THE LEGAL AND CONSTITUTIONAL IMPLICATIONS

OF

THE EVOLUTION OF INDIAN INDEPENDENCE.

R. KEMAL.

P R E F A C E.

The results of the study of the legal and constitutional problems involved in the evolution of Indian Independence are submitted in the following pages. The Indian Constitutional problems were of a threefold nature:

(1) The attainment of freedom;

(2) The Hindu-Muslim question, and

(3) The problem of the Indian States.

The long and chequered history of Indian Constitutional development has been in fact the history of the emergence of these problems and of the constitutional experiments made in order to solve them.

The British contact with India and the introduction of the British type of education and administrative institutions, indeed, offer an interesting field of investigation. I have made an attempt to take full advantage of this to bring out their implications. The study of the implications of these problems has thus developed into a consistent theme, which explains on the one side, the forces leading to the partition of India and its consequential issues and on the other, the factors that have determined the nature of the relations of India and Pakistan with the Commonwealth. This theme is also suggestive of the solution of the present problems. But no attempt has been made to set forth any concrete proposals of this kind here; because it was, in the first place, outside the scope of this thesis and in the second place was likely to outshadow the significance of the theme developed in these pages.

The conclusions reached are not in any way claimed to be conclusive and final. The attempt is confined to set forth a logically consistent theme which if improved in the

light of criticisms and suggestions may provide a clue to the understanding of both the external and internal political problems concerning India and Pakistan. In this sense, it is hoped, this work may serve the purpose of an introduction to the study of the laws of the Constitutions of India and Pakistan. This was needed because the present Constitutions of these countries are or would be to a large extent the product of the experience gained in the past and the aspirations of the future. No true understanding of the present laws of the Constitutions is possible without a comprehensive background. I would, therefore, gratefully welcome criticisms and suggestions to improve the work to attain this object in view.

The list of the books, articles, reports etc. consulted in the preparation of this thesis is given separately and it is hardly necessary for me to mention how much I owe to them. The literature being voluminous and mostly controversial, I have made every attempt to consult all shades of opinion. I have utilized all the material that was possible (available in India, Pakistan and in this country. I have found occasions when it was not possible for me to agree with some of the writers and have given my reasons for my disagreement.

I do not claim any profound knowledge of the Constitutional laws of the Dominions but I have endeavoured to secure enough information to enable me to understand the issues connected with the Commonwealth of Nations. The problems of India and Pakistan have been predominant in my mind and comparison has been made in the hope that this would lead to a better understanding of the similar problems in respect of these countries.

The Commonwealth now has become an international institution and as such I feel that the study of this living

institution was needed to be made from the standpoints of India and Pakistan. I do not know of any book or any comprehensive article written by a national of either of these countries which satisfies the demand to bring home the true value and significance of this institution, i.e. of the Commonwealth, to the people of India and Pakistan. This was equally important from the point of view of other Dominions. I feel this may be of some help to enable them to appreciate the Eastern point of view in the Affairs of the Commonwealth. I have, therefore, restated first, of all the objections advanced on this institution and have then tried to discuss them frankly. This in its limited scope will serve the purpose of removing some doubts which I think exist owing to the lack of understanding of the subtle nature of this institution.

The study of the British contact with the Moghul Empire in India on the one hand and the transfer of powers to India and Pakistan within the Commonwealth on the other, has incidentally resulted in a comparative study of the conventions and customs of these Empires which have been shared by both Indians (including the Pakistanis) and the British people. This provides a sound ground for the claim that India and Pakistan (this seems to be equally true of Ceylon) can certainly continue to be equal and loyal members of the Commonwealth without any formal bindings. There are certain points of conflict which if removed would certainly place the Commonwealth on a broader and firmer basis.

The thesis consists of ten Chapters, each dealing with a topic of its own; therefore it has not been possible to maintain the consistency of size. Some of the Chapters can be conveniently divided into two but this, it is presumed, is not necessary for the purposes of the thesis.

I confess my limitations to deal with such a vast subject but I have undertaken this in the confidence of my sincerity towards the subject.

It is indeed impossible for me to express my gratitude for the kind encouragement I have received from Mr. George Philip, M.A., LL.B., Lecturer in Constitutional Law at Glasgow University, during the course of my work.

I also thank the Librarians and the Staff of the Libraries of the University, Glasgow, and of the India House in particular, and the following institutions of India, Pakistan and Great Britain in general:-

(1) The British Museum

(2) The Institute of Advanced Legal Studies, London

(3) Lincoln's Inn

(4) The National Library, Edinburgh

(5) The Mitchell Library, Glasgow

(6) The Royal Faculty of Procurators' Library, Glasgow

(7) The State Library, Hyderabad Dn., India

(8) The Osmania University Library, Hyderabad Dn., India

(9) The Pakistan Constituent Assembly Library.

I also owe my gratitude to the Secretary of State for Commonwealth Relations, to the Embassies of the Netherlands, of Indonesia, Pakistan House, and to the United Nations Association, London, for the help extended to me.

R. KEMAL.

The University,
Glasgow.
August, 1951.

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G L O S S A R Y.

ATALEEQ	Tutor.
DEWANI	Office of Governor of a Province under Moghul Empire (Diwan = Governor; minister (in charge of Revenue as well)
DURBAR	Indian rulers Court; public levee of Indian prince.
FIRMAN	Oriental Sovereign's Edict.
FOUJDAR	An Officer in charge of law and order; subordinate to Nazim (magistrate);(Hist); Moghul Empire.
JAGIRDAR	Feudatory Chief.
KHILAT	Robe of Honour, from a Sovereign.
KHUTBA	Sermon preceding prayers, usually on Friday Prayers (Islamic).
NAZAR	Present, usually of gold coins; offered to a Sovereign in acknowledgment of one's allegiance.
NAZIM	Magistrate (Hist) Moghul Empire.
NAWAB	Native Governor or nobleman (ori,pl. of Naib; Anglo-Indian rich retired officer - Nabob)
NIABAT (NAIBE)	Deputy (Office of Naib = Deputy)
SUBAHDAR	Governor of a province (Hist) Moghul Empire.
SULTAN	Title of a Muslim Sovereign.
SWARAJ	Home Rule or Self-Government as the Watchword of Indian Nationalists.
VAKIL-UL-MUTLAQ	The Office of Prime Minister - Juristic conception, connoting general delegation of powers (Attorney) Hist. Moghul; an Office of the Prime Minister, who could exercise all sovereign powers of the Moghul Emperor (see Chapter on Sanctions behind British Sovereignty and Indian States)
VISHNU	Hindu deity.
VIZIER; VAZIER	Minister, the title of the ruler of Oudh (Moghul Empire)

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SANCTIONS BEHIND BRITISH SOVEREIGNTY IN INDIA.

I.

Burke in his analytical speeches before the House of Lords as judges in impeachment of Warren Hastings traced the sources of the East India Company's authority, and found them twofold. He said, "The East India Company itself acts under two very dissimilar sorts of powers, derived from two sources very remote from each other. The first source of its power is under Charters which the Crown of Great Britain was authorised by Act of Parliament to grant. The other is from several Charters derived from the Emperor of the Moguls, the person in whose dominions they were chiefly conservant. Particularly that Great Charter by which, in the year 1766, they acquired the high stewardship of the Kingdoms of Bengal, Bahar and Orissa."(1) This view is not peculiar to Burke only. It is also shared by Hastings. "Though the substance of it [Moghul sovereignty] no longer exists and the Company itself derives its Constitutional dominions from its ostensible bounty!"(2) Ilbert, in his book The Government of India, also contributes to the same view. "The authority of the Company", he writes "was originally derived, partly from the British Crown and Parliament and partly from the great Moghuls, and other Indian rulers."(3)

To form a comprehensive view of the foregoing statements it is necessary to trace and analyse some historical events that lead to this conclusion, while confining the enquiry to those events only which throw light on the constitutional and legal aspects.

When the efforts on the part of Queen Elizabeth to establish peace with Spain failed, the Queen sanctioned a Charter to the Company of London Merchants on 31st December 1600 for the monopoly

(1) Burke, The speeches. Vol. I, p.20.
(2) Forrest, Papers: proceeding (11 May, 1787).
(3) Ilbert, The Government of India. p.1.

of trade with the East Indies. The lead in this field had already been taken by Protestant Holland, though this part of the world was assigned to the Portuguese by the Pope, and that right had passed on to Spain as a result of the union of the Spanish and Portuguese Crowns. The Charter is copied in full in Purchas' Pilgrims. The two important clauses of this charter are given below in parts. "That they and everie one of them henceforth bee, and shall bee one bodie corporate and politique, in deed, and in name of the Governours and Companie of Merchants of London, trading into the East Indies, one bodie corporate and politique, in deed and in name, really and fully for Us and our Heirs and Successors..... being selected and nominated to the Committees of the said Companie as afore said, before they be admitted to the execution of the said offices shall take a corporate oath.....

..... To make, ordain and constitute such or so many reasonable laws, constitutions, orders and ordains, as to them or greater part of them being then and there present shall seem necessary, and convenient for the good government of the same companie, and of all factors, masters, marines, other officers employed or to be employed in any of their voyages..... may lawfully inforce, ordain, limit, and provide such pains punishments penalties, by imprisonment of body or by fines.....

..... Without the impediment of Us, our Heirs or Successors, or any of the officers, or ministers of us..... by reasonable and not contrary or repugnant to the laws, statutes or customs of this realme." (1)

It is plain from the clauses cited above that all that authority of governance and legislation was placed at the disposal of the Company which was necessary for the purpose of maintaining discipline on the high seas and regulating the monopoly of trade. The political and corporate aspects of the Company were taken into consideration when a legal personality was given to it. It might not necessarily have contemplated any acquisition of dominion

(1) Purchas' Pilgrims. Vol. I.
SEE ALSO the summary given in the Calendars of the State Papers: Colonial; East Indies 1513-1616. p.115.

in any foreign country, but there were potential qualities given to the company which in case of need were capable of developing into a state. This conclusion is not merely based upon the words "body corporate and politique", but on the fact that the company was given powers to formulate laws, enforce discipline and punish offences, and it proves that the distance of the places which were to be visited, made it imperative to give the company state-like rights of governance besides those that were necessary for commercial purposes. The later history of the company is a record which establishes this statement beyond dispute. It is true that the Company was not granted in every detail all that was needed for its subsequent career in this Charter, but it was constituted in such a way that the subsequent powers conferred on it fit in the frame so well that the course of its natural growth from its infancy to statehood is clear. Such potentialities of the Royal grant, it seems, were peculiar to the genius of the time when expansion had become the order of the day, and had caused the broadening of the horizons of vision which intuitively took the unfolded future into consideration. In this case, no wonder, if the framers of the Charter had some faint idea of the necessities of the enterprisers in the New World. Except for the question of the establishment of dominion there seems to be no difference between this Charter and those granted for the New World.

It was due to these potential qualities in the company's structure that its servants soon after establishing factories dreamt of the extension of British power in India. There are instances to show that they had followed the lead of their predecessors in sharing in the local politics. Archbold observes that this was no accident that the Company's organisation developed suddenly after the middle of the Eighteenth Century but its dreams of territorial greatness can be traced further back from the Battle of Plassey, in the correspondence which has been preserved between the Company and its servants in India..(1) Participation in local politics

(1) Archbold, An Outline of the Constitutional History of India. pp. 28 - 29.

on the part of the servants of the Company will be observed in these pages even further back than Plassey.

The monopoly of trade with India was based on the Royal prerogative: this prerogative was put to judicial examination at a later date under different circumstances, and under the influence of divergent ideals, but was upheld by the judicial authority.(1)

The company was made subject to the laws, conventions, constitution and also Statutes of the realm. The Company was not independent of the officers and the Ministers. Thus its status in England was that of a corporation. But as the Company was formulated for commercial purposes and its field of operation was beyond the kingdom it was assigned some political powers too. This made it distinct from, and superior to, other local corporations.

Before the Company's contact with India is described, the subsequent Charters, Letters Patent, and Acts of Parliament may be cited. The whole course of the history of the Company's relation with the King and Parliament is marked by two factors. The King and Parliament gave to the Company what was needed for its gradual growth and the process of acquiring strength in India. But as soon as it was felt that the Company had gained all that was expected of it without passing on the implied accusations for its actions in India to the King and Parliament, they started to extend their control on the Company's government in India. Thus it was claimed that India was ruled in the name of the Crown when the Company had established a de facto authority there without regard to the rules of the constitution that were implied in the grants they received from the Moghuls and the Indian rulers or to the contractual obligations assumed by them.

Very soon after the first Charter it was realised that the power to enforce martial law was inevitable. The Company was better defined by the Charter of James I in 1601. The Royal grant of 1615 vested the power to issue commissions in the Company. With the establishment of factories in India the power to punish

(1) East India Company v. Sandys (1683).
SEE ALSO Keith, Constitutional History of India. p.12.

offences on land was extended. The rivalries between the old and new companies and the ultimate union of both are a commonplace of history. The Company had to pass through the upheavals of the Revolution but still had not lost vigour for its future career. When the leadership passed on to Sir Josiah Child the Company was authorised to maintain forces to defend its factories in India. Sir Josiah, it seems, had inherited some ambitions of acquiring territory in India which made him prepared to measure swords with the Emperor Aurangzeb. This instance on the one hand proves that Archbold was not wrong in his observations. On the other hand the Company was implicitly given powers of maintaining forces for such occasions.

II

The chapter of the British contact with India opens with reference to the mission of William Hawkins which was followed by that of Sir Thomas Roe. Neither of them was able to formulate commercial treaties with the Moghul Emperor. Instead they were granted the privilege of trade with certain immunities. The idea of a treaty even on the footing of the subordinate kings was not favoured at the Imperial court.

The failure of these two attempts made the Company approach the local chiefs. They were able to obtain facilities for trade from the local authorities at Surat. But the first acquisition of territory was made through the grant of "Wandiwash" chief, who also gave the permission to build a castle, a fortress and to mint money.(1)

The grant was subject to the supremacy of the local chiefs. This is borne out from the fact that the permission to coin, which was considered to be an important attribute of sovereignty, was delegated to the Company subject to the superinscription of supremacy. Tenverer describes the English money of Fort George, Madras, as "A piece of the same size, (reference is to the gold coin of the Muslim kingdom of Golconda) bearing on the obverse a nude figure of Vishnu with rays emanating from his person".(2)

(1) Love, Vestiges of Madras. Vol. I, p.17.
(2) Tenverer, Voyage. Vol. II, p.16.

When the southern principality was conquered by the Golconda kings, the company secured a new grant according to the usage of the kingdom from the Golconda kings. This grant also was subject to supremacy. The Emperor Aurangzeb after his conquest of the Golconda kingdom renewed this grant by his Imperial "Firman", but in every case the conditions changed in accordance with the strength of the grantor.

The case of Bombay was different from that of Madras. Bombay island, which came to the British Crown by a marriage treaty in 1661, was transferred to the Company "to be held of the Crown, as of the manor of East Greenwich in fief and soccage" for the annual rent of £10.(1) This territory thus ceded to the Company according to an international treaty gave a new source of strength to the Company's status in India. This was the first time in the history of the Company that a territory came into its possession on which the exercise of full sovereign rights was possible. The prerogative of the Crown to govern a ceded colony and also to confer on the Company full sovereign rights was in accordance with the laws of the realm.(2)

It is not that the Company could exercise full sovereign rights on this island which had its sanction in an international agreement of the West, but its origin also can be traced in the same sort of international agreements in the East. The records of the Portuguese relations with the Indian Princes and also with the Great Moghuls are a fertile source for a systematic study of how the international relations were conducted in the East. But what has a direct bearing on the subject under treatment is the statement that the island of Bombay was ceded by the Sultan of Gujrat to the Portuguese in 1534. This is the source of an international agreement in the East concerning the island of Bombay.

The Company's sovereignty in Bombay was extended to all the inhabitants of the island Europeans and Indians. It is true that Indians were given civil jurisdiction(3) but on criminal charges it

(1) Keith, op. cit. p.9.
(2) Colvin's Case (1608).
(3) Morley's Digest, Vol. I. Perozebhais' Case. p.349. Perry, J. In Perozebhai's case does not accept this contention, but Keith and other historians establish it beyond dispute.

seems they were tried at the Company's court. There is reference to one instance of Ramakomte[1] being sentenced for life for treason after a regular trial.

The fact that in Bombay, for some time after its cession, Portuguese law was continued does not prejudice British sovereignty.[2] Even this was recognised by the rules and practice of the Indian kingdoms. The Moghuls maintained the laws and customs of the county after their conquest.

Reverting to the other possessions of the Company, e.g. Bengal was at first a mere field of trade, there were no territorial possessions. The Company's legal status entered into a new phase with the purchase of the "Zemindary" rights for three villages. This purchase only effected the transfer of the rights of "Zemindary". This was subject to Indian allegiance. The only advantage gained from the purchase of "Zemindary" was that the Company assumed civil jurisdiction over the inhabitants of the villages. This power was inferior as compared to that of Bombay because the criminal jurisdiction was vested with the "Foujdar" above whom was a "Nazim". Legally speaking zemindar's status was that of a faujdar's sub-ordinate. This is supported by the fact that the Company could not as late as the time of the conclusion of the treaty of 1757 with the Nawab obtain the right of minting coins at Calcutta and by the jurisdiction of the law courts there.[3]

The status of the "Zemindarship" did not remain unchanged, though theoretically subordinate to "Faujdar" it practically assumed and exercised extensive powers. When deterioration and corruption developed in the local administration, the Company took advantage of it and enlarged its own jurisdiction. Further it evaded the formal assent from the "Faujdar" and "Nazim" that was necessary for capital punishment. But the Company was very cautious, in putting Musalmans to death, fearing that the Nawab would interfere and assert his authority.[4] In theory all sentences of

(1) Perry, J. (Ibid).
(2) Campbell v. Hall. (1774).
(3) Cambridge History of India. Vol. V. p.590.
(4) Ibid.

death should have been submitted to the "Faujdar" at Hugli and the "Nazim" at Murshidabad before being enforced. As the Company extended its jurisdiction the importance of this theory gradually vanished. III

The position of Calcutta as compared with Madras was inferior as minting rights were not given in Bengal.

The Company had appointed different heads for the various factories. There was no centralisation of Company's administration in India. But their rivals, the French, compared with this point of view were superior. They had already taken interest in Indian politics and wielded influence at the local "durbars". This induced the Company's servants to demand a change in the policy of the Company. The Board of Directors also were alive to the situation. Thus centralization of the Indian administration of the Company was the result.

The War of the Austrian Succession spread from Europe to India and new problems emerged. The port of Madras was conquered by the French. The legal interest in this event is that the French unfurled the banner of the Nawab along with their own. This was to testify that the conquest was subject to the Nawab's supremacy.

By this time Indian politics also had undergone a great change. After the death of the Emperor Aurangzeb there was a set back. The provinces had become the strongholds of the Viceroys of the Empire, who in their domain were the de facto sovereigns, but recognised and respected the supremacy of the Moghuls. But this recognition was not derogatory to their sovereign and independent status. None of them could dare overthrow it. There were new powers like the Mahrattas in Central India and Hyder Ali in the south. They, though powerful, had no Imperial sanction or connection with the Imperial House. There is evidence to prove that Hyder Ali was prepared to accept allegiance to the Emperor as well as to promise tribute if recognised as the "Nawab" of Carnatic. Among these Indian powers involved in the struggle for supremacy were the French, and the British, the Dutch eventually withdrawing out of the picture. These changes in politics and the emergence of new political powers in India naturally affected the rules and laws of the Moghul Empire.

In the first place the powers to negotiate and conclude treaties were assumed without reference to the Emperor. The authority to confer titles and grants was exercised by the Subahdar without confirmation by the Emperor. The succession no longer remained at the pleasure of the Emperor for his servants, but had become hereditary. There was one thing in common: whenever there was a change these Subahdars having established their de facto authority obtained Imperial "Firmans" to legalise their position. For this they had to pay large sums as presents. None the less their exercise of sovereign powers did not always depend on the Imperial firman.

The Emperor gradually became a puppet in the hands of the Ministers, lost his own discretion and authority, and acted on their advice.

The Company though not in an exalted position, like the other Viceroys nevertheless was not without some legal sanction behind it. They were the recognised "zamindars" of the Empire, and their military strength made them capable of concluding treaties with the local chiefs. It was under these circumstances that their settlements were brought under one control, of which Calcutta became the seat, and Clive was put at its head.

By this time the Company was given and had secured powers to conclude treaties with foreign governments.

The servants of the Company fully equipped with, and competent for both tasks, from the legal as well as the military point of view and working under one coherent policy, conducted by one man, brought the "Nawab" of Carnatic and also the "Nawab" of Bengal gradually under their control. The details of the process of this achievement are the domain of history. This superiority gained on the fields of battle and in the courts through intrigues was legalised by treaties, to enter into which "Nawabs" were competent by the usage of the declining period of the Moghul Empire. The Battle of Plassey and the subsequent treaty are generally taken to mark the opening of a new era. Now the Company in both these provinces - the Carnatic and Bengal - had become the de facto ruler though still theoretically the "Nawabs" held the authority.

The Company was allowed, according to these treaties, to fortify their factories as they thought proper. As far as Bengal was concerned they were given the privilege of coinage also. The Company changed "Nawabs" according to its wishes, and in 1763 reserved the right of appointing the chief minister of the "Nawabs" of Bengal. Throughout the process of making and unmaking the local kings, the Company never took cognisance of the Imperial sovereignty. Neither was any reference made to the Emperor in connection with the treaties. IV

The Company after the Imperial grant of the "Dewani" of Bengal in return for which it agreed to pay to the Emperor six lakhs of rupees a year besides giving him the possession of Allahabad and the bordering district, assumed the status of a Dewan which was superior to that of a Zamindar. This grant of Dewani Hastings has described as "a presumptuous gift of what was not his to give".(1) Again it was said that "His grant gave them nothing which they could not very well have taken for themselves, had they been so minded".(2) Had this been true, Clive would never have attempted to secure this grant from the Prince who was a fugitive. As a matter of fact Clive was quite aware of the fact that the grant, though from a fugitive prince, was not devoid of the influence which his connection with the Imperial blood and the right of heir apparentship to the throne inherited.

The inconsistency of Hastings' impression about the Emperor of Delhi was the outcome of two contradictory factors influencing his mind: the ambition of establishing British sovereignty and the inconvenience felt due to the customs and rules of the Moghul Empire. Two specimens of his inconsistency are given below. "The sword which gave us the dominion of Bengal must be the instrument of its preservation and if..... it shall ever cease to be ours the next proprietor will derive his right and possession from the same natural character".(3)

(1) & (2) Forrest. Op. cit. (4 October, 1773).
SEE Cambridge History of India. Op. cit. p.597.
(3) Forrest. Op. cit. (12 October, 1772).

"The King Shah Alam", writes Hastings, but with a different tone, "can scarcely be of propriety mentioned among the powers of India. Yet his name and family subsist with all the latent rights inherent in them".(1) If this was true it was no wonder that Clive secured the grant of "Dewani" from the fugitive prince, being fully conscious of its legal significance.

Hastings was bent upon repudiating the Emperor's sovereignty in every possible way. This was not a novel idea of his own. Clive in his turn had set afloat a scheme for connecting the Company's government in India directly with the Crown, but found the Board of Directors and the Government of England unprepared for such a scheme. Hastings in the background of his successes did not care to determine his policy towards the Emperor in relation to his predecessors' experience. He wrote to the Company, "You establish your own power or you must hold it dependent on a superior which I deem to be impossible".(2) Hastings further suggests in his letter to Lord North, "Whatever form it may be necessary to give to the British Dominion in India, nothing can so effectively contribute to perpetuate its duration as to bind the power and states with whom the government may be united in ties of direct dependence and communication with the Crown".(3)

This suggestion was not favoured by the Company. The Government also was unprepared. The difficulties were twofold. None of them were in a position to the extent of the risk involved in such an ambitious scheme, and legally there was nothing clear-cut to go ahead with it. This period was marked by the uncertainty of the legal position of the Company in India and the Crown's relation to it. The fact that the Regulating Act of 1773 and the Acts of 1784 and 1793 leave the question of British sovereignty in India undefined, is in itself a proof of this uncertainty. These Acts do not extend sovereignty over Indians.

Besides there was strife between the Ministry and the Directors

(1) Forrest. Op. cit.
(2) Gleig. Memoirs. Vol. I, p.508.
(3) Ibid.

of the Company. The Company was fearful that any direct connection of its Indian affairs would increase the control of the Ministry which they resented. There was the legal position as well. Whatever was possessed was the result of the grant or confirmation of the Emperors. Any direct assignment of Indian affairs to the Crown would have amounted to subordination to the Moghul Emperor.

Uncertainty about the legal status of the Company in India was made tense by the mission sent to India under Commodore Lindsay with plenipotentiary powers. A letter of King George III was addressed to the Moghul Emperor. No cognisance of the Company was taken in this mission. Even the Company was not informed of it.

The treaties of international status too do not explicitly admit British sovereignty in India. The Treaties of Paris and that of Versailles leave the question untouched.

The Government was successful in exercising control over Indian affairs to some extent, through the Committee appointed under the Act of 1784. For such an act of intervention by Parliament there were two bases. The Company originally was subject not only to the prerogative of the Crown but also to the statutes of Parliament. The origin of the prerogative of the monopoly to the Company was confirmed by subsequent Acts of Parliament. The legal opinion about the Company's possessions in India in relation to British sovereignty was delivered as early as 1757, on the Company's memorial, praying for the grant of all booty and conquests made in India. "In respect to such places," say the Law Officers, "as have been or shall be acquired by treaty or grant from the Moghul or any of the Indian Princes or Governments, your Majesty's Letters Patent are not necessary, the property of the soil vesting in the company by the Indian grants subject only to Your Majesty's rights of sovereignty over the settlements, and over the inhabitants as English subjects, who carry with them your Majesty's laws where ever they form colonies.... in respect to such places as have lately been acquired or shall hereafter be acquired by conquest, the property as well as the Dominion vests in your Majesty by virtue of your known prerogative, and consequently the Company can only

derive a right to them by your Majesty's grant....."(1)

This legal observation is based on the theory of the prerogative as applied to the colonies. The point in question is of India, the grants as seen in the foregoing details were subject to Indian suzerainty whereas the position of colonies was different. Englishmen in colonies occupied a sparsely inhabited land which inherited no obligations. In India there were obligations. Whatever was given to the Company were either the property rights or the rights of collection of revenue or governance, subject to the supremacy of the grantors. Now the question is how could the territories given with the clear undertaking of subordination possibly accept British sovereignty at the same time. If it is taken for granted that the act of the Company in accepting such grants inherited British sovereignty, the only logical conclusion that could be reached is that British sovereignty was under that of Indian, as the original was not British but Indian. The legal position, therefore, was this. The Company acquired rights under obligations of subordination. The fact that the original Sovereign of the Company did not object to such a contract signifies that this Sovereign undertook, of course implied, to make the Company fulfil those obligations. The exercise of sovereignty by the British was confined to this extent or was towards safeguarding the rights of the shareholders who happened to be British.

It seems that, finding it difficult, the British Government in 1878 asserted their sovereign rights and sought recognition from the French. Reference was made to Article Eleven of the Treaty of Paris(2) and Article Thirteen of the Treaty of Versailles.(3) It is worthy of note in this connection that this assertion was only made in respect of Bengal, Bihar and Orissa, of which the Company held the Dewani rights, leaving aside Madras which was of common interest, and hence bone of contention. The French did not

(1) Public Record Office, C.O. 77-19. As quoted by Cambridge History, Vol. IV, p.593.

(2) & (3) SEE for details, Cambridge History, Op. cit. pp.595-6. See Chapter on States.

consent to this. This attempt towards securing recognition of sovereignty of an international character indicates that the cloud of uncertainty was disappearing from the skies of the political minds. Though still without any legal certainty, the British statesman seems to have based it on the de facto authority held by the Company in India.

There was the alternative possibility of negativing Moghul supremacy in order to establish that of the British. The sovereignty of the Moghuls though a shadow had not lost its strength. It was not so because the Emperors were strong enough to defend their authority, but from the fact that there were other Indian rulers who held this phantom in very high esteem. There were constant attempts by the rising powers to take control of the Imperial palace in order to establish authority in the Emperor's name. This was not only so in the case of the Muslim rulers; even the Mahrattas were prompt to accept the post of "Vakil-ul-Mutlaq", but would not dare to overthrow it. Any attempt on the part of the British to replace this sovereignty with their own would possibly have served the purpose of uniting all the Indian Princes against them. There were the French who were ever prompt to seize the opportunity to join any alliance planned against the British. The French were not oblivious of the possibility of extending their support to the Emperor. The whole course of the policy of Dupliex and Bussy was based upon the legitimate authority of the "Subahdars". The French who had learned well to utilise the theory of the legitimate authority of the "Subahdars" would never have missed any scheme for taking the advantage of Imperial authority. At a later date a letter of the French Officer from Deccan contemplated such a scheme. "Owing to the undisputed sovereign of the Moghul Empire", says the letter, "..... the English Company by its ignominious treatment of the Great Moghul, has forfeited its right as "dewan" and treasurer of the Empire....., thus the Emperor of Delhi has a real and indisputable right to transmit, to whom so ever he may please to select, the sovereignty of his dominion as well as the arrears to him from the English".(1)

(1) Wellesley. Dispatches. IV, p.652.

This letter belongs to a later period but its climax is not without some foundation in its earlier period.

Hastings had to modify his attitude towards the Emperor seeing that neither the Kings like the Nizam were prepared to assume the style of kingship independent of the Emperor, nor could he secure the support of the Directors and the Government. He, therefore, launched upon a modified scheme of annihilating the Imperial sovereignty. Meanwhile he had taken full advantage of the uncertainty prevailing among his countrymen about their legal possession and at the same time of the desire to extend their authority in India. The measures Hastings took to repudiate the Emperor were successful in establishing the Company's de facto authority.

Hastings stopped payment to the Emperor, which was due according to the Treaty of Allahabad. When such payment was demanded he refused it, alleging as an excuse the famine conditions of the province. "I must plainly declare," he writes to the Emperor "that until the safety and welfare of these provinces admit of it, I cannot consent that a single rupee be sent out of them which it is my power to retain".(1) This was not the fact, but just an excuse. He writes to Purling, "I think I may promise that no more payments will be made while he (the Emperor) is in the hands of the Marahattas, nor if I can prevent it, ever more." (2) Hastings could not repudiate the legality of the demand of the Emperor though much in its favour as is apparent from the last phrase of the quotation of his letter to Purling. The reason was the uncertainty of the Company's legal position in India. The tone of the letter written in his capacity of Governor-General who held the seal bearing "The Governor-General, the servant of the Emperor", reveals the significance given to the connections with the Emperor.

V

A twist was given to the policy of the Company towards the

(1) Forrest. Correspondence.
Hastings to Shah Alam - 13 September, 1773.
(2) Moncktone Jones. Hastings to Purling. 22 March, 1772.

Emperor to gain the object in a different way. "The Authority of the Emperor," writes Hastings, "should be in a considerable degree restored and means given him to support it".(1) Hastings had already condemned this policy in the case of the Mahrattas when they took control of the Imperial palace. "What consequences this new assumed policy of the Mahrattas may produce I cannot foresee; but think it more likely to embarrass Scindia himself by the burden of a ruined country, and an exhausted revenue, than to add to his own powers..... in no respect can it prove harmful to our interests".(2) It is evident that Hastings had learnt a good deal which made him change his policy and found himself almost marching on the lines he had condemned. But he took a very cautious step by appointing Major James Brown(3) as his agent at the Imperial court of Delhi. The purpose of this appointment was, in Hasting's words, "To collect materials for a more complete and authentic knowledge, not only of the Emperor, but also of the independent chiefs and states whose territories bordered on his".(4)

Hastings had launched upon a policy of achieving his purpose through the modified scheme, hence the carelessness as to the legal implications of the appointment. The Company by this appointment of an agent at the Imperial court had extended legal recognition of the authority that the Emperor held. This inconvenience was felt by Metcalfe even when he instead of an agent had assumed the status of a Resident.(5) But to Hastings there was no legal implication of this: it was merely a means for the collection of information.

This was neither the revival of the Moghul Empire as claimed by Hastings, nor its destruction. It was the suspense of the contradictory forces.

The most drastic action taken towards establishing the Company's de facto supremacy was due to the resentment against the objection raised by Scindia in the Emperor's name on the installation of

(1) Public Record Office. T.49-8 as quoted in the Cambridge History of India. Vol. V, p.600.
(2) Forrest. Papers. Vol. II, p.59.
(3) 1782.
(4) India Office: Home Miscellaneous. Vol. No. 336. Thompson. Op.cit
(5) Edward Thompson. Making of the Indian Princes, p.280.

Nasirul Mulk as the Nawab of Bengal. This is important because this was the formal rejection by the Company of the Imperial authority of the confirmation of subordinate Nawabs; otherwise previously to this the Nawab of Gujrat was extended recognition by the Company without regard to the Emperor. What brought nearer the fulfilment of the object was the Mahratta defeat.

The Mahratta war of 1803 is significant because the Emperor's territories came under the control of the Company. The Agent at the Imperial court changed his style and became the Resident. The city of Delhi and the bordering districts which were the Imperial domain were administered by this Resident. The administration was inspired and instructed by the Government of Calcutta, though carried out in the name of the Emperor.

Lord Moira's arrival in India coincides with the formal assertion of the British Government of British sovereignty in India by the Act of Parliament in 1813. This act, contrary to the preceding Acts, stated that, "without prejudice to the undoubted sovereignty of the Crown of the United Kingdom, etc. in and over the same".(1) To some authors this assertion of sovereignty seems to be sudden and also to involve the question as to the exact time at which that sovereignty came into being.(2)

Undoubtedly there was no formal assertion of this nature either in the Acts of the Parliament or in the treaties of an international character, but the fact that the legal sovereign of India was in the hands of the Company was probably a sufficient ground, in the British view, for such a proclamation. As regards the sovereignty of the Crown and Parliament over the Company, that was, of course, based on the prerogative as to which the legal officers had expressed their opinion as early as 1757. The assertion of the Parliamentary sovereignty chronologically speaking was based on the Charter and the Parliamentary confirmation which found expression in 1784 in the form of a check of the Ministry over Indian affairs. "Practically the Government of India passed out of the hands of the Company in 1784," remarked the Chancellor of the Exchequer in the debates on the Bill

(1) The Act of 1813.
(2) Cambridge History, Op. cit. p.595.

connecting the Government of India with the Crown. "And from that date a series of governors appointed under the influence of the executive government at home succeeded".(1)

This assertion found recognition in two international agreements, viz. The Treaty of Paris in 1814 and the Convention with the Netherlands in the same year. However it needs clarification as to the nature of sovereignty that was proclaimed and the areas that were referred to. As regards the first point it is quite obvious that any claim of sovereignty with the Government of the Company did not go beyond the rights of supervision for which arrangements were made through the Committee appointed in 1784. As regards the second point the reference was rather vague, and hence must necessarily be implied to intend the exclusion of the territories of the Emperor taken over after the Mahratta only for the purposes of administration. The arrangements made for such administrationhave been recognised by the Judicial Committee(2) as amounting to a Treaty between two independent sovereigns. Thus it can be construed that the sovereignty of the Company was never claimed to include the territories of the Emperor.

Moira took charge of his office under circumstances which had made him definite in his attitude towards the Company's legal status in India, at least from the British point of view. He carried the policy of annihilation of the Imperial supremacy still further. His seal no longer bore "The Governor-General the servant of the Emperor". It is followed by a chain of attempts to stop the appointment of "Nazars" on behalf of the governor to the Emperor. Amherst in 1827, says Keith, met the Emperor without the customary ceremonies. The request of Hastings to meet the Emperor on an equal footing was rejected by the Emperor, but the circumstances of Amherst's meeting seems to have been different. Keith describes the reasons for it as follows, "Metcalfe on succeeding the former Resident persuaded him that the paramount power must be prepared to insist on respect for its decisions, and the Fort (Bharatpur) was at last stormed. Doubtless

(1) Hansard. Parliamentary debate. Vol. CXLVIII, p.1334.
(2) Salig Ram's case, infra.

it was this incident among others which induced Akbar II to accord the Governor-General a meeting on the footing of equality".(1) Contrary to this and the details given by Thompson which prove that ceremonies were observed, which he represents as a trick(2) to impose ceremonials on Amherst which in Indianeyes was the admission of the Emperor's suzerainty.

