



BOOK REVIEWS

Constitutional Protection, by L. A. SHERIDAN, Singapore, Malayan Law Journal Ltd., New York Ocean a Publications, Inc., 1963, pp. Li 172, \$ 9.

This excellent work dealing with "Constitutional Protection" to the right to property in India in a setting of a comparative study of similar provisions in other South-East-Asian Constitutions is unique in more respects than one.

It is a pioneering work in that it is the first serious study directed intensively to the Constitutional provisions relating to a single Fundamental Right. General treatises and books on the Constitution of India are available to the reader; but these cannot be expected to do justice to individual provisions and themes with the fullness that marks works like the one under review.

The importance of the fundamental right to property guaranteed in the Constitution of India can hardly be overstated. Our Courts, while dealing with this subject are really engaged in determining the vital lines of fusion between the philosophical principle of individual liberty and the political creed of a socialistic society. No amount of discussion and effort focussing attention on what is involved in reaching decisions on the issues arising in this field can be regarded sufficient.

From this point of view, one great merit of the book under review is the application of the analytical technique: identifying, more or less exhaustively, the legal forms and categories involved, marshalling the several possible solutions, and, juxtaposing them with those that actually found favour with the courts.

To take only one example of such analytical application: In chapter 8, titled 'Nationalisation by Prohibition of Competition' the author draws sharp lines discriminating between 'loss of goodwill', 'loss of custom' and 'loss of the right to compete'—a distinction often ignored and, yet, one which is perhaps all important in judging the relevance of the constitutional provisions regarding compensation. In India, the question of payment of compensation to private business in case of monopolisation by the State seems to have been settled by the Supreme Court in *G. Nageshwara Rao v. State of Andhra Pradesh* (A.I.R. 1959 S.C. 308). Reasoning that the monopolising state agency



can, "by no stretch of imagination or extension of legal fiction" be said to be doing the "same business" which the ousted private individual was doing, the Supreme Court, in that case, ruled out the relevancy of the question of compensation. However, it would seem possible to argue that the decision is founded on an over simplification which the Supreme Court may see through and discard at some later date and in an altered context. In this connection the discussion of some Irish cases, especially of *Ulster Transport Authority v. James Brown and Sons Ltd.*, (1953, N.I. 79), where, in comparable circumstances, payment of compensation was held obligatory, should be of considerable interest to the Indian lawyer.

The book not only presents an exhaustive study of the judicial treatment of Articles 19(1)(f) and 31 of the Constitution of India, but, for the practising advocate, it is a treasure house of novel suggestions and, hitherto, unnoticed possibilities. One such suggestion, for instance, is that the doctrine of "Pith and substance", originally confined in its application to questions of vires of legislation by the rival governments in a federal system, should also be applied to determine the relevancy of clause (2) of Article 31—the compensation clause. There seems to be considerable force in the suggestion that a rational and satisfactory basis for the decision to exclude compensation in the case of confiscation of contraband gold, or of obscene literature, or of the right to compete with the State in an established business can scarcely be founded upon the uncertain and abstract premise of police powers rightly characterised by the author as a red-herring. The complacency of the learned Judges who disposed of the problem, in *Sheo Shanker v. Madhya Pradesh* (A.I.R. 1951 Nagpur 58), by holding that "noxious articles" are "not property" (p. 101) seems to be hardly defensible. Of course, the question of applying the doctrine of "pith and substance" to Fundamental Rights is not free from difficulty. But, analogous authority exists in support of the author's view. In any event, the author makes an important contribution by suggesting one more approach to the resolution of a difficult constitutional problem.

Other significant suggestions thrown in by the author include, the possibility of applying the test of "reasonableness", prescribed in clause (5) of the Article 19, to the provisions regarding compensation made in compliance with Article 31(2), and, the possibility of challenging the compensation offered, not on the ground of mere inadequacy, but on the ground that the inadequacy is so appalling that what is



dressed up as compensation is in reality not it. This last mentioned argument, as noted by the author, has already found judicial favour at the High Court level.

