Book Review. Law in India

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the power of "interpretation." The articles concerning general periodical review like article 109 of the UN Charter have not been of much use to facilitate amendments. Even rigid amendment rules are preferable to having none at all, as was shown by the trouble which the absence of such rules caused to the Permanent Court of International Justice from 1930 to 1936, and in 1945.

In his concluding remarks the author stresses the necessity of more intensive research into the constitutional law of international organizations. Nevertheless, the present excellent monograph gives a wealth of very interesting information which serves well to illustrate the difficulty of more general research. If one wants to escape being mired in detail, one can only describe trends. It does not matter much, as the author rightly insists, that these trends have not yet acquired the force of customary law; even if they had, they could be set aside by any specific provision included in such a constitutive instrument. However, if one would wish to give more precise information, one is confronted by such a mass of rules, differing from each other in sometimes important details, that it is very difficult to summarize these provisions in fewer pages than the author has done. Yet, the topic covers only a small fragment of the rules figuring in constitutive instruments of international organizations. A book which attempted to compare in this manner all the rules in such instruments would run into several volumes.

LAW IN INDIA


Reviewed by Ralph F. Fuchs*

Mr. Justice Mukharji's volume on The Critical Problems of the Indian Constitution consists of the 1966 Chimanlal Setalvad Lectures at the University of Bombay by a long-time judge of the High Court of Calcutta, now also Dean of the Faculty of Law of the University there. The book focuses on those constitutional issues which Mr. Justice Mukharji considers to be most basic and timely, because success or failure of the Indian democracy turns on them to a large extent. The author avoids the traditional lawyer's approach of concentrating on judicial decisions. The text deals, instead, with the Constitution itself and the uses which have been made of its provisions politically and administratively. It covers successively the executive, legislative, and judicial powers; federalism; the unwritten aspects of constitutional

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practice; and the conditions, institutions, and attitudes essential to maintaining an adequate government of limited powers in today's world.

In his introduction to the volume, Mr. Justice Mukharji stresses that the most critical aspects of constitutional development, although they turn to some extent on the forms and intended meanings of constitutional provisions, depend most largely on the "national character and national psychology." These national characteristics determine what is viable and what is ephemeral in constitutional practice. It cannot be said, however, that the book as a whole bears out the promise, implicit in this thought, of an analysis of Indian culture, social needs, and constitutional response. The approach is, rather, through the text of the Constitution, the specific meanings which have been given to its provisions, the interrelations of its parts, and the interpretations which, in the author's view, are required if there is to be a successful Indian legal order, producing individual and social justice.

Mr. Justice Mukharji asserts that "[t]he Indian genius has a flair for the absolute and the ideal and almost a congenital disregard verging on contempt for the practical and the concrete." (P. vi.) Nevertheless he does not find that the Constitution expresses this characteristic. It is a severely detailed and practical document. There is an absence from it of broad bestowals of power, an avoidance of any articulated theory of federalism, and an exclusion of any adherence to stated "isms" of either the left or the right. The author fiercely rejects the importation into Indian affairs of theories and conceptions drawn from other constitutional systems, such as parliamentary government in the British sense. The Constitution of India, he insists, is what it is—the sum of many parts, *sui generis*, and to be interpreted to carry out its specific purposes in a uniquely Indian context.

The most significant and effective chapter in Mr. Justice Mukharji's book is the opening one which deals with the executive power. In it the author argues eloquently for recognition that the President of India, far from occupying the completely subordinate political position of the English Crown, should exercise independently certain powers which have been bestowed upon him. He functions over-all in relation to the Council of Ministers, headed by the Prime Minister, for which the Constitution makes specific provision. The Council is a "government" in a parliamentary sense, as Mr. Justice Mukharji recognizes in his chapter on "conventions" (unwritten practice) by inferring a requirement that the Prime Minister be a member of the lower house, even though there is no explicit provision to this effect (pp. 159-160). The President, however, has the power to refer bills back for changes after their initial presentation to him for assent—a power which would be meaningless in relation to bills sponsored by the "government" unless it could be exercised independently (p. 17). The method of selecting the President is elaborately democratic in a manner that, like the limitation of his term of office to six years, would be unnecessary if he were to be a mere figurehead. He is not to be a member of any legislature; he is clearly to be above political partizanship; and the oath of office he is required to take is unique in providing for his duty "to preserve, protect and defend the Constitution and the law." Impeachment of a President, for which the Constitution provides, would be inappropriate for an official
who exercised no significant powers. Most particularly in a country which
is subject to many factional divisions, yet has so far been under the
dominance of a single political party, the role of the President as both a
unifying force and a safeguard against a possible “constitutional dictator-
ship”. of the dominant party is important. The author does not say to what
extent this viewpoint can prevail, given the traditions, personalities, and
popular attitudes which have operated and remain at work. Certainly the
theory that India’s government is a parliamentary one is generally accepted.\(^1\)
Mr. Justice Mukharji has supplied a cogent lawyer’s brief for a modified
view, rather than a social diagnosis or a forecast in support of his position.

