Michigan Law Review

Volume 66 | Issue 2

1967

Bedi: Freedom of Expression and Security: A Comparative Study of the Function of the Supreme Courts of the United States and India

Chester J. Antieau
Georgetown University Law Center

FREEDOM OF EXPRESSION AND SECURITY: A COMPARATIVE STUDY OF THE FUNCTION OF THE SUPREME COURTS OF THE UNITED STATES AND INDIA. By *A. S. Bedi.* New York: Asia Publishing House. 1967. Pp. xiv, 483. $7.75.

An element of weakness in American constitutional law is the traditional unwillingness of bench and bar to profit from the experience of other law cultures. This is as tragic as it is unnecessary. There are countries from which it is most natural to learn lessons of comparative constitutional law. Thus, much can be gained from the countries that share our heritage of gaining independence from the British Empire and then adopting a written constitution with a jural bill of rights. Moreover, we can profit from the experience of nations, like the Philippines, which drafted constitutions patterned in large part after the American organic acts.

Of the first group of countries mentioned, Australia and India immediately come to mind. At a time when congressional acts of doubtful constitutionality remain vital because the Supreme Court has denied standing to sue to all potential plaintiffs, we must at least seek to understand the success of Australia's practice of giving the attorney general of each state standing to attack as unconstitutional any legislation of the federal government. Again, when judgments of a state court are still treated as foreign country obligations in neighboring states, we should attempt to appreciate the more intelligent and satisfying response within the Australian federal system.

Indian courts, perhaps more than the courts of any other

country, have avidly looked to American constitutional law precedents for guidance. The opinion in practically every important case is liberally sprinkled with references to American decisions and authors, as are the standard Indian texts on constitutional law. The book under review is in keeping with this healthy tradition, and, in addition, offers a novel perspective to the American constitutional lawyer.

An American reader may suspect that the author's primary intention was to serve the advancement of Indian constitutional jurisprudence, which is, of course, an altogether worthy objective. He has mastered the American common law, its constitutional debates, the accumulated gloss of a century and three-quarters, and the available literature in a way never before accomplished by a foreign scholar. As the title indicates, the book is limited to one aspect of comparative constitutional law: the reconciliation of society's interest in freedom of communication with state security needs. The author has performed a truly inestimable service in providing a masterful, objective, and complete study of the American experience for his Indian colleagues. He has seen our difficulties, our problems, our inadequacies, and our needs, and, while treating our institutions and jurists with respect and sympathy, has unfolded for readers, not only in India but everywhere, the unwisdom of constitutionalizing such things as seeming absolutes and twenty dollar specifics.

The American reader may be disappointed by the relative paucity of Indian materials (about 100 pages out of 450). Much of the Indian experience which would prove valuable to American lawyers is not included in the book. For example, the United States Supreme Court has never expressly declared that legislative negations or restrictions of the fundamental freedoms are presumed to be unconstitutional. Apparently, respectable Indian jurists *have* made such statements. It would greatly help American scholars to be told whether such a presumption has in fact been applied in the free expression area in India, and with what results. Similarly, no American lawyer has been able to persuade the United States Supreme Court to invalidate state legislative restrictions on freedom of expression solely on the ground that a more reasonable alternative is available to the state.[1] If peddlers of milk are entitled to such treatment under the commerce clause,[2] surely peddlers of ideas are entitled to comparable judicial protection under the first amendment. In India it appears that the courts can invalidate legislation imperiling fundamental freedoms when a reasonable alternative is available—that is, when the restriction is more onerous than

1. *Cf.* Breard v. Alexandria, 341 U.S. 622 (1951).
2. Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

the situation demands.[3] The American legal community would be interested in learning the results of the application of this rule. Traditional Indian constitutional jurisprudence looks upon preventive detention as an interference with freedom of movement, and thus the author is justified in not approaching this as a first amendment problem. Yet American legal scholars would be likely to consider this an aspect of freedom of association, and once again would have relished an extended treatment by a scholar of the magnitude and experience of Dr. Bedi. Another omission is the failure to deal with the constitutional right to remain silent. Although the table of cases lists the *Barenblatt*,[4] *Braden*,[5] and *Wilkinson*[6] cases, there appears to be no systematized critique of these decisions. American readers would be interested in knowing the types of security cases in which India recognizes a constitutional right of silence grounded upon freedom of speech.

The author occasionally succumbs to the notion that society's interest in security is opposed to the individual's interest in freedom to speak. This may be forgivable, since the United States Supreme Court itself has accepted such a view. What is really involved of course (as the Court has many times been told) is a reconciliation of two legitimate societal interests: freedom of communication and state security. One is also left rather unenlightened as to the philosophy and methodology of the Indian Supreme Court and the state courts. It would be interesting to know whether Indian jurists are operating under notions of natural rights, neo-realism, or contemporary pragmatism.

Dr. Bedi has seen that there are problems of federalism inherent in constitutional adjudication in the freedom of expression context, and this is rare for both American and foreign scholars. Whether or not American solutions are entirely desirable, his identification of the problem will inevitably be of service to the Indian legal community. Indeed, the entire book is filled with helpful insights into the problems we have faced over the last two centuries. It is useful for any American lawyer or jurist to see these problems through the eyes of a detached and sympathetic scholar who is altogether fair in his critique of our institutions, our rules, and our jurists.

Against the single criticism that the American audience does not get enough of Dr. Bedi there must be placed the careful, complete, and critical research and writing that have gone into this fine and scholarly work. The subtleties, the nuances, and the unarticulated

3. 1 A. CHAUDRI, CONSTITUTIONAL RIGHTS AND LIMITATIONS 461 (1955). *See also* Chintamanrao v. State, 1951 India S. Ct. 118.

4. Barenblatt v. United States, 360 U.S. 109 (1959).

5. Braden v. United States, 365 U.S. 431 (1961).

6. Wilkinson v. United States, 365 U.S. 399 (1961).

premises of our jurisprudence are fully captured by this great scholar who has done us a double service in giving us both a new and critical look at our constitutional law and a candid, comparative look at Indian responses to similar problems. Dr. Bedi has written in his second language with beautiful style, force, and clarity. We can look forward to further works in comparative constitutional law by this imaginative and expressive international scholar.

Chester J. Antieau,
Professor of Law,
Georgetown University Law Center