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DIRECTIVE PRINCIPLES AND SOCIOLOGY OF INDIAN LAW — A REPLY TO DR. JAGAT NARAIN*

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I MUST BEGIN MY REPLY with a word of appreciation and a word of apology. I welcome Dr. Jagat Narain's spirited defence of his views and equally spirited assault on mine. I appreciate the opportunity he has thus provided me to express my thinking on the legal nature of the directive principles of state policy in the Indian Constitution, an analytical venture I had perforce to forego in "The Little Done, The Vast Undone...." But precisely because the range of ideas touched upon in Dr. Narain's letter is vast, my apologies are due to the readers (and also to the editors) for the present length of reply. Had Narain preferred to formulate issues agitating him clearly and pointedly, the structure of my response would have been different.

In the first section of this letter I will identify, and answer where appropriate, some of the personal rather than scholarly criticisms that Narain offers. Having thus disposed of the emotive elements of dialogue, I will attempt to formulate issues of mutual scholarly concern relating to (i) directive principles and (ii) approaches to (what I call) the sociology of Indian law.

I

Howsoever tempting they may have been, I believe Narain should have resisted critical remarks on my scholarly and personal integrity. Such observations are rarely, if ever, directly relevant (nor indeed conducive) to the fulfilment of scholarly tasks. Narain seems to recognize this elementary axiom of scholarly discourse when he says that "polemical legal journalism" (of which footnote 110 of my article seems to him an archetypal example) "needs to be discouraged these days." But he himself is better at precept than in practice, and thus invites a return of the compliment undeservedly extended to me in the first place.

"Polemical writing" when used as a term of reproach signifies wanton, unjustified, and perhaps unjustifiable criticism. I think Narain provides a better example of this type of polemics than anything in

*See Dr. Jagat Narain's letter *infra* at 270.

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my footnote 110 when he states and restates "my" concept of legal sociology as being "essentially conservative, jargon ridden, court-oriented and parochical." This string of projoratives does not guide me, and I believe is unlikely to guide anyone, to the substance of Narain's criticism. All that we learn is that Narain strongly disapproves of the views he thus labels. However strongly expressed, such indignant outbursts cannot be made to function as rational and reasoned critique.[1]

Narain's attack on my scholarly integrity is evidenced in his remarks on my evaluation of Austin's work. He says, "even the most bitter critic of Austin" will agree "that he in fact has accomplished a scholarly piece of work of great merit" backed by "immense.. research..which no one has so far been able to do on the subject.." But Narain thinks that by concluding my study on the "The Little Done, The Vast Undone" title theme, I have belittled Austin's superb study. He adds: "Academic honesty demands that credit must be given wherever it is due." But both in intention and in execution, my study of Austin's book is a tribute to Austin's achievement and it would astonish me if even a most superficial reading of my article were to give a contrary impression, — provided at any rate that such a reading did not stop short with the title itself.[2] The point here to which I take strong exception is the observation about "academic honesty." A *responsible* assessment of shortfalls from "academic honesty" would require at least a rigorous formulation and explication of standards of such assessment and an equally rigorous and painstaking

1. The only intelligible phrase in this string is "court-oriented," and it is intelligible only after a relocation of contexts. Probably, it bears reference to Narain's thinking (later to be examined) that I neglect the "bond" that directive principles create for the legislature. Be that as it may, this charge of being "court-oriented" would be a grave one, *if* substantiated. For it points to a professional hazard confronting a lawyer and a jurisprudent doing sociology. Veneration of courts and consequently of judicial process in the study of law in society deserves debunking but it should be found before it can be debunked. I do not believe, and Narain has failed to persuade me, that I am "court-oriented" in the above sense. Suffice it to say that a perceptive critic of my article finds adequate elements in my study with which to arrive at a reading of it sharply opposed to Narain's. See A. R. Blackshield, "Fundamental Rights and the Economic Viability of the Indian Nation," 10 *J.I.L.I.* 43 *et seq.* (1968). I should add that insofar as this point depends upon *my* reading of *Blackshield's* study Mr. Blackshield has confirmed in private conversation that this reading is correct—and has had the grace to add that in his opinion, the charge of "court-orientation" is more fairly directed by *me* against *him* than by Narain against me!

2. I applaud Austin's work in terms similar to these used by Narain. See my references to Austin's study as "the most comprehensive, insightful, and balanced account," based on "painstaking and scrupulous research," "a most definitive study of Constitution-making in India" helping us to "displace all pseudo-literature on the subject." I will not labour further to show how at various stages of my study I admire Austin's important contribution. But such admiration need not preempt criticism.

statement of shortfalls in the work under review from such standards. To forsake intellectual discipline thus involved, is also to forsake the privilege of scholarly attention.

Paradoxically, while Narain urges me to keep an "open mind" he reveals little hesitation in saying that he himself is "less inclined" to "argue" with a person like me. This because though I am "definitely weak in sociological theory," I still "display" my "wide reading" and attack other writers with "a prejudged mind." Even when backed by the subsequent dazzling, but substantially obscure, comparisons with "poverty of sociology" and "poverty of philosophy" adorned by names of Marx and Russell, these remarks remain unworthy of the "compliment of rational opposition."[3]

With the unilateral judgment of *my* knowledge of sociological theory marches the rhetoric against "jargon." I agree with Narain that "wholesale conversion to American sociological jargons" is not desirable — with the caveat that it is not merely undesirable but uninformed to ascribe this characteristic in this facile manner to American sociological writing in general. Fashionable disparaging remarks about similarity of someone's style with "American sociological jargon" are no substitute for doing the hard jobs of stating in *what* contexts, and *where* precisely, and *why* it is inappropriate or wrong to use certain expressions. At present, without the benefit of Narain's mind on these matters, all I can gather that he is allergic to words like "decisional material," "structure," "role," "socialization," *etc.* I regret to have to say that no writer can respect the varied allergies of all his readership. It is also well to recall, amidst all irritations of allergy, that the fatal step from intolerance of words to intolerance of *ideas* can often be inadvertently but irrevocably, taken.

II

In my footnote 110, criticizing Dr. Narain's views, my main stated objections to his thesis were directed to his view that (i) directive principles are *rules* of law, and that (ii) being so, and being thus "law in the real sense of the term," they are "in no way subordinate to Rights," I also carefully restated Narain's reasons for his view, which were that directive principles were such rules because (i) they cannot be altered or removed save by a proper constitutional amendment; (ii) steps toward their fulfilment, at least for the most part, have been taken by the government since the inception of the Constitution and (iii) they were analogous to rules of international law, the latter in some manner derivable from state practice.

In his letter under reply, Narain makes no attempt to answer my major point of criticism about the alleged constitutional and legal

3. I borrow this phrase from H. L. A. Hart, *Law, Liberty and Morality* 17 (Vintage edn. 1963).

relation of equality between the directives and fundamental rights. Instead Narain merely concentrates on my criticism of his analogy between directives and international law. This selective inattention is aggravated further when he reads *into* my comments a notion of law that identifies law with coercion, with mere enforceability. Once this interpolation takes place, Narain finds it easy to unleash both scholarly criticism, and some unscholarly vituperation. But of course neither expressly nor by implication did I adopt in footnote 110 or elsewhere any such theory of law. Thus a major misunderstanding mars Narain's counter-criticism of my views. Thus also possibilities of meaningful exchange of ideas recede. In order to provide some structure to the present response, I will therefore reformulate the several diffused points of contention in a series of questions and attempt to answer these with maximum advertence to Narain's main positions. The main questions are :

(a) Do directive principles form a part of Indian constitutional law ?

(b) If they do, are they properly regarded as *rules* of law ?

(c) Are the directive principles of the same legal stature as fundamental rights ?

(d) Is enforceability by courts a "necessary and sufficient condition of law " ?

A. The Directive Principles as Parts of Constitutional Law

I agree with Narain that the directives are a part of Indian constitutional law but unlike him I regard it a basic scholarly responsibility to explicate the reasons, and analyze the implications, of such a view as well as a view opposed to it. For the difficulties confronting either view at the level of legal theory are not such as can be naively resolved by curiously opposing (as Dr. Narain does) the followers of a "liberal" view as students of H.L.A. Hart with those of a "restrictive" view as disciples of Austin !

When we consider the question whether the directive principles form a part of the constitutional law, we also simultaneously consider an allied, but more basic, question concerning the "lawness" of the directives. These two questions really deserve separate analysis and the latter transcends in significance, without exaggeration, any other question of my list here. If, however, I prefer to operate within the scheme of fourfold issues, resisting the temptation of plunging fully into an enquiry about the concept of law, the choice is somewhat painfully dictated of my perception of issues as emerging from Narain's letter, and by an awareness that there are limits to the editorial indulgence to this type of writing.

At the threshold of our enquiry, it will be conducive to clear thinking if we were to explicitly define the "nature" of the question: Are directive principles legal norms or precepts? With this manner of questioning, we already leave behind the general dimension of the meaning of "law" as "legal order."[4] Obviously the question is not whether the directives in themselves constitute a legal order; but rather whether they belong to an empirically existent legal order or analytically whether *such* norms or precepts are included in our concept of law.