As regards the subsequent policy of the Company towards the Emperor, the following paragraph of Thompson is characteristic of the clear description of the practice and the motives influencing it. "Yet even Metcalfe looking back on this incident (Amherst's meeting with the Emperor) from Lord William Bentinck's time tolerantly allowed it not amiss because the superiority of the king (Emperor) is acknowledged and the motive of the acknowledgement cannot be mistaken, even while he (Metcalfe) regretted to see that the king is assuming more than he did and that Bentinck had given way, though ever so little".(3) He further quotes Metcalfe as "We have on the whole behaved generously towards the King (Emperor) from the first; and I never found him unreasonable or assuming.... I should think it our best policy in future to let him sink into insignificance, instead of upholding our dignity as we have done.(4) Metcalfe further recommended a moderate and cautious use of the supreme government's (de facto authority of British) right as the fountain of honour until opinion grew used to it."(5)

These quotations prove that a conscious attempt was made to wipe out the Emperor's importance, but as the British were alive to the ghost of reverence that existed in the immense shadows of public opinion and active and malignant to the British, it was recommended that the Emperor be allowed to sink into insignificance.

The terminology of address to the Emperor was modified so as to recognise superiority, not vassalage or allegiance.(6)

The Emperor's resentment to these attempts and especially to

(1) Keith. Op. cit. p.120.
(2) Thompson-Metcalfe. op. cit.
(3) Thompson. Making of the Princes. p.280.
(4) Ibid.
(5) Ibid.
(6) Keith. Op. cit. p.120.

the arrangement that the gifts of the Indian Princes to the Emperor had to pass through the Resident was very strong. In 1831 the Emperor addressed the Directors, avoiding the Governor-General, threatening that he would refer the matter to the King of England if no satisfactory arrangements were made in this connection. The Emperor did not stop there. He sent Ram Mohan Ray as his representative to London. The Company then could not deny that it acknowledged its title as held from the Moghul Emperor.(1)

The question of not coining in the then Emperor's name, was brought up for discussion because, since 1806 after Shah Alam's death, the Company seems to have entertained a confused notion that it safeguarded its status of independence by using the dead Monarch's authority on the coins instead of that of his successor.(2)

No purpose could be served, because there was no longer uncertainty on the part of the British Government, and in spite of the fact that Parliament had assumed supervisory responsibility through the Act of 1813 and thus applied a direct supervision, Ram Mohan Ray's mission and his emphasis on the legal position could not succeed.

In 1835 this legal basis was repudiated by coining the Indian Rupee bearing the British King's image and superinscription.

From these facts, it may safely be deduced that the East India Company gradually assumed all the attributes of a sovereign and independent power and this was as much sovereign and independent as any other Indian prince besides the Emperor. The sovereignty thus assumed was confined to the territories held under the grant of the Emperor or to the territories that were annexed in accordance with the treaties with other Indian princes. The territories belonging to the Emperor and administered by the Company in his name were definitely excluded from the territories of the Company. The Company, as it will be observed in subsequent pages, entered into contract with the Emperor after the defeat of the Mahrattas, as an independent state. The sovereignty claimed by the British Parliament was entirely of a supervisory character because India

(1) Thompson. The Making of the Indian Princes. p.281.
(2) Thompson - Metcalfe. p.137.

was neither a colony of which occupation by British subjects would (1) have implied the extension of British sovereignty, nor was it a conquest to make India entirely dependent on the Prerogative of the Sovereign of Great Britain. The sovereign rights assumed by the Company were based on the treaties, whatever their form might have been. The contractual basis of the connection of the British Crown with India made it necessary to keep India's personality and identity intact, and therefore there was no annexation effected.

VI

The foregoing historical facts throw light on the gradual development of the sovereign status of the East India Company, but in order to form a comprehensive view of its legal status vis-a-vis Indian Emperor, it is necessary to study the legal aspect of the office of Vakil-ul-Mutlaq of the Indian Empire, which the Company assumed after the defeat of Mahrattas. The office of Vakil-ul-Mutlaq before the Mahrattas was held by the Nizam. When Mahrattas assumed this office they tried to exercise the executive sovereign rights of the Emperor and even protested against the East India Company's recognition of the Nawab of Bengal. Hastings rejected this protest, but was uneasy to find the Mahrattas in possession of this influential office. In view of this he made changes in the policy of the Company towards the Emperor and set upon the scheme of re-placing the Mahrattas in this office by the Company. When the Mahrattas were defeated, Wellesley wrote to the Court of Directors of the Company: (2) "Your Honourable Committee is aware that the late Madhuji Scindia after having rescued the unfortunate representative of the House of Timur from the sanguinary violence of Ghulam Qadir obtained from His Majesty the office of Vakil-il-Mutlaq, or Executive Prime Minister, for his Highness the Peshwa, and was himself appointed to execute the functions of that office under the title of deputy, and that Daulat Rao Scindia succeeded to the office of deputy Vakil-ul-Mutlaq, and to the consequent control which his predecessor had established over the person and family of

(1) Bombay was not treated as a separate entity in view of its separate legal basis

(2) Wellesley's Dispatches. Vol. IV, p.542.

the unhappy Monarch of Delhi. By successful intrigue Monsieur Peron obtained the office of the Commandant of the fortress of Delhi, which is the residence of the Royal family, and thus secured the possession of the person and of the nominal authority of the Emperor". It was with this background that the Governor-General in Council suggested : "Among the most important political benefits of that arrangement, the reputation which the British name would acquire by affording an honourable and tranquil asylum to the fallen dignity of the king..... and by securing the means of comfort to his..... family".

Referring to the arrangement made for the administration of the territories as a result of the assumption of this office, the Privy Council remarked that "the final determination of the Governor-General in Council upon this subject was communicated to the Resident at Delhi by the letter from the secretary to the Government.... the arrangement was as much an act of state as if it had been carried into effect by a formal treaty signed by the British Government".(1) In this case the status of the ex-king of Delhi was discussed and was held that he was a sovereign. The status of the ex-king was that of a king. He "was treated and recognised by the British Government as a King and not merely as a jagiredar holding an ordinary grant from the British Government. He was the grandson of Shah Alum, and neither he nor his ancestors had ever been deposed by his own subject or by the British Government or by any other power".(2) Discussing the status of the ex-king of Delhi, it was stated that the sovereignty of the Company's courts in the territories outside the areas set apart for the Emperor could be distinguished from those that were administered in the name of the Emperor. In other words India was divided into three distinct legal entities. (1) The territory round Delhi which, after the defeat of Mahrattas, was taken under the administration of East India Company in their capacity of Vakil-ul-Mutlaq of the Indian Empire. The sovereignty still lay with the Emperor.

(1) Salig Ram v. Secretary of State for India. I.A. 1872-73. p.119.
(2) Ibid. p.127.

(2) The territory in the possession of the East India Company consisting of the areas transferred under the grant of Dîwani and other areas annexed as a result of conquest, or in accordance with some treaty with Indian rulers. (3) The territories of the Indian rulers who had assumed power in the capacity of the Governors of the Empire or had established their power as a result of some local revolution. The Subahdar of the Indian Empire, in view of the declining power of the Moghul Emperors, had established their independence though still as the governors. In the Roman Empire the states under its suzerainty acknowledged the Emperor,"but they were formally empowered to enter into foreign relations of great importance on their own account and in their own names, and the Emperor and the Imperial Diet were quite unable to enforce the formal limitation of their foreign relations."(1) As the states of the Roman Empire were treated, disregarding the constitutional theory, as full members of the European international society, the Indian rulers, including the East India Company, had established their independence and treated one another "as internationally sovereign and made alliance war and peace."

In the light of these observations it may be stated that the arrangements made for the administration of the Emperor's territories and the assumption of the office of Vakil-ul-Mutlaq by the Company was in its capacity as a sovereign body. The Company had in fact a dual capacity: it was a commercial corporation as well as a sovereign body. This dual personality was more or less distinct ever since the time it was granted authority to form treaties with foreign powers and maintained armed forces. This dual personality has been recognised in a large number of cases and it has been held that the Company was subject to British Municipal Courts only in the matters and proceedings undertaken by it as a commercial corporation.(2) But it was not subject to them in its sovereign capacity.(3) The Company claimed and exercised

(1) Westlake: Papers. pp.197-8.
(2) Perozebhai's case, supra.
(3) East India Company v. Syed Ali. Moore's Indian Ap. Ca. 555. The Nabob of the Carnatic v. The East India Company. (As quoted in Salig Ram's Case).

territorial jurisdiction. "The law established in a number of cases was that the man who entered the service of the East India Company necessarily lost his domicile and acquired one in India on the ground that the Company was in a great degree a separate and independent government foreign to the government of England".(1) Therefore the arrangement of the administration of the Emperor's territories can be compared with similar arrangements with Turkey for the administration of Bosnia by Austria, and that of Cyprus by Great Britain. It was not only the administration of the territories that was settled with the Emperor but was also the assumption of the office of Vakil-ul-Mutlaq. One was the trust of the administration of the territories and the other that of the executive functions of the Empire. Now coming to the meaning and juristic conception of the term Vakil-ul-Mutlaq, it may be remembered that in the above quoted passage of Wellesley it has been translated as the office of "executive prime-minister". Another writer states that "this title (Vakil-ul-Mutlaq) was translated in the diplomatic language of the west as paramount"; or, again referring to the Company's assumption of this office he observes: "all three areas were controlled by the East India Company as Vakil-ul-Mutlaq or lieutenant plenipotentiary of the Moghul Emperor".(2)

'Vakil-ul-Mutlaq' is a Muslim juristic term written both in a Persian form as Vakil-e-Mutlaq, and in Arabic as Vakil-ul-Mutlaq. "Vakil" in Arabic means an agent, therefore the term Vakalah (Vikalah)(3) means the office of a substitute, an agency, attorney-ship. If examined from the juristic point of view it signifies a mandate or authorisation on the basis of a contract, by which one contracting party commissions the other to perform service for him.(4) According to jurists, the authorisation may be definite or general, the first kind of Proxy is called Vakil-e-Mu'aiyan, or limited or fixed mandatory. The latter Vakil-e-Mutlaq or mandatory paramountcy.(5)

(1) Cheshire: Private International Law. p.168.
(2) Buckler: The Transactions of the Royal Historical Society. 1924. (The Political Theory of the Mutiny). See for further discussion, The Transactions, 1927.
(3) Both The Encyclopaedia of Islam and The Dictionary of Islam spell it with "W", but I find "V" phonetically more appropriate.
(4) & (5) See The Encyclopaedia of Islam. Ref: Hamilton's Hidaya.

This term was in common use in the Moghul Empire, The terms used in Moghul times denoting institutions and offices are characteristic of their two sources, i.e. Islamic and Moghal. There were terms like Diwan, Vizier, Bukshi, etc. each indicating its source as either Arabic, Persian, or Turkish. The term "vakil" was more or less used in its original sense. The following quotations from Tabaqat-e- Akbari will reveal that the term used in different connections retained its original sense. Referring to Hemun the author of Tabaqat-e-Akbari writes first, "Adali now sent Himun, the Bakhal, who was his Vizier, with a large army."(1) Then just at this juncture, "letters arrived from Tardi Beg Khan and other nobles who were in Delhi, stating that Hemun, the Vakil of Muhammed Khan Adali had approached Delhi....."(2) This use of different words by the same author about the same person appears to give two names for the same office, Vizarat or Ministership. But strictly speaking there was a difference, maintained in these two offices. Again about Pir Mohammed he writes, "The Pir was the general manager or Vakil-ul-Mutlaq of the Khan-e-Khanan, and all business passed through his hands. He was the person to whom the nobles and officers had to make their applications and of the many, high and low, who attended at his door, he hardly admitted anyone".(3) This quotation reveals the nature and the authority that was connected with it. Even the governors were given vakils who had the whole control of the affairs of the province. Referring to Prince Shah Murad's appointment to Gujerat as governor, the author of Tabaqate-Akbari mentions the appointment of Muhammed Sadiq Khan as his Vakil. And again the government of Malwa was placed under Mirza Shah Rukh and Shahbaz Khan Kambu was appointed to be the Vakil and general manager of the affairs of Malwa under Shah Rukh.(4) These references further prove that the office was distinguished from Vizarat. It was higher than that of Vizier. It constituted custodianship and was

(1) & (2) Ain-e-Akbari. Vol. I, translated by H. Blochmann. p.258.
Sir H. Elliot: History of India. Vol. V, translation.
(3) Ibid. p.258.
(4) Ibid. pp.460 - 467.

entrusted with almost all the powers that were inherent in the office to which it was appointed. The term "vakil" was used to convey the sense of "envoy" too, but, strictly speaking, it was more than an envoy, rather an ambassador or plenipotentiary. A characteristic passage conveying this sense of plenipotentiary powers is written by the author of Tabaqate-Akbari when he referred to Ali Khan, the ruler of Kashmir, sending his plenipotentiary to the Emperor Akbar "along with the two envoys he sent his own Vakil Muhammed Kasim to carry his tribute and productions of Kashmir as his presents to the Emperor".(1)

It is strange to note that Sarkar does not take cognisance of such an important office in the Moghul administration. He only refers to the office of Diwan or Vizier as the Prime Minister. "Vizier" or "Prime Minister" seems to have been an honorific title without necessarily implying the change of any particular branch of administration. He was no doubt always the head of the revenue department, but it was in his capacity as Diwan, All diwans were not viziers.(2) This omission is highly regrettable in an authority like Sarkar, in view of the abundance of literature about the distinguishable features of Vikalat and Vizarat. Abul Fazl enumerates names under two heads - Vakils and Viziers, the first meaning "prime minister" and the second meaning "ministers of finance". In the list of Vakils first of all comes the name of Bairum Khan.(3) When Bairum Khan was Ataleeq, he was much more powerful and hence Buckler mentions him as Vakil-ul-Mutlaq - mandatory paramount "the company was in precisely the same position as Bairum Khan. In 1556 Bairum Khan was the paramount power resting on Persian support, three centuries later the East India Company was the paramount power resting on British support.....(4) The office of Vakil-ul-Mutlaq in the Moghul Empire, before it passed on to the Mahrattas, was conferred on Nizam-ul-Mulk, but he did not stick to it. The author of the Mahratta history, Duff, refers to

(1) Ibid.
(2) Sarkar: Moghul Administration, p.15.
(3) Buckler: Political Theory of Mutiny. Op.cit. P.162, year 1924.
(4) Ain-e-Akbari. Translation by Blochmann, p.527.

the renewal of this office to the Mahrattas when the Emperor ascended the throne, with great pomp and show.(1) Hastings too refers to this office of Vakil-ul-Mutlaq in his correspondence with the Directors of the Company.

VII

It is evident that the delegation of the executive sovereignty was in accordance with Muslim jurisprudence and it formed a high office in the Moghul Empire. The Company assuming this office acquired a trust in accordance with the constitutional theory of the Moghul Empire. But the question arises whether the assumption of this status by the Company was in its own account or passed on to the British government. Westlake commenting on the legal position of the Company states that "an incorporated company is the creature of the state to the law or the government of which it owes its corporate existence and powers, and if it is incorporated for an object which brings it into relations with foreign states, the state which has created it cannot escape responsibility for the acts of its creature.... The relations into which it has in fact entered without being restrained by its parent state, are those of parent state of which the company is as much an organ as the department of its government".(2) Stuyt referring to Huber's remarks in the Palma's case contributes to this opinion that acts "of the East India Company (Dutch) in view of occupying or colonising the regions at issue in the present affairs must in international law be entirely assumulated to acts of the Netherlands state itself".(3)

The logical conclusion that one can draw in the light of these statements is that the obligations and rights acquired by the East India Company passed on to the British Government. As the obligations were of subordinate character, they implied subordination of the British Government and the crown to the Indian Emperor. But this is doubtful. The British Government did not seem to have

(1) Duff. History of Mahrattas. pp. 31-32
(2) Westlake. Op. cit. pp.195-6.
(3) Stuyt. The General Principles of Law. p.8.

accepted the implications of the grant of Diwani or the assumption of the office of Vakil-ul-Mutlaq. It is true that the formal declaration was made in 1813 but it also lacked precision both in terms of area and the meaning of sovereignty. Moreover the company was treated as established in above lines as a sovereign state foreign to the British Government. In view of this difficulty the theory of trust propounded by Burke seems to be more sound and logical. Burke speaking of the acceptance of the Diwani by the Company and acquiescence of Parliament remarked, "When Great Britain virtually assented to that grant of office and afterwards took advantage of it, Great Britain guaranteed the performance of its duties". He, further illustrating the obligation of the British Government and Parliament towards the people of the country observed, "Great Britain thus entered a virtual act of union with that country by which we bound ourselves as securities to preserve the people in all the rights, laws and liberties which their natural sovereign was bound to support if he had been in a condition to support. By the disposition of events two duties flowing from two different sources are now united in one. The people of India therefore come not in the name of the Commons of Great Britain, but in their own right, to the bar of this house, before the supreme justice of this kingdom from whence originally all the powers under which they had suffered were derived".(1)

It follows from the theory propounded by Burke that the responsibility of the British Government was only because it had undertaken to guarantee the due performance of the obligations accepted by the East India Company, but it did not imply that the Acts of the Company were those of the British Government. The responsibility of the British Government could be invoked only when the Company failed in the performance of its duties. Probably it was on this ground that the Emperor of India threatened the Directors of the Company that he would refer the matter to the British sovereign. It was in this theory of trust that the right of the people's sovereignty was recognised.

(1) Burke. Speeches. Vol. I, p.21.

The Mutiny brought matters to a head. The British Government's responsibility was in fact invoked by the circumstances. The Emperor was held guilty of felony by the Court(1) appointed for his trial and deported to Rangoon. The charges(2) brought against him were based on the claim that he was a pensioner and servant of the British Government and therefore within the jurisdiction of the trying court. The Indian opinion on the Mutiny is that it was an attempt at overthrowing the illegal government of the Company. The British opinion on this matter is divided. Some writers are in full agreement with the Indian opinion. Buckler in his paper the Political Theory of the Mutiny establishes that the Mutiny was not that of the Indian sepoys against the Company's government, but that of the Company which, as a disloyal vassal of the Moghul Emperor, had usurped his powers, culminating in an act of treason.(3) Others hold that the Moghul Emperor had become a pensioner of the Company surrendering his sovereign rights when he accepted the Company's protection after the defeat of Mahrattas.(4) This view is not tenable in law. The Privy Council in Salig Ram's case (supra) accepted the last Emperor's status of a sovereign. The view held by the Privy Council is undoubtedly sound on a legal basis and is supported by the foregoing historical facts. Therefore, the annexation of territories belonging to the Emperor by the Company should be treated as analogous to that of Cyprus. Cyprus was annexed by the British Government whereas the territories of the Moghul Emperor were annexed by the Company, which can not be treated as an act of British Government. The Company was an independent sovereign state and the annexation affected by it was the act of state. The military help given by the British Government to suppress the mutineers was in the nature of an alliance. It is true that this sounds paradoxical in view of the sovereignty claimed

(1) See Parliamentary Reports: Proceedings on the trial Muhammed Bahadur Shah. 1858.
(2) Ibid. p.8.
(3) Buckler: Transactions. op. cit.
(4) See Proceedings

by Parliament in the Act of 1813, but it is logical on the ground that the British Government treated the Company as a sovereign body and did not accept the implications of the subordinate obligations acquired by the Company in India. The annexation of the Emperor's territories which had a separate legal entity was in itself succession of state, and this has been accepted by the Privy Council in Salig Ram's case.

The British Government extended military help in view of political expediency, but the Parliamentary enquiry after the Mutiny held the Company guilty of mal-administration and injustice. The British Parliament was bound as securities (in Burke's words) to preserve the people in all the rights, laws and liberties which their natural original sovereign was bound to support if he had been in a condition to do so. The disappearance of the Moghul Emperor was a sound ground to replace him by the British Crown. The Act of 1858 strictly speaking did not bring about any fundamental change in the form of Indian government except that the Board of Directors and the Parliamentary Committee were replaced by the Secretary of State for India in Council. The Secretary of State for India in Council was a substitute for the Board of Directors of the Company and he was made a Member of the Cabinet in order to replace the arrangements for Parliamentary supervision through a separate Committee. It may, therefore, be concluded that Parliament thus arranged for eliminating the Company and taking the administration under its direct supervision. But this cannot be interpreted as an annexation of India, because India's legal identity continued and what was provided was supervision. The Interpretation Act excludes India from the list of Colonies. Cyprus and Ceylon were annexed as Colonies, but India was not a colony and the recognition of its international personality was made when she joined international organisation like the universal postal union as a sovereign state as early as 1878. The title of the sovereign, the Emperor of India, also signifies its identity and establishes the fact that India was an Empire in itself and the head of State was the Emperor of India. Had India been annexed as a colony or in any other form, it would have been necessary to provide some changes in law to enable her to join the international organisation, but no such fundamental change

was brought about.

The connection of the Crown with Indian administration appears to be analogous with that of the trust territories known as mandated areas. The theory of Pic and Stoyanousky declaring that sovereignty lies in the people of the mandated territories though in suspense may be contested(1) in the case of mandated territories, but it is sound in case of India. The fact that reference to the inherent right of the people to receive back the sovereignty was made evident ever since it came into British hands is well established. Even the often quoted passage of Hastings supports this statement. "A time not very remote will arrive when England will on sound principles of policy wish to relinquish the domination which she has gradually and unintentionally assumed over this country and which she cannot at present recede."(2) Still more distinct is the categorical statement of Thomas Munro and Henry Lawrence. Thomas Munro in 1824 wrote, ".... shall in some future age have abandoned most of their superstitions and prejudices and become sufficiently enlightened to frame a regular government for themselves and to conduct and preserve it. Whenever such a time shall arrive it will probably be best for both that the British control over India will be gradually withdrawn."(3) Equally unequivocal was the utterance by Henry Lawrence made in 1844, "We cannot expect to hold India for ever." Macaulay also predicted Indian independence. The theory of trust was predominant in the minds of members of Parliament when discussing the Bill of Indian Government, 1858. There were speakers like Bright, to whom the people's right was the basis for administration. "I accept the possession as a fact, there we are: we do not know how to leave it and therefore let us see if we know how to govern it. The people whom you have subdued, who have a right and strong claim on you - claims that you cannot forget - ..... our children at no

(1) Oppenheim: op. cit. pp.197-200.
(2) Private Journals of Hastings. Part II. p.326.
(3) See Coupland: Restatement on India, in which he reproduces similar quotations.

distant generation (will have to) pay the penalty which we have purchased by negating our duty to the population of India."

In view of these statements one can safely state that the circumstances under which the responsibility of the British Government towards Indian affairs was invoked, it was obligatory on its part to fulfil that responsibility by reverting the sovereignty to the people of India which was assumed by the British Government as a trust. It is undoubtedly true that the political motives in prolonging the rule have played their part in the Indian affairs, but none can deny the fact that the identity of India in international law was continued unimpaired.(1) This has helped India in its ultimate achievement of independence.

(1) see chapter on Evolution of Self-determination.

THE INDIAN STATES AND BRITISH SUPREMACY.

The East India Company started its political career as toll collector then acquired the position of a 'de facto' authority due to which it entered into treaties with other Indian rulers. The assumption of the office of Diwani and that of Vakil-ul-Mutlaq provided the 'de jure' force for these treaties. Throughout this period the East India Company's relations with other Indian powers were treated as foreign. Westlake asserts that - "(The Company) became an Indian power enjoying the same practical independence as the other rulers who had risen on the ruins of the Moghuls. It treated those rulers as internationally sovereign and made alliance, war and peace with them just as England and France acted with regard to the Elector of Bradenburg or of Bavaria."(1) It therefore may be argued that the relations between the Indian States and the Company were governed by international law though not necessarily by the law of Christian Nations or the law of Nations as it was understood then. The fact that the Company itself treated these relations as foreign is evident both from the form of treaties and correspondence on the one hand and from the maintenance of a foreign department on the other. Hastings, writing about the nature of relations with the Nawab of Bengal, speaks of them as foreign: "The alliance with the Nawab Sirajud Doulah, the Vizier of the Empire is the only foreign connection in which this Government can be with propriety said to be engaged."(2) Almost all the treaties of this period testify to the spirit of reciprocal friendship and mutual alliance on an equal footing. There is recognition of the independence and sovereignty of the

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(1) Westlake: Papers, p.198.

(2) Forrest: op.cit. Vol.I, p.8 (Hastings' Letter to the Board of Directors, 25th October, 1774)

contracting parties. "In almost every case negotiation was on the basis of equality between the contracting parties."(1) To quote another authority - "During the 18th Century treaties with the States were made on a basis of equality, hence the relationship has a quasi-international character."(2) They were quasi-international if the facts of history are judged by the standards that existed before the lapse of paramountcy. To have a true view it is necessary to see these facts in the perspective of the then existing law and custom. Lee Warner too accepts the character of the relationship with the Indian States as international.

The Treaty of 1803 with Scindia was notable for two reasons: firstly they had accepted the Supremacy of the Company; and secondly they renounced all claims upon the Emperor's Authority on the strength of the office of Vakil-ul-Mutlaq. It was from this time onwards that the Company realised the need for a change in their policy towards the States. The change, of course, could not be brought about immediately, but when sovereignty was proclaimed in Great Britain in 1813 and recognition sought from the two European powers, the Company found itself on firmer ground to effect this change. The year 1813, therefore, marks the dividing line between the theories of relationship that subsisted earlier and those that followed and came to be known as "Paramountcy."

Much has been written about the nature and theory of British Paramountcy in India; but no one has been able to trace its origin and elucidate its juristic and constitutional meaning. Almost all writers without exception have tried to propound theories relying on the facts and practices

(1) Barton: The Princes of India, p.247.

(2) Chalmers and Phillips: Constitutional Law, p.422.

of British policy with the Indian States. Difficulties are multiplied through the fact that paramountcy was not a legal term of British constitutional law. It is an Anglo-French feudal term.(1) It was never used in British Constitutional Law in the sense in which it defined the nature of the British supremacy in India in relation to the States. The authors fail to trace its origin only because none attached any importance to the relations that subsisted between the East India Company and the Moghul Emperor. Paramountcy, as established already, has its origin in the office of Vakil-ul-Mutlaq that the Company assumed after the Mahrattas. The juristic conception underlying this office has already been explained and it has been established that the Company with the assumption of this office acquired the right to exercise supremacy on behalf of the Moghul Emperor. All the kings who held the titles of Vizier and Subedar virtually passed on into the control and supremacy of the Company. But unfortunately the Company had already initiated a wrong step to put an end to the importance of this office when that was enjoyed by the Mahrattas. Now it had to reverse what was done with the approval. Further the Company was sensitive about references to the name of the declining power of the Moghul Emperor in the conduct of their affairs. The Company was not in a position to do away with it but was not at all in favour of using the Imperial name. At the same time they could not afford to neglect the benefits accruing from such an influential office. Therefore as was characteristic of the practical English legal mind, they retained the authority, and assumed it in practice while dropping its source. When the Moghul King was deposed and the Government passed on to the Crown

(1) Oxford Dictionary.

the Institution of paramount power entered a new phase.

Though the office of paramount power or Vakil-ul-Mutlaq was virtually assumed only after the defeat of the Mahrattas by Wellesley, the Company had already launched on a policy in this direction. By the appointment of the resident at the Imperial Court of Delhi a practical means of attaining this object was established. It is in this correspondence that the Imperial consent to the nature of future relationship with the Company can be noted. Shah Alam in his letter to the Governor-General says: "We now esteem you as the offspring of this Royal House and therefore have in this honour.....honour you with the title of our noble and fortunate son..... The first proof of affectionate attachment will be displayed in your exertions for the restoration of our Imperial affairs and in the arrangement and improvement of the Royal Finances."(1) From the last sentence of this letter it is evident that the King had expressed his consent to hand over the management of the Empire to the British Company, if it accepted the conditions laid down. It was this consent of the Emperor which in Mujibudawlah's letter too was referred to. "Now that the Niabat (deputy) of the Vizarat appertains to me, I am in fact the Naib here on your part and on the part of the Nawab Vizier....." But it was neither possible nor advisable for the Company to take any rash action in this direction while the Mahrattas were in the picture. Hastings therefore took a very cautious step in appointing a Resident at the Imperial Court to whom he gives these instructions - "Your first care must be, to collect the material of a more complete and authentic knowledge. You must study the character, connection, influence and power of the several competitors

(1) Forrest's papers: Letter of Shah Alam received by Governor-General on 10th September 1783, p.1024.

for the possession of the King's favour or the exercise of his authority....." Is it not clear that Hastings was very cautiously planning to wipe out the competitors for the possession of the King's favour, or in a better worded phrase, for the exercise of his authority. The exercise of authority was vested in an office known as Vakil-ul-Mutlaq or paramount power, but there could be no two persons holding the same office. It was already granted to Peshwa. The Company had to defeat the Mahrattas before attaining this office; this was achieved by Wellesley. What was planned by Hastings was achieved by Wellesley only a few years later.

A word is needed to explain the legal implication of this change. The quotations cited in the foregoing paragraphs are characteristic in one sense. They have been selected with two ends in view. First to prove that there was an office which was not only known to the academic jurists but was also used in the practical politics of the Moghul times. Secondly, to show that they use the term as it was understood by the writers themselves. If all the quotations be put together, and the different words used to convey the meanings of the term Vakil-ul-Mutlaq be studied in their context, it will clearly appear that the office was more than that of a Vizier or Minister. The equivalent of Prime Minister was Vakil, but Vakil-ul-Mutlaq was much higher in dignity and more powerful in authority. It had all the virtues and attributes delegated to the holder of the office which were naturally vested in the delegator himself. It also implied that once the delegator handed over the authority, he receded into the background. It was a general delegation of authority, hence no reference to, or consent of, the delegator was necessary for the performance of the executive work of the Empire.

II.

The question arises whether the States were all at once brought into the orbit of the relationship of paramountcy with the assumption of the office of Vakil-ul-Mutlaq and also whether there was no other relationship existing between the Company and other States? The answer to this question can be found in crystallising the cloud that impends on the historical facts and the undercurrent of policy of the Company towards the Mahrattas, the Nizam and the Sultan of Mysore. The study of the original sources of the history of Hastings' times will prove beyond dispute, that the Company had virtually established its supremacy in two regions - Bengal and Oudh and the Cannatic. The Nawabs of these provinces were completely under the influence of the Company. The only powers who could be a match to the strength of the Company were the Mahrattas, the Nizam, and the Sultan of Mysore. Among them, it was only the Sultan of Mysore who had close relations with the French and therefore was the more dangerous to the ever growing strength of the Company. The Mahrattas were the rivals for the possession of the Imperial authority. The Nizam was the only Muslim Subedar with historical connections with the Moghul Empire and therefore exalted in the eyes of the people. The Company therefore was planning for a situation which would involve these three powers in a destructive conflict. It first destroyed the Sultan of Mysore as in him was the greatest danger to the interest of the Company. The Company was cautious enough to secure the support of both the Mahrattas and the Nizam, not only under the pressure of strategic considerations but also to ensure that they might not join the other party and thereby outweigh the strength of the Company. It was not easy for the Nizam to accept

the supremacy of the Mahrattas as the Vakil-ul-Mutlaq of the Empire. The Nawab of Bhopal did not accept the Mahrattas' supremacy in spite of the fact that his dominion had been extremely reduced. It was more unlikely on the part of the Nizam, who was much stronger than the Nawab of Bhopal, to accept it without a trial of strength with the Mahrattas. United action was taken by the Mahrattas to impose this supremacy and the battle of Kara was its result. What is interesting to note in this context is the fact that the East India Company in spite of the treaty of alliance with the Nizam did not go to his rescue. But when the Nizam in his disappointment turned to the French the Company realised the danger and re-established relations with the Nizam. This time, however, the Nizam was neither the victorious ally of the Company against the Sultan of Mysore, nor the Nizam of intact prestige. The alliance was not for mutual assistance but actual protection on the part of the Company. The only power left was that of the Mahrattas and they too were ultimately brought under the Company's supremacy.

If these historical facts are studied with the treaties between the Company and the Indian States in the latter half of the 18th Century and even in the earlier part of the 19th Century, military supremacy and protection could be read as a clause of the treaty of alliance. There are certain treaties which contain clauses requiring the States to promise not to employ or have any diplomatic relations with foreign powers. The treaties signifying protection and acceptance of British influence are those entered into with Cooch Bihar 1773, Cochin 1791, Oudh 1798, Mysore 1799, and Hyderabad in 1800. The Company having established its military strength among the Indian powers invented another device for extending it to other States. This was the device

of subsidiary Alliance. It was not a new thing in the military history of the Company. It was used both in Bengal and the Carnatic. Through the Alliance the Company entered into a contract for providing military help to the State which promised to bear the expenses of the number of troops it required for the purpose. This added to the strength and prestige of the military forces of the Company and on the other hand made the States in subsidiary alliance more and more dependent on the Company. It must not for a moment be thought that the Company having established its military supremacy as a military paramount power had brought all the Indian States into subordinate legal relations. To support this view a phrase may be quoted. "The government of the Carnatic, the appointment of commands, the regulation of forces, the collection of revenue, correspondence with foreign chiefs and States, the negotiation and even the execution of foreign treaties are strictly the rights of the Nawab and must, of course, descend to his heirs, unless a provision shall be made for such cases as may admit or require the intervention of the authority of the Company."(1) This is the view about the Nawab of the Carnatic held by the most responsible officer the Governor-General of the Company, but in spite of this the Company recognised his sovereignty, hence it felt the need to base any future intervention not on any natural rights but purely on a treaty which provided a contractual right. This relationship was considered long after by the Privy Council in the Nabob of Arcot versus the East India Company,(2) and the conclusions reached by this judicial body recognise that the treaties contracted between the Company and the Nawab were those of two Sovereigns.

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(1) Forrest: Papers Vol.II, op.cit.p.445.

(2) I.A.C. (1893).

Whatever rights were ceded to the Company were based on treaties; that is why Hastings emphasised the need to acquire the rights of intervention through a treaty even in a State where the Company had already obtained enormous influence; and Hastings elsewhere refers to the Nawab as a mere pageant and cipher. The basis of this relationship being a legal contract can only be dealt with under international law.

Almost all the Indian States which were in constitutional relations with the Emperor had gradually acquired all the "de facto" attributes of sovereignty. They were in treaty relations both with the British and the French. "Before 1858 it is evident that the Indian States in their relations with each other were not bound by the policy of the East India Company. They were at war with each other when both had peaceful relations with the East India Company and viee versa."(1) The constitutional relationship they had with the Emperor was never considered in their foreign relations. There were other states where no such relationship existed. The States were capable of declaring war and formulating peace independently of either the Company or the Moghul Emperor. The question arises as to whether there was any international law so to say applicable. It is true there was no law of nations as it is understood today; but, as has already been established, neither the Indian nor the Muslim rulers were unaware of the legal principles governing nations. An English law is the law of England and French law that of France, so international law was that of a certain part of the world which comprises, if it was not exclusively composed of Europe, all nations outside Europe, but of European blood and Japan. More interesting and appropriate is his(2) remark that "Outside that part

(1) J. Westlake. The Native States, p.401. Law Quarterly, Vol. 26, 1910.

