into some progressive thought and development. In 1950, the practice that grew till around 1973 was very clear that the senior most judge of the Supreme Court, who is yet to retire and who is the senior most in the rank and file of the judges who are already in place will be the Chief Justice of India. The 1970s was a very turbulent time in this country. There were a lot of ups and downs in terms of emergency, so on and so forth. And this also rocked the vote of the Supreme Court. So, in 1973, this convention of making the senior most judge, this Chief Justice of India was deviated when A.N. Ray was appointed, and he was made the Chief Justice and his appointment superseded three other senior judges. Again in 1977, this convention was breached. Here was when A.N. Ray was appointed as the Chief

Justice by superseding the other senior most judges. So, the kind of issues that happened with the judiciary was very important.

However, again in the second judges' case of 1993, this precedent of senior most judges of the Supreme Court alone being appointed to the office of the Chief Justice was reiterated, and re-established. And this norm has not been violated. So, that is how the senior most judge becomes the Chief Justice of India. A person who seeks to be appointed as a judge of the Supreme Court should have the following qualification. First, he ought to be a citizen of India. Second, he should have been a judge of the High Court at least for five years. And he should have been an advocate of the High Court because sometimes from the bar that is a direct elevation and that kind of a practice before the High Court ought to be for not less than 10 years. And he should be a distinguished jurist. These are all things in terms of or in the opinion of the president of India.

So, from the above, it is very clear that the constitution has no age for the appointment of judges, but it has an experience in terms of having practiced law for 10 years in the High Court, being a distinguished jurist, or he has been a judge for five years, or the final thing is obviously he should be the citizen of India. Also, every judge must take an oath or affirmation. And this is done before he enters his office. And he must swear that he will bear true faith and allegiance to the Constitution of India. That he will uphold the sovereignty and integrity of India. He will duly and faithfully to the best of his ability and knowledge and judgment perform his duties of the office without fear or favour, affection, or ill will. And finally, he will uphold the Constitution and the law. So, this is the oath that the judges ought to take before they assume the office. The salaries and the privileges of the Supreme Court are determined from time to time by the parliament. The retired chief justice of India and the judges are entitled to 50% of their last drawn salary as monthly pension as well. They have quite a bit of allowances, rent free accommodation, medical aid, car, and telephone. So, these are certain privileges that are granted. And hence the salary of the judges varies from time to time.

For example, in 2018, the Chief Justice was receiving a salary of 2.8 lakhs per month, and the judges of the Supreme Court were receiving 2.5 lakhs per month. This has of course been amended from time to time. Now, the tenure of judges, unlike in the United States, which is for life, the tenure of judges in India is up till the judge attains the age of 65 years. This is only to the Supreme Court. Whereas in the High Court, it is 62 years. So, a judge can resign from his office by writing to the president. Can he be removed from his office by the president on the recommendation of the parliament? This is also possible. So, the removal of judges has always been a controversial issue. The grounds for removal are only proved misbehavior or incapacity.

And there is something called the Judges Inquiry Act of 1968, which regulates the procedure in terms of removal of judges, which is called the process of impeachment. Now

to impeach a judge, at least 100 members in the Lok Sabha or 50 members in the Rajya Sabha must give a motion. The speaker or the chairman may admit the motion, then he will constitute a three-member committee to investigate the charges. The committee should consist of the Chief Justice or a judge of the Supreme Court, or the Chief Justice of the High Court and a distinguished jurist. If the committee finds that the judge is guilty of misbehavior or is suffering from any kind of incapacity, the house can take that up for consideration.

However, that motion shall be passed by a majority, a special majority in the parliament, and then it will be given to the president and presented to him so that the judge can finally be removed. And the president then passes an order of removal of the judge as an impeachment. The first case of impeachment was of Justice Ramaswamy of the Supreme Court in 1991 till 1993. The Inquiry Committee found him guilty of misbehavior. However, he could not be removed as the impeachment motion was defeated in the Lok Sabha, the Congress Party abstained from voting. So, this has been the history vis-a-vis removal of judges.

Constitutional Law and Public Administration in India

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Week- 08

Lecture-04

Supreme Court of India

The seat of the Supreme Court is in New Delhi. There has been some debate or controversy surrounding whether the seat of the Supreme Court can be beyond Delhi because litigants and lawyers must practice and travel to Delhi very often. But post covid most of the court proceedings can be attended in a hybrid mode, virtual as well as physical. So, this has kind of eased the situation quite a bit. The process of appointment of judges could be, especially in the high courts. Usually, judges are opted as additional judges initially for a year or two and then they are made permanent judges. But that kind of an option is in terms of, trying to test the performance of someone and then making a permanent judge of the High Court.

Most of the judges of the Supreme Court come from the High Court and they are already having constitutional positions. So, they become permanent members of the Supreme Court as well. But there can be situations where the President can appoint someone as the acting Chief Justice. Wherever the office of the Chief Justice goes vacant or is in temporary absentia, then an acting Chief Justice can also be appointed by the President of India. Can there be an appointment of ad hoc judges if it is necessary for the discharge of the duties? The Supreme Court ad hoc judges can also be appointed, or even retired judges sometimes can be appointed if it is necessary for the case to be.

Coming to the fact that the Supreme Court under Article 129 is a court of record, it means the Supreme Court is empowered to act as a court, which can take cognizance of non-compliance of the judicial orders. And hence, we have what is known as the Contempt of Court Act where either civil or criminal contempt can be initiated against any individual who does not comply or follow or adhere to the directions, orders, and judgments of the Supreme Court of India, which is declared as the law of the land by the Constitution itself. Now, if one evaluates all these powers of the court, one will say that the independence of the judiciary is something that the Constitution itself has prescribed and it kind of lays down that the judiciary ought to be independent from the executive interference or from any kind of legislative role. However, if you see what the reason is why independence of the judiciary is a basic structure, why the independence of the judiciary is core and important to constitutional values and constitutionalism and why it has contributed to the

protection of democracy and fundamental rights of citizen, you can notice that the judiciary is one institution that is the most respected institution across the country. It is the judiciary that is the final door of justice even for executive transfers and appointments or denial of any kind of privileges as well.

It is the judiciary that lays down the fairgrounds of every kind of governance. So, wherever there is an encroachment of procedural or an interference by the executive branch, the judiciary has always prevented it from touching its independence. What does the independence of the judiciary do? First and foremost, it brings about judgments that are not something that the judges have to fear, or they need to favor someone. So that kind of fearless judiciary or a judiciary that is not arbitrary, unfair, or unreasonable seems to be the growth of the establishment. Impartial functioning of the judiciary is the key to democratic and constitutional values and safeguarding the tenets of justice is something that can only be done if the judiciary is independent.

It is supremely secure in terms of its tenure and is a court of records that can punish contempt of court even to anyone in the highest positions of government be it the president, prime minister, ministers, politicians, members of parliament or members of legislative assembly or even chief ministers for that matter. So, what have been the key features of this kind of independence of judiciary? First and the foremost, is the mode of appointment of judges to the court, which the judges have reserved for themselves. So, the role for the cabinet or the prime minister or the president is a more consultative process. It is not, so it is the judges who initiated the first nomination, and the government is involved in that consultative process. So, you will notice that the executive's discretion in appointment is curtailed to a very large extent and the kind of political influence on appointments is completely kind of taken off.

So, the politicians do not have a say. Their political ideologies cannot come into the scenario in terms of appointment of judges and it is the judges who decide whether a person is suitable to occupy a position of a judge or not, because they are in that role, they are in that profession. So, they are the best judge to find out the integrity and the independence of any judge to occupy such a high position. Second, apart from appointment, security of tenure to the judges is core and important. Up to 65 years is tenure for the Supreme Court judge, unless subject to impeachment. That no judge can be removed from his position is something that gives security to the judges to act without fear or favour.

So, they continue to hold the office, though under the pleasure of the President, they are completely independent from the executive branch of the government. They have fixed service conditions, there is no problem that the parliament cannot amend the service conditions of the judges. They can amend it to their benefit but not to their detriment. This kind of amendment cannot be done at any cost, except maybe when there is a financial emergency, but it has never been used so far. So, the condition of the judges remains the

same during the tenure of the office or is announced from time to time as the pay scale fixation happens.

Among the many things that the Supreme Court is now doing, they have used a lot of digital technology to enhance the experiences in the courtroom and provide easy access to litigants and lawyers. There is so much digitalization, there is so much technology that is being used, people can access many things online in terms of listing of cases. Rather, the Supreme Court has also looked at how certain courts can become completely paperless. So can everything be uploaded and then the courts can decide all these expenses and charge it to the consolidated Fund of India. And there is no vote in the Parliament for the same.

This means the salaries, the allowances, the pension, and the expenses of the administrative wing of the Supreme Court are all charged to the consolidated Fund of India. And this also ensures the independence of the judiciary. The conduct of judges cannot be discussed within the Parliament or within the state legislature. This would amount to disrespect to the duties of the Supreme Court and the High Court judges. A discussion of or on the judges can only happen during impeachment and not under any other consideration. That also ensures that the judges are not discussed either by the politicians or the executives. There is no ban after retirement. So once a judge leaves his position, there are so many other things that he can do. Some of the Supreme Court judges are taken as members of parliament or appointed as governors of the state.

So, there is nothing that prohibits them from continuing in a position. A lot of judges act as arbitrators as well. And in some cases, a lot of High Court judges have started practice as well. So that is how they are having what is known as post-retirement jobs as well. Power to punish for contempt is a very strong power, which establishes that the judicial wisdom must be respected and honored and no kind of challenge or some kind of deviation, which may lower the dignity and authority and honour of this court will ever be entertained.

No kind of disobedience to the authority, dignity and honour of the court will be entertained and an action for contempt can also be initiated. The Supreme Court has complete independence in appointing staff at the court itself. They can appoint officers and servants to the Supreme Court without the interference of the executive and they can also prescribe the terms and conditions for their service. The parliament cannot curtail the jurisdiction of the Supreme Court, it can enhance it obviously. That is something that is guaranteed in the constitution and the parliament has no role in limiting the jurisdiction of the court.

And finally, all of these clearly establish that the judiciary is on its own, it is independent from the executive, the executive has very limited role in judicial functions and hence, judicial power possesses that kind of independence and authority in implementation of judicial administration in the country. As to jurisdiction and the powers of the Supreme Court, it has quite a few jurisdictions of its own and the constitution also has such a kind of

jurisdiction. The Supreme Court is supreme and hence it can decide its own jurisdiction if the need be or if the need arises. But broadly if the jurisdiction and the powers of the Supreme Court must be classified, they can be classified into the following categories.

First, we call it the original jurisdiction of the Supreme Court. So, original jurisdiction of the Supreme Court can arise in certain matters, where you can go to the court directly as the first court to adjudicate the dispute. So, you do not have to go to the district court and the high court, you can go to the Supreme Court directly. This is called the original jurisdiction. Now, original jurisdiction can arise between the Government of India and one or more states.

If there is a dispute between center and state, this is called the center-state relationship, then you can go to the Supreme Court under original jurisdiction. Between the Government of India or any state or states on the other side or between one or more states, of course, you can go to the Supreme Court. Article 32 also provides for original jurisdiction because here is where a citizen's fundamental rights are being violated. He can go to seek either habeas corpus, certiorari, mandamus, or prohibition as a writ remedy for the protection of his fundamental rights. Article 32 itself is a fundamental right and that is where the original jurisdiction of the Supreme Court will arise.

Disputes arising from a treaty, agreement, covenant or any other engagement or similar instrument can also come before the Supreme Court in its original jurisdiction. Generally, disputes between private citizens and the state and the center can also go in the same manner. Most importantly, any kind of interpretation of a federal law can also be part of an original jurisdiction that may arise that may go to the Supreme Court. Also, interstate water disputes under Article 262 are something that can go to the Supreme Court, under original jurisdiction. Anything that is in relation to finance; center-state relationship includes finance, taxation, expenses to be adjusted between center and state can also come under the original jurisdiction.

It can include some kind of recovery of damages from the state by the center or any other ordinary commercial dispute or business-related dispute within center and state. All of these can go to the Supreme Court under its original jurisdiction. The challenges of the dual federalism that we follow, say state government and central government, all that can be referred to the Supreme Court. It is the apex court, it is the final word in the constitution, it has the final word to interpret the principles of the constitution. And hence, the Supreme Court can take all of that into cognizance and decide under its original jurisdiction.

Under the original jurisdiction, the Supreme Court can also decide the validity of any law that is passed by the parliament, whether it is constitutional or void, this kind of challenge can go to the Supreme Court. So, any law that is passed by the parliament can go to the Supreme Court directly under its original jurisdiction and the Supreme Court can decide

the validity or constitutionality of those legislations as well. Now the Supreme Court is also a kind of a constitutional court of appeal. This is called the appellate jurisdiction that is arising from the final decision of a High Court. It can either be in civil or criminal cases. In most of these cases, it is a High Court that must give a certificate saying that there is a legal question or a legal issue that must be resolved through constitutional interpretation and hence the High Court is referring the matter to the Supreme Court. So, once a certificate of appeal is granted by the High Court, then the matter can come before the Supreme Court as an appeal for deciding a legal question and not based on any factual matter and the same is provided under Article 132. So, what are the wide-ranging appellate jurisdictions of the Supreme Court? Generally, it can be divided into following categories. First, appeals in all constitutional related matters that can be arising. Appeal in civil matters, it could be anything about a law like land acquisition or so on and so forth.

Appeal in criminal matters, for example, if a person or an accused has been given the death penalty, he has a right to appeal to the Supreme Court and that is an appeal in criminal matters. And finally, appeals that can be preferred as a special leave petition. So, these are under Article 134. Criminal appeals are preferred by a person accused in a death row or if the lower court has sentenced him to death, then in all those cases an appeal can be preferred. So, this is all provided in the articles of the constitution when and what can be the appellate jurisdiction. In criminal matters, suppose the trial court has given a kind of a sentence and the high court has reversed that sentence; in those cases also certain kinds of appeal can be made. This is under Article 136, which speaks of the appeal on special leave. Special leave is kind of an authority that is granted by the Supreme Court as a matter of its discretion where it says that any judgment or any kind of an order that is made by a tribunal, it could be tribunals that have been established under various powers of various state and central legislations.

Usually, tribunals are made under several laws. Today, most special laws have a tribunal in place, consumer forum, right to information, competition commission, income tax table. Then you can appeal to the Supreme Court even if there is no provision for it by taking the special leave of the court. This is a very discretionary power. So, where there is no appeal or right to appeal under any other provisions of the constitution, the 136 appeals can be sought before the Supreme Court of India. This is not an ordinary appeal from the High Court, but it is mostly applicable to those that come from the tribunals. Article 136 special leave is a discretionary power. It cannot be claimed as a matter of right. It cannot be granted in any judgment whether final or interlocutory. It may be related to constitutional matters, civil or criminal or income tax, labour, revenue, or even matters of an advocate right under the Advocates Act.

It can be granted against even High Court matters, but it is not necessarily so. But these are cases where the High Court does not give you a certificate of appeal and hence you are seeking the special leave of the Supreme Court of India. So, under Article 136, it is a very

wide power. So, wherever the High Courts are not granting this certificate of appeal, wherever from the judgment of a tribunal, you have no right to appeal, then the Supreme Court still has the power to grant you special leave and to admit your cause, decide the matter and give you justice or finality of what the law should be. So, this is highly an exceptional power that is granted. This is a power in which you can override all other lower courts decisions. If the High Court does not give you a certificate of appeal, you have no other choice, but to let the Supreme Court decide whether this is a good case to come to the Supreme Court or not. Those are the reasons why this provision in the constitution is there. That is why we say it is the apex court or the final court to decide whether matters should be in one way or the other.

It is an extraordinary situation where 136 appeals are being allowed. But this does give unfettered powers to the Supreme Court to set down what shall be the rule of law in case of judicial appeals. Under Article 137, the Supreme Court has power to review any judgment or order made under any other law made by the parliament or any rules that are made by the parliament as well. There is something called the writ jurisdiction of the Supreme Court as well. Writ petition under Article 32 for the violation of fundamental rights is called the writ jurisdiction. And the constitution has provided the writ jurisdiction to the High Courts as well. When such writ petitions for writ jurisdictions come into play, there is Article 138 and Article 141. These are also those articles that give power to the Supreme Court. Deciding parliamentary laws, whether they fulfil the mandate of the constitution or whether their constitution or not is something that the courts can make a final call upon.

Under Article 142, the Supreme Court has power to pass any decree or order necessary to ensure complete justice in any pending case or pass such decree that is to be made enforceable to the entire territory of India in a manner that may be prescribed by the parliament or by the president. So, what the Supreme Court has here is the power to issue orders for securing even the attendance of a person, discovery or production of documents or investigation or punishment of contempt for the entire territory. Article 142 very clearly says that the power of the court is extended to the entire territory of India. Though the Supreme Court is not a trial court, it is not a court of evidence. Yet, if the Supreme Court insists that they would want to summon someone, they want to examine any document or any kind of evidence, then the Supreme Court still has the power to continue doing the same.

Coming to the next jurisdiction of the Supreme Court, it is called the Advisory Jurisdiction under Article 143. There are two categories in which the Supreme Court can give an advisory opinion. First is on any question of law or fact of public importance which has arisen, or which is likely to arise or any dispute arising out of a pre-constitutional treaty or agreement or covenant or etc. So, here, to exercise advisory jurisdiction, please note being the highest court, the President may want to seek the advice of the Supreme Court. So, the

President can refer any such question to the Supreme Court and the Supreme Court is duty bound to provide this advice to the President of India. Usually, such an advisory opinion is given to the government whenever there is a problem in understanding the judicial verdict or the judicial order. And there is more than one interpretation that it is possible that those are the circumstances when the government would want the Supreme Court to give an advisory opinion. It is not a judicial pronouncement, it is only an advisory, but it is something that is sought by the President and once the advice is given, it is not necessary that the President is bound by the advice. He may just follow the opinion in the advice or prefer not to follow that opinion in the advice.

Advisory jurisdiction sort of facilitates the government taking an authoritative legal opinion from the Supreme Court apart from seeking the same from the Attorney General of India, who is the first law officer or the solicitor general of India. So, still the Supreme Court can come in an advisory position. So, generally advisory opinions of the Supreme Court have been asked in many matters. There is in fact a list of such Acts or legislations in which the advisory opinion of the court has been sought. The latest is the 2G spectrum case where auction was mandated by the court saying that auction is the rule and first come first serve should not be followed. That was the case in terms of whether auction is a rule for all natural resources. And second was, is the auction the only rule, or should it be the preferred one? Because in some cases you may not want to follow the auction. That was something that the president sought after the judgment of the court. So, in an advisory jurisdiction, the Supreme Court did clarify and say auction is not the rule, it is the most preferred one. That is how clarificatory opinions are sought for judgment of the court so that there is clarity in the implementation. The executive may want to seek that clarification. *Ram Janma Bhoomi* case of 1993 is another case in which advisory opinion was sought. The Delhi Law Act of 1951, *Re Berubari Union* case, Sea Customs Act of 1963, *Keshav Singh*'s case, President's Election case, Special Courts Bill of 1978, Jammu and Kashmir Resettlement Act, Cauvery Water Dispute Tribunal 1992 are all some of the cases in which the advisory opinion of the Supreme Court was sought.

Constitutional Law and Public Administration in India

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Week- 08

Lecture-05

Judicial Review – I

It is already known that the power of the court and the power of the judiciary are defined and laid down by the constitution of India. The judiciary can supervise public administration, it can review the activities of public administration, it can check abuse of power of the public administration. Because it is considered as a court of record, the Supreme Court records are kept perpetually, and it is evidence for the future generation and the future administration of the country. Once the Supreme Court has laid down a law, it cannot be challenged in any other form, because that is the finality, though we say that within the Supreme Court, there is a review that is possible. For example, in the Supreme Court, if a divisional bench that is a bench of two judges gives this judgment, it can be asked before the court to review it before three judges. If that also is not something that is satisfactory, then it can be referred to a constitutional bench. And in the current times, the constitutional bench consists of five judges. Apart from that, the Supreme Court, to render justice or to correct injustice has designed something of its own called the curative petition. A curative petition is something that is allowed to cure any kind of miscarriage of justice.

So, despite exhausting all the reviews within the Supreme Court itself, if again, the citizens or a group of victims would want the Supreme Court to revisit the case, then a curative petition can be filed before the court. So, this kind of legal precedent that is laid down by the Supreme Court is the law of the land, it is the legal reference for jurists, scholars, and others. And hence, the orders of directions of the Supreme Court are supposed to be followed, and there is no choice in this matter. That is the reason why the contempt powers are given to the court. In case there is willful disobedience of any judgment, order, writ, or any other process of the court, or if there is a willful breach of undertaking given to the court, then you would say that it is a civil contempt.

Whereas, if someone publishes of some kind of scandalous matter of a court or of a judge, or someone tries to lower the authority of a court or a judge, or prejudicially interferes with the due process of judicial proceeding or involves himself or herself in the interference or obstruction of the administration of justice in any manner, he will face what is known as criminal contempt of court. However, innocent publications and distribution of fair

reporting and accurate reporting of judicial proceedings, fair and reasonable criticism of the judgment, not of the judge are something that are permissible under the freedom of speech and expression, and they would not amount to any kind of a contempt of court. So, you do have the right to comment, but you do not have the right to defame or bring down the dignity and the majesty of the court as the case is. In case of criminal contempt of court, you can face imprisonment up to six months and a fine of 2000 rupees, and the Supreme Court has the power to punish. But, this kind of a power to punish can be given to the High Court or to the Subordinate courts or to tribunals that are functioning in the entire country.

So, the judicial power clearly vests with the court, the power of judicial review of administrative action. And hence, the constitutionality of legislations, the constitutionality of executive orders or actions, both at the center and the state are finally to be examined by the courts and the courts will determine the legality, the constitutionality, and the validity of any such legislative and executive actions. And hence, what is not going to be enforceable as a matter of public policy under the constitution is something that the judiciary will always intervene, test, and set the tone. When you talk about the Supreme Court of India, the Supreme Court has performed various other functions, or has other numerous duties to intervene.

For example, very often than not, where the government has altered the qualifications of each of the election commission and election commissioners. In those matters, finally, whether the government has done it right or wrong is going to be decided by the Supreme Court. The Supreme Court is a final authority on all positions that are constitutional positions, be it the position of the governor, the election commissioners, or the role of central vigilance commission. It could also be in terms of determining the age and qualification of members of the Public Service Commission because Public Service Commissions are those bodies that select the executive branch of the government. And hence, what should be the set of criteria, when can they be disqualified, the Supreme Court has rendered a lot of service that has helped the government decide all of these matters. The Supreme Court has always agreed that it may not always be correct. And hence, the court is willing to review its own decisions. Hence, what was decided sometime in the 1980s can now be reviewed. And that could be a course correction.

So that is where the courts or the judicial decisions have the beauty of it. The beauty is that nothing of the court decision is going to be powered, it is permanent for the time being. Therefore, once the review happens, it can change as well. The courts generally entertain petitions, you can withdraw the cases, in case it is a civil case or it is a private case. You can ask the court to transfer the case from one court to another, because that is what judicial review of the judiciary happens to be.

In many matters, the litigants say that they do not have confidence in the judge or forum. So, if they want the case to be transferred from that place to another place, sometimes they

will say that the forum is inconvenient. And hence, the cases must be transferred. For example, under the Family Courts Act, the place where the divorce litigation will happen is the place where the wife resides, or where the marriage took place. So, it is a forum convenient for women.

That will be the forum where the family matters will be decided for. So, such kinds of transfer of cases or review of the judicial work, which is usually an administrative function of the Supreme Court, the Supreme Court and the various High Courts keep performing those administrative functions as well. So that is always two sides of the judiciary's judicial function as against administrative functions as well. The Supreme Court is also involved in what we call as the supervisory jurisdiction of tribunals. Now, tribunals or what we call as tribunalization has happened in India post the 1990s.

So, we have created these quasi-judicial bodies or statutory bodies who adjudicate disputes. These are specialized bodies created under those laws. For example, under the Right to Information Act 2005, we have created the Information Commissions which decide about the implementation of RTI 2005, whether the information ought to be given or not to be given, whether the denial of information was done intentionally or not. So, these are tribunals that are functioning under the specific legislation.

However, the proper court that is the proper judiciary is always a supervisory body over these tribunals. They can decide whether the tribunals are doing right or wrong. They can decide who should be part of this tribunal or not, etc. All those functions, which we would call the superintendence and control over all these tribunals within that territory are there with the High Court and within the territory of India, it is there with the Supreme Court of India. There are other different functions that the Supreme Court does from time to time. For example, the Supreme Court has a special examination for lawyers to practice before the Supreme Court. This is called the advocate on records examination. So those who want to appear in the Supreme Court have to pass this examination. They are considered as advocates on records. They are the only ones who have the right to file cases in the Supreme Court.

So, making that examination, giving those kinds of designations to lawyers are something that the Supreme Court does from time to time. The Supreme Court also engages itself with a bar council, which is the body of lawyers or advocates. Among the advocates in the bar, every year or once in two years, the courts decide or designate lawyers as senior advocates. Generally, a designation of a senior advocate is a distinguished practitioner in that court. And he is considered to have achieved a degree of success and has a standing before that bar.

And hence the judges are the ones who decide the designation of a senior advocate as well. So, these are some of the very interesting functions that the Supreme Court does from time

to time and what the judiciary is all about. Now, has the Supreme Court come up with some principles of constitutional interpretation? The constitution is a written document, and it is quite a large document. However, the words of the English language that are used in the constitution may have more than one or two kinds of meaning in the context of which it is being used. Or maybe there needs to be an application of that kind of an article in the constitution. The Supreme Court has come up with some very interesting doctrines and principles for the constitutional interpretation or the reading of the constitution. What this does is that these principles and doctrines, they put the constitution into working, they make it workable. And that is why the process is constitutionalism. This gives the constitution an application role.

Some of the important doctrines that have been evolved by the Supreme Court are:

- a) doctrine of severability
- b) doctrine of waiver
- c) doctrine of eclipse
- d) doctrine of territorial nexus
- e) doctrine of pith and substance
- f) doctrine of colourable legislation
- g) doctrine of implied power
- h) doctrine of incidental or ancillary power
- i) doctrine of precedent
- j) doctrine of occupied field
- k) doctrine of prospective overruling
- l) doctrine of harmonious construction
- m) doctrine of liberal interpretation.

While comparing the Indian Supreme Court with the American Supreme Court, the American Supreme Court does not have the advisory jurisdiction as the Indian Supreme Court has. The appellate jurisdiction of the American Supreme Court is only for constitution matters. In India, it is a wide range of matters. So, there are a lot of distinctions between how the Indian Supreme Court functions and how the American Supreme Court functions. And of course, both protect fundamental rights. And that is the reason why they are called supreme in the other sense. In India, the judges of the Supreme Court have a retirement age, whereas in the American Supreme Court, the judges do not have a retirement age, they are judges for life. So, they would either end their tenure on their death or until the time they would like to resign from their job. Coming to judicial review; the doctrine of judicial review was also developed in the United States. It was for the first time propounded in a very famous case called the *Marbury v. Madison* case of 1803. It was delivered by the then Chief Justice of the American Supreme Court by name, John Marshall.

In India, the judicial review is something that we must give to the constitutional courts. And this, has been also said to be the basic structure or feature of the Constitution of India. And this kind of a power cannot be curtailed or cannot be excluded by any constitutional amendment. Judicial review is the power of the judiciary to correct and keep a check of laws that are being introduced by the executive and by the legislature. It is not only the legislature that makes law, it is the executive that can also make law.

What law is made by the legislature is called substantive laws. And the name of these is in the frame of an Act. Whereas, delegated legislation, which means the Act must have rules, regulations, guidelines, notifications, circulars, etc. These put the act in force, they make the Act implementable. Most of these laws are made by the executive. So, Article 13(3) of the Constitution defines a law to include Acts, rules, regulations, notifications, circulars and byelaws. So, these are all laws and these laws that are made either by the legislature or by the executive can be part of the doctrine of judicial review. So historically, judicial review has been able to protect liberty and has been able to establish what we call as the limited government and maximum governance. So, it has enhanced the efficacy of legal bindingness. The respect for law has definitely come about. And it is important that the judiciary tries to keep a check on the two other organs of the government. And wherever there is some kind of conflict, the court must resolve those kinds of conflict.

So, the limitation of the government is the attempt of judicial review. And judicial review of administrative actions is not only limited to state governments, but it can also extend to union governments, it can also extend to local governments. Now, we have the municipalities, the panchayats and so on and so forth. So, all of these can be brought into existence. Judicial review has checked policies or policy consideration. So, the policy is a vision statement, it is a policy of welfare, it could be an economic policy or a social policy, whatever be the policy, judicial review of the policy has always taken place.

And, the courts can decide whether the policy is in tune with the constitutional mandate, or with public policy. These are certain aspects that the court can intervene, though they would not want to do so. From time to time, they have said that they do not want to intervene in public policy matters, but they can check whether the policy has been made with the authority to make it, whether it is sound or whether it results in any kind of violation of constitutional rights. One of the policies, which underwent judicial review was this most famous policy of bank nationalization that happened in 1970. So, some of the banks that were private were nationalized by the government. This was the time when socialism was at its peak, whether a nationalization is appropriate as per public administration, as per public policy of the land was the question before the court, which said yes. So that was also part of the judicial review process. Judicial review maintains the principles of the supremacy of the constitution and it talks about maintaining federal equilibrium between the center and the state. And three, it protects fundamental rights. That is the purpose of judicial review. The importance of judicial review was laid down in the

Kesavananda Bharati case, where Justice Khanna said that judicial review has become an integral part of the constitutional values and the power has been vested in the High Court and the Supreme Court to decide the validity of the provisions of certain statutes. So, striking down certain provisions, which violate the constitutional principle, is an inherent power of the judiciary.

Constitutional Law and Public Administration in India

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Week- 08

Lecture-06

Judicial Review – II

Judiciary plays a very important role in determining public administration, especially in trying to define the scope and ambit of public administration, and to determine what is public policy from time to time. Judiciary is empowered under the constitution to be the custodian of the constitution and the rights of citizens. Hence, when you talk about judicial review, it is the role of the judiciary as enshrined in the constitution of India to look at the powers of the legislature and the executive and to maintain the doctrine of checks and balances. It is the duty of the judiciary as the custodian of the constitution to set the limits of government and governance. Whenever the legislature oversteps or the executive decides to usurp its authority and power through judicial review, the judiciary sets the limitation on the actions and directions of the other two branches of government, i.e., the executive and the legislature.

The doctrine of judicial review in India is defined in the Constitution. However, the initial idea as propounded in the United States of America by John Marshall in the famous case of *Marbury v. Madison* could be said to be the first idea of the power of judicial review. The then Chief Justice of the US Supreme Court, John Marshall laid down that judicial review is one of the essential principles of democracy. It is the basis on which democratic values and policies can be protected and the limits of government can be defined.

The constitution of most democracies empowers the courts and the judiciary to confirm to the principle of judicial review, to protect the rights of citizens and to also limit the power of the government. It is the government of the law, not the government of men as has been said by the US Supreme Court. Hence, the history of liberty is the history of limitation of government power and not to increase, enhance or abuse. John Marshall had remarked that the duty of the judicial department is to say what the law is and if two laws conflict with each other, it is the court that must decide the operation of each of these laws.

In India, the Constitution confers the power of judicial review on the Supreme Court and High Courts; these two courts are considered as the constitutional courts. The Supreme Court of India has been declared to have the power of judicial review, entwined with the

basic structure of the constitution. The power of judicial review cannot be limited by any legislative action. The doctrine of basic structure that was propounded in the *Kesvananda Bharati* case in 1973, restructured the premise that the judiciary shall be the final word when it comes to the interpretation of law and for the application of constitutional principles. Any constitutional amendment will be tested on the point of the principles that are important in the process of protecting liberty, fraternity, and equality of citizens. Hence, judicial review is the power of the judiciary to examine the constitutionality of both legislative enactments and executive orders of both the central and the state government.

Legislature can also make certain kinds of delegated rules or legislations. As defined under Article 13 of the Constitution of India, law will include any rule, order regulation, ordinance, notification, circulars, and bye-laws. These are delegated laws which the executive is entrusted by the parliament to bring in as the force of law. If on examination, the judiciary finds that any of these laws, substantive law or procedure law, or delegated law is violative of the Constitution or the principles of the Constitution or is ultra-virus, the Supreme Court or the High Court have the power to declare the unconstitutionality or invalidity of such legislations because the constitution is the basic test for the legitimacy of any law. So, the courts can determine whether any law as being violative of the constitution and can also declare such legislations or the provisions of such legislations as null and void. Once the judiciary steps in to declare any part or the entire law as illegal, unconstitutional, or invalid, such laws will not have any force of law and they shall not be made applicable in the territory of India or of any state.

Judicial review has many aspects. Firstly, can the judicial review any constitutional amendment? Because an amendment to the constitution itself is a law-making process, though it is a higher law-making process. The answer to the first question is yes, they do have. Secondly, can they review the legislation of the parliament and the state legislature? The answer is yes. Finally, can they review the administrative actions of the union and the state and the authorities under the state? The answer to that is also in affirmative.

The Supreme Court of India has time and again used the power and the doctrine of judicial review in various important and noteworthy cases, including the *Golaknath* case in the year 1967, the Bank nationalization case in the year 1970, the *Privy Purse abolition* case of 1971, *Kesvananda Bharati* in 1973 and *Minerva Mills* in 1980 etc. Recently in 2015, the Supreme Court declared the 9IX constitutional amendment, which brought in the National Judicial Appointments Commission (NJAC) in 2014 as unconstitutional and null and void. That clearly displays the supremacy of the doctrine of judicial review in most democratic systems. The doctrine of judicial review is so critically important, one, because it will ensure to establish the supremacy of the constitution and not of any other political party and two, the doctrine of judicial review maintains federal equilibrium between the center and the various state governments as the case may be.

And finally and most importantly, judicial review protects fundamental rights of the citizens in numerous ways and cases as it has happened in the past as well. So in India, the constitution is the supreme document and the custodial of the constitution under the doctrine of judicial review happens to be the courts, rightly so under the provisions of the constitution as well. Our constitution has very specific provisions for judicial review. And if one goes to the phrases in Article 32 of the Constitution of India, or Article 226 or 227, one would very clearly look at the doctrine of judicial review, saying that there cannot be any law that violates either the fundamental rights or the legal rights of citizens. And hence, the constitution has clearly dedicated itself to empowering the judiciary, placing the judiciary in such a high pedestal, giving it the power to review any such legislative or executive actions or orders, so as to ensure that the rights that are guaranteed in the constitution are protected at any cost, and none of these are contravened by any organ of the state or its entities.

The court is the ultimate body of authority to decide that every branch of the government is a limited government. And any such action of the branches of government or governance does not transgress its limits, so as to infringe the fundamental rights of the citizens. And hence, the power of the constitution in granting writ remedies, including the habeas corpus, mandamus, certiorari, and prohibition are all such writs which the courts exercise under the doctrine of judicial review. So, to deprive the authority of the constitution, to say that the authorities of the constitution must work within the confines of the constitution is what is attempted under the doctrine of judicial review.

The scope of judicial review in India, is not as wide as what is the scope under the American Constitution. But we must look at not the wordings of the way and process in which the Supreme Court is empowered, but the way in which it has been exercised. And hence, that is what we see is the difference between constitution and constitutionalism of the working of the constitution. If you take a look at the working of the constitution and how the Supreme Court has exercised the scope of judicial review in this country, it is obvious that the Supreme Court has time and again come to the rescue of citizens in protection of their fundamental and legal rights. They have tried to limit the power of the police state.

The Supreme Court has tried to decide the welfare agenda of certain governments. They have ensured that any such law that violates or attempts to violate the rights have been declared as void. They have also, to a larger extent, gone to the question of reasonableness and suitability of certain policy implications, wherever it is utmost necessary to do so. This is because the courts do not intervene in the policy matters unless and until the policy attempts to infringe fundamental rights or takes away or abridges or negates any such legal right of citizens. They do maintain a perfect balance between what they should interfere and what they should not interfere.

It can be concluded that judicial review in India establishes the supremacy of the judiciary and the constitution, because the provisions of any law can be struck down and they could be struck down if the provisions of the law are in violative of the principles of the constitution or in violative of the principles of natural justice, which is in the American constitution called the due process of law. And hence, the judiciary is the one that is the ultimate word on how laws have to be made and implemented in this country. And they will decide the course of any such sovereignty or supremacy of the law. The doctrine of judicial review becomes critical and important when one looks at the way center state relationships have been protected and maintained and balanced by the courts.

Center state relationships in India have undergone a lot of turmoil. Unfortunately, thanks to the way in which the powers of a president's rule under Article 356 have been misused by governments in the past. So, in the most famous case of *S R Bommai v Union of India*, it is the doctrine of judicial review that laid down how this power has to be exercised and in what manner and to check the abuse or misuse of president's rule in the state governments; and it is the Supreme Court that stepped in to limit the nature of governance. There are many such occasions which can be brought into place to substantiate how judicial review has worked in India.

Another area of relevance is the Ninth Schedule. The Ninth Schedule in the Constitution was added by the First Constitutional Amendment Act of 1951. It was not part of the original Constitution; it was added later. In the Ninth Schedule, one could bring certain legislation and keep it in the Ninth Schedule, thereby stating that the judicial review of these legislations can be taken off.

Any legislation that is brought under the Ninth Schedule will not be part of the judicial review and that was done through the First Constitutional Amendment in 1951. Article 31B says that the Acts and regulations included in the Ninth Schedule will not be challenged or invalidated on the grounds that they contravene fundamental rights. And hence 31B literally looked at limiting the doctrine of judicial review or the power of the judicial review, which in many contexts in the United States has no such limits or no such power. As it were, originally as it was started, the Ninth Schedule included those legislations that were in tune to the Zamindari system at a time it was thought about being abolished. Certain legislations on land sealing and land tenancy were brought in.

And these were basically legislations in the land reform movement, which had a kind of an attempt to infringe a fundamental right, which is the right to property. Because under the abolition of the Zamindari system, those people who are holding these lands but not tilling it, and, as Zamindars, were only collecting some kind of revenue or royalty from the tenants. They would go to the court and say that their property rights have been violated, which is a fundamental right and claimed to be compensated to that extent. And these laws should be held to be invalid was the automatic challenge that could have arisen in many of

these instances and which would then disturb the state's agenda of bringing in equality on the distribution of land as a resource; because you do not want concentration of wealth in the hands of few going by what Article 39(b) and 39(c) of the Constitution, Directive Principles of State Policy also say.

So, to have equal distribution of these lands and to make the tiller the owner of the soil an agenda started in the first land reform movement in the country. And various legislations regarding the same, especially like the abolition of the Zamindari system, the land sealing law, land tenant sealing acts, are all enacted and they were immediately brought into the IX schedule so that the challenges on fundamental right and judicial review will not be done. While the IX schedule originally had 13 legislations, in 2019, the number of legislations in IX schedule, had increased to around 282 which were supposed to be completely out of the domain of judicial review.

However, in 2007 in a very significant Supreme Court judgment in a case called *I.R. Coelho*, the Supreme Court ruled that there cannot be any blanket immunity from judicial review of laws that are included in the IX schedule. The court held that the judicial review is a basic feature of the Constitution and it could not be taken away by putting any law under the IX schedule as it is. It said that the laws placed under IX schedule after 24th, 1974 became relevant. April 24th, 1974, is a very important day in the history of the Indian Constitution because it was the day when *Kesavananda Bharati* case laid down the basic structure theory and judicial review is a basic structure and from there on there cannot be taken away by any Act of the parliament including a constitutional amendment which can take away judicial review in any manner or any process. If any legislation has been added to the IX schedule after 24th April 1973, such legislation will be subject to judicial review.

But prior to that, there were times from 1951 to 1973 when the Supreme Court decided to limit its own power and excluded judicial review of legislations under the IX schedule. So it is now open to the court to review any legislation in the IX schedule, especially those that have been brought into the schedule after 24th April 1973, if they would violate the fundamental rights of citizens, because the doctrine of basic structure becomes very core and important to how the doctrine of judicial review has been developed in the Constitution. In the *I.R. Colville* case, the Supreme Court says that a law that abrogates or abridges the rights of citizens guaranteed under Part III of the Constitution, such a law will violate the basic structure of the Constitution and hence, any such law that attempts to do the same shall be subject to judicial review and the constitutional validity of such legislations, whether they are ordinary legislations or legislations in IX schedule will be subject matter of the rights test.

The rights test means any form of an amendment is not relevant to the Constitution until and unless it affects or determines the rights of individuals. That is a very interesting development of assertion of judicial review or the doctrine of judicial review. The Supreme

Court judgment in 2007 very clearly says that the essence of the right test is the only basis for intervening in the law of judicial review. And the judges have the right to challenge any law if they violate the fundamental rights of citizens or if they lead to any kind of interaction on the basis that they damage or destroy the basic feature of basic structure of the Constitution in either Article 21, Article 14 or Article 19.

This is the golden triangle rule. So if at any point of time any of these three articles are going to be touched by any kind of public administration or by public policy or public law, then they shall be subject to judicial review of the Constitution. This is the very basic feature and aspect of judicial review or the doctrine of judicial review under the Constitution of India. The important cases are the *Kesavananda Bharati* case and the *A.K. Gopalan* case. It is important to understand that the judiciary has been a very active judiciary in this country, especially in the last four to five decades. And this has been by public interest litigation and how judicial review through public interest litigation has been made possible in this country, which is nothing but judicial activism.

A lot of criticisms are levelled against judicial activism as being judicial overreach or over activism. That is a fallout of every other public opinion that one has on whatever happens in the public debate. Our judicial activism is something that comes from the United States. This is a doctrine that was introduced in the mid-70s by judges like Justice V.R. Krishna, Justice P.N. Bhagwati, Justice O. Chinnappa Reddy and Justice D.A. Desai, who laid down the foundation of judicial activism in the country. Judicial activism is nothing but a proactive judiciary. And the judiciary plays a very important role in the protection of the rights of the citizens and the promotion of justice in the society. The judiciary plays a very assertive role. It's not a very passive role. It's not a spectator, but it's an active player to actually look at the functioning of the two organs of the government. The judiciary monitors whether the two organs of the government are discharging their functions as per the constitutional mandate. This is nothing but like many jurists would call it, it is judicial dynamism. It is an antithesis to judicial restraint. In many cases, judicial restraint means judicial self-control, which is also very important, because the judiciary also should not overstep into the domain of the legislature and the executive. In cases like the same sex marriage that was recently announced by the Supreme Court, there was some element of judicial restraint as well.

So, judicial restraint is important. However, the judiciary has been an active judiciary. It has kind of motivated its own institution, because the Supreme Court and the High Court are institutions, the judges are only members of this institution. It has motivated the institution to go away from the normal routine practice, or strict adherence to the judicial precedent and procedures, which delays justice. So, progressive judges with progressive mindset have laid down new benchmarks. But more importantly, they have laid down new societal policies. And they have taken the common practices out or common customs out. And they have done social engineering. And hence, at the cost of a slight intrusion into

legislature and the executive matters, the judiciary has been protecting individual rights, especially the rights of the vulnerable sections of the community and society, including women, children, indigenous communities and people and others. And, where the legislature has not acted, the judiciary has stepped in. This was also called the theory of filling the vacuum at times.

Despite several oppositions and quite a few constraints that the judiciary did face at its very initial stages, the process of judicial activism has contributed to judicial lawmaking. But it is very important that judicial activism has been a process of judiciary and judges trying to not only do the regular role of active interpretation of existing legislations, of not only looking at the traditional rule of dispute settlement or dispute resolution, but they have also looked at the utility of this legislation and they had looked at social betterment of the lives of individuals. They have come to the rescue of people, especially when there are some harassments that have been committed. In these cases, the judges have gone beyond their personal ideology and opinion.

Judges have looked at public good and public welfare and determined the facets of public policy. So, a new kind of philosophy of the judiciary has laid down new principles, new concepts, new formulas, and they have come up with a very innovative relief to citizens, thereby expanding the standing of why the people must knock at the doors of the judiciary and seek different aspects and ambit of justice. Judicial activism is one of the talking points of reference and feature all over the world of the Indian democracy and the Indian constitution and it is a feature that has always withstood the test of times. The concept of public interest litigation was antithesis to private interest litigation. In a private interest litigation a person who is a victim or an aggrieved individual goes to the court as a petitioner and seeks relief and remedy and justice from the court.

So, you are a party who is having some standing before the court of law, and you will say that this is what is the relief that you personally want. So, in reverse contrast to this, the public interest litigation philosophy is a litigation by an individual or by an NGO or by a public-spirited body who goes to the court not for relief for themselves, but for those who are not able to access the court or access the justice. So they are not private interested litigants, they are public interested litigants. They do not get any remedy or relief. It is the general public who are supposed to benefit or the concerned group of individuals on whose behalf that NGO comes to the court who actually gets relief from a public interest litigation.

So public interest litigation is different from class action litigation in a sense that class action means, a group of affected litigants like say a trade union or workers who go to the court to seek some kind of remedy, they would be considered as a class. It is a group or class action litigation as well. So public interest litigation is more known as social action litigation. You are going for a social cause, not for a selfish cause. You are interested in social welfare and social benefit and hence you are invoking the jurisdiction of the court.

And this is where jurists have believed that the principal rules of *locus standi*. *Locus standi* means what is your standing before the court of law and why you are coming to the court. You must justify what your locus is before the court to appear before it or to file a case before it. But this rule of *locus standi* has been diluted by the judiciary and they have allowed the permission of the public interest litigation process and that has been done for larger public interest and public good.

That has been the touchstone of Indian judicial activism as the case remains. It is interesting to look at how the concept of a PIL or judicial activism is being used by human rights and other groups? Some people have used this for establishing their civil rights and political rights. Some people have gone in for social and economic rights. There are consumer groups that have gone to the court, bonded labour groups, environmental groups, those who are opposed to large dams or irrigation projects, child rights groups, groups that are fighting custodial violence, custodial death, and prisoners' rights, have all used the PIL process. There are a lot of groups that are fighting for poverty or elevation of property that have used the PIL and judicial activism process.

Indigenous people, women's rights groups, groups that belong to certain kinds of association including the bar associations or even the legal services authorities have sometimes used the judicial review and the public interest litigation groups. Many times, even the media has used the process of public interest litigation and the groups regarding the same. Therefore, Judicial review and judicial activism are closely connected with each other. But they could be different at times. For example, we say that judicial review was very much existing before judicial activism came into picture.

While we say that in judicial review, the lawmaking policies are actually tested, in judicial activism, it is the exercise of these policies to whom and how it should be exercised which is usually attempted to be covered. And hence, while judicial activism is out of the necessity of inactions from the legislature and the executive that has propelled judicial activism, judicial review was to limit the two other organs of the government. And judicial activism is a 20th century philosophy, where judges are attempting to make very positive contributions to law. They are setting standards of how judiciary and judicial institutions have to be very positive and assertive in protecting and promoting certain core rights.

Judicial activism has its own charm. And judicial review now has become a kind of a part of the judicial activism process. The reason why people would justify judicial activism is because they feel that sometimes the governments do not have a clear majority and hence, they have gotten into policy paralysis. Very often than not, the executive has failed to discharge these functions and they continue to do that. They do not really inspire the confidence of the people and hence the judiciary is the only institution where the citizens can run up to and seek for protection of their rights and fix the responsibility of the

government. Judicial activism is justified in the sense that there is a lot of pressure on the kind of population that we have in the country.

There is a lot of aspiration, a lot of conflict of growth and protection of religious and other customs. And the judiciary is the only way that can actually elevate the suffering of the masses whenever such kinds of conflicts arise. For example, very recently the Supreme Court has said that wherever there is some kind of a violence or riot that take place due to some kind of a bond or a political protest, then if any public property is damaged, then it should be recovered from the assets of the persons who had taken part in such kind of a violence, to bring in some kind of accountability, even under your right to protest or your right to strike. Judicial activism is generally justified because the judges feel very enthusiastic to participate in the social reform process. They take upon themselves that kind of role, they have liberal ideas and liberal approaches. They feel that they have the duty to render justice, which is social, economic, and political. And they have to protect the constitution, make it work. It should not be simply a letter of law in words, but also in spirit. So, whenever the legislature has failed to discharge its responsibility, either central or state, judicial activism has been completely justified. And the weakness of the government has been the survival instinct of the judiciary to power those who are honest, to power those who are hardworking and to power public interest and public issues.

Therefore, when it comes to the aspects of decent life in India, it is the judiciary that defines the basic tenets of the right to life. It talked about the right to environment, the right to health. It talked about how the system of administration of justice, whether it be the police or be it any other executive organ should work. The judiciary through the public interest or litigation process has checked the misuse of the emergency power in this country, has tried to look at ulterior motives of government and parties, especially in terms of defection and other things. The media that we had and the media frenzy to a larger extent, the judiciary has been able to balance against the rights to the responsibilities that the media should have.

The expansion of judicial review over administration has in some way promoted open government, it has promoted transparency and accountability. To a larger extent, wherever jurisdiction did not exist, it was the judiciary that decided the jurisdiction. It laid the standards of rules of governance and delegation. And finally, the judiciary was very much involved in laying down the principles of natural justice. There are several judgments where the tenets of administrative law, the principles of natural justice have been laid down by the judiciary from time to time.

That has, in some way, modulated how the administration has to be sensitive in terms of ensuring that there is a fair hearing, there is no bias, and then orders are being passed without fear or favour. To a larger extent, all the kind of fear that we had in India, some of them are fears of ideology, for example, because you may not be supporting the ruling

party and you may be supporting the opposition party some fears of management or mismanagement from the administration. There were so many other fears that Indians, unfortunately, faced in their early part of their constitution. The judicial review was able to instill a sense of confidence in the masses and in the people.

And that is how the country has been able to progress because of the strong Supreme Court delivering strong governance as well. Now, if you see how the Supreme Court has defined public interest litigation in *Janata Dal v. S Chaowdhary*, it said that a legal action initiated in a court of law for the enforcement of public interest or general interest, in which the public or any classes of community have pecuniary interest or some interest by which their legal rights or liabilities are affected can be the process in which you can define what a public interest litigation is. The Supreme Court has laid down a set of guidelines on what a public interest litigation and how and which public interest litigation will be entertained. And they have also decided to impose costs if there is a frivolous PIL that is being filed. However, the process of activism has meant that in the past PILs have been filed through certain letters that were written to the court and those letters were converted into public interest certifications as well.

So, there are several such issues that have been resolved and brought to the forefront because of the judicial dynamic approach that we have in the country. While the critics may call for judicial restraint, there is enough justification of encouraging judicial activism to the highest level. Judicial lawmaking has also been a process in which the courts have taken a serious note of judicial lawmaking. The parliament itself, while it failed to make a law, the judiciary had to step in the interim phase and make judgment law. Now, the examples of judgment law probably are best explained through the case of *Vishakha v. State of Rajasthan*. This is where the Supreme Court till 2013 from the time the *Vishakha* case was decided in 1996 had laid down a law on prevention of sexual harassment of women at workplace.

Judicial lawmaking in India is a reality and the judiciary is able to enforce this law because of the power that it has in terms of the law of precedent and the enforcement through the law of contempt. The *Vishakha v. State of Rajasthan* is the best example of judicial lawmaking in this country. Several other cases including the child labour law of 1986 that was brought about, was something that the judiciary had to interpret and apply even before the rules were brought in. And it is the judicial law as well as the legislative law that ensured that child labour in India is eradicated at least wherever it could be possible. The *Kesavananda Bharati* case laid down the law on basic structure that is also a law-making power.

The *S R Bommai* case is also very relevant because it talked about Article 356 and how President's Rules can be imposed especially not disturbing the center-state relationship. That is also a huge lawmaking factor by the court protecting the federal structure as laid

down in the constitution of India. The *DK Basu* case is also another case where guidelines and strategy safeguard for arresting a person has been laid down that has become a basic law of the land. And the *DK Basu* case is important because to a larger extent it set the limits of police power. For example, some of these guidelines very clearly say that a lady cannot be arrested after 6 pm and kept in police custody unless there is a fear that the lady is going to commit a very serious offence.

So, she should be only arrested in the presence of a lady police officer and only from 6 am to 6 pm unless there is a fear that she could be involved in commission of an offence or is involved in a grand series or great act of action against the nation or the security of the state. The second judge's case and third judge's case are also one interesting case because it laid down the law on collegium system where the judges would recommend who shall be the members of the Supreme Court and High Court and who will decide the transfer of judges. So, the collegium system now is where judicial law making in terms of appointment of judges is being determined and that also is one interesting example of how the judiciary has been making law in the process or judicial activity. In the *Murli Deora* case, a case of smoking in public places, now has become a law under the prohibition of smoking in public places rules of 2008 under the Secret and Other Tobacco Products Act of 2003. But it was the Supreme Court that actually looked at the right to health of non-smokers or passive smokers in this 2001 judgment.

So while we should say that judicial activism or judicial rule or role through public interest litigation is not something that can solve all the problems in the society or all the problems of individuals, it is nevertheless some era of hope that citizens have especially when they feel very helpless, when the executive and the legislature do not respond to their plea. And to a larger extent, there has been protection of basic human rights of the weaker and disadvantaged sections of the community. Through the PIL, the courts have been encouraging genuine public-spirited individuals, and giving them credentials of bringing social transformation in the society. *Prima facie* the court when it is satisfied that the contents of the petition are bona fide, they have intervened in the larger public interest. Sometimes they have intervened in urgent hearings and looking at the gravity of the situation, the courts have actually abated public harm and public injury, a fact which is undisputed. The courts have never gained anything out of it. And the primary motive is to just ensure that the principles of the constitution are protected. They have adopted methods in curbing frivolous petitions and checked the misuse of the judicial activism process as well.

Finally, while we say that there is right to privacy today, that right to privacy comes from the *Puttaswamy* judgment and before that it was in the *Kharak Singh* case, where again, you will notice a new unenumerated right, a right that is not in the constitution has been spelt out by the Supreme Court in the *Puttaswamy* case. The right to privacy, in the information age or the digital age or internet age was said to be a fundamental right by the

Supreme Court. So, this is how through judicial activism, the court gives a new fundamental right like several other fundamental rights that have been granted to us from time to time.

Constitutional Law and Public Administration in India

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Week- 09

Lecture-01

Constitutional Authorities - I (CAG & EC)

Some of the constitutional authorities are the Comptroller and Auditor General, the Attorney General, Solicitor General and Advocate General, Election Commission of India, Union Public Service Commission and State Public Service Commissions. Some of these have been established through the Constitution. Some are not. In addition to these authorities there is the Panchayati raj system, urban local bodies, and the idea of e-governance. Before looking into these authorities individually it is necessary to understand why these authorities have been established under the Constitution. Thus, there is a difference between a statutory body, a constitutional body, and an executive body. A statutory body is brought into existence through an act of the Parliament.

For example, the National Human Rights Commission which has been brought into existence through the National Human Rights Commission Act. On the other hand, a constitutional body like Election Commission of India owes its existence to a provision in the Constitution. There are executive bodies like Niti Aayog which have been established through a resolution or a notification that has been passed by the executor. So how is a constitutional body different from a statutory body or an executive body? First, there is independence. If it is a constitutional body the body is brought into existence without any interference from the Parliament or the executive. The members can exercise their functions without any fear or favor. They do not have to fear negative consequences like say a transfer or dismissal from their service. They also do not have to extend any favor in exchange for their appointment because this is being done without any involvement from the Parliament or the executive. Secondly, since it is established through a constitutional provision, the terms of appointment, their tenure, their eligibility, their salary, all these conditions are enumerated in the constitutional provision. So, if you need to make any change it is very difficult because you need to make a constitutional amendment. At times you need a special majority from the Parliament. At times you may also need a ratification from half of the states. So any alteration in the conditions of service will have to be affected by a constitutional amendment which is a difficult procedure. Thirdly, the members that

are going to assist this body in carrying out the functions that are also placed within the control of the constitutional bodies.

There also the Parliament or the executive does not have much role. This also goes a long way in safeguarding the independence of these constitutional bodies. Therefore, a constitutional body is different from other bodies, but how and why? Why are some of the bodies placed within the ambit of the provisions of the constitution and why not other provisions? The answer to this lies in the fact that only those bodies are placed under the constitution which perform very critical functions. Say for instance, we are the Election Commission of India. The need to ensure that elections are being conducted without any interference from Parliament or the executive is crucial in sustaining democracy. Only those bodies which perform very critical functions for which there is a need that there is no interference from any other arms like the Parliament or the executive or the judiciary. Only those bodies are placed within the ambit of the constitution.

The first of such authorities, the Comptroller and Auditor General of India. The provisions for Comptroller and Auditor General or the CAG have been provided under articles 148 till article 151 of the Constitution of India. Under Article 148, a CAG is appointed by the President by warrant under his hand and seal. It means that in case of appointment of CAG, the President is the final authority. The letter of appointment should bear the President's signature. There are also other authorities who are being appointed by the President but it is not necessary that it is the President himself who appoints such authorities. He may delegate it to some other executive function but if an authority must be appointed by the President by warrant under his hand and seal, then the President is the final authority.

He cannot delegate that function to any other executive function. A CAG is appointed by the President by warrant under his hand and seal. The Constitution also provides that the CAG should take an oath before the President. This oath is contained in the III schedule, that is the content of the oath that is to be taken by the CAG before he assumes office. The Constitution further provides that a CAG shall not be eligible for reappointment. This means that a CAG shall not be eligible for reappointment not just for the post of Controller and Auditor General but also for any other post within the Central Government or the State Government. So once a person becomes a CAG, he cannot be reappointed. It is a one-time affair. Now how is a CAG removed from his office? The Constitution provides that a CAG must be removed in a like manner and on like grounds as a judge of the Supreme Court. It has a special procedure that has been mentioned in the Constitution.

So, the President must move a motion for removal of a judge of the Supreme Court before each House of Parliament. And that motion for removal must be supported by a majority of the total membership of that House plus a two-thirds majority of the membership who is present and voting which is called a special majority. So, this is the procedure that is to be followed for the removal of a judge of the Supreme Court from his office. And on what

On what grounds can a judge of the Supreme Court be removed from his office? The Constitution provides two grounds. It must be either on grounds of proved misbehavior or incapacity. So, the CAG can also be removed from his office only on like manner and on like grounds as a judge of the Supreme Court, the same procedure and the same grounds have to be followed in this case as well. The Constitution provides that the salary and other conditions of service of the CAG has to be determined by Parliament. The Parliament determines this by enacting a separate law. There is another law called the CAG Duties, Powers and Conditions of Service Act which was brought in 1971. This particular Act determines the salary, the terms, and conditions of service, etc. of the CAG.

This particular Act provides that CAG shall hold office for either 6 years or till he attains 65 years of age, whichever is earlier. And he is eligible for a salary which is also equivalent to that of a judge of the Supreme Court. Now you might wonder that if the matters such as salary and other conditions of service are left to the Parliament to decide, would it not cause an interference, would it not breach the independence that is otherwise secured to the office of the CAG under the Constitution? Well, the Constitution does provide two safeguards to CAG even though it leaves the matter of determination of salary and other conditions of service to the Parliament. First of all, it provides that matters related to the salary, age of retirement or leave of absence, cannot be varied to the CAG's disadvantage after his appointment. This means you can make amendments in salary or conditions of service or tenure, but it cannot be made once a CAG has been appointed.

So, you cannot reduce the amount of pension, you cannot reduce the tenure because all of this will act as disadvantage to a CAG once he has been appointed. So once a CAG is appointed, his terms and conditions of service cannot be varied to his disadvantage. This is one crucial safeguard that has been inserted in the Constitution to ensure that the Parliament does not erode the independence that is otherwise secured to the office of CAG. And the Constitution also says that salary and all the other expenses of the office of CAG shall be borne out of the consolidated fund of India. So, what is it? There is something called the consolidated fund. The salary of a CAG comes from the consolidated fund of India. There are powers and functions that have been vested in a CAG under the Constitution. The makers of the Constitution had intended the CAG to carry over the functions that were performed by an office called the Auditor General of India.

This is an office that existed prior to the coming into force of the Constitution. So, the makers of the Constitution had intended that the CAG would perform functions which are similar to that of the Auditor General. But in the Constitution, the powers and duties of the CAG have been prescribed in a very broad manner. The details, say for instance, the scope of each of these powers and duties, the manner in which it has to be exercised, all of these have been left to the Parliament to decide. So, under the Constitution, it has been provided that the CAG should perform duties and powers with respect to the accounts.

Accounts of what? Accounts of the Union, accounts of the states, accounts of any other authority or body. So, this is the broadest manner in which the Constitution has laid down CAG's powers. The details of CAG's powers will be found in the statute namely, the CAG Duties, Powers, and Conditions of Services Act. In addition to this, there is a hint about the powers and duties of CAG in two other provisions. One of these is with respect to the administrative powers of CAG.

The President has to frame rules to determine the powers, the administrative powers of CAG. So before doing this, the President has to consult the CAG. Similarly, the President also has to frame rules for the conditions of service of people serving in the Indian Audit and Accounts Department. Before framing these rules also, the President has to consult the CAG. So, CAG has been vested with a power to be consulted before rules are framed for its administrative powers and before the conditions of service are framed for the Indian Audit and Accounts Department.

Another function, mentioned in the Constitution, is that the President has to consider the advice of the CAG in maintaining the accounts of the Union and States. It says that the accounts of the Union and States should be kept in such form as the CAG prescribes. The President has to take the advice of CAG with respect to maintaining accounts. These are the broad powers and duties found in the Constitution. How is it to be exercised? What is the scope of these powers? These are to be found in the statute. The Comptroller and Auditor General Duties, Powers, and Conditions of Service Act 1971 sheds light into what the powers and functions of a CAG are. The first set of functions that are to be performed by a CAG is with respect to accounts. They have to prepare the accounts of the Union and States, compile them and they have to submit it before the President, the Governor, or the Administrator of Union Territories.

So, this is one set of functions. The second set of functions is with respect to giving information and providing assistance to the Union and States on matters related to finances or accounts. The third set of functions is with respect to audit. This is a major function. They have to audit all the expenditure that arises from the government funds. There are three types of government funds. The Consolidated Fund of India is from which the government meets most of its expenditure requirements. The Contingency Fund as the name suggests is used for meeting all the unforeseen and unexpected and emergency situations. We also have the Public Accounts in which all the other public money that does not go into the Consolidated Fund of India will be received. The audit of all these three government funds, the Consolidated Fund, Contingency Fund and Public Accounts has to be done by the CAG. The CAG also has to audit all the other bodies or authorities which are substantially financed by the Union Government or the State Governments. This might also include the government corporations, the government companies etc. All these authorities have to be audited by the CAG. The CAG has to prepare companies for the audit and submit the accounts of the Union and States to the President or the Governor.

Once the President or the Governor receives this report, they cause it to be laid before the Houses of the Parliament or the State Legislature as the case may be. This infuses an additional layer of accountability to the whole process of spending of public money.

It is also important to understand that the duty of the CAG arises only after an expenditure has been incurred. So the public money is spent after an elaborate process. It is submitted before the Parliament. There is an intense scrutiny of the Parliament as to whether this expenditure is needed or not. So that duty is taken care of by the Parliament. The CAG steps in only after an expenditure has been incurred to ascertain whether it has been made through proper channels, whether it has been made after following all the legal procedures etc. The CAG steps in only after an expenditure of public money has been incurred. The second constitutional authority is the Election Commission of India. It is important to understand we need elections.

Elections are needed because it is the most democratic way of choosing the persons who should govern. Voters are given the power to choose who will form the government and make laws and policies for them. Voters are not only given power but are conferred with a responsibility to exercise the power in a manner that will ensure that democracy continues to thrive. But it needs to be noted that merely because elections are there, it need not mean that the elections themselves are being conducted in a democratic manner. So, what makes elections democratic?

First of all, everyone should have the right to vote. The right to vote should not depend on financial status, educational background, or any other consideration such as caste, religion, class or gender. It is also important that each vote has an equal value. It cannot be the case that a higher value is ascribed to a vote cast by a rich person or a bureaucrat and a lower value is fixed for a person pursuing any other profession. There must be an equal value for each vote. Thirdly, there must be a real choice for the parties to win elections. For the voters, there must be an option to choose from. Real choice here means that there should be more than one political party capable of forming a government and running the country, if they secure enough votes of course. It cannot be the case that there are three political parties A, B and C. But it is an open secret that party A will always win the elections. If elections are to be democratic in the real sense, there should be the possibility of change of power between political parties offering the candidates an option to choose from. Fourthly, it is also important that elections happen regularly. In some countries you might have seen how the heads of the government have altered the provisions of their laws so that they can continue in power for four to five terms consecutively. This should not be the case if elections take place in a democratic country. Elections should happen regularly.

Lastly, it also is important that elections are free and fair. It should be free from any bias, influence or corruption and it must be fair in all sense. There are various stages of elections in India, and it is important to understand the role played by the Election Commission in

each of these stages. First, there is delimitation of constituencies. The act of delimitation that is demarcating of the boundaries of various constituencies is done by the delimitation commission. But the act of initiating the delimitation is done by the Election Commission. For example, recently in the state of Assam, a delimitation exercise was initiated by the Election Commission. After receiving the request of delimitation from the Ministry of Law and Justice, the Election Commission directed the chief electoral officer of Assam to coordinate with the state government to issue a ban on creating any new administrative units until delimitation was completed in the state. So, the Election Commission also has a crucial role in initiating the delimitation exercise in each of the constituencies. Secondly, we also have the aspect of reserved constituencies. Some constituencies are reserved for groups who might not be adequately represented in the legislature. For example, Scheduled Cast, Scheduled Tribes, or women. Some constituencies are reserved for people belonging to these communities. Only persons who belong to these communities can contest as candidates from these constituencies. Reserved constituencies are also declared by the delimitation commission, but they do so after they collaborate closely with the Election Commission. The third aspect in the Indian elections is that of the voters list. So in any election, the list of those who are eligible to vote are prepared much before the election and are published beforehand. This aspect is taken care of by the Election Commission. The official publication of voters list is a mandate that falls within the ambit of the Election Commission. Fourthly, there are candidates who nominate themselves as candidates for each constituency.

In the nomination of candidates, there are certain dates beyond which nominations cannot be made. There are also dates beyond which candidates cannot withdraw themselves from the candidature list. The last dates of nomination and withdrawal of nominations are fixed by the Election Commission. So beyond these dates, you cannot register yourself as a candidate nor can you withdraw your name as a candidate from an election. Finally, there are election campaigns that take place before elections.

All election campaigns in various constituencies are also regulated by Election Commissions. They fix the time within which the election campaigns can take place, and the manner in which election campaigns should be conducted. There are certain dos and don'ts for election campaigns. It is the Election Commission which decides which of the activities are permissible, which of the activities are not permissible during an election campaign. Lastly, there is an election in which the Election Commission has a considerable role to play and in each of the crucial stages in the election; and the Constitution of India envisages the creation of the Office of Election Commission of India.

Under Article 324 of the Constitution, the Constitution has vested a major duty on the Election Commission of India. This is the superintendence, direction, and control of preparation of electoral rules. And the Election Commission is tasked with doing this function for the elections to four major offices, the Parliament, State Legislatures and to

the Office of President and Vice President. So, the Election Commission of India performs this function of superintendence, direction and control of the preparation of electoral rules for the election to the offices of the Parliament, State Legislatures, President and Vice President. The Election Commission of India consists of a Chief Election Commissioner and other Election Commissioners.

The Chief Election Commissioner is a permanent body. His tenure is a fixed tenure, and he is designated as the Chairman of Election Commission of India. The other Election Commissioners are appointed by the President from time to time depending on the need. In addition to the Chief Election Commissioner and other Election Commissioners, officers called Regional Commissioners may also be appointed by the President before the general elections to Lok Sabha and State Legislatures.

But Regional Commissioners are appointed for elections to certain specific areas or regions. Now the conditions of service of Election Commissioners are to be determined by the Parliament. And until such law is made, it is determined by the President. This is similar to the provision for the Comptroller and Auditor General of India. And even though the conditions of service are to be determined by Parliament, the Constitution has drafted two important safeguards.

The first is that the Chief Election Commissioner shall not be removed from his office except on like manner and on like grounds as that of a Supreme Court Judge. Very similar to that of the Comptroller and Auditor General. The second safeguard that has been provided to the Chief Election Commissioner is that his conditions of service shall not be varied to his disadvantage once he has been appointed. These two safeguards are similar to those that we saw for CAJ. Now it is very important to note that these two safeguards are available only for the Chief Election Commissioner.

When it comes to the other Election Commissioners, although they are appointed by the President, they are not clothed with the same safeguards. Instead of that, their independence and security of tenure is ensured through a provision that for removal of Election Commissioners from their office, Chief Election Commissioner has to recommend. That is the only safeguard that has been provided to the other Election Commissioners. The Parliament has enacted a separate legislation to deal with the terms and conditions of service of the Election Commissioners called the Election Commission, Conditions of Service of Election Commissioners and Transaction of Business Act of 1991.

Under this legislation, the Parliament has provided that the salary for all Election Commissioners, that is the Chief Election Commissioner, and all other Election Commissioners is equivalent to that which is paid to a Supreme Court Judge. And all of them have a tenure of either six years of service or 65 years of age, whichever is earlier. And if the Election Commissioners have to resign, it has to be made to the President.

Although in the Constitution we have a separate or a differentiation of the Conditions of Service of the Chief Election Commissioner and other Election Commissioners, from this legislation that is enacted by the Parliament, they are treated at par. All the Election Commissioners are subjected to the same terms and conditions of service.

This has created a lot of ambiguity. The Constituent Assembly members envisaged certain aspects by creating an independent Election Commission of India. So initially the conducting of independent elections without any interference from executive parliament or judiciary was proposed to be included as a fundamental right in Part III of the Constitution but was withdrawn later. But that cannot lead one to infer the importance that was attached by the members of the Constituent Assembly to the independence of the Institution of Election Commission of India. There were also proposals for appointing ad hoc bodies before each election. Before an election to the Parliament there would be an Election Commission which would be constituted. Before elections to the State Legislative Assembly another Election Commission would be constituted and this was the original idea.

Instead, it was decided to have one permanent body in one person called the Chief Election Commissioner. This was done so as to take care of any emergencies that might arise. There may be unexpected scenarios like a political party resigning from power, a member of legislative assembly or a member of parliament vacating the office due to any illness or death; and in such cases, you can't leave the office of a representative vacant for too long. In order to avoid such a vacuum and to take care of emergencies it was decided to have one permanent person as the Chief Election Commissioner.

The other Election Commissioners are, as already seen, appointed from time to time. But the Chief Election Commissioner is a permanent body. Another aspect that is interesting to note is that under the Election Commission we see a centralizing of powers. People are usually seen arguing against centralization of powers for various reasons. But in India, we decided to centralize most of the powers on the Election Commission and particularly on the Chief Election Commissioner. This is a deliberate exercise to ensure that because of regional differences among people due to culture or language or religion or community that regional differences do not result in an exclusion of people from electoral rolls. That is why there is one central body of Chief Election Commissioner which heads the Election Commission of India. But that does not mean that there is no decentralization,

There are regional commissioners who are appointed before each election. To say that Election Commissioners are completely centralized would also be a wrong idea. However, there are significantly centralized powers because of this reason. To avoid regional differences creeping into electoral rooms. Another important step that was taken by the Constituent Assembly was to accord the Chief Election Commissioner a status that is

similar to that of a judge of the Supreme Court. This was done to ensure that the Chief Election Commissioner would not be removed by any member of the executive.

Constitutional Law and Public Administration in India

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Week- 09

Lecture-02

Constitutional Authorities - II (EC)

Under the Constitution, the Chief Election Commissioner seems to have been put on a higher pedestal when compared to other Election Commissioners. In terms of Chief Election Commissioner's status as the chairman of the Election Commission and also in terms of the safeguards that are provided exclusively to the Chief Election Commissions. On the other hand, the law made by the parliament treats all Election Commissioners and the Chief Election Commissioner on the same footing. There is no difference with respect to their salary or conditions of service or tenure. All of them are treated alike. So, this ambiguity has given birth to a widely debated question. Is the status of Chief Election Commissioner higher than that of other Election Commissioners? One of the first cases that dealt with this question of law was the judgment *S S Dhanoa v. Union of India* which was a judgment of the Supreme Court. So, in this case what happened was that the President had appointed Mr. Dhanoa the petitioner, and another person as the Election Commissioner. So, there were two Election Commissioners in addition to the Chief Election Commissioner who were appointed by the President. Later on, the President issued another notification abolishing the posts of the two Election Commissioners. So, their appointment came to an end. And this abolishing of their appointment was challenged before the Supreme Court.

And the Supreme Court observed that while Election Commissioners envisage to be an independent institution, the power has been vested with the President to appoint as many numbers of Election Commissioners as he decides. So, appointment of Chief Election Commissioner is mandatory while the appointment of other Election Commissioners is only an obligatory provision. The Supreme Court also observed that the Constitution of India purposefully accords a higher protection to Chief Election Commissioner which is not available to other Election Commissioners. And the court went on to observe that Election Commissioners are on a higher pedestal than maybe regional commissioners. But the Chief Election Commissioner is on a higher pedestal than both the Election Commissioners as well as the regional Election Commissioners.

Thus, the court clearly laid down that the Chief Election Commissioner is not a person who is the first among equals, rather he is deliberately put on a higher pedestal than the other Election Commissioners. The matter was again dealt with by the Supreme Court in the case of *T. N. Seshan v. Union of India*. So, in this case the court went on to observe that the protections that are accorded to Chief Election Commissioner did not make him superior to the other Election Commissioners. Those are protections that are given to the Chief Election Commissioner because he is a permanent incumbent. The other Election Commissioners are appointed by the President as and when he deems it necessary. It is not a permanent office. On the other hand, the post of the Chief Election Commissioner is a permanent office. It is a permanent body.

So, the court reasoned that the safeguards regarding irremovability from the office were not given to Election Commissioners because their office is not permanent in nature. Their office is such that they cannot be conferred with the position of irremovability. Their process of removal cannot be made tougher by equating that removal process to that of the removal process of a Supreme Court judge. So, the court held that the higher status, the seemingly higher status that is conferred on a Chief Election Commissioner is because of the fact that his office is a permanent office, and the office of Election Commissioners is not a permanent office. The court also went on to observe that even though they were not given status equivalent to that of Chief Election Commissioner, the Constitution makers did provide the Election Commissioners also with some sort of independence and security of tenure by placing their removal subject to the recommendation of Chief Election Commissioner.

So, this was how the court settled the matter. So, the Supreme Court settled that there is no higher status that is accorded to Chief Election Commissioner and that both are to be treated at par. Very recently, a Constitution bench of the Supreme Court pronounced a judgment called *Anoop Baranwal v. Union of India*. This has the potential to transform the way in which the Election Commission of India operates. This is because, Article 324 Clause 2 of the Constitution of India, provides that the appointment of Chief Election Commissioner and other Election Commissioners shall be determined by the President until the parliament makes a law on that behalf.

So, the aspect of determining how to appoint Election Commissioners including Chief Election Commissioner has been left to the parliament by the Constitution makers. The other thing is just that the parliament has not made a law till date. Another legislation which was brought out by the parliament for regulating the conditions of service of Election Commissioners does not deal with the matter of appointment of Election Commissioners which the parliament is empowered to do. So, what the court said in this case is that because parliament has not made a law governing the appointment of Chief Election Commissioner and other Election Commissioners, it will step in and make a law. This is not a new phenomenon.

In the *Vishakha* judgment where the Supreme Court stepped in because there was a legislative vacuum. There was no rules or laws to prevent sexual harassment at work place. So, the Supreme Court formulated a set of guidelines until Parliament made a law on their behalf. So, it is the same principle which is being applied here. Since parliament has not yet made a law, the court felt that it should step in to make a law governing the appointment of Chief Election Commissioner and other Election Commissioners.

What the court stated in this case was that for the appointment of Election Commissioners and the Chief Election Commissioner, a committee needs to be constituted and this committee should consist of the prime minister, the leader of opposition in the Lok Sabha and the chief justice of India. This committee comprises a representative in the parliament, an executive member, and a member of the judiciary. And it is based on the recommendations of this committee that the appointment of Election Commissioners and Chief Election Commissioner has to be finalized. Another rule that was made by the court in its judgment is that the conditions of service of Election Commissioners should also not be varied to their disadvantage once they have been appointed. This was a safeguard that was applied solely for the Chief Election Commissioner under the Constitution.

The Supreme Court's judgment extended the safeguard to the other Election Commissioners as well. But the court did not rule that the grounds of removal of Election Commissioners should also be similar to that of Chief Election Commissioner. The court merely said that it is desirable if the grounds of removal of Election Commissioners are also similar to that of Chief Election Commissioner which is equated to that of a judge of a Supreme Court. So once again the appointment was made subject to the recommendations of a committee composed of the prime minister, leader of opposition in the Lok Sabha and the chief justice of India. The conditions of service of Election Commissioners were equated to that of Chief Election Commissioners in as much as the conditions of service cannot be varied to disadvantage after appointment.

But the court merely recommended that the grounds of removal of Election Commissioners should also be equated to that of Chief Election Commissioner. The court's recommendation is based on the fact that Article 324 clause 2 reveals an expectation that parliament would pass a law providing for the mechanism of appointment of Chief Election Commissioner. So in its absence the court was stepping in to fill the vacuum. And the suggestion of involving members of the parliament, executive and judiciary is not something new. The court did not come up with that suggestion on its own. Rather they were following the suggestion that was mooted by various committees that were constituted for looking into the possibilities of reforming the election commission. Various committees and commissions have been constituted. So, the court took up this as a suggestion from various commission and committee reports that had put forward this idea. Whether this new rule made by the Supreme Court will compromise on the aspect of

independence of the Election Commission of India, because the prime minister who is a member of the executive is involved is a question for reflection.

Regarding the administrative machinery for elections, the Election Commission of India is the nodal body when it comes to governing election matters in the country. But there are also a lot of government officers who take care of the administrative matters surrounding elections. One such officer is the Chief Electoral Officer. This is the officer who supervises the election work of an entire state or an entire union territory.

There is a similar officer for each district called the District Election Officer who supervises the election work of an entire district. There is a Chief Electoral Officer and a District Election Officer. Then we became an Electoral Registration Officer. This is the officer who prepares the electoral roles for each and every parliamentary constituency as well as state assembly constituency.