It is primarily on the analytical level that the battle ranks will be formed between those who want to deny "lawness" to the directives and those who wish to confer it on them. The issue can be resolved either by a definitional assertion, based on a reasonable logical procedure of definition *per genus et differentiam* or by an approach stressing the "open texture" of the concepts involved.[5] The first approach based as it is on concommittance of certain features (*differentia specifica*) such as sanction,[6] justiciability,[7] legal remedies or identifiability with archetypical Hohfeldian jural relations[8] is more likely than not to lead to denial of claim to lawness of the directives, or at best to an acknowledgment of their mid-air status between realms of "law" and "non-law." The second approach, most illuminatingly advocated in recent times by H.L.A. Hart, would go beyond this type of definitional enterprise and explicate different "unifying principles" for usages of the same term illustrating "different constituents of some complex activity."[9] From this perspective, it will be possible to arrive at conclusions supportive of "lawness" of the directives.

But the prerogative of choice of analytic starting points is not quite so sovereign, unless of course one is constructing theoretical systems for one's own private mental satisfaction.[10] The adoption of one viewpoint rather than the other must be capable of justification in terms of advancing our understanding and power of explanation of given states of affairs. Scientific illumination attendent upon choice of

4. 1 R. Pound, *Jurisprudence* 12-16, *esp.* at 14 (1959).

5. See J. Stone, *Legal Systems and Lawyers' Reasonings* 169-85 *esp.* 164n., 172, 179 (1964); H. L. A. Hart, *The Concept of Law* 13-15 (1961); D. Lloyd (ed.), *Introduction to Jurisprudence* 32-40 (1st edn. 1959).

6. See *supra* note 5, especially J. Stone and the literature cited therein.

7. H. Kantorowicz, *The Definition of Law* 52-89, *esp.* 75-78 (A. H. Campbell ed., 1958); but see J. Stone, *op. cit. supra* note 5 at 176, 177-78, 183.

8. See generally, W. N. Hohfeld, *Fundamental Legal Conceptions* (1919, 1964) J. Stone, *op. cit. supra* note 5 at 137-61.

9. H. L. A. Hart, *op. cit. supra* note 5 at 15-16. Hart's "railway" example provides a perspective in terms of which we can identify the directive principles as a part of the Indian legal system. Stone's analysis, *supra* note 5, admirably retains the most serviceable features of both these approaches.

10. *Cf.* Stone, *op. cit. supra* note 5 at 178-79.

a particular analytical threshold, rather than the "truth" or "falsity" in logical terms, is what matters. "A definition of law is *useful* or *useless*. It is not *true* or *false*, any more than a New Year's Resolution or an insurance policy. A definition is in fact a type of insurance against certain risks of confusion."[11] The question then is (as we shall shortly see) of ascertaining whether it is worthwhile to live with risks of the confusion rather than pay a premium that is exorbitant.

Unlike sets of rules such as international law or primitive law, often used to illustrate "borderline" cases which a useful definition of law should somehow accommodate, even as variants from a standard case,[12] the directives posses several unique features which we should stress at this stage before applying to them the various criteria of "lawness." *First*, the directives are embodied in the constitutional text and form a designated "part" (Part IV) of the Indian Constitution. *Second*, as provisions of the Constitution the directives can be amended only by a formal amendment of the Constitution, in fulfilment of the requirements of article 368. *Third*, the directives are proclaimed to be "fundamental" to one of the most major forms of state action — namely, lawmaking. They are to inform policy-making at all levels of state organization. Advertence to the directives in governance of the country is termed a "duty." As such, the directives provide guidelines for exercise of constitutionally conferred powers on the legislature, executive and judiciary. *Fourth*, the directives embody policies which in a substantial part state what I have called the "constitutionally desired social order."[13] Unlike most other formulations of state policies, modification of the policies of this part is constitutionally safeguarded in that an amendment to the Constitution is necessary to accomplish this purpose. It is conceivable that if such an amendment purported to expunge part four altogether or some of its fundamental provisions, from the constitutional text, then its constitutional validity may be an issue before the courts. *Fifth*, the directives provide, and have been employed as providing, *justification* for constitutional exercise of lawmaking power and also as guidelines for statutory and constitutional interpretation. *Sixth*, the directives are not enforceable against the state in courts of law. Non-enforceability has however not meant judicial non-cognizability. *Seventh*, part four does not confer power, bestow rights, or create remedies.

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11. F. S. Cohen, "Transcendental Nonsense and the Functional Approach," 35 *Col. L. Rev.* 809, 835-26 (1935), reprinted in M. R. Cohen & F. S. Cohen, *Readings in Jurisprudence and Legal Philosophy* 429 at 429-30.

12. See H. L. A. Hart, *op. cit. supra* note 5 at 89-90, 208-31. For a different notion of "borderline" cases not here relevant, see H. Kantorowicz, *op. cit. supra* note 7, 82-89. And for the so-called "*leges emperfacte*" see J. Stone, *op. cit. supra* note 5 at 174; Hart, *loc cit* 27-41; R.A. Wasserstorm, "The Obligation to obey the Law," 10 *U.C.L.A. L. Rev.* 780, 785-76 (1963). And see the illuminating discussion of the "Odd-lot Situation" such as the filibuster in K. Llewellyn, *Jurisprudence* 360-61 (1962).

13. U. Baxi, "The Little Done, The Vast Undone..." 9 *J.I.L.I.* 323 at 331, 344-363 (1967).

These seven salient features stem from the constitutional "given-ness" of the directive principles. An adequate understanding of the constitutional *provisions* or constitutional *behaviour* in contemporary India must take all the seven features into account. A concept of law stipulating presence of sanction, or justiciability, or a Hohfeldian relation as constitutive of law will logically entail a denial of "lawness" to the directives. Indubitably important though the emphasis on each of these elements is, unrelaxed and exclusive insistence upon them in the context of directive principles will lead to some very striking problem with regard to each of the other five features. To these we now turn.

In relation to the first feature, we will be, on such a view, confronted with the paradox that a purposeful use of the techniques of law-making (here in pursuit of the "constitutive power") resulting in a series of law-like propositions embodied in a nominate part of the legally operative constitutional text will nevertheless amount to non-law.[14] The paradox will deepen when we pass to the second feature of the directives. It will then have to be admitted that what has been considered as "non-law" still can be modified ***only*** by recourse to legislation satisfying the constitutionally prescribed requirements.

Equally haunting for this view is the fact, arising from the third feature, that though the directives themselves confer no "power" they serve to formulate standards and policies quite explicitly linked to the constitutional conferral of power as guidelines for its exercise. These guidelines are discretionary to the exercise of such powers and the discretion thus involved is not judicially reviewable — a familiar law-making technique.[15] Does the use of such a technique, though somewhat extraordinary at the constitutional level, result (for that reason alone) into "non-law ? "

Fourth, such a view will also have to countenance the probability of the constitutional validity of an amendment purporting to eliminate totally, or selectively to alter or eliminate, some important basic directives. Fifth, the persistent use of the directive principles in state action — both legislative and judicial law-making — will have to be explained (or explained away !) on basis other than the fact (repeatedly stressed in judgments) that fulfilment of directive-oriented policies have a constitutional priority over other, and often no less important, policies and principles. Adherents of the view under discussion will further have to similarly explain the use of directives as almost axiomatically fulfiling the reasonableness part of the requirement of "reasonable restrictions" on the fundamental rights provisions of the Constitution.[16]

14. The prefix "non" is not here used in its full logical rigour.

15. I am indebted to my friend and colleague Mr. A. R. Blackshield for this point, though I am not quite sure whether he would himself have wanted to raise it thus or in this specific context.

16. See Baxi, *op. cit. supra* note 13 at 344-363 and the literature there cited and discussed.

It does indeed appear that a concept of law which will lead us thus to exclude, underplay, ignore or explain away important relevant characteristics of the constitutionally given directive principles is really too restrictive to be a significant tool of analysis. This restrictiveness would have been the less irksome had any of these definitional approaches been adequate to fully explain legal phenomena by their stated criteria in the so-called "standard" as distinct from the so-called "borderline" cases.[17] The fact is that no single criterion, or set of criteria, can be extended to explain the whole range of affairs we encounter as lawmen but that each of these is illuminating and relevant to the understanding of and about law. Thus, a legal order as a whole *not* resting in any degree on institutionalized authority and coercion, *not* providing for any type of justiciability of its norms, and altogether intractable to analytical explanation in Hohfeldian categories or their variants would present perhaps a phenomenon *sui genris*, at present beyond the ken and contemplation of jurisprudents. If we were, however, confronted with such an order, the hesitation and the reluctance to even tentatively characterize it as a "legal order" will be perfectly understandable and even justifiable. Not so, however, such an attitude towards certain norms *within* a legal order that generally, by and large, meets the above — and certain other criteria.[18]

The present claim to the "lawness" of the directives resting on the five features, can further be reinforced by reference to the

17. See H. L. A. Hart, *op. cit. supra* notes 5 at 12.

18, Insofar as the statement in the text concerns legal order as a whole, we are further in agreement with J. Stone, *supra* note 5 esp. at 185-85. Stone, in addition, rightly suggests that

> If... the problem be whether an offered norm is the legal norm of a particular legal order, then its credentials are those laid down by the particular system and are only remotely related to discussion of law in general.

