

**First Dr. K. C. Ramamurthy Endowment Lecture on  
Constitutional Governance & Public Policy from an Indian  
Perspective\***

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When the Constitution was born in 1950, the literate part of the nation stood in great expectation, the much-awaited new-born child, with its bright eyes and delightful form. The other major part in far-flung villages were mute spectators. While the colonial master packed its last, the new-born child was looking for national adoption. Between the dark days of partition, and the optimistic deliberations in the constituent assembly to fashion a charter for free governance, we peacefully marched. That peace, which ushered a great momentum to nation-building, continues to be with us today undiminished, not shattered by a few skirmishes here and there. We need to talk about that fundamental building block of constitutional march, towards redesigning our social order. We are fortunate to be guided and informed by thousands of years of being a nation, without reference to physical boundaries. We possess the unmatched wealth of amalgam of cultures, faiths, religions, and languages, which have given to us a bonding of unique nature. When the Constituent Assembly discussed its future destiny in the shape of a Constitution, it dug deep into the wealth of the past, discarded the unwelcome and dead hands of the past, and looked forward to navigate into a country where none would bemoan their life as a burden.

Are human beings merely a bundle of claims and rights? Is everyone of us merely a resource for others? Is the state or the government the master of unconditional Obedience? What is the bridge between the individual, the state and forces of production and distribution? Why is that we oscillate between

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socialism with all its pure as well as diluted variations and the unbridled free market? What is public policy in the midst of all these questions?

But the charter for a Bharat of plenty and a Bharat of equality was not to be an unstoppable drive on the highway. The history of early constitutional amendments keen to break away from Zamindari abolition to property regulation, from public ownership of resources, to public control of the economy did meet their oppositions. This early part of our constitutional history is not mere history. I think we should take a few lessons from it, to understand fresh insights towards wise and mature use of the constitution. I will return to this little later.

It would be problematic and insensible to talk about governance outside the Constitution. The one has merged with the other. The question however is what is governance as directed by the Constitution, because we cannot treat the Constitution as a friendly advice to be embraced at discretion or will. The Constitution is also neither a handcuff nor a free ride. Constitutional rights are not unbridled discretions which we assume are integral to freedom, liberty, and equality. We seem to have but travelled two paths along with the rest of the world: one the path of rights and human rights-perhaps deep into the jungle of rights; the other regulated but free economy. Governance and the range of choices for social action and the making of public policy, thus, seem to be under strain. By now the layers of accountability of governance have been laid bare by courts. No functionary under the constitution can now claim immunity from accountability scan, by the court or otherwise. How do we, therefore, assess Constitutional governance in the infant days of free India, and in the multi-dimensionally globalized days of now? The connection between constitutional governance, balancing rights with sublimation of one's self, economic policies, political practices etc. are very challenging.

We cannot get answers by focusing only on domestic factors, though they are hugely impacting. If we are to discuss Constitutional governance as a Constitutional and Political subject alone the focus will be on what the Supreme Court has done in shaping the Constitution from 1951 onwards when Article 31 B<sup>1</sup> was inserted in the Constitution. The long list of

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<sup>1</sup> INDIA CONST. art. 31B amended by The Constitution (First Amendment) Act, 1951.

Constitutional amendments also provides the source materials for drawing lessons on the tensions in constitutional governance, the divergence between parliament and the court in having a final say on governance. If we are to talk about constitutional governance *vis-a-vis* public policy or public policy *vis-a-vis* constitutional governance other factors such as balancing divergent social claims enter into the picture.

We can draw a clear picture out of the hundred and odd constitutional amendments, a picture of the political process, ideological forces at play, correction of aberrations flowing from the failure of major rights enforcements, improving the federal structure, drawing the north-east into the national mainstream, dealing with political party deficits through defection politics, etc.

- a. We can classify the constitutional amendments with reference to the social and political forces and factors behind them. Amendments which were politically benign (the Fifth, the Sixth, the Eleventh, the Eighteenth Amendments); Amendments relevant for strengthening or enhancing the federal structure of the country namely, conversion of Union territories into full-fledged States, across the North-East; Amendments around the Ninth Schedule to the Constitution by large scale addition to the Ninth Schedule, to deal with challenges relating to land, property, tenancy rights; amendments in the wake of judgments of the Supreme Court namely, the Twenty-Fourth amendment's following the Golak Nath Case,<sup>2</sup> and the Twenty-Fifth amendments, following the Bank Nationalisation Case;<sup>3</sup> the Forty-Second Amendment providing for large scale changes of the Constitution, followed by the Forty-Forth Amendment, reversing the Forty-Second Amendment, both of which were essentially fundamental political changes and changes in the Constitutional structure; the Seventy-Third Amendment ushering in the Panchayat Raj System as an integral part of the constitution; Amendments to

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<sup>2</sup> I. C. Golaknath & Ors vs State Of Punjab & Anrs, 1967 AIR 1643.