At another level of the hierarchy are the people called Booth level officers. So these are officers who are functioning with the local government. These may be officers who are otherwise employed with the state government or the local government. These people will also be the voters of the particular area of which they are a Booth level officer. So there may be a constituency of which they are a voter and they may also act as the Booth level officer

Now, these Booth level officers have a very critical role to play. Since they are the particular localites of that area, they might be in a position to understand what all changes have happened in that constituency. Who all have left that constituency? Who all have migrated? Who all have passed away in that particular year? So this will help the election workers to update the electoral roles. As you all know, once you have your name in the voters list, only then you are eligible to vote. Booth level officers go from door to door in their particular constituency and they ensure that the voters list gets updated by removing the names of the people who have left the place and by adding the names of the people who have recently joined. This is an overview of the administrative machinery for elections. In addition to these officers, we also have another set of officers called the returning officers, the presiding officers and the observers. These three sets of officers are appointed under the Representation of Peoples Act of 1951. One is returning officers who are appointed by the Election Commission for a particular general election in each state and the returning officer will be generally an officer of the government or of a local authority and one returning officer can be nominated for more than one constituency in a particular state.

There are also some officers who are appointed who are called assistant returning officers who will assist the returning officers in conducting the elections. The duties of the returning officers are not explicitly mentioned in the Representation of Peoples Act. The returning officers are expected to do all such acts that are necessary for an effective conduct of the

elections. But in reality, the returning officer performs duties like accepting and scrutinizing nominations, the publishing of the affidavits of the candidates, the allotting of symbols to each election party, preparing the electronic voting machines and the VVPAT, even the counting of votes and the declaration of results. In all of these activities, the returning officer has a very crucial role to play.

The returning officers are called so because they hold the elections and return the results of an election. That is why they are called the returning officers. There is also another set of officers called the presiding officers. These are officers who are appointed by the Election Commission, but these are officers who are appointed on deputation. So, their deputation gets over when that particular election also gets over. And their duty is to keep the polling station in order and to ensure that the polls are being conducted fairly. The terms Presiding officers and polling officers must not be confused. Polling officers are those officers who are usually government servants who are appointed just for the purpose of a particular election. These may be teachers in a government school. These may be officers of a public sector undertaking. These polling officers, they are the ones who mark that indelible ink on your finger when you go to a polling station to cast a vote. Those are the polling officers. They will assist the presiding officers. The presiding officer will ensure that the elections are being conducted fairly. Their duty as the name itself hints is to preside over the polling station and ensure that everything is being conducted in a fair manner. The last set of categories of officers are called observers. There are two kinds of observers in every election. You might see people belonging to or maybe affiliated to a particular political party sitting in one corner of the polling station to ensure that there is no malpractice, to ensure that there is no one political party trying to influence the voters, etc. So, there will be representatives of each political party in one corner of the presiding polling station.

But the observers are not those people. Observers are the officers of the government of India itself who are present in each polling station in each constituency to ensure that the elections are being conducted in a smooth manner. Observers, what makes them different is that they have a power that none of the other officers have. The observers can direct the returning officer to stop the counting of the votes or to not declare the results after the votes have been counted. They can do this or they can exercise this power if they feel that some untoward events like booth capturing or some illegal malpractice is being conducted in a polling station or maybe some of the electronic votes have been tampered with or destroyed. In such cases of exigencies, the observers can direct the returning officers to stop counting the votes and to stop declaring the results.

The Constitution prescribes that the Election Commission is to ensure superintendents, direction, and control of the preparation of electoral votes. What does superintendence, direction, and control of preparation of electoral votes mean? For that, we need to look into

this legislation called the Representation of Peoples Act of 1951. It is this legislation which provides a clarity on the scope and ambit of Election Commission's powers.

There are a different variety of functions for the Election Commission of India under the Representation of Peoples Act. This starts from the Election Commission of India's mandate to notify the dates for elections. The Election Commission conducts elections to four offices, parliament, state legislative assembly, President, and Vice President. So, for all of these four elections, the Election Commission of India has to notify the dates on which the elections are to be held. The next function is that the Election Commission has to direct as well as approve the polling stations of each constituency in each state.

So, this is also something that the Election Commission has a prerogative of. In every election, there is a nomination of candidature and after that the returning officer scrutinizes the nominations to see that everything is intact, and no laws are being violated. It is only after the scrutiny of nominations, the candidature is accepted or rejected. Then after that, even after the candidature of a particular candidate has been accepted by the returning officer, the candidate can withdraw himself from elections. For all of these, there are certain last dates beyond which you cannot do any of these activities.

So, there is a last date for filing nominations as a candidate of a political party for contesting the elections. There is a last date by which the scrutiny of nominations has to be completed. There is also a last date beyond which you cannot withdraw your candidature. So, all of these last dates are being fixed by the Election Commission. It is the Election Commission which also fixes the date and time on which the elections will be completed, and the results will be declared.

So, all of these are decided by the Election Commission of India. The Election Commission also fixes the number of hours within which the entire polling process should be completed. So, if you have gone to vote in some of the elections, you might have noticed that there will be a provision of time, say from 6 am to 6 pm beyond which you cannot cast your vote. So, the number of hours within which you need to cast your vote is also fixed by the Election Commission. Now, in certain circumstances, there may be a need to adjourn the poll to a later date. Suppose there is a natural calamity in a particular state or a major accident or a riot which is happening within the state. All of these are unforeseen situations or unexpected events in which you cannot conduct an entire process of election in a very peaceful manner. So, in such situations, the Election Commission takes a call on whether to conduct elections in that state at that particular point of time or to adjourn it or postpone it to a later date. But in certain situations, there might be no option but to cancel the elections.

In legal terms, we call it declaring the elections void. So, this will render that entire process of elections as having the effect of being cancelled. This might happen in situations where

booth capturing takes place. Booth capturing is a situation where there are people inside the polling station and they ask or influence the voters to vote for a particular party, maybe by force, maybe by coercion or by threatening. This is what booth capturing and election is declared void in situations of booth capturing or maybe if they have reason to believe that the electoral votes have been tampered with or destroyed either intentionally or accidentally.

In such situations, you cannot adjourn the polls, but you will have to declare the elections void and you will have to call for a fresh election in that particular constituency. So, it is the ECI or the Election Commission which takes a call on this and declares an election void and calls for fresh polls. The entire administrative machinery for elections that is supervised by and directed by and within the control of the Election Commission of India. They have to supervise the Chief Electoral Officer who will in turn supervise the other people who come within the hierarchy. The Election Commission has the overall responsibility to supervise the entire administrative machinery.

It is the Election Commission which designates other key personnel such as the returning officers, the presiding officers, the polling officers, and the observers in each particular constituency. So the entire administrative machinery of elections runs under the control and direction of the Election Commission of India. Lastly, under the Representation of Peoples Act, there is this concept of registration of political parties. There are certain benefits that come from registering with the Election Commission of India as a political party. This might be with respect to getting symbols allocated to them or getting a particular name allocated to them.

These are certain prerogatives that are there for political parties if they register. Registration is mandatory for recognition of a political party as a national party or as a state party. For this it is the political parties who register themselves with the Election Commission of India. This is a broad overview of the various functions that are performed by the Election Commission of India as envisaged under the Representation of Peoples Act of 1951. Did you know that airwaves are considered as a public property? There is a Supreme Court judgment called the *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal*. This is a landmark judgment which ruled that airwaves are to be considered as a public property. This means that all citizens have a right to access and use airwaves in an equitable manner. Airwaves are most frequently used in TV as well as radio. You might have seen different political parties trying to spread out their message to their voters through television programs and radio programs. So, since airwaves are a public property, the Representation of Peoples Act has created a mechanism whereby it has conferred on the Election Commission of India a responsibility to ensure that airwaves or the spectrum is distributed amongst all political parties in an equitable manner.

The Election Commission of India will assign certain broadcast time on the government-owned media such as Doordarshan or All India Radio. Within this broadcast time, each political party can do their election campaign through TV or All India Radio. This is done by giving 45 minutes to each political party. This is just applicable for the government owned media that is Doordarshan and All India Radio. This is an option that is available only for the parties which are recognized as national parties or state parties.

So base time of 45 minutes is allocated to all political parties. If an additional time is given to a political party, it will be based on their past electoral performance. So, if a political party A has won in the election in the past year, then they will be given an additional time say which is different from a party which did not win the elections. So, the additional time is allocated based on the previous electoral performance. There are certain slots in TV as well as in radio which are considered prime time. This is the time gap within which there will be a maximum number of viewers listening to the programs or viewing the programs.

This prime-time slot may be from 8 to 9 or from 7 to 8 depending on which time lot is garnering a greater number of viewers. To ensure that no one political party gets the advantage of doing their election campaign during the prime-time slot, the time slots themselves are distributed to each of the political parties through a lottery system. Lots are picked for each political party to understand within which time they should do their election campaign. So, this will ensure that no preferential treatment is given for one political party for the prime-time slot. Before these programs are being aired on TV or on radio, the transcripts of that program will be reviewed and vetted to ensure that they do not violate any of the laws and regulations.

The laws and regulations are present in the Model Code of Conduct which lays down certain dos and don'ts that each political party has to abide by, each candidate has to abide by once the elections have been declared. These transcripts are vetted in order to ensure that they don't violate any of the conditions that are prescribed under the Model Code of Conduct or any other laws and regulations that are in place. And there may be a case that a political party will say that you have unreasonably asked me to restrict my speech, you have unreasonably asked me to delete a portion of my speech etc. In order to settle such disputes that might arise after the transcripts are reviewed and vetted, an apex committee will be constituted.

This apex committee will comprise of members from Akashvani and from Door Darshan and they will decide the disputes that are arising out of the review and vetting of the transcripts. Once this apex committee decides, that will be final and there can be no further deliberations on it. This is how airways are distributed equitably amongst all political parties once elections have been declared. This is also one additional function or prerogative that the Election Commission of India has by virtue of the Representation of Peoples Act, 1951.

This Model Code of Conduct is a list of dos and don'ts that each candidate and his political party is required to abide by before elections. And if they do not observe the guidelines that are mentioned in the Model Code of Conduct, the Election Commission can take an action against them which may even result in them losing out on their opportunity to become a representative. So, it is a serious guideline. Even though it is termed guidelines, it is a very serious guideline.

This has to be complied with without any dilutions. The first set of guidelines under the Model Code of Conduct is regarding the general conduct of the political parties and their candidates. You cannot indulge in any activity which is likely to cause communal tensions or tensions amongst different people owing to their religious background or caste background or gender. You cannot flare up those existing differences by your election campaigns. Secondly, even if you criticize your political opponents, it should be strictly regarding the work of those political opponents in the public domain.

You cannot criticize them for their private activities or their private life. And you also cannot lodge unverified allegations that may result in a grossly distorted picture of that particular candidate or party in the public domain. As part of general conduct, you also cannot appeal to different voters based on the language or caste or religion. You cannot ask for a vote directly or explicitly based on such considerations. And you also cannot use places of worship for your election campaigns. Say, you cannot conduct an election campaign in front of your mosque or temple or church.

These activities are strictly prohibited. There might be instances where the parties or candidates may indulge in corrupt practices like intimidating voters to vote for their particular party or to bribe their voters to vote for them. These are also activities that are prohibited under the modern code of conduct. Under the general conduct, there is also one more aspect that is mentioned which is that you cannot organize picketing activities or demonstrations in front of people as a mark of protest. You have to respect the private life of all the voters of your constituency. So, if you know that a particular voter is not likely to vote for your party or your candidate, you cannot go and sit in front of their houses and launch a dharna or a demonstration as a mark of protest.

This is also something that is clearly prohibited under the modern code of conduct. The second set of guidelines is regarding the meetings of these political parties. Whenever a political party or a candidate is holding a meeting, they have to inform the police well in advance so that necessary arrangements can be made for controlling their traffic and maintaining the law and order. They also have to seek necessary permissions if at all they want to use things like loudspeakers for their election campaigns. For all of these, there are licenses or permissions that are required. All of these have to be secured well in advance before the political parties or the candidates conduct meetings in the open public domain.

Processions happen as part of election campaigns. These are called by various names in your district. It might be an election rally; it might be an election campaign or a roadshow. In all of such processions, there are certain guidelines that have to be followed. Again, time, place etc. have to be notified to the police well in advance so that they can ensure the necessary arrangements. And if it is going to be a long procession, they have to bifurcate into segments so that after each segment is over, the police can release the traffic that they have been holding.

This will ensure that the election campaign will also happen and the public's life and the right to move will not be curtailed in a restrictive manner. This is also something that has been mentioned under the Model Code of Conduct. Now on the polling day, the candidates and the political parties have to cooperate with the election commission's officers to ensure that the polling happens in a very smooth manner. The Model Code of Conduct also explicitly states that you cannot exhibit any flag of your political party or any symbol or poster on the polling station.

It is only the candidate's name that will have to be written in the polling station. All the political parties exhibiting their candidate's name, only that is permitted. You cannot put any election campaign material such as posters, flags or election symbols in front of the polling station. Another aspect in the Model Code of Conduct is certain guidelines that are exclusively there for the political party that is in power at the time of elections. So, when a party is in power, they will have access to a lot of government resources. But the Model Code of Conduct clearly says that you cannot use government resources for your campaigning or for your advantage, for putting your political party in a position of advantage.

The government resources cannot be utilized. There are also certain other guidelines, say you cannot issue advertisements with the money that is drawn from the public exchequer. You also cannot do certain activities once elections have been declared. So, you cannot lay foundation stones in any particular building or in any particular locality. This is something that the political party in power is usually prone to doing, because they hold the positions of responsibility. So, once the elections have been declared, you cannot lay foundation stones and you cannot make promises for providing public utilities.

You cannot make promises of job guarantee, or guarantee of a facility in your constituency, etc. As long as it is a public utility, you cannot make such promises once elections have been declared. And you also cannot engage in ad hoc appointments. So, this sort of restriction comes into play in a particular time period that is fixed by the Election Commission and usually it is the two weeks preceding the date of election. It is at that point of time when such sort of restrictions will come into play. So, when all of these restrictions are in place is to be decided by the Election Commission of India.

Constitutional Law and Public Administration in India

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Week- 09

Lecture-05

E-Governance

E-governance stands for electronic governance. So, e-governance as the name suggests is the application of information and communication technology for providing government services. Why do we need e-governance? There are a lot of reasons why we might need to switch to e-governance. Firstly, it can help in a better delivery of government services to citizens. Secondly, it can improve the interactions between businesses and the industry. Thirdly, it can empower citizens by facilitating access to information. Fourthly, it can help in making the government more efficient and more importantly, it can usher in lesser corruption, more transparency, more convenience, all of this at reduced costs. With e-governance, the government can save a lot of money that might otherwise be spent on resources that are needed for providing services to people.

This might be stationary, this might be machinery, the number of personnel who are required for managing these affairs, etc. Another advantage is that of transparency. All the information would be accessible to people at their disposal, which makes the government more transparent and when the government becomes more transparent, it becomes more accountable as well. Once citizens have access to the information which is provided by the government, they can hold the government accountable for its actions. Moreover, once things become automated, it is easier for the government to process the information and deliver services more efficiently. It takes less time and there would be fewer errors while the government renders its functions, making it efficient over. Lastly, it facilitates citizens to be more proactive in engaging with how governance is being carried out in the country. They can interact more closely with the government, making them more cooperative. They can also be more active and aware citizens, which makes them capable of advocating for the rights they have as citizens and the duties that the government owes to them. Even though all of these advantages are there, e-governance comes with its own set of challenges.

For the rural population, the accessibility of the internet is an issue. Therefore, they might not be able to make use of the facilities offered by e-governance in a fruitful manner. Secondly, there is this low literacy rate in most parts of our country, which makes it difficult

for people to navigate through e-governance or on their own. So, they might need the help of other people, maybe the government officers themselves will have to assist these people, illiterate people especially, in how to go about accessing these services through technology. So, this might make the whole system seem redundant.

Language may be a significant barrier. Many people may not be able to understand the system if these services are offered to them in English or in a regional language that is not their own language. So, language may be a considerable barrier in e-governance. Another aspect that we need to bear in mind is that when the government becomes technology centered, we always need to be cautious about the loss or leakage of data. If there is a breach of sensitive data of the citizens, it can have very many dangerous consequences.

So, e-governance comes with its own set of advantages and challenges. We have something called the National e-Governance Plan of 2006, which formulates the framework for ushering in e-governance in our country. Its vision statement makes it clear that it wants the government services to be accessible to the common man through government service delivery outlets. This it claims will bring about more transparency, efficiency and reliability at affordable costs. So, what are these government service delivery outlets? This is found in a three-tier architecture.

So, at one end, we have the government service centers. These are the outlets through which e-governance services are made available to the citizens. There will be many common service centers in your locality. If you go to your nearest common service center, you can approach the common service center for getting your applications, getting your renewables, getting your registrations done etc. The personnel sitting there in the common service center would be able to process your applications through online facilities. There needs to be infrastructure which will facilitate the common service centers to provide the services to the citizens. This infrastructure is provided by the government. This may be in the form of computers, logistics, technology, network, etc. So, whatever infrastructure goes into it, that is termed as the common and support infrastructure. This infrastructure will help share information between the government and the citizens through the delivery of services through common service centers. Now what are the services that are sought to be provided through e-governance? They have titled it as mission mode projects. This is nothing but the services that are sought to be provided to the citizens. So, this may be in the form of banking services or may be getting your applications done. It may be in the agricultural sector.

There may be different mission mode projects in each sector. There may be a separate mission mode project for the healthcare sector, for the agricultural sector, for the banking sector, etc. Each of these mission mode projects will be implemented by and spearheaded by the concerned ministry. The Ministry of Agriculture will be taking care of all the mission

mode projects that are there related to the agricultural sector. So, that is how the National e-Governance Plan facilitates e-governance in our country.

How does this infrastructure work? First of all, there is the Department of Information Technology which will create this common and support infrastructure and it will also lay down the standards and policy guidelines that are to be followed. Then before the mission mode projects each of those are owned by and led by and implemented by the concerned ministries. The state governments may adopt certain state specific projects also for implementing it through e-governance. One particular example for this would be the system of Bhumi that is prevalent in Karnataka. This is an e-governance initiative for digitizing land records in the state of Karnataka. This is one such example of a state specific e-governance project. But there are limitations to the number of e-governance projects that can be implemented through state level. Otherwise, most of the e-governance initiatives will be at the central level. It is the Planning Commission as well as the Ministry of Finance which allocates funds for the smooth functioning of these e-governance. And the Cabinet Committee on Economic Affairs takes the policy level decisions for each of these projects.

There is an Ethics Committee which is headed by the Cabinet Secretary which will oversee this program to provide inputs from a policy perspective as well as implementation perspective. This is the overall architecture that has been envisaged under the National e-Governance Plan for ushering in e-governance in India. There are a lot of e-governance initiatives which have been taken in our country and which have been proved to be very successful. Common service centers are the go-to places if you want to get your online applications or renewals done. These are available in most of the localities. Then we have something called Umang. Umang is a platform which will let you access many different kinds of services that are offered by the central government, the state government and even the local bodies all in one platform. And the advantage of Umang is that it is available in many regional languages.

Digilocker is something that is familiar to most of us. This is one platform that will allow you to access, download and store your government documents like Aadhaar card, voters ID card, PAN card etc. So, the documents which are stored in Digilocker can be shown by you to a government official or if you show them for any identification purpose, you need not produce the original copy of the document. The copy in the Digilocker would be sufficient. It will be considered as authentic as the physical copy of your certificate.

UPI or the Unified Payments Interface might be an app that most of us will be using on a daily basis. This is an app that will help you make money transfers in a cashless mode. We also have an interesting initiative called MyGov. MyGov is a platform which will help citizens to provide their own inputs for governance. The citizens can submit their vision, their ideas for how the country should be run to the government. So, the government will

be in a position to understand what the citizens' expectations are, and what their ideas and visions are made available to them through this platform.

MeriPehchaan is another initiative which will help users access a lot of services with a single set of credentials. We also have something called Diksha. Diksha is an app that has been targeted for the teachers to help them bring about digital infrastructure for a better teaching facility in the country. Arogya Setu is an app that all of us have used during the COVID-19 pandemic. So, all of these are e-governance initiatives that have proven to be very successful and very helpful in navigating for the citizens. These are only some of the initiatives. There are a lot of state specific initiatives also. There are a lot of pan India initiatives that have been launched by the government that are being proposed to be launched etc. the most recent one being a policy called the National Data Governance Framework Policy. This as the title suggests is to understand how the data that is collected through e-governance initiatives is to be processed, stored, and handled with. This policy gives an exhaustive set of guidelines which can be useful in understanding how to deal with this data. It enumerates the best-case scenario of how to go about managing a data set. It proposes to set up an Indian Data Management Office. This Indian Data Management Office would be set up under the Digital India Corporation functioning under the Ministry of Electronics and Information and Technology. The Indian Data Management Office will formulate the rules that are required for accessing data, for using the data and it will develop the circumstances in which the data will have to be disclosed. And this Indian Data Management Office is also expected to come up with something called the Indian Data Sets Program. So, under the Indian Data Sets Program what is envisaged is that the data that is collected from citizens by government entities that will be depersonalized, and it will be anonymized so that the data would not be, the data would not enable us to track the persons from which we have sourced the data. So, this non-personal and anonymized data will be collected and retained for facilitating governance purposes. So, this Indian Datasets Program is something that will be implemented by the Indian Data Management Office.

Constitutional Law and Public Administration in India

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Week- 09

Lecture-06

Administrative Tribunals – I

Tribunals have been on the rise and that too administrative tribunals, which unlike the regular courts are an administrative as well as a judicial body. There are various kinds of tribunals in our country. The most essential part of tribunals is that they have respective powers and functions and in essence. There are three kinds of tribunals. The first kind of tribunal is the Constitutional tribunal that exists in our country. Constitutional tribunals take care of the interstate disputes that take place within the gamut of the pan-India level. For instance, there are the various interstate river tribunals, wherein disputes like the Kaveri disputes, they go, and they are adjudicated in these tribunals. And all these tribunals, they are specialized bodies to deal with a specific kind of an issue. The next kind of a tribunal is an administrative tribunal, which generally serves for the purpose of adjudicating service matters.

For example, there are various tribunals in the various bodies of the government of India and in the state governments as well. And then we have the statutory tribunals, which means that they have been formed by the incoming or by the enactment of a statute that has been enacted by the Parliament, which is the national green tribunal, the consumer centers that are there, the consumer commissions that are there, the state commission, the national commission, and the district commissions as well. Then we have the RTI commissions on various levels. So, these are the three levels of tribunals that exist in India. First being the Constitutional tribunal, the second being the administrative tribunal, and the third being the statutory tribunals.

Is there a difference between a tribunal and a court? There is a very thin line of difference between a tribunal and a court. In a sense, they may look similar because they are carrying out the same function that a normal ordinary court in our country generally takes care of, that is adjudication of disputes. But the change and the sense that is there in a tribunal apart from a court is about the adjudicating authorities who become the people who actually adjudicate these issues.

So, therefore, tribunals are vested with judicial power of the state under a particular statute or a statutory rule. And these bodies are known as quasi-judicial bodies because *per se*, they are not complete judicial organs, they assist the judiciary in our country and therefore, they are called as quasi-judicial bodies. Another reason why they are called as quasi-judicial bodies is they replicate the court proceedings in a manner in which it happens in a court that follows the Code of Civil Procedure in civil cases and the Code of Criminal Procedure in criminal cases. But what is of a sense out here is in a tribunal, these code of conduct in a civil matter and in a criminal matter are not followed *per se*. They are not followed by the way they are written in the books of law as it is written in the Code of Civil Procedure or as it is written in the Code of Criminal Procedure.

So, the working of these tribunals is quite lenient. The manner in which they function, the manner in which they adjudicate disputes, the manner in which they take up evidence are not followed by the Evidence Act. It is quite a liberal method that they follow in order to ensure that the litigants are not forced by the tribunal system or *per se* what we call as the evidence system that is there. The rules *per se* that are there rather they are easy going and they understand, and it is easy for the litigants to get their disputes adjudicated. These are bodies that possess the trappings of a court, they are a court, they work like a court, but they do not follow the statutory methods that are followed in a court of law strictly. It is not that they do not follow at all. They do not follow the rule as per the word. They do follow in spirit but not in word. There are various Constitutional statuses that are accorded to these tribunals under Articles 136, 227, 323A and 323B of the Constitution of India. There are many reasons for the growth of these tribunals.

There may be a question when a country like India has a Supreme Court, High Courts across all the states in the country, then there are district courts, then there are magistrate courts for civil criminal disputes. What was the need for the tribunals in a country like India? The reasons are manifold. Primarily the reasons for growth of tribunals being first, India is a welfare state which means we look after our people and that is our primary responsibility as a state. Being a welfare state does not only mean providing food, shelter, and other amenities to your people, it also comes down to the most primary thing that is justice. Welfare also equates to justice.

Therefore, one of the reasons why these tribunals came up is to ensure that the state goes on for its welfare activities, that is, if there is a dispute and it's taking time to get redressed by a normal court because a normal court is already burdened with a lot of cases. For instance, to buy a mobile phone from a market and you have paid 50,000 rupees After 10 days this phone has stopped working. When the shop owner on contact says that you do not have a warranty because for a warranty you were supposed to pay Rs. 10,000 extra and this is some hardware deficiency that is there in the phone/only software deficiency can be taken care of that will arise or may have arisen in your phone. Under these circumstances if a person would have to approach the normal court it would have taken a lot of time for

him to get his dispute adjudicated because what he wants is either a replacement for this particular phone or to get his money back.

For these reasons there is something called a consumer dispute redressal forum. There is a district consumer redressal forum, there is a state consumer redressal forum and then there is a national commission for consumer disputes. Such kind of disputes they would unnecessarily burden the judiciary who generally take care of larger kind of disputes was something that is a little more complex rather this is a kind of dispute that can be solved by someone who knows how the Consumer law in our country functions and such a person a judge with 20 years of experience need not be. He can be a lawyer with 5 years of experience or 10 years of experience and be a judge of the district consumer forum. So, therefore, to increase or to decrease such kinds of disputes and to increase the welfare and to decrease such kinds of disputes and to address these disputes in a timely manner all these tribunals and various kinds of tribunals have come up in our country.

The traditional courts at times are very slow in the manner in which they dispose of their cases. Their disposal rates are very low owing to the large number of methods that they have to follow. The procedure that they have to follow that is quite intense rather in a tribunal that procedure has been relaxed and therefore these tribunals have been on an increase because it is increasing the welfare act of the state and third and the most prominent point that we have been discussing in pieces and to bring it out into words tribunals are rapid they are efficient, and they are subject specific. They will not deal with every kind of an issue for example a consumer forum will only deal with disputes related to a consumer, a dispute related to the deficiency of a particular service or a particular product in a similar manner. A different tribunal for example a national green tribal that has come into existence by the coming of a statute that is the national green tribunal act only adjudicates matters that are related to the domain of environmental law.

Therefore, you would only have people who have knowledge and expertise in environmental law. It will not deal into any other kind of dispute. The dispute that it will deal with is related to the subject domain of environmental law only. As to composition, a regular court has a list of mandatory criteria that needs to be fulfilled before a person is appointed as a judge to the High Court or the district court or as a magistrate or as a judge of the Supreme Court of India. However, in the case of a tribunal there are two kinds of people who actually comprise the bench or the jury as we may call it. They are called the judicial members and the technical or expert members.

A judicial member as the name goes will be from the side of a law background a judicial member will have the law background and the legal knowledge associated with him. However, an expert or technical member may not be a person from the law background; he may be a person who is a subject expert in that particular area. Next with regards to the power of all of these tribunal they try cases in special matters, and they are not bound by

all the rules of evidence and procedure as in a normal court. So, this is the essence of a tribunal and why it has taken rapid growth in a country like India.

Tribunals bar the jurisdiction of civil courts. Whenever a dispute arises as a litigant or as a lawyer you need to know where you file the case for the first instance. If in case it's a consumer case you should not go to the High Court directly because the High Court may tell you to first approach the first authority that actually will adjudicate this matter and the award, or a decision of a tribunal are deemed to be a decree of a civil court. So it isn't that order, or a judgment of a tribunal does not have any relevance. It has the same amount of relevance as any decree or an order of a civil court. In this particular case that is *Durga Shankar Mehta v. Thakur Raghuraj* the question arose of a tribunal.

Tribunal as used in Article 136 does not mean the same thing as a court of law, but it includes all adjudicating bodies constituted by the state invested with judicial as distinguished from administrative or executive function. The High Courts and Supreme Court have various kinds of jurisdictions. For example, the Supreme Court has three kinds of jurisdiction: the original jurisdiction, the appellate jurisdiction, and the advisory jurisdiction. Under the original jurisdiction it will take up matters at the first instance. However, under the appellate jurisdiction it will take up matters that have been adjudicated by other courts and have come for an appeal before the Supreme Court.

And under the advisory jurisdiction it is the advice that the President of India seeks from the judges of the Supreme Court of India. This is the role of the jurisdiction of the Supreme Court with regards to the administrative and executive function. High Courts and supreme courts conduct a lot of administrative and executive functions which tribunals in a sense generally abstain from conducting. What are these administrative or executive functions that these High Courts and Supreme Court of India conduct? Under the administrative function the High Court's generally direct their subordinate courts to function in one proper manner or to function in a particular manner. For example, in Maharashtra there is the Bombay High Court.

The Bombay High Court has administrative duties as well. It will ensure how a particular subordinate civil court, or a criminal court will function. There will be a code of conduct, there will be a rule, there will be a manner in which the administrative functions of this court will actually take place. This is the administrative function of a particular High Court and similarly this is similar to all other high courts as well. Under the executive functions they do issue various notices, various kinds of orders for its various subordinate courts to function and under the administrative and executive functions High Courts and Supreme Courts they do appoint judges as well.

Supreme Court plays a major role in appointing judges in various High Courts in India and the High Court of a particular state plays a major role in appointing various kinds of judges

where may be the district judge or the civil judge, the magistrate. So, these are the administrative and the executive functions that a normal High Court and Supreme Court in our country would actually take care of which is distinguished by a tribunal in its assents. A tribal generally abstains from these kinds of duties and will generally not find itself carrying out these kinds of duties because it does not have the power to carry out such kinds of functions and duties.

As to the growth of administrative tribunals in India. Part XIV Articles 323a and 323b were inserted by the 42nd Amendment of the Indian Constitution which provided for tribunals that deal with administrative matters. The objective was excluding the jurisdiction of the High Courts under Article 226 and 227 except for the Supreme Court under Article 136. Again, these tribunals were formed to be bodies originating efficacious alternative institutional mechanisms for specific judicial cases. Not all kinds of judicial cases. but specific judicial cases. Third, an administrative tribunal is neither an exclusive judicial body nor an absolute administrative body and therefore it is called a quasi-judicial body and it lies between a complete judicial and an absolute administrative body it somewhere lies in between these two organs and compartments.

Tribunals have some general features. A tribunal comes with a statutory origin for example a national green tribunal comes via the act of the Parliament there will be an act of the Parliament and that is how it will come into picture. Then these tribunals have the features of an ordinary court in spirit not in word. It performs quasi-judicial and judicial functions bound to act judicially in every circumstance or circumstances as it may be. Every order that a tribunal gives should be reasoned enough. It cannot just give an order without a reason. As mentioned earlier as well, tribunals are not bound by strict rules of evidence and procedure. So, it is relaxing for the lawyers and the people appearing before a tribunal to not be in a watertight compartment with regards to evidence and procedure. Also, in these commissions for example in a consumer commission you as a deficit or as a consumer who has faced some harshness are also allowed to appear and to make your own submission. You need not necessarily take up a lawyer.

Next these tribunals are independent bodies, and they are not subject to administrative interference while discharging their functions. They do not come as a subordinate, but they are independent bodies, and they are free to function in a manner within their prescribed rules in a manner which is a right as per the spirit of law. Next in procedural matters they possess the power to summon witnesses, administer oaths and compel the production of documents to litigants as well and to lawyers as well and eventually as all courts of law in our country they are bound by the principles of natural justice. we would be dealing with what the principles of natural justice are but, in a sense, these are some of the features that are there in a tribunal. Further tribunals also need to be fair and open, and their judgment should be impartial and indispensable and prerogative writs of certiorari and prohibition are available against the decisions that are given by a tribunal as well.

There are various kinds of tribunals. For service matters under Article 328 the tribunals have come into existence. This has not come into existence by a statute rather it has come into existence by an Article of the Constitution. So, establishment of administrative tribunals by law made by Parliament. So, when the Parliament enacted the law, it came into existence.

With regards to the function for service matters adjudication of disputes and complaints regarding recruitment, conditions of service of government servants of the centre and the state. This is the domain in which they will function because when a particular government servant enters the government to work there are various kinds of disputes that arise. For example, disputes regarding recruitment of a particular person. What if the recruitment was not done in the manner in which it should have been then there are conditions for a particular service of the government servants. Every service has its own peculiar kind of conditions.

So, all of these things need to be taken care of. employees of local or other authority within India under the control of government of India cooperation owned or controlled by the government these are the people who will approach these service tribunals in case they face any kind of difficulties during the period of their service. These tribunals are to be established separately for the centre and the states or two or more states. So, they are not just one, they are multiple and a multitude of tribunals service matter tribunals across India. statute must provide for jurisdiction as well.

If you are not happy with the order of the tribunal you are free to approach the Supreme Court under the special jurisdiction of the Supreme Court of India. With regards to other matters, Article 323B empowers Parliament and state legislatures to establish tribunals to adjudicate matters specifically mentioned under Article 323B. They are related to levy assessment collection and enforcement of any tax foreign exchange and export industrial and labour disputes and therefore you have your labour commissions production procurement supply and distribution of food stuff rent and its regulation and tenancy issues etc. So the statute or the law defining the jurisdiction, the procedure and the power of such tribunals and *L Chandra Kumar v. Union of India* Article 323A(2)(d) and 323B(3)(d) was tracked down.

There is something called exclusion of jurisdiction of High Courts. under Article 226, 227 and under Article 32 of the Supreme Court tribunals they exercise their right under 323a and 323B and they act as a court of first instance in the concerned areas. For such matters you cannot directly approach the High Court you need to approach the tribunals under their exclusive jurisdiction based on these Articles. You cannot approach a Supreme Court under Article 136 against rulings of tribunals. High Courts are to be approached first under Article 226 and 227 because there are various kinds of courts in our country, and they have a degree of precedence.

The Supreme Court being at the top then you have the High Courts then you have the district courts. So, it is a mountain like structure wherein at the tip of the mountain you have the Supreme Court and as you come down you have the High Courts and various other courts. So when you get an order from a particular court you need to approach the particular High Court in that state under Article 226 or 227 which is the jurisdiction under which you can approach a particular court that is the writ jurisdiction of the High Courts and then if you are not happy you can eventually approach the Supreme Court of India under Article 32 or under Article 136 which is the special leave petition of the Supreme Court of India.

There is also a Railway Claims tribunals. Suppose you are traveling by the railway and your AC is not functioning in a particular span of journey at a particular time you are traveling from Delhi to Jammu and Kashmir and your AC is not working in between Delhi to a certain point and by the time you reach Srinagar it starts working. So, then you can approach the railways claims tribunals. The railway employees will approach the railway claims tribunal.

You have the Income Tax tribunal for various kinds of income tax matters. the NGT and tribunals related specifically to matters like shares debentures and any kinds of issues that happen in the regulatory market with regards to shares and various other kinds of issues that take place in the share market. Then you have the armed forces tribunals because the armed forces disputes do not come to the regular courts; they are bound via their own code of procedure and their own code of conduct. We also have something known as the administrative tribunals act.

What is the Administrative Tribunals Act? This law was passed in the year 1985 by the Parliament in Pursuance to Article 323A. This Act went on to establish a central administrative tribunal and state administrative tribunal for union and state governments. These tribunals play a very important function in the functioning of the government in our country and in regard to adjudication of disputes. The extent of these tribunals extends to the whole of India. The objective of this Act is to reduce the burden of the courts and to provide speedier remedy in disputes related to service matters.

So, any person who is in the government whether he is a railway employee or employee of any government undertaking say HAL or BHEL he or she will come under the jurisdiction and the purview of the railway tribunals act if there are concerns regarding their services. This is applicable to the armed officers, armed officers and not the Indian army. Officers or servants of High Courts or Supreme Courts, secretarial staff of Parliament. Further, chairman, vice chairman, judicial member, administrative member with a term of five years each chairman up to 65 years are the members for example UPSC, state public commission chairman so on and so forth.

The jurisdiction is if any person is appointed or recruited by any civil service that is the all India service or civil post under the union's civilian or defense service, they will come under the jurisdiction of this particular act if it is related to the service related disputes or matters of the above-mentioned employees, employees of any local or other authority within India under the control of the government of India, service matters of such persons whose services have been placed at the disposal of the central government removed from office on resignation by an order or from the President of India proved misbehavior or incapacity section 9 and decision after an inquiry made by a judge of the Supreme Court. All these issues will be something that is amenable to this tribunal.

There are reasons for the growth of administrative tribunals in particular. The reasons are more or less the same. First is, it's not fine enough for all these service-related matters to go to the judicial system because the judicial system is for other kinds of matters. They have property related disputes in several cases, they have cases related to murder, kidnapping, so on and so forth in the criminal matter or on the criminal side and second service matters you do not need a judge with 30 years of experience to adjudicate these matters. You need someone who can actually understand what is going on out here. So, you can do away with the technicalities. So, that is another reason why administrative tribunals have been on the rise because they are adjudicating disputes at a faster rate. Then you have your provision for an effective enforcement of preventive measures.

Things are getting on a preventive line at a very fast pace. Then you have decisions in line with departmental policies along with other considerations because every government department in India has its own policies. For instance, every private company has its own HR policies. Likewise, every department in the government has its own policies. Every university, every state or central university has its own policies, be it leave policy, be it medical policies or any kind of policies and therefore you do not need someone who is an expert in law but you need someone who is an expert in these kinds of policies and will actually bring out the best reason.

Another reason is flexibility. These tribunals are very flexible in their workings. You can have a discussion with the judge because you are trying to make the judge understand a particular point of law and then the time in which you get your order is a little faster than what you would get from a normal tradition. Currently we have 14 administrative tribunals in our country. Industrial tribunals, which are also called labour courts, are instituted by the Industrial Disputes Act of 1947.

It consists of a chairman and two members. The composition will vary. You can refer to the Industrial Disputes Act for the same and the objective of the industrial tribunal is the maintenance of peace and harmony in industries by quick disposal of industrial disputes because industrial disputes likewise should not come to a regular court because they would take more time. So, a person who is actually an expert in the field would be the best person

to adjudicate a dispute that arises from an industrial point of view. Next you have the Income Tax Appeal Tribunals set up in January 1941 that specializes in appeals under the Direct Tax Act and if you are not happy with an order given by the Income Tax Appeal tribunal, you can appeal before the High Court if there is a substantial question of law and this tribunal consists of six members. Then there is the Customs Excise Service Tax Appeal tribunal constituted under Section 129 of the Customs Act of 1962.

This has been mandated to decide appeals that come from the Customs Act, the Central Excise Act, the Finance Act, and the Customs Tariff Act 1975. So, there are specific tribunals and there are specific acts that these tribunals are dealing with and the appeal from these tribunal will lie before the Supreme Court depending on the valuation because customs related matters. When the customs officers they seal, they confiscate gold or some drugs of a large quantity, it would matter on the valuation and how important it is with regards to national security as well and therefore the appeal would lie before the Supreme Court or the High Court depending on its kind and nature. Then we have the Appellate Tribunal for Smugglers and Foreign Exchange Manipulators Act constituted under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act of 1976. This here is appeal from the SAFEMA 1976, the NDPS Act of 1985, the PMLA Act of 2002, the prohibition Benami Property Transactions Act 1988 and their subsequent amendments in 2016 and the Foreign Exchange Management Act 1999.

The National Tribunal Bill is headquartered in Delhi. Then we have the Administrative Tribunals which comprises the Central and State Administrative Tribunals set up as we have seen under Article 323A of the Constitution by Administrative Tribunals Act 1985, Service-Related Matters of Government Employees. This is what the Administrative Tribunals generally deal with. Someone has an issue with regards to salary compensation or the like this is where it will go.

Then you have the Railway Claims Tribal which is constituted under the Railways Act of 1989. Again, the objective of all these tribunals is one and the same, that is to provide speedy disposal of claims against the railway administration. Enquiries into claims against a railway administration for laws, destruction, damage, deterioration, non-delivery of animals, goods entrusted to be carried by the railway. For example, if you have booked say 10 wagons in the railway and they will be carrying coal from one place in Karnataka to the steel factory in Jamshedpur. Out of the 10 wagons, you have seen all of them had goods filled with them. But by the time it reaches the Tata steel plant, you see that only 8 wagons have coal in them, 2 of them do not have. You will approach the Railways Claims tribunal.

Then we have the Securities Appellate Tribunal which was established under the Securities and Exchange Board of India Act 1992. The primary concern of this tribunal is to hear and dispose of appeals against orders passed by the Securities and Exchange Board of India (SEBI). SEBI hears a lot of matters with regards to various kinds of issuance of securities

and the dealings that happen in the share market. So, disposal of appeals against orders passed by the pension fund regulatory, the development authority and also the Insurance Regulatory and Development Authority that is the highest body that takes care of insurance in our country, and it also regulates the insurance mechanism in India. Then you have the Debt Recovery Tribal which is constituted under the Recovery of Debts and Bankruptcy Act of 1993 which provides speedy redressal to lenders and borrowers.

Basically, the Debt Recovery Tribunal that is the DRAT, also functions through the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI Act) and the financial institutions can approach the tribunal. For example, if a bank goes insolvent this tribunal will be the first one to come into rescue and how do they actually restructure their insolvency plans so on and so forth. We also have something called as the Telecom Dispute Settlement and Appellate Tribunal established under the Telecom Regulatory Authority of India 1997 which performs regulatory functions, adjudicates disputes about service providers and consumers and empowered to issue directions to the service providers and appeals from the decisions are tried, they directly lay before the High Court of the Supreme Court.

National Company Law Appellate Tribunal is the highest body in relation to matters related to the Companies Act in India. Below the NCLAT we have the NCLT that is the National Company Law Tribunal and the NCLAT is the highest body constituted under Section 4, not 10 of the Companies Act 2013. Appeals from orders of the NCLT under the Insolvency and Bankruptcy Court, the Competition Commission of India, the Insolvency and Bankruptcy Board of India and the National Financial Reporting Authority as well. So, the NCLAT performs a wide range of functions with regards and also acts as the last body before you approach the Supreme Court of India.

Next, we have the National Consumer Disprints Repressant Forum. In this you have the state commissions and the registry commissions as well. This was set up under the Consumer Protection Act of 1986. It entertains a complaint valued more than 2 crore rupees. It has appellate and revisional jurisdiction from orders of state and district commissions as well and appeals against orders from National Consumer Disputes Redressal Forum directly can be filed before the Supreme Court. A person can directly approach the National Consumer Disputes Redressal Commission if the complaint or if the value is more than 2 crore rupees. If not, you have to follow the procedure of going to the district commission first, then the state commission and eventually the National Consumer Disputes Redressal Commission and then the Supreme Court of India.

Then you have the Electricity Appellate Tribunal formed as an autonomous body under the Electricity Act of 2003. This body generally hears complaints, appeals or original petition against the orders of state central regulatory commission, joint commission or the

adjudicating officer as well and the order is appealable before the Supreme Court if substantial questions of law are involved.

The Armed Forces Tribunal formed under the Armed Forces Tribunal Act which hears disputes regarding commission appointments and roles and conditions of service of persons governed by the Army Act 1950, Navy Act 1957, the Air Force Act 1950. This will not be applicable to any other person in the country. It only is for the people who are there in the Armed Forces, the Army Air Force and Navy. These also contain judicial and administrative members again because you have people who need the idea of law and also people on the administrative side who know the functioning of the policies of the various tribunals and of the various forces of law and the appeal lies to the Supreme Court in case aggression of law is there and it needs to be certified by the tribunal as well.

There is the National Green Tribunal which was established under the National Green Tribunal Act 2010 which provides for speedy environmental justice. If you have a civil dispute in an environmental matter, you will reach out to the National Green Tribunal. The National Green Tribunal does not adjudicate criminal sanctions or criminal matters. It only deals with civil disputes in environmental law. It comprises judicial members and expert members. Your expert members can be someone who is well read and someone who has the qualification to be called as an expert member in an environmental law matter. They are bound by the Court of Civil Procedure of 1906 and the orders are appealable before the Supreme Court within 90 days without having to go to the High Court in this particular matter. These are the 14 kinds of various tribunals in our country.

Constitutional Law and Public Administration in India

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Week- 10

Lecture-01

Administrative Tribunals – II

There are a few cases that the courts have analyzed. There are the case laws as the judiciary has evolved from time and again. The first such is *S.P. Sampath Kumar v. Union of India*, a case in 1987. In this particular case, the court held that it is Constitutionally valid for parliament to create an alternate institution to high courts with jurisdiction over certain matters that are provided; that the alternate body also has the same efficacy as that of the High court. In yet another case, the Supreme Court held that the appointments should be made by the Central Government after consultation of the Chief Justice of India or by a High-Power Selection Committee headed by a CJI or from the current judge from the current high court. This is the manner in which the tribunal system was anticipated; was envisioned. There are also various Acts and kinds of tribunals that came over a period of time.

And there are case laws that deal with an alternate institution to the already existing and robust judiciary that we have in India. The next case law is *L. Chandra Kumar v. Union of India* and others 1997. In this case, a question of law arose; whether a tribunal can substitute a high court and it was held that a tribunal would substitute a high court as an alternative institution mechanism for judicial review. It is primarily to lessen the burden of the high courts; and therefore, they must also be accorded with the status of a high court but, they will not have the various other jurisdictions or the other work that a high court generally has, and such tribunals will act as a court of first instance in respect of areas of law for which they have been constituted.

For instance, there is a National Green Tribunal where any environmental civil matter will first go, before the litigants approach the Supreme Court under Article 32 or 136 or the high court under Article 226 or 227 and the decision that these tribunals will be giving will be subject to scrutiny by a high court within whose jurisdiction the tribunal falls. So, it cannot be said that these tribunals are completely independent, they do have a check and balance within them as well. High courts exist for that matter. Therefore, it is said every court that is there in a particular state, will be subordinate to the high court of that particular state. For a tribunal substituting a high court any weightage in favour of non-judicial

members would render the tribunal less effective and potent than the high court. Therefore, the way the non-judicial members are chosen, needs to be done in a very wise and systematic manner.

People with judicial experience should only be appointed to the tribunals though not necessarily with a lot of experience but people who know how things work in the civil side or on the criminal side. Most tribunals generally handle civil matters. For the Motor Vehicles Act there is a Motor Vehicles Claims Tribunal; there is a Railways Tribunal as well. Income tax, customs, service matters etc. are the boundaries in which they function. To ensure uniformity in administration a separate independent mechanism should be set up to manage the appointment and administration of tribunals and it was in this judgment in the year 1997, the same was held. Until such an independent agency is set up, all tribunals were to function under the administration of a single ministry which is or was the Ministry of Law.

There is a recent judgment of 2010 which is *Union of India v. R. Gandhi*. In this case the court held that parliament may create an alternate mechanism namely tribunals. What was held in Sampath Kumar's case was on subject matters in the union list. So, this is the difference in the 1986 judgment and 2010 judgment. It also went ahead and said that there is no need of a technical member if jurisdiction of courts is transferred to the tribunals solely to achieve expeditious disposal of matters; in any bench technical members must not outnumber judicial members. This is one of the most important proponents that should be kept in mind, that, it is an adjudicative body, and an adjudicative body must have a greater number of judicial members rather than technical members because having judicial members will apply the. There the principles of natural justice will be applied and eventually justice will be done. The third point in this case was that only a secretary level officer with specialized knowledge and skills should be appointed as technical members. A person at the secretary level must ideally be a very senior bureaucrat with technical expertise within the consumer arena or the environmental arena or income tax; and they should have the requisite skills along with the experience. In the case of *Madras Bar Association v. Union of India* and another in 2014, it was explicitly stated that the group A or equivalent rank officers with experience in Indian company law service, specifically in the legal branch and the Indian legal service grade one, cannot be considered for appointment as judicial members because such officers do not come from the judiciary they pass the administrative exams and such officers may be considered for appointment only as technical members. The difference between a judicial member and a technical member may be a very thin silver lining. The fact that technical members do come from these arenas and judicial members are people who are lawyers and eventually going to become judges is an appreciable fact. Also, the administrative support for all these tribunals should come from the Ministry of Law and Justice; and they cannot be appointed through regular appointments, but they should be computed and should come from the Ministry.

Neither the tribunals nor the members must seek or be provided with facilities from the respective parent ministry or concerned department. In the case of *Royer Mathew v. South Indian Bank Limited*, that the judicial functions cannot be performed by technical members was clearly and explicitly mentioned. Technical members are only for the technical know-how, and they should not interfere with the judicial working of the tribunal. Provisions to allow removal of judges by the executive is completely unConstitutional otherwise the executive will have a say on the appointments of judges and technical members in the tribunal which would again dilute their effectiveness. There will be a uniform age of retirement for all members as it is there in every other service. Short tenures lead to control of executives over tribunals causing adverse effects on the independence of judiciary.

And lastly, the impact of amalgamation of tribunals should be analyzed with judicial impact assessment and therefore there are various tribunals for various kinds of matters and services. Over the years the tribunal system has been made a robust functioning system not only by the legislative or executive work, but also by the judiciary taking proactive steps in ensuring that there is a timely message, a timely judgment, so on and so forth. In 2020 when the judgment of the *Madras Bar Association v. the Union of India* was delivered, it stated that national tribunal commissions should be set up to supervise appointments as well as functioning and administration of tribunals. Members will have a term of five years instead of four years and they will be allowed to hold office till they reach the age of 67 instead of 65.

One of the possible reasons for doing this was this was done if we can reason it well it is because you need a proper tenurial office. Many members who come from judicial or the technical side may be well equipped on the knowledge side but to get acquainted with the procedure, and kind of cases that come will take a minimum of two to three years and only by this time a member acquires the skill and aptitude and knowledge that is needed to deliver a particular order that needs to be secured. There is another case of the *Madras Bar Association v. the Union of India*, of the year 2021. In this case, the court struck down privations to the four-year tenure and minimum age requirement of 50 years for members. From the year 1986 to the year 2021 the judiciary has been proactively instituting various changes time and again to ensure the tribunal system reaches its apex point.

It delivers justice to people and welfare for the people which is one of the most important things in a tribunal setup and a robust judiciary along with an executive and a legislature. The judiciary, also has taken the steps way beyond just being a mere guardian and has ensured that it gives the tribunals equal teeth as against mere teeth, that it can bite and be effective in the judgments and order that they eventually deliver. As to finality of orders of tribunals, it is important to understand the clauses of finality of orders of tribunals. It is also relevant why these decisions are binding? There is a finality clause that is provided in the statute to declare that a decision by an agency is final provided that bars an appeal to the court and there is also the doctrine of *res judicata* that says a thing or matter, or

basically, a case that has been finally decided on its merits, cannot be litigated again by the same parties before some other court because this would lead into multiplicity of litigation and proceedings. The doctrine of *res judicata* is based on the three Latin maxims. First, *nemo debet bis vexari pro(una et) eadem causa* which means no man should be vexed twice for the same cause as, it's not only a waste of judicial time but it's also a violation of the rights of individuals. Next, *interest rei publicae ut sit finis litium*. It is in the interest of the state that there should be an end to litigation because litigation, if it runs long, does not bring a mere benefit to either party. There is a loss of the government exchequer and the person who is bearing the laws is also at a loss. And the third, *re judicata pro veritate accipitur*, which means a judicial decision must be accepted as correct. A person can definitely appeal to the higher courts if he is unsatisfied with the lower court's verdict, but these are the three Latin maxims on which the wider doctrine of rest, Judy Carter, is actually based. Section 11 of Code of Civil Procedure prevents multiplicity of proceedings and accords finality to issues. Section 11 bars plea of issue tried in an earlier suit founded on a plaint in which the matter in issue directly and substantially becomes final. All the above apply to judicial proceedings including that of proceedings that go on a quasi-judicial setup and body as well.

In *Sulochana Amma v. Narayan Nair*, it was held that constructive *res judicata* is another facet of section 11 which bars a claim raised in a subsequent proceeding where the same ought to have been raised and decided in an earlier proceeding. But there are exceptions to these rules. In India, less rules and a greater number of exceptions is the beauty of the Indian judiciary and the Indian legal system. *R v. Medical appeal tribunal Ex-parte Gilmor* is a 1957 case. In this case, it was held that an established supervisory jurisdiction on decision on administrative tribunals. It held that a decision by the administrative tribal is final when questions of fact are challenged. The decisions of a tribunal though can be reviewed on grounds of excess jurisdiction or error apparent on the face of record. Every court has its own jurisdiction. For example, the Bombay High Court has its own jurisdiction, and that Court will not hear matters from the state of Orissa or from the state of Karnataka. A litigant who is in Orissa and has faced an issue in Karnataka, cannot go ahead and file a case before the Bombay High Court. The case must be filed in the state in which he is in the state in which the cause of action or the problem has actually arisen. Similarly, if there is a tribunal in your state, the action has taken place in your state. The cause of action cannot shift and therefore it is upon the tribunal to see whether they can accept the jurisdiction under which a particular litigant has approached them. In case of mixed questions of law and facts which are impossible to separate, a decision of a tribunal is final and conclusive. Therefore, in this case it was laid down that invoking a finality clause does not appeal to a court given there is a miscarriage of justice. In *Dhulabhai v. State of Madhya Pradesh*, in this case there were certain conditions that were laid down for the jurisdiction of a civil court. First, if the statute provides a finality clause, the civil court's jurisdiction is completely excluded given there is adequate remedy. The only exception to

this is non-conformity to fundamental judicial procedure. Next, in this very case there was a bar on review of adequacies of remedies by statute relevant but not decisive to sustain jurisdiction of a civil court.

In the same case it was held that the challenge to provisions of the particular Act as *ultra-vires* cannot be brought before tribunals constituted under the act. In questions of the correctness of assessment, orders of authorities are absolutely final. This case, laid down the conditions for the exclusion and jurisdiction of a civil court and when it comes down or boils down to correctness of assessment, the orders given by the authorities are deemed to be final. In *Sampath Kumar* case, the partial exclusion of judicial review is permitted, and a decision of the administrative tribunal is immune from judicial review by the High Court if the tribunal contains a judicial element, that is, the tribunal contains a judge. Therefore, in India only a partial immunity to judicial review is permitted.

According to Professor Wade in administrative law, there's the firm's judicial policy against undermining the rule of law to be weakening powers of the court and as per statutory restrictions and judicial remedies, given the narrowest possible construction. A sound policy against uncontrollable power of administrative authorities and tribals are also important. In a sense the doctrine of finality of administrative decisions, needs to be well appreciated in order for administrative action to be fully completed or to fully complete an administrative action before being subjected to judicial review, so that administrative proceedings are not hampered. For these reasons, generally the administrative action needs to be completely completed before they are subject to judicial review. But are there exceptions? The first exception to this is when the administrative act is in violation of the Constitution.

If the Constitution of that particular Act says that there should be four members, but there are only three members, there is an exception to this because there was a clear-cut violation of the administrative authority. Second, when the order is not reviewable by any other way and such relief is allowed by law, the order substantially affects the rights of the aggrieved. And the last when the order is in excess of jurisdiction. In simple words, a railway tribunal cannot hear a service matter dispute related to a government officer or a government servant from any government department. So, it just needs to be ensured that the administrative authority and what is written in law is followed in spirit and also in words, not merely in spirit. Second, the order that is not reviewable by any other way, given the orders being affected to the aggrieved party, also forms the ground of exception. And last, the order is in excess of jurisdiction. Another doctrine is the doctrine of exhaustion of civil remedies. Courts of law shouldn't entertain cases unless available administrative remedies have been resorted to. In simple words, if a case comes before the High Court, the High Court's primary duty is to look whether all the other administrative remedies were actually carried out or resorted to by the litigant before they approached a particular court.

Appropriate authorities must be given an opportunity to act and correct the errors committed by the administrative forum. If there is an error in the order, the administrative authorities should be given the responsibility and also the chance to correct the same and then bring it forward. Third, enabling statute must provide a procedure for administrative review, a system of administrative appeal and reconsideration. So, the judicial action must be complete in all the facets. But there are exceptions to the doctrine of exhaustion.

Exception lies when there is a violation of the due process, when the issue involved is purely legal, when the administrative action is patently illegal amounting to a lack or in excess of jurisdiction and when there is an estoppel on the administrative agency concerned. By estoppel, it is meant that the administrative agency has been told not to act in this particular case, but it still went ahead and participated or took part in this particular case. When there is a repairable injury, when the respondent is a department secretary, it cannot be done, because that will amount to conflict and the principles of natural justice that you cannot be a judge in your own case. It is necessary to consider if exhaustion of administrative remedies will be unreasonable. Administrative remedies or orders that come, need to be very reasonable. When it would amount to a nullification of the claim on the subject matter which is a private land, it cannot act.

When the rules fail to provide a plain speedy and adequate remedy, when the circumstances indicate urgency of judicial intervention, the tribunals must come in and play their role in this. When the involved claim is small, when strong public interest is involved in coordinator proceedings and when the issue is surrendered, moot or academic. And these are the exceptions to the doctrine of exhaustion of civil remedies. Only under such a process can you exhaust the process of civil remedies and entertain matters as and where it should be. In law, a matter of primary and focal importance is that the principles of natural justice must be followed in every order, in every judgment, by every court, by every judicial, non-judicial body or executive and legislative body as well.

The principles of natural justice, especially while adjudicating any case, any matter, must be addressed and they must be redressed as well. The judgments or orders, they need to be in line with the principles of natural justice. There are some principles of natural justice. First is *audi alteram partem*, which means the other side must be heard. A judgement cannot be delivered by hearing just one party to the case. You cannot deliver a judgment by hearing only the litigant. You need to hear both the parties there and there. So, procedural rules that ensure fairness in the process and exercise of governmental power, hearing the other side, fair hearing, and due process. *Audi alteram partem*, does not only mean that you hear the other side, but you must hear the other side with complete sincerity, with the fairness of judgment and hearing it by conducting the due process of law. And ingredients of fair hearing are not uniform, they differ from circumstance to circumstances.

Now, it may so happen that in a case one side may require 50 minutes to present its case, while the party that is defending the case may require only 10 minutes. Now, this is a fair hearing, this is not an unfair hearing. Therefore, it is said that the ingredients of a fair hearing cannot be uniform, they will differ from circumstance to circumstance. And sometimes the hearing in the form of full trial is required and sometimes post decisional hearings are also sufficient that you decide and then you hear the party. In a court of law, this will not happen in a tribunal system since it is flexible in nature, it is not bound by the strict procedure of civil and criminal procedure code and they do have the liberty and the leeway to exercise their domain in this particular manner.

There are some essential components to this principle of natural justice. First, the communication of charges must be made amicably clear to both the parties, and this is a mandatory requirement, an effective person must be given sufficient time to prepare for his case. When charges are leveled against the other person, the other person must also have the right to defend himself and the remedy to bring forward his defense in the best possible manner. Notice that is served upon the other side can be considered as inadequate if the notice contains unsubstantiated particulars not specific as to the consequences. If there is a service matter and a person has been dislodged from service, the notice must state as to under what circumstances and what were the reasons and under which law a particular person has been dislodged or dismissed from his service.

More than one grounds and consequences which are not identified or identifiable should not be mentioned to the act that has taken place and notice may be dispensed with where the person avoids notice. In the case of *Punjab National Bank v. All India Bank Employees Federation*, a 1971 case from the Supreme Court of India, penalty was imposed upon the respondent not specified in the notice. Because the notice did not contain details of the charges imposed, the penalty held was invalid. In this case, it was held that a notice should be clear and unambiguous or cannot be considered reasonable and proper. The same was held in *Keshav Mills Co. Ltd. v. The Union of India*. So, whenever notice is being served, the name of the party to whom it's being served, the address where it is being served and most importantly the charges that are imposed, must all be very clearly and amicably put forward to the person receiving the notice. There is next, a stage of hearing. Hearing may be oral or written depending on the complexity of the case and the level of the case in which it is. In a case involving complex questions of fact, oral hearing becomes really necessary. Such matters cannot be finished by a written hearing alone. You need to have an oral hearing in this matter. For example, in tax matters or matters of deportation, customs, service matters, you need to have an oral hearing, which is subsequently precluded by written submissions as well.

As to the next prerequisite, no evidence should be collected in the absence of the opposite party. This was held in *Stafford v Minister of Health* that when the other party is absent, evidence should not be collected. The presence of the opposite or other party is required

while furnishing information regarding previous convictions, which the court might rely upon. In *Hira Nath Mishra v. Principal Rajendra Medical College*, it was held that disclosure of material may be summary, or the copy of the materials relied upon.

In cases relating to disciplinary action against civil servants, copies of material must be supplied. The documents do act as one of the most important kinds of evidence to reach the conclusion of the case in the best possible manner. Right to cross-examination is absolutely available if oral evidence has been taken, then you do have the right to question the other party through a lawyer or as the case may be. Further, it is applicable to labour cases, disciplinary cases of civil servants, employees of statutory corporations, taxes, etc. owing to the reason that, if a person has been dismissed, the departmental head is called on and he will be asked why the person was dismissed, then the chance of cross examination arises.

Therefore, the right to cross-examination also forms a very important element. In a 1972 case of *Kanungo and Company v. Collector of Customs*, a person who gave relevant information regarding the case was not cross-examined and it was held that an informant who is giving relevant information or even mere information needs to be cross-examined in presence of the appellant on statements made to the customs authority. If the cross-examination is going on, it must be held in the presence of the other side as well. So, a right to legal representation also forms an important part of *audi alteram partem*, which is a right to request for a right to counsel. That is, if a person is arrested, he has a right or if a person has been charged or framed, he has a right to appoint a lawyer, because not everyone will be well equipped with the various kinds of law under which a person is charged.

In the case of *J.J. Modi versus State of Bombay*, the appellant denied right to legal representation, and it was held if assistance of a lawyer is part of a reasonable opportunity of showing cause, denial is a violation of Article 22, and the principles of natural justice are being completely violated. But the same is not without exceptions. There is a statutory exclusion, there is a legislative function, authoritative nature of the administrative order, impracticability, and interdisciplinary action. Under these four circumstances only, *audi alteram partem* may be excused.

Yet another principle of natural justice is *nemo debet esse judex in propria causa* which has dimensions like, justice, due right, reality, fair presentation, impartiality, claim. It simply means no man shall be a judge in his own cause. If in a service matter, the head of the department has been dismissed, he cannot be a judge or be a part of the panel that is actually deciding his case and this is the second principle of natural justice. The next principle is an essential safeguard to uphold the principles of justice and fairness in any judicial or administrative process.

Therefore, it is very important to hold the principles of justice in fairness in the judicial or administrative process. It's based on other legal principles such as, justice must not only be done but manifestly and undoubtedly be seen to be done. It simply means justice needs to be done in the best possible manner and it should not seem that justice is being done in an unfair manner where one person is being biased towards the other. The word bias, the operative prejudice, conscious or unconsciousness resulting in preconceived opinion or predisposition regarding a person or issue plays a significant role and the objective is to ensure to the public that there is impartiality of the administrative adjudicatory process and decision as a result of bias is a nullity; and the trial of a quorum is not curious and therefore not before a judge. This is also known as the rule against bias and there should be absence of consciousness or unconsciousness, prejudice to either of the parties to a case.

Thus, there are various kinds of bias. The second part of the principles of natural justice is that no man shall be a judge in his own cause. The pecuniary bias is referring to the monetary interest that a judge may have in a case. The rule is that the least pecuniary interest in the subject matter of the litigation will disqualify a person from acting as a judge. In a very old case, the *Bonham* case, Dr. Bohan was fined by the College of physicians for practicing in London without a license of the college. The relevant statute provided for equal distribution of fines between the college and the king. The claim disallowed the college's financial interest in its own judgment and became a judge in its own cause and therefore it could not take money for the practicing license that was not there. So, the claim was disallowed and the financial interest was not seen. Here, the college since it was a part of the entire procedure, it became a judge in its own cause.

Then there is the case of *J. Mohapatra & Co. v. State of Orissa*. In this case, decisions of the textbook selection committee invalidated members of the committee who were authors of the books. Withdrawing members who authored books from committee, insufficient, while their books are considered for circulation among students. This is with regards to a pecuniary bias. The second kind of bias refers to a situation which is where the judge is a friend, relative or business associate of a party to a case. Reasonable evidence of bias is necessary to challenge a decision. For example, if the son of a judge is himself involved in a case and the matter is listed before such a judge, it becomes a personal case for the judge, who is very likely to have some kind of bias towards him. And so, the judge may not be able to render justice in its complete and fullest essence. And therefore, it is said that reasonable evidence of bias is necessary to challenge a decision. There are two tests in this regard, reasonable suspicion of bias that looks mainly to outward appearance and second, reasonable likelihood of bias that focuses on the court's own evaluation of possibilities.

In *A.K. Kraipak v. Union of India*, the regulation dealing with preparation of list of suitable candidates for the post of ex-official chairman of the selection board was challenged. The selection committee's decisions were held to be violative of the principles of natural justice because the mere presence of the candidate in the selection board would definitely

influence decisions of other members of the board which can lead to a bias. So, the principles of natural justice are applied to judicial, administrative, and executive decisions as well. The third kind of bias is official bias. Official bias arises when the judge has an interest in the subject matter of the case. For instance, in a matter of land dealing, an illegal construction has come up on a particular land which at the point of time may not be illegal, but later is by some means illegal.

If you purchased a flat in that particular construction, this is something where I have an interest in the subject matter of the case, and so there is a matter bias that is related here and this can be alleged in cases where there is total non-application of the mind or acting on the advice of a superior. If a judge is acting on the aid and advice of some senior member, it is also known as an official bias. In *Gullapalli, Nageshwar Rao v APSRTC*, the Supreme Court watched the decision of the Andhra Pradesh government to nationalize road transport.

It was invalidated as the secretary of the Andhra Pradesh State Regional Transport Corporation, conducted the hearing and he had an interest in the subject matter. Another kind of bias, is a preconceived notion bias, wherein a decision maker already has an opinion or idea of a case before it is heard because that will generally lead to the general human tendency of one having a bias towards that. As to bias on account of obstinacy, it is a situation where a decision maker shows unreasonable persistence in upholding their own decision. There are valid reasons to reconsider the decision because the violation can be done indirectly, though not directly.

In the 2009 case of *A.U. Kureshi v. High Court of Gujarat*, the judicial officer was dismissed from service after being found guilty in a disciplinary inquiry. So, the appellant was previously acquitted as an accused under the Gambling Act and returned the seized money. A complaint was filed against the appellant leading to a disciplinary inquiry. The High Court recommended the appellant's dismissal based on the suggestion of the disciplinary committee. When the matter went to the Supreme Court, the Supreme Court held that it is completely improper for the disciplinary committee to judge or challenge against the same dismissal order while it acted as a pure judicial authority in its capacity.

Reasoned decisions are the third pillar in the principles of natural justice, which is the principle of reasoned decision. Every decision must have a reasoning to it. Be it an order, or a judicial reason or a note, it must have a reasoned background to it. This evolved in 2010 and is stated to have evolved recently, in judicial parlance. This is recognized in India and the USA is yet to be recognized by English law. Decisions of administrative authorities must disclose reasons because we are reviewing authorities to examine whether they are taken on the basis of relevant consideration or suffer from factual or legal infirmities. Now, the speaking order coined by North Chancellor Earl Carnes, essential for judicial review. The characteristics of reasoned decisions is that they should contain adequate reasons in

support of the decisions. No particular form of recording is required. And third, applicable to public and private laws. So, the reason must be or must have an element of adequate reasons to conclude or come at a finality of a decision. And the introduction of fairness and administrative power helps minimizing arbitrariness and maintaining the right to reason. Record reasons operate as a deterrent against similar cases, because you cannot just deliver a judgment and later take a stand stating a total ignorance of such a political judgment. Therefore, every judgment and order must have a reasoned line of reasoning that concludes to a particular reasoning.

In doctrine of justiciability, recorded reasons are subject to judicial scrutiny and therefore it is said that it is very important to record reasons as an important safeguard against arbitrary exercise of power by adjudicating authority. It is never known if there is an order that was completely given in an arbitrary matter. It is realized only when you have the reasons and then you read the order. If reasons found are unclear or not in support of conclusion, a decision may be set aside. The exceptions to reasoned decisions are externment orders and decisions by way of court-martial proceedings where these do not come into the picture. Now, in a 1978 case, *Sunil Batra v Delhi Administration*, examined Section 56 of the Prisoners Act 1894. According to this section, this implied duty of the jail superintendent to give reasons for putting jail fetters on a prisoner. Otherwise, this act will be considered invalid as per Article 21 of the Constitution. It does not only extend to the judicial activities by tribunals and courts, but it also extends to the executive who is carrying out this duty on a day in and day out basis. They also need to observe these things. They also need to observe their reasonings and their reasons as to why they are putting a particular person or fetters on a prisoner. Every order or everything that is done in a governed institution needs to be backed by reason and by order. There are also exceptions to principles of natural justice. In case where there is an emergency and there requires a prompt preventive or remedial action that needs to be taken. For example, there is a flood or a natural calamity that has taken place and a person was actually there as the departmental head is not working, is not functioning properly.

In such a kind of emergency, there can be a preventive or a remedial action wherein you may not require giving a reason or to dismiss that particular person because that is the need of the time. In case of confidentiality, wherein there are many matters that are very confidential for various kinds of reasons. It may be for the protection of a person's life. It may also extend to the aspect of national security. So, cases concerning security of the state and public tranquility or to maintain the higher order or to maintain the societal degree of calmness and consciousness and composedness, it may be required. Third, in case of purely administrative matters where cases of academic adjudication are involved. Fourth, based on impracticability. Administrative impracticability justifies the violation. Fifth, cases of interim preventive action where an order is preventive but not final in nature. When a case is ongoing, there are many orders that a court passes. These orders can be for various things,

for a party to appear on a particular day and date, for a party to bring before it a particular document, for a party to produce a particular kind of evidence. All these cases where there is an order but that order may not be final in nature is an exception to the principle. Cases of legislative action. rules, plenary, subordinate, lay down a policy without reference to an individual. If no right has been infringed or where no wrong has taken place, of course, there will be an exception.

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Week- 10

Lecture-02

Administrative Tribunals – III

There is an area of relevance namely, statutory exception or necessity. Bias is incompetent if he is the only person competent to perform an act. If there is a natural calamity, such as an earthquake or a flood and one person is very well technically equipped to deal with the public order, and the disorder that has been happening, in response to the human cry, it is therefore an exception. In cases of contractual arrangement there is a clause in the termination of a contract, wherein there is no necessity to have a hearing from both the sides so on and so forth. In case of government policy decisions, unless they are capricious, arbitrary, illegal, uninformed, and contrary to law it cannot be challenged. Otherwise generally they are not challenged. There are certain tests to determine the tests to determine the exercise of quasi-judicial powers; quasi-judicial bodies are non-judicial entities empowered to interpret the laws. But they are empowered to interpret specific laws, not all laws. Every quasi-judicial body exists for a particular kind of law, obliged to judge facts impartially, and give solutions to back official action. Second, provide remedies to situations and impose legal penalties. Their functions lie in the borderline between executive and judicial spheres.

Judicial might not mean an act of a judge or legal committee meeting for the discovery of a matter of law. Judicial act is done generally by a competent authority for consideration of facts and situation and imposes liability when the rights of others are affected. In the case law, *Royal Aquarium Summer and Winter Garden Society, Ltd. v. Parkinson*, judicial means the discharge of duties by judges in a court of law and administrative duties to be performed in court which is important to determine what is fair and what is just.

In *Ram Jawaya Kapur v. State of Punjab*, administrative authority decides questions in a judicial manner, not judicial action in a strict sense. Quasi-judicial, for administrative powers is required to be exercised judicially according to natural justice principles. When the test to determine exercise of quasi-judicial bodies, administrative and quasi-judicial actions, administrative actions and act upon policy and expediency, dictate what is politic and expedient, not concerned with pre-existing rights and liabilities, create the rights and liabilities they enforce, and they must be fair. Also, quasi-judicial bodies in terms of

administrative discretion, judicial in terms of an objective, must be empowered by statute to decide a litigation between parties. They should satisfy the principles of natural justice.

One party may be a quasi-judicial proceeding and the other the statutory authority itself. The case law here is the *Engineering Mazdoor-Sabha v Hind Cycles, Ltd.* A quasi-judicial body or Act suggests two or more parties and an outside authority to make the decision. Presence of two rival parties is a must to hold the statutory authority as quasi-judicial body and no two rival parties' judicial procedure is required to be followed in quasi-judicial acts. There is the difference between the applicability of natural justice principles. Natural justice represents a higher procedural principle developed by judges. It's not something that's written down in a statute. Next, the purely administrative acts, acts as a natural justice principle not applicable and it is not purely alien to administrative actions. Though in *R.S. Das v Union of India*, application of national justice principles was considered flexible: it depends upon the setting and background of statutes, survivors, affected, consequences, time of the case and the peculiar facts of the case. And the correction or violation of natural justice by purely administrative acts is beyond the court's jurisdictional capacity. In *Regina v. Dublin Corporation*, it was held that the test is the duty is to act judicially. If statute requires administrative authority to act judicially, it is an action of authority quasi-judicial.

So, the precondition for exercise of jurisdictional capacity was decided in *Province of Bombay v. Kushal Das*. Quasi-judicial obligation deduced from nature of function though the statute is silent and every act affecting rights of parties mandating conformity to natural justice principles is judicial. Every judicial act thus requires fulfilling natural justice principles, duty to act judicially inferred from cumulative effect of nature of rights affected, manner of disposal and other requirements in statute. Ultimately it does follow and work like a court, it does carry out the function of a court to uphold fairness, justice, equity, and good conscience and second, the distinctive quality is minimum legal standards of administrative requirements. This is all about the growth of administrative panels.

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Week- 10

Lecture-03

Role of Public Policy in Public Administration – I

The Role of Public Policy in Administration, Statutory Corporations and Public Sector Undertakings are relevant for study. There also are primary concerns with regards to public importance of public policy for a robust country like India, the parts and various dimensions of public policy, the parts of public policy and the significant role that it plays in the nature and functioning of the government. The definition of public policy has been given by various authors and public policy academicians; however, interpreting as to what public policy is and its significance occupies a primary place in the realm of public policy in public administration. Robert Eyestone states public policy as ‘the relationship of government units to its environment’. Thomas R Dye says, ‘public policy is whatever the government chooses to do or not to do.’ It is a proposed course of action by the government providing opportunities and overcoming obstacles to reach a goal. Thus, public policies are governmental decisions. But it doesn’t end here. It goes a step ahead and sees how the government actually functions. So, the manner in which a government functions is determined on what policy the government of the day is applying.

It can be for various facets and for various reasons. The relationship of the government with its environment means with its people and with the other bodies that are there in the government. There is a Central Government, there is a state government. There are governments in the rural sector and the panchayats. This entire ecosystem work is the backbone where the public policy of the government comes into picture. Where it is mentioned that public policy is what the government chooses to do or not to do, choosing the government is not a one-day thing. This choosing of the government is based on a policy that it works upon. It is the undertaking of the policy primarily and then how the government actually thinks to act in a particular direction. That is what matters most in the public policy domain. Now, if the government wants to change a particular course of action, providing opportunities and overcoming obstacles to reach a goal, how the government will actually achieve it is determined on the manner in which the government focuses its public policy to be. Though the definition of public policy defines it in a few words and is small, the interpretation of public policy is quite large.

How public policy is determined or the importance of public policy for nation building, has a multi-dimensional approach because the entire functioning of the nation depends on the nature of the public policy and how the government of the day is planning out its public outreach. So public policy and public outreach, both play a significant role in this direction. Further, the activities that the government undertakes to provide various welfare schemes, is again based on the ideology and how the government wishes to function. And every government around the world has a course of action. They do plan a course of action. The course of action is based on the public policy that it has determined that this is the policy that the government will be focusing on, or this is the manner of action. The government will have a course or manner for giving welfare schemes to the people. It would be children centric, or women centric, or elderly people centric and the elderly citizens would be at the forefront of a government's policies. So, all these are policy decisions. But to make these decisions, there is a wide range of institutional happening and people and brains that are involved.

This requires a very close interaction and relation between various governmental agencies because policies may be thought in one person's mind, it can also be formulated by a few. But to implement the same policy, you require a large number of people. The large number of people eventually will go on and carry out the envisioned policy in the way it was thought and the same being implemented. There are some cardinal approaches to and the differences between a policy and a decision. Policy is something that may be quite vague, not very firm, or not be there on paper. Policies are generally the dreams and ideologies and the direction in which a particular government plans to work out in a phased manner. Whereas a decision is a choice that is made from the alternatives that are available. Decisions are prompt, they are taken on a day-to-day basis. Policies are formulated and on the basis of the policies, in the manner in which the policy is formulated, the decisions will be based upon the policies.

So, one is acting as the back front, one is playing at the back foot and decisions they play on the front foot on a day in and day out basis. Policies include a series of decisions. Only then can you arrive at one particular policy that the government of the day decides to take it forward. Decisions on the other hand, are a single time action. For instance, a decision taken by the collector of a particular district to plant trees on both sides of the road. This is a decision, but it may be based on a policy that will ensure that the people do not face any kind of difficulties. There is a rise in temperatures, and it will be ensured that if there are bypasses or if there are the common people who are walking on the footsteps, they get tired, there are benches, there are proper footpaths and there are roads and there are trees that provide shade. So, this is a policy initiative that is being taken care of by that one decision of the collector through a single time action. So, policies form over a long period of time over people coming together, deliberating, and then finally finalizing on a point. On the other hand, single time actions are one-time actions taken.

Policies are long-term perspectives. It may be to develop the nuclear program in India. When the ISRO was being formulated or when the space program was being formulated in India during the 1950s, there were debates from both sides. There was a Professor Vikram Sarabhai who wanted that India leads into the space rush, that India also joins the space club and there were other people in the cabinet and in the government who were focusing on the point that majority of the people in India do not have food, clean water and shelter. The question was, when you do not have food, water and shelter, a proper shelter, why focus on things that are not currently important. But, if we see Dr. Sarabhai who is known as the founding father of India's space program, what he started then is, today, a robust organization in our country, one of the leading space organizations in the world, the Indian Space Research Organization. India landing on the south pole of the moon on its third attempt is something that started then that was a policy decision. This is an action-oriented thing that's been taken. So, it was a long-term perspective, and it was seen as India's space program which is now becoming a time with the various kinds of missions that India is sending the astronauts into or the space agencies involved in. For example, the Gaganyaan project that it has been involved in, has been tested recently. These are decisions that have been taken and are all based on a long-term perspective.

