BOOK REVIEW

DR. T.K.K. IYER, *JUDICIAL REVIEW OF REASONABLENESS IN CONSTITUTIONAL LAW*

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pp. i-xii, 1-294.

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Reviewed by Peter Bayne*

'Bills of Rights' have been incorporated into most of the Constitutions that have been adopted in the post-Second World War period, including those of the 'new' nations of the Commonwealth of Nations. The Bills of Rights in the Constitutions of countries in the Commonwealth are readily comparable one with another, both because the English law heritage is common to most of them, and because of strong similarities in the manner in which those rights are expressed and enforced. In particular, there has been almost universal acceptance of the judiciary as the vehicle for enforcement of the rights. The Constitutions of India and Papua New Guinea illustrate the Commonwealth pattern at this broad level of comparability, and the particular subject of Dr. Iyer's book is a matter of direct interest in Papua New Guinea.

Article 19(1) of the Constitution of India provides that all citizens of India shall have seven specified rights, such as 'freedom of speech and expression'. However, by Article 19(2) to (6) inclusive each of these rights may be qualified by laws which impose 'reasonable restrictions' on them in the interests of matters such as 'the sovereignty and integrity of India'. Dr. Iyer's book is a study of how the concept of 'reasonable restrictions' has been interpreted by the Indian courts.

Thus, the book should be of considerable interest to comparative lawyers, for the technique adopted by Article 19(1) and (2) finds analogies in many of the Commonwealth constitutions. In Papua New Guinea section 38(1) of the Constitution permits the National Parliament to invoke a 'general qualification' to give validity to laws and might otherwise be in breach of the qualified rights (sections 40 to 56). Section 38(1) permits qualifications for purposes such as defence, public safety, and so forth, *but only* 'to the extent that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind'. It is true, as Dr. Iyer argues (at p.8) that this phrase is vague, and allows less

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scope for judicial review, than the phrase 'reasonable restrictions', (primarily because of the words 'in a democratic society'), but the Indian decisions will nevertheless be of assistance to Papua New Guinean judges and lawyers called on to interpret section 38(1). Furthermore, the Indian decisions are of particular relevance in Papua New Guinea because the Indian Constitution contains a statement of the Directive Principles of State Policy, which are obviously analogous to the Papua New Guinean National Goals and Directive Principles.

The book begins with a perceptive analysis of the extent to which the legal concept of reasonableness permits judicial creativity and hence of policy-making. Dr. Iyer (at p.1) makes the fundamental point that 'the determination of the question, what *limitations* might lawfully be imposed on the guaranteed rights has, perhaps surprisingly, but inevitably given rise to wide-ranging questions of social, political and economic consequences', and that associated with this has been 'unprecedented scope for judicial creativity'. It is stressed that there is an ideological content to the notion of reasonableness, and that although a judge may not allow his purely personal views to intrude, and may make a methodical analysis of each case, there will still in some cases remain 'honest differences between the judges on issues that can be traced to the realms of public policy and political matters' (at p.6). The Indian judiciary has indeed recognised that this is so (see citations at pp.5 and 7).

Chapter One is largely an analysis of the legislative history of Article 19, together with a comparison with the United States Supreme Court decisions concerning the 'due process' clause, and the English common law notion of reasonableness. It concludes with a brief analysis of the doctrine of the 'margin of appreciation' as developed by the European Court of Human Rights, and which also bears comparison to the notion of reasonableness.

Chapter Two considers a number of matters of general significance to the interpretation of Article 19; that is, of issues which may arise whatever the particular right or freedom that is qualified by Article 19. The issues discussed include the scope for retrospective laws, the scope for subjective discretion, and the burden of proof - that is, whether the Act under challenge should be presumed to be a reasonable restriction, or whether the party relying on the Act must justify the reasonableness of the restriction. Needless to say, those are issues that will arise in any scheme for basic rights. At the end of the chapter there is some discussion of Article 4 (equality before the law), Article 15 (prohibition on discrimination on grounds of religion, race, caste, sex and place of birth), and Article 16 (equality of opportunity in matters of public employment). Articles 15 and 16 do however permit laws for the benefit of 'backward' classes of citizens. Again, there is a direct parallel here with Section 55 of the Constitution of Papua New Guinea, which provides for the equality of citizens, but which permits 'laws for the special benefit, welfare, protection or advancement of females, children or young persons, members of underprivileged or less advanced groups or residents of less advanced areas'. Section 55 is likely to be of critical importance to the validity of provincial laws which seek to distinguish or even discriminate between residents of different provinces.