<sup>3</sup> Rustom Cavaajee Cooper vs Union Of India, 1970 AIR 564.

the Constitution in relation to Articles 15 and 16<sup>4</sup>, continuing and widening the scope of reservations in public services following a judgments of the Supreme Court from Indra Sawhney,<sup>5</sup> Nagraj etc. The Ninety-Ninth Amendment endeavoring to deal with the appointments to High Courts and Supreme Courts, leading to the judgment of the Supreme Court in the NJAC<sup>6</sup> case, and equally importantly, the One-Hundred-First Amendment to the Constitution, which introduced the Goods and Services Tax, as a federal Tax Structure.

- b. One is tempted to ask the question as to whether these Amendments have on an overall perspective added strength and sense to the Constitutional structure. This question is to be asked because every shift in the power arrangement and power exercise procedures under the Constitution will necessarily have relevance for public policy making. As also lessons to be drawn from public policy in key areas, such as education, health, housing, employment, management of resources of the community, etc will give us insights into what one may call a *Constitutional Audit* of all of the above. This constitutional audit is not to be merely a legal issue. It has to be a social audit, cultural and civilisational audit and law must be a facilitating tool.
- c. It is said that the Basic Structure of the Constitution Doctrine, which has emerged post Keshava Nanda Bharti<sup>7</sup> has brought in some disquiet about the necessary freedom and discretion within the democratic process. However, while we can boast of innumerable policy measures in the field of education, health, economic structure, poverty alleviation, administration of justice, etc. that have vastly changed the landscape of the country, we still need to look at some basic institutional

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<sup>4</sup> INDIA CONST. art. 15 & 16.

<sup>5</sup> Indra Sawhney & Others v. Union of India, AIR 1993 SC 477

<sup>6</sup> Supreme Court Advocates-on-record Association & Anr. v. Union of India, (2016) 5 SCC 1

<sup>7</sup> Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr, (1973) 4 SCC 225

reforms in order that the aims of constitutional governance, and the means selected for this purpose through public policy tools, necessarily correlate. I think that for both constitutional governance and public policy, the ends and means nexus is fundamental.

The U.S. Constitution is more than two-hundred years old. Beyond the fifteenth amendment, it did not suffer major changes. Its amendment process is not simple. Though no basic structure doctrine or its equivalent has evolved there, the due process clause has ensured significant judicial intervention in several domains of governance and policies. The degree of scrutiny of State action by courts such as strict scrutiny, hard look, etc are product of both due process and the expansive reading of rights, immunities and privileges of citizens. How does public policy take shape there and whether does it offer as a model or book of rules for adoption? It appears to me that merely because constitutional fundamentals are the same, the administrative functioning, and the public policy demands need not be fashioned on the U.S. example. Similarly, the U.K. or even Communist China cannot be good examples. The one does not have a constitution, and the other has a subservient constitution. A number of reasons can be cited.

- (1) the national federal structures are different;
- (2) the legislative and executive distribution of powers are different
- (3) the scheme of rights, restrictions, and principles for State action (that is directive principles) are different;
- (4) Diversity in terms of language, faith, culture,

Therefore, before we look elsewhere for comparisons for public policy, we need to look at constitutional similarities or differences. Among the recent constitutions, such as the South African Constitution or charter of rights such as the New Zealand Bill of Rights there are differences which inform or guide judicial review, and governance actions. The point is constitutional governance and public policies are intertwined and reinforce each other.

Very often public policies or governmental decisions are taken for reasons of political expediency or skewed democratic persuasions, and which can go wrong or fail. Many instances from Great Britain can be cited and these are worthy of being seen.