Policies are more comprehensive. On the other hand, decisions are comparatively limited in terms of time, period, and scope. As mentioned, decisions are time bound. One needs to make a time bound decision. If there is a flood in a vertical area, there is a need to take a time bound action because of the need to send the lifeguards, send people from the rescue missions, send the national disaster authority forces out there and so on. If the help of the armed forces is necessary, they must be sent too. People must be evacuated and this needs to be done in a fast-paced manner. Decisions need to be taken very quickly as the decisions must bear a result. Whereas policies are more comprehensive. For example, if there is a natural disaster, which are the forces which are actually going to be at the forefront to respond during the policy or to respond during a natural calamity is to be decided. So, policies in short are long-term planned projects, decisions are carried out during the same project by taking day in and day out as affirmative or otherwise, that is, go ahead or don't go ahead, like the green and red flags.

Policies are generally divided into five broad categories. First, is the substantive policy, second regulatory policy, third distributive policy, fourth the redistributive policy, fifth capitalization. On the other hand, decisions are broadly classified into programmed and non-programmed. There are various types of policies. A substantive public policy in general, is for the general welfare and development of the society as a whole. It sees the society as one collective being and works for the betterment of the entire community, of the entire area and its base of operation is very large. This is formulated keeping in view the character of the constitution, the character of the existing laws and the nature or

character of a country. For instance, the US is a capitalist economy, their substantive public policy may be to boost capitalism to a maximum.

On the other hand, there are socialist economies wherein they would boast on how the government can provide maximum welfare to the people. In India, which is a combination of both socialistic and capitalistic, the focus is on how to encourage the capitalists and how to see that people are also taken care of their needs, and how to push people so that they also have a chance to become a capitalist one day. So, a substantive public policy is generally very broad in nature, it takes the entire nation into consideration or all the people in a nation into consideration. It deals with all the socioeconomic problems and the moral claims of society. Public policy also determines how a judiciary will function and what kind of decisions will come from the judiciary.

In India, for instance, there are a lot of litigation pending in various kinds of courts; and while we look at and analyze judgments, we would realize that the courts have been people centering the decisions that they have been making. We do recognize the rights of people a lot. For example, in a recent case in the state of Orissa, the *Anil Agarwal Foundation v. the State of Orissa*, the apex court of the country, sided with the people of Orissa, that is with the residents of that particular land. The outline of the case is such that a particular tract of land was taken away by one big business house which wanted to build a university. But that particular area was a natural heritage site very close to the sea and was on the Puri Konark Creek. So, it is a place that attracts a lot of people and wildlife. Especially. In this matter, the High Court of Orissa was clear that the land should be given back to the people who actually reside there, who don't own it but they protect the national heritage of that place. Eventually, the private party appealed against this order of the Orissa High Court before the Supreme Court and the Supreme Court taking the assistance of Article 14 realized that there had been a blatant abuse of power, and the land should go back to the people. So, this is a substantive public policy wherein the people, the socio-economic problems of people, and the moral claims of society are taken into consideration.

Another kind of public policy is the regulatory public policy. This is concerned with the trade, finance, and business of a particular country. It is concerned with how the economy of the country look like, what would be the public policy in which the economy of the country will function how should trade be regulated in this category, how should businesses function and thrive, what are the various economic safety measures that the leaders or the economists who are involved in the economic policy making should take, what are the public utilities that can be provided, what are the financial aid that can be provided to the people, the taxation regime, taxes and its formulation etc. These matters and how it works is based on the regulatory public policies. These are done by independent organizations that work on behalf of the government. For example, in India we have the LIC, we have the Reserve Bank of India that is the regulator of the country's financial system, the state electricity board, state transport corporations, SEBI (the Securities and Exchange Board of

India) that regulates the share market and its activities in India and ensures that there is no malafide activity in the share market. Then, there is Insurance Regulatory and Development Authority of India (IRDA) that looks at the insurance sector, how the insurance policies will be, and it also looks so that it does not go on with the malafide intent to actually harass individuals in that regard. This is with regard to the regulatory policy that focuses on the economic front because these are something that helps in nation building. The distributive public policy is meant for specific segments of the society and gives public assistance and welfare programs.

The kind of specific segments in the society can be young girls below the age of 18, it can be one particular community that has been wronged since time and now they are getting special treatment from the government, it can be some schemes for women or specific to children or elderly citizens or education for the elderly. These are covered under the social garb of the distributive public policy. For instance, during the COVID pandemic, the government took the decision once the vaccines were formulated; it took up the onus to ensure that every person in India would get a free vaccine in government hospitals, in the healthcare camps or institutes or minor establishments in the villages. So, distributive public policy looks at the larger picture as to how to assist one particular section of the society. This is because they require that and may not be able to be at par with all the other sections of the society. So, the adult education program may be for specific targeted individuals, or food relief during a natural calamity for a specific kind of people, social insurance, like for example, in India, the post office runs various kinds of social insurances.

Anyone can go to a post office and open and invest their money in various kinds of programs through the government, the Pradhan Mantri Jan Dhan Yojana, etc. There are many such examples where the distributive public policy is focusing on specific sectors of the government. Then there is the redistributive public policy. Here the focus is on rearrangement of policies for basic social and economic changes. The outreaches of public goods and welfare services are disproportionately divided, and this policy formulates how the same can be streamlined.

This looks to rearrange policies, because one particular segment has already benefited from it and now it is time for the government to look beyond this and see how this can grow further. Then we have the capitalization public policy. The capitalization public policy mostly provides financial subsidies granted by the union, to state and local governments. There are various schemes of the Central Government wherein they provide subsidies to the state governments and the local governments for them to take loans, for them to take various kinds of initiatives for the welfare of the people in a particular state and these subsidies are granted by the central and state undertakings in some important spheres if necessary and they may be different in nature. For instance, in various states in India the farmers get a lot of financial subsidies when they want to expand their scope of work.

For example, a farmer who has been doing paddy farming, if he wants to get into fish cultivation there are subsidies from the government wherein, they provide a lot of subsidies for that farmer to build an artificial pond wherein he can actually start harvesting fishes. Now there is a farmer who wants to start a small transport business. He would want to buy two mini trucks or one mini truck. There are institutes, there are the government banks, there are cooperative banks who provide loans to these individuals. And all this is done under the capitalization of public policy wherein the center focuses that your local governments give this thrust to the people where they have the confidence to take the things further and ensure that they also rise up from their conditions. Public policies are generally based on the constitution of the country or how the country's financial system or entire structure of the government is based upon. So public policy will be goal-oriented, and it is concerned with specific goals.

Every policy will have a specific goal. For instance, in India before the upcoming of the NITI Aayog, we had the five-year plans. So that was a large-scale policy. There was a roadmap in which we would take the development of the country further. For instance, in the first five-year plan the thrust was on agriculture and dams and therefore Pandit Nehru India's first prime minister termed that dams are the temples of modern India. This was a statement based on a policy that was implemented over the course of time by decisions.

Policies generally spell out the strategy on how to achieve a particular goal and at that time India was a young independent robust country, so it needed a particular game plan. It needed a road map in order to achieve the goals that it set for itself. Public policy also becomes an instrument to achieve a goal because you have planned a particular thing and now you are planning on how to execute it. So, to get things done this is one of the best ways in which governments of countries can function. Fourth, formulated and implemented to attain the objectives for the ultimate benefit of the masses. The outcome or the focus of a public policy is generally on its subjects. The subjects are the primary concern and the primary people who would be dealing with public policy on how it should be formulated. So, the government's scheme will be focused on the masses. Next, it looks for the collective good of the greater number.

It does not focus on individual or singular numbers. It focuses on larger people and larger numbers and ultimately the government actually decides on how it should be taken further. It chooses its path to take it further and this takes form in various kinds of ways through laws, the legislations that the government passes, the ordinances that the government comes up from time to time, the court decisions, the executive orders and in general decisions of the government. So, this is the nature of public policy and based on all of these. There are also situations of how should the law take course, how should the legislation be passed, what kind of bills are presented before the parliament, what kind of bills do they actually go on and make law and so on. The debate that takes place in a particular parliament also speaks a lot about the nature of public policy in general. Public policy is

generally something that guides the government of the country on how the administration of the government should function.

It guides the various branches in the government should function and the classes of issues that are there; or if there is an issue that arises within the government department, how should it be resolved. This may seem something as an adjudicating process, but it is more on the lines of how the same should actually be administered and reached at a particular conclusion. This entire process is formed at the backdrop of something that is the policy at large, the policy decisions. The nature of the policies, the policies of the government and how it actually looks forward to implementing the same is also relevant. Policies depict the concern of the government. By analyzing the various policies of the government, you can understand what kind of government it is.

The policies reveal what the government is trying to cover up or what the government is trying to achieve. And it shows what are the problems the government is focusing on which is by far one of the most important elements in public policy. It also involves the action of a particular problem, and it is backed by the sanction of law and authority. Now negatively there are decisions that do not take any action on a particular issue. You do have a roadmap but at times decisions do not take place in that same manner. So that is a time when policies of the government, even if they are robust and very strong, do not come into the forefront, which becomes slightly a dangerous issue in this regard.

So, your policies may be robust, but you also need them to be accompanied by robust decisions on a day in and a day out basis. The scope of public policy is determined by the kind of role that the state adopts for itself in society. The scope of public policy is for policy formulation and policy adoption. You have policy implementation, policy education, policy evaluation and policy maintenance. But there are various facets, and which make an important part in this? The first step in public policy is the formulation of the policy wherein the brains are actually mining, wherein they are contributing, and they are working to formulate a particular policy

For example, we have a scheme of the government of India on the *Atma Nirbhar Bharat*. This is a scheme of the government of India, the self-reliant India for which there needs to be a formulation for the policy. So, there will be people who would be involved to formulate a policy as to how the government will take forward the idea of a self-reliant India. A group of people will research and formulate this policy. Once the policy is formulated, it will be presented to the government wherein the government will analyze the policy. If it is good, it will then adopt it. Once the adoption of the policy is done, the same needs to be implemented. The policy is implemented through various rules, ordinances, and legislations. It is up to the government. Now once the policy is implemented, the policy also needs to be preached to the people. This is where policy education comes in. The outreach of the government policy has taken place. The

government will approach various people and the various masses of different categories and see as to which segment of the society will benefit from this policy and it will in a similar manner focus or give its thrust to that kind or to those categories of people. Once the policy education is done, the government will analyze how the policy is being received by the people and then you have policy maintenance. These are the six broad steps in which public policy actually functions. The Government identifies a problem, or a sector and it calls upon the masses from people's representatives, people from the media, pressure groups, broad ideology of the ruling party and how the same can be aligned with the ideals of the Constitution.

Thus, in a democratic setup, the government forms its own policies. As is seen, people assist and eventually the government focuses and builds up its own policy. Next, it responds to organized groups through these policies. Every country or every policy generally has a pressure group behind it that is actually pushing the policy forward for the government of the day to actually go ahead and accept the policy. The reasons for this can be multitude. Every public policy does come into existence through a process. First is identification of policy problems. Then we will be setting up the agenda. Once the agenda is set up, the formulation of the government response will take place and it will also focus on the targets and decisions in that same regard. Once these are achieved, the policy process formulation kicks in and eventually a policy comes out. In essence, there are three major components of a policy formulation. Setting goals and objectives is very essential for a policy and the objective.

Second, the strategy for its implementation is equally important and third, determination of the implementation machinery. Under the setting of goals and objectives, the problems will come in. Why this policy is required, what would be the broad objective of this policy and what is the goal that the government is eventually trying to achieve would come under this sector. There are various examples with the concerns that are going on in India. For instance, the example may be with regard to the *Atma Nirbhar Bharat*.

Then you have your strategy for implementation, that is how you will be implementing this policy. Once that stage is completed, then you need to see the implementing machinery. How the implementing machinery will be for taking this policy forward to the masses and how the masses will actually reciprocate to this policy. So, the stage of policy design is where the choices are made from a coherent framework. There are a lot of things and in a funnel approach, it all boils down and narrows down to one. It determines the integration of various factors and resources to achieve the objectives in this regard. It also identifies interlinkages and interdependencies among personal and material positions. Now if the policy is inadequate, it can be amended or it can be substantiated with something at a later point in time. The influence implementation and performance of a policy and this can emanate from internal government and external sources. So, in a sense, if we see development of a policy framework or in short, a policy design is a circle connected with

arrows. Motivation of policy makers, political and professional insights, development of a framework. You need a framework. You need your pressure group to push the policy makers. The policy makers will push it through various people, then the political professional insights will come into it, the industry insights will come into it and then eventually a decision in that regard will be taken. Thus, it goes on and builds up a very important segment and policy design comes into picture. This public policy does not only begin when a government comes into power, it also comes into picture as to how they have been functioning in the past.

Next, policy adoption. A policy is adopted via the enactment of regulations or legislation for its implementation. Parliamentarians get involved. It involves the state machinery in case of a national policy. Now there is the water policy in India. It is said to be a vision document on how actually every household in India will receive a tap connection, a water connection. How it will receive the same is a policy initiative, the national water policy of 2012. This policy is backed by the Jal Jeevan mission of the government. Under this mission of the government, it is the mission of the government to provide every household with a fully functioning clean tap water. Now we see the national water policy, then we see the mission that the government undertook and then the government undertook the decision to give water to every household. Thus, it is a cycle in which every machinery of the government gets involved and every machinery means that right from the people who actually start the policy to the executive officers or the members who will actually be implementing these policies, they are also given capacity building training so that they know how to implement such large-scale visions and projects.

So, policy adoption is more about the implementation and pre-implementation side of it as to how things will have to fall into place. What kind of preparation the government needs to make, what kind of training should various departments of the government be involved in, what kind of training should they actually take forward and so on come in this area. Then we have policy implementation. Policy implementation requires clear coordination across government and non-government agencies because taking the example of the Jal Jeevan mission, it is not that the government will be able to provide a fully functioning tap connection if it just passes a policy. You need non-government agencies, you need private contractors who would actually lay down the pipe connection, who will establish the tank, who will go ahead and enter into various contracts on behalf of the government and for the government but for the people. So, with the government but for the people. Though this seems like a perfectly well-documented, well-planned policy outreach, that is not the case every time. There are times when there is a failure. The reasons for these failures are quite different and they may vary. For instance, political motivations at every stage of implementation.

In India, we have a Central Government and a state government. Now this is a policy that every household should get clean drinking tap water or a fully functioning tap water. The

same will not be realized if there are conflicts in the political functioning of that state or that particular district. So, the governments also need to work in a unanimous and unified approach. This hampers the autonomy and flexibility of implementers in accomplishment of various tasks because such large projects would require the government to take a lot of permissions and the government to give a lot of permissions, the non-government agencies. For example, contractors would require the permission to dig the road to lay down the pipelines and this needs to be passed by the government.

So, if there is no collaboration between the government and its agencies, there is a little tussle for the non-government agencies to fulfill this kind of work and criteria. Then bureaucracy, necessity, and professional skills matter. There are many procedural delays as at times, files get stuck for months together and they are not cleared. This ensures that the policy is not being taken into proper action through decisions. Then there is lack of resources on the personal front, financial and technical front, then lack of response from target groups. If you do not get the required assistance or the required support from the people, it is very difficult to bring such policies into reality. It is very difficult to make such decisions and to accept such decisions from people.

Constitutional Law and Public Administration in India

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Week- 10

Lecture-04

Role of Public Policy in Public Administration – II

Policy education generally is done by media channels that use various kinds of acts to ensure that the policy education is done. People should be educated on the policy's objectives. There are many areas that need to be considered with regard to policy education, namely, are the benefits of the policies, how should the implementation machinery work this out, the changes to be brought about through this policy, the nature of effect on people or agencies, how will the policy actually bring about a change in the lives of people or benefit people at large and so on. The institutions that are involved in implementation, monitoring and evaluation of the policy also play a critical role in this regard. The benefits and the reason why policy education needs to be done is so that people realize the benefits that can be accrued from it. People know what kind of rights they have through this policy, the kind of benefits they are getting from this policy and people also need the right kind of attitude when the government is bringing a certain policy.

This is because at a time when a new policy is being introduced, the government may not be very prone to accept it or may not be very happy to accept it in the manner and way it is. So, the government needs to tell the people that this is for the people's welfare, because in our country, there are groups that will actually go with the mala fide intent to tell the people that a policy is bad. To ensure that such things do not happen, and such clouds are not cast over the heads of the subjects, the right kind of attitude in people is a must and this can only be done through a proper policy education mechanism.

Likewise, there needs to be an increase in people's participation. The government cannot outreach to everyone, it needs to train a few people who will again further take the training and sub-deliver the training, who will again take it further. There is a need to enhance the role of voluntary agencies. You need the hands of private bodies, private individuals, influential people, or the influential people in a particular village who are considered to be wise and who everyone looks up to in a particular village. Such voluntary agencies and people are also required who will render their services in this regard.

This can work as an alternative mode of implementation that does not go through the formal channel but through the informal channel, because at times it becomes more effective and prone. This reduces corruption and leakage because people need to know if this much money is being sanctioned for this policy, or if this is the amount that a person should receive. For instance, if 1.5 lakh is being sanctioned for this particular project that someone has applied for, he should get 1.5 lakhs deducting all the taxes that are required. You need the incorporation of required skills and expertise in this particular manner. You need various kinds of skills; you need such skills in this order. Lastly, coming to policy evaluation. Policy evaluation is again one of the most important stages in this regard.

It is a precondition to a full proof policy evaluation system, like a policy proper monitoring system. And this needs to be made at every stage in the implementation process. There should be a proper implementation plan in the form of a questionnaire in which you see how people are responding to a policy. If the response has been negative throughout for a large number of individuals and through a continued period of time, there needs to be some changes in the policy so that the decisions will be much firmer and much more pinpointed.

Then the effective way of reducing policy problems. It again is very important on how you reduce the problems. It can be qualitative and quantitative. Quantitative policy evaluation involves assessing distinctions between objectives and goals. How the objectives that are set out and how the goals are framed in this regard are very important. What is achieved and what was supposed to be achieved on a particular time frame, time and cost involved in implementation, the magnitude of the cost of implementation or has there been an extra wage in spending and excess of time involved are all things that need to be taken into consideration. Qualitative policy evaluation means assessing whether the policy is actually beneficial to people.

The objectives formulated; whether these are in consonants with the changing scenario and with the changing of the mind of the people; its viability in the long run, how far it will meet the rising expectations of the people and so on. In the quantitative policy, we focus on the little things that are there on the qualitative apps tracked; and the position is seen, and we try to focus everything with the changing scenario. And lastly, public policy is to satisfy all sections of the community at large. Every section of the community should be felt that they are taken care of because we are a welfare economy. Our first job is to provide welfare to the people. We take care of our people, whether it be women, children, or the elderly citizens or anyone. Our policies also extend to preserving animals, various kinds of domesticated animals, cows, wild animals in the forest. So, all these sections are there where the effect of a policy goes into being. With regard to policy maintenance, the Indian constitution has gone through various amendments from time to time and therefore it is called a living constitution.

The reason it is called a living constitution is because it adapts itself to the changes in time. There are various timelines in which it is changing. So a policy is actually being maintained over a course of time wherein it is understanding what is the need of the people, what is the output that needs to be delivered and how the same can be incorporated. This is based on its performance. The way in which people conceive the particular policy, the way in which people are reciprocating to the policy in the same manner and in the same order, the maintenance of the same will transpire. Policy making is not a very easy task. There are a lot of critical challenges and constraints that come in policy making. Policy making involves a lot of people coming together, a lot of organs of the government coming together. It is very difficult to reach consensus when there is a large group of people. But there are a lot of constraints that a person or a government face when they are bringing out a policy.

First is with regard to inadequacy of financial resources. You need to see if the state exchequer is ready to incur such a large amount in order to bring out or channel out this particular plan of the government. So, the first constraint is with regard to the finances. The second constraint comes up with regards to inadequate expertise and skills. If there is a certain project, for example, a certain specific kind of chemical needs to be disposed of, which the company that is actually going to do it should be thought of. You need such specialists and expertise in that field. If you don't have it, it is very difficult to formulate or ideate in that particular direction. Then policy making cannot also be very broad as it lacks clarity on what it actually wants. The emphasis needs to be on short term benefits not long-term outputs. But if your emphasis is not there on short term benefits, it is difficult to make a viable and practical policy. And then there is always political interference, there is always political instability at times, if the government does not have a majority. One section of the government thinks such, the other section thinks such. It is difficult to get the legislation out of that particular policy. Then lack of support from the people, which is quite common because generally everyone does not like change. When a changing atmosphere is coming, when something is changing, it is very difficult to garner support from the people.

If your socially enlightened groups are not involved with you, it even becomes more difficult to consult or to go ahead and to actually take support of the people. Then if there is a blatant fault in the design of the policy difficulty arises. Next, with regards to policy education, if the education is not outreached in the right manner, it is very difficult to take out the approach from the people. How will people know what the true nature of the policy is? An improper monitoring and evaluation. Timely evaluation for any project is a primary responsibility for the government. For instance, when we take up a small project, we do have little parameters that we see on how the project has been functioning. Then mobilization of public opinion in favor of policy choices. If there are policy choices, there

will also be immobilization. People may revolt or revolt to it in a manner that we may not have anticipated. And then non-attainment of legitimacy and credibility.

Policies cannot also be so futuristic and so visionary that it lacks a legitimate purpose and credibility on its first proceeding or the existing reading when we preclude the same. So, on a question related to constraints in policy making, Policymaking is a serious affair of the government. But there are a lot of constraints, and all these parameters can be highlighted in the form of a map giving a flowchart in between saying policymaking constraints. And there can be bubbles taken out on every corner wherein they can highlight through examples, non-existence of public policy or for instance, lack of clarity of goals. For example, we have the new Education Policy. The same came up a few years back, but its implementation is taking a lot of time. So, the national education policy can be critically analyzed as to why it is not reaching its primary objective. So, it is time now that we revisit the new education policy, see how the same was received by headmistresses and headmasters of schools, the principals of schools, how students who are at the forefront of taking this, how they are receiving it and then finally conclude on its nature.

Constitutional Law and Public Administration in India

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Role of Public Policy in Public Administration – III

Public policy also has some significance, due to various facets. The first, is a purposive course of action in dealing with the problem. When there is a problem and there is no new roadmap for the same, public policy bridges that gap to come up with a solution driven approach for that particular problem. It helps the government in making an informed decision and to develop strategies as to how to overcome that particular issue or concern. It also facilitates collaboration and consensus among various stakeholders which is one of the most important tasks that any government performs because the government is not a single entity; it is a multitude and purposive entity that runs into various facets. It also brings in a democratic participation. India being a democratic country it is very important that the voices of the people are heard; what the people actually want, that is given and delivered to the people by the government, and that is the reason they choose their representatives. So, once they are representatives they come and represent the people, the same should be facilitated.

Next, is socio-economic development and the wholesome scheme of national integrity is very essential in this regard. Also, on the larger picture public policy plays a very critical role in nation building. Today if we see the steel industry that is a robust industry in India; it is a gift; and the ideology was formulated because of strong policy decisions that were taken years and years back. India took a policy decision to open up its doors to the world economy. The 1991 reforms that took place, globalization, liberalization all these are policy decisions that were taken which affected where India stands today. Today when we aspire to become a 5 trillion-dollar economy it is because we can aspire, because there is a vision that we have seen. We are working on a policy through a self-reliant India; the idea of the current prime minister and ruling government; and when you have an order in place it makes the journey easier. So, public policy plays a critical role in nation building. On the professional front it understands the causes and consequences and on the political front there is adoption of right policies for the right course which brings us to the utility in this regard which is by far one of the most critical elements in public policy.

There are a few judgments, and which show how the courts have actually gone ahead and discussed a bit about public policy. Let us take up the case of *State of Punjab v. Ram Lubhaya Bagga*, a 1998 judgment. In this case, the court held that government policy is based on facts, laws, constraints, or resources expert opinion. They test the utility and the benefit of the policy, so courts rather do not enter the realm of the executive and hence there is a separation of power in the government which definitely does not lie in a watertight compartment but there is definitely a separation of power. The judiciary is a guardian to the constitution. The executive is someone who will execute what the legislator legislates. So the case law was very clear as to who should formulate policy and courts should only see as to if the policy is against public order or public morality and rather not enter into the realm of the executive wherein they come and try to execute or try to legislate wearing the boots of the legislature.

In yet another case of *Federation of Railway Officers Association v. Union of India*, the court clearly held that judicial review of public policy is limited, which means that if the government takes up a decision the courts will have a limited jurisdiction to actually review that action of the government. If the public policy is related to something technical in nature and if it falls within the purview of the legislature, it will depend. Thus, judicial review is inconsistent with constitution, arbitrary, irrational use, or abuse of power. Only in these circumstances will judicial review kick in, and the courts will come into action.

They will spring into action when they see a particular policy is against the spirit of the constitution or is against the letter of the constitution by far, or there is an arbitrary or irrational use or abuse of power. In a very recent judgment in *Directorate of Film Festivals v. Gaurav Ashwin Jain*. In this case the court held that, courts are not affiliated authorities; they will check the correctness, suitability, and appropriateness of a policy. Courts are not advisors to the executive in matters of policy, and public policy is reviewed on the touchstone of violation of fundamental rights or if the policy is violating a provision in the statute or there is a clear cut and manifest arbitrariness in the policy that has been formulated. These are some of the critical elements in which a court will exercise its jurisdiction in order to test the viability of a public policy.

Public policy thus, will not be directly improved to judicial review rather only in circumstances wherein fundamental right is violated. Suppose there is a policy that clearly discriminates against two classes of people which is based on sheer arbitrariness. That, this is something that is not advisable, and that goes against the nature of public policy, that goes against fundamental rights that is violating the statute, and is also arbitrariness; that is, it does not have a reasoning behind its functioning or its coming into existence. Courts cannot interfere on the grounds of apparent error in policy and availability of better alternatives. The subject of judicial review is quite limited, and the legality of policy must only be tested. The legal ground of the policy must be tested. Judicial review is narrowed down to see whether the policy is in consonance with the spirit of the law, with the law or

is not in consonance or against the spirit of the law. So, it is quite constrained and quite narrow in its scope. Here, it is not about the wisdom or soundness of the policy. The court will not see as to how viable the policy is going to be, rather how intellectually stimulated the policy is; it will only focus on the legal points and work on the legal aspect of the same.

Another area is of the statutory corporations in public policy. There are autonomous corporate bodies under this category, also called as public corporations and they are created by a special act of the parliament or the state legislature. They have their own powers, functions and immunities which are well defined in the legislation that has been passed. It also has financial autonomy and they are answerable to the legislature. These are state owned corporate bodies. The state-owned corporate bodies are artificial juridical persons. They can be sued and they can sue. They are managed by a board of directors appointed by the government. For instance, the railway is a state-owned entity. It has a board of directors.

It can sue and it can be sued by others as well. It can enter into contracts and purchase property and railways is one of the organizations that holds a large amount of land in the country, because it lays down the railway tracks and for this purpose it enters into various kinds of contracts to develop the land into railways, railway corridors, it purchases property etc. So, it does the function of what the government does for the welfare of the people. It has a common seal and a perpetual succession as well; it is fully owned and managed by the state and the state is the initial capital investors and the objective is purely public service and it functions like a business entity. These are bodies that help the government to take their public policy to the people, to take their ideas and visions to the people in order to make the lives of the people much easier and much more relevant in time.

We have the autonomous employee system, and this is not only for not government employees who are recruited and paid according to the rules of the entity. Then there is financial autonomy. They have financial independence and financial autonomy. They are exempt from rigid rules applicable to expenditure and public funds, not subject to audit regulations and they can borrow money from the government and from the people. They can also list themselves in the stock market. They are answerable to the legislature. They enjoy freedom in terms of internal management but when it comes to the external management, they are responsible to the legislature as to why a certain action was taken and the repercussions of the action, why is it being faced in that regard. For example, the Life Insurance Corporation of India that ensures that almost every person in India has a life insurance or has any kind of insurance so that certain parts of their life are insured, which is a state owned insurance company governed by the life insurance Corporation Act of 1956 and the objective is to spread insurance especially in the rural areas because it looks for the wider amplitude of welfare for the people which is providing adequate financial cover at a reasonable cost.

Likewise, the Reserve Bank of India which was established in 1935. It has come into existence through an Act, a legislation which is the Reserve Bank of India Act 1935, nationalized in 1949 and it is the highest organ that regulates the banking sector in India. The RBI regulates the issue of banknotes. It is the only bank that looks after the currency circulation, it prints money when required, it keeps the reserves for monetary stability. The other banks are commercial banks. Reserve Bank of India is a non-commercial bank. It is known as the banker of the banks because it acts as a banker to all the other commercial banks where people keep their money. It is the head of the banking institution and in a manner the head of the family. It operates the currency and credit system. It has a modern monetary policy framework, and it ensures and plays a critical role in maintaining price stability. It also faces global fluctuations and ensures that inflation is taken and kept under steady rules. It has central and local boards as well it has a board for financial supervision.

It is present across the states. It functions in a multitude of ways. There are various officers at various ranks who take care of the banking sector, and they regulate the entire banking economy in the country. Then we have the Food Corporation of India which was established under the Food Corporations Act 1964, whose primary objective is to provide effective price support to the farmers. There is the distribution of food grains through the PDS system that is the public distribution system in place; and this enters rural India. It also acts as one of the backbone of providing grains to rural India. It provides food security for the entire nation in and across all times and it is the reserve for the food security in India. It maintains a satisfactory level of buffer stocks of food grains and it also takes up decisions as to how the crops are growing, which crop is in excess and how the same needs or should be regulated. Organizations like these play a critical role in nation-building.

It may not seem, and their actions may not seem on a day-to-day basis, and their functions may not be felt on a day-to-day basis. But the reason they are functioning and they have been effectively functioning and this known is because the food security in our country is quite stable. The State Bank of India, which is also known as the banker to almost every Indian, is an Indian multinational public sector undertaking and financial services company. It is a listed company in the stock market, wherein, people can purchase, share and be a part as the shareholder of the State Bank of India.

It is published under the State Bank of India Act, 1955. The objective is to encourage and mobilize savings. It encourages people to open bank accounts and it has a provision of cooperative credit as well. It provides remittance services to banks and financial services to small and cottage industries, and licensed warehouse banks. It plays a major role in giving loans to small scale farmers or even large-scale farmers for that matter. People who are aspiring to enter into the business market are provided financial assistance. It is the banker to almost every Indian living in the nook and corner of the country. Let's see this case, which is *Sukhdev Singh v. Bhagatram Sardar Singh Raghubanshi*. It's a 1975

judgment which held that statutory corporations are given birth by statutes. And there are three features that should be there in a statutory corporation.

First rules and regulations framed have the force of law. They come into existence by an act, by legislation. The employees have a statutory status as well. This is because they are employees under a certain legislation. They are employees for a certain reason. Then dismissal of employees not to be in contravention of the Act. You need to take care that the people who are employed are not ousted by the provisions that go against the spirit and word of the Act. Statutory corporations and not state is under Article 12 and only a constitutional statutory authority comes within other authorities under Article 12 as stated in *Ramana Dayaram Shetty v. International Airport Authority of India*. There are a few merits and demerits of these organizations.

If we compare the State Bank of India with the private sector bank, for instance, the HDFC Bank, not every citizen in the country can open a bank account in a private bank because they have certain rules and regulations. They have a certain limit in which you have to keep your savings account. There has to be a certain stability in your savings bank and there has to be a minimum cash amount that needs to be there in your savings bank account. So, the merits of such kinds of institutions, like the Food Security of India or the State Bank of India are that they have expert managers in their management.

They have administrative authority to seek for the best of their people. They can carve out many small policies that work in the best interest in the working of the people. They can be initiative; they can be innovative and they can also be flexible in their working and also being a statutory organization they have the ability to take quick decisions in order to reach the objectives of its policy soon. And the motto as since it is a government entity or a state entity or a government undertaken entity, is service. It's not a profit making entity rather it's a service entity or a service model entity that is there for the people.

The staff is efficient. It is easier for them to raise capital because they are state undertaking. So, if they require the state, the central or the state government will come to their assistance. But as every coin has two sides, the demerits are that it is theoretical and autonomy. So, it works in a particular structure. It's quite rigid in its working. They would not want to change the way they work. At times there is a lack of initiative as well. And since there are people working on different levels at times there is a clash of interest.

Unfair practices and if not the best suitability at times and at times not suitable. So, the pros and cons can be weighed on a scale but what must be kept in mind is the service motive. Therefore, these organizations though may not be profit making entities, they play a critical role in maintaining the stability in the economy in giving the common man in India the life that they aspire and the life that they actually deserve and all the other benefits that any private bank or any private institution can give. These state-owned governments

are trying their level best. The state-owned entities are trying their level best to level up and match up with the private players. Despite certain disproportionate partialities here and there, it works out to the benefit of all. There are government companies as well. Companies like Bharat Petroleum, Indian Oil Corporation etc., which looks after the crude oil and the distribution of fuel and crude oil across various parts of India. And there are companies like Shell and there is a clear demarcation and a clear-cut change in prices that is there. So, a company or association, central or state government or central and state government combined own at least 51% of the paid-up share capital.

A government company will be a company in which the government has 51% stake and 49% is being held by the rest of the people and they are also referred to as public sector undertakings. The reason why these companies are so important and relevant is because they achieve significant equity with distribution of wealth of citizens and they help in nation building by ensuring that the growth of the nation happens along with its people and not just a particular sector of people. So, the ideology of a capitalist economy is not there, rather a mixture of capitalist and socialist wherein both can thrive at the same time. And it is suitable because private sector companies along with PSU's are needed for strategic growth and even private sector companies can be shareholders and also can be a member in these companies. So, the PSUs join hands with the private sector companies who lack financial arrangements to fulfill its objectives.

There have been various organizations that have been diluted by the government wherein, the private players or the private entity is taking a large amount of stake, and they are ensuring that the unit turns into a profit-making entity. For example, the Power Finance Corporation Limited, Chennai Petroleum Corporation Limited etc., are all examples wherein the private sector and the government sector are coming hand in hand with each other. This form is convenient when the government has to take over an existing enterprise because if the government realizes that it is a loss-making entity the government will come to involve a private sector or will try to infuse more money. For example, BSNL, the Bharat Sanchar Nigam Limited. Though it is criticized as an outdated telecom industry or a telecom company at places where the towers or the signal of companies like Jio, Reliance Jio, Vodafone, Airtel, does not reach the towers of BSNL reach because BSNL is not only a profit-making entity but it also plays a crucial role in establishing towers at border areas where there is a very thin population, because it is a service oriented and welfare company for its people; and people need connectivity. It also plays a major role in national security because you need signals, inputs, and data from those places, and companies like BSNL, hold the back pole of the government that provides security to the entire landmass.

The government may want or wish to manage an enterprise in association with private enterprises. The undertaking is a government undertaking with 15% stake, but the people who are managing it can be deputed from private companies who are doing well. They can come and take care of the company's functioning. This is where private players also

enter the domain of the private and government sector undertakings and there is competition with the private sector requiring operational autonomy always, but there are compulsions by donor countries for specific forms of organization. This is convenient when the government can be in a position to make decisions and can be in a position to take quick and rapid decisions for its people and see what works out best for its individuals.

The next among the features is that of a distinct legal entity which has a separate existence. It has its rights and duties of shareholders which are different from the company. It is formed in compliance with either the Companies Act 1956 or the Companies Act 2013 which controls itself with strict management. There are proper written rules and regulations in the form of articles of association or memorandum of association which lays down the objective of the company and the rules for its internal management and is supported by government-shared holding and private stock holding, and the companies subscribed by the government of India are not owned by it. These companies can also go and raise funds on the stock exchange.

When the government engages in trade, the position of the company is not of a political state or a political government. It is of an entity who is entering into the business domain and it's evaluated by a central government nominated authority. Generally, authority responsible is the CAG's office, that's the controller and auditor general of India which keeps a tap on these industries, on these organizations or particular institutions who are helping the nation reach great heights. In the case of *Ramana Dayaram Shetty v. International Airport Authority of India*, it is seen that an entity is called an agency when the entire share capital of it is held by the government. There is a pervasive existence of state control, it has state protected entities having monopoly status functions related to that of government and there are so many other things. On the other hand, there are entities that are owned by the government, right from BHEL, to Coal India Limited, GAIL and HAL which is playing a major role in ensuring that the defence sector gets indigenized helicopters and fighter jets that is homegrown, which also boost the country's internal defence sector and that too given India's unique geopolitical position. ONGC, NTPC, Steel Authority of India which actually formed the backbone for all these companies on a closer view can be seen as to how they work as a catalyst to one another. The steel that HAL is getting, can be provided by SAIL. They are providing a backdrop or being the backbone to each other so that the government together as an entity can be strong in business as well as in administration. This has a significance. As to the economics of SAIL, where there is a huge amount of capital required that the private sector cannot infuse, this is dealt by the public sector.

For example, electric power plants, natural gas, petroleum, the defence sector, it may not be that every private player can infuse such a large amount of money because this huge chunk of money is only there with the government and they have the robust stage here to

take up such projects. There is also the need to maintain regional balance in the geopolitical area. For the overall development, the economically backward areas also need to be touched and therefore the government entities, they establish their institutions, factories or their corporations at even the remotest area of India because you need to give and generate employment and this is something that the private players may or may not undertake. Then the PSU's take charge in underprivileged areas. So, they make and bring balance in this entire area and the development of the infrastructure. Now when there is a project that's actually unfurling at a particular place, the infrastructure also gets developed, and the government invested for development actually develops the particular area.

Once an industry comes up, officers, employees and people will come up. When all these people come up, you need the resources or facilities like hospitals, schools, healthcare centers, medicine shops, markets, supermarkets, or any market wherein these people can buy their essential services or the essential goods and items. They eventually go on to develop the infrastructure and the private sector unwillingly may or may not want to contribute to this. Another reason why the private sector would not want to contribute in these areas is because the gestation period is quite long. By the time these entities turn into a profit-making entity, it may take up to a decade and the amount of capital infused is huge and every private individual who would infuse such a large amount of money would want some kind of return if not also a huge 100% profit.

There is an aspect of control on monopoly and restrictive trade practices. PSU's control the monopoly created by private sector companies. It checks on the guidelines of monopolistic and restrictive trade practices. Not everyone can buy from all the brands that are there. So, the government has to enter in order to balance the various private sectors wherein there are companies who are only operating for the purpose of profit. These companies have the motto of service. They're doing a service for the nation, not a profit-making entity. We also have what is called the import substitution point wherein the PSUs are engaged in manufacturing and production of capital equipment, which was earlier imported from other countries. Today we are exporting such products. So, only when the government can give that boost to the private sector, they would also come up in these areas and then strengthen India's trade with other countries.

There are limitations and advantages here. The advantages of these companies are that under the provisions of the Companies Act, there is internal autonomy, there is flexibility in the decision making, there is control of the local market, curbing of unhealthy business practices as well. On the other hand, there is limitation wherein there is external interference not answerable to the parliament, political motivations and at times there is governmental inefficiency as well in all these kinds of projects because there is a lot of bureaucracy that is involved in the functioning of these entities. Now let's see the difference between a statutory corporation and a government company. A statutory corporation is

created by a special act of parliament or state legislature, whereas the government company is directly formed under the Companies Act of 1956 or 2013.

The board of directors is nominated by the government. In the case of the government, the board of directors is nominated by the government and the government is also the shareholder. Government subscribes to 51% of the capital in the government company. There is no scope for private participation in a statutory corporation, wherein in a government company there is scope for private participation in capital management. In a statutory corporation, they are bound to work within the provisions of the Act. Government companies function on the basis of business, on the basis of commercial principles.

Six, subjective restrictions imposed by the government and government companies enjoy a greater autonomy. Seven corporations are accountable to the public through the legislature. Government unconcerned ministry accountable to the public in case of government companies. There are certain projects in which the government enters into a joint venture with other companies, which are these companies wherein there is a business arrangement of two or more parties, wherein they agree to pool their resources.

They share risks to accomplish a specific task. For example, Tata entered into a public-private partnership with a company in West Bengal to make a water treatment plant for the city of Haldia. This is where the private and the government ended undertaking joined hands of state, government, and a private entity, through another arm called JASCO. Then, tasks can be a new project of business activity where the government does not have an expertise or where the private sector does not have an expertise or the private sector has an expertise but does not have the money. So, the government can infuse the money, the private sector can come in the managerial and the management position.

Each participant is responsible for profit-losses and the costs that are incurred. Now, venture is a separate legal entity in this case, partnership in the colloquial sense and the aim is to enter or to take the business into the foreign market, which again depends on how the management of the company would take the company forward. There are reasons why generally a joint venture agreement comes into picture. First is to leverage resources, second to reduce costs, third to combine expertise and fourth to enter foreign markets. These are formed through an agreement that lists rights and obligations objectives, initial contributions of the parties, day-to-day operations, right to the profit and takes the responsibility of losses.

In the case of *Faqir Chand Gulati v. Uppal Agencies*, it is a limited JV association of persons to carry out a single business. It is an association through an implied or express contract, community interest as to the purpose of undertaking stands in relation to principal and agent. But are there pros and cons of a joint venture agreement? The pros and cons of a joint venture agreement are, it gives a new business opportunity to both the private

individual and the government undertaking. It reduces the cost and risk because you have the money in safe hands, because you have the best people in the field who are holding your money too. It starts with the broader base of knowledge and the pool of talent who can actually get the work done in the best possible manner. But there are cons as well, like when there is a good thing, there will be a bad thing as well. The cons are there can be a relinquishment of a certain degree of control. The same goals and equal degree of commitment may or may not be there.

If there is an Increase in the management of teams, any change in business structure only affects the joint venture because a new team comes if the earlier team moves out. which is quite evident given it is a joint venture agreement. The entire project can go for a toss and difference in the working of the company and the management style. And there are questions as to when the project completes, how will the exit strategy be, or what will be the sale of the new business, a spinoff of the operations, the employee ownership, and will be accountable for such a reason. One of the case studies that is relevant is, which is not a JV, but per se, the study of Sony Ericsson, and how it went down. Corruption and good governance plays a very critical role in this regard, which is how corruption affects the gain out of such undertakings, which is a major obstacle to good governance. Corruption affects and undermines the trust in public institutions. When there is corruption, there will be mismanagement of public resources, there will be poor delivery of service, there will be reinforcement of marginalization and economic life, and it impacts the ability to fulfill human rights obligations. India ranks 85th amongst 180 countries as per the corruption perceptions in 2022. This is something that will work on the good governance side. This needs to be improved on an individual, departmental, state, and central level. Governments can combat corruption by implementing policies that promote transparency, accountability, and the rule of law. Then there are anti-corruption agencies as well, which are Central Vigilance Commission, Central Bureau of Investigation, Lokpal and Lokayukta. A snippet of what these actually do can be seen.

The Central Vigilance Commission was set up in 1964. In the Hawala case of 1993, that is, *Vineet Narain v. Union of India*, the CBI failed to investigate allegations of public corruption. The guidelines were laid down to ensure independence and autonomy of the CBI and the CBI placed under the supervision of the Central Vigilance Commission, which is an independent governmental agency free from executive control. And today the Central Vigilance Commission Act has been passed in the year 2003. It provides powers to inquire into the offences committed under the prevention of Corruptions Act 198, by public servants, statutory corporations, people working such corporations, government companies, societies and local authorities owned or controlled by the government. In the case of *Union of India versus KV Jankiraman*, it was held that CVC has no power to give sanction for prosecuting public servants and the power exclusively vested with the employer of the civil servant. In the recent case of Hira Nayak, it was held that when a

particular employer of a department needs to be sanctioned, criminally prosecuted for charges of corruption, the head of the department plays a crucial role in giving the sanction order to go ahead and prosecute the particular person. Otherwise, the head of the department can take a stand that it is necessary to run a departmental inquiry first and later the matter of prosecution of the particular civil servant can be taken up. CVC is a three-member body consisting of the Central Vigilance Commissioner and two Vigilance Commissioners.

The members are appointed on recommendation of the High-Powered Committee consisting of the Prime Minister, Minister of Home Affairs and the Leader of the Opposition of the Lok Sabha and the Act confers adequate independence and functions for the autonomy to the CVC. The Central Bureau of Investigation was set up by a resolution of the Union Government on the 1st of April 1963. It derives power to investigate from Delhi Special Police Establishment Act 1946 and has jurisdiction over all the Union Territories and States with consent of the State Government and functioning under the Ministry of Personnel, Public Grievances and Pension. It's a premier investigating agency in India and the divisions are Anti-Corruption Division, Economic Offences Division and Special Crimes Division.

All three have their own separate functions. The Anti-Corruption Division as the name goes, looks up into the corruption cases, economic offences, looks up into the white-collar crimes and the Special Crimes Division looks up into the heinous crimes that take place in the country. Then we have the Directorate of Prosecution, Administration Division, Policy and Coordination Division, Central Forensic Science Laboratory. All these have their own specific working, they have their own specific way to work. Anti-Corruption Division is entrusted with cases involving public servants under States or Centre involving interests of Central Government, PSU, statutory cooperation, government companies etc., preaching central laws, crime on the airlines, crime of the high seas involving serious cases of fraud, cheating, embezzlement in public joint-stock companies and involving collection of intelligence and corruption in the public services and public sector.

We also have the Lokpal and Lokayukta which came into existence through the Lokpal and Lokayukta Act of 2013 that provides for the establishment of a Lokpal for the Union Government and each Lokayukta for the States. It's a statutory body, which functions and performs through the ombudsman and inquires into the allegations of corruption against public functionaries. It has become mandatory to establish a Lokayukta for all the States. It mandates all public officials to furnish their assets and liabilities of themselves and their dependents. The jurisdiction involves conducting enquiries against allegations of corruption against the Prime Minister, Ministers, Members of Parliament, State, Central and Legislative Assemblies, Group ABC and the Officers and Officials of Central Government. Case referred to the CBI by Lokpal cannot be transferred without its approval.

The inquiry wing of the Lokpal has powers as good as the Civil Code. It can confiscate assets, proceeds, receipts, and benefits procured by means of corruption and can recommend transfer or suspension of public servants. Then there are the anti-corruption laws that look into the functioning of these institutions, when and if there are points and concerns of corruption. It can give directions to prevent the destruction of records during preliminary inquiry. Anti-corruption laws are under the prevention of the Corruption Act of 1988, prevention of Money Laundering Act of 2002, Right to Information Act 2005, public interest disclosure and protection of Informers Resolution Act 2004, Lokpal and Lokayukta Act of 2013. All these Acts look into the offences, punishment and the working of these institutions and the workings of these various legislations.

The Money Laundering Act works in order to criminalize legalizing income profits from illegal sources, and it looks after various kinds of channelizing, illegal channelizing economic crimes, which also proceeds to the confiscation of property that has been derived from money laundering and matters that are related with regards to the same. And money laundering is a punishable offence with rigorous imprisonment. The Enforcement Directorate also plays a major role in this case, especially in cases that come under the PMLA. Then you have the Right to Information Act, wherein any citizen in India has the power to ask the government how the money is being spent or how the government actually works. And it has been used widely to uncover corruption, progress in government work expenses related to information, etc.

The objectives have been to empower citizens to question the government, promote transparency and accountability in working of the government, help in containing corruption in the government and envisage better informed citizens keeping necessary vision on government machinery. Basically, the purpose of the Right to Information Act is that the government remains in check from the people, but the people should also be aware of their rights, where and when they can step in. Then we have the Public Interest Disclosure Protection of Information, Informers Resolution Act by 2004, wherein the identity of the complainant is protected, because in these matters, certain kinds of people are involved, which puts a potent threat to life and liberty.

The last part of good governance emphasizes that you require a legitimate, accountable, and effective way of obtaining and using public resources in pursuit of widely accepted policies. And that includes the development of the human being in its essence; it works on various assets and on various fronts as well. The principle of good governance needs to be participatory; it needs to be consistent with the rule of law, it needs to be transparent, responsive, and have consensus and must be objectively driven and equitable and inclusive. And the indicators of good governance are existence and quality of procedures, levels of capacity output and estimates from direct observation. And all these things are conducted by the government through various organizations. For examples, the levels of capacity or existence and quality of procedures, the output, there are various exams that takes place in

India, which is conducted by the Union Public Service Commission, commonly known as UPSC, or the State Public Service Commission, that actually goes on to depth and sees as to how and which kind of people should we select, which can, who can come into the government department and take the principle of good governance to meet it into a reality.

And transparency is one of the most essential elements in good governance. You need to make the public aware of the functioning of the government. People must know who, why, what, how and how much. The people should be aware as to who is responsible, why a particular action should be taken, the need for such action, the method of taking the action, and what cost was incurred towards the same. The public hold power for the common good, and the components are availability of information, government policies and actions, clear sense of organizational responsibility, assurance of government, efficiently administered, corruption free of government system and informed citizenry, which is one of the most important elements in good governance.

Constitutional Law and Public Administration in India

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Week- 11

Lecture-01

Delegated Legislation – I

As constitutional enthusiasts, you all must all know that it is the legislature that performs the function of drafting legislations. However, the administration or the offices who are empowered to carry out various constitutional functions and legislative functions are also empowered to make legislation. The legislature, although it oversees the entire gamut as to how legislation in a country should be governed, minuscule operations of day-to-day affairs and others is better left off with the executive wing of the government. With this we venture to understand the role of delegated legislation as to how it is relevant in today's general public administration.

To understand the concept of delegated legislation, one must first need to understand the doctrine of separation of powers. The legislature makes the law, the executive that implements the law and the judiciary interprets the law and administers justice. In your previous sessions, you must have been introduced to the manner in which administrative action can be challenged before the courts of law. In this session, you will discuss in more particular as to the legislative functions that are exercised by administrative authorities as to how they acquire such power and whether the exercise of such power is within the grand framework of the Constitution of India.

While we have the legislature to make the laws, why should the administration be even involved in making the laws? Because at the end of the day, those who are in the legislature represent the public; the electoral system that is put in place under the constitutional framework allows the legislature to be the will of the people. Then why bring in the administration and create the clout of certain maladministrative actions or interference with the will of the people? This is merely because of the wide nature of activities that today the government or the state in general undertake. Traditionally, the state was generally involved only in administration of its subjects' activities and the people were allowed to carry on their activities with the permission of the state. There was not much interference by the government in your day-to-day affairs.

That brought in the concept of *laissez faire*- live and let live. The government only intervened in the manner in which they required to create a governance structure so that people can live and let live. However, today the government is not just a mere regulator, it is also a businessman. It also undertakes activities in competition to other individuals. It provides for employment opportunities. It takes care of the welfare activities of those who are downtrodden, those who are oppressed and tries to ensure that the civil liberties guaranteed under the Constitution are meted out and no individual is left to face injustice under the hands of any third person or the administration itself or the state, no matter who it is. In today's era, the government is no longer a mere administrator. It is also an economic regulator. It is also a businessman and has also taken up the duty to protect the welfare objectives and provide to all its citizens certain aspects of security both in the sense of economic well-being as well as social well-being. With the government performing such a large number of activities and engaging in diversified roles, there was no other avail but to allow for the administration to carry out the legislative functions in addition to its generic executive actions.

Let's move on to understand the relevance of delegated legislation. When we use the term 'legislation', it could mean several things. However, when we use the term 'delegated legislation', we refer to that gamut of legislation which is passed by an authority who is not the legislature. At the outset, kinds of legislation can be divided in the terms of supreme legislation as well as subordinate legislation. Supreme legislation generally refers to that gamut of law which is made by the legislature itself. It is also interchangeably termed as the parent Act, primary law, supreme legislation and from all of these aspects emanates delegated legislation also known as subordinate law or child legislation. The similarity between supreme legislation and subordinate legislation is that they both are products of legislative power which is vested in the government. But however, its distinction is that the delegated legislation is an outcome of delegation by the sovereign itself. It is a delegation that is made to an executive wing whereby the executive makes the law for it to be implemented.

Regardless of who makes the law, whether it be supreme legislation or delegated legislation, the force of law remains the same. As a matter of distinction, it is to be observed that supreme legislation is passed by such authority who does not require any other delegation of power to it. It is by itself vested with the power to make such supreme legislation. Whereas the executive on the other hand has to be delegated with such vested power by means of a delegation and only thereafter can the executive come up with a subordinate law or a delegated law be so it. The connected aspect thereof is that for an executive to pass a delegated legislation, the validity and continued existence of the delegation is essential. It owes its existence to the superior who has delegated such powers to the executive. It may thus be understood that the constitutional scheme rejects the notion of inherent lawmaking power in the hands of the executive administration. Unless such

power is delegated by the legislature, the executive or the administration cannot claim a valid right to make a law, either by way of rules or any other manner whatsoever. In this context, Justice Mukherjee provides that delegated legislation is an excuse for the legislators, a shield for the administration and a provocation to constitutional jurists.

The term ‘delegated legislation’ could be used in two senses. Firstly, delegated legislation is called so because such legislation emanates from a subordinate authority by virtue of exercise of a legislative power which is delegated, hence the term delegated legislation. And secondly, in common parlance, the subordinate legislation itself is called delegated legislation. Hence, the legislative powers are executed by an authority other than the legislature itself. Further, the powers of the authority are limited by the statutory provision by means of which the delegation is made. In the second sense, where we refer to the subordinate legislation itself, such subordinate legislation could be in the form of rules, regulations, bylaws, orders, etc. It could also include notifications and other particular aspects whereby the executive seeks to promulgate certain legislative actions so as to be implemented on a given subject matter. Take the example of the Essential Commodities Act of 1955. There are certain commodities that are expressly defined as what essential commodities should be. However, the list is not exhaustive in nature. The Central Government has been given the power to further enlist certain other aspects under the said heading of essential commodities. During COVID-19 lockdown, certain other things such as masks and sanitizers were also brought under the head of essential commodities. This is something that the Essential Commodities Act expressly allowed the Central Government to issue a notification and make such a declaration.

Challenges to Delegated Legislation

As to in what circumstances can a delegated legislation be held to be unconstitutional or void? In the earlier instances, you must have come across that any law that is passed which is in delegation with your fundamental rights, be it passed by the legislature itself can be held to be unconstitutional and void. What about the delegated legislation then? Delegated legislations too have a mandate that they have to be in consonance with the constitutional framework and also not to be in violation of the fundamental rights that are granted by the Constitution.

Further, they too, the delegated legislation also has to be in consistency with that of the parent legislation. In the sense, a delegated legislation cannot supersede the ambit that the parent legislation itself covers. This leads us to the query as to whether delegated legislation is necessary even or is it a requirement of the day? The age-old principle and orthodox view that constitutional scheme rejects the notion of inherent law-making power and the particular aspect that it is essential that the separation of powers that is mandated by the Constitution is maintained so as to ensure that each wing of the government performs its functions and activities in the rudimentary framework of the rule of law. That brings us to

the premise as to how delegated legislation can be considered. In the orthodox perspective, delegated legislation has been regarded as an evil by itself.

However, it was deemed necessary even because the administration was much more convenient to take decisions where the legislature itself could not reach out. Administrative legislation was traditionally looked upon as a necessary evil because of the inevitable infringement of separation of powers. However, the relaxation of this doctrine paved the way for allowing for the growth of delegated legislation. It is pertinent to note that the borderline between the legislative functions and that of the administration was being thinner and thinner day by day. The same was because a clear-cut division of power did not allow the government to take up its multifarious roles that it had envisaged for itself, be that as an administrator or that as a businessman or that as a caretaker or provider of welfare to its citizens.

Such predominance has paved the way to understand that delegated legislation today is the need of the hour. And further, there cannot be an instance without delegated legislation involvement in the day-to-day affairs. That brings us to the juncture that in fact, the delegated legislation is there to stay and is therefore a requirement of the day. Let's move on to the concept of growth of delegated legislation as to how it has become so predominant in today's era that it is the need of the hour and the requirement of the day. As we discussed earlier, the growth of the state functions from that of a mere police state to that of a welfare state is something that stimulated the growth of delegated legislation.

Earlier, the government was only in charge of the security of the territory and that of the people. However, taking across the role of a welfare state, taking across the role of that of a businessman has only made the state much broader in its ambit of functions. Therefore, the multitude of actions, activities that the government undertakes today is much bigger and larger than that of a police state which it was several years ago. The Constitution of India envisages that a total of 552 members may be appointed to the Lok Sabha. The Lok Sabha which is the House of the People, and the Lower House of the Indian Parliament currently hosts about 545 members of which two are nominated. And these members meet across in three sessions to deliberate on the entire gamut of law making within the country. The three sessions are generally the budgetary session which is between January to the first week of May, the monsoon session which is between July and August and the winter session which is between November to December. Is this amount of time sufficient to delve into the entire multitude of functions that a welfare state is going to carry? No. And it is impossible for the 545-member strength to look into the gamut of activities that is performed by 1.4 billion people.

Just as you would recollect that during your childhood, your parents would have asked you to go ahead, and purchase say certain grocery items from the nearest grocer while they would look at bigger things that are required in the house such as that of cooking the dish

for your lunch or dinner. Similarly, the parliament too to relieve itself of the stress of overwork and so that it is capable of attending to major matters delegates the power to legislate in the hands of the executive or the administrator that it can look across such minor matters by itself and hence the term parent legislation as against child legislation. The second reason as to why there is a growth of delegated legislation is because of the technical complexity of the subject matter of legislation. Not always the legislatures are equipped with technical and sound principles of knowledge on a given subject matter. Sometimes the laws that are being framed may be something of scientific or technical nature that requires an expert body to determine how the legislation is to be implemented.

That leaves the parliament to have its faith and belief entrusted upon the administration so that the scientific body of knowledge can be succinctly brought in forth in the legislative mandate and policy and hence giving way for delegated legislation on such subject matters. Thus, technical legislations on matters such as electricity, drugs, gas, and otherwise generally the power to create delegated legislation is vested in the hands of the Central Government because these matters require a certain amount of scientific profound knowledge which allows for governance in a better manner on such technical aspects. The third foremost reason as to why there has been a growth of delegated legislation is the need for flexibility in the governance framework. The legislature cannot be available at all times. The COVID pandemic clearly stipulated the need for urgent action and flexible manner in which the governance structure should be taken about and that the legislature by itself could not have met out.

As such the delegated legislation allowed for flexible governance during the COVID-19 pandemic. The contingency that was present and prevalent during those times, it was impractical for the parliament to sit on the particular sessions and also carry on the particular legislative function. As such delegated legislation played a pivotal role in the governance framework. Situations and contingencies such as this mandated the growth of delegated legislation over a period of time. The inherent feature of delegated legislation is meting out the requirement during an exigency and as such you would have seen, and you will always continue to see the removal of difficulties clause in numerous legislative mandates.

This removal of the difficulty clause is also called the Henry VIII clause on which we will subsequently discuss in detail as to how the manner in which the Henry VIII clause is to be interpreted and how it is to be utilized so that the power that is vested in the executive is not abused. The fourth reason why there has been a growth of delegated legislation is that the delegated legislation by itself allows for meeting the need for experimentation. The concept of delegated legislation allows the executive to do a permutation and combination of the various manner in which the laws can be implemented. Further, this allows the executive to understand as to what are the repercussions that it could face at the time of implementation.

For example, the matters that are connected with road safety measures is something which you could do about by way of a tested mechanism. The determination as to which roads must be a one-way, which road should involve a passage for only vehicles which are that in the nature of a car, in which roads should you prohibit entry of say non-passenger vehicles such as a good truck are all matters which is to be determined by way of an experimentation mechanism. So, in those aspects, if you were to put a clause under the Motor Vehicles Act by itself as to which roads are to be governed and in which manner they have to be governed, probably the Motor Vehicles Act which already is a large legislation would probably run into several thousands of pages which could never have an end to it. Lastly, the complexity of modern administration required that the delegated legislation paid its way to the current form that we see today. If you look at it from the perspective of a police state, the government and the state machinery has grown to such an extent where certain economic and social spheres have also been ventured there too by the government. And that bringing across the new aspect of a governance structure required delegated legislation to be implemented time and again because the legislature did not have time to sit on as a businessman. Thus, the pragmatic and practical requirement to have delegated legislation supersede the modern governmental functions mandated the growth of delegated legislation. The growth of delegated legislation has not just been an Indian phenomenon, rather a global one in that perspective. In the United Kingdom parliamentary supremacy is at its peak, it is of that nature that it is above the entire gamut of activities.

The constitutional validity of a parliamentary legislation is something that took several years before even being brought up before the judiciary in the UK. The conflicting rule was that administrative law was never looked upon as law and as such it regarded a hindrance to the development of the executive to its fullest extent like how it has taken place in other jurisdictions including that of India. But however, administrative law, just as it has grown in other jurisdictions, even in the United Kingdom, has found its prevalence and relevance both in the manner of governance as well as in the framework of legislative policy. When it came to the concept of delegated legislation in the United States of America, it is to be known that the doctrine of separation of powers was one of the biggest challenges to the growth of delegated legislation. The primacy that was given to the separation of powers doctrine in the United States did not allow for the delegated legislation to have a concrete growth in the United States.

However, the modern administration structure allowed for delegated legislation to pave its way into the governance structure in the United States as well. In the US, the implementation of delegated legislation has found its aspects into various functions of the government. In one of the cases where it was challenged as to how price fixation can be delegated to the price administrator, the US Supreme Court upheld that delegated legislation can be allowed for and is the norm of the day. Similarly, where sentencing guidelines were challenged, that in theoretical practice, although the United States and its

Constitution follows the principle of separation of powers which is envisaged in the article 1, 2 and 3 of that Constitution. However, in practical consonance, the same cannot be said to prevent the growth of delegated legislation.

Delegation of powers has well much pervaded into the practice of governance in the US as well. We now move on to conclude the discussion of this introductory lecture as to how delegated legislations have been classed. The legislature as we discussed earlier cannot be at all places to prescribe the minuscule aspects of what the law should govern. In most circumstances, laws provide for either the Central Government or any other regulatory authority to prescribe certain rules which could govern the conduct or regulate the manner in which any activity is to be governed. So, first and foremost, delegated legislations can be classified based on their title in the form of rules, bylaws, notifications, ordinances, etc.

What is title-based classification and how are they different? For instance, under the Companies Act of 2013, Section 469, the Central Government has been empowered to make rules for carrying out various provisions of the Act. And in certain aspects, it has also been provided that the conduct of a person should be regulated as may be prescribed under various portions of the Companies Act of 2013. The Central Government has come up with several rules that regulate and govern the matters of incorporation, it could relate to the aspect of buyback of the shares, it could be relating to appointment of directors, the manner in which the meetings have to be undertaken, and so on and so forth. Further, it is also pertinent to note that besides the Central Government, certain specialized bodies like the Institute of Company Secretaries of India have also been nominated and given the power to prescribe certain secretarial standards. And these secretarial standards govern the matters as to how meetings should be undertaken, the manner in which the notice is to be served to the parties, which of course, the legislature could not have superseded because of the technical expertise that is required for the sake.

So, on the basis of title, rules are those that are provided in most of the legislations. Similarly, bylaws are also provided for, for instance, where the power is extended to any non-governmental authority to make certain conduct of regulations. In those circumstances, they are referred to as bylaws. For example, under the Securities Contracts Regulation Act, any recognized stock exchange has been empowered to make bylaws for the regulation and control of contracts that relate to securities. The same has been predicted by virtue of putting across a rider that the same shall be subject to the prior approval of the SEBI, which is a regulatory authority.

Similarly, there may arise scenarios where the prescribed code of conduct or regulations may not really give across the actual meaning that it was intended to notify. So, in those circumstances, power is given across to the government or any other particular authority to come up with clarificatory aspects and as such the term notifications. The Goods and Services Tax Act, particularly under the Central Goods and Services Tax Act, Central

Government is empowered to give across recommendations to the council by way of notification for carrying out the various provisions of this Act. By virtue of those, there have been several notifications that have been passed by means of which certain clarificatory reliefs have been provided to various service providers under the Goods and Services Tax Act. Further, title-based classification would also include the aspect of ordinance.

Under Article 123 and 213 of the Constitution, the executive has been empowered to pass ordinances where the legislature is not in session. Sometime around September 2020, the farmers in and around the surrounding areas of Punjab and Haryana had come across and staged a nationwide protest against three farm ordinances which were passed by the Central Government. Although the legislations that were proposed in the form of ordinances and in the form of bills were beneficial to these farmers, the nationwide protest showed as to how good the Indian democracy upholds. It was a time of exigency when the COVID-19 pandemic was in and around and the parliament could not have its regular sessions going about. But nonetheless, in order to ensure that there is security of food within the country, the ordinances were passed.

The nationwide protest just shows clearly as to how the Indian democracy allows for delegated legislations also to be voiced by public opinion. And further, as to how the checks and balances are intact to check the misuse of powers where the same has been misused. The purpose-based classification of delegated legislations contains specific powers which could include the power to extend the appointed date, the power to exclude operation in areas which are notified by the said notification or to suspend or modify the provisions so long as the said purpose based delegated legislation does not substantially alter the legislative mechanism that is created. In this context, it is pertinent to note that Section 5 of the Environment (Protection) Act is a purpose-based delegated legislation, whereby the Central Government is given wide powers that regardless of any other law or the provisions of the Environment (Protection) Act itself, the Central Government has been enabled to come across by way of directions for even giving across orders for the closure or prohibition or regulation of any industry of that nature. The Central Pollution Control Board and the State Pollution Control Boards have been designated the particular powers under various laws to allow for operation of industries.

Nonetheless, Section 5 of the Environment (Protection) Act gives across a superseding enabling power to the Central Government to oversee the operations of these boards by virtue of delegated legislation, which is given by way of directions. The next aspect that we will learn about is authority-based delegated legislation. Generally, in the case of delegated legislation, there is some designated authority who is given the power to make such delegated legislation, either in the form of rules, bylaws, notifications or otherwise. The authority-based classifications stipulate which authority is essentially to make a particular delegated legislation. For instance, a central Act may enable a government of the

state to actually make certain kinds of rules, or it could delegate the power to the Central Government itself. Take the example of the Air Act. Under the Air Act, the power to make rules has been extended to the state government under Section 54. The state government more particularly under Section 54 has been empowered to make certain prescriptive rules and regulations in regard to the governance of a State Pollution Control Board. It could relate to the terms of appointment of the Member Secretary, it could relate to terms of appointment of the Chairman or the fees that are to be paid to the members of the committees of the State Boards, etc.

Constitutional Law and Public Administration in India

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Week- 01

Lecture-01

Introduction to Constitutional Law & Public Administration in India

Firstly, this course will deal with the Constitution of India, trying to understand the basic principles of constitutional governance in this country. There will be a deliberation on the significant aspects of the Constitution that affects public administration. The framework of the Constitution, responsibilities of government, both the legislature, executive and the judiciary will be discussed.

Looking at the various aspects and role of certain constitutional authorities is a critical component of public administration. Hence constitutional authorities including our local self-governance, Comptroller and Auditor General of India, Election Commission of India and others will be keenly discussed and deliberated. Following the Constitution is administrative action, because what is written in the Constitution has to be administered. And hence the role of the administrative agencies would be taken up in the next segment of this course. Administrative law is all about the principles of administration that one must follow. Every administrative action is subject to judicial review, which is the check and the balance. The Indian judiciary is the watchdog, the custodian of the Constitution and hence judicial test of administrative action becomes a very important component of this course.

Delegated legislation will also be discussed in this course. What is delegated legislation, the purpose of delegated legislation and the controls for dedicated legislation will also be taken into consideration. This course will look at administrative tribunals, as there is a phenomenal growth of administrative tribunals in the country. They are sometimes called as administrative tribunals, or as quasi-judicial tribunals. Sometimes they are also called constitutional tribunals as well. So, the functioning of the tribunals and their contribution into public policy will also be taken note of.

Finally, the course will also deal with public policy in administration. Public policy is an important component of public administration. And the nature and scope of public policy in India is actually at a crossroad currently. Various aspects of all kinds of policies, be it welfare policies which can be social in character and nature, fiscal policy or economic

policy, which is important for a developing economy like India, political strategy and defence related policies that are also critical for the growth of the nation will also be taken due note under this course. The course will conclude on the need for regulatory authorities.

As we have seen in India, public policy has been governed through the dimensions of certain regulatory agencies that have been brought about. Over a period of time, thanks to the Indian judiciary and the Indian democratic principle, these regulatory bodies have become autonomous to a larger extent. They have become independent, and they have contributed significantly to the growth of policy making in this country. We can look into the important role played by the Reserve Bank of India. The Reserve Bank of India is the central bank. It is the custodian of all financial matters for the central government. The Reserve Bank of India has been laying down some important critical policies from time to time for the financial governance in this country. The finance policy of the nation is very stable, as we have already seen that there are many economies that are getting into recession or are on the verge of recession. Whereas, Reserve Bank of India, which is a deemed autonomous independent organization has been able to keep stability in the country through its policies. Also, the policies of the Disaster Management Authority. India is quite vulnerable to disasters and climate change. We have a serious issue with the Himalayan mountain and disasters that occur over there. And we also have seen unprecedented rainfall, unseasonal rainfall, extreme weather events, including cyclones at both the coasts of the Indian territory. Policies of the Disaster Management Authorities also become critical in how India faces these disasters and climate challenges.

Let's understand the Constitution and the governance framework that has been established by the Constitution of India. 70 years back when India got its status of being a republic, we got independence from the Britishers, and we gave ourselves a Constitution. The Constitution is the fundamental law; it is the law that gives powers to all the three organs of the government. Rather, it gives power to all agencies of governance. The Constitution is the basis of governance. Without the Constitution probably the country has no governance framework.

Framing of the Constitution probably is slightly on the easier part. But how it works in the real world is what determines the framework. This takes us to the concept of constitutionalism. Constitutionalism is the concept of the working of the constitution. It is putting the constitution into practice. And it is testing the constitution as it works among the people. So, in running the constitution, most countries have faced challenges and difficulties, including the United States. Though the Constitution of the United States is brief and crisp, (it is even one of the oldest constitutions in the world) the working of the United States Constitution has seen many ups and downs. In the United States, there are two political parties, the Republicans and Democrats. And the Supreme Court is also equally divided between the political ideologies of the judges, which is not the fair aspect

of public policy in the constitution. Hence, around the world, countries have realized that running the constitution is harder than framing the constitution. And there are agencies that run the constitution, primarily, the political body, the legislature, the executive body, the administrators and the judiciary. But these are not the only agencies that run the constitution; there are a whole lot of other agencies in public administration that lay down the framework for constitutionalism. Constitutionalism is the spirit of the constitution. It is not only adhering to the text, but the spirit of it, because the constitutional framework in India looks at democracy as a principle of constitutional governance and of public administration. We will try to understand public administration in constitution as the starting point to this course.

Let us try and understand the word public, public policy or public administration. In public policy, public administration and public governance the word 'public' is something very critical. The term public is to be understood opposite the word private. What is private is confined within four walls. What is private is confined in terms of secrecy. What is private may be opposite to transparency or accountability. What is private is within someone's own domain. The term public very clearly would entitle a starting point of our debate in this course. If your actions stay within yourself, then they are private. But if your actions are affecting anyone outside- that may include your immediate society, it could include your community, it could include the state, it could include the country, and then what you do is a matter of public policy.

Interestingly when we talk about public policy as against private, you will also notice that it's also about understanding public in the character of public resources. Let's take the example of public ownership of public resources. If you are harvesting rainwater and are storing the water within the four walls of your house, then the water is a private resource under private ownership. How you use that water- whether you waste it, whether you use it, or whether you sell it, may not be within the domain of public policy. However, groundwater is a public property resource. And hence, we need a public policy for governance of groundwater. Let us understand this in detail, because you must understand why and how the intervention of public policy under the framework of the Constitution is a necessity and why public administration of water governance is an imperative factor. Before 1974 in India, we did not need a law on water, because water was a free commodity. Everybody could have access to the water. And you could use the water in a 'wise use' doctrine without actually misusing the same. But in 1974, India brought in a legislation called the Water (Prevention and Control of Pollution) Act of 1974, where it said that if anyone decides to pollute the water, he shall be held liable. So, while you can keep water, there is a duty casted upon you through public policy and law that you cannot contaminate or pollute water.

Why should this law or public policy mandate against the activity of pollution of water? The answer to this is simple. Water pollution, if committed, is not going to affect just the

individual who committed it, it may affect the community at large. So, from a private domain, pollution becomes a public policy dimension. Hence, a public policy dimension of an action that can affect anyone else apart from you and becomes an actionable intervention of the government.

Let us take groundwater for that matter. Over a period of time, we all thought groundwater is a private resource. We had a British era legislation which said that groundwater can be covered as a right of easement. This is under the Indian Easement Act, 1882. Interestingly, easement is only the right of use, not the right of ownership. So, you can use groundwater as much as you need, but you cannot abuse it beyond a particular period of time. So, the right of use is different from the right of claiming ownership.

The central government has enacted three national water policies. The latest was enacted in the year 2012. The government came up with a national water policy for several reasons. First and foremost, water is under the state list of the seventh schedule of the Constitution, which means water governance or legislations on water can only be made by the state government. In a country like India governance of water may also be quite diverse from state to state. And water is a national resource in one sense, because India unfortunately faces water scarcity. As a country, vis-a-vis the kind of population that must look at the carrying capacity and the water equity that has to be managed in terms of water governance. Though we have some sources of river water, fresh water, we are still a water deficit country when it comes to per capita consumption of water.

So, the central government wanted to bring a unifying policy among the states. But the central government cannot make a law because it's in the state list. State governments can make a law. But can the center bring about a vision document on the use of water or the prioritization of water use by making a public policy dividing water. You will notice that, while water is mentioned in the constitution, it has been mentioned in several parts of it. For example, Article 262 says that anything that is interstate is within the domain of the central government. But how have you seen the constitutionalism of water? How have you seen the working of the constitution towards water governance? That is precisely what this course should do. That is what you should get an idea about. Over a period of time, as the mandate of the constitution says that the central government has constituted a lot of these interstate water tribunals to resolve amicably any kind of dispute on interstate water, say between say a state like Karnataka and Tamil Nadu in terms of Kaveri river and water. And hence, the water policies of the national government laid down some very interesting and very important principles, which can be judicially adjudicated. For example, what is the judicial adjudication of water prioritization in terms of use? You will notice that the national policy very clearly says that in terms of water use, the first use should go for drinking water.

Second, they say after drinking water, you can look at it from an agricultural perspective.

From an agricultural perspective, you can look at it from a commercial perspective, though agriculture sometimes can be commercial, but you can make the prioritization of water as it is required, whenever there is water deficit or deficiency of the quantity and quantity of water, then prioritization use doctrine has to be used. And finally, water can be used for industrial purposes. So, the water policy in India very clearly displays the need for governance, the need for a constitutional framework to run a country in which there is a deficit of water. So, this is precisely why we require public policy on water.

Because as per articles 39B and C of the constitution, the ownership of wealth cannot be concentrated in the hands of a few individuals. This is the theory of socialism. This is the theory of equitable distribution of resources. So, in India, we do not allow ownership of resources in the hands of a few individuals, including water. Water is a resource and ownership has to be equitably distributed, because that is something that we cannot allow as a constitutional principle to go about.

So, constitution, public administration and public policy are interlinked or intertwined, because what is written in the constitution has to be brought about in terms of a policy and what is stated in a policy has to be administered so that water disputes water war, and any kind of communal or any kind of conflict in the society can be avoided. Without water, there is no life. Without water, there is no state, without water, there is no governance, without water, there is no constitution. You will notice then the public administration clearly knows how to prioritize water, where to give it for first use, how to govern water, and that would lead down how the constitution actually deals with the right to water. Interestingly, right to water has been held to be a fundamental right under article 21 of the constitution of India.

You can refer to the *F.K. Hussain v. State of Kerala* case to know more about the right to water. So it is a right under article 21. It is a duty of the state under article 39B and C, because 39 is in the chapter of the Directive Principles of State Policy. It is a constitutional framework about how to resolve interstate disputes on water and hence the central government's policy on water lays down the public administration that is required in water governance today.

Public policy dimensions can be brought about through executive intervention. It can be brought about through the intervention of the judiciary, but how does public policy get shaped vis-a-vis the parliament or the legislative dimension? Let us take a few legislations as an example. In 2002, the parliament enacted a very important legislation creating a regulatory agency called the Competition Commission of India. We enacted what is known as the Competition Act. It has been amended a couple of times. We brought in an agency to look at fair competition in the market. This agency has laid down some very important public policy dimensions about how competitors should behave in a market situation.

Interesting difference, please note today, because thanks to the population that we have in this country, one of the biggest markets for consumer goods is India. When market potential is there, when there is more demand than actual supply, naturally the suppliers tend to exploit the market with unreasonable, unfair practices, state practices. Prior to the competition law, we had the Monopolistic Restricted Practices Act of 1969. That was replaced by the Competition Act. Now, the MRTP Act did lay down that monopolies are not good for any market because monopolies or monopolistic suppliers, producers or manufacturers tend to dominate the market. They tend to exploit the market. They tend to make unfair profits in the market. Secondly, restricted practices where restrict your competitors from entering the market. So there are so many barriers that you impose in terms of cost, in terms of quality. So, the MRTP Act was good for the time it was in force, but the competition law was necessitated because India entered into the World Trade Organization agreement, GATT, TRIPS and so on and so forth. We opened our market for foreign direct investment, foreign companies to come and make in India, invest in India. A lot of imports were permitted and local industries and imports were actually in a competition situation at times. And hence, to ensure fair competition but also to protect consumer interest, which is the welfare of the citizens, we the people the Competition Act was enacted. Though we don't have a perfect competition policy in this country, the competition law was a legislative intervention; a landmark intervention brought by the government in 2002. It laid down a very important parameter for public behavior of companies, manufacturers and producers in terms of how market access has to be done by them.

We brought in another legislation called the National Food Security Act of 2013, which is another interesting aspect of public policy. In India, you talk about the right to life, but we have not talked about the right to food and equity of hunger threats, deaths due to malnutrition, were not uncommon in India. Nutrition and food was scarce in some of the regions. We have heard about Kalahandi in Odisha and so on and so forth. These are episodes where food was actually a problem and an issue. To entrench the right to food of every citizen, minimum basic food to sustain and live, the Food Security Act was brought into place, but with multiple other objectives to actually fulfill. Because, food security is not solely citizen-centric. The word security means it has strategic and security attention as well. Food security means that India must first be food sufficient, self-sufficient. We cannot depend upon imports. So we have to look at the green revolution. We have to look at sustaining the population and giving them enough resources to actually have good food. And remember if India goes to war with either Pakistan or China, food security becomes a critical factor because then imports cannot be something that you can rely upon. So food security in the broader context, not necessarily in the context of the act of 2013, would mean multiple dimensions about how the state must plan, especially in extreme circumstances when there is a strategic or a security intervention. Two, it should also plan

for unprecedented, unseasonal rainfall. Because even today in India, the agricultural economy is at least to the extent of 30 to 35% rain dependent. When there is poor rainfall, or rainfall less than what was expected, there could be shortage of food grains and that should be planned in terms of storage. So you have agencies like the Food Corporation of India and others that are actually responsible for ensuring that food is adequately available, not only for the civilian population, but also for the defense population if it is required. So, these two are very important examples of legislative interventions in public policy that have happened in the past two decades, which have laid down a very important dimension to constitutional governance in terms of the rights of citizens, but also establishing the duties that are there of the various agencies of the government.

