Book Review. Law in India

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employee's permanent or temporary residence; (2) the place where the employee takes his meals; and (3) the place where the employee ordinarily receives his salary.

The various American workmen's compensation systems are most similar to the Italian system, with accidents occurring outside the place of employment being compensated only if the employer provides the means of transportation or if the trip is otherwise affected by the specific dangers of the employment. This book shows that there is room for improvement.

**LAW IN INDIA**


Reviewed by Ralph F. Fuchs*

The two volumes by Indian authors consist of recent lectures in the Chimanlal Setalvad series at the University of Bombay. They possess unusual importance for two reasons. One is the extraordinary current significance of some of the issues of Indian constitutional law and judicial administration that are discussed; the other lies in the role which each author has played in relation to these matters and the weight which consequently attaches to his views. K. Subba Rao was Chief Justice of India at the time of the famous Golak Nath decision holding, contrary to a prior decision, that the Fundamental Rights bestowed by the Indian Constitution can no longer be curtailed by amendment.¹ He wrote the plurality opinion of the Court in that case after having led recurring majorities of his colleagues in earlier adjudications on constitutional protections to property, which culminated in Golak Nath. H. M. Seervai is Advocate-General of the State of Maharashtra and the author of a 1967 treatise on Indian constitutional law² that has attracted much attention. Here he appears as a forthright critic of the work of the Court. The former Chief Justice

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1. Golak Nath v. State of Punjab, A.I.R. 1967 S.C. 1643. See Fuchs, Book Review, Law in India, 17 Am. J. Comp. L. 144 (1969). By means of an expansion of American "prospective overruling" the Court avoided the application of its new holding to amendments adopted prior to the decision, which remain in effect. Under the terms of an amendment so adopted the Court upheld the state land reform law, reallocating property rights among individuals, which was before it.


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writes of the reasons for Golak Nath in a manner which adds materially to his opinion as chief spokesman of the Court.

Mr. Seervai is in essence a realist who sees the basis of judicial authority in constitutional as well as other adjudications as dependent on specific bestowal, including that in constitutional texts and prior interpretative decisions. In English law, which lacks a written constitution, judicial authority rests on precedents and statutes. There is no "rule of law" rising higher than these sources. Nor is there an antithesis between law and a legally bestowed judicial or administrative discretion, each of which operates within defined limits. To Chief Justice Subba Rao, on the other hand, "[t]he Supreme Court has no higher duty under the Constitution than to protect the people's freedom" and, as "[t]he first essential" to this end, provide enforcement of the rule of law, including enforcement of the Fundamental Rights against purported constitutional amendments that would curtail them.

The elaborate process of reasoning from constitutional texts, set forth in the Golak Nath opinions to support the decision, is repeated in Chief Justice Subba Rao's lectures and demolished by Mr. Seervai; but it becomes essentially irrelevant if the decision was actually rooted in a higher law or was, as the Chief Justice also asserts, "A sincere attempt . . . to save for the future, the remaining fundamental rights from the process of destruction by Parliamentary Amendment," which assertedly had taken place. The recital here leaves little doubt that this purpose was the reason for the decision. The final arbiter of constitutional change affecting the Fundamental Rights becomes, then, the judgment of the Court, unless another constituent assembly should be summoned. As many critics have emphasized, a democracy cannot accept such judicial constriction of popular processes. Hence the issue generated by the Golak Nath decision will remain central to Indian politics until it is resolved by some reenactment of the amending process, an unlikely repudiation of the decision by the Court, or future judicial interpretation of the existing Fundamental Rights with sufficient flexibility to avoid the need for their amendment.

Chief Justice Subba Rao supplies, to be sure, an impressive recital of the lengths to which the ruling Congress Party of India had gone over the years in employing the relatively easy amending process in Parliament, not only to overcome decisions which had invalidated

4. Ibid., 89-91.
6. Ibid., 88-95. Such amendments are held by the majority in Golak Nath to be "laws" which are expressly made void by Article 13(2) because of their contravention of the Rights.
7. In addition to the principal point stated in the preceding footnote, the source in the Constitution of the amending power and the basis for preserving the effectiveness of amendments previously adopted were adumbrated by the Court.
8. Subba Rao, supra note 5 at 80.
9. Article 368, which prescribes the amending process, provides that for the great bulk of constitutional provisions, amendments may be adopted by a
prior legislation, but also to forestall future decisions by adopting amendments to insulate enumerated statutes from judicial review. Such trigger-happiness with relation to real or anticipated threats from the judiciary, in preference to further litigation to produce change, is indeed repugnant and was not necessary or even fully effective to save essential economic and social reforms. Mr. Seervai makes no defense of it or of the merits of the measures which the Congress Party was attempting; but he attacks the extremism and artificiality of the ultimate judicial response.

Both writers deal with a large range of other matters as well—notably the burden on the Supreme Court and state High Courts because of their extensive original and appellate jurisdiction, the less-than-adequate status of the judiciary in the governmental structure, the unyieldingly low level of judicial salaries, the existing counter-productive set of provisions for the retirement of the judges, and handicaps besetting the bar. The former Chief Justice supplies, in addition, an illuminating account of the decision-making processes of the Supreme Court which, according to him, involve oral conferences only in a "very few" important cases. Oral argument before the Court, with its unlimited duration and continuous exchange of views among the judges and counsel, are considered to provide the necessary groundwork for subsequent consideration and interchanges on the part of the judges. Mr. Seervai believes the judges should be more restrained in their questioning of counsel.

