

## BUCHBESPRECHUNGEN / BOOK REVIEWS

**George H. Gadbois, Jr.: Supreme Court of India, The Beginnings**, Oxford University Press, New Delhi 2017, 312 pages, hardcover, £ 16.99, ISBN: 978-0199472161

Since the Supreme Court, in 2015, struck down the National Judicial Appointments Commission Act, the issue of judicial appointments and the need for greater judicial transparency has been heavily debated in India. This Act was passed by a clear majority of India's legislature, as there was a dire need felt for greater transparency in judicial appointments. Instead of a closed-door procedure led by the senior most judges of the Supreme Court, the Act provided for a Judicial Appointments Commission, consisting of judges, some members of the executive and eminent persons in the field of law. However, the judiciary felt that this change in the system of judicial appointments would violate judicial independence and struck down the Act. The decision was heavily debated and criticised because it was felt, among other things, that once again a move for greater transparency in the judicial system was blocked. This was exacerbated by an incident in January 2018, when the four senior-most judges (including the next Chief Justice) publicly released a letter highlighting various procedural and otherwise anomalies in the functioning of India's highest judicial forum. However, as the Chief Justice in question reached the retirement age and bid farewell to the Court, he took these issues out the door with him, and the debate died down. This is in fact, characteristic of the Supreme Court lately – whenever an important issue is brought to light, some lawyers, academics and scholars discuss it and eventually, the Indian Supreme Court returns to business as usual.

Against this background, it is perhaps important to re-visit some basic ideas and principles on which the Court was established, to better understand how the Court and judiciary have reacted in times of major transition – which will help provide perspective for the path ahead. Providing a comprehensive insight into how the Indian Supreme Court's jurisprudence and manner of working have changed over the years, George H. Gadbois Jr.'s book "*Supreme Court of India: The Beginnings*" is an excellent starting point in this discussion.

While a scholar from the Global North, Gadbois, resided in New Delhi intermittently for his research and visited the Supreme Court. During this time, he interacted with members of India's judiciary to understand more deeply its history and working. The book is an edited and republished work based in his doctoral thesis (which was published in 1965) presented at the Duke University (USA).<sup>1</sup> Various points, that have long needed attention and discussion, come across from his work: how the original idea of the court was mooted as the court of final appeal, the historical and political context of the Supreme Court's beginnings and the intersections and clashes between law and politics as India won freedom and formed its own Constitution.

1 His original thesis was titled "*The Paramount Judiciary in India: 1937-1964*".

The book begins with an introductory chapter on the history of the Federal Court and the Privy Council, as they existed in pre-independence India (Chapter 1: “Evolution of the Federal Court of India”).<sup>2</sup> Gadbois looks not only at the Constituent Assembly debates in the development of the Articles about the Supreme Court, but also at the Round Table Conferences (earlier, in 1933) on various discussions on the level at which new court(s) needed to be set up in India, and their powers and functions.<sup>3</sup> Interestingly, he draws attention to the concept of an impartial and independent judiciary, saying that this idea was colonial legacy. In pointing to this, he also points the way to questions about why the Indian judiciary’s ideas of independency and transparency exist as they do now. He also traces the development of judges’ behaviour and conduct in courtrooms (and briefly also discusses court practice) as something which India retained from Colonial Rule. In fact, he points out that even as India transitioned to an independent state, there was not much change in the way that judges heard cases, or how cases were argued in court(s). He concludes that largely, the UK Privy Council was lauded as an independent and impartial tribunal, and therefore it was in India’s interests, in that time, that it continues to function.

In this introductory chapter, Gadbois discusses the evolution of the Federal Court, and separates to a large extent, the independence struggle and political scenario in India from the development of India’s judiciary. He also eliminates the possibility of any relationship between the establishment of a new political federation in India and the establishment of a new judicial framework. He argues that the establishment of a new Supreme Court was a question based entirely in the way appeals were dealt with in the presently existing court system. Separating judicial and court history from politics was perhaps important for him to trace the history of the Privy Council and the Federal Court. However, one wonders whether his conclusion, i.e. that it was in India’s interests to keep the Privy Council, was entirely realistic and reasonable given the political background of the time.

