

COMPARATIVE FEDERALISM (1987). By Durga Das Basu. Prentice-Hall of India Pvt. Ltd., New Delhi. Pp. xxv+642. Price Rs. 200.

THE DIFFERENCE between a Unitary and Federal constitution lies in the concentration of all legislative power in the Central legislature in the former and in the distribution of such power between the Central and the state legislatures in the latter. But within the category of Federal state there are two kinds of federations. One is having a dual citizenship, *i.e.*, citizenship of the country as also of a state. The other is a single citizenship for the whole country and no separate one for any state. While India by its Constitution has opted for a single citizenship for the whole country, there are certain problems which prevent its straightforward application throughout the country. The problem is of a citizen of the country having equal rights in all the states.

In the book<sup>1</sup> under review Basu has highlighted the peculiar case of the State of Jammu and Kashmir (J & K) for which a special provision is made in the Constitution in article 370.<sup>2</sup> Herein lies the important difference between J & K and other states. J & K as also other states ruled by Indian princes acceded to India by the Instruments of Accession. But while the terms of accession have been preserved by article 370 of the Constitution in case of J & K, in case of all other states the original terms of their instruments of accession have been superseded by the application of the Constitution of India to them. Hence no instrument of accession executed by a ruler of an Indian state has now any validity except that of J & K. This explains the special relationship between that state and India. It has resulted in the promulgation of the Constitution (Application to Jammu and Kashmir) Order 1954 which modifies the Constitution of India by amending several of its provisions in their application to the State of J & K and by excluding some and leaving a few to apply to it without modification.

One special provision has led to a recent controversy which has been referred to the Supreme Court for opinion under article 143 of the Constitution. This is such a special feature of the Indian Federation that the subject of comparative federalism can hardly contemplate it. This may be the reason why Basu has not dealt with this particular controversy. Nevertheless, this book is meant more for India than other federations and

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1 Durga Das Basu, *Comparative Federalism* (1987).

2. The substance of the article can be stated as follows: Notwithstanding anything in the Constitution the power of Parliament to make laws for the State of Jammu and Kashmir is limited only to those matters in the Union list and the Concurrent List which, in consultation with the government of the state, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the state to the dominion of India.

therefore it would be appropriate to add some more discussion to this subject.

The only federation in which there is a semblance of this problem is Canada. In the Constitution of Canada a constituent state has a power, concurrent with the power of the federation and subordinate to it, to legislate about "immigration into the province" under article 75 of the Canadian Constitution Act 1867. The exercise of this power may affect a Canadian citizen in respect of "property and civil right in the province" in view of section 92 (13).

But the State of J & K has far greater powers. While under article 19 (1) (d) of the Constitution of India every citizen has the right to move freely throughout the territory of India and, under article 19 (1) (e), has the right to reside and settle in any part of the territory, this right alongwith other rights guaranteed by other clauses of article 19 is made subject to "such restrictions as the appropriate legislature deems reasonable" in applying article 19 to the State of J & K for a period of 25 years from the commencement of the Order of 1954. The word "twenty-five" is an extension of the original words "ten" and "twenty" showing that article 370 itself is a transitional provision in the Constitution and it was not the intention to prolong this special relationship between India and J & K too long. Once the extension regarding the limitations on the application of article 19 by state legislation is stopped, article 19 as a whole will apply to that state.

The Constitution of J&K exists separately from the Constitution of India. It has to be read with the latter as applied to J&K by the Order of 1954. A combined reading leads to the following peculiar constitutional position described by Basu. He observes:<sup>3</sup>

(i) The people of J&K are citizens of India at the the commencement of the Constituton if they satisfy the conditions laid down in articles 5 or 6.

(ii) Notwithstanding anything in article 7 of the Constitution of India, however, a permanent resident of J&K who migrates to Pakistan but returns under a valid term for resettlement or permanent return to J&K will be a citizen of India.