From time to time, the international community has played a very central role in not only maintaining democracy in various countries or strengthening democratic principles in various countries, but also laying down certain kinds of goals, including what we call the SDG goals or what we call the MDG goals. Now, Millennium Development Goals as has been fixed by the international community, very clearly displays that a lot of public administrative and public policy intervention have to be strengthened in India. The country has to look up to the aspirations of fulfilling the same and hence, we have to look at a different dimension of public policy in this country.

There are six principles that are important for this course on Constitution, Public Administration and Public Policy. Firstly, it is critical to bring in the highest levels of transparency and accountability in governance. The Millennium Development Goals actually insist upon this quite severely. So any policy must further the objective of ensuring transparency and accountability. Not to forget that you already have a Right to Information Act, which to some extent, ensures the same, but the next generation of reforms in Right to Information has already arrived. We must strengthen the Right to Information movement and we need to actually look at transparency and accountability. These two are different words. Accountability is not in terms of just giving information. That is probably ensuring some kind of transparency. Accountability in terms of fixing responsibility on who should actually do what and then imposing adequate liability in case those are not actually fulfilled. So accountability in India has been a huge issue. Government accountability, even the accountability of the private sector has been a critical factor. In the course of this discussion that we have, we will try and evaluate the current positions of transparency and accountability and we will probably take it further in terms of what has to be done next.

Second principle of public administration and public policy is Participation. We are in a democratic nation where the people have to decide what should be their policy. How should the policy be made? Generally there are two kinds of theories. One is called the top-down approach, where the policy is just made by those who have the power to make it. One is the bottom-up approach, which is the truly democratic way of actually doing the policy.

Participation ensures the democratic process of policymaking. When the Constitution itself was made by we the people, shouldn't every other policy in the Constitution also be made after due consultation of stakeholders? This is precisely what we talk about accountable government, which is also a participatory government. Participation is not a mere tokenism, it is not mere lip service, it means real participation, it means actual participation. It means a democratic process where everyone has the ability to voice their concerns and the government must listen to the concerns of those who may be affected either positively or adversely by that kind of a policy.

The third principle is the principle of pluralism. Pluralism is important because we are a country that is quite divided by religion sometimes, we are divided by caste sometimes, we are divided by ethnicity, sometimes language divides us. It is important that the political process in this country uses the power that it has or the power of influencing these people at it has to actually unify. So, the kind of pluralism that we have in the country should be used as a strength. All our different interests or the different lifestyles or different convictions that we have, or the kind of different diversities that we have must be used as our strength in the governance framework rather than using them as weakness. Pluralism principle is a very effective principle in India. It has worked in the past to a larger extent and it increases the democratic value of this country. It strengthens the very conviction of this constitution which tries to look at unity in our diversity.

The fourth principle is the principle of subsidiarity. Subsidiarity very clearly states that the central government should usually perform its function with or in association or in partnership with the local administration. There is a very interesting saying which says, "think global but act local". Inevitably in India, because we are so diverse, we are not talking of India being a union of states, we are talking of India being a federal state. Centralization is quite strengthened in India, be it taxation matters, finance matters or governance matters. The parliament is quite strong. And the framers of the constitution or the fathers of the constitution wanted the central government to have that kind of strength. So, the central government being strong, you have seen in the past that a strong central government can be good for the country, it can sometimes be bad for the country, as we have seen in the imposition of emergency, because there can be abuse of that power as well. The central government should have all the powers that it has, even those powers of residuary character in nature, it should have the powers to, bring a law to give strength to international agreements, as we have seen in Article 253 of the constitution. Nevertheless, the government in Delhi cannot be an effective government unless it has foot soldiers in the local government. So, the spirit of the 1992, 73rd and 74th amendments should be an effective spirit that the central government ought to follow. So, local government and local governance is very, very important; that is where people see governance, people see administration, people see public policy. So, the top-down policy making would be fine,

but it should have local sensitivity. And that kind of subsidiarity principle is something that should be a governance principle in public administration as well.

The fifth and sixth principles are principles of effectiveness and efficiency of public administration. This cannot be compromised at all. You can have the best of regulators, but if you do not have the best of men manning these regulatory agencies, efficiency and effectiveness of public policy and administration are going to be adversely affected. In the post globalization era, where there is a reverse of globalization, there is so much nationalism as against globalization. It is very, very important that efficiency and effectiveness of public administration and public agencies are insisted upon. Performance-based appraisal is the next method of public administration.

The final principle of public administration is equity in access to services; services that a citizen actually realizes are either directly to the government or indirectly from the government. And hence equity in accessing all these services and goods is a very important principle of public administration. Equity does not mean equality, it means equity as one deserves; he should be entitled to those kinds of privileges, those kinds of resources from the government. Equity should play a very critical role. There shall not be disparity of development in a Northeast region from Uttar Pradesh to Tamil Nadu. Access to service and equity are the effective institutional principles of public administration. So, the six principles of public administration are transparency and accountability, participation, pluralism, subsidiarity, efficiency and effectiveness and equity in access to all kinds of services from the government.

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.

Constitutional Law and Public Administration in India

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Week- 01

Lecture-03

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

Generally, the blueprint for any architectural activity is a planned document, based on which construction of the building will commence. In this context, the Constitution, be it the Indian Constitution or otherwise is considered as a blueprint. It is the four corners of a box under which the entire country is going to be governed. The four corners are the limits of government as determined by the Constitution. The Constitution is primarily a design document for what the country ought to do. Interestingly, because countries and nations across the world are different, the society is different and requirements are different.

A lot of countries do not have the problem of recognizing official languages. However, India has this challenge and hence, the Constitution recognizes that we do not have a national language. The choice was between declaring Hindi or Sanskrit as the national language, but none of them were adopted as such. The framers of the Constitution believed that it is better to declare official languages because India is so vast and diverse in terms of its linguistic diversity.

The Constitution displays that unique kind of a character of a nation and hence every country's Constitution is going to be significantly different. For example, a house that is built in the United States is not the way Indians usually build the house. Similarly, the Constitution reflects the country, its diversity, its societal aspirations, and challenges. Hence there is a unique structure to the Constitution. Comparing the Indian Constitution with American or any other Constitution will show how uniquely some of these Constitutions have been designed. The uniqueness will also be in relation to certain kinds of words. For example, 'due process of law' versus 'procedure established by law'. Majority believes that these mean one and the same thing. But the word that is used and how it is texturized in the Constitution is entirely different. The blueprint for residential or commercial building will be entirely different. Similarly, the Constitution of any country has different parts to it and each of these parts has a purpose. The words that are used in many of these parts of the Indian Constitution are not strictly interpreted the same way.

The Constitution cannot be said to be a civil law document. The Constitution is also not a criminal law document. It is a special law, but more importantly, it is not special for the purpose that it is special against gender but in terms of the foundation of law. The blueprint of any Constitution is unique and creates what the Constitution fairly represents in terms of public opinion. The Constitution will hold people in power accountable towards the people that they attempt to serve. At this juncture, it is important to understand the distinction between a government servant *vis-a-vis* a public servant. Public administration is all about the powers of the public servant. The term public servant means that one is appointed to serve the people. One may be a person with power, but the power must be held responsibly and in the beneficial interest of the public. That is quintessential for anyone in the bureaucracy and who call themselves a public servant. Very often than not people in public administration claim that they are a government servant. To some extent that is true because the government is their employer. In other Constitutions and jurisdictions, this person may be a government servant because they do not represent the people's opinion, they may just be serving the government and be loyal to the government and not to the people at large. But in India, the government is of the people, by the people and for the people. The government has no existence of its own. It must function for, by and of the people.

And any government servant must only go by, 'of, by and for' principle. A government servant is employed by the government; the government is their master. But government servants' accountability is towards the people at large. If they are responsible for public administration, every action of public administration should be in the furtherance of the people they serve. This is what the Constitution must emphasize, insist, and try and hold accountability to. This is critical in terms of public administration.

Aristotle, a jurist, philosopher, and a political thinker believed that some of the good Constitutions could be an aristocracy as well. He believed that monarchy can be, (monarchy is where the head of the government is a monarch or a king) a good Constitution. But if the Constitution is promoting tyranny or oligarchy, it was a bad Constitution in his opinion. Unfortunately, the Russian Federation sometimes is alleged to have given oligarchs a higher status. To a larger extent, people argue that this is the result of a bad Constitution. There are so many countries where there has been civil war. In Africa or in the Arab world, though sometimes they have a constitution, it has never led people to an accountable administration. So maybe the Constitution has not worked, and tyranny has been the basis of rule over the people and the beneficial interest of the people, or the welfare interest of the people have not been emphasized. To determine whether a Constitution is good or bad, there should be an evaluation based on the performance of the Constitution. Today, the Indian Constitution will be rated as excellent for the simple reason that, we have not been disturbed with the democratic process ever in this country, even though we had one black incident in the democratic process which was the imposition of emergency in

1975. Nevertheless, our Constitution has been able to protect the democratic values, the democratic structure and the institutional governance has been in place and people-centered welfare measures have always been promoted in India.

Aristotle wanted to test whether a constitution is weak or not. A weak Constitution is not sufficiently strong enough to bring the classes of institutions or the agencies under it accountable to the people. If a government cannot be held accountable under the Constitution or if the government does not have respect for the Constitution, then a decision as to whether that constitution is good or bad can be made. But more importantly a distinction can be made between a strong and a weak Constitution. The Constitutions in Europe are considered strong Constitutions. The Constitutions of Australia, Canada and the United States are also considered as strong Constitutions.

Wherever you see political battles or political struggle, you do not see growth and development or protection of human rights or accountability of government. What you see is a civil war or dictatorship. How good the country is in terms of economic, social and cultural growth will be one of the elements to bring in the element of a strong Constitution. To a larger extent when we look at indexes like the happiness indexes, there can be a credit to strong Constitution as against weak Constitution.

Embarking on a journey to the genesis of constitution making would take us to the year 1215. Magna Carta was signed as the first step towards looking at some form of Constitutionalism in Europe. Magna Carta is one of the first human rights documents where citizens demanded rights and insisted on duties from the state or the crown. As a document it laid down certain principles which the monarch must follow which is due process of law. Due process of law means that when a law is made only that will be followed and applied and nothing else then apart from that. Law must be laid down as that will take down any kind of arbitrariness or unfairness and it is an important way of protecting rights.

So, Magna Carta laid down the due process. It also laid down fair trial because it was important for the administration of justice to have a fair trial in terms of not holding someone guilty before the evidence regarding the same is adduced and everyone should have an opportunity to defend himself or herself. The fair trial process was something that Magna Carta insisted upon and the origin of the writs under Article 32 of the Constitution of India was also brought about in this document. Magna Carta is a declaration of the bill of rights of citizens. It was a freedom from tyranny of the monarch, it was a document that will be the guiding light for administration especially by the king at the time. And hence doing administration by the book of law is something that you can always trace down to Magna Carta.

Following this, the Statute of Westminster in 1275 was also brought into effect. This was clearly a shift of power from the king to the people; the common men and their

representatives who could then decide what is just and unjust in a society. The Statute of Westminster was also critical because it brought in collective responsibility in terms of law making. The true spirit of parliamentary democracy can be traced to the Statute of Westminster. This is where the idea of the Constitution in the United Kingdom comes from, but the United Kingdom even to this day does not have a perfect Constitution.

But the credit for the modern day Constitution must go to John Adams in the United States from the Commonwealth of Massachusetts, which in 1718 was a state and this state had a Constitution which was then later translated into the United States of American Constitution. The US Constitution can be considered to be the mother of modern-day Constitutions. The process of Constitutional governance in modern times can be completely committed to how the United States gave a framework for modern democracies to adopt a Constitutional basis of governance.

What can be the structure of the Indian Constitution or what is the structure of the Indian Constitution? Of course, we have the legislature, executive and judiciary. The roles of the three organs of the government have been clearly stipulated. The parliament and the state legislatures are the two organs of the legislature. Today, the local governments can also bring certain kinds of bylaws for governance in other local parties as well. You have the executive- the president and the governor, they are considered the chief executive of each of the respective governments. The president is the chief executive of the central government and the governor is the chief executive of the state government. We have two Constitutional courts, Supreme Court and High Court and the subordinate courts also play an important role as well.

The Constitution provides for governance and administration. After it provides for the governance and administration, it provides for what is the role for the parliament. Though Article 51A was not part of the original Constitution, fundamental duties were added to the Constitution. Constitutionalism has grown up in India from a time where people were fighting for their basic rights. There are four generations of rights. The first generation of rights is considered to be civil and political rights. The world fought for peace. There was a transformation of the politics class and the society in India. Exercising your vote or your adult franchise or creating your ways of expressing an opinion in the public etc. are civil and political rights. Freedom of speech and expression is an integral part of the civil and political rights structure because, as a human being you must have the basic right of speech at least and that should be ensured as a fundamental right in the Constitution. So, there was a fight for civil and political rights and a generation sacrificed a lot to gain civil and political rights. For example, in many countries, the right to vote for women was absent. Gender rights was absent in a lot of Constitutions across the world. Women got the right to vote quite later than men could do it. Getting independence from the British could be part of your civil and political rights structure; you do not want an external government, you do

not want a government imposed by the crown instead you want your own people as elected representatives; you want your own citizens to rule you.

These were the basic struggles as the first generation of people or citizens under any Constitution struggled for. The second generation of rights that citizens did strengthen were social, cultural and economic rights. Under this category, cultural rights could be any kind of cultural rights in terms of expressing your religion, expressing your movement. Right to assembly can also be your fundamental right. Right to life is under civil and political rights, right to equality under civil and political, right to press under civil and political. Press freedom was important for civil and political rights to be there because we wanted the ground to be civilized and the press could hold that to the account. Several Supreme Court judgments in the 80's and 90's ensure the freedom of press as the first generation of civil and political rights. So, social, economic and cultural rights are, internationally and nationally, the second generation of rights the citizens under the Constitution fought to expand.

The third generation of rights- post the Liberalization Privatization Globalization era, 1991, we moved away from socialism to capitalism. Socialism is an important part of the preamble of the Constitution. Let us assume that socialism as something the state would provide, if the state will be a facilitator, it will be producing goods and services. In Russia, China and India socialism has a great influence; Marxism has a great influence. India was influenced by socialism, post-independence and became part of the Indian policy for quite some time. But post 1991, there was liberalization of the economy, there was privatization, there was globalization thanks to India being part of the World Trade Organization. We opened up our borders for foreign investors and foreign goods. We wanted to make the world a marketplace. So, you will notice that the third generation of rights became critical and they would constitute the right to the environment because of disasters such as the Bhopal disasters.

Third generation of rights came into place, when the quality of life started getting spoken about quite rigorously and the citizens started demanding the same. When we speak about the right to development, the principles of sustainable development are important. Then people started strongly demanding that the state better take care of public health. Right to health is also critical because emergency care is the bedrock of saving life and we did not only demand these rights from the government, but we also demanded it from citizens across the society. So, in the *Parmanand Katara* case, the Supreme Court said that doctors cannot reject a patient and they have to stabilize the patient especially in emergency cases and that is their duty under the Constitution. So, right to development, right to environment and right to health became the third generation of rights and the Constitution started providing for the same. The third generation rights have stabilized and we are actually as we take this course in the era of fourth generation of rights.

The fourth generation of rights today is the digital rights. Digital rights are critical because today we are all online. There are a lot of challenges to digitalization of our public life. Right to privacy and data protection are fourth generation right. There are many dimensions to right to privacy; it is not bodily privacy, it is information privacy. And we are talking about the responsibilities of institutions like Facebook, WhatsApp, Instagram, LinkedIn, so many others where your personal data is available, but these companies may not be temporarily bound by the rules of this country. Fourth generation of rights could include same sex marriage as LGBTQIA community is demanding today from the Constitution. The Constitution is a document that gets into some of these aspects along with the duties of citizens, duties of the state, the Directive Principles of State Policies are precisely what the duty of the state is to be. And all of these play a critical and important role on how the Constitution is the box under which every player in the game must play. Anything that is out of the box will definitely be unconstitutional and will be considered to be illegal, invalid and void.

The Constitution of India was inspired by all the Constitutions of the world. The drafters were the ones who created the expression of the assembly, but it was the constituent assembly that gave us the Constitution. So, they debated, deliberated, and decided what is good and bad for the country. And the total strength of the constituent assembly was nearly 389 members. They were supposed to be elected members, but not directly. Out of the 389 members of the constituent assembly, 296 seats were allotted to the rest of India, whereas 93 seats were given to the princely states in India. And the princely states did not take part. So, it was left to 292 members who came from 11 different provinces to decide what should be written in the Constitution. The idea of the constituent assembly itself arose in 1934. The first idea was given by Sri M.N. Roy in 1934. He said that we need a constituent assembly to officially ask for a Constitution to frame the Indian Constitution. Following M.N. Roy, Pandit Nehru spoke in 1938. He, on behalf of the Indian National Congress, declared that India requires a Constitution free from the Britishers so that they can govern themselves. And in 1940, the British government agreed to the demand to have a constituent assembly and this was called the August Offer. During the Second World War, the British cabinet came up with a proposal, which was not accepted. Then the Indians rejected the proposal framed by the Britishers as the Constitution. We wanted to frame it ourselves.

Where did the idea of federal scheme, governor and judiciary and public service commission come in the Constitution of India? The credit should go to the Government of India Act of 1935. The Government of India Act was repealed later, but that was the basis on which we fought for our independence, though it took another 13 years for us to gain full independence. The Government of India Act has given the federal scheme, the governor and judiciary. We looked up to the British Constitution for parliamentary form of government, the rule of law principle and importantly, single citizenship, So, the British

had the same, other Constitutions actually gave more than one, but they have removed it as we go forward.

Wrists, especially the writ of *habeas corpus, mandamus, certiorary, prohibition and quo warranto* and most interestingly, parliamentary privileges were also borrowed from the British Constitutional principle. The US Constitution gave us fundamental rights, it talked about judicial independence and the impeachment of judges, that is what inspired us. The Irish Constitution talked about the Directive Principles of State Policy and the Rajya Sabha rule. The residuary powers, advisory jurisdiction of the Supreme Court also comes from the Irish Constitution. The Canadian Constitution talked about federation with a strong center and that is what we got.

Constitutional Law and Public Administration in India

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Week- 01

Lecture-04

Sources of the Constitution & Constituent Assembly

The Canadian Constitution gave us the idea of having a strong centre. We are not a federal legal system. A lot of jurists believe that we are quasi-federal or semi-federal. The state governments are also powerful in their own response in the subjects that are allotted to the state. Although states have their own ability to govern, they do not have a Constitution to themselves. So, they are not independent, and India is not a union of states. It is a federation where states have their governance, and the centre can always dominate and take over state governments if required by imposing president's rule or other ways. Subsidiary powers are what is remaining is always the central government. The Canadian Constitution says that the powers that are not mentioned in the Constitution are subsidiary powers, because the Constitution cannot envisage all the powers at the time it was enacted.

The central government can introduce something unique either in taxation or governance. For example, service tax was introduced under the Finance Act. It was not in existence when the Constitution was built. If there is an international convention or a treaty which the central government must enforce, then the power to make a legislation to fulfill its commitments under international agreements or treaties is with the central government. The Canadian Constitution also brought in the advisory jurisdiction of the Supreme Court. The advisory jurisdiction of the Supreme Court is important though quite rarely exercised. One of those examples of the advisory jurisdiction of the Supreme Court was in the 2G case when in one of its earlier decisions the Supreme Court did mention that auctions shall be the only process of resource allocation in the country. The government found it very difficult to complete the obligation by the Supreme Court of India to which the advisory jurisdiction was sought. The Supreme Court said that it shall not be mandatory but it is the most preferred method of auction. When the government or the president of India requires legal advice on certain Constitutional matters and the Supreme Court being the final word on the Constitution probably gives this advice in this way.

Apart from adjudication of discourse of determination of rights, the Supreme Court has other functions as well and the Canadian Constitution gave us all that. The Australian Constitution gave us a Concurrent list and the German Constitution gave us emergency

powers. So, a Constitution gives the idea of justice mostly social economic. The French Constitution talked about the Republic, the idea of liberty, equality, infatuation, South African, how to amend the Constitution, Japanese Constitution of course was published in the 19th century. The Indian Constitution is the comparatively the best of the world because we wanted to give ourselves the best Constitution and it became bigger and broader and a country like India which is so challenging in terms of the geography and so many class, religions, ethnicity, so many tribes, so many kind of challenges, this Constitution was something that we had to do to ourselves and probably it could be one of the best Constitution because it has the best from the world.

The Constituent Assembly was formed in 1946. They spent about a year trying to give us a Constitution and had different committees; there was a draft committee, there was a minor committee and there was a major committee and the major committee especially on union powers was headed by Jawaharlal Nehru. There were other committees that were advising, the Constitution was there were minor committees including Finance and others, so major and minor they had to write so that each person takes care of whatever is required. And then we had the drafting committee which took 6 months to draft the Constitution, after the Constitution we had debated the entire process and the drafting committee of course was headed by Dr. B R Ambedkar. He was the chairman of the drafting committee and he had other members including N Gopalaswami Ayyangar, Alladi Krishnaswamy Iyer, K M Munshi Muhammed Saadulah, N. Madhava Rau and T.T. Krishnamachari. These were the members of the drafting committee.

Dr. B R Ambedkar introduced the final draft of the Constitution in the assembly on November 4th 1948. The first reading of the draft started, the second which a clause-by-clause reading started on November 15th 1948 and it ended by October 17th 1949. And in the stage during 1948 to 1949 as many as 7653 amendments were proposed of which 2473 were actually discussed in the assembly. Finally, the Constitution was adopted on November 26th 1949 and November 26th is generally considered as law day or Constitutional day because that is when the Constitution was adopted into this country.

And when it was adopted in 1949, it contained one preamble, of course the Constitution will have only one preamble, three 95 articles and 8 schedules. Dr. Ambedkar was India's first independent law minister at that time. While we adopted the Constitution on November 26th 1949, the Constitution came into force only on 26th January 1950. That is when we truly determined ourselves to be a republic and that is when the republic gets celebrated. So that is how the Constitution assembly came into force and you will notice that there are some interesting facets of history that some would like to take to a normal Constitution. So, the Constitution assembly took almost 3 years, 2 years, 11 months and 17 days to draft the Constitution, it had 11 sessions, 4, 165 days. The constituent assembly was headed by Dr. Sachidanand Sinha, then it was headed by Dr. Rajendra Prasad. So the

Constitution assembly had a head to manage the debates in the Constitution. General elections in India were held in 1952 and from 1950 to 1952, the Constitution assembly acted at the provincial parliament of India. The two core houses of parliament came to existence only in 1952. Interestingly the Constitution has been amended more than 100 times and please note, currently we have 448 articles and 22 parts in the Constitution. That is the history of how the Constitution came into existence.

The Constituent Assembly did do a lot of work but there were some criticisms. One of the criticisms of the Constitution assembly was that it was not a perfectly representative government. It did not represent the public directly. So it was not kind of a, you know, elected body representing the idea of the people. These were basically those who came from different status of the society and you will notice that it was not representative of the communities that we have. You will notice that community wise representation in the Constitution was as follows: Hindus were 163, Muslims were 18 and the Sikhs were only 4, Anglo-Indians 3. Indian Christians there were only 6 in the Constitution. So people questioned this kind of representation over there. Not necessarily religious though at that point of time. One critique is that it was not a sovereign body. It was still not something that we were completely independent of. That the British are actually influencing the making of the Constitution in some form is something that and was the British proposal being considered. India required a fast process to gaining independence and getting the country running from the clutches of the British. So taking such a huge amount of time, see the American Constitution, it is said that it was drafted just in 4 months.

But the Indian Constitution took 6 months. But what happened in the Constitutional assembly and how finally it got in the process was a major criticism of the Constitution. In fact, Naziruddin Ahmad, a member of the Constituent Assembly said that this is not a tactical committee. The major criticism of the Constitutional assembly is that it represents only one party, which is the Indian National Congress. Most of the members of the Constitutional assembly were politicians or they were lawyers. At that point of time, lawyers were de-facto politicians and politicians simply tried to have a lobby. So, the Constitution looks like a heavier legal document than anything else, maybe because of the dominance of lawyers and politicians in the Constitutional assembly. At that point of time whatever was the best that could be done, with the best of people who could be assembled to be part of the Constituent Assembly was done.

The princely states were also given their due but they did not take part. It is in that context of the time and the circumstances, the economic capacity of the state, the social and political challenges and percolations that were happening at that point of time, the challenges of dealing with Muslim League, which did not want to take part as they wanted partition and the separation. Taking all those into consideration and being fair to the Constituent Assembly, they did a fantastic job in giving us this Constitution on November

26, which is called the Constitutional Day to celebrate, this date in history in which we got this Constitution.

Some final facts that may be of interest to many of us are that the Constitutional assembly was creative in trying to have a symbol for our activity. The symbol of the seal of the Constituent Assembly was an elephant. B N Rao was appointed as the legal advisor, the Constitutional assembly. S N Mukherjee was the chief draftsman. Putting things in legal language and legal words also becomes a very critical aspect. Prem Behari Narain Raizada was the calligrapher of it. The original Constitution was handwritten in Italics style in English and later was translated to Hindi. Beohar Rammanohar Sinha decorated the original preamble. They created history by writing this Constitution, adopting, and enacting it. That is how the Constitution becomes critically important and how we dropped the process of getting us the Constitution, which then looks at the entire gamut of public administration. India currently is a very powerful nation; it is considered to be a nuclear state, among the top 5 economies of the world, it is the top populated country in the world, it has the largest diaspora across the world and it is one of the richest country in terms of resources and richest country in terms of historical cultural matter as well.

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Week- 01

Lecture-05

Salient Features of the Constitution of India

The Indian Constitution is a bulky document and understanding that will be the primary basis of understanding public administration and public policy in India. The Constitution as the foundation, lays down the pillars of democratic society, public policy, and public administration. Hence, taking a bird's eye view at this stage of the course will be very important.

Salient features of the Constitution are important for us to understand because the Indian Constitution is quite unique in its content, and we will talk about some of these unique features because we have largely customized the Constitution, and it resonates with the spirit of the people of India to an extent. As we know that India, that is Bharat was a place which was earlier dominated by only Hindus, who were on the other side of the Indus River or the Sindh River. Later, Mughals invaded and then the British colonized us. This country did occupy so many kinds of communities that became part of this nation. The Constitution draws a lot of values and systems from the historical evolution of the country. Has the Indian Constitution changed from what it was as originally adopted in 1949? Lot of authors and jurists would say that the Indian Constitution has changed. A large part of the original Constitution continues to remain the same despite a mini amendment of the Constitution in the year 1976 which is the 42nd Amendment of the Constitution.

The 42nd Amendment is called the mini-Constitution because it was so huge that it was like one small Constitution on its own. It is one of the most important turn of events in the Constitutional history of India where Mrs. Indira Gandhi had to impose an emergency on the country and a lot of historians and jurists of that time have written that it was an abuse of the Constitutional power. It was important for the country and the parliament to ensure that such an imposition of emergency does not happen again. Hence, the 42nd Amendment brought in some checks and balances on government, and it made the Constitution a much better document. The original Constitution as it were continues to remain but the 42nd Amendment refined it and other amendments which have happened to the Constitution which are more than 100 amendments that have taken place have only made the Constitution a better working document. The improvement of any law is very important

for social transformation. The Constitution is also one such document that needs to undergo the change and Article 368 of the Constitution provides for amendment to the Constitution. It was accepted that the Constitution was adopted as the base document but the changes to the Constitution will be inevitable and hence the amendment process is something that must be undertaken from time to time. So, post 1976, there substantial change to the Constitution has been made and one should know the 12 main features of the Indian Constitution briefly.

The first and the foremost is that this Constitution of India is the lengthiest written Constitution. Unwritten Constitutions can be far lengthier if you consider the nature of documents that must be collated as what is the Constitution. One can argue that Constitutions must be comprehensive but there is no problem if the Constitution is allotted and a detailed document. This only strengthens the Constitution. However, on the other side of the pitfall of a lengthy Constitution is varied interpretation. For example, in many of the law schools where the Constitution is a subject or a core paper, it cannot be taught in one semester. Analyzing and evaluating this lengthy document has its own challenges. Currently, this Constitution has around 470 articles and it is divided into 25 parts, and it has 12 schedules. So, 470 articles, 25 parts and 12 schedules. But the Constitution originally had 395 articles, 22 parts and 8 schedules. 4 schedules, 3 parts and around 75 new articles were later added to the Constitution and have extended the length of the Constitution from what it originally was. There are many factors which can justify such a long Constitution and among those factors is the vastness of the country, the diversity of the population, its culture, and the geographical factors.

We have friendly neighbors such as Bangladesh and Sri Lanka, but we have some challenging neighbors like China and Pakistan which also something that the Constitution must draw and take some issues from. The Constitution is not a regular legislation and hence a Constitutional document for India must take all these diverse issues and challenges into consideration. For example, the seven sister states in the Northeast have posed a lot of challenges because they have a unique way of autonomous councils to govern and hence protecting the identity of people from the Northeast and giving them that kind of separation in terms of keeping intact those kinds of governance structures was something that the Constitution had to envisage.

The second salient feature for us to consider is that we have drawn the Constitution from various sources. Drawing from the USSR, France or South African or Japanese Constitution is a very important comparative lesson that we had undertaken in bringing the salient feature of our Constitution. But let us not forget the Indian Constitution heavily borrowed from the Government of India Act of 1935. That has been the core part of the Constitution. The periphery of that core has been drawn from the lessons across the world.

Third, the Constitution is a very important document which has flexibility in terms of amendment. There is a blend between what should be kept rigid, and which may be modified. Amendment to a Constitution is not like amending a regular legislation. Amending the Constitution requires a lot of procedural aspects, sometimes it would require consent of the states or it requires two thirds majority in each house and so on. A special majority is always relevant for a Constitutional amendment to come into place. This ensures an element of rigidity, if required and that clearly shows the blend that the Constitution famous wanted to get.

Fourth feature is the federal system. India is a quasi-federal country. Quasi-federal is not entirely federal. The unique feature is that the states are independent in their own territories of legislative dominance. The process of public administration between the central and the state in India is known as cooperative federalism, which means the state and the centre cooperate to fulfill the visions of the Constitution to take the country forward. And the best method is the method of cooperative federalism, the opposite of which is competitive federalism. So, the state and the central are not competing for investments and so on instead they cooperate so that the welfare of the citizens can be achieved. Parliamentary form of government based on the Westminster model is also another feature of the Constitution of India. In the past, India did borrow a few from the American Constitution. The American Constitution, especially at the federal level and for the states envisages a presidential form of government. India did not opt for the presidential form of government; instead it opted for the parliamentary form of government. These are broadly the two forms of government across the world, parliamentary form of government and the presidential form of government. Both systems have their own advantages and disadvantages. The constituent assembly debates shows us why the decision to choose the parliamentary form of government was made and this was mainly borrowed from the United Kingdom. Under this system, the President is a nominal executive as against a proper executive in the United States. The President of the United States is also the chief of the armed forces, so is the President of India but he is a nominal chief, not the real chief. In the parliamentary form of government, the party that forms the government is generally a party that has a majority in the floor of the house, and it then nominates its leader called as the prime minister. But what is also important in the parliamentary form of government is that though the majority party elects its leader, they also form a cabinet. The cabinet is supposed to be the collective body responsible for running the government.

This is precisely what you would expect post-emergency- that though you have the prime minister who is supposed to have the real executive power, the prime minister shall only work on the aid and advice of the council of ministers. This brings about collective leadership and a greater degree of accountability and transparency. It will also check abuse of power or also help to emit the power in terms of concentration in the hands of just one individual. We have a bicameral system of a parliament in the central government. There

is a lower house, which has the direct representative of the people and you have an upper house, which is the indirect representative of the people. The lower house is called the Lok Sabha and the upper house is called the Rajya Sabha. Similarly the UK also has the House of Commons and House of Lords.

What is important is that once the prime minister has been given the oath to head the government, he becomes a prime minister of the country. He is the leader of the party. He will have the prerogative to appoint his council of ministers. The council of ministers can be of cabinet rank, state rank or independent rank. And that depends upon how the parliament holds these kinds of ministers accountable in terms of the debate or in terms of the legislations that are actually being made.

The next feature of the Indian Constitution is parliamentary sovereignty and judicial supremacy. But parliament is not sovereign, the people are but here the word sovereignty means that the parliament is supreme in making legislations and work. Whatever is made by the parliament is the law of the land. Unless the parliament has authorized any other agency of the government, no one can make actual law without the consent, approval and authority of the parliament. The parliament is supreme, it is sovereign, it represents the wish and will of the people and what the parliament says shall be the law of the land. Judicial review has been so supreme that it has been able to check the legislature and the executive. It has been able to hold these two other organs of the government accountable.

For democracy to survive, thrive and progress, judicial supremacy is important. The Constitution did realize that the Supreme Court and the high courts (Constitutional courts) must have an upper hand in determining the final word of interpretation in the Constitution. Judiciary is the custodian of the Constitution, judiciary is the watchdog of the Constitutional agencies, judiciary is the final word on interpretation of what the Constitution should mean and what the Constitution should look like. Judicial supremacy is drawn from the American model.

Fundamental rights are also an important feature. We have the right to equality, right against exploitation, religion, freedom, educational rights for certain institutions and Constitutional liberties as well. Directive Principles of State Policy (DPSP) are also part of the Constitution. We have fundamental duties as well under Part IVA. There is a duty to respect the national flag, the national anthem, protect the sovereignty and unity and integrity of the country, to promote the spirit of common brotherhood among the people, preserve rich heritage of all composite cultures and so on.

The next interesting feature of the Constitution is secular state. The term secular was not a part of the original Constitution; it was introduced by the 42nd Amendment in 1976. Secularism may mean many things. But if one just has to look at the secular character of the Indian state, the state does not have a religion of its own, the state is secular. But

communities and citizens can have their own religious practices. So, we are not an Islamic state or a Hindu state or a Christian state; we are just a secular state. The state has the duty to treat every religion equally. The term secular is used in the Preamble of the Constitution. But if you want to track and trace secular obligations of the Constitution, you can definitely trace it to Article 14, which talks about equality; the state should treat everyone equally, be it citizens or institutions. And you cannot delay or deny equal protection of law to any religious institution, community, be it major minor communities. Article 15 says that the state shall not discriminate on the ground of race, sex and religion. Article 15 also very clearly mandates and puts an obligation on the state not to discriminate on the basis of religion. That clearly states a secular principle. Hence, while the word secular came in 1976, Articles 14 and 15 were already part of the original Constitution. So, secularism was something probably intended to but not used by the Constituent Assembly. Look at Article 16 which talks about equal opportunity for all citizens in matters of public employment. So, you cannot give preference to only one religion or one community. Article 25 says that every person has their equal entitlement to the freedom of conscious right to practice, profess and propagate any religion. So, if you read Articles 26, 27, 28 and 29, you will notice that to a larger extent, secularism is an important bedrock of the Indian Constitution. Minorities can have the right to run their own educational institution. This is provided in Article 30, which means that the state will encourage minority institutions to get into the business practice of education and they can continue to seek protection under the Constitution. So, not really major, but even minority communities have the right and ability to do the same. Finally, Article 44 of the Constitution, which mandates the state to endeavor to bring in a uniform civil code which also to a larger extent, puts in the element of secularism as a DPSP.

However, one will have to clearly appreciate and understand that secularism or a secular state in a western concept and secularism under the Indian Constitution can actually be called different. For example, in the west, when secularism was being advocated, it clearly meant that there must be a separation from the church vis-a-vis the state. In the west, the state and the church were together and what the church said was actually the law of the land. And hence they said that the state must not necessarily be a spokesman of the church and it should not just come to get every law that the church wants it to do. That is when the concept of secularism was introduced to distinguish the politics of the state to the politics of the state. But please note in India, we are not looking at secularism from this angle. For us, secularism is a positive concept. In the west, it was used as a negative concept because you wanted to split the church from the state. Keep the church different from the state; let the state be neutral, equal, and transparent. Religious law or canon law is not necessarily something that the state has to adopt. So, let the state embrace all religion, all communities, and all people, whether they are part of the church or not. But in India, secularism is positive because we want to provide equal opportunity to people from all religions. So, secularism and religion or religious based rights are not necessarily one and the same.

So, in India, preference to one religion by the state is something that is not permitted. Here we are talking of a very positive aspect of secularism where the state has to treat every religion, every religious community equally in all matters of public administration. Taking the step forward on secularism, we have made a very systematic and significant contribution, positively in terms of treatment of Scheduled Tribes and Scheduled Castes. Very often than not, you are not ascribing them with any special religion, which is the major religion in the state. But by fairly treating these marginalized communities and giving them Constitutional status, the state has acted secularly. So, scheduled tribes and scheduled castes have been given their dues. So, the state is not only a state that represents the majoritarian views or ideas or concerns or challenges, but it represents every person from every walk of the society.

The ninth saving feature is the universal adult franchise. In India, one can vote if one is above 18 years of age. This right to vote for a person above 18 years was introduced in 1989 through the 61st Constitutional amendment. Until 1989, the age was 21. The broad-based democratic process in India is one of the biggest processes in the world. We have a powerful autonomous body called the Election Commission of India, which is a Constitutional body. And their performance has been one of the unique features of the Indian Constitution. The self-respect of a common man is upheld when the democratic process of elections takes place for either the central government or to the state election and assembly and also to the local governments. So, the representation of people and their ability to decide the governance model is something of a great unique feature of the Indian Constitution.

Emergency provisions under Articles 352, 356 and 360 are one of the important features of the Constitution, because to a larger extent, they have maintained the unity of the nation. This power has been able to keep the states binded with the union and the federal government. And have allowed no state to split from the union, which is not possible under the Constitution at all. There is no provision for states to leave the union. That includes the state of Jammu and Kashmir which was annexed to India with the special provision in Article 370. We have three kinds of emergencies. First is national emergency that can be imposed on the ground of war or external aggression or armed rebellion under Article 352. Second is a state emergency that can be imposed under Article 356, where the states fail to follow the directions of the central government. What is critical is about Article 356 is the imposition of a state emergency by imposing the President's rule. So, the failure of a Constitutional machinery of the state, the central government can dismiss the state government and impose the rule of the central government. The final emergency is called a financial emergency. If there is financial instability, a financial emergency can be imposed in this country. We have Maoism and Marxism in certain parts of the country, some parts of Northeast which even now have militants. The emergency powers have been the basis of protecting the unity, integrity, and sovereignty of the nation. While emergency

provisions have been used in extraordinary and legitimate circumstances, it should not have a political undertone to it. This is an important element for governance of the Constitution itself.

The eleventh salient feature is single citizenship and the twelfth is cooperative society. In India individual states cannot grant you any kind of citizenship. What the Citizenship Act of 1955 does is that through the single citizenship you will be able to owe allegiance to one nation and that brings about a very patriotic flavor to how the Indian Constitution will be taken into. Cooperative society is again one important aspect of the Constitution. A Constitutional intervention to promote cooperative societies was brought about by the 97th Constitutional amendment of 2011 which said that the cooperative societies must get Constitutional protection. Article 19 gives the right to form cooperative societies because Article 19(1)(g) gives you the freedom of trade, occupation and business among which cooperatives can be one such model of that kind of a business. Through Article 43B, the state government is supposed to promote cooperatives. It could be a milk cooperative, it could be any other farmers' cooperatives and the cooperative model is a win-win situation for the members of the cooperative who are part of the producers and part of the community. So, it is an empowering legislation where the state intervenes and promotes the cooperative model. The cooperative model has a socialistic undertone to it, but it is an empowering measure, and the Constitution speaks about the kind of production of goods and services the cooperative model brings into place. Usually, cooperatives are regulated under the state legislature because of the division of subjects. However, the central government has come up with an interesting law, the Multi-State Cooperative Societies Act, 2002.

Earlier a cooperative was confined only to a state because it was registered under that state and in 2011 the parliament recognized that the cooperatives are of national importance, they should go beyond the state, they should be able to do business in an integrated manner on a national basis and they could register under the Multi-State Cooperative Act and the state government will not object to it and the central government will start regulating the multi-state cooperatives. So, for that purpose, the cooperative societies feature in the Constitution was added. Getting a brief overview of the salient features of the Constitution helps us understand the structure of what the Constitution looks like and as we go forward we will take each of these provisions in greater detail as well.

Constitutional Law and Public Administration in India

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Week- 02

Lecture-01

Schedules of the Indian Constitution

Generally, in most legal documents, there are annexures or attachments, which usually are explanations to the main provisions. The 12 Schedules in the Constitution also add to the length and the bulk of the Constitution. Originally, the Indian Constitution had only 8 Schedules and later 4 more Schedules were added. The First Schedule of the Constitution, which covers Article 1 and 4, deals with the names of the states and union territories and their jurisdiction.

The Second Schedule deals with the provisions of emolument, allowances, and privileges of a lot of Constitutional functionalities. For example, the emolument, allowance and privilege of the President of India, the Governor of different states, the Speaker, the Deputy Speaker of the Lok Sabha, the Chairman and the Deputy Chairman of the Rajya Sabha, the Speaker and Deputy Speaker of the legislative assembly, the Chairman and Deputy Chairman of the legislative councils in the state, the judges of the Supreme Court, High Court and finally, the Comptroller and Auditor General of India are mentioned in the Second Schedule. The functions of the Constitutional functionaries have been mentioned in the following articles 59, 65, 75, 97, 125. This is not necessarily an exhaustive list of articles, but some of the articles which deal with these Constitutional functionaries and their emoluments, privileges are mentioned in the Second Schedule. So, the powers are mentioned in the main part of the Constitution. But the privileges and allowances that are mentioned in the Second Schedule.

The Third Schedule of the Constitution is about the forms of oath or affirmation that must be taken by the Constitutional functionaries. These pertain to articles of the Indian Constitution, which are mentioned in the second Schedule. It includes Articles 188 and 219 as well. The forms of oath or affirmations or the oath being administered to the union minister, those who have elected members of parliament, the judges of the Supreme Court, the Comptroller and Auditor General of India, state ministers, members of the legislative assembly are all mentioned in the Third Schedule

The Fourth Schedule is about the allocation of seats in the Rajya Sabha to the states and the union territories. And these pertain to articles 4 and 80 of the Constitution of India. The Sixth Schedule of the Constitution comes to the rescue of administration of tribal areas, especially in the state of Assam, Meghalaya, Tripura, and Mizoram. These are also Scheduled tribe areas, but they are mentioned in the Sixth Schedule, because they are in the north-east and they have been accorded special status in the Constitution in terms of the autonomous administration.

The Seventh Schedule of the Constitution is the most popular of all the Schedules, because it is about the division of power between the union and states in terms of List 1, which is called the Union List, List 2, which is called the State List. And then there is a List 3 as well, which is called the Concurrent List. The Union List contains around 98 subjects on which the union government has the power to legislate and govern in this country. The State List contains nearly 59 subjects. The federal structure in this country is heavily centralized; there are more powers granted to the central government, just by the sheer number of subjects that are being allocated to the central government. And the Concurrent List contains around 52 subjects. Originally, the Concurrent List had only 47 subjects, with a few amendments, 5 more subjects have been added. The Concurrent List can also be dominated by the central government. So, more than 145 subjects are there on which the central government can legislate upon and that is how this federation has strengthened centralization in this country.

The Eighth Schedule is about languages recognized by the Constitution. Originally, only 14 languages were recognized by the Constitution, but presently there are 22 languages that are recognized in the Constitution. Some of the popular ones are Assamese, Bengali, Gujarati, Hindi, Kannada, Kashmiri, Konkani, Marathi, Punjabi, Sanskrit, Sindhi, Tamil, Telugu, Urdu, Malayalam, Dogri and Bodo. Sindhi was added through an amendment in 1967 and Manipuri and Nepali were added by the 71st amendment and Marathi was brought about by the 92nd amendment and the 96th Constitutional Amendment changed the spelling of Oriya to Odia in 2011. Articles 344 and 351 pertain to the languages.

The Ninth Schedule is a controversial Schedule because it is about land reform. This Schedule was added by the 1st amendment of 1951. It contains Acts and regulations of the state legislature dealing with land reform and abolition of the Zamindar system. This Schedule was created to protect these legislations from judicial scrutiny because the land reform and the Zamindar system directly affected the right to property which is a fundamental right and to give them special status from the scrutiny of the judiciary and from the interference of the judiciary. Once a legislation is brought under the 9th Schedule, judicial review and scrutiny of such legislation could be avoided and right to property could be trampled upon by the state. However, in 2007 the Supreme Court ruled that even the legislations in 9th Schedule will be subject to judicial scrutiny, diluting the original purpose

of the 9th Schedule. Judicial scrutiny is important and critical as it brings in a sense of accountability and no such law should be beyond the scope of the Constitutional courts.

The Tenth Schedule is quite controversial. This Schedule talks about the disqualification of members of parliament and state legislatures on the ground of defection. This is called the ‘anti-defection’ law. This was added in 1985 through the 52nd amendment. This is a very important aspect of public policy in this country.

The Eleventh Schedule is about the specific powers, authority, and responsibility of the panchayats and this was brought about by the 73rd amendment in 1992. This Schedule has nearly 29 matters that are supposed to be dealt by panchayats. So, that is how devolution of power was supposed to happen at least Constitutionally on paper. The Twelfth Schedule was added by the 74th amendment act of 1992 talks about the powers, authority, and responsibility of the municipalities. It also has around 18 matters and this Schedule.

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Week- 02

Lecture-02

Constitution and Public Policy

Can we define what public policy is under the Constitution? It is quite interesting that there has been an attempt to define public policy in India. It is not written explicitly, but I think it can be read into by the court. And the same was done by the Supreme Court in *Delhi Transport Corporation v. D.T.C. Mazdoor Congress* in 1991. This is a significant case on the rule of proportionality. Because please note, one of the issues on public policy is you should be punished or there should be some kind of a sanction on you to the extent of the fault that you are committing, not anything beyond that. That is called the rule of proportionality. Which says that one should be punished only to the extent of one's fault because a disproportionate punishment is not just. A just punishment is in favor of public policy.

The court in 1991, in this case, said that the rules which stem from public policy must be laid to further the progress of society when social changes bring about an egalitarian social order through the rule of law. Courts can be guided by various principles to determine what public policy is. There is no perfect test of what it may be, and it is not going to be static. Public policy could be as simple as that which is not opposed to public policy.

To a larger extent, people have said that public policy is like an unruly horse. You try to control it and define it, it won't be possible to do so, because that is precisely how it looks. Public policy is applied in so many facets, be it arbitration, dispute resolution, cases of taxes and frauds, it may not be possible to say in clear terms as to what is public policy in each of these cases. A lot of people have said, and jurists believe that public policy is nothing but public interest, a larger public interest. Some have also gone ahead and said that it is a kind of a political experience of what public good is. So, defining public policy may not be possible, but something that is contrary to the fundamental law of the land is not public policy. Something that is contrary to the interest of the country and something that is contrary to justice and morality is not public policy.

Let us understand this better in terms of the Constitution and public policy perception by taking an issue which will describe the importance of this course. Article 48 of the Indian Constitution under the directive principles of state policy talks about the organization of

agriculture and animal husbandry. It says that the states shall endeavor to organize agriculture and animal husbandry on modern and scientific grounds and shall take steps for preserving and improving the breeds and prohibiting the slaughter of cows and calves and other milch and draught cattle. This is something that is mandated by the Constitution. Article 48A which was added to the Constitution later, says that there must be protection and improvement of the environment, safeguard of forest and wildlife. There is an obligation on the state to prohibit the slaughtering of certain kinds of animals that are cows in that sense. This has been an interesting question all throughout, because very recently, cow slaughtering legislations have come under media scrutiny. There is a misconception that cow slaughtering ban has been introduced recently. A misconception that it is a modern public policy dimension that has been introduced only in some states and not in every state and that while you can slaughter any other kind of animal, which are permitted by law and you can market meat or have meat, slaughtering of cows and other milk and draught cattle is banned in this country and this ban came only recently. This is not true at all. The government is trying to invoke an old provision of law; the original basis of the Constitution as it were. The Constituent Assembly debate on Article 48, is quite interesting because there was a big debate about whether there should be a specific provision in the Constitution.

Why should the Constitution determine what you eat? What is the purpose of bringing this provision? A certain section of the community in the Constituent Assembly opposed this provision in the Constitution saying that this is unnecessary. The public policy concern among the majority section of the community was that cows were holy or sacred or having a divine purpose. Hence, that community wanted protection of cows. The Constitution that this policy should be implemented all over. However, the central government wanted to provide states with flexibility. Hence, they let the states take this initiative and if they believe that a particular policy was the right public policy at that point of time. So, while Article 48 was brought into place as an original part of the Constitution, could it be said as the public policy of the majority at that point of time? The answer is yes. Did it trample upon the rights of the minority? Sometimes at their cost, yes. Because public policy cannot be a unanimous opinion. Public policy or public administration is not based on everyone's individual concept or everyone's acceptance of public policy. Sometimes it is necessary to protect several aspects of public administration and public morality. Even though this is how public policy works, you will notice that in the case of protection of cows or other milch and draught cattle in bringing in legislations to prohibit cow slaughters, states like Kerala, Arunachal Pradesh, Meghalaya, Nagaland, Sikkim, Tripura, Manipur, and Mizoram have no such law. But the rest of the country has a law that makes cow slaughter an offence. 22 out of 28 states have banned cow slaughters. Though the Constitution says so under the directive principle of state policy, the states have a choice to follow the directive principles. The interesting dimension is that states can have differential policies than the national government. Respecting the cooperative federalism process is the beauty

of public policy. But it should remain with the dominant will of the state and the state can then exercise the reservation of creating an exception to Article 48. And this has existed for the past 70 years of the Constitution. Because states such as Kerala, Arunachal Pradesh, Meghalaya, Manipur and Mizoram, food habits of the community allow them to consume beef and for them probably the cow is not a sacred animal.

These are states that have been dominated by a certain section of the community and they have continued to hold that position despite major political parties becoming or coming to power over them. So, this very interestingly looks at the dimension of not only say a Hindu versus Muslim dimension, it also looks at the dimension of public policy as laid down in the original Constitution versus as laid down as a reservation of exception of certain states. Cow slaughtering legislations were passed as early as in 1950s and 1960s. They are not new legislations at all.

Recently, the government that came to power wanted to revive these legislations to bring about greater awareness of this legislation. They wanted to effectively implement this legislation and for which what they did was in certain states they announced the punishment for cow slaughter. In certain states they decided to monitor which kind of cattle is being taken to the slaughterhouse or not and most importantly many of these states they started monitoring the trans-border movement of these cattle. It was easy to transport these cattle from Karnataka to Kerala and then take them to slaughterhouses. This interstate movement of cattle for slaughter was attempted to be regulated by bringing some changes and amendments to the existing cow slaughter law and that revived the debate. But please note it was not new, it was the same public policy of the constituent assembly. It was the same public policy at that point of time in 1950 that continues even now. What has been done is strengthening public policy in terms of effective implementation; certain measures were taken from time to time.

There are a couple of interesting cases on this which can be a guiding light to understanding how public policy on cow slaughter was taken into due note and consideration of. In *Mohd. Hanif Qureshi and Ors. v. State of Bihar*, the Supreme Court in 1958, a challenge was taken to the Supreme Court to look into the legitimacy of Article 48. To look into these cow slaughtering legislations whether they should be held to be legal or they should be held to be unconstitutional. Lot of people raised the concern that these laws have resulted in closing their business of slaughterhouses. The challenges were on multiple grounds and multiple fronts. They also claimed that this kind of a profession in the Constitution is only one sided; it takes the side of one community altogether. For example, there is no mention of non-consumption of pork in the Constitution. The court rejected this argument and held that protection of cows is not just a matter of economic profitability. It is a matter of a national consciousness. It should be laid down as the public policy of the nation as it aspires to a larger section of the community to hold this cow as a sacred holy animal. And to protect these kinds of cattle for milking, white revolution, and other purposes, it is very important

that such a ban on cow slaughter be protected, and it is under general interest as well. Interestingly, in some of these legislations, you will notice that some of the legislations have a very clear ban on cow slaughter, very clear. It is called the absolute ban on cow slaughter. Some states make a distinction between milching cow and other kinds of cow and some can be slaughtered while others cannot be. This distinction is also something that some states have exercised as a discretion.

When one is trying to determine public policy, the test laid down in the case of the *Keshvananda Bharati v. State of Kerala* is crucial. In this case, the court said that public policy means that the national interest shall take precedence over the interest of a specific group of people. And the national interest of inscribing article 48 was very clear. Ban on cow slaughter continues to be an integral part of the Constitution's directive principle, whether it is an absolute ban or with exceptions. Cow slaughtering legislations or the anti-slaughtering legislations, as we will call it, are legislations protecting animal rights. Every country can have one national animal for the protection of Constitutional principles. And the Indian cow has been granted that kind of a special status right from the time the Constituent Assembly debated putting this specific article in the Constitution. There is a growing debate on the rights of nature. Should nature have rights? The Uttarakhand High Court very recently held that the river Ganga has a right of its own. It has a legal personality of its own, though the same judgment was stayed by the Supreme Court. If a river has rights and someone pollutes it, there can be an allegation of pollution on behalf of Ganga. So, you do not have to file a case on behalf of the pollution control board of the state. You can be the person who takes the case on behalf of Ganga.

The larger message of public policy in India is intertwined with integral cultural practices that respect nature. We revere each of these things in nature, be it forest, be it rivers. That is why you notice that rivers have been named after Gods and Goddesses, Ganga, Cauvery, Yamuna, Brahmaputra, and so on and so forth. There is reverence to religion, holiness, divinity, there is a greater degree of responsibility and duty to protect, the duty to conserve, not to exploit, not to usurp and not to pollute.

We also have the Prevention of Cruelty to Animals Act, 1960. You cannot kill any animal in a cruel manner. Though it is a cognizable offense, it is the duty of a person in charge of animals to take responsible measures to ensure the safety of animals. So, the way you slaughter is also critical and important. In 1967, rules prohibiting cow slaughter were brought in the Andaman and Nicobar Islands. Under these rules, one cannot slaughter or cause to slaughter a cow, bull, or bullock without a certificate from a veterinary officer of the competent authority. Penalty for violation is 250 rupees. Punjab brought this legislation in 1955 itself. You cannot slaughter or cause to slaughter, offer to slaughter any cow without a certificate. There are exceptions in self-defense, of course. Maybe it is an infected animal with continuous diseases. So, it is not an absolute ban, exceptions can be created. You cannot sell or cause to be sold or offer to sell beef in Punjab. Punjab is not dominated

by the Sikh community. But that is a state that continues to hold cow as an important Constitutional animal. You cannot export or cause to export cow for slaughter. Goa also has a similar law. However, an infected animal can also be taken for slaughter. You cannot sell beef in Goa. It is fined with 200 rupees.

There are designated competent authorities under these statutes. In Delhi, since the 1994 Act, a sub inspector is also authorized on behalf of the government of Delhi. He can enter, stop, search, they can seize animals. One cannot slaughter, sell, or possess flesh as well. One cannot transport or cause to be transported. One cannot directly or indirectly export. In contrast, the public policy in Australia is to consume beef. They can cut, kill, slaughter, and eat. But in India, the public policy is slightly different. This is where cultural aspects to any Constitution affect the direction of public policy in that country. Culture, religion, community and other aspects also play a very critical role in determining the Constitutional public policy.

The meat industry is one of the highly contaminating industries and a major contributor to climate change today. Several western countries who advocate that India must take some action towards climate resilience and climate protection must first reflect on themselves as they are the biggest emitters of carbon. In one sense, we have the largest cattle population apart from having the largest human population. Huge amounts of methane production from these cattle have also been alleged by climate activists. The debate on cow slaughtering and laws prohibiting them helps us in the analysis of the Constitution as a factor influencing public administration as it were.

In this lecture, we have tried to link the Constitution to public policy and public administration. We have looked at the Constitution and its structure, the purpose of the Constitution, how the Constitution is framed for and what are the different parts of the Constitution.

Constitutional Law and Public Administration in India

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Week- 02

Lecture-05

Preamble of the Indian Constitution

The third important word that is mentioned in the preamble of the Constitution, it is the word secular. Now, the word secular was added into the Constitution by the 42nd Amendment Act of 1976. And the Supreme Court has said that the word secular is not alien to the Constitution, rather if one reads articles 25 to 28 of the Constitution, which guarantees the fundamental right to freedom of religion, assumed that this was what the state wanted to be, that the state wanted to have a secular character and not a religious one. Secularism today has become an important touchstone of public policy. The next word that is used in the preamble of the Constitution, the word democratic is also relevant and important as one would say that democracy is the kind of system or quality that a society wishes to adopt. And democracy or democratic form of governance is generally considered as the doctrine of popular sovereignty, that the position of the supreme power is in the hands of the people, for the people and by the people.

If one analyzes the word democracy it is an indirect democracy. So, democracy generally is of two types, one is called direct, the other is called indirect. And in direct democracy the supreme power lies directly with the people. And hence they can decide issues based on referendums, or they can also exercise issues such as recall of their representatives. So, the people will have a direct call on the democratic process of public administration and public policy. And other important public policy legislation must pass through the referendum process. So, it is direct democracy in which the citizens directly decide on the law that is to be enacted for them. And any public servant can be recalled from his public office by the citizens. So, the citizens can be public servants in office and the citizens can remove the public servant from office as well.

So, direct democracies may work in smaller nations and countries like Switzerland and others. But in bigger nations, direct democracy is difficult to operate and manage. In democracies, there must be equal political rights to all and must hold the form of government elected to be accountable. And that can be achieved generally by indirect democracy, which generally can be either parliamentary form of democracy, or the

presidential form of democracy. So, in indirect democracy, the people elect their representatives, as members of parliament, or members of legislative assembly, and these so-called nominated members govern the society. This kind of indirect democracy is also called a representative democracy. And the Indian Constitution brings about what is known as representative democracy. And while in democracy, the parliament is supreme, the parliament is interested with the lawmaking power, with the power of making policies and creating actions. It is the executive that is responsible to protect the principles of democracy through the institution of the parliament. In India democracy embraces not only political democracy, but it also embraces social democracy, or what we may also add as economic democracy. Dr. Ambedkar in a speech that he gave in the Constituent Assembly on November 25, 1949, just the day before the Constitution got enacted said that political democracy cannot last until it lies at the base of its social democracy.

What is social democracy? It is a way of life, which recognizes liberty, equality and fraternity. The principles of liberty, equality and fraternity are not only to be treated as separate items, but they also form a union in the sense that to divest one from the other is to defeat the purpose of democracy. Liberty cannot be diverse from equality, equality cannot be diverse from liberty, nor can liberty and equality be diverse from fraternity. So, stressing upon the democratic values, Dr. Ambedkar clearly said about democracy in a political context of how the government has to be formed, who has to form it and how it has to be formed.

But the real fabric of democracy is in society. And social democracy is critical, because over there these three words, liberty, equality, and fraternity will ensure political democracy. The Supreme Court also has kind of agreed with Dr. Ambedkar, when the Supreme Court said that the Constitution wants to establish an egalitarian social order, in which e citizens, irrespective of social, economic, and political background, enjoys the same kind of democratic values in this republic. Therefore, democracy and democratic institutions have an important role.

The preamble stands the same as an important touchstone of what is going to be expected in the country. Democracy is a combination of two words, they are two Greek words, *demos* and *kratia*, which means people and the rule. So, *demos* means people, *kratia* means rule. So, people's rule is what democracy is. So, it's the combination of two Greek words, which has led to this word called democracy. Referendum, Recalls are direct forms of democracy. The democratic principles, democratic values are the vision of the preamble of the Constitution. And the preamble of the Constitution clearly becomes the document for all of us to realize how the constitutional ideals are going to be followed in the history of the country.

Another word called republic, which is also mentioned in the Constitution and words like liberty, equality and fraternity are critical and important. Republic means that the head of the state is an elected official and not official who attains that position or who inherits that position due to some hereditary, kind of succession. So, in a republic, the monarch kind of a system is taken up, which means you don't have a head of state, who becomes head of state by inheriting the crown or the seat. So, kingship is out of the question. There is no queen, there is no monarchism. We are a republic where the head of the state is an elected person. He represents the ideals of the society. He is having someone who comes from the society. He's not someone who's privileged. And he wants this public office to be accountable to the people at large.

In India, the head of the state is the President of India or the Governor. And they have a tenure of five years. And the republic means that the state has the right to choose its own head. And it is free from any kind of external influence, or any kind of external rule. No one from outside is determining the direction of the country. The people of the country have into their own hands, the direction in which the country has to be taken for the group. These are words with heavy implications and expressions and ideas and philosophy. And hence, looking at all of these five words in the preamble the words socialist secular were added to the Constitution. They were not originally in the Constitution, they were added later.

Though they were added in 1976, today, they are the basic fabric of the Constitution, they have the basic fabric of public administration, and public policy. So these are non-alienable concepts. They are non-alienable doctrines. And at any point of time, anyone can trample, change or deviate or distract from the basic vision that is mentioned in the preamble of the Constitution. These five words are the basic tenets of constitutional public administration in this country. That is the philosophy and the idea behind the aspects of public administration in the Constitution. Now, taking the preamble forward, it is important that one starts understanding the significance of the preamble. Is the preamble significant in any sense over a period of time, after we gave the Constitution, the significance of the preamble has been debated for quite some time. And a lot of people thought that the preamble is not part of the Constitution because the Constitution starts from Article 1 or Part 1.

So, the preamble is not necessarily a part of it. But the Supreme Court has been clear and they have laid down this to rest as early as in 1960, in the case of Berubari Union of 1960. This case was a case that came from the President of India as a reference under Article 143 of the Constitution. In this case was the implementation of the Indo-Pakistan agreement relating to the Berubari Union and the exchange of enclaves in 1960. Now the Supreme Court in 1960 said that the preamble shows the general purpose behind the several provisions of the Constitution and is thus a key to the minds of the makers of the Constitution.

Further, where the terms used in any article are ambiguous, or capable of more than one meaning some assistance at interpretation may be taken from the objectives enshrined in the preamble. So, the Supreme Court clearly says the preamble is the guiding light and wherever some kind of guiding light is required in interpretation of the Constitution, then the preamble is something that the judges can always rely upon. And in case of the *Keshvananda Bharati*, decided in 1973, which is also called the case on basic structure doctrine, held that the preamble is a part of the Constitution, it is integral to the Constitution. It is not just a guiding light; the preamble is the first opening part of the Constitution and it's extremely important that the Constitution shall always be read and interpreted in the light of the preamble.

The preamble is like the sun, the preamble is the grand noble vision of the makers of the Constitution. Hence, at no point of time can the preamble be considered as a separate part, it's an integral part. So, in the case of LIC of India, it's a case of 1995 the Supreme Court held, this is the *LIC of India versus Consumer Education and Research Centre* 1995. The Supreme Court held that, keeping everything aside that the preamble is an integral part of the Constitution. Two things should be noted at this point of time. The preamble is neither a source of the power of the legislature, nor is it something that prohibits the powers of the legislature. It is not saying that the preamble is kind of justiciable in any form, in any court of law. The preamble is the way in which public administration will be guided, the directive principles of state privacy wherever they are in some kind of ambiguous in nature or character, the preamble should be the part which should guide any such actions as the case may be. The Supreme Court did say that the preamble is like the dream that the makers said what India should look like.

India should look like something which can be an economic superpower, nuclear superpower, or the third largest economy with 1 trillion kinds of GDP and so on and so forth. Whatever ideas one may have about the Indian state, the ideas emanate from the preamble. So, the few jurists have said that the preamble is like the jewel in the crown. However important the crown is, it will be a jewel that shines and makes the crown look quite attractive and something that is needed to be looked at. So, the preamble has been also said by certain jurists to be the most precious part of the Constitution.

One can measure the effectiveness of the Constitution by reading the preamble. Interestingly, the preamble also states the political wisdom of the makers of the Constitution, what they thought should be the society. So, the philosophy of giving India a society which shall have liberty, justice, equality and fraternity is what the preamble was supposed to be all about. The term liberty means the absence of restraint on the activities of individuals, at the same time providing opportunities for the development of individual personalities. That's liberty and to some extent, many would assume that liberty is some kind of a right. Yes, it can be, but it's liberty in the sense that as human beings, free unto yourself, you have given the state the power to create a kind of a government and this

government shall respect individual liberty as the case may be. So, the word liberty and its importance in the preamble, it means that citizens of this country have liberty of what? Liberty of thought, expression, belief, faith, and worship. And when liberty is violated in the means of fundamental right, such kind of infringement of fundamental right shall be adjudicated, shall be justiciable and it shall be enforceable in a court of law. So, liberty should not be construed as an absolute liberty or a license to do whatever one likes. It's a liberty of responsibility. It's a liberty of duty. It is a liberty of exercising your fundamental rights in a responsible and a free manner as the case may be. To be honest, the idea of liberty and equality and fraternity in the Indian Constitution was taken from the French Revolution, which happened between 1789 and 1799. What was put in the preamble becomes a significant part of understanding what it means.

Second, let's look at the word justice. This is a complicated word, a word that may have quite a few, you know, meaning as it is, it could be claimed. So, we have defined justice in three forms and that is social, economic and political. And these are something that have to be secured to the society, the citizens by the state through the fundamental rights and the direct means of state policy. So, what does social justice mean? Social justice denotes equal treatment. And all citizens, irrespective of their social background or distinctions, as we were called, and now those distinctions could be based on caste, color, race, religion, sex, and so on, shall be treated equally.

In terms of social justice, there is no person who is going to be treated as a privileged class. So, privileges shall be granted if so, to an individual, irrespective of his caste, color or creed, and no person of the society should get any special or preferential treatment. However, that particular section of the society in India in ensuring social justice, like the sections of the society and economic background, why is there a reservation policy in place? It could be those coming from the backward sections of the community, the SCs, the STs and OBCs, and women can be treated differentially, to render social justice in one sense. Justice could also mean economic justice, which clearly means the principle of non-discrimination. While social justice talks about equal treatment, economic justice denotes the principles of non-discrimination among people on economic factors, which means the inequality of wealth has to be reduced by the state.

And the state must try and give economic opportunities to a person in the society as equal as possible. Often than not, economic justice is also called distributive justice, which means the resources and the wealth of the nation shall be distributed equally among the citizens. And that is how the disparity of wealth can be reduced to a larger extent. Distributive justice is an important connotation of economic justice. The third is political justice, as one would say that political rights, be it the right to participate in the elections, right to vote, the right of association, the right of public opinion, the right to take part in lawmaking, and so on and so forth.

Such kind of rights, or be it the right of the voluntary organizations or NGOs shall also be given access equally to all citizens. Interestingly, it is not that the one who has more power has the more voice in a democracy. Everyone should get equal access, equal say in the democratic decision-making processes of governance, and that would achieve political justice. The ideas of justice and fraternity come from the Russian Revolution of 1917. And that also adds a significant part to the basic tenets of the Preamble and the Constitution of India.

The term equality is also interesting and important. While we say equality is a principle under Article 14 of the Constitution, it clearly says about equality, which is civic, which is political and economic. So, Article 14, 15, 16, 17 and 18 explicitly talk about the principal rules of equality. The directive principles also secure the same. But you will notice that equality is again not an absolute rule, exceptions to women and children and the marginalized sections of the community can be made. And a person has the right to be treated equally before and by the law. And equality is some kind of equal respect for human beings, despite his religion, creed, caste or any other cases. So, equality before the democratic process, the economic process and the social process are something that is important and critical. To a larger extent, equality respects not only life, but it also respects livelihood and the equal opportunity to work.

These are critical and important. So, issues of human gender justice are just issues that can be dealt with or under the principles of equality. One would kind of remember an important doctrine called equal pay for equal work, which means that between men and women who are working in the same class for the same kind of activity or efforts or same kind of position that they are working. The equality principle would mean that men and women cannot be discriminated on pay, equal pay for equal work. This is a public policy, constitutional public policy. And that is something that you can apply in public administration as well.

Fraternity is critical and important to maintain the social fabric in Indian society, which is unfortunately so diverse and sometimes divided. So, to maintain the unity of the society, fraternity is an important principle of the constitution and its preamble. The term fraternity means brotherhood. This means promoting the highest form of peace, harmony in society. And trying to transcend all religious linguistic, regional sometimes, sectional diversities and to embrace oneness of the nation as one Indian. So sometimes, when there is a reference to a South Indian and in a recent movie, the actor says that "*I'm an Indian from South. So, I'm not a South Indian.*" To a larger extent, trying to bring in oneness of a nation, which is divided from North to East is the principle of fraternity. Fraternity also to a larger extent protects the dignity of an individual. It tries to maintain equilibrium in the society, which is quite sacred for progress of democracy for maintaining democratic values.

It also casts upon people the duty, the duty not to make hate speeches, the duty not to create hatred among individuals and communities. The duty not to derogate any other individual from any other community or region or society. The dignity of women, dignity of all kinds of people who are major or minor, who own privileges or not, are the principles of fraternity that are so important for a country to remain united and for a country to move away from communal violence, regionalism, casteism, regionalism and sectionalism. India, for a long period of time experienced different forms of criminalism and regionalism. The principles of fraternity are followed, enforced and applied as a public policy and administration.

We are all Indians and that is all that matters. Single citizenship concept in fraternity protects the principles of fraternity. The kind of barriers that are created, either politically or otherwise, have to be removed for fraternity to ever last and for fraternity to progress the ideals of democracy. So, some of these aspects that infringe the ideals of fraternity are communalism, regionalism, casteism, linguistics and sectionalism. All of these have no place in the constitution. We must move above all of these to accept the noble principles of the preamble.

So, having kind of understood the purpose of the preamble, its significance, each word that is mentioned in the preamble and what it means, it can be finally concluded that the preamble is an integral part of the constitution. It is not just a guiding light, but it's the light itself. And it is something that will determine the rules of public policy. It clearly establishes the way the preamble would be important for public administration.

Constitutional Law and Public Administration in India

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Week- 02

Lecture-06

Union & Its Territory – I

The next topic for discussion is on the Union of India and its territory. Article 1 to 4, which is part I of the Constitution of India deals with the Union and its territory. And these four articles tell and describe what is the Federation of India in terms of the Federation of States, and what is Bharat as the Union of States. One will understand that the traditional name of India is Bharat and the modern name is India. Hence that the constituent assembly had adopted a mix of both India and Bharat. The Federation of States, is not in terms of what is there in the United States, but it is a different form of state seen in India.

India has a territory in which the states also have certain kinds of territories. So, the Union also has the Union territories which are administered by the central government. The State has a territory which is not a sovereign territory that sovereignty belongs to the Union. But of course, for a kind of federal governance and for public administration and application of public policy, the states have been divided in India as the division of the Union per se.

What does Union consist of? It consists of all the territories that have been constituted as states which are around 28 in number and Union territories which are around 8 or 9 in number. So, these states define the territory of India. One should also understand that India is one nation, it is an integrated nation which is not divided into states, but it's an integration of those states; that there are certain states that have special provision for governance under the Constitution. Because of special circumstances, we will have some discussion on it.

The Constitution does provide for the fifth and the sixth schedule of the Constitution, which contains certain special provisions in respect of administration of scheduled areas in tribal states within certain of these states. That is how it has been constituted as of now. In 1956, just after we adopted the Constitution, the country had only 14 states and 6 Union territories over a period of time that has increased to 28. Some of the Union territories have been declared as states and they include Himachal Pradesh, Manipur, Tripura, Sikkim, Goa, Arunachal Pradesh and Mizr. Also, it is important to maintain the sovereignty of the territory of India or the land.

India can actually have foreign territory being acquired, conquered and that this could be taken under a treaty. It could be taken on lease. This is under international law or it could be annexed to the territory of the Union of India through what we call as occupation. Goa, Daman, Diu, Puducherry, Sikkim are some of these territories that have been taken to the Union of India. However, all these territories were under some kind of foreign occupation. So that is something that one will have to take the note and consideration of. Time and again, talking about Article 2, it empowers the Parliament to admit into the Union or establish new states on such terms and conditions as it thinks fit. That is what the Parliament can do. Please note, Article 2 of the Constitution grants two basic powers to the Parliament. First, the power to admit into the Union a new state and the power to establish new states.

These are two powers that the Parliament has. The admission of states is a provision where a foreign territory is declared as a state and admitted into the Union or it could mean that some part of state reorganization or readjustment, which is internal, can also be made by the Parliament. Article 3 of the Constitution talks about the authority of the Parliament to form new states by separation of territory from any state or by uniting two or more states or parts of the state of any territory thereof. Article 3 also empowers the Parliament to increase the area of any state, diminish the area of any state, alter the boundaries of any state or alter the name of any state. Interestingly, you will notice that any such bill is not necessarily considered as a constitutional amendment.

So, state reorganization or state territory annexation is not necessarily some kind of a constitutional amendment and it is not some kind of a major process that is involved. The bill to look at territorial readjustment in the Union of India can be introduced by a simple majority. However, even before it can be used and passed by a simple majority, such a bill can be only introduced with the prior recommendation of the President of India. And the President is duty bound to refer such kind of state readjustment bills to the concerned state legislature for expressing their respective views. And once such views have been made by a simple majority, those bills can be brought into existence and act and the state territories can be readjusted.

So that is what is very clearly mentioned in the Constitution and hence, this kind of readjustment or reorganization of the state is not a constitutional process necessarily though it is defined between Article 1 to 4 of the Constitution of India. It does not require a constitutional amendment. Though it does not require constitutional amendment, most of the state reorganization and readjustments have happened through constitutional amendments. Article 4 of the Constitution declares that the law made for admission or establishment of new state or alteration of the areas and boundaries of the names of existing states are not considered as amendment under Article 368 of the Constitution. So that is what Article 4 actually states to the extent.

The Supreme Court in a case in 1969 has ruled that the settlement of boundary disputes between states or among states is something that can definitely be the prerogative of the parliament. Hence, the territory of India is something that the Union of India owns and the Union of India has the ultimate power to reorganize, readjust the territories of India amongst the state or amongst the Union territories as the case may be. Also, it is the power of the parliament to decide which territory will be managed by the Union government through the President of India as Union territories and which of the territories will be managed through a state government and statehood can be granted to such kinds of territories. The Union of India and its territory is not confined to the mainland. It also extends to islands, such as the islands in Lakshadweep, which are on the western side of the country, which are in the Arabian Sea and Andaman and Nicobar Islands which are in the Bay of Bengal.

These are a large number of islands that are also part of the territory of the Union of India. And please note, while these islands are not only important for strategic purposes, they are an integral part of mainland India. And because these islands are important, they have been kept as Union territories time and again and that is how the territory of India gets extended. Speaking about the Union of India and its territory in terms of islands. There are matters of international law at this point of time and exclusive economic zones. What can India explore in terms of the seaward area of land is also considered in this territory of India. Under international law, especially under the law of the United Nations Convention on the Law of the Sea, it becomes very important, because there are some kinds of extended territory for economic activities and economic purposes, called the horizontal and vertical territory of the Union of India. When it means vertical territory of the Union of India, it is about the air space, which is also a form of territory of the Union of India. So it is land, it is air. And it could be apart from being vertical, it can be horizontal. Under international law, that kind of horizontal measure includes the 12 nautical miles as the territorial waters. So, territory means not only territory on land, it also means under international law, territory of water as well.

It is important at this point of time to also discuss, maybe in some detail about Delhi, which is the administrative capital of the Union of India and Chandigarh, which is the administrative capital of two states, which is Haryana and Punjab. Now, these two are cities per se. However, these two cities have been a kind of a challenge and a problem because of the claim that exists. Delhi had to go for full statehood. Unfortunately, it was not granted full statehood. So, it is a unique state with limited powers. Chandigarh, which was supposed to be a city and both Haryana and Punjab actually claimed the same. Some of these cities or some of these territories had to be granted some kind of a special status, so as to amicably resolve territorial disputes, not only between states, but also between governments as the case may be, or between local representatives as the case may be. Because the history of creation of state's has been a kind of a volatile situation. Many of

these state reorganizations have happened due to some kind of a protest or due to some kind of an agitation or demand.

And many of these states were created basically on linguistic lines, but not necessarily so. And hence, keeping the demand of the population and the need of the political process at that point of time, the division and readjustment of states is a continuous process that has happened from time to time. Finally, it's important to have a brief look at the Jammu and Kashmir Reorganization Act of 2019. This was also a very important milestone in the organization of states in India. Jammu and Kashmir enjoyed special status under the Constitution of India, thanks to Article 370. India had made such a promise to the king of Jammu and Kashmir before it could be brought to the Union Territory of India. Finally, while Article 370 granting special status to Jammu and Kashmir has been taken away, the 2019 order very clearly now makes Jammu and Kashmir as the territorial integral part of the Union of India. To maintain that kind of a status, today Jammu, Kashmir and Ladakh have been declared as Union territories and they are being managed by the President of India through the Central Government. So, Article 370 has been taken off as the special status to J&K. J&K now becomes a part of India, which also clearly will tell you that the Constitution of India now extends to J&K. Earlier, most of the legislation would say this law applies to the entire country except to the state of J&K. So J&K under Article 370 was given that kind of autonomy to decide what can be the law and regulation that is administered to that country, to that state or to that territory. And hence J&K had been given that kind of an autonomous status from the application of laws from mainland India or from the Union of India. So, they could choose whether the same law will apply or with some kind of a modification.

The Constitution had granted that kind of a special status to J&K as a state under Article 370 that has been removed. The Constitution and all its provisions apply to J&K and all central laws inevitably apply to J&K and J&K becomes as good as any other state for the administration of the Union and its territory. Moving further, one would look at the state and the Union Government. Now moving on to state and the Union Government or the interrelationship between state governments and the Union Government, vis-a-vis territorial administration or what is called as territorial public administration and the application of public policy. Public policy in union territories can be defined by the central government, whereas a part of public policy in the states is determined by the state government.

This territorial administration is left to the states and public administration is defined by the aspirations of that state and that state government. That brings India into a very interesting quasi federal process. One must appreciate that in the previous slide, it is said that foreign territories can be acquired, conquered or taken away under a treaty or can be

readjusted under a treaty. The examples that we should look at in terms of boundary or territorial readjustment through a treaty is the exchange of territory between India and Bangladesh. This is a classic example, which happened post 2015.

But the history of the same goes back many years. Because India shares one of its longest boundaries with Bangladesh. In 2015, there was a constitutional amendment, which was the 100th constitutional amendment. This was brought in to give effect to the acquiring of certain properties of territory by India and transfer of certain territories by India to Bangladesh. So, India did transfer 111 enclaves to Bangladesh in exchange of 51 enclaves that India received from Bangladesh. So, this long boundary between India and Bangladesh was attempted to be readjusted through this treaty between India and Bangladesh through the agreement that was entered into by the two countries. This was entered in 1974, interestingly. But the 100th constitutional amendment allowed such readjustment of the Union Territory. And this 100th constitutional amendment also dealt with the transfer of adverse possession and the demarcation of nearly 61-kilometer border stretch area. And these provisions did affect the territory of the following states, which is very important because what the union does may affect state territory and state boundaries. There are four states that are having close boundaries with Bangladesh. First is West Bengal, of course, Assam, Meghalaya and Tripura. And this was something that was very interestingly done in terms of the foreign territorial readjustment as the case may be and demarcation of what was required in that process.

