Introduction to some Basic Contemporary Themes*

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I

This book consists of a selection of papers presented at a Seminar in Nagpur in January, 1978. The purpose of the same was to examine recent trends and developments in the working of the Indian Constitution.

Inaugurated by the Chief Justice of India, the Seminar was intended to be an academic affair. Chief Justice Beg's printed speech was on "the Supremacy of the Constitution". This was the theme that Chief Justice Beg had explored in *Kesavananda*, in an introduction to a book on "The Supreme Court and Parliamentary Sovereignty", and in Mrs. Gandhi's *Election* case.[1] It was both of academic interest and practical value. It sought to consecrate the concept of the rule of law as a fundamental tenet of constitutional interpretation in India. It was an interesting jursitic exercise. In his inaugural address to the Seminar, Chief Justice Beg, however, struck a different note. He defended the famous *MISA* judgement in which the Supreme Court refused to interfere in preventive detention matters during the emergency. The speech itself became the subject of national news.[2] The tone of the speech set the mood of the Seminar. If Chief Justice Beg's written paper struck an academic note, his speech impliedly urged the Seminar to look at contemporary issues critically. Chief Justice Beg's theme of the written paper can be gleaned from his judgements.[3] We have also included Chief Justice Beg's written speech in our collection.

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*This review of the Seminar sessions and papers contains the personal assessment of the present writers. It highlights certain focal points of controversy and is not intended to be an official record.

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1. *Kesavananda* v. *State of Kerala*, A.I.R. 1973 S.C. 1461, *Indira Gandhi Nehru* v *Raj Narain*, A.I.R. 1975 S.C. 2299; M.H. Beg: Introduction to R. Dhavan: *The Supreme Court and Parliamentry Sovereignty* (Sterling, New Delhi, 1976).

2. See *Hindustan Times*, 23-1-1978, p. 5.

3. *Supra* note 1

II

The Seminar itself began with a discussion of the manner in which the Indian Constitution had been amended so many times. In particular attention was focussed on the famous Forty-second Amendment enacted during the emergency. The Seminar commenced with a plea by Dr. Rajeev Dhavan that legislative powers are often not used for the purposes which it is claimed that they are used for. The Forty-second Amendment was seen as a devious attempt to consecrate and concentrate power under the guise of a revolution. Dr. Dhavan's paper has not been included because his basic thesis has been printed as a book and in the form of an article.[4] The Dhavan thesis was modified by Dr. M.C. Jain Kagzi whose paper has been included even though Dr. Kagzi has also set his ideas down in a book.[5] Dr. Kagzi, too, questioned the need for the Forty-second Amendment.

We begin this collection of articles, however, with an article by Dr. N.G.S. Kini, a political scientist. The Seminar was intended to be a lawyers' affair with an inter-disciplinary element thrown in. Dr. Kini's paper seeks to establish a correlation between a country's constitution and the social and political system within which it operates. He argued that "parliamentary responsibility of the cabinet is a dangerous myth and an illusion in India" and suggested that a proper system of constitutional change can only arise when "a more intelligent and structured citizenry... knows the value of change and when to approve it." This approach was, to some extent, supported by Dr. Kagzi. Dr. D.C. Jain on the other hand, put forward the view that the Forty-second Amendment was designed to achieve some very credible socialistic and scientific motives. Dr. Mohammed Ghouse stressed the socialistic motives underlying some of the property amendments and blamed the courts for making these constitutional amendments necessary. By way of contrast Mr. P. Koteswara Rao argued a case for a fresh Constituent Assembly and designing a less eclectic constitution. In turn, Professor T.S. Rama Rao made the plea that

> if constitutionalism is to survive in the post-emergency environment, it is essential for parliamentarians and the community at large to see the need for preserving the norms of democracy and the rule of law at all times. It is illusory to expect the judiciary to be the sole guardian of the rule of law.

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4. R. Dhavan, *The Amendment, Conspiracy or Revolution* (A.H. Wheeler and Co, Delhi, 1978). R. Dhavan "The Amendment: Conspiracy or Revolution," (1978), *Illustrated Weekly of India* (Feb. 19, 1978) ...Vol. XCIX, (No. 8) pp. 34-35.