In the second chapter, he elaborates the development and working of the Federal Court of India, up to the point it when it was replaced by the Supreme Court (which is the highest judicial authority to present day). Several characteristics of the Federal Court, which differentiate it from the Supreme Court today, are also discussed in this section. For instance, the powers given to the Federal Court under the Government of India Act, 1935 were very limited when compared to the powers of the modern-day Supreme Court. In addition, different types of jurisdiction exercised by the Federal Court are also discussed – namely original and “constitutional appellate” jurisdiction. Both heads are illustrated and analysed with the

- 2 The Judicial Committee of the Privy Council was the highest court of appeal established as part of the judicial system in the Commonwealth and select British territories in 1833. It continues to do so for some of the same, but India was removed from its jurisdiction under the Abolition of Privy Council Jurisdiction Act 1949.
- 3 These Round Table Conferences were meetings held in London, which the British Government (then ruling India), Princely States in India and several Indian officials were part of. These conferences were an attempt to discuss the establishment and functioning of the new Indian Federation, as well as a Constitution and court system for the same.

help of an overview of decisions given by the Federal Court, in interpreting provisions of the 1935 Act, resolving disputes between states and/or provinces as well as interpreting provincial and central legislation. In this discussion, the origins of the term “significant question of law” are explained, particularly with regard to how, at the time, an order from the High Court, stating that a case was relevant and important enough to be heard by the Federal Court, was required. Particularly for the highest court of the land, the question assumes significance because it decides to what extent a superior court with wide powers can assume jurisdiction over a matter. This is helpful in understanding the roots of the wide jurisdiction the Supreme Court has even today and throws necessary light on the way the Supreme Court has interpreted the constitution over the years.

Also highly relevant is his discussion is the establishment of new judicial fora, when the Federal Court (Delhi) and the Privy Council already existed. This is also important to understanding the transfer of powers between courts/judicial fora as India became independent. While discussing history and chronologically explaining the transfer of powers between judicial fora in pre and post-independence India, he also critiques various factors that contributed significantly to establishing the judiciary as it stands in modern, post-colonial India.

The third chapter traces the development of the Supreme Court of India as the new judicial establishment, particularly in the context of a newly independent and self-governed India. The book also provides important perspective in that it traces the development of the Supreme Court (of appeal, as it then was) in the time that India’s entire government system was passing from the hands of the British to the new Government that would rule India. Many of the problems in India’s judicial system are also the result of historical clashes between the judiciary and the government. This point is, therefore, particularly helpful in understanding the historical context of India’s government and judiciary relations, particularly as they have seen tensions through the years.

Gadbois’ take on judicial independence is exactly the kind of understanding we need to build on (albeit his examples are limited to the classic oft-quoted ones, i.e. UK and US judiciaries). He illustrates how the UK, on the one hand, had judges appointed by the Lord Chancellor but how its judiciary maintains independence because of the appointment of able individuals and transparent processes. He contrasts this with the US, where despite jurisprudential emphasis on judicial independence, judges are appointed by the President on the basis of what is considered politically favourable. What he rightly points out is that in India, it was (and for the most part, is) assumed that untold evils result automatically from any influence, however slight, of party politics in the selection and appointment of judges. What therefore stands out in this Chapter is his conclusion that the protection afforded to the Indian judiciary is overdone, and, in a sense, unrealistic.

The development of the Supreme Court under India’s new Constitution, post 1950, is discussed in Chapter 4, “Jurisdiction and powers of the Supreme Court”. Here, the original, appellate and advisory jurisdictions of the Supreme Court are discussed extensively with the help of politically and constitutionally significant decisions of the modern-day Supreme

Court. This section provides an account on the interpretative powers of the Supreme Court under the various heads of its jurisdiction derived from the Indian Constitution. While discussing the extent of advisory jurisdiction and debating its advantages, the chapter touches upon how the topic is approached in other jurisdictions – but does not go into further detail on the issue.

