

Constitutional Directives: Morally-Committed Political Constitutionalism

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36-odd state constitutions around the world feature non-justiciable thick moral commitments ('constitutional directives'). These directives typically oblige the state to redistribute income and wealth, guarantee social minimums, or forge a religious or secular identity for the state. They have largely been ignored in a constitutional scholarship defined by its obsession with judicial review and hostility to thick moral commitments in constitutions. This article presents constitutional directives as obligatory telic norms, addressed primarily to the political state, which constitutionalise thick moral objectives. Their full realisation—through increasingly sophisticated mechanisms to ensure their political enforcement—is deferred to a future date. They are weakly contrajudicative in that these duties are not directly enforced by courts. Functionally, they help shape the discourse over a state's constitutional identity, and regulate its political and judicial organs. Properly understood, they are a key tool to realise a morally-committed conception of political constitutionalism.

Keywords: constitutional directives, directive principles, political constitutionalism, moral constitutionalism, constitutional identity

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INTRODUCTION

Directives in constitutional practice

Liberal constitutional discourse has been dominated by a proceduralist, acontextual, universalising worldview. This Rawlsian vision of constitutionalism castigates thick, substantive, moral commitments (other than fundamental rights) in constitutions as illiberal and unwise, at best to be tolerated as minor deviations only when absolutely unavoidable. In practice, however, the ideal of proceduralist constitutionalism is approximated only by a handful of liberal democratic states, arguably the United States and Australia. Many other (sufficiently or aspirationally) liberal-democratic states include thick moral commitments in their constitutions.

Jeff King has characterised such thick moral commitments as constitutional ‘mission statements’.¹ An important, but much-ignored, form of these thick commitments is a set of provisions I will call ‘constitutional directives’, ‘directive principles’ or simply ‘directives’. Constitutional texts variously describe them as ‘directive principles of social policy’, ‘directive principles of state policy’, ‘goals and principles of state action’, ‘principles governing economic and social policy’, ‘fundamental objectives’, ‘fundamental obligations of government’, ‘principles of state policy’, ‘state tasks’,² ‘fundamental tasks’ and so on. On a conservative count, 36-odd state constitutions around the world—starting with that of Ireland in 1937—feature such constitutional

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¹ J. King, ‘Constitutions as Mission Statements’ in D. J. Galligan and M. Versteeg (eds), *Comparative Constitutional Law and Policy: Social and Political Foundations of Constitutions* (Cambridge: Cambridge University Press, 2013) 73–102.

² On ‘state tasks’, see generally K. Sommermann, *Staatsziele und Staatszielbestimmungen* (Germany: Mohr Siebeck, 1997).

directives.³ While the Irish provisions are treated as pioneering, it has been suggested that they were themselves inspired by proto-directives in Republican Spanish⁴ and Weimar constitutions.⁵

All 36 of these constitutions contain at least some directives that seek to secure access to a social minimum (in relation to healthcare, education, nutrition or such like). About 15 of these constitutions also contain an egalitarian directive requiring redistribution of income and wealth. Environment protection also features prominently.⁶ So do provisions relating to national unity and identity, especially in relation to language, religion and culture. Many directives concern themselves

³ These include the constitutions of: Ireland (1937), India (1950), Qatar (provisional constitution, 1970), Bangladesh (1972), Panama (1972), Pakistan (1973), Papua New Guinea (1975), Portugal (1976), Spain (1978), Sri Lanka (1978), Nigeria (1979), Tanzania (added in 1984 by amendment to the 1977 Constitution), Zanzibar (1984), Nepal (1990), Namibia (1990), Sierra Leone (1991), Zambia (1991), Tibet (constitution of the government in exile, 1991), Ghana (1992), Andorra (1993), Lesotho (1993), Uganda (1995), Ethiopia (1995), Gambia (1996), Eritrea (1997), Thailand (1997), Sudan (1998), Nigeria (1999), Somaliland (2001), Swaziland (2005), Thailand (2007), Nepal (interim constitution, 2007), Bhutan (2008), Angola (2010), South Sudan (2011), and Nepal (2015). This count does not include constitutions of federal units (such as Jammu and Kashmir, Lower Austria, Basel City and Western Cape). Also excluded are ‘positive rights’ provisions in communist constitutions—such as the right to work under the Constitution of the Union of Soviet Socialist Republics 1977, Art 40—which were also typically non-justiciable. The list also excludes provisions such as the Canadian Constitution Act 1982, s 36, which are *probably* best understood as directives, even though they do not self-characterise themselves as such.

⁴ I. Jennings, *The Approach to Self-Government* (Cambridge: Cambridge University Press, 1956) 19. See Constitution of the Spanish Republic 1931, Arts 42–50.

⁵ R. Walsh, ‘Private Property Rights in the Drafting of the Irish Constitution: A Communitarian Compromise’ (2011) 33 *DublinULJ* 86, 95. Weimar Constitution, Art 151: ‘The economy has to be organized based on the principles of justice, with the goal of achieving life in dignity for everyone. Within these limits the economic liberty of the individual is to be secured.’ On social provisions in post-World War I European constitutions generally, see A. Headlam-Morley, *The New Democratic Constitutions of Europe* (Oxford: OUP, 1928) 264f.

⁶ On environmental ‘directive principles’ generally, see D. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver, BC: University of British Columbia Press, 2012) 45–77; L. Weis, ‘Environmental Constitutionalism: Aspiration or Transformation?’ (2018) 16 *ICON* 836.

with economic organisation of the state, usually favouring a 'balanced' system between state socialism and unfettered market capitalism. Thus, contrary to the belief that directives are simply non-justiciable social rights, in terms of subject matter they concern much more than social minimums. Here are a few sample directives:

- The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength.⁷
- Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.⁸
- The State shall pursue a policy of conserving the natural resources available in the country by imbibing the norms of inter-generation judicious use of it and for the national interest. It shall also be about its sustainable use in an environmental friendly way. The policy shall ensure the fair distribution of the benefits generated by it by giving local people the priority and preferential rights.⁹
- The State shall create the necessary economic and social environment to enable people of all religious faiths to make a reality of their religious principles.¹⁰
- The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.¹¹

Constitutional directives were enthusiastically embraced by postcolonial constitutions of the New Commonwealth (ie, former non-settler British colonies) coming to terms with the legacy of divisive and impoverishing colonial policies, which included ethnocultural identity wars and deep material

⁷ Constitution of Ireland, Art 45(4)(2).

⁸ Constitution of the Federal Republic of Nigeria 1999, Art 18(1).

⁹ Constitution of Nepal 2015, Art 51(g)(1).

¹⁰ Constitution of the Democratic Socialist Republic of Sri Lanka 1978, Art 27(11).

¹¹ Constitution of India, Art 38(1).

inequalities. Framers of these constitutions wanted to do more than simply address the most glaring shortcomings of colonial governance, viz the denial of human rights and democracy. They also sought to tackle its more hidden, but no less dangerous, legacies, including the denial of basic social and material needs and extreme inequalities of wealth and income. That many postcolonial states failed to live up to these founding aspirations is another matter. In terms of design, constitutional directives were seen as a key weapon in the process of decolonisation. Whatever their European pedigree, it is not surprising that constitutional directives were popularised by early postcolonial adopters such as India (1950) and Nigeria (1979). Nor are they a dated phenomenon from the mid-twentieth century. As the list in footnote 3 amply demonstrates, they have remained consistently popular with framers of constitutions. Even the recently minted 2015 Constitution of Nepal contains an extensive chapter on constitutional directives. As we will see later in the article, some of the later constitutions are building upon the experiences of the older constitutions they are borrowing from, and, in particular, experimenting with sophisticated non-judicial mechanisms to politically enforce these directives.

Judicial obsessions

As a phenomenon, constitutional directives have largely been ignored by scholars for two main reasons. Comparative constitutional scholarship remains dominated by scholars from English-speaking common law jurisdictions, especially the US and the UK. The main internal debate between these scholars has centred on the legitimacy and the appropriate form of rights-based judicial review. On one side of this debate are supporters of US-style ‘strong-form’ judicial review, against those who prefer a ‘weak-form’ model from the Old Commonwealth jurisdictions (mainly European settler colonies such as New Zealand, and the UK), and those who see no need for rights-based judicial review of legislation at all, as in Australia.¹² What unites all sides in the debate is the assumption that judicial review is the main show in town—little surprise then that non-justiciable directive principles become, at best, a side-show. Whichever side you are on, justiciability frames the debate. This obsession with judicial enforceability and rights has rubbed off even on scholarship outside the Anglo-American framework, which often treats constitutional directives at best as ‘mere

¹² M. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008); S. Gardbaum, ‘The New Commonwealth Constitutionalism’ (2001) 49 AmJCompL 707, 745; A. Kavanagh, ‘What’s So Weak about “Weak-Form Review”? A Rejoinder to Stephen Gardbaum’ (2016) ICON 1049, 1049–1053.

moral appeal¹³ with ‘no practical implication,’¹⁴ at worst as ‘design flaws’.¹⁵ When it is not dismissive, scholarship from the Global South has focused mostly on what courts have managed to do with these supposedly non-justiciable constitutional provisions anyway.¹⁶

Admittedly, there is a thriving scholarly British tradition—originating in the political Left but increasingly being supported by the political Right instead—of advocacy for political constitutionalism that goes beyond defining itself in opposition to judicial review.¹⁷ Much of this debate turns on the institutional strengths, weaknesses and predilections of parliaments and courts, and the merits of non-legal constraints over state power through constitutional conventions. But constitutional conventions, at least of the British variety, tend to be very different from constitutional

¹³ D. Olowu, *An Integrative Rights-Based Approach to Human Development in Africa* (Pretoria: Pretoria University Law Press, 2009) 96–98.

