BOOK REVIEWS

COMPARATIVE CONSTITUTIONAL LAW (1984). By Durga Das Basu. Prentice-Hall of India Private Limited, New Delhi. pp. XXX+528. Price Rs. 150.

I Importance of Comparative Constitutional Law

COMPARATIVE LAW as a principle is of course as old as comparative religion, comparative philosophy or comparative linguistic *etc.* But to acknowledge a principle, as Gutteridge did in his *Comparative Law* long ago, is one thing and to put the principle to use is another. If a choice is made among the different comparative studies from the viewpoint of the fundamental nature and the present and the future importance of the study, at any rate from the point of view of India, perhaps the comparative constitutional law would emerge as the most important. This was realised by the framers of the Constitution of India themselves. The Legal Adviser of the Constituent Assembly, B.N. Rau, as a pointer to the constitution making collected constitutional precedents and other papers some of which published in the *Constitution of India in the Making* offered provisions of different constitutions of the world which could be studied so that the best features of these constitutions would be embodied in the Constitution of India.

Indian Constitution itself is a monument to the study of comparative constitutional law and is a practical proof of the advantages to be derived from it. The unique combination of a parliamentary system of government and a written constitution which is supreme and, therefore, the necessity of judicial review and several allied features are nothing to comparative constitutional law. Durga Das Basu was the first and almost the only jurist to recognise that the uniqueness of the Indian Constitution lies in its comparative basis. He was ahead of everybodyelse in starting this movement for the study of constitutional law. It was a pleasant surprise to receive his commentary on the Constitution of India almost along with the coming into force of the Constitution. Further, the amount of material which is put into the very first edition of his *Constitution of India* showed the future lines of development of the Indian Constitutional law by reference to the developments in the other written constitutions of the world by judicial decisions of the courts of the respective countries.

In the history of the world, the U.S. Constitution which is over 200 years old established a unique precedent. The foresight of the founders of the American Constitution in firmly establishing and protecting from all interference the basic human values and fundamental rights in the Constitution as of everlasting importance is justified by the success of the Constitution and of the nation which framed it. Both of them have during the course of 200 years attained the precision of primacy in the world. It is this success which persuaded almost about 50 countries of the

modern world to adopt written constitutions as supreme law after the Second World War. India was thus riding the crust of this wave. So was Basu. By the enormous sweep of his study and research in comparative constitutional law he went on improving his commentary on the constitution from edition to edition and consequently enlarging its volume. The stage was reached when comparative constitutional law has to be treated as a study in itself. Since comparative constitutional law underlies the development of the constitutional law not only of India but also of those countries which have adopted written constitutions on the American model, the principles of comparative constitutional law have to be treated as underlying the different divisions of the national constitutional law of any country. In this respect India enjoys perhaps the greatest advantage. *Firstly*, the common law system based on the rule of law and the independence of the judiciary already furnishes a fertile field for the study of comparative law. *Secondly*, even if England by tradition relied on the basic first principle such as the sovereignty of Parliament and the rule of law which perhaps were themselves regarded as the Constitution of England by Dicey and others, the supremacy of the rule of law served the purpose of a written constitution. After all a written constitution is the only means to achieve the endurance of the permanent values of law and life. But even England could not stand out of the world-wide development of the comparative constitutional law basing itself on the written constitution. When U.K. became a member of the European Community of States, it became bound by the Treaty of Rome and the other institutions which enforced a uniformity of certain legal principles to hold the community together. Seers like Lord Denning in his judicial decisions, Lord Scarman in his Hamlyn Lecture *The English Law—A New Dimension and H. W. R. Wade*[1] have realised that even U.K. is now subject to the system of constitutional and limited government. The very fact that the European Court of Human Rights has the final say on the enforcement of human rights in the principal states of the European community has meant that its decision would prevail over those of the decisions of the House of Lords in England and this has actually happened in such decisions as *Attorney-General* v. *Times Newspapers Ltd.*[1a] and *R. v. Henn*[2]. This shows the overriding importance of comparative constitutional law which has taken within its sweep the traditional U.K. system of an unwritten constitution upheld by common law and judicial decisions.

In India Basu has been the pioneer of the study of comparative constitutional law and its developer. The present state of the development is the undertaking of a series of 10 volumes which would constitute the full contents of comparative constitutional law.[3] The volumes in the series are (1) *Comparative Constitutional Law*, (2) *Comparative Federalism—General*

1. See generally H.W.R. Wade, *Administrative Law* (4th ed. 1977). Wade & Phillips, *Constitutional Law* (8th ed. 1970).

1*a*. [1973] 3 All. E.R. 54 (H.L.).

2. [1980] 2 All. E.R. 166 (H.L.).

3. Durga Das Basu, *Comparative Constitutional Law* (1984).

Principles, (3) *Comparative Federalism—Particular Powers*, (4) *Human Rights—in general*, (5) *Human Rights—in particular*, (6) *Judicial Review*, (7) *Amendment of Written Constitution*, (8) *The Executive*, (9) *The Legislature* and (10) *The Judiciary*.