- a. “During the first eighteen months in power, the post-war Labour government, signally failed to draw up contingency plans to deal with the possibility that severe fuel shortages might combine with an unusually cold winter to cause chaos. But massive snowfalls in January and February 1947 did just that. “Factories were closed down; villages were cut off; livestock died thousand; people froze in their homes without even the radio as a solace since that, too, was the victim of the power crisis.”<sup>8</sup>
- b. “Another blunder, less serious but notorious at the time, was the Conservative government’s decision to develop and build a ballistic missile system called Blue Streak. Designed in 1955 and originally intended for military use, the estimated cost of the system had sextupled by 1959 from a mere €50 million to €300 million. A year later, it was canceled as a military project, partly because it was proving too expensive but also because it was proving impossible to devise any means of protecting it from a first-strike attack. But killing off the project would have seriously embarrassed the government, so ministers decided to keep it alive.”<sup>9</sup>
- c. “By far the biggest aeronautical blunder of that time was the decision to develop and build Concorde, the world’s first – and last – supersonic passenger aircraft. Ministers in Harold Macmillan’s government, led by the prime minister, believed that the future of civil aviation lay with planes that could fly faster than the speed of sound. They also believed that building such a plane in collaboration with the French government would ease Britain’s entry into the Common Market. They were wrong on both counts. President de Gaulle of France vetoed Britain’s entry into the Common Market in 1963, and Concorde was a commercial flop. No countries would allow it to fly supersonically over land, and no airlines wanted to buy

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<sup>8</sup> Anthony King and Ivor Crewe, *The Blunders of Our Governments*, (One World Publications, 2014).

<sup>9</sup> *Id.*

it (though the two countries' state-owned airlines, Air France and British Airways, were in effect bribed into operating it). It quickly became known as "the flying white elephant". Only sixteen were ever built, and in 1979 the British government wrote off its entire, enormous investment."<sup>10</sup>

- d. "Probably the biggest single blunder committed by Harold Wilson's post-1964 Labour government was its decision not to devalue the pound, if not immediately, then at least within a year or two of taking office. Ministers were divided on the issue, but Wilson and his chancellor of the exchequer, James Callaghan, were adamant that devaluation would damage Labour politically, tarnish Britain's international reputation, and relax the economic pressures on British industry to reform and modernize itself. From late 1964 onwards, Wilson as prime minister forbade ministers from discussing even the remote possibility of devaluation. But the financial markets had other ideas. They decided that, whatever the government might think, the pound was overvalued and would have to be devalued sooner or later. Eventually, in November 1967, amidst mounting market pressures, Wilson and Callaghan did devalue it. Callaghan felt honour-bound to resign as chancellor. Wilson as prime minister clung on<sup>11</sup>."
  
- e. The Labour governments of the late 1970s, first under Harold Wilson, then under James Callaghan, were at least as blunder-prone as Heath's government had been. Their much-vaunted but now long-forgotten Community Land Act 1975<sup>12</sup> cost millions and achieved nothing.
  
- f. Several of the Thatcher government's latter-day blunders were events-driven and media-driven. The mid-and late 1980s witnessed a sharp increase in crowd disturbances at football

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Community Land Act, chapter 77, 1975 (London).

matches in Britain and overseas. A riot in 1985 between Birmingham City and Leeds United fans caused the death of a teenage fan when a wall collapsed. Soon afterwards crowd violence at the Heysel Stadium in Brussels led to the death of thirty-nine spectators attending a Juventus-Liverpool match.

- g. Her government responded by introducing a Football Spectators Bill, which reached the statute book in 1989. The new legislation provided for the creation of a Football Membership Authority, which would administer a new National Football Membership Scheme.
- h. In April 1989, with the government's bill well on its way to the statute book, ninety-six Liverpool fans were crushed to death in an incident at Sheffield's Hillsborough Stadium.
- i. Like the Football Spectators Act<sup>13</sup> the passage of the Dangerous Dogs Act 1991<sup>14</sup> was an event and media-driven affair.  
[Examples-Courtesy: The Blunders of Our Governments, by Anthony King and Ivor Crewe]

These select English examples are cited to show that the West-Minister model of governance and Public Policy is a slippery slope.

It may thus be seen that the triangle with constitution at the top, and governance and policy angles at the bottom is a dynamic triangle. It is sometimes attractive to draw from examples and experiments done elsewhere. Either we mechanically copy them or change and adopt them as our national conditions may demand.

All discourses in law, political science, or social sciences need to revolve around definitions, concepts, and ideas. What is public policy can be seen from various angles, namely economic, fundamental rights, social justice,

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<sup>13</sup> Football Spectators Act, 1989 (UK).