(2) Westlake: op.cit. p.313.

of the world which I have indicated there are facts of the same nature as some of those which international law deals with; for example, governments and their dependents, as in dealing with these facts there are the same principles of national justice to which international law ought to conform and is supposed to conform..... The Indian system is free to have its own nomenclature.....(1) It can be fairly deduced from the observations of this authority on International law that despite the fact that the Company had become the strongest power in India, and had in some cases extended its protection to some of the States, the States had not lost their international personality as it was understood in those times. It is wrong to apply the criterion of modern law to the facts of history, especially since the present international law owes its origin to the laws of the Christian nations. The States were not within its sphere but they had their sovereign existence in India. Even Persia and China were admitted to the sphere of present international law in 1899 and 1907 respectively. Again, even if the States are judged according to the principles of modern international law they do not fall too short of this definition. This classification is here made to maintain the distinction between the nature of the relationship that the Company established with the Indian States as a de facto and that of the de jure paramount power in the position of Vakil-ul-Mutlaq. The de facto relations were, as has been observed, entirely based on the principles of International law and those which formed the basis of relationship between the paramount power (Vakil-ul-Mutlaq) and the States were constitutional. The Company had become paramount and thus succeeded the Peshwa but not the Emperor of Delhi.(2)

(1) Ibidem,
(2) Keith. op,cit.p.

The Company was in a position to exercise Imperial authority in the name of the Emperor but not in its own name. It was the delegation of power and therefore the position of the Company was that of a trustee. The Imperial authority was in trust in the hands of the Company. But it did not amount to a complete transfer of the natural succession. In view of this constitutional position it could interfere in the States, in constitutional relationship with the Empire as once Scindia, making the Company's constitutional subordination to the Emperor, a basis had tried to intervene in the Company's affairs on the recognition of the Nawab. It may also be pointed out here that the Company in the first place was an independent Sovereign and in the second place had also assumed the office of trust. In other words the Company acted as an independent Sovereign in its own affairs and as an Executive Prime Minister vis-a-vis the Emperor.

The Indian States which had acquired the attributes of independence even from the point of view of the Moghul Constitutional law were not the feudatories of the empire. Mahrattas and Sikhs had acquired their titles without any grant. The rulers strictly speaking held provinces of the Empire as governors who in view of the fact that the emperors had grown so weak as to act on the whims and fancies of the ministers having control over them, had acquired a hereditary character of succession and de facto sovereignty. It was this constitutional origin of these states that made them so eager to gain Firmans for the renewal of the appointment of the office at every new succession. The grant of Jagir (fief) and the appointment of governorship were two separate things. It could have been combined in one person but this did not change the distinct legal identities. But the Company's servants with the background of feudal system

at home and the meagre knowledge of the nature of the constitutional principles of India, very effectively pursued a policy of replacing British authority as that of a lord-paramount. They failed to maintain any discrimination between the office of paramount power and the overlordship of lord paramount. The fact that the Company was the strongest power and enjoyed the privilege of controlling the execution of the Imperial authority resulted in a policy which could have been better suited to a natural succession than to a trustee. The Company was conscious of the declining prestige of the Emperor on the one hand and the extension of its political influence on the Indian States on the other hand and therefore assumed all the dignities that were usual with the Emperor. This fact can be seen throughout the history of the Company's policy towards the State from 1813 to the time of the Mutiny. Even the Board of Directors which always insisted on the policy of non-intervention seems to have changed and approves annexation of territories of the Indian rulers in the absence of any natural successor. They justify it by relying on the constitution and customs of India as if they had succeeded the Moghuls in reality. It is to this period that the policy of intervention, annexation, insistence on prior permission for adoption, etc., owes its origin.

III.

The main change which came was that the Company shifted its policy in relation to the States from the field panel of international law to that of constitutional law and the Imperial codes. The servants of the Company carried this change out vigorously. Foreign relations had already been taken under control according to the treaties with

most of the States and had become a common feature of the relations. Some of the States were made to promise not only acceptance of protection but also of obedience and subordination. The term military subordination in the treaties was changed to general subordination. Sanads were issued to emphasise both the absence of original granters Moghul or Mahratta and confirmation of the Company States like Mysore and Kashmir were carved out as the Company's grants to the rulers. In these States not only subordination, obedience and protection were guaranteed, but also the grantor reserved the rights of jurisdiction of law if need arose. Enunciation of any new law on the part of the State was made subject to the previous sanction of the Company. The basis of the relation of the Company with States undoubtedly had an air of feudalism. An attempt was made to place the Sanad States in this category, though they had their original title, by the renewal of Sanads.

Another important feature of the policy prosecuted by the Company, in relation to the States, from 1813 to 1857, was that the Company virtually attempted to wipe out the different legal and historical relations that it had established with different categories of States. Common principles of policy were made the rule. Big or small, sovereign or subordinate, States with original titles or those of its own creation, were one and the same for it. The fact that the British Company had a sovereign to look back to, encouraged this policy, which is considered as one of the main reasons for the upheaval of 1857.

On the part of the Indian rulers, reliance was on the Treaties, maintaining at the same time differences in their dignity according to the size and historical background of the State. One thing was common to all of them. All

without exception had delegated the conduct of their foreign relations but were very reluctant to acquiesce in, and resentful against annexation or intervention. They accepted the supremacy of the Company which came through treaties, but rejected the supremacy which emanated from the source of the office of paramountcy (Vakil-ul-Mutlaq). This clash of views continued till the upheaval of 1857 in which the very existence of the government of the Company was in danger. What is important in the chain of this upheaval is that the States with the disappearance of the Moghul Emperor took steps which amounted to their legal independence. The name of the Emperor was replaced by that of the local ruler on the coin and in Qutba. But not all of them rejected the supremacy that was established through treaties. On the other hand some of them gave substantial help to the Company which was in keeping with the spirit of the treaties. It is to this period that the Nizam's de jure declaration of independence belongs.

A question arises as to whether the States which declared their legal independence only in revolutionary circumstances when the British Government was engaged in putting down the Mutiny could justifiably be treated as independent and sovereign States. In the first place, as has been established, the States under the Moghul supremacy had assumed all virtual and de facto attributes of sovereignty. Their recognition of Moghul supremacy according to Eastern standards was not an infringement of their sovereignty. An analogy may be found in Eastern history in more than one case. The Abbasid Caliphs had their supremacy recognised by all the sovereigns of the time, who were both in fact and in law independent; even the Muslim Kings of India accepted Khilat and title from the Abbasid Caliph which implied

recognition of Abbasid supremacy. Those interested may refer to Altutmish's enthusiasm and efforts to obtain such Khilat and Title. Even in Indian history the Mahratta rulers accepted the supremacy of the Peshwas. In the second place, the States recognised Moghul supremacy but they did not accept the succession of the East India Company in place of that of the Moghuls, and that is why they declared their independence. Had there been no declaration of independence that would have at least implicitly amounted to its acceptance.

IV.

No sooner were the troubles of the Mutiny over, than it was decided by the British Government to establish direct rule of the Crown in India, and then followed the Queen's declaration. In this declaration there is no reference at least explicit, to the paramountcy rights, which recognised intervention, on the other hand intervention was denounced and a solemn promise to respect the treaties that had been contracted with the States by the Company was made. This omission of paramountcy and acceptance of Treaties explicitly recognised the claims of the States and thus put an end to the controversy to which among other causes the Mutiny was attributed. Such a declaration in the absence of any ruler at Delhi in whom the States could see a rival to the Crown, shows that this was not because the British Government was apprehensive of any such danger but had realized that neither the Company nor the Crown itself could be a natural successor to the Imperial office and thereby utilise all its attributes. Contrary to this the British rightly and wisely too, implied succession to the de facto supremacy of the Company established

through the treaties, by accepting them and also referring to the general peace of India at large. This change of attitude can be seen in the use of suzerainty in the Royal Title Act (1) which was not enacted to make any changes in the laws of the governance of India but was intended to fill up the vacuum that was created by the mere acceptance of treaties without any explanation or interpretation. The acceptance of the treaties on the one side implied the recognition of the principles of international law as a basis of their relationship, and on the other hand the reference to the general peace and order of the whole of India needed further clarification. The Interpreting Act(2) for the first time used "suzerainty" of the British Crown over the native Princes. This provided the statutory definition of the nature of the relations with the Indian States. As regards the second aspect of the application of international principles it was only defined as late as 1891, through a circular of the Government of India which stated, "The principles of international law have no bearing upon the relations between the Government of India as representing the Queen Empress on the one hand and the native States under the suzerainty of Her Majesty on the other."(3) This circular was issued in view of the fact that the Government of India realized that the policy of non-intervention announced by the declaration and on other subsequent occasions could not be adhered to literally. This declaration gave birth to the controversy that existed between the States on the one side and the British Government on the other. The nationalist writers taking the third point of view thus making the controversy move in a triangle. Before this controversy is assessed and examined one fact must

(1) 1876.
(2) 1889.
(3) Government of India: Gazette, 21st August 1891.

be made clear, the fact that the British Government used "suzerainty" instead of "paramountcy" giving it legal status, needs some explanation of the meaning of this term.

The Encyclopaedia Britannica defines "suzerainty" as "a term of feudal law, is now used to describe a person or States in a position of superiority to others. The term was rare in feudal times in England."(1) For the first time "suzerainty" was used in the Interpreting Act to define the authority of the British sovereign over native Princes. There is no concensus of legal opinion on the meaning of "suzerainty" and that was the main reason why it was ultimately dropped from the convention of 1881 between the South African Republic and the British Government.(2) In spite of this difference in legal opinion on its meaning, the term was used in defining the relations of the Crown to the Indian States. "Paramountcy" was not employed in the legal and important official documents. This change was more conspicuous in the fact that the word "paramountcy" used in the Indian Independence Bill was dropped and "suzerainty" was used instead.

With this background to the meaning of the term and history of its use it seems appropriate to enquire why "suzerainty" was employed to replace "paramountcy" and the sense it conveyed in this context. As far as its original feudal sense is concerned it cannot be strictly applied to India as a whole, even the States which were the East India Company's creation joined the ranks of the other Princes taking advantage of the common policy that the Indian Government followed towards the States. There was another marked difference, feudal suzerainty implies allegiance both of the subordinate and his subjects to the suzerain or his overlord. This was not the case even of those States which

(1) Encyclopaedia Britannica: Article - Suzerainty.
(2) Ibidem.

were the East India Company's creation. Sidgwick describes three characteristics that could be noticed in the evolution of feudal suzerainty: "First, intenser and closer relationship or lordship and service. Second, the relation of the individual to his land. Third, the exercise of government function over free men."(1) No one except Tupper tries to define the relationship in the terms of the feudal system, who does so in spite of the fact that no such evolutionary facts are to be noticed. The question of suzerainty was raised in the case against the Gaekwar of Baroda. It was explicitly laid down that, "'suzerainty' is a term applied to certain international relations between two sovereign states whereby one, whilst retaining a more or less limited sovereignty, acknowledges the supremacy of others. Such a relation may be in the nature of a fief or conventional i.e. by some treaty of peace or alliance in contrast with the fief; which is a sovereignty granted by a lord paramount, over some defined territory accompanied by an express grant of jurisdiction."(2) It was further stated that "His Highness by International law is not capable of being made a co-respondent in a suit for dissolution of marriage in the High Court in England."(3)

"Suzerainty" according to another authority is a term of feudal law as is the case of vassalage....."and scarcely appropriate to modern state relations. Nevertheless they have survived, although with a somewhat altered meaning. In its most appropriate sense it would appear to denote a state which, <u>although once a part of a paramount state, has as a result of agreement or disruption, established itself as a separate political community, although without achieving independence in its external affairs relations</u>."(4) As compared

(1) Sidgwick: Development of European polity, p.202.
(2) and (3) Statham v. Statham etc., A.C. 1912, p.95.
(4) International Cases, p.45.

with the above cited definition, the Indian States were at no time part of the paramount state, hence do not come in the purview of this definition.

The suzerainty that was used to define the relations with the Indian Princes was conventional relying on treaties and allowances in contrast with the fief. Even those states which owed an express grant of territories and jurisdiction over it subsequently were brought into line with other States.

The other form of the extension of supremacy known to international law is known as a protectorate. The main difference being that, a "protectorate" flows from or is a reduction of the sovereignty of the protected state. Suzerainty is conceived as derived from and a reduction of the sovereignty of a dominant state.(1) The only title to it, being the superior strength of the protector state. It has been admitted that the protected states of India in this sense in the majority of cases have their own titles. There is no grant of territory or jurisdiction originating from the British Crown. There are writers like Sen who classify the Indian States according to their titles. He says, "Vassal states, comprise all those States which derive their titles from grants. .....Such are the Sanad States of Bundel Khand and some of the Simla Hill States."(2) They do not, of course, exhaust the list of the States in this class. Even the Sanad States, as a matter of fact, had their own title. According to Leslie Scott, the Sanad is nothing more than an evidence or record. "The word 'Sanad' (in older documents often spelt 'Sunnad' as it is pronounced) is, as we have been informed, in common use in India, not only of diplomatic instruments of grant, but in ordinary commercial

(1) Encyclopaedia Britannica: op.cit.

(2) S. Sen: Indian States, p.18.

documents, and receipts for money, and means merely evidence or record."(1) As far as the meaning of the word "Samad" is concerned we have nothing to disagree with, but its use in documents of grant explicitly conveys the sense of subordination. It is a commonplace of Indian History that as a result of conquest Sanads were issued by the Conquerors to confirm the titles of the conquered sovereigns and states. A record of such Sanads issued by Aurangazeb after the conquest of the Qutub Shah's Kingdom could be seen both in the State Archives at Hyderabad - known as Daftar-e-Diwani and Mal - and in family Archives of the several people as well. The Sanad States though they had their original titles, gained recognition for these titles through Sanads from the Crown. A Sanad is an evidence of agreement, but the only difference being that the agreement is completed by its acceptance. The Acceptor is not a signatory and this form therefore has been used for those who are inferior in status.

The other form similar to a Sanad is an agreement. "Agreement" should not be understood, as far as Indian States are concerned, in the sense of its international usage. Its history demands certain qualifications to this. In order to form a correct view of the meaning of this word Hastings' following paragraph may be read. "No. - - is a Persian copy of a Cowlnama or agreement on engagement which I obtained from the Vizier confirming to Raja Chief Singh and his posterity, the stipulations formerly made on behalf of his father, Balwart Singh, the Vizier desired that the stipulations made in favour of the Rajah might be executed in this mode rather than by an article in the treaty, and it was equally satisfactory to the Rajah."(2)

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(1) Report of the Indian State Committee, 1928-29. cmd.3302 - Counsel's advice, p.66.

(2) Selected State Papers: Vol. I, p.26.

Further referring to the grant of Kara or Corah to the Mahrattas by the Emperor he says ".....given a Sanad for Corah or Kurrah to the Mahrattas."(1) This suffices to show the original meaning of these two words. The meaning they originally conveyed establishes the fact that these forms were used in order to show that the person in whom they originate is the natural fountain of the authority they confer.

V.

The States classified according to the form of the relation, that is treaties, engagements and Sanads, can, of course, be distinguished from one another, in stature. But now we have to see whether this principle of distinction and differentiation could be maintained as regards their legal status. There is one common thing retained by the States and recognised by the judicial bodies of Britain, this is the suzerainty common to all from the small State of Kathiwar to the largest States like Hyderabad. In Hemchand de Chand v. Azam Sakarlal Chotamlal(2) established that the jurisdiction exercised in connection with Kathiawar was political and not judicial in its character. Kathiawar as a whole was not within the King's Dominions. There had been no assertion of territorial sovereignty. The legal entities of these territories has thus been distinguished from those included in the King's Dominions.

The princes were to a greater or less extent sovereign within their own dominions and the legal aspect of international law has to be applied in their relations with

(1) Ibidem, p.30.

(2) Hemchand Dechand v. Azam Sakarlal Chotamlal, I.A.C. (1906) pp.1-29.

the British Government. The sovereignty held by the States was common and as far as this is concerned all States were governed by this rule and were the same in the eyes of the law. Sovereignty rested with the States except to the extent to which it has been delegated to the Crown, "To the extent of such transfer the sovereignty of the State becomes vested in the Crown, whilst all sovereign rights, privileges and dignities not so transferred remained vested in the ruler of the State. The phrase 'residuary jurisdiction' is sometimes used in official language. In our opinion it is the state and not the Crown which has all residuary jurisdiction."(1) There are two points referred to in this theory propounded by the legal councils of the Princes in their support. First, that the sovereignty is divisible, secondly the transfer of certain rights of sovereignty transferred to the Crown by the State, leaves them with the rest of the sum total of the sovereign rights which they call residuary jurisdiction. As far as divisibility of sovereignty is concerned, there seems to be a consensus even among the writers of the opposite group. Sovereignty is divisible within the State but not without. State sovereignty within the State can undoubtedly be divided between its different organs, this rule was rather carelessly applied to the fact that the States had transferred certain sovereign rights to the Crown, as has been maintained by some eminent writers. This transfer does not amount to the division of sovereignty. It is the delegation of sovereignty. Thus it can be plainly stated like this - sovereignty within the State is divisible but without it is only delegatable. "Division" has the sense that the States with their divided sovereignty do not have separate entity, for this purpose they are one, merely parts of one. It can be further explained

(1) State Committee Legal Opinion, p. 61.

on the analogy of the internationally recognised sovereign States in relation to U.N.O. The fact that the members of this international body agree to abide by the clauses of the Charter implies limitation of sovereign rights to the extent that they are transferred. As soon as any member state breaks away from this body such rights revert to it.

The states are foreign territories for the British Government. Not only the States but the territories of Berar also are foreign. Berar was a territory of which the administration was handed over according to the Treaty. It too remained a foreign territory for all purposes. The Indian States are foreign for the purposes of the Foreign Jurisdiction Act of 1890. The sovereignty of States like Tanjore and Faridkote has been judicially recognised.(1) The criterion of separate entity depends on three factors as has been laid down in the judgment of the Madras High Court by Sir D'Arcy Reilly:

(1) The people of the territory must owe allegiance to the ruler;

(2) The Laws enforced in the State must be the ruler's laws, either made or recognised by him;

(3) Those laws must be enforced by his courts deriving their authority from him and not subject to the judicial control of any outside authority. (2)

The States are in possession of sovereignty which fulfils all these three conditions. It may be asked what about the States in which magistrates were appointed by British authority. This question was decided in the Kathiwar case and it was maintained that the fact that the British officers were in charge of the judicial administration does not bring the territory and such administration subject to

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(1) Secretary of State versus Kamachi Bai, 7 M.I.A.(Tanjore) Guru Dayal Singh versus Rajah of Faridkote 1894.23 A.C.

(2) Kotha Venkata Rama Ready versus Bhopal Mao (Gadwa) 53 M. 968.

the Municipal Courts of Britain because though such administration was made by British officers the authority behind it was that of the rulers.

There are certain objections raised in this connection, first and foremost is that the Indian States have been made subject to the laws made by the British Parliament, In defence of this view Lee Warner quotes 37 George IIb Chapter 142 Section 28 which imposed a restriction in respect of lending money to Indian Princes without the consent of the Court of Directors or Governor-General in Council. The relevant clause runs like this - ".....be it therefore enacted..... no British subject by himself or by any other person directly or indirectly employed by him lend any money or other valuable things to any native prince in India by whatever name or description such native princes shall be called....." This is legislation entirely meant and confined to British subjects, the mere reference to Indian states in no sense of law extends the authority of British law to the State's territory or the persons of their sovereigns, therefore to read the extension of jurisdiction of this Act on the Indian Princes is not at all tenable in law. Every sovereign state is empowered to regulate the conduct of their subjects. It may be in relation to another individual, or class, within the State or another Sovereign State or any class in that State.

Another objection raised is that for all international purposes, at any rate, the whole empire, including the protected State united to it must be regarded as one nation represented by the British Government. The treaty of extradition with Germany of 1872 was signed to the effect that the British Government took the responsibility for this obligation for the whole of the Empire, and therefore the Indian States were

bound to co-operate in rendering the Treaty effective in their dominions too. As has been said by Westlake: "If the hands of the British law cannot directly reach the fugitive offender outside its own jurisdiction, the State which harbours the fugitive must produce him on British soil where he can be dealt with according to law."(1) There are two answers to this defence: first, the States by delegating their sovereign rights regarding foreign affairs have implicitly accepted the obligation of co-operating with the British Government in this sphere.

In the same way the declaration of war and conclusion of peace in the war of 1914-1918 as well as that of the last war was made on behalf of the States along with India not because the States had no sovereign rights of their own, but because their sovereign rights of making war and peace were delegated to the British Government which had taken the responsibility for conducting their foreign relations as a whole. In the second place, as far as the handing over of a fugitive was concerned, this was regulated according to an agreement between the Government of India and the States. An Extradition agreement to this effect was mutual in its operation and the fugitive defined as that of the Indian government included fugitives coming within the definition of the treaty above cited. In the eyes of the Courts of the States any such fugitive was the fugitive of the Indian government. All necessary procedure had to be adopted in order to secure the person of the fugitive. A common practice in Hyderabad State was that the British Indian Courts used to utilize the political agency of the Resident who in his turn used to send the case to the

(1) Westlake: op. cit. p. 272.

political secretary of the State. It was necessary to establish a prima facie case on which the High Court used to give an order for handing over the fugitive. It is plain from these facts that the extradition arrangement was not derogatory to the sovereignty of the States.

The last but not the least objection is based on the fact that the rulers of the Indian States were bound to loyalty to the Crown and that their rulers have been, and could be punished by fine, by the deprivation of salutes, and in extreme cases by deposition. The rulers are legally liable for an offence to a penalty imposed by a political superior.(1) The Maharaja of Gawalior was reprimanded for his military inefficiency, and the history of British relations with the State was "one of constant military interference and chastisement of the Durbar troops, the strength of which was considered dangerous."(2)

The Indian States Committee has particularly chosen two cases, namely those of Baroda and Manipur.(3) In the Baroda case a Commission was appointed to go into the complaints brought against the ruler's administration and to suggest reforms. In 1891 violent dispute occurred in Manipur State which led to the abdication of the Maharaja, especially because Mr. Quinton and his colleagues were beheaded under the orders of the Senapati or General (the brother of the Maharaja), and the Prime Minister of the State.(4) In almost all these cases the procedure adopted was political. There was no normal judicial procedure or trial adopted. When a ruler was deposed for his complicity in the death of his Uncle and was interned outside his State, he appealed to the Privy Council against the findings of the

(1) Tuppers (Sir Charles Lewis): Our Indian Protectorate, p. 5.
(2) Lee Warner: op.cit. p. 24.
(3) Baroda Case 1873-75 &. Manipur 1891-92.
(4) State Committee, pp.16 & 17.

Commission. It was held that the conviction of the ruler was by a Commission appointed by the Government, "in its political and sovereign character.....and was not in any sense a Court,"[1] from which any appeal could be heard. In other words the action taken by the British Government in these cases was an Act of State. An Act is so defined only when it is taken against a sovereign. The fact that the British Government took action against the rulers did not establish the extension of British jurisdiction over the State but on the other hand its political and sovereign character, proves that the States were treated as sovereign.

VI.

Now the term "suzerainty" as it was used in relation to the States both by the British Government and the judicial bodies, was used not in its original sense of feudatory relations but in its modern sense, showing its usage in international law. "Suzerainty" therefore expresses in this connection international guardianship. It does not imply the extension of sovereignty. "Sovereignty" is used in the sense of territorial sovereignty or of the word Dominium. in Roman law, even to the extent of the rights coming in the sphere of foreign affairs. The term "division of sovereignty" implies Dominium. The States delegating to foreign powers do not pass on Dominium on these rights, on the other hand they place them in trust with the British government. This fact can be further explained on the analogy of the sovereign rights over railway area and cantonments that the State placed with the British Government. The

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(1) Mahadev Singh (Panna) versus Secretary of State, I.A. [illegible] 1904. p. 239.

The jurisdiction exercised by the British Government in such areas displayed all sovereign attributes except Dominium. The Privy Council in Mohammed Yusufuddin versus Queen Empress held that the jurisdiction over the railways in the territory of the Nizam was exercisable to the extent and limits of the Deed."(1)

Suzerainty therefore can be conceived as derived from, and a delegation of, the sovereignty not of a dominant state but of a state under suzerainty. This at least is the case in British suzerainty in relation to the Indian States. The source is the State and not the British Government. Thus there remains no difference between a protectorate as defined in international law and a Protected Indian State under British suzerainty as explained in the above paragraphs.

Protectorate in international law, may be called a kind of international guardianship, but "it is characteristic of a protectorate, in contradiction to suzerainty, that the protected state always has, and retains for some purposes, a position of its own within the family of Nations, and that it is always for some purposes in International Person and a subject of international law."(2) Keith maintains a distinction between protectorates and protected States: "The essential characteristic of the protectorate is that the Crown assumes and exercises full sovereign authority, though without annexing the territory. In the case of the protected State the sovereign authority belongs to the sovereign of the State, and not in any sense to the British Crown, and the role of the latter is derived from treaty arrangements with the States which do not confer any sovereignty over them, but give powers and duties in respect of either or both internal and external affairs, or the latter almost exclusively."(3) It is not

(1) Mohammed Yusufuddin vs.Queen Empress I.A. p.239, 1904.

(2) Oppenheim. op.cit. p. 169.

(3) Keith: The Governments of the British Empire (1935) p.508.

desired here to go into the intricacies of the term and its proper use but it is evident from the foregoing facts that sovereignty belonged to the rulers.

The inability to unearth the legal principles under the political actions of a democratic Imperial government have led many eminent scholars both of India and Great Britain to fallacious conclusions and the controversial character of the problem has supplied fertile ground for propounding theories, which try to treat the controversial problems with the theoretical background. The theories propounded by the State C ommittee also signify the theory of personal relationship. The legal aptitude of Prof. Holdsworth could neither stand feudatory theories of Tupper nor the defence of A.P. Nicholson and Leslie Scott in favour of the Princes. He was equally unsympathetic to Chudgar's book which could well be treated as a production inspired by a hatred of the Princes. Two important characteristics of the theories he put forward in the State report and supported and explained in his article are notable. In the first instance he raised the law of the relationship of the Indian States with the British Government, from the sphere of Constitutional law, but does not carry it any further than a special kind of constitutional law, thereby adjusting it to contain certain elements derived from international law. In the second instance he treats paramountcy as a part of the prerogative of the Crown but at the same time distinguishes it from the other parts of the prerogative as he treats paramountcy as a source of this distinct prerogative and not vice versa.

For his definition of constitutional law he relies on Dicey's criterion, "constitutional law is the body of law which includes all rules which directly or indirectly affect the distribution or exercise of the sovereign power

in the State. Hence it includes (among other things) all rules which define the members of the sovereign power, all rules which regulate the relations of such members to each other, or which determine the mode in which the sovereign power or the members thereof exercise their authority."(1) Professor Holdsworth relying on this definition concludes, "the rules which govern the relationship between the paramount power and the States are covered by this definition. And I think that the part of constitutional law of British Empire into which this relationship falls is that part which is concerned with the prerogative of the Crown....., but it is very distinct part; and, in order to differentiate the distinctive features it is necessary to distinguish it from other parts of the prerogative."(2) This definition of constitutional law is applicable if the whole Empire of which India and the Indian States formed a part, could be treated as one state. But this was not true, if the Indian States formed a part of the State then there could not have been any act of State in relation to them. The fact that the States have been treated as sovereign states by the judicial bodies of Great Britain by denying appeal to the Acts of the British Government in their relations, and also by extending immunities to their heads, established it beyond dispute that they were sovereign in the eyes of the judicial bodies of Great Britain. They were not therefore parts of the State. To say that they are within the British Empire is quite different from saying that they are part of the state, i.e. Great Britain. They were not even subject to the appeal to the Privy Council as was the case with the Dominions. The constitutional law of Great Britain has a peculiar character of its own, besides

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(1) A.V. Dicey: Law of the Constitution, 9th Edition, p.23.

(2) Holdsworth: The Indian States and India. Law Quarterly Review, Volume 46, 1930, p.424.

the law of the Constitution of Great Britain, there are constitutional conventions relating to the Dominions both in their relations with the United Kingdom and with one another. These Constitutional principles and doctrines also form part of this subject, but even these principles do not cover the relationship of the British Government with the Indian States. The relationship with the Indian States seemed to fall within this sphere for two reasons. In the first place, the notification of the Indian Government that the principles of International Law will have no bearing upon these relations signified a change of policy. The criticism levelled against this notification by Professor Westlake was, "the only criticism to be made on that notification is, that it would have been more accurate to speak in it of international law simply than of the principles of international law."(1) It is a commonplace of the conventions of the British Empire that there is no international law, applicable to the relations of its different parts with the Great Britain and with one another. But as has been pointed out by Professor Westlake, they were not devoid of the principles of International Law. The States regulated their relations with the British Government, according to the principles of International Law, but not in accordance with International Law. Some Indian writers define this law as inter-Statal law.(2) From this point of view Indian States form a peculiar type of law which at least according to the definition given by Dicey could not be defined as constitutional law and it is equally futile to define them by terms like "inter-Statal law" which have no universal recognition. As was done by the State Committee which left it undefined "they fall outside both international and ordinary municipal law...."(3)

(1) Westlake: The Native States: Law Quarterly, 1910, Vol. 26, p.312.

(2) Pannikar: [illegible]

(3) State Committee, p. 25.

Therefore they said that "the States were sui generes, i.e. there is no parallel to their position in history, that they are governed by a body of convention and usage not quite like anything else in the world."(1) As far as this body of usage and convention is concerned, it is for convenience' sake defined as "a very special part of the constitutional law of the Empire." It might be used in this sense not as defining the relationship of the United Kingdom but those of the Empire, though the legal status of the Indian States was superior to that of the Dominions who had the appellate jurisdiction of the Privy Council and were subject to Parliament derogatory to their legal sovereignty. What it is desired to point out is that it would have been much better to leave the relations undefined. In the second place constitutional law was used to define the Imperial character of the Crown, and to this extent there was some justification. There was one glaring omission in that neither in the report nor in the article did Professor Holdsworth attempt to maintain the distinction between the statutory use of suzerainty and paramountcy in the Imperial character. But he has rightly maintained paramountcy as the source of prerogative and not vice versa, that means he recognises that the "state territory is not British territory nor are the subjects whilst residing in their States British subjects..... Paramountcy..... does not depend on the Common Law; and though in some respects the mode of its exercise has been prescribed by statute, its existence is not dependent upon statutes. Existence depends upon treaties, engagements and Sanads supplemented by usage....."(2) He maintains that "other powers are only exercised by the paramount power in partnership with the States - one example is the control of military forces of the States, paramountcy therefore is a part only of the prerogative." But "paramountcy

(1) Ibidem.
(2) The Indian States and India, 426.

is a very distinct part of the prerogative." This distinction he brings about in two ways. "In the first place, its ambit and in the second place the legal basis upon which it rests are different. Prerogative extends over all countries which are governed by the Crown, either by itself, or by the British Parliament, or by the Parliaments of the Dominions; and it extends over all the subjects of the Crown in that country and over aliens temporarily resident there. Paramountcy, on the other hand extends only over the Indian States and the Indian States are subject only to that part of the prerogative which is included in the term paramountcy..... paramountcy..... does not depend for its existence on common law, but on treaties, engagements, Sanads supplemented by usage and suffrance."(1) The Legal Council on the other hand established that the Crown had no sovereignty on any state by virtue of prerogative or of any source other than cession from the rulers of the State. There is no controversy about the treaties which seceded sovereign rights, it is only the usage, sufferance and other political practices for which a theoretical explanation with a special kind of prerogative was propounded. Usage in municipal law was said to be itself sterile; capable of creating neither rights nor obligations.(2) Julian Palmer said, "we cannot say that because a thing was done once or twice a right to do it again arises.

The usage and sufferance was further supported both by Sir W. Holdsworth and Lee Scott but in different ways. The element of consent was deduced by both of them from the acquiescence in the actions taken by the paramount power in relation to the States. There is no evidence that the States had acquiesced in them. Almost all writers have quoted

(1) State Committee, p. 61.
(2) Legal Opinion: State Committee, p.67.

Lord Reading's reply to the Nizam about Berar in which Lord Reading had emphasised the point that paramountcy was the sole judge and arbitrator on the points of dispute between the paramount power and the State, also between the States themselves. By many it has been adduced that the Nizam's silence was an acquiescence recognising the rights of paramountcy to make arbitrary decisions. Unfortunately writers of today like Professor Watmul[1] of America quote Reading's letter which after the conclusion of the treaty[2] on Berar, establishing the joint sovereignty of British Crown and Nizam, had lost its importance. The fact that Reading's did not put an end to the Nizam's claim on Berar, and the British Government had to revise the so-called Perpetual Lease Agreement proves that, what was attempted was nullified by subsequent actions. The same was the case with other States; there was no voluntary consent, if there was any consent at all it was brought about by some kind of pressure. Such consent in municipal law cannot be justifiably recognised, but the well-known principle of forced consent in International law might be applied to the relations with the States.

Now the question arises whether the treaties, engagements and the principles of usage and suffrance could be binding on all States, or whether each State has its own particular case. There is no doubt that a good number of treaties have common clauses like cession of foreign powers, defence, protection, etc. but that does not mean that common clauses inserted in the majority of treaties justify their generalisation. It is true that the Political Department of the Government of India tried to build up rules of precedence out of the various incidents in relation to the States. They tried to find guidance for the policy of the

(1) The Status of Hyderabad during and after British Rule in India: American Journal of International Law. Jan. 1949.
(2) The Agreement of 1936.

British Government on particular occasions in relation to a particular state out of the stock of history. This was like the experts of the foreign department giving their opinion on a certain issue deriving guidance out of the history of their government's relations with that particular country. There was no legal force given to the precedents that is known in the domain of law. Each State had its own historical background and own treaties with the British Government.

VII.

A certain action taken in connection with any State was legally defined as an Act of State. The sole judge of such acts was the British Government. If it relied upon any precedent of a similar situation it was entirely a guidance directing and influencing a sovereign state in its action with regard to another sovereign state.

Julian Palmer gives a different name to the rights of paramountcy in relation to the States. He calls them resultant rights which are the product of the association that subsisted between the paramount power and the Indian States. He calls them rights because he too believes that the law of relationship falls within the sphere of constitutional law rather than international. A deep study of the development and changes of the paramountcy revealed that, in view of the disappearance of the natural sovereign, an attempt was made to base the natural paramountcy rights acquired through the office of Vakil-ul-Mutlaq, on some other suitable basis. The only basis that the legal minds could deduce was that of usage and sufferance, because the rights that the treaties gave to the paramount power were not competent to cover the whole field of the policy of

the British Government. Usage and sufferance were found untenable in the eyes of law and as a result of this defect another basis, that of resultant rights, was supplied by Julian Palmer. The difficulty is solved merely by admitting the international character of the relationship. Superficially the incapability of the States for the declaration of war and peace, the existence of the jurisdiction of the British Government over Railways, cantonment areas, Residencies, Civil Stations and over European subjects and occasional interference in the internal affairs of the State, seemed to be great objections.

Intervention is not unknown in the sphere of international law. The issues that were made a cause of intervention by the British Government could be well covered by the definition of Intervention in International law. In International law the checking of sovereignty by exterior action of sovereignty is known as intervention.(1) Great Britain sent her troops in 1826 at the request of the Portuguese Government against a threatening revolution on the part of the followers of Don Miguel; and in 1849, at the request of Austria, Russia sent troops into Hungary to assist Austria in suppressing the Hungarian revolt. The Indian States had agreed by treaties to seek help in case of danger from within and this was in no way derogatory to their sovereignty as was the case with Portugal and Austria. It could not be a violation of the territorial sovereignty of the States. Then there was the case of intervention by Great Britain, France and Russia, the guarantors of the independence of Greece for which the title was acquired by Article 3 of the Treaty of London of 1863. The purpose

(1) Oppenheim: op.cit. p. 250.

of this intervention was to re-establish constitutional government. This was an intervention in the internal affairs of an independent sovereign State. In the same way a State that had guaranteed by treaties the form of Government of another State or as in India the reign of a certain dynasty over the same, had a right in case of a threat to that dynasty to intervene.(1) There was not a single case of intervention in the internal affairs of an Indian State by the paramount power which could not be covered by any of the seven categories enumerated by Oppenheim. The other cases of jurisdiction can either be covered by the doctrines of servitude or extra-territoriality.