5. M.C.J. Kagzi, *The June Emergency and the Amendments* (Metropolitan Book Co., Delhi, 1977).

At the root of the controversy about constitutional change lies the controversies surrounding the Supreme Court's decisions in *Golak Nath* v. *State of Punjab*[6] and *Kesavananda* v. *State of Kerala*.[7] Before 1967, Parliament and other amending bodies[8] assumed the plenary power to amend any part of the Indian Constitution. In 1967 *Golak Nath* decided that Parliament could not amend the Constitution so as to abridge fundamental rights. In *Kesavananda*, the Supreme Court decided that the "basic structure" of the Constitution cannot be altered by a use of the amendment power. The court did not specify what the "basic structure" was. That would be determined by the courts in days to come. Against this background, Dr. Upendra Baxi argued that there was a need for a "wise accommodation" between Parliament and the courts, that the power to change the Constitution did not contain the power to destroy it, and that the constituent power was shared between Parliament and the courts. This argument was supported by Mr. Lakshminath and subjected to critical examination at the seminar by Dr. Dhavan. At the seminar, Dr. Dhavan argued that the constituent power was indeed shared by Parliament and the courts. Parliament had the substantial power to change the Constitution while the courts monitored the procedure by which the changes were made. Dr. Dhavan argued that the historical pedigree of the "basic structure" theory was quite sound but the juristic techniques through which it was articulated by the courts and used as a political weapon was questionable.

Dr. S.P. Sathe supported Dr. Dhavan's argument that some constitutional institution, responsive to day to day pressures (e.g., Parliament), must be free and have the plenary power to determine a country's needs. He felt that in 1973 *Kesavananda* was not a credible decision. But, in 1975 after Mrs. Gandhi's *Election* case, *Kesavananda* became an important, interesting and credible decision. He pleaded for restraint on the part of the courts and Parliament while expressing the view that there ought to be no limit on the latter's powers. Professor Madhavan Pillai wound up this part of the discussion by suggesting that in the present state of affairs, the court shave the duty to balance various value-choices that face the Nation; but Parliament, referenda and general elections should be used to determine the fate of the country where the courts do not perform their duties adequately or sufficiently.

The discussion on the amendment process to the Indian Constitution and the "basic structure" doctrine created various lines of discussion. One group favoured the *Kesavananda* doctrine while another favoured the supre-

6. A.I.R. 1967 S.C. 1643.

7. *Supra* note 1.

8. Aritcle 368 requires the ratification of the state legislatures with respect to certain matters enumerated in the Constitution.

macy of Parliament. Some argued that *Kesavananda* had a political flavour to it in 1973 but later acquired a credible dimension because the emergency which was declared in India in June, 1975 after the judgement in Mrs. Gandhi's *Election* case and which lasted till March, 1977 convinced people that the Constitution ought not to be easily tinkered with. Some argued for the use of new referenda, election and constituent assembly techniques to resolve political differences on these weighty constitutional questions. At the end of the session, the argument was destined to go on even though the lines of argumentation were more clearly drawn up.

Many of the issues discussed at the Seminar have become important political issues. The idea that there must be a 'referendum' before certain parts of the Constitution can be changed has become the official policy of the Janata Party and approved by some opposition parties. The "basic structure" doctrine has become an important part of the Janata Government's Forty-fifth Constitution (Amendment) Bill, 1978. The Janata Government has also advocated the view that the fundamental right to property should be abolished. The discussion in the Seminar captured the mood of these important incipient developments. It also forecast the kind of debate that would follow. It is a moot question as to whether the goals of the Constitution and the people of India can be achieved through the divisive tactics of "amendment" and "basic structure" politics. Something deeper and more constructive is needed.

III

No discussion of contemporary constitutional trends is possible without a discussion of preventive detention and the emergency. Dr. C.M. Jariwala traced the history of preventive detention and stressed that some kind of appropriate judicial procedure should be maintained to review preventive detention cases. In this he was supported by Justice Abhyankar, Dr. Baxi, Dr. Dhavan, Dr. Kagzi and Professor T.S. Rama Rao.

