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Limited Government and Judicial Review

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RECENT BOOKS

Book Reviews

Limited Government and Judicial Review. By *Durga Das Basu.* Calcutta: S. C. Sarkar & Sons (Private) Ltd. 1972. Pp. xxvi, 575.

For those who have at least a passing acquaintance with Indian constitutional literature, Dr. Basu needs no introduction. He ranks as one of the leading authorities on the Indian Constitution and the whole of Indian constitutional law. His writings have not only been influential in systematizing the body of Indian constitutional law but have also had an important impact on the course of decisions in that area. His pioneer commentary on the Constitution of India was itself an extraordinary work of seminal importance.[1] While he has distinguished himself as an academician, his experience in the field of public law has been very rich and extensive. He has served as a member of the Law Commission of India, a judge of the High Court of Calcutta, Dean and a member of the Faculty of Law at Calcutta University, and, more recently, Tagore Law Professor at the University of Calcutta. The book under review is based on the Tagore Law Lectures, delivered by the author at the University of Calcutta in 1968-1969.

This volume can be said to be a distillate of Dr. Basu's ripe scholarship, insights, and wisdom on the general subject of constitutionalism. It is an interesting and skillful amalgam of several features. In the first place, the author is intent on demonstrating a universality of ideas concerning limited government and its necessary adjunct, judicial review; in doing so, he draws upon his wide learning to present each matter in its comparative aspects. Recognizing the distinctive contributions made by American constitutional theory and practice to the concept of limited government and to the role that judicial review plays in giving flesh and blood to the written document, he draws heavily on constitutional development in the United States. His expertise in and knowledge of American constitutional law and the course of American decisions is, indeed, impressive. He also draws heavily on English constitutional practice to contrast systems that recognize an unlimited parliamentary power with those that recognize that Parliament, as well as other organs of government, is subject to a constitution interpreted by the courts. The book is valuable alone for its comparative aspect.

The volume also affords very valuable insights into, and in this sense is a limited commentary on, judicial interpretation of the Indian Constitution. The author reveals his extraordinary intimacy

1. D. Basu, Commentary on the Constitution of India (5th ed. 1965).

with the decisions of the Supreme Court of India and also his great skill in analysis of cases, synthesis of materials, and formulation of doctrine. Dr. Basu is always forthright and clear in stating his ideas and does not hesitate to condemn what he regards as erroneous views or holdings by the Court.

In these lectures Dr. Basu is not primarily concerned with the systematic exposition of constitutional law; rather, he is interested in the significance of the decisions of the Supreme Court of India for basic constitutional concepts. The book is a treatise that transcends empiric study of judicial interpretation and penetrates to what Dr. Basu considers to be fundamental ideas with respect to human society and the nature of government, the idea of limited government, the concepts of natural law and natural right, and the source of constituent power in a constitutional system. In this book Dr. Basu reveals himself to be not only a distinguished commentator on the Indian Constitution and a scholar greatly versed in the bodies of decisional law in various countries, but also a thoughtful jurist and legal philosopher.

A word may be said about Dr. Basu's method, which I have described as comparative in character. Perhaps he has given us a clue to what may really be the most effective way in which to treat materials comparatively—that is, by centering on the constitutional structure and interpretations of one particular country, but analysing and appraising them in the light of developments under other systems. The reader emerges with a very good picture of the Indian constitutional system as it is related to other systems and of the extent to which it has built on the American system in particular; at the same time, the reader gains a clear understanding of the difference between a system of limited government reinforced by judicial review, like the system found in India, and the unlimited parliamentary power of the English system. The book may well suggest a pattern for comparative treatment in other areas.

Within the limited scope of this book review it is not possible to do full justice to the work. At most one can attempt to portray the general theme of the several lectures and point out some particularly interesting ideas as they relate to a comparison between the Indian and American constitutional systems.