As far as the declaration of war and peace is concerned the States have surrendered these rights to the paramount power, hence the declaration of war and peace on behalf of the paramount power automatically applies to the States. It is not their incapacity, but the delegation of this capacity is affected through treaties. This is the reppsitory international personality of the States with the Paramount Power. It had not lost its personality by its delegation. As regards Railways, and cantonment jurisdiction it is the right ceded to the paramount power in accordance with defence and protection treaties. It is a well known fact that the Railways in India were planned in accordance with the requirements of the defence of the country. Besides this the jurisdiction was limited by the terms embodying it, as had been established in the case of Queen Empress versus Mohammed Yousufuddin, 1897. I.A. 137.

Contrary to the Railway jurisdiction a different view is held as regards Air.(2) The States seem to have partnership contract rather than subordinate surrender, the jurisdiction

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(1) Ibidem. pp.251-254.

(2) In recent times Indian delegations to international organisations consisted of members of British India as well as of the States.

both on Railways and Cantonments was temporary. The fact that this jurisdiction was transferred back to the States proved beyond dispute that the jurisdiction was qualified by the terms of its delegation. The repository power over this jurisdiction though exercised all the attributes of executive sovereignty short of dominium. As soon as the paramountcy lapsed or the paramount power and the States agreed to its termination, it came to an end.

So far an attempt has been made to clarify the view that as far as the legal status of the States is concerned, they were fully sovereign and this sovereign status was recognised by the British Government and British courts. Their delegation of foreign affairs and defence implied co-operation with the British Government in these fields. Their relations were governed by the principles of international law. International law was not applicable to the relations of the States with the British Government in the same way as it was in the case of the Dominions. Their position was, as far as legal status was concerned, higher than those of the Dominions. Their relations were not devoid of international principles.

Were the Indian States international persons? Undoubtedly they were sovereign persons as they were not incorporated in any British Dominion or in any other State. Their status was not analogous to a federated State which loses its dominium in the part of its sovereignty which is transferred with its dominium to the federal government in terms of the federal subjects. In other words, as a result of the formation of federation the locus of sovereignty of the constituting States changes. There was no such change of locus amounting to the organic formation of a new legal personality like federal government implying dominium, so the criterion of divisibility did not apply and hence there

was no loss of their sovereign personality. Openheim rightly remarks: "Independence is not unlimited liberty for a State to do whatever it likes without any restriction."(1) Further he states: "And it is generally admitted that a State can through conventions, such as a treaty of alliance or neutrality and the like enter into many obligations which hamper it more or less in the management of its international affairs. Independence is a question of degree whether the independence of a state is destroyed or not by restrictions." Strictly speaking there is hardly a State in existence which is not in one point or another restricted in its territorial supremacy by treaties with foreign powers. There were many sovereign states which had concluded treaties with other states which imposed such restrictions that they appeared to many writers of international law derogatory to their independence but that was not the case. For example, various treaties of the United States with some of the Republics of the Caribbean which gave the United States the right of intervention and obliged the latter not to conclude any treaty endangering their independence or granting their territory to a foreign power. Or the case of South Africa through Article 4 of the Convention of London 1884 stipulating that South Africa should not conclude any treaty with any foreign state other than the Orange Free State without approval on the part of Great Britain. The Cuban Republic also was made to undertake not to enter into such treaties with foreign powers as would impair the independence of Cuba. Some writer treated Cuba on this ground just as a protected State of the United States.

Then it can be asked were they internationally recognised as sovereign independent States. There was no possibility of such recognition. The States had suspended

(1) Oppenheim:

their international personality in favour of the paramount power. This surrender had brought about restriction on them. The States were international persons but placed under servitude. This restriction was defined according to the terms of the treaties the States had contracted with the paramount power.

It is undoubtedly an established fact that the Indian States had restrictions imposed on their personality but what it is desired to maintain here is that such restrictions did not amount to destruction of their personality. To quote Oppenheim, "Such imperfect International personality is, of course, an anomaly, but the very existence of a State without full sovereignty is an anomaly in itself."(1) This question has been answered affirmatively by Westlake too: "It is not necessary for a State to be independent in order to be a State in international law."(2) In support of this view many other authorities could be quoted: "That they can be full, perfect and normal subjects of international law, there is no doubt. But it is wrong to maintain that they can have no international position whatsoever." India herself was a member of the League of Nations and U.N.O. before she became fully sovereign and independent. Thus it can fairly be stated that the Indian States even when not recognised as fully sovereign States were not devoid of any international position.

The Indian States have been recognised as sovereign States and the actions taken by the British Government towards them were treated as Acts of States. The authors who have agreed to accept States with imperfect international independence in the international sphere as having international personality, excluded the Indian States not on a

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(1) Oppenheim: p. 114.

(2) Westlake: i. p.21.

matter of law but on a matter of fact. They seem to have had no data to decide the case of the Indian States. For example, Oppenheim(I) does not include them in the list of protectorates just because he could not find their heads emjoying immunities in international law. As a matter of fact it has been held in the case of Stratham v. Stratham(2) that the Gaekwar of Baroda could not be made a respondent to a case because he waw recognised as a sovereign.

The Indian subjects were considered as foreigners in British India. In Emperor v. J.R. Tewari, criminal Revision Case No. 128 of 1925 under the Foreign Jurisdiction Act of 1915 concerning a State subject of the State of Benares of Bombay, readily took it for granted that "one who is the subject of an Indian State can not at the same time be a subject of the British Government and that he therefore is necessarily to be treated as an absolute foreigner liable to be expelled from British India." The Indian subjects of course were British protected subjects when abroad because the affairs concerning them while they were abroad came into the foreign affairs for which responsibility was taken by the Paramount power, hence this style was implied in the treaties concerning foreign affairs. They were excluded from the list of British subjects even when abroad for the purposes of British nationality.

The case of Sirdar Gurdyal Singh v. The Raja of Faridkote established the rule that "Nevertheless, for other purposes and within the domain of private international law, such States are to be regarded as possessing an independent civil criminal and fiscal jurisdiction." These facts prove that for private international purposes too the Indian States

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(1) Oppenheim: op. cit. pp.165-6.
(2) Supra.

were regarded as sovereign States.

There is one more strong point in favour of the fact that before surrendering their international affairs the Indian States possessed international personality. Had not the Indian States been, at any time in history independent and hence capable of conducting their foreign affairs, how could they delegate these rights to the paramount power? Can a person give something to another person which he does not possess? This is not possible. The fact that the treaties included clauses governing foreign affairs prove ipso facto that the paramount power recognised these rights to be possessed by the Indian States otherwise that would not have formed a clause of the treaties.

The fact that the Indian States did not lose in any of the six ways their Statehood, as described by Oppenheim negatively prove that they did not destroy their international personality. They would not have retained this personality had they changed their persons in any of these ways. Their incorporation with other states would have certainly destroyed their personality. "If however a State permanently hands over the control of its foreign relations or any material thereof to another State it would then cease to be fully sovereign, although if it retains its political separateness with some capacity for separate foreign relations, it will not cease to be an international person, a State may be semi-sovereign and still become a member of the international body."(1) It may, therefore, be established that the relations between the Indian States and the British Government were of political character and the legal position was left untouched. Even the subordination as revealed by the treaties was of a political nature.

(1) Cobbett, p. Cases on International Law, p.55.

There were States, of course, which had no treaties, so to speak. Their relations were defined by the common terms of the treaties of other States. The fact that they were small in size and importance or that they had no treaties did not minimize their legal sovereignty. Even the States of Kathiwar and Mahals in Orissa where the British Government had assumed control over a good many branches of government have been treated as sovereign. Such control had its sanction in the consent of the rulers who delegated them to the British Government in the interest of the administration. The States therefore big or small were equal in their legal status but different in their stature.

VIII.

Could these treaties, governing the relationship with the State be transferred to any successor sovereign government in India? Opinion is divided on this point. The Indian States Committee advocated direct relationship which for the first time was admitted in section 210 of Montagu-Chelmford Report. Professor Holdsworth maintained that it was not possible to effect any such transfer because the relations are a special part of prerogative and have a direct relation with the Crown, and the Government with full sovereign attributes in India would be a new Government altogether. It was in view of this theory that the State Committee recommended that the relations between the paramount power and the States would cease to be entrusted to the Governor-General in Council and was to be handed over to the Viceroy.

Treaties of a political character, according to International Law and British practice can not be made

binding on the State in Succession. The theory propounded by Holdsworth and Julian Palmer was that the treaties were assumed by the Crown as a paramount power which was distinct from the British Government in India. They had a special and direct connection with the Crown. This theory was given legal sanction only in the Government of India Act 1935, not by any positive inclusion of the term Viceroy in the Act itself but through the Letter Patent appointing Lord Linlithgow as Governor-General and Viceroy of India. The same Act designates the head of the Indian Federation, as Governor-General of India and the Person dealing with the States on behalf of the Paramount Power as the Crown Representative. ".....We do .....appoint you ..... our Governor-General of India and our Representative for the exercise of our functions in our relations with Indian States....." "And we do hereby declare that so long as you shall hold the said office you shall while in India bear in addition to the styles and Titles of the said Officer, the Style and Title of our Viceroy."(1)

Thus for the first time in the history of the States, their demand for the recognition of direct relations with the Crown was given somewhat legal sanction. But the Indian national writers do not accept this legality. "The successor Dominion Government could not be deprived of paramountcy as it is inseparable from the sovereignty of British India."(2) "It is argued on the other hand that the Government of India was the seat of paramountcy..... the relations of the Indian Princes were all along with the Government of India and through it with the Crown after 1858."(3)

These rights and duties of paramountcy were

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(1) The Gazette of India Extraordinary 1st April 1937. p.3.

(2) Paramountcy in Indian Constitutional Law by R.B. Naik, p.291.

(3) Ibidem.

considered as the covenants running with the land or praedial servitudes and attached to the government for the time being of British India whatever form it takes."(1) And also that if the Government of England ever became a Republic the treaties would be just as binding upon the new Republican Government as upon the monarchial Government; and that therefore a change in the form of Government makes no difference to the binding force of treaties.(2)

Holdsworth replying to these suggestions said: "In the first place, the rights and duties involved in paramountcy, involve rights and duties which relate not only to the States and British India but also to the Empire as a whole. In the second place, some of the rights and duties involved in paramountcy.....are of so personal a character that they cannot be deemed analogous to covenants running with the land or praedial servitudes."(3)

There is nothing personal in a constitutional monarchy which does not come strictly speaking within the purview of Parliamentary authority, hence in the perspective of Governmental advice. Even the prerogative is subject to Parliamentary authority. Parliament can make what alteration it pleases in prerogatives. In the case of A.G. versus De Keyser's Royal Hotel 1920,(4) the Court of Appeal and the House of Lords held: "in any case so long as a statute giving power of the same nature as the prerogative remains in force, it supersedes the prerogative and the Crown is not entitled to act under the prerogative." In order to waive this objection Holdsworth holds that the prerogative is not the source of paramountcy but on the contrary paramountcy is the source of

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(1) Sir Viswaswami Aiyam: Indian Constitutional Problem, 210-213.
(2) Ibidem, p.214, asquoted in The Indian States and India by Holdsworth.
(3) Indian States & India. Law Quarterly Vol.46, 1930. p.430-31.
(4) A.C. 1920, p.508.

a separate prerogative of the Crown which rests on the basis of treaties, engagements, Sanads, usage and sufferance.(1) This clearly indicates that the distinction maintained in the prerogative ordinary and extraordinary; subject to parliament and beyond the scope of its control are not known to the Law of the Constitution in England. It can be justified only on one ground of practice. The cession of territories in India has been treated as a special prerogative and could be effected without the sanction of Parliament.(2) Instead of all this technical complication, in a straight forward way it can be said that the treaties being of an international character could only be assumed by the successor of the sovereign Government with the consent of the other party to it. As regards the change in the form of Government it is quite plain that India by becoming a sovereign state did not only change the form of Government but emerged as a new international personality. How far could these treaties have been made binding had they not been denounced will be discussed in the proper place. The mere fact that the Indian States were treated at least legally as sovereign States establishes the principle that besides other considerations the principles of international law should be applicable on this point.

Besides this legal point there were other political considerations affecting this topic. The Indian people struggled to attain independence from foreign rule and also directed their efforts towards responsible government in the States. The Congress gradually from the policy of non-intervention and sympathy changed its policy to direct intervention. "The Congress stands for the same political,

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(1) The Indian States and India. Law Quarterly, Vol. 46. 1930. p. 423.

(2) Keith: State in succession.

social and economic freedom in the States as in the rest of India and considers their status as integral parts of India which cannot be separated."(1) Thus ran the resolution moved at Haripura in 1938. This was a clear indication of the policy that the Congress had decided to take in relation to the States. Congress encouragement and direct help in the Satyagrahas of the State peoples are proof in themselves that Indian Independence also implied responsible government in the States, with their integration with the rest of India.

The British Government as a paramount power had the obligation on the one hand of protecting the dignities and privileges of the Princes and on the other hand was awakened to the rising tide of the political consciousness of the people. The policy adopted was one of non-intervention coupled with advice to the Princes to adapt themselves to the changing situation. As to the question whether the paramount power had any obligation towards the protection of the rights of the Indian subjects, the only reference on this point is implied in the Queen's declaration. All these points fall in the purview of the later chapters. What is here desired is only to refer to the allied points, so that they may be exhaustively discussed.

The last important point that needs clarification is the fact that the rulers of the Indian States and their subjects were given titles by the paramount power. The creation of the Chamber of Princes by Royal Proclamation in 1921 is also an event which demands explanation. It is a fact that the Indian rulers and their subjects were given honours. This was a somewhat ceremonial aspect of the Imperial character of their relations. The attendance of the Indian Princes at the Durbars also a ceremonial, implied subordination. But

(1) Indian Annual Register, 1938, pp.299-300.

this ceremonial aspect cannot be carried so far as to be given a constitutional importance, as was the case in the Moghul Empire. In the Moghul Empire ceremonials were Institutions signifying legal characteristics. Ever since the disappearance of the Moghul Emperor, the British Government consciously based its relationship on treaties etc. The Durbar was held and honours were bestowed upon Indian rulers and their subjects after the Moghul fashion. The Indian rulers did not object to this because the honours from the Moghul Emperor in its period of decline were in no way derogatory to their authority, instead they were an advantage to them. The supremacy of the Moghuls was not the same as was the case with the British Government. The British supremacy was becoming more and more apparent and effective. On the part of the Indian States the ceremonial character of the honours was treated on a different basis than that of the legal relationship with the Crown. Whatever the contention of the Indian States and their supporters, this evidently proved the acceptance of protection and supremacy. This practice with its historical background can be in no other way justifiably explained.

The creation of the Chamber of Princes by Royal Proclamation was quite in accordance with the spirit of the treaties. The Indian Princes had not only handed over their international affairs but their relations inter se. They were not therefore in any way entitled to set up a body providing a common platform for all of them, unless consent was given by the British Government. Without the consent of the British Government any such attempts to set up a body like the Chamber of Princes would have been contradictory to the treaties. Besides this, the Chamber of Princes was not supported by all the Princes and some of the most

important held themselves aloof. This fact itself explains well that the mere fact that the Creation of the Chamber of Princes was brought about through Royal Proclamation could not make the States legally bound to it. Legally, proclamation had no more importance than an expression of consent. As this factor was common to all States instead of individual intimations of the consent, a common pronouncement was made to that effect,

The Indian States, as has been observed, were protectorates in the true sense of the term. Though "suzerainty" was used in order to define statutorily the nature of the relationship, its use was not in its original feudal sense. The term was used in the sense closer to that of Protectorate, because it was based on conventions. The fact that the Indian States could be better described as Protectorates has been proved by the following points:

1. The rulers of the Indian States were given immunities as Heads of States while they were outside their territory.

2. The actions taken by the British Government were defined as Acts of State.

3. The subjects of the Indian States were foreigners as far as British India was concerned.

4. Historically the Indian States were as much sovereign and independent under the Moghul supremacy as was the case with the sovereignty and Independence of the East India Company.

5. The fact that the treaties have clauses referring to the surrender of foreign relations on behalf of the States, proved that the Indian States had this title and its acceptance was implied in the acceptance of the treaties to that effect both by the East India Company and the British Government.

6. The surrender of International affairs and defence did not amount to division of sovereignty in that sphere. The Indian States were recognised as sovereign States by the British Courts and enjoyed all privileges. Their relations therefore were governed by the principles of International Law.

From the point of view of international law, they were not perfect international persons. Their inperfections lay in the extent of the restrictions and servitudes or condominium as was the case of Berar accepted by Conventions. This restriction, servitude, or condominium did not amount to the destruction of their international personality. It was a kind of diminutio but it was diminutio minima. How the treaties were denounced in the Indian Independence Act and what they implied in the accession to the Indian Union will be discussed in the proper place.

THE EVOLUTION OF SELF-DETERMINATION

I

It is proposed, in this chapter, to trace the principle of self-determination in the constitutional development of India which has not only determined its course towards independence but has also influenced allied problems. It may still play an important part in the future. Before the facts forming the landmarks in its progress are enumerated it is desirable first to refer to the theory of trust propounded by Burke. The foregoing discussion on this aspect has established that the administration of India passed on to the Crown on the basis of trust and this theory may be contested as far as the form of the Act of 1858 is concerned but there can be no disagreement on its substance. It was in view of the theory of trust that almost all the statesmen who had some knowledge of Indian administration prophecied about Indian independence. The people of India had revolted against the Company and had been subdued with the help of British armed strength. The Mutiny was in itself the result of mal-administration by the Company as the French Revolution was the result of the tyrrany of the rulers. A revolt of the people of which an example was already near at hand for Britain could have certainly led British Statesmen to realize the importance of the people. However the arrangement of direct rule was neither a permanent annexation nor an extension of British Sovereignty in perpetuity. Strictly speaking it was an executive Sovereignty, with the inherent sovereignty of the people of India kept in abeyance. The name of the Crown in this context was more legal than real. The reality of the sovereignty of the Crown was as much as the authority of the trustee is real. Even the Executive Sovereignty was, in fact, exercised by the Secretary of State for India who was given the authority even to over-ride his Councillors. The people of India remained as expectant recipients of the Sovereignty. The Parliament was a superentending body exercising a check on the authority of the Secretary of State.

Macaulay reminded the Parliament of its duty that "We may educate our subjects into a capacity for better Government, that having become instructed in European knowledge they may in some future age demand European institutions. Whether such a date will come I know not. But never will I attempt to avert or retard it. Whenever it comes, it will be the proudest day in English History.(1) The policy advocated by Macaulay was in fact executed when in 1885 the Indian National Congress was created under British auspices. The Congress in fact was treated as an instrument for forming contact between the Government and the people. Similarly with a view to enlist the cooperation and support of the influencial people and interests a different procedure was adopted, for which two guiding principles seem to have been provided. The first was a good government. which implied a change of government to direct government. The second principle as the representative character of this Government. Representation does not in its earlier phases signify the representation of the people as a whole but that of the people and interests which held influence in some way or other. It clearly implied that a subordinate ruling class was to be created, for this an indigenous institution was at hand. The institution of the "Durbar" was to be utilized for this purpose. The spirit undoubtedly was that of the "Durbar". But the form that was given to it was British. Again in Macaulay's words it was an engrafting on despotism of those blessings which were the natural fruit of liberty. As in Britain it was preparing for a transition from an autocratic to an enlightened aristocratic Government. Britain had passed through such changes, that is an enlightened aristocracy intervening between autocratic and democratic governments. In the case of India there was not only a hereditary aristocracy but also a landed and commercial aristocracy.

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(1) Coupland (Sir Reginald) India: A re-statement. P. 292 (summary of speech reproduced) See also Hansard, XIX, 1833, 536.

Sir Syed Ahmed Khan had brought home the fact that mutiny was the result of neglecting Indian counsel and sentiments. Before him many other statesmen who had any knowledge or experience of Indian administration, including Dalhousie had emphasised the need of admitting Indians to the administration. The reforms soon after the enactment of 1858 seemed to be inevitable from this point of view, and the act which may be said to have the representative principle into Indian politics. The Indian Council Act, 1861 extended the scope for admitting Indians into the legislative Council but it was only a representation through nomination. It is, therefore, difficult to assess the meaning of the term "representation" in this context. It is evident from the nature of the arrangements thus provided that the Indians were taken into the confidence of the Government, not as the representatives of the people but as a better avenue for forming contact between the Government and the people. The fact that the control of Finance or the executive were outside the purview of this body ruled out the possibility of this stride being in the direction of Parliamentary Government.

On the side of administration the need to enlist and train Indians was felt. In order to achieve this object, the introduction of a British type of education was felt necessary. It is characteristically English that the ultimate aims were hidden away from sight in the final enunciation of the policy that was to determine the mode of training Indian assistants to help their masters in the administration. This aim ultimately inspired the concentration on English literature and science. English literature was to be introduced not only as a means of teaching the language of the administration but more important than that was to become the classics for Indians. English was to take the place of Sanskrit, Arabic and Persian. The British rulers had made practically no efforts to gain insight into the resisting forces of culture in India. The Brahman genius had disrupted Buddhism from within. It had also stood firm to a great

extent under the onslaught of Muslim culture, coming to India from political as well as missionary sources. The survival of Indian culture was due to its amazing capacity for adaptation to circumstances, its power of absorbing what was life-giving,of modifying what was non-essential, and of rejecting everything that would have weakened the foundation of its social system.(1) Indians be they Hindus or Moslems could not be satisfied with English as their classical literature bereft of spiritual inspiration instead of their own classics in Sanskrit, Arabic and Persian. The gap thus left and the failure to enrich the individual personality on the one side and material prospects through the admission to the administration forced Indians to develop a dual personality. "In all this there is no wilful hypocrisy. On the platform they enunciate in all sincerity sentiments that are a real part of their educational apparatus and professional life. But in their conduct they obeyed forces that were outside their professional life and swayed their whole personality."(2) The unrest thus created in the spiritual domain was bound to have its repercussions. As the conflict of Hindu and Moslem cultures had already given birth to the Bhakti movement. To the conflict between the East and the West attached the most imaginative and enthusiastic Hindus and Moslems, and there came into existence revivalist movements, Ray Brahama-samaj and later Arya Samaj were the results of this revivalism among the Hindus. Tariqa-e-Muhammedia, the Wahabi movement, and even that of Qadyani were the most significant among the Moslems. These movements were in reality attempts on the part of their founders to revalue the tenets of their religion. The purpose in fact was to counter the Western influence on thought and to fill the gap that it had left in the spiritual domain. It is interesting to note, that the British system of education that was adopted with a view to westernisation failed in its purpose and on the contrary set afoot

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(1) The Education of India: Authur Mayhew. P. 39 - 40.

(2) Ibid. P. 214.

great resisting forces which turned the character of the political organisations which once were cradled by the rulers themselves. The other important feature of the constitutional structure was the admission of Indians to the administration keeping them away from the policy-making. The incompatibility could not be dragged on indefinitely. Very soon the demand to shape the policy of administration on the one side and revivalism on the other brought new forces into play in Indian politics. The major step taken, was to introduce the reforms of 1909.

II

The Morley Minto Reforms of 1909 were in fact a well-planned scheme of concessions to meet the demands of Indian nationalism half way, which had assumed an active and revolutionary character especially in Bengal and Bombay thereby leading to the assasinations of the officials. The most significant aspect of these reforms from the Indian standpoint was the introduction of the principle of election both at the centre and in the provinces. But again this concession was further characterised by British caution; instead of being based on territorial constituencies, had given different interests agency for election. A small official majority was retained at the centre. But in the provinces elected members out-numbered the official members. On the side of the executive Indians were appointed not only to each provincial executive council but also to that of the Governor-General. These reforms were still in line with the Council Act of 1892 which intervened between those of 1861 and 1909 as a half-way house. The foremost issue of this period being a change from nomination to election, but the changes were coming in more swiftly because the sense of subjection had become predominant and the Congress which in 1892 had received the concessions in the form of this Act with a view to satisfying its aspirations had now changed into an extremist movement. There were still moderate nationalists whose leadership was in Gokhale's hands

They were thinking in terms of colonial constitutional development. But they were already losing their grip on the extremists whose activities were accentuated by two facts. In the first the legislative councils were still regarded as Durburs rather than as Parliaments and in 1909 no less than in 1892 both the authors of the measures of advance and their critics, liberals as well as conservatives, declared as categorically as Macaulay in 1833 that India was not qualified for Parliamentary Government.(1) In the second place there was no substantial change to meet the national aspirations of the extremist group. In the words of the authors of the Montagu Chelmsford Report "The change was one of degree not of kind."(2)

The colonial model representing the concession of self-government to the colonies was in one respect at least very different from that of India. In the colonies the European races presented some racial difficulties, but they were overwhelmed by those who were from British stock. On the contrary Indians were not only excluded from the colonies but also caused a conflict between the interests of the white and the coloured peoples. The cultural conflict accentuated by the sense of frustation and subjection was bound to influence, the course of Indian politics. Even if a moderate like Gokhale had welcomed the reforms of 1909; it was only with the understanding that it was a liberal step towards the goal of self-government, which he had demanded in his presidential address at the Congress session of 1905. From the extremist point of view which was gaining strength in national life, the Reforms were entirely unsatisfactory. The idea of nationhood had already accumulated sufficient support to thrive; there were new classes coming into the forefront. Education on Western lines had created a new class of professional men who were better equipped with Western knowledge to fight a national

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(1) Coupland. Indian Constitutional problems. Vol.I. P.25.

(2) Montagu Chelmsford Report. cd. 9109

cause. They were at the same time deeply rooted in the ancient culture and were inspired by the idea of revivalism. Such people were gradually gaining strength in the rank and file of the Congress.

The commercial interests of Britain were much more important than the political, the British enjoyed monopolies in the field of commerce, this was naturally against the Indian commercial classes. The commercial classes finding themselves at a loss to break the monopolistic barriers enjoyed by British commercial interests naturally rallied round an organisation, which could at least form a centre of their future hopes. The Indian commercial classes were to play an important part in the rise of the Congress movement and in its strength in the future.

The Moslems having lost their power, had acquiesced in the status quo. Soon after the Mutiny their energies were concentrated mainly on denouncing the responsibility of their complacency in those disturbances; Sir Syed being their representative. Soon after that with the realisation of the liberal attitude of the rulers they found it necessary to safe-guard their interests separately because they as the preceding ruling class were the object of suspicion. Revivalism in the Moslems in India had worked differently from that in the Hindus. The Moslems were taken by a feeling of rivalry which with a sense of revivalism kept them away for a long time from Western education in which their fellow country men had already made some headway. It was Sir Syed who realising the consequences of such a policy took the lead in introducing Western education to Moslems. For these reasons Sir Syed warned the Moslems even at the earlier stages to keep themselves away from the Congress. He as a member of the Governor-General's council had advocated in 1883 on the Central Provincial Local Self-Government Bill, the unsuitability of the system of representation by election which he said means "the representation of the views and interests of the majority of the population." The Parliamentary system had thus awakened

Moslems to new anxieties. The fact that the Congress had gained strength enough to attract the attention of the Government inspired the Moslems to prepare themselves for the 1909 reforms which were much in the air. As the Moslems had already decided not to make common cause with Congress, they created the All India Moslem League, which held its first Session in December 1906. Suffice it to say that the idea of nationhood that was gaining strength in Indian Politics took two directions. The Moslems developed the idea of protection and weightage into the doctrine of self-determination later. National self-determination was to be developed in such a way that it implied not only the independence of India but of the Moslems as a separate nation as well. It is proposed first to study the idea of nationhood matured with the object of attaining freedom from British rule for India in which both Hindus and Moslems were united. Then it will be observed in what different directions it crossed the subsections of Indian life and how far the people of the Indian States were concerned with it.

The Congress was thus prompted to make room for the Moslem claims and in its constitution itself amendments were made to the effect that a fifth of the total number of representatives on the All India Congress Committee would consist of Moslems. Another article imposed a restriction to the effect that no subject could be discussed or resolution carried in the Congress if three-fourths of the Moslems or of the Hindu delegates objected, provided that they constituted not less than a fourth of the whole assembly, and further that in all proposals made for the extension of Indian self-government, the interest of the minorities must be duly safeguarded.(1) Though the demand of the Moslems for

(1) The Constitution of the Indian National Congress 1912 articles 13 and 26: Congress in Evolution by Sir Verney Lovett as quoted by Coupland P. 46. Vol I.

separate electorates was rejected, the changes thus brought into the constitution clearly indicated that congress was in a rather accommodating mood for further concessions. Even the Moslem League was not entirely unprepared to enter any contract with the Congress to make common cause for Indian freedom. The common factor between them was the desire to attain self-government. At the meeting of the Council of the League in 1913 a resolution was adopted demanding a system of self-government which could be made best suited to India. But it rejected the Colonial Model of self-government with joint electorates. The Congress on the other hand had already denounced separate election. The Congress and the League had the common demand for self-government but the Congress insisted on joint election whereas the League demanded separate election. There was another point of difference: the League Resolution explicitly inserted the connection of the British Crown whereas in that of the Congress it was implied. It was in such circumstances when a sense of self-determination was dawning on two most important political bodies of India that the War broke out. The sense of a common object was so strong that in 1916 the Congress and the League ratified an agreement known as the Lucknow Pact. The ratification of the agreement alarmed British statesmen and as a result of that the well-known announcement of 1917 was made on 20th August by the Secretary of State for India in the House of Commons. "The policy of His Majesty's Government, with which the Government of India are in complete accord is that of the increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to the progressive realization of responsible government in India as an integral part of the British Empire. They have decided that substantial steps in this direction should be taken as soon as possible, and that it is of the highest importance as a preliminary to considering what these steps should be, that there should be a free and informal exchange of opinion between those

in authority at home and in India . . . . . .

"I would add that progress in this policy can only be achieved by successive stages. The British Government and the Government of India on whom the responsibility lies for the welfare and advancement of the Indian peoples must be judges of the time and measure of each advance, and they must be guided by the cooperation received from those upon whom new opportunities of service will thus be conferred, and by the extent to which it is found that confidence can be reposed in their sense of responsibility.

"Ample opportunity will be afforded for the public discussion of the proposals which will be submitted in due course to Parliament."(1)

It is interesting to note that the term "responsible government" was not legally defined. Grey had pointed out in 1851 that responsible government was a system well understood but not legally defined. He therefore depreciated its insertion in an Act. "Responsible Government must not be based upon statutory conditions but on the faith of the Crown."(2) To quote Coupland, "The words 'responsible government' are indefinite and can be variously construed, and it was disclosed after his death by his biographer that Lord Curzon had himself inserted the words in the draft of the declaration, in the belief that they had only this rather vague and loose meaning. He was greatly perturbed, it is recorded, to find that he had committed himself to the form of Government in India against which less than 10 years before, he had warned Lord Morley."(3) The term 'responsible government' though legally undefined had assumed a definite meaning in the course of its historical development. Such was the case in

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(1) Montagu Chelmsford Report. P. 5.

(2) Wheare, K.C. The Statute of Westminster, 1931. Oxford 1933. P. 27.

(3) Coupland op. cit. Vol. I. P. 53.

England ever since the Civil War and similar were the developments in Canada and the Indian statesmen were used to interpret such terms in the knowledge of the historical development of both England and her colonies.

The announcement of Responsible Government was negatived by the sub-clauses which were most diplomatically worded. The Responsible Government itself implied the retention of the British connection, whereas many liberal thinkers of the earlier age were thinking in terms of relinquishing control. This did not fall short of Indian expectations because both the Congress and the League had committed themselves to the demand for self-government. But it was negatived by the sub-clauses. In the first place the full recognition of the principle of self-determination was not recognised because the judges of the time and stages of the concession toward self-government were declared to be the rulers both in England and India rather than the consciousness of nationhood in the people of India. The declaration was not in any way novel. It had been long recognised. In the second place the possibility of "ample discussion" from the point of view of the Indian political parties was bound to accentuate the conflicting demands.

The Report when made public revealed the fears entertained by the people of India. From the point of view of the principle of self-determination the report justified the apprehension assumed by British statesmen for the Parliamentary system of government in India, not only because India was not yet ripe for universal adult Franchise but also because India inherited religious difficulties which could not be solved unless the people themselves resolved to find a solution for it. The Act of 1919 was drawn more or less on the line suggested. Responsible government even in the provinces was further limited and the dyarchy dividing the subjects as transferred and reserved limited the scope of the fully fledged legal personality for the provinces. India was legally distinguished as British and Indian India. But at the same time the idea of federation

thus set afoot, on the one side implied devolution of powers from the central Indian Government to those of the provinces and on the other side the Indian states were not all together out of the scheme of all India Federation. Thus the effect in practice was that the Indian constitutional problem had taken the form of a triangle within India - self-determination, the minority problem and the Indian states. The future problem was thus consciously or unconsciously given a frame within which the political forces were set at play. As far as the minority problem was concerned, a challenge was thrown to the people of of India in the inspiring address of the Report to solve the communal problem among themselves. This challenge proved a source for a new demand for the powers to frame constitution which was unknown in the early history of colonial constitutional changes.

When the Act of 1919 was ready to be put into practice the temper of Indian nationalism had changed. The unrest in India which had in some parts of India taken the shape of violence and had prompted the British Government to envisage a new policy of reforms had entered a new phase, under the guidance of Gandhi ji. The Congress in 1920 had resolved on the object of attaining Swaraj by the people of India by all legitimate and peaceful means. The fact that the source of attainment was attributed to the will of people, marked a definite deviation from the previous policy. As a means of realizing this object the weapon of non-violence was officially adopted. They denounced the Act of 1919 as well as those moderates who had extended their cooperation to the Government. The entry of the Turkish Empire to the War on the German side and its consequences, which gave birth to the Caliphate movement among Indian Moslems. For Gandhi ji, there could be no better situation for making common cause with, and enlisting, Moslem support than this. The non-cooperation campaign of 1920 was launched and was carried on by both Hindus and Moslems in order

to uproot British rule in India. The circumstances that followed the Lucknow Pact and encouraged the Reporters to insist on the communal difficulty owing to which they had accepted separate electorates for Moslems, were no more at the time of its operation. The Moslem League and the Congress were so united between 1919 and 1924 that the Indian atmosphere was most unsuited for any such scheme. Even when the Moslem League held its session separately at Lahore Jinnah said "steps must be taken to scrap the present constitution and devise a constitution in consultation with the representatives of the people which will give them a real control and responsibility over their affairs."(1) The reference to the people though mild is quite significant in pointing out that the Moslem League as a separate entity did not fall short of the mark in demands for the rights of self-determination for the people. Further both important organisations were against the constitution.

III

Meanwhile important changes were taking place in international politics among the war aims the most important was the right of self-determination promised to the people in the event of victory. However cautious might be the application of this principle to the Western world, Eastern peoples could never be prepared to take it for granted.

When the Peace Conference opened the difficulty for the British delegates was obvious when the clauses of the Peace Treaty came for discussion and especially the application of the principle promised during the War, it was obvious that the same principle was interpreted by the French, British, and Americans with different emphases. "However fervid might be our indignation regarding Italian claims to Dalmatia and the Dodecanese it could be cooled by a reference, not to Cyprus only, but to Ireland,

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(1) Quarterly Register, Vol. I. No. 2.

Egypt and India."[1] "The British and French Empires were faced with widespread secessionist movements. Violent nationalist movements threatened to make foreign rule impossible in Egypt and India. The Arab world from Morocco to Iraq was rising in a general demand for the rights of self-government."[2] There was undoubtedly difficulty in arriving at an agreement on a definition of self-government, especially in the discussion that followed over India, Japan and Germany which revealed divergence of opinion.

