RESIDUARY LEGISLATIVE POWERS IN INDIA : RETROSPECT AND PROSPECTS (1990). By Ali Mehdi. Deep and Deep Publications, New Delhi, Pp. x + 133. Price Rs. 125.

THE GRANT of the residuary powers in the Indian federation is like a magma reservoir of a somnolent volcano which erupts occasionally to generate more heat in the academic circles than in the political ring. The slim streak of lava oozed out of the vent can, however, articulate and sharpen the political bouts providing constitutionally edged weapons to the entangled federal and state governments. The existence of the residuary clause in a federal constitution, though considered to be a federal necessity, is also a recognition of the limitation of the flight of the human imagination to visualize the future contingencies in their real and concrete shapes. This limitation is borne out more if one glances at the Indian Constitution wherein, despite a detailed and meticulous formulation of the powers of the two governments, the residuary clause still managed its entry. The conferment of the residuary powers to either government in a federation may be considered not only a symbol of prestige for the receiver-government for playing, if possible, a dominant role but an index also to reveal the play of the historical forces at the time of the formation of the federation.[1] The handing over of the residual powers to the Centre in India was necessitated because the Constituent Assembly wanted a strong dominating Centre and the communal partition of the country had left no choice.[2] The compendious and exhaustive layout of the distribution of powers designed in the Indian Constitution made a member of the Constituent Assembly to predict that the residuary power was destined to get an insignificant place and was to remain a topic of only an academic interest.[3] The residuary field did not assume a significant place but it no longer lies 'barren or unproductive'.[4] The book[5] under review dwells on the whole gamut of the residuary powers to asses its place under the Indian Constitution and brings forth its fertile or productive nature from legislative, judicial and political points of views.

The book provides a detailed account of the operation of the residuary

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1. It is, however, pertinent to note that the constitutent States which got residuary powers in the federations of the USA and Australia do not play any dominant role in the modern times because of the play of socio-economic and political forces in their national and global arena which acted in just opposite direction of the historical forces operative at the time of the formation of these federations. Their respective federal governments (without any residuary powers) grew to strength to assume a prestigious and dominant role in these federations.

2. For historical perspective see *infra* note 5 ch. 3.

3. *XI C.A.D.* 953 (per T.T. Krishnamachari).

4. *Union of India* v. *H.S. Dhillon*, A I.R. 1972 S.C. 1061 at 1121.

5. Ali Mehdi, *Residuary Legislative Powers in India : Retrospect and Prospects*. (1990).

clauses as obtaining in the federations of the United States of America, Canada, Australia and Switzerland in its chapter 2 which is, interestingly, the second largest chapter of the book. The Tenth Amendment which incorporates the residuary powers of the States under the American constitutional system has been interpreted by the judiciary according to the changing times.[6] The theory of 'federal equillibrium' or 'dual federalism' which held its sway in the later part of the nineteenth century touched the pinnacle in the middle 1930's when many Federal Acts fell flat as the American Supreme Court found them beyond the enumerated powers of the Congress.[7] The compulsion of the times after 1937, more precisely during the second world war, made the Supreme Court to parade an about-face[8] to bank upon the Marshall's point of view of 'National Dominance'. The wonderous approach of the Supreme Court during this period prompted a writer to remark that "the scope of national authority has become a question of Government policy, and has substantially ceased to be one of constitutional law".[9] In recent times, however, the court seems to recognise again that "the (Tenth) Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the state's integrity or their ability to function effectively in a federal system...."[10] The author discusses the someresults of the American Supreme Court, though occasioned by the particularities of the changing times, in a lucid style to sketch the wavy graph of judicial interpretation of the residuary clause in America.[11]

The Canadian federation had to pass through an agonising era of an alleged Watson-Haldane conspiracy and a destructive interpretation of its Federal residuary clause by the Privy Council (of Britain) which through some of its judges, judicialy subverted the centripetal spirit of the British North America Act, 1867..[12] Justice Haldane shredding the

6. *Id.* at 4-14.

7. See *Schechter Poultry Corp.* v. *US*, 295 US 495 (1935); *U.S.* v. *Butler*, 297 US 1 (1936); *Carter* v. *Carter Coal Co.*, 298 US 238 (1936).