Especially important in Mr. Justice Mukharji’s remaining text are his
account of Indian federalism, his recital of the difficulties under which the
judiciary operates because of low salaries, severe provisions with respect to
retirement of judges, and inadequate correlation of the administration of
the various courts. Suspicious of administrative justice, he would subject it
more thoroughly to control by the courts than is the case at present (pp.
172-174), and is bitter in rejecting the possible use of ombudsmen to correct
deficiencies and abuses in public administration, which he regards as a
threat to judicial review (pp. 175-178). In an excursion into social diagnosis
the author expresses distaste for the Constitutional exclusion of religious
instruction from government-supported educational institutions, because
“education without religion . . . is really no education at all” and produces
“evil effects in faithlessness and indiscipline.” (Pp. 149-150.) Over all, in the
face of the great difficulties which prevail in Indian society, Mr. Justice
Mukharji places reliance on the “rule of law,” which the Constitution
provides, as the greatest safeguard for the future. It should be carried out
through courts which understand the forces at work and which, if they
“do not represent the will of the people,” can at least “claim to represent
their conscience.”

It is a distressing aspect of the Indian constitutional system to Mr. Justice
Mukharji that the easy process of constitutional amendment which has
been provided has led to an average of approximately one amending Act
each year, in many instances consisting of numerous parts, and that several of
the provisions of these Acts have overturned court decisions holding statutes
to be unconstitutional. Especially objectionable, in this view, is the device
adopted by the First Amendment Act of 1951, whereby specific statutes
have been enumerated in a Ninth Schedule to the Constitution and protected
from holdings of invalidity. The list has twice been augmented and consists
now of 64 measures, both Union and state. It ought to be beyond the power
of the Parliament, “under the cover or guise of a constitutional amendment”
to make “unconstitutional statutes constitutional by the mere process of
incorporating” them into a Schedule (p. 62). Subject to this amending
process, the power of the courts to determine the constitutionality of statutes
under the Indian Constitution, especially Part III containing the Funda-
mental Rights, is undoubted.

In contrast to Mr. Justice Mukharji, Dr. Jain blames the courts of India,
particularly the Supreme Court, for obstructive and technical decisions

\(^1\) See M. P. Jain, Indian Constitutional Law (1962), 97-102.
invalidating essential reform measures. For him, constitutional amendments to overcome such decisions are clearly justified. In relation to rights of property, the power of the courts to render such decisions should be reduced (p. 206) by the deletion of Article 19(1)(f) which in general terms confers on citizens the right “to acquire, hold and dispose of property,” subject to “reasonable restrictions.” In general, however, “there is no escape from judicial review in a backward democracy like ours. The Courts still remain here the bulwark of citizens’ freedom, rights and honour” (p. ix).

Dr. Jain’s book, a doctoral thesis in Government at Allahabad University, is a full-length study of Article 31 of the Indian Constitution, its purposes, the manner in which it has been applied and construed, the additions and amendments which have been made to it, and the consequences for the nation, especially in relation to agrarian reform. Dr. Jain points out that the Indian Constitution protects rights which must be secured by effective social control, as well as claims of the individual against the State (p. viii). He writes from the standpoint of one who supports “the goal of democratic socialism which has been the accepted ideology of the ruling party ever since Independence” (p. vii). The first eleven chapters of his book contain a very full, illuminating, and valuable exposition of the origin and purposes of the property provisions of the Indian Constitution, their operation in relation to agrarian reform legislation, the interplay among this legislation, judicial decisions, and the process of constitutional amendment, and the resulting state of the law. In his twelfth and final chapter Dr. Jain appraises the current condition of Indian economic development, including agrarian reform, without, however, relating the deficiencies which exist to difficulties with the law. His account is informative and useful.

Dr. Jain analyzes very well at the outset the functioning of the institution of property and the effects upon it of legal developments; and he expounds effectively the purposes of the Constituent Assembly with relation to it. He also exposes tellingly the processes of legal reasoning by which the courts, from time to time, have drawn hidden meanings from otherwise plain words of the Constitution and have found unexpected relevance in remote clauses, with the effect of defeating legislative measures. His over-all characterization of courts and judges (p. 133) is in consequence undiscriminately hostile, just as is his grouping of “capitalists, ... financiers, ... and landlords” with “profiteers, hoarders, blackmarketeers and other similar social enemies” as harmful “vested interests” (p. 109). These are but exuberances of expression in an otherwise excellent analysis which does not purport to go significantly beyond the property area.

Both Mr. Justice Mukharji and Dr. Jain discuss in brief appendices a cataclysmic event in Indian constitutional history, which took place on February 27, 1967, when the Supreme Court decided the case of Golak Nath v. State of Punjab,2 to which Dr. Sathe’s brief but thoughtful monograph is devoted. In that case a full bench of the Court decided 6-to-5 that the Fundamental Rights provisions of the Constitution of India may not be amended by any of the processes of Article 368, which provides for Amendments, in a manner that would “take away or abridge” these Rights.

