NOTES AND COMMENTS

FUNDAMENTALNESS OF FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES IN THE INDIAN CONSTITUTION*

Fundamentalness of fundamental rights

THE IDEA of rights is canvassed as of modern origin and is usually traced to the Magna Carta of 1215 of Great Britain. But Ghoshal, an eminent historian, points out a number of "civil rights" enjoyed by the individuals in ancient India and he says that they occupy an important place in the literature of the *Smritis*[1]. He asserts this by critically analysing the ancient Indian literature. But V.P. Verma maintains that there is no conceptual formulation of the notion of rights, the notion of *dharma* comprehend some of the basic ideas involved in the concepts of rights and duties and freedom, and Hindu conceptualisation is totally different from the modern way.[2]

This later view is convincingly "contradicted by the direct evidence of the texts"[3] by Ghoshal. Altekar expresses the view that :

> While discussing the relations between the state and the citizen, political science seeks mainly to define the mutual rights of the two parties. Hindu constitutional writers have approached the problem from quite a different point of view. They usually describe not the rights of the citizens, but the duties of the state, the former are to be inferred from the latter.[4]

Saletore points out that "for the first time the formulation of what may be termed rights even in the modern sense can be found from the times of

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* In this paper the effort to trace the origin of the fundamental rights and the directive principles to the ancient Indian wisdom need not be construed as acceptance of the existence of the fundamental rights and the directive principles in ancient India as incorporated in the Constitution based on western liberalism and eastern socialist thought. It can only be said that the protection of the fundamental rights and implementation of the directives are one of the aspects of *dharma* in the ancient India.

1. U.N. Ghoshal, *A History of Indian Political Ideas* 550 (1959).
2. V.P. Verma, *Studies in Hindu Political Thought and its Metaphysical Fundation* 259 (1959).
3. *Supra* note 1 at 61, f.n. 8.
4. A.S. Altekar, *State and Government in Ancient India* 64 (1958).

Kautilya".[5] He classified them as "civil rights", "economic rights", and "legal rights".[6]

From the views expressed above it can be inferred that rights were enjoyed by ancient Indians either expressly knowing them or as "comprehended" in "*dharma*" or inferred from the concept of "duties". To Indians the sense of enjoying rights had their roots from the ancient days. There occurred a long gap between the ancient and modern history due to foreign invasion and assertion of political power. That is why most of the contemporary scholars trace them to the Indian freedom struggle. Granville Austin, observed that the "Fundamental Rights and Directive Principles had their roots deep in the struggle for independence"[7]. K.S. Hegde, ex-judge of the Supreme Court of India viewed that the "inclusion of Fundamental Rights in India's Constitution had its beginning in the forces that operated in the national struggle during the British rule"[8]. At the most, as Justice K.S. Hegde said, the inclusion of the fundamental rights in an enumerated fashion, that too in a basic document like the Constitution, can be traced to the sufferings of people during freedom struggle, but not the rights itself.

The demand for the fundamental rights during the freedom struggle was traced to the formation of Indian National Congress itself, wherein the demand was 'implicit'[9]. The first demand for the fundamental rights appeared in the Constitution of India Bill, 1886. Between 1917 and 1919, the Indian National Congress passed a series of resolutions demanding civil rights and equality of status with the Englishmen. The next demand for the fundamental rights was Annie Besant's Commonwealth of India Bill, 1925. The assertion was reiterated firmly by the Nehru Committee in 1928 which stated that the guarantee of fundamental rights should be in such a manner that it would not permit their withdrawal under any circumstances. The Indian leaders pressed for the declaration of the bill of rights at the Round Table Conference which proceeded of make the Government of India Act, 1935, and it was turned down. The framers of the Indian Constitution, thus preferred to have a written bill of rights following the American experience instead of the British pattern of not having them explicitly.