8. The aftermath of the economic depressions of 1930's and President Roosevelt's court-packing proposal are the compelling factors of the time to make the Supreme Court give decisions like in *National Labour Relations Board* v. *Jones & Laughlin Steel Corp.* 301 US 1 (1937); *Steward Machine Co.*, v. *Davis* 301 US 548 (1937); *Mulford* v. *Smith* 307 US 38 (1939).

9. Dodd, quoted in Godshall, *Government in the United States* 668 (1941) quoted in the book under review, *supra* note 5 at 12-13.

10. *Fry* v. *U.S.*, 421 U.S. 541 (1975); *National League of Cities* v. *Usery*, 426 US 833 at 842-843 (1976). But See also *Garcia* v. *San Antonia Metropolitan Transit Authority* 469 US 528 (1985).

11. *Supra* note 5 at 7-14.

12. See Edward McWhinney, "The "Old" and "New" Federalism in Canada : Classical Federalism, Consociationalism and Constitutional Pluralism", 29 *J.I.L.I.* 1 (1987); S.K. Bhatnagar, "Abstract : Cultural Pluralism and Notion of Dissent in Canada and India" submitted at the International Canadian Studies Seminar on "Cultural Pluralism and Notion of Dissent : Canadian and Indian Experiences" held at the Faculty of Arts, M.S. University, Baroda, on 13-16 March, 1989.

BNA, Act, to pieces according to his own whims and following the footprints of the illustrious predecessor of his ilk, Justice Watson, divided the residuary power between the Provinces and Dominion by declaring that in normal times it belonged to the former and in cases of war or similar national emergencies to the latter.[13] The implications of such judicial constitution-rewriting was that the vital and broad residuary powers of the Federal government were shrivelled into insignificant magnitude.[14] The book under review traces the historical journey of the Canadian residuary clause in an objective manner but does not refer to its position under the present Canadian Constitution. The residuary power given to the States in Australia has been treated merely of a declaratory nature.[15] Like its Canadian counterpart in which the Dominion was given a power to legislate for the "the peace, order and good government", the Commonwealth of Australia is also endowed with the same power by using the same phrase in its Constitution. It is, however, interesting to note the contradictory judicial interpretations which were put on the same phrase by the two judiciaries operating in different socio-economic and political milieus. In Canada, while political and constitutional battles centred round *this* phrase, a residuary power clause for Canadians; it was, on the other hand, merely taken in Australia to convey generally that "the purpose and design of every law is to promote the welfare of the community"[16] as the phrase does not give any substantive power to the Commonwealth.[17] The author compares the Canadian and American judicial approaches with the Australian one to show that in matters of constitutional interpretation the judges peep into the working of the other constitutions in order to understand their own constitution.[18] The residual powers of the cantons in the Swiss Constitution have not generated any judicial controversy worth elaboration. The juristic opinions, instead of the 'judicial approach' as the author gives a heading[19] for discussion of the Swiss position, have also not gained any ground to influence the functioning of the Swiss confedration.

The author projects a historical perspective of the growth of the residuary clause before it finally found its place in the present Indian Constitution.[20]

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13. *Toronto Electric Commissioners* v. *Snider* (1925) AC 396. See also *A. G. for Ontario* v. *Canada Temp. Federation* (1946) AC 193 at 205-206.

14. Ivor Jennings, "Constitutional Interpretation : The Experiences of Canada", 51 *Harvard Law Review*, 1 at 35-39 (1937-38).

15. See *Commonwealth* v. *Cigmatic Pty. Ltd.* (1962) 108 CLR 372; *R.* v. *Phillips* (1970) 44 ALJR 497, 505.

16. W. Harrison Moore, *Commonwealth of Australia* 274-275 (2nd ed. 1910) cited in *infra* note 17 at 308.

17. *R.* v. *Foster* (1959) 103 CLR 256 at 306, 308 (Windeyer J.).

18. *Supra* note 5 at 26-29.

19. *Id.* at 30.

20. *Id.* at 32-49.

Tracing the course of the evolution of federalism[21] and the residuary powers in India, the author examines the deliberations in the Constituent Assembly to throw a light on the historical forces operative at that time. The factors responsible for the conferment of the residuary powers on the Centre were many—such as the scar left by the communal partition of the country, the weakening of the forces championing the cause of the states' autonomy, contemporary nationalism, a desire for the strong Centre for bringing social and economic revolution in the Independent India etc. It may be noted that even in the pre-Independence era the provinces did not enjoy the residuary powers under the Government of India Acts of 1919 and 1935. The reasons were, however, different from those which denied the same power to the States in the Independent India.

