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Directive Principles and Unconstitutional Law

By

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In a treatise on Directive Principles, Dr. K.C. Markandan has pointed out:

> An important aspect of the Constitution which has not been adequately studied and hence not properly appreciated is the part relating to the Directive Principles of State Policy...

This statement, made in 1966, appears to be relevant even after the passage of seven lean years of research. The learned writer goes on to say that:

> The Directives elaborate, reinforce and ensure to the people of India what has been proclaimed in the Preamble. 1

When it is said that the provisions of Part III of the Constitution dealing with fundamental rights can be enforced while those in Part IV enumerating the Directive Principles of State Policy can not be so enforced, it need not

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1. K.C. Markandan, Directive Principles in the Indian Constitution, Preface, p. vii (1966).

necessarily mean that the Directive Principles may be relegated to a second class status in the Constitution. The Directive Principles, to quote from the Constitution, are "fundamental in the governance of the country." While the provisions ensuring fundamental rights are devoted to protecting the rights and freedoms of the individual in a democratic society, the directive principles are dedicated to bringing about and maintaining a welfare state where a socialistic pattern of society is envisaged. In a parliamentary democracy where the real executive and the virtual legislature are not different, all that the founding fathers of our Constitution considered necessary to do to usher in a welfare state was to give the state a few directives which would provide essential guidelines for its activities.

II

It may be noted that the adoption of the Directive Principles in the Indian Constitution has been inspired to a considerable extent by the principles of social policy contained in the Constitution of Eire. There is, however, a significant difference between the principles in the Indian Constitution and those in the Irish Constitution. While the Constitution of Eire provides that:

> The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively and shall not be cognizable by any Court under any of the provisions of the Constitution. 2

the Indian Constitution contents itself by stating that:

> The provisions contained in this Part shall not be enforceable by any Court. 3

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2. Constitution of the Irish Republic, 1937, art. 45.

3. Constitution of India, art. 37.

The obvious and deliberate departure from the Irish model is of significance. Courts in India are free to take cognizance of the non-application of these principles in the making of laws, though they cannot enforce them. The word "exclusively" in the Irish provision emphasises that the application of the principles of social policy is left solely to the care of the legislature. In India, on the other hand, it is not only the duty of the State to apply the directive principles in making laws, but also the responsibility of the courts to apply them in taking cognizance of laws, for instance, in interpreting and declaring laws. All that the courts are constitutionally prohibited from doing is to enforce these principles. It would therefore seem that a declaratory judgement is not precluded under the provisions of article 37 of the Constitution.

Lord Atkin has said that:

> "The Court has power to make a declaration whenever it is just and convenient" 4

There is no good reason why declaratory judgement should be limited to the sphere of private law and administrative law. Judicial procedures are intended for the purpose of proper administration of justice and not for confining the Goddess of Justice in a straitjacket. 5

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4. Simmonds v. Newport Abercarn Black Vein Steam Coal Company (1921)1 K.B. 616, 630.

5. See section 3 of the New Zealand Declaratory Judgement Act, which provides: "Where any person desires to do any act... the legality... of which depends on the construction... of any statute... such person may apply to the Supreme Court by originating summons... for a declaratory order determining any question as to the construction.... of such statute."

The words used in the Article are that "the provisions... shall not be enforceable by any Court." If the words are given a literal interpretation to which our courts appear to have a pathological proneness, they would mean that the courts may be approached to secure a declaratory judgement. In such a judgement no enforcement by the court is contemplated.

As our concept of declaratory judgement is derived from English law, it may be helpful to refer to one of the Rules of the Supreme Court of the United Kingdom which deals with such judgements. Order 15, rule 17 of the Rules of the Supreme Court provides:

> No action or other proceedings shall be open to objection on the ground that a merely declaratory judgement or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

Could it be said that a declaratory judgement is of no legal effect? Zamir has pointed out:

> A declaration made by the Court is not a mere opinion devoid of legal effect; the controversy between the parties is thereby determined and becomes a res judicata. Hence if the defendant subsequently acts contrary to the declaration, his act will be unlawful. The plaintiff may then again resort to the court, this time for damages to compensate him for loss suffered or for a decree to enforce his declared right. Apprehensive of such consequences, the defendant will usually yield to the declaratory judgement. 6

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6. 1.Zamir, The Declaratory Judgement, (1962) p. 3.

III

In a petition for a declaratory judgement, a law may be impugned as contravening one or more directive principles. If the court sustains the petitioner's contention that the alleged contravention is manifest, a finding to that effect is tantamount to a declaration that the impugned law is unconstitutional. According to Dicey by 'constitutional' we mean "in conformity with the principles of the constitution" 7 And Directive Principles of State Policy in our Constitution cannot be excluded from the category of principles of the Constitution. It therefore follows that a law passed in contravention of a directive principle, being contrary to the principles of the Constitution, is unconstitutional.

