

## BOOK REVIEW

*THE INDIAN CONSTITUTION (OXFORD INDIA SHORT INTRODUCTIONS), MADHAV KHOSLA, OXFORD UNIVERSITY PRESS, 2012. Pages 191. Price ₹ 195.*

It is legitimate to assume that the readers of this journal are familiar with the formidable scholarship that the Constitution of India has engendered. And so, if she wonders what another work on the Constitution can contribute, her cynicism would be understandable. But she is in for a surprise, as she turns the pages of this little work that sheds great light in the field of constitutional law.

The work presently under review is not an article-wise, or even a chapter-wise discussion on the Constitution. It does not even propose to offer analysis topic-wise. Instead, in the author's words, its chief intention is to "introduce the Constitution". But that is the modesty of the author. An 'introduction' ordinarily understood, gives the impression that the book is a primer, but it is in fact much more. The present work is a masterly exposition of some of the prominent themes that run through the Constitution, and often even beyond it. It is an amalgam of text, context, judicial precedent and academic commentary, making the whole, far greater than the sum of its parts. Madhav Khosla raises questions, which he hopes will stimulate deeper analyses and thought, while conceding that his ideas and arguments are often inchoate, hoping to "provoke rather than persuade."

Khosla picks just four areas as the subject matter of the book, namely: Separation of Powers, Federalism, Fundamental Rights and Directive Principles and Amendment of the Constitution. He explains the constitutional position and offers fresh and novel insights as he goes along. Attorneys are not the custodians of the Constitution, he rightly cautions us at the very beginning. But in doing so, Khosla overlooks the historical fact that lawyers and judges had purloined and shaped the Constitution from the very beginning, as Nehru had bewailed. And so, as he visits the core areas that he has chosen, he has to constantly grapple with judicial decisions and other forms of legal intervention, which have sought to interpret the Constitution. The courtroom, in Khosla's words "is a site in which the Constitution is regularly made and unmade, interpreted and reinterpreted, and understood and misunderstood". And he does not hesitate to highlight the shortcomings and absurdities of many of those judicial decisions, and argues that this oscillation from clarity to ambiguity forms part of our shared constitutional journey.

But the author is clearly not uncomfortable with judicial supremacy, as is clear from his approach to the basic structure doctrine (an issue that will be subsequently discussed). And this makes his view on a case like

*Supreme Court Advocates on Record Association* unconvincing.<sup>1</sup> It is difficult to accept his view that it is an “exaggeration” to say that the decision has placed the power of judicial appointments in the hands of the judiciary. “What that decision did, rather ingeniously, was to make the executive and the judiciary both powerful as regards appointments”, says the author. But that is not how either of the two concerned organs have either understood or implemented the said decision. In order to institute a safeguard against the concentration of power to make judicial appointments, the creation of a broad based National Judicial Commission has assumed importance. Again, the author’s view of the ‘collegium invention’ as an “internal” check and balance is theoretically elegant, but ignores many realities of the institution. The operationalization of the collegium system can get reduced to a cipher by an autocratic Chief Justice and it can also become a forum for name-bargaining by powerful senior judges, during the appointment process.

The discussion on federalism is instructive and comprehensive. It naturally deals with the perennial academic question of the true character of the Indian Federation: whether the Indian Republic is really federal or more unitary. The legislative lists, the doctrines of pith and substance, harmonious construction and colourable legislation all receive due attention. But what is particularly noteworthy is the author’s focus on the asymmetric features of the federation. A glaring example of such asymmetry is seen in Art. 370. Khosla argues that while it was intended to give more autonomy to the State of Jammu and Kashmir, it has become asymmetric in the opposite sense. This is especially problematic in that it has given the Union greater powers vis-a-vis the State of Jammu and Kashmir, which it does not ordinarily have with respect to the States. He also argues pertinently that those who seek to abolish Art. 370 on the ground that it unjustifiably privileges the State of Jammu and Kashmir need to understand that without this provision nothing binds the State to the Union of India.

Khosla then proceeds to highlight a second category of asymmetry: which is intra-State in nature, and is evidenced in Art. 371-D relating to Andhra Pradesh. The third kind is regional: the special provisions in the Sixth Schedule for autonomous districts and regions for the four North Eastern States for Tribal Areas. Again very pertinently, he argues that while the fear that a symmetric federal structure will result in exploitation of certain groups may be genuine, India’s experience, however, does not establish the converse. According to Khosla, the contribution of asymmetric federalism is far from clear, and the question will require greater academic attention in the future. “In the end”, he says, “we may find that an asymmetric federal structure performs disappointingly, and will serve to reflect, rather than resolve, what is ultimately a sociological problem”.

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<sup>1</sup> Supreme Court *Advocates-on-Record Association v. Union of India*, (1993) 4 SCC 441.