¹⁴ C. Jaffrelot, *Dr Ambedkar and Untouchability: Analysing and Fighting Caste* (Delhi: Permanent Black, 2005) 112.

¹⁵ J. Usman, ‘Non-Justiciable Directive Principles: A Constitutional Design Defect’ (2007) 15 *Mich St Int’l L Rev* 643. See also Okere, who rues the absence of even a *Conseil Constitutionnel* type enforcement body for the Nigerian directive principles: O. Okere, ‘Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution’ (1983) 32 *Int’l & Comp LQ* 214, 221.

¹⁶ P. Tripathi, ‘Directive Principles of State Policy: The Lawyer’s Approach to Them Hitherto, Parochial, Injurious and Unconstitutional’ (1954) 17 *SCC (J)* 7; U. Baxi, ‘Directive Principles and the Sociology of Indian Law: A Reply to Dr Jagat Narain’ (1969) 11 *J Indian L Inst* 245; J. Narain, ‘Judicial Law Making and the Place of Directive Principles in Indian Constitution’ (1985) 27 *J Indian L Inst* 198; B. de Villiers, ‘Directive Principles of State Policy and Fundamental Rights: The Indian Experience’ (1992) 8 *SAJHR* 29, 39f; M. P. Singh, ‘The Statics and the Dynamics of the Fundamental Rights and the Directives Principles: A Human Rights Perspective’ (2003) *SCC (J)* 1; G. Bhatia, ‘Directive Principles of State Policy’ in S. Choudhry, M. Khosla and P. B. Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford: OUP, 2016).

¹⁷ See, generally, P. Dobner and M. Loughlin, *The Twilight of Constitutionalism?* (Oxford: OUP, 2010); R. Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 *ICON* 86; G. Gee, ‘The Political Constitutionalism of J. A. G. Griffith’ 28 *Legal Studies* 20; M. Tushnet, ‘The Relation between Political Constitutionalism and Weak-Form Judicial Review’ (2013) 14 *German LJ* 2249; A. Tomkins, ‘Review: In Defense of the Political Constitution’ (2002) 22 *OJLS* 157.

directives. Conventions share a proceduralist vision of constitutionalism—in this worldview, constitutional norms only tell constitutional actors how (not) to act; they rarely, if ever, specify desirable goals of state action. Conventions may require the monarch to always assent to a Bill passed by the two Houses of Parliament, or parliament to seek the consent of a devolved legislature when legislating on a devolved matter. Unlike directives, they tend not to require the legislature or the executive to reduce inequality, protect the environment, or secure access to free education.

The key divide between *legal* constitutionalism and *political* constitutionalism relates to a difference over whether courts or politicians should bear the primary responsibility for protecting and enforcing a constitution. The debaters typically assume that any *substantive* constitutional norms automatically implies legal constitutionalism, ie enforcement by courts. As a corollary, it is assumed that political constitutionalism rules out all substantive constitutional commitments, beyond the settlement of institutional procedures. Directives—as substantive constitutional norms to be implemented politically—challenge these assumptions. To be sure, this paper does not necessarily recommend the use of constitutional directives, nor does it necessarily endorse a commitment to political constitutionalism. Its main purpose is to study the neglected phenomenon of constitutional directives, and to highlight some of their key implications for constitutional practice as well as scholarship.

The argument from democracy

The ideological basis for the Anglo-American hostility to thick moral commitments in constitutions comes from Rawlsian liberalism in the United States and the Diceyan doctrine of parliamentary sovereignty in the Old Commonwealth. A parliamentary-sovereignty-based approach objects not only to constitutional commitments to substantive moral goals, but to all constitutional moral commitments, including rights. It rejects the dualism of constitutional norms and ordinary norms, and the concomitant assumption of the normative superiority of the former over the latter.¹⁸ According to this view, all norms of a state are to be made and unmade in the ordinary democratic process, with parliamentary legislation at the apex of the state's normative order. It is the purest form of proceduralist political constitutionalism, best approximated to by the Australian Constitution.

¹⁸ A. Dicey, *Introduction to the Study of the Constitution* (Indianapolis, IN: Liberty Fund, 8th ed, 1982) 37f.

For this school of thought, procedural democracy is not only the main source of legitimacy for state action, it often is the *only* source.

Whatever the truth of these claims, the curious design of constitutional directives *requires* a contemporaneous democratic endorsement through the ordinary political process of any move to implement a constitutional directive. Assuming that the constitution itself has sufficient democratic pedigree, enforcement of constitutional directives requires two different democratic endorsements at two different points in time. Even if arguments from democracy bite thick moral commitments in constitutions that are judicially enforceable, they must have less traction when these commitments are embodied as constitutional directives. A commitment to a Diceyan vision of parliamentary sovereignty is fully compatible with thick *moral* commitments, such as constitutional directives. Dicey himself, after all, saw no incompatibility between a commitment to parliamentary sovereignty and to the rule of law. The argument from democracy is best understood as insisting on political constitutionalism—but it should tolerate morally-committed political constitutionalism as well as a purely proceduralist version of the same.

The argument from liberalism

Rawlsian liberalism is more nuanced, and makes a distinction between moral norms that may be constitutionalised and those that may not be. Rawls's conception of political liberalism has been so successful that it has come to be seen by many as the only way for a state to be liberal. In this acontextual, universalist vision, a liberal constitution should only contain those moral norms which *would be* acceptable to every rational and reasonable citizen. Because citizens would reasonably disagree on their conceptions of the 'good', thick moral commitments that go beyond fundamental rights ('constitutional essentials', to use Rawlsian terminology) should be left out of constitutional settlements. The Rawlsian state's aversion to endorsing any thick moral conception of the good is called 'anti-perfectionism'. Because all rational, reasonable citizens would be behind a (hypothetical) veil of ignorance when making their decisions, they will lack all contextual information about their identitarian and moral commitments anyway.¹⁹ The outcome is a normatively thin, rights-based, proceduralist constitution that *anyone* can rationally endorse, and *everyone* should endorse. Not only is there no place for thick moral values in this constitution, Rawls suggests that even the

¹⁹ J. Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, revised ed, 1999) 118f.

egalitarian difference principle—one that would be endorsed by rational citizens as part of the ‘basic structure’—should not be constitutionalised, because citizens cannot be certain when the principle has been breached.²⁰

Anti-perfectionist liberalism is defended as more *legitimate* because any state endorsement of a moral good that a citizen could rationally disagree with will amount to her ‘expressive subordination’.²¹ It is seen as more stable because the constitution, it is said, can be neutral between incompatible conceptions of the good, which are best pursued through ordinary democratic processes. The easier reversibility of ordinary political decisions allows hope of future victories to citizens who have lost out in the latest round of political contestation. The trouble with the stability argument is that, in many societies, liberalism is itself seen as a partisan worldview with its own conception of the good, rather than as a neutral referee between other, perfectionist, visions of a good life. In fact, this understanding is continuous with a different, perfectionist, version of liberalism.²² This perfectionist conception, less popular with constitutional scholars but more in line with a popular understanding of liberalism, makes no claims to neutrality. Instead of asking the state to avoid choosing between different conceptions of a good life, it advocates *value pluralism*—the idea that there are many ways of living the good life, and that the state should facilitate and promote all of them. This does not mean anything goes, there are some conceptions of the good, for example those that are thoroughly at odds with personal autonomy, which the state should not endorse or promote.²³ This ‘perfectionist’ state is still liberal, because it uses coercion only in order to protect or enhance our autonomy. But it does not shy away from using other—non-coercive—tools to protect and promote value pluralism. Nussbaum claims that even a state that endorses value pluralism is ‘expressively subordinating’ those citizens who insist that there is only one way to live the good life

²⁰ F. I. Michelman, ‘Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment’ (2004) 72 *Fordham LR* 1407, 1414.

²¹ M. C. Nussbaum, ‘Perfectionist Liberalism and Political Liberalism’ (2011) 39 *Philos Public Aff* 3, 35.

²² See generally J. Raz, *Morality of Freedom* (Oxford: OUP, 1988).

²³ This is a relatively light-touch judgment. See generally T. Khaitan, *A Theory of Discrimination Law* (Oxford: OUP, 2015) 93f.

(say, only as a Christian, or a philosopher, or a hedonist, or a farmer, and so on).²⁴ Investigating the merit of this claim is a matter for another paper, but a critique is likely to ask whether the Rawlsian qualifications that make relevant only the consent of the *rational* and *reasonable* citizens don't themselves amount to expressive subordination of those who do not qualify, and whether any state can really avoid expressive subordination in the sense that Nussbaum uses the term. At any rate, we probably overestimate the number of people who actually believe that theirs is the *only* way to live a good life. Even monotheistic religious traditions, seen as most hostile to value pluralism, frequently acknowledge the value of other ways of living, albeit in a structured hierarchy of value. It may also be noted that almost all actions permissible for the value-neutral Rawlsian state are compatible with, if not required by, value pluralism. Anti-perfectionist liberals, as liberals, are condemned to practice value pluralism even as they refuse to preach it.

