## Constitutional Studies Professor Raag Yadava National Law School of India University Lecture 2 Directive Principles of State Policy and Philosophical Principles

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Hello everybody, welcome back to the second lecture of the Constitutional Studies course for week 6. In the second lecture, we will be addressing first the directive principles of state policy found in part 4 of the Indian constitution which concern the Right to Equality and after going through these provisions, we will be heading straight into the philosophical principles, the identification of the philosophical principles and the understanding of the philosophical principles which underline the various constitutional provisions.

As you would have seen from our study of part 3 of the constitution and as you will see again in part 4 of the constitution. When the constitution speaks of equality, it does so in a number of different ways and it is important for us to understand and unpack the different meanings of the word equality, so as to be able to effectively address in a nuanced and forceful way the various claims to equality that are made in the name of the constitution.

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So, let us first step into part 4 of the Indian constitution which is the directive principles of state policy and the provisions for the right to equality. Now, if you remember from last week the directive principles of state policy are not enforceable in courts of law, unlike part 3 of the Indian constitution.

The rights that we considered in the first lecture are those that, if violated, can be vindicated by approaching either the High Court of the state in which you are or the Supreme Court of India. The directive principles of state policy however cannot find resolution in this way. Yet, they are extremely important in two ways.

The first is that the Supreme Court has consistently held that the content of the fundamental rights in part 3 of the Indian constitution must be understood by an analysis of the directive principles of state policy in part 4 of the constitution. So, for example, if there is a case concerning the Right to Equality in terms of the maternity leave or equal pay for equal work to reduce the gender pay gap, the Supreme Court will in looking at Article 14, look at the concomitant directive principle in part 4 of the Indian constitution so as to provide a broad and liberal and progressive understanding of the right under Article 14.

Now, the second way in which the directive principles of state policy are important are in relation to citizens, they are useful for citizens to measure governmental action. The directive

principles of state policy can be seen by us as the constitutional aspirations or hallmarks of good governance by any government of the day.

And therefore, in our understanding, in our appreciation and our criticism of governmental policy as citizens whether it be by the ballot box every 5 years or in any other way, it is important for us to have the directive principles of state policy especially the provisions concerning equality which we will have an occasion to study now, to have them before us so as to be able to measure the actions of the government of the day against this charter of aspirational political ideals.

So, as to be able to say whether the government has done well, whether the government has delivered on the constitutional promises that it is obliged to work towards or whether it has forfeited its responsibility to meet these ideas.

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The constitutional principles contained in part 4 that are relevant to us are Articles 39, 39A, Articles 41 and 46. Coming first to Articles 39 and 39A, Article 39 notes that the state shall in particular direct its policy towards securing, that the citizens men and women equally have the right to an adequate means of livelihood, that the ownership and control of material resources of the community are so distributed as best to subserve the common good, that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment, that there is equal pay for equal birth equal work for both men and women.

So, therefore, we see that there are four clear commitments to equitable distribution in Article 39, Article 39 A first notes that the state must endeavor to ensure that both men and women have an equal access to means of livelihood. Therefore, it exhorts the state to reduce and minimize the sex discrimination that exists in the field of access to employment.

In sub-clause b of Article 39 notes that, so far as possible, the state must ensure that the ownership and control of material resources are so distributed as best to subserve the common good and in particular in clause c that the operation of this economic system that is the distribution of material resources does not result in the concentration of wealth and means of production to the common detriment.

Therefore, what the directive principles of state policy are committing the government to do is to ensure that in so far as the distributional aspect of equality goes, that is not the status based equality but the distributional aspect of the material equality that our policies and principles ensure that there is no concentration of wealth and that the resources of the community are distributed so as to best subserve the common good.

Now, obviously if as in this case of the "Zamindari system" or as we saw in our study of the social and historical realities of India and as Professor Amartya Sen expertly demonstrates in his lecture. The current system in India does not ensure that the common good is subserved by the enormous concentration of wealth in a few hands whether the wealth be of property or of access to capital.