(iii) It is left to J&K to define the classes of persons who are to be permanent residents of J&K. This has been done by article 35A of the Constitution of India, which, (a) states the laws with respect to permanent residents and their rights; and (b) gives the legislative power to make such laws to the State of J&K. These laws are to define the classes of persons who shall be the permanent residents of J&K and to confer on them special rights and privileges in respect of, (i) employment under the state government; (ii) acquisition of immovable property in the state; (iii) settlement in the state; or (iv) right to scholarship and such other form of aid as the state government

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3. *Supra* note 1 at 214-16.

may provide. This special provision in the Constitution is to stand notwithstanding anything contained therein.

It may be pointed out that the factor of unequal development among the other states in India has encouraged some of the backward states to claim some such rights for their residents also. This has led to the addition of some articles in the Constitution<sup>4</sup> entitled "Temporary, transitional and special provisions" in which article 370 is contained. Article 371 and articles 371A to 371F make special provisions in relation to certain other states of India. Articles 371G, 371H make special provisions in relation to certain other states of India. Articles 371G, 371H and 371I have been added by the 53rd,<sup>5</sup> 55th,<sup>6</sup> and 57th<sup>7</sup> Amendments to the Constitution in respect of the States of Mizoram, Arunachal Pradesh and Goa, respectively, in 1986 and 1987. This will show that the desire to have some special rights exists in certain states due to their backwardness and other peculiar problems, which desire in the State of J&K has led to a full-fledged separate Constitution for that state.

The common features of the special rights are those rights and privileges which have been reserved for the State of J&K legislature to confer on their permanent residents. The feeling that "sons of the soil" of a particular state should not be surpassed in their rights by other citizens of India from other states exists in a latent form in certain states. In the State of Madhya Pradesh admission to a medical college was made subject to the payment of heavy capitation fees for students who were not "bona fide residents" of that state while those who were, got exemption from its payment. In a majority judgment the Supreme Court in *Joshi v. State of M.P.*<sup>8</sup> held that the provision was valid.

It was explained that the rule was not contrary to article 15(1) of the Constitution which prohibits discrimination on the ground of place of birth. There is thus a latent problem in an incipient form in certain states in India, which has assumed a blatant form in the State of J&K. It is to be borne in mind, however, that it is not any feeling of separatism which makes a state try to protect its *bona fide* residents against competition from people coming in that state from other parts of India. On the other hand, it is a fact that people of certain states are backward as compared to those of the more advanced states. There is inequality in fact between the backward and advanced states. According to article 14 of the Constitution there has to be equality before law and equal protection of laws.

The question is whether the principle of article 14 is to be extended to the relationship among the states also. Reasonable clarification does not contravene the principle of equality because just as equals have to be treated

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4. Part XXI.

5. The Constitution (Fifty-Third Amendment) Act 1986.

6. The Constitution (Fifty-Fifth Amendment) Act 1986.

7. The Constitution (Fifty-Seventh Amendment) Act 1987

8. A.I.R. 1955 S.C. 334.

equally unequals have also to be treated unequally. In this larger sense, to some extent, even the special relationship of J&K may be understood more sympathetically.

The problem of the Indian Constitution in this respect is how best the inequalities among different states in India are presently reconciled by such expedients as exist in articles 370 and 371. But the ultimate goal must be to eliminate the root cause of the inequality. Once the backwardness of certain states is removed and all the states become equally advanced the need for such special protection to the residents of such states will disappear. In the meanwhile, it would be interesting to see if the challenge to any legislation by a state reserving certain rights to its *bona fide* residents is considered in regard to the constitutionality of such a provision in the light of article 14 of the Constitution. Such consideration would be an advance over the decision in *Joshi* by the Supreme Court.

Once this disparity of socio-economic conditions among the different states is removed, a clearer vision will be available for consideration of the basic question between the federation and the states regarding the distribution of legislative and administrative powers. There is a demand from the states for having more sources of revenue than are presently allotted to them under the existing distribution of legislative powers. This can be considered in a healthy atmosphere and appropriate expansion of the financial resources of the state can be made, once the unhealthy element of claims to backwardness existing in certain states is eliminated by economic advancement of those states.

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