

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 22: Welfare Goals, Rights, Enforcement: Interaction

Greetings to all of you we are in module four where we are discussing the role of the legislature the executive and the judiciary on the directive principles today, we will be discussing the important intervention done by the Parliament on the matter of distributive justice on the principles of distributive justice vis-a-vis the right to property as enshrined under Part III of the Constitution. Thus, we have given the name of the lecture as welfare goals rights enforcement how the interaction takes place. So, in today's session we shall be talking about the structuring of the right to property under the Indian Constitution. What is the history and how this right to property underwent a complete transformation on the ground of introducing larger reform based on the very premise of fulfilling the goals given under the directive principles particularly Article 39 of the Constitution. Article 39 talks about distribution of material resources, which talks about non concentration of wealth, which talks about reduction of inequalities in income. And how this relationship between the directive principles and fundamental rights have contributed to the amendment to the Constitution in the form of two new Articles 31A and 31B. In fact, another important change has been done by introducing Article 31C which all which we also we plan to discuss with you.

As we understand that the role of the rights or the significance of the rights under any Constitution is to limit the power of the state. So, rights are there for guaranteeing dignity to an individual, rights are there for ensuring autonomy of an individual. Along with that rights also play a critical role in limiting the power of the government and thus making the government accountable for its action which the government takes in the matter of rights, which the government attempts to take in the matter of the very regulation of rights or restricting of rights. Life, liberty and property are considered to be three important rights. Every Constitution for that matter gives prominence to these three rights because these three rights play a

significant role in securing dignity of an individual as well as exercising freedom by an individual and also confronting the state if the state exceeds the assigned power.

The Indian Constitution is no different and that is the reason why right to property has been categorically indicated in the chapter on fundamental rights. There are two provisions one was Article 19(1)(f) where there was a right to freedom given to possess property to dispose property to acquire property. Another one was given under Article 31 where it was stated that that no one shall be deprived of property unless there is a law made for such deprivation. Article 19(1)(f) deals with the right in favour of a citizen, Article 31 deals with the right in favour of both citizen and non-citizen. Article 31 presented a very defined process of depriving any individual of his property that says that it must be only with the authority of law.

This provision was discussed at length in the Constituent Assembly and I read the Draft Article 24 which got adopted as Article 31 in the 1950 Constitution. It says: : *“(1) No person shall be deprived of his property save by authority of law.(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for the payment of compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined.(3) Nothing in clause (2) of this article shall affect-(a) The provisions of any existing law, or(b) The provisions of any law which the State may hereafter make for the purpose of imposing or levying any tax or for the promotion of public health or the prevention of danger to life or property.”*

So, if you read the Draft Article it is very clear that property is acknowledged as a fundamental right. However, the state has been conferred upon with the necessary power to take away the property, but such decision of depriving an individual with the property must be coupled with must be backed by payment of compensation for taking away the property. The state must suggest and come up with a plan for the payment of compensation for dispossessing an individual from his property. Now, this right to property in the context of Draft Article 24 was discussed in the Constituent Assembly and it was suggested that that we need to understand the right to property from the perspectives from the perspective of individual's interest where property plays a significant role in securing dignity where property plays an important role in fulfilling socio-economic life guaranteeing socio-economic entitlement where property plays