The chapter on Rights and Goals show a masterly understanding and grasp over the subject. But the reviewer would like to focus on Khosla's interpretation of two cases: *Maneka Gandhi*<sup>2</sup> and *Selvi*.<sup>3</sup> *Maneka*, he says, is a deeply muddled decision and offers a reinterpretation. Khosla argues that the case concentrated on the word "procedure", and that "the method to its madness" was a rejection of the distinction between procedure and substance altogether. Accordingly Khosla writes:

"Maneka was not as much about procedure itself being insufficient as it was about procedure necessarily if impliedly incorporating substantive ideals. Maneka did not then want more than procedure; rather, it wanted procedure to mean more. The decision is seen as one that saw a shift from procedural to substantive due process; and technically this shift did take place. But for the Court addressing this shift directly was unnecessary, because it found it simply unintelligible to say, as the Founders did then and many of us do now, that the satisfaction of procedure by itself can mean anything."

*Selvi*, he says, is one of the few post 9/11 decisions in the common law world in which civil liberties were passionately protected. But more substantially, it showcased the primacy of Art. 21 over Arts. 20 and 22. Since Art. 20 could not cover all the situations in which the impugned tests could be used (for instance, if criminal charges were not contemplated), the Court fell back on Art. 21 to prohibit incriminatory tests during investigation. The right to privacy, the right against cruel treatment and the right to fair trial, all integral to the due process guarantee in Art. 21 were invoked by the court, in coming to its final conclusion. Art. 21 now protects the rights under Arts. 20 and 22, and more. In achieving this broad protection for individual liberties, Khosla is of the opinion that Art. 21 has eclipsed these Articles. But their textual presence, he feels, might enable us to engage with the precise contours of the rights they enshrine, with greater precision.

The chapter on amending the Constitution naturally dwells on the Basic Structure doctrine – an issue that has assumed a central place in constitutional discourse. Khosla is conscious of the criticism that the doctrine is counter-majoritarian, and leads to judicial supremacy. It is necessary to disclose here that the reviewer is a critic of the Basic Structure doctrine, and has stated his objections elsewhere.<sup>4</sup> Khosla does not see the need to grapple with

<sup>2</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

<sup>3</sup> *Selvi v. State of Karnataka*, (2010) 7 SCC 263.

<sup>4</sup> See Raju Ramachandran, *Sudhir Krishnaswamy: Democracy and Constitutionalism in India – A Study of the Basic Structure Doctrine*, 3 INDIAN J. CONSTI. L. 213 (2009). See also, Raju Ramachandran, *Supreme Court and Basic Structure Doctrine* in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 107-33 (B.N. Kirpal, Ashok K. Desai *et al* eds., 2000). For an interaction between Raju Ramachandran and Sudhir Krishnaswamy see,

the question of whether unelected judges have the power to annul amendments sanctioned by constitutionally prescribed majorities. His justification for not entertaining the larger question is rooted in the fact that power has not really shifted to the Supreme Court, because, hardly any basic structure challenges have been successful. There are two main reasons he ascribes to this important judicial fact. First, the threshold for establishing damage to the basic structure is significantly high. The second and interesting reason he gives is the increasingly asymmetric nature of the Constitution. Khosla notes,

“Asymmetry has made it progressively more difficult to determine, and thus notice departures from, the Constitution’s basic structure. Over time, incremental amendments over a range of matters have diluted the Constitution’s normative character. And this has prevented the judiciary from ascertaining, with the specificity that adjudication demands, whether the Constitution’s basic structure has indeed been damaged or destroyed.”

Khosla questions the conventional wisdom about the anti-defection provisions of the Constitution embodied in the Tenth Schedule. He argues that while the problem of defection is real and pertinent, the broadness of the anti-defection law has hit at the heart of legislative operations in the country. Since no member can act ‘*contrary to any direction*’ issued by her political party, legislative deliberation and voting run the risk of becoming a mere ornamental exercise. In this connection Khosla notes, “The law removes room for legislators to vote their considered opinions and thereby express impartial views, something thought to be central to preserving the dignity of legislation.” By detailing the manner in which anti-defection laws often corrode parliamentary institutions, Khosla makes out a good case for limiting the anti-defection provisions to cases involving motions of confidence and no-confidence.

Fali Nariman once famously remarked that he often found “thinking” about a brief more productive than reading it. We use the Constitution every day in legal practice. We sometimes need to sit back and think about it. Khosla’s book gently persuades us to do just that, and in doing so, is a suitable read not only for students, but also for legal practitioners and those interested in the dynamic document that is the Indian Constitution.

—Raju Ramachandran\*

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Raju Ramachandran, *The Krishnaswamy thesis ... A reaction, not yet a critique*, available at <http://lawandotherthings.blogspot.in/2009/04/debating-basic-structure-doctrine.html> (Last visited on September 22, 2012).

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