Another important feature of the book is the comprehensive study it presents of the comparative constitutional provisions and the corresponding judicial treatment accorded to these, in Pakistan, the Federation of Malaya, Northern Ireland and even in India under the Government of India Act, 1935. The author wisely points out that the views expressed in this country regarding the provisions as they stood before the 4th Amendment to the Constitution continue to be of great significance for these other countries with analogous constitutional provisions. This significance is further enhanced by the fact that in the constitutions of some of these countries—that of the Federation of Malaya, for example—there are no provisions corresponding to Articles 19(1)(f) and 19(5) of the Constitution of India, with the result that a single provision corresponding to Article 31 of our Constitution has to do service over the entire field. These references to the legal systems of other Asian countries and Northern Ireland, not only place before the reader, material hitherto unnoticed but they also draw his attention to literature more closely analogous to our own and more truly significant in grappling with Indian problems, coming as it does, from societies closer to our own in political and social development.

The discussion at pp. 123-8 of the book is likely to create the erroneous impression that the High Courts in India have regarded themselves free to deviate from the interpretation given by the Supreme Court in *Subodh Gopal's* case to clauses (1) and (2) of Article 31. Citing *Venkata Munga Bai's* case the learned author observes that the High Court at Hyderabad stuck to its original view in favour of the more extensive interpretation of Article 31(2), whereas Madras “remained true to the narrower view” until two years after the Supreme Court decision. The fact is that Hyderabad High Court, in *Mungabai's* case, actually cited the Supreme Court decision in *Subodh Gopal's* case, and followed it; though, in doing so it happened to be enforcing the view it had taken even earlier than the decision in *Subodh Gopal*. Also, in *Santhamma v. Neelamma*, the Madras decision of 1956 referred to by the learned author, the High Court cites the *Subodh Gopal* decision, but does not find it applicable to the facts of the case in hand inasmuch as the readjustment of the property rights of the members of the “Kavaru” by legislation did not present a problem of “deprivation”



at all. As Rajagopala Ayyangar, J., pointed out, such readjustment did involve the exercise of "police power" but the "police power" of this nature did not fall under Article 31(1); it fell under Article 19(5) instead. Similarly, it is not strictly accurate to say that the "Supreme Court continued to apply (the restricted interpretation) to section 299 of the 1935 Act" (p. 124). In *Bhikaji Narayan Dhakaras v. State of Madhya Pradesh*, the case referred to by the learned author, the Supreme Court noticed that before the commencement of the Constitution the law was as laid down in section 299 of the Government of India Act and the interpretation put by the Federal Court on the provisions of that section was different from the interpretation put by the Supreme Court on the analogous language of Article 31. However, the Supreme Court did not allow the petitioner to test the validity of the impugned Act on the basis of section 299, because "this objection was not taken or even hinted at in the petitions and cannot be permitted to be raised at this stage" (A.I.R. 1955, at p. 786).

At another place (p. 50) the learned author observes: "Cases where articles 19 and 31 have been held cumulative after debate on the matter are few". The leading case on this point, *K. K. Kochunni v. States of Madras and Kerala*, had been certainly noted, but it finds place only in a foot note and the context would seem to underrate its authoritative character in setting the controversy at rest. Similarly, earlier Supreme Court decision in *State of Bombay v. Bhanji Munji*, A.I.R. 1955 S.C. 41, perhaps deserved being pedestalled much higher for an adequate appreciation of its impact.

However, the lively criticism levelled by the author at some High Court decision is not only appropriate but of great service. *K. H. Modi v. State of Bombay*, A.I.R. 1960 Bombay 459, seems to be the most, interesting of these decisions. Here, the learned Judges reasoned, quite curiously, that because the forfeiture of the land concerned was not for any public purpose Article 31(2) of the Constitution was not attracted, and, consequently, the acquisition involved was not constitutionally bad (p. 106). By this remarkable reasoning a law violating one requirement of Article 31(2) will be invalid, whereas, should the same law violate more, or, all the requirements of the Article it will be saved. Such reasoning only indicates a failure to appreciate the basic nature of the concept of Fundamental Rights, and, fortunately, is not adopted in any other decision.



To conclude, the book under review is an excellent work of high academic merit. It presents an exhaustive study of a complex and vital area of Constitutional law, with hair-splitting precision, and, if one may be permitted to say so with complacency, crushing insight. It abounds in thought provoking and maturely conceived suggestions which deserve serious consideration by judges, advocates and jurists. The approach is direct and practical, and the style truly lively. The book is a must for every library well-equipped with literature on Constitutional law.

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