COMPARATIVE FEDERALISM. By DURGA DAS BASU. (1st Edition) [New Delhi: Prentice-Hall of India Private Ltd. 1987. xxv + 642 pp. Hardcover: Rs 200.00]

DURGA Das Basu is a legend in legal literature. He has been a prolific writer. His *mangum opus, The Commentary on the Constitution of India,* which is now running into the silver jubilee edition, remains one of the most authoritative expositions of the Indian Constitution, and provides a useful study even when examining the constitutional experience in Australia, Canada, Federal Republic of Germany, Switzerland, United Kingdom, United States, and USSR. He has been a judge of the Calcutta High Court, a member of the Indian Law Commission, Dean of the Calcutta University Law Faculty, and above all a Tagore Law Professor. Because of his legal acumen one peruses his writings with great expectations of erudition and perception. Basu's *Comparative Federalism* fairly satisfies such expectations of an ardent reader.

The book is the second in a series often volumes on comparative constitutional jurisprudence. The first deals with *Comparative Constitutional Law.*

The book consists of all the attributes expected of a standard publication on federalism by an experienced author. It is divided into three major parts: (1) general principles, (2) union-state relations, and (3) relations between states, *inter se.* The first part deals with the general concepts, territory, citizenship, distribution of legislative powers, and the impact of the four types of emergency envisaged in the Indian Constitution, namely external, internal, breakdown of constitutional machinery in a state, and financial. In the second part, safeguards and limitations on central and provincial powers, union control of states, and institutions for dispute resolution are discussed. The third part examines inter-state comity, commerce and cooperation. Models of comparison are the constitutions of Australia, Canada, Federal Republic of Germany, India, Malaysia, Nigeria, Switzerland, and USA. Emphasis, however, is on the Indian situation. In the chapter on origins, federalism is rationalised as an administrative expediency. While federations have come into existence traditionally through centripetal forces as in the United States or centrifugal forces as in the case of India, basically for administrative convenience, in the post-colonial period federalism has been a technique of governing pluralistic societies though not always with admirable success. The book does not address the more contemporaneous issues like pluralistic societies.

What are the characteristics of a federation? According to the author while the political scientists emphasise the autonomy of constituent units, the legal test is whether "constitutional division of powers is *justiciable,"* so that a lawyer "can take a case to the Court if the division of power is transgressed by a regional Government or by the general Government."[2] This test, however, will not be functional if the constitution itself envisages the circumstances for transgressions. For example, the Parliament of India may encroach upon the reserved State legislative field: (1) in an emergency,[3] (2) for implementing treaty obligations,[4] (3) when the upper house of the Parliament resolves by a vote of not less than two thirds of members present and voting that it is expedient in national interest,[5] and (4) when two or more states request the Parliament to enact the law for them.[6] Because of such broad powers the scope of justiciability is very limited.[7] The test propounded by the author may lead to unrealistic conclusions.

The broad features of a federal constitution, based on the above "legal test" according to the author are: (1) a written constitution, (2) dual government, (3) distribution of "governmental powers", (4) non-unilateral amendment of the distribution of power, and (5) guarding of the distribution of powers by the judiuciary. These are essentially the features enunciated by Dicey.[8]

[1] Underscoring in the text.
[2] At p. 13.
[3] Article 250, Indian Constitution.
[4] Article 253, *ibid.*
[5] Article 249, *ibid.*
[6] Article 252, *ibid.*
[7] See the decision of the Supreme Court of India in *State of West Bengal* v. *Union of India,* A.I.R. [1963] S.C. 1241.
[8] A. V. Dicey, *Introduction to the Law of the Constitution* (10th ed.) 1982 reprint:— "... the essential characteristics of federalism — the supremacy of the constitution — the distribution of powers — and the authority of the judiciary — reappear, though no doubt with modifications, in every true federal state." at p. 165.

Territorial integrity of the federation as well as the constitutent units is an essential ingredient of a federation. Chief Justice Chase had described the American federation as an "indestructible union composed of indestructible States."[9] Fissiparous forces are the very anathema of federalism. Supremacy of a federal constitution warrants the enforcement of the unity of the polity. The enforcement of national cohesion in America needed, in the picturesque words of Dicey, "the thunder of the civil war"[10] that occured during 1861-1865. In the context of such a territorial integrity, the book provides an excellent analysis of the current secessionist movement in the Punjab for carving out a new Sikh nation of Khalistan. The author argues that as there is no provision in the Indian Constitution for secession, the "union" provided in Article 1 cannot be dissolved "in whole or part by secession", save by an amendment of the Constitution. As some of the judges of the Supreme Court had opined in the case of *Kesavananda Bharati v. State of Kerala*[11] that the federal system was one of the "basic features" of the constitution, the author concludes that "if this theory stands, secession cannot be effected by any thing short of the consent of all the States or by a revolution or civil war."[12]

National aspirations and political realities are different from legal issues. It is now a matter of history that India was trifurcated. While there may be no rational justification for further Balkanization of an already amputated nation, arguments founded upon constitutional constraints appear to be untenable. According to Article 1 of the Indian Constitution, India "shall be a Union of States." The Indian territory comprises the territories of (a) the States, (b) the Union, and (b) those that may be acquired. The First Schedule defines the territories of the States and the Union. Parliament may, however, by law create new States, eliminate an existing State, alter the boundaries and names of existing States, or redistribute their territories.[13] Such a law is not an amendment to the Constitution even though it involves an amendment to the First Schedule.[14] The First Schedule has been amended several times regarding the eliminating or creating of States.

