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Basu: Commentary on the Constitution of India /Jenning and Tambish: The Dominion of Ceylon. The Development of Its Laws and Constitution

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REVIEWS

COMMENTARY ON THE CONSTITUTION OF INDIA (2d ed.). By Durga Das Basu. Calcutta: S. C. Sarkar & Sons, Ltd., 1951. Pp. lxxii, 1063. 30 rupees.

THE DOMINION OF CEYLON. THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION (Vol. 7 of the series, THE BRITISH COMMONWEALTH). By Sir Ivor Jennings and H. W. Tambiah. London: Stevens & Sons, Ltd., 1952. Pp. xvi, 319. \$9.35.

THE actual drafting of the Constitution of the Republic of India occupied three years. A Constituent Assembly to draw up a constitution was first convened in December, 1946, and its members (numbering three hundred in all after the withdrawal of Pakistan's representatives) did not finally reach agreement until November, 1949, the new Constitution coming into force on January 26, 1950. The constitution that they agreed upon, perhaps in consequence of these exhaustive deliberations, is elaborate and prolix. It is easily the lengthiest constitutional instrument ever drafted—395 articles, plus 9 schedules, the whole instrument, in the official version published by the Government of India Press, running to 254 pages. It must also be the most eclectic constitutional document that has been adopted: its articles echo the phrases of the constitutions of many countries, for the Indian Constitution-makers have borrowed copiously, and perhaps not always discriminately, from the constitutions of many countries, particularly the English-speaking federations—the United States, Canada, and Australia. In this sense, the new Indian Constitution tends to parallel the Weimar Constitution and other post-1918 European constitutions in that the drafters have sought, by the dry light of reason and by assiduous culling of the positive law texts, to construct themselves a constitution. Part IV of the Indian Constitution (Articles 36-51), for example, is devoted to a detailing of the "Directive Principles of State Policy," principles which "shall not be enforceable by any court, but . . . are nevertheless fundamental in the government of the country and it shall be the duty of the State to apply these principles in making laws."

Now the notion of including a statement of such Directive Principles in the Constitution was apparently derived by the Indian Constitution-makers from the Constitution of Eire of 1937; Eire in its turn owed the same notion to the Spanish Republican Constitution of 1931. Lacking the teeth of a bill of rights, and yet at the same time intended to be more substantial than the gusty recitals normally included in the preambles to constitutions, it is true to say that the Directive Principles of State Policy have been, from the outset, an anomalous portion of the Indian Constitution; it is perhaps not surprising therefore that they have not been utilized or invoked at all up to the present day. This particular outcome is of course not a unique situation in the day-

by-day working of constitutions—many provisions in the United States Constitution, for example, had become dated soon after the adoption of the Constitution and are now generally forgotten. Yet it may be regretted that the Indian Constitution-makers, in spite of their undoubted erudition, have not profited from the worst errors of the “professorial” constitutions of post-1918 Europe. We can observe, indeed, all through the Indian Constitution, the same key characteristics that are found in those constitutions: a notable heaviness of construction in conjunction with complicated rules which attempt to provide for all foreseeable contingencies—in a word, the attempt to rationalize power, to replace the extralegal facts of power by rigid and extensive rules of positive law.

In certain significant respects, however, the new Indian Constitution differs from many of the post-1918 European constitutions. Where the latter tried to disarm the executive branch of government at a time when economic and political conditions all pointed to the need for a strong centralized administration, the Indian Constitution clearly looks to the establishment of a strong executive at the center. In this regard, the Indian Constitution-makers deliberately rejected the American presidential-type executive, with the substantial separation of powers that it necessarily implies, in favor of the English parliamentary-type executive. They also took the further step of arming the Executive with drastic powers, under which, when the Executive is “satisfied that a grave emergency exists,” it can suspend or modify the normal constitutional provisions, including the very elaborate Bill of Rights section of the Constitution—a provision that recalls the drastic emergency provisions of the old Weimar Constitution. Indeed, when it is remembered that the normal restraint upon a parliamentary-type of executive of an effective two-party system is not present in India, in view of the absence of any real parliamentary opposition to the present Congress Party government, it may be wondered whether the desire for a strong executive has not been carried too far, and too much of effective power located at the center.