Views are different with regard to fundamentalness of the fundamental rights. Unending controversy is going on, as to whether the fundamental rights are "declaratory" or "constitutive".[10] Declaratory in the sense that

5. B.A. Saletore, *Ancient Indian Political Thought and Institutions* 248 (1963).
6. *Id.* at 249-266.
7. Granville Austin, *The Indian Constitution : Cornerstone of a Nation* 50 (1972).
8. K.S. Hegde, *Directive Principles of State Policy in the Constitution of India* 38 (1972).
9. Shelat, *The Spirit of the Constitution* 16 (1967).
10. The concepts of "declaratory" and "constitutive" are borrowed from international law.

the rights exist even prior to their recognition, as they are natural and law simply declares them. Constitutive means that they came into existence only and only by the enactment of the law. In other words, according to the declaratory view, the law recognises the already existing rights, and according to the constitutive, the law creates the rights.

The declaratory view is based on "natural law" theory. Natural law is based upon the innate moral feeling of mankind; instinctively felt to be right and fair, though not prescribed by any enactment or formal compact.[11] To Aristotle law was the rule of God and also it was based on reason unaffected by desire.[12] Then the great Greek philosopher advocated, that the law "ought to be supreme over all".[13] To Kautilya, the "reason shall be held authoritative" which is nearer to Aristotle's view.[14] Aristotle's explanation of natural law appears apparently of 'two fold' as Friedmann called it,[15] one of 'divine origin' and the other of 'right reason' as its origin.[16] This led to a "conflict between a duty to human law and a duty to the law of God".[17] If Aristotle's two explanations, one as rule of God and the other as that of right reason are viewed through Hindu jurisprudence, there appears to be no difference. "Innate reason" means, what one's own conscience dictates. Conscience tells always only divine truth. The law as the rule of God and as the dictate of right reason is one and the same.

"The philosophical foundations of the rights of man is natural law and the history of the rights of man is bound up with the history of natural law".[18] The concept of natural rights has been accepted by Chief Justice Subba Rao,[19] thus : "the concept of Fundamental Rights is rooted in the doctrine of natural law"[20]. It is submitted that nature itself has limitation and so also in the case of natural rights. Natural rights are embeded in the society. As society changes, they also vary.

In *Kesavananda* v. *State of Kerala*, Justice Mathew dealt with the concept of natural rights elaborately.[21] He observed that "natural rights" are those "rights which are appropriate to man as a rational and moral being and which are necessary for a good life".[22] "They owe nothing to their

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11. *VII The Oxford English Dictionary* 36 (1933).
12. As pointed by B.A. Saletore, *supra* note 5 at 206.
13. *Ibid.*
14. *Id.* at 208.
15. Friedmann, *Legal Theory* 99 (5th, ed.).
16. K.P. Krishna Shetty, *Fundamental Rights and Socio-Economic Justice* 20 (1969).
17. H.A. George Sabine, *History of Political Theory* 39 (3rd. ed., 1960).
18. Jacques Maritain, *Man and the State* 80-81, quoted by Mathew, J., in *Kesavananda* v. *State of Kerala*, A.I.R. 1973 S.C. 1461 at 1939.
19. K. Subba Rao, *Fundamental Rights under the Constitution of India* 1.
20. *I.C. Golak Nath* v. *State of Punjab*, A.I.R. 1967 S.C. 1943 at 1655.
21. *Supra* note 18 at 1938-1944.
22. *Id.* at 1939.

recognition in the Constitution—such recognition was necessary if the Constitution was to be regarded as complete."[23] They are limited by the requirements of those universal order to which they are subordinated, to be more specific, they are limited intrinsically by the end for which one has received them and extrinsically by the equal rights of others by ones own duties to others.[24] Hence the fundamental rights are natural rights and the Indian Constitution recognises and declares them, to make itself a complete code. The effect of this natural rights theory will be that the rights can only be restricted, but they cannot be abrogated. Cautiously, the framers of the Indian Constitution expressly stated the allowable restriction, without committing to the scale of restriction, leaving it to the good sense of future generations. But unfortunately, the rejection of natural rights theory led to the 'odious' decision in the *Habeas Corpus* case.[25]

The constitutive view in a way can be traced to the positive theory of law. Justice Ray held the view that the fundamental rights are social rights conferred by the Constitution and there is no law above the Constitution.[26] But Justice Khanna rightly observes, with reference to right to life and liberty, that they are "not the gift of the Constitution".[27] Similarly the fundamental rights are not the gift of the Constitution.