an important role for enjoying freedom. On the other hand, property should also be seen from communities' interest or right in that property which is broadly based on the idea of distributive justice where it is suggested that that resources must be equitably distributed. So, that minimal resources shall be with everyone to lead a decent and dignified life. Draft Article 24 underwent a very rigorous debate and very significant suggestion. For example, members suggested that there should not be any compensation for expropriation of the property. If the state decides to take away the property, there should not be any compensation or it was suggested that there a distinction has to be made between petty acquisitions and social reform. If the acquisition is being taken for social reform, for distribution of resources, for distribution of lands or for bringing agrarian reform, then in such a situation there shall be no obligation upon the state to commit to due compensation for such property and that is what the members vehemently argued for. So, it was suggested that on compensation let the legislative wisdom be the last word what shall be the quantum of identifying the compensation and what compensation to be paid to the property owner should be within the exclusive domain of the legislature and judiciary shall refrain from examining this. That is the reason you find that a good number as good as 97 amendments were being moved in relation to Article 31 or Draft Article 24 of the Constitution. There were different views on the payment of compensation different views on the role of the state and the role of the judiciary. First view suggested that that supremacy shall be of the legislature where legislature shall decide on the compensation. Legislature shall decide to withhold the compensation to give this compensation where the property is being taken for a public purpose and the same shall not be questioned in the code of law. The second view was that full compensation should be paid in cases of taking away the property from the property owner including the situations including the cases where property is taken away from zamindaris from the property owners of large agricultural land. The court can be a final arbiter to examine the adequacy of compensation.

So, when you read the Constituent Assembly, it gives a very interesting insight on the relationship between the fundamental rights and directive principle. That is the reason why we thought of making it a separate discussion in our course, because the framers are very clear that the directive principles are of equal importance that of rights and directive principles shall also guide the state for making necessary plan to fulfil socio-economic entitlement of every individual and they were aware of the fact that in such plan one important subject would be property of individuals particularly the one who were zamindaris during colonial rulers. Let us look at what some significant members they argued or they suggested with regard to the right

of the government to take away the property and the claim over compensation by the property owner.

Shri Damodar Swarup Seth said moved an amendment where he suggested to replace Article 24, where he says that by providing this, we are making this provision as a Magna Carta in the hands of capitalists in India. Something similar was suggested by Shri KT Shah, where he said that there would be no expropriation without compensation. He suggested that let there be compensation there for expropriation. Members like Shri Shibban Lal Saxena, Shri HV Kamath and Mrs. Renuka Ray argued or urged that the power to determine compensation should be exclusively with the legislature, with the elected people, with the elected representative and the same shall not be open to any kind of investigation in the court of law. So, these members suggested an amendment that no law relating to compensation shall be called into question in any court on the ground of inadequacy of the compensation. Shri Thakurdas Bhargava moved an amendment where he suggested that let there be proper or fair compensation in the case of acquisition in the case of appropriation.

Shri Naziruddin Ahmed and Shri Jaspat Roy also advocated for just or equitable compensation for expropriation for taking over the property by the government. Shri Naziruddin Ahmed observed that the word compensation shall be construed as fair and equitable compensation. Thus, it is necessary to lay down for fair and equitable compensation as one of the conditions precedents for taking over the property. Shri KM Munshi said that the word compensation cannot be construed to understand just compensation as it has been understood, as it has been explained or interpreted in American or Australian court. Why? Because deliberately there is an omission of the word just in the Indian scheme. Shri Alladi Krishnaswami Ayyar viewed that the principles of compensation laid down by the legislature would be invulnerable in any court unless they amounted to fraud on the Constitution. So, if the compensation is so negligible that it takes the conscience of anyone the decision to compensate for depriving an individual of his or her property should not become a subject matter of judicial process.

Even though numerous amendments were presented, Draft Article was adopted without any major substantive change. An important question was raised that when the government makes a law for taking over the land of private individuals for the very purpose of land reform, giving land to the landless people by taking away the land from the one who has been owning innumerable or who has been owning a large tract of land more than what is justifiably managed by an individual. In the State of Bihar, Bihar Land Reform Act was enacted just in the same

