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A Short Introduction that Goes Way Beyond

*Ananth Padmanabhan**

Rarely does one stumble upon writing on Indian law, especially books, which seriously and critically examine judicial perspectives and put forth an independent view. The commonplace character of our 'scholarship' is evident from the sad reality that only case digests, passing off as commentaries, do well in the market. Lawyers are looking for something that aids them in finding the law, not understanding it, and students are happy with classroom lectures in textbook format. In this unhappy scenario comes along a short book of less than 200 pages which is enervating and stimulating for the mind. Madhav Khosla's 'Short Introduction to the Indian Constitution', published by the Oxford University Press, is a lot more than it professes to be, and one only wishes it were longer.

This book, through its four chapters, takes us through the content of most, if not all, provisions in our Constitution. More importantly, it teaches us how this wonderful document has attempted to accommodate divergent interests through its asymmetric character, and reveals how the self-serving abuse of this character has taken place at the hands of those working this document. The book also takes a hard look at many myths associated with the working of the Indian Supreme Court and its interpretation of important constitutional provisions including fundamental rights and directive principles.

While introducing the text, Madhav captures the aspirational goal of the Constituent Assembly in the opening sentences, and eloquently describes their endeavour as '*an extraordinary experiment in human history*'. He also demarcates, with clarity, the boundaries of his endeavour – to explain the architecture of the Constitution while gently touching upon some of its themes. Aware of the constraints

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brought in by the limitation on words, he spells out that this book will provoke more and persuade less. Reading further, I realise that this is quite an understatement. Madhav, in every chapter of the book, has put forth novel arguments on several controversial constitutional issues, thus proving why he, in the words of Sunil Khilnani, is “*an important new voice in our intellectual life*”. These arguments, as explained by Madhav himself, relate to the appropriate manner of interpreting the constitutional text, rather than normative debates on what the constitutional provision or scheme ought to be. Such debates, and Madhav’s view of them in the background of current political developments, shall hopefully become the subject matter of a separate academic work in the future.

The first chapter deals with an examination of the constitutional scheme pertaining to separation of powers. While taking the reader through the different wings or branches of governance, Madhav has addressed important issues relating to the working of the respective branch. Thus, the discussion on Rajya Sabha, the Council of States, is enriched by a critique of the Supreme Court’s inability in the *Kuldip Nayar*¹ decision, to articulate criteria that would qualify as sufficient for a member to adequately represent a State. Similarly, Madhav expresses serious doubt about the constitutionality of the oppressive provisions in the Tenth Schedule, i.e., the anti-defection regime, and argues that the Supreme Court verdict in *Kihoto Hollohan*² did little to preserve the independence of legislators. The *reductio ad absurdum* that the Supreme Court decision in *P.V. Narasimha Rao*³ has come to infamously stand for also finds special mention in this chapter.

¹ *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1.

² *Kihoto Hollohan v. Zachilhu*, AIR 1993 SC 412.

³ *P V Narasimha Rao v. State (CBI/SPE)*, (1998) 4 SCC 626.

The ingenious manner in which the Supreme Court levelled the balance of power between the Executive and itself in respect of appointments to the higher judiciary also merits attention in the book. Unwittingly, Madhav concludes that primacy finally shifted, through on ingenious interpretation of Article 124, to the hands of the judiciary. Hence, presently '*healthy convention*' ensures appointment of the candidate even where the Executive requests reconsideration, so long as the collegium reiterates its recommendation. A play out of this convention was unfortunately witnessed quite recently when the Union requested the Supreme Court collegium to reconsider three of the names proposed for elevation to the Court. The chapter also contains a brief discussion on independent constitutional bodies such as the Election Commission and the Comptroller and Auditor General, but misses out on a mention of tribunals and the scheme under Articles 324A and 324B of the Constitution. Considering that the tribunal model of adjudication has gained considerable popularity and earned equal amount of flak in recent times, it would be worthy of inclusion in subsequent editions.

The second chapter addresses the Indian model of federalism, and the unique constitutional scheme of distribution of powers between the Union and the States that has come about largely due to the way in which our Republic was formed. The need for a strong Centre was felt during the drafting phase, and this explains the tilt in favour of the Union in our federal structure. Madhav however goes on to show, through a comprehensive review of the constitutional scheme, that the States enjoy supremacy within the sphere allocated to them. In support of this point, Madhav cites the example of 'police reform' – a boiling concern –and argues that reforms on this front have been stalled due to the matter being a State subject in the VII Schedule.

