

LEGAL AND CONSTITUTIONAL HISTORY OF INDIA (two volumes)
(1984). By M. Rama Jois. N.M. Tripathi Pvt. Ltd., 164, Samaldas Gandhi Marg, Bombay-400 002. Pp. xxiv+723 (vol. I), xx+388 (vol. II). Price Rs. 32.50 (vol. I), Rs. 21 (vol. II).

THIS MONUMENTAL work represents almost well balanced, historically informative, critical, penetrating and judicious approach of the author and is unquestionably the latest study on Indian legal and constitutional history. The fascination of the book lies in his scholarly approach by adopting not only the humanistic skills of the historian but also, to a greater or lesser extent, the methodology of citation of quotations from authentic Sanskrit texts with their English translations like a disciplined academician of comparative law eminence.

At some future date some other scholar may attempt another version but he may not muster the scope and depth of Justice Jois' qualitative approach. The two volumes represent the culmination of a task which was seriously undertaken as a mission, for it is obvious, as acknowledged by the author, that the subject was conceived as early as 1968-70 for intensive study at the instance of an eminent scholar, Justice E.S. Venkataramiah, now judge of the Supreme Court of India.

The study in two volumes is a brilliant attempt to cover a very wide range of legal and constitutional history of India. In the first volume, the author, according to the preface, deals with ancient legal system together with judicial and constitutional systems. The subject matter of this volume is divided into eight parts. Five topics covered under part first in the introductory form are the concept of *dharma* (the law), its origin, basic aspects and observance in the civil, criminal and constitutional spheres of the Hindu system of ancient India. The author has made an extensive reference to the rarely available legal literature of the early *Vedic* and the post-*Smriti* period. From these discussions it is specifically pointed out that the ancient Hindu law was never static. However, there was no growth of Hindu law after the great galaxy of commentators came to an end with the commentary *Viramitrodaya* of Mitra Misra.

Under part second various topics of civil law are classified under fifteen chapters for intensive discussion. In a lucid and literary style by adopting research methodology the author has taken special interest in presenting the relevant portion of the authoritative ancient texts and literature relating to origin of lawsuits (*vyavahara*), the general rules regulating contracts, payment and recovery of debts, suretyship, pledges/mortgages, deposits, sale, resumption of gift, partnership, association, master and servant, boundary dispute, gambling and betting, partition, and duties of husband and wife. This academic presentation further affirms the belief that the ancient Hindu law was quite systematic and rich in legal

literature.

Under part third, the author has presented an analytical study in four chapters of various other civil laws relating to easement, weights and measures, land, common carriers, torts, ownership and possession, documents, slavery and so on. Political scientists and legal scholars will be greatly benefited by them while dealing with the current related problems.

Ancient Hindu law relating to crimes is intensively discussed by the author by classifying the subject matter in nine different chapters under part fourth. The author, while stating the object of the law of crimes, has explained its conceptual classification during the ancient period. A successful attempt is made to explain that there existed a well defined theory of punishment in ancient India and justice was carried out in the name of the king. In certain cases even death sentence was prescribed for Brahmins. Crimes were very well categorised and for each of them the procedure for trial, proof and punishment was prescribed. The study specially mentions the law and procedure relating to defamation, assault, theft, violence, adultery, rape and various other miscellaneous crimes, e.g., kidnapping, trespass, suicide.

Part fifth presents in detail the law relating to evidence and the discussion is a good testimony to the fact that during the ancient Hindu period there existed a systematic law of evidence. This was essentially aimed at making the trial impartial and providing proper opportunity to the accused and the prosecution to present their respective cases before the presiding judge. The *Smriti* texts, while dealing with the rules of court procedures in trial of cases, also laid down detailed rules regarding admissibility and inadmissibility of evidence. Part sixth gives a proper account of the principles and rules of interpretation. The author has specially mentioned thirty-eight maxims of interpretation, based on general experience, which were being adopted by the court in ancient India. It is also pointed out that *Maharshi* Jaimini was the founder of *mimamsa* (interpretation) system and the author of *Mimamsa*. Its purpose was to construe the meaning of words and sentences used in the *Vedas*. In fact *Jaimini Sutras* were meant to serve a dual purpose : (i) enunciation of general principles, and (ii) interpretation of specific *Vedic* texts. Subsequently several commentaries were written on *Mimamsa*.