This certainly is the correct, and in most cases satisfactory, procedure for ascertaining "lawness" of a norm at issue. However in the context of the directives, such a reference to the Indian constitutional order is not likely to provide any answers for the simple reason that the Constitution is silent on the issue. So that whether, and with what degree of justification, one can argue about the "lawness" becomes intimately rather than "remotely" related to "discussion of the nature of 'law' in general.

And in the Indian constitutional contexts not merely the directives are thus related to the concept of law. Difficulties with the expression "law" lie at the heart of all-important article 13, and article 372 continuing existing laws into force on the adoption of the Constitution has led to equally tough, and no more tractable questions, about the meaning of "law." See for a recent analysis of some of the problems under the latter article, D. S. Misra, "Definition of Law and the Supreme Court," 14 *J.I.L.I.* 434 (1968). See also *State of West Bengal* v. *Corporation of Calcutta*, A.I.R 1967 S.C. 997 (*Director of Rationing and Distribution* v. *Corporation of Calcutta*, A.I.R. 1960 S.C. 1355 *overruled*), holding that the common law rule that the Crown (State) is not bound by statute unless named therein expressly or by necessary implication was not a law continued to be in force by article 373 being only "a cannon of construction" rather than "a rule of substantive law." (*Per* Subba Rao C.J. at 1007).

functional role of the directives — necessarily a matter of empirical verification. At the outset, however, we must admit that if *all* forms of state action consistently ignored or infringed *all* the directives we should be deprived of this reinforcement, though the justification for the plea of "lawness" of the directives, based on some of their salient seven features may still remain intact. Of course, it is possible to counter such a situation by saying that the shorterm loss of functionality of the directives would not mean that such a loss will necessarily be permanent. Short-term "ignoring-infringing" pattern of behaviour may well in course of time be replaced by "implementing-immunizing" behaviour. Jurisprudentially, this means that to urge that desuetude had deprived the directives of their character of being constitutional precepts, one would have to demonstrate not merely "lack of efficacy" but that such a lack was as "enduring" one.[19]

But all this presupposes (and in the present case rests in the fact of) the legal "giveness" of the directives. If the directives were not constitutionally posited, and if they were subject to change without a legislative act of the Parliament, then no amount of functional justification would have any significance. It is only because the directives are legally "given" in the Indian context that one is emboldened to add and highlight the functional dimension. Suppose that the Constituent Assembly or the First Parliament had proclaimed the directives in a solemn resolution, and that this resolution was formally reiterated by all states in India and at a conference of Justices of the Supreme Court of India. Suppose also that this resolution had been appropriately implemented over a long period of time. Most of us who take a liberal view of the law will, even under these ideal conditions, not want to characterize this resolution as a part of Indian constitutional law.[19a] This sort of functional justification thus primarily depends on the constitutional givenness of the directives. This feature is crucial in any enterprise at clear thinking on directives.

Attention to constitutional characteristics is thus of great importance and this becomes clear as we focus on the restricted relevance of the directive principles of social policy in the Constitution of Ireland (1937) which provided both the inspiration and model for their counterparts in the Indian (and in turn Pakistan's) Constitution.[20] The differences between the Indian and the Irish directives[21] do

19. H. Kelsen, *General Theory of Law and the State* 119-20 (1946).

19a. A somewhat similar question has already been posed by the justly famous "Practice Statement" issued by the Lord Chancellor. See 3 *W.L.R.* 1338 (1967). Most authorities are agreed that the statement does not have the force of law. For a stimulating analysis of this aspect, see J. Stone, "1966 and All That : Loosing the Chains of Precedent," (*forthcoming*).

20. See for the text of article 45 of the Irish Constitution laying down the directive principles of social policy, 2 A. J. Peaslee, *Constitutions of Nations* 235 at 261-62 (1960).

21. See, for a brief statement of relevant differences, mainly content, A. G. Donaldson, *Comparative Aspects of Irish Law* 168-170 (1951).

certainly show up the limits of the functional justification we have proffered for regarding the directives as part of constitutional law.

Some differences are of course relatively trivial. Thus while the Irish Constitution has only one article prescribing the directives, the Indian Constitution has sixteen articles (not counting article 351). The contents of the prescriptions naturally vary. Like their Indian counterparts, the Irish directives can only be modified by a constitutional amendment. But the critical difference lies in the fact that the principles of the Irish Constitution are expressly "intended for the general guidance of the Oireachtas," their "application···in the making of laws" is entrusted to "the care of the Oireachtas exclusively" and the principles "shall not be cognizable by any court under any of the provisions of this constitution."

The principles are thus specifically addressed to the national legislature. Even then they are intended to offer "general guidance" and are not, as in India, enshrined as precepts "fundamental in the governance of the country" which additionally purport to impose a "duty" of advertence to the directives in making laws. Further, the Irish Constitution by addressing these directives exclusively to the legislature, narrows the sphere of their operation while their Indian counterparts are addressed to the state in the widest sense of that term. Like the Indian directives, the Irish directives are not enforceable: what is more, however, the latter appear to be, and are clearly intended to be *un*cognizable by the judiciary. It is conceivable then that judicial advertence to the Irish directives in constitutional or statutory interpretation may be opposed as violative of an express prohibition of the Constitution.

Nor are these merely paper limitations. The Irish Supreme Court has made very little effort to make any use of directive principles, so that the question of comparison with the Indian judiciary's use of the directives simply does not arise.[22] There is a corresponding asymmetry in the scholarly effort devoted to study of Irish principles.[23] The

22. The only case which involved article 43 of the Irish Constitution is *The Pigs Marketing Board* v. *Donnelly (Dublin) Ltd.*, 1939 Irish Reports 413. It was urged that the Pigs and Bacon Acts 1935 and 1937 were unconstitutional because, *inter alia*, they were inconsistent with the concept of "social justice." Mr. Justice Hanna made a short shrift of this contention by dwelling on the vagueness of the concept and by taking the view that "social justice" did not involve a "question of law for the courts." *Id.* at 418.

See generally as to frequent and sensitive employment of norms of "social justice" by the Supreme Court of India, B. N. Banerjee, *Natural Justice and Social Justice* (1960); and with specific reference to "special justice" (under articles 28, 39, 41-43, 46 of part IV) the discussion of the views of Bhagwati, J. and Chagla, J. in H. M. Seervai, *Constitutional Law of India* 75-76 (1967). The conclusion by Seervai, with which I do not agree, comes close to the approach of Mr. Justice Hanna's in the *Pig Marketing Board* case, *loc-cit.*

23. A leading book, now in its second edition, on fundamental rights in Ireland has no chapter or section on directive principles and only passingly refers to them. See J. M. Kelly, *Fundamental Rights in Irish Law and Constitution* (2d ed. 1967).

express limitations of article 45 of the Irish Constitution must no doubt be a major factor contributing to this state of affairs.

It is possible (and on this point I have been unable to do any research) that the Oireachtas has moved towards fulfilment of the principles of social policy. To this extent surely it makes sense functionally to regard the directives as forming a part of Irish constitutional law. But it should be quite evident in view of the above-discussed differences that the strength of the justification does suffer somewhat.

In any case, it must be sufficient to rest the attempt at characterization of the directive principles as law on the distinctive features of each constitutional context. In each such context, it must be emphasized that this use of law-making technique is certainly extraordinary. Precisely because of this, we are apt to wonder about their legal character: we are not accustomed to such *pure* declarations of legislative and constituent policies. But there is *no* inherent reason why legislative technique cannot be put to such declarative statements of the desirable.[24] Unless this basic point of departure is clearly accepted, all contextual attempts at characterizing such anomolous phenomena as law will remain needlessly and wastefully suspect.

Finally, even as we accept the functional justification, it must be acknowledged that the earnestness of our plea for investing the directive principles with lawness will not simply abate because the values they reflect are repugnant to us. The repugnancy can at least be twofold. First, we may think (as I do) that certain specific directives do not fit in with the constitutionally desired social order as we preceive it. Thinking in this manner, I have suggested that we classify directives according to their fundamentalness to, and in, the constitutional vision. Those that are fundamental can be termed as "social revolution" directives, those not so may be christened "compromise directives" (which I lumped under the "dustbin" approach).[25] Obviously, reasonable men may differ, if not so much over the

24. A good example of the innocuous use of legislative technique is furnished by the Annotated Laws of Massachussetts (ch. 2 § 9) declaring the Chickadee as the official bird of Massachussetts. This example is highlighted by Lon Fuller in his *The Morality of Law* 91 (1964). There are, I believe, Indian counterparts of this type of legislation designating a national bird (peacock) and a national animal (lion). Would these statutes be any less "law" if they were merely declarative of the national bird or beast, not providing penalties for their violation or rewards for their conservation? Also relevant is the fascinating study by D. Daube, "Greek and Roman Reflections on Impossible Laws," 12 *Nat. L. F.* 1 (1967).

