Constitutional Law and Public Administration in India

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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.