Within the Commonwealth itself a remarkable change was brought about by a resolution at the Imperial War Conference of 1917 moved by the Prime Minister of Canada to the effect that India be brought into the sphere of associateship with the Dominions . . . . . "Dominions as autonomous nations of an Imperial Commonwealth and of India as an important part of the same, should recognise the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations and should provide effective arrangements for continuous consultations in all important matters of common Imperial concern . . . ."[3] India was not only an associate but a full member that was to be fully represented at all Imperial Conferences in future. In 1918 Sir S. Sinha and the Maharajah of Bikaner were allotted seats on the War Cabinet and a new political office was created in addition to that of the Secretary of State for India namely that of High Commissioner for India. A step further was taken when Indian delegates sat in their own right at the peace conference and signed the Treaty of Versailles on behalf of India. India became a member of the League of Nations, whereas all its

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(1) Alfred Cobban: National Self-Determination, referring to H. Nicholson: Peace Making 1919, 1933 P. 193.

(2) Ibid.

(3) Proceedings of the Imperial War Conference 1917 (Cd. 8566) P. 40, 49, 50.

members were bound by the Covenant[1] to be fully self-governing. The same was the case with Labour and other international conferences.

Besides these changes the Montagu Chelsford Report, the Commissions Report and the Commission of the Army opened a new vista with a view to accommodating both civil and military services in the changing circumstances. The burden of these recommendations was to increase the rate of Indianisation. This was accepted and a beginning was made to attain this objective in 1924 and in 1934 a military training centre was formed at Dehra Dun. More important than these recommendations is the legal point raised in connection with the British members of the Indian Civil Service. Against the common usage of the British constitution, the members, who were, in legal terms, executors of the trust on behalf of His Majesty and therefore the servants of the Crown for this particular purpose, were to receive a contractual guarantee from the Indian authority. To cite the Report itself "The present organisation of the services came into existence when admittedly the centre of political gravity was outside India and when the service took a leading part in the shaping of policy. Those conditions have appreciably changed and will change further, and it is but natural there should be dissatisfaction among the services with their position and also among the Legislatures with the restraints and limitations imposed on their powers in relation to the services.

India both in the Commonwealth and International spheres emerged as a perfect legal personality. In international law India seemed to have acquired this status in spite of two drawbacks: though the Indian delegation consisted of British and Indian members, they were nominated by the Secretary of State, hence could not be taken as the representatives of the people. In the second place there were no means of expressing the will of the

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(1) Article I Paragraph 2, as quoted by Coupland. op cit. P.84

Indian people in India's foreign policy in the fullest democratic sense. But both these drawbacks were not in any way the drawbacks denying international personality to India. The membership of the League of Nations implied the recognition of international personality, whatever by the form of government and limitations thereto. There is another approach to this fact. When the East India Company's Government passed on to the Secretary of State at least legally there was no change of status. The connection with the Crown was on the basis of trust and the offices including the Secretary of State in Council were appointed in order to execute that trust. Thus the personality of India remained unhampered. India found its place amidst the Dominions as well as in international conferences in her own right. She was undoubtedly till then not a Dominion, but this did not involve inferior status in international law. The fact that the resolution was made in the Imperial Conference to admit India to full membership which was confined to the Dominions only shows that India though not a Dominion was as good as a Dominion. The necessity for Indianising the services in India and providing means of democratic governance were not overlooked. There was no conflict, between the principle of self-determination and India's international legal personality; on the contrary it was an advantage. A great advance had to be made from the internal point of view towards full realization of self-determination. It is desired here to show that India was a legal international personality even though the will of the people was absent. What was lacking was to ascertain this will. However this was a domestic aspect and was therefore beyond the scope of international affairs.

India had as early as 1876 been admitted to the Universal Postal Union. The Accession under Article 17 of the Berne Convention of October 9, 1874. The procedure of admission was exactly the same as for foreign state. No action on the part of British Government was necessary in order for British India to

secure accession.(1) The 1878 Convention was signed separately for British India and Canada; a common representative signing for Great Britain and for Canada but a separate representative signing for British India.(2) This merely proves the fact that the international personality of British India under the Company continued and her admission to the League of Nations in 1919 was just a recognition of this continuity.

Indian political opinion was too uncooperative and restless to be satisfied with the constitution of 1919. It could only be worked for a time with the help of the moderates. The moderates now were among both Hindus and Moslems. The impending necessity for taking another step towards re-examining the problem was obvious. The Simon Commission or statutory Commission was appointed in November 1927. As expected it could not satisfy the aspirations of the people for the very reason that there was no one on this commission who dad the confidence of the people. The details of its boycott and later events are details of history. The appointment of the Commission in the light of the challenge thrown by the Montagu Chelmsford Report inspired Indians to solve their problem among themselves. As a result of the Resolution carried at the All Parties Conference (1928) a Committee was appointed to determine the principles of a Constitution of India. It was in itself a challenge to the Simon Commission and at the same time a reply to the challenge thrown by the Montagu Chelmsford Report.

The Simon Commission was undoubtedly a step towards solving the problem of India from the British point of view. The most unfortunate situation was faced by the Commission. It is doubtful how far the intentions of the British Government were aimed at solving it with all sincerity. Difficulties undoubtedly

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(1) Stewart. R. D., Treaty Relations of the British Commonwealth of Nations. (1939) P. 117. Ref. to Benjamin Akzin. "Membership in the Universal Postal Union." A.G.I.L. Vol. XXVII, 1933. P. 651.

(2) Ibid.

were there. But there are records as well to show that these were exploited to permit delays and bargaining. When the news of the expected boycott reached Lord Birkenhead, he in a private letter to the Governor-General wrote "I should therefore like to receive your advice if at any moment you discern an opportunity for making this (statutory Commission) a useful bargaining counter or for further disintegrating the Swarajist party ..... If such an acceleration affords you any bargaining value use it to the full, and with the knowledge that you will be supported by the Government."(1) Such is the record which if reviewed even in the changed circumstances to take a dispassionate view one is lead to conclued that the British Government took advantage of the forces that proved helpful to slow down, the progress of constitutional development. Perhaps they were cautious at every stage to ascertain the success for which the cooperation of the people of India was necessary. Strictly speaking the Indian national Congress or the Moslem League had hardly cooperated in working the constitution of 1919. The only prompt cooperation came from the moderates in both camps. The decision of the Congress to fight the election was a plan to wreck it, somehow the background under which the Simon Commission started its work was too strained to still the enthusiasm of the none-cooperative congress to boycott it. There were undoubtedly communal difficulties and it was in view of that, that as a result of the All Parties Conference the Nehru Committee was appointed.

IV

The Nehru Committee drafted a model constitution for India with a view to attaining Dominion status, but the most remarkable contrast with the Dominions was that it had attempted to legalise all that was customary and conventional, in the case

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(1) Krishna. K.B. The Problem of Minorities (1936) P.37 (with reference to Earl of Birkenhead, Frederick Edwin Earl of Birkenhead, the last phase, 1935 Vol. II P. 251)

of the Dominions. For such an accommodation between complete secession from the British Empire to which the Congress had already comitted itself and the Dominion form of Government. Ireland was an example to be followed. The article defining this relation was in fact, a reproduction of the first article of the Anglo-Irish Treaty of 1921. It was further stated that the King's representative, the Governor-General was to act on the advice of the Executive Council which was to be formed on the Prime Minister's advice. The basis formed by a legal and contractual relationship which definitely pointed towards the people's right to self-determination rather than to the Crown was strengthened by general constituencies on a basis of adult suffrage. Two other notable points dealt with, rather summarily were defence and the civil service. The main burden was to show that a Dominion may not necessarily be capable of protecting herself as was held by Keith. The second point of importance was the definite trend of the drafters towards a unitary rather than a federal form of Government.

The Report could not be adopted unanimously. There were people like Jawaharlal Nehru who were not prepared to commit themselves to acquiescence in Dominion status. Besides there was the Hindu - Moslem question, a centre of conflict. This will be dealt with later. The Indian states too were given a place and sympathy was expressed and support was promised to the people in their struggle for self-determination with the object of attaining full responsible governments in the States.

The Simon Commission with full knowledge of the broadline thus laid down had in a way concrete temms for bargaining. The spirit of this bargaining seems to have dominated future events, unfortunately the bargaining was conveniently substituted with other controversies. The Report, however, a source of the triangular controversy i.e. the communal question, the states, and the freedom of India proved in itself a beginning

for ironing out the differences and problems. The Simon Commission got its terms of reference widened to take the states into the purview of its recommendations.

The Report in one way laid down the foundation of the elasticity and comprehensiveness of the constitution that India was to receive in the future. Instead of periodical investigations and recommendations, it recommended a constitution with such elasticity as to suit future concessions without any major change in its frame. Responsible government in the provinces as a part of federal scheme were recommended powers of raising loans and framing budgets recommended with one limitation. It was the emergency and discretionary powers of the Governors, this in future found its place in section 93 of the Government of India Act, 1935. Nothing substantial was contributed towards the immediate realization of self-government or responsible government at the centre. On the other hand it was singled out as a distant objective. Thus the federal realization itself was pushed back and a unitary government with its dualism recommended. The possibility of establishing a convention underwhich certain subjects such as defence, and foreign affairs were to be treated as being the responsibility of the Government to the Secretary of State and Parliament, while on other subjects the Government was to be responsive to the non-official members of the legislature. It was this dualism which was bound to arrest natural progress, as was the case with 'dyrarchy' in the provinces.

The history of Round Table Conferences, Select Committees, and the White Paper which was the result of voluminous recommendations of these bodies, are details which do not demand separate treatment.

The Round Table Conference was in itself a step tempered by caution to the demands of Indian nationalism to frame their own constitution, however unsatisfactory, the Nehru Committee was a concrete example of how the people of the different parties could be brought together to sit round a table to solve the

problem. The British Government by organising the Round Table Conferences not only provided a means of great achievement but at the same time conceded half-way the demand for self-determination which implied constituent rights as well. Before the recommendations and the outcome of these conferences are mentioned, it is necessary to review the course of self-determination that was to give the Moslems a separate identity and ultimately make them a separate nation. These conferences were responsible for making a thorough examination of the communal problem, and assessed the essence of Moslem aspirations and ambitions.

V

The Moslem League came into existence as a result of the introduction of the principle of election in Indian politics. Before that the sense of the distinction of Moslems interests from those of other communities in India was present in the minds of Moslem leaders. There were some Moslems, ~~undoubtedly~~ who were members of the national congress but the community as a whole remained distinct from the Congress. The fact that the Moslem League as a separate political organisation for Moslems on the parallel of the Congress in itself implied that their aspirations for the freedom of the country though common with other sections of the population were at the same time qualified by separate interests. Soon after the creation of the Moslem League the demand for a safeguard through nomination changed into a demand for separate election. A Moslem representative elected in a common constituency in which Hindu voters were in a majority, was bound to be the man who could saitsfy the demands of the majority at the expense of his own Community and therefore even the reservation of seats was not considered to be a suffieient safeguard for the Moslem interests. The Moslem deputation headed by the Aga Khan among other facts stated to the Governor-General that the number of Moslems in India was greater than the population of any great state in Europe. This sense of numerical

strength accentuated by the historical background provided a basis for weightage. The reforms up to 1919 accepted the principle of a separate electorate for Moslems. The Simon Commission too could not denounce it. The gradual political experience gained by Moslems and the data of their strength in different parts of India awakened them to new aspirations.

The Moslems in India were not only a great minority but a majority as well. The realisation of being a majority in some provinces gave the Moslem League dual objectives. Firstly the Moslem League pledged itself to the safeguards for the minorities in the provinces where they were in minority and at the same time in view of the development of constitutional tendencies towards federalism promised to safeguard the Moslem majority interests in provinces where they were in a majority.

The first contract that the Moslem League entered into was at Lucknow in 1916 the agreement known as the Lucknow Pact. The Lucknow Pact offered the Moslem League a recognition in its distinct identical capacity of sole Moslem representative organisation from the Congress. The Congress accepted separate electorates as well. This pact could not last long, and Hindu-Moslem differences increased. The other point of contact with the Congress was during 1919 and 1924 when the Moslem Khilafat movement and the movement of non-cooperation and disobedience allied under the common antagonism towards British rule.

In the Lahore session of 1924 Jinnah clearly defined the dual object of the Moslem league in six of the basic principles that were necessary to safeguard Moslem rights. Among these six principles two items were to emphasise that the Moslems regarded complete provincial autonomy and the need for caution in any territorial distribution that might affect Moslem majority provinces. Besides these demands, these principles reiterated the unsuitability of pure and simple democratic institutions for India unless they were suitably modified to safeguard the Moslems.

The Congress under the leadership of Gandhiji had not only become a dynamic and revolutionary body though relying on non-violence as its weapon for political agitation, but at the same time had revivalist tendencies looking always back to past history, culture and even technique. Revivalsim in politics implied Hindus and Moslems striving to return back to their past history and traditions. They could not have done so unless they had crossed the period of 'rapprochement'. They ignored the common factors that had helped two fundamentally different and distinct cultures to live side by side. "In fact the two revivalisms stimulated each other, competed with each other and became more and more different in outlook."(1) The Moslems thus except for a very brief period which was entirely a contractual participation, never joined Congress. Gandhiji introduced religion into politics. It was a good weapon to bring the Hindu masses under Congress, but at the same time it was very difficult to keep the dividing line between politics and religion. In Professor Beri Parsad's words, "It was like walking on an edge of a razor, to give religion its due weight in politics and to keep life as secular as possible."(2) Congress officially adopted non-violence. "It could be adopted by anyone as a policy. To preach it as a religious tenet, as a principle binding under all circumstances, and to bring suffering on oneself as a method of changing the opponent's heart, had the appearance of Hindu or rather Jain and Buddhist inspiration."(3) Gandhini's revivalism with the introduction of spiritualism and non-violence into politics provoked other groups and added to political feuds. Undoubtedly spiritualism for India was inevitable, nay all politics "stand in need of spiritualism in the sense of moralisatinn," that is to say permissions with principles of truth, sincerity, disinterestedness, and

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(1) Beni Parshad : Hindu Moslem Question.

(2) Ibid.

(3) Ibid. pp. 50 - 51.

humanitarianism. But spiritualism beyond them tends to reproduce religious atmosphere, dogma and ceremonial in politics. It smacks of a reversion to theocracy and is doubly dangerous in a country which follows more than one religion. Congress under such strong forces with nominal Moslem representation on its executive Committee, and accentuated with urdu Hindu language, became an antagonisitc and predominantly Hindu organisation. It lost the attributes of a national organisation. The Moslem League was on the other side of the scale putting its weight into winning over the Moslem masses for its solidarity.

Gandhiji had a genius for dominating Congress in spite of the fact that in later years he had ceased to be even a primary member. It was entirely due to Gandhiji's technique and to his lieutenant's organising capacities that he forced his will on the Congress. When the Congress accepted the invitation to the second Round Table Conference, he was its sole spokesman. These Conferences revealed the fact that the communal problem was based on some essential facts, and it could not be solved by the sub-committee appointed for this purpose and which was piloted by Gandhiji. The two main points of controversy in themselves point out the course that the Hindu Moslem question was taking. The Moslems were out for the fullest possible provincial autonomy and the federal structure with as few residuary powers as possible as the centre. Thus they aimed at making the Moslem majority province least controlled by the Hindu dominated centre. At the same time they pleaded for separation of Sind from Bombay. The Hindu representatives on the other hand were in favour of a stong federal structure with the maximum possible residuary powers. The members who were in favour of separation of Orissa from Bihar were unwilling to see Sind added to the Moslem majority provinces. The other major point of difference was the separate electorates which now had been extended not only to Moslems but to other communities as well, Gandhiji could not accept the separate electorate for the

depressed classes and his fast and the consequent Poona Pact are well-known landmarks in constitutional history. The Act of 1935 on these two major points tried to strike a via media between Hindu and Moslem claims. The federation thus realised was neither a strong nor a loose one, it was rather a half-way solution. The Communal award already announced was adopted with the modification of the Poona Pact. All these facts have been narrated to show on the one side the points of controversy between Hindus and Moslems were gaining strength and on the other side the ascendancy Gandhiji had gained in Congress.

VI

Congress even constitutionally is a unitary body. It has its different provincial organisations but the hold of the working committee has two-fold strength because the general body has never disagreed. When the Constitution of 1935 was ready to be put into operation. The Congress rejected it. The Moslem League rejected the main part of it, but was prepared to work the provincial part. Both Congress and the Moslem League contested the first elections. The Congress won the majority of seats in six provinces. Then the Government invited its leaders to form Ministries they demanded safeguards that the discretionary and emergency powers of the Governors would not be used. However the Congress accepted office but unfortunately the Congress Governments thus formed were brought strictly under the control of the High Command and a triumvirate set up to direct and control the provincial ministries. Interference from above in the provincial ministries was extra-constitutional. India had no homogeneous atmosphere suitable for a majority rule. Even in Western democratic countries coalition governments have been adopted in times of crisis and necessity, Congress refused to include any Moslem League members in the cabinet. "Orthodox parliamentarianism led the Congress leaders to forget that one-party theory even if true of political agitation was not in the absence of an accomplished revolution applicable to ministerial office. The change from extra-constitutional action to

governmental responsibility . . . . . was a change of scale and method of the profoundest significance and called for a fresh evaluation and arrangement of political forces. The country was passing through a crisis and crises have usually been surmounted even in England through coalition . . . ."(1) The League on the other hand became conscious of handicaps both in its own organisation as well as those allied with the constitution itself. Their thinking minds set out for a solution - a solution which could make them masters of their own affairs. The position of Moslems even in the majority provinces was not very secure. The Congress members of the legislatures in Bengal and Sind wanted one thing, their purpose was to defeat the Moslem League. Punjab was the only Moslem province where there was a stable Moslem government, not of the League but of the Unionists. The Frontier Province was in fact a Congress province since the red shirt leaders had formed and alliance with the Congress. The Moslem League used the same technique that the Congress was using not only to bargain in the Hindu majority provinces, but also to gain ascendancy and strict disciplinary control over the Moslem majority provinces. A Moslem League high command was created as a counterpart of the Congress high command. This proved the beginning of the Moslem League's rise for which the Congress was entirely responsible. The responsibility lies with the Congress because it rejected the separate electorate which had long ago been accepted in the Lucknow Pact. It was further responsible because the controversy over a strong or loose federation was its own creation. These facts awakened the Moslems to new dangers and stirred them up to new aspirations. They were numerically strong enough to form a nation. They had a different culture, traditions, and heroes from whom to derive inspiration. The revivalist and religious tinge of Congress policy gave them a warning of future fears. They had besides this large areas

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(1) Ibid.

with their own majority to form a separate state. This was the solution that was brought forth.

VII

The principle of self-determination could no more be denied to the Moslems. They claimed they had all the attributes that any nation in Europe had for the application of this principle. Pakistan was the demand which could be attained through the realisation of self-determination for the Moslems. Now that self-determination for India was bound up with self-determination for Moslems as well, the last step was taken when in August 1942 a resolution of the All India Moslem League assented the right of 100 million Moslems in India to establish a sovereign state consisting of the provinces in which they were in a majority.

In international politics the principle of self-determination was working in favour of Moslem inspirations. "The Sinn Fein rebellion in Ireland was not against the mis-government of a twentieth century English Government; it was a revolt in the name of four centuries of history. Where history has dug a ditch as deep as that between the Catholic Irish and the British state, where even the last hope of reconciliation has been thrown away, as it was in the year before 1914 secession of a rule based on naked force."(1) The Anglicization by the state had given a strong sense of nationalism to the Irish and Scots leading the revival and preservation of their native culture. "British policy diverging from the sounder lines it had followed in Canada by supporting the Protestant Royalists at all costs laid the foundation of parition."(2) The danger of secession in the case of Canada and South Africa could not be avoided in the case of Ireland. The history of the British

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(1) Cobban : P. 75.

(2) Cobban : P. 85.

Empire provides two classical examples of self-determination, and in each case, self-determination was pushed to the logical conclusion of secession, as a result of the use of force and unsound diplomacy which strengthened the claim to the sovereignty of the people. The history of Ireland proved a classical example for India in two respects. The Irish struggle was the result of differences of economic interest, religion, descent, bitter historical emnities, and alien ascendancy. India's case as an alien race was still stronger and the Indian National Congress seemed to have followed the Irish model rather than that of any of the Dominions. In the second respect it was a classical example for Moslems because the secession was the result of religious differences. The principle of self-determination had passed through different phases in Europe. It was first the basis for the claim of the people's sovereignty against the Divine Right of Kings and their autocratic governments. It passed through its ebb and tide and the same principle became a source of inspiration for nationalism in Germany. During the 1914 - 1918 War and after it, it had a still greater part to play in the re-making of the Imperial map of Europe and Asia. It was the rock of this principle on which the vessels of the Great Empires of Europe and Turkey dashed and ruined. Communities inhabiting territories with distinct languages, cultures and histories were given the right of carving out states for themselves. The idea of nation and stste became synonymous. It was this principle which gave birth to the problems of minority and boundary adjustments. It was natural that India should have had to deal with the same principle in its different aspects. The principle of self-determination, implying the people's sovereignty was bound to set forces in play which were to define the people. Thus the principle with its extension to India, shifted the stage of political changes from Europe to India. The Congress played the same part in pushing it into action that British policy had done

in the case of America and Ireland. The lack of liberal comradship in sharing power in the provinces with the Moslem League was the result of orthodox parliamentarianism. The Congress tried to take the Moslem masses into its fold over the head of the Moslem League. All the qualifications for the application of the principle of self-determination for the Moslems were already in existence. They were more favourable to the Moslems than to any nation in Europe. What was needed was the awakening and driving guidance through the historical sources both from the commonwealth and the international spheres.

The centralisation of India started with the Regulating Act of 1773 and reached its climax in the time of Lord Curzon when even a distinct area like Burma was annexed with India. But very soon it was realised that the control of the Governor-General of Bengal extended over the Presidencies of Madras and Bombay in order to bring them under direct control, however inevitable in Lord Clive's times was outdated in later years for a big country like India. The Indian Council Act of 1861 gave the Provinces a legislative Council with a non-official majority. Further it was through the Reform of 1919 when under the dyarchy semi-responsible governments were made possible. Under this Act the Provinces were the Agents of the Central Government, but the trends towards their legal independence were distinct. The Act of 1935 gave them full legal personality subject to the discretionary powers of the Governors only. All these facts go far to explain that the realisation of self-determination was not only to be carried into communal politics, but into the sphere of regionalism as well. In a country as big as India the various languages, communities and climates, naturally implied regionalism. As a matter of fact it is the conception of regionalism which proved a first step towards Moslem self-determination. The Moslems were first awakened to the regional majorities and demanded a loose federation with the minimum possible number of powers at the

centre. The Congress dominated Nehru Committee's Reports proved unsatisfactory to the Moslems, because it rejected their two fundamental claims for separate election and loose federation. The burden of the opinion of Hindu delegates at the Round Table Conference was against these two claims. This proved the source of distrust. The fact of the strength of the scattered Moslem minority would have come to nothing more than a separate electorate had there been no areas of majority for them. The Separation of Sind was a logical consequence of this awakening.

The provinces of India took their shape on the principle of administrative convenience. Neither economics, language, religion nor culture played any part in their making. The Moslem League resolution moved at its session at Delhi for strengthening the provincial autonomy was conceded by the Congress by adopting the linguistic basis for re-marking the boundaries of provinces in accordance with this demand. Its provincial organisation is based on the linguistic areas of India. Nehru himself has given his opinion in its favour. "The future of Surma valley is a living question in Assam, and the Assamese are keenly desirous that Sylhet should be transferred to the administrative province of Bengal so as to leave them an area which is linguistically more homogeneous. The people of Sylhet I found were equally in favour of this change and on the face of it, the desire is reasonable. Sylhet is not only linguistically Bengali but its economy is more allied to that of Bengal than Assam proper."(1) Among the reasons, he enumerates religion as well, because the people of Sylhet district are predominantly Moslems. If this principle is applicable to Sylhet district why not to Sind, Orissa, Carnatic, Andhra, Maharattas, and Pakistan as well. The Indian Constitution framed by the Indian constituent assembly has provided room for future changes. But the policy of the central Government seems to be to deny those very principles

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(1) Nehru, Unity of India : London, P 191.

of re-making boundaries on the linguistic basis on which they had organised the Indian Congress. Nehru had admitted: "I might add that my frequent references to linguistic areas, and the languages of the provinces necessitate that the provincial units should correspond with the language area."(1) This is one out of many issues on which the principle of self-determination has still to play its part.

The principle of self-determination giving sovereignty to the people once carried to India could not be kept within the legal barrier of British India. The Indian States were undoubtedly distinct legal areas but the force of universal truth that had crossed larger areas and distances than the Indian states presented were bound to give the right to the people of the states. There was nothing illegal in their claims for responsible governments to check the despotic governments of the rulers. It is true that there were treaty relations with the Paramount Power which promised protection to the rulers and their dynasties against the dangers coming both from without and from within. The enactment of Indian legislature to save the Indian Princes from criticism in the Indian Press was a step to meet this obligation. But the fact that the British Government in India, itself was experiencing the same fate proved it futile to make any further effort in this direction. It will be too legalistic to interpret treaties of protection to be the protection from new democratic forces which were unknown at the times of the conclusion of the treaties. The forces were causing changes all over the world. How could a power suffering from such forces protect the States from them? The Congress attitude towards the States was neutral in the beginning. This neutrality changed into sympathy and ultimately since 1929 the Congress openly declared that the states should be brought into line with British India by the introduction of responsible government.(2) When the

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(1) Ibid. P. 258.

(2) Lovett : Op. cit. P. 27.

Responsible Ministries came into power in 1937, the Congress encouraged, supported and in some cases guided the agitation carried on by the people. Separate organisations were set up both under Congress and the Moslem League to deal with the problem of responsible governments in the States.

The situation of India, its geographical and economic interdependence, common interests in communication, are factors which go to emphasise the need for a common policy of defence and foreign affairs. It was this factor of its geographical situation and economic dependence on other parts of India which a paramount power could not neglect. The Montagu Chelmsford Report, realising this important factor in relation to India and the Indian States considered it necessary to iron out the complexities it had. The Butler Committee was appointed to clarify these complexities. The Simon Commission considered it imperative to get its terms of reference extended to cover the States. Undoubtedly all of them emphasised the importance of distinct relations for the Crown with the States and propounded theories which accepted their legal entities. But none of them minimised the common factors that were to influence the course of Indian independence in which the States were bound to be integrated. The principle of self-determination for the people of the states was as important as the territorial affinities with Britsih India. It was this principle of self-determination which played its part in consolidating both India and Pakistan and it is the problem springing from this principle which still has to be solved in at least one state, and even after the accession to india and Pakistan the problem of responsible government for the people of the Indian States still forms a major part of politics in both countries.

ASSERTION OF SELF - DETERMINATION.

I.

Dominion status was declared to be the aim of Indian constitutional development, as far back as 1917. But it has been observed that the insertion of the term "Dominion" was made by Lord Curzon(1) because it lacked legal precision. Further Dominion status as judged from the nature of the autonomous powers which existed in the self-governing colonies was restricted and did not imply anything more than the concession of responsible government coupled with the reserved powers of the Governor-General. The Governor-General in his capacity as the representative of the Crown still held powers which did not fall within the sphere of responsible government. Again, from the stand point of international affairs these self-governing Dominions formed units of the Empire and their existence was unknown to international law. The World War I undoubtedly accelerated the speed of the changes as a result of which the Dominions gained national identity and their admission to the League of Nations in their own right. The declaration of Dominion status for India, therefore, was of a limited autonomous power on the analogy of the Colonies.

Indian views of national independence had far outgrown the term Dominion Status itself. Dominion Status was rejected when the Nehru Report was turned down. The Congress and the Moslem League were undoubtedly divided on the questions of communal representation and that of united India. But they were unanimous in their demand for complete independence. Maybe the League left this aspect more or less out of discussion because the Congress had always emphasised this aspect and the League had nothing to disagree with. From the stand point of the Congress Indian independence was explicitly defined as severance from the Commonwealth. The Muslim League

(1) Coupland, R. The Indian Problem (1833-1935). Vol. I, p.53.

preferred to leave this ambiguous.

The Dominion Status pledged in the declaration of 1917 and also in the preamble of the Act of 1919 could have been extended any time without any difficulty. The Act of 1935 was made elastic enough to be adjusted in future to the changed status. But the changes that the term had undergone increased the difficulty. Moreover the British Commonwealth as it existed before World War II was not legally defined in all its details by the Statute of Westminster 1931.(1) It was only a partial legalisation of the non-legal conventions governing the relations of the British Dominions which owed their origin to the Imperial Conferences. The nature of the British Commonwealth was such that its success depended on the good-will of the Dominions to observe the non-legal conventions. India could join only as a willing member. The Act of 1935 came into operation only in the Provinces. The Central Government of British India continued in accordance with the provisions of the Act of 1919 except that its powers - executive and legislative - were to be restricted to the matters assigned to it in the Act of 1935. The delay in the full operation of the Federal constitution of 1935, among other reasons, was due to the failure to get the states into its scheme. This delay caused suspicion as to the sincerity of the pledge of the British Government for Dominion Status.

The outbreak of World War II and the Viceroy's declaration of war on behalf of India changed the circumstances. There was no reference made to the Legislature. The declaration was made both on behalf of British India and the States. As far as the States were concerned the conduct of their foreign affairs was in the hands of the paramount power and the declaration of war on its behalf implied their participation too.(2) There were no responsible governments in the States. The Princes contributed to the cause of War and there was no legal ground for criticism levelled again the war efforts, whatever the moral aspect, the occasional utterances of the people in their political organisations were not important enough to be taken into account because there was hardly any political organ-

(1) 22. George V. c.4. 1931.
(2) Case No. 16. The Digest of International Law Cases. (1939-40).

isation to carry such weight. The case of British India was different. Though there was no legal obligation on the Governor-General to consult the ministers or the legislature for the purpose of the declaration of war, he did it in his capacity as the representative of the Crown. The case from factual considerations was very different. There were responsible governments in the provinces and the legislature at the centre had a right to vote on the financial bill which was closely connected with the war effort. The discretionary powers of both the Governor-General and the governors of the Provinces, of course, had provisions to meet the emergency cases and the financial bill or any such similar measures could be adopted without the consent of the legislatures. Any such attempt would have certainly set the clock back. Thus the war created a situation which definitely contributed to the solution of the deadlock.

The Congress held that the issue of war and peace for India could only be decided by the Indian people, and invited the British Government to declare forthwith in unequivocal terms their war aims.(1) The declaration(2) of Lord Linlithgow on behalf of His Majesty's Government made on October 18th, 1939, was taken to be entirely unsatisfactory and then followed the resignations of the Congress Ministries in the provinces.

The stand taken by the Moslem League in this situation was for the partition of India as it was set forth in the resolution(3) of the Moslem League passed on March 23rd, 1940, at its Lahore session. The growth of Moslem self-determination and the reasons therefor have been already given.

II.

In view of the circumstances described above there were only two issues that the British Government had to decide upon. First, the question of independence and the time involved for it. Secondly

(1) Banerjee. The making of Indian Constitution. Document No. I, p.1.
(2) Ibid. p.4.
(3) Ibid. pp.22-23.

the question of partition. As far as the first was concerned the British Government was already pledged to Dominion Status on the analogy of the other Dominions. Now both the changes brought about in the British Commonwealth due to the attitude taken by Eire and the Union of South Africa, and also due to national sentiments in India in view of the War, had pressed them to evolve a formula which could satisfy the Indian demand. The main difficulty was time. Indian opinion was demanding immediate responsible status. British Government was cautious so as not to commit itself to immediate surrender. The Muslim League had grown both in strength and prestige. Its declaration of Pakistan had aroused enthusiasm throughout the Muslim population of India. The British Government could not ignore its strength. In a way the declaration of Lord Linlithgow to postpone the Act of 1935 and to consult all the Indian political parties for any future constitutional changes was a reply to the Muslim League's demand for the abandoning of the Act of 1935 in favour of partition. Again the suggested expansion of the Governor-General's Executive Council comprising the members of all the political parties in British India and Indian States implied the denunciation of the orthodox majority rule as was witnessed in the provinces with the Congress ministries, instead, the seed of coalition government was sown as a possible suggestion for the solution of the communal problem. More definite terms were put forward in March, 1942, in The Draft Declaration. Sir Stafford Cripps, a member of the War Cabinet, was sent out to India by the Cabinet to discuss the proposals with Indian leaders. The main proposals were: I. A Constituent Assembly to be set up after the cessation of hostilities to frame a constitution for India. II. The Indian States were to participate in the Constituent Assembly. III. The British Government would accept and implement the constitution subject to (1) the right of any province to refuse and to retain its existing constitutional position, provision being made for it to accede later if it so decided. With such non-acceding provinces, if they so desired, His Majesty's Government would be prepared to agree upon a new constitution giving them the same full status as that of the Indian Union and arrived at by an analogous

procedure; (2) The signing of a treaty between His Majesty's Government and the constitution making body. The treaty would cover all necessary matters arising out of the complete transfer of responsibility from British to Indian hands, and make provision for racial and religious minorities. But the treaty would not impose any restrictions on the power of the Indian Union to decide in the future its relationship to the other member states of the Commonwealth of Nations. IV. The constitution making body would be composed of representatives of British India elected by proportional representation by the members of the lower houses of the provincial legislatures, voting as a single electoral college and would include the representatives appointed by the Indian states. V. Until the new constitution could be framed the British Government would retain the control and direction of the defence of India as part of their world-war effort. VI. The leaders of the parties were invited to join the Viceroy's Executive Council.(1)

The negotiations broke down as the Congress insisted on immediate responsible government, at least in fact if not in law. The Muslim League followed Congress and reiterated the demand for Pakistan. It is desirable to reserve comments and criticism on the proposals and their failure to obtain agreement thereon because there are other plans and statements set forth on behalf of the British Government to solve the deadlock, the survey of which in chronological order would help a better appreciation of the efforts and the final assertion of the principle of self-determination.

In June, 1945, Lord Wavell, who had taken charge as Viceroy, made a move to secure the consent of the Indian parties for the Indianisation of the Executive Council with the exception of the Viceroy and the Commander-in-Chief. The appointments were to be made on an equal proportion of Muslims and caste Hindus, besides a the representation of other communities. This plan failed as no agreement could be reached regarding the formation of the Executive Council. In this context a passing reference may be made to Desai-Liaqat Formula in respect of the distribution of portfolios in the Executive Council. It was proposed that the Congress and the

(1) Ibid. pp.56 - 60.

Muslim League should have 40 per cent of the portfolios each, and the other communities were to receive 20 per cent. It was this formula which, though modified, provided a basis for the future interim government.

There was a change in government in England and the Labour Government which came into power announced on February 19th, 1945, that a mission of three Cabinet Ministers(1) was to visit India to work out a possible solution of the deadlock. The Labour Government was impressed by the Parliamentary Delegation which had gathered information during its visit to India in the winter of 1944/5 that immediate steps ought to be taken towards the solution of the Indian problem. The Cabinet Mission was its result. On 15th March, 1946, Mr Attlee, the Labour Prime Minister, declared in the House of Commons, "Is it a wonder that..... she (India) should herself have freedom to decide her own destiny. What form of government is to replace the present régime is for India to decide; but our desire is to help her to set up forthwith the machinery for making that decision".(2) He again observed that in India they could not "Allow a minority to place a veto on the advance of the majority". He further pointed out that India "will find great advantages in remaining within the British Commonwealth, but if she elected to go outside it Britain would make the transition as smooth and easy as possible".(3)

The Cabinet Mission interviewed many Indian leaders belonging to all parties and groups and ultimately a conference was held in Simla with the representatives of the Congress and the Muslim League. In spite of a good deal of discussion and correspondence(4) no satisfactory solution could be found, and the Mission made a statement(5) on the 16th of May. The salient features of this statement were

1. There should be a Union of India comprising British India and the States. The subjects that the Union

(1) Lord Pethick-Lawrence - Secretary of State for India.
Sir Stafford Cripps - President of the Board of Trade.
Mr A.V. Alexander - First Lord of the Admiralty.
(2) Hansard, Vol. 420, dated 15th March 1946. p.1421. A summary may be found in the Indian Annual Register or the British Annual Register for 1946.
(3) Ibid, p.1421.
(4) Cmd. 6829. (correspondence). (5) Cmd. 6821.

was to deal with were: Foreign affairs, defence and communication, coupled with powers to raise finances required for these subjects.