An unconstitutional law is generally considered invalid. The usual phrase used by judges as well as text-writers is "unconstitutional and void". It is "void", not in the sense of empty, because it is very much there and its contents, though lacking in validity, are clearly in existence, but in the sense of "invalid, not binding".8 In the field of private law, we are familiar with contracts which are valid, but unenforceable. In the sphere of public law, here is an instance of the reverse. An unconstitutional law, as it contravenes the principles of the Constitution, is invalid, but is still enforceable, because no authority has been created by the Constitution to prevent its enforcement. This is not an altogether uncommon or unprecedented phenomenon. In a number of West European countries where there is no provision for judicial review of parliamentary legislation, an unconstitutional law, that is to say, a law which contravenes a provision of the constitution can, in theory, be passed and enforced. But this seldom happens, and never wittingly. Any

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7. A.V. Dicey, Introduction to the Study of the Law of Constitution 430 (8th ed. 1915).

8. See Oxford English Dictionary which gives these meanings.

suggestion by a member of the legislature or a doctrinal writer or from any one else for that matter, to the effect that a proposed piece of legislation would be in conflict with any provision of the Constitution would induce the House of Legislature to make sure that the proposed enactment is brought within the bounds of constitutionality and legality, by suitable amendment, if necessary. Enactment of a piece of legislation with the full awareness that the law is unconstitutional is not an exercise the legislatures of these countries would freely indulge in. It may be that the provision for judicial review tends to make legislatures of some countries shift their responsibility to the judiciary. "Let us pass any law which we fancy, which will disarm the voter; let the courts declare it invalid. What does it matter? We have done our duty to the voters. If some other body stands between the people and us, their dear representatives, it is not our fault" is not an attitude shared by many democratic countries not only where there is no provision for judicial review, but also where there is such provision.

IV

It will not be easy for the courts to determine the issue in all cases where constitutionality of a law is challenged as in conflict with one or more of the directive principles. For instance, it will be difficult to decide whether a law secures or protects a social order in which justice, social, economic and political, informs all the institutions of the national life.

But it may not be so difficult to decide and declare that a particular law which permits the vesting in one person of judicial and executive functions is unconstitutional as violative of article 50 of the Constitution. Again, if the state starts new schools for young children and charges fees from them, it is not hard to see that the levy of fees is in conflict with the provisions of article 45 which stipulates endeavour on the part of the government to provide for free and compulsory education for all children

under the age of fourteen years. There have been instances where a state insisted that it was necessary for confirmation in its civil service for a member of the Scheduled Tribes to be conversant with English, Hindi, and one of the officially recognised regional languages, in addition to his tribal language, while other employees were required to know only English, Hindi, and their own mother tongue. Instances like this where there is clear violation of the directive principles are not difficult of disposal by a court of justice. Directive principles whose violation is clearly manifest may be distinguished from the one postulated in article 41 which obliges the state to provide for securing the right to work, to education and to public assistance in certain specified circumstances "within the limits of its economic capacity and development". In the latter case, it would be difficult for a court to adjudge the limits of the economic capacity and development of the State. But in the majority of cases where violation of a directive principle is alleged, it will not be hard to make a correct appraisal of the situation. In a few hard cases, however, bad laws may continue to cling to the statute book.

V

A question which has arisen time and again is the apparent or real conflict between fundamental rights and directive principles in the Constitution. Apart from the assumption cherished by some scholars that there is no such conflict and that the two are complementary to each other, there is a general feeling that they tend to be sometimes a trifle incompatible and that a judicial scrutiny is necessary to keep them together. Many judicial decisions unfortunately declared the existence of incompatibility, in spite of attempts at reconciliation or harmonization. If there be any clear instance of conflict, and no harmonization appears to be possible, a choice may have to be made; but in making the choice, the general principles of the Constitution have to be kept in view, more than what is referred to as the plain

meaning of the words employed. It is doubtful whether any word has identical meaning for all those who employ it. To cite one instance, under the word 'compensation' dictionarees give a number of meanings. One of them is "thing given as recompense'. It is not inconceivable that a Zamindar most of whose property has been acquired for public purpose would be amply recompensed if he were awarded an honour known as, say, Bharatvibhushan. It is not uncommon for moneyed men in certain democratic countries to buy titles of honour. As long as the award of an honour which is distinguished from a title by an exercise in mimamsa is considered constitutional, there is no reason why there should not be a class of citizens who "relinquished" their right to their vast estates and earned the coveted honour Bharatvibhushan. 9