Building on the method of "prospective overruling" recently applied in some constitutional matters by the Supreme Court of the United States, the Court held, however, that because of prior decisions which had sanctioned amendments without limitation, none of the 17 Amendments previously adopted might be questioned on this account in relation to either their past or their future effect. Specifically saved by the decision were Amendments validating certain land reform legislation involved in the case, including Ninth Schedule listings. Thus by a strategy reminiscent of that of the Marshall Court in this country and at least equal in "activism" to anything attempted by the present Supreme Court of the United States, the majority of the Indian Court imposed on the future, so long as its decision holds, a constitutional regime in which the Court, rather than the Parliament, will have the last word with respect to additional Amendments that are alleged to impair any of the Fundamental Rights. Amendments designed to overcome prior decisions holding statutes unconstitutional may be expected to undergo particularly close scrutiny.

None of our three authors approves of this decision. Its strained logic raises to new heights the method of causing seemingly plain constitutional provisions to mean something different from what they appear to say; and it is not acceptable. The threat of rigid limitation of governmental power to enact and administer social legislation, which the decision raises, is not consistent with democracy. These disadvantages are a higher price than Mr. Justice Mukharji is willing to pay for increased constitutional stability—if, indeed, greater stability can result. To Dr. Jain, needless to say, the decision of the majority of the Court is an unjustified and harmful usurpation. Dr. Sathe in the second and third chapters of his book offers telling criticisms of several aspects of the Court's reasoning in relation to the principal point decided, as well as of the use made of "prospective overruling." Reasoning from the result, as one must in relation to the future, he goes on to consider how the Court in judging new Amendments which might restrict the Fundamental Rights, as well as in determining the validity of statutes, can contribute to constitutional development instead of imposing rigid limits.

In the Indian Constitution, with its numerous provisions, the Fundamental Rights should be recognized as falling into two categories, according to Dr. Sathe. The first category involves detailed and specific Rights, such as some of the Articles specify. Others are more "transcendental," not in a natural-law sense but in the sense of expressing the truly fundamental ideals of individual freedom, equality, and secularism, which the framers of the Constitution wrote into the document. Some of these underlie other provisions than those in Title III, which insure individual participation in democratic processes, but could perhaps be read into certain Title III provisions, as equality of representation has been read into the equal-protection-of-the-laws clause of the Fourteenth Amendment of the United States Constitution. In any event the Supreme Court of India can, if it will, amplify and safeguard these fundamental ideals in its future constitutional decisions, adapting the basic rights to changing circumstances as the

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Supreme Court of the United States has done. Adoption of this philosophy in the past might have avoided some of the decisions, protective of rights of property, which it became necessary to overcome by constitutional amendment; adherence to it now becomes imperative when attempts at change in the Constitution itself are to be judged. The Court's "more policy oriented approach" in the Golak Nath opinions, emphasizing consequences as well as constitutional wording, gives ground for hope on this score, in Dr. Sathe's opinion (p. 60). If this hope is borne out, both current fears of constitutional rigidity and the practice of resorting to frequent Amendments for the purpose of overcoming court decisions may be obviated.

Among the voluminous writings of Indian authors on the constitutional law of that country, many are confined to textual analysis and exposition. The three books under review rise far above that level. They express sturdy judgments, grounded in study and thought, with continuous attention to ends to be served. Their orientation is indigenous at the same time as they draw liberally on knowledge of foreign systems to an extent which is surely one of the most admirable characteristics of Indian constitutional scholarship. The influence of a growing volume of this kind of writing could contribute immeasurably to Indian development.


Reviewed by John N. Hazard*

The impact of conquerors upon India's traditional system of public order has stimulated Robert Lingat to conclude his exposition of Hindu law with a thesis deserving the attention of comparatists concerned with the consequences of the destruction of traditional social restraints in the process of modernization. The Islamic Emperors brought to an end the royal power that had made the divinely defined "duties" of the Hindu system function under a King who combined both religious and temporal authority. In consequence, the supreme power of India was metamorphosed and lost the influence of the traditional restraints upon the exercise of power which had been inherent in the prescriptions of the scriptures. Islamic Emperors could be arbitrary with Hindu subjects.

The change brought about a sharp difference also in the impact of traditional restraints upon the masses, for only the Brahmins were left to remind them of the social order to which they should adhere, and even these learned masters became a relatively weak force under Moslem domination, for they were deprived of their privileges and predominant position. Consequently the masses forgot, or almost so, that their social order rested traditionally upon reverence for duties performed out of a sense of religious desire rather than compulsion by temporal power. The result was catastrophic for a traditional social order based on conscience and inner restraint.

* Member of the Board of Editors.