VOLUME 31 | SEPTEMBER, 2022 ISSN 2456-9704

DIRECTIVE PRINCIPLES AND JUDICIAL LAW MAKING IN THE INDIAN CONSTITUTION

By Rajarshi Deb
From Kalinga Institute of Industrial Technology (KIIT) Deemed to be University, Bhubaneswar.

ABSTRACT

Constitutional law in India and judicial decision-making essentially, it describes the Supreme Court of India as having the authority to make laws and to rule on any issues pertaining to the interpretation, implementation, and administration of the Constitution. The highest judicial body in the nation, the Supreme Court, is tasked with authoritatively, but not exclusively, unifying the nation's constitutional law and, if necessary, overturning its prior rulings. The court's decisions are binding on all other courts.[1]

Law making by judges does not occur in a vacuum. There were several variables that went into the creation of the Constitution, some of which served as its skeleton and were anticipated to show up in the functioning. This does not imply that the Constitution's meaning will always be clear. Far from that, what is meant is that the founding fathers, speaking for a people with justifiable hopes and expectations, wished to pass on their spirit to next generations.[2] *Additionally, it was believed that the legislative branch, the executive branch, and the judicial branch would work together continuously in a cooperative manner rather than in a hostile manner to maintain this dynamic process. The endeavour was designed to be collaborative and joint, so the "case or controversy" and "separation of powers" ideas (and the related notion of "checks and balances")*[3] *were the conventional western concepts of judicial review in adversarial situations that emerged.* The founding fathers had also given the legislative, executive, judicial, and general public the freedom to decide among themselves what institutions and structures would be best for putting their ideas into practise, including, if necessary, altering the Constitution. *Such arguments are supported by the Constitution's relatively recent creation, which contrasts with the 198-year-old US Constitution*[4]*, the 118-year-old Canadian Constitution (British North America Act), and the 85-year-old Australian Constitution (Commonwealth of Australia Constitution Act).*

According to this viewpoint, it would be appropriate in some circumstances to refer to the founding fathers of the Indian Constitution's concept rather than just the discussions that took place in the Constituent Assembly. In light of this, a teleo-contextual approach to constitutional interpretation is required, or, more specifically, a teleological

[1] Sec art. 141 of the Constitution; Bengal Immunity Co. v. State of Bihar , A.I.R. 1955 S.C. 661; Golak Nath v. State of Punjab, A.I.R. 1967 S.C. 1643

[2] The term “spirit” of a constitution must not, however, be interpreted in some mystical sense. Cf. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27

[3] Muskrat v. United States , 219 U.S. 346 (1910); Schechter Poultry Corp. v. United States , 295 U.S. 495 (1934); Young s town Sheet and Tube Co. v. Sawyer , 343 U.S. 579 (1951); United States v. Nixon, 418 U.S. 683 (1974); Immigration Service v, Çhadha , No. 80-1832 (1983)

[4] However, even in the United States, acceptance of the Supreme Court's judicial supremacy and conception of its position as an equal partner have not always been universal. See A.M. Bickel, The Supreme Court and the idea of Progress 180-81 (1970).

view influenced by the context, including the historical context, and purpose of the Constitution in relation to the policy and principles underlying the legislation under review.[5] *The author suggests examining judicial law making in connection to the directive principles of state policy with this approach in mind.*[6]

ARE THE STRUCTURES AND SUBSTANCE UNDERPINNED BY A UNIFIED PRINCIPLE?

This paper's main argument is that judges in India must adopt a creative view of their role. In this position, there are two ways that judicial law making in the proper sense can and should take place: (a) directly, by examining the law or executive action under review in the context of the Constitution's guiding principles, values, and goals; and (b) indirectly, by giving the legislature and executive a great deal of latitude, by adopting a liberal view of law. Despite the fact that there is less of a presumption in favour of constitutionality when pure executive action is involved, particularly when personal liberty is at stake and the action has been taken by a fairly junior official, such as a junior police officer, the Constitution neither expressly nor even implicitly assigns to the judiciary the task of determining the soundness, propriety, or wisdom of legislative or executive action.[7]

Notably, the Constitution does not expressly grant the court the authority to declare any governmental or executive action to be in violation of the Constitution or to be unlawful, leading to a dispute with those bodies and the assertion of the judiciary's superiority. The Constitution does not grant or acknowledge such superiority. In fact, there is no a priori reason why the legislature or administration in a particular situation shouldn't theoretically be able to similarly declare (though without effect) its own superiority by deeming a Supreme Court decision to be illegal. The Supreme Court's rulings are enforceable across India "in such way as may be stipulated by or under any law made by Parliament," according to article 142, which also makes its orders and decrees binding on all Indian courts. But in the context of the court's appellate jurisdiction over the nation's High Courts, the authority to interpret the Constitution is only tangentially mentioned (article 132). No express general power of judicial review in the American sense is therefore provided for, presumably on the grounds that the directive principles, which are fundamental to the country's governance and which it is the duty of the state to apply through laws (article 37), put an entirely different complexion. This is in

[5] Thus Justice Cardozo was right when he said: "The teleological conception oi his functions must ever be in the judge's mind." Quoted in A. S. Miller, The Supreme Court: Myth and Reality, ch.3 (1978).

