use" doctrine from the *Motion Picture Patents*[13] case to the present far-reaching doctrine is well known.[14] Less frequently noticed is the fact that the courts have, again as a matter of patent law, qualified injunctive patent relief in accordance with broad considerations of public welfare.[15] Even during the period characterized by Mr. Vaughan as one of "approval of pools that restrain trade"[16] the Supreme Court held a patent-pooling agreement illegal on public interest grounds.[17] Today, expanded procedures for discovery, the declaratory judgments statute and express statutory authorization for award of attorney fees considerably broaden the range of judicial control over undesirable patent practices.

Mr. Vaughan has performed a useful service in collecting and classifying what is now a considerable body of experience with abuses of the patent system. Indeed, his subtitle, "Legal and Economic Conflicts in American Patent History," suggests that he set forth to do no more. While the work is unfortunately marred by instances of incomplete information and inaccurate reporting, it will nevertheless be of utility within this narrow compass. As to the final resolution of the questions raised by Mr. Vaughan and others respecting the patent system itself, we must look to broader balanced studies directed to the typical rather than the atypical and to the impact of the system upon all phases of technological development.

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[13] Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917).

[14] Consult, e.g., Report of the Attorney General's National Committee to Study the Antitrust Laws, 250–54 (1955).

[15] E.g., Milwaukee v. Activated Sludge, Inc., 69 F. 2d 577 (C.A. 7th, 1934), cert. denied, 293 U.S. 576 (1934).

[16] P. 40.

[17] Pope Mfg. Co. v. Gormully, 144 U.S. 224 (1892).

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We the Judges: Studies in American and Indian Constitutional Law from Marshall to Mukherjea. By William O. Douglas. Garden City, N.Y.: Doubleday & Co., 1956. Pp. 480. $6.00.

This book represents the Tagore Law Lectures delivered by the author at the University of Calcutta in July, 1955. In 12 chapters, the author, Justice of the United States Supreme Court, surveys the main provisions of the American and the Indian constitutions—provisions relating to fundamental (civil) rights, the judiciary and their jurisdiction, judicial control, trade and commerce.

The book is of absorbing interest to the student of comparative constitu-

tional law. India and the United States both have federal constitutions, though due to their different origins each has its own peculiar features. In America the states, which would have been completely independent but for the common British yoke, knit themselves together under a federal constitution after attaining independence. It was inevitable that the residuary power was left with the states, and the power of the central government was restricted by enumeration. India had a unitary administration under the British till 1935. Powers granted to the provinces (now called the states) were the result of decentralization of administration in the course of concessions toward self-rule. The need to bring the Native States into the constitution and to allay the fears of the Muslim minority made the notion of a federal type of constitution acceptable to the Indians. But the separation of the main body of the Muslims from India by the creation of Pakistan, together with the economic and political forces prevailing at the time of the drafting of the constitution, led to the central government having the residuary power and becoming so strong that some might question the appropriateness of describing the Indian constitution as federal. Nevertheless, it cannot be denied that India has a federal constitution; India has borrowed freely from the American Constitution as well as from some others, and there are striking similarities between the American and the Indian constitutions in important spheres.

Both countries have similar important problems. Both have a multi-racial community: in the one there is the Negro problem; in the other the problem of the Schedule Castes and the Harijans (the untouchables). The eternal problem of recognizing and protecting civil rights, so essential to a democracy and for keeping the minorities safe and contented without prejudice to the right of the government to exercise necessary powers, and the problem of adjusting the rights of the states with those of the central government figure prominently in both systems. Therefore the constitutional experiment in the one is (or should be) of interest in the other. As for India, Sir Maurice Gwyer, the first Chief Justice of India, observed,[1] "The decisions of the Canadian and Australian Courts are not binding on us, and still less those of the United States, but, where they are relevant, they will always be listened to in this Court with attention and respect, as the judgments of eminent men accustomed to expound and illumine the principles of a jurisprudence similar[2] to our own; and if this Court is so fortunate as to find itself in agreement with them, it will deem its own opinion to be strengthened and confirmed." Moreover

[1] In re The Central Provinces and Berar Sale of Motor Spirit and Lubricants Taxation Act, 2 Fed. L. J. of India 6, 16 (1939).