Issues relating to cession of territory were examined by the Supreme Court in the *Berubari Advisory Opinion.*[15] The Supreme Court expressed the view that the power to acquire and cede territory was a sovereign power which existed outside the Indian Constitution. That case arose out of the Indo-Pakistan Agreement of 1958 whereby parts of Indian territory in the Berubari union were to be transferred to Pakistan and certain enclaves in Cooch-Bihar were to be exchanged. A unanimous bench of eight judges held that "one of the attributes of sovereignty is the power to cede parts of national territory if necessary,"[16] and that cession could be effected by a constitutional amendment. As a result of this opinion, the Ninth Amendment was enacted to implement the cession.

[9] *Texas* v. *White.* [1869] 7 Wall. 700 at p. 720.
[10] Dicey, *supra,* n.8 at p. 149.
[11] A.l.R. [1973] S.C. 1461.
[12] At p. 114.
[13] Article 3, Indian Constitution.
[14] Article 4(2). *ibid.*
[15] A.l.R. [1960] S.C. 845.
[16] At p. 856. para. 29.

The Second Berubari Case[17] related to the transfer of the Chilhati village consisting of some 512 acres of land. The village was not a part of the Indo-Pakistan Agreement or the 9th Amendment. The Supreme Court held that the area was allotted to Pakistan by the Radcliffe Award, dividing the Indo-Pakistan boundary at the time of partition, and that "through inadvertence" it was not delivered to Pakistan. Consequently, what was transferred was an area belonging to Pakistan, and this did not involve any cession. This was also the position in *Maganbhai Patel* v. *Union of India.*[18] The boundary dispute between India and Pakistan in the Rann of Kutch that led to an armed conflict was finally resolved by referring it to an international tribunal. The tribunal upheld Pakistan's claims to three sectors in the Rann and the Government of India sought to transfer those sectors. The Supreme Court held that a mere adjustment of boundaries can be achieved by an executive act.

These cases, apart from the soundness of their reasoning or conclusion, declare the existing constitutional position that any part of the Indian territory may be ceded within the constitutional infrastructure by an amendment.

Undoubtedly, some of the judges of the Supreme Court in *Maganbhai Patel* had opined that the federal system is a "basic feature" of the Indian Constitution. A critical evaluation of the "basic features" theory is not only daunting but an impossible task in this book review. However, the observations relating to federation are only *obiter dicta.* Even according to the votaries of the theory in the *Kesavananda* case, the enumeration, if any, was only illustrative. Indeed in *State of West Bengal* v. *Union of India*[19], the Supreme Court pointed out that the characteristics of a "truly federal form" are: (a) an agreement between sovereign states to unite, (b) supremacy of the Constitution, (c) distribution of powers, and (d) supreme authority of courts to interpret the Constitution. The court also held that in India, characteristic (d) is in full force, (a) and (b) are absent, and the distribution of powers was "hedged in by numerous restrictions."[20] The dissenting judgment of Subba Rao J. is emphatic about India being a federation. The majority opinion however, raises doubts as to whether the Indian Constitution meets the requirements of orthodox federalism.

Surprisingly, the book under review does not discuss these important cases. The author also does not elucidate how secession may be effected by the "consent of all the States." Consent of States is imperative only for the purposes of effecting an amendment to the Constitution in regard to the entrenched provisions. Even that provision refers only to ratification through resolutions by "the Legislatures of not less than one-half of the States .. ."[21]

The book does not examine important doctrines of construction relating to a federal polity such as the doctrines of Immunity of Instrumentalities, Implied and Ancillary Powers, Inherent Powers,

[17] *Ramakishore Sen* v. *Union ofIndia,* A.I.R. [1966] S.C. 644.
[18] A.I.R. [1969] S.C. 783.
[19] A.I.R. [1963] S.C. 1241.
[20] At p. 1252, *ibid.*
[21] Article 368(2), Indian Constitution.

Pith and Substance, Colourable Legislation, Progressive Interpretation, Overlapping, Occupied Field, and Repugnancy. The purpose of a book review is not a critical evaluation of the entire contents of the book. The above observations are made only to point out that an erudite exposition like the present book is not free from imperfections as to reasoning and contents. Inspite of such short comings, the book provides substantial information on the countries under study and will be a standard book not only for students of law but also political scientists.

L. R. PENNA