Also to talk about foreign territory, there were many princely states in India. And many of these princely states had to be cajoled to join the Union of India and handover the territories to India as well. As much as 552 princely states were within the geographical boundaries of India. And to be honest, of this 552, 449 joined India, but 3 did not. 449 out of 552 joined India and they were part of the Union of India, they handed over the territories to India, but 3 refused to do it. It was Hyderabad, Junagadh, and Kashmir. They refused to join India. However, in the course of time, the government of India and the Union of India was able to convince Hyderabad and integrate Hyderabad. Junagarh joined India through a referendum. This is very important because there are a couple of territories where a referendum was organized based on which they were actually integrated into the Union of India, Junagarh is one, Sikkim is another. Kashmir was brought into the Union territory through the instrument of accession.

So that is how the territories of India got integrated geographically. Most of the princely states, most of them agreed, 3 resisted, but slowly all the 3 came around and the geographical area of India was integrated as one. Also, the first linguistic demand for a state was from the Telugu speaking population. This happened in 1953 and after a prolonged popular agitation and the death of a popular Congress leader called Sri Ramulu who actually went on a hunger strike demanding the Telugu state, states different from

Madras state and that is how Andhra became a linguistic demand of a state being created. So that is something that also can be taken note and consideration of.

These are some of the aspects that could be critical and important and that which were the states or territory of states in 1956. By 1956 Andhra was there, Assam was there, Bihar, Bombay, Jammu and Kashmir, Kerala, Madhya Pradesh, Madras, Mysore which turned into Karnataka, Odisha, Punjab, Rajasthan, Uttar Pradesh and Bismillah. These were the territory of states that it created. In 1956, from 14 states that we had, now we have increased to 28. What is the public policy in the creation of states? For example, one may argue that the public policy in creation of state is that larger states are difficult to administer. Two, the states have to be created by linguistic and other ethnic and cultural considerations and they get better managed when they are divided. So, a smaller state, better administration, larger state may not be better administration. Three, the political process has demanded on several occasions where the creation of states has been resulted in terms of the political process that was involved. For example, that the state of Nagaland had to be created because of the Naga tribes demand and the kind of agitation and movement, a state like Nagaland was created in 1963. So, these are unique issues and unique circumstances in which the creation of states did happen.

Also, you will notice that Maharashtra and Gujarat were actually one state and in 1960 again on linguistic line, the two states were divided because of the Gujarati speaking populations demand and please note Gujarat became the 15th state in the union. So all of these are very interesting developments as one would see and also one would also look at Sikkim. Now the history of Sikkim is quite intriguing for the simple reason is that China does claim Sikkim as some kind of its territorial extension of land and India has always said that Sikkim is an integral part of the territory of the Union of India. Now the history of Sikkim goes back to again a princely rule that Sikkim was in and Sikkim was even now quite a remote distant place in the Himalayan belt in the northeast and it had a king that was ruling that place. The British ruled Sikkim, but once the British left there was a choice in India to actually integrate the geographical territory of Sikkim, but Pandit Nehru hesitated in integrating Sikkim as a complete territorial land of the Union of India. Pandit Nehru at that point of time believed that doing so many kinds of antagonizing China and at that point of time what the Union of India decided was they would make Sikkim as the protractor of India.

So, it is like giving protection and saying that in Sikkim if there is any issue of defense, or external affairs or any issue of communication then the Union of India will always be a protector of Sikkim and for these purposes India would support Sikkim but for other purposes Sikkim would be an independent and autonomous state. However, in Sikkim again there was a popular protest and a movement against the king and the princely rule and India was forced to get into Sikkim. There was a referendum in Sikkim whether the people of Sikkim would want to join India. This referendum happened in 1975 and in that

referendum the people of Sikkim overwhelmingly voted for abolition of the institution of the prince and the king and consequently by the 36th constitutional amendment Sikkim was made a full-fledged state of India. So, this very clearly also looked at a special provision in the constitution which is called article 371 F providing for special provision for the administration of Sikkim. This is how Sikkim was or the territory of Sikkim was brought into the Union of India. Also, reorganization of states happens quite often in India and the recent reorganizations we can take a discussion upon and those are the creation of Chhattisgarh, Uttarakhand, Jharkhand and Telangana.

Now in the year 2000, three more states were created, one out of Madhya Pradesh, two out of Uttar Pradesh and one out of Bihar and these became the 26th, 27th and 28th states of India. Telangana is the 29th state. Telangana was bifurcated Andhra Pradesh in 2014 though both Telangana and Andhra Pradesh are Telugu speaking population. Again, in terms of state reorganization this was understood that Andhra Pradesh was bifurcated due to cultural and regional issues. Telangana happens to be the youngest state in India but that is just the bifurcation of state and nothing more than that. Finally, under part one of the constitution of India states can be renamed, one should not forget that even some of the states have been renamed, spellings have been changed, union territories have also been renamed so that the colonial British pronunciations or the way of calling it can be changed. For example, Pondicherry is now Puducherry and the state of Mysore is now the state of Karnataka because Kannada and that is the language. So, why was it called the state of Mysore because the Mysore king was ruling a part of the territory of Karnataka So, such kind of change of name can also happen and interestingly some of them have happened through constitutional change and constitutional amendment. For example, Orissa is now Odisha and the state of Madras is now Tamil Nadu. So, one should not forget some of these developments that did happen under the constitution of India. So, there have been many acts that were passed as I told you through the recommendation of the president and the expression of the state legislature. These were mostly because of the state reorganization act and the latest state reorganization act happens to be the JNK reorganization act which bifurcates JNK into three that includes Ladakh and declares the same as a union of three as well.

Constitutional Law and Public Administration in India

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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.

Constitutional Law and Public Administration in India

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Week- 03

Lecture-02

Union & Its Territory – III

The territory of India, under international law, is a disputed territory as claimed by two neighboring countries viz, Pakistan and China. These countries never accepted India's territorial sovereignty over many areas of land and portions of territory that India claims as its sovereign territory. While there exists the challenges of recognizing Indian territory, both on the eastern front as well as on the northern front, the northern front is of particular international importance, because there is a territory of land belonging to India, that has been occupied by Pakistan. This occupation has existed since 1947. The United Nations and other international organizations call it Pakistan controlled Kashmir, whereas In India, we call it Pakistan occupied Kashmir [PoK]. Some call it as Pakistan administered Kashmir. But the current Government in India has announced this area as Pakistan occupied Jammu and Kashmir. There are online maps that depict the disputed areas which are under the occupation of Kashmir and some area that is there with China. There are certain territories in PoK that were given by Pakistan to China according to sources. Pakistan occupied Kashmir is divided into Azad, Jammu and Kashmir and Gilgit Kashmir. These two areas were created for better administration of those areas. There is a line of control between India and Pakistan. The history of POK starts from the very nature of how Maharaja Hari Singh, the ruler of Jammu and Kashmir during independence, wanted to keep Jammu and Kashmir as an independent state. While India and Pakistan got partitioned, Jammu and Kashmir always thought that it should remain independent, without aligning with Pakistan, or India.

In 1947, the Pakistan-Pashtun tribes attacked Jammu and Kashmir. So, there was an invasion from the Pakistani side. At that point of time, Jammu and Kashmir was a princely state, ruled by King Hari Singh who did not have any other option. He did not have a military either back then. He then sought help from the Indian Governor General, Lord Mountbatten. At that time, India was almost getting its own independence. And the Governor General Mountbatten who was the last Governor General of India promised to clear the Jammu and Kashmir soil from the invaders.

Lord Mountbatten's statement clearly shows that India was, recognizing Jammu and Kashmir as its integral part. It was waiting for the princely states to join the mainland and to join the Union of India. And the state was almost ready to be annexed to the Indian mainland. According to history, the government of India gave this option to Jammu and Kashmir. Maharaja Hari Singh later signed the instrument of accession, which was a very important instrument. This instrument of accession with India and Lord Mountbatten, is the real seed of the Kashmir dispute. Because of the kind of location of this area, both India and Pakistan make a claim on this territory. The situation is problematic because Pakistan never accepted the sovereignty of India on this territory. And this has been a problem for more than 70 years between the two nations because they have been fighting over the territory of Kashmir. Kashmir therefore had to have some kind of autonomy or independence. But with the abolition of Article 370 of the Constitution in India, India has decided that Kashmir will be part of the Union of India. Even the Britishers during their colonization did not treat Kashmir as a different territory.

If one looks at the territory in Jammu and Kashmir, currently almost 50% of Jammu and Kashmir has been occupied by Pakistan. India has about just half of the territory and half has been occupied illegally by Pakistan. That is a major part. There is a lot of activity in PoK, and there are certain resources that are available over there which have been exploited. People mainly are in agricultural activity in PoK. The economic and cultural situation over there is quite challenging.

The tiers of public administration or scope or application of public administration in the territory of India are at three levels. The first one is the union, union territory and union administration. Below it, we have the state territory and state administration. For example, we have 28 states, it could be like the state of West Bengal, it could be the state of Odisha or any other state. Then we have divisions or zones or regions. For example, we have the western zone, eastern zone etc.

Some of these divisions are sometimes important because they may be divisions based on cultural aspects or in aspects of governance as well. Some of these divisions are also based on the establishment of certain tribunals. For example, we have national green tribunals, which look at different zones. We have a national green tribunal in the southern zone and in the western zone. So, zone wise, the country is divided into a central zone, Eastern zone, northern zone, north-eastern zone, western zone, and southern zone; totally six zones. This is how India could be divided into certain kinds of zones for better public administration and public policy purposes. Below the zones, every state is subdivided into several districts. A lot of states have divided, and a lot of new districts have been created because of more population density and for better management and every district has district level administration. Usually, that is where an Indian civil service officer is deputed as the district head or the district collector, a term used in earlier times.

Each such district could also have a district magistrate and in certain places, like the entire union territory of Lakshadweep is considered as one district for which there is one district administration. Some states have as many as 26 districts. Karnataka may have around 31 districts and it depends upon the population. A state like Uttar Pradesh has 75 districts. Uttar Pradesh happens to be the largest state in India and Maharashtra has 36 districts. Jammu and Kashmir has 20 districts, Ladakh has 2 districts, Puducherry has 4, Delhi has 11. Below the districts are the taluks. In many states, it is called taluka. In certain states like Andhra Pradesh, it is called as Mandal. In some places, it is called some division. In many Hindi speaking belts, you will notice that the sub-district is called the Tehsil.

Now you also have a metropolitan area, which is there in an urban district, because within that urban district, there could be one city, which may be declared as the metropolitan area. Then there is the town council and then at the village Panchayat or below the metropolitan area, there is a block or a wall. This is how the territorial division of administration takes place in India. So, right from Delhi, as the union government to the state, state to division, sometimes it is required in terms of union administration of powers and responsibilities. Then from state to district, from district to sub-districts, within the districts, then metropolitan areas or town councils and then downwards towards village Panchayats and in the metropolitan areas, it is called the ward. These are the aspects of governance of public administration in the territory of India.

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Week- 03

Lecture-03

Citizenship – I

The Constitution of India is a document that governs the citizens of this country. But a constitution can govern persons living in a country also. So, the distinction is between persons who live or who are residents of one country, where they come for work or for temporary shelter purposes, as against those who are citizens of the nation. Sometimes the Constitution makes important and significant demarcations about the kind of rights, duties and responsibilities, citizens and non-citizens can have. Every modern state does define citizenship. It also defines the distinction between a citizen and an alien. An alien is supposedly someone who is not from the same land or from the same city, but from some other state. Aliens may not enjoy some of the civil and political rights. For example, aliens may not have the right to vote or decide who is their elected representative and take part in the democratic process as it were. So, if you cannot vote, you cannot also contest elections or hold public offices because these are exclusively held for citizens.

The controversy regarding the citizenship of Mrs. Sonia Gandhi was on the ground, she not being an Indian citizen and therefore, she should not hold the highest office of the Prime Minister of India. Sonia Gandhi has the citizenship of India now, though she is, born in another country, where she got married to an Indian. Likewise, these are issues that may arise. The point is, aliens have lesser rights, but when we talk of aliens who are non-citizens, aliens can be distinguished between friendly aliens and aliens that are enemies. For instance, in the case of China or Pakistan, India has had suspicion on citizenship arriving from these two countries. There have been at times sanctions or embargoes on the nation. There have been diplomatic expulsions even, as it were. Alien enemies are subjects of a country which is considered not so very friendly with India or subjects of the state to which India is at war with. Friendly aliens are anyone from any other jurisdiction where India has bilateral and multilateral treaties and has friendly relationships. But since aliens are considered different from citizens, the Constitution of India in Article 5 under Part II of the Constitution talks about citizenship at the commencement of the Constitution.

Article 6 which is a special provision talks of the rights of citizens who have migrated to India from Pakistan. Article 7, lays down rights of citizens of certain migrants to Pakistan

and Article 8, talks about the rights of citizens of certain persons of Indian origin, residing outside India. Article 9 talks about persons voluntarily acquiring citizenship of a foreign state not to be citizens. The Article speaks in the negative saying that if a person has taken the citizenship of foreign state, he loses the citizenship of this country. Article 10 mentions the continuity of the rights of citizenship. Finally, Article 11 in Part II, talks about the rights of parliament to regulate the right of citizenship by law. It is noteworthy that, while the parliament can regulate the right of citizenship by law, the Citizenship Act of 1955 becomes the most important law to determine and govern the issues of citizenship and public administration.

The Constitution of India, entitles citizens with certain kinds of rights and privileges as against aliens or against persons who are residents in another country. In India, some of the privileges and rights that citizenship confers, or citizens have over any other person are mentioned in Articles 15, 16, 19, 29, 30 etc. Citizens have better rights, better fundamental rights, and better protections. But citizens have duties as well, like to pay taxes, the duty to respect the national flag, national anthem, and a duty to defend the country too. Thus, citizens have duties as well as rights and privileges laid down in the Constitution. There are some public offices in India, which citizens alone can hold. These include the offices of the President of India, the Vice President, the Chief Justice of India and a judge of the Supreme Court or the High Court. Only a citizen of India can be the governor of a state if you are a citizen of India or hold the office of the Attorney General or advocate general in different states. These are Constitutional positions which only citizens can occupy.

The Constitution also says, how can you acquire citizenship? The Constitution deals not only with matters regarding acquisition of citizenship, but also aspects relating to loss of citizenship. While the country was divided between Pakistan on the west and east and India as the major land, the issue of people from Pakistan and in Pakistan became very important. Hence, the parliament was empowered to enact the citizenship act. And the Constitution provides the guidance about how citizenship ought to be given in case of persons who have migrated from Pakistan Article 6

Two documents, the Citizenship Act of India and the Constitution, when read together, will show that there are four categories of persons who can become citizens in India. First category consists of a person who has domicile in India and has fulfilled any of the following three conditions of which the first condition is that such a person must be born in India, second, either of his parents were born in India; and third, he has been the ordinary resident for five years, immediately preceding the commencement of the Constitution of India. If a person satisfies any of the above three conditions he becomes a citizen of India. This is the first method by which citizenship can be granted.

Another way is that a person who migrated to India from Pakistan becomes an Indian citizen if he or either of his parents or any of his grandparents were born in the undivided

India and fulfilled any one of the two conditions. In case such a person migrated to India before 19 July 1948, he has been ordinarily resident in the territory of India since the date of his migration. In case where such person has so migrated on or after 19 July, 1948, he must have been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him before the commencement of this Constitution, and in either case such a person shall not be registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application. The same conditions apply in the third instance to a person who migrated to Pakistan. An Indian who goes to Pakistan after March 1st, 1947, but later, returns to India and decides to settle in India, and has been a resident of India for six months preceding the date of his application for citizenship, will also be entitled to citizenship. So, an Indian who goes to Pakistan and then comes back once he is resident of India for six months, he can apply for citizenship.

Then there is the instance of a person who or either of whose parents or grandparents' parents were born in undivided India, but who is an ordinary resident outside India. Such person shall become an Indian citizen if he has been registered as a citizen of India by the diplomatic or the council representative of India in that country upon an application made by such person to the Indian diplomatic mission or to the councilor office. So, if a person is domiciled in India, or has migrated from Pakistan, or has migrated to Pakistan but later returned to India or a person of India originally residing overseas or abroad can apply for citizenship In India.

There are methods for acquisition of Indian citizenship. Firstly, you can acquire citizenship by birth, that is if you are born in India. But just by birth, you automatically do not become a citizen of India. Your parents also should be Indian citizens. In this context, it needs to be mentioned that surrogacy has become very popular in India. And a lot of the surrogate children will be born and claim citizenship even though their biological parents are from some other country. The additional condition is that by birth plus both parents of a person must be citizens of India and they should not be illegal immigrants at that point of time, for a person to get citizenship by birth.

Secondly, if a person is born outside India, before December 10, 1992, is a citizen of India by descent, if his father was a citizen of India at the time of his birth. In these cases, a minor who is a citizen by virtue of his descent can also apply for citizenship if he does not renounce the citizenship of the nationality of India. This came by way of an amendment in 1992.

The third important process of acquiring citizenship is by registration. The central government can call for applications and a person can apply to claim citizenship. To acquire citizenship in this manner, a person must be a resident in India for the previous seven years before an application for registration can be made. Since this is in case of a

person of Indian origin, who ordinarily resides in India, the rule applicable to him is the seven-year period. A person who is married to a citizen of India and is an ordinary resident in India for seven years, can also make an application for registration. There is the instance of a minor child of persons who are citizens of India where the minor child was not born in India, but in some other jurisdiction. They can also make an application if their parents are Indians. A person of full age and capacity whose parents are registered as citizens of India can also make an application.

The fourth method in which citizenship can be obtained is through a grant of certificate of naturalization by the central government. For citizenship to be granted through naturalization, the concerned person should not be a subject or citizen of any other country and that country has not objected to his citizenship or rejected his citizenship. A person can decide to renounce the citizenship of some other country and make an application for Indian citizenship, which has been accepted.

If a person has resided in India or have been in service of the government of India, through various means and have stayed in India for a preceding 12 months before the date of application, naturalization is something that is applicable in terms of an immediate preceding 14 years. If a person has resided in India or been in the service of the government of India, then the aggregate of the time resided is taken into consideration and this is also one of the methods in which a person can acquire citizenship by naturalization. Also, such person must be of good character, have adequate knowledge of English or any other language that is there in the language schedule of the Constitution and then certificate of naturalization can be granted if the person shows that he intends to stay in India, enter into and continue to serve in a national or an international organization in India or in some kind of a society company or a body corporate as well. So, citizenship by naturalization is granted to distinguished persons in service who have made India their home. It may include people who come from different talented backgrounds, maybe science, philosophy, art, culture, cinema, literature, movies, voluntary services and so on and so forth. There are many individuals who decided to stay back in India, continue in India, serve in India, they may be part of Christian institutions and some of them have continued to hold a lot of property, land, business, and other philanthropic matters in India. Hence, by naturalization what you do is you show allegiance to the Constitution of India, and this makes one entitled to be given citizenship. These are some important aspects regarding citizenship.

Sometimes citizenship can be granted by annexation of a territory of the nation as well. Though India has never had an expansion policy, India has never been an aggressor nor taken over any land or territory, though it could have done so if it wanted to. However, even after the Citizenship Act of 1955 there were certain territories like in Pondicherry and others or even Goa for that matter where the government of India had to take over after a certain duration of time without any conflict or violence. Whenever these territories are actually annexed to mainland India and the Constitution tends to apply in those places by

annexation or incorporation of a territory to the Constitution of India, citizenship will be granted to the people who are residents in those territories as well. The Citizenship Act has been amended a couple of times.

There is also a question as to how one loses citizenship. This is not something that is going to be forced in a democratic process or a society. A citizen can decide to renounce your citizenship, or citizenship can be terminated, or a person can be deprived of his citizenship. It is important to mention the process of deprivation because it is the process of snatching away the citizenship of India. Deprivation of citizenship can be done by the Central government when they come to know that the citizenship has been acquired by fraud, by falsification of documents or any other illegal mischievous criminal breach of papers. Then citizenship can be cancelled. Second, the Act very clearly says that if you are not loyal to the Constitution of India, citizenship will be deprived. Patriotism and citizenship sometimes are used synonymously; your loyalty to the country, to the nation and to the oath to the Constitution are very paramount and important.

A citizen who has shown disloyalty to the Constitution of India can also be deprived of the aspect of citizenship. A citizen who has unlawfully traded or communicated with an enemy during war, can also be deprived of his citizenship. If a citizen has, within 5 years after registration or naturalization, been imprisoned in any country for 2 years or more, then also he will be deprived of his citizenship. This is to try and dissuade criminals from continuing to hold citizenship of the country. Any person who has been resident outside India for 7 years continuously can also be deprived of his citizenship. The law says so, but again exceptions and discretionary power of the central government is always there especially in current circumstances where there is so much globalization. The 7 years must be continuous. Even if you have entered India once within the 7 years you can continue to hold the citizenship of the country.

The next aspect is termination. Termination is by a choice. Here is where the Indian citizen voluntarily, means without endurance, without any undue influence, he does it without any compulsion, out of his own choice. He will voluntarily, consciously, look at acquiring citizenship of some other country. There are a lot of non-resident Indians who are now acquiring citizenship of various countries including the United States, UK, Australia and so on and so forth. Then automatically, his citizenship of India gets terminated. A person can hold citizenship of only one nation or one country at a time. If the citizenship of the UK is automatically acquired, then Indian citizenship shall be terminated. Thus, termination leads to loss of citizenship.

By renunciation a citizen of India has the capacity to declare that he no longer wants to hold the citizenship of this country. It is possible for a citizen of India to declare that he is no longer a citizen of India, and this declaration usually happens during war when India is engaged. Then you know there is a hostile government military that takes place, and you

have to show allegiance to that new government military and hence this is possible that you can just make a declaration that you renounce the previous citizenship for whatever purpose to save life, to save property, and oneself from any kind of torture. This kind of right to renounce is there with every citizen like they have the right to make a choice about which citizenship they need to acquire. Renunciation can be resumed immediately. Renunciation is only a temporary declaration because that is not by submitting an application to the government. The Indian citizenship can be resumed on your wish, and people of age as well as minors have given this choice to make the declaration of renunciation. In India there are no two kinds of citizenship, that is citizenship of a state and citizenship of the central government or the union territory or the union government. There is only a single citizenship policy, or we can say, there is no dual quality citizenship.

Some nations have adopted the dual citizenship policy. Switzerland is an example of the same but most countries across the world have single citizenship. The USA is another nation which has allegiance not only to the state but also to the center. They have unions of states, that is the United States. That is where the allegiance between center and state can also happen. In India the advantages of single citizenship are very clear that a citizen will not be discriminated against in public employment or in attaining privileges and grants from the central government just because he is from one state.

The rule of public administration is to take citizens of all states equally and that makes the parliamentary responsible for ensuring that no citizen of any state whether it is in the heartland of India or in the hinterland of India are actually neglected for any kind of schemes, policies or welfare measures as the state would like to bring it. The single citizenship provision helps against any claim of discrimination. In a single citizenship there is the right to move across the country freely. But there are restricted areas sometimes because of the tribal population. They could be restricted due to military and defense purposes but otherwise generally there is freedom of movement across the country. At times, in Jammu and Kashmir that kind of freedom of movement was restricted. There was some special status to Jammu and Kashmir, and they could introduce some kind of restriction for Indians to move around in Jammu and Kashmir. By abolition of the article 370 of the Constitution that kind of a special status to Jammu and Kashmir also has been taken away and hence you have the right to claim the freedom of movement across the country.

There is a concept called the overseas citizen of India. To a larger extent, a lot of people think that this has introduced dual citizenship. The whole idea of bringing the OCI card holder started off quite some time back. The L.M. Singhvi's report wanted to bring in harmony between non-resident Indians, citizens abroad and the Constitution of India. So, to hold those who have gone outside India back with their roots in India, the whole idea was of giving them some kind of card, some kind of identity status, giving them some amount of freedom or privilege to come back and stay back in the country or to hold on to

their ancestral home. There was a lot of debate on the citizenship act being amended to bring in some kind of privilege to persons of Indian origin. The Citizenship Act was amended in 2003, then 2005 and then 2015 as well.

The 2015 Amendment Act is currently the law that defines overseas citizens of India. Before 2015 the people abroad and who were connected to India had what is known as the PIO card, or the Person of Indian Origin card. At present, they are given the overseas citizen of India card. Person of Indian origin, Overseas Citizenship of India card. Such persons continue to be a citizen in some form but are overseas. That is the idea that comes from the 2015 Amendment and scheme that was introduced for people from abroad.

Who is entitled to OCI? Any citizen of any other country is eligible to become a citizen of India under the OCI status. The only thing is he can be of foreign origin having some connection with India. There are a lot of conditions about how India will apply for the overseas citizen of India card, or he can hold dual citizenship in some form or some manner. There are a lot of conditions about OCI but there are certain rights to an OCI person. The central government can decide what these rights are from time to time. An OCI person is not considered a full citizen. He is considered a quasi-citizen of this nation. He cannot hold any public office, or the president, vice president, attorney general, judge or hold any other public office because he does not have the right to work. OCI people are not entitled to vote. They cannot also stand for elections in either of the state or the central legislature. OCI citizenship can also be cancelled due to the same reasons like fraud and other false representations as well.

However, OCI citizens are given some benefits. First, they have the chance of multiple entry lifelong visas for visiting India for any purpose. However, for doing research they require special permission. So, there is no need to apply for a visa each and every time. This is one major advantage for OCI card holders. Second, they are exempted from registration with the Foreigners Regional Registration Office which applies to any foreigner who is going to stay for a long period of time in India. Foreigners must make that registration and they must report to the local police station, but OCI are exempted from this. OCI card holders are in parity with NRIs. NRIs are non-resident Indians. They are still Indians but not resident in India. In respect of all economic, financial, and educational facilities, you can also look at acquisition of agricultural plantation property depending upon the state regulation that applies to such agricultural plantation property. Which means if an NRI can hold immovable property an OCI person can also hold immovable property. Another one important thing about NRIs and OCIs is that an NRI can also undertake adoption in India. An OCI person can also adopt a child.

OCI people shall be also treated in part with a citizen in some cases. For example, in many of these tourist visiting places like Archeological Survey of India or any other monument in India or even national parks and sanctuaries foreigners have a different fee, citizens have

a different fee. An OCI card holder can claim the same fee that is charged to a citizen when he visits such monuments and national parks. That is also a privilege granted to OCI people. From PIO we have gone to an OCI status in terms of citizenship.

Several amendments of the Citizenship Act have been undertaken. The first amendment happened in 1985, called the Assam Accord, to bring in peace in the Northeast. India granted Bangladeshi migrants citizenship status and that was the first amendment that happened in 1985. In 2003, a major amendment was brought in bringing the notion of citizenship vis-a-vis illegal immigrants or whom we call as refugees. The National Registry of Citizens was developed to make this kind of a clear distinction. However, the most controversial in recent times was the amendment that was brought in the year 2019. This resulted in the infamous protest that lasted for a very long period called the Shaheen Bagh protest. So, what was the Citizenship Amendment Act of 2019? What did this act bring into light? This law empowered the central government to provide citizenship to people belonging to the Hindu, Sikh, Buddhist, Jain, Parsi or Christian community who came from, Afghanistan, Bangladesh or Pakistan who entered India on or before 31st December 2014. This was the real reason why this amendment became a controversy. In a sense, this amendment decided that under the Foreigners Amendment Order of 2015, the exemption would be given to minority communities from Bangladesh, Pakistan and to a larger extent, it would be applicable to the minority committees like Hindu, Sikhs, Buddhist, Jain, Parsis and Christian. And this did not involve or include Muslims. That is probably the reason this amendment act became the most controversial part in 2019. Now, this amendment was brought by the BJP government, and it was considered that it was a right wing or Hindu majority opinion, and the amendment was criticized heavily as being discriminatory based on religion leading to a lot of controversy.

The protests were quite violent at times and lasted long. The immigrants, especially from Bangladesh and other places, thought that their political right was infringed by these. There were protests in universities like Aligarh Muslim University, Jamia Millia, etc. Lot of damage to public and private property took place during this time. This was a volatile amendment that was challenged on the streets of the country. While India has suffered the issues of immigration, especially from having a porous border with Bangladesh, and especially in Northeast, India also has been a country that has accorded refugee status to people who have come and sought shelter. The Tibetan refugees, the Chakma refugees, the Tamil refugees all have been granted shelter or asylum in this country. India has had a great history of asylum seekers who have been given shelter and protection. And many of these refugees have been given the process of naturalization in this country. However, the mass influx of refugees started creating a lot of problems in urban areas and in urban planning, because it is at a state cost that you must incur the necessities of protecting life for the refugees. This impacted state policy to a larger extent and has been a matter of public

debate. It has been a problem for public administration as well about how to deal with these refugees, how to, not allow them to squatter around or create camps in places that can actually create a lot of public order and public morality issues.

In India, this has been a major challenge. The Assam government has always had a problem with this kind of a migration. Though migration results in cheap labor, it also results in a lot of administrative challenges, especially the law-and-order problems because the locals feel threatened, they do not feel safe. So, this is a conflict of public order as well as of state policy. It is more important because citizenship is only one single citizenship that is granted by the central government. Therein, it becomes a national issue and a national problem as well. Places like Arunachal Pradesh, Mizoram, and Nagaland have been able to defend some kind of illegal immigration, because they have something called the inner line permit. That is, a special permit is needed because there are scheduled areas. Hence, it is not easy for immigrants to move to these three northeastern states. The aspect about who can create such a kind of special privilege or special permit, which kind of states can do it is also a matter of public concern as well.

When the Citizenship Amendment Act of 2019 was being discussed, debated, or brought about, the central government was concerned about the refugees that were coming from Myanmar. These refugees were Rohingya Muslims. And hence, the justification of the central government was that if this Citizenship Act provided for minority sections of Myanmar, especially Muslims, also to acquire citizenship, then that would create a new issue of public administration. And the Indian government was firm that it wanted to deport the Rohingya Muslims and refugees back to Myanmar, even though they were given temporary refugee status, because they moved from Bangladesh to India. That is the reason the central government justified not including Muslims in the Citizenship Amendment Act of 2019. Some of the protests against CAA were peaceful, like the Shaheen Bagh protest, but the Shaheen Bagh protest occupied a major highway entering Delhi. So, the court had to intervene and close this protest. Several protests revolving around the CAA seemed to have the latest controversy about who should be allowed to acquire citizenship, especially if a person is a migrant, a refugee. Some special statuses have been granted to only non-Muslims under the Citizenship Act of 2019. Religious minorities from Afghanistan, Bangladesh and Pakistan, had been accorded this kind of a special exception.

The identity card of citizenship happens to be the passport that a person holds. But mere proof of passport alone is not going to determine citizenship, because the passport is only the permit to go abroad. Citizenship can be proved through various other documents as well. One of the methods of showing that you are a citizen or not is by holding your Aadhaar card. Sometimes holding your voter ID card is also the basis on which citizenship can be proved, in case you need to prove the same.

Also, any kind of deprivation of citizenship can only be done through procedure established by law, because holding citizenship is like a right to life. This was held in the most famous case of Menaka Gandhi versus Union of India, decided in the year 1978 by the Supreme Court of India. In this case, the impounding passport was held be invalid, because the procedure established by law was not followed in that case. The denial of citizenship and retrieval of citizenship can only be done by procedure established by law. The citizens have the protection of the Constitution. And being a citizen is an integral part of one's identity and one's life. And that is what the Supreme Court held in the *Maneka Gandhi v. Union of India* case.

Constitutional Law and Public Administration in India

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Week- 03

Lecture-04

Citizenship – II

The concluding and important part in the topic of citizenship is public administration and the law on citizenship. While we say there are rights that citizens have, then there is a distinction of who a foreigner or an alien is. The duty and obligations of the foreigners in India may be governed under the Foreigners Act of 1946 or the Registration of Foreigners Act of 1949. Foreigners in India will not be treated equally because only citizens have the right to be treated equally. And hence, foreigners may be treated unequally, which means that they may be treated slightly differently from how Indians or Indian citizens are considered. But does it mean that foreigners have no rights at all in India or under the Constitution of India? First of all, a foreigner is one who is not a citizen of this country, but still continues to reside in this country for various reasons and purposes.

He could be a foreigner who travels to India on a tourist visa and decides to overstay or he is probably travelling in India. He is here on business or research, or on a diplomatic mission or any other person. But generally, they are not citizens, who are holding Indian citizenship. The Constitution of India very clearly says that foreigners will not have fundamental rights of certain kinds and categories. The fundamental rights mentioned in Article 19 are solely available to Indian citizens. These are freedoms that citizens alone will have. In Article 19, only citizens have the freedom of speech and expression, freedom of movement and the freedom to do trade, occupation, and business.

So, citizens have these extra freedoms that foreigners may not have, and every other constitution tries to make that distinction. Second, every sovereign nation can deny foreigners certain kinds of freedoms or rights, as democratic sovereign states, they must follow the principles of natural justice. And basic human rights have to be granted even for foreign nationals. And that is where the UDHR principle of 1914 becomes very relevant and important.

It talks about universal declaration of human rights as an integral part of the democratic process. And these are not just rights given by the Constitution, but they are universal rights of human beings. This is an international law and international law usually guides most

national law. Sometimes what national law cannot provide international law can provide. You have to understand that while UDHR has not been ratified by India expressly, to a larger extent, the Supreme Court and the High Court have recognized UDHR as the principle to govern rights, which are not necessarily just fundamental, but which are very basic rights, which even non-citizens should be entitled to. And hence, non-citizens cannot be deprived of the basic liberty and equality. Foreign nationals can access the judicial system and the democratic process in this country. But this is not an absolute right, and it cannot be compared to the rights of the citizens. Articles 22, 20 and 21 under the Constitution are rights that are used in the exercise of detention or arrest. These are rights in terms of where liberty is being taken away.

Some of these fundamental rights can be suspended during an emergency. But we can assume that those rights that are provided, the right against self-incrimination, the right of an accused during arrest, shall be fundamental rights available to non-citizens or foreigners as well, because the Constitution uses the word citizen only in Article 19. Therefore, it can be concluded that foreigners have been given protection under the Constitution, they have been recognized with certain kinds of rights. And they are entities that are recognized in the Constitution of India and hence, public administration has a duty and an obligation to not only recognize these rights of the foreigners, but also respect it, adhere to it and see that these rights are not infringed. So, foreigners are treated humanely, and foreigners have access to the justice delivery system in this nation.

To a larger extent foreigners have a positive right under the Constitution of India, though they are not having all the absolute rights, or all the rights that a citizen has, which is considered fair. It is important to consider public administration vis-a-vis a citizenship concept. Some questions that arise in this regard are, why is citizen and administration so very important and what is the linkage between citizenship and public administration or Is public administration entirely functionally interconnected to the concept of citizenship. It is noteworthy that public administration is generally established to serve citizenship.

The purpose of public administration, of those kinds of entitlements that are useful to the public, is what public administration can be normally defined. It is necessary to look into how the administration and administrators administer public property, public rights, and how they adhere to public duties. What kind of facilities and benefits citizens are entitled to and how they can be transferred functionally to the public is very importantly connected with these two words called citizenship and public administration. So, every administration must take decisions in this democratic setup for the benefit of the citizens or the larger public as it were. It is the citizens who can make the choice of the kind of public administration that they want. Citizens have this right and if there is growth of citizenship, if there is growth of people rights, if there is growth of the economic capacity of the citizens, there is growth of public administration.

Thus, these two are connected, and concepts under the constitution have a core relative. The purpose of public administration or the establishment of public administration is citizen centric and citizen oriented. Citizens always have expectations and foremost they do not want the public administration to be like an alien administration. That can be highlighted through an example. Alien administration is something that is foreign, distant, and not representing a section of the same society or community. Not being responsible for the apathy of citizens or the problems that citizens often face is an alien public administration. The ideology of public administration today has moved, from being merely a regulator to being a welfare providing public administration. Initially public administration was only kind of a license raj and merely trying to regulate, be the police state or be the state which has power but not responsible power.

Right now, public administration in India has a very positive role and the positive role is to provide a lot of civic, basic amenities to citizens trying to take care of their welfare and trying to be more responsible for their well-being. And hence, in this context, if there is a gap between what is expected by the citizens and what is delivered by the public administration, naturally it will result in a lot of grievances. It is very common to have these grievances in society between, what should the public administration do and what it should not do; what it has done, and has it done to the satisfaction of the citizens. Citizens are like consumers and public administration is like a manufacturer.

One can always argue that there is nothing like absolute consumer satisfaction, or absolute citizen satisfaction. However, citizen satisfaction is paramount in terms of evaluation of the functioning of public administration. Do most of the citizens accept the role of public administration, accept the functioning of the public administration and the final implementation of public policies as it were? Very importantly public administration must be trustworthy and must be interacting with the citizens.

Public administration must communicate, it must be transparent, and it has to share information. Because the whole institution of public administration is funded by citizens who pay tax. The whole concept of the institution of public administration arises from the people and it is created by the people and it is of the people because public administration is just a reflection of each individual in the society. Hence, citizen grievances against administration have to be reduced. But unfortunately, as India is growing in terms of the LPG era, India is becoming a more literate, legally literate nation, more Indians are migrating to the cities, and are well off.

It is noticeable that unfortunately, some of these citizen grievances are not reduced, but they have increased. There is a growing discontent among citizens about the way public administration is being done in this country. And hence, the focal point of discussion of politicians and administrators and even judges should be to how and to what extent this kind of grievances can be reduced, how can these grievances be addressed amicably and

how can to a larger extent the citizens satisfaction index if it were so be improved. This becomes the responsibility of the politicians, administrators and jurists who occupy the post of public administrators. One of the most important components of public administration is public awareness.

It is important for public administration to reach out and state how and where it is moving in what direction it is framing public policy. And hence, the spread of education or literacy or information becomes a very critical factor in the social awakening of people towards administration. And hence, the more open the ideology of the public administration is, the more transparent it is, the more democratic it would actually constitute to be. And hence, today the concept of public administration is not closed door administration. It is not saying that the right of admission is reserved.

Public administration is or ought to be more open, more transparent. And that is the process of channel of addressing grievances of citizens. It is only right for citizens to have grievances of public administration because they feel affected, they feel aggrieved by the public policies that are made from public administration from time to time. While public administration must do public good, what it all must also do is that it must ensure that there is no infringement of the concerns, the rights of people in the human process. Public administration owes this duty to the concept of citizenship. Citizenship is precisely for the same reason. The citizen belongs to this nation and looks to the public administration and expects the public administration of this nation to tell it that he can call, recall and vote for it. And that is what the democratic citizenship is conceptualized against. There are a lot of factors that result in grievances between citizens and public administration and with many examples.

Hence, it is the important duty of public administration to set up institutions for redressal of grievances. That is where the strengthening of the status of a citizen improves. He must ensure that his grievances are redressed in a timely, speedy, and judicious manner. And he wants to make the government and institution especially responsible for the exercise of their public powers. So, the redressal of grievance, today, happens through a lot of these quasi-judicial bodies that have been created from time to time. For example, how does public administration improve accountability? How does public administration improve the informational gap? How does the public administration pass on the vital information of public policy to the citizen? One of the mechanisms of doing that is through what is known as the Right to Information Act of 2005. The RTI Act improved public administration to some extent in India. It was the need of the hour and it was important that citizens can get information from government and public authorities as a matter of right. Earlier, before 2005, it was given as a matter of discretion from the government and the citizens have the right to know how the government functions, where the money is being spent. To a larger extent, the Right to Information Act also in one sense wanted to check corruption in public office and public administration.

Citizens have a lot of grievances on corruption. In a country like India, corruption can be a major problem of public life and public administration. And hence, to address all these kinds of grievances, the Parliament enacted a very important legislation called the Right to Information Act of 2005. And to that extent, the information started passing on. Citizens can demand it, citizens can ask for it and the government is duty bound to deliver the same. Also, if the information is delayed or denied, the RTI Act created the Information Commissions, both at the Central Information Commission and the State Information Commission as a quasi-judicial body to redress the grievance between public administration and the citizens who have the right to seek that kind of information.

Under Section 3 of the Right to Information Act, only citizens have the right to information. Foreigners do not have this right. That is very critical and important. Citizens have a clear definition or understanding, they can seek this right to information because it is a kind of grievance, it is a kind of a leverage of rights between the government, which is a public administration government to that of the citizen who has the right to it. So, RTI is only for citizens, and it is only for their grievances.

There is a form that will address those kinds of grievances in it as well. And hence, through the enactment of RTI one would assume, post 2005, a major objective of promoting citizen satisfaction has been achieved. That is just one of the processes of public law that has looked at granting citizenship, that kind of an interesting, progressive right. To a larger extent, moving away from the British colonial legacy of saying that there can be secrets of the government, that was a major path breaking movement in this country. Also, one should understand that there are expected norms of behaviour in a society. And very often than not, these norms are breached by fellow citizens. And it is the duty of the public administration to protect everyone's interest in society. Everyone has the right to express himself or herself. And those kinds of norms in society have to be dealt with as strictly as possible. The norms of behaviour in a society between a fellow citizen to another citizen can be addressed.

The police or any other system of governance have to come into action. But such norms of behaviour are expected even towards foreigners. So, an Indian must respect the rights of the foreigners. That is the basic behavioural part that is expected of citizenship and of citizens in this country. And the bureaucracy of public administration must specially protect foreigners because they feel even in this state or in this country and sometimes, they are here as tourists.

In the incident of Holi during which, a young you tube vlogger was forcefully molested by putting colours. She was refusing to take those colours, but a young man unfortunately forced himself on her. And such kinds of action against foreigners are also something that comes within the domain of public administration. A public administration must owe an equal responsibility to protect the rights, liberties of foreigners on land as well. And hence,

it is important that foreigners when they are in India may also have convenience of public administration.

Some of the instances of foreigners who may have challenges of public administration could be the denial of the visa, extension of visa or extension of permits to do business in this country, invest in this country etc. Foreigners also should be provided with the platform to retrace their grievances as or if not more than equal to what citizens are expected to have. That kind of alienation of foreigners in any nation only makes that nation not accessible to foreigners. A country's worth, a country's development is tested by the means and mechanisms of how much the public administration treats the rights of citizens as equal to the rights of foreigners. Hence, any show of arrogance, irritation, lack of proper response or procrastination or delay only tarnishes the image of public administration, not only in the eyes of citizens, but also in the eyes of foreigners.

Today public administration, when it has a more positive role or a welfare role, there are so many things of public administration that affect the lives of citizens and foreigners. For example, health services, which are emergency health services, a foreigner may meet with a road accident, so can an Indian meet with a road accident. How does the public administration then respond to such kind of emergency health services required by persons in India. It is a critical factor of the image of public administration. The support, the kind of assistance that is required from public administration, is very critical, because the public administration has a lot of resources at its disposal.

Public administration controls the government machinery, and it is supposed to be held accountable for the same. In certain kinds of matters, citizens and foreigners must be treated equally. Neither of these parties must be allowed to get frustrated, dissatisfied or be unhappy with the kind of public administration that is there in the country. Accountability of public administration is so important. If that kind of accountability, sensitivity or response to public administration is not in place, then the result of it will be discontentment among the people.

Wide disparity between the performance of the administration and the expectation of the citizen brings a gap which may result in conditions of operation, conditions of wrongful action, infringement of rights, disinterested society, a disorganized society, or a high rate of crime. At some point in time, there is so much of a point of no return that the organized state will totally become a moot nation. So, the process of administration must be just and deal with corruption. The standards of honesty and integrity towards citizens and their interest must be of the highest rank and order.

If there is faith that citizens should have, and the kind of account the citizen should be able to get, public administration will go a long way in making a society a much better place to live in. An average citizen expects certain average things from a public administration. It

is not extraordinary that the public administration cannot deliver. It is the citizens who created the constitution, the public administration, and we the people.

What does the citizen expect from public administration? The first thing that he may expect is a proper attitude from the officials in the public administration. He does not expect public officers to have arrogance in the way they speak and act towards citizens' concerns. Two, in India, they expect things to happen as soon as possible without delay or without any waiting period. So, the time of delivery of public policies in public administration must be fairly at a quick pace.

Also, citizens expect no favouritism. It is important that public administration should be fair and favouritism unfortunately which is such a major thing sometimes has been ruled out. Finally, corruption must be reduced, which is a big task nowadays. But just taking away middlemen, brokers is sufficient to a larger extent to deal with corruption sometimes. And finally, what citizens expect from public administration is that the resources in public administration should be so fairly and equitably distributed so that there is no gap between the rich and the poor or no discrimination between the rich and the poor, especially that the rich can access public administration easily and the poor cannot access public administration easily is done away with.

Simple factors can actually be a tendency that can be overplayed in public administration and that tendency needs to be curbed and a failure to recognize a poor citizen's right, is the failure of the public administration precisely. Taking care of the weakest in the society, taking care of the most vulnerable in the society, like in a house, the most attention that is deserved are elderly citizens and young children who are the weakest per se, and they are the ones who require the maximum assistance.

Public administration is also about that. They have to identify the most vulnerable community, pre-citizens and people who require the first attention. They deserve the first call of public administration and the same should be followed. The interaction in citizenship and public administration is very critical to mount the defense of social harmony and social peace. Because once this gap between citizens' expectations and public administration increases, the result is unfortunately going to be social unrest, social violence, and social tension. Finally, at some point of time, it may also result in civil war, if necessitated in some jurisdictions.

Administrative reforms as it had happened in terms of two reports that have been submitted in India. The Administrative Commission does deal with the expectations of the public, the need of the public vis-a-vis an unresponsive administration. The establishment of the Central Vigilance Commission, the Lokpal and the Lokayukta, to some extent deal with the administrative process of corruption. But these are not sufficient agencies that can make the public administration responsible.

It is important to conclude on the fact of nationality versus citizenship. Very often they are used quite interchangeably and synonymously in India. When it is said you are an Indian national, you are a whole Indian citizen. Nationality is more pediatric, it is more nation-centric, nationality is more international law centre, citizenship is domestic, it is within the citizen versus state, nationality is between the state, it is citizen vis-a-vis international. While you can use this word interchangeably, the Supreme Court very clearly wanted to clear the distinction between these two.

Citizenship is only granted to natural persons who are natural individuals. Citizenship is not granted to corporations, legal personalities, and legal entities. Whereas, a company registered in India can be considered to hold Indian nationality. Natural persons who hold citizenship enjoy civil and political rights. Nationality entitles you to a status that will determine rights of entities in international law. So, that is the distinction because mostly international treaties refer to nationalities, they talk about what member nations do to their own nationals. That is the basis of distinction in terms of clarity of what we still mean. But vis-a-vis natural persons within the constitution as we the people, the concept is citizenship.

Constitutional Law and Public Administration in India

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Week- 03

Lecture-05

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.

Constitutional Law and Public Administration in India

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Week- 04

Lecture-01

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

good governance from t

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.

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Week- 05

Lecture-04

Article 21

Article 21 of the Constitution of India is one of the most important Articles, apart from being the most important Article in part III of the Constitution relating to fundamental rights. Article 21 talks about protection of life and personal liberty. It says that no person shall be deprived of his life or personal liberty, except according to the procedure established by law. So, if one reads Article 21, it says that protection of life or personal liberty are the two components of it.

Personal liberties are slightly different from protection of life. Personal liberties are your freedoms, what human beings aspire in terms of liberty of thought, process, belief. And the second part is the right to life, which means every citizen has this kind of right which cannot be taken away by the state, however, except by the procedure established by law. Article 21 is the most important provision in terms of protection of citizens' rights. There are a lot of case laws and judicial reviews that have happened and what exactly is meant by what is stated in Article 21. In the 1950s, in a case called *A.K. Gopalan v. State of Madras*, the Supreme Court had taken a very narrow interpretation of Article 21 by holding that the protection that is available under Article 21 for right to life and personal liberty is only available against arbitrary executive action. This was a kind of limited interpretation, which meant that if your right to life is curtailed by legislative action, which is by a law, then you cannot approach the courts and you cannot claim that there is an infringement of Article 21. In *A.K. Gopalan*, the Supreme Court gave the legislature and the law that is made by the legislature, the right to decide the elements of life and liberty, and when such elements of life and liberty can be curtailed. However, when it came to 1978, in the *Maneka Gandhi* case, things changed as discussed in the chapter on Article 21, because of the 1975 emergency, wherein, the judiciary wanted to uphold constitutional values and constitutional freedoms. The judiciary was asserting itself from legislative and executive interference.

So, there was judicial activism at this point of time, in terms of very prominent processes that could have been laid down. Which means that when an emergency was imposed, a lot of people were arrested arbitrarily through an executive action. Emergency imposition

itself was a kind of a law-making power. To challenge the imposition of emergency and what were the rights available during emergency and how much of life and liberty were curtailed because people were arbitrarily arrested due to the emergency law many processes were laid down. Many of the writs were suspended, like writ of habeas corpus.

Whether the emergency was constitutional or not, could not have been tested going by the *A.K. Gopalan's* judgment. In the *Maneka Gandhi* case in 1978, the Supreme Court of India said that the *A.K. Gopalan* case is not a good law as they did not go in for a wider interpretation of Article 21. And it was ruled that the right to life and personal liberty of a person cannot be declared by any law unless that law is reasonable, fair, and just. So, the executive action is already to be tested on Article 21. However, the parliament or the legislative action will also be tested if it voids life and liberty of citizens.

So, if the law is just fair and reasonable, then to that extent, the procedure established under that law can, to some extent, curtail your life and liberty. And that's why Article 21 says you have the right to life and personal liberty. But they can be taken away by procedure established by law. The *Maneka Gandhi* case laid down a fact of what was very well understood in the American Constitution, which uses the word due process of law, which means that if the law establishes a just process, then life and liberty can be curtailed to some extent, they can be restricted or deprived, but not otherwise. And that due process of law means the law will be just fair and reasonable. Borrowing from the spirit of the American Constitution, the Indian court did lay down the emphasis on procedure established by law in one part of the *Maneka Gandhi* case. But however, due process and procedure established by law have some distinctions and broadly that was how this was laid down or brought into existence.

It means that, the expression procedure established by law, though is quite differently used under the Indian Constitution, it only means that you not only have liberty of the body of the individual, but also of the person's thought and processes which is quite relevant and important in understanding the ambit of right to life under Article 21. Further, the court also defined the meaning and purpose of the right to life as the right to life with human dignity. It's a life that is meaningful, complete, and worth living which is what life would normally mean. So having the widest expression and widest implication of both life and liberty, the Supreme Court, gives a new dimension to the reading of Article 21 in the *Maneka Gandhi* case. Today the right to life and personal liberty has been discussed by the Supreme Court in a lot of cases, in understanding what meaningful life is and what is life with dignity or a life that is complete and worth living. It is also discussed as to when can state actions, which deprive a meaningful, dignified, complete and worthy life be interfered with and when it should not be interfered with? The courts have said, for example, in the state of *Subash Kumar v. State of Bihar*, that the right to environment had qualified this. Later it was expanded as the right to a clean and healthy environment being a fundamental right under Article 21.

So, life includes a decent environment, pollution, free water, and air. It also means protection against hazardous industries and activities. This was the case of *Mr. X v. ZY* of 1997, where a person cannot be regarded as medically unfit and cannot be denied employment, merely on the ground that he was found to be HIV positive. Any kind of discrimination of employment affects right to life is what the court held in this case which means livelihood is the most important aspect of life and a person must be entitled to gain gainful employment and take his livelihood as a matter of right to life. In cases of the violation of right to livelihood, a lot of people have been ignored of their contractual rights where their contractual employment has been terminated unreasonably and unfairly which in turn affects livelihood.

A lot of people have been displaced due to land acquisition that happened due to the land acquisition act of 1894 and without any compensation, resettlement, or rehabilitation. Now whether it affects the right to livelihood? In the *Narmada Bachao Andolan v. State of Madhya Pradesh* 2011, by the Supreme Court, the court held that, if someone is displaced and the state is not sensitive enough in providing compensation, rehabilitation, and resettlement, it amounts to violation of livelihood of individuals. The courts in terms of livelihood have come up with a lot of interpretation under Article 21.

Right to privacy, in current times, has gained a lot of significance. The parliament recently passed the Personal Data Protection Act. The Supreme Court has also decided that the right to privacy is integral to the right to life. It is integral to Article 19, which ensures your freedom. Right to livelihood is a very positive right, that you can claim from the state. that it should not be infringed and you are entitled to livelihood. Right to privacy can be inferred as a negative right. It is sometimes called the right to be left alone. It is the right in which you do not want the state to intervene. The first among the cases in which right to privacy was brought into highlight happens to be the case of *Kharak Singh v. State of UP* in 1964. In this case, the petitioner was accused of dacoity. But later, he was acquitted because of lack of evidence. However, the Uttar Pradesh police insisted on surveillance of the petitioner and this would mean that he, his house would be visited by the police in the night. And he was asked to periodically come and mark his attendance in the police station. His movements were tracked, and so on and so forth. So, the UP police, despite that he was acquitted and there was lack of evidence of his involvement in dacoity, continued to do surveillance of the petitioner. The petitioner filed a case challenging the constitutional validity of the state action. And the court in this case, holding that there is something called right to personal liberty and there is a right to privacy held that, restrictions on one's movement can be only placed in the rest of their circumstances, if it's so necessary for the security and interest of the state. If not, any such actions of the police would encroach on one's private life. Visiting someone's house at night is a violation of privacy.

Personal liberty is something that must be protected at all circumstances at all levels. So the right to privacy has gained a lot of significance and attraction. Recently, a nine-judge

bench of the Supreme Court, Justice Puttaswamy's case, again reiterated that there is right to privacy as a fundamental right under the Constitution of India. *Justice Puttaswamy's* case is important and interesting for the simple reason that today we are in the era of digital information, or the internet which tends to invade a lot of privacy. This kind of invasion of privacy can happen not only by the government, but also by the private sector. Hence, the issue about what is the scope, extent, and definition of privacy in the internet world was discussed by the Supreme Court in *Justice Puttaswamy's* case. And they did hold and reiterate once again that this was an essential part of the freedom of liberty, personal liberty and went on to state that, it is the duty of the state to protect privacy. It is the duty of the state to also provide for a law for the protection of data that is personal in character and nature.

Privacy of an individual and privacy of an institution can be two categories of privacy. But nevertheless, privacy is now enshrined in the Constitution. Globally, the European Union passed a law called the General Data Protection Act, or the GDPR legislation. Globally, the discussion on privacy has taken a lot of attraction. And in India as well, it is found that the law casts a duty on anyone who collects personal information to keep that information in a fiduciary capacity, with trust and confidence, not to divulge this personal information to any third parties and not to use data as a commercial kind of a property and venture.

So, when you collect personal data, you have to protect it, you have to have enough cybersecurity measures so that it is not breached or leaked, and someone does not misuse the same. That kind of right to privacy is also something that is brought about under Article 21 of the Constitution. The next right is right to shelter and is important. Shelter is important because if your life must be meaningful, you need shelter, you need a roof above your head. The right to shelter was enshrined in a case called the *Uttar Pradesh Avas Eam Vikas Parishad v. Friends Corporation Housing Society*. It is a 1996 judgment of the Supreme Court. Tenants are dislodged or displaced immediately on notice of the landlord without having an alternate place to live. So all of these become critical issues. And there are various aspects of your life like personal liberty, and one will have to take due care while deciding right to housing, right to shelter.

Right to health is also very critical and important under right to life. You need a healthy life, and the state has the duty to provide your health so that your life is meaningful, it is dignified, and it is healthy, but it is not only the state. The courts have extended the right to health to say and suggest that such a right must be protected even by private medical institutions and must be respected by doctors who are duty bound to give you emergency medical treatment or medical aid without any kind of expectation of consideration or commercial price.

A doctor will have taken Socrates' oath, which is important to save lives. So, doctors, the government and institutions have a duty to ensure that the right to health of citizens are

adequately protected and they are not influenced in any adverse or other manner. In cases like the *Paramanand Katara* case, it so happened that because of these kinds of accident cases, hospitals were very hesitant to admit patients because it became a medico- legal case. You must call the police and unless you call the police you cannot start the emergency treatment of the patients. In some cases, hospitals reject accident cases and do not give first aid, or emergency care because they fear police action, and they fear that they will be called to the court to be posed as witnesses. So, there is a lot of harassment that the doctors and hospitals face due to which they hesitate in admitting patients and giving them first aid. The Supreme Court changed this whole scenario, declaring the right to health as a fundamental right against both state and non-state actors. It ensures that hospitals will not reject patients, especially if they stabilize and give them fair treatment of emergency and first aid. So, the court comes to that kind of a level to elevate the sufferings that people have done due to accident or due to emergency medical treatment and right to health was declared as a fundamental right under Article 21 of the Constitution.

What is critical here is also to understand whether the right to life includes the right to die. This was a very interesting question that was laid down in a lot of cases like the *Rathinam* case and most importantly in *Gian Kaur v. The state of Punjab* case was decided in 1996. Committing suicide is taking one's own life. There are various means in which it can be done. You take your own life, or you ask the doctors to do it; it is called euthanasia. And whether the right to life can include the right to die. So initially the courts did say that the right to life can include the right to die. So, if you want to take a Samadhi, you want to sacrifice your own life in terms of walking yourself and not eating food or going on a hunger strike maybe. According to the court, the right to life can also be negatively inferred, meaning the right to die. But in *Gian Kaur v. The state of Punjab*, the court had a concern that the state has an interest in your life. There are families that are dependent upon your life. Saying that the right to life also includes the right to die, then that would result in a negative understanding of the concept. Life is to believe, life is positive, life is about gaining and fulfilling the expectations of life. There should be a positive thought and mindset when it comes to the constitutional dimension of life and personal liberty. So, giving someone the right to suicide as a part of Article 21, the courts did not agree with that. However, the courts in cases like the *Aruna Shanbaug* case have said that euthanasia is possible in critical illnesses, where someone is in a vegetative state and is unable to recoup or come back, and the doctors can decide to do what they would like to prefer.

Doctors like the word end of life care. So, taking away their life support system and taking a call on someone's life at such critical junctures, can the doctors and the hospitals take due care of the same. The *Aruna Shanbaug* judgment and the subsequent judgment has said that in India, it is possible to do passive euthanasia, but not active euthanasia. Active euthanasia involves someone being injected with something so that he dies, or someone being given a drug so that his life is taken out. That's an active euthanasia. So, the doctors

assist in your death, and they do an active assistance in your death. That kind of euthanasia, the courts have said, is not something that is permissible and should not be encouraged at all. Because in the legal system that we are currently in, we are not so mature enough, or so advanced that this can be provided for and this could amount to a lot of misuse and abuse, not only by the citizens who wish to take their life, but also by the hospitals and institutions. So the checks and balances will be absent in those cases. However, in passive euthanasia, a team of doctors and if the judiciary through a judge, decides that this is a fit case for committing euthanasia, or as end-of-life care, then a team of three doctors along with the judge can come to this rightful conclusion and the person can be relieved of his final journey. And passive, removal of the life support system may be done. However, again, while this is a judgment, the cases where such a euthanasia has been committed are not so very common for us to discuss or understand, but it is constitutionally recognized.

Right to free legal aid is an essential part of the right to life and personal liberty of the accused. Legal aid is something that every person who is unable to access justice is entitled to. The judiciary has stepped up this kind of a right of free legal aid by establishing the Legal Services Authority, at the state level, at the district level, and then finally at the national level. This authority is usually headed by a very senior judge, and a list of those people who want to be represented in the court as they cannot access the court and the justice delivery system for many reasons. The reasons could be financial or otherwise. Then the Legal Services Authority will appoint lawyers as defense counsels who will represent the accused and they will take their case and costs before the court of law. This also becomes an essential part of the right to life of an accused because an accused should not languish in the jail as an under trial, he has the right to come out on either bail or get a speedy trial. So, the right of both speedy and fair trial is also the right of life. That can only be ensured if legal aid reaches those marginalized sections of the people who have wronged the law, nevertheless, who have the right to get or seek justice from the court of law.

Right against solitary confinement was a kind of a colonial punishment that the jailers were used to. Just because you have been a convict doesn't mean you should be in solitary confinement, which means you don't have the right to socialize, talk. The very basic aspect that even a convict has rights and the convict has the ability to socialize was recognized in this case. And such treatments of solitary confinement in jails was abandoned, the court intervened and said this is something that must be stopped. In the criminal justice system, some of these reforms have helped establish the dimension of human dignity, even to a convict, even to an accused.

Right against handcuffing. Unless there is a threat that the accused is going to escape or if the accused causes any danger to public life, he shall not be handcuffed. Handcuffing was a common practice for every kind of accused. But the court said that is totally unnecessary because it is not a dignified way of treating an individual. And all individuals just because they have been accused does not mean they are hardcore criminals or a threat to society.

So, the right against handcuffing was also something that was pronounced by the courts on the right to life.

Right against inhuman treatment, in which there are so many degrees like, first-degree, second-degree tortures, which are done by the police and by the jailers at time in the prison and in custody. They have this tendency of misusing the power because they are within the four walls of the police station. So, any kind of inhuman treatment, which results in any kind of an injury to an individual in custody would entitle him to get rights. And this is a violation of his right to life. Because inhuman treatment cannot be administered in any democratic society. But the democratic value is that you have dignity even in death, and if anyone infringes the same, especially the state of the police, they are entitled to be punished for the infringement of the right to life.

The sanitation workers are called manual scavengers. Manual scavenging is a prohibited activity, namely, employing people to clean your toilets or toilet drains is completely now prohibited by law wherein you can only use mechanized systems, because a lot of lives were lost. A particular section or caste in the society were working as manual scavengers. Treating them in such a kind of inhuman manner has been now prohibited by law, employing these individuals for such manual work is considered as inhuman treatment and hence, that is also an activity that India and the Indian Constitution does not encourage. Rather for the employing of such manual scavengers, there is a punishment that is prescribed by law and it is a criminal punishment. It is a criminal offense because you are mistreating human beings and employing them for such kinds of jobs.

Constitutional Law and Public Administration in India

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Lecture-05

Article 21A and Article 22

The Constitution of India has brought about public administration in this country over the past 75 years of independence. The contribution of the Supreme Court and the High Courts, which are considered as Constitutional courts, which are also considered the custodians of the principles of the Constitution in this regard are highly appreciable. The courts, through what we call judicial activism, have been able to protect the right to life in India. A look at judicial activism, vis-a-vis article 21, one judge who stands out in terms of delivering the aspects of what right to life should mean, was none other than Justice P N Bhagwati. Justice P N Bhagwati always wanted to expand the horizons of human rights. He believed that human rights cannot be static but must be dynamic. He also said that human rights must advance as growth, development, and the country progress forward. He also believed in the moral and legal obligation of the judiciary to contribute to legal enlightenment and to remove the darkness that can be there in democracies and to light the lamp of justice. And for this, Justice P N Bhagwati always believed that the law of precedent, which means the law which are judicial verdicts of the apex or Supreme court must be respected and followed by all the the High Courts.

The High Court is to be followed by all the lower courts. The law of precedent and the common law, which is a law based on common sense, is based on basic human rights tenets. These two namely, the precedent and the common law can be the basis of judges to mould the legal system and to give it shape and direction because the legal system requires a direction to progress forward. Legal systems only nurture that kind of growth over a period. The responsibility of the judiciary has been significant in the country, especially in terms of trying to look at how law should progress forward and what should be the reading of law and what kind of limits to public administration can be imposed by the judiciary.

The Supreme Court and the High Courts have an inherent Constitutional power of what is called the power of judicial review. Judicial review means, the judiciary in the exercise of its Constitutional power as the custodian of the principles of the Constitution shall ensure that the organs of the government viz the executive and the legislature are within the

confines and limits of what the Constitution empowers them. So judicial review has been the touchstone of Indian democracy. And the judiciary has always been the protector of human rights. Hence, the judicial attitude in the country in terms of human rights can very well be understood vis-a-vis how the judiciary has drawn the scope of Article 21, which assumes a very positive right of right to life.

It is understood that the Parliament is supreme, no doubt in terms of laying the law, but it is a judiciary that is supreme in terms of interpreting the law and in upholding the validity of the legislative actions. The Constitutionality of every legislative and administrative action is to be tested by judicial review as is the case. The fundamental rights have a special kind of protection under the Constitution and that is why they are called fundamental, and not merely rights. Suppose the courts looked at the right of delayed execution. In India, there is still the practice of the death penalty, and there has been a lot of debate to take this away. The courts in the rarest of rare circumstances, where the nature of the crime is so heinous that it shocks the conscience of the society would grant a death sentence. In India, the death penalty is given by hanging. There are jurisdictions where death penalty is given by a lethal injection and in which other practices of death penalty are there, but the British practice of giving death penalty by hanging is continued.

Now in India, the courts have said that if a man is under the death penalty, there is a chance for the convict who has been sentenced to death to always file a mercy petition before the President of India. And the President of India will decide whether to accept the mercy petition. In case of acceptance the death penalty will be commuted to life imprisonment, that means to spend the entire life or rest of your life in jail. So sometimes because of executive inaction, there is an inordinate delay in deciding these mercy petitions. In those cases, the Supreme Court has found that it was most appropriate that such delay in deciding execution petitions must be protected under right to life. And hence, the death penalty that is pronounced to a convict must be commuted to life imprisonment. That also is a case that has been decided under right to life, which means right to life under Article 21 is available not only to free citizens but can also be exercised by accused and convicts. Right to travel abroad, as seen in the *Maneka Gandhi v. Union of India* case, also lays down the meaning of the right to life. That is the right to move freely across the territories of India as well as beyond the territories of India.

This kind of right is subject to restrictions under the Constitution, but unless they are reasonable and laid down by procedure of law, the right to travel abroad cannot be refrained or restricted. There are many nations where this right is not there like China or North Korea. The value of the Constitutional principle and Indian judiciary can only be realized if we look at some of these rights and a lot of Indians are migrating to other countries to study for work. There is a huge Indian diaspora in almost all countries across the world. Indians abroad are assuming political and judicial offices in many of these countries, solely owing to the decision of the Supreme Court in *Maneka Gandhi v. Union of India*, that one cannot

be stopped from going abroad, unless the principles of natural justice are followed and wherein it was held that a person's passport cannot be impounded except according to per the procedure established by law. The philosophy of judicial decision has been very clear that there can be very less restriction or restraint on the right to life. And this is something that can be positively enjoyed by Indian citizens under the principles of the Constitution.

So, any kind of restraint must be in public interest. And this would give rise to a new dimension of rights, because the three words right to life means so many other things. Right against bonded labour or the cruel and inhuman practice which unfortunately continues in some parts of the country. Whenever such an issue has come before the courts, they have abolished bonded labour, prohibited the same, and they have taken criminal actions. There are legislations that make it a crime. But again, you can work out of your own free will and choice, and you cannot be subject or forced to do some kind of labour.

Right against custodial harassment is important, which states that even if a person is in jail or prison, he has the right to dignity, as an accused, against any kind of custodial harassment which lead to a writ of habeas corpus and the courts can intervene in these matters. In many cases, victims or aggrieved individuals have approached the courts for protection and recognition of their rights. But in many other cases, many of these rights have been proclaimed by public interest litigations, or the concept of a PIL, where you are not seeking anything for yourself, but you are seeking something for a person who cannot access justice. Public interest litigation also is called a social interest litigation because you have a social cause, you do not have a private cause, it is not for something that you are doing. And public-spirited individuals can now approach the court for protecting someone else's right under Article 21 as well. Right to emergency medical aid was a landmark intervention of the Supreme Court. Before this right was proclaimed, suppose there is a road accident and an individual is injured, it was considered as a police case or a case that must be reported to the police immediately. The police may have to record the statement of the victim, and only then the doctors were allowed to give emergency aid. Now, whenever the doctors responded by giving first aid, emergency aid, trying to stabilize the patient, because his life must be protected first, these doctors were called to the court as witnesses, because they would have seen the patient, they would have seen the wound, and the status etc. of the injured person.

So to induce evidence about the gravity of the accident, before pinning of liability, the doctors would be called upon to the courts, and leave them feeling harassed by the system, because courts are not easy, it takes a lot of time, the doctor may be called once or twice and he has to spend the entire for having done a noble cause of saving life, facing the rigour of the legal system. These were times when the judiciary decided to step in, and they proclaimed that there is a right to emergency medical aid. And when such emergency medical aid is being provided, not in government hospitals, they have the duty of giving treatment to every citizen. This is about emergency aid being given even by private

hospitals in *Paschim Bengal Khet Mazdoor Samity v. State of West Bengal*, in 1996 and *Parmanand Katara v. Union of India*, in 1989 by the Supreme Court.

These were two cases that clearly established the fact that doctors have taken an oath, which is called the Hippocratic oath to save lives. And hence, they must save their lives and the legal system should not harass them, nor should they be called to the court to be a witness. They should save lives first, and then the police can go about their investigation. These two cases changed the dimension of the way life was being treated by doctors, hospitals, and emergency aid workers. This was a very significant turning point about how the right to life was protected in the Indian democratic system.

Right not to be driven out of a state is yet another important right because, the state in which one is born, that is the state of birth need not be the state where he is employed. And where one is employed is not the necessary place where he will depart from this material world. So, states in India should not create issues of driving away non-state individuals. The territory of India is one Union called Bharat. And anyone can stay anywhere, vis-a-vis the rules that are laid down, though there may be some kind of restriction in certain tribal areas, in certain hilly areas about whether you can buy land or not, is a different issue. No one can be driven out of a state he is employed in.

Right to fair trial assumes importance because trial, even to a person who has been found guilty, just before the trial also, as you can't pronounce someone guilty before it. In the Kasab case, where Kasab was found with an AK47 killing people, there were videos that were taken of him. It was quite evident that he must be held guilty for having caused the death of many innocent individuals. Even then Kasab was entitled to fair trial. After the trial, he was pronounced guilty and then executed through the death penalty process.

Right of prisoners to have necessities of life inside a prison and the right of women to be treated with decency and dignity, which is the principal rule of equality, are important rights. Right against public hanging using all these cruel methods was a practice in olden days is also an important right. There is the right to be heard as well. And these were some of the rights that were there in 21. But there are the New Age rights under 21 read with Article 19 and 14. All these rights are in the golden triangle that are required for human existence and human development, and the New Age rights are under the golden triangle. For example, the right to information. Today, we have a law called the Right to Information Act of 2005. It was read under Article 19(1)(a) under the Freedom of Speech and Expression. Then there is the right to reputation, right of ID from a judgment of conviction, right to show some security and protection of family, right to economic and social justice and appropriate life insurance, all of these are basically rights.

You cannot be arrested at midnight and women cannot be arrested after 6 pm unless there is a critical threat that they may escape the provisions of law. Noise pollution, environment,

and electricity are also new rights that have been recognized. Right to electricity now has become a very important right because right to housing also has been recognized as a part of right to life. Right to education is something that is included now under Article 21 A. Right to education has been a matter of various judicial verdicts before this was brought about as a Constitutional amendment.

The right to free education up to 14 years is now a fundamental right which the state government is responsible to provide. But the duty of the state to provide education has always been something that has been laid down by the courts from time to time. They have restricted the so-called business of education to know whether capitation fee management seats can be created. And the state when it provides education, it should provide it with a social welfare purpose. So, on education, the courts have been intervening from time to time and they have been able to support the fact that the right to education can be converted as an explicit right which is now enumerated in the Constitution. The Constitution 86th Amendment Act of 2002 brought Article 21A into the Constitution. As per Article 21A, the right of education is free, compulsory, and safe and shall be quality education without discrimination on the child's economic, social, or cultural backgrounds. The courts have read Article 21A as a fundamental right as well. So bridging the gap between government schools and private schools, the right to education now is something that you have as a compulsory free education, irrespective of whether it is a government or a private school, and such a right shall exist under Article 21.

Article 22 of the Constitution of India gives protection against arrest and detention in certain cases. Article 22(1) says that no person who is arrested shall be detained in custody without being informed as soon as may be, of the grounds of such arrest, nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice. So, these are certain safeguards in Article 22 given to people who are arrested or detained which are as follows. First, they have the right to be informed about the grounds of their arrest as soon as possible. They should have the right to consult a lawyer of their own choice, and they shall be produced, and they shall be produced before the nearest magistrate within a period of 24 hours of such arrest according to Article 22(2).

However, in calculating these 24 hours, the time necessary for the journey from the place of arrest to the court of the magistrate can be excluded and no such person shall be detained in custody beyond the set period of 24 hours without the authority of a magistrate. Article 22 of the Constitution does give a very important safeguard to people who are arrested. And this is an executive action. The Constitution itself speaks of the duties of public administration, especially the policy or the exercise of the powers which must follow the fundamental rights guaranteed to an accused or a convict under Article 22.

These safeguards are based on the principles of natural justice that if there is any kind of action that is going to be taken against you, you must be told and be informed about why

an action against you has been taken. It is the fairness required under the principles of natural justice, that is the right to be informed. It is the duty of the state and its executive officers or the public servants so that they must serve the public first and inform the public if any adverse action is being taken against them. Now, this principle of natural justice is a principle of administrative law, and is a principle of public administration. This must be followed both in civil matters as well as in criminal matters, more so in criminal matters, because unless you follow the procedure established by law, you do not have the right to infringe someone's right to life.

So, informing the grounds of arrest is critical and important and the accused or the convict can make a rightful defence before the court of law, he can try and prove his innocence as well. So, the reasons for the arrest must be clear, and they must be communicated as soon as possible. This will ensure that any kind of arbitrary arrest or detention can be checked through judicial review. And hence, producing someone before a magistrate within 24 hours clearly means that the magistrate will apply his judicial mind through the checks and balance theory. He will check the police power, whether they have exercised the power appropriately and whether it is so very essential to detain someone, or he can be granted bail.

As the Supreme Court has said, and reiterated on numerous occasions, even recently, that right to bail must be granted in all bailable offenses and they cannot be denied and as far as possible. Until someone is held guilty, the police or the state must refrain from arresting them. So, bail is the rule and jail is the exception. The police officer though has discretion in making an arrest, it is not a discretion that should be abused or misused. It can be checked, and the courts can intervene, and judicial mind can be made applicable on whether the arrest was necessary, whether the arrest is right, and whether there was a *prima facie* case to establish that the accused has committed a crime. So, all of these are important and that is why a person who is arrested shall be produced before a magistrate within 24 hours of arrest.

Now, there are some exceptions in Article 22. It says that Article 22(1) and Article 22(2) shall not apply to a person who for the time being is an enemy alien. So, someone who has been an enemy of the state is an alien and not a citizen. So, it could be a spy from some other country. An Indian citizen who is a spy can claim Article 22 but an enemy alien, meaning a non-citizen from an enemy state, cannot do so. So, Article 22 or the protection under Article 22 will not be applicable to them. Preventive detention law also is an exception under Article 22. So preventive detention law is used in extremely rare circumstances to maintain law and order. The Constitutionality of such law has always been questionable and has been challenged. But the Constitution says that Articles 22(1) and 22(2) shall not apply to any person who has been arrested or detained under any provision providing for preventive detention. Preventive detention is used against notorious rowdies or those who are habitual offenders who are kept detained. So, it's

preventive detention and not arrest; it could be a house arrest or preventive arrest, so it's not necessarily a ground or allegation that you have committed a crime, it is just that you should not be involved in the same.

So, to prevent someone from getting involved in crime, such kind of actions can be exercised against people who have a criminal record. In those circumstances, if the preventive detention law is the basis of your arrest or detention, then the protection under Article 22 is not available. So, Article 22 has seven such clauses. And hence, it gives you an idea of how meaningful and important arrest under the Indian Constitution is and why the grounds of arrest must be informed, because only then you can test and check whether the grounds are fair, reasonable etc. While Article 22 is an independent article, Article 22 is under the provision of right to life. So, it promotes and supplements the right to life. So the right to life of citizens includes the right of life under arrest and detention as well. Sometimes the right of deportation of alien enemies must be exercised. In those circumstances, when deportation of some migrants or aliens are going to take place, then the provisions of Article 22 may not be applicable.

There are a lot of cases and issues that are related to Article 22. For example, one being that suppose you must be informed of the grounds of arrest should documents regarding the grounds of arrest should also be given to you. While you can seek documents, it is not necessary that every document is going to be given to the accused substantiating the grounds of arrest. What is important is many of these documents will be submitted to the magistrate as evidence. And hence, while documents are vital, it is not a rule that every document should be supplied, which is stating the grounds of arrest. However, the warrant in case you have taken a warrant must be issued and the information must be mandatorily provided for which can help someone come out of that kind of detention as well.

The right to be consulted is a very important right and to be defended by a legal practitioner is so very important. This is mandatory and if someone cannot exercise the right to consult on his own, there is established what is known as the legal services authority, that is the National Legal Services Authority, state, and district legal services authority as well. Anyone who has income less than a threshold, for example, in Karnataka, if the annual income is less than one lakh, you are automatically entitled to legal services. You can seek the state's help in getting your representation. Such a right of legal aid is a right to life. The right to legal aid or the right to access to justice is very important to ensure democratic values and to check abuse of the provisions of the Constitution. If one looks at the direct instance of state policy that is Part IV of the Constitution, one will notice that there are certain principles that the states must follow and providing access to justice is one such state duty. The state particularly has this duty casted upon itself. And under Article 39(e) of the Constitution of India.

Article 39(a) talks about equal justice and free legal aid and is a Constitutional mandate right now. It is the duty of the state to provide the same. Currently, the state Legal Services Authority appoints lawyers known as defense counsels. These lawyers must defend those who are arrested and detained. They must provide defense against state action or inactions. That is their primary duty and they are fully paid by the government just like a government pays prosecutors to prosecute offenses. Here you have defense counsels who will argue against the prosecution and defend the arrested person or the detained person. So, Article 39(a) which provides equal justice and free legal aid, was introduced by the Constitution 42nd Amendment in 1976. The 42nd amendment in 1976 happens to be one of the major Constitutional amendments that brought in several reforms, both in the enumeration of how the Constitution is written, and its interpretation, and especially post emergency the judiciary started playing a very active role. Article 39(a) of the Constitution supplements Article 22 and reads as follows: the state shall secure that the operation of the legal system promotes justice on the basis of equal opportunity and shall in particular provide legal aid by suitable legislations or by schemes or in any other way to ensure that the opportunities of securing justice are not denied to any citizen by reason of his or her economic or other disabilities. So, Article 39(a) is part of the Constitution. Someone's access to the court and justice system shall not be deprived because of his economic or other any kind of disability conditions. The question on the *Kesavananda Bharti* case which later came on the basic structure doctrine is one of the landmark judgments in Indian history. It completed 50 years of this doctrine into the Constitution, which means we should consider which are the basic features and structures of the Constitution which cannot be amended at all or taken away. Article 22 is one such basic structure as well.

