

BOOK REVIEW

CONSTITUTIONAL IDENTITY, GARY JEFFREY JACOBSON, HARVARD UNIVERSITY PRESS, CAMBRIDGE, MASSACHUSETTS. LONDON, ENGLAND, 2010. PAGES XVII + 1 – 368. PRICE NOT STATED.

Admitting that “identity can be a complicated matter”,¹ Amartya Sen tells us: “The illusion of destiny, particularly about some singular identity or other (and their alleged implications), nurtures violence in the world through omissions as well as commissions.”² Directly relevant to the core theme of the book under review is his further remark: “In fact, a major source of potential conflict in the contemporary world is the presumption that people can be uniquely categorized based on religion or culture”.³ If that is true then one wonders whether search for identity is something worth pursuing. But sustaining the most outstanding, if not unique, characteristic of the Indian Constitution that its basic structure is beyond amendment, the Supreme Court has concluded that “the Constitution is a precious heritage; therefore you cannot destroy its identity”.⁴ Maybe while Sen is justified in his statement about human beings, the Supreme Court is justified in its treatment of the Constitution. In that case Gary Jeffrey Jacobson is also justified in investigating constitutional identity and titling his book as such. He has additional justification for his investigation and publication of the book in the fact that while the two constitutions or their provisions may look alike, they may receive different interpretation and application in different countries. Quite often the courts and lawmakers are faced with the question whether and to what extent they could rely on foreign precedents and practices in the application of their constitution. While a *prima facie* attraction exists for learning from the experiences of others, it is strongly pleaded that the constitution is an expression of aspirations and future vision of a particular society which may and does widely differ from society to society in view of its extant circumstances, history and culture. Therefore, the judges, jurists and policy makers continue to debate on the extent of reliance on precedents set in one country by another country.⁵ For that reason the difference between the constitutions of different countries becomes relevant. Moreover, as quoted above, the identity of a constitution has also become relevant for the purpose of amendment to the constitution.

The process of written constitutions which is traced back to the Constitution of the United States, has become almost universal after World War II. Since then and particularly since the fall of the Berlin Wall in 1989, the

¹ AMARTYA SEN, *IDENTITY AND VIOLENCE* XI (Allen Lane ed., 2006).

² *Id.*, xiv.

³ *Id.*, xv.

⁴ *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625, 642: AIR 1980 SC 1789, 1798.

⁵ See, e.g., PK Tripathi, *Foreign Precedents and Constitutional Law*, 57 COLUMBIA L. REV. 3119 (1957); PK Tripathi, *Perspectives on the American Constitutional Influence on the Constitution of India* in *CONSTITUTIONALISM IN ASIA* (Lawrence Beer ed., 1979); C. McCrudden, *A Common Law Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. OF LEG. STUD. 499 (2000).

economic globalization supported by advancement in technology has brought people and their institutions closer to one another. Exchange of people and ideas from one society to another has also become much more frequent, intense and faster. Simultaneously the constitution of a country is taken to be the defining characteristic of that State, around which that State has to survive and move forward. Correct and progressive understanding and application of that document is the *sine qua non* for the survival and progress of that society. This leads to the tension between the two principles of distinct identity of the constitution and the need of learning from the experience of one another. As a comparative thinker, Gary Jacobsohn takes up this phenomenon for study. In the process he hopes to demonstrate that, “the dynamics of constitutional identity are to a significant degree an expression of a developmental process endemic to the phenomenon of constitutionalism”.⁶

The author argues that:

“A constitution acquires an identity through experience, that this identity exists neither as a discrete object of invention nor as a heavily encrusted essence embedded in a society’s culture, requiring only to be discovered. Rather, identity emerges dialogically and represents a mix of political aspirations and commitments that are expressive of a nation’s past, as well as the determination of those within the society who seek in some ways to transcend that past. It is changeable but resistant to its own destruction, and it may manifest itself differently in different settings”.⁷

He adds, “I embrace the idea that a dialogical engagement between the core commitment(s) and its eternal environment is crucial to the formation and evolution of a constitutive identity”.⁸

In this theoretical background and for the purpose of establishing his point, the author picks up primarily the constitutions of three countries starting their names with “I” – India, Ireland and Israel – because of their common background of British connection, a predominant religious majority with a small minority and the well developed role of the courts in setting the constitutional identity. But the discussion is not confined to these countries. The United States is spread all over while enough attention has been paid to some other countries too such as Turkey, Peru, Sri Lanka, South Africa, Honduras and Korea.