[2] Apart from the area of family law, succession and inheritance and tenancy rights and in respect of certain minor matters, the laws of India are based on the English law, the foundation of the laws of United States, Canada and Australia.

the days when laws were regarded as nothing more than the "willed" "commands" of a territorial sovereign are long gone by; there can no longer be self-sufficiency in law any more than in the areas of trade and commerce.

In regard to due process in the American Constitution, Justice Douglas observes: "All shades of opinion demanded a Bill of Rights."[3] "A Bill of Rights was the necessary addendum to allay the fears and suspicions of those who, having known the tyranny of the government, suspected that the new one they had created might fall into habits as vicious as those of all that had preceded."[4] These words are equally descriptive of the Indian sentiment at the time of the framing of the constitution and are in sharp contrast to the scoffing of Sir Ivor Jennings,[5] to whose remarks about the enforcement of the civil rights under the American Constitution the author gives an effective and energetic answer.

Sir Ivor Jennings questions the wisdom of incorporating fundamental rights in the Indian constitution and makes the criticism that the introduction of the word "reasonable" in regard to the restrictions which the legislature may impose on the rights under the several qualifying clauses to Article 19 would let in once again judicial review which he thought was sought to be shut out under the amendment. He does not sufficiently appreciate the forces that were at work when the framing of the Indian constitution was taken up, the claims made by the Muslims and other minorities, by the Schedule Castes and the Harijans, and the need to allay their fears and suspicions, and that indeed the Cabinet Mission itself was for the introduction of fundamental rights in the constitution. The detailing of the qualifications in the enunciation of the fundamenal rights need not be gibed at. The Indian constitution merely spells out what the Justices of the Supreme Court of the United States had expressed over the decades in regard to the Bill of Rights. There appears to be nothing wrong in stating the categories of matters in respect of which a government may impose restrictions on fundamental rights: no government can function without the power to exercise reasonable restrictions in such matters. The incorporation of the word "reasonable" makes it necessary that the restrictions imposed in each individual case are reasonable, and whether they are so or not may be determined in a court. The provisions are understandable as an honest effort to indicate the spheres of the government and the need for circumscribing its powers.[6]

While dealing with fundamental rights and due process, Justice Douglas

[3] P. 257. [4] Pp. 259–60.

[5] P. 394. Consult Jennings, Some Characteristics of the Indian Constitution 49 (1953).

[6] On the whole question of fundamental rights in the Indian constitution consult the lectures delivered by Dr. Alladi Krishnaswami Aiyer, a very important member of the Drafting Committee, under the auspices of Srinivasa Sastri Memorial Institute, Madras. Consult Jennings, Some Characteristics of the Indian Constitution 47, 50 (1953).

observes that in India there is no express due process clause but that nevertheless the Indian courts have taken under judicial review cases involving gross violation of natural justice.[7] This requires explanation. First, the incorporation of fundamental rights provides a greater part of the security afforded by the due process clause. Second, the provision that the restrictions be "reasonable" is also in large measure equivalent to securing due process. The learned Justice himself notices that the Indian courts have struck down laws and regulations and set aside executive acts on the ground of unreasonableness.[8] Third, apart from anything above mentioned, the Indian courts have always taken cognizance of matters involving gross violations of natural justice, especially in regard to criminal and quasi-criminal trials and proceedings. Even in respect of departmental enquiries regarding the conduct of government servants for purposes of disciplinary action, the courts have demanded that there should be a proper presentation of the specific charges to the person concerned and that he should be given a reasonable opportunity to be heard in his defense. The observations of Lord Watson in the case of *Dillet*[9] are frequently quoted by Indian courts, and the Indian High Courts have frequently exercised their revisionary jurisdiction, under their powers of general superintendence and control over courts situated in the area of their appellate jurisdiction, in matters where there has been "some violation of principles of natural justice."[10]

Comment is required by another observation of the learned Justice—that the rights guaranteed by the American Constitution, like the prohibition of bills of attainder and impairment of obligations of contract, restrictions on search and seizure, the guarantees of confrontation and compulsory process to procure witnesses, the right to jury in civil cases, prohibition of excessive bail and cruel and unusual punishment, are not to be found in the Indian constitution.[11] The above rights are not set out because the situation for doing so did not arise. In India there has never been, and there never will be an act of attainder. There can be no punishment except under statute making provisions for the same. The Indian Penal Code has been a great improvement over the English Law of Crimes, both in regard to the categorization and definition of offenses and in regard to the manner of punishments provided. The Penal Code of India has been and is more rational. Search and seizure there can be only under the provisions of the Criminal Procedure Code of

[7] P. 286.

