

Constitutional Law and Public Administration in 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, socialism 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.