Constitutional Studies
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Lecture 18
Directive Principles of State Policy

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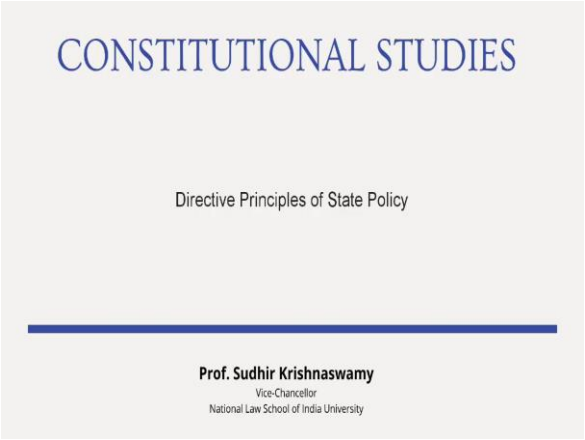

Hey there, welcome back to Constitutional Studies Week 9. This week we focus on art of the constitution, a distinct chapter called the Directive Principles of State Policy. This chapter, chapter 4 of the constitution has generated a fair degree of confusion for the courts, for parliaments, for law students and lawyers alike. It is a novel and interesting part of the constitution that carries a significant historical burden, the burden of the transformation of India to a developing country into a modern one. A country free from the ravages, economic inequality and social inequality and ready to embrace the world in the spirit of scientific requirementsd.

So it is quite a broad agenda for social transformation which is captured in Part 4 of our constitution, but one that has received very little intellectual attention and legal attention over the years. In this lecture, I will introduce you to this part of the constitution and take you through some of the main debates that occurred both prior to the constitution and soon after the constitution's adoption leading up to the turn of the century.

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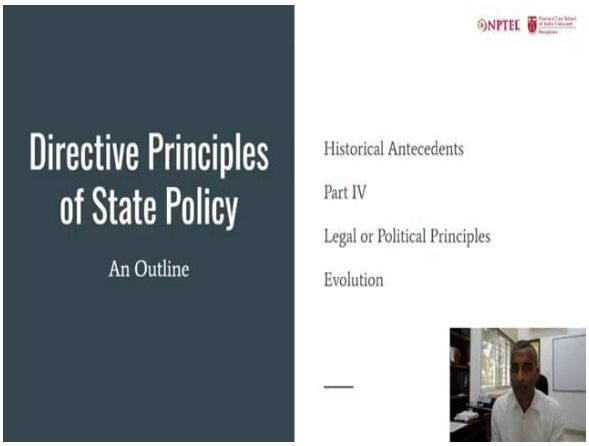

The broad outline of this lecture will be to first introduce some historical antecedents to the directive principles of state policy. Its novelty does not mean that it is invented out of thin air. Similar experiments existed in a couple of constitutions and had been spoken about in Indian political history of freedom movement. We then trace how, ~~this,~~ the directive principles came to be placed in part 4 of the constitution. And then enquire whether these principles are best thought off as legal or else political principles. And what would that mean in practical terms.

Finally we close with a short take on the evolution of these principles from relative back waters of the constitution in the 50s to emerging quite silent stage at the turn of the century and is likely to be very important in the decades to come. So let me get started with by tracing some of the early historical antecedents to directive principles chapter.

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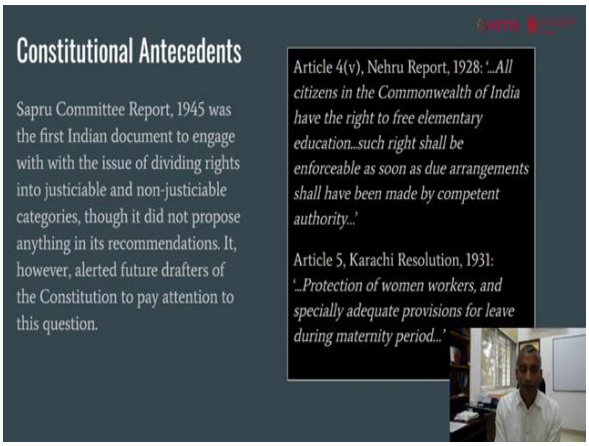

Now the Sapru Committee of 1945, we have done this data in this kind of historical tracing through much of this course and I think by now you are familiar with this method. It is very important for us to understand this background history or else we end up with rather truncated or minimal understanding of the constitutional provisions as they are. The Sapru Committee of 1945 was the first Indian document to engage with the issue of dividing rights into justiciable and non-justiciable categories.

