

Department of Distance Education (DDE),
NALSAR University of Law, Hyderabad

Notes for M.A. (Animal Protection Laws)

Sessions on Indian Constitutional Law by Sidharth Chauhan (sidharth.chauhan1983@gmail.com)

December 14, 2021 (Tuesday, 2:45 pm -4:45 pm)

- Three Branches of Government – Executive, Legislature, Judiciary
- Distribution of Powers – Federalism and the Separation of Powers
- Legislative Process in India

Separation of Powers - Overview

Are there common presumptions behind the principles of federalism and separation of powers in the design of governance structures? A first-principled discussion could begin by looking at federal systems as examples of the vertical distribution of political powers while the application of the 'separation of powers' corresponds with the horizontal distribution of powers. At the root, both are strategies for avoiding or undoing the concentration of powers or excessive centralization of political authority. Both ideas flow from the central assumption of political liberalism that the conferral of absolute powers in the hands of a government (be it an elected one or not) poses a systemic threat to the liberty of citizens and these powers should therefore be constrained through a thicket of institutions and practices.

What are the structural differences between the U.S. Style Presidential forms of government (stronger separation of powers) and the Westminster Parliamentary Forms (weaker separation of powers)? An obvious difference is that the Presidential forms of government entail a neat separation between the electoral legitimacy of the executive and legislative branches. In comparison, Parliamentary forms of government entail the principle of 'collective responsibility' which binds the executive to the legislature.

Liberal Constitutionalism broadly suggests three strategies for placing limits on the exercise of powers and discretion by the executive branch. They can be loosely classified as:-

- Vertical Ideas of Accountability, wherein elected officials are held accountable through periodic elections that entail the transfer of power in case of dissatisfaction with laws and policies made by the incumbents
- Horizontal Ideas of Accountability, wherein the actions of the political executive are scrutinised by the political opposition in the legislature, subjected to judicial review and counterbalanced by 'Fourth Branch Institutions' (e.g. Regulatory Bodies, Tribunals, Oversight Bodies, Integrity Offices).
- Diagonal Ideas of Accountability, wherein the actions of the political executive are also examined and critiqued by the media, civil society organisations, social movements and other sites of knowledge production and cultural capital (e.g. Universities, Literature, Cinema, Popular Art Forms).

Overview of Indian Federalism

What are the general justifications for federalism? Some of them can be framed as:-

- administrative efficiency,
- recognition of demographic diversity,
- instituting mechanisms for conflict-management

What is meant by the delegation of functions? Decentralisation of political power?

Deconcentration of powers/governance?

Varying ideas of federalism - namely cooperative federalism, competitive federalism, asymmetric federalism (for examples see Article 371A to 371J, 5th and 6th Schedules).

Criteria for the reorganisation of States since Independence (movement away from linguistic and ethnic identity to the redressal of economic under-development)

Older debates in Indian federalism have looked at the use/misuse of Article 356 (President's Rule in States) and the Role of Governors as agents of the Central Government;

Legal debates have examined conflicting claims about legislative competence (Seventh Schedule-Lists I, II and III) and the regulation of inter-state trade and commerce (Articles 301-304).

Current debates about the role of the Fifteenth Finance Commission (Arts. 270, 275, 280) and the allocation of direct tax collections between the Centre and the respective States

- Methods of distributing finances (allocation of tax revenues, plan transfers, centrally sponsored schemes or projects)
- GST Council (Art. 279A) – supposed to be a coordination mechanism involving State Finance Ministers, but voting procedures heavily weighed in favour of the Central Government – current controversy about payment of GST Compensation to States, which was promised for the 2017-2022 period

Steps in the Legislative Process

PRE-LEGISLATIVE STAGE:

Demands made by interest groups, social movements, organised economic or political entities (also described as the 'history of agitation')

Preparation of draft Bills – usually done at the initiative of the executive, often in response to public demands or promises made by the ruling party

Concerns about the extent of consultation and expertise reflected in the preparation of draft Bills

FORMAL LEGISLATIVE PROCESS:

First Stage: Introduction of a Bill inside the legislature, usually done by a ruling party legislator but there is also a provision for Private Members' Bills

Second Stage: Referral of the Bill to a Standing Committee of Parliament (usually focused on the functions of a particular Ministry) which has representation from different political parties. Standing Committees have the power to invite public comments or to hold consultations with stakeholders.