If one embraces Raz's self-consciously moral, context-sensitive, perfectionist liberalism, the theoretical difficulties with thick moral commitments in constitutional texts are less troublesome, at least for directives that are substantively liberal in their orientation. Of course, constitutions still need to endorse the right moral goods. As human artefacts, they will make moral mistakes. But the possibility of making moral mistakes is a reason to consult, deliberate and debate, not to shy away from moral judgment. Admittedly, the constitutional context is special—constitutional norms tend to have a longer shelf-life (although not as long as is often supposed by a US-centric lens), and are harder to change (again, not so hard as the US constitution). The continuing popularity of constitutional directives in postcolonial constitutions, many of which are framed in deeply divisive contexts, also belies the worry that moral constitutional commitments are a recipe for instability. In fact, at least in some contexts, directives have been deftly deployed to enhance stability by deferring controversial issues to future politics.²⁵ More broadly, almost every liberal constitution includes thick moral commitments of some form—whether in their preambles, or statements of fundamental value, or other mission statements. The wide gulf between the practice of (sufficiently or aspirationally) liberal states and the theory of political liberalism should itself give us reasons to re-interrogate our commitment to the latter.

²⁴ Nussbaum, n 21 above.

²⁵ See generally T. Khaitan, 'Expressive Accommodation of Ideological Dissenters' (2018) 16 *ICON* 389.

At the very least, directives demonstrate the possibility of combining substantive constitutional commitments with their political—rather than judicial—enforcement. They demonstrate that political constitutionalists need not adhere to a purely procedural vision of a constitution simply because of their rejection of legal constitutionalism. Insofar as they represent the possibility of a morally-committed political constitutionalism, greater attention to directives will add further sophistication to the debate between legal and political constitutionalism.

Structure

The paper has two parts. The first part of the paper will provide a conceptual account of directives. Here, I will take the account provided by Lael Weis as my starting point,²⁶ but interrogate and finesse her claims to deepen our conceptual understanding of conceptual directives. While I will agree that constitutional directives are indeed *obligatory*, I will show that they impose obligations in a special way: they are telic norms that identify (typically specific) moral objectives whose full realisation is deferred to a future date. Their obligatory character distinguishes them from permissive or power-conferring provisions, such as ‘by law’ clauses. Directives are necessarily telic, unlike preambular/fundamental value statements, which may be telic or deontic. Their telic character gives them a temporal dimension, facilitating partial deferral of their obligatory burdens. I will also argue that these directives impose two distinct duties: (i) a *duty to endeavour* to realise the directed goal, which kicks in immediately, and (ii) a *duty to fully realise* that goal by some (specified or unspecified) future date. Although framers can seek to fine-tune the degree of expressive salience that directives have, this salience tends to be lower than that of preambular values. They also tend to be more precise and contained, in relation to preambular values.

In this conceptual part of the paper, I will also argue that although Weis is correct in claiming that directives are *contrajudicative*—in that the duties they impose are not accompanied by reflex rights and therefore their breaches are not corrected by courts—they are only weakly *contrajudicative*. Limited forms of judicial engagement with directives are frequent and legitimate. The combination of partial deferral and *contrajudicative* character allows them to be used as fine-grained tools of constitutional incrementalism. Finally, I will argue that whether a norm is a directive or a right depends not on the structure of the provision containing it, but on the manner in which the

²⁶ L. K. Weis, ‘Constitutional Directive Principles’ (2017) 37 OJLS 916.

constitutional practice of a jurisdiction treats a provision. This implies that directives and rights are mutable—a former directive can become a right and vice versa.

The second part of the paper will offer a functional account of constitutional directives. I will show that apart from their incrementalist function during the framing of a constitution, directives can also perform two key functions during the life of a constitution. First, they can perform an identitarian function, along with other expressive provisions of the constitution. In particular, they can facilitate a calibrated polyvocality in constitutional expression, such that the constitution may not only simultaneously endorse a thesis and its antithesis, but also assign different expressive weights to the thesis and the antithesis concerning constitutional identity. Recognising their contribution is important for appreciating that constitutional identity, especially in divided societies, need not be univocal.

Furthermore, this part will explain the regulatory function of constitutional directives. In particular, I will show that, with respect to regulating the political state, directives set the agenda for the political discourse, and are used by political actors to legitimise or criticise certain acts and agendas. They are also invoked by the legislature, when enacting ‘directed’ legislation, to demand greater judicial deference during review and to influence judicial interpretation of the constitution. Judges use directives as interpretive aids, as reasons to give greater deference to directed legislation, and as a source for determining constitutional morality or identity.

A CONCEPTUAL ACCOUNT

Directives as positive constitutional norms

Directive principles are *constitutional* norms (and therefore referred to as ‘constitutional directives’ in this paper). There are no doubt comparable directives contained in legislation, which may or may not have a constitutional character,²⁷ but in this article, I am particularly interested in directives found in big-C constitutional codes. This feature also distinguishes them from purely *moral* norms, at least in the sense that they are *posited* social facts that are found in constitutional documents. It is a moral norm that the state ought to further the welfare of its people. It applies whether or not the constitution of that state says so. But it becomes a constitutional norm only if posited in its

²⁷ See generally Child Poverty Act 2010.

constitution, whether explicitly or by implication. No doubt, a constitutional norm can also be a moral norm, when there are moral reasons to discharge the obligations it imposes.

Harel supposes, correctly, that constitutional directives may well be posited through social facts other than the constitutional text, such as constitutional conventions and practices.²⁸ This, however, is likely to be rare, since constitutional conventions tend to concern themselves with how constitutional actors behave, rather than what they should seek to achieve. Given the expressive importance of constitutional norms in most jurisdictions, their constitutional status must give directives a certain salience.²⁹

On obligatoriness

Constitutional directives 'place binding constitutional obligations on the state'.³⁰ This feature distinguishes directives from non-obligatory provisions of a constitution, such as provisions that are merely permissive or power-conferring. For example, permissive 'by law' clauses, such as section 22 of the 1996 South African constitution stating that the 'practice of a trade, occupation or profession *may* be regulated by law', tend not to be obligatory.³¹ Directives, on the other hand, impose binding obligations on state institutions.

Directives are also different from constitutional provisions that, although obligatory, are indifferent to the substantive purpose to be achieved. Mandatory 'by law' clauses—such as Article 18(6) of the 2005 Iraqi Constitution requiring that 'Citizenship provisions *shall* be regulated by law'—tend to be obligatory on the legislature.³² However, this provision does not, at least on its own,

²⁸ A. Harel, *Why Law Matters* (Oxford: OUP, 2014) 154.

²⁹ King, n 1 above. See also, *ibid*, 180 ('to the extent that the legislature fails to honour these directives, it is subjected to effective condemnation').

³⁰ Weis, n 26 above, 920.

³¹ On 'by law' clauses generally, see R. Dixon and T. Ginsburg, 'Deciding Not to Decide: Deferral in Constitutional Design' (2011) 9 *Int J Const L* 636.

³² The words 'may' and 'shall' are indicative of whether the provision is permissive or obligatory, but they do not determine the issue conclusively. More contextual information is needed to know for certain.

appear to care about the nature of the citizenship regime the legislature establishes. It seems to be compatible with a restrictive or liberal regime, and equally at home with a *jus soli* regime as with a *jus sanguinis* regime. Constitutional directives, on the other hand, are 'directive' in two different senses: in the first sense they are *directions* or obligations addressed to the state. In the second sense, they also determine the *direction of travel* for the state's policy, although—depending on the level of abstraction in which the directive is specified—this can leave a future policy-maker with very broad or relatively little discretion. Section 18(3) of the Constitution of the Federal Republic of Nigeria 1999, for example, obliging the government to 'strive to eradicate illiteracy, and to this end ... provide (a) free, compulsory and universal primary education; (b) free secondary education; (c) free university education; and (d) free adult literacy programme' not only imposes an obligation on the state, but also specifies the goal towards and even some means by which it must act to fulfil its obligation. This is rather different from the permissive section 93 of the Canadian Constitution Act 1867, which states that 'In and for each Province the Legislature may exclusively make Laws in relation to Education'.³³

To take another example, compare the following provisions—the first is a 'by law' clause in Singapore's constitution, and the second a Bangladeshi directive:

— The Legislature shall by law make provision for regulating Muslim religious affairs and for constituting a Council to advise the President in matters relating to the Muslim religion.³⁴

— The State shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities.³⁵

Although both clauses deal with minorities, the Bangladeshi directive obliges the state to make provisions to 'protect and develop' the cultures and traditions of minorities, whereas the Singaporean 'by law' clause simply empowers the legislature to make law regarding religious affairs of a particular minority group. Directives are, therefore, distinct not only from constitutional

³³ Section 93 has other, non-permissive, provisions too.

³⁴ Constitution of the Republic of Singapore 1965, Art 153.

³⁵ Constitution of Bangladesh 1972, Art 23A.

provisions that are non-obligatory, but also from provisions that oblige the state to act but are indifferent to the objective it might seek to achieve.

Differences Between Directives and Value Statements

Weis suggests that the obligatoriness of directives ‘distinguishes [them] from [other] constitutional statements of value ... found in preambles ... [or in] a section that lists ‘fundamental’ or ‘founding’ values.’³⁶ This is hard to accept, for constitutional ‘mission statements’— to borrow Jeff King’s terminology³⁷— are surely binding on those to whom they are addressed even when they take forms other than directives. Even when there is no explicit addressee, it is likely that the state is an implied addressee of all constitutional provisions. Take one of Weis’s examples of a constitutional statement of value: ‘The fundamental values of the constitutional order of the Republic of Macedonia are ... the free expression of national identity ... political pluralism ... and ... ecological protection and development.’³⁸ Even though this provision does not explicitly urge the state to promote/honour/secure the specified values, it is clear that the primary—if not the only—addressee of this statement is the state in question. Constitutional provisions that address themselves to other entities, such as fundamental duties for citizens, tend to explicitly say so. These value statements are more than merely descriptive, they must have some normative content.