2. The Union should have an Executive and a Legislature formed from the British Indian and States representatives. Any questions raising a major communal issue in the Legislature should require for its decision a majority, the voting of each of the two major communities, as well as a majority of all the members present and voting.
3. All subjects other than those ceded to the Union and all residuary powers should vest in the provinces.
4. The States should retain all powers other than those ceded to the Union.
5. Provinces should be free to form groups with Executives and Legislatures and each group could determine the provincial subjects to be taken in common.
6. The constitution of the Union and of the groups should contain a provision whereby any province by a majority vote of its legislative Assembly might call for a re-consideration of the terms of the Constitution after an initial period of ten years, and at ten-yearly intervals thereafter.
7. The Constituent Assembly was to be framed on the following basis :- The members of each Provincial Assembly were to be divided into two groups, general and Muslim, except in the Punjab where they were to be divided into three groups, general, Muslim and Sikh. Each group was to elect its own representatives to the Constituent Assembly by the method of proportional representation with the single transferable vote. The number of seats allotted to each province and community was to be in proportion to its population, in the ratio of one to a million. The total number from governors' Provinces was to be 292, to these were to be added 4 representatives of the chief commissioner's Provinces and not more than 93 members from the Indian States.

The method of election from the Indian States was left to be determined by consultation. The States would in the preliminary stages be represented by a negotiating committee. The Constituent Assembly thus formed would hold a preliminary meeting in which a chairman and other officers were to be elected, and the general order of business was to be decided upon. And an Advisory Committee on the rights of citizens, minorities, and tribal and excluded areas was to be set up. Thereafter the provincial representatives would divide up into three sections, A. B. & C. These sections were to proceed to settle provincial constitutions for the provinces included in each section and were also to decide, whether any group constitution was to be set up for those provinces, and if so with what provincial subjects the group was to deal. Then the representatives of the sections and of the Indian States were to re-assemble for the purpose of settling the Union Constitution.

8. The Paramountcy of the Crown over the Indian States was to lapse.(1)

9. An Interim Government was to be set up, having the support of the major political parties.

The proposals of the Cabinet Mission could not be considered as entirely satisfactory to all sections of the Indian population. However, the Muslim League accepted it in as much as it provided the possibility of setting up a Muslim state - Pakistan. The Congress decided to accept the plan with a view to framing the constitution. The Sikhs(2) on getting some assurance from the Secretary of State, and particularly from the Congress, agreed to implement the plan.

For the administration of India during the Constitution-making period the Cabinet emphasised the need for setting up an interim government composed of the representatives of the major parties. The Viceroy announced on 16th June that invitations had been issued to

(1) Cmd. 6835 (Memorandum by the Mission on States and Paramountcy), see also pages relating to the Indian States in Cmd. 6862.

(2) Papers relating to the Sikhs. Cmd. 6862.

Indian leaders with a view to forming the best available coalition interim government. The Executive was to comprise 5 members of the Congress and 5 of the Muslim League and four others representing various interests. The Viceroy also declared that in the event of two major parties, or either of them, proving unwilling to join in the setting up of a coalition government on the above lines, the Viceroy would proceed with the formation of an interim government which would be as representative as possible. A good deal of correspondence(1) took place on this issue. However no success could be achieved in obtaining an agreement between the Congress and the Muslim League. Meanwhile a Caretaker Government was set up. This was felt necessary in view of the fact that the Viceroy could not proceed with the Muslim League Ministry at the centre, as the Muslim League had accepted his offer and in view of the Congress rejection the Muslim League had to press for the fulfilment of the promise to set up a coalition government, whereas the provinces with the Congress majority had outnumbered(2) those with the Muslim League majority. Then came the provisional government with Pandit Nehru. The Viceroy still continued his efforts to secure the cooperation of the Muslim League. As a result of this an interim government was set up which consisted of fourteen members, five representing the Congress, five the Muslim League, and one each representing the Anglo-Indians, Parsees, Sikhs and Indian Christians.

III.

The first session of the Constituent Assembly commenced on the 6th December, 1946. The Muslim League members did not attend owing to the differences arising from the interpretation relating to the voting in sections of the Constituent Assembly. The Viceroy and the Indian leaders visited London with a view to solving the difficulties in the way of the cooperation of the Muslim League. No agreement could be reached.

At the London conference discussions centred largely round the

(1) Cmd. 6861.
(2) 9 out of 11.

interpretation of paragraph 19 of the Cabinet Mission scheme, providing for the constituent Assembly after a preliminary session to divide into the three inter-provincial groups of regional areas to plan their respective futures. The Congress held that each province of a group was entitled to meet separately on the question of joining the group. In view of the probably unfavourable attitude of Assam, a mainly Hindu province, towards the proposed North East grouping and that of the North West Frontier province with Congress leanings towards the North West grouping, the issue was of great importance. The view taken by the Muslim League was that the decision should rest with each group as a whole. This was shared by the authors of the scheme and supported by the legal advisers of His Majesty's Government. On 6th December His Majesty's Government issued a statement(1) reiterating this interpretation and stating that the decision of the groups should, in the absence of agreement to the contrary, be taken by a simple majority vote in each section.

In view of this deadlock created by the controversy over the interpretation of paragraph 19 of the Cabinet Mission scheme, the British Government announced the taking of necessary steps to effect the transference of power into Indian hands by a date not later than June, 1948.(2) It was also stated that in case there was no agreement between the two major parties, the government would have to consider as to whom the powers were to be handed over on the due date, whether as a whole to some successor government, or to more than one successor government in such other way as might seem most reasonable and in the best interest of the Indian people. This statement may be suitably described as an award by the British Government in the face of disagreement between the Muslim League and the Congress.

Lord Wavell was succeeded by Lord Mountbatten in March, 1947. On June 3rd he issued a statement declaring that the partition of India as a whole and also of the Provinces of Bengal, Assam and the Punjab, was the only solution of the political deadlock. A

(1) Keesing's Contemporary Archives. Dec. 1947, p.8304. Also The Times, London, 7th Dec. 1946.
(2) Cmd. 7047.

referendum was to be held in the North West Frontier to decide whether that province would join India or Pakistan. A referendum for a similar purpose was to be held in the district of Sylhet. The Constituent Assembly was to be divided into two sections, i.e. for Pakistan and India. The boundaries of the divided provinces were to be finally fixed by a Boundary Commission.

The plan under the pressure of circumstances was accepted by the Congress, the Muslim League and the Sikhs. The referendums in the North West Frontier Province and Sylhet district were in favour of partition and Pakistan. Thus the Indian impasse was ultimately solved through an award of the British Government. To quote Lord Mountbatten - "In the absence of such agreement the task of devising a method by which the wishes of the Indian people can be ascertained has devolved upon His Majesty's Government".(1)

IV.

The Second World War has been responsible for the speedy arrangements and quick decisions that brought India to her independence. There have been changes in other Dominions during this period. In India the problems were twofold: long term solution was needed to solve the communal problem, and a short term arrangement to meet the emergency created by the War. The Government could not carry out the War plans successfully without enlisting the cooperation of the people. In all the plans set forth by the British Government to solve the Indian political deadlock, the twofold objective was predominant. The realisation of this fact by the British Government was not without some delay. The attempts during Lord Linlithgow's Viceroyalty to seek cooperation by conceding trivial measures proved unsatisfactory in gaining the purpose. Even a promise to confer Dominion Status after the cessation of hostilities was characterised by Gandhi as a post-dated cheque. The Congress demand for the declaration of war aims in unequivocal terms, when the Allies

(1) Speeches of Lord Mountbatten: Nicholas K. 1949. Speech broadcast on 16th May, 1947.

were fighting for the freedom of all the nations, was tacitly made to get recognition of India's freedom. They demanded the denunciation of imperialism, and immediate independence for India. It was in no sense non-cooperation in War, on the part of India, provided only that she got independence. There was an extension of cooperation implied in asking for war aims and independence together. The Muslim League too extended cooperation but with different qualifications. In the case of the Muslim League the promise for cooperation in war effort was explicit provided the Government conceded their demand for constitutional changes. The situation became worse when the application of the Atlantic Charter(1) was denied in the case of India. It was, however, subsequently clarified that the framers of the Atlantic Charter were mainly concerned with the European nations involved in the War. Under these circumstances the expansion of the Viceroy's Executive Council could not gather any support. The demand of India was for immediate independence, at least in fact if not in law.

As far as the question of a de facto responsible Government at the centre was concerned, it could be set up without any difficulty. The act of 1935 had undoubtedly imposed restrictions on such a government and any government within the scope of this Act could not possibly satisfy Indian demands. But any concession towards setting up a fully responsible Government was in accordance with the analogy of the Dominions. The Dominions in fact attained responsible government first and then followed the legalisation of the de facto status. And even the legalisation was not carried to the limit. In Canada Lord Byng, the Governor-General, refused dissolution on the advice of Mackenzie King, the Liberal Prime Minister.(2) This is one of the many instances that go to prove that there was a divergence between de facto and legal status of the Dominion. In India too such a de facto responsible government was not an impossibility and in fact the Interim Government was a

(1) Article 3. Atlantic Charter.
(2) See Stewart, R.B. Treaty relations of the British Commonwealth, p.40, where he cites a recent case of reservation, namely, The Navigation Act, 1935.

responsible government within the definition of the term. The British Government, in spite of the conditions both in regard to an unfavourable atmosphere for a responsible Government(1) in its true sense as Mr Nehru complained, and also in respect of the extreme national sentiments in favour of breaking away from the Commonwealth, was not too slow in yielding to this demand. In other words, India became a Dominion in fact first, then followed legalisation by the Indian Independence Act. There was, in this respect, a close analogy with other Dominions, the only difference being that the process of attainment of de facto dominion status and its legalisation were effected in quick succession and thus the delay witnessed in the case of the other Dominions was avoided. This phenomenon has far reaching significance. It should be treated, in the interest of the smooth development of the Commonwealth, as a guiding example illustrating the principle that possession of thorough knowledge required to construct a piece of work should help to avoid delay and errors involved in the process of its invention.

The only concession the Indian leaders were prepared to make was to have a fully responsible Government at the centre with arrangements for the prosecution of the War in collaboration with the Allies. They were prepared to postpone the legalisation of this de facto status till the end of the War. Thus even in the claims of the Indian leaders the twofold aspect of the problem was distinct. The British government wanted to proceed step by step, whereas the Indian Political Parties wanted to settle terms with the Government independently of each other; neither was possible. In the long process of negotiations the British Government realised that they had to take their final decision with regard to Indian independence once for all. The Indian political parties were convinced that they could not settle terms with the Government separately. The British Government in the Draft Declaration was more definite than ever, both in regard to Indian independence, as

(1) Mr Nehru remarked that the Muslim League Members of the Interim Government acted as King's Party.

to the communal problem which after the demand for Pakistan was no more a minority problem, but had taken shape as a conflict between two majorities. The subsequent attempts in Lord Wavell's proposals evidently showed that in place of attaining agreement on the long term plans the Government tried to secure cooperation at least in the short term arrangements. These facts go to prove that in the circumstances, as they then stood, the Government distinctly visualised the twofold aspect of the problem. The short term solution of the deadlock was given priority not only because the War effort demanded it, but because it would have certainly provided a firm basis for the solution of the long term aspect of the problem. The two were interdependent and closely related.

In India the minority problem had a long and chequered history. It was further complicated by the fact that besides the Muslims there were other minorities which were equally conscious of the majority rule. Among them the Scheduled Castes as the untouchables were constitutionally defined and Sikhs were important. In the Round Table Conferences representatives were invited not only of all the communities of India but also of different shades of opinion of one community. Against this tradition all minorities, except the Sikhs, gradually sank into insignificance. According to the Act of 1935 among the objects of the discretionary powers vested in the Governor-General and Governor was the protection of the minorities. As far as the Draft Declaration was concerned the minorities were consulted and it was also envisaged that the Treaty would make provision for the protection of racial and religious minorities. But the Cabinet Mission did not go beyond consulting the different interests. When they met at Simla, it was in fact a tripartite conference in which the Muslim League and the Congress appeared to settle terms with the Government. The fact that the Sikh leaders also participated in some of the negotiations was only because the creation of Pakistan had involved the partition of the Punjab in which the Sikh community being evenly distributed had a distinct interest. The other communities were out of the question. The British Government ceded its right to protect minorities and took it for granted that the crux of the problem had narrowed down to

the question whether the Muslims should have the right of self-determination in all the provinces where they were in the majority or the same principle was to be applied to those portions of the Punjab and Bengal where non-Muslims were in a slight majority. The logic in this case was that if the Muslims demanded self-determination in disregard of the geographical unity of India, because they were in a majority in some provinces, the same argument should apply in the provinces without regard to their geographical unity. Thus the assertion of self-determination definitely laid down the principle that the majority of the population was to be ascertained without regard to the geographical and administrative units. It was only a solution of the problem as far as it related to the conflict of two self-conscious geographical majorities.

The principle of self-determination as ascertained and enforced in the international sphere was not exactly what has been applied in India. The principle as ascertained is known as plebiscite. No plebiscite was held in India in the true sense of the word. Instead it was asserted on the simple majority votes of the Legislatures. This was because the Muslim League and the Congress were recognised as the successors of the British Government in fact.(1) The only province which seemed to be geographically allied to Pakistan but politically affiliated to the Congress as far as the provincial legislature was concerned was the North West Frontier. It was therefore necessary to ascertain the will of the electorate. Then there was the district of Sylhet which, being predominantly Muslim, had to be detached from the province of Assam in accordance with a referendum. In both of these cases the referendum was to decide which of India or Pakistan they preferred. As the principle of the partition of India as a whole had not been decided by plebiscite, so there was no case to resort to a plebiscite to ascertain the will of a province or in partitioning another. It was taken for granted

(1) Mr Attlee's reference to the procedure adopted for the appointment of the Governor-General on the advice of Indian leaders. Second Reading. Hansard, Vol. 2139, No. 139, Thursday, 16th July 1947, pp. 2760-61. He said "Both the Congress and the Muslim League have been recognised in the Bill as successor authorities".
Ibid. See also the Opposition's views and the Secretary of State for India's reply on this point, pp. 2540-41.

that Indian politics had taken a turn where partition was the only solution, and the Congress and the Muslim League, the only political bodies to have a say in the matter. In fact neither party was willing to leave out an area in which their community had a majority under the Government of the other party.(1) The Congress demanded the partition of Bengal and the Punjab as a counter-demand for the partition of India by the Muslim League. The Muslim League used the same argument in its demand for the Sylhet district. The solution of the Indian problem was based on the principle of the division of India in accordance with the majority areas of the Muslims and non-Muslims, and the geographical and administrative unity was ruled out. Muslims of India under the constitutional changes gradually developed the idea of self-determination for the Indian Muslims as a whole, and therefore put forward a case for a separate nationhood. At the time of the assertion of self-determination it was narrowed down to the Muslim majority areas, instead of all Indian Muslims, as no provision was made for the transfer of populations or for other similar problems. It may, therefore, be assumed that Muslims and non-Muslims both in India and Pakistan along with other minorities had lost their case for self-determination. There were minority protection arrangements made by both the successor governments, and their implications will be dealt with in subsequent pages.

The principle of self-determination thus established in case of the formation of Pakistan was strikingly similar to the principle recognised in the western world. Even the conflict between this principle and geographical and economic considerations has been resolved, more or less in the same manner. This further establishes the fact that the scene of such political changes is shifting from West to East under the influence of similar democratic forces. The following observations of Stuyt appear as if they are the deduction of the changes that have taken place on the Indian sub-Continent. "The principle recognizing the rights of people to determine their political fate may be applied in various ways; the most important of these are, on the one hand the formation of an independent state,

(1) Speech of Lord Mountbatten, op. cit. 16th May, 1947.

and on the other hand the right of choice between two existing states. The principle, however, must be brought into line with that of the protection of minorities; both have a common object - to assure to some national group the maintenance and free development of its social, ethnical or religious characteristic.... The fact must, however, not be lost sight of that the principle that nations must have the right of self-determination is not the only one to be taken into account. Even though it may be regarded as the most important of the principles governing the formation of states, geographical, economic and other similar considerations may put obstacles in the way of its complete recognition, under such circumstances in the nature of a compromise based on an intensive grant of liberty to minorities may appear necessary according to international legal conception and may even be dictated by interest of peace".(1) It is quite evident that the principles of fundamental rights and protection of minorities in the Indian sub-Continent after partition, which was a partial recognition of the principle of self-determination in view of geographical and other difficulties, have also gained legal sanction not only due to international obligations but also due to the fact that both governments have undertaken such obligations.

V.

Indians made their demands for constituent rights when virtually the non-party conference set up the Nehru Committee to frame a constitution for India. Since then the demand for constituent rights have formed a major factor in all the political negotiations. The efforts of liberal leaders, especially that of Sir Tej Bahadur Sapru, in the field of the constitution is well known to every student of the Indian Constitution. The British Government virtually accepted this demand as a challenge to Indian politicians among whom no agreement could possibly be attained. The British Government since then proceeded in all their statements and plans on the assumption that the work of framing the constitution for India was left to Indians.

(1) Stuyt. The general principles of law. Note 9, pp.182-183.

What was needed on the part of the British Government was to provide a basis for setting up a body with powers to frame a constitution acceptable to all parties. The framing of the constitution prior to independence was necessary because there could be no transfer of power possible without a constitution. The constituent body with sovereign rights could also be a party to enter into a treaty with the British government which would cover matters arising out of the transfer of powers to Indian hands.

The formation of a constituent assembly must be such as to ensure as broad and accurate a representation of the whole of the population as possible. A constituent assembly of this nature could only be true in its definition when based on the adult franchise. The plan set forth by the Cabinet Mission and the Viceroy for setting up a constituent assembly for India was obviously lacking in the spirit of this democratic principle. There were reasons for it. India was threatened with disturbances and disorder which were likely to develop into civil war. The British Government had fixed a date for the transfer of powers. The time left for any arrangements for the transfer was limited. To quote Lord Mountbatten again - "The one point on which every community was agreed, and on which all British officials were agreed, and with which I very soon agreed myself was that a decision at the earliest possible moment as to how we were to transfer power was a prime necessity, if we were to put a stop to communal strife and bring back the atmosphere of peace and friendliness without which no progress can possibly be made".(1) The British government was aware of the defect in the constituent assembly. To cite the Cabinet Mission. "The most satisfactory method would be by election based on adult franchise, but any attempt to introduce such a step now would lead to a wholly unacceptable delay in the formulation of the new constitution."(2)

The British Government was thinking of defining the relations of India to the United Kingdom as well as the Commonwealth through a

(1) Mountbatten, op. cit. p.20.
(2) Cmd. 6821, para. 18.

treaty. This was possible only with a body having power to enter into a treaty. There was a better solution and one more in line with the spirit of the development of the Commonwealth. To bring into existence a body of this character was dependent on the enactment of the British Parliament. An Act conferring Dominion Status and also providing a constitution for the transition period would certainly eliminate the process of setting up a body with treaty-making powers and then entering into a treaty. By enacting the Indian Independence Act the British Parliament effected the transfer of power into Indian hands, defined the relations of India and Pakistan, with the United Kingdom and the Commonwealth, and also a constitution for the transition period. The Act of 1935 was wide and elastic enough to serve this purpose. Thus the Constituent Assembly was left with the task of framing a constitution without any trouble of providing for day to day constitutional needs.

The Cabinet Mission plan envisaged an assembly for the whole of India with certain qualifications. The provinces were divided into three groups A. B. and C. Group A. consisted of Madras, Bombay, United Provinces, Bihar, Central Provinces and Orissa. These happened to be predominantly Hindu provinces. The Group B. consisted of the Punjab, North West Frontier Province and Sindh. These provinces happened to be predominantly Muslim. Group C. was made up of Bengal and Assam in which Bengal was a Muslim majority province, whereas in Assam Hindus were in the majority, but the total effect was that Bengal and Assam together sent 34 non-Muslim and 36 Muslim representatives to the Constituent Assembly. Besides these provinces there were representatives from the Chief Commissioner's provinces, Delhi, Ajmer-Marwara and Coorg to join Group A. and the representative from British Baluchistan was to be added to Group B.

The crux of the problem was in regard to paras 4-8 of section 19 of the plan. The differences of opinion as regards their interpretation which existed between the Congress and the Muslim League and the final statement of the British Government expressing their agreement with the view held by the Muslim League on the basis of the opinion of their legal advisers have already been recorded.

This made it imperative to divide the Constituent Assembly into two as ultimately these two sections emerged as the Constituent Assemblies of India and Pakistan.

With the idea of federation for India, the States and their participation were considered an important factor in Indian politics. In the chapter on the States it has been observed that in spite of their sovereign identities, the Reports of the Montagu-Chelmsford Committee and of the Simon Commission dealt with them as an important part for the success of federation. The Act of 1935 was shelved mainly because the States were reluctant to join. In the Chapter on the evolution of self-determination it has been noticed that the legal barriers formed by the sovereign identities of the States could not stop the infiltration of the ideas for responsible government in the States. The statements and plans under review also dealt with the States. The only thing that the British Government was reluctant to transfer to the successor governments was paramountcy. Paramountcy as defining the relation of the States with the British Crown on analysis has been found to have two aspects,(1) inter-dependence based on the strength of the British government in India and the geographical factors involving such relationships; the legal aspect depending on a contractual basis such as treaties etc. The British Government could and did declare the lapse of paramountcy, but could not and did not denounce the de facto interdependence between the states and British India. Undoubtedly this interdependence could never be justifiably or even desirably defined as paramountcy. In the Cabinet Mission plan the states were provided with representation in the Constituent Assembly and they were allotted 93 seats. There was only one thing, which denied the principle of self-determination for the people of the State; namely the fact that the state representatives were to be selected by a method to be determined by consultation. Even in the Act of 1935 the method of selection was left to the discretion of the rules. This was the basis divergent from that adopted in British India, but it was in no way an entire

(1) See Chapter on States.

denial of the principle of self-determination from the people of the States. The representatives of the States in a sovereign body could be nobody else but the true representatives of the people of the states whose will under the changed conditions had become sovereign. The arrangements made for state representation in the Constituent Assembly envisaged by the Cabinet Mission plan were only a compromise measure rather than a permanent feature.

THE TITLE AND THE SCOPE OF THE ACT(1)

I.

The short title of the Act has been defined as the "Indian Independence Act". Mr. Harold Macmillan the member for Bromley speaking in the debates of the Commons on the second reading of the Bill observed, "I must here frankly say that my friends and I do not much like the title of this Bill..... the more so because I understand it is a phrase which does not result from any Indian request, but is due to the sole initiative of British draftsmen. This phrase seems to us to dwell too much on one aspect of the Commonwealth system, for it is the peculiar glory of the free nations which comprise the British Commonwealth that they are both independent and inter-dependent,"(2) or in Mr. Wilson Harris' opinion, the use of the term "Independent Dominions" involves a certain contradiction. Dominions as between themselves are interdependent, not independent.(3) In replying to this the Prime Minister remarked, "With regard to the word "Independent," that again one may quarrel over, but I think one has to consider both history and psychology in this matter. It is a fact that is not generally realised throughout the world that although it is properly said that there is interdependence, there is complete independence in the Dominions from any control, whether from Whitehall or from Parliament. That is the important point that needs to be stressed. It is not perhaps quite the same as if this was being formed from one country which had never been in the position of being under this Parliament and Whitehall. I think that is the point that Indians really want to have emphasised; they quite accept the position and know the advantages of being in

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(1) The Indian Independence Act 10 & 11 George 6.C.30.

(2) Hansard, Volume 439, No.139, Thursday, 10th July 1947. Col.2480

(3) Hansard, Volume 440, 14th July 1947 (Committee stage) Col. 42.

the (sic) Dominions."(1) Having heard this explanation Mr. Harris raised another question in this context, "Is allegiance to the Crown which is inherent in the position of any Dominion really consistent with the use of this term." The Prime Minister replied, "I think so, because the King is king of Great Britain, king of Canada and of any Dominion."(2)

The Prime Minister in his speech relied on the fact that a subject nation when admitted to the rank of equality was bound to demand explicit and unequivocal definitions of the terms defining their relationships. This is undoubtedly partially true, but it is not the whole truth. Interdependence has long been abandoned as an essential basis of intra-Commonwealth relationships. This is not to suggest that interdependence has been altogether eliminated from the list of the factors underlying that relationship. What it is desired to clarify is that interdependence as an essential and basic relation in the changed Commonwealth has been abandoned and instead it has come in as an extra factor supporting the basic conditions and principles of this relationship. Now it may be asked when and how did this change come about. It is a commonplace of Commonwealth relations that a member can remain neutral if it so desires. If neutrality is possible in spite of the continuity of the relationships, then the logical conclusion would be that the factors making neutrality possible should not be made a basic and essential condition for the membership of the Commonwealth. Neutrality on the part of one or more members while the Commonwealth is at war makes it inevitable that the belligerent members cannot share the interdependence existing among themselves during war, with those who proclaim themselves neutral/

(1) Ibid. Col. 43.
(2) Ibid.

neutral. The neutral members being members of the community of nations have to maintain their neutrality in accordance with the law of the nations. What will happen if interdependence demands something which goes contrary either to the very purpose of neutrality or to international law? Naturally the neutral members will solve the conflict and that in one way only. The choice will be for neutrality and international law rather than interdependence. Keith had observed "To declare war or make peace or assert neutrality separately from the rest of the Empire would virtually be an act of secession....."(1) Keith carries the logical conclusion to secession and this can be the only logical conclusion if interdependence is treated as a fundamental condition for membership of the Commonwealth. But what has actually happened in the case of Eire? Was it that Eire seceded as a result of her neutrality during World War II? Did all the members of the Commonwealth exclude Eire from membership? The answer is undoubtedly in the negative. By this policy of neutrality Eire's detachment from other nations of the Commonwealth during one of the most critical periods in their history was undermined but the character of her association with it was not fundamentally altered.....(2) The invitation extended for the Commonwealth Conferences of 1944 and 1946 lay down explicitly the principle that neutrality did not, from the standpoint of the members of the Commonwealth, cause the secession of Eire from the Commonwealth.(3) It is therefore true as well as desirable to treat interdependence not as a fundamental condition for membership of the Commonwealth but as an extra favourable factor to support and strengthen the relationship. In view of this conclusion it is safer to say that interdependence comes/

(1) Keith, A.B.: Dominions as Sovereign States, ed. 1938, p. 205.

(2) The Commonwealth and the Nations: Nicholas Mansergh, p. 208.

(3) She was not invited in 1948. Though Eire did not participate in the Conferences of 1944, and 46, the emphasis here is on the fact that invitation was extended, which implied that she was still considered a member of the Commonwealth.

comes in the field of Commonwealth relationships as an extra factor having its origin in the consent of the members; and therefore its existence or disappearance should not affect the fundamental factor governing the relationship. This is equally justified on the grounds of the divisibility of the Crown. The Crown acts in the interest of that particular Dominion to which it is attributed. There is no interdependence just because there is one king. The position is that there are as many crowns as there are Dominions. The unity of the Imperial period or even of that of the autonomous Dominions has long been abandoned. The Crown acts on the advice and in the interests of the Dominion concerned. If all the Dominions have common interests which make interdependence advantageous, then only does it come in the purview, but as an extra factor, created entirely by a favourable situation. In other words interdependence does not depend on its own title; it is only the situation that the common interest of the Commonwealth creates and the Dominions individually give it the title and only then does it emerge. In other words interdependence remains as an element of policy and politics rather than as an integral part of the legal and constitutional principles and conventions governing the relationship.

There is a marked difference between India and the other Dominions as compared from the standpoint of the legal basis of their respective relationships with Great Britain. Colonies were part and parcel of the British Empire. They received authority through gradual devolution without affecting the legal character of their relations with the mother country. This was the case at least till recently. Their neutrality while Great Britain was at war appeared to be a legal inconsistency; through there are writers like Schlosberg(1) who do not contribute/

(1) Schlosberg (H.J.): The King's Republics, London 1929. See Ch. on Neutrality, pp. 44-50.

contribute to this view. But India stood in her relations with Great Britain on a different footing. India was brought into relationship with the Crown, not as a colony but as an Empire[1] in itself thereby retaining her individuality and identity. Her neutrality even before attaining Dominion status was as good and legally consistent while Great Britain was at war as that of Hanover.

The question of allegiance has been answered to by the Prime Minister, when he pointed out the divisibility of the Crown. This question has far reaching bearings on the policies India and Pakistan have adopted, but discussion of this will be better postponed to subsequent chapters. What is desired here is to understand what the title of the Act bears out and also to assess its scope. Related problems can be better dealt with when the determination of the exact terms and their implications will be examined.

There arises a difficulty in the use of the word "India". It may be argued, in the first place, that "India" is a geographical expression and comprises both British Indian and Indian states; secondly, as far as the use of the word "India" in the title goes, it gives independence not only to the Indian Dominion but also to the Dominion of Pakistan. During the debates this point also was raised by Mr. R.A. Butler: "Perhaps we might be given a little explanation as to what "India" means here, and what it means under the new connotation. I understand that it has been arranged with the parties concerned as an agreed matter."[2] The Prime Minister with reference to this/

(1) When India joined the Imperial Conference in 1917, it was as an Empire, and therefore the use of the term 'inter-imperial' appears to be quite appropriate because there were thus two Empires brought together. The British Empire and the Indian Empire, Cf. Wheare; op.cit.p.27 N.I.'The term is inaccurate. The relations it purports to describe are not relations between empires - which is what 'inter-imperial' means - but relations between parts of a single empire.' This was not the case at least since the time India joined this relationship as an empire in itself.

(2) Hansard: op.cit. col.40.

this question observed: "Whether we should call the Dominions India and Pakistan, that is largely a choice of names decided by the Indians themselves..... We are awfully apt to talk of "Americans" when we do not mean the people of North and South America. We often talk of "Americans" and do not mean the people of the whole of North America. In the same way, I have no doubt that we shall continue to talk of "Indians" although one part is particularly called India..... We had a good deal of talk on this when the 1935 Act was discussed. We always had to distinguish between British India and Indian India."(1)

The first reference to distinguish between British India and Indian India was made in the Interpretation Act.(2) It is a well known fact of history that the Government of India Bill 1919 was adopted with the words "British India" substituted for "India". "India" was not a geographical expression as well as the name of a State as the Prime Minister observed.(3) "India" was a geographical expression only. The name of the State was "British India". The other states were known by their individual names, e.g. Hyderabad state, Mysore state, etc. India comprised both, but excluded when used in geographical sense, Burma, which was part of British India. The Colonial Laws Validity Act 1865(4) excluded "India", both British India as well as the Indian states from the purview of that Act. Even in the view of the British Indian Courts(5) the Indian states were foreign territories and this was the case even of Berar(6) which was administered by the British Indian Government.

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(1) Hansard: op.cit. col.44.
(2) 28 & 29 Victoria 1889, sections 3-6.
(3) Hansard: op.cit. col.44.
(4) 28 & 29 Victoria C.63, 1865.
(5) See Chapter on the States.
(6) See Fitzgerald's article on Berar A.I.R. 42: 514, ~~vol~~.

Now the question arises as to how far the use of "India" was correct in view of the legal precision of the name of the state British India which gained independence and was also partitioned by the same Act. The Indian independence Act does not only speak of the independence of British India and its partition but also enacts the lapse of paramountcy over the Indian states. The Government of India Act of 1935 provided for the accession of the Indian states into the federation and nothing in the Act was to extend to the states unless they acceded to the Federation. The Indian Independence Act enacts the lapse of suzerainty, hence the use of "India" in this connotation seems to be justified because not only British India through this enactment became independent but also the Indian states regained independence as a result of the lapse of suzerainty and the denunciation of treaties that imposed subordination.

As regards Pakistan it is quite clear that Pakistan had no existence for the purposes of law before the 15th August 1947 though in fact two governments, one for Pakistan and the other for India, were de facto in existence before the appointed day. The Act itself came into effect on the 15th August. Both could come together and they did. The Act speaks of the "Dominion of Pakistan", and the legal name, the "State of Pakistan" owes its origin to this Act. The fact that the word "Pakistan" was not inserted in the title of the Act may be explained in two ways. Firstly it was a short title,(1) and was not expected to include everything in it. The Dominion of Pakistan finds expression in the Act itself. Secondly, the term "India" was used as was explained by the Prime Minister in its geographical sense including the areas comprising Pakistan, hence it reflects nothing on the legal name "Pakistan State".

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(1) Willmot v. Rose (1854) 23. Q.B. 281.
"the title cannot over rule the clear meaning of the enactment."

There remains the last, but not the least, point, namely that there is nothing in the title of the Act to suggest partition as well as independence. So the point arises whether the Act should be treated as a partition Act as well. The language used in the Clauses of the Act providing for the creation of two Dominions: "An Act to make provisions for the setting up in India of two independent Dominions....." does not clearly use the term "partition". Could it be interpreted as implying other than partition? It needs no emphasis to see that the setting up of two Dominions in place of one State is a result of partition. Clause 9(b) section 2 of the Indian Independence Act runs as follows:- "For dividing between the new Dominions and between the new provinces to be constituted, the powers, rights, property, duties and liabilities of the Governor-General in Council or, as the case may be, of relevant provinces which, under this Act are to cease to exist." Here is the word "dividing" explicitly used and if read with other clauses of the Act it can only be construed as the Act bringing about partition. The principles of construction and their application to this Act may be postponed till we come to deal with them individually and also to probe into their implications. It is now, undoubtedly, a settled rule that the title of the statute forms an important part of the Act(1) and may be referred to for the purposes of ascertaining its general scope(2) and thus it may be profitably employed to throw light on its construction and this rule applies both to the long and to the short title but the title can not over rule the clear meaning of the enactment. In interpreting the intention and meaning of the Act with a view to ascertaining its scope, it should be read in the light of other provisions. This Act contains sufficiently clear words dealing with partition.

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(1) Fielding v. Morley Corporation, 1899. Ch. 3.
(2) Fenton v. Morley, 1903. A.C. 447.

A reference to the modern tendencies as decided in the leading cases, in order to take a broader view for the purposes of construction seems to be necessary. It has been observed that in interpreting the constituent, or organic statute such as the British North American Act the construction must be the widest possible.(1) Even a statute is said to be justifiably construed contrary to its literal meaning when a literal construction would result in an absurdity or inconsistency, and the words are capable of another construction which will carry out the manifest intention.(2) In South-Eastern Railway v. the Railway Commissioners reference was made to the speech of the minister on the introduction of the Railway Canal and Traffic Act. In view of these leading cases the list of which is undoubtedly not exhausted, and also in view of the word "dividing" used in the Act itself, the only construction manifesting the intentions of the Act would be to describe the Act as one providing for partition and hence it could be named not only an Act of Independence but also of partition.(3)

Then comes the question; was it not a secession or breaking off of a new state from an existing state? The answer is in the negative. Because the setting up of two Dominions and independence are simultaneous phenomena. A break-off could only be either through revolt followed by recognition by the parent state or by a treaty with the same. Had India gained independence prior to partition and had the break-off been the result of any contract then, it would have been a case of secession, but as both independence and the setting up of two dominions happened simultaneously, it can be interpreted as a partitioning Act. This case is further supported by the fact

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(1) Corporation v. King, 1935. A.C. p.500. See also The Governor-General v. Raleigh Investment Co. Ltd. (1944) F. C.R. (India) 22a.