Here, however, another important characteristic distinguishing the Indian Constitution from the post-1918 European constitutions comes into play, namely the presence of a Supreme Court exercising judicial review on the model of the Supreme Court of the United States. The Indian Supreme Court will be peculiarly able, if it so chooses, to prune away much of the verbal foliage in the Constitution and look to the essential purposes that the Constitution was intended by its drafters to embody. The Court starts on its work with all the advantages that Chief Justice Marshall possessed when he wrote his seminal opinions on the United States Constitution; it will have a clean slate and will be able to chart virtually its own course. So far, it must be noted, the Indian Supreme Court has moved with extreme caution. With notable exceptions like Mr. Justice Fazl Ali, its members have eschewed altogether the frank, policy-making type of approach favored by the United States Supreme Court in the present day, and have confined themselves to a baldly positivist approach. This is no doubt due mainly to the continued

dominance in Indian jurisprudence of English judicial traditions and patterns of thought; the Privy Council's approach to constitutional interpretation in the era of the old British Empire, and the Commonwealth that succeeded it, was to treat dominion constitutions as mere statutes—distinct from constitutions—and to subject them to the “ordinary” (restrictive) rules of statutory construction, with a reading-down of the provisions of those constitutions as the inevitable result. The high-water mark of legal positivism on the part of the Indian Supreme Court was attained in one of that court's first opinions, *Gopalan v. State of Madras*,¹ when, over a very strong dissent by Mr. Justice Fazl Ali, the Court (through Chief Justice Kania) rejected any notion of a “purposive” interpretation of the Constitution and insisted instead on strict and literal interpretation as the guiding principle of construction. The consequence was a very restrictive ruling, in the *Gopalan* case, upon the protections conferred under the very elaborate Bill of Rights contained in the new Constitution. There has since been no noticeable departure from this judicial attitude. Indeed, while Indian legal education continues to be closely tied to positivist methods and certainly while the present group of English-trained judicial decision-makers remains on the bench, the mechanico-positivist approach probably will prevail over the more consciously purposive, policy-oriented methods. One point must, however, be mentioned here. The Indian Constitution makes mandatory the retirement of Supreme Court judges at the age of sixty-five. This provision seems to have been included in the Indian Constitution on the assumption that elderly judges are conservative judges, a proposition which, in the light of American experience, must be taken with some reserve. Sutherland, Van Devanter, McReynolds, and Butler were, certainly, while members of the United States Supreme Court, elderly men, but so also were Holmes, Brandeis, Hughes, and Stone. One unfortunate result of the Indian mandatory retirement-at-65 rule is likely to be that men will be removed untimely from the bench just as they are beginning to find their feet as constitutional judges and approach their period of greatest intellectual usefulness. For example, Mr. Justice Fazl Ali, recently removed from the Indian Supreme Court bench on attaining the age of sixty-five, was forthwith appointed by the Indian Government to the responsible and presumably physically arduous post of governor of a state within the Indian federal system.

The approach to constitutional law study in India seems likely, in the foreseeable future—in view of the consciously eclectic approach of the Indian Constitution-makers—to be primarily in terms of comparative constitutional law. Mr. Basu's work is understandably directed to this end. It is basically a heavily annotated version of the new Indian Constitution, the annotations being clippings from analogous provisions in the constitutional instruments of other countries with occasional reference also to positive law texts and citations of case law. Yet I cannot help feeling that the effectiveness of this type of approach is subject to severe limitations, comprising as it does the study

1. 13 Sup. Ct. J. 174 (1950).

of the positive law of the constitutions of particular countries in isolation from their "living law"—the *de facto* behavior, mores, and norms of the people of those countries. This is not to say of course that the study of legal texts should be written off altogether, for the legal texts themselves play a part in creating new norms of community behavior; it is simply that a meaningful approach to comparative constitutional law requires that the positive law of the various countries be constantly tested against a background of the law in action in those countries—that is, against actual patterns of community attitudes and working governmental practices. In the absence of such a comprehensive approach, a work like Mr. Basu's, though providing for reference purposes a most convenient collection of assorted positive law materials, is somewhat more restricted than it need be in its area of usefulness for the study of constitutional and comparative law.