Could an obligatoriness-based distinction between directives and other mission statements be justified on the rule/principle distinction?³⁹ One might think that only ‘rules’ are *binding* in the sense that one can either obey them or not, whereas ‘principles’ are things one has to *take into account* while making a decision, they are not binding because one can comply with them to a greater or lesser degree.⁴⁰ Whatever the merit in this distinction conceptually, compliance with constitutional directives is no more an either/or choice than compliance with preambular

³⁶ Weis, n 26 above, 920.

³⁷ King, n 1 above.

³⁸ Constitution of the Republic of Macedonia, Art 8.

³⁹ R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977) 22f.

⁴⁰ Dworkin, of course, thought that both rules and principles are binding.

constitutional values, which can—and sometimes do—have the same subject matter. Like Dworkin's principles, constitutional directives can also be outweighed by more pressing concerns. Perhaps, relatedly, a distinction could be drawn based on the level of abstraction or generality of their subject-matter. Might it be that values are too 'general' to be binding, whereas directives have the necessary specificity to be obligatory? While constitutional directives do tend to be relatively less general than constitutional values, this is not necessarily the case. The subject matter of the following directive, for example, is almost indistinguishable in respect of level of generality from what one might expect in a preamble or a statement of constitutional value:

The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.⁴¹

Admittedly, a directive of such breadth is atypical. We can, however, say that value statements *tend* to be more general or abstract in comparison with constitutional directives.

Directives as Telic Norms: the Temporal Dimension

While constitutional directives are obligatory for the state, so are a host of other constitutional norms, values and principles that King collectively calls 'mission statements'.⁴² As with all obligations, they apply irrespective of the ideology or policy-orientation of the party in power, and are mandatory. This does not mean, however, that no conceptual distinction is possible. Constitutional directives necessarily impose *telic* (teleological) duties, whereas other constitutional obligations may be *telic* or *deontic* (deontological). *Telic* and *deontic* norms differ in the nature of duties they impose with regard to their subject-matter (say, 'X'). *Deontic* norms speak to the character of the action being considered, *telic* norms are concerned about its goals. A *deontic* norm requires us to honour/respect/recognise/venerate/consider X. A *telic* norm, on the other hand, is purposive, and seeks to promote/seek/secure/achieve/realise X. Intense debates on the legitimacy of affirmative action to favour disadvantaged groups can be understood in terms of the distinction between *telic* and *deontic* norms: opposition to affirmative action is often articulated in terms of its failure to

⁴¹ Constitution of India, Art 38(1).

⁴² King, n 1 above.

honour the value of equality (since affirmative action requires unequal treatment); however, those who support affirmative action often do so because it will help *promote* equality.

Preambular values are sometimes expressed in telic form ('to secure to all its citizens justice...'),⁴³ at other times in deontic form ('commit ourselves to ... respect for human dignity').⁴⁴ Constitutional directives, however, almost always take the form of a telic norm, requiring the state to secure/realise/achieve/provide etc the stated objective. The distinction is clearly brought out while comparing the language in Articles 44 and 45 of the Constitution of Ireland. Article 44(1) imposes a deontic duty on the state to '*respect and honour* religion'. This article immediately precedes Article 45, containing directive principles, which uses telic verbs like *promote* and *secure*. In fact, whether or not a constitution explicitly characterises them as 'directives', telic obligatory norms which also satisfy the contrajudicative feature discussed below are best treated as constitutional directives in substance.

Deontic and telic norms are differently sensitive to time. Deontic norms do not have a temporal dimension: if they apply, they apply immediately. Deontic norms do not require the state to 'start respecting the value of equality in ten years time', or 'progressively honour the rule of law over time'. Of course, a deontic may be 'brought into force' at a later date. But once it is effective, it applies with its full force, without reference to time. Telic norms are different—they can be made sensitive to time. A duty to secure X may or may not come with a deadline ('within ten years').⁴⁵ It may impose a duty to 'gradually implement corresponding policies' designed to achieve the stated objective.⁴⁶ Thus, even though a telic norm is operational, the duty to realise its objective may unravel over time.

It is precisely this temporal possibility with telic norms that facilitates the use of constitutional directives as deferral tools. This is why directives can help reduce decisional costs at the time of framing a constitution by shifting the decisional weight on a controversial issue from now

⁴³ Constitution of India, preamble.

⁴⁴ Constitution of the Republic of Fiji, preamble.

⁴⁵ Constitution of India, Art 45.

⁴⁶ Constitution of Nepal 2015, Art 52.

to the future (and from entrenched constitutional solutions to reversible political ones).⁴⁷ They are able to perform this function of deferring controversial decisions only because of their telic character. No doubt, 'by law' clauses also perform a similar deferral role.⁴⁸ Directives, however, entail *partial*, rather than *full*, deferral of a given decision. To understand the distinction, consider some of the possible questions one could ask in relation to a practical decision:

Whether to act on the relevant issue at all?

If yes, *what* should the action seek to achieve?

Once we know that, *how* should one go about achieving it?

And finally, *when* would be a good time to act?

Because these stages in decision-making are conceptually separable, it is open to a constitution-maker to defer some, but not all, of these questions to a future decision-maker. A full deferral entails the deferral of all of these questions to the future, whereas a partial deferral settles some of these questions constitutionally but leaves others for politics to sort out later. Directives do not postpone all decisions relating to their subject matter: we have already noted that they are 'directives' both in the sense of being *directions* to the state as well as in the sense of being *directional*, ie, charting the direction of travel. The *when* question is clearly deferred; usually so is the *how* question. On the other hand, the *whether* and the *what* questions are usually settled by the constitution in the form of binding obligations on the state.

It is the telic character of directives which allows them to be simultaneously obligatory and deferred. The best way to capture this temporal simultaneity is by noticing that they entail two distinct duties: (i) a *duty to endeavour* to realise the directed goal, which kicks in immediately, and (ii) a *duty to fully realise* that goal by some (specified or unspecified) future date. Compare this with the duty of 'progressive realisation' entailed in some social rights guarantees (eg in the South African constitution). Progressive realisation, in the context of social rights, is different partly because it makes these duties justiciable, and partly because it sometimes includes an additional duty to

⁴⁷ Khaitan, n 25 above.

⁴⁸ Dixon and Ginsburg, n 31 above.

immediately guarantee the minimum core of the right in question.⁴⁹ Given that the mobilisation of contemporaneous political will is essential to the realisation of any constitutional directive, democratic objections to thick moral norms in the constitution are muted—while the past continues to oblige, it needs the present’s permission to manifest itself.

Expressive Saliency of Directives

The necessarily telic character of directives distinguishes them from preambular value statements which may or may not be telic. There is another, non-conceptual, distinction between them—as *moral* commitments of the state (whether telic or deontic), both types of provisions have expressive saliency. Our moral values and goals indicate who we are. Their *constitutional* status makes them symbolically weighty in determining the moral and ethnocultural identity of the state in question. Expressive saliency is a characteristic that admits to degrees—a provision can be more or less salient. This degree of saliency can depend on a number of factors, including its anteriority, abstraction and controversiality.

On two of these three counts, preambular provisions are likely to have features that tend to garner greater expressive saliency than constitutional directives. With respect to anteriority, preambles and fundamental value statements appear at or closer to the start of a constitutional text, which tends to have higher saliency than provisions buried somewhere in the middle of the document, which is where directives usually find a home. There are exceptions, of course: the directives in the Ugandan Constitution of 1995, for example, are incorporated as part of the Preambular text, and precede the substantive provisions of the constitution. The Bangladeshi Constitution of 1972 places constitutional directives in Part II, right after the state-constituting Part I, signalling their relative importance in the constitutional scheme. These approaches, however, are rare; it is far more common for constitutional directives to find mention somewhere in the subsequent parts of a constitutional text. Of course, anteriority in a constitutional scheme is not the sole determinant of saliency. Political discourse on a given provision is ultimately the key determinant of its expressive importance at any given point in time. Saliency of a constitutional norm cannot be fixed in time, nor can its authors do more than merely try to influence it. Like much else in

⁴⁹ See generally D. Bilchitz, ‘Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance’ (2002) 119 SALJ 484.

constitutionalism, constitution-makers frame and influence the discourse, but politics ultimately makes the final call. Anterior placement is, at best, indicative, of the potential salience of a provision.

Secondly, the level of abstraction of a provision is likely to matter. Abstract moral goals and values are likely to be more salient than their specific policy articulations often found in directives. Public commitments to liberty, equality, or justice, in general, will usually have greater symbolic weight than an agenda for guaranteed annual leave, unemployment benefit or free legal aid. If Mario Cuomo's famous dictum— 'You campaign in poetry. You govern in prose'— has any truth to it,⁵⁰ it should be unsurprising that poetic preambular values tend to be more inspirational than typically prosaic directives. No doubt there are exceptions, but these exceptional specific goals have more salience than general ones despite their specificity rather than because of it, usually for one of the other reasons identified in this sub-section.

Finally, when it comes to controversiality, the tables might be turned. Precisely because of their high-level abstraction, preambular values tend not to be especially controversial. Directives, because of their relative specificity, invite greater discontent. What is more, deferring controversial decisions to a future date is precisely the reason why framers sometimes use directives as a tool of constitutional incrementalism.⁵¹ A controversial provision, like the cow slaughter directive or uniform civil code directive in the Indian Constitution, tends to be more salient than an uncontroversial one. Having said that, a controversial directive is likely to be less salient than a controversial preambular value: compare the cow slaughter prohibition in the Indian directive (which, despite its public justification in terms of scientific agriculture, effectively protects a Hindu majoritarian practice) to the anterior recognition of 'the foremost place' of the majority religion Buddhism in Article 9 of the Sri Lankan Constitution. Unlike the Indian directive, which constitutionalises a specific policy, the Sri Lankan provision incorporates a broad value. Both are controversial, but the Sri Lankan provision arguably has greater salience in defining political discourse than the Indian provision.⁵² Thus, if a

⁵⁰ F. Barnes, 'Meet Mario the Moderate: Is He the Last Liberal or a Lost Liberal?' *New Republic* 8 April 1985.