In the first lecture, with its intriguing title, "The Correct Approach" (pp. 1-43), the author sets forth some threshold ideas, which he regards as particularly important for his Indian readers. At the outset he makes the point that the Indian courts should make no apology for drawing on American experience and decisions in interpreting provisions of the Indian Constitution, since the underlying philosophy and many express features of the Indian Constitution are based on the American experience—notably, of course, the idea

of judicial review, the federal structure, and the enumeration of fundamental rights.

It is evident that the author has a devotion to constitutionalism, judicial review, and the idea of limited government, as well as a very high respect for the Indian Constitution in particular, and he expresses regret that this respect is apparently not shared by all of his fellow citizens. He is disturbed by the relative ease with which the Indian Constitution is amended and by the fact that it has been amended so frequently during its relatively short history, as compared with the less frequent amendments of the United States Constition over a longer period of time. He admonishes his fellow citizens to respect the courts as guardians of the Constitution. He suggests alternative methods for selecting judges and notes the importance of paying adequate judicial salaries to attract to the bench persons with the superior ability necessary for dealing with constitutional questions.

In the next chapter, "The Problem of Power and Need for Limitations" (pp. 44-68), the author gets to the heart of the basic ideas that he intends to develop. The problem is one of limiting governmental power. Pointing out that the experience in England merely transferred power from a "single-headed Leviathan to a hydra-headed uncrowned Leviathan" (p. 44), namely, the Parliament, he says that even a representative legislature is capable of abusing its power. Judicial review is also necessary because legislative bodies, as well as executive agencies, are capable of arbitrary and ruthless action at the expense of the liberties of the people, and it is not an answer simply to say that abuse of power by the legislature can be corrected by throwing the rascals out at the next election. The reader becomes aware early in the book that the author has strong convictions about judicial review and that there is not the least bit of doubt in his mind that judicial review is a good thing. He accepts the American ideas that the constitution is fundamental law, that as fundamental law it ranks superior to all other laws, and that in the end the judiciary's peculiar function is to interpret the constitution and therefore give it the final authoritative exposition. He does not see this as a violation of the principle of separation of powers or as a betrayal of the democratic system. In India it is unnecessary to engage in extended arguments in support of judicial review, since the Indian Constitution makes it clear that the courts are intended to exercise that function and that any law that is found to be in violation of the Constitution is void.

In the third lecture, "The Written Constitution as a Limitation" (pp. 69-149), the author builds on ideas developed in the second lecture and, to some extent, anticipates ideas developed again in a later lecture on fundamental rights. He here develops the thesis of the

written constitution as a superior law and, in turn, traces the concept of a superior law to its basic roots in what he regards as universal natural-law theories. While the main emphasis in this lecture is on the idea that the written constitution is a legal document that requires authoritative exposition by a judicial tribunal, the author also develops some limitations on judicial review, notably with respect to so-called nonjusticiable problems. His treatment of nonjusticiability follows from the point, which he emphasizes, that the courts of India have no general power to declare legislation invalid but possess only a power to deal with constitutional questions in the course of justiciable controversies coming before the courts. A major part of the chapter consists of a very useful review of the kinds of questions that are nonjusticiable under the Indian Constitution, either because of express indication in the Constitution that the final determination of the question is reserved to other branches of the government or because nonjusticiability is implicit in the very nature of the problem.

In the fourth lecture, "Fundamental Rights as a Limitation" (pp. 150-215), the author gets to what is probably a favorite theme—that a principal function of a constitution is to protect the rights of a person against the arbitrary exercise of power. In his view, the whole concept of fundamental rights flows from basic natural-rights theories. He credits Blackstone for importing the doctrine of natural rights from the realm of political philosophy into the realm of jurisprudence, traces the early development of the natural-rights theory in American constitutional thought, and observes that even after the adoption of the Bill of Rights in the United States Constitution—a development that could be viewed as a positive incorporation of natural rights—the doctrines of natural law and natural rights continued to wield a potent force in the judicial protection of individual rights. This discussion leads Dr. Basu to the question of whether a specific constitutional formulation of certain rights excludes the judicial recognition of other rights. In this connection, he relies on American experience to support the idea, formally expressed in the ninth amendment to the United States Constitution, that the express enunciation of some rights does not exclude others, which are retained by the people. Thus, he points to the recognition by the United States Supreme Court of the freedom of association,[2] the right to educate a child in nonpublic schools of the parents' choice,[3] and the right of privacy.[4] (If the book had been written later, Dr. Basu could have referred to the recent abortion decisions by the Supreme Court[5] as

2. *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

3. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923).

4. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

5. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

a further development of the right of privacy.) At this point the author engages in a critical discussion of the Indian decisions interpreting article 21 of the Indian Constitution, which provides that no person "shall be deprived of his life or personal liberty except according to procedure established by law." Pointing out that the earlier Indian decisions gave a very restricted interpretation to article 21, Dr. Basu is happy with later cases that have construed it more broadly and have used it in a way very similar to that in which the due process clause in the fourteenth amendment of the United States Constitution has been used to protect substantive liberty and as a basis for rights related to those expressly enunciated. He advances the thesis that various aspects of privacy as developed in American decisions could be developed under article 21 of the Indian Constitution, although he recognizes that, at least under some of the past decisions of the Indian Court, the reasonableness of any restriction could not be questioned.

The fifth lecture, "Due Process Under the Constitution of India" (pp. 216-74), is of particular interest to American readers because of the extraordinary history of interpretation of the American due process clause, particularly after the adoption of the fourteenth amendment. In American constitutional doctrine, due process not only refers to procedural regularity but has also come to have a substantive content in that it operates as a restraint on the arbitrary exercise of power. The drafters of the Indian Constitution carefully avoided using the "due process of law" language in their Constitution and instead provided in article 21 that no person should be "deprived of his life or personal liberty except according to procedure established by law." On their face, these words have reference only to procedural due process, and Dr. Basu acknowledges this. However, he points out that the opportunity was open to the Indian courts to develop the basic concept of substantive due process in interpreting other provisions of the Constitution. The Indian Court has, in fact, done this, so that while there is no formal due process clause and no formal acceptance of the idea that the Court is free to write new conceptions of fundamental rights into the Constitution by use of due process language, a process that has been much criticized in American jurisprudence, the Court has nevertheless borrowed the basic notion that power must be exercised in only a limited way unless the constitutional language makes clear that the legislative power is to be free from any restriction of reasonableness.

It is in this connection that Dr. Basu discusses the American notion of the police power, which he says was invented by American courts to reconcile the differences between liberty, on the one hand, and the need for legislation to secure important public objectives, on the other. Dr. Basu maintains that, although there is no formal ac-

ceptance of the idea in India, by its interpretation of "reasonableness," the Indian Court has, in effect, also used police power thinking.

Even with his enthusiasm for judicial review and for the power of the court to declare invalid legislation that it finds to be unreasonable or arbitrary, Dr. Basu still takes pause when he considers the decisions by the Indian Supreme Court in the field of legislation providing for the expropriation of property. He is particularly disturbed by the Bank Nationalization Case,[6] in which he found that the Supreme Court of India in effect incorporated the whole notion of substantive due process as a limitation on the eminent domain power. He thinks that in this situation the Indian Court carried substantive due process even further than the American courts, and he is not happy about this. Noting that the United States Supreme Court has, for all practical purposes, abandoned substantive due process in the protection of property and economic rights and kept it intact only with respect to the protection of other rights, Dr. Basu recognizes that the Indian Constitution leaves no place for the idea of preferred rights or for distinctions between the degrees of judicial protection accorded the various rights explicitly protected by the Constitution.