The discussion on legislative competence explores serious limitation on the law-making power of Parliament and the State Legislatures. It also cautions the judiciary to go beyond these limitations, or the ones imposed by virtue of Part III, while adjudicating on the constitutional validity of any statute. Using the example of the Armed Forces (Special Powers) Act, upheld by the Supreme Court in the *Naga People's Movement of Human Rights*⁴ decision, Madhav illustrates the thin line separating the issue of who can legislate from the one on whether the legislation can be enacted in the first place. He concludes, notably, that the constitutional concerns with any legislation do not end with fundamental rights compatibility and legislative competence. Strands of this reasoning, though couched in terms of violation of Articles 14 and 21, are found in the recent Supreme Court decision in *Nandini Sundar*⁵, where the “Salwa Judum” brand of policing was held to be out of line with constitutional values.

The discussion on ‘asymmetric federalism’ is however what really places this chapter, and the book, on a different pedestal of scholarship. A common conceptual thread stretching across, and seeking to explain, provisions as diverse in content as Articles 370 (which provides for the so-called ‘special status’ for Jammu and Kashmir), 371-F and 371-D and the Sixth Schedule, has not so far been developed in any of the earlier, and more detailed, works on our Constitution. Madhav uses the term ‘asymmetric federalism’ as being a form of federalism where some of the constituent units in the federation have more autonomy or privileges than the others, and applies this doctrine to explain the presence of the above provisions. Article 370, introduced as a transitory provision, has assumed a life of its own and in Madhav’s words, “*binds the State (Kashmir) to the Indian Union.*” Similarly, Article 371-F, by providing for reservations for certain sections of the population of Sikkim in the State’s Legislative

⁴ *Naga People's Movement of Human Rights v. Union of India*, (1998) 2 SCC 109.

⁵ *Nandini Sundar & Ors. v. State of Chattisgarh*, (2011) 7 SCC 547.

Assembly, seeks to accommodate special interests, while the Sixth Schedule supplies a framework of 'regional asymmetry' for addressing special interests within the States of Assam, Mizoram, Meghalaya and Tripura. Madhav rightly points out that the Supreme Court has been aware of this need to accommodate, as striven for through the above model of asymmetric federalism, and intervened only in rare occasions such as *P. Sambamurthy's*⁶ case, when Article 371-D(5) contravened the separation of powers doctrine. Though the Constituent Assembly may not have had this model of asymmetric federalism in mind at the time of drafting the document, it goes a long way towards explaining the manner in which these 'special' provisions have been operationalized. This doctrine is also important in understanding the clarion call for separate statehood in different parts of the country, and for differential treatment by existing States, and the futility of it all as the privileges of asymmetric federalism seem to hardly translate into better attainment of constitutional goals.

Madhav is in fine form in the third chapter where he advances several interesting arguments on the interpretation of Part III of the Constitution, which enshrines fundamental rights. He starts the discussion with an issue that has assumed greater significance post the publication of this work: the horizontal application of fundamental rights. This issue, which was at the forefront of the constitutional challenge to the Right to Education Act, 2009, in the *Society for Unaided Private Schools of Rajasthan*⁷ case, delves into the possibility of casting a legal obligation on private actors to honour the fundamental rights of citizens. Contrasting the language used in certain provisions such as Articles 15(2), 17, 23 and 24 with the rest of Part III, Madhav argues that the Constitution partially adopts a horizontal approach towards rights. He cautions against the extension of this approach to the other rights that are clearly addressed to the State, as unfortunately

⁶ *P. Sambamurthy v. State of Andhra Pradesh*, (1987) 1 SCC 362.

⁷ *Society for Unaided Private Schools of Rajasthan v. Union of India*, (2012) 6 SCC 1.

done in the *Vishaka*⁸ decision. However, he is equally critical of the decision in *Pradeep Kumar Biswas*⁹, which defines “State” under Article 12 in terms of where the power is sourced from rather than the kind of power which the body in question wields.

