

Constitutional Law and Public Administration in India

Prof. (Dr) Sairam Bhat

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

National Law School of India University, Bengaluru

Week- 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 delegated 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.