Third Stage: Discussion on the modified Draft Bill, followed by voting in the floor of the House. The enactment is completed with the formal process of Presidential/Governor's Assent to the Bill passed by

the Legislature.

Central problems in statutory interpretation:

Do we go by the documented legislative intent (subjective approach) or do we assign a detached purpose (objective approach)? How much weightage should be given to the history of agitation, the legislative debates and the post-enactment history? How do we account for intervening social, economic, political and technological changes when it comes to interpreting statutory provisions?

December 15, 2021 (Wednesday, 10 am-12 pm & 12:15-1:45 pm)

- Structure of the Indian Judiciary
- The Idea of Common Law
- Directive Principles of State Policy (DPSP) and Fundamental Duties
- Constitutional Aspects of Environmental Protection/Animal Rights

Hierarchy and Composition of the Indian Judiciary

We must ask whether the modern Indian legal system faces a crisis of legitimacy on account of the colonial origins of its most significant institutions and codes? How do the citizens of independent India perceive the position of the formal legal system in their lives? Have we worked out a convenient balance between the formal and informal methods of dispute settlement? Does this compel us to seriously engage with the idea of 'Legal Pluralism'?

We should also try to understand the key characteristics of the significant legal traditions in the world (Civil Law Systems, Common Law Systems, Islamic Legal Systems and Indigenous Traditions) and ask whether such classifications have any utility in the postcolonial context.

Civil Courts - Structure and Procedures

Ranks in Subordinate Judiciary:

- Civil Judge (Junior Division)
- Civil Judge (Senior Division)
- District Judge

Jurisdiction in civil suits is usually based on the location of the affected parties and the pecuniary value of the dispute. Civil Suits usually include disputes about control over real estate, management of finances, performance of contractual duties/services, professional negligence, disputes within the family, disputes involving business forms and other forms of wrongdoing. Complications arise when commercial transactions involve parties located in multiple places. Especially difficult to determine jurisdiction in the context of disputes related to online transactions.

Civil Litigation in Higher Judiciary:

- High Courts
- Regular First Appeals – Section 96, Code of Civil Procedure

Regular Second Appeals – Section 100, Code of Civil Procedure

Reference – Section 113, Code of Civil Procedure

Review – S. 114, Code of Civil Procedure

Revision – S. 115, Code of Civil Procedure

Inherent powers of a Civil Court – Section 151, Code of Civil Procedure.

Writ Petitions that are meant to protect fundamental rights of citizens/groups are filed under Articles 226 or 227 of the Constitution of India.

- Supreme Court of India (Appeals in Civil Cases – Art. 133, Special Leave Petitions – Art. 136, Writ Petitions – Art. 32, Original Jurisdiction – Art. 131)

Criminal Courts - Structure and Procedures

Ranks in Subordinate Judiciary:

- Judicial Magistrate First Class (JMFC)
- Chief Judicial Magistrate (CJM) / Chief Metropolitan Magistrate (CMM)
- Sessions Judge

Jurisdiction in criminal cases is usually based on where the crime took place and/or location of the affected parties. It is also based on the gravity/seriousness of the offence and the prescribed punishments. Details about the jurisdiction of different levels of criminal courts can be found in the Schedule to the Code of Criminal Procedure 1973. Complications about jurisdiction arise in criminal cases related to online transactions. Consider the occurrence of offences mentioned in the Indian Penal Code 1860 such as Obscenity (Section 292), Insult to Religion (Section 295A), Criminal Defamation (Section 499) or even those covered by special laws such as Copyright Act 1957, Indecent Representation of Women Act 1986 and Information Technology Act 2000 to take a few examples.

Criminal Justice Process consists of three stages – (I) Investigation by State Police/Special Agencies, (II) Trial before Courts and (III) Punishment/Correction.