The author begins with the maintenance of identity in changing times even in the face of the amendment process. Accordingly, he titles the second chapter of the book: “The Conundrum of the Unconstitutional Constitution” in which he tries to establish the relevance of the scope of constitutional amendment

⁶ GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* xvi (2010).

⁷ *Id.*, 7.

⁸ *Id.*, 13.

for the purpose of constitutional identity. Citing examples of several countries including Ireland, Peru, Sri Lanka, Honduras and the United States where the question of unconstitutional amendments has been raised and discussed in the courts, he finds that with the exception of the United States, the courts in all these countries have admitted that amendments could be questioned in courts and invalidated by them if they changed the identity of the constitution. But among all these assertions he finds that only in India the amendments to the constitution have been found unconstitutional and invalidated by the courts on the ground that they went against the basic structure of the Constitution. After initial rejection,⁹ subsequent doubts¹⁰ and a confused ruling,¹¹ a closely divided Supreme Court in *Kesavananda Bharati v. State of Kerala* ('Keshavananda')¹² laid down that the basic structure of the Constitution could not be changed through the amending process. The close division was converted into an almost unanimous decision in *Indira Nehru Gandhi v. Raj Narain* ('Indira Gandhi')¹³ and finally confirmed in *Minerva Mills Ltd. v. Union of India* ('Minerva'),¹⁴ from which the author quotes the relevant words for his purpose: "Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But *the Constitution is a precious heritage, therefore, you cannot destroy its identity.*"¹⁵ In support of maintaining the identity of the constitution he also draws support from Khanna J. in *Kesavananda and Bhagwati J* in *Minerva*.¹⁶ He could have also drawn similar support from *M. Nagaraj v. Union of India* ('Nagaraj'),¹⁷ *I.R. Coelho v. State of Tamil Nadu*¹⁸ and *Ashok Kumar Thakur v. Union of India*¹⁹ which perhaps were not available to him at the time of writing.²⁰

On the non-application of the doctrine in other constitutions, specifically in Sri Lanka, the author says: "The Indian basic structure doctrine was forged against the backdrop of a determined threat to constitutionalism in its generic form, leaving open the question of its applicability to constitutional change that preserves the essentials of a constitution but is transformative with respect to its specific identity".²¹

⁹ Shankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458.

¹⁰ Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

¹¹ Golak Nath v. State of Punjab, AIR 1967 SC 1643.

¹² (1973) 4 SCC 225; AIR 1973 SC 1461.

¹³ 1975 Supp SCC 1: AIR 1975 SC 2299.

¹⁴ (1980) 3 SCC 625; AIR 1980 SC 1789.

¹⁵ *Id.*, 1798. (Emphasis supplied).

¹⁶ *Id.*, 71.

¹⁷ (2006) 8 SCC 212.

¹⁸ (2007) 2 SCC 1.

¹⁹ (2008) 6 SCC 1.

²⁰ See, MP Singh, *Ashoka Thakur v. Union of India: A Divided Verdict on an Undivided Social Justice Measure*, 1 NUJS L. Rev. 193 (2008); Mahendra Pal Singh, *India* in *How CONSTITUTIONS CHANGE* 169 (D. Oliver & C. Fusaro eds., 2011) (For a discussion of these cases and other issues in detail).

²¹ JACOBSON, *supra* note 6, 69.

