

diagramming of the elements of statements in legal texts. Modern logical skills, not yet widely used by lawyers, can undoubtedly be acquired by lawyers just as can skills in legal accounting.

As this Symposium opened with the description of one aspect of the pioneer approach of applying scientific methods of research to jurisprudence (*i.e.*, in the form of "Jurimetrics"), it very appropriately closes with the description of another pioneer approach, that of applying modern logic to legal research. Modern research methods promise improvements which will be realized gradually step by step, without even the possibility or the need for predicting the ultimate outcome. One feature of the ultimate outcome nevertheless appears clearly from the last article of the Symposium. Modern logic will undoubtedly become a standard law school subject.

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INDIAN CONSTITUTIONAL LAW. By M. P. Jain. Bombay: N.M. Tripathi Private Ltd., 1962. Pp. xxvi, 668. (\$7.00).

LAW as a comprehensive process of authoritative decision must be more than a pre-existing body of rules stemming from the written constitutional charter or the unwritten conventions. When applied to varying specific cases, law must perforce draw, beyond the authority of the past, upon contemporary community expectations as to the course of future developments and decisions with respect to recurrent particular problems. The function of legal rules is, therefore, to communicate the perspectives of peoples—to wit: their demands, their identifications, and their expectations—about this process of decision. Communications through the written constitutional charter or the unwritten conventions may be inadequate to express such perspectives. Written words are inevitably obscure and incomplete. Similarly, doubts may often be expressed about the compatibility of the unwritten conventions with the constitutive goals of the community. Hence, any gaps, ambiguities, or contradictions among the indices of community perspectives should be remedied by recourse to a comprehensive map of community values.¹

The Constitution of India, proclaiming India to be a Sovereign Democratic Republic, came into force in 1950, driven by the hope of securing to all citizens social, economic, and political justice; liberty of thought, expression, and belief; equality of status and of opportunity. It was designed to assure the dignity of the individual and the unity of the Nation. While this drive continues, the dynamic current of contemporary developments in India places upon In-

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1. McDougal, *Some Basic Theoretical Concepts About International Law: A Policy-Oriented Frame Work of Inquiry*, 4 J. CONFLICT RESOLUTION 337, 343 (1960).

dian Constitutional Law an important duty to embrace the manifold of new problems arising from the uncertain conditions still prevailing in the country.² The response of scholars and lawyers to these recurrent problems should be focused on clarifying the hard realities which condition people's perspectives with a view toward enhancing effectiveness and rationality in future constitutional decisions. It is not merely a matter of examining past authority. It is, in the final analysis, a matter of inventing and recommending new solutions.

Dr. M. P. Jain purports to respond to this challenge in his book on the Indian Constitutional Law. Yet, though the book contributes a great deal in rendering more intelligible past experience in the development of the Indian Constitutional Law, it has very little to offer towards extrapolating the course of future development and evaluating new alternatives. Dr. Jain's principal difficulty is his failure to distinguish between past decision and disciplined future preference. By excessive brooding on past authority, he impedes the creative impulse.

Of particular interest, where these inadequacies are apparent, is his account of the relationship between the Indian President and the Council of Ministers headed by the Prime Minister. Dr. Jain's view is that since the structure of the Central Executive follows the British model, the powers of the Indian President are, like those of the British Crown, only formal. Effective authority is accorded to the Council of Ministers which is responsible to the Lower House of the Parliament. Resting his argument on the theory of automatic, compulsory application of the British conventions in India, Dr. Jain concludes that the Indian President has "no function to discharge either in his discretion or in his individual judgment"³ and that the advice of the Council of Ministers under Art. 74(1) "is binding on the President."⁴ But this view fails to foresee a wide range of probabilities in the future⁵ when, without Prime Minister Nehru, the President may be required to play a more independent role in the performance of his duty to "preserve, protect and defend the Constitution and the Law."

The relevant development thus far, as documented by the author, only reflects, and to some extent implements, the intentions of the framers of the Constitution. But this is just one factor to be considered in interpreting the written constitutional provision such as Art. 74(1) or the alleged unwritten

2. For a recent statement on these conditions, see the message of the Indian President, Republic Day, January 26, 1964, reprinted in *India News*, Embassy of India, Washington, D.C., Jan. 31, 1964, p. 1, col. 3.

3. P. 86.

4. Pp. 98-99. Art. 74(1) reads: "There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions."

5. He seems to concede that in a few extreme cases, *e.g.*, dissolution of the Lower House of the Parliament, appointment of the Prime Minister, and dismissal of the Ministry, the President has marginal discretion. P. 99. It is still unclear what operational meaning he gives to the phrase "marginal discretion."