In cases involving minor offences, there are provisions for compounding which means that an admission of guilt can lead to the disposal of a case with smaller punitive consequences. Another method that is used in other jurisdictions is 'Plea-Bargaining', but it has made little progress in India despite a formal provision introduced in the Code of Criminal Procedure (CrPC) in 2008.

Higher Judiciary:

High Courts:

Appeal against Conviction – S. 374(4),

Appeal against Acquittal – S. 417,

Appeal against Sentence – S. 377,

Criminal Revision – S. 397.

All provided under the Code of Criminal Procedure, 1973,

Writ Petitions under Art. 226, 227 of the Constitution of India.

Supreme Court of India (Appeals in Criminal Cases – Art. 134, Mandatory Review in Death Penalty cases, Special Leave Petitions – Art. 136, Writ Petitions – Art. 32)

Role of Special Courts and Tribunals

Examples include Labour Courts, Family Courts, Motor Vehicle Accidents Claims Tribunals, Rent Controller Courts, Land Acquisition Collectors, Administrative Tribunals (Central & State Level), Debt Recovery Tribunals (DRTs), Securities Appellate Tribunal (SAT), National Company Law Tribunal (NCLT/NCLAT) and Competition Appellate Tribunal (COMPAT) among others.

Presumptive benefits of specialised knowledge and efficient settlement of disputes, but there is a trade-off with desired standards of judicial expertise and independence from the Executive Branch.

Alternate Dispute Resolution (ADR) Methods

- (a) Commercial Arbitration
- (b) Conciliation, Negotiation, Mediation, Lok Adalats
- (c) Ombudsman ('Lokpal'/ 'Lokayukta' offices – origins in Scandinavian countries)

Section 89 of the Code of Civil Procedure 1908 (inserted in 2002), provides for Court-Annexed forms of ADR. In recent years, newer methods of Online Dispute Resolution (ODR) have emerged. They are specialised services provided by private parties.

What is the Common Law Method? What are its relative strengths and weaknesses?

- The idea comes from English legal history, where judicial interpretation has been seen as the main instrument of legal change. So much so that courts have exercised the authority to question the content and validity of laws enacted by Parliament. The belief is that 'artificial legal reason' (supposedly possessed by judges and legal practitioners) as opposed to ordinary capacities for reasoning are needed to closely examine the collective wisdom of a society and applying what is learnt through accumulated experience to specific disputes, thereby progressively improving the legal system's response to a range of problems.
- However, critics of the common law method argue that such reliance on judicial interpretation only leads to more subjectivity and uncertainty in the application of rules. Jeremy Bentham famously argued in favour of comprehensive codification as the main instrument of legal change. Legislation drawn up by popularly elected representatives is seen to have more legitimacy in the eyes of the public and is supposedly more responsive to shifts in the social, economic and political situation. Laws enacted by Parliament are also seen as usually having general applicability as opposed to judicial decisions most of which are given in response to private disputes or specific fact-situations.
- Does the Common Law method unnecessarily privilege the opinions and attitudes of insiders in the legal system as opposed to those drawn from other walks of life? Why are judges and lawyers obsessed with precedents, that is older decisions made about comparable subject matter? Why can't we simply discard older decisions when we are looking at new and unforeseen situations? Is there a middle way between the ideas of 'backward-looking coherence' (FIT) and 'forward-looking responsiveness' (JUSTIFICATION) when it comes to legal interpretation?

Why do we invoke 'artificial legal reason' in the first place, especially when it comes across as unintelligible and disagreeable for most of the population?

Directive Principles of State Policy (DPSPs) related to Environmental Protection

Think about the language used in the following provisions that appear in the Constitution of India and their implications for environmental protection.

Article 48: Organisation of agriculture and animal husbandry - The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

Article 48A: Protection and improvement of environment and safeguarding of forests and wild life - The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country

Article 51-A: Fundamental Duties

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

Article 19(1)(g) – Freedom to practise any profession, or to carry on any occupation, trade or business

Article 19(6) – Reasonable Restrictions on the freedoms mentioned in 19(1)(g)

(How should we read economic freedoms in light of the seemingly divergent goals of environmental protection? What are the textual and other interpretative strategies for justifying restraints on these rights?)