After all that is written in prior chapters, the separate chapter on "Judicial Review" (Lecture VI, pp. 275-348) simply seems to repeat what has been said earlier, and, in part, it does. The author points out the differences between the American system, where judicial review is implied from the nature of the constitution as superior law and the function of the Court to interpret the law, and the Indian situation, where judicial review is expressly recognized and the power of the Court to declare legislation void is made explicit in the Constitution. In spite of this explicit recognition of the doctrine, the author finds it useful to present arguments in favor of judicial review both to justify its inclusion in the Constitution and to support a vigorous exercise of the power. He takes the occasion here to point out that the Court, in exercising judicial review, should deal only with the express language of the Constitution and should not include certain a priori assumptions that may distort constitutional interpretation. Thus, he questions the wisdom of incorporating the ideas developed by the United States Supreme Court in applying the supremacy clause to invalidate state legislation found to impinge on interstate commerce, since the situation in India, where concurrent powers are expressly recognized in the Constitution, is quite different. He also warns against reading into the constitutional section on expropriation of property the idea of just compensation found in the American Constitution, since the property provision in the Indian Constitution was addressed to a totally different situation. Despite parliamentary efforts through constitutional amendment to make it clear that the

6. Cooper v. Union of India, All India R, 1970 S. Ct. 564.

courts are not to question the compensation formula, the Indian Supreme Court has continued to adhere to the idea that "compensation" as used in the Indian Constitution means "just compensation" in accordance with the American idea. In Dr. Basu's view this is a limitation that the Indian Supreme Court has mistakenly written into the Constitution.

In the seventh lecture, "Interpretation of a Constitution" (pp. 349-422), the author emphasizes the necessity of interpreting a constitution as a constitution and not as a statutory instrument, and he points to what he regards as weaknesses in the perspectives brought to constitutional interpretation by the Privy Council and the Canadian Supreme Court. He notes that the experience of Indian judges, "trained in deciding cases on private law, while interpreting the Constitution with its Bill of Rights and avenues of Judicial Review, has in some cases, been similar to that of the Privy Councillors dealing with constitutional questions coming from the Dominions" (p. 362). It took some time for the Indian Supreme Court to realize that there was something wrong in the cautious attitude toward judicial power expressed in *Gopalan v. Madras*.[7] The Supreme Court of India has now proceeded to the point of interpreting the term "personal liberty" in article 21 of the Constitution as broadly as the word "liberty" in the fifth and fourteenth amendments to the United States Constitution is understood by the United States Supreme Court. Dr. Basu points out how, in other respects, the Court has expressed its realization that an exclusively legalistic and textual interpretation would do injustice to the Constitution. Interpretation must be progressive, not static. Because of the great detail of the Indian Constitution, there is less room for the kind of extensive and progressive interpretation that has taken place under the broader and more indeterminate language of the United States Constitution. Moreover, since the process of amending the Indian Constitution is easy, progressive judicial interpretation is not nearly as important in India as it is under the United States Constitution. Dr. Basu points out that the Indian Constitution does contain some general terms that can be given either expanded or narrow construction.

The important questions of "Effects of Unconstitutionality and Prospective Overruling" are examined in the eighth lecture (pp. 423-97). Express provisions of the Indian Constitution make it clear that a declaration by the Supreme Court that a statute is unconstitutional invalidates the statute and that this decision is binding on all other courts; in a very real sense, the Indian decision operates in rem on a statute, whereas the American decision operates only in personam between the parties, and any further unenforceability of a statute depends upon the doctrine of precedent rather than upon any notion that the statute is no longer in effect. Dr. Basu is skeptical of the

7. All India R. 1950 S. Ct. 27.

American doctrine, developed in *Linkletter v. Walker*,[8] that a decision announcing a new rule of constitutional law may, depending on the circumstances, be given prospective effect only. He feels that this result is impossible under the Indian Constitution and that, in any event, the doctrine is undesirable and a distortion of the concept of judicial review. One need not accept all of Dr. Basu's criticisms. Quite clearly, the possible consequences of making a new procedural decision retroactive so as to give the benefit of collateral attack to prisoners in jail, which could result in wholesale voiding of convictions and the impossibility of conducting new trials because of the staleness of evidence, are very important, and a court need not close its eyes to these policy considerations in exercising its power of review.