Of course, the use of law-making technique for the declaration of the directives is far from being innocuous. The directives provide an apt illustration of what K. Llewellyn illuminatingly termed "the Wither of the Net Totality." In these terms, the directives do certainly provide "emotionally charged idealogical configurations" facilitating performance of the law-jobs. See K. Llewellyn, "The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method," 49 *Yale L. J.* 1335 at 1387-392 (1940). And see, in the content of "Is—Ought" interaction in law, A. R. Blackshield's employment of this notion, in his "Legal Order and Social Inertia," *Archiv Fur Rechts-und Sozialphilosophie* (1969 forthcoming).

25. Baxi, *op. cit. supra* note 13.

classification or the basis of it, then surely over the grouping of the directives under each rubric. On this basis, I have concluded that certain directives are repugnant to the constitutional value system as I see it. But I myself for that reason will not want to say that the objectionable directives are not a part of constitutional law, but rather that they *ought* not to be so, and should be appropriately expunged from the text of the Constitution.

The second form of repugnancy would however be more disturbing in contemplation, but even in this case our ascription of lawness would have to stand—or in the alternative we should have to exclude from our conception of law, those laws which we consider unjust. This sort of situation would occur if some of the directives were (and seemed to most of us) repugnant to the scheme and substance of overall constitutional values. This would be so, for example, if article 42 called upon the state to provide unjust or inhumane conditions of work (instead of "just and humane" as now) or if the latter part of the same article called on the state (as it might be amended ingeniously with a view to check the population explosion) to "aggravate maternity distress" rather than to provide for "maternity relief" as it now does. Our personal revulsion in such cases cannot have any *analytical* bearing on the question of lawness of these directives. But we might still want to say that they so substantially offend the scheme of constitutional values as not to merit the benediction of lawness. In other words, we would want to say they are not a part of constitutional law because they are totally repugnant to constitutionally proclaimed social order. But those of us who want to say this will have in effect also to be saying that "unjust law is no law."

This discussion is intended to show that it is simply not enough, and may even be irresponsible, to repeat the formula "directive principles are law." The proposition is not self-evident, still less so are its full implications, and I have stressed merely the salient ones.

The foregoing analysis now better enables us to say that the directives are, being law part of constitutional law of India. It may, however, be said that it is perfectly defensible to assert this proposition even without such elaboration for the constitutional text itself designates the provisions embodying the directive principles as a "part" of the Constitution. It will not do to say that such an argument is a purely verbal one ; for both in intention and accomplishment the Constitution-makers have succeeded in institutionalizing part four as a part of the Constitution simply by so designating it.

True though this is, there are at least two difficulties with this type of argument. One is that quite often we—judges, lawyers, and jurisprudents—refuse to recognize the preamble to a statute or a constitution or a treaty as a part of statutory, constitutional or conventional international law. In fact, the Supreme Court of India has

already declared that the preamble to the Constitution is not "a part of the Constitution."[26] The reason for so holding was that the preamble is never regarded as "a source of substantive power." But then this is also a feature of the directives. Of course, when the Supreme Court so held it did not mean that the preamble is *not* a part of the *Constitution* which would be absurd. What was meant was that it is not a part of the constitutional *law* of India. Now it is possible say, with perfect consistency, that like the preamble, the directives are also not a "part" of constitutional law; but this surely is paying too high a premium for such consistency. For as we have already seen such an attitude is unlikely to enable us to either understand or explain the Indian constitutional order as it now exists.

We are here not concerned however with this view. As, if not more, important perhaps than their placement in the Constitution is the fact that the directives and the preamble share many distinctive features. They reflect high ideals of liberal democratic polity; they are both available to and can be used by all agencies of the state as guidelines to action as major goals of policy; courts can use them as *topoi* for rhetorical judicial reasoning.[27] But neither confers powers or legislative competence: neither can in itself give rise to a cause of action for which remedy is available in a court of law. Neither the preamble nor part four (including of course article 351) confers power, bestows rights, creates remedies. Finally as parts of the Constitution both can be amended only by following the procedure prescribed by the Constitution. To be sure, the directive principles specify and to a great extent concretize aims and aspirations of the Constitution-makers, as do fundamental rights. But these and other provisions of the Constitution can in turn be defensibly regarded as merely one massive foot-note to the preamble.

The only point of difference would seem to lie in the placement of the preamble and the principles. The latter feature as part four of the Constitution, whereas the former is not designated as a part. This distinction would be trivial were it not for the fact that the word "part" tyrannizes us to take the distinction more seriously than is

26. *In re Berubari Union*, A.I.R. 1960 S.C. 845. For a lawyer's criticism of this view see Seervai, *Constitutional Law of India* 75 (1967). For the use of preambles in statutory interpretation, see *Attorney-General* v. *Prince Ernest of Hanover*, [1957] A.C. 436 (*per* Viscount Simonds L.C.); G. Barwick, "Divining the Legislative Intent," 35 *Australian L.J.* 197 (1961), with particular reference to an interesting clause in the Interpretation Act, 1960, of the Republic of Ghana.

27. For a perceptive discussion of this notion, See J. Stone, *op. cit. supra* note 5 at 325-37 (1964) with literature there cited.

Of course no discussion of this aspect can be regarded as complete without a reference to the continuing vitality for judicial policy-making of the preamble to the Statute of Elizabeth I, 1601. The statute itself was repeated by Mortmain and Charitable Uses Act, 1888, though the preamble was excluded from repeal. See, *e.g.*, H. G. Hanbury, *Modern Equity* 174 *et seq* (7th edn. 1957).

warranted. But a thing need not be designated a part of the whole, in order for it to be such a part. The best way to disabuse our minds on this aspect is to imagine, however unpleasing aesthetically, that the Constitution began with recitation of the principles and part four merely embodied in the preamble. It would still appear absurd, and rightly so, to say that the long list of directives is not a part of the Constitution and therefore in the present sense not a part of constitutional law. We may then have to accept the implication of the view that if the directives are to be regarded as a part of constitutional law, and then the preamble shares the very same character.

But the second difficulty, if it were to actually exist, with the view cannot be thus resolved. Suppose that a second paragraph to article 37 were to be found reading as follows:

> Notwithstanding anything in this Constitution, the provisions contained in this part shall not be deemed to be a part of the constitutional law of India.[28]

Such a provision, it may be said, is absurd; but granting that it were to exist, it would be even more absurd to insist on the view that whatever exists in the Constitution is a part of constitutional law, notwithstanding such an express disclaimer. In fact, those who deny that the directive principles are a part of constitutional law proceed, I suspect, on precisely this kind of reading of article 37 as presently worded. Be that as it may, we have to acknowledge that claims of the "lawness" of directive principles, so far as they are based on the argument here under discussion alone, are to this extent at least analytically deficient.

B. Are the Directives Rules of Law?

I think it totally misleading, if not erroneous, to describe the directives as *rules* of constitutional law. To so that they form a *part* of constitutional law is one thing; to say, therefore, or for any other reason, that they are *legal rules* is quite another. And the distinctions here involved are not just merely verbal; underlying them are different approaches to the study of law and differing conceptions of law itself. If law is to be regarded as a system of rules, whether using the expression "rules" in a narrow or a broad sense, then it may perhaps make sense to say that every part of it must also be a legal rule or a set of such rules. If on the other hand law is to be viewed, *á la* Pound, as a body of authoritative precepts consisting of rules, principles, standards, conceptions, and doctrine, within the context of received techniques and received ideals, then not every precept need

28. We might imagine such a provision being sought to be enacted as a constitutional amendment by Parliament as a result of unfavoured judicial responsiveness to the directives; or we might imagine a similar negative deeming being supplied through interpretation of the *existing* article 37, by the Supreme Court itself. The manner in which such a contingency arises is here not material. What concerns us are the repurcussions on our task were it to arise.

be a rule. To be sure, on either approach, the hard problems of *justification* of legal decision remain, though perhaps less acutely for the preceptivists.[29] Moreover, just as those who adopt the rule-system approach have continually to refine and expand the taxonomy of rules,[30] so also the preceptivists have to undertake again and again the conceptual task of restructuring the meaning ascribed to each type of precept and redrawing its boundaries. This kind of efforts is perhaps a natural destiny of any pioneering jurisprudential enterprise. But to abandon these fine distinctions on the ground that their boundaries remain indeterminate and subject to overlapping is simply to exchange, in a misguided quest for clarity, a tolerable degree of confusion for an irredeemable kind of confusion. It is as if, for like reasons, a sociologist were to want to abandon the essential distinctions between power on the one hand and prestige, influence, dominance, rights, force and authority on the other.[31]

A little over a quarter century ago Roscoe Pound formulated a "hierarchial classification of sources and forms of law." Among the latter, he valuably distinguished between rules, principles, conceptions, doctrines, and standards.[32] Later, in 1959, Pound consolidated these distinctions under four heads: rules, principles, precepts defining conceptions and precepts defining standards.[33] The most important distinction for at the present purposes, is that between rules and principles. Rules, said Pound, are "precepts attaching a definite detailed legal consequence to a definite detailed state of facts" whereas principles are

> authoritative starting points for legal reasoning, employed continually and legitimately where cases are not covered or not fully or obviously covered by rules in the narrower sense.[34]

Conflict between principles, not by any means infrequent, is resolved usually by reference to received legal ideals. Sections of a penal code or precepts regarding attestation and execution of wills were among

29. On the problem of justification in general, see R. Wasserstorm, *The Judicial Decision* (1961); R. Hodgson, *Consequences of Utiliterianism* 110-41 (1967); R. Sartorius, "The Justification of the Judicial Decision," 78 *Ethics* 171 (1968); Dworkin, "Review of Wasserstorm: The Judicial Decision," 75 *Ethics* 47 (1964-65).