(2) Exparte Walton (1881) 17 Ch. D. 746.

(3) The words in the Clause 9(b) Sec. 2 say: "For dividing.....the powers, rights, property....." Rights certainly includes juristic personality and all the rights attributed to it (see Chapter on the succession of state under the Act infra)

that "partition" had been used and meant throughout the negotiations for the settlement of the Indian political deadlock and during the debates on the Indian Independence Bill as well. This has its significance in relation to the problems of state succession and it will be dealt with in all its details there. Suffice it here to say that the Indian Independence Act was inter alia a partitioning Act.

The Act is said to be "An Act to make provisions for the setting up in India of two independent Dominions, to substitute other provisions for certain provisions of the Government of India Act 1935 which apply outside those Dominions, and to provide for other matters consequential or connected with the setting up of these Dominions." As is quite clear, the Indian Independence Act of 1947 on the one hand is a measure to confer de jure Dominion status that de facto was assumed by India just a few months earlier, and on the other hand to borrow Mr. Attlee's phrase it was an 'enabling Act', which makes provisions for the needs of both constitution and governments of the future. This Act makes provision at the same time for partitioning[1] India "between the new Dominions" and the provinces of Bengal, the Punjab and Assam as defined in the Act of 1935 with a view to bringing into existence the new provinces of Eastern Bengal and Western Bengal; Assam with the exclusion of the Sylhet district that was to be annexed to Eastern Bengal, and Eastern and Western Punjab. The boundaries[2] of these new provinces were to be determined by the 'award'[3] of the boundary commission appointed for this purpose. Meanwhile the boundaries for the purposes of the setting up of the new Dominions until they were finally determined by the Commission were defined in Section 3 (3) a.b.c.;

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(1) Sc. 2, 3, 4.
(2) Sc. 3 (3).
(3) It may be noted here that "award" has been used throughout whereas "decision" by the agreement of all the members also was a possibility.

in other words if the 'award' followed the enforcement of the Act the two states had for the purposes of law defined boundaries.

The Act provides no permanent constitution as was the case with the Ceylon Independence Act(1) but makes temporary provision for the Government(2) and Legislature. Though the provisions were temporary they were complete as they covered the adaptation of the Act of 1935 for the purposes of the Government of the new Dominions. And the limitations with which the Act of 1935 was enacted were removed.(3)

As a result of the setting up of the new Dominions it was necessary to define the position of the states(4) and tribes(5) on the one hand and on the other hand it was also necessary to change the Royal style and titles.(6) With this change it was also made consequentially necessary to denounce all the responsibilities(7) connected with British India and the States.

The Act was drafted on the presumption that there was to be one Governor-General for both the Dominions. This, however, was not possible and two separate Governors-General were appointed but the provisions of the Act were broad enough to cover this and no change from this point of view was necessary. The Governor-General of pre-partition India was the Governor-General in the Act, who was entrusted with powers(8) to put this Act into practice. This is the most important clause of the Act as it covers a wide field connected with the partitions and other administrative and legal matters. As will be observed, this clause became the centre of contention.

The Secretary of State for India and his services(9) were accordingly dealt with, and the amendments of the connected

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(1) George 6.c.1947. (2) Sc. 5, 6, & 8.
(3) Sc. 8 (3) (4) Sc. 7,
(5) Sc. 7 (h) (6) Sc. 7, Clause 2.
(7) Sc. 7 a.b. (8) Sc. 9.
(9) Sc. 10 & 14.

Acts[1] in respect of administrative matters as well as of the armed forces were provided. There was provision also for the British armed forces[2] who were to leave India after some time. As the Secretary of State's office was being wound up provisions were made for legal proceedings too.[3] It was also necessary to make provision for the separation of Aden[4] and to define the operation of the Act of 1935 outside the two Dominions[5] in view of the changed context. For the purposes of interpretation all details were laid down in Section 19.

The Act has three schedules: the first gives the description of the districts provisionally included in the new province of East Bengal and the second those of the West Punjab. The third has in the first part modifications of the Army Act and the Air Force Act in relation to the British forces and the second and third parts of the third schedule, contain modifications of the Army and Air Force Acts in relation to the Indian forces.

II.

The above description gives in broad outline the scope of the Act. It will be of great interest and profit to compare this Act as far as the definition of Dominion Status in this Act is concerned in order to make a comparative study with both the Statute of Westminster (1931) and the Ceylon Independence Act (1947). Before any comparison is made it is desirable to assess on the one side the factors that were responsible for the enactment of the Statute of Westminster and on the other side those which preceded the Indian Independence Act. In the preceding chapter a study of the forces influencing the assertion of the principle of self-determination in the final phase has been made in detail. In this context only a reference to them would suffice well for

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(1) Section 10 (3), [illegible].
(2) Section 12, 13.
(3) Section 15.
(4) Section 16.
(5) Section 18.

the purposes of comparison. Conditions in Ceylon were very different from those in India and any reference to Ceylon would be only to the Ceylon Independence Act itself, rather than to the factors of history or the circumstances under which the Act came into existence.

The Statute of Westminster was to a large extent declamatory and therefore a measure to recognise and define the then existing position.(1) The recommendations of the Imperial Conferences of 1926 and 1930, whatever be their limitations, were remarkably significant in one respect. They advocated the removal of the inequalities that existed between the Dominions and the United Kingdom in view of the proclamation of equal status in 1926. The recommendations were twofold. They recommended the removal of those inequalities, "not by the method of legislative change only, but also by conventional conversions."(2) It was in keeping with the spirit of the characteristic constitutional structure of the British Commonwealth. The Statute of Westminster was not the sole legal measure to remove all inequalities, because the Conferences of 1926 and 1930 had already dealt with some of them and through constitutional conventions equality of status was most satisfactorily achieved. This was done with "the knowledge and upon the condition that certain other resolutions in respect of the remaining inequalities would be carried into effect in the terms of the Statute of Westminster."(3) The Statute was only a partial measure and that too a declamatory one.

It is of great interest to note in this context that the conferance of 1930 could not deal with all the points that were raised in connection with inequalities, and besides this difference between the problem and its actual handling there was

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(1) Wheare K.C. Statute of Westminster & Dominions, p. 123.

(2) Ibid. p. 124.

(3) Ibid. p. 34

a difference of another kind existing in the "legal elements" which formed a part of the constitutional status of one "Dominion" from another. There was a difference of view among the Dominions as to the extent to which they desired to get the legal inequalities removed through the Statute itself. In view of the resolutions laid down by the Conference of 1930 qualifying the operation of the Statute in respect of certain Dominions, provision was made in the Act itself, for such qualified operation in respect of these Dominions. It may here be mentioned that the changes brought about both by the conventions and by legal measures were interdependent. The legal measure was inevitable because merely conventional resolutions were not enough to remove all the legal inequalities that existed in view of some Acts of Parliament i.e. The Colonial Laws validity Act, Merchant Shipping Act, 1894, and also the Colonial Laws of Admiralty Act, 1890. The change in the Royal Title and also in that of the Parliament are points of importance to be borne in mind for the purposes of comparison.

The question as to how far the Statute apart from the resolutions of the Imperial Conferences was successful in its object may be better answered in Wheare's words, "As has been seen, it is doubtful whether the Statute has succeeded in the first of its tasks, which, in the words of the King's Speech in 1931, it was intended to perform, 'to make clear the powers of Dominion Parliaments.'"(1) It is not only the power of the Parliaments of the Dominions which failed to be defined with legal precision, but also the term "the Dominion" itself. According to the Statute the term "Dominion"(2) was said to mean "any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of

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(1) Wheare, op.cit. p.303.

(2) The Statute of Westminster, Section 1.

New Zealand, the Union of South Africa, the Irish Free State[1] and Newfoundland[2]." The nature of the co-operation amongst the members of the British Commonwealth of Nations in those days was such as not to demand more than what was actually provided for. It was natural that the Commonwealth witnessed changes and it progressed by the way of adjustment. The inequality involved in the status of the Governor-General both in his relations to his ministers and in his relation to the British Government attracted attention and was accordingly dealt with in the Conferences. Then there was the question of the legislative powers of the Parliaments in relation to the doctrine of extra-territoriality. The Colonial Laws Validity Act had necessarily to be amended in order to give the powers of legislation in respect of repugnancy to the Parliaments of the Dominions.

In view of the differences that existed in the Dominions themselves, the adoption of the Statute was effected in different ways. In 1934 South Africa re-enacted the Statute,[3] so as to make it one of the South African Statutes, This different method was aimed at making the South African Parliament entirely independent of the Imperial Parliament. The Irish Free State as it was then known through the Constitution Act 1936 removed the crown from the sphere of all internal activities, and through the Executive Authority (External Relations) Act 1936, empowered the Executive Council to appoint diplomatic representatives and conclude treaties in the name of the king. In other words the king was to act only in the sphere of external affairs and on the advice of the Executive. It implied that the king derived his powers from the Dail and hence from the people. In Canada it operated without any change in the wording. Australia and New Zealand only in 1942[4] and 1947[5] respectively.

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(1) Reference to its secession from the Commonwealth will be made later.

(2) Newfoundland in view of the economic crisis lost its Dominion Status in 1933 (24 Geo.5 C2) and has now joined the Canaddian Federation.

(3) The Status of the Union Act, 1934. No. 69.

(4) No. 56 of 1943. (5) No. 38 of 1947.

It may be of interest to note here that the effect of the Statute in the international sphere was not to put an end to the powers of legislation of the Imperial Parliament; at least in respect of Canada, Australia and New Zealand. Another point worth noting in this context is that despite the provision for legislation by the Imperial Parliament, on the request of the Dominion concerned, there was no restriction whatsoever on the full growth of the international personalities of these Dominions.

The term "Dominion" was, in this sense, used to describe the status of the countries like South Africa and Irish Free State to whom full legislative autonomy was intended to be granted amd also to countries like Canada, Australia, New Zealand (and of course Newfoundland was included) who of their own free will had consented to receive a "restrictive legal competence." But even by including section 4 in the Statute the United Kingdom Parliament has not abolished, in strict law, its power to legislate for the Dominions. Professor Wheare maintains that, "....it is a rule of construction. It is not directed to the United Kingdom Parliament, it is directed to the Courts. And so long as it remains unrepealed, it is effective for that purpose. But it does not render it legally impossible for the United Kingdom Parliament to legislate for a Dominion without the request and consent of the Dominion.(1) It is one of the many other considerations before the draftsmen of the Indian Independence Act 1947, to make necessary changes in the wording of this section 4. How far this change in the wording has proved successful in bringing about the desired effect will be noticed in the subsequent chapter.

III.

With this background in view it is desirable to see how India stood from the legal point of view in relation to the

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(1) Wheare op.cit. p.153.

United Kingdom. It has been observed that India passed into the British administration; and the Secretary of State in Council in the United Kingdom and the Governor-General in Council in India were the real rulers, but the identity of India remained unimpaired. With the changes in circumstances and the changes in political conditions in India and authorities and powers entrusted to the Secretary and the Governor-General gradually devolved upon the local executives. Although the Secretary of State legally held all the powers that were originally vested in him even in the Acts of 1919 and 1935, the tendency was to devolve them through conventions so as to avoid interference in Indian affairs. The report of the joint select committee on the Government of India Bill 1919 observed, "In the relations of the Secretary of State with the Governor-General in Council, the committee are not of opinion that any statutory changes can be made, so long as the Governor-General remains responsible to the Parliament, but in practice, the convention which now governs these relations may wisely be modified to meet fresh circumstances by the creation of a legislative assembly with a large elected majority."(1) Again in the case of the Governor-General's relations with the Executive it was observed, "It would be inadvisable to seek to define the Governor-General's (or the Governor's) relations with his ministers by imposing a statutory obligation upon him to be guided by their advice, since to do so would be to convert a constitutional convention into a rule of law.....the declaration of special responsibility of the Governor-General (or the Governor) with respect to any matter does not mean or even support that on every occasion when the question relating to that matter comes up for decision, the decision is to be that of the Governor-General (or the Governor) to the exclusion of

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(1) Report of the Joint Select Committee on the Government of India Bill, 1919. Discussion on Clause 33 of the Bill.

his ministers."(1) It was also agreed in the Parliament that the Secretary of State should cease to control the administration of the transferred subjects in the Provinces.(2) The tendency to d evolve powers by constitutional convention rather than legal measures are analagous to those in the Dominions. This tendency was stronger in 1937 when the Act of 1935 came to be enforced and the formation of the Congress Ministries depended on the solemn promise that the Governors would make least use of their powers given by the Act of 1935. The record of the work of the responsible governments in the Provinces proved that the constitutional conventions worked well as long as there was no serious political conflict.

The Act of 1935 did not confer full responsible government at the centre and envisaged a sort of dyarchy with distinct lists of transferred and reserved subjects. There was no change in the central government as the expectation of the participation of the States in the federal scheme was not fulfilled. The war created a situation in which a step forward was inevitable, and the expansion of the Governor-General's Executive followed. It is claimed by the Executive Councillors that they enjoyed de facto the position of responsible ministers.(3) Subsequent events have already been studied. The steps taken up to, and for the setting up of the interim government were entirely based on conventions. The interim Government itself relied on conventions. In other words in India changes were brought about on the analogy of the Dominions relying on Constitutional conventions rather than legal measures. The Interim Government was a fully responsible government and the Governor-General acted entirely on its advice.

There is another angle for reviewing the status of India as compared with the Dominions. In India secession of territories was not dependent on the sanction of Parliament.(4)

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(1) Joint Parliamentary Committee, paras. 74 & 75.

(2) Montagu Chelmsford Reforms, para. 291.

(3) Coupland. op.cit.

(4) The Law of Treaties - Arnold Duncan McNair, p. 28.
See also the Law Officer's Reports reproduced there.
Ibid. pp.29,30

This prerogative of annexation or secession enjoyed by the crown independent of Parliament was brought within the scope of federal legislature of those of the provinces as the case may be[1] thereby making it dependent on consultation with the government and the legislatures concerned.

India's personality in international law was often said to be anomalous because she joined the League of Nations and concluded treaties of an International character while she was governed by the Parliament and enjoyed least attributes of self-government. Before any critical view of this opinion is taken it is necessary to refer to one fact, the King and Emperor of India delegated powers of an international character to the Governor-General and on the strength of these delegated powers, the Governor-General concluded treaties with foreign countries, as for instance with Afghanistan. The King and the Governor-General whenever they acted did so as the King and the Governor-General of India. That was the only theoretical basis for concluding treaties in the name of India as a matter of her own right. The fact that Parliament held control over Indian affairs was based on the theory of trust. Whenever they questioned any point about India or discussed Indian affairs, they did so in the capacity of a supervisory body with full recognition of India's identity. The fact that the Government in India was run by a Governor-General who was a British national should not influence the legal case for India's personality in international law. It would have been quite a different case if India had been annexed to the United Kingdom thereby losing her identity. The King acted as the head of the State of India, and the fact that India joined the League of Nations and concluded treaties of an international character in her own right is the sufficient ground to recognise her legal personality in international law. As far

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(1) The Government of India Act 1935. Section 110(b)(1) Section 311(1).

as territorial autonomy and its devolution into Indian hands was concerned, this was just a local matter. A close analogy can be drawn with any country where an absolute monarch surrenders his absolute powers to the people thereby bringing into existence a Parliament and making himself a constitutional monarch. In international law the country had its existence independent of whether it was under an absolute monarchy or a constitutional monarchy. In the case of India two facts have already been proved, first, the sovereignty exercised in the name of the British King by the Secretary of State through the Governor-General was entirely executive. The people were recognised as the holders of creative sovereignty. Secondly, the position of the Parliament was supervisory. The divisibility of the Crown, recognised in the case of the Dominions, in fact existed ever since the Emperor of India disappeared and the Crown was substituted for the purposes of performing the executory duties of the Indian Government. It was not a substitution in all its aspects.

Viewed entirely from the British point of view as well, the change of Government brought about by the Government of India Act, 1858 was not a change of international character. The Act speaks of reversing the rules relating to the governance of India placed in trust for the Crown. The ground for such terminology was based on the fact that the sovereignty of the British Crown was claimed earlier. The Act was to bring about an internal change in the form of Government. The internal changes therefore should not influence the identity of a State, because "a community is able to assert its rights and to fulfil its duties equally well, whether it is ruled by one dynasty or another, or the form of government is a monarchy or a republic. These governments are regarded merely as agents through whom the community expressed its will."(1) As even from the British point

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(1) Hall: International Law.

of view there was no succession of international personality effected by the Act of 1858, therefore there should be no controversy on the point whether the personality of the state as it existed under the East India Company's government passed on unimpaired even when the government was said to be ruled in the name of the Crown. As regards when and how that succession took place, that has already been dealt with.(1)

A point may arise as to the period before India joined the League of Nations. What was her status in international law before that? The time when India joined the League of Nations marks only the extension of recognition in the international law to India. In other words it signifies the admission of India to the community of nations which before that was entirely confined to European nations; this was the case with Japan and Persia, but it does not imply that these eastern countries possessed no international personality before that. The second point, which could be raised, is how could an international personality be an dependent on the British diplomatic services. The reply to this involves the point of distinguishing of equality of status and inequality of function as was raised in respect of the Dominions. "The inequality of function expresses itself mainly in the fact that the Dominions still avail themselves in many cases of the services and organs of Great Britain, in particular for the protection of their citizens abroad and for obtaining information as to conditions in foreign countries."(2) The discussion here is only on the point whether an international personality can avail itself of the services of another personality. This has been the peculiar characteristic of the British Commonwealth and therefore there should be no objection to the continuity unimpaired of India's personality in international law. This of course is only to emphasise the existence of such international personality. The diplomatic services were established

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(1) Chapter I.

(2) Oppenheim: International law, vol. I p.

even before the enforcement of Indian independence.(1)

Now remains the question of the applicability of the doctrine of extra-territoriality by the Indian Legislature before the Indian Independence Act. The Statute of Westminster inter alia, settled the controversy about the powers of the Dominion Parliaments to make laws having extra-territorial operations. In two cases(2) the Federal Court of India expressed the view that extra-territorial operations could not be a ground for holding legislation by Indian legislature ultra vires the Legislature. The observation of the court was undoubtedly "Obiter". Again in Wallace v. Commissioners the Federal Court referring to previous case (supra) remarked that "We have nothing to add to the reasoning there set out." In this case also the observation by Spens C.J. was "obiter".

These observations of the Federal Court, certainly "obiter", lay down a modern view as compared with the view expressed earlier(3) that the subordinate legislatures shall not be held to possess any extra-territorial jurisdiction unless it is conferred upon them expressly or by necessary implications. The modern view as expressed by the Federal Court of India emphasised that there was no such presumption. The view was based on the decision of Croft v. Dumphy.(4) In this case the Privy Council considered the application of the doctrine independently of the Statute of Westminster in respect of Canada. Having gone into the point of the competence of a state in international law to pass certain kinds of law having operation beyond the conventional limits of the seaward belt i.e. three miles, and relying on the support of the authority on international law, established that the impugned provision in the Canadian legislation was within the competence of

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(1) Soon after entering the Government Mr. Nehru took stpps to form diplomatic relations with U.S.A. and U.S.S.R.

(2) 1st Governor General in Council v. Raleigh Investment Co. Ltd. 1944. F.C.R. 229.
2nd. Wallace Bros. & Co. Ltd. v. Commissioners of Income Tax, Bombay. 1945. F.C.R. (India) 65.

(3) MacLeod v. Attorney General for New South Wales. 1891. A.C. 455.

(4) Croft v. Dumphy. 1933. A.C. 156.

its legislature. "It will thus be seen, when the Imperial Parliament in 1867 conferred upon the Parliament of Canada full power to legislate regarding customs, it had long been the practice to include in Imperial Statutes relating to this branch of law executive provisions to take effect outside territorial limits..... In these circumstances it is difficult to conceive that the Imperial Parliament in bestowing plenary powers on the Dominion Parliament to legislate in relation to customs should have withheld from it, the power to enact provisions similar in scope to those which had long been an integral part of Imperial legislation and which presumably were regarded as necessary to its efficiency."(1) It is obvious that the question was decided relying on the implied competency of the Dominion Parliament in accordance with international law, and the Statute of Westminster and its retrospective effects as envisaged in section three were left open. Another case cited in support of this construction in Governor-General v. Raleigh was the British Coal Corporation.(1) The view relied upon was, "in interpreting a constituent or organic statute..... the widest possible aptitude must be adopted." Speaking of the limitations imposed by the doctrine of extra-territoriality the Lord Chancellor had observed that, that was a doctrine of somewhat obscure(2) extent. Even in the case of Australia the then Justice Evatt(4) doubted the existence of the restriction against extra-territorial legislation when Australia had not adopted the Statute.

Coming to the point Spens C.J. in Raleigh's case remarked, "though the Statute of Westminster is not applicable to India the Constitution Act of 1935 has to be interpreted in the light of the discussions on the subject that had been taking place between 1926

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(1) Ibid. p. 166.
(2) The British Coal Corporation v. King 1935. A.C. p. 500.
(3) Ibid. p. 520.
(4) Trustees, Executors & Agency Co. Ltd. v. Federal Commissioner of Taxation. 1933. (49.Com.L.R. 220)

and 1935....." Spens C.J. also pointed out that "the Federal leglislature's power of extra-territorial legislation is not limited to the cases specified in clauses (a) to (e) of Subsection E.1. of Section 99 appears clearly from entry No. 23 of List I of the 7th Schedule relating to fishing and fisheries beyond territorial waters." It is a rather liberal view which was undoubtedly in keeping with the spirit of the Constitution. The construction of the Constitution Act like other instruments if made without any reference to the events responsible for their enactment is likely to be out of tune with the ever changing circumstances. There are writers like S.D. Sharma(1) who hold that the interpretation so widely made is not sound. Even he does not deny the principle of necessary implication in respect of "police,revenue, public health and fisheries," and, "to a 'reasonable' limit further than the conventional three miles limit of territorial waters..... or in case of expulsion from India to the use of necessary force outside the territory....." He has relied much on the conservative principle of interpretation. But such a strict principle of construction does not seem to be in tune with the Commonwealth which has developed and grown in status mostly in deriving its strength from implied principles of autonomy and sovereign attributes or from conventional devolution of the same rather than by legal measures. It has also been observed in the preceding pages that the fact that India was excluded from the list of the Dominions did not imply that she was inferior in status as compared to the other Dominions. India had retained her identity as an international personality and was superior to at least Newfoundland which continued to be enumerated in the list of the Dominions even after the Dominions Status was suppressed in 1933. The views held by Spens C.J. in the light of the foregoing observation was not revolutionary. In the context of political

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(1) J.C.L. Vol. XXVIII Parts III & IV. pp. 91-95.
Applicability of the doctrine of extra-territoriality to Indian legislature.

trends in India, the spirit of liberal construction seems to be rather difficult to appreciate in its true perspective. The case made by Sharma could only be justified on the ground of demanding the extension of the Statute in respect of the doctrine but not on any other. This is enough to compare the situation preceding the attainment of India's Dominion Status as compared with the other Dominions. In spite of all that was established by the Courts of law in respect of this doctrine, it was obvious that none held that the Statute was unnecessary for the Dominions. Similar was the case of India and more justified in view of political trends and other considerations.

The details of the case Governor-General v. Raleigh are of great interest especially from one point of view. They point out the tendencies that were prevalent not only in the discussions of the Acts of 1919 and 1935 but also in their construction by a Court like the Federal Court of India. In view of the facts one feels no hesitation in observing that the Indian Independence Act like the Statute of Westminster was to a great extent declaratory, and to borrow a phrase from Mansergh it was "a symbol of achievement rather than the beginning."

The last point that needs attention is the inequality arising from the existence of the appeal to the judicial committee of the Privy Council. There is hardly anything of special significance as compared with the practice of the other Dominions and it will be discussed when dealing with the implication of the Act in this respect and the abolition of the appeals both by India and Pakistan.

VI.

The comparison of the situation as it existed before the enactment of the Statute and the conditions preceding the passing of the Indian Independence Act requires further clarification on one point. As has been seen in the approach towards Dominion Status both from the standpoint of the resolutions of the Imperial Conferences as well as from the angle of the Statute, there were at/

at least three main categories - Canada, Australia and New Zealand could for the sake of convenience be grouped together in spite of the fact that the Canadian approach is very different from that of the other two. The fact that the Union of South Africa adopted the Statute through the Status of the Union Act 1943 and provided for a separate seal instead of the Great Seal of the Realm[1] was a divergent approach in itself and when the issue of neutrality in 1939 was decided in favour of war by a majority of 13 in a house of 153 members, among them only 147 voting[2] it was established that the South African approach though not as revolutionary as that of Eire was basically the same. The Irish approach has been demonstrated not only by the Constitution Act and the removal of oath Act of 1933, and the declaration of a Sovereign Independent Republic but also by the fact that she preferred to remain neutral while the Commonwealth was at war.

Now the question arises, to which of the three categories do India and Pakistan belong, at least, as far as the Indian Independence Act is concerned. The Indian Independence Act "inter alia" is in a sense an adoption of the Statute of Westminster because the words of the Statute are enacted in Section 6 (2) of the Indian Independence Act; of course, not the same because it is more like the Status of the Union Act. The Ceylon Independence Act also resembles the Statute of Westminster and in this case the resemblance is closer, firstly because the enactment of the Ceylon Independence Act involved the repeal of the Colonial Laws Validity Act whereas in the case of India it did not, as that Act did not apply to India. In the second place through an agreement what was Constitutional convention propounded through the Imperial Conferences has been made formally binding. Thus a formal definition of the relationship of the Commonwealth was expressed.

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(1) Royal Executive Functions and Seal Act, 1934.
(2) Dr. Mansergh op.cit. p. 15.

The Indian Independence Act from this point of view is very different from that of Ceylon. These are the few points which have been dealt with besides the problems of partition and their consequences. The study of their comprehensive implications is desirable not only because they define the nature of the Commonwealth as it exists today but also because Pakistan is still ruled in accordance with the adapted Constitution of 1935 which was made in accordance with the provisions for this purpose in the Indian Independence Act.

The Indian Independence Act as far as its clauses go, in respect of the setting up of two Dominions and dividing the provinces, has far reaching effects. The problems of state succession are many and complicated. No comprehensive treatment of the Act would be complete unless the problems of state succession both in view of the partition of India and from the standpoint of the accession of the Indian States to the new Dominions were sufficiently considered. This gives a more or less complete picture of the scope of the Act.

STATE SUCCESSION UNDER THE ACT.

The question of the succession of the international personality of pre-partition India has caused a controversy and writers (1) on international law have so far held divergent views on this question. The same question was raised by the expert committee dealing with the consequences of partition in respect of foreign relations. (2) The members of the Committee also disagreed on the question of the succession to international personality of pre-partition India. The members representing India held the view that the formation of Pakistan was the result of secession and as such the juristic personality of pre-partition India continued; in the new Dominion of India and Pakistan came into existence as a new state. The members representing Pakistan were of opinion that the personality of pre-partition India disappeared all together as an entity and was succeeded by the independent Dominions of equal international status both of whom were eligible to lay claims to the rights and obligations of pre-partition India. In view of these divergent opinions and on the suggestion of Lord Mountbatten, the Partition Council decided to evolve a formula with a view to meeting the case of both sides. The Governor-General promulgated an order entitled the Indian Independence (International Arrangement) Order (3) 1947, to give legal form to the agreement in regard to the devolution of international rights and obligations upon the Dominions of India and Pakistan.

(1) e.g., H. B. Sankar: International personality of India & Pakistan (United Asia Vol I No.3) & D.K. sen: The Partition of India and succession in international law. (Indian law Review 1947.)

(2) Proceedings of the Expert Committees Vol. 3 Govt. of India publication, Report of the Expert Committee No. 9.

(3) No. G.G.O. 17 New Delhi. 14. the August 1947 ibid. pp. 293-94.

According to this agreement:

1. Membership of all international organisations together with the rights and obligations attaching to such membership devolved upon the Dominion of India.
2. Rights and obligations having an exclusive territorial application to any of the new Dominions devolved upon the Dominion which comprised the area related to such application.
3. Rights and obligations under all international agreements to which India was a party immediately before 15th August devolved both upon the Dominion of India and upon the Dominion of Pakistan and if necessary was to be apportioned between the two Dominions.

The question of the international succession was discussed during the debates on the Indian Independence Bill in the House of Commons. It was observed, "the question of the international status of the two new Dominions is not one which will be finally determined by the terms of this Bill. It is a matter for members of U.N.O. and other foreign states as much as for H.M.G. in the U.K.. Our own view is that the new Dominion of India continues the international personality of existing India and that she will succeed as a matter of international law to membership of U.N.O. which existing India enjoys as an original signatory of the San Francisco charter... ..... our hope is that on the establishment of the New Dominion of Pakistan she will be accepted as a new member of the family of nations.....(1)

The other arguments relied upon by the representative of the Indian government may be summarised as follows:

1. Variations in a state's territory or a change

(1) ibid. P. 289, quoted by Mr. Patel in his note.

in its constitution does not affect the identity of the state. In support of this argument he cited the cases (1) of Prussia in 1807, when it was deprived by the Treaty of Tilsit of half of its territory.

2. Austria in 1859 lost Lombardy.
3. France in 1870 lost Alsace and Lorraine.
4. Czechoslavakia in 1938 yielded the Sudeten land and other portions of its territory to Germany, Hungary, and Poland.

He further argued that a sufficient nucleus of territory, with the capital and machinery of government remained to carry on a personality capable of discharging general obligations. Such was the case in the separation of the entire province of Burma from India in 1937.

II. As regards constitutional changes it was argued that a change in the form of government does not in any way alter the international personality of a state.

The question of the succession of international personality was again raised on the application of Pakistan to U.N.O. stating that its member, India, being partitioned, the membership continued in the two successor Dominions, India and Pakistan and therefore Pakistan automatically became a member of U.N.O. Pakistan however was prepared to apply anew in case it was desired.

The question was studied by Dr. Van Kerno assistant secretary-general for legal affairs and a memorandum was submitted by him with the approval of Mr. Trygve Lie, which was released on 12th August. According to this it was treated as a case of break-off to form a new state and it was held that there was no change in the international status of India and that it continued, "as a state with all its treaty rights and obligations of the old state." In support

of this view the analogies of the separation of the Irish Free State from Great Britain and of Belgium from the Netherlands were cited.

Apart from separation the Indian Independence Act was treated as that which brought about the basic constitutional change in India as a result of which India acquired a new status in the United Nations. In view of these observations it was decided that:-

1. The new Dominion of India continued as an original member state.
2. Pakistan had to apply for admission.
3. India, in view of its changed status was however to issue new credentials (1) to its representative after 15th August.

II.

In view of the above summary, it is desirable in the first place to ascertainthe status of pre-partition India in international law. It has been held throughout this thesis and substantiated with arguments that India was not annexed to the U.K. nor was it converted into a colony and as such maintained the identity of its juristic personality which was for the first time admitted to the family of Nations in 1919 when India became one of the founder members of the League of Nations. The fact that India was not self-governing in the sense that the other colonies were was a matter of domestic concern and had no bearing on international law. "India is not included in the self-governing Dominions. The position is separate and distinct and its status regulated by the Government of India Act of 1919..... it may be said that whatever the internal government of India may be,

(1) See details in United Nations Bulletin, 19th August, 1947.

it is considered an independent state, in the sense that it is a member of the League of Nations and possesses powers of making treaties as do the Dominions."(1) In view of this fact it is wrong even to say that "the status of India remained peculiar in the eyes of international law." (1) The fact is that India having been admitted to the family of nations gained recognition of the fact of juristic personality she already possessed. The recognition supplied the necessary evidence that the personality existed. Further the state is at liberty to choose any form of government as its agent. The fact that India had a constitution different from those of the self-governing Dominions did not diminish the significance of her international personality in international law.

The Indian Independence Act in itself was nothing more than an enactment of a constitutional character as far as its clauses concerning Dominion statues go. Therefore the constitutional changes effecting the form of government were not matters which necessarily would have implied any change of credentials if it was accepted that the juristic personality of pre-partition India continued in the Dominion of India. The Crown remained the Crown of the new Dominions and the appointment of the representatives was made even after independence by the Crown. The fact that after independence it was made on the advice of the new Dominion had no bearing on international law. It was a matter of domestic and constitutional character.

It may be safely deduced that the act conferring Dominion statues, pure and simple without reference to partition is a matter of constitutional importance only and therefore the question of state succession does not arise at all. In view of this it will be wrong to say as is said in the above

(1) American Journal of International Law.1927. Editorial Comments p.98.
(1) Sarkar H. B. United Asia, P.231.

quotation that India "succeeds as a matter of international law to membership of U.N.O." There is no question of succession. What should have been written is, "India 'continued', as a matter of International law in membership of U.N.O." The continuity of the juristic personality of India even after independence could be established beyond dispute only if it had been an act of conferring Dominion status pure and simple. But it is not, it is more than that. It has clauses providing for division of territories as well as of assets (1). Therefore the question cannot be considered solely on the basis of Dominion Status. It suffices here to say that India in international law possessed a juristic personality before partition and the question whether that personality completely disappeared or continued in one or both the new Dominions has got to be decided.

III.

It is necessary at this stage to explain what state succession means and in what aspect this theory of state succession is applicable to the Dominions. State succession is said to occur only when changes affect a state, or part of a state, as an international person, either in its extinction, birth, secession, or annecation. To cite Stuyt, "State succession may be said to occur when a part of an existing state becomes a new state or when a part of an existing state is acquired by another state or when the whole of the territory of an existing state is absorbed by another given state." (2) The list is by no means complete. Keith has attempted to classify cases of state succession, but even

(1) Clauses 9.1.b. Indian Independence Act (mark the term 'dividing'.

(2) General principles of law as applied by international tribunal to disputes on arbitration and exercise of state jurisdiction by A. M. Stuyt. (The Hague Martinus. 1946) P. 69.

he has rarely referred to cases of division (1). In the present context, the interest is mainly in the cases of dismemberment of International personality. To cite Oppenheim "A state ceases to be an international person when it ceases to exist. Practical causes of extinction of states are: merger of one state into another, annexation after conquest in war, break up of a state into several states, breaking up of states into parts which are annexed by surrounding states." (2) Keith discussing the cases of break-up of a state refers to Hall, saying, "Hall here seems inconsistent; he admits that in the case where a state breaks up so that one part remains representative of the old state, that part alone is responsible for the general debt - the fact remains that the general debt of a state is a personal obligation - yet he accepts the theory of partition for a total break-up". (3). The theory of state succession in relation to India and Pakistan has to be assessed to determine whether it was the total break-up of pre-partition India thereby bringing about an end to its personality or was only a secession thereby continuing the personality in the Dominion of India. In other words it has got to be proved on certain criteria, and therefore the first task is to find out the criteria..

The succession of state in reality is a principle of private law and is developed from the notion taken from the law of property.(4). But it is not followed strictly in all its aspects. The extinction of a state is comparable with the death of an individual (5) but states do not die

(1) Keith A.B: The Theory of State Succession 1907 (Stevensons Ltd., London.)
(2) Oppenheim op. cit. P. 149.
(3) Keith op. cit. p. 100. See Hall W. E. Elements of International Law No. 1. p. 116 8th ed. 1924.
(4) Brierly: J.L. The law of Nations (Oxford 1949) p.135.
(5) Ibid.

in any literal sense. In reality there is no true analogy between the succession to an "hereditas" and that of a state (1) and again according to Huber the state succeeds to the rights and liabilities as its own. The personality of the former state disappears absolutely, and what succession is succeeded to is not to the personality but to the "Jura" (2). Keith further rejects the idea of Roman heir on the ground that the conception of an heir in the early Roman law is that of a person who had to be heir whether he wished to be so or not, whereas the succession of a state in international law is effected through an act of the will of the state. (3). Therefore the disappearance of a state should be understood in the sense that it undergoes such fundamental changes as to detach from it the identity of a juristic person and other matters connected with it have to be interpreted in the terms of treaties and similar arrangements. (4).