We are fortunate that Basu has been able to give us the first two volumes of the series, namely, the *Comparative Constitutional Law* and *Comparative Federalism-General Principles*. What appears to be an enormous undertaking for a single author has been made possible because of his dedication and learning for the last 40 years or more. With constant study and its refinement almost everyday of his life, the author has so much imbibed the issues, case law, development and trends in the field of comparative constitutional law which itself is so vast that he had no difficulty in systematically dealing with each part of this study and that too with a felicity which comes only after the vast knowledge is fully imbibed and digested. The result is that what appears to be a daunting and a difficult subject has received an exposition which is completely methodical, clear, exhaustive and yet simple to read and understand. In the opinion of the reviewer these are the hall marks of a truly good book. What is more is that for the students of law, politics and indeed for the students of life and the growth of the nation, nothing is more important than the constitutional law of the country. A true understanding of the constitution of a country requires an insight into the manner of its development either by legislation or by judicial decisions or by administrative pursuits. In shaping these formative forces, no nation can stand alone. What is done in one country affects not only the thinking but also international interests in other countries. Therefore, a really fruitful study of constitutional law necessarily involves a knowledge of how its various features are developing in other countries following the system of written constitution.

The reason why the study of constitutional law is not complete without a comparative study is this. Constitution and its development affects the life of the individual in every respect. Life is constantly growing and diversifying. However, new development in the affairs of mankind calls for adjustment and a corresponding development in constitutional law. Much of this development is conscious. For, the needs of the people and the solution of their problems have to be met. That is real justice. Law, therefore, must endeavour to reach justice all the time. The quest for justice is a world-wide phenomenon. It is influenced in each country by the knowledge of developments in other countries. No one can understand a problem of constitutional law fully unless he sees in the perspective of the developments regarding such a problem in other countries. It is by this process of study, comparison adaptation to the individual needs of a particular country that comparative constitutional law develops and becomes an instrument of mutual help.

In this first volume of the series the author has selected the basic principles of comparative constitutional law which underlie its different departments. These principles will have to be borne in mind later on when the

subsequent volumes deal with two different parts of constitutional law. These are : (*i*) the doctrine of the basic features of the Constitution which embody the basic values embodied in the Constitution. In *Keshavananda Bharati* v. *State of Kerala*[4] the largest ever Bench of the Supreme Court consisting of 13 judges decided by a majority of 12 against 1 that these basic features form the identity of the Constitution. An amendment of the Constitution under article 368 can change but cannot abolish or destroy the identity of the Constitution. Thus the development of the doctrine gave the judiciary the final say as to how much change in the Constitution can be made by an amendment. Beyond that limit the amendment would be unconstitutional because it would amount to destroying the identity of the Constitution.

(*ii*) The doctrine of political question by which the courts abstain from deciding controversies which are essentially political and not justifiable in a court of law;

(*iii*) the doctrine of separation of powers;

(*iv*) rule of law;

(*v*) Prospective overruling;

(*vi*) due process;

(*vii*) right to human dignity and privacy and

(*vii*) constitutionality of capital punishment.

It will be obvious that none of these basic principles are phrased in the language of the Constitution. A discussion of these principles is thus not a commentary on the language of the Constitution. On the contrary, these principles are regarded as basic, more as a result of judicial interpretation of the spirit of the Constitution rather than its letter. Basu quotes Chief Justice Marshall in *Sturges* v. *Crowninshield*[5] saying that "[t]he spirit of an instrument, especially of a Constitution, is to be respected not less than its letter, yet the *spirit is to be collected chiefly from its words.*"[6] Indeed, the difficulty of keeping to the letter of the Constitution made another scholar"[7] to call this approach to the development of constitutional law, "constitutional common law" drawing inspiration from but not required by the Constitution.

Basu also has the same cautious approach to the "rule of law" in the interpretation of the Constitution. He rightly observes and quotes comparative constitutional law to show that in India we had adopted a written Constitution from which alone the rule of law has to be spelt out.[8] But here again the adoption of the concept becomes necessary for the judges when the ordinary meaning of the constitution does not suffice to meet the ends of justice. For instance, the high courts have the jurisdiction to entertain writ

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4. A.I.R. 1971 S.C. 1461.

5. 17 U.S. 122 (1819).

6. *Ibid.* quoted in *supra* note 3 at 210.

7. Henry P. Monaghan, "Foreword: Constitutional Common Law", 89 *Harv. Law Rev.* (1975-76).

8. *Supra* note 3 at 376.

petitions under article 226 and to dismiss them *in limine*. The Constitution does not say that reasons must be given by the court like any other judicial tribunal for its decision even if they are dismissals *in limine*. But the Supreme Court has maintained that reasons must be given by the high courts even in dismissals *in limine* because the Supreme Court in granting special leave to appeal under article 136 must know the reasons for the decisions of the high courts which are appealed against. Otherwise such appeals would amount to original petitions to entertain which the Supreme Court has no jurisdiction.[9] Similarly, in exercising the powers of judicial review against administrative and quasi-judicial decisions for violation of the rules of natural justice the Supreme Court added to the existing rules of natural justice the requirement that reasons must be given for a decision which adversely affects the right of any person[10] against state power. The study of comparative constitutional law would be jejune and lifeless if it were to consist of merely comparing and contrasting the language used in the different constitutions for achieving the same objects. The study becomes stimulating because the ideas embodied in the basic concepts of these constitutions are also interment and there is always the possibility of a clash of difference of views between different courts or judges of the same courts. For instance, in interpreting the right to life, the U.S. Supreme Court has been liberal in upholding the right of abortion for every woman while the German Constitutional Court has been restrictive of this right—apparently because different ideologies motivated these different decisions.