[6] Constitution of India, pt. IV

[7] See, e.g., Additional District Magistrate, Jabalpur v. Shivakant Shukla, A.I.R. 1976 S.C. 1270, When the court considered the claim that a presidential order suspending fundamental rights under the Maintenance of Internal Security Act of 1971 was passed in bad faith, without justification, or on completely unrelated grounds, it concluded (Khanna J. dissenting) that the court could not typically address such matters. Cf., however, the House of Lords' decision in Inland Revenue Commrs. v. Rossminster , [1980] 1 All E.R. 80 at 92-93 : [1980] A.C. 952 at 1011, where Lord Atkin's dissenting opinion in Liversidge v. Anderson , [1942] A.C. 206, which upheld judicial review of ministerial discretion to detain a person for “reasonable cause”, was approved.

contrast to articles 13 and 32, which provide for the enforcement of such rights through the Supreme Court. In particular, it is clear that, through directive principles[8], the Constituent Assembly severely restricted the Supreme Court's review authority with respect to property rights and some other fundamental rights. Therefore, even if they are not judicially enforceable, the Supreme Court is free to decide on its own whether a legislation or even an executive action complies with or conflicts with directive principles. After all, the concept of a law or the presence of a law do not require judicial enforceability.[9] This is demonstrated even by the operation of the idea of declaratory judgement in public law, which is enforceable in theory but not in practice. Therefore, the directive principles are legally binding on the state and indirectly even on the Supreme Court in that it is required to make sure that the state is enabled and not hindered by the court's function under the Constitution to accomplish its constitutional responsibility in the best way.

RELATIONSHIP BETWEEN FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES

There are three different perspectives on how fundamental rights and directive principles interact. According to the first perspective, the former are superior to the latter, hence in the event of repugnance or irreconcilable disagreement between the two, the latter must yield to the former. This point of view is founded on the quasi-natural law tenet that some rights—symbolized in India by fundamental rights—are holy, transcendental, and so essential to the existence of any constitution that they must take precedence over all other provisions. Another form of this viewpoint emphasises that no court may find a statute in disagreement with the directive principles to be void because it would be to enforce them and insists on reading the directive principles' stipulation that they are not enforceable in court (article 37) literally.[10] According to the second viewpoint, fundamental rights and directive principles are equally important, thus wherever they conflict, an effort should be made to harmonise them. This method assumes that such harmony is always possible, indicating that there are never any situations in which a disagreement cannot be resolved. The Constitution declares that directive principles are "fundamental in the governance of the country," that it is the "duty" of the state "to apply these principles in making laws," and that a law's binding nature does not cease to exist simply because it cannot be enforced. This supports the third view, which holds that directive principles are superior to fundamental rights.

The Supreme Court and various court justices have made various rulings on this matter over time. As a result, Das J. found that directive principles were secondary to fundamental rights and served only as a tool for constitutional interpretation in the case *State of Madras v. C. Dorairajan*.[11] The court has utilised the latter component of this

[8] G. Austin, the Indian Constitution: Cornerstone of a Nation 173-75 (1996).

[9] See J. Narain, "Equal Protection Guarantee and the Right of Property under the Indian Constitution", 15 I.C.L.Q. 199 at 206-08 (1966); J. Narain's Letter to the Editor included io Upendra Baxi, "Directive Principles and Sociology of Indian Law - A Reply to Dr. Jagat Narain", 11 J.I.L.I. 245 at 270 (1969).

[10] H.M. Seervai, Constitutional Law of India, vol. II at 1033 (2nd ed. 1976).