⁵¹ Khaitan, n 25 above.

⁵² On the Sri Lankan provision, see generally, B. Schontal, *Buddhism, Politics and the Limits of Law: The Pyrrhic Constitutionalism of Sri Lanka* (Cambridge: Cambridge University Press, 2016).

controversial goal or value must be given constitutional status, incorporating it as a directive is likely to have less salience than elevating it as a preambular or anterior value.

The Contained Normativity of Directives

The relatively more specific character of directives also allows drafters to police their scope a lot more effectively than the more abstract—and therefore more expandable—fundamental values. The indeterminacy of value statements tends to originate from their vagueness, generality or ambiguity. These indeterminacies can be distinguished by a simple example: the word ‘child’ is vague because there is no sharp dividing line that separates a child from an adult; ‘child’ is general because it underspecifies the gender of a child who could be a boy or a girl; ‘child’ is also ambiguous inasmuch as it could mean one’s offspring or a person of a young age. Broad values such as liberty, equality, justice, secularism, dignity typically express indeterminacies of all three sorts. This is precisely what makes them relatively uncontroversial—at a broad level of abstraction, people can read them to endorse their particular conception of the relevant value. This very attribute, however, also puts expansionist pressures on these values—their meaning is malleable, so that while they cannot mean anything at all, they can mean quite a few different things.

More precise directives, on the other hand, can be more determinate and resist expansionist pressures better than abstract values. Being more specific, they also admit to further containment strategies such as qualification, instantiation and contradiction. Qualification can moderate the goal outlined by a directive—a duty on the state to strive to provide ‘free *primary* education’ or ‘reduce *extreme* inequalities of wealth’ limits the normative force of a directive in a manner that is usually difficult to achieve with fundamental values. One only needs to consider the implausibility of provisions that declare ‘moderate liberty’, ‘due dignity’ or ‘measured equality’ as a cherished value to appreciate the difficulty. Of course, qualification can happen with fundamental values as well: equality of opportunity is an example. But the qualified value should be a celebrated value in its own right (like ‘equality of opportunity’) for this to work. Rights provisions giving effect to these fundamental values do often temper their force (‘no deprivation of liberty without due process’, for example). But when expressed as a fundamental or preambular value, qualification is difficult to achieve.

Instantiation works by making a specific directive an instance of a controlling, more general, directive. This was used to great effect by the Indian framers to moderate some of the more illiberal

directives requiring the state to seek to prohibit cow slaughter (made subservient to a general directive to organise agriculture on scientific lines) and alcohol consumption (again, made an instance of a general directive to improve health and nutrition).⁵³ Framers can also introduce contradiction, either between directives, or between a directive and another constitutional provision, in order to contain its scope. The alcohol prohibition and cow slaughter directives in India were clearly in conflict with several fundamental rights, which would necessitate a fine balancing act by the state trying to implement the directives.⁵⁴

Summary

Thus, constitutional directives impose binding obligations on the state, entailing telic norms which allow a partial deferral of the duty to realise the stated objective. These features help us distinguish them from non-binding constitutional norms (which may be permissive or power-conferring), as well as from deontic norms which cannot be deferred. Unless controversial, they tend to have a lower degree of expressive salience compared with value statements, but framers can attempt to calibrate their salience by playing with their anteriority and abstraction. They also tend to be more precise and determinate, making them more amenable to containment strategies such as qualification, instantiation and contradiction.

On contrajudicative character

The second feature of constitutional directives is their *contrajudicative* character: ‘they are not designed to be given effect by direct judicial enforcement.’⁵⁵ It is true that constitutional directives, although addressed to the state as a whole, are meant to be enforced primarily by the political organs of the state, viz the executive and the legislature.⁵⁶ In most constitutions that contain them,

⁵³ Khaitan, n 25 above.

⁵⁴ *ibid*, 410.

⁵⁵ Weis, n 26 above, 920.

⁵⁶ I do not deny that courts too are, or can be, political. But, usually, they are political in a different—attenuated—sense.

this non-justiciability is expressly provided for in the text.⁵⁷ In other constitutions, such exclusion may be through implication or convention.⁵⁸ Some constitutions even go to the extent of providing the mode of their political enforcement: section 176 of the Thai Constitution of 1997, for example, requires that ‘The Council of Ministers which will assume the administration of State affairs must, within fifteen days as from the date it takes office, state its policies and explanation for an implementation of the directive principles’. Similarly, Articles 53 and 54 of the Constitution of Nepal 2015 require the government to present an annual report on the progressive implementation of the directives, which is to be monitored by a parliamentary committee.⁵⁹ Their contrajudicative character is a key reason for the controversy surrounding directive principles, and for their ostensible rejection in the South African Constitution.⁶⁰ When contrasted with the Nepali and Thai innovations, the South African scepticism about their effectiveness suggests a limited constitutional imagination. Whatever we might make of their contrajudicative character, it remains the defining feature of constitutional directives, making them an important tool for political constitutionalism.

Weakly contrajudicative character

This is not to suggest that directives are, or are meant to be, irrelevant to adjudication. We will see in the next section that judges can, and have, used them in several ways. These uses are illegitimate only if one understands their contrajudicative feature too strongly. Take, for example, a court trying to determine whether the fundamental right to property was proportionately restricted by legislation for redistribution of land. A constitutional directive requiring the state to ‘endeavour to promote material equality’ is surely relevant to determining whether the objective of the redistribution legislation was legitimate. This might, in turn, depend on the scope of this directive, and especially whether it required the promotion of equality of opportunity or of resources. Surely,

⁵⁷ See, for example, Constitution of India, Art 37; Constitution of Spain, s 53(3); Constitution of Ireland, Art 45.

⁵⁸ On the status of the Ghanaian and Ethiopian Constitutions, which do not have a non-justiciability clause, see A. J. Ali and K. Appiagyei-Atua, ‘Justiciability of Directive Principles of State Policy in Africa: The Experiences of Ethiopia and Ghana’ (2013) 1 Ethiopian J Hum Rts 1.

⁵⁹ See also Constitution of the Republic of Ghana, Art 34.

⁶⁰ D. M. Davis, ‘The Case against the Inclusion of Socioeconomic Demands in a Bill of Rights Except as Directive Principles’ (1992) SAJHR 475.

in a case such as this, the court will rightly see its role to encompass the determination of the scope of the directive. Therefore, a more precise understanding of their contrajudicative character is necessary. This is where our discussion in the preceding section on the obligatoriness of directives is helpful. We concluded that section by discovering that directives impose two duties on the state: (i) a *duty to endeavour* to realise the directed goal, which kicks in immediately, and (ii) a *duty to fully realise* that goal by some (specified or unspecified) future date.

What is key to the contrajudicative character of constitutional directives is that a breach of either of the two duties may not, on its own, give rise to a cause of action in courts. It is this contrajudicative feature of the nature of the obligations that directives impose that distinguishes them from rights. Unlike rights, directives do not match the obligations they impose with corresponding rights vested in any person. In Kelsen's terms, directives lack corresponding 'reflex rights'—when their duties are breached, their intended beneficiaries do not have any correlative legal claims against the breach.⁶¹ Kelsen gives the example of the duty to perform military service, which is not accompanied by any reflex right vested in any person.⁶² Constitutional directives are similar—they are not accompanied by reflex rights either.

Nothing in this sub-section should be read to imply that rights are the sole domain of the judiciary. Rights impose obligations on politicians as well as judges, and to that extent, they may also be seen as 'directives'.⁶³ The difference is simply that breaches of rights give rise to a cause of action in courts; breaches of directives do not.

Constitutional incrementalism

The combination of their temporal dimension and their contrajudicative character makes directives an excellent tool for *constitutional incrementalism*. Incrementalism is a decision-making strategy that favours a step-by-step approach. Each group tests the incremental or marginal value of the proposal

⁶¹ H. Kelsen, *The Pure Theory of Law* (Berkeley, CA: University of California Press, Max Knight tr, 1967) 127–128.

⁶² *ibid*, 128.

⁶³ See generally G. Webber et al, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge: Cambridge University Press, 2018).

on the table: not whether the proposal is ideal objectively, but whether it is better than a plausible alternative.⁶⁴ *Constitutional* incrementalism seeks to transfer at least some of the decisional weight of a controversial matter away from the present to the future, and away from the constitution to politics: ie, it adopts at least a two-step approach rather than doing all the heavy lifting at once. As Lerner puts it: 'All constitutional strategies included in the incrementalist toolbox are intended to defer to the future controversial choices regarding the foundational aspects of the constitution in order to permit some form of agreement on a constitution to be reached.'⁶⁵ Constitutional incrementalism allows disagreeing groups to agree to disagree for now, and fight their battles at a future date. Because ordinary political decisions are more readily reversible than constitutional ones, groups also have the solace that even if they lose the first political battle in the future, the war will not be lost. Furthermore, constitutionally incrementalised decisions are less vulnerable to democratic deficit challenges because the actual realisation is left to ordinary democratic politics.

Constitutional incrementalist tools include the use of indeterminacy (to leave the precise meaning of a provision to be determined in the future), 'by law' clauses (to allow parliament to decide in the future), and sunset clauses (which preserve the status-quo until a set date, when the issue will be reopened for political resolution). As incrementalist strategies go, constitutional directives are more nuanced than most of these other options because of their partial rather than full deferral of duties, calibrated expressive salience, and the possibility of a tailor-made containment of the issue.