Summing up his own views on the issue and drawing support from the writings of Edmund Burke the author says that:

“[a] constitutional amendment may thus be considered problematic in one of two ways: (1) The change it portends could subvert the essentials of constitutional government, at the core of which is the rule of law and the administration of impartial justice; and (2) The change it portends could substantially transform or negate a fundamental political commitment of the constitutional order that had been central to the nation’s self understanding”.²²

It is in the first sense that the thirty-ninth amendment was invalidated in *Indira Gandhi* and secularism was emphasised in *S.R. Bommai v. Union of India*²³ in the second sense.

Differentiating between the constitutional text and identity, he says: “The constitutional text is usually a critical component of constitutional identity but not coterminous with it”.²⁴ For example, secularism in India is not so much expressed in words in the Constitution of India as much as it is fundamental to it. Reverting again to Burke the author states: “Burke, then, provides a sound argument for constitutional maintenance, for protecting the basic core of constitutional identity against radical changes that would disrespect fundamental law as an ‘idea of continuity’”.²⁵ Finally, taking the Honduran example of removal by military coup of an elected president who wanted to amend the constitution to have a second term, the author cites the role of the Indian Supreme Court in the following words: “Thus as vital as was the Indian Supreme Court’s role in the amendments crisis, its larger role as a shaper of constitutional identity cannot be adequately described without recognising the institutional, dialogical context within which it operated”.²⁶

Citing Learned Hand who supported restraint on the exercise of judicial power “that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish,”²⁷ the author expresses his views in the following words: “Profound as is Hand’s teaching, the provision in some polities for straight-forward and simple amending increases the likelihood that in these places deeply problematic change could occur while the spirit of moderation remained generally prevalent.”²⁸ Finally, he justifies the Indian position by contrasting with that of US:

²² *Id.*, 70.

²³ (1994) 3 SCC 1.

²⁴ JACOBSOHN, *supra* note 6, 78.

²⁵ *Id.*, 78.

²⁶ *Id.*, 81.

²⁷ *Id.*, 82.

²⁸ *Id.*, 82.

“Where, as in the American case, amending the Constitution is such a formidable undertaking, there should perhaps be a much stronger presumption against the exercise of judicial review than, say, in India, where the adoption of amendments is only slightly more challenging than the enactment of ordinary law” and concludes “In principle, however, it might be desirable to keep the option open, if for no other reason than this could serve to remind politicians and citizens that, as Kurt Goedel understood, constitutional change is inherently bounded.”²⁹

In chapter three titled: “The Quest for Compelling Unity” the author tries to find an answer to the question, “how does constitutional identity take shape and develop?”³⁰ To answer this question he proceeds to state the universal truth that “in one way or another all constitutions confront or embody the problem of disharmony”³¹ and disharmony is a precondition for change. Comparing the constitution with human life, he tries to establish that as the identity of an individual is made by a number of things that he has lived through, the constitutions also acquire their identity in a similar way. The constitution itself may not establish a new polity but may be a statement of an existing one. Referring to the background literature on the question of constitutional identity, he suggests consideration of “three interrelated thematic focal points: aspirational content, dialogical articulation, and generic/local balancing. Framing them are the two ubiquitous ideas that drive the dynamic of constitutional identity: prescription and disharmony”.³²

Citing examples primarily from the US Constitution on aspirational content he concludes by stating, “Constitutions provide structures to mediate among conflicting political aspirations, but that they must or can be neutral with respect to them does not necessarily follow”.³³ On dialogical articulation he says:

“Pursuing identity along a dialogical path may require reconsideration of the juri-centric model that has long dominated contemporary constitutional theorizing, exemplified in the work of Ronald Dworkin, whose considerable achievements have not, it must be said, flowed from their attention to comparative issues. ... The Indian legal theorist, Upendra Baxi, has called attention to the limited reach of Dworkin’s theory, particularly when applied to the experience of postcolonial constitutionalism.”³⁴

In India he reads two claims on constitutional identity: *one* the secular composite culture and *two* a Hindu nation, which continue to struggle. On

²⁹ *Id.*, 83.

³⁰ *Id.*, 86.

³¹ *Id.*, 86-87.

³² *Id.*, 103.

³³ *Id.*, 106.