[11] A.I.R. 1951 S.C. 226 at 228. See also Mohd. Hanif Quareshi v. State of Bihar, A.I.R. 1958 S.C. 731; In re The Kerala Education Bill, 1957, A.I.R. 1958 S.C. 956.

perspective in several instances when it has ruled that these principles can be appropriately cited by courts in assessing the reasonableness of a statute seeking to impose restrictions on a fundamental right in the public interest under article 19.[12] According to constitutional theory, this cannot be seen as being of great consequence because it would be extraordinary for the court to rule in a particular situation that a legislation of this nature is unreasonable if it is properly tied to a guiding principle. Therefore, when the court considered whether restrictions on the right to acquire, hold, and dispose of property were reasonable by referring to article 47[13] (on the state's responsibility to enact alcohol prohibition in the nation), such an attitude was at the very least implicitly required by the theory to justify incorporation of directive principles into the Constitution. Another variation of this strategy is present in some circumstances, which maintains that these principles do not give legislative authority and are not a "source" of it.[14] Such cases appear to ignore the "obligation" of the state under article 37 to use these principles when enacting legislation, aside from attempts to engage in semantic gymnastics. The Supreme Court does not appear to be entirely conscious of its proper function in preventing abuse of power in the domain of personal liberty. The court determined that there was no strict separation of powers under the Constitution, that preventive detention was not "basically impermissible under the Constitution" because it was intended to ensure "safety and security of the country and the welfare of the people"[15] in *A.K. Roy v. Union of India*[16], which involved the legality of a law authorising preventive detention (detention without trial by a court). However, it was not made clear how the court would make sure that abuse of authority did not occur in this case. Although the court later made a reference to the need for a social revolution that goes beyond all national institutions and basic human rights in the sense of means of subsistence on the one hand and the rule of law and the independence of the judiciary from the executive and legislature on the other[17], this point is still valid.

Perhaps the simplest way to understand the various strategies is to look at successive attempts at constitutional modification in the domain of property rights. There are three interconnected facets to this topic that have generated more debate and, perhaps, introspection than any other area covered by the Constitution: (a) the definition of the constitutional requirement of compensation in the context of the state's compulsory acquisition of property under article 31(2) in order to further the goals of directive principles; (b) the doctrine of prospective overruling in the event that the Supreme Court rules against a law or a constituent act of Parliament that seeks to amend the Constitution in order to further the objectives of directive principles; and (c) the nature and reach of the modifying authority granted to

[12] State of Bombay v. Balsara, A.I.R. 1951 S.C. 318; Express Newspaper private Ltd. v. Union of India, A.I.R. 1958 S.C. 578; In re The Kerala Education Bill, ibid.; Chandra Bhawan Boarding & Lodging v. State of Mysore, A.I.R 1970 S.C. 2042.

[13] Balsara, ibid.

[14] See, e.g., Deep Chand v. State of Uttar Pradesh , A.I.R. 1959 S.C. 648; Assistant Commr. v. Buckingham and Carnatic Co., A.I.R. 1970 S.C. 169

[15] A.I.R. 1982 S.C. 710.

[16] ibid.

[17] S.P. Gupta v. President of India, A.I.R. 1982 S.C. 149 at 197-98.

Parliament by article 368 when used to carry out directive principles.

(a) In the case *State of West Bengal v. Bella Banerjee*[18], the petitioner, whose property was taken over by the State of West Bengal compulsorily under a law providing for some compensation in such cases, challenged the constitutional validity of that law on the grounds that the compensation provided was illusory and therefore was insufficient while (the argument continued) article 31(2) provided, in effect, for full compensation at market value in cases of compulsory acquisition of property. It should be emphasised that only in this context was the term "compensation" used in the clause. However, the Supreme Court decided that the requirement of compensation in article 31(2) meant a "just equivalent of what the owner had been deprived of," operating seemingly against the intention and concept behind the property provisions of the Constitution. According to judges, various things can account for such law making: (1) apprehension that massive plans for social and economic change would materially violate a person's property rights, which could only be secured by legal action; (2) the western legal tradition's strict training of Indian judges, with its focus on creating a system that is mostly based on logic , the doctrine of precedent, and a consideration for the individual's property rights, in the absence of any readily available guiding principles from the native Hindu and Muslim legal sources; (3) engaging in a dialectical process to reach a social synthesis that serves the needs of the society as a whole and prevents the country from veering too far in one direction, i.e., collectivism. These were entirely reasonable explanations, but they did not completely reflect the true intentions of the founding fathers. Thus, the Constitution (Fourth Amendment) Act of 1955 was created, excluding the issue of a given case's adequate compensation from judicial review. The court later decided that phantom compensation was a constitutional deception that could still be challenged in court.[19] However, it was never made clear how inadequate compensation was to be separated from illusory compensation or who would ultimately draw the line between the two—the legislature or the judiciary. The court ignored the fact that determining whether the compensation was illusory of necessity involved determining whether the question of adequacy because the question of adequacy was expressly excluded, since the maxim "what cannot be done directly cannot be done indirectly" applies to both the legislature and the courts.