A right or a directive? Practice, not structure

Although they are both obligatory norms, we know that the key distinction between rights and directives is the contrajudicative character of the latter. What makes constitutional directives contrajudicative? Typically, the constitutional text itself bars judicial enforcement of these directives.⁶⁶ But a textual prohibition is not necessary for a constitutional provision to be treated as

⁶⁴ C. Lindblom, 'The Science of "Muddling Through"' (1959) 19 *Pub Admin Rev* 79, 83. See also J. Rawls, *Political Liberalism* (New York, NY: Columbia University Press, 2005) 89f.

⁶⁵ H. Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge: Cambridge University Press, 2011) 39.

⁶⁶ See, for example, Constitution of India, Art 3; Constitution of Ireland, Art 45.

contrajudicative. Section 24(b) of the South African Constitution, which guarantees the ‘right to have the environment protected, through legislative and other measures’, is treated as a contrajudicative directive principle even though it appears in the fundamental rights chapter.⁶⁷ Constitutional text is an important factor, but not determinative of whether a provision is a right or a directive.

Weis claims that ‘it is the structural features of a provision—and *not* its practical operation—that determines whether it is a directive principle.’ It is no doubt true that a provision needs to satisfy certain structural features in order to qualify as a directive—in particular, it has to be an obligatory normative provision. But its contrajudicative character cannot be settled by its structure. Whether a provision is a *right* or a *directive* is settled not by its structure, but by how the practice of a given jurisdiction treats it.

Let us recall the two duties that directives typically impose: (i) a *duty to endeavour* to realise the directed goal, which kicks in immediately, and (ii) a *duty to fully realise* that goal by some (specified or unspecified) future date. However, there is no general conceptual difficulty in enshrining accompanying reflex rights alongside either of the two duties that directives impose. There are several clear ways in which a government may breach the first duty ‘to endeavour to realise’ the stated objective—by failing to do anything at all in regard to the objective, by doing something that clearly detracts from that objective, and so on. The South African social rights jurisprudence has been instructive in demonstrating how such duties can indeed be enforced judicially.⁶⁸ Of course, there will be cases in the grey zone, but that is true of almost every constitutional right. Furthermore, with regard to the second duty, at least for some objectives—say the objective to enact a uniform civil code in the Indian Constitution⁶⁹ or the objective to provide workers adequate rest in the Gambian Constitution⁷⁰—it is possible to determine whether ‘full realisation’ has been (broadly) achieved.

⁶⁷ Weis, n 26 above, 921.

⁶⁸ D. Bilchitz, *Poverty and Fundamental Rights* (OxfordOUP, 2007) chs 4–6.

⁶⁹ Constitution of India, Art 44.

⁷⁰ Constitution of the Republic of the Gambia 1997, Art 216(6).

Admittedly, there exists interpretive latitude in determining their scope, but, again, that is true of rights too. Interpretive latitude isn't a bar to justiciability—at most it calls for greater judicial deference in hard cases. If the level of interpretive latitude is a difference between rights and directives, it is at best one of degree. There is nothing in the structure of section 24(b) of the South African Constitution, concerning environmental rights, that prevents a court from enforcing its duties, even if it might defer to the will of the political branches in most cases of alleged breaches. It may be that South African courts have so far treated it as a directive principle and refused to legally enforce its duties, but nothing in its *structure* stops them from changing their stance in the future.

What emerges then is that whether a constitutional duty is a 'right' or a 'directive' is a positive doctrinal choice, to be made by practitioners (framers, enforcers, revisers and interpreters) of a constitution. The same duty can be a right in one jurisdiction and a directive in another. Even within a given jurisdiction, a directive can, at a subsequent time, be translated into a right, or a right be treated as a directive. Several directives in the Indian constitution, concerning social minimum guarantees, have been translated into rights by the judiciary (by being read as implied by the right to life and personal liberty under Article 21).⁷¹ A constitutional amendment in India converted the primary education directive into a fundamental right.⁷² Ultimately, it is not the structure or the content of a norm that determines its contrajudicative character, but whether the practice of that jurisdiction treats its duties as judicially enforceable or not.

Summary

We can conclude this discussion with this summary: constitutional directives are obligatory telic norms that identify objectives whose full realisation is deferred to a future date. These directives impose two duties: (i) a *duty to endeavour* to realise the directed goal, which kicks in immediately, and (ii) a *duty to fully realise* that goal by some (specified or unspecified) future date. They tend to have a lower, if variable, expressive salience than value statements and are more amenable to containment strategies. Directives are contrajudicative in that these duties are not enforced by courts. Ultimately, the characterisation of a norm as a directive depends on the constitutional

⁷¹ Bhatia, n 16 above; T. Khaitan and F. Ahmed, 'Constitutional Avoidance' (2015) 35 OJLS 607.

⁷² See Constitution of India, Art 21A. See also *Unni Krishnan v State of Andhra Pradesh* (1993) AIR 2178.

practice in a given jurisdiction, rather than on the constitutional text or on the structure of the norm in question.

A FUNCTIONAL ANALYSIS

What constitutions do

We have already noticed that, because of their calibrated expressivism and constitutional incrementalism, directives are a sophisticated tool to win over fence-sitters during a constitutional negotiation. Their salience and normative content can be fine-tuned to match the demands of the disgruntled groups rather precisely.⁷³ Even so, as they remain contrajudiciary—why would a dissenting group settle for a constitutional directive? If they cannot be judicially enforced, what is the point of having them in the constitution? This question can be answered only if we look at the functions, if any, that constitutional directives perform during the life of a constitution. Do directives continue to play any real role as constitutional norms? Or, as is feared by their critics, do they remain a dead weight? Exploring this functional question is the central concern of this section.

The success of directives as constitutional norms can only be measured against the functions that constitutional provisions typically perform. I take it as relatively uncontroversial that constitutions of states typically perform the following main functions:

Identificatory function—the task of giving the state an identity. In the thin sense, this includes naming the state, identifying its territorial reach, and its people. Many constitutions seek to confer a thicker identity on their states, including its fundamental political, moral or religious values, its identifying symbols such as flags, anthems etc, its defining ethnocultural identity and so on.⁷⁴

Constitutive function—state constitutions constitute state power by creating or recognising key state institutions, and regulating their composition, powers and duties.

Regulatory function

⁷³ For a detailed case study on their role as an accommodational tool, see Khaitan, n 25 above.

⁷⁴ See generally G. Jacobsohn, *Constitutional Identity* (Cambridge, Mass: Harvard University Press, 2010).

Regulating constituent power—state constitutions seek to regulate constituent power, at least with respect to the manner and form of their own amendment and any substantive limits on the amendment power. Not all constitutions invoke constituent power for their amendments though, some allow constituted power to amend them. A few constitutions also seek to lay down the procedure for convening constituent power for the adoption of an entirely new constitution. The legitimacy of constitutional attempts to constrain constituent power remains deeply contested.⁷⁵

Regulating constituted power—this is arguably the most important function of a state constitution, ie, to limit and regulate the exercise of the power of state institutions.

Regulating persons, including citizens, subjects, aliens and corporations—constitutions typically confer rights on persons subject to the exercise of state power, although some constitutions also impose duties on them. Constitutions also classify persons subject to their writ into different categories (citizens, residents, visitors, aliens, non-natural persons etc) by conferring and imposing varying levels of rights and duties upon them.

Of these functions, constitutional directives are capable of performing the identificatory function and of regulating constituted power. They perform these functions in a manner distinct from other constitutional provisions, because of their two distinguishing features: obligatoriness and contrajudicative character. These features, together, allow directives to perform their identificatory function in a polyvocal and calibrated manner, and their constituted-power-regulation function in an incrementalist fashion.

The identitarian function of directives

Constitutions often seek to construct an identity for their state and its people. This constitutional identity may sometimes seek to compete with and replace other, existing, identities. At other times,

⁷⁵ J. I. Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Oxford: Routledge, 2012); Y. Raznai, *Unconstitutional Constitutional Amendments* (Oxford: OUP, 2017); S. Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford: OUP, 2012).

it may seek only to recognise and reinforce one or more existing identities of its people, or sub-groups thereof.

What can be said with some certainty about the identitarian function of constitutional directives is that the state they construct is usually a welfare state rather than a libertarian state. Given the prominence and ubiquity of social and economic directives relating to access to basic goods and distributive justice, they clearly envisage a strong role for the state in securing these objectives. There is no constitutional space for a limited, libertarian, police state in the postcolonial countries that adopted such directives.

Beyond this, the identitarian character of directives will depend on their content. But we can still say a few general things. First, because of their calibrated expressive salience, directives tend to function as footnotes to the chief identitarian parts of a constitution—usually its preamble and its first few state-constituting and anterior fundamental value provisions. As footnotes, they sometimes expand upon, augment, or make more precise the grand identitarian narratives contained in the early parts. The Namibian Constitution of 1990, for example, recognises justice and non-discrimination as some of its founding values in its Preamble. The directive contained in Article 95 gives specific content to this value by obliging the state to implement, *inter alia*, equal remuneration for men and women and provide maternity benefits for women. The specific directive is continuous with the preambular values, even as it seeks to (non-exhaustively) give it more specific content.