Despite poor organization and numerous typographical flaws in Chief Justice Subba Rao's book, one emerges from a reading of both volumes with a renewed sense of respect for the performance of the Indian judiciary at its top levels in disposing, with whatever difficulty, of a task of extreme magnitude. The failure of Indian political leadership to grasp the needs of this branch of the government and lend it every facility, which both these writers deplore, remains highly regrettable. Both authors, it should be noted, exemplify the learning which characterizes many leading Indian jurists by widespread reference to English and American authors, decisions, and jurisprudential experience. Although the discussion of American experience is not altogether free of minor flaws, it draws shrewdly, in the main, on the lessons of that experience.

Professor Merillat's book brings the resources and skills of a penetrating scholarship, including research into economic and political reality, to bear on the principal complex of problems with which the other two volumes also deal. The result, aided by the author's extensive experience in India itself, is a richly informative history and appraisal. It prepares for the discussion of constitutional developments by an account of the pre-independence agricultural land-tenure systems in India, that called for reform; the nature of the reforms proposed; the extent to which resistance at the state legislative level majority of the membership of each house, constituting not less than two-thirds of those present and voting, followed by the assent of the President.
adapted these reforms to middle-class rather than dispossessed-class purposes; and the importance today of urban development programs in accomplishing social improvement that gives rise to constitutional issues. The property and related clauses of the Fundamental Rights provisions of the Constitution, together with their judicial interpretation, have resulted on the whole in much greater legislative freedom for the state to curtail and acquire property rights with less than full compensation to the owners than prevails, for example, in the United States. Nevertheless crucial judicial decisions have from time to time imposed uncertainties and hazards on reform measures, sometimes with only tenuous reasoning based on constitutional texts. The response through constitutional amendments has been excessive; but the stricture imposed by the Golak Nath decision, whether or not its doctrinal framework can be defended, has no support in the actual intentions of the Constituent Assembly with respect to the amending process.

Professor Merillat's account extends beyond Golak Nath to the Supreme Court's decision in February, 1970, invalidating the first bank nationalization measure of Prime Minister Indira Gandhi's government. In intervening cases prior to that decision, the Court had given evidence of a relaxed interpretation of the Fundamental Rights; but in that case the tribunal, possibly goaded by the aggressive political stance reflected in the measure, held 10-1, after 34 days of argument, that the law was invalid because it provided only "illusory" compensation for property taken and denied equal protection of the laws. The battle lines between the Court and political forces bent on radical change, at least as against unpopular economic interests, were thus drawn anew. In December, 1970, the Court struck down the President's measure to terminate the privy purses and tax exemptions of the Rulers of former principalities or their successors, which were accorded in the Constitution after these Rulers agreed to the entry of their principalities into the Union. The Prime Minister's smashing victory in the 1971 elections obviously strengthens the Government's hand vis-à-vis the Court; but the nature of any ultimate ac-

10. R. C. Cooper v. Union of India, A.I.R. 1970 S.C. 564. Professor Merillat deals with this case in a Postscript to his book; Mr. Seervai criticizes the decision in the Preface to his volume, showing that it was made to rest in part on the conception of a transcendent "rule of law" such as Chief Justice Subba Rao sets forth in his book here under review. The former Chief Justice was no longer a member of the Court, having resigned, as Professor Merillat notes (p. 272), to become a candidate for the Presidency.


12. Madhav Rao Scindia v. Union of India, A.I.R. 1971 S.C. 530, discussed at length on p. 79 of this issue by N. Roberts. The decision in the majority opinion was based, not on the now uncurtailable Fundamental Rights provisions of the Constitution, but on other provisions specifically applicable to the claims of the Rulers. If these should now be curtailed or deleted by constitutional amendment, questions could be raised of whether property rights secured by Fundamental Rights provisions had been invalidly abrogated. In the eyes of two of the Justices, they had been violated by the Presidential action under attack.
commodation is not made clearer by this political event. One hopes that, despite the sharpness of political rhetoric, the value of the judicial process in contributing to the reasoned development of basic national policy will not be lost.

Given the vital importance of success of the Indian experiment to the survival of democracy east of Europe, American concern with events in that country should remain continuously high. It is fortunate that, in the legal sphere, an observer of the calibre and knowledgeable-\*\* of Professor Merillat is at work, reporting his findings.

SOVIET LAW


Reviewed by George Ginsburgs*

Monographs on Soviet citizenship law by local authors are a rarity, so the appearance of the present study is somewhat of an event. Back in 1965, Mr. Shevtsov had already published a brochure on the subject, which ran to 64 pages, and his latest treatise has now been expanded to almost three times the size.

The survey contains little that is startling. As is unfortunately all too common in Soviet legal literature, the author spends a disproportionate amount of time on polemics over definitional terms, as though by virtue of semantic gymnastics and casuistic disputation a higher substantive truth will suddenly be revealed and the scattered fragments of the universe neatly fall into place. The lengths to which Soviet writers can go in arguing over syntactic abstractions never ceases to be a source of wonder and frustration to one weaned on the empirical tradition who must plough through vast tracts of verbiage representing the legal equivalent of the medieval brainteaser about how many angels would fit on the head of a pin.

Few new facts emerge from the analysis. One useful bit of fresh intelligence is a positive statement to the effect that in practice a presumption operates that foundlings in the USSR come of Soviet parents and thus the law recognizes them as Soviet citizens which helps dispel a minor mystery engendered by statutory silence on that score. Some welcome light is also shed on the administrative routine of processing applications for admission to Soviet citizenship. The preparatory work is handled by the legal department of the Presidium of the USSR Supreme Soviet which makes the necessary inquiries and puts the data in proper form; as a rule, the Consular bureau of the Ministry of Foreign Affairs furnishes its opinion on the issue of an

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