

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-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.

Writs, 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.