The suggestion that in interpreting its provisions, the general principles of Constitution should be kept in view and the so-called "plain meaning of words" should be made to subserve the principles, may not find favour with most members of our judiciary who are accustomed to follow English rules applicable to the interpretation of statutes. Practically all the models they follow are inappropriate to their purpose. The House of Lords and the lower courts in the United Kingdom are not required to interpret any constitution; Judicial Committee may interpret Constitution Acts, but they are again statutes of the British Parliament and in spite of occasional lightly audible musings that it is a Constitution they are interpreting, the trend in interpretation appears to be one that is suited to a statute. If they adopt the trend in constitutional interpretation in the United States, they are faced with a difficulty posed by the difference that the U.S. Constitution abounds in general concepts and employs very

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9. As they can be regarded as a class by themselves, the creation of such a class with its nexus found in their relinquishment of property, may not violate the provisions of Article 14 of the Constitution.

comprehensive words while the Indian Constitution, being eclectic, has a mixture of general concepts, vague formulations as also precise regulatory provisions. In this context, the preferred method, if one may suggest it, is to give predominence to general principles which pervade the Constitution. If that is done, even what may be regarded as imprecise or vague formulations in Part IV of the Constitution may not only be given flesh and blood but also be supplied with a habitation and a name. One could recall in this context decisions of the German Constitutional Court based on Article 1 of the Basic Law which states:

> "The dignity of man is inviolable. To respect and protect it is the duty of all state authority."

It would have been easy for the Constitutional Court to abdicate jurisdiction on the plea that the article does not provide for any concrete provision of law. It is the general principles of a constitution which are of importance than regulatory provisions like the denial to a retired judge of a High Court the right to practice law before the same Court. A provision like the one mentioned above could be easily derived from the general principles.

VI

It is no secret that our judiciary fight shy of what they call the spirit of the Constitution, as though it were an evil genius. In the Gopalan case, Chief Justice Kania observed:

> There is considerable authority for the statement that the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words... But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of

> a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of Justice to declare void any legislative enactment. 10

A few months later, Justice Das stated:

> ... a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view. It is, therefore, quite clear that the Court should construe the language of article 13(1) according to the established rules of interpretation and arrive at its true meaning uninfluenced by any assumed spirit of the Constitution. 11

It is difficult to agree to the view that the Preamble of the Constitution as well as the Directive Principles are elusive or ethereal, that they are not expressed in words, that their true meaning could be gathered only by applying to them the "established" rules of statutory interpretation set down in Maxwell or Odgers and that beyond Maxwell and Odgers there is chaos. One should assume following scrupulously the principles enunciated by the learned judges, that as the rules of interpretation are not laid down in "express constitutional provisions",

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10. A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27 at 42.

11. Keshava Madhava Menon v. State of Bombay, (1951) S.C.R. 228 at 232-233.

one is free to interpret the Constitution by its spirit which may be gathered from the language employed, inter alia, in the Preamble and Part IV of the Constitution.

Independence was presented to us in a silver platter. Should we permit Maxwell and persons of his kidney to rule us from their graves? It is a great pity that the Parliament of the United Kingdom, while adopting the Indian Independence Act, 1947, did not make express provisions in it for psychiatric treatment under an Indian national health scheme.

We have already adverted to declaratory judgments in relation to a law which is challenged as violative of one or more of the directive principles. We have also referred to the legal effect of such a declaratory judgement. One is, however, tempted to quote from two doctrinal writers of the United States who appear to be very much favoured by our higher judiciary in spite of their oath to perform the duties of their office without fear or favour. Willis has said:

> A judicial declaration of the unconstitutionality of a statute neither annuls nor repeals the statute but has the effect of ignoring or disregarding it so far as the determination of the rights of private parties is concerned. The Courts generally say that the effect of an unconstitutional statute is nothing. It is as though it had never been passed. 12

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12. Quoted in Deep Chand v. State of Uttar Pradesh (1959) Supp. (2) S.C.R. 8 at 23.

Willoughby stated:

> The Court does not annul or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognize it, and determines the rights of parties just as if such statute had no application. 13

In the Indian context, should the fact that no machinery is envisaged in the Constitution for the enforcement of the Directive Principles make any difference in the implementation of a law adopted in contravention of constitutional provisions? The Courts are not empowered to enforce the provisions of Part IV of the Constitution. But in general they are authorized to refuse recognition and consequently implementation of laws repugnant to the Constitution. That is all that they need do in regard to a law which is in conflict with Directive Principles. This may not be considered as doing something indirectly that cannot be done directly. To cite an imaginary instance: courts may not direct the government to declare the Taj Mahal to be of national importance; but they could and should declare unconstitutional under article 49 of the Constitution an order of an executive authority to demolish this wonder of the world. If this power to preserve the tomb of Mumtaz Mahal, a national movement, could be conceded to the courts, could not a similar right be conceded to them to protect a social order in which justice shall inform all the institutions of national life?

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13. Quoted in the Deep Chand decision, supra, note 12, at pp. 23-24.

Wadhwa