In marked contrast to the Constitution of the Republic of India, the new Constitution of Ceylon, which also came into force after World War II, is short and very simple. Though, as a matter of history, it derives its original authority from certain United Kingdom enactments and Orders-in-Council, it is essentially the political creation of local (Ceylonese) leaders. It seems to have been the desire of these leaders to have a system of government analogous to that of the United Kingdom: not merely does the Constitution provide for a cabinet system of government according to the English model (that is, parliamentary-type executive), but in addition the legislature possesses substantially unlimited law-making powers—after the fashion of the English Parliament. Thus the Ceylon Constitution itself may be amended by a vote of a two-thirds majority of the lower house of the Ceylon Parliament. Other than this requirement of a special legislative majority for constitutional amendments, the only restriction on legislative power relates to religious freedom, the Constitution specifically forbidding any law prohibiting or restricting the free exercise of any religion, or discriminating against or conferring any advantage on any one community or religion.

In view of the virtual absence of any formal restrictions on legislative power, and specifically the absence of a bill of rights or similar comprehensive collection of fundamental guarantees and affirmations, it is perhaps not surprising that no provision is made in the Constitution of Ceylon for the exercise of the power of judicial review by the courts, and indeed that such a role for the Supreme Court seems never to have been envisaged by the Constitution-makers. Thus, according to present conceptions of the nature of the Constitution of Ceylon, the protection of minorities is left, as in the United Kingdom, to the self-restraint of legislative majorities. It is to be noted in this connection that the franchise rules are deliberately adjusted to produce something of a bias in favor of minorities—a system of weighting gives the sparsely populated rural districts (where the minorities are strongest) a higher proportionate representation in the legislature than urban areas.

The picture that Sir Ivor Jennings and Mr. Tambiah present is of a constitution which, if it is patterned very closely on the United Kingdom model rather than drawing more substantially upon indigenous Ceylonese experience, is at least the preferred choice of local leaders and is also the culmination of an unbroken chain of development, under British rule, towards representative government and independence. Was it altogether wise, in view of the relative lack of experience in self-government at the time Ceylon attained its independence after World War II, to adopt a constitution based substantially on the United Kingdom principle of the sovereignty of parliament, without any certainty that there would develop in Ceylon that major working check upon legislative majorities under the United Kingdom Constitution—a strong and stable two-party system? The authors of the present study do not offer us any picture of the current state of the party system in Ceylon under the new constitution. It seems clear, however, that in avoiding the temptations of drafting a cumbersome all-foreseeing constitutional instrument, after the post-1918 European constitutional pattern, the Ceylonese Constitution-makers have placed a large degree, perhaps too large a degree, of trust in men rather than in legal prescriptions: custom and convention to this extent, it is clear, will be the life-blood of the new constitution. The Indian Constitution-makers, by contrast, have distrusted men perhaps too much and have attempted, by elaborate written formularies, to make theirs a government of laws alone and not of men. Which of these approaches is most likely to produce a viable and enduring constitution? The Western World has a stake in the success of both these constitutions and will watch with interest and sympathy the working operation of each of them over the ensuing years.

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ACTIONS FOR DECLARATORY JUDGMENTS (2d ed.). By Walter H. Anderson.
Atlanta: The Harrison Co., 1951. Pp. 2171 (3 vols.). \$60.00.

"TRIAL by combat" need not be synonymous with trial by technicality. If society is to retain (or regain) its faith in the judicial process, judicial procedures must be clear, practical, expeditious, and inexpensive. The declaratory action has come to be identified with these attributes. It might be hoped that these adjectives could also be used to characterize this treatise on the declaratory remedy. Such, unfortunately, is not the case.

The style is complex and confused, and there is a profusion of extraneous detail. Instead of incisive critical analysis, there is an incessant repetition of the many facts of many cases. The following abstract affords a striking illustration of these observations:

"Where an action was brought for a wrongful death against a landlord, and the basis of the action was that the deceased was the

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