And it is therefore important for us to criticize and to note current government policies in so far as they fall short of sub clause b and c of article 39. Finally, we get to article 39b which ensures that the state must endeavor to provide equal pay for equal birth work for both men and women. Now, this again is extremely important because it is difficult to reconcile this constitutional principle with the gender pay gap that we found in our study of social and historical realities in India both in the formal in and the informal sector.

Coming now to Article 39A, it notes that the state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall in particular provide free legal aid by suitable legislation or schemes or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Now, as we all know the rights that are guaranteed to us under the constitution or under the various legislations and schemes of the government are often only available to those who have the ability to ensure that they are enforced by either approaching the necessary courts or the bureaucratic establishment.

For a large proportion of the Indian population this is simply out of the question, these rights are simply rights that exist on paper and not in reality because they do not have the ability to be able to enforce these rights by approaching the necessary forum. In this way while we may have formal equality in so far as our legal rights and welfare rights may go, in reality there is an enormous substantive inequality in so far as people's actual access to these rights is concerned.

Now, this is obviously very troublesome because to have rights on paper but to not have them in reality is to mean that we have no rights at all. And what Article 39A does is to ensure that the state shall work towards promoting a legal system which ensures that individuals are not denied equal access to the court system because of poverty or any other economic or other disability.

In fact, it is for this purpose that we currently have a statutory body called the "National Legal Services Authority" which is based in Delhi which ensures through various schemes and programs that free legal aid is provided to any individual who requires legal assistance in a court and that moreover that various government schemes are brought to the people's doorsteps rather than having individuals go through the burdensome task of approaching government officials and government offices themselves. It is the work of the national legal services authority to ensure that Article 39A is put into place, is practiced and implemented on the ground.

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Moving on now to Articles 41 and 42 of the directive principles, Article 41 notes that the state shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and other cases of undeserved want.

What Article 41 therefore commits the state to is to ensure that no individual is deprived of the important rights to work and to education and to public assistance because of these various disabling factors. Now, one of the major reasons for inequality in Indian society is that individuals who fall sick or are otherwise disabled physically or mentally or are elderly individuals and senior citizens are essentially not considered equal in their participation in public life.

Now, obviously because of these various disablements because of old age, individual's participation in society may change and may take a hit. Yet, it is incumbent upon the state to ensure that this inequality does not disable their complete participation in both public life, that is the right to work and indeed in their educational attainments.

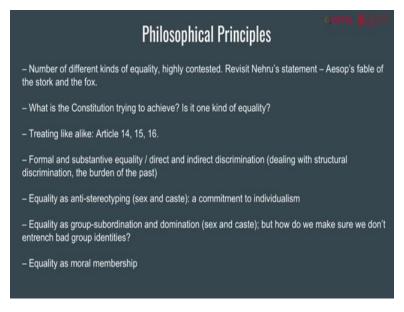
Indeed, it is important to understand that without this kind of welfare assistance the ideal of equality of status and of opportunity which is thought of in the preamble to the Indian constitution will remain a pipe dream. Article 42 next notes that the state shall make provision for securing just and humane conditions of work and for maternity relief.

Now, it is that second part for us that is extremely important. It is often the case in India that women who want to raise a family and also enter the workforce are excluded from doing so because when they have children, they take a hit on their professional front, they either have to fall back to their male counterparts or indeed are completely excluded from the workforce for a long period of time which sounds the death knell for any professional or career aspirations they may have.

Now, one of the ways in which this kind of sex-based inequality can be removed is by providing maternity relief either directly by the state or through legislation by ensuring that private players, by private parties and employers are necessarily forced to provide maternity relief. In this way the enormous burden that women have to face in terms of the cost to their professional and career lives is then mitigated, because during their maternity they are not considered to be off work rather maternity is recognized as a beneficial good and beautiful activity which need not put women back on their professional front.

And this is therefore one of the very important factors which will ensure that we reach a society where there is lesser sex discrimination than there is today and more just and humane terms upon which women can participate in the workforce.