<sup>14</sup> Dangerous Dogs Act, 1991 (UK)



social order, national sovereignty, and currently global impacts and factors. All public policies can be likened to concentric circles, but internally connected and impacting each other, for instance, policy on education has relevance to equality, equal opportunity, gender justice, status, individual fulfilment, and employment too. Similarly, policy on health has impacts on longevity, maternity benefits expansions leading to child health care, equal access to health care and disaster management situations, etc. policy on rural employment and development has dimensions of balancing rural-urban growth, Panchayats as self-governing units, and local democracy. Policy on the environment has implications for industrial expansions, health, and urban as well as rural planning, as also transportation. Policy relating to water resources has concerns of sustained development. Policy on agriculture has impacts on food self-reliance, balancing imports and exports of food items, and many of which have interconnections with world trade agreements and multilateral treaties.

Again we Journey between unbridled claims for individual interests and collective welfare. In the process, culture, family and organising economies for dharmic way of life and fulfilment are subordinated.

Public policies in the field of environment, encounter peoples' protests, very often propelled by hidden hands. Court's interventions derail and delay economic decisions.

New road maps on least Court interventions, institutional dialogues, and expansions of Parliamentary Committees, new forms of political party structures as bridges between the State and People are to be drawn. This should reinforce values of culture, family as the great mediator of clashes and claims and promotion of private space for public good and public space for private good.

Critiques of public policy in India cite the following as reasons for policy inefficiencies:

- (1) excessive fragmentation in thinking and action;
- (2) excessive overlap between policy-making and implementation;
- (3) lack of informed debate and non-governmental inputs;

- (4) lack of systematic costs, benefits, trade-offs, and other consequences; in other words, the institutional structural problem and the institutional competence problem;

Coupled with the above are the substantive and procedural legitimacy dimensions. The last two are intrinsically connected to constitutional governance. A "good policy-making process" would meet the following criteria<sup>15</sup>:-

- i) the problems and issues confronting a sector are subjected to expert analysis;
- ii) information on overlaps and trade-offs with other sectors is systematically gathered and made available to policy-makers;
- iii) opposing points of view within and between sectors, are properly articulated, analysed, and considered and those likely to benefited or harmed are identified and their reactions anticipated;
- iv) decisions are made with due legal authority, after consultation of those likely to be affected, and with the involvement of knowledgeable persons in the sector(s) concerned;
- v) those responsible for implementation are systematically involved in the process, but are not allowed to take control of it;
- vi) policy-makers and /or their advisers have the honesty, independence, intellectual breadth and depth to properly consider and integrate multiple perspectives and help arrive at optimal policy choices within a reasonable time.

All of the above are to be seen as the great bridge between citizens and the state. Government ceasing to be a weight or burden will be the great public policy emanation.

Writing about educational change, a teacher in the U.S., Fullan M. writes: changes meet with failure because, "no distinction is made between theories

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<sup>15</sup> O.P Agarawal and T.P. Somanathan, "**Public Policy Making In India: Issues and Remedies**", February, 2005, available at: <https://www.igntu.ac.in/eContent/IGNTU-eContent-353062467985-MA-PoliticalScience-4-Dr.GeorgeT.Haokip-Paper401PublicPolicyandDevelopmentinIndia-Unit2.pdf> (last visited 21.05.2023)

of change (what causes change) and theories of changing (how to influence those causes). We have many theories on changes and policy-making, such as top-down and bottom-up approaches, a combined approach, Rational choice theories, namely Game theory and agency theory, as also a new entrant called disruptive innovation taken from management schools. ‘Online learning or community colleges’ are a few examples. All these theories are products of sectoral approaches and also plans for treating the private spaces of people and the local conditions as public spaces for changes. The challenges lie in making this marriage happen.

Few aberrations in policy-making need to be noticed. The freebies basket freely offered by political parties is now becoming a permanent item of manifestos. I understand that party manifestos cannot be beyond constitutional limitations and no election promise can be a private plunge into public funds. If laws can be tested on constitutional grounds for their validity, party promises cannot be immune. When policies such as these do not promote righteousness resonating with ethical norms and cultural roots, they will not stand as Dharmic flags for social change. The distance between buying votes and buying minds is not big.

Just as in law, so in public policy theories. There can be no ‘one size fits all solutions’ relevant to distinct social changes and concerned public policy. A 2013 study by the OECD, the Organization for Economic Cooperation and Development, on *‘Nature of policy change and implementation’* looks at the multiple layers involved in achieving and effecting changes. For us, besides the multiple layers engagement, what is important is the invitation of these layers to constantly ‘inhale’ the constitutional framework, and the idea of a constitution as both the walking stick and the bedroll, as also the yoga of freedom and dharma in the unique alliance of our country’s great potentials.

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