REVIEWS

INDIAN CONSTITUTIONAL LAW By M.P. Jain, N.M. Tripathi Private Ltd., Second ed. (1970) pp. XXXIII and 582. Rs. 40.

> THE SERVICE of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and sufferings, so long our work will not be over.
>
> Jawaharlal Nehru.

These words of the first Prime Minister of India show the resolve of the Indian leadership to march towards a just social order. The Constitution which it gave to free India was bound to reflect this determination. India is perhaps the only country among those liberated after the second world war which has remained democratic consistently despite various challenges. She has been successfully using law as an instrument to bring about profound social and economic transformation. This makes the Indian constitutional experience a fascinating subject for study. It is no wonder that so many eminent Indian and foreign scholars should have been provoked to write discourses on the Indian constitutional experience.

Dr. M.P. Jain has doubtless earned recognition as one of the front ranking legal scholars of India. His other works include a book on Indian legal history[1] and a number of articles in Indian and foreign legal periodicals. Recently a book on administrative law, which he has written jointly with Dr. S.N. Jain, Acting Director of the Indian Law Institute, has also came out.[2] *Indian Constitutional Law* in its first edition had acquired a reputation as one of the most comprehensive critical commentaries on the subject. It is most often cited in Indian legal literature. Since he wrote the first edition, many changes have taken place in constitutional law. The second edition which has now been published was long overdue.

The book is divided in seven parts as follows: (*i*) Introductory, (*ii*) The Central Government, (*iii*) The State Government, (*iv*) The Federal System, (*v*) Political and Civil Rights, (*vi*) Miscellaneous Topics and (*vii*) Constitutional Interpretation and Amendment. The author does not comment article by article treating each article as a unit by itself. This form

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1. M.P. Jain, *Outlines of Indian Legal History*, N.M. Tripathi Private Ltd., (2nd ed. 1966).

2. M.P. Jain and S.N. Jain, *Principles of Administrative Law*. N.M. Triptathi Private Ltd. (1971).

of writing, which is very common among Indian legal writers has been rejected by the author because it "fails to give a coherent and integrated picture of the Constitution."[3] The author treats the subject topically and thereby presents a very comprehensive and thoughtful analysis of the constitutional processes. The arrangement of chapters which the author has followed is, however, not happy. The division between the central government and the state government is artificial. Since the author has dealt with the distribution of power between the central government and the state governments in the chapter on the federal system, there was no need to deal with these two governments in separate chapters. This leads to unnecessary repetition and disintergrativeness. The process of law making by Parliament is similar to that of the state legislatures. There was no need to mention it at two places. Similarly the law relating to privileges of the legislatures could have been discussed at one place. There was no need to discuss the judiciary under two heads, the union judiciary and the state judiciary. It is well known that the Constitution does not have a two tier system for the judiciary. The President's powers have been discussed at various places. For example, his power to dissolve the legislature has been discussed in the chapter on the legislature whereas his other powers have been discussed in the chapter on the executive. The grouping of subjects like citizenship, elections, fundamental rights, government services in one part under the title 'Political and Civil Rights' is confusing. The provisions in the chapter on elections, barring two which are given in articles 325 and 326, deal with the conduct of elections and the methods of settling disputes arising from elections. They do not confer any rights. The directive principles are not in the nature of rights. The fundamental rights, because of their special importance deserve a separate treatment. It is difficult to defend the inclusion of the rights of government servants in this part. The chapter on constitutional interpretation has been unnecessarily grouped with the process of constitutional amendment. These organisational defects however have in no way robbed the work of its intrinsic value. They have been mentioned because it was felt that with a little different break-up of the subject the exposition would have become much more meaningful.

A constitution drafted in the fifties of the present century could not be written on a clean slate. The Constitution of India had to be drafted in the light of the constitutional experience of other advanced countries, the Indian experience prior to independence and the urges and the aspirations of the Indian people. The Constitution is not "just a blind and slavish imitation of other Constitutions" but in many respects "strikes new paths, new lines of approach and patterns."[4] The author describes with meticulous detail the constitutional experience of other countries with a view of provid-

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3. See, preface to the first edition of M.P. Jain, *Indian Constitutional Law* (1962) quoted in the preface to the second edition, M.P. Jain, *Indian Constitutional Law* (1970 ed.) (hereinafter cited as *Jain*).

4. *Jain* at 3.

ing an insight into the choices made by the makers of the Indian Constitution and the departures which the Constitution makes from the established constitutional patterns.