Now you remember in the last session that we discussed the Karachi resolution, which had already embraced a wide degree of social and economic rights as being part of the *Poorna Swaraj declaration* that India should be committed to Gandhi's plan of action to make the freedom movement appeal to the wide mass of this country. Article 5 of the Karachi resolution spoke in terms of the protection of women workers and making adequate provisions for lead during maternity and so on and so forth.

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Even earlier prior to the Karachi resolution, the Nehru report in 1928 had already anticipated that all citizens in the common-wealth of India shall have the right to free elementary education and that a suitable adjustment of time may be given for the enforcement of this right so that adequate resources could be made available. It was this kind of tension between granting wide social rights, rights to social welfare goods to be provided by the state to citizens at large and the lack of adequate resources that seems to animate the Sapru Committee report in 1945.

The Sapru Committee report was the first to divide up these kinds of commitments., C~~c~~ommitments to liberty and equality and fraternity on the one hand and commitments to social and economic rights on the other into justiciable and non-justiciable categories. Let me spend a minute to explain this. Justiciability means is it amenable to a court's jurisdiction, can a court of law consider these rights and then~~in~~ interpret and implement them?

The Sapru Committee was the first to hint that - may~~-~~be, some of the social and economic rights should be put into a bucket where they were not enforceable by the courts.

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So the future drafters of the Indian constitution in the constituent~~te~~ assembly picked up on these concerns. T.T Krishnamachari was one who was quite skeptical of the moves to treat part 4 of the constitution as being non-enforceable by courts. He suggests, ~~and I read~~ "in view of the fact that quite a number of new items have crept into this part which might be called veritable dustbin of sentiment. I see no objection actually to this or any other amendment coming in because this dustbin seems to be sufficiently resilient as to permit any individual of this house to ride his hobby-horse into it."

You can tell from T.T Krishnamachari's acerbic tone that he was no fan of the design of P~~p~~art 4 of the constitution nor was he a fan of the content, the principles that went into P~~p~~art 4 of the constitution. Ambedkar though took a slightly different view, he suggested that unlike Krishnamachari it was not his intention to introduce into this part, principles as mere pious

declarations, they should be made the basis of all executive and legislative action that may be taken here after in a matter of governance of the country.

So Ambedkar took the view that committing principles to legislative and executive action was not simply a pious declaration, it was just a division of labour between the various organs of government. While the judicially might have primacy with respect to the enforcement of fundamentals rights, the legislature and the executive will have primacy with respect to the implementation of the directive principles.

Now the directive principles are wide chapter of principles and to the extent that Krishnamachari is skeptical about whether something holds them together he may well be right, but having said that let us see what we ended up.

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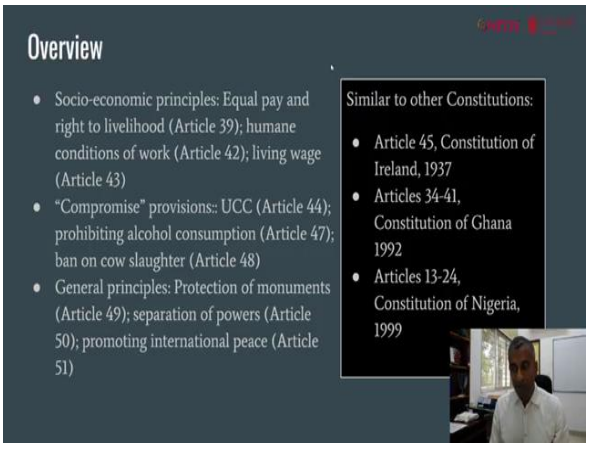

We ended up with a chapter part 4 of the constitution which runs from Article 37 to Article 51 but there are different kinds of principles in the chapter. First, one notices that there are principles that could best be described as socioeconomic principles. Equal pay for equal work assuming conditions of living wage all related to labour, to questions of labour. There were principles on which a common agreement could not be found and those principles were deferred in the constitution neatly exercised left to future legislature, a future executive to decide to uniform civil court, alcohol consumption and cow slaughter seem to be topics that could not be settled by the constituent assembly as they were and it simply can differ.

A third set of principles in part 4 of the constitution appear to be those principles that are broad principles that apply to various fields ranging from historical monuments to the principle of the separation powers and one promoting international peace. But we cannot go too far while discussing part 4 of the constitution without talking about the key, the two key principles in part 4 of the constitution.

The first of these is Article 37; so we will come back to 37 discussions at a later point when this, when going over early discussions on enforceability. But let me see this much, the provisions contained in this part shall not be enforceable by any court. But the principles therein laid down 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.