year when India became republic and this Land Reform Act of the State of Bihar was primarily for abolishing zamindari system in the State of Bihar. Now, this Act was assailed by Kameshwar Singh who was zamindar. He argued that this law is violative of the right to property guaranteed to him under Article 31 along with Article 14 of the Constitution because this law is not applying equally to all the categories of zamindars. Now the court in *Kameshwar Singh v. State of Bihar*, (1951) applied a very narrower approach of the relationship between the fundamental rights and directive principles. Court gave the prominence to fundamental rights and struck down the Land Reform Act. Now when this law was struck down by the High Court of Patna, a realization was made by the members of the Constituent Assembly who are also functioning as a provisional Parliament. This is because the matter of 1950 first election took place in 1952 and first Parliament got constituted in 1952. So, after the making and adopting the Constitution, the Constituent Assembly was functioning as provisional Parliament by virtue of Article 379 of the Constitution. So, instead of taking up the matter through an ordinary judicial process of approaching the higher court challenging the decision of the High Court what government did is that government came up with a proposal to amend the constitution in order to bring in a balance between the significance of directive principles particularly the goal of distributive justice the goal of non-concentration of wealth and its applicability vis-a-vis the right to property. So, what Parliament did is that it brought in an amendment to the Constitution - 1st Constitutional Amendment. The amendment which was brought in in the Parliament also based on the very the very consideration of the important land reform laws of different states or the provisions related to equitable distribution of the wealth.

So, apart from *Kameshwar Singh Case* these three cases -*State of West Bengal v. Subodh Gopal Bose*, (1954), *Dwarkadas Shrinivas of Bombay v. Sholapur Spinning and Weaving Co. Ltd.*, (1954) and *State of West Bengal v. Bela Banerjee*, (1954), were also there before the Supreme Court. And the Supreme Court in these three cases gave prominence to the expression compensation as it has been given under Article 31. The Court held that the compensation is very meagre and therefore, the expropriation exercise undertaken by the government is not as per the right guaranteed in Part III of the Constitution. So, the court has said that without reasonable compensation the decision of the government would be violative of Article 31. As I said that all this resulted into the amendment. As per the amendment whereby two new provisions were added. Article 31A which was introduced to save laws related to the acquisition of states, save laws with regard to extinguishing of shareholding, amalgamation of corporations. We are here particularly concerned with the acquisition of states or the land

reform laws. So, the 1st Constitutional Amendment narrowed down the protection given to zamindars in the context of the right to property and the compensation in cases of expropriation by the state. So, Article 31A was introduced to save such laws and Article 31B was introduced to grant immunity to certain set of laws which were introduced for agrarian reforms in this country. Article 31B suggested that any law which has been included in Schedule 9 cannot become a subject matter of judicial scrutiny. And when it was challenged in *Sankari Prasad Deo v. Union of India*, (1952). The court said that the Parliament has got a very overarching power to amend the Constitution which includes even an amendment of fundamental rights. Because 1st Constitutional Amendment has amended the right to property and to claim compensation for acquisition of such property. In a way it has also brought in a very

defined balance between socio-economic goals laid down under the directive principles and individuals right over property. Now, *Bela Banerjee Case* also led to the 4th Constitutional Amendment 1955 where in “compensation” was added with the word “just and equivalent”. It was equated with “just an equivalent”, “full and fair money equivalent” or “true equivalent”. It was suggested that compensation must be a just compensation. This which in a way it was suggested that that even if the term is compensation the same should not be understood as any negligible sum to be paid to the land owner for taking away the property. Now this issue was raised time and again that whether the compensation determined by the legislature should it become a subject matter of judicial scrutiny and if it becomes subject matter of judicial scrutiny, it defeats the purpose of giving prominence to the public purpose

prescribed in the directive principle or economic justice mandated under the directive principle, which of his fundamental rights. The court continued to say this that compensation must not be negligible, must not be illusory. If it is negligible or illusory, then there is the scope of reviewing the sale. In *RC Cooper v. Union of India*, (1970) the court said that the Constitution guarantees right to compensation, but then it is not that equivalent amount to be paid in the form of compensation to the land owner. The court in *RC Cooper Case* has said that the right to compensation which is there under Article 31 guarantees an equivalent in money of the property acquired. So, *RC Cooper Case* has again given prominence to the amount which the government is paying for acquiring the property. And then this compensation word was substituted by 25th Constitutional Amendment as amount. When the question was raised that whether this word amount also to be understood as compensation as a just and fair compensation.