II Is a judicial decision state action ?

Another principle which is of interest to comparative constitutional law is whether the judiciary is "state" and whether a judicial decision would infringe a fundamental right guaranteed by a constitution ?

Article 12 of the Constitution of India does not include the judiciary in the definition of "state" and hence state action which can be challenged for infringement of a fundamental right would not include a judicial decision. However, the U.S. Supreme Court had to take a wider view of state action to prevent indirect infringement of fundamental rights by private action securing the same goal as would have been secured by state action. Therefore, in *Shelley* v. *Kraemer*[11] and other decisions the concept of state action was widened by the U.S. Supreme Court so that when private action is upheld by a judicial decision an infringement of a fundamental right would take place and such a decision would be set aside on that ground. Basu has been of the view that judiciary is not excluded from the definition of "state"

9. See for *e.g.*, *M/s Filterco* v. *Commissioner of Sales-Tax*, (1986) 2 S.C.C. 103 and *Vasudeo Vishwanath Saraf* v. *New Education Institute*, A.I.R. 1986 S.C. 2105.

10. See *Siemens Engineering & Manufacturing Co.* v. *Union of India*, A.I.R. 1976 S.C. 1785.

11. 334 U.S. 1 (1948).

in article 12. In this respect he is on the side of justice necessary to safeguard the future development of constitutional law and observations of certain judges like Hidayatulla J. and Mathew J. express the same view.

In *Maharaj* v. *Attorney General of Trinidad and Tobago*[12] the Privy Council held speaking through Lord Diplock that the constitutional right to have a redress against deprivation of fundamental freedom of personal liberty could be vindicated by grant of damages against the State for denial of natural justice and deprivation of personal liberty of a lawyer by the order of a judge. But in *Chokolingo* v. *Attorney General of Trinidad and Tobago*[13] the same Lord Diplock speaking again for the Privy Council was not prepared to go beyond indicating that a judicial decision could be challenged on the ground of contravention of S.1 (*a*) of the Constitutional Order if it violated the process of law by violating principles of natural justice. The effect of the previous decision was thus restricted. The moral to be drawn is this. If the objectives of a constitution are sought to be perverted by private action upheld by a judicial decision then the principle that what cannot be done directly cannot be done indirectly would apply and such private action would also be contrary to the Constitution. It is on this basis that the concept of state action has been widened in India to include acts of statutory corporations and government companies.[14]

III Revolutionary legality

Can comparative constitutional law suggest the defence of a constitution against its subversion by a military coup or a revolution. The thoery is stated by Hans Kelsen[15] as follows:

The state and its legal order remain the same only as long as the Constitution is intact or changed according to its own provisions. It is to take advantage of this theory that the Supreme Court of India has prevented what it thought would be a subversion of the Constitution by propounding the doctrine of the basic features of the Constitution which cannot be amended because such amendment would be outside the scope of the Constitution[16]. But other countries were not so fortunate. The seizure of power by the army and subversion of the Constitution took place in certain countries and had to be acknowledged as legal giving rise to the so-called principle of revolutionary legality.[17] Tribunals or the Supreme Courts of some countries had to endorse the legality of such unconstitutional actions.[18]

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12. [1978] 2 All. E.R. 670 (P.C.).

13. [1981] 1 All. E.R. 244 (P.C.).

14. See, *Central Inland Water Transport Corporation* v. *B.N. Ganguly*, A.I.R. 1986 S.C. 1571.

15. *General Theory of Law and State* 368 (1946) and *Pure Theory of Law* 209 (1967).

16. See *Keshavananda Bharati* v. *State of Kerala*, *supra* note 4.

17. See J.M. Eekelaar, *Oxford Essays on Jurisprudence* 22(1973).

18. Pakistan—in *State* v. *Dosso*, (1959) 1 *Pakistan Law Reports* 849; Uganda—in *Uganda* v. *Commissioner of Prisons ex-parte Matovu* (1966) East African Reports 514; Rhodesia—in *Madzimbamuto* v. *Lardner-Burke* (1968) 2 S.A. 284.

The Judicial Committee of the Privy Council in deciding the appeal against the Rhodesian decision did not recognise the legality of the subversion of the Constitution only because it thought that the violated constitutional order might yet respond to the artificial respiration then being applied to it by the British Government which refused to recognise the unilateral declation of dependence in Rhodesia. But otherwise the Privy Council was not prepared to disapprove the doctrine which would allow legitimacy to be conferred upon the usurpers

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