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So, these were the articles which concern the directive principles of state policy. Now, again these are Articles which are not enforceable directly in courts of law but which if used by

citizens and by courts to inform their understanding of governmental action, will go a long way in ensuring that the political principle of equality is actually established and implemented in India across the board.

So, having now seen what the constitution says about the principle of equality in parts 3 and 4. We are in a position to appreciate that the constitution is actually talking about a number of different kinds of equality, that equality is a highly contested notion and that as Pandit Nehru noted in the very first slide where we saw, that it is difficult to achieve complete equality because if we follow one principle of equality, if we follow the principle of formal equality for example we will lead to a situation where there is substantive inequality. If we follow a situation where we try and remedy substantive inequality there will be formal equality.

So, having now seen parts 3 and 4 of the constitution and what they say about the notion of equality we are in a position to appreciate better, the fact that the constitution is actually talking about a number of different kinds of equality, that it is not a single concept but rather a banner under which operate a number of different and highly contested concepts.

In fact, if we revisit Pandit Nehru statement which we saw in the very first slide it is difficult to achieve equality because we run into other principles of equality. So, take for example the idea of formal and substantive equality, if we try to achieve a formally equal system then we will have a situation where there is substantive inequality, if we as we took the example earlier design an entrance exam where we test skills of Maths and English there is a high likelihood that members of the Dalit community will be excluded but that is a formerly equal system.

On the other hand, if we try and achieve substantive equality by modifying the exam system to ensure that there are reservations, then we have a substantively equal society but a formerly unequal society. In fact, at this point it is interesting to make a small digression and to note a children's story, a famous fable by the author Aesop concerning the stork and the fox which will help us throw some light on this issue of the different kinds of equality.

Now, in this story the fox one day thought of a plan to amuse himself at the expense of the stork at whose appearance he was always laughing, you must come and dine with me today he said to the stork smiling to himself at the trick he was going to play. The stork gladly accepted the invitation and arrived in good time and with very good appetite.

For dinner the fox served soup but it was set out in a very shallow dish and all the stork could do was get wet the very tip of his bill not a drop of soup could he get but the fox lapped it up easily and to increase the disappointment of the stork made a great show of the enjoyment. The hungry stork was much displeased at the trick but he was a calm even-tempered fellow and saw no good in flying into a rage.

Instead not long afterward he invited the fox to dine with him in turn, the fox arrived promptly but at the time that he had been set the stork served a fish dinner that had a very appetizing smell but it was served in a tall jar with a very narrow neck. The stork could easily get at the food with his long bill but all the fox could do was to leak outside the jar and sniff at the delicious odor.

So, what this fable shows us is that two individuals may be served the same meal, may be served the same social circumstance. But in fact, the result could be deeply unequal and it is this basic idea told beautifully in this story which we must keep at the back of our mind, that equality actually is a series of contested concepts that may often conflict with each other.

And so when we speak about equality we must unpack the notion and ask what is exactly the kind of equality that we are trying to achieve and that the constitution is trying to achieve, is it one kind of equality, is it many different kinds of equalities, do these different kinds of equalities sit well with each other, do they contest with each other, how does one think about this?

In our study of the constitution, we have seen some basic principles emerge. The first principle of equality is that we must treat like, alike. Now, this was a principle that was very clear in Articles 14, 15 and 16 of the constitution, each of these three Articles noted that if two individuals are placed in similar circumstances if they are alike in the relevant respect, then under the constitution you must treat them in the same way. Alternatively, if they are situated differently, they must be treated differently.

This was the core of the phrase equal protection of the laws which was then substantiated in Articles 15 and 16 of the constitution. We may say that we must treat like, alike, but again the real question is in what capacity are these two individuals alike, are they alike and is the classification relevant to the and does it bear a nexus to the objectives ought to be achieved? Men and women are alike in so far as in the position of command of assuming command positions in the amigos, but they are not alike in so far as the issue of maternity leave comes.