The asymmetric character of our Constitution is used as an analytical device by Madhav in the discussion on fundamental rights, especially the right to equality. He reads Article 14 conjointly with Articles 15 and 16 to contend that our Constitution, far from mandating a ‘one-size-fits-all’ form of equality, tinkers and plays around with this concept using the idea of positive discrimination. There is no better indication of this than the caste-based reservations prevalent in India, and the fact that these measures have been upheld not as an exception but as a facet of equality. The Supreme Court’s views on reservations, whether it be the 50% cap and creamy layer restrictions as laid down in *Indira Sawhney*¹⁰, or the extremely low standard of scrutiny employed to assess the constitutional validity of Article 15(5) in *A.K. Thakur*,¹¹ reveal the tension and the difficulty in interpreting this asymmetric model of equality to balance competing interests. Madhav goes to the extent of submitting that recent amendments such as Article 16(4A) and 16(4B) have “*junked judicial safeguards which have been laid down to preserve the logic of reservations.*” This prescient statement assumes relevance in the context of the recent Constitution (One Hundred and Seventeenth Amendment) Bill, 2012, which seeks to further dilute the minimal safeguards laid down in the *M. Nagaraj*¹² decision while upholding the above amendments. The asymmetric model is, clearly, being misused to garner votes and political support in the name of caste, rather than to achieve real equality through positive discrimination.

⁸ *Vishakha v. State of Rajasthan*, (1997) 6 SCC 241.

⁹ *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111.

¹⁰ *Indira Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

¹¹ *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

¹² *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

Madhav devotes the highest attention to Article 21, and rightly so, considering that this salient constitutional provision has spurred considerable debate due to the shifting stance by the Supreme Court as regards its interpretation. He treads the path of careful scrutiny of the decision in *Maneka Gandhi*¹³ and advances the view that this seemingly monumental pronouncement did not really complete the journey from procedural to substantive due process. This narrative fits well with the final relief granted in *Maneka*, which was to pave the way for a post-decisional hearing opportunity to the Petitioner. Madhav's conclusion that *Maneka* only pushed the case for a better and fairer procedure is more reasonable than interpreting the decision as endorsing substantive due process. Similarly, his scepticism of the 'unenumerated rights' theory is amply justified through a study of the outcome in *Olga Tellis*.¹⁴ His thesis that the Court has used Article 21 in a conditional manner to guarantee certain rights when the additional promise was already made by the State is largely correct though the Court's role in the guarantee of compulsory education as a fundamental right under Article 21 is a notable exception. The linkage sought to be drawn between freedom of religion and personal laws is a bit unclear, and it is felt that the discussion on pluralism, which contributed very little to the understanding of Article 25 while eating up precious space, could be kept out of subsequent editions.

The final chapter of the book deals with constitutional amendments and the basic structure doctrine. Though not as analytical as the earlier chapters, it is certainly as engaging and informative as the rest. Madhav has clearly taken the effort to trace the genesis of the basic structure doctrine and put forth a few strong points on what this doctrine really entails. Madhav concludes that this doctrine does not represent a struggle for power between the Judiciary and the Legislature as much as an effort to distinguish between a constitutional

¹³ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

¹⁴ *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545.

amendment and revolutionary action. While answering the oft-asked question as to why this patently potent doctrine has not been instrumental in striking down various controversial amendments, Madhav reverts to the theme of asymmetry. He argues that the present state of asymmetry in the Constitution, largely brought about due to earlier amendments, makes the real character of this document blurred and ambiguous. This internal asymmetry, according to him, makes it difficult for the Court to assess the true scope and character of the Constitution's basic structure. This is probably the reason why Parliament is emboldened to introduce further amendments derogating from Article 14, especially in the context of reservations, as it is impossible today to really predict the essence of the equality protection in our Constitution.

To sum up, Madhav's work is a lucidly written account of the different provisions in our Constitution, the major debates surrounding their interpretation, and the path forward in understanding emerging constitutional controversies. Apart from its views on Indian constitutional law and theory, this book also holds promise for Indian scholarship in general due to the precise and neatly structured narrative. A special word of commendation is also due to the publisher for having come out with a book on Indian law that captures several important issues over the span of 165 well-edited pages, with no spelling errors or grammatical misconstruction.

ARTICLES AND ESSAYS

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