At other times, however, these footnotes recognise the possibility of a counter-narrative, an antithesis that runs against the grain of the preambular narrative. This counter-narrative may be contained and calibrated, but its constitutional recognition is nonetheless significant. By introducing an internal qualification, if not a contradiction, it denies the proponents of the grand preambular narrative a complete victory, and provides solace, if not hope, to their challengers. To be sure, such polyvocality can be achieved through any expressive part(s) of a constitution. With different expressive tools, of varying salience, at their disposal, framers are able to fine-tune the relative weights they wish to assign to the identitarian thesis and its antithesis. Jacobsohn characterises this expressive polyvocality as the internal *disharmony* in constitutions, and (rightly) attributes to it a creative energy that gives constitutional identity a 'dynamic quality, which results from the interplay

of forces seeking either to introduce greater harmony into the constitutional equation, or contrariwise, to create further disharmony.⁷⁶

Examples of provisions concerning religion from the constitutions of three South Asian neighbours illustrate the point. The Preamble of the 1973 Pakistani Constitution invokes Islam, the Quran and the Sunnah, and immediately follows up this invocation with another preambular clause declaring that ‘adequate provision shall be made for the minorities freely to profess and practise their religions and develop their cultures’. While the thesis and the antithesis are both contained in the Preamble itself, Article 2 of the Constitution declaring Islam as state religion, and the directive in Article 31 to facilitate Islamic living for Muslims augment the thesis. Article 20, guaranteeing the right to freedom of religion, on the other hand, strengthens the antithesis.

The Sri Lankan Constitution enjoins the state, in a directive-like Article 11—placed immediately after the state-constituting Part of the Constitution—to give ‘Buddhism the foremost place ... while assuring to all religions the rights granted by Articles 10 and 14(1)(e)’. This directive—of high expressive salience, given its anteriority—contains its qualification within itself. This is then followed up by a less saliently located directive in Article 27(11), found in the part that contains other constitutional directives. This article strengthens the counter-narrative by requiring the state to ‘create the necessary economic and social environment to enable people of all religious faiths to make a reality of their religious principles.’

Bangladesh offers an even more interesting example.⁷⁷ The Preamble invokes Allah, and Article 2A declares that the ‘state religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions.’ The antithesis in this provision is then augmented by relatively salient anterior directives, placed in the chapter that immediately follows the initial state-constituting provisions. Article 8 declares

⁷⁶ G. Jacobs, ‘Constitutional Identity’ in S. Choudhry, M. Khosla and P. B. Mehta (eds), *Oxford Handbook of the Indian Constitution* (Oxford: OUP, 2016).

⁷⁷ The history of religious clauses in the Constitution of Bangladesh 1972 is complicated, with several amendments and constitutional review of these amendments. For an overview, see J. H. Bhuiyan, ‘Secularism in the Constitution of Bangladesh’ (2017) 49 *J Leg Plur Unoff Law* 204.

‘secularism’ as a ‘fundamental principle of state policy’ and Article 12 defines ‘secularism’ to mean, among other things, the elimination of ‘the granting by the State of political status in favour of any religion’. Article 7B makes all of these mutually contradictory provisions unamendable.

In each example, framers use directives, alongside other expressive provisions, to arbitrate between religious majoritarianism and minority rights. They deploy preambles, state-constituting articles, anterior value statements, fundamental rights, and constitutional directives in a complex mix to calibrate the expressive accommodation offered to each side of the bitter religious debates the subcontinent has witnessed. In each case, they have played with the placement of the relevant directive to increase or decrease its relative salience. This ability of directives—to aid constitutional polyvocality—allows unresolved contestations over identity to be reflected in the constitutional text, thereby endorsing value pluralism. The resulting expressive disharmony keeps the controversial issue on the state’s agenda, but the calibrated textual contradictions potentially frame (but by no means determine) the manner in which future political contestations take place.

The regulatory function of directives

The manner in which constitutional directives regulate the actions of politicians and judges will vary from jurisdiction to jurisdiction. It will depend not only on the constitutional culture in a relevant jurisdiction, but also on the seriousness with which directives are taken in their constitutional practice. The account that follows is a snapshot of the role directives have performed in the Indian context. This is not intended as representative of other jurisdictions, merely as an attempt to sketch the possibilities with regard to the regulatory functions of constitutional directives. The broader point is this: Anglo-American political constitutionalism pits legislatures against courts as vying for supremacy over the final determination of constitutional disputes in a zero-sum game. Directives facilitate the rejection of this either-or model in which one institution is *generally* superior to the other. Instead, inasmuch as they can exist alongside justiciable fundamental rights, directives permit a nuanced calibration of institutional relations. Framers can judge piecemeal, rather than wholesale, which particular norms are best left primarily to courts for their enforcement, and which to politicians (there are, no doubt, other options available as well). It is plausible, in a given polity, that there will be some issues that politicians are more likely to care about, and others which judges are more likely to safeguard.

To be sure, all constitutional institutions have a duty to uphold their constitution—the issue at hand is one of emphasis, ie, which institution has the *main* responsibility for the enforcement of particular constitutional norms. If we allow for the plausible presumption that differently designed institutions result in differentiated expertise, it should be unsurprising that different parts of a constitution should be entrusted for their enforcement to different institutions.

Political Function

Constitutional directives impose substantive obligations on the political organs of the state. The notion of ‘political enforcement’ of constitutional norms gives rise to much scepticism. Especially at present, when a lazy prejudice that paints all politicians as self-seeking and insincere abounds, they are not expected to behave normatively. The Indian political experience with constitutional directives tells a different story.

At least 131 examples of ordinary primary legislation enacted in India (by federal and state legislatures) since the enactment of its Constitution in 1950 explicitly invoke directive principles generally, or mention specific directives. This figure does not reflect a vast number of statutes which effectively sought to realise a directive, but failed to invoke it explicitly. Nor does it encompass enforcement by secondary legislation and executive orders. Almost all of these invocations are preambular, usually in the statement of objects of the legislation,⁷⁸ although a few are used to guide the discretion conferred upon officials⁷⁹ or as norms whose breach justifies the intervention of a state government in the affairs of a municipality.⁸⁰ Approximately 47 of these mentions are found in statutes enacted between 1969 and 1977, during the heady days of Indira Gandhi’s left-wing populism. But that still leaves a large number of enactments outside this period—what’s more, there is no other similar period of concentrated enthusiasm about the directives, their invocation is more or less evenly spread out in subsequent years. Directives are invoked not just by primary legislation. At least eight constitutional amendments explicitly cite them as a rationale for the amendment.⁸¹

⁷⁸ See, for example, the statements of objects in the Himachal Pradesh State Commission for Women Act 1996.

⁷⁹ United Provinces Excise Act 1910 (as amended in 1970), s 28(2).

⁸⁰ Assam Municipal Act 1956 (as amended in 1965), s 296.

⁸¹ These include the 1st, 24th, 42nd, 44th, 73rd, 76th, 86th, 93rd and 98th amendments to the Constitution of India.

Part of the explanation is no doubt strategic—a statute seeking to implement a constitutional directive, while not immune from judicial scrutiny, does garner some judicial deference when facing a constitutional challenge. Furthermore, this ‘directed’ legislation also provides legislatures with an opportunity to influence constitutional interpretation.⁸² This cannot, however, be the complete explanation. For statutes are not the only documents where directives are invoked. They feature regularly in the political discourse as well, including party manifestos. The 1989 manifesto of the Bharatiya Janata Party criticised the government of the day because ‘directive principles of state policy have been forgotten’. The Congress Party manifesto of 1999 promised to further implement the rural decentralisation directive, while the Bharatiya Janata Party manifesto of 2014 promised to enact a Uniform Civil Code to implement the directive contained in Article 44. By imposing constitutional obligations on politicians, directives can help foster a constitutional culture in actors other than the judiciary.

If directives have sufficient expressive salience in a constitutional polity, they can serve a legitimisation and criticism function in the political discourse. They also perform an agenda-setting function, such that the goals incorporated in a directive need to cross a lower political interest threshold to get on to the state’s agenda. Furthermore, newer constitutions are no longer leaving their implementation to these contingent factors. We have noted above that the Nepali and the Thai constitutions have institutional mechanisms such as mandatory legislative reporting and oversight rules to ensure that directives remain on the political agenda. Whether these design innovations end up giving directives a political salience akin to the annual state budget or remain another checkbox on the legislative calendar remains to be seen. What is likely, however, is that constitutional makers will continue to innovate to give more bite to these tools of political implementation.

The degree to which the Indian experience is representative of the political function that directives can play is an agenda for further research. It is clear that at least Ireland serves as an example at the other extreme, where directives seem to have largely been politically and jurisprudentially irrelevant.⁸³ The difference between the Irish and the Indian experiences with directives suggest that for directives to perform a politically normative role, they must be

⁸² Weis, n 26 above, 918.

⁸³ Jacobsohn, n 74 above, 266.

controversial and significantly under-realised. If a directive is uncontroversial—either because its agenda is readily accepted by key players in the political establishment or because it is readily rejected by all such players—it is unlikely to become politically salient. If it is readily accepted by all, there is no need to rely on them to provide *additional* support for their agenda. For a directive universally disliked, there will be no advocates, at least until one emerges (so, with shifting political fault lines, any directive *could* become controversial, and therefore salient). It is, however, unlikely that a universally disliked directive would make it into the constitutional text in the first place.

Furthermore, a directive will also lack normative force in politics if its goal has largely been achieved (or, is seen to have been achieved). This requirement may be viewed as a subset of the controversy condition—an already satisfied directive is unlikely to give rise to much political controversy. A different way to understand this requirement is with reference to Jacobsohn’s notion of external disharmony—as a discontinuity between a constitution’s ideals, norms and aspirations and those of the society in which it is situated.⁸⁴ The greater the level of external disharmony, the more likely is it that a constitution is *militant*, or at least *transformative*, vis-à-vis the society in which it is located.⁸⁵

These reasons explain the lacklustre role of the Catholicism-inspired Irish directives in a country where—until recently—the Catholic church played a dominant role. Article 45 of the Constitution of Ireland was primarily inspired by a 1931 papal encyclical *Quadragesimo Anno*, which was already the basis of several statutes preceding the Constitution of 1937.⁸⁶ Most Irish directives require the state to ‘secure’ welfare rather than to necessarily ‘provide’ it directly. ‘Securing’ could be done by simply protecting pre-existing access or by outsourcing the duty to another entity, which in the case of Ireland was the Catholic Church.⁸⁷ The need for a political/statutory programme to implement them was as not keenly felt as it was in India.