Equally we also came across the principle of formal and substantive equality which is also known as direct and indirect discrimination where the issue was concerned with dealing with structural discrimination and the burden of the past. Now, as we saw many caste communities especially Dalits have faced oppression and subjugation both in distributional terms and in terms of their social status for many generations and the weight and the burden of this past means that they somehow cannot catch up to society.

We may go through a process which is formally equal and based on merit but lo and behold at the end of that process almost as if by magic it is only the upper castes or it is only those individuals who have had the privilege of the upbringing that they have had who are able to emerge victorious, who are able to gain access to the resources whether it be wealth or poverty or employment opportunity.

Now, in such instances it is very important the constitution notes in many provisions as we have seen in Articles 15 and 16 as also in provisions concerning maternity relief, that we not only follow a system of formal equality but rather that we look behind this formal equality and see what must we do to ensure that there is substantive equality on the ground.

One example of this is the exceptions in Article 15 and 16 for reservations or affirmative action for women, for Dalits and for other backward classes. Now, these are communities which if not provided these reservations would arguably continue to suffer, and therefore we need a radical step to break the burden of the past.

But as we go through this process of ensuring substantive equality we must be sure that we do not enter a situation where the principles of substantive equality further lead to entrenching these bad identities, we lead, we want a situation where we are substantively equal, not just on paper but in real life, and therefore reservations can be a good means and method for doing that.

But are we making sure that by way of using reservations we are not entrenching further inequality. So, this is a debate about formal and substantive equality. Another debate that we saw, another philosophical principle was that concerning the anti-stereotyping principle, often members of a particular caste, particularly lower caste Dalits and members of the female sex have to deal with many stereotypes about the ways in which they behave, about their

temperament, about their capacity and about their inclinations which actually do not reflect their true natural abilities.

As we saw in the Babita Puniya case, the argument put forward by the Union Government, by the Central Government was that women are generally not suited to command positions because of the sort of culture that we find in the army, that women are not suited to command positions because they will leave their service to the army when they have children and because of their family responsibilities. Indeed, in many instances of castes, members of the lower caste are thought to be impure, are thought to be unintelligent and are thought to be second class citizens.

Now, none of this is true, these are simply stereotypes that we impose upon members of a particular category by virtue of belonging to that group, indeed some women may choose to their families, some women may in fact not be good at holding command responsibilities just like some men may not be good at holding command responsibilities.

Similarly, perhaps some members of the Dalit community should not be employed in a particular place of employment and perhaps some of them do not possess the kinds of qualities that one would consider good and valuable.

But this is a evaluation that must be made not by respect to some stereotype that we have of these communities by some prejudice that we carry, but rather by a commitment to individualism which is the core principle in part 3 of the constitution, we must judge individuals by reference to their characteristics, their traits, by reference to the work that they have done and the values that they have demonstrated, not with respect to some unthinking attachment to a group identity which serves to exclude them from the public realm.

So, this principle of equality a stereotyping is extremely important in considering the different types of practices of inequality that we come across and indeed as we will see in our first case study on the case concerning Anuj Thakur which is the case where women were excluded from working in any establishment serving alcohol was essentially a case about stereotypes about women and their place in establishment serving alcohol, obvious we will see the Supreme Court came down very strongly on the side of women to make sure that these gender stereotypes did not limit them anymore for to ensure that full and complete participation in Indian society.

A related principle to the equality is anti-stereotyping principle is that of equality as group subordination and domination. Now, many groups aside from the stereotyping are also subjected to domination and subordination and have been for a very long time. Again members of various caste communities and members of the female sex have as a group been subordinated and dominated.

And therefore one of the principles of reservation as we saw is to ensure substantive equality by reference to this principle of group subordination and domination where women and members of the lower caste, especially the Dalits can utilize this identity that was earlier a marker of subordination and domination as now an identity of liberation, women can claim that as women they must be entitled to break free of the cage and use their identity as a women as a celebratory aspect of their diversity and their difference.