Now this core principle, 37 you can call it the gateway Aarticle to part 4 of the constitution makes 2 or 3 things, 2 or 3 elements clear. Nnot enforceable by court, nevertheless fundamental in the governance of the country. A legislative and executive duty to implement these principles, to apply these principles. This was the structure that 37, but equally important are the two key provisions of Aarticles 38 and 39, which set out two broad principles.

First; the principle that a state must act in a manner that promotes the welfare of the people at large and second that the state must act in a manner that minimizes inequalities in income and inequalities in status, facilities and opportunities. Article 39 goes even further, it assures that everyone should have a common right to an adequate means of livelihood, that is Article 39 A and it follows that with rather strong principles against monopolies by suggesting that the ownership and control of the material resources of the community are so distributed as to sub serve the common goods.

It also seems to put in place a principle of competition that the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment. These kinds of principles, principles of economic and political design are not common place in constitutions, while the constitution of Ireland does provide for some broad socioeconomic rights for the guidance in the legislature. It is not anywhere close to being as broad or substantive as the Indian provisions.

Ghana and Nigeria have followed India in part by adopting a mix between enforceable and non-enforceable fundamental rights. But once again these jurisdictions are, do not have the same width and breadth as the Indian constitution. So let me stop with the overview here, some broad principles in part 4 of the constitution.

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And what we are trying to do in the next stage is to move on and understand, what is this distinction between enforceability between fundamental rights and directive principles? If I returns to Article 13 clause 2 and Article 37 and maybe we should read Article 32 of the constitution as well, we understand that while fundamental rights are phrased in negative terms which is that the state shall not make any law which takes away abridges the rights conferred by this part in directive principles the state has a positive obligation, the state shall apply these principles in making laws and these principles are fundamental in the governance of the country.

Conversely, while in fundamental rights in Article 32, the Supreme Court and the High Court in Article 226 are empowered to enforce these rights to the detriment, to strike down state and executive action, in Article 37 it makes it very clear that the provisions of this part shall not be enforceable by court. Let us add this together, fundamental rights state cannot take away or abridge directive principles, state shall apply these principles in making laws.

Fundamental rights, the court shall enforce fundamental rights and strike down state action directive principles the court shall not enforce these principles it is left to the legislature. So you

notice as a matter of institutional design that part 3 and part 4 of the constitution adopt at least as an institutional matter compl~~e~~mentary approaches, while one endows the state with power, the other takes away state power, while one endows the court with the power to enforce the other directive principles takes away the power of the court to enforce.

A second distinction is important here and that distinction is the distinction between enforceability and justiciable. In an earlier slide we have used the language of justiciability, while talking about the historical antecedents to part 4 of the constitution. But the constitution chose to only make laws, I mean, directive principles not enforceable by the courts, but they ~~are~~ may be justiciable by the courts.

What made the distinction be, I want to suggest to you that the distinction is simply one between primary enforceability of the primary role of the court to enforce these provisions as distinguished form the secondary ability of the court to take into account, to take cognizant of the principles and interpretation in other ways but not directly enforce them. So the gap between enforceability and justiciability allows courts to have a secondary role, but not a primary role. So, so much for the distinction between directive principles and fundamental rights.

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And what you will notice is that this approach to directive principles that I tried to sketch out for you so far is not one that is commonly found in the literature, in the academic literature or in the

commentaries in this field. And hence, I recommend you that we might do well to illustrate it a little bit more before we look at how the Indian courts have applied this area of the constitution.

To summarize, what we have suggested is that the political constitution, which is implemented by the political branches of the government through actions of legislation, executive action and budgetary spending is what the directive principles, is where the directive principles belong. The legal constitution that is the constitution has rules of law allow the courts to undertake a secondary implementation of the directive principles.

As an interpretive tool to fill in gaps and shape constitutional interpretation to enforce action taken by political branches, to nudge political branches, to act. This was how the constitution was designed and part 4 of the constitution gave a clear emphasis to the political branches of government and de-emphasized legal implementation through the courts. However, this division in legislative, executive and judicial role was not the one that was well understood either in the 1950s or for that matter as we turn the century, in the first two decades of 21st. So let us get started and look at how the courts and other institutions have approached this field.

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In the earliest cases and the earliest case was a case called *State of Madras versus Champakam Dorairajan* in 1950 one of the earliest cases before the Supreme Court itself and the question before the court was whether affirmative action reservation quotas towas non-brahmin communities in the state of Tamil Nadu was constitutionally valid.