Article 248 read with Entry 97 of List I in the Seventh Schedule of the Indian Constitution is taken to confer residuary powers of legislation on Parliament. The combined reading of the two leads one to understand that the residuary power covers those subjects only which are not mentioned in the three lists of the Seventh Schedule. The author comments on every important word or phrase of these provisions to present an analytical study which enables the readers to appreciate the nature and the spirit of the Indian federalism in this regard.[22] The residuary power is also shown 'in action' by the author to reflect the legislative activism of Parliament.[23] He illustrates the various areas in which the use of this power has been made and, then, he remarks :

> ...[An] inference may be drawn that taxation was the most fertile area for the residuary power exercised by Parliament...But the practice shows that Parliament has made resort to the residuary power frequently even at some times *without labouring to find out the appropriate head of subjects* mentioned in the entries 1 to 96 of the List I.[24]

Before lamenting the practice of Parliament for not labouring to find out the appropriate entry, had the author himself laboured a little more to show the concrete examples of such legislations *with* their respective probable entires, too, his remark would not only have been substantiated but the readers would also have been benefitted. Nevertheless, the comment shows the analytical bent of mind of the author. The author goes on further to critically examine the various reports and documents having a bearing on Centre-State relations in order to appreciate the 'demand for a fresh look' raised in certain quarters.[25] The Report of the Rajamannar

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21. See also S.K. Bhatnagar, "Evolution of Federalism in India" V *Law Review* 99 (1986).

22. *Supra* note 5 at 50-62.

23. *Id.* at 62-63.

24. *Id.* at 63 (emphasis added).

25. *Id.* at 64-73.

Commission, which outright recommended that the residuary powers should vest in the States, had been once dubbed as being politically motivated.[26] The Sarkaria Commission recently came out with a novel device to recommend that the residuary powers of legislation in regard to tax matters should remain with Parliament while the residuary field other than that of tax should be placed in the Concurrent List.[27] The author, criticising this recommendation, comments, "it is unfortunate to make substantial amendments to appease the opposition".[28] The author has, however, neither given any evidence to prove his charge of 'appeasement' levied against the Commission nor cited the material on which such conclusion is based. This apart, his academic objections[29] as well as the forceful recommendations of the Sarkaria Commission deserve an objective political and academic debate.

The application of the judicial umpirage for balancing the competing constitutionally demarcated powers of the governments in a federation is well recognised. For studying the trends of the judicial interpretation of the residuary power in India, the author divides the period from 1950 to 1988 into three phases.[30] All the periods—the first period (1950-1960) the second period (1961-1970) and the third one (1971-1988)—are brought under light to draw some broad distinctive features or impressions of each one. The first period seems to be uneventful and unexciting but the second period is viewed as a period of "judicial conflicts between liberalism and conservatism."[31] The last period is marked by the most important decision, till now, in *Union of India* v. *H.S. Dhillon*[32] which generated a hot academic debate.[33] The Supreme Court by a thin majority of 4 : 3, overruling a 4 :1 decision of the High Court of Punjab and Haryana, held that Parliament was competent to include capital value of agricultural land for computing the total value of the assets of an individual for the purpose of imposing wealth tax. The case mainly involved the interpretation of entry 49[34] of the State List, entries 86[35] and 97[36] of the Union List and article 248 of

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26. P.K. Tripathi, "Federalism : The Reality and the Myth", 3 *JBCI* 251 at 273 (1974).

27. *Report of the Commission on Centre-State Relations*, 1988, Part I, 31.

28. *Supra* note 5 at 72.

29. *Id.* at 70-73.

30. *Id.*, ch. 5.

31. *Id.* at 94.

32. A.I.R. 1972 S.C. 1061.

33. See e.g Alice Jacob, "Residuary Power and Wealth Tax on Agricultural Property, A note on *Union of India* v. *H.S. Dhillon*". 14 *JILI* 80 (1972); Parmanand Singh, "Supreme Court on the Residuary Power, A Note on *Union of India* v. *H.S. Dhillon*", 4 (1-4) *JBCI* 67 (1975); Hari Chand, "The Wealth Tax Case : A Comment on *Union of India* v. *H.S. Dhillon*" II *SCJ* (Jour. Sec.) 39 (1972) and Mohammad Ghouse, VIII *A.S.I.L.* 405 at 436 (1972).

