THE SUPREME COURT AND THE CONSTITUTION: AN INDIAN DISCOURSE (2020). Edited by Salman Khurshid, Lokendra Malik and Yogesh Pratap Singh. Published by Wolters Kluwer India Pvt. Ltd., Gurugram, India. Pp 448. Price Rs. 1150/.

LORD COOKE of Thorndon writes in his essay entitled *Where Angels Fear to Tread*[1] that in the Second Judges case[2] Justice J.S. Verma (who himself later on became the Chief Justice of India) and his colleagues were anxious to emphasise that, no matter where legal power in these matters may ultimately decide and notwithstanding the primacy or conclusiveness conferred by the majority judgement on the opinion of the Chief Justice of India, the process of consultation with a view to a consensus between the executive and the judiciary and within the judiciary or at least the higher echelons of the judiciary is desirable. Such was the context that Justice Verma aptly quoted from Measure for Measure[3] wearing Isabella's plea to Angelo for her brother's life[4]:

"O, it is excellent
To have a giant strength, but it is tyrannous
To use it like a giant".

Lord Cooke—like many other lawyers both inside and outside India—opined that the majority judgement, admirably motivated though it was by devotion to the rule of law, made free with the actual provisions of the Constitution. A layman might have felt bewildered by something like a sleight of hand. At the same time it might have been thought intrusive and cheeky for an outsider to say as much directly. It was for this reason that Lord Cooke commenting upon the Second Judges Case closed the thought in Shakespearean language by a reminder that later in the same speech Isabella had added[5]:

"But man, proud man,
Dressed in a little brief authority,
...

[1] Robin Cooke "Where Angels Fear to Tread", in B N Kirpal, Ashok H Desai, Gopal Subramanium, *et.al.* (eds.), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* 97-98 (Oxford University Press, 2000).
[2] *Supreme Court Advocates-On-Record-Association* v. *Union of India*, 1994 AIR SC 268.
[3] William Shakespeare and J. W. Lever, *Measure for Measure: The Arden Shakespeare* (Bloomsbury, 2012).
[4] *Id.* at 109.
[5] *Id.* at 120.

Plays such fantastic tricks before high heaven
As makes the angels weep"…

The angles theme, borrowed from the novel by E. M. Forster was reflected in different shades by Lord Cooke himself after the subsequent judgement(s) in the Judges case, but this time it has been reflected somewhat differently in the present volume entitled "The Supreme Court and the Constitution: An Indian Discourse". Alexander Pope famously observed in his poem *An Essay on Criticism*, that 'For fools rush in where angels fear to tread.'[6] The excuse for rushing in can only be that the issues are of profound constitutional significance, going far beyond ordinary questions of law. This book explores different shades and challenges of constitutionalism and judicial decision making in the Supreme Court. The present volume comprises dozens of articles critically describing crucial aspects of the functioning of the Indian Supreme Court and our constitutional order. Let us have a brief look at these papers.

The book starts with an insightful forward by Professor Gary J. Jacobsohn. Commenting upon the role played by Supreme Court in shaping Indian experiment of constitutionalism, Prof. Jacobsohn writes that, in a very real sense, the Court became the perfect embodiment of the disharmonies within the Constitution, as it found itself over time on both sides of the tension inherent in the dual commitment to socio-economic transformation and liberal democratic rights. In its early years the judiciary was, as Nehru's comment about the Court's initial pro-landowner actions suggests, both contemptuous of "the sovereign will of Parliament" as well as an impediment to the implementation of many of the framers' constitutionally grounded egalitarian vision. He further notes that, Nehru and Ambedkar implicitly understood that a militant constitution will include preservative attributes, just as an acquiescent constitution will incorporate transformational elements. The very notion of a confrontational constitution hints at the magnitude and daunting nature of the challenge of reconstruction; what an Indian jurist once called a "militant environment"[7] is unlikely passively to submit to the transformative designs of a hostile constitution.

[6] "An Essay on Criticism", *Encyclopaedia Britannica*, *available at*: https://www.britannica.com/topic/An-Essay-on-Criticism (last visited on January 2, 2021).
[7] V. R. Krishna Iyer, "Towards an Indian Jurisprudence of Social Action and Public Interest Litigation", in Indra Deva (eds.), *Sociology of Law* 292, 308 (Oxford University Press, 2009).