Article 23 of the Constitution of India deals with right against exploitation and looks at prohibition of traffic in human beings and forced labour. So, trafficking in human beings is a major criminal conduct. And trafficking happens across even borders. So, poverty is misused, and is the basic reason why there is so much human migration, human exploitation. And the Constitution of India provides for some kind of protection, it provides for state action against human profiting. Because there are so many forms of bonded labour. They can be quite modern because the older bonded labourers were with chains being attached. Slavery was one such, notorious way of bonded labour. But there are so many other bonded labourers that are created through the debt system. The Zamindari system also created bonded labour. There is a clear prohibition by the Constitution, which makes a statement that you cannot practice bonded labour and you cannot engage in human trafficking. This is kind of a legislative prohibition or regulation. But keeping this in the Constitution clearly emphasizes the importance that the Constitution gives to certain values of respecting human beings and protecting human rights. The right against exploitation is human rights and it means that you cannot be forced to work, and you cannot be a bonded labourer for any reason, be able to have debt or some kind of obligation that you owe towards the individual. And you cannot use human beings for your own selfish interest,

that is you can't employ a beggar to beg for you. That would also amount to some kind of human trafficking. Engaging sex workers and trying to gain a living from the fact of the sex worker is also one form of human trafficking.

The state ought to give equal opportunity of employment to every individual without any discrimination, based on any religion, race, caste or classes as they were. That is very important for the state to practice. Engaging children in labour is prohibited. The Supreme Court has been protecting the rights of the child also there are so many international conventions to which India is a party, the notable ones being the Convention on the Rights of the Child. The Supreme Court has intervened on child labour and done a very noble service in protecting child rights in this country. Through several cases, including the most popular cases called the *Bandhua Mukti Morcha v. Union of India*, in 1997, Supreme Court judgment. The courts have clearly said that the states must enact legislations that prohibit child labour. So, children have only the right to education and employing such children is an offence. The health of the child is the duty of the state. Under some of these legislations, children were not allowed to work in hazardous industries. Anyone less than 18 years old is a child. But a child between 14 and 18, can be employed but in a non-hazardous industry. So, between 14 and 18, under certain conditions, children can work, like in a startup, entrepreneur, he can employ people, work in one's own farm in their own house. But not in a hazardous industry or in a capacity where the health is impacted, or innocence of the is exploited by any chance.

So, the Supreme Court has given a lot of directions on education, health and nutrition of children. Employing children as prostitutes or sex workers has also come to the purview of the Supreme Court through a lot of public interest litigations. Under Article 23, the Supreme Court has very clearly shown the path of, treating this as a very serious and heinous crime of pushing children into sex trade or sex workers. It is not only children of India, but even those who are coming across the border, the Supreme Court has very clearly less patience regarding all of these.

The Devadasi system is practiced in India. In *Vishal Jeet v. Union of India*, a 1990 Supreme Court judgment, the Devadasi system was also reviewed by the Supreme Court. And the Supreme Court did not approve of these kinds of systems that bring down the modesty of women, dignity of women, and don't treat them equal under the justice doctrine or justice idea of the Constitution of India. Article 24 is like Article 23, it's right against exploitation, but it is very specific in terms of saying that there is prohibition on the employment of children in factories, because factories are considered inherently hazardous activity.

So, you cannot employ any child. But the prohibition is up to 14 years. So, after 14, you can work based on certain types of industries. There is a clear prohibition of employing children in mines. For even 14 to 18 year old children, mines as well factories are considered hazardous. The term what is hazardous has been a kind of a challenge because

in some cases, it was asked whether a construction industry is hazardous or not. The Supreme Court has visited this sometimes and has concluded that the construction industry may not be so, but use of cement construction industry can impact safety of the workers. So, state governments have passed regulations on prohibition of children in construction works as well.

Constitutional Law and Public Administration in India

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Week- 05

Lecture-06

Right to Freedom of Religion

The Constitution of India provides for the right to freedom of religion. The preamble talks about secularism, or a secular state, which means the state shall not have a religion of its own, and citizens are free to exercise their own religious freedoms under the Indian Constitution. So, Article 25 says that freedom of conscience and free profession, practice and propagation of religion is allowed. However, this is subject to public order, morality, and health. Since India has had a great heritage for religious harmony, people from different religions have lived peacefully and harmoniously for many years now in this country and this country has welcomed all forms of religion. With the refugee status given to the Dalai Lama, Buddhism also has now become an integral religious part of the Indian country. Religion is usually a matter of belief or faith. And the Constitution of India recognizes that this belief or faith must be protected, and one should get the freedom of religion. Hence, there are four Articles that are dedicated, from Article 25 to Article 28, that deal with ensuring or securing the secular model of governance in the Constitution.

The Indian Supreme Court has time and again come in terms of trying to interpret these freedoms and the apex court has in *Kesavananda Bharati* said that secularism is a basic feature of the Constitution and hence, the state will protect the rights of citizens in all religion. A reading of Article 25, says that nothing in this Article shall affect the operation of any existing law or prevent the state from making any law, which may regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practices, which means the state can make law in the matters of religion, especially in trying to regulate or restrict economic, financial, political or other secular activities. So, the state can also go ahead in providing social welfare and trying to reform or in trying to open Hindu religious institutions of a public character to all classes and sections of humanity. So, in terms of caste, religious institutions cannot regulate.

So, the state can make a law. The rule of equality applies over here because the state shall treat all religions equally as a principle and all persons are equally entitled to the freedom of conscience and the right to freely profess, practice, and propagate their own religion. However, to propagate would not mean conversion. Explanation 1 to Article 25 says that

the wearing and carrying of Kirpan, which the Sikh do shall be deemed to be included in the profession of the Sikh religion. So as a matter of Constitutional recognition Kirpan can be carried by Sikh as a part of professing their religion. Explanation 2 says that the reference to Hindus shall be construed as including a reference to a person professing the Sikh, Jain or Buddhist religion and the reference to Hindu religious institutions shall be construed accordingly. So, Sikhism, Jainism and Buddhism are an integral part of Hinduism under the Constitution of India. So, why we talk about the requirement of a uniform civil code in this country has been a debate. Article 44 of the Constitution of India requires us to make such a law called the Uniform Civil Code, because it is a religious law that determines your personal space, your personal life, your family life, including inheritance and succession. While there is a rule of equality that the state must treat all religions equally, this obligation of the state is to also ensure that every citizen within that religion is also treated equally.

There are some very interesting issues that were addressed under Article 25, regarding an institution called the Ananda Marga. Ananda Margis have the right to perform tandava as was held in this case of 1984. It was considered part of their essential religious practice. This is a doctrine that the Supreme Court has evolved, that if it is an essential religious practice, it can be protected under the right to freedom of religion. If it is not a very essential religious practice, then it cannot be protected under the right to religion. The best-case scenario to explain this is the use of loudspeakers. There is a case called the *Church of God (Full Gospel) v. KKR Majestic Colony Welfare Association*, a case decided by the Supreme Court in 2000, wherein the court said that no religion prescribes that the prayers should be performed by disturbing the peace of others. Nor does any religion preach that they should be using during the religious activity, voice, amplifiers, or the beating of the drum. So that kind of practice, which adversely affects the rights of others cannot be included as essential religious practice, getting protection under Article 25. Use of loudspeakers under the ambit of right to religion, profession, practice and propagation will not be permitted. Generally, the state is not allowed to interfere into someone's religious belief by any chance, but it may be required on the grounds of public order, morality and health and environment.

Article 28 clearly says about freedom as to attendance at religious instructions or religious worship in certain educational institutions. No religious instructions shall be provided in any educational institutions only maintained out of state funds. No person shall be forced into any kind of religious practices in state aid institutions. In a case called the *Bijoy Emmanuel v. State of Kerala*, popularly called as the national anthem case, there were three children belonging to a sect called the Jehovah's Witness worshipping Jehovah who was worshipped as the creator, and they refused to sing the national anthem. According to these groups, singing Jana Gana Mana was against the tenets of the religious faith. These children stood up respectfully when the national anthem was being sung daily. They stood in silence, but they did not sing because they believed this as per their religion and in honest

belief that they cannot sing the same. A commission was appointed to enquire into the matter and in the report the commission stated that these children were law abiding and did not show any disrespect. However, the headmistress under the instruction of the deputy inspector of school expelled the students. The Supreme Court held that expelling the children for not singing in the national anthem violates the freedom of religion. Fundamental rights guaranteed under Article 19(1)(a) which is a freedom of speech and expression [which includes the freedom to remain silent] and Article 25(1) has been infringed in this case. It was further held that no provision of law must compel or obligate anyone to sing the national anthem and it is also not disrespectful if a person stands during the singing of the national anthem. The singing of the national anthem has been an issue quite recently as well. There was a Supreme Court judgment which said that a national anthem should be played at the beginning of every movie that is being screened and it expected citizens who went to the theatres to stand during that national anthem so that some kind of patriotism can be shown during such public assemblies or public gatherings. So, this has been an issue under the right to religion like where do you balance the interest of the right to religion and the right of patriotism, national security, integrity.

Under Article 25, there can be some restrictions that can be imposed. Public order as a restriction appears in two parts of the Constitution and they should mean one and the same thing. It appears in Article 19(2) of the Constitution. So public order means your freedoms under 19(1) are subject to the restrictions given under Article 19(2). So, the freedom of speech and expression, the freedom of movement, are subject to public order. And here also the right to religion is subject to public order. So, in your religious practices if you are going to infringe any kind of public order, to that extent your right to religion will be subservient and it can be curtailed, restricted, and regulated as well.

Communal violence in our country has been a kind of a challenge for the state to address. The frequency of communal violence has reduced in the last couple of decades, but this was quite a prevalent issue for the state to manage. When temples and other religious institutions are affected by frequent communal violence, the state is duty bound to maintain public order. This is something that religious institutions can claim as a matter of their freedom of religion. Because communal violence affects one's religious practice, religious faith, and religious ceremonies and if the state does not maintain law and order, freedom of religion itself becomes completely redundant and irrelevant.

While the courts have said that religion is a matter of faith, but the belief in God is not essential to constitute a religion, they have also said that the doctrine in each religion, what is so essential and what is not, is left to different religions for them to determine. Also, the courts have said that the philosophy of the religion is different from the religion itself. Time and again the courts have tried to look at the various dimensions to religion. If faith, philosophy, and religion are essentially different, then it can be so. One of the issues that

have been is about gender equality or gender equity that religious institutions are expected to follow.

When you are talking about a public premise or a public temple, then you cannot have the right of admission to serve, you cannot take matters into your own hand and determine who can enter and cannot enter a temple. There were controversies of Yesudas trying to enter the Guruvayur temple. There were controversies about whether women can be priests in Hindu temples. There was controversy about whether women can enter Sabarimala temple as well. So, this essential religious doctrine now has become a very important doctrine for the Supreme Court to determine what should be protected or what should be excluded under the garb of freedom of religion and what should be permissible in terms of the public character of such places and institutions. In *Adithayan v. Travancore Devasthanam* board was a case about a non-Malayali Brahmin to be appointed as a priest in a temple in Kerala. The court held that if a person is well versed, properly qualified and trained to perform the puja in any appropriate manner and worship the deity, then such person shall be appointed as the pujari of the temple despite his caste. So, caste cannot be the basis of determining who the priest in the temple is.

And hence, it was observed that a temple is not a denomination where there is a specific form of worship that is required by a particular caste and hence a qualified, well versed and trained pujari should be permitted to perform puja in the temples as well. Of course, taking over certain Hindu temples has been challenged as being Constitutionally valid or not. In certain places, the right to perform puja by a particular kind of community was abolished. For example, in Kashmir, Mata Vaishno Devi Shrine Act of 1988, was enacted and the administration governance and the management of the shrine was vested in a board instead of a family that was managing that kind of a shrine. So, the Supreme Court held that such an act where the state breaks over and denies a particular family or a group of individuals from managing a shrine or a temple can be considered to be Constitutionally valid and that family after the temple has taken over cannot claim the right to do the puja. So, the state in public interest can always take over that.

A question arose whether Triple talaq has an essential religious practice connotation in Muslim law and can be protected under Article 25 as the freedom of religion, practice, profession, and propaganda. The courts very clearly have said that this is a practice in the Muslim community and in a 3:2 majority, the court ruled that the practice is illegal and unconstitutional. The court held that an injunction would continue to bar Muslim men from practicing Triple Talaq till a legislation is enacted for this purpose. The government did formulate a law for protection of rights of women in marriage, especially in Muslim law and Triple Talaq now has become an offence.

Morality and health were part of the restriction that you can exercise on freedom of religion. So, in the name of religion, any kind of atrocity, any kind of discrimination, any kind of

harsh, illegal, irregular treatment of women can be regulated by the state. Very recently, in a case called *In Re noise pollution* case, and one arising time and again, especially in the month of November was whether firecrackers can be used during the valley. Now, in a city of Delhi, which has had a very long history, more than three decades of history of very bad air pollution, the government of Delhi has banned firecrackers. Initially, they regulated it, then they banned it. In between there were green firecrackers, but still they were polluting and affecting health. So, in general, when the state makes a law in larger public images, and they may want to ban a particular kind of activity, seize certain kinds of equipment or certain kinds of issues, this is largely done in terms of controlling air and mass pollution. Now, during your essential freedom of religion, if that practice of religion is affecting the larger community and the larger environment, then a complete ban on firecrackers can be justified.

So, public order, morality, and health. Now health is critical. Firecrackers affect the right to health and the right to clean air and environment. Burning firecrackers or killing the effigy of Raavana during some of the Indian festivals can be controlled and restricted. Or you can look at certain kinds of eco practices to exercise your freedom of religion. The courts have come down heavily on these kinds of management of religious affairs by the community. And they have very clearly said that religious denominations have to adhere to the guidelines of the Supreme Court, because the larger health of the community is something they are bound to respect and follow.

Now, of course, there has been some criticism saying, why only Hindus have to have these restrictions and why not other religions, it is better to look at the objectivity of the intervention of the court. The objectivity of the court is very well established, saying that there can be a ban, complete ban on firecrackers, especially at peak air pollution time. And that is the time when Diwali comes. The right to health of communities and people must be given paramount protection under the Indian law.

Article 26 of the Constitution of India does allow for freedom to manage religious affairs to any section of the community and the right to establish, maintain institutions for religious and charitable purposes. As a religious institution, you can have your own, you can do your own affairs, you can own and acquire movable and immovable property and you have the right to administer such property in accordance with law. So, while Article 25 guarantees the right of individuals to practice professing religion, Article 26 allows institutions to have the freedom of religion. So, that is the difference mainly between Article 25 and Article 26. So, Article 26 is protecting what we would call as the collective right of a particular denomination of religious people or citizens. While Article 26 is for collective exercise or right to religion, it is also subject to public order, morality, and health. And that is why the Supreme Court has always said that there are three conditions to be completed before the freedom under Article 26 can be exercised first. That the collection of Individuals who have a particular kind of a belief or who believe that they are in one spiritual congregation,

so they must have that kind of a belief that they belong to one sect or one community or one kind of religious belief, they should have a common organization and they must have a distinctive meaning. And for example, the Supreme Court has said that Ram Krishna Nishan can be exercising the right under Article 26. The Ananda margis are also religious denominations within the Hindu religion itself. And the Aurobindo society, unfortunately, has been held not to be a religious institution. So, while Ramakrishna Ashram and Ananda margis have been given the protection under 26, Aurobindo society is not considered as a religious denomination.

Article 27 clearly lays down that no person shall be compelled to pay any tax for the promotion and maintenance of any religion. So, there is a kind of a tax exemption. While we look at maintaining secular order, we should also maintain the fact that while religious denominations need not be taxed, the state shall not spend public money for the promotion and maintenance of a particular religion. That is also something that must be clearly looked into. Article 27 of the Constitution says that it prohibits the levy of tax, but not fees. So, which means there is a difference between tax and fee. And sometimes to look at what we call a secular administration, a fee may be part of what can be levied to say those who are attending the religious event. For example, if you are taking a yatra to the Amarnath caves, then can the government charge a particular kind of fee. That cannot be considered as a tax, if there is an expenditure that is involved by the state to take the pilgrims from one destination to another to take them safely and to see that the yatris don't suffer any kind of harsh weather or harsh conditions. The government must take certain kinds of steps and measures for which a fee can be levied on the pilgrims. And it is important to give them some services. It could be medicine, hospitals, food and or it could be taking such safety measures to reach the holy place or holy cave as in the case of Shiv Linga, which exists in the Amarnath caves.

Under Article 28 no religious instruction should be provided in any educational institution, which is maintained only out of state funds, which is also a very important declaration under the Constitution of India. And it clearly says that state aided institutions must be secular, and they shall not have religious instructions, to increase the rights of students from other religions as well. There are religious institutions which are managed by endowment trust. And endowment trusts are not necessarily the ones that receive state aid or state funding. So, in such kinds of institutions, religious instructions can be imparted. But when state funds are received, the secular character of the educational institution shall be maintained at all instances.

Article 28 makes a distinction between four types of educational institutions. First and foremost, it says those institutions wholly maintained by the state, institutions that are administered by the state, but established under the endowment of a trust, institutions recognized by the state and institutions that receive aid from the state. So, you can make a

distinction where Article 28 applies. You cannot administer religion to a minor without his consent, or without the consent of a guardian. So, these schools must refrain from religious instructions, unless they have been permitted to do the same as a private endowment or a private trust. The private endowment and private trust have been established for imparting religious instruction itself. So that is the main purpose. So, once you have that kind of recognition, then you can go ahead and impart such kinds of instructions. In India, it is not only about religious instructions in state institutions that is to be looked at in schools, but also in terms of universities as well. So, for example, we have an institution called the Aligarh Muslim University. Aligarh Muslim University was established under a legislation in 1920. And while we say that Aligarh Muslim University is for Muslims, that is not the exact purpose of the university itself. So being brought to legislation, this is not an institution that can promote only one religion, it is not an institution where religious instructions can be imparted.

Article 29 and Article 30 talks about protection of the interest of minorities, especially in managing their cultural and educational rights. Article 29 provides that any section of citizens residing in any part of India, and whatever distinct language, script or culture they may have of their own, shall have the right to conserve the same. Minorities are linguistic minorities, because they may be from a small region with a small language of their own. They may be cultural minorities, because they are a small sector of a community, which has a distinct culture within a given state already, because initially when states were made in India, they were made on linguistic lines. And then we subdivided it based on even cultural aspects like the hilly region as in the plains.

So, when Uttarakhand was crafted from Uttar Pradesh, it could be both based on cultural and other kinds of criteria that was required. But what Article 29 very clearly protects and provides is that you shall have the right to preserve your language, your script and your culture. And this is part of a citizen's right under the Constitution. Further, this Article also in one sense states that no citizen shall be denied admission into an educational institution maintained by the state or some institutions that receive aid from the state on the grounds of race, religion, caste, or language. So, there cannot be discrimination in state- aided institutions based on religion, race, caste, and language.

Educational institutions must open their doors and treat everyone equally. And hence discrimination on the ground of race or religion, or even caste or language cannot be made. Article 29 grants protection to both religious minorities as well as linguistic minorities, because religious minorities could differ from one state to another. For example, in the state of Jammu & Kashmir, which is now the Union Territories of Jammu & Kashmir and Ladakh, Hindus may be a minority. So, when you look at all over India, Hindus may be a majority, but if you look at one state, there could be one religion and people of that region who can be considered as minorities. So as soon as you come within that status of being a minority, you can claim the protection under Article 29. Further linguistic minorities can

also claim protection. And the Supreme Court has held that the scope of this Article is not necessarily restricted to minorities, as we commonly assume them to be. It must differ from state to state and from region to region. And if a minority committee wants to protect its language, there is a provision in the Constitution to recognize such kinds of languages. And the conservation of any language shall amount to the rights of the citizen under the Representation of People's Act 1951 as well.

Article 30 is the right of minorities to establish and administer education institutions. So, 29 is about protecting your culture and language. And to do so, can you establish and administer educational institutions? Article 30 grants this kind of right to both religious and linguistic minorities. So, they can establish and administer educational institutions of their choice. And they can look at acquisition of property, they can hold such property. And this is guaranteed to them in terms of what we call the protection of minority rights. And the state has a duty and an obligation not to discriminate against educational institutions that are specially managed by minorities. Under Article 30, the right to establish and administer educational institutions is not a general right. It is only a right given to minorities. The majority population cannot claim the right under Article 30. There is a distinction about those institutions that seek aid from the state and those institutions that seek recognition from the state. The kind of syllabus that are prescribed in some of these minority institutions can be a subject matter of the regulatory power of the state. So, the state can lay down standards of education, employment, prescribe the syllabus or the academic kind of curriculum in these minority institutions through its regulatory power.

The state shall not, in any way, issue guidelines, which could be guidelines such as guidelines on labour law, guidelines on taxation and so on. The state can lay down those kinds of rights while the citizens have the right to establish these educational institutions. There is some autonomy for institutions under Article 30. The autonomy is that these minority institutions can decide who their governing body should be, they can decide the rules and regulations and what kind of faith or confidence they should have in the management of the affairs of the institutions or who should manage it.

They have some autonomy in terms of appointment of teaching staff who should it be, and they can act against such kinds of staff that have shown dereliction of duty. They can admit students of their choice and set up reasonable fee structures and they can use their property and assets to benefit the institution. So, these are some kind of autonomous powers that are granted to institutions established under Article 30. While Article 30 gives this right, it is the duty of these educational institutions to ensure equality as far as possible within that minority community itself and they must provide the opportunity to give the disadvantaged citizens in that minority community. So, it is important that they understand that while there is a fundamental right given to establish, they should not violate social welfare, they ought to not create any law-and-order situation, health, and other national interest issues.

The character of minority institutions is that they must be subservient to the Constitutional goals and the welfare of students and teachers will be paramount and any kind of regulation that the state makes on the welfare of students and teachers must be adhered to by the minority institutions fully. If these institutions in some form have been getting aid from the state, then all the guidelines that the state imposes for such institutions must rigorously be followed. So, you can exercise all your rights, but this is the condition based on which these rights are to be exercised and reasonably enjoyed.

Constitutional Law and Public Administration in India

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Week- 06

Lecture-01

Right to Constitutional Remedies - I (Article 32)

The last part of fundamental rights under the Constitution of India, warrants discussion on two articles, namely, Article 31 and Article 32 of the Constitution. Article 31 of the Constitution is also a very critically important article. However, this article now stands removed from the Constitution, though not entirely but in its larger context. Article 31 as it was adopted in the Constitution, stated the right to property as being one of the fundamental rights. But by the 44th Amendment Act of 1978, this was taken off and it was put in Article 300 of the Constitution. That is why the right to property no longer is a fundamental right. The acquisition of state is provided under Article 31A. Most of the land reform legislations did look at acquisition of states. The State took over a lot of entities and corporations. In the 1970s and 80s, while we were influenced by the socialism theory of government or democracy, we did look at nationalization of banks and public sector undertakings being established. Government took over the duty of doing a lot of businesses, extraction of mangroves, running of trains and buses, and so on and so forth.

The duty of the state vis-a-vis what it wanted to do with private property in terms of acquisition warrants discussion. There were these jagirs that were there in the princely states and hence those jagirs could be taken by the government and only the state could own a state and that was provided for in the Constitution. Article 32 speaks of Constitutional remedies which are the core and important aspect of the fundamental rights chapter. The architect of the Constitution, Dr. Ambedkar had clearly stated that Article 32, is the very heart and soul of this document called the Constitution of India. It is really very important for citizens to have Constitutional remedies, without which rights that are guaranteed under part III of the Constitution will only remain rights, they will not remain fundamental. They may remain legal, but they will not remain fundamental. So, without Article 32 and Article 226, which are called the writ remedies of the court, these rights would not be fundamental or core.

So emphasizing that Article 32 is the most important article he said that fundamental rights would be of no use unless a proper mechanism was developed for citizens to avail these

rights and enjoy them in a meaningful manner. And, if they are not able to exercise any kind of remedies, then the rights will be of no use. Article 32 is the right to move to the Supreme Court by appropriate proceedings for the enforcement of one's rights. There is India, the hierarchy of the court system in the judiciary that starts from say the district level and within the district level, there are criminal and civil courts, if you are an aggrieved individual.

The principle of locus stand exists for one to go to the court and claim the appropriate remedy, either against state or against private individuals as well. From the district court, you are supposed to seek the appellate jurisdiction of the High Court from the High Court, you can appeal to the Supreme Court. In certain cases, appeal is a discretion of the court, the court may grant you or admit your appeal or may not admit your appeal. But in most cases, like for example, in case of an accused having been given the death penalty, then the appeal is kind of right so that the Constitutional court or the apex court can actually decide whether it was appropriately granted, or it was not. From the High Court, you can appeal to the Supreme Court, from the Supreme Court, you can take a review within the Supreme Court, from a two judgement to a three judgement and then the mercy petition as it were, in case death penalty is being awarded, goes to the President of India.

However, under Article 32, the point that one should realize is that you do not have to go under the rigour of district, High Court, Supreme Court and any other court or any other review of the Supreme Court but you have the right to go to the Supreme Court directly. It is possible to cut short this time and the rigour and process that is established by the judiciary and you go to the Supreme Court directly, in case you think there has been a breach of your fundamental rights by the state or by any other authority. This 'any other authority' has been discussed under Article 12 of the Constitution. Courts generally have two broad jurisdictions. One is called the appellate jurisdiction.

From district to High Court to Supreme Court, is usually an appeal process. So, the Supreme Court is then considered as an appellate court. But when you are approaching the apex court directly, then you are going under what is called the original jurisdiction. Article 32 is an original jurisdiction suit. Wherever a citizen feels that his fundamental rights are going to be infringed or violated, or he finds that the machinery to exercise his right is not very effective, then he can directly approach the Supreme Court under Article 32. Article 32 grants us a right to move to the court and seek the enforcement of your rights. The Supreme Court has power under Article 32 to issue directions or order or any kind of writ for the enforcement of any fundamental rights. And the writs that are generally issued under Article 32 include, the writ of *habeas corpus*, *mandamus*, *prohibition*, *certiorari* and *co-warranto*.

The writ of *habeas corpus* is usually used to get a person who is in detention. *Habeas* and *corpus* mean to produce the person before the court of law, so that his rights can be

determined, either in detention or in custody, or vis-a-vis state exercise and abuse of power. The writ of *habeas corpus* is generally being used vis-a-vis police action of the state. And law is created by the legislature, but it is the executive that implements the law, and, in its implementation, the executive may violate the principles of natural justice, or the principles of protection of fundamental rights, and hence, the courts will intervene by issuing a writ of *habeas corpus*. This writ in current times has been utilized even for producing a person who is missing or who has gone missing and requesting the state to take actions to find the missing person.

Any person in the eyes of law can seek the intervention of the court, Supreme Court under Article 32 for the protection and the preservation of his fundamental right, and he can ask the court to protect his interest by issuing these kinds of writ. So, is Article 32 a fundamental right itself? The answer is yes. It is one fundamental right being used for enforcement of all other fundamental rights through the help of the court. Interestingly, if you see the power of the Supreme Court and the power of the High Court are two distinct powers because one is under 32, the other is under 226. The wordings are almost the same because the writs that the courts of the High Court and Supreme Court issue are one and the same. But when one can go to the High Court and when he can go to the Supreme Court is left to the individual choices because Article 226 can also be utilized in case there is a violation of fundamental rights. However, Article 226 is a little bit broader and wider because under 226 apart from fundamental rights, one can go into the High Court for the enforcement of a legal right also.

The writ of mandamus is like a judicial review of executive action. If this writ is being issued, then an executive officer in the government will be expected to do his statutory duties, which means that either he has omitted to do it or he has done an act that infringes the rights of citizens, or he is unable to perform his duty to protect the rights of citizens. In those circumstances, with the power of judicial review, the Supreme Court will intervene and issue the writ of mandamus directing that government executive officer to do precisely and exactly what is supposed to do by the court order. The writ of mandamus is a very powerful writ, and it is used to protect citizens' interest vis-a-vis the state. So, the state and its functionaries ought to facilitate the rights of citizens and the writ of mandamus is a very powerful writ that is used quite often.

Writ of prohibition and certiorari se are two writs which look at judicial review of the judiciary itself. These two writs are generally issued when there is a prohibition of a higher court trying to supervise a lower court. Prohibition literally means to forbid; the writ of prohibition means to forbid. That means the higher court will ask a lower court which is exceeding its jurisdiction, not do so as it is not a case within the jurisdiction of the lower court. The higher court directs the lower court to transfer the case to some other court or to the high court. So, by a writ of prohibition a higher court may prohibit a lower court from admitting a matter or deciding a case which the higher court thinks that the lower court is

out of jurisdiction. The writ of certiorari is a Latin expression and literally means to be informed. This writ is generally issued against a judicial or a quasi-judicial body to either transfer the case or crash the case as the issue is. So generally, a certiorari means that the higher court concludes that judicial, or a quasi-judicial body is not deciding the case appropriately and hence they would want to exercise judicial review on this, that is when the writ of certiorari is usually issued.

The final writ is called the writ of quo-warranto. Quo-warranto means under what authority or under what warrant. This writ is usually issued to challenge the occupation of any public office. So, if any person is appointed to any public office, he or she must be able to justify the qualifications and the requirements to hold that kind of public office. So, to check irregular illegal appointments to public offices, this writ is generally being issued.

All these five writs that are there under 32 and 226 literally make judicial review a very powerful tool in public administration. So, public administration cannot have its discretion in a manner that violates the fundamental rights of citizens. The judiciary will check public administration. It will balance between the writ of public administration to the writ of citizens and it will ensure that public administration is done in an equitable manner, in a manner that does not violate the rights of citizens. The Supreme Court under Article has been the defender and guarantor of fundamental rights of the citizen as rightly stated by many Constitutional law authors.

Article 32 though is original, it is very wide in its power and how and the Supreme Court can intervene, not only in some rare cases that the Supreme Court but can exercise 32 as and when it feels that it is expeditious for the court to intervene. It may want the remedies to be inexpensive, speedier and in some cases a summary remedy. The Supreme Court can try to intervene in these matters. The Supreme Court just intervened under Article 32 for fundamental rights, and they have been extended for any statutory or legal right because the right to life under Article 21 has been so broadened, so expanded to mean so many different facets. Article 32 has been invoked not only for what is being stated in the Constitution, but what the Constitution means for a citizen to have a dignified life in the country. So, for all those unenumerated, unlisted, rights that have come from the President, Article 32 has been invoked. While writs can be invoked and sought by the court, Article 32 does not stop the Supreme Court just in terms of giving writs. It can also give directions or pass orders.

The right under Article 32 is not something that you need to postpone. The courts have said that even if there is an alternate remedy, if your fundamental right is violated, approaching the Supreme Court under 32 is still applicable. So, having an alternate remedy is no bar to seeking the relief under Article 32. The Supreme Court is your protector, your defender and an aggrieved individual has an option to either go to the High Court or to the Supreme

Court or any other remedy that he has. The jurisdiction of the Supreme Court under 32 can always be invoked.

There is something called the doctrine of laches. It clearly means that there has been a delay in seeking remedy. The courts usually invoke this doctrine even under Article 32 and Article 26. You cannot unnecessarily delay approaching for remedies. If you are someone who could not access justice, someone who is not literate, then the court may under doctrine of laches give you an exception. But generally, an unexplained delay may take away your right to seek remedy under Article 32. For example, like in the Sardar Sarovar project, the *Narmada Bachao Andolan v. Union of India*, in 2000 decided by the Supreme Court, the petitioners had very appropriate intention to look at the rights of tribals or forest dwellers who were not compensated when the Sardar Sarovar and the Narmada Bachao Andolan project was being planned and who were displaced and the government did not intervene in the case. One of the pleas in the *Narmada Bachao Andolan* case was that the dam building must stop, and the dam heightening project must not be allowed to continue. The court said that the petitioners approached the court very late in opposing the construction of a dam at a very late stage when a lot of so much of public money or taxpayers' money has been already utilized and therefore there is a public interest.

The public interest in the case was to provide drinking water to a large section of the community in Bihar. This petition should be barred by limitation or by the doctrine of laches. So, the courts have warned civil society organizations and individuals of this approach as soon as possible so that effective remedies can be granted under Article 32. Article 32 has grown over a period of time, both in terms of private individuals seeking the intervention of the court, like in the case of *Maneka Gandhi v. Union of India*, or in terms of the public interest litigation that has been championed by the Supreme Court from time to time. So there are two ways in which the writ under Article 32 can be granted. The Supreme Court has been a court that has not only given orders and directions and writs, but it has also looked at managing executive action. So, there is something called continuing mandamus. In a very famous case, this is called the Forest case of India namely, *TM Godavarman Thirumulpad v Union of India*. This was a petition filed in the year 1996. That was the first time it was decided. The Supreme Court was kind of surprised that the forests are not being managed or conserved effectively for the better right of a good environment or a healthy environment. And hence, the Supreme Court took upon itself the business of India's forests. Over the period of more than 15-20 years, the continuing mandamus even goes as of now in the Supreme Court, which was decided just last year. So, all these years, it was a continuing mandamus. It was the order of the court saying that if there must be any executive decision taken in forests in India, you must approach the court. So, the officers in the government had no power to decide about how and what matters to be taken inside forest areas. They could only do that after the permission of the court. And that is why this TM Godavarman case is a case of what we call as continuing

mandamus where the court would want to supervise, monitor, and implement its orders. And hence, the court appointed the Central Empowered Committee which would take a call and they would report to the Supreme Court as the case was made. Article 32 is a fundamental right to constitutional remedies.

The way in which judicial review happens in India and why there is so much respect for the judiciary, has the power of contempt. If any individual willfully, does not comply with the orders of the court, be it the High Court and the Supreme Court, then for that kind of an intentional, willful non-compliance the court can act against that individual, be it an executive officer or be it any other private citizen for contempt of court. There are two kinds of contempt, one is called civil contempt, where you may be asked to pay a fine and there is criminal contempt, where you may be asked to go to jail for not following the directions and the orders of the court. The courts usually may not use criminal contempt, but they may impose a very exemplary cost in case you do not comply with the orders of the court. So, in that context, the power of the judiciary in India is important. That is where the courts can issue their writs. Thus said the Supreme Court and judiciary in general, has been able to eradicate a lot of evils in our society.

If one scrutinizes the directions of the court in the last 30 years, especially post-emergency, the prerogative writs that have been issued, has been, the fountain of justice. The idea of the writs may come from common law, in England. They have laid the foundation of justice in this country. To a larger extent, the writs are, substantially checking public administration, they almost have a permanent character in how they have been issued and have been a jewel in the Constitution.

The legality of many actions of the executive and the legality of many laws are also something that the courts have checked over a period. Article 32 can be invoked by both Indian citizens as well as by corporate citizens. By this it is meant that sometimes industries may feel that their right is being violated, a company or society may feel that their right is violated. The press, for example, may feel that their rights are being violated under the Constitution, and they are also entitled to exercise the power to go and access the Supreme Court.

You can also go under Article 32 to the Supreme Court when you think that a law is being enacted without jurisdiction and also if an, an action is taken in a mala fide manner and seek the intervention in case, where the offices of the government itself in their employment services feel that there is an arbitrary action. So, it is not only for citizens but government employees, and public servants, who feel that within their organization and department, there is no fairness, there is no equity, there is no justice, can also seek the intervention of the court under Article 32.

Article 32 has been utilized for election matters by even political parties, or by citizens or by the Election Commission of India. A lot of institutions that are Constitutional bodies like the Election Commission being one have approached the court directly and have sought the court's intervention for any kind of wrong that should be brought to the attention of the court and in which it is felt there needs to be a judicial intervention on a national level, so that the Constitutional principles can be enhanced and better protected. Some of the legislations, which affect rights, can also be challenged under Article 32. For example, the Supreme Court has been approached in the Triple Talaq case, either in the original jurisdiction or in the appellate jurisdiction.

There is a long list of matters that the Supreme Court has intervened in and have given relief to workers in terms of compensation as well. They have given relief to sex workers. relief in service matters, matters emanating from contracts or customary rights, or rights following from a subordinate legislation or a right based on case law. All of these have been used for the intervention of the court. But it is also important to look at a word of caution here.

The Supreme Court has time and again imposed costs if the writ power of the court has been misused for frivolous petitions or for speculative matters. The court then dismisses such kinds of petitions because the time of the Supreme Court is very, very precious. And going to the court for all small matters or frivolous matters, like putting a ban on some film on some speculative character that it may hurt religious sentiments. The Supreme Court is supreme in that context. Time is also supremely important. So in those kinds of situations, the court then will dismiss it with a warning, impose a cost either on the petitioner or on the lawyer who should have checked whether this is a matter admissible under the writ power or not.

Constitutional Law and Public Administration in India

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Week- 06

Lecture-04

Directive Principles of State Policy (DPSP)

The Directive Principles of State Policy (DPSP), which are enumerated in part IV of the Constitution of India, extend from article 36 to article 51. DPSPs are unique to the Constitution. It demonstrates what the fundamental law of the land or the foundational law of the land that is the Constitution of India wants to give as vision for governments. These are directives, guidelines, or things that the states ought to do. They are some principles that the state must follow. The directive principles in totality seeks to achieve a fair and equal society. 75 years since India has gained independence, we are still grappling with poverty and efforts to establish an egalitarian state. And the directive principles attempt to fulfill those mandates. Like Glanville Austin has described DPSP, they are the conscience of the Constitution and something that the Constitution holds firmly to, stands firmly for the philosophy of the Constitution can be set through the moral compass of what the directive principles must state. So, these are the kind of moral guidelines or the moral principles. Moral guidelines, whether are binding; may not be. However, they are the moral compass in the sense that the policies of the state can be tested with them, whether such policies are in tune with the directive principles or not.

This idea of the directive principles of state policy is adopted from the Irish Constitution of 1937 which had got it from the Spanish Constitution. DPSP denotes that the state should keep in mind these principles while formulating policies and enacting laws and that is why they are a kind of instruction from the Constitution. What the Constitution drafters would like the state to follow in its process are the instructions from the framers of the Constitution and they are a document of guidelines from the framers of the Constitution. What the state is expected to do and not do is something that has been put across in a very comprehensive manner, because the directive principles of state policy cover the three aspects of justice, namely, political, economic, and social. They aim to realize that the preamble of the Constitution is trying to bring about justice, liberty, equality, and fraternity. Which is what one should see in the directive principles.

What is in the directive principles are not justiciable; they are not enforceable, or they are not binding in a court of law. Because these are guidelines or principles, of the foundation

to what you must do and what you ought not to do. You can't literally enforce it and seek a grievance or redressal of the same through the means of either compensation or by asking the state precisely to do that immediately. These are aims to achieve, but they may not be achieved immediately. There are several landmark judgments of the Supreme Court that have shaped the socio-economic policies of the nation. Those judgments of the Supreme Court are guided by the principles in DPSC.

The DPSP can be looked at in a sense that they are the first set of documents that state what shall be the public policy in India or what shall be the basis of public administration in India. While public policy and public administration have been reimagined, reshaped and redesigned over a period, the public policy before 1991, post 1991 could have been entirely different. However, the first foundational public policy document for public administration, state policy for public administration could be the directive principles of state policy. So, it is important to appreciate and understand what DPSP is here.

The DPSP has clearly said that the state that we have envisioned is a welfare state, a state that just seeks to bring welfare to its citizens, it is a government of the people, by the people and for the people. So, people's interest or public interest is paramount in public administration. Everything that needs to be done or ought to be done by the government must promote and nurture and take forward citizens' interest into consultation. To some extent, a few authors have said that the directive principles of state policy have two broad principles. One is that the directive principles have been shaped with socialist principles. And two the directive principles have been shaped through the Gandhian principle. There is also a third view of the liberal or intellectual principle. If you look at the content of the DPSPs, the first content that you see are all those based on the socialist principle. Socialist principle means we must look at the disparity of income between the haves and the have nots and ensure that wealth is not concentrated in the hands of human divisions. Adequate means of livelihood to all the citizens must be brought about. Inequality of income or status, facilities and opportunities must be eradicated as far as possible. We must try and ensure the common good, subservient of the common good. The common good is the only driving force for state policies. Socialism is in terms of distribution of resources, which shall be equitable only. So, directive principles face all that. It talks about equal pay for equal work, preservation of health and the strength of workers and children.

No forceful abuse of work and healthy development of children is what is in form. The directive principles of state policy, which has the component or is based on the socialist principle, also talks about promotion of equal justice and free legal aid or what is knowns as we call as providing legal aid to the poor or providing access to justice for the poor as well as right to work, right to education, public assistance to those who are unemployed, old, sick and disabled. Under Article 41, public assistance in cases of unemployment, old age, sickness, and disablement are provided for. Making the workplace just and humane, bringing conditions of maternity and paternity leave are all provided in Article 42.

Securing a living wage, not minimum wage, but a living wage under the Constitution, that is the distinction that is needed. Because minimum wage is the economic parameter, living wage is the actual parameter and a living wage, which can ensure you a decent standard of life, social and cultural opportunities to all workers must be ensured and that is what article 43 of the DPSP says or the Constitution of India says.

The Constitution looks at labour reforms and labour rights like collective bargaining and the spirit of collective bargaining. Article 43A says that the states must take steps to secure the participation of workers in the management of industries. A goal to raise the level of nutrition, the mid-day meal schemes, the standard of living of people and improvement of public health is provided in Article 47. From the list of principles, the socialist principle is definitely reflected in the Constitution of India, it is the socialist ideology that is the bedrock of the Constitutional structure and state policy.

The second principle that is quite evident from reading the directive principles of state policy is the Gandhian principle, or the Gandhian ideology or the philosophy of Rama Rajya. Gandhi believed in a national movement and his ideals of directive principles of state policy are for example the following. He believed in decentralized government; he believed in empowering the village panchayat. He wanted local self-government to be established and the unit of self-government should be the best model of governance in certain subjects, in certain areas.

So, if you read article 40, a local self-government is something that is mandated. Panchayats are to be empowered and created and they must be enabled to function on their own. That is the first point where Gandhi's philosophy and ideology is reflected. Second, article 43 clearly reflects Gandhi's way of life. It talks about promotion of cottage industry. Today, the cottage industry is like a small-scale unit. So, if people want to engage themselves in entrepreneurship or entrepreneur skills, the state government must facilitate the same. And this could be done either individually or like article 43 says through the cooperative movement. So, the rural areas must be able to produce goods and sell the goods. They must be able to creatively establish their enterprise skills. That is also a Gandhian introduction. Article 43B says that the cooperative movement is one of the most important movements that the state must encourage, promote, and bring into existence because the cooperative movement is completely parallel to the corporate movement. The corporate movement is profit oriented; the cooperative movement is oriented towards enriching the members of the corporation. And the producers or the manufacturers who are the members of the corporate, get direct access to the market and direct benefits or profits from the market. The cooperative movement as the case always helped India in the food security system. It has helped bring about the green revolution. It has brought access from the farmers to the consumers directly taking away the middleman out. And most importantly, the cooperative movement has been very competitive with the pricing and hence this also adds to the consumer or citizen interest.

Article 43B clearly says that cooperative societies must be encouraged because these are voluntary formations with autonomous functioning. They have a democratic and professional management. The Milk Federation cooperatives that are there in several states led by Amul is a great example of achievement of Article 43B. Educational interests of the SC/STs or the economically weaker section of the community, must get protection from social inequalities and injustices or exploitation and Article 46 mandates the same.

Gandhi's idea of Harijans and their special protection and special status is something that the Constitution propounds. The consumption of intoxicated drinks or drugs that are injurious to health comes under Article 47. Very importantly, Article 48 clearly directs the state to prohibit the slaughter of cows, calves and other milch and draught cattle so that they and their breed can be improved. Cow slaughter legislations, which have been revived, are not new.

It is a part of the Constitution itself that the states are to protect cows from being slaughtered. So Article 48 has that mandate for the states. Most of the cows, anti-cow slaughtering legislation was passed in the 1950s and 60s. The only thing that has happened very recently is that the punishments have been enhanced and the process of investigation or holding someone criminally responsible has been strengthened through some of the amendments that were brought in the recent times. So, we find the socialist principle in the DPSP and the Gandhian principle in the DPSP.

Third are the liberal principles or the intellectual principles of DPSP. First is Article 44, namely the contentious issue on uniform civil code which requires a lot of liberal approach from the state itself. And that is why it is called the liberal ideology of the DPSP. It requires people to move away from religion and detach themselves from the equal practices of religion and to achieve greater common good and to promote the equality of genders. Article 44 as it were in the Constitution very clearly had stated to bring in uniform civil code. Its implementation, in earlier times, would have resulted in a fair and equal society between men and women of all religions that is now being attempted to. To provide early childhood care and education of all children is under right to education under Article 21A, but Article 45 also talks about the same. To organize agriculture and animal husbandry on modern and scientific lines in Article 48 and to protect and improve the environment and safeguard forest and wildlife under Article 48A are also DPSP. Article 49 requires promoting and protecting monuments and places and objects of historic and artistic structures of national importance. Article 50 which is very important lays down to separate the judiciary from the executive in the public service of the state. So, the judicial independence in appointment is clearly reflected in Article 50. If the judiciary has crafted on its own basis about how it should select judges, Article 50 is one such provision of the Constitution that supports the independence of judicial appointments. Article 51 of the DPSP speaks about the obligation of the state to promote international peace and security and maintain just and honorable relations with nations. This is applicable to the states as

well as the Central or federal government. States must promote international peace and to foster respect for international law, the crucial aspect being that international law is no longer a weak law.

International law is to be respected. All treaty obligations of the state must be also honored and increase settlement of international disputes by arbitration which is what Article 51 calls for. In 1976, through the 42nd amendment, to the original principles, four new directive principles were added. In 1976 by Article 39, it was said to secure opportunities for the healthy development of children. It was added that to promote equal justice and to provide free legal aid in Article 39E. In Article 43A, there is to take steps to secure workers participation. And finally, in Article 48A, it was added to protect and improve the environment and safeguard forest and wildlife. So, this is now extended to the state. To protect and improve the environment and to safeguard forest and wildlife is something that the states ought to do. And this is where the 42nd Amendment of 1976 added it. The 44th Amendment in 1978 added one more directive principle: that the state ought to minimize inequality in income, status, facilities, and opportunities. This was in Article 38. In 2002, the 86th Amendment Act to the Constitution made elementary education a fundamental right under Article 21. So that was changed. And in 2011, the 97th Amendment Act added a new directive principle in relation to cooperatives, which is already said in Article 43B.

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Week- 06

Lecture-05

DPSPs and Fundamental Duties

Some of the important directive principles of state policy are what is called DPSP. As for example, we are talking of the Constitutional mandate to provide equal justice and equal access to justice. In India, a lot of people are not aware of how to get their rights realized. They do not know what happens in case the state or any other person has infringed their rights. And these are impoverished communities or the people who are from the economically weaker sections of the community or socially backward. The Constitution of India does recognize that the access to the court or access to justice must be equal for every Indian citizen.

And to further this kind of an aim, we have Article 39A under which legal aid now has become a Constitutional right. Legal aid is an aid provided to a person who has been arrested but doesn't know that he can seek bail or a person who has been accused of an offence is to be represented before the court of law to prove his innocence or to justify his cause. And it is the courts that have established the National Legal Services Authority at the national level. There is a State Legal Services Authority at the state level and District Legal Services Authority at the district level. So, this kind of arrangement through the Legal Services Authority, provides legal services to those who have such services. For example, anyone who has less than one lakh income per year can straightaway go to the Legal Services Authority and seek legal aid. And free lawyers will be given, and the lawyer will be paid by the state.

So, the poor and the disadvantaged community will have the right of representation in the court of law, and their plight will be heard by the court. And that is how the importance of legal aid comes into picture. Usually, legal aid is a matter of guaranteed right to all accused in criminal cases. However, this income below one lakh criteria may be applicable to civil cases of minor nature, land litigation etc. Legal aid provision is a very important component of democracy, that someone should have the right to free and fair trial.

Someone should have the right to legal aid, like any other aid, and can be compared to medical aid which is a matter of right. And it is the responsibility of the state to provide

such kind of aid to those who cannot afford it or those who cannot access the same. *Hussainara Khatoon v. State of Bihar* is a very interesting case in which for the first time the Supreme Court highlighted the plight of undertrials. The Supreme Court time and again has asked the jail authorities to speed up the cases of under trials, so that they can seek bail. Under trials are prisoners who are in jail without getting bail.

So, their conviction or guilt has not been proved, but they languish in jail for several years, because they do not have the right to legal representation. *State of Maharashtra v. Manubhai Vashi*, is also an important case in which directions were provided to the states to provide legal aid in all criminal cases, regardless of their economic status. *A R Antulay v. R S Nayak* also is a very famous case in the same manner. So, these are some of the very important DPSPs, which have seen the light of the day. They have been implemented, not only at the national level, but also at the state level.

Legal aid as a matter of priority due to the cooperation of the executive and the judiciary has become a full-fledged reality in the country. Legal aid was not part of the original Constitution; it was the 42nd amendment that brought in legal aid to DPSP and the states have achieved a great degree of success in providing the same. Article 39 of DPSP, is a very, very important fundamental directive. This one article in six parts speaks about social and economic justice. It says that the state shall direct all its policies in securing the following objectives.

The objectives outlined are as follows. Men and women shall be treated equally and there is a right to adequate means of livelihood. So, in India, in terms of gender equality, the Constitution itself is the driving force. And today, men and women are treated equally without, no discrimination on the grounds of sex. This means that the state must have its policy, not only vis-a-vis its own state employment, but in private employment also the state must derive that kind of a policy.

Under 39B, the ownership and control of material resources of the community are so distributed as to best subserve the common good. So, all material resources of the community are to be distributed equally for the common good of the community. The operation of the economic system, like corporate, economic, business, growth must not result in the concentration of wealth and means of production to the common detriment. That means against common good, there cannot be concentration of wealth or means of production. So, you cannot just have a kind of a monopoly granted to certain companies or to certain industries, so that they can take advantage of the entire system. Having a healthy competition or having a law that promotes and protects competition was the duty of the state under Article 39. The central government enacted the Competition Act, 2002. In Article 39, there is also an important directive principle that has been put across as the aim and purpose of the state policies. There are quite a few cases on directive principles of state policy, and people have asked why there is discrimination against the state.

For example, in the *Indian Express* case, one issue is that newspapers wanted newsprint, and the state must supply the same. Newspapers serve the common good, they serve the common interest of the community by giving them information, by bringing in some accountability of the government. So, their rights on the Constitution also are something that the state must intend to protect at all given points of time. Now, Article 41 again is about things like the welfare idea of the state, unemployment benefits, disability pension, medical assistance, all which have been introduced by the state to promote the welfare agenda. In cases like *Olga Tellis v. Bombay Municipal Corporation*, the Supreme Court said that the right to means of livelihood of even street vendors is a right that must be protected.

So, the government has an obligation to provide social security and secure the means of livelihood even among those who may be street vendors or those who trade on footpaths and those who sell food. So, we have a separate legislation, which talks about such kind of licensing to street vendors as well, for protecting people from unemployment. For protecting the vulnerable sections of the community like elderly citizens, we have a legislation now, called the Elderly citizens maintenance act. There are several insurances, not only for health, but for crops and against industrial accidents. All of these, in some sense, fulfill the mandate under Article 41. So, these are very successful DPSP. And they have been implemented in letter in spirit as well. Article 45 makes provision for early childhood care and education. It is not no longer just below the age of six years; it is now 14 years as elementary education as a fundamental one.

So, the 86th Amendment was an important one, which brought education as a fundamental right under Article 21A. Article 51A(k) is also core and important here. It is a new fundamental duty wherein, whoever is a parent or guardian of a child has the duty to provide opportunities of education to a child. And that is a duty that is there under Article 51A(k). So, it is not only the duty of the state, but it is also the duty of parents and guardians as the case being. *Mohini Jain v. State of Karnataka* was decided at a time when the state alone was providing education, it was subsidizing education. And hence, the Supreme Court did not want education to be like a business. It did not want a capitation fee. It wanted to reiterate the purpose of the state, that the state must provide education at affordable prices, and quality education must also be provided. In some cases, it should be free and compulsory. So the responsibility of the government in providing education was reiterated in some of these cases. Now, coming to the direct principles of state policy and fundamental rights. Directive principles are not enforceable or binding. They cannot be justiciable. But sometimes, you use the courts to bring in or enforce your DPSP.

The fundamental rights have always been justiciable. And directive principles, on the other hand, are non-justiciable. They are guiding principles as these are higher moral norms of the state. And usually the Supreme Court, whenever there is a conflict between fundamental rights and direct principles of state policy, decides that the fundamental rights

will prevail if there is a conflict. So, in a very famous case called *State of Madras v. Champakam Dorairajan*, in 1951, the Supreme Court gave fundamental rights an upper hand over DPSP. And it held that, though fundamental rights can be amended by the Parliament by bringing some Constitutional amendment, this case of *Champakam Dorairajan* was overruled by a case called *Golaknath v. State of Punjab* in 1967. So, in 1951, where *Champakam Dorairajan* said, fundamental rights can be amended by the Parliament, the Parliament has all the freedom to do it.

And hence, few fundamental rights underwent Constitutional amendments in the open stages, right from the First Amendment in 1951 to the 17th Amendment in 1964 till the time *Golaknath v. State of Punjab* came in, and the Supreme Court then ruled that, the Parliament cannot take away or abridge any of the fundamental rights. So, fundamental rights are sacrosanct in nature. In the words of the court, fundamental rights cannot be amended for the implementation of directive principles of state policy. So, the fundamental rights are core, and you cannot change them.

So, just to implement the directive principles, you cannot bring any change in the fundamental rights. So, the *Golaknath* case created a difficulty, following which the Parliament wanted to change the power to abridge some of the fundamental rights. And they said that if we want to implement equal pay for equal well, then we may have to take away a right that is there in Article 14 or amend some right in Article 31, right to property. Because the Parliament was meddling with the *Golaknath* case in the 1973 *Kesavananda Bharati* case, in which the Supreme Court declared that there is something called the basic structure of the Constitution, and basic structure of the Constitution cannot be amended at all.

And fundamental rights come within the basic structure of the Constitution. The present position is that fundamental rights gain supremacy over directive principles of state policy. And in the garb of implementing directive principles of state policy, the Parliament or the government cannot abridge or infringe any of the fundamental rights. Directive principles of state policy ought to be implemented without changing, or altering the basic structure of the Constitution. And they cannot in any sense, abridge, amend, or alter fundamental rights. So, this very clearly was the direction given by the courts in reading the Constitution. So, Part III prevails over Part IV, that is fundamental rights prevails over DPSP. So, going by the fact that one always wants the implementation of social reforms, DPSP is a social reform agenda.

It also brings about the socio- economic justice dimension, but that itself should not result in violation of fundamental rights. For example, DPSPs kind of agenda of saying to abolish the Zamindari system, the Jagirs or the Inamdar systems wanted tenancy reforms and surplus land to be redistributed. So, land to the tiller of the soil. We wanted cooperative farming. All these agendas were very important. They were part of the social reform that

the Constitution wanted the governments to undertake. However, while gaining any of these aims, if these violate the fundamental rights of citizens, which prominently was right to property, then that would violate the basic features and the basic structure of the Constitution.

If you compare fundamental rights and direct principles of state policy, it is to be understand in this context; that fundamental rights are stating what the state shall not do with your rights that is, not infringe speech, expression, right to life etc. Whereas directive principles are usually positive assertion of duties towards substitute. Fundamental rights are justiciable. They are legally enforceable by the courts of law in case of violation. Whereas, DPSP are not legally enforceable by the courts. Fundamental rights aim to establish political democracy in our country. And what does DPSP do? It tries to establish the social economic democracy of the country. Fundamental rights are the political democracy. DPSP is the social economic democracy, because here is all about the political rights of the citizens, that is civil and political rights of the citizens vis-a-vis the state. Fundamental rights have legal sanction, they are having legal power. DPSPs have no legal sanction, they are mostly on moral and political considerations. And another major distinction between fundamental rights and DPSP is this that fundamental rights do not require a separate legislation for its enforceability. That it is there in the Constitution itself making it enforceable. Whereas DPSP requires a separate legislation for its implementation, how it should be done and what should be done. So, DPSP are not automatically enforceable. Some states may adopt, some may not. So, DPSP requires some additional act from the state to bring them into force, unlike fundamental rights.

Usually, the way the courts intervene in fundamental rights, is they say that they will declare any law as being unconstitutional and invalid if it infringes fundamental rights. However, the courts cannot declare a law violative of any DPSP as unconstitutional and invalid in case it is challenged as being against DPSP. So, fundamental rights are mostly individualistic, they are personal in character, whereas DPSP promotes the welfare of the community in general. So, it is more societal and more socialistic. So, these are some of the differences between fundamental rights and DPSP.

Fundamental duties exist under the Constitution to promote sustainable development as in the Vellore *Citizens Welfare Forum v. Union of India* case and the *TN Godavaraman* case. The *TN Godavaraman* case is called the forest case. It tried to bring in forest management in India. The Supreme Court said if the executive cannot manage the forest, the Court will do so. So, to promote sustainability, to protect the environment for the future generation, the Supreme Court intervened in these two matters, which is fine under Article 48A, for protection and improvement of the environment safeguard enforcement.

There are some kinds of observations of DPSP. DPSP, do not have any legal force. So, the purpose of having it in the Constitution is often considered, stating it to be a cheque without

any signature. So, it is like having nothing on your hand. And even stated to be a “*dustbin of sentiments*” by T.T. Krishnamacharya. A lot of people have thought that this is important as it is a pious aspiration, a manifesto of aims for the state. So, there are two views. People have criticized the illogical arrangement of DPSP. There is no chronology or a structure or a hierarchy to how these DPSP have been written and which have never been classified properly, socio-economic or whatever is different. So, it is criticized as a structureless chapter, which it does not have any reasons for science or technology. It sometimes is quite prejudicial. And it can be different from state to state because India is divided by five geographical groups. So, necessarily DPSP have never taken that into consideration at all. DPSP is criticized as not being very aggressive in its objectives and motives, though DPSP has been amended only twice. There is no new or fresh impetus infused into DPSP. A review of the Constitution may lead to that. And finally, DPSP has been criticized because DPSP may result in a lot of tension in the federal structure of the state itself. And this has happened quite very often. The conflicts may be between the president and the government. Because the government may not want to implement DPSP as the implementation of DPSPs are mostly based on the economic capacity of the state and the political capacity.

Economic capacity means the state is prepared to fund for example, the Mahatma Gandhi National Rural Employment Guarantee Act, it is a law that is in furtherance of the social justice of DPSP. The state must have that many funds to provide the same means of livelihood as means of guaranteed employment or right to work is ensured through the MGNREGA project. So, because everything is on economic basis and then political basis, it may result in a lot of tension between even the central government and the state government. And very often than not some prime ministers may overrule their cabinet.

These are possibilities to implement DPSP as well. So, it may result in a lot of conflict towards the implementation of some of the objectives under DPSP. Those are some of the pitfalls of observations on what DPSP should have been. However, they continue to be a very important part of the Constitution. To some extent, they have filled the vacuum in the Constitution between fundamental rights and the power of the government. So, if Part IV can be said to be between Part III and Part V. So, before you say what the President can do, what the government can do, you just give them a document about what vision should be there and what policy should be there. And to one extent, one of the justifications of DPSP is, it is not just based on political ideologies of parties, but on a Constitutional ideology. So, in that sense, it passes the crucial test of establishing a non-partisan kind of Constitution, a constitution for the entire country and not necessarily driven by any philosophy, ideology, or any kind of political whims and fancies. So, there is some justification to how it is, but of course, there is always scope for improving DPSP and adding new purposes that may fulfill the aspirations of the current generation.

For example, there is a lot of debate today on Uniform Civil Code. The current generation seems to have imbibed the idea that it is time that the state implements the same because

Article 44 of the Constitution which speaks about uniform civil code had never been attempted to be brought about. Though we have some form of uniform civil code in some states, that is like Goa for example, it is a Goa-Portuguese code. Though not a perfect uniform civil code, it does give you the sense of what that state should aspire to. So, your rights are not dependent upon your religion or to what caste or creed you belong to. Your rights must be protected under the Constitution uniformly. So, one Muslim woman or any other woman need not be discriminated against just because she is Muslim. Every right of every gender every person under the Constitution must have equal protection of rights, especially right to property and right in marriages as well. That is the agenda of Uniform Civil Code and that is being pursued in present times.

Finally, the fundamental duties in the Constitution speak about the duty you have towards your community and your country and that as a human being, you ought to be duty conscious. This is a part of your personality. You have responsibilities not only to your family, but also to your society, to your country and to that extent, you must follow those fundamental duties that are stated in the Constitution. Fundamental duties were not originally there in the Constitution. Article 51A on fundamental duties was brought in through the 42nd Amendment to the Constitution in 1976 and they have made a very important role for citizens participation in the development of the nation. There are eleven fundamental duties of citizens in Part IV A of the Constitution of India. They are:

- A. to abide by the Constitution and respect its ideals and institutions, the national flag and the national anthem.
- B. to cherish and follow the noble ideals which inspired our national struggle for freedom.
- C. to uphold and protect the sovereignty, unity, and integrity of India.
- D. to defend the country and render national service whenever called upon to do so.
- E. to promote harmony and the spirit of common brotherhood among all the people of India, irrespective of religion, linguistic and other sectional diversities, to renounce practice of any kind of derogatory to the dignity of women.
- F. to value and preserve the rich heritage of our composite culture.
- G. to protect and improve the natural environment, including forests, lakes, rivers, and wildlife and to have compassion for living creatures.
- H. to develop a very scientific temper, humanism and the spirit of inquiry and reform.
- I. to safeguard public property and to abjure violence.
- J. to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavor and achievement.
- K. one who is a parent or a guardian, shall provide opportunity of education to their children, between the age of 6 to 14 years.

The last one was added by the 86th Amendment in 2002. This is a fundamental duty of parents and guardians. So, these are the eleven duties that are there in the Constitution of

India and every citizen is expected to follow. In case a citizen is found not following these duties, the courts can decide to enforce these duties as well. This is the dimension of public policy, as the Constitution states it. The Constitution is only one of those documents that can state that public policy and there are so many other philosophical ideas and documents and legislations that can also frame or structure the kind of public policy this country ought to accept.

Constitutional Law and Public Administration in India

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Week- 07

Lecture-04

Law Making & Legislative Interpretation

There are certain legislative interpretations which are used in the process of lawmaking. Law making is of three different types. One is legislative lawmaking, second is executive lawmaking and third is judicial lawmaking. But, most important of all is the legislative law making through the parliament and the state legislatures. The executive lawmaking is through the delegated legislation whereby the parliament has already framed law in a broader perspective and has left certain areas for the executive to make certain laws, rules, and regulations for its functioning and this is called the executive lawmaking. Judicial lawmaking is a trend through judicial activism where the higher courts of the land have made certain decisions and that has become the law. That is called judicial lawmaking.

The word sovereign in the preamble of the Constitution, means that it is the power of the parliament to make law. Sovereignty is a political science term. India has territorial sovereignty means, within the territory of and the boundaries of its nation, the country has an absolute power of lawmaking that is the territorial sovereignty. And therefore, India has a territorial sovereignty of what constitutes the union of India to make lawmaking in its sphere of the nation. So, the word sovereign is a very important source of power for legislation and lawmaking for any country and therefore the preamble states India is a sovereign country.

Legislation consists of the declaration of legal rules by a competent authority and who is a competent authority. An elected government is a competent authority. The parliament is a competent authority which has the sovereignty to make law regarding its subjects. Therefore, sovereignty is an essential aspect to make legal rules which is to be followed. Now in India the sovereign and competent authority is the parliament under Article 245(1) of chapter 11 of the Indian Constitution, subject to the provisions of the Constitution.

Parliament may make law for the whole or any part of the territory and the legislature of the state may make law for the whole or any part of the state. This is the constituent power and the source of power for the legislature for its lawmaking. In the words of Salmond, who was a pioneer in political science, 'legislation is a source of law which consists of the

declaration of legal rules by a competent authority'. Competent authority in a bicameral legislature can also be a state government. In a federal structure it can also be a state government or a central government.

Legislation is an important source of law like any other source of law but legislation forms the primary and main source of law as it derives power from the people for its lawmaking. Article 245-254 of the Indian Constitution talks about the legislative powers. Dr B.R. Ambedkar who was the president of the drafting committee stated that the states are autonomous and they are not entirely dependent on the centre for legislative or executive authority. They are on equal footing with the centre. Article 246 of the Constitution grants to the union and states their authority in the spheres of their legislative, executive and financial functions. There is separation of power in the strict sense of legislative, executive and judiciary but in India there is no strict separation of powers between legislative and executive but there is a division of power between the states and the centre in the matter of legislatures. The central government has its own sphere of lawmaking, the state government has its own sphere of lawmaking.

The Indian federal system as like many other countries was not founded by the treaty or an agreement among the princely states. After independence, all the princely states agreed and acceded to the sovereignty of the nation and therefore their accession to the union was absolute and this is precisely the reason why Indian system of federalism is more unitary in character for the sake of unity and integrity. No states or the formerly princely states which became the states later does not have any power to secede from the union government. The division of powers are under state list, central list, and the concurrent list under the seventh schedule. This reflects the unitary characteristics of the Constitution. The unitary list has more subjects for legislation than the state list.

The concurrent list is a list where both the state government and central government have the power to make law but the parliament takes predominance over the state legislations for the sake of unity, integrity and uniformity in certain legislations which is required. The parliament can enact legislations on the subject matter of state list in case of state emergencies or the governor's rule in the circumstances prescribed by the Constitution and therefore after reading the provisions under seventh schedule, Indian Constitution is unambiguously in the favour of centralization within the federal framework. Now Article 246 clause 1 states that in the Indian Constitution, the parliament can make law enumerated in list 1 of the seventh schedule. This list contains matters such as foreign affairs, defence, war, railways etc.

Article 246 clause 2 states that the state can also make law on the matters enumerated in list 3 in the seventh schedule. State list is a list where both the state and the central government can make the law. Article 246 clause 3 says that only the state has the power to make law with reference to the list enumerated in list 2 of the seventh schedule. This

contains matters such as agriculture, fisheries, water, public health, sanitation, police etc. Significantly the residuary powers are with the central government.

Any matter which is not listed in any three of the lists either state list, union list or concurrent list is called the residuary powers and that is under the central government. This forms one of the basic centralizing tendencies of the federal structure of India. The Supreme Court in a very famous case held that if the said statute is not relatable to any of the subject matter in the state list then it is a matter of legislation for the central government. Either it must be the union list, concurrent list, or the residuary powers. When we are having three different lists there is always a question of interpretation as to what are the matters that categorically fall under the difference. In this very famous case *Union of India v. Dhillon* the Supreme Court held that the test for a central government whether it has the powers to legislate is to see in the list 2 of the state list if any of the provisions or related provisions is the subject matter of the state list and only the state can make the law. If not, then the legislation can be made, on the subject matters of union list, concurrent list or it shall be under the residual powers under Article 248.

Another important feature of centralizing tendency for law making and legislative interpretation is that it is a rigid Constitution. Indian Constitution is a very elaborate Constitution in terms of law making and in terms of amendment. The states do not have the power to amend the Constitution; it can be done only by the parliament and among the three lists, the central government takes precedence over subject matters.

The judiciary is independent, the Supreme Court is the highest court of appeal in the country but the states have high courts but there is only a single unitary Supreme Court in the centre. So, the central government has the power in the matter of international relations and diplomacy; the state government does not have such powers. The boundary of the state is determined by the central government. The states reorganization is done by an act of parliament though it revolves around the states subjects and only a few have the bicameral legislature and therefore the representation to the parliament is more of a centralized nature.

Regarding the matter of election, the election commission is a central authority and all the legislation relating to the elections is done by the central government and not the state government. Though the provisions are provided in the Constitution for the state government to make law relating to the election, predominantly the law or regulations relating to the election for the sake of uniformity is made either by the parliament or by the delimitation commission or by the election commission.

Emergency is another important provision in the Constitution which has the most distinguished feature of a unitary structure. Why it is important to understand whether Indian federalism has a unitary structure with the federal feature is because the division of power under the three lists gains a prominence in the legislative sphere. The deployment

of armed forces into the state territories is prerogative of the central government. The taxation aspects like GST makes the central government have financial supremacy.

The union government has sweeping powers in the economic terms and in terms of allocation of resources to the different states of the country. Now this significantly signifies the structure of the Indian federal structure of division of powers. The state government is a little on the lower side for legislative spheres of lawmaking. The central government has an upper hand in the lawmaking. This is called a strong unitary feature in the federal structure.

Article 249 in the Indian Constitution says that if there is a matter in the state list which has become the matter of national importance then the Union can make law. Article 250 also speaks about how the union can make law on the matters included in the state list in times of national emergence. The best example and the recent example are the goods and service tax as to the usage of Article 249. The GST was meant to amalgamate many central and state taxes into one single window of common tax to prevent cascading or double taxation.

This was also a matter of shifting the economy from an informal to a formal one. This taxation of GST did not exist before. The taxes relating to goods were under the state list of entry 52 of the Seventh schedule which was the tax on the entry of goods into the local area of consumption. The 54th entry in the schedule was about the tax of sale of goods or purchases. So, it essentially meant that these taxes were under the state list and not under the central list. The government had the powers to make laws regarding taxation.

Therefore, the government had to amend the Constitution to avoid the ambiguity and get the importance of tax under their control. Now with the Constitution 101st Amendment of 2016 the government amended a few Articles in the Constitution to execute the imposition of tax. Article 246A was inserted under this amendment which states that the Parliament has the exclusive power to make law with respect to certain goods, services tax where supply of goods or services or both takes place in the course of interstate trade and commerce. The word supply gained significance because it was inserted instead of the word sale or purchase of goods.

By the usage of the word ‘supply’ it was made into an exclusive list of the union government because as stated above, the 54th entry in the state schedule list was regarding the state purchase or sale. A similar thing can be seen in the amendment of Article 286 where the words sale or purchase of goods were replaced by the words supply of goods and services. This was done to get the services along with the goods under the ambit of the union government. Article 249 was also amended to add the words service goods and service tax provided under Article 246 (a). This gave the centre with the more power to

enact any law applicable to the states mentioned in the state list including the goods and services tax.

Article 279 (a) was also added to the Indian Constitution which described the formulation of GST council. The council would be a joint forum for centre and states. GST council is an important Constitutional authority formed making an amendment to the Constitution and inserting the section, inserting the Article of 279 clause (a). The final Article with reference to the goods and services tax is Article 269a added through this amendment. So, this was also pertaining to the goods and services tax.

All these are the powers of the union government where though there is a legislative sphere for the state, the union government can always take over certain subjects for its legislative law making and thus this characteristic is called the strong unitary structure with federal characteristics. Now moving on to another doctrine called the doctrine of pith and substance for a legislative interpretation. This enactment substantially falls within the powers conferred by the Constitution on the legislature. Now it says that it cannot be held invalid merely because it incidentally encroaches on the matter assigned to another legislature.

The state government makes laws regarding the subject matter in the state automatically. Sometimes when it encroaches upon the matters assigned to states in the central subject it cannot be held invalid. Therefore, the doctrine of pith and substance comes into picture. To examine the true character of the enactments the entire act is required to be understood when there is any dispute between the union and state on the subject matter between the union list and the state list.

When you are making a law either by the state or by the center, there is always a situation where certain provisions encroach upon the territory of either the state list or the union list. At that time the doctrine of pith and substance is interpreted by the supreme court so that which is more predominant than the other so where the state government can make the law. If the center strikes down such a law saying that the state governments have encroached upon its legislative ambit it will be very difficult for the states to make any law and therefore the courts have evolved a situation or a procedure or circumstances where the doctrine of pith and substance is applied to see which is the most predominant subject matter so as to ascertain the list whether it is state list or central list or the concurrent list.

Now it also has made states more independent in its law-making sphere. One such important case is the Tamil Nadu exhibition case where the Madras High Court held the Act was invalid stating that the subject matter belongs to the central government and not the state government and therefore the Tamil Nadu state government did not have the jurisdiction or the validity to make such law. Now the theatres and dramatic performances were subject to the provisions of entry 60 of List 1 and held that Section 9(2) of the Act

was invalid as it specifically dealt with the copyright which is a matter included in entry 49 under the union list.

The court said that it agreed with the doctrine of pith and substance, it could encroach upon the federal government, but it did not support the Tamil Nadu Act stating that the pith and substance of the act essentially fell under the union list and not the state list. The Supreme Court said that the decision of the Madras High Court was reversed stating that the act was valid because the pith and substance was not the copyright, and it was held the cinema was the pith and substance; the cinematic performances were the pith and substance; and therefore it was the subject matter under the state list using the doctrine of pith and substance. The state list was ascertained as to what was the subject matter therefore in this case the Supreme Court held that essentially this was the subject matter of the state list and therefore the Tamil Nadu case was valid in its jurisdiction. Here the main purpose of the act was to curb the infringement of the copyright there were two subject matters essentially it was up to the court to decide which subject matter falls under which category therefore the court interpreted it to be cinemas and not copyright and therefore it was under the state list and not under the central list.

Another important feature is the doctrine of colourable legislation according to which, only when a legislature has no power to frame a legislation so that it appears to be within the competence is known as doctrine of colourable legislation. It states that it is a question of competency of the concerned legislature to enact the impugned legislation. The legislation cannot be transgressed, can't be covert, can't be indirect or disguised. Such legislation is colourable. Essentially it means that it does not have the power to make law on such matters but is making law in a colourable format.

Disguising a law in such a way that it must achieve the intended purpose without having the jurisdiction to do it. He says that the legislature can't make any law on matters indirectly if it can't do so directly. The important case in this aspect is *K. T. Moopil Nair v. State of Kerala*. In this case the petitioner owned some forest land in the Palghat taluk of the Palghat district which was a part of the state of Madras before it became part of the state of Kerala. The district was in Madras and therefore the Madras preservation of private forest Act of 1949 was applied. Under this Act the owners of the private forest couldn't sell, lease, mortgage or alienate their forest or part of their forest without the prior permission of the district collector. However, the collector in the exercise of his powers could allow the set of trees to be cut. The permit was brought by the petitioner for about 3000 rupees per year.

These were the facts of the case and as such there were many facts, many legislations involved. The Travancore Cochin Land Tax Act provisions stated 2 rupees per acre as tax and then the powers of the collectors, because of which the petitioner had to pay a huge amount of money in terms of land taxes. Now this was challenged in the Supreme Court. The Chief Justice in his judgment made few observations and said that the Act did not

prescribe any procedure to compel the government to conduct the surveys or assist the lands. So, he made few very important observations stating that the proposed procedure does not necessitate notifying the proposed assessee. This was a very important procedure to be followed by the state.

To ascertain whether the Act made by the state was colourable in nature. There were many errors in making the procedures by the Assessing Authority and then there was no procedure for obtaining the opinion of the civil court which is common in all taxing statutes and therefore the Supreme Court made few observations in the matter of procedural aspects. After having made an observation in such procedures the Supreme Court held that this Act was clearly confiscatory in nature and then he gave his analysis stating that by making the petitioner to pay a forced amount and for the surveyed proportions of the forest the Act was made in the guise of a colourable legislation. He believed that since the petitioner would not be in a position to pay the tax the government would have auctioned the land, and in case where there would be no bidders for the land for the auction the state would become the auction purchaser and take control of the land. In 1884 he held that the tax was confiscatory in nature and therefore the section 4 and 7 of the Act was declared unconstitutional for its nature of colourable legislation which was violative of the provisions of Article 14 of the Constitution and the violative of Article 19 as well.

However, regardless of the fact that an alternative way of earning the tax money could be devised the court held that the mere fact that there was no survey conducted of the land there were several shortcomings in the legal matters of the Act and it was very clear that the government wanted the petitioner to give up his land. Since they couldn't make him do it in a direct way they made it in an indirect way through the payment of the higher taxes. So, this type of legislation is called colourable legislation and this has been invalidated by the Supreme Court in its various cases. Another important aspect of legislative interpretation is the doctrine of eclipse. As per Article 13 clause 1 of the Indian Constitution it says all laws in force in the territory of India immediately before the commencement of this Constitution insofar as they are inconsistent with the provisions will to the extent of inconsistency be void. The Constitution came into force on 26th January 1950 therefore according to the Constitution any Article which was created before 26th January and which are violating any provisions of the Part III of the Constitution after its existence will be declared void.

An important case in this is *Keshav Madhav Menon v. State of Bombay*. In this case the petitioner was the secretary of the People's Publishing House titled the *Railway Mazdooran ke Khilaf Nai Zazish*. This was a pamphlet published in the book within the meaning of Section 1 of the Press and Registration Books Act of 1867. However, the Bombay government authorities considered this to be a news sheet under Section 2(6) of the Indian Press Emergency Powers Act of 1931 and said that it had been published without any authority. When the case was still ongoing the Constitution commenced in 1950. The

petitioner challenged the Act claiming that it was unconstitutional under Article 13 clause 1. Also, the concerns raised were whether section 15 clause 1 and 18 clause 1 of the definitions in 2 clause 6 or 2 clause 10 of the Indian Press Emergency Powers Act was inconsistent with the freedom of press under the Article 19(1)(a) read with clause 2.

The High Court in this case decided that the application was based on the second question. The High Court was of the opinion that the proceedings which had begun should have commenced, continued even though the Act was inconsistent, and the fundamental rights were conferred under Article 19 clause 1. The petitioner then approached the Supreme Court. Although the Act did not become void at initiation on 26th January 1950 it became void which meant that it no longer was effective. And therefore, he cannot be convicted after the commencement of the Constitution as there was no existing law to convict him for violation.

If a retrospective application was mentioned in Article 13(1) then he would have been a person convicted under the Act for an act done before commencement of this Constitution. Therefore the majority decision by the court the petitioner's petition was dismissed. Doctrine of waiver is another important aspect. To understand the doctrine of waiver we must first understand the meaning of the word waiver. According to the Webster dictionary is an act of intentionally relinquishing the or abandoning a known right or claim or a privilege.

The Supreme Court in its word says waiver involves a conscious, voluntary, and intentional relinquishment or abandonment of a known existing legal right where the party would have enjoyed it. Therefore, according to the doctrine of waiver whoever is entitled to some privilege or right can waive those rights if he is not coerced into doing it or does it with his free will.

In a very important case of *Baseshar Nath*, the Constitutional validity of the doctrine of waiver of a fundamental right was examined. The facts of the case were that the central government referred the appellant's case to the investigation commission and the commission directed the authorized official to examine the appellant's account. After the necessary procedures were conducted, it was held that a certain amount had to be paid for a settlement under section 8(a) of the Taxation on Income (Investigation Commission) Act, 1947. The central government was reported about the approval of the settlement and the said approval was accepted by the state government. The appellant was asked to pay some amount of money. It was contended by the respondent that the Act laid down the two separate procedures; one was for investigation the other was for settlement and therefore claimed that the appellant had waived his fundamental right founded in Article 14 by voluntarily entering the settlements. It was held that it was impossible to give up the basic right guaranteed by Article 14 of the Constitution, and it is incorrect to argue that by settling

under section 8(a) the appellant had given up his fundamental right. So, Article 14 is based on public policy and therefore it cannot be waived by a mere Act.