Consequently, the book shifts to a more contemporary perspective, where it traces developments in the oft-debated judiciary vs. government debate in India, the central point being the question of who should have the last word (Chapter 5). Referring to the history and development of how the Supreme Court can invalidate legislation, Gadbois traces different areas of the law where the government and judiciary have collided. Some of the specific examples he uses are the debates over due process in the Indian Constitution, preventive detention and perspectives on the State's right to take away private property for public purposes. In the last section, he also describes the zamindari system (a system by which the rich and upper-class landowners often exploited the poorer labourers who worked on their land holdings) and examines different political and legal angles of the issue with reference to the Constituent Assembly debates. This sheds light on the beginnings of social rights litigation in India, which is one of the most important aspects of the developments of the Supreme Court's jurisdiction and its place in India's constitutional tradition. The discussion has been drawn largely from case law and legislation to conclude how the jurisdiction and working of the India Supreme Court was somewhere in the middle of the spectrum between the US, where the due process clause was interpreted somewhat liberally and the UK, where the Parliament was supreme and judicial review the weakest.

Chapter 6, "Judicial Review in a Modern Democratic Welfare State", discusses in further detail the nuances of government-judiciary relations. Following on from the key constitutional law judgments discussed in Chapter 5, Chapter 6 discusses other judgments of the Supreme Court which led to clashes between the government and judiciary. The effects of these clashes are classified under three heads, which are discussed in detail, namely: that the Supreme Court has prioritised individual rights over community interests, which has also led to time consuming litigation, secondly, diminishing of the prestige of the judiciary and legal profession, and thirdly, a "piecemeal" abolition of judicial review. While criticising these aspects of the Supreme Court's power, the Chapter also delves deeper into the reasons why the Court stands for what it does, in modern-day India.

He brings forth, and supplements his arguments on whether concepts borrowed from the UK and the US are really transferable to India's social and political setting. In this context, the distinction between implementation of fundamental rights and directive principles is also explained: briefly, that the latter are individual rights, more basic and natural rights-implemented by the courts; whereas the latter are social policy goals implemented largely by the state. This distinction provides useful insight also into the relationship between individual and collective rights, in the constitution and as interpreted by the Supreme Court. In addition, it also puts forth the point that the Supreme Court interprets the Indian Constitution as ordinary law, rather than special legislation.

In its conclusion, the book provides an overview of the important political events, court decisions and constitutional traditions that unfolded as India transitioned from its rule under the British, into a state with an evolving Constitution of its own. Moreover, the conclusion also raises important questions about the changing role of the Supreme Court in a democracy like India. Reviewing and analysing briefly these findings, the author concludes that while India's Supreme Court enjoys extraordinarily wide powers, judicial review in India has certainly not translated into judicial supremacy. In saying this, he seems to have concluded that no matter how wide the jurisdiction of the Supreme Court, the ultimate decision on what "law" is rests with the Parliament (government).

Gadbois' research is very useful for India today, particularly for constitutional lawyers. India being a Common Law jurisdiction, there sometimes is an over-emphasis on case law and therefore, first principles often retreat into the background when discussing constitutional theory and practice. This is where the book provides a wider perspective, while also pointing out the importance of going back to first principles and constitutional history. For instance, he criticises judicial review in India also on the ground that the Supreme Court does not rely – as he believes it should – on Constituent Assembly Debates and surrounding social and economic policy considerations while interpreting the Constitution.

While many of the discussions on the modern-day Supreme Court in his research also have their basis in case law, the book places necessary emphasis on political and legal history, as well as the debates of the Constituent Assembly and preceding governmental discussions in understanding the evolution of the Indian Supreme Court. In doing this, it almost compels the reader to look deeper into the reasons – political, historical, legal, social – why the Supreme Court stands as it does today.

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