In spite of its meticulous detail and near exhaustive specificity, the Constitution contains large leeways. There is nothing unnatural in this because some amount of vagueness and ambivalence is inevitable in any human drafted legislation. A Constitution is more prone to this because it is intended to state not rules for the passing hour but priciples for an expanding future.[5] The very vagueness of a constitution is its strength because it gives it a rare adaptibility and capacity to respond to the changing social conditions. Dr. Jain deals with all such important questions and suggests the lines along which the Indian constitutional law should develop.

Although by convention, the President is to act on the advice of the council of ministers, the Constitution does not say so unequivocally. This has, therefore, been a subject of controversy right since the days of the first President of India, Dr. Rajendra Prasad. Two views on this subject are possible.[6] However, the view that the President is bound to act on the advice of the council of ministers is more in harmony with the parliamentary form of government which the Constitution has adopted. Dr. Jain takes this view and gives convincing grounds to support it. Wherever there are provisions that seem to contradict the above premise, he cautions against their literal interpretation. For example, the President enjoys the right to send messages to either house whether with respect to a bill pending in Parliament or otherwise.[7] Such a provision exists in the United States because there the executive is altogether separate from Congress and hence the presidential messages are a means of communication between the executive and the legislaure. This kind of provision is, however, not relevant in India where the President acts on the advice of the ministers who are members of the legislature. Should the President be exercising such a power, there will result "a first class constitutional crisis."[8] The author, therefore, hopes that this power would be rarely used and except in an exceptional situation "would lie dormant."[9] The author's position on the constitutional role of the President has been by and large vindicated by a recent decision of the Supreme Court.[10]

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5. Cardozo, *The Nature of the Judicial Process*, 83 (1921).

6. For a most recent discussion of the constitutional powers and role of the President, see, Henry W. Holmes, Jr. Powers of the Indian President: Myth or Reality, 12 *J.I.L.I.* 367 (1970).

7. Art. 86(2).

8. *Jain* at 29.

9. *Ibid.*

10. In *V.N.R. Rao* v. *Smt. Indira Gandhi*, A.I.R. 1971 S.C. 1002, the Supreme Court held that art. 74(1) is mandatory and, therefore, the President cannot exercise the executive power without the aid and advice of the council of ministers. Any exercise of the executive power without such aid and advice will be unconstitutional.

The Governor's position became very much controversial in recent years. After the fourth general elections when the non-Congress parties came to power in various states, the Governor was required to do a good deal of tight rope walking. He has to act in a dual capacity, one as an agent of the federal government and second as the constitutional head of the state of which he is the Governor. This made his position all the more difficult. As an agent of the President he is required to reserve certain bills passed by the state legislature for the assent of the President.[11] He is also required to watch the performance of the state government and report to the President when he finds that the state government is not functioning in accordance with the Constitution.[12] Obviously he cannot discharge such functions according to the advice of the council of ministers only. As most of the state governments were constituted of a number of splinter groups which had nothing in common except the desire to share the power, they were bound to be unstable. The members freely resorted to floor crossing giving their loyalty and support to the highest bidder. The Governors had to perform the unpleasant task of reporting such matters to the President. Unfortunately the actions of the Governors have lacked consistency and, therefore, they failed to lay down healthy conventions. The author critically examines the actions of the Governors in various situations and pleads for the formulation of healthy conventions to guide the Governors.

The author points out how members of the legislature misuse their privileges which have been secured to them so as to enable them to discharge their functions effectively. He also criticises the existing fluid nature of the legislative privileges and suggests that they be codified. The codification in his view will provide better protection to the press as well as to the citizens. In order to make this possible he suggests that clause(2) of article 19 of the Constitution be amended so as to permit reasonable restrictions on freedom of speech and expression.[13]

The part on the federal system has been extremely well written. The author points out that the tendency of the Constitution is "towards centralisation within a federal pattern and framework."[14] One interesting observation is that all disputes regarding the distribution of power have been agitated in private litigation only. Inter-governmental legal controversies which are quite common in other federations have been rare in India. The author tellingly illustrates how Indian federalism differs from the established patterns of federalism. For example, article 252(1) provides for delegation by two or more state legislatures to Parliament of power to legislate with respect to a matter in the state list in relation to such states. The author tells us that "no such provision authorising states to delegate power to the centre exists in the U.S.A."[15] The Indian provision is "a close replica of the

11. See, arts. 31A, 200, and 254(2).
12. Art. 356.
13. *Jain* at 88.
14. *Id.* at 273.
15. *Id.* at 317.

Australian model,"[16] but while such a provision has never been used in Australia, it has been used quite a few times in India. The Indian Constitution envisages a co-operative federalism. The author discusses how the pendulum has swung from competitive federalism to co-operative federalism in countries such as Canada, the United States and Australia and high-lights the Indian provisions which lay emphasis on the co-operative element.