[8] Consult p. 28 where the author cites Harla v. Rajasthan, 14 Sup. Ct. Journal 735 (1951), with obvious satisfaction.

[9] In re Dillet, 12 App. Cas. 459 (1887).

[10] Ibid., at 467.

[11] See footnotes on pp. 260, 300.

India or an express enactment. Similarly, summoning of witnesses and conduct of trials and proceedings have all to be under specific and express enactments and in accordance with their provisions. As regards jury trials, India never had jury trial in civil cases. Only in certain classes of criminal cases was the trial to be with a jury. Indian feeling has never been strong that there should be a jury trial in all civil and criminal cases. On the whole Indians have been highly satisfied with the manner of administration of justice by the Indian courts.

Absence of a dual system of courts in India, a feature strongly distinguishing the Indian from the American system, is noticed in the book *in extenso*. That the Supreme Court of India exercises jurisdiction in matters of private law applicable to the citizen of a state—in matters of heirship under the Panjab Customary Law[12] and in the matter of the interpretation of the provisions of the Criminal Procedure Code[13]—appears to the author as very noteworthy,[14] but seems very ordinary to an Indian. Not only is there in India a single judiciary but also a single legal system. At the beginning of the nineteenth century when the influence of the writings of Bentham was at its highest, Macaulay called for the making of laws for India in the form of codes or enactments. Successive law commissions consisting of illustrious men of the law of Britain drafted several bills based on the English law but shorn of its technicalities, and these bills became in due course laws of India. Today in matters relating to crimes, evidence, succession, probate and administration (except where Hindu or Muslim law applies), contracts, sale of goods, partnership, agency, companies, negotiable instruments, criminal and civil procedure, trusts, etc., the Indian law is based on enactments passed by the central legislature and on the English law. The laws of the provinces (these became the states under the new constitution) relate mostly to land law, tenantry rights, local government and other purely local matters.

Before 1935 India was a unitary state. The Governor in Council of the Province was responsible to the Governor-General of India in Council, and he to the Secretary of State for India in Council who in turn owed his responsibility only to the British Parliament. Then the highest courts in the country were the High Courts. Their judges were appointed by His Majesty the British King. Appeals from the High Courts lay to the Privy Council, either under the provisions of the procedure codes or by special leave. It was soon after 1935, when the British enacted a kind of federal constitution for India, that a Federal Court for India was constituted. This functioned as a constitutional court since the distribution of legislative and other powers be-

[12] Singh v. Singh, 17 S. Ct. J. 562 (1954).

[13] Hussein v. Bombay, 16 S. Ct. J. 338 (1953).

[14] See pp. 109, 110.

tween the central government and the provinces under that act called for interpretation of the constitution and consideration of the validity of provincial enactments. The desire of Sir Maurice Gwyer, the draftsman of the 1935 Act and the first Chief Justice of India, to see the jurisdiction of the Federal Court of India enlarged remained unfulfilled until in 1948, after the passing of the Indian Independence Act, an enactment of the Indian Legislature abolished appeals to the Privy Council, and the Federal Court of India became the highest court of appeal. With the coming in of the new constitution the Federal Court became the Supreme Court of the country. Therefore the single judiciary in India. In this connection it may be noticed that not only the constitution and jurisdiction of the Supreme Court but also those of the High Courts are part of the new constitution, that judges of the High Courts (which are established for each state) are appointed by the President of India,[15] and that a judge of the High Court may be transferred from one state to another by the President in consultation with the Chief Justice of India.[16] Thus there is an effective single judiciary.

Having regard to this system of single judiciary and all-India laws, it is clear that there is nothing extraordinary in the Supreme Court of India entertaining appeals from the High Courts in each state and exercising jurisdiction in all matters of law, central or state, private or public. India, therefore, had no need for "diversity jurisdiction," and the problem of developing or not developing a "federal common law" did not arise there. Nor did India have to face the problem of the federal courts enjoining the state courts.