30. See the seminal articles by J. Dickinson, "Legal Rules: Their Function in the Process of Decision," and "Legal Rules: Their Application and Elaboration," in 79 *Uni. Penn. L. Rev.* 833, 1052 (1930-31); E. Patterson, *Jurisprudence* 117-26, 274-80 (1953); H. L. A. Hart, *The Concept of Law* (1961); L. J. Cohen, "Book Review," 71 *Mind* 395 (1962); and more recently, L. M. Friedman, "Legal Rules and The Process of Social Change," 19 *Stan. L. Rev.* 786 (1967). And see *infra* note 35.

31. See the lucid exposition by R. Bierstedt, "An Analysis of Social Power," 15 *Am. Soc. Rev.* 730-38 (1950).

32. See R. Pound "Hierarchy of Sources and Forms in Different Systems of Law," 7 *Tulane L. R.* 475 (1933), *repr.* Hall, *Readings in Jurisprudence* 661 (1938).

33. 2 R. Pound, *Jurisprudence* 124 *et seq.* (1959).

34. See *supra* note 32. We adopt here the earlier definition. See for a later version. Pound *supra* note 33.

the favourite examples (for Pound) of rules in a narrower sense. Precepts like "No man shall profit by his own wrong" constitute principles. For such precepts is not presupposed, as in rules, "any definite detailed set of facts," nor attached "any definite detailed legal consequence."

As noted earlier, no writer, including of course Roscoe Pound, has maintained that a sharp distinction can be drawn between rules and principles or among other varieties of precepts. Nor indeed can an attempt at drawing sharp logical distinctions be successful.[35] These constructs provide tools for a kind of "form criticism."[36] They thus help us to perceive the complexity associated with evolution of law and society.[37] Most importantly, these distinctions enable us to more fruitfully understand, describe, analyze and in most cases advance what Max Weber called the "rationalization of law."[38]

In the Indian Constitution it is thus rewarding to trace the variety of precepts and analyze their differing use and significance. While this obviously cannot be attempted here a few illustrations may be mentioned. Provisions regarding the manner of election of the President and the Vice-President of India are clear examples of rules in the narrow sense, whereas the directive principles both in form and substance, partake of the features readily ascribable to principles and policies.[39] It is also possible, as judicial responsiveness to the directive principles has already shown, to regard the directives as providing the contents to various constitutional standards, such as that of "reasonable restriction" on fundamental rights. Commendable attempts are also being made by courts to interpret, where two or more courses of interpretation are available, state action as action oriented to, and following, the directives. Thus it is that in a recent decision,[40] for example, Mr. Justice Dhavan of the Allahabad High Court, reasoned on the basis that article 37 in exhorting as a "duty" the state to apply "these principles in making laws" also implied a similar "duty" of advertence on courts in "applying law."[41] And then he proceeded on the basis of article 41, another directive, guaranteeing, *inter alia*, a "right to work" and "public assistance in cases of...sickness" to negative a proffered

35. See for a recent attempt at "logical" differentiation between "rules" and "principles," R. M. Dworkin, "The Model of Rules," 39 *U. Ch. L. Rev.* 19 (1967); and the stimulating critique by G. G. Christie, "The Model of Principles," *Duke L. J.* 649 (1968).

36. See D. Daube, *Forms of Roman Legislation* 8-22 and *passim* (1956).

37. See Pound, *op. cit. supra* note 33.

38. *M. Weber on Law and Economy in Society* xxxix—lii, 224 *et seq.* (Rhinestein ed. 1954).

39. See Patterson, *op. cit. supra* note 16, at 282-87, for a discussion of "policy" as an additional dimension of distinction within authoritative precepts.

40. *Balwant Raj* v. *Union of India*, A.I.R. 1968 All. 14.

41. *Id.* at 17.

"strict interpretation" of a rule which would have militated against the directive's "guarantees."[42]

Even after the basic tasks of understanding the "nature" of the directives are done in their role as principles and policies, it remains necessary to stress their distinctive features and limitations in this very role. The directives, *first*, are precepts embodied in the Constitution. They are thus not the type of principles emerging from decisional law. *Second*, they are primarily addressed to executive and legislature, agencies functionally more appropriate to move towards their fulfilment. *Third*, the embodiment of the directives in the constitutional text has this significance that their relevance in making and application of laws is indisputable and in some cases commands priority over their precepts of policy, and countervailing principles and policies must have a stronger justification to prevail over the constitutionally declared ones. *Fourth*, some of the directives themselves are so formulated as to provide countervailing principles which require observation in state action. Right to work, for example, is subject to "the limits of State's economic capacity," prohibition on the slaughter of cows is significantly prefaced by reference to modernization of agriculture and other allied purposes and the directive enjoining prohibition of intoxicating drinks is similarly linked to "standard of living" and "level of nutrition."[43] State action, whether simply or purposively inadvertent to these countervailing considerations will be thus difficult of justification.

Fifth, though fundamental to policy making the directive principles remain unenforceable in courts. This, while scarcely detracting from their lawness, has the important consequence that, absent a suitable legislative intervention, their legal evolution through judicial interpretation is categorically limited. Principles evolved or employed by courts, in contrast, often tend to assume importance transcending their roles as guides to judicial interpretation, as grounds of decision, and become conditions of valid legal action. Such for example may be seen to be the case with the principles of natural justice. This type of future is simply not open to the directives.

Finally, it should be recalled that state action inadvertent to or infringing the directives will be unconstitutional but not illegal. Contrast article 24 prescribing :

> No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment

with article 39

> The State shall, in particular, direct its policy towards securing
> * * * *
> (*e*) that childhood and youth are protected against exploitation...

Both precepts are embodied in the Constitution; both are expressed in a mandatory manner; both thus can be assimilated to a category of

42. *Ibid.*

43. See for a fuller discussion Baxi, *op. cit. supra* note 13.

obligations of the state. In fact, we may say that the wider policy of article 39(*e*) is partially but substantially fulfiled in article 24. But the violation of the latter article will have concrete legal consequences, which violation of article 39 will not have. Violation of article 24 will, in other words, be both unconstitutional and illegal, that of article 39(*e*) will be only unconstitutional.[44]

It may be objected at this stage that the fact that one has to take recourse to the distinction between "illegal" and "unconstitutional" itself illustrates difficulties with the notion that the directives are part of constitutional law. It may further be pointed out that precisely such a distinction has been canvassed in relation to the view that the constitutional conventions are not a part of British constitutional *law* and that they are non-legal rules, or prescriptions of constitutional morality merely. On this latter point, whatever may be the appropriate view with regard to the British constitutional conventions, it must be immediately said that any analogy between these and directives will be logically weak. And the fact that such a distinction has originated or has been employed in the context of constitutional conventions cannot be an argument against its use in a vastly different context.[45] Such an argument will surely confound the *meaning* of this distinction with its *use*.

The first and indeed the main objection, however, rests on too restricted a conception of law which excludes, by a definitional fiat, from a legal system merely exhortative norms, directed to orient conduct, but not justiciable and therefore not available as constituent determinants of legality.[46] The rarity of such norms in the existing legal systems makes possible such habits of thought: but by the same token when confronted by it, it also urges us along to a more liberal conception of law itself.

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44. See for this distinction J. Austin, *The Province of Jurisprudence Determined* 257-60 (1832; Lib. of Ideas edn., 1954). Of course, Austin was concerned to make this distinction as a part of his principal thesis that sovereign power is itself not capable of being bound by "*legal* limitation." And he would simply have regarded directive principles as rules of constitutional morality, as maxims "wearing the guise of a law," like the maxim *privilegia ne irrogato* enshrined in the Twelve Tables. We do not have to adopt Austin's theory to borrow his distinction.

