ANNUAL SURVEY OF COMMONWEALTH LAW, 1968, Ed. H.W.R. Wade and Harold L. Cryer. Butterworths, 1969. pp. 857. £8·40

THE VOLUME under review is the 4th in the series started in 1965. The *Annual Survey* may, therefore, be said to have passed the stage of experiment and has become an established work of reference for those interested in the development of law in the Commonwealth countries.

The Commonwealth as a political entity has an uncertain future. One or the other of its members is always threatening to walk out. Britain's entry into the European Common Market might subject it to unbearable strains because Britain is, after all, the kingpin of the structure. However, whatever may be the fate of the Commonwealth as a political entity, the common thread of the English common law will continue to bind the countries constituting the Commonwealth. The Commonwealth Law Conference held in India last winter brought out convincingly this aspect of the Commonwealth association. The period surveyed in the current volume covers material received at the Bodleian Law Library between 1st July, 1967 and 30th June, 1968, with occasional additions. The criterion may appear to be an artificial one, but is practical. Reference, where possible, has been made to appeals against the judgements noted in the volume.

There are twenty major heads under which the law is surveyed starting with constitutional law and ending with maritime law. Under each head the authors who are eminent university scholars have been left free to deal with the subject according to the method they thought best. The chapter on constitutional law starts with an introduction, proceeds to deal with Commonwealth generally, and thereafter examines legislation and the judicial developments in different countries commencing with the United Kingdom and ending with Trinidad and Tobago. But most other subjects have been treated topic-wise. In certain chapters such as on the monopoly and restrictive trade practices, there is, in the main, a topic-wise treatment of the subject, but in respect of judicial development and legislation the study is country-wise.

India figures most prominently in the chapters on constitutional law and fundamental rights and civil liberties. The countries with long-established constitutions have only refinement to offer, while the newly independent countries of Africa are too beset with violent changes to give the picture of ordered constitutional development. Pakistan had been handicapped by the continuance of martial law since 1958. Therefore, it is India alone which presents material for the study of a newly independent country striving for economic development in the framework of parliamentary democracy. The progress is by no means smooth and the struggle results in a quick succession of legal events. In this context, the considerable space that is given to India, in these chapters, is fully justified.

In the chapter on fundamental rights and civil liberties, the *Golak Nath*[1] decision of the Supreme Court finds appreciative mention as one of the most encouraging of all cases reported during the year.[2] The court's reliance on 'prospective overruling' is characterised as a compromise solution to the difficulties which would be caused by a declaration that the questioned constitutional amendments were void *ab initio*. It is observed:

> This solution may not fully satisfy either the politicians in power or their academic critics but it does ensure that for the future, the power of Parliament to modify, restrict or impair fundamental rights would be restricted to temporary suspension (as during grave emergencies under article 358) and to modifying their application (as to armed forces under article 33). Any other abridgement of fundamental rights would require the formation of another Constituent Assembly, convoked by Parliament.[3]

The curbs placed by this decision on Parliament's power to amend fundamental rights are thus welcomed as making for progress in the direction of liberal democracy. There may be no quarrel with this, except for the underlying assumption that it is within Parliament's power to convoke such an assembly, should the need to abridge the rights arise. It may be pointed out that the Constitution of India does not lay down any guidelines as to the composition, powers and working-procedure of such an assembly.

A too cautious approach towards constitutional amendments is illustrated by the provisions of the Constitution of Ghana which were under consideration during the period under review. The draft constitution contained (*a*) clauses not capable of being amended or repealed; (*b*) clauses capable of amendment or repeal only after reference to the Supreme Court; (*c*) clauses which are capable of amendment or repeal only after approval by two successive Parliaments and (*d*) clauses requiring merely two thirds majority in the assembly for their amendment. Remembering that Ghana is the land of extinct dodo, the commentator in the *Survey* finds in the above provisions "occasion for reflection on the fate of slow moving and unadaptable birds."[4] More seriously it is said:

> But such is the stringency of these safeguards that it may seriously be questioned whether the end-product provided sufficient flexibility to permit effective government.[5]

Indian protagonists of highly entrenched provisions may well ponder over the implications of this observation.

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1. *Golak Nath* v. *State of Punjab*, A.I.R. 1967 S.C. 1643.
2. *Annual Survey of Commonwealth Law*, 1968 (hereinafter cited as *Survey*) p. 150.
3. *Id.* at 151.
4. *Id.* at 6.
5. *Id.* at 90.

