

Directive Principles of State Policy and Fundamental Duties: Constitutional Imperatives

Dr. Uday Shankar

Rajiv Gandhi School of Intellectual Property Law

Indian Institute of Technology Kharagpur

Lecture 11: DPSPs within the Realm of Constitutionalism

Greetings to all of you. We are in Module 3, where we are discussing the salient features of the Directive Principles of State Policy under the Indian Constitution. And today, we shall be discussing DPSPs within the realm of constitutionalism. These are the concepts we aim to cover in today's session. We will see, in general, how a constitutional project is envisaged, and how we really look at the positioning of the principles of constitutionalism from these three models: political constitutionalism, legal constitutionalism, and Commonwealth model. We will also see how the directive principle operates under the Indian Constitution interacts with the idea of constitutionalism in the Indian context. When you look at the issue of the idea of constitutional project it is generally understood in a sense that how the very foundation of the document-making process, which governs the country, has taken place and what are the factors that are taken into account the influences that were there in making of the document all these factors collectively facilitate in the making of the constitution. The Indian Constitution is a very significant document, where historical facts have played an important role. There are provisions which truly symbolizes the practical aspects of the governance, as well as there are theoretical underpinnings. That is why you find that the Indian Constitution covers every aspect which are essential for making a modern state with a guarantee to a decent life. Because of the very fact that historical, practical, and theoretical importance are there in the making of the Constitution, those factors were considered in the making of the Constitution. The constitutional provisions are very much so reflect on all the challenges one foresees in modern constitutional democracies. The challenges must be resolved through the constitutional process; otherwise, the very legitimacy of the constitution will be challenged. Thus, it is suggested that the constitution gives the framework, or it is based on a framework with an idea to accommodate religious, linguistic, and intricate ethnic values; and all of this collectively are to be addressed in a manner. So, a core value shared system with

commonalities identified in the making of the constitution. So, you can very well find that the Indian Constitution truly symbolizes these aspects. Generally, the making of the constitution addresses certain aspects of the past and the aspirations for the future, which we describe as a cosmopolitan constitution, where the factors of social revolution are taken into account. As well as a commitment to build a new country with newly found zeal and passion, such zeal and passion get reflected through political processes. So, cosmopolitan constitution largely based on these two ideas, a social revolution where injustices were fought, and a resolution is adopted to shape up a document with a clear commitment to eliminate social injustice in this background. We try to understand what this principle of constitutionalism is and how we really connect it with the directive principles. So, we try to also understand the theoretical underpinning of the directive principles in the larger context.

Constitutionalism, as it has been suggested by Charles Howard, that it is long predates that modern meaning, meaning thereby that the idea of constitutionalism is very old. It is antedated by the Constitution, which is based on certain principles. That is why it is suggested that it is a set of principles embodied in the institutions of a nation. And it is not an external value nor to be seen as prior to the institutionalization process. It is the constitutionalism that is at the base, which is at the very core empowering the institution for governance. And thus, constitutionalism, in its essence, is generally understood as imposing a legal limitation on government, where we understand constitutionalism as a principle of limited government which has been further elaborated by Martin Loughlin, where he argues that constitutionalism is a theory concerning the role, standing, appropriate institutional form, and telos—of a purely modern invention. So, it is the principles of constitutionalism that legitimize the governance which justifies the power of the state. Generally, it has been said that the significance of constitutionalism to a constitution is to be understood as the significance of grammar to language. We try to understand the very strength of constitutionalism on which it flourishes, thrives, or gets further strengthened. Two such pillars are representative government and institutional differentiation. Representative government would mean a process of governance wherein people delegate power to elected representatives. And it is the elected representative who represents the people, and the wisdom of the elected may best discern their true interests. So, it is the elected people who are authorized to govern, who are authorized by the people to govern, and thus the very idea of limited authorization by the people

upon the elected officials or a small number of citizens selected by the people. Second, where you talk about institutional mechanisms, where the idea is to define the scope, ambit, and nature of the power of different institutions. So, vertically, the institutions are performing the task within their power, and horizontally. So, this second pillar is largely related to the idea of separation of powers, where there has to be a very clear understanding among the institutions not to encroach upon each other's jurisdictions. And not encroaching upon each other's jurisdictions is based on the very basis of limited government. So, the concept of constitutionalism is not reducible to a specific institutional configuration. It is not suggesting that the institutional arrangements be done in a particular way. It is more based on the very philosophy of limiting power. It is more about promoting a certain ethos of governing. It is more about defining the boundary and expecting the institutions are expected to operate within that boundary, and how you define the boundary. The principles of constitutionalism categorically convey that the boundary should be defined based on the text, which is known as the constitution; therefore, the exercise of political power must be subject to the constitution. Exercise of all kinds of power must be subjected to the constitution. The directive principles are also connected with this idea of constitutionalism, where we see the directive principle as a non-justiciable feature, and with that it suggests a middle path between constitutionalism and political constitutionalism, where it does not advocate for the non-justiciability aspect, does not advocate for strong judicial review. And there is an expectation that the political processes will proceed in a stable manner would be stepping in to realize the goal laid down in the constitution. A middle path against the prevalent debate on justiciability, and giving significance to judicial review. Directive principle is generally seen as a mechanism, a device, or a strategy for accommodating disagreements and political constitutionalism echoes the same. Political constitutionalism is about managing the disagreement that is very inherent to social life. Where the disagreement is seen to be getting addressed through a legal process or a political process, where law offers a series of partial and temporary resolutions that would enable social life to continue in a relatively stable manner instead of creating a sort of chaos creating disruption and disruptions. So, political constitutionalism is an idea where the constitution steps up with a political action and would not get completely disconnected from the views of people. And the agreements with which people have delegated power to the government. These are the four tenets of political constitutionalism: acknowledgment of reasonable disagreement within a political community, such disagreements are to be managed through democratic processes and institutions. The view

that the constitution should not remove political decisions from the reach of ordinary and representative democratic processes, and judicial institutions, are tools to support and uphold the intention of democratic legislature in managing disagreement; these are four tenets of political constitutionalism. So, you can very well say that here, in political constitutionalism, judicial review is seen as only for validating the legislative action.