In the ninth, and final, chapter, the author discusses "Amendability of the Constitution and Judicial Review of Amendment Acts" (pp. 498-559). Dr. Basu quite rightly closes the book with a lecture on the amendment process, a factor not always fully appreciated in discussions of judicial review, although the whole significance of judicial review depends on the rigidity of the amendment process. If the amendment process is laborious, a court may feel an obligation to keep the constitution up to date by assuming an activist role, whereas a court in a country where the amendment process is fairly easy can take a more relaxed attitude and be content to follow precedent much more closely. The author clearly articulates the difference between legislative power and what he calls the constitutive power, that is, the basic power on which the constitution rests. Dr. Basu rejects the idea that the constitutive power can be asserted by the people only through a revolution outside the formal process. Amendment procedures may be more or less flexible. In a constitution, the people, who are the source of constitutive power, may provide that the power resides elsewhere for amendment purposes, or they may provide for an amendment process in which they play a part through referendum. The Indian procedure is quite flexible, since it requires no referendum, but only a special majority vote of both houses of the legislature. The author is critical of the decision in *Golak Nath v. Punjab*,[9] in which the Indian Supreme Court held that any amendment impinging upon fundamental rights must be enacted in the same way that the original Constitution was enacted, namely, by a constituent assembly, rather than by the regular amendment process expressly provided for in the Constitution. In Dr. Basu's view, this decision is clearly wrong. He makes the point, and I think correctly, that when a constitution prescribes its own procedure for amendment, this procedure governs, and courts are not competent either to challenge it or to insist on other methods; certainly they should not find

8. 381 U.S. 618 (1965).

9. [1967] 2 India S. Ct. 762, All India R. 1967 S. Ct. 1643.

some implicit limitation on the amendment process over and above that stated in the constitution. This chapter is in itself very helpful and illuminating, and it deserves wide reading.

In this volume, rich in its scholarship and understanding, Dr. Basu has made a highly valuable contribution to the literature dealing with limited government and judicial review. It should take its place with other comparative treatments of these matters.[10] For the uninitiated, it is an excellent introduction to Indian constitutionalism and the role of the Indian Supreme Court in exercising its power of review. Any treatment of these questions is of special interest to American lawyers, jurists, and scholars, since the subject of judicial review and the role of the United States Supreme Court, whether activist or nonactivist, continues to be a matter of debate and discussion. Dr. Basu makes no new arguments in defense of judicial review, and some American students of the subject, while accepting his conclusion, may not accept all of his premises. But he presents a persuasive case and does so with conviction and enthusiasm. After long experience, Americans have become alive to the perils of judicial review and the danger that a court carried away by its own zeal may assume a superlegislative role and intrude into areas reserved for determination by the elected legislature and the people themselves. American readers may not, therefore, completely share Dr. Basu's strong support of a vigorous exercise of the judicial review power, but it should be noted that the Supreme Court of India faced the problem of developing a sense of confidence and resoluteness in exercising a power that was expressly given to it. Scholars like Dr. Basu perform a great service in bringing the support of history, philosophy, and the experience of other countries to the defense of judicial review and in urging a vigorous use of that power. One gets the impression that Dr. Basu feels that the Supreme Court of India has come a long way in discharging the function with which it was entrusted and that, on the whole, it has charted a good course. Nevertheless, the Court is vulnerable in some of its interpretations, and Dr. Basu is expert in probing the Court's decisions and in pointing out what he regards as errors and weaknesses.

Dr. Basu has earned a place as the foremost scholar in Indian constitutional law. In this volume he enhances this reputation and emerges also as a distinguished comparative scholar.

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10. *E.g.*, M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD (1971), reviewed by this reviewer in 70 MICH. L. REV. 987 (1972); E. MCWHINNEY, JUDICIAL REVIEW (4th ed. 1969); Geck, *Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices*, 51 CORNELL L.Q. 250 (1966).