The first chapter in this book is "Faith not Force: In Search of Rights Jurisprudence" by Mr. Salman Khurshid, who himself was a student of jurisprudence at Oxford during the fascinating time of Professor Ronald Dworkin interprets the crises and rise of democratic governance in India. His essay goes back to the most fundamental question of jurisprudence advanced by legal Philosopher H.L.A. Hart when he wrote a widely cited article with a subtitle 'The Nightmare and the Noble Dream'.[8] For Hart the nightmare was American Legal Realism's claim that legal doctrine had no determinate content, that every judicial decision was 'an uncontrolled act of law-making', while the noble dream was Ronald Dworkin's hope that all serious legal questions had a single correct answer compatible with morality's dictates. Mr. Khurshid has argued how the Supreme Court of India has misread rights thesis in recent pronouncements of *Anuradha Bhasin* v. *Union of India*[9] and some recent judgements. The understanding of Dworkin reflected in the judgment of the apex court is something that he found in H. L. A. Hart's model of judicial decision making and rejected it as an inadequate description of the legal system. He further argued in his chapter how competing rights are to be balanced is an integral part of Dworkin's thesis and may guide the Supreme Court while engaging with State-imposed restrictions on personal liberty.

Dr. Yogesh Pratap Singh in his chapter 'The Metamorphosis of Judicial Appointments' traces the contours of one of the most controversial aspects of the Indian Judiciary, *i.e.,* appointments of judges. Through a crisp structure, Dr. Singh demarcates the timeline of appointments into three phases since 1950. Each phase is characterised by a powerful authority that has played an influential role in the appointments, *viz,* a strong executive or the Collegium. He has suitably touched upon the matter of judicial independence in India by analysing a few cases and stressed the importance of the appointment process in ensuring this independence. Some light has been shed upon the construct of insularity, impartiality and authority. The author finally concludes the chapter by highlighting the requirement of systemic reforms in the system.

In a thought-provoking piece, 'The Constitutional position and role of the Chief Justice of India', Dr. Lokendra Malik elucidates on the practice of appointing the Chief Justice of India through the convention of seniority *vis-à-vis* article 124 of the Constitution. The author chronicles the developments under this practice ever since it originated in the Supreme Court.

[8] H.L.A. Hart, "American Jurisprudence through English Eyes: the Nightmare and the Noble Dream" 11 *Georgia Law Review* 970-989 (1977).
[9] *Anuradha Bhasin* v. *Union of India*, (2020) 3 SCC 637.

He sheds light on various Central Governments honouring this mode of appointment by adhering to it across their respective tenures. A detailed analysis of the instances when the trend was buckled has been given, primarily when senior judges were superseded by the Government during emergency. The article also talks about subsequent reinforcement of the practice through various court cases and constitutional provisions.

A major point of discourse in the legal community has been the assignment of judges to various posts upon their retirement from service. In his second chapter in this book, Dr. Malik touches upon this issue. He highlights the contentious trend practiced in India which has severe repercussions on judicial independence. In a meticulously researched chapter, he reflects upon the assignment of Judges of the Supreme Court to political posts upon retirement, with a few recent examples, and the negative implications that they may have on the credibility of the justice delivery system of the country. He then addresses the need to regulate such assignments and concludes off by suggesting certain measures through which judges can contribute to the legal system post-retirement but without involving themselves in controversial positions.

In a jointly authored chapter, 'The Justice in Judicial Activism: Jurisprudence of Rights and Freedoms in India and Canada', Dr. Shruti Bedi and Mr. Sébastien Lafrance look at the phenomenon of judicial activism in the countries of India and Canada. They outline the rationale for choosing these two nations to highlight the phenomenon, owing to the similarity of legal systems in both countries. The authors have analysed judicial activism by looking at specific instances in both countries where such activism has been displayed. While deliberating upon judicial activism in Canada, specific focus has been given to the Canadian Charter of Rights and Freedoms, perceived 'attacks' on it, and its interpretation by the Supreme Court of Canada.

Dr. Nachiketa Mittal and Ms. Amrita Singh in their joint chapter titled 'Unclothing the Truth of Appointment of Women Judges in Constitutional Courts' have touched a worrisome subject matter which is often ignored in academic debates, *i.e.,* judicial appointments *vis-à-vis* women judges in the Supreme Court and the High Court. *Prima facie*, this may appear to be a sensitive study but academically it is a fair assessment of the judicial appointments and gender imbalance. On the apparent scrutiny of the subject matter, it appears that there has been a consistent denial of appointment of women judges to the Supreme Court and the High Courts in adequate percentage by the collegium. This could have been an inadvertent decisional error

but when the authors examine the issue in the light of a history of the last 70 years, it becomes an obscure as an error that should conveniently be ignored. The authors after providing a statistical account of the status of women judges in the constitutional courts have examined the trends of such appointments, assessing their elevation from the Bar or promotion from the District Courts and the percentage thereof.