45. Professor G. Hughes has recently made a telling use of this distinction in "Civil Disobedience and Political Question Doctrine," 43 *N.Y.U.L. Rev.* 1, 18-19 (1967).

46. Our uneasiness with exhortative, non-justiciable legal precepts may arise from the fact that in majority of the cases judicial process is concerned with determinations of legality of actions, state or private. This being so, any other function of the process is required to have some special justification and even authorization, as in the case of advisory opinion by courts. But if legislature can promulgate precepts which are hortatory and directive, (see *supra* note 24) why should the courts not make pronouncements which may, in relation to such norms, be likewise exhortative and admonitory when these precepts are disregarded? A pronouncement of unconstitutionality *sans* illegality will precisely perform the latter function. Under present legal systems of the world, courts are known to perform even stranger functions; they act as educational agencies, rolling up the functions of both law and education as instruments of social control, in the process. See *e.g.* H. Berman, *Justice in the U.S.S.R.* 299-311 (rev. enlarged edn. Vintage Paperbacks 1963).

C. *Directive* v. *Rights*

The third question, relating to the legal stature of the directives vis-a-vis the fundamental rights, deserves a summary answer and this is how I answered it in footnote 110. I have to repeat that it is no "polemical legal journalism" to say that it is nonsensical to assert (as Narain does) equality of constitutional status between the directives and the fundamental rights. It is a constitutional truism, and no less true because of this, that the directive principles are subordinate to fundamental rights. The Constitution-makers so envisioned the relationship between the two, and the courts and other agencies of the state have so viewed them over the years. As any good textbook on the Constitution will tell us, in case of a conflict between directives and rights the former must yield; the courts cannot declare as void any law which contravenes directive principles whereas the reverse will be true in case of fundamental rights; and the courts are not empowered to compel state action in pursuance of directive principles whereas they can do so when fundamental rights are involved.[47]

D. *Enforceability and the Concept of Law*

From my negation of Narain's characterization of directive principles as *rules* of law, possessing a stature of constitutional equality with fundamental rights, Dr. Narain seems to infer that I regard enforceability as a "necessary and sufficient condition of law."[48] Neither does such a view follow from my above stated positions nor indeed do I hold it. But I do believe that it is useful and even essential to regard some kind of "institutionalized coercion," meaning thereby a reference to both *authority* and *coercion*,[49] as a necessary but *not* a sufficient condition of law *in the sense of a legal order*.[50] I agree however with Narain

47. D. Basu, *Shorter Constitution of India* 212-14 (5th edn. 1967); H. M. Seervai, *Constitutional Law of India* 49-50 (1967); This is of course not to deny that we can speak of the directive principles as being equal, or superior, to fundamental rights at the extra-legal levels—whether the levels be of political, economic, and social philosophies or morality. See, for example, A. R. Blackshield, *op. cit. supra* note 1 at 44-45.

But Dr. Narain confines himself to the technical *legal* level as the footnote to his assertion of complete legal equality of the directives and the rights refers to "a contrary view" expressed by Das J. in *State of Madras* v. *Dorairajan*, A.I.R. 1951 S.C. 226,228. In that case, the learned Justice explicitly rejected the contention that article 46 of part IV can "override the provisions of Article 29(2)" in part III.

48. Of course, it is somewhat jurisprudentially unsophisticated to refer to "enforceability" as such. See the penetrating analysis in Kantorowicz, *op. cit. supra* note 7, at 60-61 and for the "varieties of enforcement," see H. L. A. Hart, *Law Liberty and Morality* 53-60 (Vintage edn. 1963).

49. On the centrality of institutionalized coercion to legal order see J. Stone, *op. cit. supra* note 5 at 181-82. (Cf. Weber's emphasis on differences in "the sociological *structure* of coercion" between "legal" and "conventional" orders. *Max Weber on Law in Economy and Society* 27 (Rheinstein ed. 1954). P. Shelznick is right to insist following M. Weber, that "The key word in the discussion of law is *authority*, not coercion." See P. Selznick, "Law: The Sociology of Law," in 9 *International Encyclopedia of Social Sciences* 50 at 51 (D. L. Sills ed., 1968).

50. Of course it remains vital to this day to recall the three senses in which the term "law" can be used: as meaning legal order, or as judicial process or as a set of authoritative legal material. Indefatigable canvassing of these distinctions was one of R. Pound's major contributions to legal theory. See, *supra* note 4.

that a unit-by-unit analysis of precepts of legal order, with a view to ascertain sanctions sustaining each norm, is misguided and futile.

I hope that some of the above discussion will pacify Narain's jurisprudential anxieties expressed sometimes diffidently ("He (Baxi) would, I guess refer me to Austin and Kelsen ! I am not sure on this though.") and sometimes too confidently ("If he (Baxi) likes the traditional identification of law with brute force, a hangover from the imperial days and inherent in some forms of legal positivism, that is his view and not mine"). It now remains for me to meet his two other related points.

Narain now suggests that he referred to international law "as a *paradigm* case and not as the test." With typical vehemence he, therefore, suspects that my criticism of him must have been either "based on ignorance of elementary rules of logical reasoning" or must simply be "another clever move" on my part to misrepresent his views. It does not occur to him that the manner in which he presented his argument may lead some people to think that he was drawing an analogy. Nor need of course analogical reasoning necessarily involve what he calls "the test" of whether the principles are law.

Here, as elsewhere, the source of Narain's grave misunderstanding of my views lies in his too ready and unsupportable ascription of a crude command theory of law to me. Of course the paradigmatic reference to international law will be a perfect and well-justified answer to any one asserting that directive principles are not a part of Indian constitutional law because they are not enforceable. It is a merit of Narain's analysis that, following H.L.A. Hart, he makes this point quite clear in the context of the directive principles. Naturally, this was *not* the position I was criticizing in footnote 110; whether as analogy or as a paradigm the reference to international law is a cogent and pleasing way to dispose of naive arguments against the attribution of lawness to the directives.

My criticism was, however, clearly directed to Narain's use of the notion of state practice as contributory to or attestive of rules of international law in support of his thesis that directives are a part of Indian constitutional law. This criticism is not met by Narain's defence that the reference to international law was paradigmatic. A paradigm is a model or a pattern and a paradigmatic argument proceeds by demonstration rather than inference. Therefore, such an argument will be appropriate if someone were to assert that that state practice in any form does not ever contribute, either by way of formation or attestation, to legal rules. A simple way to answer this argument will be to hold up international law as a paradigm.

But such a claim is not involved in a thesis that the directive principles are law and it is still less likely to be involved in a counter-thesis, denying "lawness" to them. It is the textual anchorage (with

its attendent features) in the Constitution which ultimately provides the foundation for the thesis; state action implementative of the directives is possible as such, and relevant to the present dialogue about the directives, only because of this anchorage. In *this* context where *no* general proposition denying the potency of state practice as law-creative is at issue, what can a reference to international law as a standard case or a paradigm mean? The plain truth is that while the notion of "state practice" has its uses in theories *about* international law, the normative and empirical features of national legal orders do not make possible the extension of this notion to their spheres. And surely Dr. Narain is not unaware of this.[51]

If then *this* reference to international law is not paradigmatic, my earlier characterization of the entire Narain argument as an analogy stands.[52] And so does the corollary that the analogy is both feeble and misguided.

Second, denying that enforceability is either a "necessary" or "sufficient" condition of law, Narain states that the "existence of law" has to be worked out "independently" by "reference to other criteria (including, I emphasize, the binding nature of state practice)." One can only wish him well in such an enterprise.

But as a "closely related question," Narain raise the question of the role of acquiescence as a social process involved in the transformation of a "social norm" into a "legal norm". Who is, asks Narain, "to subscribe to or have belief in the binding or obligatory nature of a social norm" before it can be regarded as a "legal norm?" His answer is that "the Constitution, the State and the people" have in varying degrees all "a claim here." On the "central points" involved here he generously refers me to the writings of "Lasswell, McDougal, Hart,

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51. See Narain, "Equal Protection Guarantee and the Right of Property Under the Indian Constitution," 15 *I.C.L.Q.* 199 at 207 (1966). In the text Narain, seeks support in the notion of "state practice" for the proposition that directives are rules in the real sense of the term. In the footnote, to which the text at this point refers, he boldly confronts the problem of ignoring—infringing pattern of behaviour and asserts that notwithstanding such behaviour the directives will be rules of law on the grounds that they are in the constitutional text and subject to change only by constitutional amendment. In effect, he seeks support of the state practice if it helps his thesis: if it does not, he is prepared to discard the notion altogether. It is perhaps possible thus contrary to the common adage, to both eat and have one own's cake—by eating at least a half of it!