⁸⁴ *ibid* 87.

⁸⁵ *ibid* 217.

⁸⁶ D. Coffey, *Drafting the Irish Constitution, 1935–1937* (London: Palgrave Macmillan, 2018) 241–242.

⁸⁷ T. Murray, *Contesting Economic and Social Rights in Ireland: Constitution, State and Society, 1848–2016* (Cambridge: Cambridge University Press, 2016) 115.

Thus, directives are politically useful only when they add extra weight to a political agenda by borrowing some of the constitution's legitimacy. We have seen that directives can perform a constitutional incrementalist function by partially deferring controversial agendas. It is unsurprising that directives have been politically significant in India, where a number of them were constitutionalised precisely because of their incrementalising ability.⁸⁸

Judicial Function

We can finally turn our attention to the role that directives can perform in adjudication. This section is final and brief because the judicial treatment of directives has already received considerable scholarly attention (at least relative to other aspects of constitutional directives). Although not directly enforceable by judges, constitutional directives can nonetheless have significant legal effects. This section maps four legal uses that they have been put to by the Indian judiciary.

First, directives have been used to construct India's constitutional identity. One of the more overtly political functions of constitutional courts in any jurisdiction is to help shape and change its constitutional identity, no doubt alongside other constitutional institutions. Constitutional identity is a key interpretive tool, so judges can hardly avoid participating in the contest over its content. While participating in the construction of constitutional identity, judges usually have to take all expressive provisions of a constitution into account, including directives. Unlike politicians, judges are also under an institutional duty to seek coherence in constitutional meaning, and therefore carry the additional burden of smoothing out any expressive disharmony that arises from a polyvocal text. To do this, they need to highlight the significance of particular provisions, and minimise or ignore that of others.

This identitarian function becomes even more significant in constitutions whose judicially-determined constitutional identity—its 'basic structure'—is unamendable. While declaring 'secularism' to be a part of the basic structure of the Indian Constitution, the Indian Supreme Court argued that 'Though the concept of ... "secularism" was not expressly engrafted while making the constitution, its sweep, operation and visibility are apparent from fundamental rights and directive

⁸⁸ Khaitan, n 25 above, 412.

principles and their related provisions.⁸⁹ In fact, the Court has held that the harmony between fundamental rights and directive principles is itself a feature of the basic structure of the Indian Constitution,⁹⁰ giving these parts a co-equal expressive role in the definition of constitutional identity.

Second, Indian judges have come to give special judicial deference while reviewing the constitutionality of statutes enacted towards the implementation of a constitutional directive (or 'directed legislation', to borrow a phrase from Weis).⁹¹ While the Indian judiciary has resisted parliamentary attempts to completely immunise directed legislation from judicial review,⁹² it has held that 'A restriction placed on any Fundamental Right, aimed at securing Directive Principles will be held as reasonable [if] it does not run in clear conflict with the fundamental right'.⁹³

Third, Indian courts have used directives as significant interpretive aids in the construction of constitutional as well as statutory provisions.⁹⁴ In several cases concerning statutory interpretation, courts have favoured a meaning which furthers a directive's agenda over one that does not do so.⁹⁵ In constitutional interpretation, their key role has been as a reservoir of fundamental rights implied under the constitutional right to 'life and personal liberty' guaranteed under Article 21. For example, the Court relied upon the education directive in Article 45 to discover an implied fundamental right to primary education under Article 21.⁹⁶ It is possible to see these cases as a judicial 'translation' of a directive into a right—even so, we should remember that the judiciary needs a plausible vehicle

⁸⁹ *Bommai v Union of India* (1994) 3 SCC 1, 208 at [257].

⁹⁰ *Minerva Mills v Union of India* (1980) AIR 1789.

⁹¹ Weis, n 26 above, 918.

⁹² n 90 above.

⁹³ *State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat* (2005) 8 SCC 534.

⁹⁴ See generally Tripathi, n 16 above; Baxi, n 16 above; Narain, n 16 above; de Villiers, n 16 above; Singh, n 16 above; Bhatia, n 16 above.

⁹⁵ Bhatia, n 16 above, 651–652.

⁹⁶ *Unni Krishnan v State of Andhra Pradesh* n 72 above.

(such as Article 21) to facilitate such translation. In the absence of a suitable vehicle, such translation is not possible. Little surprise then that the only directives that have been thus translated are those concerning minimum social guarantees. The redistributive directive or the controversial sectarian directives (such as those concerning the prohibition of cow-slaughter) have not been translated into rights. Even with regard to the social minimum guarantees, the judiciary appears to have been mindful of its secondary role with respect to directives, and has cited legislative inaction as a justification for the translation of the education directive into a right.⁹⁷ The implication is that, had the legislature done what the constitution asked it to do, the judiciary would not have acted.

A related phenomenon is ‘reading up’—use of directed legislation to interpret a constitutional provision.⁹⁸ ‘The legislation is not simply given deference’, Weis tells us, ‘but is used as a source of constitutional meaning.’⁹⁹ For example, an affirmative action measure contained in a statutory rule, seeking to implement the directive contained in Article 46 to promote the interests of scheduled castes and tribes, prompted a change in the judicial understanding of the constitutional guarantee of equality from a formal conception to a substantive one.¹⁰⁰ This final example returns our attention to the role of constitutional directives in furthering political constitutionalism, since they allow legislatures to play a significant role in determining the content of constitutional rights. And yet, this role does not displace a judicial role, but supplements it.

Finally, directives have been used as moral guides by courts while exercising their law-making function. For example, the Indian Supreme Court cited the directive in Article 42 concerning the obligation to provide ‘just and humane conditions for work and for maternity relief’, alongside a panoply of other constitutional provisions, to lay down guidelines against sexual harassment at the workplace in the absence of legislation.¹⁰¹ This judicial reliance on positive constitutional (and legal) moral commitments when making laws should be unsurprising—law-making is one of the most

⁹⁷ *ibid*, 45.

⁹⁸ Weis, n 26 above, 940.

⁹⁹ *ibid*, 941.

¹⁰⁰ *State of Kerala v Thomas* (1976) 2 SCC 310. See also Bhatia, n 16 above, 653–655.

¹⁰¹ *Vishaka v State of Rajasthan* (1997) 6 SCC 241, 247–248 at [5].

contested judicial functions, despite its ubiquity (at least in the common law world). Relying on positive moral guidance in the constitutional preambles, value statements, rights provisions and directives helps a court fend off some of the criticism concerning the legitimacy of judicial law-making.

Thus, directives guide judicial discretion in shaping a state's constitutional identity, reviewing any directed legislation, interpreting its laws and the constitution (including, sometimes, 'translating' a directive by reading it as an implied right) and making laws to fill any legislative gaps. There isn't a complete separation between the judiciary and directives. While the bar on direct enforcement of (untranslated) directives exists, directives are only *weakly* contrajudicative.

CONCLUSION

Constitutional directives show a different route to political constitutionalism—one where the legislature and the judiciary don't vie for power in a zero-sum game, but agree to a flexible, non-exclusive, institutional division of power. They preserve the primacy of democratic politics without acceding to a proceduralist constitutional vision often underpinning advocacy against judicial 'activism'. They suggest the possibility of a morally-committed liberal democratic constitutionalism.

Conceptually, constitutional directives are obligatory telic norms that identify thick moral objectives whose full realisation is deferred to a future date. These directives impose two duties: (i) a *duty to endeavour* to realise the directed goal, which kicks in immediately, and (ii) a *duty to fully realise* that goal by some (specified or unspecified) future date. The telic character of these duties facilitates the use of directives as an incrementalist tool, where current constitutional controversies are passed on for future resolution through ordinary politics. They tend to have a lower, if variable, expressive salience than value statements and are more amenable to containment strategies. Directives are weakly contrajudicative in that these duties are not directly enforced by courts. Ultimately, the characterisation of a norm as a directive depends on the constitutional practice in a given jurisdiction, rather than on the constitutional text or on the structure of the norm in question.

Constitutional directives, along with other expressive provisions of a constitution and constitutional practice, give content to a constitution's identity. They are also key to enshrining internal disharmony in constitutional texts, recognising deep societal disagreements over controversial matters. This polyvocality allows framers to address multiple audiences in sometimes contradictory voices, facilitating broad, if fragile, agreement in divided societies. These carefully

calibrated disharmonies become the engines for constitutional change, and frame political contestation between warring groups within a constitutional ecosystem.

Directives also regulate the exercise of political and judicial power. As obligations on the state, they demand realisation from the political organs of the state. If sufficiently salient (because controversial and under-realised), they can become a basis for initiating and legitimising political action. Recent design innovations have sought to give further teeth to their political implementation. Finally, directives also constrain judicial discretion in shaping a state's constitutional identity, reviewing any directed legislation, interpreting its laws and the constitution (including, sometimes, 'translating' a directive by reading it as an implied right) and making laws to fill any legislative gaps.

With these conceptual and functional features, constitutional directives hold the promise of a morally-committed political constitutionalism. Greater scholarly attention to their functioning in different jurisdictions, including the effectiveness of the innovative political enforcement mechanisms being adopted by some constitutions, will enrich our understanding of constitutionalism. It will also widen our understanding of the range of possibilities that exist within liberal democratic constitutionalism.

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