Particular mention should be made of Dr. Iyer's discussion of

the relationship between the application of the standard of reasonable restrictions and the Directive Principles of State Policy. These Directives state a number of ideals which the State should strive to attain, in particular economic objectives such as that the 'State shall...direct its policy towards securing...that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment' (Article 39(c)). At many points, there are comparisons to be made with the National Goals and Directive Principles in Papua New Guinea's Constitution: compare Article 39(c) to the third Directive Principle in the second of the National Goals, 'Equality of Participation'. Dr. Iyer records (at p.88) that the Indian Supreme Court has held that these Directive Principles are one of several factors to be taken into account in the determination of what is reasonable, but that there has been much recent criticism of an alleged failure on the part of the judiciary to accord to them sufficient weight. Dr. Iyer is not unsympathetic to giving weight to the Directive Principles, but be argues (at p.88) that:

> The primary responsibility for furthering the interests represented by the Directives lies on the Legislatures and Governments in India. It is also their responsibility to adequately articulate those interests in the laws passed by them. The present demands make it appear that somehow the initiative lies with the judiciary to articulate and overtly support the Directives in the judgments...the fact remains that initiative will always lie with the Legislatures and not with the Courts.

Thus, he argues (at pp.87-90, 261) that the *laws* should be framed so as to articulate clearly the particular Directive Principles which are in issue, and to relate the policy of the legislation to those Principles. If the laws are framed with clear objectives, '[j]udicial reaction may then be justifiably scrutinised' (at p.90). Dr. Iyer's comments make obvious sense, and are relevant to the debate in Papua New Guinea as to the manner in which the National Goals should be reflected in judicial decisions.

Chapter Three is a detailed analysis of the application by the courts of Article 19 with respect to particular freedoms. This chapter is a rich field for comparative constitutional lawyers, for many of the issues discussed arise under other Constitutions. Care must however be taken to ensure that there is strict comparability, for slight differences in wording could mean significant differences in interpretation. For example, Dr. Iyer's discussion of the freedom of speech guarantee in Article 19(1)(a) and (2) includes an analysis of the extent to which restrictions on account of the law of contempt of court are permissible. This issue arose squarely in *Re Rooney* (SC 163, 11 September 1979), where the Supreme Court refused to modify the law of criminal contempt in the light of section 46 of the Constitution (Kearney J. dissenting on a relatively minor issue). However, the Indian cases on this issue are not comparable, for Article 19(2) expressly preserves the 'existing law' (that is, at Independence) of contempt of court. Section 46 of Papua New Guinea's Constitution makes no such reservation (and, it is submitted, section 160(2), which recognises that the Supreme Court may punish for contempt against itself, does not fix the content of that law). The

freedom of speech guaranteed by section 46 is stronger than that found in comparable Commonwealth Constitutions.

Dr. Iyer concludes (at p.264) that 'many judgments...appear to be *ad hoc* decisions on matters of importance to India's policy', and that the courts have sought 'to strike a balance between the freedom guaranteed and social control'. Further, he suggests that the balancing process makes it impossible 'to adhere to any one mode of interpretation scrupulously'. This insight into the process of constitutional interpretation is quite suggestive, and may well apply to other constitutions. A particular constitutional doctrine may for a period of time yield results which are functional (in the sense that they are consonant with the predominant values or interests in the society), but over time those values and interests may change and the doctrine become dysfunctional. Older constitutional systems such as those in the United States of America and Australia provide examples of such outmoded doctrines. However, there is a tendency for doctrine to lag behind social change, which sometimes leads to judicial decisions which are inappropriate to the social situation. This is less likely if the courts and lawyers follow Dr. Iyer's suggestion (at p.264) that:

> A more thorough approach to the determination of reasonableness will entail a deeper inquiry by the Courts into the social and economic background to the statutes challenged before them and an equally sustained inquiry into the consequences of a statute's operation.