Article 21 – No one shall be deprived of their life and liberty except by procedure established by law

(Should this language be read expansively to include a right to live in a sustainable environment? So far, this provision has been used to articulate the right of citizens to live in a pollution-free environment. Can it be further extended to justify proactive measures aimed at creating conditions of climate justice?)

Article 25(1) - Freedom to practice religion (subject to public order, morality and health)

(How do religious beliefs shaped our attitudes towards other species? Do they further entrench 'anthropocentrism' or do some of them create respect towards animal lives?)

Idea of legal personhood – What is the case for extending it to animals?

e.g. attempts made by Steve Weiss to file Habeas Corpus petitions on behalf of caged animals.

Is there an implicit recognition of some species as legal persons within the Constitution of India? How do we compare the same with arguments for attributing legal personality to corporations, religious dieties and natural features such as mountains and rivers?

Protections for Scheduled Areas (Article 244 and related provisions)

The Fifth Schedule to the Constitution of India includes provisions that enable modifications in the application of Central and State Laws to the Scheduled Areas. In particular, Paragraph 5 empowers the

Governor of a State to issue notifications to this effect, specifying the Scheduled Areas which are to be exempted from the application of Central and State Laws. This schedule also provides for the creation of Tribal Advisory Councils which are to be consulted in policy-making that directly affects the Scheduled Areas. The Fifth Schedule areas are concentrated in the States of Jharkhand, Chattisgarh, Orissa and Telangana with some of them located in other States

Samatha v. State of Andhra Pradesh, AIR 1997 SC 3297.

The Andhra Pradesh Scheduled Areas Land Transfer Regulation, 1959 (to be read with the Mining Act, 1957) was amended in 1970, and thereby did not prohibit mining leases being given to non-tribals on government-owned land located in Scheduled Areas. In the 1990s, the TDP Government in Andhra Pradesh ordered several such land transfers to private firms, particularly for Graphite mining in Ananthagiri Mandal, Vishakhapatnam District. This alienation of land that was customarily inhabited by Adivasi communities, was challenged in the higher judiciary by the petitioner, which was a NGO. Initially, the Andhra Pradesh High Court rejected the challenges and did not interfere with the land transfers. However, on appeal, the Supreme Court gave a more sensitive decision relying on Paragraph 5 of the Fifth Schedule. It discussed the historical problem of exploitation of tribal communities by outsiders, especially through land-alienation and money-lending practices. In many ways, this is the first significant decision of the apex court that interpreted the Fifth Schedule provisions in a purposive manner.

The Sixth Schedule contains provisions for the creation and recognition of Autonomous District Councils, specifically in the States of Assam, Meghalaya, Mizoram and Tripura. These were created and then subsequently modified alongside the reorganisation of these territories. This schedule includes elaborate provisions that lay down the composition and powers of the Autonomous District Councils, which operate to the exclusion of Panchayati Raj Institutions and Municipal Bodies contemplated by the 73rd and 74th Amendments respectively.

We can also consider the models of identity-based representation that have been implemented in local elected bodies located in Scheduled Areas, especially under Panchayati Raj Extension to Scheduled Areas (PESA) Act, 1996. These models usually entail electoral reservations for Scheduled Tribes in State-Level Laws dealing with local government. While Jharkhand is the main example for such customisation, in Telangana there are demands for further sub-classification among Scheduled Tribes in order to ensure an equitable distribution of opportunities for higher education, public employment and political representation.

Union of India v. Rakesh Kumar, 2010 SC

The Jharkhand Panchayati Raj Act, 2001 was challenged for allocating 80% seats to Scheduled Tribe candidates in respect of panchayats located in the Fifth Schedule Areas. The Chairperson posts for these Panchayats were also reserved for Scheduled Tribes. These exceptional arrangements were initially struck down by the High Court, citing violations of Article 14. However, the SC justified them while looking at the special status given to the Scheduled Tribes under the Fifth Schedule as well as the intent behind the Panchayati Raj Extension to Scheduled Areas Act, 1996.