A chapter titled 'Role of Supreme Court Arresting Social Democracy' by Dr. Ayaz Ahmad examines the role of the higher judiciary in arresting the constitutional discourse on social democracy. The realisation of social democracy has been termed as 'silent revolution' by some scholars which is necessary to stabilise the political democracy. The essay highlights that the Supreme Court of India has not fully appreciated the salutary intentions behind such provisions and misread them on most occasions which arrested the progress on realising social democracy. Constitution, to be fair, did lay down the road map for the inculcation of such spaces that disparate social classes could share. The author highlights constitutional provisions intended to create those spaces and short-sighted judicial interventions in their implementation. The chapter finally suggests various proposals to correct structural deficiencies of the higher judiciary.

In his chapter titled 'Administrative Powers, Roles and Responsibilities of the Chief Justice of India', Mr. Chirag Balyan examines the scope of the administrative authority of the Chief Justice of India under the Constitution, *viz,* appointment and transfer of judges, change of the seat of Supreme Court, framing of rules and appointment of officers and officers of the Supreme Court. The chapter also discusses the role of the Chief Justice of India in the appointment of his successor and that of other judges of the Supreme Court. Finally, some of the miscellaneous roles of the Chief Justice of India are highlighted. Gaurav Mukherjee's in an interesting article entitled "The Case against Excluding Minority Institutions from the RTE Act" critically examines the Supreme Court verdict in *Pramati Educational and Cultural Trust* v. *Union of India*[10] which upheld the validity of articles 15(5) and 21A of the Constitution. The surprising decision of the court in universally imposing certain quality standards in schools in *J.K. Raju* v. *State of Andhra Pradesh*[11] is also examined, and a reading down of the judgment

[10] *Pramati Educational & Cultural Trust* v. *Union of India*, (2014) 8 SCC 1.
[11] *J.K. Raju* v. *State of Andhra Pradesh*, Contempt Petition No. 532 of 2013.

in Pramati is suggested as a manner of ensuring a meaningful result being achieved by the judgment.

The Supreme Court is *Supreme But Not Infallible*, the same has been recognised in the Constitution which has given power to the Supreme Court itself under article 137 to review its judgment, if there are errors apparent on the record. In the year 2002, the Supreme Court in *Rupa Ashok Hurra* v. *Ashok Hurra*[12] unanimously held that in order to rectify gross miscarriage of justice in its final judgment, the court will 'allow' the curative petition filed by the victim and provided certain guidelines to file it. The chapter titled 'Curative Petitions: A Rule of Law or Ruse of Law' jointly authored by Shriya Maini and Vishesh Wadhwa critically examines this judicially conceived jurisdiction of 'Curative Petitions' in the backdrop of contemporary Supreme Court: Practice and Procedure and justify its inevitability and significance by engaging theoretical and epistemological methodology.

With the dawn of constitutional democracies in 20th century there is a renewed emphasis on the plights and rights of refugees, Ms. Shreyasi Bhattacharya and Dr. Shuvro Prosun Sarker address this important issue in their chapter 'Citizenship, Refugee and the Supreme Court.' The authors offer us an in-depth look at the situation concerning the refugees in India, and the legal protection is afforded to them. The chapter addresses the issue of citizenship and non-citizenship, as well as the challenges concerning illegal migrants. The pivotal role played by the judiciary in ensuring the safety and protection of the rights of the refugees has been emphasised upon. The relevant legislation such as the IMDT Act, Foreigners Act and the Citizenship Rules, to name a few, have been deliberated upon. Finally, in an attempt to highlight the application of these legal principles and the role played by the judiciary, the cases concerning the Chakma and Rohingya refugees have been critically analysed.

Dr. Caesar Roy in his essay deliberates upon the evolution of the Public Interest Litigation System in India. He analyses its important aspects such as its historical development in India (primarily in the 1970s), the constitutional backing for it in the nation, and relaxation of the locus standi norms which allowed people unconnected with a situation to file a PIL about it. The approaches of other countries towards this concept have also been dealt with. Dr. Roy also touches upon the key cases that contributed to the vast PIL jurisprudence in India and highlights

[12] *Rupa Ashok Hurra* v. *Ashok Hurra*, (2002) 4 SCC 378.

the perceived abuse of the system today owing to judicial overreach, and he concludes off by suggesting measures that can be undertaken to strengthen the PIL system.