34. Entry 49, List II reads, "Taxes on lands and buildings".

35. Entry 86, List I reads, "Taxes on the capital value of the assests, *exclusive of agricultural land*, of individuals and companies....." (emphasis added).

36. Entry 97, List I reads, "Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists".

the Constitution. Holding that the impugned central law is not on entry 49 of the State List, Chief Justice Sikri, a party to the majority holding, observed that "if a Central Act does not enter or invade any matter in list II, there is no point in trying to decide as to under which entry or entries of list I or list III a Central Act would rightly fit in."[37] This observation has come in for a severe criticism at the hands of some scholars[38] as such interpretation makes the specific entries (1 to 96) of the Union List useless or of lower status whereas the entries in the State List get all prominence and, consequently, thrown open to a possible liberal interpretation.[39] Sikri, C.J., further opined that if the tax imposed by the impugned Act did not fall either in entry 49, List II or in entry 86, List I, it would be arbitrary to say that it was beyond the ambit of entry 97, List I, also.[40] The exalted status, thus, given to entry 97 of the list I to read the power (to make impugned law) into it for avoiding power vaccum in the legislative sphere has been acclaimed by some other scholars.[41]

The residuary clause remained academically or otherwise torpid till the *H.S. Dhillon case* came in which the court strirred up the hornet's nest and the participating judges, showing an academic cleavage on constitutional issues, provided fondue for scholarly thought and write ups. The author, after discussing the opinions of the judges in the case and the view-points of the scholars on the case, mildly supports the conservative approach[42] and unreservedly suggests a way out to get out of the quagmire by proposing an amendment in the lists to give power to enact law on the disputed subject matter, to the states,[43] instead of Parliament. But the residuary clause, despite the acceptance, if possible, of *his* amendment, may remain in a fluid stage[44] with regard to its content and extent as was supposedly left in the *Dhillon's* case. The residuary power may continue to pose the problem of interpretation, but it is suggested that whenever a judicial decision *assigns* a particular item either to the Centre or to the States, an amendment in the Seventh Schedule for the approval or the disapproval of the decision should be initiated by Parliament after having

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37. *Supra* note 32 at 1075.

38. See e.g. Seervai, *Constitutional Law of India* vol. II at 2008 (3rd ed. 1983). See also V.N. Shukla, *Constitution of India* 470 (7th ed. 1986).

39. This is what happened in Canada as the Judicial Committee of the Privy Council took the stand that for determining the validity of a Dominion Act, it should be firstly seen whether the Act fell in the Provincial List; if it did not then the power rested with the Dominion. See also *supra* notes 13, 14.

40. *Supra* note 32 at 1069.

41. See views of Alice Jacob, Parmanand Singh and Hari Chand, *supra* note 33.

42. *Supra* note 5 at 103.

43. *Id.* at 104.

44. See Mohammad Ghouse *supra* note 33 at 436.

prior deliberations[45] with the States.[46] The suggested course may be good for the health of the Indian federation as the people's amendment, instead of a judicial amendment, is desirable for setting the rattling controversies at naught.

The book is like a refreshing breeze and the author deserves congratulations for making an attempt to attract the attention of all towards the issues discussed in the book. Barring a few printing errors,[47] the presentation of the book is good enough to claim a place in the law libraries.

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45. The forum of the Inter-State Council set up under article 263 of the Indian Constitution may be utilized for the purpose of deliberations on this matter. However, see S.K. Bhatnagar, "Abracadabra of Inter-State Council and National Unity" in U.N. Gupta (ed.), *Indian Federalism and Unity of Nation* 244 (1988).

46. For amendment in the Seventh Schedule of the Indian Constitution, article 368 requires ratification by the Legislatures of not less than one half of the States.

47. E.g "feel" instead of "Jail", p. 46, 'Constitutions' instead of 'Constitution', p. 102, "gave" instead of "given" at p. 107, "bettle" for "battle" at 115. Furthermore, the last line at page 24 is reprinted as the first line at page 25.

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