³⁴ *Id.*, 109.

generic/local balancing he cites South Africa's textbook example which raises difficulties when it comes to the European Union because of the tension between universalistic and particularistic demands. Balancing the universal and particular is also central to the debate over constitutional borrowing.

Dealing with preliminary application the author says that the constitutions of South Africa and India symbolise a clear break from the past without entirely escaping it. In Africa, the author finds that the constitution came into being through principles approved by the court while in India much of the debate is over secularism.³⁵ In Indian secularism he finds an interesting challenge for a theory of identity. The debates in the Constituent Assembly show that there was emphasis on status based hierarchy towards democratic ways of equality. With respect to the justification for the same if identity is continuity with past, the author makes two points in response:

“First, constitutional identity can accommodate an aspirational aspect that is at odds with the prevailing condition of the society within which it functions. Like appropriation of Ashoka to accommodate tolerance. The second speaks directly to the authenticity-existentialism polarity as in case of India on the concept of secularism in which [t]he state need not relate to all religions in the same way; the bottom line, however, is that public policy regarding intervention, non interference, or equidistance be guided by the same non sectarian principle of equal dignity for all.”³⁶

The author supports such a model of secularism in India in view of its religious past. Concluding the chapter the author says, “To describe a specific constitutional identity requires familiarity with the history and culture of a given society, for it is out of custom and tradition that a people acquire the materials from which the rules and aspirations that shape future governance spring”.³⁷ He concludes: “In the end, constitutional identity will be fashioned – and refashioned – through the struggle *over* constitutional identity”.³⁸

As is obvious from its title – “The Permeability of Constitutional Borders” in chapter four, the author deals with the issue of guidance or use of precedents by the judges in one jurisdiction from the judicial precedents or interpretation in other jurisdictions. Analysing the arguments for and against such a use on the ground of country specificity of a constitution and commonality or universality of broad issues in every jurisdiction, the author undertakes a detailed analysis of instances from India, Ireland and Israel of cases where foreign precedents have been used with caution to arrive at a desirable result promoting universal values particularly in the evolution of human rights. In conclusion the

³⁵ *Id.*, 125.

³⁶ *Id.*, 129.

³⁷ *Id.*, 134.

³⁸ *Id.*, 135.

author deals with two objections that are taken against the use of foreign precedents, namely the cultural and juridical objections. About the former it is argued that the public law reflects an inner relationship with the people over whom it operates and therefore interpretation and application of public law in one jurisdiction may not be in tune with the cultural setting of another jurisdiction. About the latter, it is generally said that it is a kind of judicial activism exercised by the judges. Through examples of specific cases in the three jurisdictions of India, Ireland and Israel, the author has tried to blunt the argument that the judges have inventively and intelligently used the precedents from other countries keeping in mind the cultural setting of the two jurisdictions as well as by technically justifying such an application as the legitimate exercise of the judicial function.

Chapter five deals with the classification the author makes between the militant and acquiescent or the transformative and preservative constitutions respectively. The former, as the name suggests, are the ones that aspire to change the existing social order while the latter preserve or sustain the existing order or leave it undisturbed. The author places the Constitution of India in the former category while he places the Constitution of the United States in the latter category. It is well recognised and established that the Constitution of India was intended to bring a social revolution in the country and all organs of the State, including courts, were expected to act in support of that revolution.³⁹ Enough support for this conclusion can be drawn from the stage of initiation of the Constitution making process until the adoption of the Constitution. The Directive Principles of State Policy, articulation of the Fundamental Rights, special provisions for weaker sections of the society in Part XVI and universal suffrage, among others of the Constitution, sufficiently prove that point. The Constitution of the United States on the other hand did not even pretend to bring any change in the existing social order. Even after talking of equality of all men, it preserved the institution of slavery against the wishes of many. Similarly its silence on family is also presumed as a mark of acquiescent constitutionalism.⁴⁰ The absence of reference to family in the Constitution of India on the other hand is because the Constitution wanted to empower the state to make whatever changes it considered appropriate. The fact of reform in Hindu family law, which embraced more than eighty percent of the population of the country, soon after the commencement of the Constitution, supports such an empowerment.⁴¹ Abolition of polygamy is thus a big change in the Indian society. Cases like *Sarla Mudgal v. Union of India*⁴² which extend the penal provision against bigamy even after conversion to another religion which permits bigamy are extensions of that change. Article 44 which