The court in *Kesavananda Bharati v. State of Kerala*, (1973) has said that the replacement of the word amount would not be seen as any substantial change in the scheme of compensation. The obligation of the state to pay compensation for expropriation. The court said that if the amount is illusory then there is always a window available for the judiciary to interfere. But then the court has certainly with this narrowed its own role in the matter of acquisitions. Now we have got a law which talks about land acquisition and the compensation. There is a statutory law which talks about acquisition for the public purpose. An important development took place through 44th Constitutional Amendment Act where right to property was omitted from the Chapter on fundamental rights and it was placed as Article 300A in the Constitution. So, it was replaced and was given a different status from fundamental right to constitutional right.

Article 300A reads: *“Persons not to be deprived of property save by authority of law. No person shall be deprived of his property save by authority of law.”* And because the court has said in *Kesavananda Bharati Case* that while exercising amending power even fundamental rights can be amended. So, in 44th constitutional amendment the Parliament has amended right to property where Article 19(1)(f) and Article 31 was omitted from Part III of the Constitution. So, Article 31A when you read it limits the role of the judiciary by stating that if the estate has been taken away or if the law is made to take away the estate, then such law should not be considered as void because it violates Articles 14 and 19 of the Constitution. Under Article 31A, 5 subject matters of such intervention by the government on the matter of owning property was included. Prominent one in relation to directive principles is related to land reform, acquisition of estate.

As I said that that another important change was done is Article 31B. Now, why this focus on Article 31A and Article 31B is to just bring this discussion at the forefront that as and when judiciary has failed to draw a balance between the Part III and Part IV or particularly between the socio-economic welfare goals laid down in Part IV and the rights given in Part III, it is the Parliament which has stepped in and provided that balance. Article 31B which was also a significant result of the 1st Constitutional Amendment is provided for a newer scheme called placing a law in the 9th Schedule and such placement would not be open to judicial review. I read Article 31B, which says: *“Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the*

rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.”

With this innovative idea of 9th Schedule a blanket immunity was suggested for certain state laws. Now, the members who are members of the Constituent Assembly and member of this provisional Parliament, they debated on these two provisions. Pandit Thakurdas Bhargava said that Article 31A and Article 31B go much beyond the necessities as the nine Acts given in the Schedule are finalised by one stroke of the pen. Because when Article 31B got introduced, it was the nine acts which were placed under the 9th Schedule. I do not want to be a party to the amendment that validates all the laws in one stroke without going through these laws. So, only because the scheme of Article 31B suggested that only because the law was placed in 9th Schedule now it is having a kind of blanket immunity. Pandit Kunzru suggested that alleged amendments were inserted not because of the ineffectiveness of Article 31, but because of political purposes. Shri KT Shah also criticizes that the inclusion of all nine Acts in the Schedule as inclusion undermines the interpretative power of the Supreme Court and the President cannot act impartially and independently. Dr. Ambedkar justified that Article 31A has got a limited purpose only in relation to states or to be read as purpose of land reform.

As I said Article 31A has got expanded by adding other facets. For example, taking over the management of industry, extinguishing the shareholding rights, all these are also included in Article 31A. Now, scope of Article 31A was challenged in some of the cases. For example, in *KK Kochuni v. State of Madras*, (1960), the court has said, that a law unconnected with agrarian reforms cannot have the protection of Article 31A. So, court was in a way very determinative on this approach that if such kind of immunity is given then it must have a direct connect with the purpose for which the amendment has been introduced. In *Balmadies Plantations Ltd. v. State of Tamil Nadu*, (1972) again it was said that the protection of Article 31A can be sought only if the purpose is disclosed in the statute. So, there has to be a very clear enunciation that why the law is made and whether such law has to do with land reform or not. In *Hasmukhlal Dahayabhai v. State of Gujarat*, (1976) again it was observed that the Constitution does not bar dual protection of Articles 31A and 31B. There is a possibility that both the protections can be made available to the laws. So, Article 31B if you look at it, as I said it came up with a new plan of giving immunity to the laws, once the laws are placed in the 9th Schedule. So, Article 31B immunizes law that take away fundamental rights and such immunity is also from back date, it is also retrospective in nature. When 9th Schedule scheme was introduced, only 9 Acts

were inserted in 9th schedule. As on date 285 different laws are there and it is criticized that these many laws are not directly connected with agrarian reform or land reform or not directly connected with the very principles laid down in Part IV of the Constitution.