Similarly, members of the Dalit community often use the political grouping of Dalit Bahujan as a way to make the site of decades and centuries of suffering and injustice, as a site for protest for struggle for complete membership of the community. And therefore, we must see and understand that this principle of group subordination and domination plays a very important role not just in the constitutional scheme of things but in the actual political sphere, where members of these communities are now turning these categories on their heads to demand for equal rights and for equal justice.

But one of the principles here that must be remembered is that in utilizing these group identities we must not fall foul of our commitment to individuals, it must not happen that by using these identities we do not further entrench them, rather the Dalit identity ensures that men and women of the Dalit community can liberate themselves from the shackles of caste discrimination and not that they further identify themselves as Dalits who have been oppressed and who can therefore continue to labor under these identities.

A criticism that has been made of the OBC category where instead of liberating themselves from their caste categories many members of the Gujjar and the Meena community for example positively utilized their membership of these communities as bargaining chips to get political rewards.

Therefore, that double-edged sword is something that we must be very wary of, that group subordination and domination is a principle which has an enormous libratory value but at the same time must not become a principle that further entrenches these bad identities. And finally we come to the principle of equality as moral membership.

Now, as we have seen in many instances, it is not the distributional aspect that matters rather it is the fact that as members of the human race as human beings we can lay claim to a certain basic amount of dignity and respect as members of the human community. And it is this aspect of equality as moral membership which was instrumental in the decision of the court in the Naz foundation case which we will also study in the last part of this week.

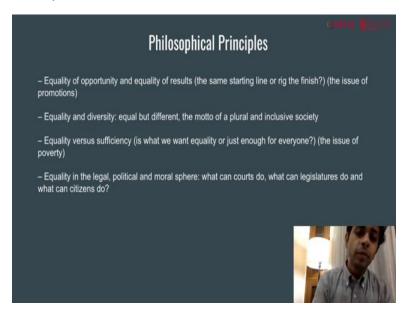
In that case members of the homosexual community who were till then considered as criminals under Section 377 of the Indian Penal Code laid claim to their moral membership to the fact that as individuals they were differently constituted to the majority of Indian society but yet that their sexual orientation was an expression of their nature, was an expression of their humanity.

And therefore, their diversity and difference should be respected and not punished it was their claim to equal membership of Indian society as proud individuals rather than as criminals that ultimately turned the favor of the court in the Naz foundation judgment.

Therefore, the principles that we speak about under the broader banner of the principle of equality under the Indian constitution are varied, we have the idea of equality as stereotyping, we have the idea of equality as group subordination and domination and the idea of equality is moral membership, all of which go to ensure that we do not just have formal equality in Indian society but rather that we have substantive equality.

And all of this is funneled through the textual provisions in Articles 14, 15 and 16. And therefore stepping back now one can understand and see how the text of the constitution embodies certain deeper principles, each of which has a part to play in relation to different kinds of claims of equality by different kinds of individuals in relation to different kinds of political context.

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Let us now come to a principle of equality that we have not actually encountered till now, and that is the principle of equality of opportunity and equality of results. Now, the Indian preamble commits us to a system of equality of opportunity. Now, what does this mean?

It means that two individuals must have the same starting position in society that what you make of yourself must be a result of the actions you take and the choices you make rather than as an accident of birth or a circumstance that is not within your control, all individuals must start at the same line and have an equality of opportunity in life, indeed whether they succeed or they fail and the final destination they reach is up to them depending on the path they take and the choices they make.

Therefore, the Indian constitution in the preamble commits us to equality of opportunity and not to equality of results. This however, has been the subject of debate in relation to the idea of promotions under the Indian constitution. Now, as we saw Articles 15 and 16 of the constitution create a system for reservations in various fields for certain protected groups.

Recently the issue had come up as to whether the idea of reservations and affirmative action extended not just to when these individuals were included in employment but also to when they were promoted that is to say that should individuals once they have been provided the same starting point and the same opportunity we further assisted by ensuring that they also receive favorable promotions over other individuals.