In part seventh the author has discussed, in detail in six chapters, the content of the administration of justice—the court, trial and judgment. The administration of justice was according to the *Smritis* and it was considered as one of the most important and obligatory functions of the king. The king, as head of the state, was also considered the fountain-head of justice. The king's court was the highest court in the gradation of courts. It is also an eye-opener that in the *Vedic* period there existed a proper code of conduct for judges and others concerned with the administration of justice. It also provided for qualification and appointment of judges. Impartiality, independence and fearless functioning of

judges were also recognised. Even the king was bound by *Smriti* and customary law. There existed a well defined judicial procedure for legal proceedings and judgment.

Principles and provisions relating to *rajadharma* (constitutional law) are stated in part eighth of the study. The author has pointed out that in the *Vedic* period *rajadharma* was recognised as the paramount *dharma*. It consisted of fundamental and eternal principles worthy of emulation under any system of polity and recognised for all persons exercising political power. It is also pointed out that the seven well recognised constituents of a state were the king, his ministers, capital, realm, treasury, army and allies. Legislative power was entrusted to the *parishad*. There was a council of ministers to aid and advise the king on various matters of administration. Though the divine origin of kingship was recognised, the duties of the king were also specifically laid down. However, the people were the ultimate source of strength of the king.

In the second volume the author has made an important analytical contribution regarding legal, judicial and constitutional history of India during the Moghul and British periods. This study is further divided into six parts dealing intensively with matters relating to state and judicial system under Muslim rule, evolution of modern legal and judicial system, judiciary under the Constitution of India, constitutional development during the British rule and various historical steps which ultimately led to the enactment of the Indian Independence Act 1947, the framing of the Constitution of India 1949 and enactment of subsequent constitutional amendment Acts up to 1978.

While pinpointing the historical landmarks of the legal and judicial system during the Muslim rule in part one the author has given a brief historical account of various invasions of Muslim rulers from 1192 A.D. onwards in the first chapter. He has referred to the invasions of Mohammad Ghazni and Mohammad Ghorī which marked the beginning of the Muslim rule in India. Babur was the founder of the famous Moghul empire in India in 1526 which continued till the British came to India. The author has pointed out that during the Muslim period the ruler was administering justice according to tenets of the *Quran* and there was no specific provision regulating the constitution of the state. Every Muslim ruler was required to rule in conformity with the tenets of the sacred law—the *Quran*. Moghul Emperor Akbar was the first ruler who exhibited tolerance towards Hindus. In chapters two and three, the author has given a brief account of the Muslim legal system and judicial system respectively. The main sources of Islamic law are *Quran* and *Sunna*. Other sources are *ijma* and *qiyas*. Under Muslim criminal law, the offences were classified under three heads: (i) crimes against God, (ii) crimes against the state, and (iii) crimes against private individuals. Punishments for offences were based on the principles of “life for life, limb for limb” and “blood money”. The Muslim criminal jurisprudence, according to the

author, treated the criminal law as a branch of private law rather than of public law. G.C. Rankin described the Muslim criminal law as very complicated, technical and obscure. During Muslim rule, specially after Akbar, there was a set pattern of the administration of justice. The Muslim emperor was considered to be the fountain-head of justice and for discharging judicial functions he nominated other officials like *qazi*, *diwan* and *faujdar*. The four types of courts in Bengal were those of the *nazim*, *daroga-i-adalat al aalea*, *diwan* and the *qazi*.

Under part two the author has discussed the evolution of modern legal system in six chapters. Referring to the transition stage from Moghul to British rulers, he has pointed out how the East India Company and its governors were gradually grabbing more and more administrative and judicial powers from the politically weak Moghul rulers. The landmark was the grant of *diwani* rights by the Moghul emperor to the company. Warren Hastings' plan of 1772 was another landmark in reforming the law and judicial system. Warren Hastings declared a very significant policy of safeguarding personal laws of Hindus and Muslims and their interpretation through *pundits* and *qazis* respectively. Gradually, reforms were further introduced in the judicial system during the period of Cornwallis and William Bentinck. For the first time in 1833 the old system of regulation law was abolished and the law making power was centralised and vested with the Governor-General-in-Council at Calcutta under the Charter Act 1833. Also under section 53 of the Act, the First Law Commission was established for codification of laws in India. The author has nicely summarised subsequent events and the presentation of law reports by four law commissions. Among others, preparation of the Indian Penal Code was the remarkable contribution of the First Law Commission for introducing uniform penal law in the whole of British India.