(b) The Supreme Court's doctrine of prospective overruling, which it introduced in *Golak Nath v. State of Punjab*[20], provides an illustration of judicial innovation and proper law making. In that case the court upheld the constitutionality of Parliament's first, fourth, and seventeenth amendments to the Constitution in accordance with article 368, which grants Parliament the authority to amend any provision of the Constitution with the requisite special majority and, in certain circumstances, under certain conditions. The first amendment shielded certain agrarian reform measures, including those requiring the nationalisation of private property, the state's forced acquisition of agricultural

[18] A.I.R. 1954 S.C. 170.

[19] Vajravelu v. Special Deputy Collector , A.I.R. 1965 S.C. 1017

[20] Supra note If overruling its earlier decision in Shankari Prasad v. Union of India , A.I.R. 1951 S.C.458

estates and rights, and other laws, from legal challenges based on violations of fundamental rights. The fourth amendment prohibits judicial examination of the appropriateness of compensation in situations involving the forced acquisition of property. Additionally, the seventeenth amendment defined provisions for agrarian reform and shielded from any challenge certain other forms of land tenure.

These amendments clearly aimed to advance social and economic justice, redistribute resources, and prevent the concentration of wealth and the means of production as foreseen by directive principles (articles 38 and 39), but they were declared unconstitutional by the court (by a majority of six to five) on the grounds that changing the Constitution amounted to making a law by Parliament, even though article 368 nowhere refers to such a change as a law. Since the state had passed laws in accordance with directive principles, it would have been a task of enormous magnitude, if not an impossible task, to reverse the effects of every state action taken prior to the judgement. The amendments and the law enacted under their authority appeared to be invalidated only as of the date of the judgement in the case. The court merely held that the state would not have the authority to amend fundamental rights, so it is unclear whether the amendments were actually invalidated by all of the judges even prospectively. However, the principle is what matters: the idea that the court's potential future overturning of the amendments was an act of positive law making.[21]

(c) As we've seen, the Golak Nath case determined that Parliament lacked the authority to modify fundamental rights under article 368 on the grounds that doing so would have constituted a constituent act, not a law, and that these rights were transcendental in nature. However, in Kesavananda Bharati v. State of Kerala[22], when problems resembling those in Golak Nath occurred, this judgement was later overturned. The twenty-fourth amendment, which, despite Golak Nath, sought to protect these amendments by expressly empowering Parliament to make any law even though it was in conflict with any provisions of the Constitution, sought to deprive the petitioner of his property in land by the state in exchange for compensation deemed adequate by the state under an agrarian reform law enacted on the authority of the constitutional amendments described in the preceding paragraph. The statute and the changes, according to the petitioner, were unlawful. This argument was refuted by the Supreme Court, which also concluded that Golak Nath was ruled incorrectly. It did not, however, hold that Parliament's ability to modify the Constitution was unrestricted. It was argued that this ability could not be used to change the Constitution's fundamental principles or distinguishing characteristics. These characteristics could be outlined as the socialist, secular, democratic, and republican aspects of the Constitution, as well as other crucial elements—though not all of the Constitution's articles.[23]

[21]Cf. Linkletter v. Walker , 381 U.S. 618 (1965)

[22] A.I.R. 1973 S.C. 1461

[23] In Kesavananda Bharati, ibid., five judges reportedly believed that every article—no matter how insignificant—had a core that could not be altered by a constitutional amendment.

CONCLUSION

In the context of the Constitution as a "home-grown" institution, The Supreme Court must communicate with the populace, see them as they see themselves, understand what they need, and speak their language. According to the Constitution, the court has an unshakeable duty to cooperate with the legislative and executive branches of government wherever possible and to never claim to have superior wisdom to that of the other partners' wisdom or judgement, or to be able to overrule them in the area of their legitimate operation. This trust is the foundation of the court's existence. This means that the court cannot engage in a spirit of confrontation with its partners in the American sense in order to fulfil that trust. However, when the legislature or administration ignores its constitutional duties and imports ideologies—whether capitalism or communism—that are opposed to social mores as well as the spirit and philosophical underpinnings of the entire Constitution, such a clash is justifiable. Naturally, the partnership loses its very soul in such unusual circumstances and turns into a dead creature. When the executive or even Parliament has abused its power in matters of personal liberty, the abdication argument will also be relevant.