³⁹ See, G. AUSTIN, THE INDIAN CONSTITUTION (1966)(Chapter 2 of the book titled: "The Road to Social Revolution" gives an account of how the constitution makers made a deliberate choice for bringing a social revolution through the Constitution and chapter 7 titled: "The Judiciary and Social Revolution" emphasizes the role of the courts in the social revolution).

⁴⁰ JACOBSON, *supra* note 6, 227.

⁴¹ JDM DERRETT, RELIGION, LAW AND THE STATE IN INDIA 326 (1968). (Derrett has compared India's boldness in bringing these changes to the Code Napoleon).

⁴² (1995) 3 SCC 635: AIR 1995 SC 1531.

provides for uniform civil code is also part of such a change though it is another matter that it has not yet been acted upon. The author concludes:

“The adoption of the Hindu Code laws – and the jurisprudence that followed in its wake – exemplifies several key elements of militant constitutionalism: the socialization of conflict, the blurring of the line separating public and private sectors, and the ascendance of legislation over adjudication as the institutional focus for social regulation. But the modest success of these laws in actually transforming the social order only underscores the inherent limits of all power – whether constitutionally sanctioned or not.”⁴³

Finally the author concludes that the relationship between the legal and social order is a mark of a constitutional identity though as in the case of Article 44, the reform agenda has to keep in mind the demands of multiple cultures. That is why it is placed among the Directive Principles of State Policy.

Continuing with the same theme in chapter six, with reference to the Israeli case *Adalah v. Minister of Interior* (‘Adalah’)⁴⁴ which related to the family reunion of an Israeli Arab with his Palestinian wife whom he married abroad, the author discusses as to how the identity of the constitution is determined as supportive of security of the state or the right to family in which through eleven different opinions the Israeli Supreme Court by majority decided not to allow the Arab to bring his Palestinian wife to Israel for security reasons. The case in result identified the Constitution as one for the Israelis. “Israel’s constitutional identity embodies a commitment to Jewish and democratic values.”⁴⁵

In conclusion the author says: “Central to this book’s inquiry into constitutional identity has been a concern with continuity and change in the constitution.”⁴⁶ It is because of such a concern that we continue to obey the constitution. Assurance of constitutional longevity lies in the flexibility of the constitution. The idea of identity is an evolving phenomenon in which change is compatible with continuity rather than opposed to it.⁴⁷ Returning to the theme of dialogical engagement the author says: “identity in the constitutional arena, elusive a concept as it is, can best be appreciated within a dialogical or transactional ‘operation’ in which all elements, including identity itself, are at least potentially modifiable through their engagement with one another.”⁴⁸

Taking up the identity issue with specific reference to the amendment of the constitution the author goes back to an amendment of the Turkish Constitution with which the book starts. This amendment gave freedom to

⁴³ JACOBSON, *supra* note 6, 252.

⁴⁴ HCJ 7052/03(2006) 115.

⁴⁵ JACOBSON, *supra* note 6, 313.

⁴⁶ *Id.*, 323.

⁴⁷ *Id.*, 325.

⁴⁸ *Id.*, 326.

Turkish women to use head scarves in public which the Turkish constitutional court invalidated.⁴⁹ He treats it as an example of dialogical progression on the question of secularisation of Turkey.⁵⁰ In family matters he cites a Korean case in which a section of the Civil Code was invalidated because it went against the constitutional right of human dignity and pursuit of happiness “as well as the right to free marriages and equality”.⁵¹

Towards the end of the book the author suggests “that the dynamics of constitutional identity are less the result of any specific set of background cultural or historical factors than the expression of a developmental process endemic to the phenomenon of constitutionalism”⁵² which can be pursued in comparative perspective for which he suggests the following four propositions:⁵³