Fundamentalness of directives

It is the ancient Indian practice of laying down policies, by *Dharmasastras*, for the state. In ancient India the state used to undertake many functions which socialists, ancient and modern, are advocating, yet these went hand in hand with the enlargement of rights and freedom.[28] There is the illusion that the correct economic thought is only of recent growth and exclusively of European origin.[29] But the "concept of a declaration

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23. Corwin, *The Higher Background of the American Constitutional Law*, quoted by Mathew, J., *id.* at 1939.

24. Rommen, *The Natural Law* 243, f.n. 49 (1947), quoted by Mathew, J., *id.* at 1941-1942.

25. *A.D.M. Jabalpur* v. *Shivakant Shukla*, A.I.R. 1976 S.C. 1207.

26. *Supra* note 18 at 1691-1692.

27. *Supra* note 25 at 1254.

28. K.V. Rangaswamy Ayyangar, *Aspect of Ancient Indian Economic Thought* 30 (1934).

29. *Id.* at 5. P.K. Tripathi, Directive Principles of State Policy : The Lawyer's Approach to Them Hitherto, Parochial, Injurious and Unconstitutional, in *Spotlights on Constitutional Interpretation* 291 *ff.* (1972), has chronologically traced the directive principles to the American Constitution of 18th century and its interpretation by the judiciary, then to British experience, explicit expression in Weimar Constitution and then through Irish Constitution of 1937 come to inclusion of the directive principles of state policy in the Indian Constitution.

of policy in regard to social and economic obligations of the state cannot be said to be foreign to the genius of India".[30] Kautilya recorded specific injunction in his *Arthasastra,* as that "the King shall provide the orphan, the dying, the infirm, the afflicted and the helpless with maintenance; he shall also provide subsistence to helpless expectant mothers and also the children they give birth to".[31]

Dharma is the supreme law of laws, king of kings. It is "*Raja Dharma*" in which all living creatures take refuge, Yudhistira observed.[32] *Dharma* is based on innate right reason or is emanated from the conscience of the seers. "*Raja Dharma*" or the principles of the state can also, in a way, include western concept of natural law.[33] It is the obligations of the state to implement them. *Raja Dharma* in effect is the fundamental social and political principle exposing complete fulfilment of human ends as well as universal security.

The directive principles of state policy enunciated in part IV of the Indian Constitution are nothing but principles of *Raja Dharma.*[34] Fundamental principles of governnance mean *dharma* or the path of duty of the government.[35] Thus, these principles can be traced either to divine will or right reason. They are equally fundamental with the fundamental rights. Article 37 specifically echoes as "the principles laid down are fundamental in the governance of the country".

Thought here was the ancient practice of laying down the policies of the state, the idea to have such principles incorporated in the Indian Constitution can be traced to the Karachi Resolution of 1931. Then, the Sapru Committee Report of 1944-45 envisaged the idea of justiciable and non-justiciable rights. B.N. Rau recommended the classification of rights into two parts, one dealing with the fundamental principles of state policy and other with the fundamental rights as such. At first there was staunch opposition for the inclusion of non-justiciable rights in the subcommittee on fundamental rights. Speaking about the nature of the two parts B.N. Rau observed that "there are certain rights which require positive action by the State and which can be guaranteed only as far as such action is practicable, while others merely require that the State shall abstain from

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30. B. Shiva Rao, *The Framing of Indian Constitution: A Study* 319 (1968).

31. B.N. Rao infers in his address to the Indian Council of World Affairs, 10 August 1949. Quoted by Shiva Rao, *id.* at 319-320.

32. U.N. Ghoshal, *supra* note 1 at 189.

33. *Id.* at 181.

34. *Raja Dharma* includes variety of activities of kings, including personal, character and his public relations. It is a comprehensive phrase to which no equivalent can be found in English literature.