The Supreme Court should take a preventive and positive approach to its role in enacting laws, acting independently to express its views on how the Constitution's spirit and philosophy can be put into practice in particular areas like the secular principle, domestic and international peace, and social justice, in addition to a corrective approach in which it decides whether the laws referred to it are valid and consistent with the Constitution's philosophy.

It is crucial for judges involved in law making to understand that the fundamental principle of constitutional law is the dignity of the human person as expressed in the Constitution's overarching ethos. This explains why basic rights related to an individual's liberty of person and directive principles, read with the preamble, are all significant and so superior to the other fundamental rights.

*****

REFERENCES

[1] Sec art. 141 of the Constitution; Bengal Immunity Co. v. State of Bihar , A.I.R. 1955 S.C. 661; Golak Nath v. State of Punjab, A.I.R. 1967 S.C. 1643

[2] The term “spirit” of a constitution must not, however, be interpreted in some mystical sense. Cf. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27

[3] Muskrat v. United States , 219 U.S. 346 (1910); Schechter Poultry Corp. v. United States , 295 U.S. 495 (1934); Young s town Sheet and Tube Co. v. Sawyer , 343 U.S. 579 (1951); United States v. Nixon, 418 U.S. 683 (1974); Immigration Service v, Çhadha , No. 80-1832 (1983)

[4] However, even in the United States, acceptance of the Supreme Court's judicial supremacy and conception of its position as an equal partner have not always been universal. See A.M. Bickel, The Supreme Court and the idea of Progress 180-81 (1970).

[5] Thus Justice Cardozo was right when he said: "The teleological conception oi his

functions must ever be in the judge's mind." Quoted in A. S. Miller, The Supreme Court: Myth and Reality, ch.3 (1978).

[6] Constitution of India, pt. IV

[7] See, e.g., Additional District Magistrate, Jabalpur v. Shivakant Shukla, A.I.R. 1976 S.C. 1270, When the court considered the claim that a presidential order suspending fundamental rights under the Maintenance of Internal Security Act of 1971 was passed in bad faith, without justification, or on completely unrelated grounds, it concluded (Khanna J. dissenting) that the court could not typically address such matters. Cf., however, the House of Lords' decision in Inland Revenue Commrs. v. Rossminster , [1980] 1 All E.R. 80 at 92-93 : [1980] A.C. 952 at 1011, where Lord Atkin's dissenting opinion in Liversidge v. Anderson , [1942] A.C. 206, which upheld judicial review of ministerial discretion to detain a person for "reasonable cause", was approved.

[8] G. Austin, the Indian Constitution: Cornerstone of a Nation 173-75 (1966).

[9] See J. Narain, "Equal Protection Guarantee and the Right of Property under the Indian Constitution", 15 I.C.L.Q. 199 at 206-08 (1966); J. Narain's Letter to the Editor included io Upendra Baxi, "Directive Principles and Sociology of Indian Law - A Reply to Dr. Jagat Narain", 11 J.I.L.I. 245 at 270 (1969).

[10] H.M. Seervai, Constitutional Law of India, vol. II at 1033 (2nd ed. 1976).

[11] A.I.R. 1951 S.C. 226 at 228. See also Mohd. Hanif Quareshi v. State of Bihar, A.I.R. 1958 S.C. 731; In re The Kerala Education Bill, 1957, A.I.R. 1958 S.C. 956.

[12] State of Bombay v. Balsara, A.I.R. 1951 S.C. 318; Express Newspaper private Ltd. v. Union of India, A.I.R. 1958 S.C. 578; In re The Kerala Education Bill, ibid.; Chandra Bhawan Boarding & Lodging v. State of Mysore, A.I.R 1970 S.C. 2042.

[13] Balsara, ibid.

[14] See, e.g., Deep Chand v. State of Uttar Pradesh , A.I.R. 1959 S.C. 648; Assistant Commr. v. Buckingham and Carnatic Co., A.I.R. 197[illegible] S.C. 169

[15] A.I.R. 1982 S.C. 710.

[16] ibid.

[17] S.P. Gupta v. President of India, A.I.R. 1982 S.C. 149 at 197-98.

[18] A.I.R. 1954 S.C. 170.

[19] Vajravelu v. Special Deputy Collector , A.I.R. 1965 S.C. 1017

[20] Supra note lf overruling its earlier decision in Shankari Prasad v. Union of India , A.I.R. 1951 S.C.458

[21] Cf. Linkletter v. Walker , 381 U.S. 618 (1965)

[22] A.I.R. 1973 S.C. 1461

[23] In Kesavananda Bharati, ibid., five judges reportedly believed that every article—no matter how insignificant—had a core that could not be altered by a constitutional amendment.