Dr. V.S. Rekhi's paper on preventive detention without trial not only briefly looks at the historical reasons for preventive detention but also examines judicial reaction in preventive detention cases and the manner in which politics and preventive detention intermingle with an undigested inelegance. Dr. Rekhi demands clearer guidelines for the use of the preventive detention powers and for the preservation of the *modus operandi* through which citizens can ventilate their grievances.

Professor C.G. Raghavan criticized the *MISA* judgement during the emergency. This was in direct contrast to the views expressed by Chief Justice Beg in his inaugural address. In discussion, Dr. Dhavan also expressed the view that courts were not free to do what they liked when faced

with rigorous and extensive "exclusion" clauses taking away the courts' jurisdiction to interfere in certain cases which came before them. Professor T.S. Rama Rao also commented, in discussion, on the pragmatic aspects of the *MISA* judgement. He argued that had the *MISA* decision gone the other way, the general powers and jurisdiction of the courts may have been curtailed further. Significantly, Justice Chandrachud, Chief Justice of India after Chief Justice Beg, recently told a conference that although the *MISA* judgement was correct in law, he wished he had the courage to resign after he delivered the judgement.[9]

The main discussion was on the manner in which the Indian Constitution permits an emergency to be declared under article 352. By virtue of article 358 the automatic effect of a declaration of an emergency under article 352 is the suspension of the right to move the courts for the enforcement of the seven freedoms stated in article 19. Article 359 enables the central government to suspend any other fundamental rights by specific declaration.

The Indian Constitution gives fairly vast powers to declare a national emergency in India. It also gives powers to impose a financial emergency[10] and a 'state' emergency in the states where there had been a failure of constitutional machinery of the states.[11] Not unnaturally, the discussion at the Seminar was primarily concerned with the kind of national emergency declared under article 352. An emergency had been declared because of an external threat in 1962 after the Chinese war, and continued for almost six years long after the threat of an active war with China had lapsed. Such an emergency was also declared in 1971 following the Bangla Desh war till 1977. Finally came the 1975 emergency which was declared for the ostensible reason that there was a threat of internal disturbance. The Shah Commission has recently expressed the opinion that the declaration of emergency was not justified.[12]

Professor Raghavan had suggested that an emergency should be declared only in conditions of war or grave civil insurrection requiring the imposition of martial law. The view that an "internal emergency" (*i.e.*, an emergency could be declared when there is an internal disturbance) should be proclaimed only when there is a civil war or armed insurrection was also put forward by Professor K.N. Seshadri.

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9. Chief Justice Chandrachud's speech to the Federation of the Indian Chambers of Commerce and Industry *the Times of India*, 23-4-1978, the *Hindustan Times*, 23-4-1978, *Patriot*, 23-4-1978, *Sunday Statesman* 23-4-1978.

10. Article 360, the Constitution of India.

11. Article 356, the Constitution of India.

12. *Statesman* (Delhi), 16-5-1978.

Dr. D.K. Singh went one step further and suggested that other provisions of the Constitution contained enough powers to deal with "internal" emergency.[13] Accordingly, the power to impose an "internal" emergency was not necessary. Dr. Singh argued for the retention of emergency powers but with a more rigorous parliamentary control and with greater consultation between the President and his Council of Ministers. He also argued that the automatic suspension of fundamental rights under article 358 was not at all necessary.

Dr. Singh's paper set the tone for the discussion that followed. Dr. Ghouse called for judicial review on the justification of an emergency. He also went one step further than Dr. Singh to suggest that no civil liberties should be suspended during an emergency under article 358 or article 359. In reply to this Dr. Singh and Dr. Dhavan pointed out that the effect of an emergency was to (*a*) alter the federal structure to some extent and (*b*) modify the extent of civil liberties. To delete both articles 358 and 359 would enfeeble the emergency provisions considerably. Dr. V.D. Sebastian made a powerful plea in his paper that "the provisions in the Constitution for the suspension of the fundamental rights when a proclamation of emergency is in operation should be deleted. It seems possible to meet adequately any situation created by war or rebellion or insurrection or disorder without suspending the fundamental rights." Along with Dr. Ghouse he adopted this line of argument at the Seminar.