35. See the speech of D. Biswanath, V *C.A.D.* 367, taken from K.C. Markandan, *Directive Principles in the Indian Constitution* 133 (1966).

prejudicial action".[36] He gave two examples as typical ones for each type. For the former, the example is right to work, which cannot be guaranteed except directing the policy of the state in that direction, for the latter life and liberty of the person, wherein the state can restrain from interfering. Hence, the distinction was made between the fundamental rights and the directive principles of state policy for the purpose of obviating the administrative and other practical difficulties that might arise if the directives were to be enforced at the behest of citizens.[37]

Some were pessimistic and others were optimistic towards the directives. Some called them as 'a veritable dust bin of sentiment'[38] attaching no value.[39] Jennings referred to part IV of the Contitution as the expression of the Fabian Socialism without socialism.[40]

But to B.R. Ambedkar, the directives were like the "Instruments of Instructions".[41] They were also hailed as the essence of the Constitution[42] and also as the most cardinal, important and creative provisions.[43] Thus, the members of the Constituent Assembly described the importance of the directives from negative extreme to positive extreme and there was no consensus on the point. But the attribute of fundamentalness to part IV by article 37 leads to the inference that the directives are also equally important as the fundamental rights.

Upendra Baxi formulated four questions in evaluating the importance of the directives, the discussion based upon which will be more useful. They 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?"[44]

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36. Quoted by B. Shiva Rao, *II The Framing of Indian Constitution: Select Documents* 33 (1968).
37. K.P. Krishna Shetty, *supra* note 16 at 78.
38. See the speech of T.T. Krishnamachari, VII *C.A.D.* 582, cited by Granville Austin, *supra* note 7 at 75-76.
39. VII *C.A.D.* 487.
40. Ivor Jennings, *Some Characteristics of the Indian Constitution* 31 (1953).
41. VII *C A.D.* 41-42 cited by Markandan, *supra* note 35 at 136.
42. *Id.* at 277 cited by Markandan, *id.* at 126.
43. *Id.* at 479-480, cited in *id.* at 127.
44. Upendra Baxi, Directive Principles and Sociology of Indian Law—A Reply to Dr Jagat Narayan, 11 *J.I.L.I.* 245 at 248 (1969).

There is consensus in holding that the directive principles form part of Indian constitutional law.[45] But, it is viewed that the directives under the Indian Constitution do not confer power, bestow rights or create remedies.[46] Directive principles are mandatory injunctions to the state. An injunction implies power to execute it. Every substantive directive starts with "the state shall" and thereby enjoins the state to direct its policies towards that end, and they confer power upon the state to undertake the measures to implement them. Directives, apart from conferring power upon the state create rights and remedies also. But the exercise of the rights and remedies depends upon the good sense of the public. The method of demanding enforcement of the right is by persuasion and, actual verification whether rights are honoured by the state or not is by the electorate. Hence under article 37, only courts are prohibited from enforcement, but not the good sense of the public.

For the second question whether directives are rules of law, Upendra Baxi answers negatively.[47] He tries to adopt the subtle distinction of rules and policies made by Roscoe Pound and to identify directives with principles and then to deny that the directives form rules of constitutional law. Pound describes rules as "precepts attaching a definite, detailed legal consequence to a definite detailed state of facts."[48] To analyse this statement of Pound, the main ingredients of the explanation are, that there must be (*i*) definite detailed facts, (*ii*) definite detailed consequences, and (*iii*) those consequences must be legal.

With regard to the first ingredient, there is no difficulty, as the directives are definite, detailed facts. The direction of directives is definite, the end they seek to attain is also definite, though within the set out limits, or in other words, within the definiteness there may be variance. The difference of opinion, may occur in regard to "consequences" and their base on "legality". Hence the question is not, what are the consequences of the 'fact', set out in the directives if followed positively, but it is, what are the consequences if they are not followed.

If the directives are not given adequate consideration the consequences in the first instance, will be constitutional crisis and the persons in power may have to face dethronement. Then one may rightly point out, that in the past the Government of India failed to implement directives to a desired

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45. For an elaborate discussion, see Jagat Narayan, Equal Protection Guarantee and the Right of Property under the Indian Constitution', 15 *C.L.Q.* 199 at 206-207; Upendra Baxi, "The Little Done and Vast Undone"—Some Reflections on reading Granville Austin's *The Indian Constitution*, 9 *J.I.L.I.* 323 (1967); Jagat Narayan, Dr. Jagat Narayan Letter to the Editor, 11 *J.I.L.I.* 270 (1969); Upendra Baxi, Directive Principles and Sociology of Indian Law, *supra* note 44.