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Now there was a provision in the directive principles which suggested that these kinds of affirmative action are programmes~~s~~ were~~as~~ necessary to reduce the inequalities between social groups. However, the constitution also prohibited in Article 15 discrimination on the basis of caste, the court took the view that a quota of a non-brahim populations that effectively on the basis of caste quota that identified communities based on caste and gave them a special ability to enter medical and engineering schools was unconstitutional.

Because it violated the fundamental rights in Article 15 (1) and Article 29 (2) but the directive principles of state policy which mandated that the state must do such things, the court suggested was unenforceable and hence not relevant to the discussion in the case. This was the first case where the court ~~is~~ established the priority or the relative importance of fundamental rights over directive principles a debate that has come to dog the Indian debate ever since.

Mohammed Hanif Qureshi in 1959 the court took a slightly moderate tone, it dealt with the case, it dealt with the law made by the State of Bihar with respect to butchers who made a living out of the slaughter of cows. And the court took the view that directive principles that require some actions against cows slaughter in line with animal husbandry should only be implemented in a manner that was consistent with fundamental rights.

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Once again the court suggest that fundamental rights have priority over the directive principles, but does not undermine them in full. In similar cases in *Chandrabhavan* and so on the court has started to moderate this question of the relationship between fundamental rights and directive principles, but by that time much damage~~d~~ had been done in the field of land reform.

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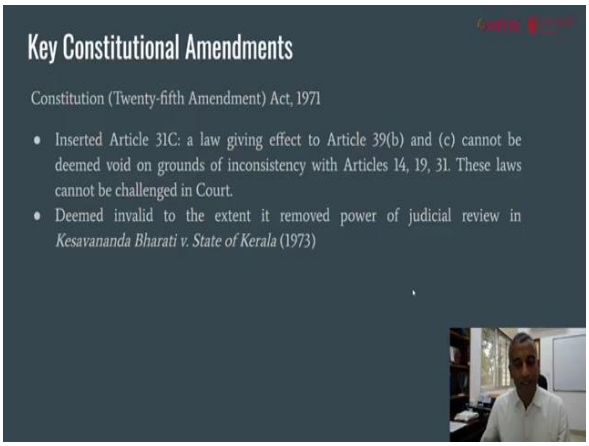

What it occurred in that period from 1950 to 1970 was that several land reform laws had been struck down on the grounds that they violated the right to property. This in the early years led to the amendment of the right to property, its removal and replacement as a constitutional amendment. However, the courts were not done yet. In subsequent cases they still struck down various land reform and tenancy reform legislation on the grounds that they pay inadequate compensation or they do not follow due process in the ways in which they eliminated property rights.

In ~~the Twenty-fifth Amendment Act,~~ the Constitution Twenty-fifth Amendment Act in 1971 a new provision was introduced to constitution Article 31C, Article 31C took the view that so long as you were implementing Article 39 (b) and (c) there could be no challenge to a law on the grounds that violated 14, 19 or 31. Now remember 39 (b) and (c) are the provisions that say the ownership and control of the material resources of the community are so distributed as best to sub serve the common good.

And (c) says that the operation and the economic~~s~~ system ~~is~~ does not result in the concentration of~~with~~ wealth and means of production to the common detriment. You can imagine that the purpose of Article 31C was primarily to protect land reform legislation and at a later day protect nationalization statues, which were used to push India towards more socialist mixed economy.

This Twenty-fifth Amendment sparked one of the longest and arguably most significant constitutional battles that relate to land reform laws and this was *Kesavananda Bharati versus State of Kerala*. It was the first case in 1973 where the Supreme Court said that while parliament had the power to amend the constitution it could not amend the constitution in ways that altered its basic features.

As far as Article 31C was concerned majority of the courts took the view that a harmonious balance could be maintained between fundamental rights and directive principles and was willing to uphold this provision. Now you must remember that this argument for a harmonious balance is a long way from *Champakam Dorairajan* and the early cases.

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So between the period 1950 and 1973, the court has effectively changed its mind and put in place a more balanced account of the relationship between part 3 and part 4 of the constitution. Nevertheless the Forty-second Amendment Act was enacted in 1976, it widened Article 31C to include all directive principles of state policy effectively giving directive principles of state policy a status superior to the fundamental rights in the constitution.

Now surprisingly Article 31C was challenged in *Minerva Mills case*. The court in ~~and~~ Minerva Mills case, took the view that ~~as harmonious balance was~~, harmonious balance between fundamental rights and directive principles was a basic feature of the constitution, the constitution could not be amended in a manner that gave primacy to the, to directive principles

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over fundamental rights. In this manner the court moderated its position on the hierarchy, but also tempered the push by parliament to elevate the directive principles over fundamental rights.