In his essay on Special Leave Petitions (SLP), Mr. B. Muthu Kumar parleys an interesting trend where an overwhelming majority of the cases as SLP in the Supreme Court of India has hampered its functioning. The author talks about the Government being in the biggest litigator in the Courts and analyses empirical data concerning SLPs to further his arguments on the subject matter. He sheds light on their original intent behind SLPs and how with time, they have been used unfortunately for frivolous purposes. Mr. Ashit Kumar Srivastava in his piece examines the vast authority possessed by the Chief Justice of India in the administration of justice. He traces the origin of the present date Supreme Court from the erstwhile Federal Court. The author offers an in-depth analysis of the phenomenon of 'Master of the Roster', its origin from the original three High Courts. He also delves into the recent controversies surrounding the office of the Chief Justice of India and analyses the impact of the phenomenon of 'Master of the Roster' on the Collegium, and allotment of benches, and other facets of the Supreme Court administration.

In their joint chapter, Ashish and Pragya have critically analysed the recent judgment of the Supreme Court of India of India in Prashant Bhushan case. The Court had passed a 108-page judgment[13] in response to a tweet by the alleged contemnor and held him guilty of having committed criminal contempt of its. The authors have explored the law of contempt from the country since its inception, gradual developments, and how the eventual contemporary events have that have shaped up the relationship between Bar & Bench. This chapter brings out the macro issues of the growth of democracy and constitution surrounding the issues involved which need further adjudication/deliberations on substantial questions of law in the times to come.

The book has argued that as the judicial procedure is deformalized, the Court evolved new public remedies to support it in the protection of citizen's rights and liberties guaranteed in the Constitution. Some unique tools like the public interest litigation, special inquiry mechanism, fact-finding commissions, scheme remedies, compensation, post decisional monitoring, and a

[13] Refer to Judgement dated August 14, 2020 passed by the Supreme Court of India exercising its inherent jurisdiction in Suo Motu Contempt Petition (Criminal) No.1 of 2020.

nation-wide Legal Aid Scheme were not only recognised but also institutionalised on the initiative of the Supreme Court to give justice to those who were unable to have access to its doors. It's a must read for academics, practitioners, students, judges and legislators. Overall, from all the essays and the arguments provided therein, it can be concluded that by the late 20th century, these understandings have been transformed. Wherever the constitutional language permitted, courts and scholars came to agree that social welfare rights were judicially enforceable. In India the main vehicle for this transformation was the constitutional protection given to a judicially enforceable right to life; other social welfare rights were described as contained within that right. Elsewhere, the constitutional language was adequate in itself to make social welfare rights judicially enforceable.

Written and expressed in an interesting style, which also includes the personal experiences and well-researched writings, the book aims to provide insight to the society on the working and substance of the Supreme Court of India. Indeed, this Volume, contains a wealth of information and provides some solutions to the unsatisfying questions on various roles of the Apex Court in the Indian constitutional set-up, as understood in its practical sense in the country. However, there is something which I think has been missed out—yet, if social welfare rights were judicially enforceable, they were not enforceable in quite the same way as other rights were. They were seen as presenting what American legal philosopher Lon Luvois Fuller in a paper titled "The Forms and Limits of Adjudication"[14] called problems of polycentricity, a more theorised description of the intuition that implementing social welfare rights called for a kind of policy analysis is different from that associated with classical civil and political rights.

The Apex court ruling on whether the Reserve bank of India should extend the loan moratorium induced during COVID-19 and can it waive the accrued interest on interest are few recent examples of the same. In early 2020, the court had struck down an RBI circular imposing a ban on virtual currencies. Now applying Fuller's thesis on the same, it can be argued that adversarial adjudication is not suitable for resolving "polycentric" problems.[15] Fuller compared polycentricity with a spider's web— a pull on one strand will distribute the tension throughout the web as whole in a complicated pattern.[16] When applied to adjudication, polycentric

[14] Lon Fuller, "The Forms and Limits of Adjudication" 92 *Harvard Law Review* 353-409 (1978).
[15] Pratik Dutta, "Needed: A Fine Balance", *The Indian Express*, November 11, 2020, *available at*: https://indianexpress.com/article/opinion/columns/rbi-covid-19-loan-moratorium-supreme-court-7046727/ (last visited on January 2, 2021).
[16] *Supra* note 14 at 395.

problems normally involve many affected parties and a somewhat fluid state of affairs. The range of those affected by the dispute cannot easily be foreseen and their participation in the decision-making process by reasoned arguments and proofs cannot possibly be organised. As a result, the adjudicator is inadequately informed and cannot determine the complex repercussions of a proposed solution.[17]

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[17] *Supra* note 15.

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