British conventions. Equally significant is the question of how far past experience in regard to the authority of the President can serve, in the light of contemporary expectations, as an effective guide for future problem-solving. A proper answer would entail a balanced evaluation of the play and counter-play of the political parties in the Parliament and the relative strength of the personalities of the President and the Prime Minister. Current political trends indicate that it will not be easy to perpetuate the existing predominance of a single party in the Parliament. Nor is it possible to predict with confidence that the Prime Minister's influence in the Parliament will always be as decisive as it appears to be now. Similarly, no one can sense for sure that power in the States will not pass into different hands. The party in power at the Center may then not be the same as the one in the States and new problems will confront the Presidency. If the President can mobilize reasonable support in the Parliament, there seems little doubt that, as time passes and the need arises, he will play a more effective role, even in normal times, notwithstanding the dogmatic assertions that compulsory application of the British conventions makes the advice of the Council of Ministers binding on him. The very first President of India—who was an eminent legal scholar in his own right, not to mention that he was also the President of the Constituent Assembly which wrote the Constitution—once, in a persuasive public statement, refused to equate the powers of the Presidency with those of the British Monarch alleging that “there is no provision in the Constitution which in so many words lays down that the President shall be bound to act in accordance with the advice of the Council of Ministers.”⁶

Another instance of Dr. Jain's heavy reliance on the authority of the past is his sermon on the scope of Executive power. He seems to assume that since in a parliamentary form of Government the Cabinet must have majority support in the Legislature, it is in virtual control not of the Executive alone, but even of the Legislature itself. From this assumption he concludes that “the Executive is not confined to discharging only those functions which have been specifically conferred on it by the Legislature or by the Constitution.”⁷ Clearly, such a view of an all-powerful Executive is attributable to

6. Calcutta Statesman, November 29, 1960. A good statement realistically defining the powers of the President is found in Mathur, *The Constitutional Position and Powers of the President of the Union*, (1962) 1 S.C.J. 15; see also Ayyar, *Is the President of India a mere Constitutional Head?*, (1961) 1 S.C.J. 5. *Contra*, Nehru's Press Conference on July 7, 1959, *The Hindustan Times*, July 8, 1959, p. 1; and on December 15, 1960, *id.*, December 16, 1960, p. 6.

7. P. 115. He cites two decisions—*Moti Lal v. Uttar Pradesh Gov't*, ALL INDIA REP. 1951 All. 257, and *Ram Jawaya v. State of Punjab*, ALL INDIA REP. 1955 S.C. 549), wherein the courts upheld executive acts which did not have the specific sanction of the Legislature. But in both cases the Courts did refer to indirect, if not direct, legislative support for the executive acts in question. It is pertinent to observe that the court more recently, in its advisory opinion in *Ref. by President of India u/Art. 143(1)*, ALL INDIA REP. 1960 S.C. 845, 855, appeared to close in on the issue of reconsidering the scope of Executive power earlier stated in *Ram Jawaya's* case, though it did not in fact do so because it found enough in the facts to support its decision.

an ardent belief in the 18th century norms of Royal Prerogative or Absolute Monarchy. A view more in accord with contemporary constitutional theory and practice would be that all three branches of the Government have been accorded important roles in the national decision-process. Reasoning that, since the scope of the Executive power is undefined, it is residuary, the author proves too much; for, as a matter of fact, the scope of the Legislative power is also undefined.

To give merely one example, since treaty-making is alleged to be an Executive act, it might be that the Parliament has no authority to participate in treaty-making through the process of approval, or that the Judiciary should automatically approve the Executive act of treaty-making even if the Parliament's approval has not been secured. Dr. Jain supports that view.⁸ To deny Parliament participation in treaty-making would not only be contrary to explicit constitutional provisions,⁹ but also contrary to the trend, crystallized in the theory and practice of a large number of countries, toward progressive participation of the popular assemblies in the conclusion of treaties.¹⁰ That denial would retard the future potential role of the Legislature and the Judiciary which can be usefully brought to bear on decision processes. Dr. Jain seems to have ignored the recent advisory opinion of the Supreme Court in *Ref. by President of India u/Art. 143(1)*,¹¹ which concluded that the India-Pakistan Agreement involving cession of national territory to Pakistan required legislative approval:

There is . . . no doubt about the legislative competence of Parliament to legislate about any treaty, agreement or convention with any other country and to give effect to such agreement or convention.¹²

Shifting to the author's analysis of the Central Legislature, one finds recurring evidence of an unqualified trust in the authority of the British conventions untouched by examination of relevant contextual factors affecting future development. He states that though the freedom of action of the Indian Parliament is controlled to some extent by the Constitution itself, yet within the spheres and limits allowed to it, its powers are plenary. It may pass laws of any sort, reasonable or unreasonable.¹³ Resting his conclusion on the early decisions of the Indian Supreme Court,¹⁴ he asserts that the only limitations on the "omni-competent" Parliament are those specified in the Constitution itself, and the courts will not go beyond those written words:

8. P. 115.

9. Articles 73(1), 246(1), and Entry 14 in List I of the Seventh Schedule.

10. For a comprehensive exposition of the theory and practice of states, see K. Narayana Rao, *Parliamentary Approval of Treaties in India*, IX-X INDIAN YEAR BOOK OF INTERNATIONAL AFFAIRS 2 (1960-61).

11. ALL INDIA REP. 1960 S.C. 845.

12. *Id.* at 852.

13. P. 84.

14. Prominent among them are: *In re Delhi Laws Act*, 1951 S.C.J. 527; *Gopalan v. State of Madras*, ALL INDIA REP. 1950 S.C. 27.

If the Parliamentary legislation does not infringe any constitutional limit, then the function of the courts is only to interpret and apply the law; courts cannot then go into the policy of legislation.¹⁵

Implicit in his statement are strong undercurrents undermining the force of manifold constitutional as well as extra-constitutional limitations of the Indian Parliament and retarding inventiveness in the judicial process.

Ironically, in other areas Dr. Jain rejects "positivism" in favor of a policy-oriented approach to judicial interpretation. But his resistance to extending judicial creativity in legislative matters is paralleled by his failure to elaborate on the significance of the recent abandonment of the literal approach in the area of property rights. Dr. Jain would have achieved more in his effort to relieve judges from "positivism" by recommending the expansion of *Kochuni v. States of Madras and Kerala*¹⁶ in the political and civil rights field. In *Kochuni*, the Supreme Court departed from the mechanistic approach previously announced in *Gopalan v. State of Madras*.¹⁷ The reviewer shares the doubt expressed by Professor Nathanson that "the approach represented by . . . [*Kochuni*] can be confined to property interests."¹⁸

Finally, the author's treatment of the functioning of Indian federalism affirms the predominance of the Central Government.¹⁹ But he fails to take due notice of the powerful pulls of the States and their conflicting political and financial demands on the Center which might pose serious problems in the future. Again, the nature of the difficulty is the same. He is so heavily occupied with describing the existing centralization that the emerging era of State-demands escapes his attention. Even at this time when the authority of the Congress cuts across the boundaries of all States, the pressure of state demands can be felt in many directions. But when the monolithic power of Congress is threatened by those adverse political parties gaining power in the States, the Central Government may not be able to enforce its authority to the same degree as it does today. These are the important considerations bearing upon the future pattern of federal-state relations. They cannot be lightly treated in any analysis of Indian federalism.

Despite these shortcomings, this book can be recommended to both Indian and foreign readers. Its documentation is abundant and Dr. Jain's careful comparisons with other constitutions are invaluable aids to scholarship. His work is a healthy response to a long felt need for a volume on Indian Constitutional Law that would offer elaborate textual treatment, instead of mechanical commentary on the individual articles of the Constitution. It is at least a partial answer to Professor Harrop A. Freeman, who, while reviewing

15. P. 84.

16. ALL INDIA REP. 1960 S.C. 1080. Cf. *S.M. Transports, (P.) Ltd. v. Sankaraswami-gal Mutt*, ALL INDIA REP. 1963 S.C. 864, 873.

17. ALL INDIA REP. 1950 S.C. 27.

18. Nathanson, *Indian Constitutional Law in American Perspective*, 56 Nw. U.L. REV. 190, 203 (1961).

19. Part IV, especially pp. 329-34.

Basu's *Shorter Constitution of India*, complained that "nearly all Indian law books are merely annotations of statutes, similar to . . . United States Code Annotated."²⁰

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20. 60 COLUM. L. REV. 255, 256 (1960).

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TO MR. JUSTICE WILLIAM O. DOUGLAS

In honor of twenty-five years of steadfast service
on the Supreme Court of the United States
The Editors of the Yale Law Journal dedicate this issue.