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This subsequent position Minerva Mills position on the harmonious relationship is now part of a basic structure doctrine and cannot be amended. After 1980, there has been a wave of public interest litigation and other litigation enforcing directive principles as fundamental rights and the court has been very willing to get into these cases and allow directive principles to be effectively read into part 3 of the constitution.

These include the directive principles that relate to education, environment and free legal aid, we have discussed some of these cases earlier in this course, but the court now was effectively interpreting part 3 to include the core elements of part 4.

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In the constitution Eighty-sixth Amendment Act, you see that parliament and the executive has jumped into the act and has begun to incorporate some principles that are found in part 4 of the constitution in the case of compulsory education; Article 45 as a new fundamental right under Article 21A.

This fusion between part 3 and part 4 of the constitution may seem like some radical new push and transforming our social and legal sphere, but it is not quite what it seems, while the legal form of part 4 of the constitution and part 3 of the constitution is changing, the capacity of the state to deliver these promises is not quite there yet. And hence, the early debates as you were maybe familiar with the constituent assembly still remain.

We can make pious declarations and if we do not have the ability to implement and enforce them then just by merely calling them rights we do not achieve very much. We also run the risk as we do in *Shyam Narayan Chouksey versus Union of India* that a court might decide that in order to cultivate a spirit of nationalism or patriotism that the National Anthem should be played in cinemas. And it may do so based on the directive principles as well as fundamental duties.

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In either case, the enforcement of directive principles by the courts appears to be, I mean a constitution framers seem to have chosen well to keep directive principles out of court enforcement and to leave it to future legislatures to make these changes. This gets us up to the early part of the 21st century we are now at the end of the second decade of the 21st century and

we see that while there is a resurgence of emphasis on the directive principles, the core confusions that existed at the early part of part 4 implementation in the 1950s remain, while we are, we still remain unsure about the precise role of the court. And the precise role of the legislature and the executive, and these questions remain with us even at the end, at the point at which we are.

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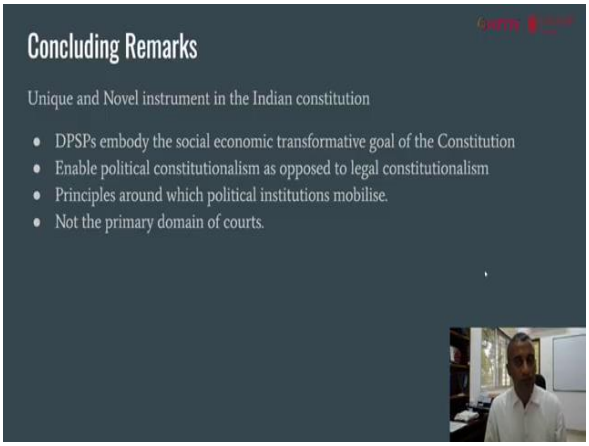

So to conclude let me say the following, part 4 of the constitution represents a unique and novel instrument in the Indian constitution by which I mean much unlike most other constitution, is not like the Constitution of the United States for that matter countries in Europe have such part 4 model.

Second, the directive principles were placed in part 4 of the constitution to really capture the transformative goal of the constitution, you must remember that we notice when we read the preamble that the Indian constitution was not historically self-conscious it did not talk about colonialism, the ravages of cast, the ravages of communalism and so on.

But part 4 of the constitution embraces that back on history and prescribes some key principles as being the foundation principles of governance in India. Second, part 4 of the constitution directive principles seems to embrace a model of political constitutionalism as opposed to legal constitutionalism by this we mean that political institutions are far more important for the mobilization of these principles than courts, it is at least common place to say that somehow

social transformation in India has been engineered or propped up by the courts as being the real vanguard among the institutions of state.

This short history that I have covered for you today should make it very clear that when the political branches of government the executive and legislature were strongly pushing for the implementation of land reform laws as well as other laws of social transformation like affirmative action laws, it was the court that struck down these laws and forced a very strong institutional conflict that ~~in (())(32:29)~~ led up to the emergency and almost constitutional breakdown in the 1970s.

So I have given you a very early hint of why ~~the directive,~~ the story of the directive principles of state policy is critical to an understanding of Indian constitutional and political history as well as Indian constitutionalism in general. For the purposes of an introductory lecture like this, I cannot deal with these questions in any greater detail so I will stop here. But I hope I have provoked enough interest among you to look at the directive principles with care and to imagine what is the kind of political society that the implementation of directive principles ~~is~~ aim to achieve.

So let me stop there, thank you. We will come back for the last lecture of this course in a couple of days. thanks, bye.