The book discusses legislative prerogatives. While the legislators in India have the same privileges as members of the House of Commons in England, subject to such modifications thereof as the Indian legislature may make,[17] and the Indian legislatures have power to constitute enquiry committees, never in the history of India have there been investigating committees of the legislature going into the conduct of individuals in the manner of congressional investigating committees. Often the Indian Legislature has appointed committees to enquire into and report on public matters—industry and trade in specified areas, taxation and finance, education, public health, social reform legislation—and the committees have held public sittings and taken evidence; but these constitute different matters. The conduct of a government official will be enquired into if need be by a departmental committee, or by an enquiry committee set up under the law relating thereto, or by a court in appropriate cases. The conduct of a private citizen will be investigated by the courts in appropriate cases. This does not mean that the Indian Legislature does not exercise jurisdiction in respect of acts which amount to contempt of its authority, but this again is a different matter. The reason for the differ-

[15] Indian Const. Art. 217.

[16] Ibid., at Art. 222.

[17] Ibid., at Art. 105.

ence between America and India in these matters lies in the difference in their respective constitutional provisions. The presidential form of government in the United States is responsible for the large prevalence of congressional investigations. In India the right of putting questions and getting them answered on the floor of the house, the right of moving motions of adjournment and resolutions, and above all the right to defeat a government by a vote of nonconfidence or by outvoting the government on a major issue constitute sufficient checks upon the government.

The title of the book is apt. Throughout it deals with judicial interpretation of the main provisions of the constitution in the two countries and the influence of the judges in the development of their respective systems. The author justly points out: "Constitutions can say that commerce must be free; but over the years the courts will be largely the ones who will implement these provisions. That at least has been the American experience. And the performance of the judiciary in that regard has, on the whole, produced a highly commendable record."[18] The trends show that the Indian experience will be no different. That the Indian constitution embodies and that the judges in India administer fearlessly the great principles of democracy, and that the people of India have abundant faith in both—and in the traditions of freedom—are brought out by the author. He writes: "The great postulate of democracy is confidence in the common sense of the people and in their maturity of judgment, even on great issues—once they know the facts. This is the tradition which India is also building. . . . [E]ven illiterate masses can cast their votes with intelligence, once they are informed. No more brilliant demonstration of that thesis was ever made in the history of the world than in India's general elections of 1951."[19] Then he cites with approval an extract from the judgment of the late Chief Justice of India in *Singh v. Pepsu*,[20] in which it was held that issuing of pamphlets attacking a high judicial officer can be no ground for preventive detention.

Nowhere is to be found any violent criticism of the provisions of the constitution, nor even in respect of the recent amendment of Article 31 which has evoked adverse criticism among some Americans. All that the author says is: "What effect the 1955 Amendment will have remains to be seen. If the Parliament appropriate private property for only nominal compensation, the spectre of confiscation would have entered India, contrary to the teachings of her outstanding jurists."[21] The Justice is not unaware that the amendment was in pursuance of agrarian reform and that there is still room for the view that the question of public purpose is justiciable.[22] It is scarcely necessary to say that there is no real danger of the spectre referred to by the judge haunting India.

[18] P. 255.
[19] P. 320.
[20] 41 A.I.R., S. Ct. 271 (1954).
[21] P. 297.
[22] Pp. 295, 296.

Some of the Indian judgments appear to bewilder the author. He refers to the decision in *Bombay v. Appa*,[23] in which the Bombay High Court refused to declare an act forbidding polygamy among the Hindus invalid, because the act did not apply to the other communities. A closer look at the state of Indian law and of personal laws especially will clear the position. The enactment modified the rule of Hindu law previously obtaining, according to which a Hindu could legally have any number of wives. A Muslim can have only four wives at a time. Does this mean there is discrimination between the Hindus and the Muslims? The enactment in question is in pursuance of *reform* of Hindu law—a law by which the Hindu wishes to be governed and not a general enactment which exempts Muslims. It is clear therefore that such beneficial legislation cannot be struck down because Muslim law of marriage remains unaltered.

The book is written with sympathy and understanding and with that restraint and dignity which mark the high judicial office the author occupies.

There is no doubt that the book will be read with absorbing interest and appreciation in India; and there is every reason why it should have a similar reception in America. It is an excellent vindication of the need for a comparative study of constitutions, especially of the American and Indian.

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[23] 39 A.I.R. 84 (1952).

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