Now, when you try to look at the connection between the directive principles and political constitutionalism, there is no denying that the directive principles, as an idea or a goal, accommodate differing viewpoints. It accommodates opposite ideas, and thus the principles get incorporated and institutionalized in the constitution. Through a very clear understanding that the government must progressively approach in fulfilling those values. And non-justiciability further reinforces that understanding, where it says that the fulfillment of the goal and the realization of the goal should be a subject matter of the democratic process and need not become a matter of judicial scrutiny, which is truly reflected when you look at the language of Articles 37 and 38, which talk about securing social order, fundamental aspects of governance, and the responsibilities of institutions that are significant for the life of the nation. And it says that while making laws, the executive and the legislature are required to give credence to and importance to the directive principles. So, directive principles can very well be said to be a manifestation of political constitutionalism where disagreements are managed through a democratic process, and the legislature plays an important role by bringing a sort of yardstick that is acceptable to everyone.

With political constitutionalism, let us also look at the features of legal constitutionalism, which is largely centered around the idea of rights and the enforcement of rights and how the courts interpret them. So, judicial review is generally seen as at the very core of legal constitutionalism, where the judiciary has been tasked with declaring a law is considered unconstitutional if it goes against the entrenched rights, which are enumerated under the constitution. That is generally seen as a form of judicial review, guarding against the tyranny of the majority. So, the integrity of the law is largely based on these rights, where any law that violates them is invalid must be struck down and judges do have an important role to play in determining the wideness of the law. That is the significance of legal constitutionalism. Now, when you look at the directive principles where you point that those directive principles. Flags this point that the non-justiciability of directive principles is aligning them with the political constitutionalism, where it is not the judiciary that

has been entrusted with the task as a prime institution to see the realization of the directive principles. The prime responsibility is largely on the legislature and the executive. So, the judiciary has not been exclusively vested with the power to enforce the directive principles; the power lies with the legislature. So, the directive principles refrain the judiciary; it categorically says that the principles are not to be enforced through the court of law. And thereby, it comes closer to the idea of political constitutionalism. Notwithstanding the very fact that we do have a provision under Articles 13 and 31C, which clearly positions the role of the judiciary on the matter of rights or giving prominence to the rights, which in a way enables the judiciary to undertake necessary scrutiny to ensure that the law effectuating the directives aligns with a larger constitutional mandate. But that is only the role of the judiciary to see whether it is getting aligned with the constitutional mandate or not. Judiciary cannot direct the government to enforce a particular directive principle unless and until a law has been made for effectuating that directive principle.

The third model of constitutionalism is, and we try to see how the directive principles fit into this third model, which is the Commonwealth model. Where the Commonwealth model is largely advocating for a middle path from the traditional concepts of judicial supremacy or legislative supremacy. Commonwealth model, you will find in some of the countries which were colonized by the British, such as Canada, New Zealand, and Australia. Commonwealth model basis on these two ideas: One is pre-enactment political review of legislation, which is largely been seen as the responsibility of the political branch to examine the constitutionality of a legislative proposal. So, instead of the matter going to the court of law and the code deciding on the constitutionality of the legislative proposal, it is the political branch that waits to evaluate whether the legislative proposal is in accordance with the constitutional scheme or not. And the second one is the judicial review of legislation, wherein the code determines the constitutionality of state action. So, in the first mechanism, the legislature engage in reviewing proposed legislation. It is the political process through which suggestions are made for improving the legislative proposal. In the second mechanism, we find that although the courts have the power to review, the court does not really provide finality on a given point. It is not the case that the determination done by the court is automatically final. So, in the Commonwealth model, it is not that fundamental rights impose any kind of limitation on the legislature. The responsibility lies with both the judiciary and the legislature, and the final authority on interpreting and enforcing lies with the politically

accountable branch. So, here you find that this Commonwealth model distinguishes itself from traditional approaches by treating legislature and courts as joint or supplementary rather than alternative, exclusive protectors and promoters of rights. That is why you find that in some jurisdictions; you do have a branch of the judiciary which is manned by judges directly appointed through political bodies or the parliament. Commonwealth model grants the legal power, but not the duty of the final word to the legislature. In giving political discussion to the legislature whether or not to use it in any particular case, the new model creates a gap between this legal power and its exercise. There, where it distinguishes from legal constitutionalism and political constitutionalism. Let us look at the connection between directive principle and Commonwealth constitutionalism. The principle is not enforceable by code; it is fundamental in governance, and there is a defined duty upon the state to apply this principle. So, the overall framework of Part IV of the Constitution certainly conveys legislative supremacy, wherein the judiciary as an institution assumes a subordinate role. So, on this understanding, you can very well say that the active principle given in Part IV embodies the principles of the tenets of the Commonwealth model of Constitutionalism, where legislative authority takes up a predominant position in contrast with judicial review.

To conclude, one may say that the directive principle reflects a middle ground between the extreme models of legal and political constitutionalism. But at the same time, it does not conform with the tenets of the Commonwealth model of constitutionalism; one cannot say that it is entirely based on Commonwealth middle-of-the-road constitutionalism. The structure of Part IVA aligns with the mixed form of constitutionalism, which is what we can currently argue and assert.

These are the references for the session.

Thank you very much.