The language is authoritative and places an obligation of the state that no one can be relieved of his fundamental right and therefore the fundamental right cannot be waived. Any fundamental right cannot be waived because the fundamental rights are based on public policy which are valued and respected throughout the world. So the state has a duty to respect all fundamental rights and any waiver of fundamental rights cannot be merely an act of whims or fancies. So, the state has every duty to protect the fundamental right of every citizen and it can't claim through any Act that the citizen has waived his fundamental right. So, this becomes a very valid case in terms of doctrine of waiver of fundamental rights. Therefore, it is important to understand all the procedures, functions and legislative interpretations of the union legislatures and the state legislatures for the effective functioning of the government in the country.

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Week- 07

Lecture-05

Election Commission & Election Process

The Election Commission of India is a Constitutional authority deriving its powers from the Constitution for the conduct of free and fair elections in a democratic setup. The important legislations for the conduct of elections in India are primarily Article 324 to 329 of the Indian Constitution. The Election Commission of India derives its powers mainly from Article 324 to 329. The Presidential and Vice-Presidential elections act of 1952 and the rules of 1974 deals with the conduct of elections to the office of the President and the Vice President. Another important legislation is the Representation of People Act of 1950 and 1951 and the rules framed under the Act. They form the major role in conducting the free and fair elections and the Election Commission of India also derives its powers from the representation of people act. The Registration of Electors rules 1960 is a very significant Act. The election symbols reservation allotment order of 1968. The election symbols reservation allotment amendment order of 2017 is a very important act for the conduct of elections.

Another significant growth is the Model Code of Conduct framed under Article 324 of the Indian Constitution. As the word says, it is a Code of Conduct, and it is not a legislation but has been framed by the Election Commission for the conduct of free and fair elections. Before analyzing the functions of the Election Commission, it is relevant to understand the concept of delimitation of commission of India. Delimitation literally means the act or process of fixing limits or boundaries of territorial constituencies in a country. For example, India has 550 constituencies for the house of people i.e. Lok Sabha. So, these constituencies are fixed by the delimitation commission. They are the territorial constituencies for which the elections are conducted. The delimitation commission was first formed in 1952 based on the Delimitation Commission Act of 1952. So far, the Commission has been formed four times, once in 1952, 1963, 1973 and 2002.

Once the act is enforced, the union government sets up a delimitation commission based on the delimitation act. The Delimitation Commission of India is a very high-power body whose orders have the force of law, and they cannot be called in question before any court of law either in high court or in the Supreme Court because they have been primarily set

up for the formation of constituencies for which the election has to be conducted. The Delimitation Act of 2002 has been established to govern the allocation and adjustment of seats in the house of people. Now the seats or allocation and adjustment will be made based on the population whenever there is a census conducted and based on that, the delimitation commission readjusts or allocates the constituencies as per the census. Now, if you look into the latest census, the latest delimitation commission was in 2002 and the seats were allocated as of 550 constituencies.

Now, if it is based on the 2026 census, the parliament would consist of 888 MPs based on the new census. Now, when the delimitation commission makes such a proposition for the constituencies, these orders come into force as on the date where the President of India signs and it is tabled in the parliament. The copies of its orders are laid before the house of the people and the state legislative assemblies, but no modifications are permissible therein. The Delimitation Commission has the absolute powers in allocating the constituencies. They frame constituencies for the parliament and for the state legislatures.

So once the act of framing the constituencies has been made, it can only be tabled in the parliament and the state legislatures where no modifications can be made, and it must be passed as an act. The Constitutional provisions of delimitation commission are as follows: the delimitation commission derives its powers from Article 81 which states the composition of the house of the people. Now, the composition of the house of the people changes after every census. So as per the recent census of 2002, we have 550 constituencies. Now, when it further becomes a higher number based on the new census of 2026.

Article 170 talks about the composition of the legislative assemblies in the state. So, wherever there are legislative assemblies, certain states have legislative assemblies and legislative councils, certain states have bicameral legislation. So, in such cases, Article 170 provides the powers to the delimitation commission. Article 82 talks about readjustment after each census according to the population. After every census the delimitation commission allocates the constituencies.

Article 330 talks about reservation of seats for the scheduled castes and scheduled tribes in the house of the people. Now, this is one of the major powers because we are a representative democracy and the representation for all spheres of community must be made and therefore Article 330 provides the reservation of seats for the scheduled castes in the house of people. Article 332 is about the reservation of seats for the scheduled castes and scheduled tribes in the legislative assemblies of the states. So, these are the important Constitutional provisions where the delimitation commission derives its powers for its function. Looking further, who are the members of the delimitation commission? The chairman is a member of the Delimitation Commission. The Delimitation Commission has a chairman. The former Election Commissioner is an ex-officio member. So, whenever any

member is made to the delimitation commission, he must be a former Chief Election Commissioner. So, he is an ex-official member. The other state Election Commissioners are also the ex-officio members of the delimitation commission.

These three form the major members of the delimitation commission. Moving on, Article 324 is the reservoir of powers for the Election Commission. Article 324-1 talks about the powers of the Election Commission which speaks of superintendence, direction, and control. So, these are the three words which mandates the Election Commission for the entire process of conducting the election. The Commission is a Constitutional body having jurisdiction over elections to the parliament, state legislatures, offices of the President and the Vice President. This covers the entire process of elections to the whole of the country. This Article also provides for the appointment of the Election Commission. Now, if we investigate the powers of the Election Commission, the Election Commission is a constituted body, is an autonomous independent body with a view to conduct free and fair elections. Now, for example, there are other Constitutional bodies which are framed under the legislation. There is no separate legislation for the Election Commission.

The Election Commission derives its powers directly from the Constitution and specially from Article 324. So, this is a part of the basic structure because the Election Commission is the authority which conducts the free and fair elections for democracy and democracy is a basic structure of the Constitution. As such the functions of the Election Commissions are the basic structure of the Constitution. The Election Commission states that India is a Constitutional democracy with the parliamentary system of government and at the heart of the system is the commitment to hold regular, free, and fair elections. What is the meaning of regular elections? For example, the elections for the house of people or the Lok Sabha is for 5 years.

So, unless dissolved earlier, so whenever there is a necessity to conduct the elections at regular intervals, the Election Commission shall do so. Now the Rajya Sabha cannot be dissolved. It is a continuous body, but it still the Election Commission conducts the elections for the members of the Rajya Sabha. So, therefore, the mandate says that it is committed to conduct regular, free, and fair elections. The Constitution mandates the Election Commission saying that no constituency shall be unrepresented for many terms. It must be represented either in the house of people that is Lok Sabha or the Rajya Sabha.

The plenary powers of the Election Commission mean the power is absolute and unqualified. This is because the Election Commission derives its powers from the Constitution. So, the matter of the elections is in the part xv of the Constitution. Now, the words superintendence, direct and control has been the subject matter of judicial interpretation in several cases. In numerous cases, the Supreme Court has said that the words superintendence, direct and control has vast meaning, must be made, highest order and must be interpreted in a very broad interpretation so that the Election Commission has

most powers to conduct the elections. The Supreme Court held that Article 324(1) is plenary in character, that is absolute and unqualified and provides wide powers to the election permission in preparing and conducting of elections. Now, there is also another explanation to this word plenary. Now the plenary, the power of plenary comes into picture in the areas which are left unoccupied by the legislation.

When there is no legislation for conduct of elections either by the parliament or by the state legislature, then the Election Commission can make legislation. The example is the election symbols order of 1968. When the Election Commission made this order deriving its powers of election from the Constitution of India and the representation of people's act, this was questioned as to whether Election Commission is a legislative body to make legislations. The court held that the power to make rules, regulations, directions, orders etc., in the areas left unoccupied by the legislation, the Election Commission has the unlimited powers. Now, in representative democracy, the symbols form an important role in the elections.

The political parties have been allotted symbols to identify themselves during the elections and this did not have any legislation either by the parliament or by the state legislature and therefore the Election Commission had to step in to make the election process more transparent and as such the election symbols order of 1968 was made by the Election Commission. This order was upheld by the Supreme Court stating that the Election Commission has unlimited, unqualified, and absolute plenary powers to make such orders. But the Supreme Court also in its interpretation said that certain orders of the Election Commission are subject to judicial review. Certain orders can be questioned in the court of law in a prescribed manner. So, the limitations of the powers of the Election Commission are laid down by an act of the parliament.

The basic limitation is that if there is any act by the parliament, for example, the Representation of People's Act of 1951, the Election Commission follows the enactment and the legislation. But when there is no such enactment, the Election Commission has the powers to frame the law. The Election Commission while making orders, directions or rules or regulations, they shall conform to the rule of law and principles of natural justice .these are the inherent limitations for the Election Commission which the Supreme Court has identified saying that though the Election Commission has the plenary powers to conduct elections, certain limitations like the existence of legislation or the rule of law and the principle of natural justice has to be followed by the Election Commission.

Moving on, Article 324 also talks about the Election Commissioner. For the functioning of the Election Commission, the Election Commissioner is required and clause 2 of the Article 324 provides that the Election Commission shall consist of Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix. There shall be one Chief Election Commissioner, that is the CEC and any number of other election commissioners. Until parliament makes any law on

that behalf, the Chief Election Commissioner and Election Commissioners are appointed by the President. So, this is a Constitutional provision that the Election Commissioner and the Chief election commissioner have to be appointed by the President.

But if there is any such law made by the parliament for the procedure to nominate the election commissioners, then the legislation shall be followed. When any other Election Commissioner is so appointed, the Chief Election Commissioner shall act as the chairman of the Election Commission. For example, the Election Commission of India now has one Chief Election Commissioner and two other Election Commissioners. So, the Chief Election Commissioner acts as the chairman and two other Election Commissioners are the Election Commissioners. So, these form the framework for the Election Commissioners under Article 324.

According to the Election Commission act, the Chief Election Commissioner or an election commissioner shall hold office for a term of 6 years or up to the age of 65 years. The 1991 Election Commission act deals extensively with the term of office, rules of service and conditions. This does not deal with the procedure of nominating the Election Commissioner. Article 324(5) says that subject to the provision of any law made by the parliament, the conditions of service and tenure of office of the Election Commissioner and the regional commissioners shall be such as the President may determine. Now the President has powers in appointing the Election Commissioners and fixing the conditions of service and tenure, but the Election Commissions act of 1991 deals only with the appointment, conditions of service and terms of office. After the 1991 Election Commission Act, a bill in 2023 was introduced in Rajya Sabha which called for the Chief Election Commissioner and the other Election Commissioners appointment, conditions of service, terms of office bill.

The bill is presently in the Rajya Sabha. The proposed legislation repeals the Election Commission act of 1991, and it proposes to be the next law on the appointment of the Election Commissioners. So, there have been certain deviations from the act of 1991. A very important case regarding the functions, conduct and appointment of the Election Commissioner is the *T N Seshan v. Union of India*. He was a celebrated Chief Election Commissioner, and he made a challenge to the government legislation regarding the functions and appointment of the Election Commissioners. In 1993, the then central government passed an ordinance and got the Presidential assent under Article 342 (2) and (3) to deploy two Election Commissioners. Till this act in 1993, there was no provision for other Election Commissioners, the Election Commission had only one Chief Election Commissioner. Under this Act, the government appointed M S Gill and G V G Krishnamurthy as two other commissioners along with the Chief Election Commissioner. The same was challenged by T N Seshan saying that this might dilute the functioning of the Chief Election Commissioner. But the Supreme Court unanimously upheld the Constitutionality of the act equating the status, powers and authority of the two Election

Commissioners to be same as that of the Chief Election Commissioner and does not dilute the powers of the CEC.

So, the Supreme Court held that the appointment of two other Election Commissioners along with the Chief Election Commissioner is a Constitutional mandate already prescribed under Article 324. So, the court held that the Chief Election Commissioner did not enjoy a status superior to the other Election Commissioners. So, when there were differences between, even though there were differences between the service conditions of this CEC and the other Election Commissioners, the powers, and the status of the Election Commissioner and the CEC are equivalent to each other. The scheme of Article 324 clearly provided for the multi-member committee and not an individual CEC. So, this Act of 1993 was upheld by the Supreme Court when challenged by T N Seshan.

Regarding the Election Commission, there were certain recommendations made by certain committees set up for the function. The tenure is for 6 years, and the age of retirement is 65 years, or whichever is earlier. The Goswami committee was formed to examine the electoral reforms in 1990 which also stated that a collegium system should be made for the selection of the Chief Election Commissioner. Already said the Election Commission act of 1991 does not prescribe the procedure for the selection of Election Commissioners. It only talks about the terms, conditions, and the service rules. So, the Goswami Committee made a recommendation stating that in 1990 there must be either a collegium system or a proper procedure for the selection of the Chief Election Commissioners. The Law Commission Report of 255 also suggested formation of a three-members panel composed of CEO and other Election Commissioners. Now, there also were many suggestions saying that 3 members panel of the CEO i.e. The Chief Election Officer and the Election Commissioners should be made for the appointment of the other Election Commissioners.

According to Article 324(2), the power of appointing the Chief Election Commissioners and 2 Election Commissioners is vested in the President of India. This is a Constitutional provision subject to the provisions of law made by the parliament which includes many other legislations and other provisions of the Constitution. As understanding there is no legislation regarding the appointment of the Election Commissioner.

The appointment of Election Commissioner must have either a separate legislation or a separate procedure set up by the parliament. Now, it is the executive of that time whose council of ministers in consultation with the prime minister advises the President based on which the appointment is made. So, it is an understood fact that whoever is in the majority or in the government at that time suggests the names to be made as the Election Commission. But that does not mean that the Election Commission is a biased or an unbiased Constitutional body. It really states that the executive nominates the appointment of the Chief Election Commissioner or the other Election Commissioners. So, the necessity to have a procedure for the appointment of these Election Commissioners is time-tested.

There have always been suggestions since 1990 for setting up a separate procedure or the collegium system. Like how the Supreme Court has a collegium system there may be a process for appointment of these top functionaries and a procedure which should involve the opposition party members to nominate the Election Commissioners. So, these are certain suggestions made by the certain committees so that to conduct free and fair elections the nomination or the appointment of the Election Commissioners should also be free and fair. So that is understandable because a Constitutional authority like Election Commission having unlimited plenary power should also have a proper appointment procedure for top functionaries.

A comparison of the Election Commission Act of 1991 and the proposed bill in 2023 shows certain differences. So, the Election Commission act 1991 was an ordinance in 1993 and then became an act in 1994. Now, the new bill of 2023 proposes to repeal the Election Commission act of 1991. As such there must be evolving legislation considering the time and requirement. The bill specifies the same composition of the Election Commission in 1991.

So when the 1991 act said there shall be one Chief Election Commissioner and other Election Commissioner it retains the same composition. Now, what has improved in terms of the bill of 2023 is that now the President shall appoint the Election Commissioners and the Chief Election Commissioners on the recommendations of a selection committee. This bill proposes the establishment of a selection committee. The selection committee shall consist of the Prime Minister of India, the leader of the opposition in the Lok Sabha and the Union Cabinet minister nominated. But this certainly talks about the executive. The executive is the authority which nominates the top functionaries or Constitutional authority such as the Election Commission. Now, it also states that the leader of the opposition in Lok Sabha has not been recognized. The single largest opposition party will assume the role. Now, these are the functionaries for the selection committee but the selection committee in this manner when proposed by the bill shall be considered that this is also an executive authority. Under the 1991 Act the terms of office mandates that the CEC and the ECS will hold office for a term of 6 years or until the age of 65 years. This is retained in the bill of 2023. Further the bill states that the CEC or the other Election Commissioners shall not be eligible for reappointment. It is a one term office. Now the salaries and allowances are as in the 1991 Act which provides that the salary and allowances for the Election Commissioners will be equal to that of a Supreme Court judge.

This was a major consideration in the bill stating that the salary allowance and service conditions of the Election Commissioners will be the same as that of a cabinet secretary. In this sense, the objectives, and reasons of the bill states that the office of the Election Commissioners is not equivalent to that of a Supreme Court judge but is equivalent to that of a cabinet secretary. Under the conduct of business all business of the Election

Commission is to be conducted unanimously in case of any difference of opinion between CEC and other Election Commissioners it shall be decided through the majority because there is a three-member committee, namely, one CEC and two other Election Commissioners.

The conduct of business shall be held unanimously based on the consensus and in case of differences of opinion the CEC or the Election Commissioners, the decision shall be made through the majority. Now removal and resignation under Article 324 of the Constitution of the CEC will be in a manner like that of a Supreme Court judge.

This has been a Constitutional mandate, and this has been retained by the 2023 bill though the office of the Election Commissioners is not equivalent to that of a Supreme Court judge, but the removal is in a manner like that of a Supreme Court judge. This is done through the order of the President based on the motion passed by both houses of the parliament in the same session. So, the motion of removal must be adopted with majority support of total membership of each house and at least two thirds support from members present and voting, which is the same procedure as for the removal of the Supreme Court judge. The other Election Commissioner can be removed from office on the recommendation of the CEC.

This bill retains the same provision. Under Article 325 are important provisions for the conduct of elections stating that there shall be one general electoral roll for every territorial constituency for example any person who is a citizen of India prescribing the rules for having the right to vote shall have his name in the electoral roll. There shall be a general electoral roll for every territorial constituency. Now every person shall be eligible for inclusion of his or her name in such roll in any such constituencies and he cannot be discriminated against on the grounds of religion, race, caste, sex or any of such limitations. It says that when you have your name in the electoral roll you are eligible for voting.

The elections to the house of the people and to the legislative assembly of every state shall be based on adult suffrage. Adult suffrage means any person who is an adult attaining the age of 18 irrespective of any such other limitations which is not disqualified by law shall have the power to vote. A citizen of India who is not less than 18 years of age under any law made by the central government is eligible to vote either in the state legislature or the parliament or any of the elections conducted for the local bodies. He should not be disqualified under the Constitution, or any law made by the appropriate legislature for example if the representative of people's act of 1951 makes any provision for the disqualification to vote then he shall be disqualified from voting. So, the other reasons for disqualification of voting may be on the ground of non-residence, the unsoundness of mind crime or corrupt or illegal practices.

Now the law states that if you are not disqualified by any provisions of the Constitution or any provisions of the legislation you are eligible to vote provided you are a citizen of India and are the age of 18. Other important provisions are Article 327 and 328. Subject to the provisions of the Constitution the parliament can make law regarding the elections. The parliament may from time to time make law with respect to all matters relating in connection with the elections to the house of parliament or the house of legislatures of the state. Now parliament can make laws regarding the elections of union and the state.

This includes the preparation of electoral rolls and the delimitation of the constituencies. Now electoral rolls are prepared by the Election Commission. The legislature can make any legislation regarding the preparation of electoral rolls. The Election Commission can make any rules and regulations or the orders regarding the electoral rolls. The delimitation of constituencies, the Delimitation Commission of India derives its powers under the delimitation act made by the parliament. Article 328 talks about the provisions of the Constitution if any law is not made by the parliament.

When the parliament does not make law the legislature of the state may from time to time make such provisions. But usually in India for the conduct of elections most legislations are framed by the union parliament. The state legislatures have a very minimum interference in the provisions in the legislations relating to the conduct of elections because it's completely made by the union parliament. In case the union parliament has not made any such provisions or the legislation the state government can make such law relating to the conduct of elections.

But the state government can make laws relating to the conduct of elections with that state which includes the preparation of electoral rolls and all other matters necessary for securing the due Constitution for either house of parliament. Another important aspect is Article 329 which states that bar on jurisdiction. Now any act of the delimitation commission or any act of the Election Commission having made such rules and regulations under Article 324 cannot be questioned in any court of law. The validity of any law relating to the delimitation of constituencies or allotment of seats to such constituencies made under the powers of Article 327 or 328 shall not be called in question by any court of law.

The act of delimitation is purely of an executive nature, and it cannot be questioned in the court of law. Certain things can be questioned in the court of law through a format called an election petition which has an appeal to the Supreme Court. But generally, the delimitation commission has the superior powers in conducting an act of delimitation of constituencies. Any election to either house of parliament or to the house of legislature shall not be called in question except by an election petition presented to such authority. For quite some time there was a presence of election tribunals, but the Supreme Court held that an election petition shall be made to the high court of any state having an appeal to the Supreme Court. The election petition cannot be made under Article 226 which deals with

the fundamental rights, but it can be made as an election petition to the state high court and then subsequently having an appeal to the Supreme Court. So, as a matter of fundamental right the petition cannot be made either to the Supreme Court or to the high court but as an election petition in a prescribed format the question on any election law can be made on any conduct of elections to the Supreme Court.

An important case in this regard is *N P Ponnuswami v. The Returning Officer*, in which the Supreme Court interpreted the word election to have a very vast and wider meaning so that the Election Commission has more superior powers in conducting the elections. The word election is mentioned in Article 329 connotes the entire election process starting with the notification calling the election. Whenever there is any notification saying that this constituency must have an election so this process of election starts from then. It culminates in the declaration of the result. So, summarily the election process starts with the issue of notification calling the election and culminating in the declaration of the result. So, under any circumstances in this election process neither the Supreme Court nor the legislature can interfere when the process of election has already begun.

The only authority which can change the election process which can adjust the election process is the Election Commission. The high court has no jurisdiction under Article 226 of the Constitution to entertain the cases relating to elections but can be made only through election petition. Election petition is a prescribed format to look into the cases of the election and the Supreme Court has categorically said that Article 226 is not the appropriate forum to question the election disputes. In the *Ponnuswami* case the action of the returning officer for rejecting the nomination papers was questioned in the Supreme Court but the court said that the Election Commissioner or the returning officer has the highest authority under the high court and Article 329 which covers all electoral matters; and the high court has no such jurisdiction. Part xv of the Constitution and the representation of the people's act talks about the election petition.

Election petition must consist of any matters which has the effect of officiating the election process. It can be brought under appropriate stage in an appropriate manner and before any special tribunal; there was a special tribunal called the election tribunal but now it is under the high court. Under Article 329B it prescribes a manner and stage at which the other grounds may be raised under the law to call for the election. Now these grounds cannot be urged in any other manner at any other stage before any other court and election petition is only the prescribed and appropriate forum to deal with the electoral offenses or the practices of elections. In case of appeal to the Supreme Court an important case is *Meghraj Kothari v. Delimitation Commission of India*. Meghraj Kothari was a resident of Ujjain. So, he filed a petition before the Madhya Pradesh High Court and this case is a landmark case in ascertaining the Delimitation Commission powers. It challenged the order because the Delimitation Commission has the powers to set aside or ascertain any commission as the parliamentary commission as the constituency for scheduled caste and scheduled tribe.

So, the high court dismissed a petition on the ground that Article 329a of the Constitution and order of the delimitation commission cannot be questioned in any court.

The delimitation commission has the superior powers in such matters. Another landmark case is *Indra Nehru Gandhi v. Raj Narain* which infamously led to the declaration of national emergency in 1975. Here the question was malpractices or the corrupt practices during the election which states that Indra Gandhi had procured the assistance of a gazette officer who was the government servant and he cannot be involved in the process of the election for the very purpose of free and fair elections.

This was made as an election malpractice and corrupt practices for election and when the Allahabad High Court disqualified Indra Gandhi for corrupt practices during the elections and her election was disqualified by the Allahabad High Court and consequently led to the declaration of emergency. In this case particularly the 39th Constitutional Amendment Act was challenged. Another important landmark case is. The Supreme Court in this case held that the Chief Election Commissioner and the Election Commissioner have absolute authority in conducting the elections or postponing the elections or determining the date of the elections.

The order of the Election Commission directing a repoll was a step in the process of election. Directing a repoll to any constituency based on circumstances and condition was a part of the process of election and as such the Election Commission had wider roles. As the election process was still not complete, any writ petition under Article 226 shall not be upheld by the court. The Supreme Court examined the interpretations at length in the provisions of Article 324 in this case. In this case the Supreme Court categorically stated that 324 of the Constitution is a reservoir of power for the Election Commission to act in such areas. So, in such areas where the legislation is not there the Election Commission can make such regulations.

In this case there was a repoll ordered by the Election Commission. This was questioned. The Supreme Court held that litigative challenges to electoral steps taken by the Election Commission is not permissible under the high court or the Supreme Court but only through an election petition but even when the election process has been started it can't be questioned. The term election has a very wide connotation commencing from the notification calling the election and culminating in a final declaration of the returned candidates and this was the definition given by the Supreme Court for the word election and election process.

Another important case is *A C Jose v. Sivan Pillai*, in 1984 about usage of electronic voting machines instead of ballot boxes. Here also the Supreme Court interpreted the Constitutional 324, 327 and 329. It also read with the Representation of People's Act of 1951 section 59, the conduct of election rules 1961 and interpreting all these legislations

the Supreme Court held that ballot also means the electronic machines not just the paper ballot and therefore from this case onwards the electronic voting machines have been legalized by the Supreme Court in this case. The recent addition to the progressive legislations regarding the elections have also been made. In 1968 the Election Commission made the symbols order which provided for the specification of reservation choice and allotment of symbols at elections. Now, it's a very understood fact that when the political parties stand for elections, they must have symbols, and this must be regulated through any order and this order was made by the Election Commission. Paragraph 3 of the order mentions the registration of political parties. It also mentions the recognition of political parties either as a national political party or as a state political party. This election symbols order also provided for resolution of disputes in cases involving splits and recognized parties for example if a larger party wants to become several state parties or smaller parties must become a larger party so as to have a recognition by the Election Commission. Any party to stand for election must have recognition by the Election Commission through a symbol and this the election symbols order talks about the same. Certain symbols are reserved for political parties.

Paragraph 5 of the order distinguishes between a reserved and a free symbol. Reserved symbol is for the political party and a free symbol is for the non-recognized parties or the independent candidates. This helps the people in understanding as to who it has to identify during the elections and whom it has to vote and what are these symbols and the identification of the parties; and therefore, this election symbols order was a very progressive legislation at that time.

The important aspects of the symbols order; the preamble of the election symbols order states that it derives its power from Article 324 as in many cases the Supreme Court has already said 324 is a reservoir of power so the symbols order was made in consonance with powers under Article 324. It also derived its powers from section 29A of the Representation of People's Act because for conducting free and fair elections the identification of political parties as a national party or a state party or an independent party was a very important factor. Election Symbols (Reservation and Allotment) Order, 1968, framed by the central government under section 169 of the Representation of People's Act was also considered. Rule 5 of the Election Rules of 1961 was also considered. The Election Commission specifies the symbols that may be chosen for a candidate in the state assembly and parliamentary elections. The Rule 10 of the Election Rules of 1961 also talks about the task of preparation of a list of contesting candidates. So, whenever an election is declared to be conducted the list of candidates must be made by the Election Commission.

The conduct of election rules empowers the Election Commission of India to have general or specific directions to the returning officer. During the conduct of election, the officer such as the returning officer plays a very important role during the election process so as such his powers are also vast, but the direction had to be in consonance with the allotment.

So, the allotment of symbols under the symbols order plays a very important role for the conduct of elections. The conduct of election rules authorizes the commissions to revise the allotment of the symbols by returning officers. For example, if the state party has a symbol now it becomes a national party; so, the recognition must be made by the Election Commission.

If the national party wants it to be made as a state party the symbols order also talks about such conditions. Another important case is the *Kanhaiya Kumar* case. The Constitutional validity of this symbols order was challenged in the apex court stating that whether the executive in Election Commission can make legislations or orders or directions or regulations. The main object of Article 324 was again reiterated by the Supreme Court saying that it must be interpreted that the Election Commission can issue such orders.

According to Article 327 there is the power to make law where the legislature has not made any such legislation. There was no such legislation regarding the symbols and the recognition of political parties and therefore the Election Commission made such an order. So, the Supreme Court upheld the validity of the order on the grounds that Article 324 provides the Election Commission with vast powers for conducting elections and this power is inherent in the Article. Rule 5 and Rule 10 of the conduct of election rules is in consonance with Article 324. The latest Amendment Act is the 2021 which allows electoral registration offices to require the existing or the prospective electors to provide other numbers. So, this is as the Supreme Court said that the formation of electoral rolls is a continuous process, so they must keep updating the electoral rolls by addition and deletion of names.

This must be made and is a primary function of the Election Commission. The Amendment Act of 2021 provides for the other number to be included in the electoral roll for the purpose of establishing an identity but for the 2021 act this was made a voluntary basis as the matters of right to privacy was considered. So, the Election Commission of India in its instruction dated 2022 launched the program to collect the other numbers of existing and prospective electors on a voluntary basis from august 2022 in all states and unit territories. It is voluntary. As the Election Commission in its own order stated that the link Aadhaar with the voter id card is a voluntary act but it is for Aadhaar identification.

Considering the Supreme Court's judgment on right to privacy the Election Commission held it as a voluntary basis. Now under this act it also states that this is a law for the purpose of electoral rolls. So, this preparation of electoral rolls is a very important function of the Election Commission and all these aspects for preparing electoral rolls, updating the electoral rolls and making such provisions for the identification of the elector's identification of the voters was a very important part of the election process. This act made certain provisions for the technological aspects of the election process. So there has to be a repository known as the Aadhaar data world and Election Commission strictly follows

the guidelines prescribed by the Aadhaar commission and does not store the other numbers in its database. It has its own encrypted machinery to store these databases and it is used only for the authentication purposes and the Election Commission does not retrieve any personal information from the Aadhar database. These provisions were made so that the Election Commission is technologically upgraded; so that the free and fair conduct of elections and the election process is to be held regularly and at appropriate time. So, these are the provisions of the Election Commission. Election Commission forms a very important structure, a basic structure in the democratic process of India.

Constitutional Law and Public Administration in India

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Week- 09

Lecture-03

Constitutional Authorities - III (Public Service Commissions & Law Officers)

The third set of Constitutional authorities are the Union Public Service Commission and the State Public Service Commission. Part XIV of the Constitution of India deals with services under the Union and the States. There is a separate Public Service Commission for the Union and a separate Public Service Commission for the States. However, both have been dealt together in the Constitution. So, the Constitutional provisions for the Union Public Service Commission and the State Public Service Commissions are common and are contained in articles 315 to 323 of the Constitution.

The Union Public Service Commission and the State Public Service Commissions can be dealt with separately. Article 315 of the Indian Constitution establishes the Union Public Service Commission. As to the composition, the Constitution merely states that in the UPSC, there must be a chairman and some other members. All of these chairmen and the other members are appointed by the President. But the numerical strength of the members who should be appointed has not been mentioned. But the Constitution mentions that at least one half of the members of the Union Public Service Commission should have held office for 10 years either under the Union government or under the state government. So, the numerical strength is not mentioned, but the Constitution provides that one half of the members should have been government servants for at least 10 years.

The tenure of every member has also been fixed. It is either 6 years of service or 65 years of age and the Constitution states that no member of the Union Public Service Commission shall be eligible for reappointment to that office. There are three ways in which the service of a member of the Union Public Service Commission will get over. Either he will retire, or he can resign by submitting a written resignation to the President or he can be removed from his office.

For removing a member of the Union Public Service Commission, the President has to first refer the matter to the Supreme Court. Once the Supreme Court conducts an inquiry and submits a report to the President recommending that the member should be removed from the office only then the President can pass an order to remove a member from the Public

Service Commission. Now what are the grounds for removal? The President has to refer the matter of removal to the Supreme Court on the ground of misbehavior. That is when the whole process of removal would be initiated. Till the Supreme Court's inquiry is completed, the President can choose to suspend a member of the Public Service Commission from his office. There are some grounds on which the President can initiate the process of removal of the member of the Public Service Commission unilaterally, that is without referring the matter to the Supreme Court. There are three such grounds. The first is if a member of the Public Service Commission has been adjudicated as an insolvent. Second if he engages in some paid employment outside the duties of his office while he is serving as a member of the Public Service Commission. The third ground is if the President is of the opinion that a particular member is not fit to continue with the duty owing to some physical or mental infirmity. These are the grounds on which the President can pass an order for removal without involving the Supreme Court and this order will be considered as final. As regards the State Public Service Commission the Constitutional provisions are all the same. There are differences between the two. The first thing to be noted is that the members of the State Public Service Commission are appointed by the Governor and the second difference is with respect to tenure.

For a member of the Union Public Service Commission the tenure is either 6 years or 65 years of age whichever is earlier. When it comes to the State Public Service Commission the tenure of the members is either 6 years of service or 62 years of age whichever is earlier. So unlike the members of the Union Public Service Commission the members of the State Public Service Commission are also not eligible for any reappointment. If the members of the State Public Service Commission have to resign, they have to tender their resignation before the Governor. In the case of UPSC it was before the President.

In the case of the State Public Service Commission, it is before the Governor. But the process of removal of the State Public Service Commission members is very similar to that of the members of the Public Service Commission of the Union. It is the same process, it is the same ground, it is the President who initiates it, and the matter is referred to the Supreme Court etc. So, the same process is proven. But the power of suspension which in the case of UPSC was with the President is exercised by the Governor in the case of State Public Service Commissions.

There is also something called a Joint Public Service Commission. So, if two or more states want to have a common Public Service Commission they can pass a resolution to that effect in their state legislative assembly. And the Parliament will create a Joint Public Service Commission for those states. The states of Punjab and Haryana had a Joint Public Service Commission for a very brief period of time. In the case of the Joint Public Service Commission also it is the President who carries forward the majority of the functions. The governor does not have much of a role to play. So how are PSCs made independent Constitutional bodies? How is their security of tenure ensured? The security of tenure is

ensured by making the process of removal a rather difficult procedure whether it be the Union Public Service Commission or the State Public Service Commission. The process of removal can only be initiated by the President and that too with the Supreme Court's inquiry and recommendation. Under Article 318 it has been provided that their conditions of service are determined by the President or the governor depending on whether it is the Union Public Service Commission or the State Public Service Commission.

But their conditions of service cannot be varied to their disadvantage once they have been appointed. Under Article 316 it has been provided that members of a PSC cannot be appointed or reappointed to that office. But Article 319 clarifies that the chairman of a Union Public Service Commission or State Public Service Commissions cannot seek any employment under any government offices once he retires or is removed from service. But when it comes to other members of a Public Service Commission they can become the chairman of a Public Service Commission but they cannot seek any other employment in any other government offices. So, the chairman is ineligible for any further employment with the government be it any government office.

The other members of a Public Service Commission are eligible for becoming chairman of Public Service Commissions but are ineligible for holding any other posts. Why is it that such a high condition of a service is imposed? It is because of the nature of functions of a Public Service Commission. The first function of a Public Service Commission is conducting the Union Public Service Commission exams or the State Public Service Commission exams. The major function of Public Service Commissions is to conduct exams for appointing people to various government services in the union or the state government.

If it is the union government, it will be the UPSC which will be conducting these exams and if it is the state government services it will be the State Public Service Commission of that particular state which will be conducting exams. The Union Public Service Commission is bound to assist states if they want to conduct joint recruitment. So, two or more states may want to conduct joint recruitments for the government posts that are there in those states and if that becomes necessary, they may request the Union Public Service Commission's assistance. In such cases the UPSC has to give assistance to these two or more states which are conducting such joint recruitments for government posts. This usually arises when candidates possessing certain specific qualifications for certain specific services are being recruited.

Now the Constitution states that the government shall consult UPSC when it comes to recruitment, appointment, promotion, transfer, disciplinary matters and even in litigations that are filed by government employees before the courts against the government. The usage of the word shall in normal parlance means that it is a mandatory condition. So, this means that the government should consult the UPSC mandatorily when it comes to all of

these aspects of recruitment, appointment, promotion, transfer, etc. But in a judgment called the state of *State of UP v. Manbodhan Lal Srivastava* it has been ruled that this consultation is not mandatory. So, it is just a recommendatory condition, and this consultation is not at all mandatory.

So, what this means is that a candidate cannot challenge the decision of the Union Public Service Commission just because the government did not consult the UPSC before the appointment or transfer or the promotion. The lack of consultation cannot be a ground of challenge for the appointments. This has been held in this case by the Supreme Court. One last function of public service commissions is to render advice if at all any matter is referred to them by the President or the governor. So, these are the functions of the public service commission.

These functions have a critical importance. It is the public service commission which constitutes the appointment and transfer and promotion in various government posts. It is because of this that their independence is critical, and it is because of this that certain strict conditions of service have been imposed on them especially when it comes to ineligibility for reappointment. In the case of Comptroller and Auditor General the public service commissions also have to submit reports annually. The UPSC has to submit the report to the President who will cause it to be laid before the Parliament and the state public service commissions have to submit their annual reports to the governor of that state who shall cause it to be laid before the state legislature. This is an additional accountability that is ensured. This is very similar to the provision that we saw in the case of Comptroller and Auditor General.

There is another set of authorities, the Attorney General, the Advocate General and the Solicitor General. Coming first to the Attorney General for India. The office of Attorney General has been established by virtue of Article 76 of the Constitution of India. The Attorney General is considered as the highest law officer of a country. He is appointed by the President and the Constitution prescribes some conditions of eligibility or qualifications for a person to be appointed as the Attorney General. The Constitution states that the Attorney General should possess the qualifications of the judge of the Supreme Court. The qualifications for a person to be appointed as the judge of the Supreme Court is mentioned under Article 124 of the Constitution. According to Article 124 for a person to be appointed as the judge of the Supreme Court he should be an Indian citizen.

Additionally, he should have been the judge of a High Court for at least 5 years, or he should have practiced in the High Court as an advocate for at least 10 years. The third condition is he should be in the opinion of the President an eminent jurist. So, the condition of being an Indian citizen is the first condition and the other three conditions either one of them has to be satisfied. So, he has to be an Indian citizen and he should have been the

judge of a High Court for at least 5 years or an advocate in the High Court for 10 years or is in the opinion of the President an eminent jurist.

As regards the tenure of Attorney General the Constitution prescribes that he shall hold office during the pleasure of the President. This means that the Attorney General holds the position only as long as the President wants him to. So, in the case of other Constitutional authorities there is a fixed age, say 6 years or up to 62 years of service and so forth. But in the case of Attorney General he continues in service as long as he enjoys the confidence of the President. On the flip side he can be terminated from services by the President anytime he wants without assigning any reason. There are many other authorities in the Constitution who hold office under the pleasure of the President. The civil servants are an example, the governors are an example. So, all of these authorities hold office during the pleasure of the President. An Attorney General is one such office. Compared to the Constitution his salary is also determined by the President.

The Constitution enumerates the functions of the Attorney General in a very broad manner. It provides that the Attorney General has to give advice to the government of India on legal matters and has to perform duties which are of a legal character. And these duties may be assigned by the President, or it may be assigned by some provision of the Constitution. The President has assigned some specific functions to the Attorney General and this has been done by virtue of an executive notification. There are three such functions. The first is to appear on behalf of the government in matters before the Supreme Court. So, basically these will be cases where the government of India is a party to a litigation before the Supreme Court. In such cases the Attorney General has to represent the government of India. The second function is to represent the government of India in Presidential references under Article 143. The President can refer certain questions of law which are of importance to the Supreme Court and these cases will be heard by the Constitution bench.

In such Presidential references the Attorney General may be asked to represent India. The third function is to appear before the government of India that is to represent the government of India in high courts if necessary. The Constitution of India guarantees certain privileges to the Attorney General. One of the privileges is that the Attorney General has a right to an audience in all courts. The right to an audience means that an Attorney General can appear on any of the courts in India and represent the clients. He can only speak and take part. He cannot exercise any right to vote. The final privilege is that which is accorded to all the members of the Parliament, the freedom of speech.

There is no liability for anything said or any vote given or any liability for any publication which has been made under the authority of the Parliament. This freedom of speech which is guaranteed to other members of Parliament is available to the Attorney General as well. So these are the three privileges or the powers which are available to the Attorney General under the Constitution of India. The Parliament has enacted a legislation called the Law

Officer Conditions of Service Rules 1987. In this there are three types of law officers, the Attorney General, the Solicitor General and Additional Solicitor Generals.

The office of Attorney General is created by the Constitution. However, the Solicitor General and additional Solicitor General's offices have been created under a statute called Law Officer Conditions of Service Rules. So, these are statutory bodies and not Constitutional bodies. This particular statute prescribes a term of office of three years for all law officers that is for Attorney General, Solicitor General, and additional Solicitor General. For Additional Solicitor General, the term of office of below three years may also be prescribed and all the three law officers are eligible for reappointment for a further term that is for one more term and the service of each of these law officers can be terminated by a three months' notice from either side, either from the government or from the Attorney General or the Solicitor General themselves.

The statute also prescribes that the law officers are eligible for a retainer fee, office allowance and fee for the appearances. The office allowance and the fee for appearances is familiar. But retainer fee is what you pay upfront for engaging a lawyer to appear on behalf of yourself in any litigation matter. The statute lays down certain restrictions on all law officers. They can only accept briefs from the government. They cannot advise any other person for lodging a case against a government. They have to seek prior permission from the government if they want to defend an accused in any criminal proceeding or if they want to accept any other appointment. They also cannot advise any other ministry or department unless that request for advice is received through the Ministry of Law and Justice. The office of the Solicitor General is something that is not created by the Constitution. Among all the other authorities this is one single authority which is not constituted under the Constitution.

How is a Solicitor General appointed? This is purely an executive appointment because the Solicitor General is appointed by a body called the appointments committee of the cabinet and this appointments committee of the cabinet comprises the Prime Minister of India and the Minister for Home Affairs. This is an exclusively executive appointment. Now, the Solicitor General is the second highest law officer in the country. In the hierarchy he falls right beneath the Attorney General and the additional Solicitor Generals are mostly appointed for focusing the work on High Courts. As to the function of Solicitor Generals the statute, on the law officers' conditions of service rules treats all the law officers equally and does not shed much light into the functions of the Attorney General or the Solicitor General. In usual practice the Solicitor General merely assists the Attorney General. So, in assisting also they only appear before all courts within India. They do not usually tender legal advice to the government. The act of tendering legal advice is something that falls within the exclusive prerogative of the Attorney General's powers. So, the function of Solicitor General is to assist the Attorney General by appearing before the courts that are

appearing on behalf of the Union of India in courts, but they do not tender legal advice to the government.

The next constitutional authority in this category is the Office of Advocate General for the state. This is an office that has been established under Article 165 of the Constitution and most of the provisions are very similar to that of Attorney General or it is comparable to that of Attorney General. So, if the Attorney General is the highest law officer of a country the Advocate General is the highest law officer of a state and if the Attorney General is appointed by the President the Advocate General is appointed by the Governor and for an Attorney General the qualifications should be similar to that possessed by a judge of the Supreme Court. When it comes to an Advocate General, he should possess qualifications of a judge of a High Court.

What are the qualifications that a judge of a High Court should otherwise have? He should be an Indian citizen and he should have either held judicial office for a minimum of 10 years or he should have been an advocate in a High Court for a minimum of 10 years. So, these are the qualifications that a judge of a High Court should possess, and the same qualifications should be possessed by a person for being appointed as the Advocate General of a state. Just as the Attorney General holds office during the pleasure of the President, the Advocate General holds office during the pleasure of the Governor and his salary is also determined by the Governor. The functions are also very similar. It is to give legal advice to the government of the state and to perform duties of a legal character which are bestowed on the Advocate General either by the President or by the Constitution.

The provisions are said to be comparable and give a better understanding of the position of Advocate General. When it comes to the powers and privileges of the Advocate General, two of the powers and privileges that he has is common with the Attorney General. This is the right to speak in and take part in the proceedings of any state legislature, but he does not have the right to vote. There is a similar provision for Attorney General. The second one is that of the freedom of speech with no liability for anything that is said, or any vote given or any publication which is made within the authority of the state legislature.

This is also something that we saw in the case of Attorney General but the right to an audience in all courts which is a privilege that was available to Attorney General that is not available to Advocate General barring that the other two privileges are available to Advocate General as well. As to a summary of Constitutional authorities, the first Constitutional body that was that of the Comptroller and Auditor General. His appointment is by the President, but he is not eligible for reappointment. His removal is on like manner and grounds as a Supreme Court judge and his salary, and conditions of service have been laid down by the Parliament in the statute called CAG Duties, Powers, and Conditions of Service Act 1971.

The next constitutional authority is the Chief Election Commissioner. He is also appointed by the President and his removal is also on like manner and like grounds as a Supreme Court judge. His salary and conditions of service are determined by the Election Commission, Conditions of Service of Election Commissioners and Transaction of Business Act of 1991. We also looked into the Election Commissioners other than the Chief Election Commissioner. They are also appointed by the President and in the Constitution, it does not say that the removal is on like manner and grounds as a Supreme Court judge.

That was introduced after a Supreme Court judgment was pronounced by the Constitution bench. His salary and conditions of service are also determined by the Election Commission, Conditions of Service of Election Commissioners and Transaction of Business Act. In the case of the Attorney General, the President is the authority appointing him and since he holds office during the pleasure of the President, his removal is also affected by the President by withdrawing the pleasure. The salary and conditions of service are determined by the President. We also have the law officer's Conditions of Service rules to supplement this.

The Advocate General is appointed by the Governor and his removal is also by the withdrawal of pleasure by the Governor. The salary and conditions of service are determined by the Governor. The last constitutional authority is the Public Service Commission. So, for a member of a Public Service Commission, the appointment is by the President, and they are not eligible for reappointment. When it comes to removal, it is the President who affects the removal after recommendation of the Supreme Court's Inquiry Committee. The salary and conditions of service are determined by the President or the Governor as the case may.

Constitutional Law and Public Administration in India

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Week- 09

Lecture-04

Local Self Governance

The 73rd and 74th Amendments of the Constitution created two important bodies within the Constitution. The 73rd Amendment gave birth to the Panchayati Raj systems in the country and the 74th Amendment gave birth to the urban local bodies in the country. So, with the 73rd and 74th Amendments these two have become part of the constitutional bodies. As to the evolution of the Panchayati Raj system in India, self-governing village communities have always existed in the form of village assemblies or Panchayats which took care of issues at the village level. So, the local government bodies with elections to it just like the government at the center or the state is a phenomenon that was there from the British era. Lord Rippon had created what was called the local boards. Later, the village Panchayats were established under the Government of India Act of 1919 and were continued in the Government of India Act 1935 as well. Gandhiji was a staunch proponent of decentralization of power.

He wanted each village to constitute a republic so that it would be self-sustaining and capable of managing its own affairs. In the constituent assemblies in the debates of the constituent assembly there were many people who agreed with Gandhi's vision of local self-government at the village level and strongly advocated for it. However, there were also many strong oppositions to this idea, and these came from none other than the stalwarts in the Constituent Assembly like the Prime Minister Jawaharlal Nehru who was skeptical of the idea because he thought that it would pose a threat to the unity and integrity of India.

Dr. B. R. Ambedkar was also someone who was not keen on having local self-governments at the village level because he believed that this would perpetrate evils like caste-based discrimination or religious-based discrimination. So, they were all very skeptical of the idea of local self-government at the level of villages. Nonetheless, the idea of Panchayati Raj was incorporated as a directive principle of state policy when the constitution came into force. Under Article 40 of the constitution the state shall take steps to organize village panchayats and endue them with such powers and authority as may be necessary to enable them to function as units of self-government.

This has been incorporated as a directive principle of state policy. The directive principle of state policy is non-justiciable, and they are only advisory in nature. The idea of local self-government has always been there. So, even before the 73rd and 74th Amendment Act came into force in 1993, there were some states like Gujarat and Maharashtra which had adopted the Panchayati Raj system from the 1960s. But the problem was that there was no uniformity amongst states. There were only a few states which had incorporated this idea. Also, there were no regular elections that were held to the Panchayati Raj institutions. In some cases, the Panchayati Raj institutions would be dismantled and there would be no fresh elections to replace the one that was just the one's tenure that just got over. So, the government began constituting various government committees to study this issue and to understand what could be done better to reform this local self-government system in India. So, one of the first committees to study this issue was the Balvant Rai Mehta committee.

This committee proposed the idea of a three-tier Panchayati Raj system and this committee also proposed that there should be direct elections to the Panchayati Raj institutions at the village level that is at the most basic level and there should be indirect elections to the tiers that are above the village level at the block and district level. And the Balvant Rai Mehta committee proposed that planning and development activities should be entrusted with the local self-governance. After that in 1977, there was the Ashok Mehta committee. He and his committee proposed that instead of the three-tier system, there should be a two-tier system. There should be a Zilla Parishad at the district level and there should be another one called Mandal Panchayat below the Zilla Parishad which will comprise a group of Panchayati. Then in 1985, the G V K Rao Committee recommended that the Zilla Parishad at the district level should be the principal body and the office of the district development commissioner should act as the CEO of the Zilla Parishad.

This G. V. K. Rao committee proposed that regular elections should be held to the office of Panchayati Raj institutions. It was only the L.M. Singhvi Committee proposed that there should be a separate chapter devoted to the constitutional recognition of Panchayati Raj systems and it also proposed that judicial tribunals should be evolved for settling the election disputes, election disputes arising from the elections to the Panchayati Raj institutions. The committee which came after L M Singhvi committee is very crucial.

The P K Thungon Committee reiterated the demand for constitutional recognition and it also proposed that there should be a fixed tenure of five years. More importantly it was this committee which proposed that there should be reservation for members coming from the Scheduled Caste, Scheduled Tribe communities and reservation for women in the seats that are there in the Panchayati Raj institutions. In the same year another committee was also constituted called the Gadgil Committee. This committee proposed that there should be a separate state finance commission for devolving funds to the Panchayati Raj institutions and there should be a state election commission separate from the election machinery that is otherwise there to conduct the elections to the Panchayati Raj institutions. When the

Panchayats were finally added to the constitution by virtue of the seventy third amendment act in 1991, a lot of these provisions which were recommended by various committees over the course of years, they were incorporated in one form or the other. So, all of these major recommendations were reflected in the final form of seventy third amendment act 1991. Although this amendment act was enacted in 1991, it came into force only in 1993. So, the Panchayats were added to the constitution as a separate chapter through the seventy third amendment. This is called the Part IX of the constitution. This seventy third amendment also added the eleventh schedule to the constitution.

The basic structure of the system needs to be understood. First of all, there is a gram sabha. This gram sabha would comprise all the adult members who are registered as voters in the Panchayati area and the functions and the role that is to be played by gram sabha will be decided by a state legislation. We have a separate three-tiered system of the Panchayati Raj institutions with the gram panchayat at the base covering villages or a group of villages. Above that is the block level or the taluk level or the mandal level. These may be known by different names in different places. But the block level or the mandel level may not be constituted in smaller states. At the apex level, we have the zilla panchayat which covers the entire district, entire rural area of the district. The Panchayati Raj system does not apply to certain areas called the fifth schedule areas and certain states in the sixth schedule areas. The features of the Panchayati Raj institutions are as follows:

First of all, direct elections are conducted to all the three levels of the Panchayati Raj institutions. That means all the representatives are directly elected by the people and the term of each Panchayati body is five years. Now, if the state government dissolves the Panchayati before the end of its five-year term, fresh elections must be held within six months of such dissolution. This is an important provision which ensures that local self-governments are not left in vacuum and that they will continue to be in existence. Before this amendment, in many states there used to be indirect elections to local bodies and it used to be fragmented because no elections used to be held immediately after dissolution.

So, the 73rd Amendment has sought to provide against this by ensuring that there will be regular elections once the term of a Panchayati Raj institution is over. Another interesting feature in the Panchayati Raj system is that there are seats which are reserved for candidates belonging to Scheduled Caste communities or Scheduled Tribe communities. This was a very important recommendation that was made by the P K Thungon Committee. So, this has been incorporated in the 73rd Amendment. For other backward castes, the states may provide reserved seats if they find it necessary.

The seat reservation for SC and ST community candidates is something that we have already discussed in the context of parliamentary and state legislative assembly elections. However, there is another provision that makes this entire system of Panchayati Raj institutions more interesting. One third of the positions in all Panchayati Raj institutions

are reserved for women. This reservation of one third of the seats of women is not merely in the general category seats but also in the seats reserved for scheduled caste and scheduled tribe communities. This means that a seat may be simultaneously reserved for a woman candidate who is belonging to Scheduled Caste or Scheduled Tribes.

Furthermore, these reservations do not only apply to the ordinary members of the Panchayats but also at the level of the chairperson or the *adhyaksha* that is there at all the three levels. So, this means that because of the mandatory reservation there may be a woman candidate who is a chairperson who is also simultaneously belonging to the SC, ST community. This is a very refreshing change. There have been many attempts to introduce such a mandatory reservation of seats for women in the parliament and the state legislatures as well. Many bills have been formulated in this regard but most of them have failed to see the light of the day.

It is in this backdrop that it becomes necessary to appreciate how mandatory reservation for women has been introduced in the Panchayati Raj institutions and that too a reservation within the SC, ST seats as well ensuring that women belonging to all communities would get adequate representation in the local self-government. Now, when it comes to the functions, the Panchayati Raj institutions are expected to deal with preparing plans for economic development and social justice. But what all powers can be exercised by the Panchayati will be determined by the state government through legislation. The Panchayats will mostly deal with plans and schemes related to matters that fall within the ambit of the 11th Schedule which was also introduced by the 73rd Amendment.

In the 11th Schedule there are subjects like agriculture, drinking water, rural housing, health, sanitation, etc. There are 29 subjects in the 11th Schedule most of which are linked to the development and welfare functions at the local level. So, it is the state government which decides how many of these 29 subjects in the 11th schedule should be transferred to the local self-government at the Panchayati level. Another important feature of the Panchayati Raj institution is that there is a state election commissioner who is appointed for conducting elections to the Panchayati Raj institutions. This state election commissioner is appointed by the concerned state government for conducting exclusively the elections to the Panchayati Raj institutions.

This state election commissioner is independent of the election commissioner of India. This is also an important safeguard that was recommended through one of the committees. Two additional safeguards have been provided to the state election commissioner. First, he can only be removed on like manner and on like grounds as a judge of the high court and second, there can be no variation of conditions in his service once he has been appointed. These are comparable to the safeguards that are provided to the chief commissioner under the Election Commissioner of India. But it is very important to note that the state election commissioner that has been constituted for conducting elections to Panchayati Raj

institutions is independent of the election commissioner of India. Then there is also a State Finance Commission which is constituted once every five years. This commission examines the financial position of the local governments in the state. It also reviews the distribution of revenues that are there between the state and the local governments and between the rural and urban local governments.

So, this creation of a state finance commission ensures that the Panchayati Raj institutions get funds allocated to them independent of the executive or the legislature and it is not converted as a political issue. One more important feature of the Panchayati Raj institutions is that the state government can authorize the Panchayats to levy, collect and appropriate taxes, duties, and tolls. So, this will also go into the revenue system of the Panchayati Raj institutions. In addition, the state government can also constitute separate funds for crediting the money that the state government receives by or on behalf of the Panchayats and the audit of the accounts of the Panchayati Raj institutions are done by the concerned state legislature. So, this is an overview of the salient features of the Panchayati Raj institutions which have been introduced through the 73rd Amendment Act.

Among the features of the Panchayati Raj institutions, some of the provisions are mandatory. They have to be enacted by the state legislature, but some of the provisions are direct. So, in these provisions, the state legislature can take a liberty and can frame the provisions according to its discretion. Let us look into what are the mandatory provisions in the Panchayati Raj system. So, the state legislation that recognizes this Panchayati Raj system that has to constitute the gram sabha, has to constitute the three-tier Panchayati system. Then there should be a direct election to Panchayats and an indirect election to the post of chairperson. The tenure of five years is fixed. So, the state legislation cannot tamper with that. And 21 years is the minimum age for contesting elections to any of the posts within the Panchayati Raj institutions. So, that also cannot be altered. Then the state legislation establishing the Panchayati Raj institution has to provide reservation for SC/ST community and the one-third reservation that is applicable to women. The establishment of State Election Commissioner and the State Finance Commission are also mandatory provisions. So, the state legislation has to have all of these provisions. The state legislature may provide that in the Panchayati Raj system, there has to be such proportion of representation for the MLAs within that particular constituency or the MPs who are there in that particular constituency.

This is a directory provision. This is not mandatory. Then it is up to the state government to decide whether the Panchayati Raj system in its state should have a reservation for other backward castes. It is a state government which decides which of the functions within the 11th schedule, which of the matters within the 11th schedule should be transferred to the Panchayati Raj institutions. So, it will depend on the state legislature's decision to transfer which among the subjects to the Panchayati Raj institutions that will decide what all are the functions that are to be performed by the Panchayati Raj institutions. For example, if

the matter of agriculture is transferred to the Panchayati Raj institution in a particular state, that Panchayati Raj institution will have a role to play in implementing the schemes and planning the schemes related to agriculture.

But if that is not transferred and that is retained by the state government with itself, then the Panchayati Raj institution will not have any role to play. So, the power, authority and responsibility, the extent, scope, and ambit of all of this of the Panchayats is decided by the state legislature. Through the legislation that is enacted by it. So, there are no mandatory provisions there. Then the state legislature also authorizes the Panchayats to collect tax fees and tolls. This is also not a mandatory obligation. The state may authorize the Panchayats, the states may not. So, these are the mandatory and directory provisions within the 73rd amendment, within the part IX of the constitution. The system of Panchayati Raj institutions does not apply to fifth scheduled areas in the constitution. The fifth scheduled areas are some states which are included in the fifth schedule because of the tribal populations that are there in the states. There are some special provisions that are made applicable to the fifth scheduled areas.

In these states, the local self-government is brought into existence through other legislation and not through the constitution. This legislation is called the Panchayat (Extension to the Scheduled Areas) Act 1996 or the PESA. This is applicable only to the fifth schedule areas and not to the sixth schedule areas. Many of the tribal communities have their own traditional customs of managing common resources such as forests, water reservoirs, etc. Therefore, PESA protects the rights of these communities to manage their resources in ways that are acceptable to them.

How does PESA or the Panchayat extension to scheduled areas Act provide for this? It gives more powers to the gram sabhas in the fifth scheduled areas. For instance, gram sabha has been given the power to safeguard or preserve the customs, traditions, cultural identity and customary modes of dispute resolution of the tribal communities. The gram sabha has to approve the socio-economic development projects before they are taken up for implementation by the Panchayats. The gram sabha has to be consulted before land is acquired and rehabilitation takes place. Gram sabha's approval is mandatory before any license is granted for mining projects.

In all of these aspects, gram sabha's role is more prominent in fifth scheduled areas and this gram sabha operates with a view to further the tribal communities and traditions to ensure that their traditions do not get eroded with the introduction of modern systems such as elected Panchayati systems. So that is the very idea behind PESA to ensure that there is a balance between the local traditions of tribal communities and the modern elected bodies.

The 74th Amendment Act was enacted in 1991 for urban local bodies. The urban local bodies, also called municipalities, have a three-tier structure. There is a nagar panchayat

for a transitional area that is to say an area that is in transition from a rural area to an urban area. There is a municipal council for a smaller urban area and there is a municipal corporation for a larger urban area. So what amounts to transitional areas, what amounts to smaller urban areas or what amounts to larger urban areas, all of these would depend on the population, the revenue, the percentage of employment etc. In many ways, the 74th Amendment is a repetition of the 73rd Amendment except that it applies to urban areas. So all the provisions of 73rd Amendment relating to direct elections, reservations, transfer of subjects to the 12th schedule, State Election Commission, State Finance Commission are all incorporated in the 74th Amendment as well. All of these provisions apply to urban local bodies as well. One additional provision that is there in Part IXA that establishes municipalities is the constitution of a committee for district plan. This committee for district planning consolidates the plans that are prepared by Panchayats and the municipalities in the district, and they also prepare a draft development plan for the district as a whole. There is also a committee for metropolitan planning within the municipalities.

This is for the preparation of a development plan for the metropolitan area as a whole. The details of the committee for district planning and the committee for metropolitan planning will have to be worked out by the concerned state governments. The aspects of mandatory and directory provisions are very similar and comparable to that of Panchayati Raj institutions. The only additional mandatory provision in the case of municipalities is the establishment of the committee for district planning and the committee for metropolitan planning in the metropolitan area. So apart from this all of the other provisions which were mandatory in the case of Panchayati Raj institutions became mandatory in the case of municipalities also and the provisions which were directory are continued to be directory in the case of municipalities as well.

Constitutional Law and Public Administration in India

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Week- 11

Lecture-02

Delegated Legislation – II

To understand the evolution of delegated legislation in India, we would take a two-prong approach. We will understand the evolution in a two-phase manner, wherein we would first study the evolution of delegated legislation in the pre-constitutional period, that is prior to 1950 and the evolution of delegated legislation subsequently after the adoption of the constitution. In this context, it is pertinent to note two various cases which were decided prior to the adoption of the Constitution. This leads us to a discussion of *The Empress v. Burah*, a matter decided by the Privy Council. The case before the Privy Council was an appeal which was from the High Court of Calcutta as it then existed. The appeal before the High Court of Calcutta was filed by persons who were convicted of murder and sentenced to death. They were sentenced to death because the courts which were there in Khasi, Jaintia and Naga Hills were removed from the jurisdiction of the civil and criminal courts that were established in the country and thereby which the lieutenant governor was allowed for extension of those particular laws which was essentially applicable to the Garo Hills by virtue of an 1869 legislation. The power to extend the laws to other territories was the question before the honorable courts to determine whether such delegation of power was an excessive delegation or not. It is pertinent to observe that the High Courts of Calcutta were predominantly oriented as to how the judicial minds in the UK were trained. They regarded that the Indian provincial governments were subordinate to that of the UK Parliament and as such a further delegation by the Indian Parliament to the left-hand governor would be treated as an excessive delegation and sub-delegation is not permissible under law.

However, upon appeal, the Privy Council reversed the decision of the Calcutta High Court and held that the Indian legislature was not a delegate of the Imperial Parliament and had plenary powers of its own legislative powers and the same was on similar lines as that of the Imperial Parliament itself. Although it did agree that the Governor General could not by legislation create a new legislative power or create any other subsequent authority, but however, if the power was given to the left-hand governor to extend the applicability of certain laws that were passed by the provincial legislature, the said power was a competent

delegation of legislative power and as such, such delegation is a valid delegation. Similarly, in *Jatindra Nath Gupta v. The Province of Bihar*, the question arose with regard to the Bihar Maintenance of Public Order 1948. In this case, the question arose as to the extension of the law for a further period than for which it was made for. Under this law, a particular provision allowed for the extension of the Act for a further period beyond one year, which was essentially passed by the legislature. In this case, the majority of the federal court held that such an extension of a period is unlawful and is an invalid delegation of power. However, Justice Fazal Ali gave a dissenting opinion in the sense, he gave a contrary view, and he was a minority bench in this, wherein he observed that the particular extension is correct and a valid delegation of power. These two cases predominantly created the validity of delegated legislations in India. On adoption of the Constitution in 1950, India adopted a democratic model, and the powers of the sovereign were vested in three bodies, which is the legislature, executive and judiciary, thereby embarking a separation of the sovereign power in these three bodies. There is a fair way to understand that the separation of judiciary from the executive and the legislature is essential for having a successful democratic model.

In this context, the Delhi Laws Act, 1912 matter, which arose before the Supreme Court becomes relevant to understand to what extent the legislative power can be exercised by the executive. The matter concerning the Delhi Laws Act of 1912 was the first case on delegated legislation that was determined by the honorable Supreme Court of India. This matter was brought before the Supreme Court by means of a reference that was made by the President of India under article 143 of the constitution. The query that was put before the Court was with regard to the power of the Central Government under Section 2 of the Delhi Laws Act, which allowed for extension of the particular laws that were applicable to Part A states to states that were enumerated under Part C of the particular Act. With the adoption of the constitution, the states were reorganized, and Part A, B and C states were created, and various states were enumerated depending upon their administrative capacity.

Under the Delhi Laws Act of 1912 and the Delhi and Ajmer-Merwara Land Development Act, 1948, there were a particular aspect of regulatory regime that was created by virtue of which the Central Government was authorized to extend to any Part C state such legislative provisions with such modification and restrictions as the Central Government may deem fit. So, long as such enactment is similar to that nature which is already enforced in a part A state. The provision was so enumerative and exhaustive that it gave complete freedom to the central government to make any modification to any existing law that prevailed in such part C state. The Supreme Court was to determine the legality of this provision. It is to be observed that all seven judges who determined this matter gave separate opinions on this particular topic. The question pertinently was whether the legislative in India could be permitted to delegate its legislative power and if yes to what extent. It is to be observed that the majority of this judgment observed that delegation of legislative power in India is

a valid delegation. But however, it is subject to two foremost limitations. Firstly, an executive cannot be authorized to repeal a law which is already in force and thus under the particular legislatures that is the Delhi laws Act and the Ajmer-Merwara Act. The provision which empowered the Central Government to repeal an existing law in force which was there in Part C state was held to be wrongful in nature and as such void.

Secondly, it was also observed that while exercising such delegated power of modification, the legislative policy should not be changed. In this sense, the particular subordinate legislation which is brought forth should always be consistent with the parent legislation which is there in force. As such substantive alteration or modification is something that cannot be allowed by virtue of delegation of this legislative power. And to this day, we follow this particular premise wherein wherever there is a legislative action that is taken by virtue of a delegated legislation and if the same is not in consonance with that of the parent law or the supreme law, then in those circumstances, the subordinate law or the child law is held to be bad in law and as such void. On one hand, the judiciary observed that delegation of legislative power is permissible to the executive. On the other hand, it clearly allowed for a particular framework or a particular manner in which a demarcation for the extent on which such power can be exercised by the executive. Bringing the contours on which delegation is permissible in India.

With this we move on to the next aspect which deals with the functions that can be delegated to executive authorities. You may have observed that in every statute there is a particular clause which is known as the ‘appointed date clause’ wherein it empowers the relevant Central Government or the state government to appoint a particular day on which such act can come into force. In those circumstances, is this a particular provision that can be given for delegation of such powers? The codes on numerous instances have held that appointed date clauses are valid. The Legal Services Authorities Act of 1987, although passed in 1987, was brought into force only in 1997 after a long gap of about a decade. One of the reasons as to why this power has been extended to the government to bring in across the implementation of the law is because implementation of legislative Acts requires certain administrative set ups that are to be made. And as such appointed date clauses which allows for the Central Government or any other state with a government, the power to notify as to when the act becomes applicable is a valid delegation of power.

The second aspect wherein the functions that are generally delegated by in the form of delegated legislation is with regard to supplying of certain details. The legislature gives the broad framework on which the law becomes applicable, and the Central Government is given across the further delegated power to supply for essential details as to how the law is to be implemented. In this context, a case concerning the particular manner in which the legal profession is to be governed is essential to be discussed. The matter pertains to *Hansraj L. Chulani v. the Bar Council of Maharashtra and Goa*. In this case, the facts were of such nature that the State Bar Council had framed a rule upon the aspect of right to

practice legal profession and under this rule, it disqualified persons if they are engaged in any other occupation. The matter arose as to whether a person who is carrying on the medical profession in the form of a doctor can carry out the legal profession or not. The delegated rule which was formed by the State Bar Council was challenged before the courts of law. The Honorable Court clearly stipulated that this was not an excessive delegation, and the rule was valid because the entire scheme and purpose of the act was stipulated by virtue of supplying details which was done in the rules. Essentially, practicing a legal profession requires that the person does not engage in any other alternate occupation that requires his full time and devotion.

A second aspect of understanding as to how supplying details is essential for creation of delegated legislation can also be observed while looking across to the Minimum Wages Act. Under the Minimum Wages Act, the Central Government is given the power to essentially determine to which particular industries the Minimum Wages Act becomes applicable. In *Edward Mills Co. v. State of Ajmer*, the query arose on the same Minimum Wages Act of 1948 wherein the power of the appropriate government to add other industries to the Schedules to which Minimum Wages Act is applicable was challenged as an excessive delegation of power. It was held that the opinion of the government was given the foremost importance under the legislative mechanism and there was no said bridled powers on the basis of which the Central Government was authorized to decide the matter as to whether an industry should be included in the schedule or not. Please note, the Supreme Court taking into account the nature on the basis of which the legislation has been formulated which is the welfare of workers clearly stipulated that such a delegation of power is a valid delegation of power, and the Supreme Court upheld the validity of the Minimum Wages Act.

The further function that may be delegated to the executive is that of inclusion and exclusion. As observed in the Delhi Laws case and the case concerning the Minimum Wages Act, it is essential that the power to include is something that is a valid delegation of legislative power. Now this allows for various aspects as to how the legislative policy can briefly be set up and the government is empowered to extend the applicability of such legislative policy to suitable mechanisms which can be provided by way of inclusion or exclusion of certain industries. In this context, it is pertinent to observe the matter concerning *Hamdard Dawakhana v. Union of India* which was one of the particular instances where a central law which is essentially the Drugs and Magic Remedies (Objectionable Advertisements) Act of 1954 was held to be invalid on the ground that it allowed for excessive delegation of power. When we spoke about the aspect of the power of inclusion or exclusion, please note that this power should always come across with the aspect of provision of flexibility to the executive to allow for legislative policy implementation.

However, it comes with the rider that such power to allow for flexibility should always be curtailed by certain restrictions that are placed under the Act. Under the *Hamdard Dawakhana* case, the Drugs and Magic Remedies Act allowed for enlisting various lists of diseases under the particular schedule by the Central Government. It was held by the Supreme Court that the said provision to include the list of various diseases did not have any particular principles, criteria or standards that was laid down for identification of such particular diseases and as such it was held that this is an excessive delegation of power. Another aspect of delegation of power is the power of suspension. Few of the enactments allow for the appropriate government to suspend or relax the applicability of a certain legislative provision to a particular entity, subject matter, or territorial jurisdiction. In those circumstances, it is to be observed that the power of suspension is an essential function that can be delegated because there may be certain exigencies that may arise whereby the following the legislative procedure may result in an untoward incident or may be something that cannot be done in the scheme of things as to how the facts and circumstances unfold. For instance, under the Banking Regulation Act of 1949, the Central Government on representation that is made by the Reserve Bank of India, the supervisory Central Bank of India that the applicability of the particular provisions under the Banking Regulation Act required to be suspended. The Central Government may for a period of up to 60 days suspend the operation of all or any of the provisions of the Banking Regulation Act from being applicable to any specified banking company. Now this particular power involves in itself the power for suspension of the application of the Act and as such it is a valid delegation of power because the circumstances of some nature may have arisen whereby the banking company is unable to fulfill the requirements of the Banking Regulation Act. But however, the failure of any banking institution may relate or lead to the collapse of the entire financial system as happened in 2008-2009 in the US where two major banking institutions collapsed. Such power which is provided in the Banking Regulation Act of 1949 may prevent a scenario that had occurred in 2008 in India.

The next function that can be delegated to an executive authority is the application of an existing law. We have already looked across this particular power of delegation in the Delhi Laws Act of 1912. So, it is quite clear and evident that by extending the application of the existing law to other states there is no excessive delegation or wrongful delegation of legislative power. However, so long as the delegation or the legislative policy is not in incontinence with that of the constitution whereby an excessive delegation structure is created where there is a power that is given across to the executive to make across the application with such number of changes whereby the exact legislative policy itself is being abdicated. In those circumstances alone the extension of application of existing laws will be held to be an excessive delegation. Otherwise, where the legislative policy remains intact and has the necessary controls or checks and balances for exercise of such application of existing laws, such a delegation is a valid delegation.

The next power, modifying existing statutes to suit the application requirement. We have already discussed in the Delhi Laws Act case that the power to modify is something that should be exercised with abundant caution. The legislative function in order to ensure flexibility to the executive cannot be given with unbridled powers to modify the exact legislative policy or scheme that the legislation tries to achieve. Modification is essential to come with brittle powers of checks and balances and so long as such checks and balances are there the same shall be treated as a valid delegation. Two factors need to be considered at the time of determining whether the modification is a valid delegation or not. Firstly, is the need for such delegation and secondly it is the danger or risk of misuse of such power by the executive.

The next aspect of functions that is delegated is generally that of the power to prescribe punishments. The power to prescribe punishments generally of punitive nature is given to either the Central Government or the state government or any other authority that is created by virtue of a statute. Generally, this power involves a delegation to the executive for punitive actions. It is essential to note that under this particular power while exercising the same it is essential that the statute contains the contours to the maximum punishment that is required to be provided and where a delegation is given to any particular governmental authority who is created by a statute. There is a particular government approval that is provided for a check and balance to ensure that the power is not misused. An illustration of such delegated power is contained under Section 37 of the Electricity Act of 1910 whereby the Electricity Board has been empowered to prescribe punishments for breach of the Electricity Act of 1910. Similarly, under Section 59 of the Damodar Valley Corporation Act of 1948, the power to prescribe punishment has been delegated to a statutory authority without a maximum limit fixed under the said Act. Further it is essential to note that whenever such a power is given something that is of similar nature to that of the Electricity Act is essential to be followed.

The next function which is often delegated under various statutes is the power of framing of rules. We have already discussed this when in the initial discussion about delegated legislation that in most legislations you will find that either the Central Government or the state government has been given the power to prescribe rules. In a few other instances the power to make such rules has also been delegated to a statutory authority or a particular professional body. The discussion that we had about *Hansraj L. Chulani v. Bar Council of Maharashtra and Goa* is pertinent. So, as long as the rules are in line with the parent enactment, that is the delegated legislation is in consonance with the particular supreme legislation, the said rules are valid and must be observed. Where the contours of the validity of the rules is to be challenged, it is essential to prove that the rules are not in consonance with that of the supreme law or that it is in a manner that is against the fundamental rights.

The last form of delegated legislation that you fall out with as a function is generally the Removal of Difficulties Clause that is found in a legislation. The removal of difficulties

clause is also called the Henry VIII clause to indicate the manner in which Henry VIII who was the earlier king of England had an autocratic manner of governance. He would ensure that his will was enforced, and all his difficulties were removed by ensuring the instrumentality of a parliament that was extremely weak in nature during his regime. Various critics of delegated legislation and that of the staunch proponents of the doctrine of separation regard the removal of difficulties or the Henry VIII clause as the most preposterous of delegated legislation or delegated functions. It is provided that such clauses which provide for removal of difficulties must be bridled with extreme caution and worded extremely carefully so as to allow for the narrow interpretation of the same and not provide for a widest interpretation of the said clause. It is pertinent to note that although the critics against the Henry VIII clause or the removal of difficulties clause, it is essential that such a clause prevails in a legislation. It is because the legislature cannot always foresee what the outcomes of implementing legislation can be. It may so happen that upon implementing the particular legislation or statute there may be several difficulties that may come across as that of opening of a Pandora's box and in order to ensure that the opening of such Pandora's box does not arise in implementing the legislative scheme or policy, the Henry VIII clause or the removal of difficulties clause is essentially inserted into a legislation.

Under this manner, the appropriate authority which could be either be the Central Government or the state government or a prescribed authority is given the power to either pass the rules, regulations or orders or certain bylaws in order to ensure the smooth functioning of the legislative policy. To illustrate this, we would refer to Section 37 of the Payment of Bonus Act of 1965, whereby under Section 37(1), it was provided that the Central Government was empowered to make such orders not inconsistent with the purposes of the Act. Further, it was provided under subsection 2 that the order of the Central Government which was passed under subsection 1 would be final. Although subsection 1 seems a narrow-worded clause, subsection 2 made it an unbridled power because there were no questions that were to be laid to any action that was taken by the Central Government under section 37(1). It was challenged in *Jalan Trading Co. v. Mill Mazdoor Union* wherein the Supreme Court was called upon to question the legality of Section 37 of the Payment of Bonus Act 1965. The Supreme Court by a majority of 3:2 held that Section 37 was ultra-vires, the Constitution of India on the ground of excessive delegation. It was provided that the Central Government was made the sole judge of whether any difficulty or doubt would have arisen in the particular implementation of the legislation. Such power was an autocratic form of exercise of delegated legislation. Hence, the same was invalid. Although the majority took a view that Section 37 of the Payment of Bonus Act was amounting to an excessive delegation, it is pertinent to also understand the view of the minority. The minority in this matter took a liberal interpretation of the aspect of delegated legislations and observed that the powers and functions that were delegated to the Central Government by in no means were a legislative function. But rather it was something that was in order to devise the legislative policy in implementation. In the words

of Justice Hidayatullah, former Chief Justice of India, Parliament has not attempted to set up another legislature. It has stated all that it wished on that subject of bonus in the Act.

Apprehending however, that this application of the new Act doubts and difficulties may arise and not leaving their solution to the courts with the attendant delays and expense, Parliament has chosen to give the power to the Central Government to remove doubts and differences by a suitable order. It is to be observed that the minority in this particular matter, that is *Jalan Trading Company*, took this liberal perspective on the basis that the Payment of Bonus Act was more of a welfare legislation, wherein there was a stance that the welfare of the labourers could be affected because of the interference of the judicial system. And as such, the finality clause that was given to the orders that was passed by the Central Government was said to be justified. It is said that generally Henry VIII clauses have to be riddled with power. But the view of the minority is also something to be observed and cherished. In this circumstance, it is essential to understand that not all removal of difficulties clauses tantamount to an arbitrary exercise of power. The purpose of the statute needs to always be looked at before coming to a conclusion on whether such a delegation of power is excessive or not.

Constitutional Law and Public Administration in India

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Week- 11

Lecture-03

Non-Constitutional Bodies - I (CVC)

In this unit on the course of constitutional and public administration in India, we will learn about several non-constitutional bodies and a few legislations associated with these institutions to have a comprehensive understanding of these bodies. As the name of this unit very clearly suggests, these bodies are not created by the Constitution. The bodies that are established or created by the Constitution are known as constitutional bodies such as the Election Commission or the Finance Commission. Non-constitutional bodies on the other hand are either created by way of statute or maybe through an executive resolution or other ways. So non-constitutional bodies can be divided into two categories. The first category would be statutory bodies which means they are established by way of a statute. And the second category would be non-statutory bodies which means they are established otherwise. So, like your constitutional bodies such as the Finance Commission or the UPSC, these bodies lack the authority granted by the constitution. However, they are extremely important for the smooth functioning of public administration in India.

We will understand the significance of these bodies as we progress through this unit. So, before moving on to the first non-constitutional body, let us understand the Prevention of Corruption Act of 1988 first. So, let us first understand what corruption is and what are the major causes of corruption and why it is an issue that we need to fix. There are a lot of public officials or bureaucrats in our country such as IAS, IPS, IFS, all of these offices. They have a lot of public duties or functions that they are supposed to perform or discharge, and they also have certain power or authority that comes with the position they are holding. So, when a public official or a bureaucrat is trying to take an undue advantage of their position or their power or authority and accept some kind of a reward or a bribe, that is what is known as corruption. And there can be several causes of corruption. One major cause is poor functioning of public institutions. Another important cause is poor implementation of anti-corruption law such as the Prevention of Corruption Act itself. Another important cause or reason is the lack of awareness among citizens as to what exactly is corruption and how they can help prevent corruption. Lack of political transparency can be another cause. So, there are several causes of corruption. As per the

Corruption Perception Index of 2021, India's rank out of the 180 countries that were surveyed was 85, which means India has a huge issue of corruption. And as per a study conducted by Transparency International in 2005, more than 60% of Indians had paid a bribe at some point in their lives. So yes, corruption is a huge issue in India.