Now, we will not go for lack of time and space into this issue but this is something that one must keep in mind. In Indian society do we want a society where we try and provide equality of opportunity to everyone or do we ensure that members of backward communities of disadvantaged groups are assured an equality of result.

Now, it could be that we ensure an equality of result for a certain period of time until these individuals are able to come back on their feet and are able to participate on equal terms but again on the other side of the argument if we are artificially ensuring equality of results rather than equality of opportunity is that a sustainable political system, is that a fair political system, this is an issue that as citizens we all must consider.

Coming next to the principle of equality and diversity we see that in India the constitution commits us to a plural and inclusive and diverse society and therefore while we are committed to an equal society equality does not mean uniformity, equality does not mean that everyone follows the majority norm, rather that there should be space for everyone to be equal yet different.

So, for example, the Naz foundation case where members of the heterosexual minority were given the right to practice and to follow their sexual orientation in ways that were on equal terms with members of the heterosexual majority but were yet different, indeed the same principle is true of the religious freedoms provided in India where all religions are equal even though they are different where each religion is provided the space to operate within a plural inclusive and multicultural society.

The idea of equality is not one where everyone must do the same thing, equality does not mean sameness, rather equality means diversity and a vibrant political culture where different groups of different persuasions and different individuals of different makes can all participate and together and enrich each other from the collective diversity of the group. Next comes the principle of equality versus sufficiency.

Now, in many of the debates that we have seen the issue especially in relation to distributional equality to poverty concerns the idea that it is important that not just we have equal with everyone else but rather that we have enough. Now, as Professor Amartya Sen notes in his lecture.

The issue of poverty is not that we want everyone to have the same amount of wealth but rather the motivating factor for us is that everyone should have a sufficient amount to lead a dignified life, indeed as we saw in Articles 39 and 39A this was the precise issue raised by the constitutional drafters. That the state must ensure that individuals lead a life where there is no concentration of wealth, so that everyone has sufficient amounts of basic resources required to survive.

The issue therefore which we must disambiguate is perhaps not one of equality but one of sufficiency and this is an idea that we must keep in mind as we go through in our lives the different issues of poverty where the poor people of India are not claiming that they must have the same as those who are rich, rather the first and most visceral claim is that they must have sufficient amounts to ensure and lead a dignified life. It is important for us therefore to be conceptually clear that the issue of equality is different from the issue of sufficiency and perhaps it is the latter that is the driving political force in many of our debates concerning poverty.

Finally, to wrap things up we have gone through a number of different philosophical principles which apply in a number of different ways. But all of these concern three different spheres, that is the legal, political and moral sphere. In the legal sphere, we have seen how courts can make sure that government action follows certain guidelines and certain principles under Articles 14, 15 and 16 of the constitution.

And therefore, there is equality in the legal sphere which is what the courts can do to make sure that India is an equal society. Then we have seen the directive principles of state policy which commit the political branches of government to acting in ways that make India a more equal and a fairer and just society, but there is also the moral principle of equality with which we began this lecture.

The moral principle of equality which is found amongst other things in Article 15 of the constitution is the idea that citizens in their relationship with each other must also engage in socially transformative activities such that we engineer an equal society between ourselves, equal both in relation to distribution perhaps if we are employers and equal in relation to the status and the respect and the dignity that we accord to other members of our community.

Therefore, equality operates in all its different avatars across these three different spheres, the legal, the political and the moral sphere. And as citizens of India we must be aware of our participation in relation to the legal process, to the political process and very importantly the moral process in our everyday lives.

With this, dear students we will end this lecture of week 6. Just to recap in this lecture we have gone through the various directive principles of state policy which concern the political aspirations for the government to follow and to make India an equal society. We have then seen and addressed the various philosophical principles that are at play in this, in the constitution's provisions of equality both in part 3 and part 4.

And we have learnt that there are a range of different principles which interact with each other to produce the ideal of equality under the Indian constitution and that we must be aware of our activities in relation to the political principle of the equality along all these different complicated and contested facets. Thank you very much for listening in and I will see you in the next lecture.