Professor Seshadri independently followed some of the arguments Dr. Singh had put forward for a more rigorous procedural control of various stages of the emergency. He also added several arguments of his own. Dr. Baxi and Dr. Kagzi in discussion also put forward the view that each stage by which an emergency was declared, sustained and terminated should be examined piecemeal and subjected to procedural and substantive restraints.

As against this approach, Dr. S.N. Jain put forward the view that the whole of Part XVIII of the Constitution dealing with emergency powers ought to be deleted. He felt that the Union List contained adequate provisions to deal with emergency situations. He maintained that the Constitution was sufficiently flexible to deal with any demands that an emergency may create. This approach can be referred to as the "legislative" model in that the power to declare an emergency has to be derived from an Act of the legislature or the ordinance-making power of the President. This contrasts with what can be called the "executive" model of emergency

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13. The powers to impose a state emergency in article 356 and order preventive detention in accordance with article 22 of the Constitution.

powers where an emergency is declared by the executive and ratified by the legislature (if at all) later while enjoying full *de jure* effect in the interim. The "legislative" model was supported by Dr. Kini and criticized by Dr. Singh and Dr. Dhavan. The latter argued that emergency powers should remain with the executive even though subjected to rigorous legislative control and stressed that it was a contradiction to speak the language of emergency powers while adhering to the "legislative" model.

The debate between the "legislative" and "executive" models continued. There was a plea by Dr. Dhavan, Dr. Baxi and Dr. Kini that what was needed was a critical evaluation of the social metamorphosis by which the people of India drifted into the 1975 emergency. Dr. Sathe's view that the Seminar should not be too overtly concerned and overwhelmed by the recent experience of the emergency was subjected to critical appraisal at the seminar.

The need for limiting the scope of "internal" emergency and imposing a more complete control of the exercise of emergency powers has become an important public law issue in 1978.

IV

Indian federalism has been under considerable pressure. The pressure arises for the pragmatic reason that although policy initiation requires a centralization of powers, the implementation of various policy schemes requires a decentralization of powers away from the centre. This pragmatic reason, amongst a host of day-to-day disputes is considerably heightened by the fact that different political parties have been in power in the centre and the various states of India. Inevitably a fair number of anthologies and articles have been written on federalism in India.[14]

At the Nagpur Seminar Dr. R.B. Jain, who is a political scientist, pleaded that what India needed was a "federal culture", without which no viable federal system was possible. This was followed by an analysis of some contemporary political pressures on the current Indian federal structure by Dr. Alice Jacob. Dr. Jacob concentrated on the implications of the West Bengal Memorandum which called for a greater decentralization of power, a more effective representation in the Upper House of Parliament and more state control and say over federal policy matters. In discussion,

14. Asok Chanda, *Federalism in India: A Study of Union-State Relations* (Allen and Unwin, London, 1965); Jain *et al* (*ed*) *The Union and the States* (National, Delhi 1972); Alice Jacob (ed.) *Constitutional Developments Since Independence* (I.L.I.) 202-403 (Tripathi, Bombay, 1975); Alice Jacob, "Centre-State Relations in the Indian Federal System", 10 *J.I.L.I.* 583-636 (1968).

Dr. Jacob argued against the ideological interpretation of the West Bengal (Marxist) Memorandum put forward by Dr. Baxi and Dr. Dhavan. She argued that the West Bengal Memorandum was a logical extension of and similar to the Report of the Rajamannar Committee from Tamil Nadu in 1971. The latter committee made similar proposals even though it was motivated by different ideological considerations. Dr. Jacob was in favour of the centralized notions in the Constitution while prepared to accept certain piecemeal recommendations in the Rajamannar Committee Report and West Bengal Memorandum.