The very language of Article 31A and Article 31B certainly suggest that Article 31B is wider in nature because of the kind of immunity which is given just because of placing the same in a 9th Schedule. Article 31B was put under the right to property and immediately after Article 31 and Article 31A. And this very opening word of Article 31B says that “without generality of the provisions contained in Article 31A” means that Article 31 was meant to protect legislation dealing with property rights and not any other types of legislation. So, the scope and ambit of the right was very limited. But as I said that Article 31 was been invoked to protect laws which are not concerned even with property rights. Article 31 was in question that what is the scope and ambit? The court in *State of Maharashtra v. Mansingh*, (1978) has said that Act once struck down by the court is not open to challenge when it is subsequently included in Schedule 9. So, this is kind of blanket immunity law enjoys once it is placed under 9th Schedule. In *Waman Rao v. Union of India*, (1980), the court has said that amendments to the Constitution made before 24th April 1983 were valid and constitutional but amendments made on or after the said date were open to challenge on the ground that they are beyond the constituent power of the Parliament. So, with the timeline in *Waman Rao Case*, the court has given a space to itself that all kind of inclusion must not be given immunity. The court must examine that whether the very exercise is done in pursuant to the objective of Article 31 or not.

In *IR Coelho v. State of TN*, (1999), the court has come up with this understanding where the court has said that “the judgment in *Waman Rao Case* needs to be considered by a larger Bench so that the apparent inconsistencies therein are reconciled and it is made clear whether an Act or regulation which, or a part of which, is or has been found by this Court to be violative of one or more of the fundamental rights conferred by Articles 14, 19 and 31 can be included in the Ninth Schedule or whether it is only a constitutional amendment amending the Ninth Schedule that damages or destroys the basic structure of the Constitution that can be struck down”. So, how do we really look at the questions on the very exercise of placing a law in 9th Schedule and whether such placement violates basic structure. The very nature of law which is violating the basic structure because the very fact that such law is suggested to be placed in 9th Schedule. The court in *IR Coelho Case* answers this question by saying that a law that abrogates or abridges rights guaranteed by Part III may violate the basic structure doctrine or it may not.

There is a possibility that law is relative of fundamental rights and that violation may directly hit the basic structure. If former is the consequence of the law, whether by amendment of any article of Part III or by an insertion in the Schedule IX, such law will have to be invalidated in exercise of judicial review power.

So, in IR Coelho Case the court has said that we can very well examine that whether the law is violating Part III or the law is per say violating the basic structure of the Constitution and if such scenario arises then the court can apply basic structure doctrine for invalidating such amendment, invalidating the placing of the law in the 9th Schedule that is what the court has said. So, one may argue that Article 31 which was a fundamental right in favour of right to property with a very clear power in guaranteed in favour of the state for acquiring the property and paying compensation that has undergone a complete transformation in order to do a balancing between the welfare goals enshrined in the Constitution particularly Article 39 with right to property as of right given in the original Constitution. So, that is how you see that important amendments were introduced new provisions were added Article 31A and Article 31B to validate agrarian reforms, to give constitutional validity to land reforms and also to see that compensation should not become a major litigative issue on the matter of expropriation and on the matter of distributive justice. Eventually the court has approved the scheme of altering the fundamental rights in Kesavananda Bharati Case and taking clue from there right to property was removed from the Chapter on fundamental rights and made it an ordinary constitutional right.

So, one may say that that this evolution which has which has been seen in the form of constitutional amendment Article 31A and Article 31B and Article 31C, they are to be seen as a kind of effort to draw a balance between the principles laid down and fundamental rights for ensuring socio-economic justice while upholding constitutional values, while upholding also the significance of liberty and dignity.

These are the references of this session.