52. Apart from the present common-sense use of paradigm argument, the other is the philosophical use, consisting in what is called the "Argument From Paradigm Case" (APC). See, *e.g.*, R. J. Richman, "On the Argument of the Paradigm Case," 39 *Australasian Journal of Philosophy* 75 (1961); C. J. F. Williams, "More on the Argument of the Paradigm Case," *Id.* at 276-78; A.R. Blackshield, "The Game They Dare Not Bite...," 3 *Jaipur L.J.* 44 at 78-80 (1963). It is quite clear that despite his elusive references to "logic" Dr Narain does not seem to be advancing *this* type of argument. Nor indeed would the use of APC be apposite in the present context.

It is also much to be doubted whether Dr. Narain was implicitly inviting my attention to general use of paradigm, in its codificational and notational aspects. On this R. K. Merton, *Social Theory and Social Structure* 104-14 (rev. edn. 1968); and E. Hass, *Beyond the Nation State* 126 (1964) extending Merton-type analysis to the study of International Labour Organization.

Honore, Fitzgerlad, Goodhart, Brownlie, Fuller and many others." This problem for Narain is partly "sociological" and partly "philosophical." He is unable at the end to refrain himself from a not too gentle admonition that I should not try to "dispose of summarily in footnotes" such problems and my attempt at doing so has been "unsuccessful."

This last charge can only be sustained in an Alician Wonderland because there probably we can "dispose of" things which do not exist in the first place. The fact is that footnote 110 does *not* deal with the problem as Narain now sees it. That footnote was merely a response to his early thesis about the directives, which did not adumbrate this specific point (along with many others) that Narain now raises.

The way Narain formulates his "central" points is much too obscure to make their pursuit rewarding. For example, what does it mean to say that a "state" or "constitution" "subscribes" to a "belief" in the obligatory nature of a norm? This is surely reification with vengeance. Then there are problems connected with the notion of acquiescence itself, which those who canvass it have an intellectual obligation to pursue and clarify for us. What are we looking for when we look for acquiescence? Conscious consent or merely a lack of dissent? Belief or belief coupled with behaviour consistent with, (and with what measure of consistency), that belief? Are we to count heads and yeas in determining acquiescence or to be satisfied with a general determination of consensus within a group or a sub-group? This latter might be necessary if, as Dr. Narain hints, that the "general acquiescence" is rather difficult to establish. But further, is it possible to develop at least two contrasting notions of "elite acquiescence" and "mass acquiescence?"

All this at the sociological level, but we may now ask further what is clearly involved in Narain's opposition between a "social normal" and a "legal norm?"[53] Is acquiescence to be regarded as a constitutive condition of law (whether conceived as "legal order" or a set of precepts) or whether it just provides a matrix from which law may thus arise? In concrete decisional situations there arise further problems regarding permissible use of acquiescence as legal techniques where at least alternative legal technique to attain the same result are

53. The treacherous term here is "norm". Be that as it may, we require a mere analytically rigourous formulation. I would unhesistatingly single out Ehrlich (from Narain's list) as meriting special study. Any attempt at reformulating these questions and in finding new approaches to them, must remain fully advertent to the promise and pitfalls of Ehrlich's pioneering attempts to study the "living law". See E. Ehrlich, *Fundamental Principles of the Sociology of Law* (W. L. Moll trns., 1936); J. Stone, *Social Dimensions of Law and Justice* 732-34, 645-46, 649-50 (1966); P. H. Patridge, "Ehrlich's Sociology of Law," 38-39 *The Australasian Journal of Philosophy* 201 (1966), F. S. C. Northrop "Underhill Moore's Legal Science: Its Nature and Significance," 59 *Yale L.J.* 198 (1949-50).

available.[54] And finally, if by any chance, this notion has something to do with the directive principles, it is Narain's duty to explicate the linkage for further scholarly scrutiny.

These questions are not even properly raised, let alone answered, either by bibliographical bravado or by general observations which neither represent nor invite clear thinking. To do so is to behave like a chief who insists in presenting an obscure recipe to a hungry guest.

III

Apart from his rather unnecessary and unjustifiable dispute over my style, Dr. Narain has been unable to formulate pointedly his objections to what he thinks to be my views on sociology of Indian law. After much contemplation on Narain's letter, I can isolate three main propositions which Narain might be advancing but none of these save perhaps the last, seems to be directly relevant to my study which he seeks to evaluate (even, as he says, at "the periphery of the substance").

Narain, first, seeks to answer the argument that "it is just not possible to understand social reality without a descriptive framework." Apart from the fact that I have great difficulty in grasping the argument and the "threefold" reply that Dr. Narain offers, that simple point is that I have not made nor implied such an argument. At a very general level, however, I do consider that systematic description of social phenomena is an indispensable preliminary task, though not obviously the only task, of sociology. And this is a proposition which will, I trust, have Narain's agreement as well, despite his sweeping denigration of description.[55] The fact that I am myself impatient with description and conceptualization is I believe evident throughout my article. For example, after outlining the notion of and the need for transpersonalization of power in the Indian political system, I suggest that the question "is one of the *initiation* of requisite changes within a power system rather than of their systematization after they have

54. See the comments on the use of the theory of acquiescence as an alternative to the technique of prospective overruling in *Golak Nath*, W. S. Hooker, Jr. "Prospective Overruling in India; *Golak Nath* and After," 9 *J.I.L.I.* 596 at 630-34 (1967); and A. R. Blackshield "Fundamental Rights and the Economic Viability of the Indian Nation," 10 *J.I.L.I.* 183 at 230-37 (1968).

55. *Cf.*

> those who believe that sociology is a scientific discipline are not obliged to claim that the formulation of laws constitutes its entire value. A part of sociology consists of exact description within an orderly frame of categories which involve only simple theorizing. Descriptive sociology is valuable in two ways. First, in the case of contemporary studies it provides information which is indispensable for the solution of practical problems and for the formulation of, and choice among, rational social policies. Secondly, where historical description, or the description of little known societies is concerned, it makes an important contribution to humane studies.

T. B. Bottomore, *Sociology* 28-29 (1962).

occurred."[56] Similarly my call for a closer relation of sociological generlizations on Hinduism with empirically based studies, and the dichotomy between "Hinduism-in-Books" and "Hinduism-in-Action," show at the very least that I do not regard mere description (in Narain's words) of "social reality" as an "end in itself."[57] Future elaboration of my views on these matters has to be more than merely suggestive but Dr. Narain's remarks, to be candid, are quite unhelpful to me in this direction.

Narain's second point relates to *his* choice of sociologists and consequently of sociological approaches and theories. Negatively, he feels that "the fact is that we need more of C. Wright Mills and less of Parsons, Almonds *etc.*" Without even barely hinting at the reasons of this disdain, he offers a catalogue of *his* preferences, a list of distinguished sociologists. This list, quite obviously random and indiscriminate (note that Parsons is now reinstated), is a good example of the encyclopadeic tendencies Narain is so quick to impute to me. The list is intended to illustrate that each of the nine named sociologists (and "many others" including "Soviet sociologists") has his own distinctive method. Whether or not the latter claim is true in detail, the point remains that all Dr. Narain is saying is that in some ways the sociological approaches and theories of these nine eminent sociologists (and many unnamed others) should be studied in the context of (what I prefer to call) sociology of Indian law. This exhortation is too elementary to be made in a scholarly discourse. The anciallry point that we need "more" of Mills and less of "Parsons, Almond *etc.*" (despite some ambivalence as to Parsons) really leads us nowhere as we have not been given the privilege of knowing the reasons of Narain's admonition. Scholarly preferences thus cannot be meaningfully canvassed. At any rate, I am not very sure that Dr. Narain would have found my cumbersome article any the *less* "encyclopadeic" if I had stretched the contexts of enquiry to refer to all the names of his catalogue; and I further suspect that by so doing I would have only aggravated his strong feeling that I was "weak in sociological theory."

Finally, Narain's third point states, in the above context, *his* preferences for sociological theory in general and also as relevant to sociology of Indian law. He would like to see "more emphasis being placed on :"

(i) "the physiology (including neuro-physiology) of legal sociology in general,"

(ii) "the ability to see social phenomena... in a macroscopic rather than microscopic manner ;"

(iii) "the due place of Linguistic Phenomenology and anatomical (dissection), statistical and scientific methods generally."

56. See, for example, Baxi, *op. cit. supra* note 13 at 335-339. See also *id.* at 344 (civil disobedience *Vs.* institutionalization of democracy), at 360 (research on directive principles).

57. See, *id.* at 426-30.

It is easier to sympathize with Narain's aspirations in this regard; for the human mind is forever, and particularly at the thresholds of learning, attracted by grandiose visions. But, with respect, it is most difficult to make much sense out of Narain's above cryptic prescriptions. I suspect there are difficulties of meaning and not just communication here. What, in concrete terms does it mean to say that one prefers emphasis on "physiology (including neuro-physiology) *of* "legal sociology *in general*" (emphasis added) or by call for emphasis on "anatomical" method, whose meaning is scarcely made clearer by inserting the words "dissection" in parenthesis? Similarly omnibus is the vague reference to "scientific methods generally." I know that one can only make general observations in a letter but I cannot agree that minimal elaboration, necessary to avoid scholarly evasion, should be thus abandoned.