Under part three the author has excellently presented in brief the growth and development of modern judicial system. Beginning with the early stages of judiciary in three separate Provinces of Madras, Bombay and Calcutta, he has given subsequent historical accounts emphasising that the British realised the necessity of having a uniform judicial system throughout the British territory in India. Referring to the establishment of the mayor's courts under the Charters of 1726 and 1753, recorder's courts, conflicts between the Governor-General-in-Council and judiciary from 1773 to 1781, the author has pointed out that under the Indian High Courts Act 1861 the British merged the then existing two separate judicial systems—the company's *sadar adalats* and the king's courts. Systematic rules of procedure and trial were provided by the enactment of the Codes of Civil and Criminal Procedure. Another significant provision was regarding appeals from Indian High Courts to the Privy Council in England. Thus a well defined hierarchy of courts was established in India, viz., the High Courts and the subordinate courts for civil and criminal matters.

The author has given in a lucid style in part four of the book an account of the judicial institutional set up under the Constitution of India. Referring to relevant constitutional provisions he has pointed out how the judiciary enjoys independence under the Constitution, how the final appeals to the Privy Council were abolished and how the final appellate jurisdiction of the Federal Court was transferred to the Supreme Court. The Supreme Court and the High Courts became the courts of record under the Constitution. Each High Court was also required to control subordinate judiciary working under its territorial jurisdiction.

In part five the author has made a successful effort to present an enormous mass of historical landmarks which vitally contributed to the constitutional developments during the British rule in India. Beginning with the Charter of 1600 to the Regulating Act of 1773 and its subsequent reform in 1781, he has nicely pointed out that the British governor of the East India Company and subsequently British Parliament were gradually making constant effort to control the Indian legislative and administrative machinery under well defined provisions of the charters and the Government of India Acts. The British were also fully aware that they had to rule India politically as a part of British empire and, therefore, the constitutional reforms were made from time to time with the same object in view and in order to implement these policies. Of special significance was their policy of "divide and rule". In the constitutional reforms of 1909, 1915, 1919 and 1935 on the one hand the concept of more and more representative form of government was being introduced, and on the other side by side, the fundamental principles of British policy to rule India were being introduced and legally enforced. The author has very well presented in a nutshell all historically important constitutional reforms which were introduced by the British in India to meet the challenges of the emerging nationalist movement.

In the last part, *viz.*, part six the author has specifically mentioned the historical steps which ultimately compelled the British to grant independence on 15 August 1947 and even prior to that to set up a constituent assembly to frame a constitution for India which came into force on 26 January 1950. The historical account also reflects on the last efforts made by the British to retain their control on the Indian territory by appointing various commissions and delegations for political negotiations. Ultimately India was partitioned as India and Pakistan on the eve of its Independence which was really a painful but unavoidable decision of the British. The author has succeeded in highlighting the historic revolution and the supremacy of the Constitution. In the end the salient features of the Constitution of India and its subsequent amendments from 1951 to 1978 are properly presented by discussing in a nutshell various forces behind them. These constitutional amendments reflect the changing dimensions of the Constitution to meet the aspirations of the people of India.

The extensive footnotes and bibliography will enable those interested

in pursuing further indepth studies to delve more deeply into the working, success and failure of various significant issues, as described in the book. Moreover, as indicated above, the literature cited should prove to be a valuable guidepost for anyone who would embark on such a task. General index, in detail, further makes the task of legal academics easier to locate and consult the relevant matter in the book.

On the whole, though the book (in two volumes) is very useful and the latest vital contribution on the subject, its volume second needs some more elaboration. The work deserves to be on the shelves of all the libraries of colleges and universities for scholars interested in the study of legal, political and constitutional development of India.

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