Dealing with the question whether the Indian Constitution is federal, the author says :

> If the essence of federalism is the existence of units and a centre, with a division of functions between them by the sanction of the Constitution, then these elements are present in India. In normal times, the states in India have a large amount of autonomy and independence of action. They have control over most of the nation building activities. They have full fledged parliamentary form of government. At no time are they regarded as delegates or agents of the centre.[17]

It is well known that the British constitutional experts as well as politicians did not concede the Indian demand for a bill of rights because they honestly felt that a bill of rights either would constitute a mere string of platitudes or would obstruct effective legislation.[18] However, most former colonies of the British empire have incorporated the bill of rights in their constitutions after independence and Britain has accepted the usefulness of such declarations, though initially only for export, now even for its own use since it has become a member of the European Commission on Human Rights.[19] The chapter on fundamental rights was included in the Indian Constitution in response to the long standing demand of Indian opinion. A declaration of fundamental rights was intended to make these rights unassailable even by the legislature. It is, however, clear that the framers of the Constitution did not want to make them beyond the reach of the process of constitutional amendment. In *Golak Nath* v. *State of Punjab*,[20] the Supreme Court held by a majority of six to five judges that Parliament cannot amend the Constitution so as to take away or abridge the fundamental rights. The court based its decision on the premise that if fundamental rights are to be really fundamental, they should not be abridged even by a consitutional amendment. This decision has raised a nation-wide controversy. The author subjects this decision to a critical examination. He takes objections to the legal interpretation as well as to the policy premise

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16. *Ibid.*
17. *Id.* at 425.
18. See, *Joint Committee on Indian Constitutional Reform*, Part I para 366 (1934).
19. S.A. de Smith, Fundamental Rights in the Commonwealth, 10 *I.C.L.Q.* 83, 215 (1961).
20. A.I.R. 1967 S.C. 1643.

adopted by the majority. He admires the positive implication of the *Golak Nath* decision. If fundamental rights cannot be taken away or restricted even by a constitutional amendment, the court would have to interpret them in such a manner as to accommodate legitimate social and economic change. This according to the author "throws a great responsibility on the Supreme Court."[21] This reviewer had also felt, as the author does, that the major responsibility for keeping the Constitution and particularly the fundamental rights abreast of the times would fall on the Supreme Court in view of the constitutional amendment becoming politically difficult.[22] Political events of the recent months, particularly the massive majority won by the ruling Congress party in the Lok Sabha have, however, proved beyond doubt that the initiative for constitutional change is bound to remain with Parliament for quite some time. Moreover, it is respectfully submitted that the Court failed to fulfil the promise it held out in *Golak Nath*. The heavy emphasis on the property rights which it laid in its recent decisions[23] belied all hopes of its becoming an equal partner with Parliament in the Indian endeavour to usher in a new social order based on justice, social, economic and political. The court would have done a great service to the Indian Constitution in general and to fundamental rights in particular had it shown greater deference to the will of the legislature in matters affecting economic rights. An over enthusiastic insistence on the sanctity of property rights may now result in total emasculation of those rights. A constitutional amendment seeking a total watering down of the due process in respect of private property has been introduced in the Lok Sabha.[24] A hope that the court will strike down these amendments on the ground that they are incompatible with the *Golak Nath* decision, if it comes true, will give rise to an unfortunate confrontation between Parliament and the Supreme Court. It is needless to say that in any such confrontation the court stands to lose because it is inherently a weak body.

Dr. Jain deserves congratulations as well as our thanks for bringing out the second edition of this extremely lucid and most comprehensive critical commentary on Indian constitutional law. It will serve the needs of all those who are interested in undertaking a serious study of this constantly developing subject.

*S. P. Sathe**

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21. *Jain* at 790.

22. See, S.P. Sathe, *Fundamental Rights and Amendment of the Indian Constitution*, 61 (1968); Amendability of Fundamental Rights: Golak Nath and the Proposed Constitutional Amendment, (1969) *S.C.J.* 33 at 40-41.

23. These decisions are *R.C. Cooper* v. *Union of India*, A.I.R. 1970 S.C. 564 (popularly called the *Bank Nationalization* case) and *H.H. Madhav Rao Scindia* v. *Union of India*, A.I.R. 1971 S.C. 530 (popularly called the *Privy Purse* case). See, comments on these two cases, S.P. Sathe, Right to Private Property, Some Issues, *Economic and Political Weekly*, Vol. V May 2, 1970 and The Privy Purse Judgement *Economic and Political Weekly*, 2026 No. 51 (Dec. 19, 1970).

24. The Constitution (Twenty-fifth) Amendment Bill which was introduced in the Lok Sabha on Wednesday, 28th July, 1971.

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