Constitutional Law and Public Administration in India

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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 *sou 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 Lokaitas 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 attack 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.

Ashfak 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.