I can claim, with all the temerity of one who is utterly bewildered thus far, that I can understand somewhat Narain's second proposition, namely, the need for "due" emphasis on "macroscopic" rather than "microscopic" method study of society. Of course, what is "*due*" (or what Narain will regard as such) is very much in doubt. Prescinding this, however, there is a great temptation for me to rehearse the now classic contours of controversy between these two apparently opposed methodologies. I will not yield to the temptation, first, because it is out of bounds for a writing of this kind which is only a reply; and second, and more important, because these matters are better stated elsewhere and I cannot hope to summarize or simplify them here without distortions.[58] I need only say that I still adhere to my sharp statements on "holistic" (or "macrosociological" lest Dr. Narain may call me to task for being jargonistic) sociological generalizations,[59] which have probably generated Narain's statement of opposed preference. Narain's response to my plea for "theories of middle range" in pursuit of legal sociology has been heard before, though differently, in general sociological literature.[60]

The truth is that while true humility may seem to have become an obsolete virtue in some fields of intellectual enquiry, in social sciences, and in sociology, it still remains almost a categorical imperative. Let us never fail to ponder :

> Perhaps, sociology is not yet ready for its Einstein, becavse it has not yet found its Kepler—to say nothing of its Newton, Laplace, Gibbs, Maxwell or Planck.[61]

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58. See R. K. Merton, "Social Conflict in Styles of Sociological Work," 3 *Transactions* 21-46 (Fourth World Congress of Sociology, 1961); and more recently, *id.*, *On Theoretical Sociology* 33-68 (1967).

59. See *supra* note 57.

60. R. K. Merton, *op. cit. supra*, note 58.

61. *Id.* at 47.

DR. JAGAT NARAIN'S LETTER TO THE EDITOR

Dear Sir,

My attention has been drawn to an article by Mr. U. Baxi in volume 9 of the *Journal* ("The little Done, The Vast Undone" p. 323) in which he makes references to some of my writings. While I would always welcome criticisms (howsoever strong they might be) with an open mind, I consider it an obligation to offer the following general comments on his criticisms.

The criticisms seem to be polemical rather than academic in nature. Such polemical legal journalism needs much to be discouraged these days. For example, at p. 363 Mr. Baxi refers to my article on "Equal Protection Guarantee and the Right of Property" which appeared in 15 *International and Comparative Law Quarterly* 199 (1966). It is most surprising that while there my view that those Directive Principles of State Policy which are regarded as binding on the State should be regarded as parts of the Indian constitutional law, he not only pickes out certain sentences of mine that suit him and gives them his own emphasis but he also deliberately omits to state what I think to be the real test in such regard. Here I quote the sentence from my article: "The crucial test thus is whether the 'Directive Principles' create some *bond* between the Constitution and the legislature in India, *i.e.*, whether they are of a binding nature" (15 *I.C.L.C.* 199, 207). This clearly means that I do not regard enforceability of law through courts (or indeed any other institution) as a necessary and sufficient condition for the valid existence of law. (Judicial validity is only a symptom (rather than a condition for identification of law). Such existence of law has to be established independently by reference to other criteria (including, I emphasize, the binding nature of state practice) which have yet to be fully worked out. A closely related question here is: who is to subscribe to or have belief in the binding or obligatory nature of a social norm before it can be regarded as a legal norm? The country's Constitution or the state or the people generally ('general acquiescence') or any other institution, organized or unorganized? My view is that the Constitution, the state and the people, all of them have a claim here, though in India there are difficulties in the way of establishing general acquiescence in view of the present state of development of sociological studies. The point nevertheless needs to be investigated further. On the central points involved in the problem, I would refer Mr. Baxi (I very much hope, he now has an open mind) to the writings of Lasswell, McDougal, Hart, Honore, Fitzgerald, Goodhart, Brownlie, Fuller, and many others. (He would, I guess, refer me to Austin and Kelsen! I would not be sure on this, though). The problem is partly philosophical (in that it involves identification of the criteria) and partly sociological (in that such identification must be based on an analysis of the social process), but it is there and cannot be disposed of summarily in footnotes such as he unsuccessfully attempts to do, *e g.*, by attributing to me "a basic misunderstanding" of the directives and rules of international law. That the problem exists is further shown by the issues raised by this year's pronouncement of the Judicial Committee of the Privy Council on the legality of the Smith regime's 1965 "Constitution" for Rhodesia (*Madzimbamuto* v. *Lardner, Burke*).

If he likes the traditional identification of law with brute force (a hangover from the Imperial days and inherent in some forms of 'legal positivism'), that is his view, not mine. Further, I gave the instance of international law as a *paradigm* case and not as the test. How else could it be? I hope, he understands it now. Under such circumstances, to say that "All through his discussion, Narain relies heavily on the analogy between rules of international law and directives" discloses either sheer ignorance of the elementary rules of logical reasoning or yet another clever move on his part.

What I have said here also applies to his criticisms of my other writings in the same article, so far as the tone of such criticisms is concerned.

May I be allowed to say also a few words about his article? (I do so because I too happen to have read most of the works he refers to and met persons of the stature of Professors Morris-Jones and Professor Hurst.) I have read it with interest and find some ideas exciting and some points worth exploring. But on the whole, I must say, it is more encycolopaedical than sociological. His concept (in line with the thinking of many others) of legal sociology seems to me to be essentially conservative, jargon-ridden, court-oriented, and parochial.

What is happening to legal sociology in India? A wholesale conversion to American sociological jargons and obsession with *describing* social pehnomena? Is that what we need? Should we not be looking for minds which have a vision of history (appreciation of the historical context) and are also prepared to think afresh, engage in imaginative and original thinking, and offer ideas on how to change the society in the interests of progress? (What is progress need not be a subject of philosophical puzzle in India). Description is important, but it should never be forgotten that it is only a means to an end (social progress). It is not the end in itself. We therefore need persons who have got the mind and the will to question the basic assumptions of the system instead of becoming readily imprisoned with a court-oriented, parochial, view of law and with foreign jargons wholesale (consider Mr. Baxi's emphasis on "decisional material") such as "structure," "role," "socialization," "motivation," "actor," "value-system," "attitudinal factors," and so on. If the argument is that it is just not possible to understand social legality without a conceptual framework, the answer to that is three-fold: (i) such a framework must be derived from the social *mores* of the particular community; (ii) a framework without an empirical theory to support it is worse than nothing; (iii) there is more to social reality than just written or spoken language; encompassing the whole gamut of civilization is necessary, which requires resort to other factors (such as appreciation of historical developments) as yet insufficiently emphasized; and what could really be behind the present 'cultural revolution' in China (whether it succeeds or not is hardly relevant here).

The fact is that we need more of C. Wright-Mills and less of Parsons, Almonds *etc.* (Consider, for instance, Mills' "Sociological Imagination" and "The Power Elite"). The question is not whether we should work on legal sociology in India or any where else. As Professor Sawer has said, today we are all at least sociologists. The real question is: What kind of sociology do we need? On this point one needs only to consider the varying approaches of Hart, Ginsberg, Ehrlich, Young, Titamuss, Townsend, Abel-Smith, Parsons, C. Wright-Mills and some others,—each of whom would claim to be a sociologist and yet his method and approach to sociology is different from others. Soviet sociologists, again, are different in some ways. For myself I would like to see more emphasis being put on the physiology (including neuro-physiology) of legal sociology and in general on the ability to see social phenomena perceptively, imaginatively and in a macroscopic rather than microscopic manner, while recognizing the due place of linguistic phenomenology and anatomical (dissection), statistical and scientific methods generally.

We need persons who can examine works of merit in their proper perspective. Even the most bitter critic of Austin (whose book Mr. Baxi seeks to review) would recognize that he in fact has accomplished a scholarly piece of work of great merit and that there is an immense amount of research behind it, which no one has so far been able to do on the subject of making of the Indian Constitution. Academic honesty demands that credit must be given wherever it is due. Mr. Baxi hardly does justice to Austin when he concludes on the "little done" theme.

I would have liked to offer my own comments on the *substance* of what Mr. Baxi has to say in his article (the above comments can at best be regarded as pertaining to the periphery of the substance). This I have not been able to do partly because of time. More importantly, however, I am less inclined to argue with a person who, though he is definitely weak in sociological theory, displays his wide reading and

attacks other writers with a pre-judged mind. The point about sociological theory is significant because if we do not fully grasp its relevance now, the poverty (and even failure) of sociology will after some time become as apparent to anyone as the poverty of philosophy did to Marx,—a view shared presently by Russell as is evident from his disillusionment with the current Oxford philosophy.

Having said all this, I trust Mr. Baxi has got the courtesy to reply to this letter in the *Journal,* so that the reader might decide for himself whether I am a person of strange view as Mr. Baxi seems to think.

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Yours sincerely,

(Sd.) Jagat Narain