There was also some discussion on the specific issue of the replacement of sales tax by additional duties of excise on selected commodities. This was the theme of a joint paper by Dr. S.N Jain and Dr. Jacob. This highly technical area has assumed great importance both politically and because of its economic and administrative impact. This issue was an item in the Janata Party manifesto in the 1977 general elections. Dr. Jain and Dr. Jacob argued that a general extension of this scheme of replacement of sales tax by additional duties of excise would not be feasible because of various reasons discussed in their paper.

Clearly, there is a great need to discuss various aspects of Indian federalism. Many at the conference—like Dr. Jacob, Dr. Baxi, and Dr. Dhavan—felt that there was a considerable need for a separate seminar on Indian federalism.

V

Independent India has witnessed a vast increase of governmental power. This power is exercised by ministers, civil servants, autonomous and semi-autonomous bodies and tribunals. Under the theory of separation of powers which India has inherited from the Western constitutional systems, the judiciary had been given the power and the responsibility to ensure that these powers are exercised *bona fide* for the purposes for which they are given by those to whom they have been entrusted. In time, the judiciary has kept a watching brief on the exercise of these powers—sometimes leaning over backwards to help the citizen affected by the use of these powers. On occasion wily litigants have used the judicial machinery to countenance judicial interference on technical grounds and thereby making inroads into the government's legislative and administrative programmes. The government, in turn, anxious at times to avoid a judicial scrutiny of its powers and distressed, at other times, because judicial interference has caused delays, has not been too happy with the scale and nature of judicial review of administrative action.

The Forty-second Amendment enacted during the emergency sought to

curtail these judicial powers. It took away the High Court's power to superintend the work of various administrative areas elaborately, and empowered Parliament to set up an independent hierarchy of tribunals in certain areas. This altered the nature of judicial review of administrative action considerably. These matters are discussed in detail in Dr. S.N. Jain's paper.

Dr. S.N. Jain argued that the curtailment of the powers of judicial review of the High Courts would lead to inconsistencies and injustices. This view was questioned by various persons, including Dr. Baxi and Dr. Dhavan, who argued that some limitation on judicial review was necessary and that the changes, although perhaps, in some measure, more radical than they needed to be, might call for a judicial reassessment of the juristic techniques used by courts to review administrative action.

Mr. Balram K. Gupta saw the Forty-second Amendment as ushering in a variant of the French Administrative Law system of independent tribunals outside the jurisdiction of ordinary courts. This conclusion was queried in discussion by Dr. Dhavan. The Janata government seems to have approved a policy of restoring the powers of the High Courts and abolishing the hierarchy of tribunals established by the Forty-second Amendment.[15]

It is impossible to understand the importance of these papers without appreciating the unintended, but nevertheless significant, polarity that has crept into on the relationship between the government and the courts. The government wants a freer hand to do what it likes. The courts want to retain their powers—both as a matter of parochial rights and constitutional duty. It was argued by some participants that the lawyers support the courts because their fortunes are bound up with courts maintaining a wider jurisdiction.

There is no doubt that much thought needs to be given to the manner in which India's administrative system is to be redesigned. Some thinking on this was done by the Administrative Reforms Commission,[16] whose recommendations were never implemented. The real problems of administration do not arise from judicial review even though the latter can throw a spanner in the administrative work at an inopportune time. Some reconsideration of judicial review alongside a wider re-examination of the administrative structure through and by which India is governed, is called for. It might even call for a reorganization of the judiciary. Much thought is needed to resolve the problems in this area.

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15. See sections 6-9 of the Constitution (Forty-third Amendment) Act, 1978, which restored the powers of review of the High Courts and clause 35 of the Constitution (Forty-fifth Amendment) Bill, 1978, which abolishes the hierachy of tribunals created by section 46 of the Constitution (Forty-second Amendment) Act, 1976.

16. *Reports of the Administrative Reforms Commission* (1966-69).

In the end, this anthology does not cover all the problems which contemporary Indian public law faces. It merely singles out certain issues which certain academics found to be important. These issues have also been the subject of political controversies in post-emergency India. This collection of articles is only a starting point. A lot of thought and discussion needs to be devoted to the public law needs of modern day India.