1. “The text is a start”.⁵⁴ It makes sense to scrutinise carefully the text itself.
2. “Bounded fluidity”.⁵⁵ The future of constitutional identity is inscribed in its past. The constitution is a prestigious heritage.
3. “The disharmonic invitation”.⁵⁶ The dissonance in a polity’s formal constitution functions as a provocation to change. Judiciary alone may not bring that change, it may be an ally.
4. “The balance of internal and external disharmonies”.⁵⁷ Civil War amendments in US changed the Constitution but not the people and their mind set. Accordingly the Civil Rights Acts soon after the Civil War failed to implement the War amendments which could ultimately be enforced only about one hundred years later from 1960 onwards.

On the whole the book appears to be part or consequence of an ongoing engagement of the author with comparative constitutions. Towards the end of the last or beginning of the current millennium he contacted me in connection with his secularism project which culminated in *The Wheel of Law: India’s Secularism in Comparative Constitutional Context*.⁵⁸ He was kind enough to have sent a copy of it to me. Much of that book supplies the background for this book too. Later while the challenge to some of the amendments in the Constitution of India was pending in the Supreme Court in Nagaraj, I read his paper on un-constitutional constitutions in which he had implied the possibility of some of

⁴⁹ E. 2008/16 (case 2008/16, decision 2008/16) 2008.

⁵⁰ JACOBSON, *supra* note 6, 332.

⁵¹ *Id.*, 343.

⁵² *Id.*, 348.

⁵³ *Id.*, 348ff.

⁵⁴ *Id.*, 348.

⁵⁵ *Id.*, 349.

⁵⁶ *Id.*, 351.

⁵⁷ *Id.*, 353.

⁵⁸ GJ JACOBSON, *THE WHEEL OF LAW: INDIA’S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* (2003).

these amendments getting invalidated though ultimately, the Court upheld all the amendments unanimously. Later he also published his paper with the same title as of the book.⁵⁹ Little is known to me of the receptivity of the book in academic circles,⁶⁰ but in all fairness to the author it could definitely be said that he is deeply engaged in issues of public law and policies which have been of central concern in many societies around the world and have engaged many scholars and policy makers. As has been noted above, the issue of constitutionality of amendments to the constitution has engaged India since the very first amendment of the Constitution in which constitutional identity has played a stabilising role. Similarly the debate on the use of foreign precedents in the interpretation of the Constitution was raised quite early in the life of the Constitution which is not yet over. As identity of the constitution is relevant to the resolution of these issues, the book is a welcome addition to the existing literature on the subject.

Returning to Amartya Sen's caution at the beginning let us, however, be careful that the idea of constitutional identity is not stretched to assigning an *ism* to the constitution so that it becomes a rallying point of supporters of one *ism* or another and ultimately becomes a matter of conflict. Let us not forget Justice Homes' warning that "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics"⁶¹ so that the constitution is not appropriated by the believers of one ideology to the disadvantage of others. The constitution is the product of the people and it must belong equally to all of them. By assigning it one or the other identity it cannot be used by any group of people to the disadvantage of other groups. The constitution must remain open equally to all people and therefore only general identities such as democracy, human dignity, social welfare etc. could be assigned to it as its identifying marks but not the ones that could be utilised for the disadvantage of any individual or group of them. In that light, in the Israeli case *Adalah* discussed above, I will like to support the minority view of Chief Justice Barak rather than the view of the majority. I hope the author is fully conscious of these perils of identity in his book.

— M.P. Singh*

⁵⁹ GJ Jacobsohn, *Constitutional Identity*, 68 REV. OF POLITICS 361 (2006).

⁶⁰ See Mallikarjun G, *Book Review: Constitutional Identity*, 6 NALSAR L. REV 185(2011) (After some search I could find only two reviews of the book, one by Mallikarjun G. and the other by Martin Edelman in a journal whose title I could not trace, which are somewhat sketchy and do not throw enough light either on the content of the book and its contribution to the existing literature).

⁶¹ *Lochner v. New York*, 198 US 45.

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