High levels of corruption anywhere in the world is also associated with increased human rights violations. See all these public officials or officers, they are there to uphold the right of law that is envisaged by the Constitution. So, when they choose not to do that, and when they become greedy, and they are not only interested in filling their pockets, but it will also definitely lead to human rights violations of the ordinary people in the country. Corruption is also a huge threat to progress and development and good governance, and it also disrupts democracy. So, we have the Prevention of Corruption Act of 1988, which aims to prevent corruption in the public sector. This is the major objective of this particular Act. One of the most important definitions from this Act that you need to know is the definition of 'public servant', which is given under Section 2(c) of the Act. A public servant can be a person who is in the service of the government, who is remunerated by the government, a public servant, a vice chancellor can be a public servant. It is a long list of definitions that is given under 2(c). So, all of these are considered public servants for the purposes of this Act.

Another important definition that you should know is the definition of 'public duty'. Public duty is defined as a duty in the discharge of which the state, the public or the community at large has an interest. Essentially, public duty is a duty in which public interest is involved. It is precisely this public duty that these public servants are discharging and violation or a breach of this public duty is what gives rise to an action under this Act. The Act provides for different kinds of offences, and it also prescribes punishment for these offences. Let us learn some of the important ones. So, a public servant who attempts to accept or accepts bribe for dishonesty or improperly performing his public duty or choosing not to perform his public duty at all, which means he abstains from performing that public duty, can be punished under Section 7 of the Act. It is immaterial that whether he actually dishonesty or improperly performed or discharged his duty, the very act of attempting to accept bribe or accepting bribe can be punished. And the punishment provided for this particular offence is imprisonment of a minimum term of 3 years, which can be extended up to 7 years and a fine can also be levied.

What about corrupt individuals who try to pay or who pays bribe to public officials? These persons can be punished under Section 8 of the Act with imprisonment up to 7 years or with fine or both. We know that there are a lot of underprivileged population in our country who are often targeted by public servants to pay bribe. They are coerced or compelled or forced to pay bribes in most of the cases. These persons are exempted from the purview of Section 8, which means that if you are forced or coerced or compelled to pay bribe to a public servant, then you won't be punished under Section 8. However, such a person will have to inform the law enforcement agencies within 7 days from the date of paying bribe.

What happens if a commercial organization commits an offence under PCA? If a commercial organization is found to have committed an offence under this Act, then a fine can be imposed on that organization under Section 9.

The last important offence is Section 13, which talks about criminal misconduct by a public servant. So, if a public servant is found to have misappropriated or converted some kind of a property that was entrusted to him by virtue of his position or if he allows some other person to misappropriate or convert a property that was entrusted to him, he can be held liable for criminal misconduct. Similarly, if a public servant is found to have enriched himself illicitly, in those cases also, he can be punished under Section 13. When can you say a public servant has enriched himself illicitly? If he has a huge number of monetary resources or property that does not correlate with his known source of income or his legal source of income, then he can be said to have enriched himself illicitly. The Act also provides separate punishment for abutment and attempt of any of the offences under this Act.

With this background, let us move on to the first non-constitutional body in this segment, that is the Central Vigilance Commission. The Santhanam Committee on the Prevention of Corruption recommended the establishment of a Central Vigilance Commission in the early '60s. Following this in 1964 through an executive resolution, the CVC was established. So initially we learned that there are two categories of non-constitutional bodies.

One is statutory bodies, which are established by way of statute and the second is non-statutory bodies. So, because CVC was established through an executive resolution, it makes it a non-statutory body. However, in 1996, the Supreme Court in the case of Vinay Dharain and others versus Union of India gave a deduction to the government to confer statutory status to CVC. Essentially the court asked the government to give statutory status to the Central Vigilance Commission. So, the Central Vigilance Act of 2003 was enacted, which conferred statutory status to CVC. Hence, CVC is a statutory body. However, it started off as a non-statutory, non-constitutional body. So CVC is the top agency in the country to prevent corruption in the offices of the central government. It is the apex vigilance institution with no executive influence. Please note and remember that CVC has been designated as the agency to receive and act on complaints under the Public Interest Disclosure and Protection of Informers Resolution or the PIDPI resolution in 2004.

So, this resolution is also popularly known as Whistleblowers Resolution. We learned about the concept of whistleblowers and the Whistleblowers Protection Act of 2014 in a while. However, for the time being, please remember that CVC is the designated authority to receive and act on complaints under the PIDPI resolution. Now let us see what the composition of CVC is. CVC comprises one Central Vigilance Commissioner and a maximum number of two Vigilance Commissioners. A Central Vigilance Commissioner or a Vigilance Commissioner is appointed by the President on the recommendation of a

three-member committee consisting of the Prime Minister, the Union Minister of Home Affairs, or the Leader of Opposition in Lok Sabha. And they are appointed for a term of four years or until they attain the age of 65 years whichever is earlier. And once their term is over, they are not eligible for further employment in Central or State Government courses. This is done to ensure utmost transparency in the functioning of CVC.

Let us see how the Central Vigilance Commissioner or Vigilance Commissioner can be removed from their position. They can be removed by the President if he is adjudged as an insolvent or if he has committed an offence which in the opinion of the Central Government involves a moral turpitude. Thirdly, he can be removed by the President if he engages during the term of his office in some kind of a paid employment outside the duties of his office. So, if he takes up some kind of other job while he is working as a Central Vigilance Commissioner or a Vigilance Commissioner, then he can be removed by the President. Or if in the opinion of the President, he is unfit to continue in the office because he has become unsound or he has some kind of a physical ailment that affects his performance as the Central Vigilance Commissioner or Vigilance Commissioners. Or if this particular Commissioner has acquired any financial or other kind of an interest which will affect the performance of his functions prejudicially.

In all these cases, the President has the power to remove the Central Vigilance Commissioner or Vigilance Commissioners. These are not the only grounds for the removal of the Central Vigilance Commissioner or Vigilance Commissioners. There are two other additional grounds. So, the Central Vigilance Commissioner or Vigilance Commissioners can be removed on two additional grounds which are on the ground of misbehavior or incapacity. But in both of these cases, the President will have to refer the situation to the Supreme Court and Supreme Court after an inquiry is of the same opinion, then it can advise the President and after that the Vigilance Commissioner or the Central Vigilance Commissioner can be removed.

Now the salary, allowances, and other conditions of service of a Central Vigilance Commissioner is similar to that of civil servants. Moving on, let us look into the organizational structure of CVC. CVC has its own secretariat consisting of a secretary, additional secretaries, deputy secretaries, undersecretaries and other office staff. CVC also has a Chief Technical Examiner's wing which consists of two engineers of the rank of Chief Engineers, and they are designated as Chief Technical Examiner and it also has other supporting engineering staff. Chief Technical Examiner's wing is the technical unit of CVC, and their functions include conducting a technical audit of construction works of governmental organizations from a vigilance angle, investigation into complaints on construction works of the government, assisting CBI in matters involving technical issues and also advising CVC in cases involving technical issues. Finally, CVC also has a commissioner for departmental inquiry. So, the commission may appoint persons as commissioners for departmental inquiries whose function is to conduct oral inquiry in

departmental proceedings initiated against public service. So, this is the organizational setup of CVC.

Let us learn about some of the functions of CVC. Now we learned about some of the offenses under the Prevention of Corruption Act previously. If there is an allegation of commission of any of these offenses under PCA by a Central Government employee or an authority or by a group A civil servant or any other level of Central Government authority as specified, it is CVC that has the power to inquire into that allegation or cause an inquiry into that allegation. Secondly, CVC also exercises superintendents over the Central Bureau of Investigation of investigations relating to PCA offenses. CVC also reviews the progress of application spending with competent authorities for sanction of prosecution under PCA. PCA has a provision which talks about prior sanction for initiating prosecution.

Please note that the sanction is not required for investigation, only for prosecution there is a provision for sanction. CVC also advises the Central Government and its authorities on matters referred to the CVC. CVC also exercises superintendents over the vigilance administration in various Central Government ministries and its authorities. We previously learned about the PIDPI resolution, the Public Interest Disclosure and Protection of Informers Resolution and how CVC was designated as the agency to receive and act on complaints under this particular resolution. So yes, that is another function of CVC that they receive complaints regarding public interest disclosure, and they recommend appropriate action as per the complaint.

CVC has another role when it comes to making rules governing vigilance and disciplinary matters of civil servants. The Central Government is required to consult the CVC before they make such rules and CVC has a special role in the appointment of direct rate of enforcement. And we will learn about the prevention of money laundering act towards the end of this particular unit and the directorate of enforcement or ED is the authority that is responsible for the administration of prevention of money laundering act. So, as per Section 25 of CVC Act, a committee consisting of the Central Vigilance Commissioner as the chairperson and members including Vigilance Commissioners, Home Secretary to the Government, Revenue Secretary to the Government, secretary of the department of personnel and training, all of them together recommends appointment of officers to the post of deputy director and above in the directorate of enforcement. CVC has a specific authority to receive information regarding suspicious transactions under the Prevention of Money Laundering Act.

In 2013, the Lokpal and Lokayukta Act was enacted in a further effort to prevent the menace of corruption and this act has added some functions to CVC. Firstly, CVC will recommend the director of prosecution under the directorate of prosecution which is something that the Lokpal Act envisages to the Central Government. CVC also has a role in the appointment of officers to the post of SP and above in CBI except for the director of

CBI. CVC has been empowered to conduct preliminary inquiry into complaints referred by the Lokpal in respect of certain officers and officials. So, these are the different types of functions that CVC has to discharge.

CVC also has certain powers, and it also has to discharge some kind of duties. Regarding powers, CVC has the power to regulate its own procedure. We talked about how CVC is a body without any executive influence. So, it has the power to determine and regulate its own procedure and whenever it is exercising some proceedings that are of a judicial character, CVC has the power of a civil code and CVC can also require the Central Government or its authorities to submit information for exercising supervision. When it comes to duties, CVC has to present an annual report to the president on whatever activities they conducted in that particular year and the president will then place this report before each house of the parliament.

Another important thing that you should know about CVC is the chief vigilance officers. Now chief vigilance officers are appointed in every ministry or department of the central government and he heads the vigilance division of these ministries or departments and he connects his division with the CVC and CBI. So, basically what a chief vigilance officer will do is that he will collect intelligence about the corrupt practices engaged in by the employers of his organization. He also can investigate verifiable allegations reported to him. So, after the investigation he will prepare a report and he will send this report to the disciplinary authority concerned for further consideration and he can also refer matters to CVC for advice whenever necessary. So, that is all about the central vigilance commission.

We will learn about a very important legislation which is the Whistleblowers Protection Act of 2014. We talked a bit about this legislation when we talked about the PIDPA resolution. Now we will understand this act in a bit more detail. So, let's first understand what exactly this term whistle blowing means. Back in the day this English Metro Bolton police used to carry a whistle around with them. If you are a policeman and you are walking around the neighborhood and you witness a crime or you see an offender running away from the crime scene you will blow the whistle to let other police officers nearby or the general public know that a crime has taken place in this particular area. Similarly, you must have seen security guards carrying around a whistle. They are also carrying around a whistle for similar purposes. So, if somebody is trying to break into the ATM or a building that they are guarding they might use this whistle to alert the people nearby that some kind of a crime or an illegal activity is taking place here.

Similarly, whenever an employee or an ordinary citizen or a non-governmental organization brings about some kind of an information regarding a fraudulent or an illegal activity committed by his employer or an organization they are also metaphorically blowing a whistle. They are not physically blowing a whistle but metaphorically they are blowing a whistle and alerting the society or the general public regarding this fraudulent or

illegal activity committed by the employer or the organization. So, that is why people who come forward with such kind of information are known as whistleblowers. And whistle blowing is a very important thing if we want to prevent corruption because we know we were talking about corrupt public servants and corrupt organizations. In order to bring about the truth about these servants or organizations we need brave whistle blowers. Whistle blowing indicates that there is a fault in the system and that has to be fixed. That is exactly what these brave whistleblowers are doing. We have a lot of brave whistle blowers in our country as well as in other jurisdictions. We have Sunil Toke; he is a head constable at the traffic division of Mumbai Police, and he has raised his voice against the rampant corruption in the traffic division and because of this very reason he has been transferred around 12 times.

To give an example of a whistle blower from another country we have Erin Brockovich, she is an American paralegal. She was instrumental in finding evidence against this company known as Specific Gas and Energy that was releasing a chemical called hexavalent chromium into the water bodies in an area in California and that was causing widespread illness and people had no clue what the cause was for this particular illness, and she was an ordinary citizen. She was not an employee in the Specific Gas and Energy unlike Sunil Toke. He complained about his own employees or the organization. Erin Brockovich was not an employee; she was an ordinary citizen. However, she was instrumental in finding information against the Specific Gas and Energy. Now that we know what is whistle blowing and who is a whistleblower, naturally the question might come to you 'why do whistleblowers need protection'? As we saw in the case of Sunil Toke, he was transferred around 12 times because he was a whistleblower. Similarly, whistle blowing can also be an extremely dangerous activity as you are going against public servants or organizations that have enormous power and resources with them.

They have the power to take away your jobs, they can run you out of money and even in extreme cases they can resort to violence. In India we have something called Right to Information, this Right to Information Act under which you can file a Right to Information application, and you can recover information regarding the government or government authorities. People use RTI as a tool to collect information regarding the government and use it for whistle blowing and these RTI activists are under great threat. Several have been attacked, harassed, and even murdered by public servants or organizations against whom they were whistle blowing. This is a reality in our country. This is precisely why whistle blowers require a great deal of protection. Back in 2001, the Law Commission in its 179th Report on Public Interest Disclosure and Protection of Incomers, proposed a bill for the protection of whistleblowers. In 2003, a very unfortunate incident happened which was the murder of Satyendra Dubey. Satyendra Dubey was an engineer at the National Highway Authorities of India. It is alleged that he was murdered because he was a whistleblower in the Golden Quadrilateral Project of the National Highway Authorities of India.

Following this, a repetition was filed in Supreme Court and in 2004, the court gave a direction that administrative set up has to be made until a suitable legislation to protect whistleblowers is enacted. In 2004, the PIDPA resolution about which we learned was issued by the government and it empowered CVC to act on complaints from whistleblowers. In 2005, India signed the UN Convention against corruption. So, now India not only has a national commitment to fight corruption, but India also has international commitments to curb this menace of corruption. Finally in 2011, the bill was proposed and in 2014, the Act was enacted.

Let us learn about some of the salient features of the Whistle Blowers Protection Act of 2014. As the name suggests, it is an Act to protect whistleblowers. So, public servants or any other person or a non-governmental organization can make a public interest disclosure to a competent authority. We learned about the definition of public servants under the Prevention of Corruption Act. The definition is applicable here Section 2(c) of PCA. However, the only difference is that under PCA judges are considered as public servants, but for the purposes of Whistle Blowers Protection Act judges are not considered as public servants. Now, let us understand who a competent authority is. Competent authority is different for different groups. For example, for a union minister, the Prime Minister is the competent authority. So, if a union minister wants to whistle blow, he will have to disclose that information to the prime minister.

For a state minister, the Chief Minister is the competent authority. In some cases, CVC is the competent authority, and it changes according to different groups. Now, let us understand what a public interest disclosure is. So, public interest disclosure is a complaint regarding an offense under the Prevention of Corruption Act or it can be a complaint regarding willful misuse of power that has caused demonstrable loss to the government or caused wrongful gain to a public servant or a third party or it can be a complaint regarding an attempt or commission of a criminal offense by a public servant. Once a complaint is received by the competent authority, the first thing that they will do is that they will ascertain the complaint. They will make sure that the complaint himself has sent in the particular complaint.

Anonymous complaints are not entertained by the Act. Even the PIDPI resolution did not entertain anonymous complaints. So once this ascertainment is done, the competent authority might do a discrete inquiry. If the complaint is not sufficient to move forward with a full-fledged investigation, however, they feel that there is some merit to it, they can conduct a discrete inquiry to get more information. So, as part of this discrete inquiry, they will seek comments or explanations or a report from the heads of departments in which this public servant is working. And this competent authority as well as the head of the department is under an obligation to not reveal the identity of the complainant except if the complainant himself has disclosed his identity to the public servant or to the general public through his complaint or otherwise.

Once this report is submitted by the head of the department and the report is of the opinion that it reveals a willful misuse of power, then the competent authority can initiate proceedings against this particular public servant. Please note that the competent authority does not have jurisdiction in all situations. For example, if a matter or any of the matters raised in the complaint has already been dismissed, or is decided by a court of law, then competent authority will not have jurisdiction in that case. Or if seven years or more has passed since the incident that gave rise to the complaint, then also competent authority will not have jurisdiction.

The Act provides protection against victimization. What is victimization? For example, if you are an employee in an organization and you are whistleblowing against this particular organization or certain higher-ranking officials in that organization, this organization can take some sort of an adverse action against you. For example, they can relocate you into another remote location or they might terminate you from your job without any explanation. So, a whistleblower is protected from such acts under this particular legislation. So, it is a duty of the Central Government to ensure that there is no victimization against a whistleblower, and this is given under Section 11 of the Act. And a whistleblower can make an application to the competent authority if he is victimized, or he feels that he is likely to get victimized and the competent authority will issue directions to the public authority or public servant to prevent victimization.

If at all some sort of an adverse action was taken against the whistleblower, the burden of proof to show that this was an action that was taken with sufficient reasons and not as an act of revenge is on the public authority or the public servant. And if at all they fail to adhere to the directions given by the competent authority, action can be taken against them, and they can be charged a fine of up to 30,000 rupees. The Act also provides for punishment for revealing the identity of the complainant malafidely. We talked about how there is a strict obligation of the competent authority and the heads of department to not reveal the identity. So, if anyone reveals the identity of the complainant with malicious intentions, then they can be punished with imprisonment up to 3 years and with a fine up to 50,000 rupees.

It also provides for punishment for filing false or frivolous disclosures. If somebody is filing a complaint which turns out to be false or files a frivolous complaint which is not important or necessary by any means, those can be punished under the Act and the punishment is an imprisonment up to 2 years with fine up to 30,000 rupees. The Act also prescribes separate punishment for heads of departments and companies. If at all one is not satisfied with the decision of the competent authority after all the investigation, then an appeal can be made to the High Court. And this competent authority is also under an obligation to prepare annual reports and submit them to Central and State governments.

Constitutional Law and Public Administration in India

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Week- 11

Lecture-04

Non-Constitutional Bodies - II (CBI)

The next non-constitutional body that we will learn about is the Central Bureau of Investigation or CBI. It is quite popular in institutions in India. To know about the history of CBI, you will have to go back to the Special Police Establishment Act of 1941. Back in the day, India was a British colony, and the Second World War was happening. Huge amount was set aside for the activities connected with the war. And it was noted that certain officials and non-officials were appropriating money from this fund for their private use. So there was rampant corruption and bribery that was happening in the War and Supply Department. To curb this, the Special Police Establishment Act was enacted, and the Special Police Establishment Act had the power to investigate allegations of corruption or bribery in the War and Supply Department. Later, this power to investigate was extended to corruption cases in railways as well.

In 1946, the Delhi Special Police Establishment Act was enacted because even after the Second World War, the need for a centralized agency which would investigate certain matters including corruption cases was felt. So, this particular agency was now under the supervision of the Home Department. Earlier the Special Police Establishment was under the supervision of the War and Supply Department. And now the jurisdiction was widened to all departments of the government. So after this, after independence, in 1963 through an executive resolution, the Central Bureau of Investigation was then set up because a need was felt for a centralized agency that will conduct investigations on behalf of the central government into not just corruption cases but into passport frauds, major frauds, crimes committed in high seas or in airlines was felt and that is why CBI was set up. CBI is not a statutory body. It was set up through an executive resolution, but it derives its powers from the Delhi Special Police Establishment Act. So, it is not a statutory body. However, it derives its powers from the statute, this particular statute.

Also please note that states have something called Criminal Investigation Departments which is their department to look into certain crimes. CBI is the investigation agency of the central government. So, states have CID, or the Criminal Investigation Departments and the center has the Central Bureau of Investigation or CBI. Currently, CBI has seven

divisions including Anti-Corruption Division, Economic Offenses Division, and the Division to look into special crimes. So, the CBI has the authority to investigate central government areas and union territories. However, if the CBI wants to investigate in a state, it will have to get the consent of the state. We will talk about the general consent and the special consent of states in one of the following slides. But for the time being just keep this in mind. So, it is the main investigating agency in the country. Currently, CBI is under the Department of Personnel and Training which is under the Ministry of Personnel, Public Grievance and Pensions.

Regarding the composition of CBI, it is headed by a director and this director is assisted by a special director or an additional director. This director of CBI is appointed by a three-member committee consisting of the Prime Minister, Leader of Opposition in the Lok Sabha and the Chief Justice of India. And the director is appointed for a minimum term of two years, and it can be extended up to five years. So, like the State Police Department which has several ranks of police personals like DIGs, CBI also has different ranks of police personals like joint directors, Deputy Inspector General, Superintendent of Police and all other ranks of police personals.

Moving on to the functions of CBI. CBI as you know it investigates cases of corruption or bribery and even cases relating to the violation or infringement of other economic or fiscal laws. There are several other economic laws in the country. So, CBI can investigate an alleged violation of such laws as well. CBI has power to investigate serious crimes or assassinations or crimes committed by organized groups. Now this is what you might have known about CBI more. CBI also takes steps on the request of a State Government or in the direction of a Supreme Court or High Court, any case of public importance for investigation. So, the High Court or Supreme Court can also direct a CBI investigation into certain matters and the CBI also maintains crime statistics and disseminates criminal information.

Let us talk about the provision of prior permission. The Delhi Special Police Establishment Act had a section which was Section 6A which was inserted into the Act in 2003. As per the section, if the CBI wanted to investigate an alleged offense of corruption committed by an officer of the rank of Joint Secretary or above, it had to get a prior approval from the central government. CBI is free to move forward with investigation into an alleged offense of corruption committed by any other officers except if the officer is of the rank of Joint Secretary or above. In those cases, it required prior approval or permission from the central government for investigation. We talked about prior sanction for prosecution under prevention of corruption. This is prior permission for even starting an investigation. So, in 2014 in the *Subramanian Swamy v. Director of CBI* and another, the court looked into this particular section as it was challenged, and the court held that it is bane due to Article 14 and hence unconstitutional. What is Article 14 about? Article 14 talks about equality. So, it talks about protection of laws and equality before law.

If a particular group of public servants because they are higher ranking officials are given special treatment from or protection from the investigation form of CBI in corruption offences, then that does not sit well with the concept of equality as envisaged under Article 14. And exactly this is the reason why the court held that this is unconstitutional. The court held that the protection under Section 6A has the propensity of shielding the corrupt. And very recently in 2023, the Supreme Court held that this particular judgment that made it unconstitutional, that made Section 6A unconstitutional has retrospective effect. So even if there was an instance where the CBI wanted to move forward with investigation against an officer of this particular rank, which was before this particular judgment, it does not matter, the Section 6A is unconstitutional from the date of its insertion into the Act. So, that is from 2003, the date on which it was inserted into the Act, it is considered as unconstitutional. The next important thing that you should know when it comes to CBI is the Consent of States. So, as we mentioned before, CBI has the authority to investigate Central Government areas and Union Territories. However, when it comes to investigation into states, territory of different states, states will have to consent to that. So, states can either give a general consent or state can give a specific consent. So, if a state for example, the state of Kerala, if the state of Kerala gives a general consent for CBI, it means that once that consent is given, CBI can freely enter the state and conduct investigations, it does not have to approach the state government again and again for consent. It is a general consent for investigation. However, if Kerala is only giving a specific consent, which means if there is a case in Kerala that CBI wants to investigate or Kerala refers that matters to CBI, only in that case CBI can come and investigate. If there is another case the CBI wants to investigate in Kerala, for that they have to take a consent again from the government of Kerala. So that is case specific consent. And if the Supreme Court or High Court has referred a CBI investigation into a particular case, this consent of the state does not matter. The CBI can enter the state and investigate. Recently there has been a trend of several states withdrawing general consent for CBI investigation within their territories. Mizoram was the first one to withdraw general consent in 2015. Currently, Chhattisgarh, Jharkhand, Kerala, Meghalaya, Mizoram, Punjab, Rajasthan, Telangana, and West Bengal have all withdrawn general consent to CBI for investigation within their territories. So, this could possibly be because the states fear that CBI investigations are used as a political tool by the party in power and this has happened in the past as well where political parties that are in power have used CBI as a tool or a political tool. And even the Supreme Court has on some occasions remarked that CBI is a caged parrot. There are several other criticisms of CBI such as there is no accountability. All of these criticisms are there. However, CBI is still the main investigating agency of the country, and we learned about the composition, the history, the functions, and some of the important aspects related to CBI.

Constitutional Law and Public Administration in India

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Week- 12

Lecture-01

Non-Constitutional Bodies - III (Lokpal & Lokayukta)

So far we learned about two non-constitutional bodies which become a part of the anti-corruption framework in India. Firstly, we learned about the Central Vigilance Commission. Secondly, we learned about the Central Bureau of Investigation. Both are very important non-constitutional bodies. The next two bodies- Lokpal and Lokayukta also become part of the anti-corruption framework in India. However, let us first understand what the system of Ombudsman is because Lokpal and Lokayukta has been established taking inspiration from the institution of Ombudsman. Ombudsman is the world's first democratic institution for addressing ordinary citizens' grievances. We were talking about public administration and public servants, officials or bureaucrats, people who are involved in public administration. If at all they are taking an action against a citizen which is beyond their specified powers or authorities and by that an unfair treatment has been meted out to a citizen. The citizen needs some sort of an outlet to convey this unfair treatment or administrative arbitrariness that has caused to him. For that an Ombudsman was appointed and this Ombudsman system was first established in the Scandinavian country of Sweden in the year 1809. Very early in the 19th century, the institution of Ombudsman was established in Sweden. It is a fairly old institution with a long history. The term *Ombud* in Sweden means representative or attorney or proxy.

Essentially, he hears the grievances of the people and becomes a representative of the ordinary citizens before the three branches of the government- the legislature, executive and judiciary. In Sweden, the Ombudsman was appointed by the parliament which means the legislature and Ombudsman has the power to check on the activities done by the executive and the judiciary, and it even had the power to keep an eye on the military actions of the state. Ombudsman in Sweden was quite powerful, and it was also independent from the legislature. Legislature cannot exert its influence or power on the Ombudsman. Ombudsman looked into several administrative actions taken by the executive or the judiciary or the military and looked into complaints regarding administrative arbitrariness or administrative excess. If at all the administration is inefficient, then Ombudsman can also look into those matters and if at all there is issue of corruption, Ombudsman look into

those complaints as well. According to the jurisdiction of Ombudsman in Sweden, Ombudsman had the power to look into a matter or cause an inquiry into a matter which is complaint to him, which is brought to him as a complaint or Ombudsman if he himself comes to know about some kind of an administrative arbitrariness or judicial excess, then he can initiate an inquiry which means he had *sou moto* jurisdiction as well. Ombudsman in Sweden is not free from accountability because he had to submit an annual report to the parliament. In that way, Ombudsman has also been made accountable. And if at all there is no confidence in the person who is appointed as an Ombudsman, then he can be removed from his position. So, it is not that Ombudsman becomes all too powerful and then he starts misusing his position. Ombudsman did not have the power to regulate administrative actions or interpret laws. Whatever is executive's domain will remain as executive's domain. Executive is there to implement laws and whatever is judiciary's domain will remain as judiciary's domain. Judiciary is there to interpret laws. The Ombudsman did not have the power to change the course of law or interpret laws or regulate administrative actions. It only had the power to look into administrative arbitrariness. And once Ombudsman has done an inquiry into a complaint, then the Ombudsman will file a report based on the investigation or inquiry. He will file the report to the higher official. So, if a complaint is made regarding a public servant or a public official, whoever is that public official's higher official, that higher official will receive the report from the Ombudsman and Ombudsman will recommend what actions shall be taken against this public official.

The system of Ombudsman then started spreading to other Scandinavian countries such as Finland, Denmark and Norway. New Zealand was the first commonwealth country to get inspired from the system of Ombudsman and establish their own system for redressing grievances of ordinary citizen, which is known as the Parliamentary Commissioner for Investigation which was instituted in 1962. UK then came up with its own version of Ombudsman, which is known as the Parliamentary Commissioner for Administration in 1967. France and certain other European countries, have administrative courts instead of Ombudsman. In socialist countries such as Russia, they have procurator system. Essentially, they are all democratic institutions to address the grievances of ordinary citizens.

Lokpal and Lokayukta has also been established by being inspired from the history of Ombudsman and other similar systems. The Administrative Reforms Commission, which was there from 1966 to 1970, headed by Morarji Desai, recommended the establishment of a Lokpal for the Centre and Lokayuktas for the State. This Lokpal was recommended to be appointed by the President in consultation with the Chief Justice of India, the Speaker of Lok Sabha, and the Chairman of Rajya Sabha. As far as possible, this appointment has to be non-political. These institutions will be independent and impartial, and their proceedings and their investigation shall be done in private and as informal as possible. And one deviation from the Ombudsman system was that judiciary will be kept out of the

purview of Lokpal. As mentioned before, in Sweden even judiciary came under the ambit of Ombudsman, however, the Administrative Reforms Commission was of the opinion that judiciary shall be kept out of the system of Lokpal and Lokayukta. The proceedings of Lokpal and Lokayukta will not be subject to any kind of judicial interference as well. Even though comprehensive recommendations were given by the Administrative Reforms Commission, nothing came out of it.

Following the several bills were also introduced to establish the system of Lokpal and Lokayukta. In 1986, a Lokpal Bill was introduced, however it lapsed due to the dissolution of Lok Sabha. Other bills that were introduced following this also met with the same fate, nothing materialized. But states started enacting state laws and started establishing Lokayuktas. Maharashtra was the first state to establish Lokayukta in 1972. Finally in 2013, the Lokpal and Lokayukta Act was enacted. It seeks to establish a Lokpal for the Centre and Lokayuktas for different states just as the Administrative Reforms Commission envisioned. Lokpal's jurisdiction includes the Prime Minister, Ministers, Members of Parliaments, Group A, B, C and D, Officers, and Officials of the Central Government. Even though the Prime Minister is under the purview of Lokpal, it is a limited jurisdiction that the Lokpal has on Prime Minister. There are several limitations on the actions that can be taken against the Prime Minister by the Lokpal.

Coming to the composition of Lokpal, Lokpal consists of a chairperson and a maximum of 8 members and 50% of these members shall be judicial members. And 50% of them shall come from the Scheduled Caste or Scheduled Tribes or OBCs, minority groups or shall be women. The selection of the chairperson and other members shall be done by a Selection Committee. This Selection Committee will consist of the Prime Minister, the Leader of Opposition in Lok Sabha, the Lok Sabha Speaker, the Chief Justice of India, or a sitting judge of the Supreme Court who is nominated by the Chief Justice of India and an eminent jurist who is nominated by the President upon the recommendation of the others in the Selection Committee.

Institutions that are fully or partly financed by the government also comes under the jurisdiction of Lokpal. However, government aided institutions are excluded from the ambit of Lokpal. Lokpal Act also contains several provisions for strengthening CBI. Lokpal will also have power of superintendents and direction over any investigating agency including the CBI for the cases referred to them by the Lokpal. The Act also provides for certain timelines for finishing up preliminary enquiry. Lokpal can take 3 months. However, it can be extended by another 3 months. For finishing up investigation, Lokpal can take 6 months. Again, it can be extended by another 6 months. For finishing up trial, Lokpal can take 1 year which can be extended further by a year. The Act also protects honest and upright public servants.

We discussed the Whistle Blower Protection Act of 2014. The major issue with respect to that Act is that it has still not been notified by the government which means it is still not operational. Which means that it has not come into force yet. Similarly, Lokpal, even though it has been notified, it has not been fully functional even though it has been 10 years since the enactment. Very few complaints have been received by the Lokpal and most of these complaints were frivolous. The Act also prescribes heavy punishment for filing false or frivolous complaints which might deter people from coming forward to the Lokpal and filing their complaints. There is a limitation period of 7 years just like in the Whistle Blower Protection Act. We said that if it has been 7 years or more since the action that has given rise to the complaint has taken place, then the competent authority will not have jurisdiction. Similarly, Lokpal also cannot look into an incident that has taken place 7 years or even beyond that. Lokpal, unlike the Ombudsman in Sweden, does not have the power to take *suo moto* actions. Lokpal does not entertain anonymous complaints. The Whistle Blower Protection Act also does not entertain anonymous complaints so did the PIDPI resolution. Yes, there is an aspect of protecting honest and upright public servants. However, this feature might also deter people from coming forward with complaints to Lokpal.

Speaking about Lokayukta, many states had established Lokyuktas even before the 2013 Act. By 2013, 21 states and one union territory which is Delhi had established Lokayukta. However, there is absolutely no uniformity as to how states have established Lokayukta or with respect to qualifications, with respect to jurisdiction. Let's see some of the areas where they differ. With respect to the structural organization of Lokayukta, some states have just appointed Lokayukta such as Bihar or UP or Himachal. Whereas states like Rajasthan, Karnataka, Andhra Pradesh have established Lokayukta as well as Upalokayukta. In some states such as Punjab, the authority has been designated as Lokpal instead of Lokayukta. Hence, even with respect to the structural organization or the name of the authorities, there are differences. Secondly, when it comes to appointment, there is somewhat of a uniformity. Generally, they are appointed by the governor and the governor does so in consultation with the Chief Justice of the State High Court and the leader of opposition, the state legislative assembly. Another area where they differ is with respect to qualification. In some states such as Himachal, UP, Karnataka and Orissa, qualifications of Lokayukta have been prescribed. However, in some states absolutely nothing has been prescribed with respect to qualification such as Bihar, Maharashtra and Rajasthan. With respect to tenure, they are generally appointed for a period of five years or until they attain the age of 65 years whichever is earlier. With respect to jurisdiction, in some states such as Orissa and Rajasthan, the chief minister is excluded from the purview of Lokayukta. Whereas in some states such as Himachal or Andhra, chief minister also comes under the purview of Lokayukta.

However, in most states, Lokayukta has the power to initiate *suo moto* investigation. But in the case of UP, Himachal and Assam, so-moto power to investigate does not exist. And with respect to the scope of cases covered in some states, both allegations of corruption and maladministration can be looked into by Lokayukta. However, in some cases, Lokayuktas can only investigate corruption allegations. They do not have the power to investigate allegations regarding maladministration. Hence, there is no uniformity in how Lokayuktas have been established in various states. The state of Lokpal in the country, even though the act was enacted 10 years ago, is still not satisfactory. So, you see, these two institutions which were supposed to follow the footpath of Ombudsman and other similar systems in other jurisdictions, which started off as a very ambitious goal, has still remained somewhat of a goal and we have not yet realized it yet.

Landmark decisions on anti-corruption

Vineet Narain v. Union of India- Ashafak Hussain, who was alleged to be a member of Hizbul Mujahideen, a terrorist organization, was arrested in Delhi in March 1991. While the law enforcement agency was questioning him, he revealed that his organization was getting funds through a hawala transaction with the help of a Surrender Jain and his family. What is hawala transaction? Firstly, you must know what black money is. Black money is illegal money. You are not supposed to be in possession of black money, and you are not supposed to transfer black money to somebody else. We will learn what illegal money or black money is and how that money is laundered, which is a process known as money laundering at the end of this unit. But for the time being, just keep in mind the term black money. So hawala transaction is a way of transferring black money without the actual transfer of money. Suppose there is a person in country A, there is a person A in country A who wants to transfer 10 crore black money to a person B. A is in India and B is in US. Because this is black money, A cannot just go to a bank or a money transfer service and just ask them to transfer this money to B. This will attract the attention of law enforcement agencies and that money can obviously be traced back to A. So, A will approach a hawala agent in his country and he will transfer these 10 crore rupees to this hawala agent. In return, this hawala agent will give A a unique code, sort of like an OTP. The hawala agent will also receive some sort of commission from you. So, this hawala agent will then intimate to a hawala agent in country B to give B the equivalent amount of 10 crores in US dollars once B shares the unique code with him.

Ashafak Hussain claimed that Surrender Jain and his family has been giving them funds through hawala transaction. CBI raided the premises of Surrender Kumar Jain, his brother, his relatives and all the businesses. From this raid, they received Indian and foreign currency as well as they received two diaries and these diaries contained information regarding certain payments made by different persons. The name of the persons was not

written, it was just the first letter of their names written. However, it was eventually found out that these are the names of very high-ranking politicians, bureaucrats, etc. When this information came to light, CBI suddenly stopped investigating and CBI officers who were involved in the case were actually transferred to other places. The public is bound to lose its trust in CBI when this happens. So, in 1993, a public interest litigation was filed in the Supreme Court alleging that CBI and other government agencies have failed in fulfilling their public duty by not investigating the Jain diaries and that the investigation was stopped to protect the persons who were involved in this case. So, this case is not just related to Jain diaries, but it was also about having a free and biased free working of government agencies. The main issue before the court was unsatisfactory functioning of government agencies, mainly CBI and the Enforcement Directorate or ED.

In 1993, the government constituted a Committee headed by then home secretary N.N. Vohra, which looked into the activities of crimes indicates, mafia organization, which had developed links with and were being protected by government functionalism, political personalities. The report of the Committee said that mafia is virtually running a parallel government, and that the mafia in the country had become so powerful that they were running a parallel government. And the court was convinced from this report that there is a need for improving the procedure for constitution and monitoring the function of intelligence agencies. Taking into consideration of the recommendations of the Committee, Supreme Court gave directions to give the Central Vigilance Commission statutory status. Court also gave a direction that CVC shall be responsible for the efficient functioning of CBI and CVC was directed to have superintendence over CBI functioning, which means that whichever investigation CBI was handling, CVC will have a supervising role.

Moving on, the next case is a very recent case, a decision was given by the Supreme Court recently in November 2022 regarding the value of circumstantial evidence in bribery cases. Suppose that there is no direct evidence in a bribery case (direct evidence as in, primary oral or documentary evidence). Maybe the person who was forced to give bribe has died. The court held that if there is no primary or direct evidence, the court can determine the culpability or guilt of the public servant using circumstantial evidence. Direct evidence in a criminal case is obviously the most important type of evidence. Suppose there is an eyewitness to this particular alleged event, direct evidence in that case is an eyewitness. Suppose there is some sort of a documentary evidence. This person has requested money through WhatsApp message or through an email, then that is documentary evidence. These are direct and primary evidence. In the absence of any of this evidence, if there are other circumstantial evidence, then obviously that can be looked into by the court. But court also added that foundational facts have to be proved in that case. Court also said in this particular order that to prove the demand and acceptance, certain aspects have to be kept in mind. In some cases, someone offers bribe without any demand because this culture of offering bribe has become so normalized in our country. It

has been ingrained in our brains. If a person offers bribe without any demand and if the public servant accepts that, even in such cases, acceptance can be punished under Section 7.

The last case that we are going to look into is *Bank Securities and Fraud Sale v. Ramesh, Gheli*. There was a private bank which merged with a public sector bank and there was an allegation leveled against certain officers of this private bank. Under the Prevention of Corruption Act, only public servants can be punished. The question here before the court was whether officers of private bank are public servants and the court held that officers of private banks can be considered as public servants under Prevention of Corruption Act.

Constitutional Law and Public Administration in India

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Week- 12

Lecture- 02

Non-Constitutional Bodies - IV (Information Commission)

You have learned about Article 19(1)(a) which talks about freedom of speech and expression. You have learned about Article 21 which talks about right to life. You have also learned about right to information which is not an express fundamental right guaranteed by the constitution. However, the courts have time and again held that this is an indispensable part of Article 19(1)(a) as well as Article 21. As early as in 1975 the Supreme Court had solidified or affirmed that right to information is a very important fundamental right. So, this happened in the case of *State of UP v. Raj Narain*. What happened in this case? So Raj Naren filed an election petition in Allahabad High Court alleging that there is misuse of public money happening with respect to the re-election of Prime Minister of India and this is committed by a certain political party.

So Raj Naren wanted state of UP to submit a particular document known as the blue book as evidence in this matter. So whenever a Prime Minister travels in and out of the country there are certain security protocols or guidelines that have to be followed right. So this blue book essentially contained all of these security guidelines and protocols. Whereas Raj Naren wanted state of UP to submit this particular document as evidence in this election petition. In response state of UP submitted before the court that they won't be able to produce this particular document as evidence because they are exempted from doing so under Section 123 of Evidence Act.

What does 123 of Evidence Act say? Now this provision is related to certain privileges that government have with respect to submitting evidence in the court. So this section says that no one shall be permitted to give evidence on an unpublished official record relating to any affairs of the state unless with the permission of the head of the department or head of the concerned department. So there will be many records of the government that are not known to the public right. So those are unpublished official records. And if such records relate to any affairs of the state you know these might be highly confidential documents relating to security of the state or other related matters.

So in such cases the government might not want to make them public knowledge. So if head of the department gives permission to any person to give evidence on such document they can go to the court and give evidence. However if the head of the department does not give permission in this regard then no evidence can be given on such document. So this is the justification that state of UP took in this court to not submit blue book as an evidence in this matter. However the High Court was not satisfied with this justification and they said that you failed to prove how this particular document relate to an affairs of the state.

So state of UP filed an appeal to Supreme Court. Supreme Court also upheld the decision of High Court and they wanted the government to disclose this particular document. So yes right to information is an indispensable part of freedom of speech and expression as well as right to life. So I have already mentioned how RTI is an important role in the fight against corruption and how RTI activists file RTI to obtain vital information regarding public authorities. So the Right to Information Act is concerned with public authorities.

So public authorities are institutions or bodies including institutions of cell government which are established by the constitution or through a central legislation or through a state legislation or maybe through a notification by the appropriate government. So these public authorities are mandated by the Act to designate certain number of officers as central in public information officer or state public information officers. So if you want to file an RTI application you are supposed to file such application to either a central public information officer or a state public information officer depending upon which public authority you know which information regarding which public authority you want to obtain. So if you are interested in filing an RTI application and the government department or the public authority says they have not yet designated any officer as a public information officer or such public information officer refuses to accept your particular application or in a situation where you want to file an RTI application and this particular public information officer is asking for an unreasonable amount as fees for processing that particular application or suppose in some case you have already filed an RTI application but you have not received any response to it within the time that is specified by the Act or you have filed an RTI application and you have received a reply as well but you believe that such information that is provided to you is either inadequate or misleading or false or any other related complaint you know maybe with respect to the RTI application or with respect to the public information officer or state public information officer all such complaints will be either made to the central information commission or state information commission. So these are two bodies that are established by the RTI Act of 2005.

So they are non-constitutional but statutory bodies. So coming to central information commission it is a high powered independent body which looks into complaints received to it and central information commission's jurisdiction extends to all central public authorities. So essentially CIC is the watchdog of information secrecy and denial of information. So central information commission and state information commissions are bodies established by the RTI Act to ensure that the public receives proper and adequate information in a timely manner under the RTI applications made by them. Coming to the composition of chief information commission it consists of one chief information commissioner and not more than 10 information commissioners.

So when CIC was established initially it had one chief information commissioners and a total of five information commissioners including the chief information commissioner. So they are appointed by the president upon the recommendation of a committee consisting of the prime minister who is chairperson of the committee, the leader of opposition in Lok Sabha and the union cabinet minister who is nominated by the prime minister. So even though the president is appointing them it is always based on the recommendation of this committee. Coming to the qualification of chief information commissioner or information commissioners they shall be persons of eminence in public life with expertise and knowledge in various subjects such as law, social service, journalism, science, etc. They shall not be members of parliament or members of legislative assemblies and they should not hold any other office of profit or they shall not be connected with any political party and they shall not be pursuing any other profession along with being a chief information commissioner or information commissioners.

Coming to the tenure of such persons it is decided by the central government generally it's five years and or until they attain the age of 65 years and they can be removed by the president the grounds of removal are similar to the grounds of removal of a vigilance commissioner. Coming to the powers and functions of central information commission the primary function as I have already mentioned is to receive complaints regarding RTI applications made to any central public authority. So they receive complaints from those who were unable to submit an information request or from persons who were refused requested information or they did not receive any response within the time limit specified by the act or they were requested such fees such unreasonable amount as fees for processing that particular RTI application or they have received the response to their RTI application but they believe that they have received inadequate or misleading or false information. With respect to its powers the central information commission while it's conducting an inquiry into the complaint received by it has the powers of a civil court with respect to issuing summons receiving evidence requesting any public record from any court or office. Coming to the state information commission it consists of one state chief information commissioner and not more than 10 information commissioners and

they are appointed by the governor of that state upon the recommendation made by a committee consisting of chief minister as a chairperson, leader of opposition in the legislative assembly and the state cabinet minister nominated by the chief minister.

Such state information commissions receive complaints from complainants against public authorities under their jurisdiction with respect to RTI applications made to them. State information commission submits an annual report to the state government on the implementation of the provisions of RTI act and such report is placed before the state legislature. So if a complainant is not satisfied with the decision made by the central information commission or the state information commission they can make an appeal to any officer above the rank of a chief public information officer or the state public information officer. So that's all about central information commission and state information commissions. Next we will learn about inquiry commission.

Commission of Inquiry

Most of you might remember the Pegasus controversy of 2021. Pegasus project which is a collaborative investigative journalism initiative undertaken by 70 media organizations alleged that Pegasus spyware, this is a malware, or a virus was secretly deployed into mobile phones and other devices of several prominent public figures. This included politicians, supreme court judges, ministers, opposition leaders, journalists, lawyers, activists, etc. In India it was alleged that around 300 individuals were targeted. Some of the prominent figures who were alleged to be targeted by this particular spyware were Rahul Gandhi, Alok Verma who was a former director of CBI, activists such as Stan Swamy, Umar Khalid, etc. Pegasus spyware is developed by NSO Group which is an Israeli technology and cyber arm firm. And only national governments can purchase this particular spyware that too with the authorization of Israeli government. So essentially the allegation here is that the Indian government has purchased this particular spyware with the authorization of Israeli government and has been using it against certain individuals.

So when the controversy broke out, the central government denied any kind of investigation into this matter or court monitored inquiry into this particular controversy. So when there was no central effort to probe into this matter, state of West Bengal stepped up and Mamata Banerjee's cabinet approved the constitution of a two-member inquiry commission and this commission was led by former Supreme Court Judge Madan B. Lokur and the second member was former Calcutta High Court acting Chief Justice Jodhir mai Bhata Charya. Mamata Banerjee mentioned in a press conference that she wanted a central committee to look into this. However, since that was not happening, she had to constitute a state inquiry commission.

Later the Supreme Court also agreed that there should be a central investigation into this matter. So, they constituted a three-member technical committee which was also supervised by a former Supreme Court Judge. This technical committee actually found that out of the 29 devices that were submitted to them, five of them contained some sort of a malware. There was no conclusive proof that that was Pegasus spyware, but this was just a final report study of this particular committee. When this technical committee was constituted, state of West Bengal decided to discontinue the inquiry commission set up by them and later on Supreme Court also state the operations of this particular commission.

Now this whole back story was provided to you to make you understand that commission of inquiry can be set up by central government as well as state government under the Commission of Inquiry Act of 1952. So yes, both central government and state government can set up a commission of inquiry to look into matters of public importance. Central government can set up a inquiry commission for matters coming under list 1, 2, and 3 of 7th schedule and state governments can set up a commission of inquiry to look into matters coming under list 2 and 3 of 7th schedule. So, central government and state governments can appoint commissions of inquiry to look into any matter of public importance. For this, a resolution to that effect has to be passed by the parliament or state legislatures as the case may be and then official guess of notification should also be made.

This guess of notification will contain the functions and duration of such commissions. So, if central government has already appointed an inquiry commission to look into any particular matter and if any of the state governments wishes to appoint a parallel commission to look into the same matter, they can only do so with the approval of central government until the central government commission is operational. If state government has already appointed an inquiry commission, central government can appoint a parallel commission only if it is of the opinion that inquiry should be extended to two or more states. So, every commission should have at least one member, it can have more than one member. If it has more than one member, then one of them shall be designated as the chairman of the commission and this commission is supposed to submit a report to each house of the parliament or to the state legislature as the case may be.

The first commission of inquiry that was appointed was a one-man commission which comprised of Justice M.C. Chagla which was known as Chagla Commission, and this was appointed in 1958. This commission looked into certain alleged transactions of LIC. Next, we will learn about the powers of commission and certain other matters related aspects of inquiry commission.

Coming to the powers of the commission of inquiry, as per section 4 of the act, commission has the power of a civil court with respect to issuing summons, enforcing the

attendance of any persons, and examining them under oath. It has the power of a civil court with respect to receiving evidence, requesting any public records from courts or other offices. Commission can also issue commissions like a civil court. Under order 26 of Civil Procedure Court or CPC, court can issue commissions and these commissions are essentially advocates who are known as advocate commissioners and they might be appointed as such for examining a witness, going to a disputed land, and making local investigation regarding the land or for any other matter as has been decided by the court. Commission of Inquiry also has the power to issue such commissions like a civil court.

Additional powers are given under Section 5A and 5B. As per Section 5, the commission can require any person to furnish any information subject to the privileges that may be claimed by such persons. The commission or any other officer as authorized by the commissioner, provided that such officer is not below the rank of a guess at our officer can enter into any building or place where commission has a reason to believe that such building or place might contain books of account or documents that might be relevant to the matter of inquiry and if they find such books of account or documents, they can seize such documents or extracts and or make copies thereof. Then all proceedings before the commission is considered as judicial proceeding. As per Section 5A, commission can utilize the services of central government or state governments.

So, if it is a commission that is appointed by the central government, it can utilize the services of the investigative agencies or officers of central government and state government. If it is a commission that is appointed by a state government, it can utilize the services of officers and investigative agencies of central government and state government with the concurrence of central government and state government respectively. And these officers or investigative agencies shall submit a report to the commission and commission shall verify the contents of such report. As per Section 5B, the commission has the power to appoint persons having special knowledge with matters related to the inquiry as assessors and these assessors are appointed to assist and advise the commission. An important point to be noted is that the commission has the power to regulate its own procedure.

However, this is subject to any rules made in this regard under Section 8 of the Act. It is very pertinent to note that reports of inquiry commissions are not binding in nature. So, just because the commission of inquiry has been appointed and the commission has submitted a report before the parliament, or the state legislature does not mean that these reports are binding, and this has been appointed by various courts time and again. Most recently, commission of inquiry has been constituted in Manipur to look into the Manipur violence and this will be chaired by a retired judge of Murthy High Court. So that is all about Commission of Inquiry. Central governments and state governments can both appoint inquiry commissions to look into various matters of public importance.

Constitutional Law and Public Administration in India

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Week-12

Lecture- 03

Non-Constitutional Bodies - V (Disaster Management Authority)

Disasters can be of different types. There can be natural disasters such as tsunamis, earthquakes, floods. Disasters can also be man-made such as the Bhopal gas leak tragedy. Recently, the world has been increasingly facing several disasters and most of them are caused by climate change. For example, the USA has been witnessing a lot of massive widespread forest fires in the recent years. In India, several states were faced with floods in 2018. Very recently, Delhi was faced with a very bad flood situation. In Turkey and parts of Syria, there was a huge, massive earthquake that happened in 2023, which claimed the life of over 58,000 people. Firstly, we need to prevent these kinds of disasters. Secondly, there needs to be some level of preparedness. If at all a disaster is to happen, we need to be prepared to face that disaster as an individual, as a part of the community, as a part of the state or the nation. We need to be resilient towards disasters.

That's why we have a disaster management authority. However, this authority only came into existence from 2005. What all happened before that? The decade of 1990s was declared by the UN as the International Decade for Natural Disaster Reduction. Following this, in 1999, a High-Powered Committee was constituted to look into the disaster management aspects in the country. In 2001, the Gujarat earthquake happened, which was an earthquake that happened on a large scale, which claimed the lives of several people. Following this, a National Committee was constituted, which was to look into improving preparedness when it comes to disasters and to suggest effective mitigation mechanisms for disaster management. It also was to suggest a disaster management plan. All of this was done by the Committee, but no action was taken based on the Committee's report. Please note that in the Constitution, in the 7th Schedule, which talks about the union list, state list and the concurrent list, there is no mention of disaster management. There can be some entries which you can interpret as, being a part of disaster management. However, there is no explicit entry as disaster management in the schedule. In 2002, the National Commission to Review the Working of the Constitution, headed by Venkatachaliah, looked into the dire state of disaster management in India and they said that the mechanism for immediate state responses to emergencies and disasters

is wholly inadequate in India. There was a suggestion prior to this commission by the Ministry of Agriculture, to add a new entry concurrent list, which will be management of disaster and emergencies, natural or manmade. The Venkatachalia Commission also agreed with this suggestion. However, we do not have an entry on disaster management even now. In 2004, another natural disaster happened, which was again a widespread large-scale disaster, which was the Indian Ocean Tsunami.

Following this, the National Disaster Management Act was enacted which envisaged the establishment of the National Disaster Management Authority. In 2005, by way of an executive order, a National Disaster Management Authority was instituted, which means initially it was an executive body, even though the statute was talking about its establishment. In 2006, finally, it was notified as Statutory Body. The National Disaster Management Authority (NDMA) is responsible for bringing together all of the stakeholders whenever there is a disaster in order to prevent disaster, to improve preparedness, to be more resilient. It brings together all stakeholders in the face of a disaster. It is the topmost disaster management authority in India. It works under the Union Ministry of Home Affairs. The Prime Minister will be the ex-official chairperson of NDMA and there are nine members in total, who will be nominated by the Prime Minister, and he will also designate one of them as the Vice Chairperson of NDMA who will be responsible for the day-to-day functioning of the authority. NDMA had several functions. Firstly, to prevent disasters, increase preparedness and be more resilient towards disasters. Essentially, making India more resilient and safer in the face of disasters. And how do we do that? Through education, knowledge and through technology. There is never one single entity that is responsible for disaster management. Actually, it's a combined effort. However, we have this authority to guide us, to supervise or to monitor all of these activities. All efforts to prevent disasters, to be more prepared and to be resilient, they will have to be done in a sustainable way. We talked about the Planning Commission, wherein we talked about economic and social development. Development is essential for the progress of the country, no doubt. However, development will also have to be done in a sustainable manner, keeping the environment in mind. So, we need to conduct our development of nation in a way that we are not exhausting all of the resources that are available to us. We are also keeping in mind the future generations that will come. Whatever developmental activities are there, they'll have to firstly keep in mind the environment.

Secondly, they'll also have to keep in mind the disaster resilience aspect. If that is not done, more disasters are bound to happen and they will happen in a larger scale, in a scale that is much larger than what would have happened had there been proper disaster management planning that went before these developmental activities had taken place. So this particular objective will have to be carried out keeping in mind the environmental

sustainability using technology, knowledge, education. Traditional wisdom can also be used for carrying out or materializing this particular objective.

Second objective is similar, but in other words, which is to mainstream disaster management into developmental planning process. Whatever developmental planning is carried out in the country; it has to be infused with disaster management. Speaking of this, it is not just the Disaster Management Act that is there for managing disasters. Even other legislations, even though they may not look like a disaster management legislation can be used for this purpose. For example, Chapter 14 of Indian Penal Code talks about offenses against public safety and health, which can be used for preventing certain disasters. Water Act, Air Act, all of these are there to prevent water pollution and air pollution respectively. They can also be considered as a component of disaster management. There are several building safety standards and other industrial safety standards which are there to prevent industrial disasters and disasters relating to buildings. You can even say that Motor Vehicle Act is a legislation to prevent disasters. All of this following safety standards is essentially important. If those are not followed, then that can lead to a lot of manmade disasters as well. And in the face of natural disasters, these buildings or constructional activities will suffer a lot. For example, in UK in 2017, there was a Grenfell Tower that was caught in fire. The fire actually started in one of the apartments in their fridge. It was not supposed to cause a disaster of this huge scale. However, because the building was constructed, flouting several building safety standards; the cladding, the outer part of the building was constructed using a material that escalated the fire instead of reducing it. There were a lot of safety standard failure that were there in the Grenfell Towers, which led to the escalation of fire to a great extent, and which claimed the lives of many people. This is precisely the reason why we need to follow the signed-up safety standards, industrial standards, building standards, all of that.

The third objective is to develop forecasting and early warning system, which also has a fail-safe communication component. So, you get your weather forecast in your phones or you might see weather forecast in your channels. Similarly, they also forecast if there is heavy rainfall, which might lead to floods. All of these early warnings, as much as possible, shall be given to the general public once again to reduce the scale of disasters. It is the objective of the National Disaster Management Authority to develop such kind of forecasting and early warning system, which also has a fail-safe communication component.

The next objective of Disaster Management Authority is to develop a techno-legal framework for regulating and for ensuring compliance with respect to all of these matters, for the identification, assessing and monitoring of disaster risk. The next objective is to ensure efficient response, especially for the vulnerable section of the society. Whenever there is a disaster, it is always the most vulnerable section of society that is vulnerable to

disasters as well. These are underprivileged people, who come from lower income families, who are coming from the minority communities. They are always more vulnerable in the face of a disaster as well. So there needs to be efficient response, on the ground response and specifically, especially for these vulnerable groups as well. The next objective is to undertake reconstruction activities after a disaster has happened. And this reconstruction activity will have to be disaster resilient. It is also the objective of the Disaster Management Authority to enter into proactive and productive partnership with the media. Whenever there is a disaster, media helps to amplify the voice of the victims of the disaster so that the elected representatives of the area, the bureaucrats in that area, so that proper and timely action can be taken place. Yes, media in some times also exaggerates information, however, it is an important tool.

The authority is also responsible for approving the national plan. It will recommend minimum relief for the disaster victims. It also exercises superintendence over National Disaster Response Force (NDRF). It also approves plans prepared by different ministries and their departments. It lays down guidelines that has to be followed by different state disaster management authorities while they are formulating plans for their respective states. It is also responsible for coordinating and the enforcement and implementation of the policy and disaster management plans. It is also the function of the National Disaster Management Authority to recommend provision of funds for mitigation mechanisms. It also extends support to other countries if they are faced with a disaster and if the Central Government has the authority to do so. It also undertakes several activities for capacity building. As mentioned before, there is a State Disaster Management Authority (SDMA) in every state which will be chaired by the Chief Minister of that state and the Chairperson of the State Executive Committee will be the ex-official Chief Executive Officer of SDMA. The State Executive Committee is also envisaged under the Disaster Management Act and is responsible for implementing disaster management plans. It is essentially the coordinating and managing body. There will be other 8 members who will be nominated by the chair of the authority and one of them will be designated as the vice chairperson who will be responsible for the day-to-day functioning of the state disaster management authority. The national disaster management authority, they are supposed to lay down a state disaster management plan or policy and they will approve plans, disaster management plans made by different ministries and departments of the state government. There is also a District Disaster Management Authority or DDMA in every district of each state. And that will be headed either by the district collector or the District Magistrate or Deputy Commissioner.

These are the officials who can be appointed as the chairperson of a district disaster management authority. To give an example of a success story of disaster management in one of the Indian states, we can talk about Odisha. State of Odisha is in the eastern side of India and also is vulnerable to cyclones and other natural disasters because of its unique

positioning. In 2019, there was a cyclone, a very peculiar cyclone which was named Cyclone Fanny which had a recorded speed of 240 km per hour. However, in Odisha, there is a robust disaster management mechanism. They also enter into partnership with international organization for disaster management and because of the efficient and timely response to this particular cyclone, it was very well managed, the number of fatalities was very low. Odisha is a success story when it comes to disaster management in India. But not all states or even the situation of national planning of disaster is as successful as has been in the case of Odisha. Even though the Act was enacted in 2005 and the National Disaster Management Authority came into existence in 2005, the first National Disaster Management Plan was only formulated in 2016, over 10 years, over a decade after the enactment of the Act and the establishment of the National Disaster Management Authority.

There is also a growing allegation that there is lack of coordination, there is inadequate training given to the first responders whenever there is a disaster, and it remains one of the biggest challenges to proper disaster management. For example, when the Kerala floods happened in 2018, this was a major allegation that there was no proper coordination among different disaster management authorities, different levels of disaster management authorities. However, during the Kerala floods, there was a great deal of community resilience. The community came together for disaster management and that is a great example of community resilience. In 2019, the disaster management plan introduced biological and public health emergency. COVID-19 pandemic wreaked havoc across the world and India also. Disaster Management Act was frequently used during the pandemic and several directions and guidelines were issued by the central government using the disaster management plan. In theory, these are all effective and proper. In practice, we see that there is still a lot that we need to figure out and fix in terms of disaster management.

Constitutional Law and Public Administration in India

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Week-12

Lecture- 04

Non-Constitutional Bodies - VI (Planning Commission & RBI)

Let's learn about the erstwhile Planning Commission and NITI Aayog that has replaced it. In life, we need some sort of planning, right? Most of the times before we do anything, we tend to make plans and we try to execute these things according to the plans we have made. Yes, sometimes things happen spontaneously, sometimes things happen unplanned. However, most of us try to plan things ahead, maybe it could be a vacation or buying some stuff, could be anything. To give an example, suppose you want to buy a television, one wouldn't randomly go to a shop and buy the first television that he sees there or open an e-commerce website and place the order for the first television that pops up on his search. Ideally, what a person would do is firstly figure out how much money he has in hand. Suppose this person has 1 lakh rupees in his hand. He decides not to spend all of that money on a television, he wants to keep aside some money as savings. Say he decides to keep 60,000 rupees as savings. He is left with 40,000 rupees. It's not necessary that he has to spend all 40,000 but he is keeping aside 40,000 to buy this television. He decides to buy a 42-inch television which might cost him around 30,000 rupees. Once this budget of the television is decided, budget and size of the television is decided, he'll then decide where to keep this television, or this step can come before deciding the size of the television as well. Finally, he decides to keep it in the living room. Then, he might go to an electronic shop and tell the shopkeeper that, he wants a television that is of a particular size within the decided budget. Or if he wants to buy it online, he'll put on search filters and find the perfect television that fits to the description. Not everyone might plan the same. However, this is just to give an example as to how we plan things in our life.

Similarly, a country also needs some sort of social and economic planning for its proper development. That is why we had a Planning Commission and that is why we now have NITI Aayog. The establishment of Planning Commission was inspired from the Soviet model. Jawaharlal Nehru visited Soviet Union and he observed that there was much less inequality among people regarding distribution of wealth and Soviet Union fared well in the face of certain economic crisis, whereas other countries did not. In 1938, even before

independence, we had a National Planning Committee under the leadership of Nehru, which was to look after the planning of the country in the future. Hence, even before independence, the country was conscious that it needs solid planning to progress. In 1946, an Advisory Planning Board under the chairmanship of KC Neogi recommended the establishment of a Planning Commission. Planning Commission was set up through an executive resolution in 1950. Hence, it was a non-statutory body as well as a non-constitutional body. Please note that Planning Commission was an advisory body, which means that the final say was up to the government whether or not to implement the recommendations given by the Planning Commission. Essentially, Planning Commission's recommendations had no binding power on the government.

The Planning Commission was established with an aim to find a balance between private and public partnerships, between rural and urban economies, to improve the living standards of the citizens, to increase production and to increase employment. You have already learned about Directive Principles of State Policies and that certain DPSPs are related to the economic or social aspect of an individual's life. For example, DPSPs on adequate means of livelihood, right to work, and equitable distribution of material wealth are related to various social and economic aspects of an individual's life. Because the Planning Commission was entrusted with the social and economic development of the country, it was one of the tools to implement DPSPs. The Planning Commission used to assess how much resources the country has and how to augment such resources. A country has different kinds of resources such as human resources. Human beings possess different levels of knowledge or skills that can be exploited. When the term "exploitation" is used in relation to resources, we are not talking about over-exploitation which might lead to the deterioration of such resources. We are talking about effective utilization of such resources. A country has capital resources like money, monetary resources. A country has natural resources as well.

Firstly, the Planning Commission will assess, or it will estimate how much resource our country has. And it will also see if any resource is lacking in number or if it is not up to the mark, then how to augment or how to increase such resources. Secondly, it will formulate a plan for the effective utilization of such resources so that we can get the optimum result out of such effective utilization. Thirdly, it will prioritize. A country has different avenues of development that it has to focus on. There is social development, economic development, and cultural development. It has different sectors that it has to focus on such as the agricultural sector, transport sector, energy sector and so on. It might not be possible for the country to focus on all of these avenues of development or all of these sectors simultaneously. So, Planning Commission used to prioritize which avenue of development it should focus on or which sector it should focus on. It also used to figure out the factors that were pulling our economy down and the area or the avenue of development in which we lag behind.

The Planning Commission was responsible for the formulation, implementation, and regulation of Five-Year Plans. So, India had five-year plans from 1951 to 2017. The first five-year plan from 1951 to 1956 focused heavily on the agricultural sector. During this period, the farmers were equipped with knowledge regarding modern agriculture. Their focus was on increasing yields. A lot of dam projects were also built during the first five-year plan period such as the Bhakra Nangal project, the Damodar Valley project, Tungabhadra project. The second five-year plan focused on the industrial sector, specifically the steel industry. Each five-year plan had a different focus area. Several units or institutions of the government were also under the Planning Commission such as the Institute of Applied Manpower Research, the Unique Identification Authority of India which was responsible for the issuance of the Aadhaar cards. The National Informatics Centre which is responsible for the development and implementation of the IT systems of the government was also under the Planning Commission.

Even though the Planning Commission was an advisory body and the recommendations of it had no binding power, gradually it became very important and powerful. The Prime Minister of India was the chairperson of Planning Commission. It also had a deputy chairman who was responsible for the day-to-day functioning. He had the power to take part in cabinet meetings even though he did not have the right to vote. But the very fact that he was able to take part in cabinet meetings, shows that the position of deputy chairman was a very important position. The Planning commission also had ex-officio members such as the Finance Minister and the Planning Minister. Whenever this term ex officio member is used, please understand that we are talking about people who became part of or who became members of a particular body or an institution by virtue of the position that they are holding. So, Finance Minister or Planning Minister becomes ex-officio members of Planning Commission by virtue of the position that they are holding.

Planning commission also had other members but please note that there were absolutely no representatives from any of the states or union territories in the planning commission. Planning Commission was not just making plans for the development of the center. They were supposed to formulate plans for the development of the whole country. However, there was absolutely no representation from the states in the planning commission. There was another body which had a representation from the states which was the National Development Council. Once Planning Commission has formulated plans, it was supposed to bring this plan before the National Development Council. This council had members from all states, all Chief Ministers were in the National Development Council.

On August 13, 2014, the BJP government announced that they are scrapping Planning Commission, and a new body will be established in its place. On 1st January 2015, the National Institution for Transforming India or NITI Aayog replaced erstwhile Planning Commission. NITI Aayog was established through an executive resolution. So, just like planning commission, NITI Aayog is also a non-statutory, non-constitutional

body. NITI Aayog is a premier think tank which means that it gives directional and policy inputs to the government. It designs long-term strategic policies and programs and also tenders advice to central and state governments. What were the reasons why Planning Commission was replaced? As mentioned before, even though Planning Commission was just an advisory body, gradually it became too powerful that at one point the Administrative Reforms Committee had remarked that it had become a parallel cabinet or a super cabinet. Secondly, the concept of federalism was slowly withering away because the flow of development was top-down. The center decides everything, and it was in a way imposed on the states and union territories. Another criticism leveled against the Planning Commission was that there was a huge overlap of functions of the Planning Commission and the Finance Commission. the Finance Commission is a constitutional body. However, the rationale given by the government for replacing NITI Aayog is that India in the recent years had undergone a major transformation socially, economically, technologically, and demographically. And because of this India needs a new body for implementing planning in its country and that is why NITI Aayog was established.

Under NITI Aayog, the states have a more empowered role and policy designing is not done in a top-down manner. It will be done in a bottom-up approach and there is improved synergy and collaboration between the states and the center. The chairperson of NITI Aayog is the Prime Minister. It has a Governing Council which consists of Chief Ministers of all states and Lieutenant Governors of all union territories. It also has Regional Council. If there is an issue between certain states or union territories, regional council can be summoned by the chairperson, and it will function for a fixed period of time. Such regional councils will consist of Chief Ministers and Lieutenant Governors of the concerned states or union territories. NITI Aayog also has special invitees which are experts, or it also has regional councils. So, if there is an issue between certain states or union territories, Regional Council can be summoned by the chairperson, and it will function for a fixed period of time. NITI Aayog also has full-time members as well as part-time members. It has ex-officio members who are four members from the council of ministers. There is also a Chief Executive Officer who is an officer of the rank of secretary. NITI Aayog also has special invitees who are experts or specialists which are nominated by the chairperson. The underlying theory behind the establishment of NITI Aayog is that there shall be effective implementation of cooperative federalism which was the underlying theory behind Planning Commission as well.

However, it did not materialize completely. NITI Aayog also has three specialized wings. These are the Research Wing, the Consultancy Wing, and the Team India Wing. Team India Wing consists of representatives from the state and ministries. It establishes a direct communication channel between the state and NITI Aayog. There are certain offices

attached to NITI Aayog such as the National Institute of Labor, Economics, Research and Development and the Development, Monitoring and Evaluation Office.

Reserve Bank of India

The next non-constitutional body that we will learn about is the Reserve Bank of India (RBI). RBI is the Central Bank of India which was set upon the recommendation of the Royal Commission on Indian Currency and Finance in 1926. The issue of establishing RBI as the Central Bank of India was brought up again by the Indian Central Banking Enquiry Committee in 1931. Three years later the Reserve Bank of India Act was enacted and thereby the RBI as the Central Bank of India was established. However please note that RBI was initially not a government owned bank, it was a private bank, and it was nationalized only in 1949 and also from 1935 to 1937 Reserve Bank was located in Calcutta and in 1937 it was then moved to Mumbai. Now Reserve Bank has around 19 regional offices not just in Mumbai.

There are multiple reasons behind nationalization of RBI. First reason is that after the end of the Second World War there was a trend around the world where countries were nationalizing their respective central banks. For example, the Bank of England was nationalized in 1946. As for the second reason, there was huge inflation ever since the beginning of the Second World War. Inflation is generally an increase in price of goods or services. Ever since the beginning of Second World War that is from 1939 September to August 1948 there was a huge inflation happening around the world. In August 1948 the wholesale prices almost doubled. To prevent or curb such inflation tendencies India needed a centralized bank which will be its currency and credit manager. Another reason behind nationalization is that the country was focusing on planned economic development. We learned about the Planning Commission and the Five Year Plans the country had a huge focus on planned economic development and RBI was one of the tools for effective economic development.

Currently RBI has a Central Board. The Central Board manages or governs RBI's affairs, and the Central Board of Directors is appointed by the Government of India. RBI also has other organizational elements such as the Board for Financial Supervision. There is a Local Board, Board for Payment and Settlements and other components as well. RBI also has around 30 departments including the Central Vigilance Cell. The RBI is a supervisor of the entire banking and financial system in India. RBI is the regulator of the banking and financial system in our country.

RBI issues master circulars and directives and notifications to the banking institutions on several topics and the banking institutions are supposed to adhere to these particular guidelines or directions or master circulars. For example, RBI had notified banking institutions to strengthen their security systems to make electronic transactions much

safer. Banks are supposed to put in place risk management system, and they have to identify existing risks in their digital transaction infrastructure and also efficient fraud detection and prevention mechanisms among other things. RBI does all of this to protect the interest of the depositors, to maintain the confidence of the public in the system, to provide cost effective banking services to the. Hence, RBI is a regulator.

RBI is the administrator of several acts such as the RBI Act of 1934, Banking Regulation Act of 1949, Foreign Exchange Management Act of 1999 and many others. RBI is the issuer of currency. RBI prints currency notes. However, the coins are minted by the government of India as per the Coinage Act of 2011. However, one rupee note is printed by the government of India and not RBI and this is because one rupee note is not considered as a currency note, it is still considered as coin. RBI can also exchange currency notes. Sometimes you might wrap a lot of currency notes with an elastic rubber band and sometimes these rubber bands damage your currency notes or sometimes you might have accidentally washed currency notes along with your clothes and then you will get a very wrinkly old looking currency note or sometimes insects bite and damage your currency note. What can you do when your currency notes are damaged? You can give them to your banks and the banks will deposit these notes to Issue Offices of RBI. Once these notes reach there, RBI will verify the genuineness of these notes and then it will put it into two categories. One is a fit category which means they can be reissued. So, they go back to the economy and the second category is unfit which means they cannot be reissued, and these notes will be destroyed by the RBI. A very important question here is can RBI demonetize currency notes? Demonetization in the recent history happened in 2016 November when the 500 and 1000 rupee notes were demonetized which means they are no longer of legal tender value. You cannot use those notes to buy anything. We had to return all of these to the banks. Demonetization happened once again recently with respect to 2000 rupee notes. Who takes this decision? Is it RBI because RBI has the power to print money? As per Section 26 subsection 2 of the RBI Act only the Central Government has the power to demonetize currency notes. RBI does not have that kind of a power.

The next function is with respect to monetary policy or credit control. There is a Monetary Policy Committee which consists of 6 members. 3 from RBI including the RBI Governor and 3 experts appointed by the Government of India. Essentially, what they are doing is they either increase the money supply or they decrease the money supply to keep the prices very stable. We talked about inflation. There can also be cases where value of money decreases. In both of these cases in order to prevent any kind of a chaos the Committee will either decrease money supply or increase money supply to make the prices stable keeping in mind the objective of growth. Another important function of the RBI is that it acts as the banker to the government. What do we do with our money? We deposit in different banks. Similarly, the union government or the state government can

deposit their money in RBI and then RBI in some cases can make payments on their behalf or carry out exchanges on their behalf. Government can also borrow money which means to take a loan from RBI. So, government can either borrow money from the internal source which is RBI, or it can go to an external or foreign source such as the International Monetary Fund or World Bank. Another important function of RBI is that it is the Manager of Foreign Exchange. As mentioned before RBI is responsible for the administration of Foreign Exchange Management Act of 1999. What is foreign exchange? All of these foreign currencies we are involved in international trade. Whenever there is a trade with a different country there will be flowing in and flowing out of foreign currency like other currency such as dollar or pounds. All of this foreign money flowing in and out of the country is known as the foreign exchange. RBI is responsible for the orderly management of foreign exchange reserves, and this is done to have a very smooth external trade.

Moving on to the next function RBI also acts as a Bankers Bank. Other banks can borrow money from RBI especially in case of emergency. RBI is known as the bank of last resort. In the previous slide we talked about RBI being a regulator. In this regard banks will have to take approval from RBI if they want to open a new branch or an ATM.

Prevention of Money Laundering Act, 2002

Money laundering, as per the UN Office on Drugs and Crimes is a huge issue. Around 2 to 5% of the global GDP is being laundered. So, what exactly is money laundering? Just like how we wash our used old clothes and get them clean, criminals also employ a lot of methods to clean their dirty money. Dirty money is the money that they have obtained by committing illegal or criminal activities. These activities could be organized crimes such as drug dealing, sex trafficking or other crimes such as murder or tax evasion. Now you might ask why these criminals can't just use this dirty money just like how everybody else is using their money. If you are working in a software company which is a legal job and you are getting salary, you can use that money to buy things or you can deposit that money in your bank. However, if a criminal is to do the same with the dirty money that he has, firstly it might attract the attention of law enforcement agencies. If somebody is depositing a huge amount of money in the bank, it will raise an alarm and they will ask for the source of the money that is first. Secondly, they can use this money to trace back the origin of it and they will find out the illegal or the criminal activities that this person is involved in. These are some of the reasons why which criminals prefer to launder money and make it clean so that it can be reintegrated into the financial system.

Money laundering is a complex process that has several steps. This is not to say that in reality or in practical situations criminals are going to go by the textbook and they will be doing money laundering step by step. Sometimes in reality these steps might overlap, or they might not be in the same order. However, we are trying to understand the concept so

this is for our better understanding as to how money laundering can actually take place. So, the first step is acquiring dirty money obviously. The second step is called placement. In this step the dirty money is placed into an establishment. In placement what happens is criminals will establish a front for money laundering. They might establish a shop and they will justify that this money is coming from the business that is going on in this shop. Back in the day criminals used to establish laundromats. Laundromats are shops where you can go and get your clothes washed. There will be a lot of washing machines in a laundromat and you can wash your clothes in any of them by paying money. These laundromats used to be cash only because if the customer is paying through any other method, it can be traced. This is not enough for laundering the money. The next step is called layering. In layering a lot of complex financial transactions happen. There are a lot of countries and banks in several other countries which provide high security which give the source of the wealth or identity of their customers highly confidential. So, money can be sent to these banks and from there it can be wired to other banks or other institutions. This is done to obscure the origin of this money. So, if at all in this stage law enforcement agency needs to find out the origin of the money it becomes extremely difficult because a lot of complex financial transactions have happened, and it is virtually impossible to find the owner of this money. In the final step which is known as integration this money is put into the hands of the owner. Money is put back into the hands of the owner. Once the owner gets the money, he can use that money to buy things, or he might use it as a foreign direct investment or whatever he wants to do with that he can do.

In India we have Prevention of Money Laundering Act of 2002 (PMLA) which criminalizes money laundering, and it also provides for confiscation of assets that is derived from or was involved in money laundering. The most important definition from this act that you need to know is Section 2(u) which defines proceeds of crime. Any asset that is obtained through the commission of a scheduled offense is known as 'proceeds of crime'. Proceeds of crime is what dirty money is. The Act has a schedule attached to it which lists out several offenses from other legislations such as the Indian Penal Code, Arms Act, Customs Act, Prevention of Corruption Act, Wildlife Protection Act, Narcotic Drugs and Psychotropic Substances Act. If some kind of an asset is obtained from the commission of any of these offenses, then that is known as proceeds of crime. Section 3 punishes actual involvement or assistance or attempt in any of the following processes involved or in connected with the proceeds of crime. Trying to acquire proceeds of crime that is punished, the use of proceeds of crime, possession of proceeds of crime, concealment or projecting it as untamed property which is essentially what money laundering is or claiming that it is untamed property are punished by Section 3 of the Act and the punishment is provided under Section 4 which is rigorous imprisonment of a minimum term of 3 years but it can be extended up to 7 years and with fine. The Act also imposes certain obligations on various entities such as banking institutions, financial institutions to report if at all they are suspicious of a money laundering activity. This Act

also confers a wide range of powers for its authorities such as power to search, power to survey, power to seize and freeze assets, power to attach property, power to issue summons, production of documents and give evidence, power to retain property and records and most importantly the power to arrest. Hence, PMLA is an important legislation which helps in curbing and preventing money laundering in India.