46. For unique features of the directives, see Upendra Baxi, *id.* at 250-258.

47. Upendra Baxi, *id.* at 258.

48. Roscoe Pound, 2 *Jurisprudence* 124 *et seq.* (1959), quoted by Baxi, *id.* at 259.

measure, but it has not received dethronement on that account. It is submitted that the Government of India from the day of independence has been implementing the directives, and by tactfully diverting the attention of the public, they continue.

The main question is, whether the consequences are legal or not? Even violation of the fundamental rights has no legal consequence strictly as the capacity to enjoy them is violated. Dethronement of the party in power, which fails to realise the directives, results in legal consequence. So the directives attach, "a definite legal consequence to a definite detailed state of facts" to answer in Pound's language and hence the directives are rules of law.

Answering the third question, Baxi, in an emotional tone describes it as "nonsensical"[49] to assert equality of constitutional status between the directives and the fundamental rights. Regarding their legal status he says that the "Directive principles are subordinate to fundamental rights" calling it as "constitutional truism".[50] Without any substantiation, Baxi infers that the Constitution-makers, courts and other agencies viewed them so. It is submitted that, in the Constitutent Assembly, there was no proper discussion on this point and it is incorrect to say that the Constitution-makers "envisioned" that the directives are inferior to the fundamental rights. The preparatory work of the Constitution does not help us to arrive at a conclusion. Also, the courts never followed a policy consistently on the point. In *State of Madras* v. *Champakam Dorairajan*,[51] Das, J., had expressed that the directive principles "have to confrom to and run subsidiary to the Chapter on Fundamental Rights" which in the words or P.K. Tripathi formed "the most damaging opinion expressed on the value and effectiveness of the directive principles."[52] Except in this case, the Supreme Court of India never allowed its pen to write such a language. Later on the doctrine of harmonious construction[53], and the doctrine of integrated scheme[54] were adopted and finally, the judiciary accepted the primacy given to the directives through the 25th Amendment to the Constitution.[55] Other agencies like legislature, and the executive, never advocated the subordination of the directives to the fundamental rights but they canvassed all the time, *vice-versa*. Thus, the view that the directives are inferior to the fundamental rights, relying on the views of the Constitution-makers, courts and other agencies is incorrect.

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49. Upendra Baxi, *id.* at 263

50. *Ibid.* In his foot note 47 Baxi accepts the equality of directives with the fundamental rights at the 'extra-legal levels'.

51. A.I.R. 1951 S.C. 226.

52. *Supra* note 29 at 291.

53. *M H. Qureshi* v. *State of Bihar*, A.I.R. 1958 S.C. 731.

54. *I.C. Golak Nath* v. *State of Punjab*, *supra* note 20.

55. *Kesavananda* v. *State of Kerala*, *supra* note 18.

It is submitted that the directive principles are in no way subordinate to the fundamental rights. Moreover, the head lines of part III holds that part as fundamental rights and also article 37 in part IV holds that part as fundamental. Also there cannot be difference between two "fundamentals". The doctrine of "integrated scheme" enunciated in the *Golak Nath* case[56] by Chief Justice Subba Rao, presupposes the equality of parts III and IV, which constituted the integrated scheme.[57] Hence the directive principles are of the same stature in all respects as that of the fundamental rights.

Finally regarding enforceability, Baxi, stresses for "institutionalised coercion"[58] as a necessary and sufficient condition of law. But Goodhart rightly observes as "if a principle is recognised as binding on the legistature then it can be correctly described as a legal rule even if there is no court that can enforce it".[59] The Indian Constitution is 'emphatic' and declares in no uncertain terms that the directives create binding obligation upon the legislature.[60] Article 37 declares that the directives are "nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws". There could not be more explicit language to make the directives binding on the state.[61]

Hence the fundamentalness of the directives is based on natural law and they are equally fundamental along with the fundamental rights.

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56. *supra* note 20.

57. K.P. Krishna Shetty, *supra* note 16 at 104.

58. Upendra Baxi, *supra* note 42 at 263.

59. Jagat Narayan quotes this from a letter written to him by Prof. A. L. Goodhart in "Equal Protection Guarantee and the Right of Property under the Indian Constitution, *supra* note 45 at 206-207.

60. *Id.* at 207.

61. *Ibid.* Also see P.K. Tripathi, *supra* note 29 at 295, for justiciability and binding character of the directive principles of state policy.

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