Indeed legal remedies are not substitute for political maturity. However excellent the machinery of democracy, if the technicians who work in it do not measure up to their task, endless problems and conflicts will arise, creating lack of confidence in democracy itself. The truth of this was brought home by the crisis which overtook some of the states in India in the period under review. The constitutional machinery was put to severe strain in West Bengal, Punjab, Haryana, U.P., and Bihar by defection and brittle coalitions. The events are succinctly narrated in the *Survey* and the dangers attendant thereon are noted. The events are, however, not interpreted as making for a breakdown of constitutional government. On the contrary it is observed that the Indian Constitution does not lack resources for handling these difficulties provided that there is a strong and sufficiently impartial central government to operate article 356. The following comment gives a diagnosis of the present and a prognosis of the future:

> What the events of the period under review do seem to suggest, however, is a breakdown in the *homonia* or *concordia* or spirit of harmonious give and take and constitutional like-mindedness which the classical theorists of western political institutions insisted upon as the *sine qua non* of constitutional government and order. The crises in West Bengal and Punjab particularly display how easily the most ingenious, explicit and far-sighted constitutional machinery can be brought to an impasse from which the only escape is appeal to higher powers on a different constitutional plane. So long as the problems are restricted to the states, the overall order absorbs the difficulty; but where they arise on the union level, constitutional escape routes would not be easy to find.[6]

As feared, the crisis did develop at the union level. The split in the Congress party following the Presidential election of 1969 raised dark forebodings of defections and shifting coalitions at the centre. The 1971 election has averted the crisis for the time being by placing one party strongly in power. The question, however, is how to preserve the stability which has been achieved. There is no magic way. The conventions of the British-type parliamentary government depend, as we find it in the *Survey*, on the good faith and respect for the common good of the chief actors in governmental changeovers.[7] Interesting is the method by which the Constitution of Uganda (adopted on 8 Sept, 1967) has sought to meet the problem of shifting coalitions. We find there an ingenuous provision that the party which has the largest number of elected members in the national assembly shall itself elect such further number of specially elected members as may be required to give it a majority of not more than 10 of all the

6. *Id.* at 59.
7. *Id.* at 5.

members of the assembly. The solution is far too novel to be adopted in this country but the very fact that the provision is brought to our notice is an instance of the value of the *Survey*. Varied are the experiments being made in the newly developing countries of the Commonwealth to watch them through the eyes of eminent scholars.

The chapter of administrative law deals with such subjects as excess of power, failure to exercise power, abuse of discretionary power, natural justice and so on. In the matter of failure to exercise power, the author summarises the position thus:

> Where administrative authorities are entrusted with a discretionary power it is their duty to exercise that discretion in all cases. The courts will not allow them to adopt in advance some inflexible rule of policy and then fail to consider each on its merits. On the other hand it is possible for them to adopt rules of policy as guidelines in the exercise of their discretion.[8]

The distinction drawn is fine and is illustrated in the Australian case where the registrar of licences had a preconceived policy as to the grant or renewal of licences. Kerr, J., commented :

> Provided that the policy is indicated to an applicant and he is given an opportunity to make an exception, if he can, of his own position, then the existence of such policy does not vitiate the exercise of the discretion.[9]

Not the least interesting is the portion dealing with abuse of discretionary power and the scope of judicial review. The power of judicial review has been steadily enlarged in India as illustrated by *Barium Chemicals*,[10] *Binapani Devi*[11] and *Kraipak*[12] cases decided in the recent past by the Supreme Court of India. The position is hardly different in England where Professor de Smith has asked: are there unreviewable discretionary powers ? His conclusion is that few discretionary powers "are found to be absolutely unreviewable when they have a direct impact on private rights."[13] The presumption in England seems to be in favour of review. In *Padfield* v. *Minister of Agriculture, Fisheries and Food*,[14] the minister had refused to order an inquiry under the Agricultural Marketing Act, 1958 into a complaint regarding the sale of milk. The minister claimed that under the Act an inquiry is to be held 'if the minister so directs', and, therefore, he had an unfettered discretion. The House of Lords rejected the contention. Lord

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8. *Id.* at 162.
9. *Ibid.*
10. *Barium Chemicals* v. *Company Law Board*, A.I.R. 1967 S.C. 295.
11. *State of Orissa* v. *Dr. Binapani Devi* (1967) 2 S.C.R. 625.
12. *Union of India* v. *A. K. Kraipak*, A.I.R. 1970 S.C. 150.
13. *Survey* at 167.
14. (1968) A.C. 997.

Reid said :

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and the objects of the Act; the policy and the objects of the Act must be determined by construing the Act as a whole and construction is always a matter for the court.[15]

"The heart of the case", according to Professor Wade, "is the rejection of the whole idea of unfettered discretion.[16] To Professor Wade, unfettered discretion is now a myth.

A review has its limitations. Every chapter of the volume cannot possibly be discussed or even referred to. What is mentioned above is sufficient to show how brilliantly the contributing authors have performed their task. On every topic whether it is criminal law or torts, international law or real property, we find a resume of all the recent events, legislation and judicial decisions as well as commentary which is at once perspicacious and authoritative. The book is a veritable gold-mine of information and legal knowledge. It is a must for every law library worth the name. Every serious lawyer would like to have it on his table.

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15. *Survey* at 167.
16. *Id.* at 168.

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