The first criterion that has been relied upon by writers and supporters of the view of secession rather than partition is the fact that "a sufficient nucleus of territory and of the machinery of government remained to carry on a personality capable of discharging general obligations."

There is no disagreement on the view that the loss of territory should not be a criterion to judge the continuity or extinction of the juristic personality of a state. Even Sen who holds the view of partition in contrast to secession relying on Hyde and Huber says that territory should not form the basis of consideration in this respect. (5)

(1) Hurst (Sir Cecil): International Law (papers) London, 1950, p.79.
(2) & (3) Keith op. cit. p.3.
(4) Brierly, J.L. The law of Nations op. cit.p24.
(5) Sen. Op. cit.

Prussia was obliged to surrender more than half of its territory but she continued to exist as an international state. Such was also the case with Saxony in 1815. Similarly in 1822 Brazil which was considerably larger than Portugal in area and population seceded from the kingdom of Portugal but the juristic personality of the Kingdom of Portugal continued in international law.(1) Another striking example is that of Turkey when it lost most of its territorial possessions and was transformed into a republic. The Ottoman Debt Arbitration, held that in international law the Turkish Republic was deemed to continue the international personality of the former Turkish empire (2). To conclude, territorial loss could not be a certain criterion for judging the continuity or extinction of the personality of a state.

Sen discusses this question of secession on three bases:-

1. The transaction leading to territorial changes must be an act of international law.
2. The parent state must be a party to the transaction in its international capacity.
3. How far the transaction in any manner reflects on the extinction of the international personality of the parent state.

On these three bases he concludes that in the case of India there was no act of international law to which India was a party in her international capacity, nor was there anything in the Indian Independence Act even remotely suggesting that the Dominion of India was a continuation pure and simple,

(1) Ibid.

(2) Annual Digest 1925 I 26, pp. 78 and 79.

of India's juristic personality on the contrary it is manifest from the provisions of the Act that the territory of India in its entirety was partitioned between the two new Dominions. He, therefore, holds that it was not a case of breakaway but of a total break-up and that there was no expressed or implied reservation in the Act, for the continuity of the juristic personality of India. To quote him, "The correct view appears to be that India has ceased to exist in international law, and her place has been taken by the Dominions of India and Pakistan." (1).

Thus having rejected the territorial criterion for judging the continuation or extinction of the international personality of a state on which all agree, the question arises what should be the ground for judging the case of India. Before any principle be deduced in order to discuss the Indian case, it is desirable first to deal with some of the commonly cited analogous, or so called analogous cases of secession or dismemberment of states in international law. The cases relying on the loss of territories need not be cited again as that basis has been rejected.

Among the cases cited by both sides, those of Belgium and the Irish Free State are of great importance. Dr. Van Kemmo relied on these two cases and observed that they were cases of breakaway. Closely allied is also the question whether if their separation be interpreted as dismemberment they should be distinct from that of Pakistan on the ground that they had a separate political existence in history and their unification was the result of their subjugation which was in disregard of the wishes of the people. To borrow Sankar's words, "Ireland had a separate history and political (2) existence before the Union of 1800; Belgium had also a

(1) Ibid. P.106

(2) Probably he wants to refer to legal identity before the union.

separate existence before the Vienna Settlement of 1815 and regained independent status after the successful revolt in 1831." (1)

To take the Netherlands first, it may be recalled that it was a case of real union. The effect of real union according to Oppenheim is that "the member states of the Union although fully independent make one international person, two states which hitherto were separate international persons are affected in that character by entering into a real union, for through that change they appear henceforth together as one and the same international person." (2) In international law such real union does not take cognisance of their constitutional autonomous status of individual identity, whatever be its characteristics, but the fact that two international persons come into a real union establishes the fact that their original individual personalities come to an end and thereby a new juristic personality emerges and thus they become one and the same international person. Any change in their personality thereafter as far as international law is concerned will have to be judged from the standpoint that the change thus brought about is in the life of one juristic persona. The difference of separate historic existence or constitutional autonomy or any other such difference of a constitutional character should not influence the analogical comparison as far as in the aspect of international law is concerned. The case of India, therefore, could not be distinct and different on this ground if some other similar phenomena existed. To cite Keith, "the real union and federal union are for international law purposes, one, though from the point of view of public law they differ in

(1) Sarkar: op. cit. p. 233.

(2) Op. cit. p. 144.

the respect indicated by Westlake, for it is undeniable that the United States have much of their internal distinctness merged through federal legislation, whereas Norway and Sweden had no common legislature at all and Austria and Hungary only the delegations." (1) On this basis it can be stated that for the purposes of consideration of the changes in international law no account of the conditions relating to Public law should be made. India was a Federation, Holland and Belgium a real union, their difference lay in matters of public law but not in international law. The analogy as far as international law is concerned is correct and satisfactory.

Now the question is whether the separation of Belgium from Holland amounted to secession or dismemberment. Keith cites many examples of secession among which the cession of Lombardy by Austria to Sardinia through the treaty of 10th November, 1859, and the cession of Savoy and Nice to France by Sardinia through the treaty of 23rd August, 1860, and of Heligoland by Great Britain to Germany in return for certain territories in Africa, according to the treaty of 1st July, 1890, are a few." (2) The common characteristic is that in every case secession was effected according to a treaty between two sovereign states. Another common feature is that they result from the cession of territories forming part of states or their possessions. The case of the Netherlands and Belgium though apparently distinct he treats as analogous to cession. It must be noted here that for the sake of convenience in classification Keith uses the term "cession" in a broader sense to include in it the cases in which rules of state succession have to be decided in accordance with the principles of international law or are regulated by treaty. Thus the term includes cession pure and simple as well as the split of states as was the case of the Netherlands.

(1) Keith op. cit. p. 93.
(2) Keith: Op. cit. p.10.

To borrow his expression, "analogous to cession is the case of the separation of the Netherlands and Belgium in 1831 to 1839. Holland remained the same, but granted Belgium freedom and sovereignty." (1) In spite of the fact that in the case of Belgium Keith finds a distinct situation and characteristics he treats it though not as cession in its original sense but as analogous to it. It should also be borne in mind that the separation of Belgium was the result of the principle of the identity of separate nationhood and it was absolute division on the basis of territorial nationhood as was the case with Pakistan. Ever since the Union the two nations had merged their separate identities and had thus become one in the eyes of international law. When they broke up into two, the case in its international legal aspect was exactly similar to that of Pakistan. It has already been observed that the creation of Pakistan was the result of the recognition of the principle of self-determination. Moreover, other authorities do not contribute to the view of break-up. For instance Pradier Fodere categorically asserts that the dismemberment of the kingdom of the Netherlands resulted in the suppression of the ancient state. Fauchille is equally emphatic. He holds that the international personality ceased to exist as a result of its division into two new states Belgium and Holland. Bustamente Y. Sirven contributes to this opinion establishing the extinction of the international personality of the former state. (2).

Considering the case of the Irish Free State the argument set forth by Sen that it came into existence as a result of a treaty concluded by Great Britain in 1921 holds good, the treaty being an act of international law but the

(1) Ibid. p.11.

(2) Quoted by Sen op. cit. P.197.

principle cannot be applied in each and every case.(1) It is possible that the personality of a certain state might come to an end as a result of a treaty between the states taking its place. Such a treaty is possible on the same ground on which Poland was held as a party to the Treaty of its formation.(2). Ireland came into union with Great Britain in 1800 and as a result of this union its former personality came to an end. Irish nationalism demanded separation of the whole of Ireland but in view of the religious differences between the Catholics and the Protestants they had to concede the partition thereby leaving the Northern part united with Great Britain. The separation of the whole of Ireland on the strength of separate nationhood with the intention of dissolving the union would have certainly amounted to dismemberment of the juristic personality of Great Britain, but the fact is that the Union and the legal personality thus brought about remained unaffected by the fact that the Irish Free State accepted a treaty defining secession of a part which in no way reflected dismemberment. Again excluding the question of territory it can be stated that the union of the whole of Ireland once brought about remained unaffected in spite of the fact that there was loss of territory simply because there was no reference in the treaty to such dissolution.

The Irish Free State itself held a different view as regards the theory of state succession. There are two cases manifesting the difference of view on this point between the Supreme Courts of the Irish Free State and that of the United States. The Supreme Court of the Irish Free State in the case of Fogarty Vs. O'Donoghue (3) held that the government

(1) Besides this was the Irish view.

(2) German-Polish mixed Arbitral Tribunal: 1925.

(3) Case No. 76. Annual Digest 1927.

of the Irish Free State was the successor of the de facto government of the revolutionary period. The Supreme Court of the U.S.A. in the case of Guaranty Safe Deposit Company (1) held that since the Irish Free State which was set up by an Act of the British Parliament succeeded to the old government of Ireland and not to the revolutionary organisation known as the Irish Republic which did not succeed in establishing a de facto government. Strictly speaking from the standpoint of the Irish Court it was a state established through revolution and as such should form a new state and the recognition by the parent state in no way affects the personality of the parent state. From the standpoint of the American Supreme Court a new state came into existence as a result of breakaway and therefore should not affect the international personality of the parent state. It would have been a different case if Ireland had had a separate international identity and in that case the act of conferring Dominion status pure and simple without affecting the former identity would never have involved the question of state succession. The Crown in international law continued but as a Crown for the purposes of the Irish Free State. The emergence of a new state in international law was a phenomenon involving the issue of state succession and on the grounds above discussed it was a case of secession.

IV.

There is however one example in which partition of a state has been recognised. Stuyt with reference to the information supplied to him by Professor J. Basdevant of Paris University refers to the arbitrial decision dated

(1) Ibid Case No. 77.

October 12th, 1833, in which the consequences of the division of the Swiss Canton Basel ~~have been~~ were discussed (1). One important point that shows a close analogy with the idea of division of public domain as has been recognised in the case of the partition of the public domain of pre-partition India was also recognised in this case. The principle was laid down that "the University of Basel did not enjoy an absolute private law character and so its property could be divided as the public domain of the state." (2) Compared with this principle is the rule laid down by Oppenheim for a state breaking off that "succession with regard to fiscal property takes place only to the extent found on that part of the territory."(3) Pakistan succeeded (4) to all properties, assets and belongings of pre-partition India in accordance with the decisions taken by the partition council composed of the Indian and Pakistan members and presided over by Lord Mountbatten or in the event of failure according to the proportion fixed by the statutory tribunal set up for this purpose. Contrary to this is the view held by the writers who say that the international personality of pre-partition India continued in the Indian Dominion. They question the validity of the division of property and other assets situated within the territory of the Indian Dominion. For instance Sarkar observes, "from the view point of international law, one can however question the validity of the seceding state's demand for a share of the public property and other assets territorially situated in the old state. (5).

(1) Stuyt Op. cit. PP.71-74.
(2) Ibid.
(3) Oppenheim, op. cit. P. 194,para 84.
(4) See details of the partition arrangement reached by the Partition Council in the proceedings of the Expert Committees. Govt. of India Publication 1948 in 3 vols.
(5) Sarkar: op. cit. p. 234.

A straight answer to this is that the division of the public property and assets was legally provided for in the Indian Independence Act on the basis of the agreement reached between the Congress and the Muslim League with the British government. The British government recognised both of them as its successors. Even before the enforcement of the Indian Independence Act, that is, prior to 15th August, 1947, these were two interim governments acting on behalf of India and Pakistan. The decisions on the partition of the property and assets of pre-partition India were made by the agreements between the two governments. As regards the two governments it was said that, "this view with regard to international personality on behalf of Pakistan is reinforced by the fact that to-day two governments are functioning in the country, one for Pakistan and one for India with equal status." (1) In other words the government of India was dissolved "de facto" and replaced by two governments of equal status. In view of this fact the principles should be deduced from what has actually taken place under the authority of the agreements between these two governments. And according to the principles thus deduced it should be concluded that India was divided. The division of assets was not based on any instrument of secession in which case Sarkar's question as to the claim on the property and assets of pre-partition India would have been justified. On the contrary, the theory of secession in the face of the agreements by these two governments that were legalised, by the Indian Independence Act with retrospective effect or by the orders of the Governor-General under the authority of this Act does not stand.

The question arises whether the principles on which the division of the public property and assets of pre-partition India took place can be a sound ground for justifying the extinction of juristic personality. It is undoubtedly true

(1) Expert Committee Proceedings Vol. III. P. 207.

that there is no succession of personality in the sense of the succession of a private person. The succession in international law is not in its strict sense succession to personality, it is rather succession to 'jura'. But it certainly involves the question of the division of property and assets besides other rights and obligations and therefore could be one of the grounds, if not the only ground, for considering the question of continuity or extinction of international personality. Besides the division of property and assets closely reflects the nature of changes in the organisation of the government which acts as an agent of a state and is therefore helpful to ascertain the extent to which the continuity of this organisation was affected. In the note presented on behalf of India it was claimed that a sufficient nucleus of territory and of the machinery of government remained to carry on a personality able to discharge general obligations. A glance at the list of contents of the three volumes of the proceedings of the expert committee manifests the fact that each and every organisation besides the administrative departments and defence forces were divided between India and Pakistan. Where such division was not found desirable the assets were evaluated and on the basis of this evaluation they were apportioned. It is quite different to say that the government of India had sufficient machinery of government to prosecute the obligations of its personality because such arrangements were made in the interest of the administration of both governments, but in fact as well as in principle the whole administration was dissolved and apportioned between the two states. The procedure adopted was such as to maintain as much efficiency of the administration as possible but this did not reflect on the principle of division, on the other hand it was made on the basis of agreement between the two governments.

V.

Now it remains to examine how for the act itself can be interpreted well enough to throw light on the question of state succession. As is evidenced from the statement already quoted of the spokesman of the British Government made in the House of Commons at the time of the passage of the Independence Bill, the Act was not meant to provide any such definition and the question was left to the decision of the foreign governments and the appropriate organisations. But this statement clarifying the views held by the British Government cannot be interpreted as binding upon the construction of the Act itself. In spite of this observation, for the purposes of legal investigation, it is necessary to examine the Act from this standpoint. However, this is further necessitated in view of the fact that the clauses of the Act have been invoked both by the expert Committee and by other writers on this question.

The only clauses of the Act that have any bearing on this question are:-

1. Se. 2 (1) Subject to provisions of subsection 3, and (4) of this section, the territories of India shall be the territories under the Sovereignty of His Majesty which immediately before the appointed day, were included in British India except the territories which under Subsection (2) of this section are to be the territories of Pakistan.

On the strength of this clause, it was contended that:

(a) Clause 2 of the Indian Independence Act distinctly brings out that the territories of India shall be territories under the sovereignty of His Majesty which immediately before the appointed day were included in British India, with certain exceptions; this establishes the identity of the Dominion of

India with the India of to-day (pre-partition India.)

(b) After certain northern and eastern portions of its territories are separated from India, nearly three quarters of the territory will still be comprised in the remainder along with the capital of the state (1).

In other words the size of territory and the continuity of the Capital in the light of this section have been sought to prove the continuity of the international personality. It has already been established that the size of territory is not one of the fundamental factors determining the question of state succession. The same answer suffices in relation to the continuity of the previous Capital.

(2) The other clause which relates to this question runs as follows:-

9 - (1) The Governor-General shall by order make such provision as appears to him to be necessary or expedient - 'inter alia'.

(b) for dividing between the new Dominions, and between the new provinces to be constituted under this Act, the powers, rights, property, duties and liabilities of the Governor-General in Council or, as the case may be, of the relevant Provinces which, under this Act, are to cease to exist;

This clause definitely speaks of constituting the New Dominions and the new provinces. The words - "the new Dominions and.... the new provinces to be constituted under this Act", established the fact beyond doubt and therefore beyond dispute that the new Dominions thus constituted under this Act had no existence whatsoever before this enactment; at least not in law. Had it not spoken of

(1) Expert Committee No. IX. Op. cit. p. 206

the constituting of the new Dominions', there could have been at least some doubt as to their origin but as it is there is no doubt. The two New Dominions owe their origin to this Act.

The second phrase of this clause says that "the powers', rights', property', duties and liabilities of the Governor-General in Council or, as the case may be, of the relevant provinces which, under this Act, are to cease to exist"; the question is who ceases to exist. What is governed by the word "which"? Is it the Governor-general in Council and the Governors of the said provinces or their powers', rights', property', duties and liabilities? Or again, "which" is confined to the provinces, and the Governor-general and governors stand unaffected. The word 'which' undoubtedly covers only the provinces. But one would obviously be inclined to ask what rule of construction of necessary implications it provides as regards (a) India; (b) the offices of the governors and governor-general, (c) the rights and obligations. The provinces are described as being constituted in the same way under this Act as the new Dominions. There is no distinct mode of creation provided for them. In the case of the new Dominions they are constituted as a result of the division of the territory of pre-partition India and similarly the new provinces are created as a result of the division of the previous provinces of Bengal, Assam and the Punjab. If these provinces as a result of constituting the new provinces cease to exist the logical implication would be that the prepartition India out of which the new Dominions have been constituted, too should have ceased to exist. It could have been interpreted in some other way if both the creation of the new Dominions and that of the new provinces was not governed by the words 'to be constituted.'

The offices and the rights and obligations referred to also should cease to exist unless provided otherwise, in the Act. (The Act as already said was drafted in anticipation that there should be one governor for both Dominions but afterwards it was made known that the Dominion of Pakistan would like Jinnah to be appointed as governor-general of Pakistan. The Act was worded in such a way as to meet the situation in either case.) Even if it is presumed that there was to be one governor-general for both the new Dominions, it does not imply that the office of the Governor-general too would have been one. What was suggested was that the offices of the governor-generalship of the two new Dominions would have been held by one person. As such the office of the governor-general of prepartition India too came to an end; hence the necessity of taking the oath anew. If he had continued in his office, without any change in its continuity, there would have been no necessity for the renewal of oath. The Act made him more dependent upon his ministry than ever before; but this ought not to have necessitated the renewal of the oath. He still held office on behalf of the Crown. There was no change in this respect, nor was there any transfer of powers from the Crown thereby bringing about any change in the legal basis of his status and his relationship with the Crown. The fact that the Governor-general in spite of still being the representative of the Crown and the person of Lord Mountbatten held the office, the renewal of the oath was considered necessary, establishes the fact that the office of the Governor-general of prepartition India too came to an end; and from the 15th August, 1947, two new governors-general assumed office in the two new Dominions.

From this the logical conclusion follows that not only the provinces, but India with all its administration was dissolved by this Act and the dissolution of the government

in its entirety establishes the fact that the personality of prepartition India came to an end.

The word 'rights', needs a little explanation. Hall in his footnote refers to the varying views of writers on international law on the question of state succession. He states, "Grotius for example says that if a state is split up, 'anything which they were held in common by the parts separating from each other must either be administered in common or be rateably divided in respect to territory its rights and obligations are not impaired and if they have not been apportioned by special agreement, those rights are to be enjoyed and those obligations fulfilled, by all the parts in common'. Again quoting Phillimore who amplifies the views held by Grotius and Kent, says, "If a nation be divided into various distinct societies, the obligations which had accrued to the whole, before the division, are, unless they have been the subject of a special agreement, rateably binding upon the different parts." Hall comments on these observations in these words. 'It is difficult to be sure whether these writers only contemplate the rare case of a state so splitting up that the original state person is represented by no one of the fractions into which it is divided, or whether they refer also to the common case of such portion of the state territory and population by secession that the continuity of the life of the state is broken. If the former is their meaning their doctrine is correct, so far as property and monetary obligations are concerned; if not, it would be hard to justify their language even to this extent. No doubt the debt of a state from which another separates itself ought generally to be divided between the two proportionately to their respective resources as a matter of justice to the creditors, because it is seldom that the value of their security is not affected by a diminution of the state indebted to them, but the obligation

is a moral, but not a legal one. The fact remains that the general debt of a state is a personal obligation."

Two important conclusions flow from these observations. First, the writers recognise the fact that a state can be split into two or more parts and the rights and obligations of the former state can be apportioned among them rateably; by special arrangements to this effect. Secondly the cases of cession from dismemberment are distinct, for the obvious reason that in the first case the continuity of the personality is presumed whereas in the second case, the loss of personality is established. In the case of split of state as a result of which loss of personality occurs, the rights and obligations could possibly be divided rateably. The word "division" does not necessarily imply that it should be effected in two equal divisions.

"..... the provisions of the Indian Independence Act do not make it manifest that British India was totally partitioned between the two new Dominions, for in that case one would have expected two equal divisions of the country in terms of square miles without any recourse to plebiscite." (2)

The property of prepartition India has been divided between the two new Dominions in accordance with the decisions taken by the Partition Council, which in most of the cases was able to apportion the assets in accordance with some formula or other.

To cite one out of many examples of apportionment of the

(1) Hall, W. E. International law. op. cit. p.116

(2) Sarkar op. cit. p. 233.

assets and liabilities between the two states reference can be made to the sharing of the securities held in Cash Balance Investment Account by the prepartition India and silver Reserve held by prepartition India.

It was decided by the partition Council that

(a) Pakistan's claim, if any, for sharing in the securities held in the Cash Balance Investment Account was covered by the decision to allot 75 crores in cash to Pakistan.

(b) Silver Redemption Reserve: It was agreed that Pakistan should get 17½ per cent of the Reserve.(1).

It is unnecessary in this context to deal with the ground on which this formula was evolved. Similar formulae were evolved in other cases of liabilities as well. Whenever the Partition Council failed to come to some decision it was referred to the Tribunal set up under the order of the Governor-general for the purposes of arbitration.

As regards the Title of the Act there is hardly anything more to add to what has already been stated in the preceding chapter (2). It may be recalled that the title of the Act is a part of the Act, but it should not preclude the possibility of interpreting the Act in relation to other clauses; therefore the Act is not only that of Independence but also of the partition. The fact that the word 'partition' has not been inserted in the title does not establish in itself that nothing more than independence was intended.

The other point closely connected with the question of state succession is about the beginning of the state of Pakistan. Was it on the 15th August, 1947, that the state

(1) Expert Committee No. II Report. Op. cit. p. 98.

(2) The title and scope of the Act.

Pakistan came into existence or can the date of its birth be traced still further back? It is quite obvious that the state Pakistan was unknown to the world of law, both municipal and international; before the 15th August 1947, but that does not necessarily mean that Pakistan did not exist before that date. This point needs clarification in view of the fact that the State-Pakistan has been treated in this thesis as a contracting party to the arrangements of partition, if not in law, at least in fact. The question then arises if Pakistan had no existence, what so ever, in fact, or in law, how could it become a party to all these arrangements?

It may be recalled that India assumed full responsible status in fact with the commencement of the Interim Government that was composed of the representatives of both the Congress and the Muslim League. The Governor-general continued but with a changed policy acting according to the advice of his ministers. Once the results of the referendum and the decisions of the legislatures of the provinces were taken in favour of Pakistan, in fact two parallel Governments were set up, one responsible for the particular matters concerned with India and the other for the problems connected with Pakistan. These two governments under one governor-general, in fact, enjoyed the status of responsible governments and were in no sense inferior to their predecessor the Interim Government. The Capital for the interim purposes for both these governments continued to be New Delhi. The Governor-general acting on the advice of that particular Government which the matter under decision concerned and for the matters of common concern a common agreement was reached. In view of this de facto situation one would be tempted to conclude logically that, in fact, Pakistan as well as the New Indian Dominion came into existence before the appointed day. It is wrong to say that the Indian Dominion or the Dominion of Pakistan had no existence

of their own.

In some cases (1) the question of the beginning of a State was raised and it was held that Czechoslovakia came into existence by the resolution of 28th October, 1918, and not by virtue of international treaties which took for granted the existance of a state which was a signatory to them, or again, in another case it was observed that the foundation of the Austrian Republic did not date from the ratification of the Treaty of St. Germania but from the resolution of the Austrian Constituent Assembly of 30th October, 1918." The new Dominions too came into existence, it may be said on the dates when the Congress and the Muslim League accepted the statement of the 3rd June Government of His Majesty. It is difficult to fix one date, because the statements were accepted by the Congress and the League on the 15th June, 1947, and the 9th June, 1947, respectively. However it may be said that the foundations of the State Pakistan in view of the date of its acceptance was laid down on 9th June, 1947, and that of the Indian Dominion on 15th June, 1947. The treaties of St. Germania or that of Versailles took the existence of the states of Czechoslovakia and Austria for granted whereas the Indian Independence Act gave legal sanction to de facto existence. It also implied the recognition of these two New States by the British Government, therefore it may be said that the legal recognition was extended on the 18th July, 1947, when the Bill became an Act.

In the preceding pages, an attempt was made to establish the legal position of state succession and the commencement of the two new Dominions with their legal consequences. It is by no means an attempt to establish the theory of universal state succession for the very reason that with the disappearance of the juristic personality of prepartition India all the personal rights attributed to it

(1) Case No. 8,11 Annual Digest 1925-26.

also came to an end. It would certainly have created a difficuly situation for other countries. The difficulties of this nature were fully realized and agreements were reached to meet this situation. Such arrangements are not novel in international law. In order to form a comparative view of the arrangements made between India and Pakistan and other normal rules in the light of precedents it would be desirable to consider these arrangements under the headings:-

(a) Political Rights and Duties;

(b) Local Rights and Duties;

(c) Fiscal property and Debts;

(d) Contracts.

A better appreciation would be possible only if one were to glance at the partition machinery for this purpose.

It was decidad at the meeting of the Indian Cabinet (Interim Government) on 6th June, 1947, inter alia,

(a) 'that when the question of partition had been legally decided, and after the members of the existing Cabinet resigned, a Separation Committee should be set up by His Excellency in consultation with the leaders, with H. E. as Chairman. It was noted that H. E. would not act as arbitrator in this Committee, but would merely assist in resolving differences between the two parties or at least in reducing them to the minimum.

(b) That there should be set up along with the Separation Committee a standing tribunal or a panel of umpires to whom points of differences which could not be resolved, could be referred. On 17th June, 1947, a press note was issued by the Governor-general in which new broad outlines of the machinery set up

for working out the administrative consequences of the partition was laid down. It was said in the press note that:-

'Broadly speaking, there will be a special Committee of the Cabinet consisting of the Viceroy, two Congress men and the Muslim League members of the Interim Government who, through a steering Committee of two officers, will conduct and coordinate detailed investigations at expert level on various problems arising from the partition of the country. There are all together ten such expert Committees and each of them will receive assistance from the Departments concerned.....'

As soon however, as the decision of the provinces indicate that there will be partition the Special Committee of the Cabinet will be replaced by a Partition Council which will represent the interests of the two future Governments.

The Expert Committees will deal with such problems as division of the Armed forces, organisation, records, personnel, assets and liabilities, revenues, currency and exchange, economic relations, domicile, foreign relations and contracts." .....(1)

The Partition Council was set up according to the decision (2) of the Special Committee of the Cabinet.

To begin with the question of the political Rights and Duties may be taken first: Oppenheim states: "No succession takes place, ..., with regard to rights and duties of the extinct state arising either from the character of the latter as an international person or from its purely political treaties (3)" The extinction of an international person may take place in different ways, for instance a state may be absorbed by another state, the parts of a state may be annexed by the surrounding states thereby bringing about an end of an international person as was the case of Poland or

(1) Proceedings Vol. I. Op. cit. 31.

(2) dated 26th June, 1947. Neid. p. 33.

(3) Oppenheim: op. cit. p. 148.

a state may be split up in two or more parts and each part may become an international person; as was the case of pre-partition India, but the difference in the phenomena of changes does not make any difference in the legal consequences flowing from them because the legal basis in all such cases in spit of the differences of the objects behind them is the fundamental fact that an international person comes to an end; whatever be the mode of effecting such changes. Therefore the political Rights and duties also came to an end with the disappearance of prepartition India. Apart from this, there are treaties which run with the land and in such cases the treaties continue to be in force and succession takes place in the case of that state which holds the territories that are related to the treaties in question such are the treaties governing the boundaries, for example, in the case of the treaties with Afghanistan regarding boundaries, the Pakistan Government was bound by them as a result of succession. (1).

Sir Dhiren Mittra, Solicitor General to the Government of India, divides the treaties into three categories.

(a) Treaties of exclusive interest to Pakistan,

(b) Treaties of exclusive interest to India; and

(c) Treaties of common interest.

The treaties mentioned in categories (a) and (b) come under one heading, and will devolve on the respective Dominion in view of the fact that they run with the lands and will devolve on the Dominion that holds the territories connected with them.

As regards the treaties that are of common concern, he suggests the formula propounded by McNair in the light of Commonwealth practice, viz., "such treaties will have effect as if the Treaty was effected after consultation between the governments of the two Dominions in accordance

(1) Proceedings Ex. Com. XIX; op. cit. p. 214 See Sir Dihren Mittra's notes.

with the procedure indicated by McNair." The question here is whether such treaties will, as a result of the emergence of two new States, lose their force or continue. The view taken by Sir Dhiren Mittra seems to be in favour of their continuance. It is not impossible provided it is so agreed by the two States and no objection is taken by the other states who are party to them. In this case the practice of the Commonwealth, viz., the application of one treaty on the territories mentioned therein, certainly solved the problem. The views expressedby the expert committee also were in agreement on the continuity of the treaties but the strict legal view would be to say that this arrangement amounted to the renewal of these treaties, the treaties that run with the land or those of commercial interest would certainly continue of their own title provided there were no legal political strings attached to it. The arrangements thus made to divide the treaties into three categories was based on agreement and not on any rule of law. The situation created by the legal consequences would have been to bring them to an end but the arrangement reached provided the necessary sanction for renewing them. One treaty could be binding on two Dominions in view of the practice of the Commonwealth as in both cases it was entered into in the name of the Crown and as such would be applicable to the territoriesmentioned therein and consulted thereupon. The basis of this formula is the unique characteristic of Commonwealth practice and therefore does not reflect on the legal position as it emerges in consequences of the extinction of the personality of prepartition India.

The arrangements reached, both in respect of treaties as well as the diplomatic relations of prepartition India were based on a formula. Again this formula was the outcome of agreements between the two governments that:-

(a) Membership of all international organisations

together with rights and obligations attaching to such membership, will devolve solely upon the Dominion of India.

(b) The Dominion of Pakistan will take such steps as may be necessary to apply for membership of such international organisations as it chooses to join.

(c) Rights and obligations under international agreements having an exclusive territorial application to an area will devolve upon the Dominion which is in possession of those territories.

(d) Except the agreements falling in the above category (c) of an exclusive territorial application, rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve upon the Dominion of India and upon the Dominion of Pakistan, and will be apportioned between the two Dominions.

This formula is broad enough to include all the topics of the problems of state succession both of an international as well as of a municipal character. It at the same time provides a clue to the fact that the personality of pre-partition India cannot be said to be continued in the Dominion of India for the reason that India has been able, leaving aside of course the question of the renewal of credentials of the Indian representative, to continue her membership and Pakistan had to apply as a new state. The question of membership in the first place could have been continued by India on the basis of this formula too without prejudice to the question of the extinction of the personality of pre-partition India and in the second place Pakistan had to apply in either case, as with the disappearance of the personality

of prepartition India the membership also came to an end. India too as a new state should have had to apply which was not done.

This, however, does not correspond either with the juristic position as established in the preceding pages, nor with the view in favour of the continuity of the personality of prepartition India. The change in the status of India, as was argued in the legal opinion of the Assistant Secretary general for the legal Department of the U. N. O., did not necessitatethe change in the form of credentials because:-

"The position of British Indian Ambassadors abroad after partition will depend upon the terms of the letters accrediting them to foreign states. The appointment is usually by the Crown. It may be that in the case of British Indian Ambassador the King acts on the advice of the Government of India but that, vis-a-vis the foreign power, is immaterial. The King remains King of both Dominions and he will be the authority to appoint the Ambassadors for the Dominions. There is no transfer of power in this respect from the King. We are therefore, of opinion that the appointment of the ambassadors already made will not lapse on the appointed day. In view of the fact that the two Dominions may not like to have the same Ambassador and that the Ambassadors' authority extends personally to matters concerning British India as at present constituted it will be desirable as soon after the appointed day as possible to renew the letters accrediting the Ambassadors on the advice of the two Dominion Governments, and if they do not agree to the existing Ambassadors being common Ambassadors restrict the existing Ambassadors' authority to matters concerning the Dominion which is willing to continue the present Ambassador.(1)" The Expert Committee scrutinized the terms and opined that....'The only change required in the credentials is one of form, namely the omission of the

(1) Expert Committee IX proceeding op. cit. pp. 212-213.

description of Emperor of India' in reference to the King, by virtue of the acquisition of Dominion status by India. We are not sure, however, if fresh credentials need be presented for this purpose only, as a mere matter of form. In any case these need not be presented unless a foreign power to whom our representative is accredited asks for it." (2) It follows that the change of credentials for the reasons of change in status - i.e., from a subordinate position to an independent one, as was presumed by the Assistant Secretary-general, was not a matter of international law, the only ground for the justification for renewing the credentials was that the representative speaking on behalf of the whole of India, including Pakistan and the states, lapsed on 15th August, 1947. On this ground certainly U.N.O. would have been justified in the demand for renewing the credentials; otherwise not. It can also be deduced from this that the fact that either of the two Dominions could continue the Ambassador or the other representatives to foreign powers and U.N.O; was possible only in view of the fact that there was no change in the Crown but as has been seen, as far as India is considered, the King was the King Emperor only and with the termination of the trust the King Emperor of India too disappeared for both municipal as well as international purposes, and instead a new King who was the King of the Commonwealth was substituted and as such even this change of the head of states did not necessitate a change of credentials. However the question of the continuity of diplomatic representatives have to be studied without prejudice to the question of the extinction of the personality of pre-partition India. This arrangement it may once again be stated was possible in view of the practice of the Commonwealth, and both the new Dominions could have been represented by the same persons if they so desired.

(2) Ibid.

The whole discussion may be summarised as follows:-

(1) India was an international person even before independence.

(2) The conferring of Dominion status being a constitutional act did not bring about any change in the international field; the true phenomenon that caused changes in the international field was the fact that India was partitioned.

The creation of Pakistan cannot be said to be the result of secession because:-

(a) The partition, though based on agreement between the de facto governments of India and Pakistan was not brought about through any international transaction in which India had been recognised as an international person as was the case with Ireland.

(b) It is not through an international treaty but through an act of Parliament which at the most can be treated as a document of conveyance were that all the changes brought about.

(c) It was done by the British Parliament in the capacity of a trustee relying on the consent of the future recipients of soveraignty.

(d) The Act itself speaks of division of treaties, rights and obligations and the terms lead to the conclusion that both the new Dominions have been newly carved out of prepartition India as was the case with the new provinces and if the old provinces ceased to exist as a result of this creation of new provinces, this holds equally good for India too.

(e) The formula evolved for the purposes of terminating this controversy has not laid down the juristic position, nor was it possible to do so through an agreement; it is a formula to lay down some principle to meet the consequences of partition and the question of personality has been left out unresolved.

(f) The fact that India was able to retain her membership of the international bodies or her diplomatic representatives should be considered without prejudice to the question of the continuity of juristic personality. Firstly because this was possible in view of the agreement to such arrangement laid down in the formula evolved and secondly because the King remained untouched with all his powers to appoint the diplomatic representatives. This has no bearing on the question of the continuity of personality.

(g) The Act brings about the dissolution of the whole administration followed by the partition of the armed forces, personnel, assets. etc.

The other questions of the rights and obligations under contract entered into by the prepartition Indian Government and similar matters were settled in accordance with the decisions of the partition Committee and has hardly anything of extra significance to be mentioned separately.

As regards the question of nationality it may be said that all the citizens remain outside the effect of any legislation of either Dominion and those within the Dominion till something otherwise enacted. This question will have to be dealt with in the Chapter on The British Commonwealth, hence no further discussion is desirable at this stage.

The last point which need be mentioned under this heading is the effect of joining the Indian states in the federal schemes of India and Pakistan. Is the federation thus created with the Indian states a new state or an enlargement of the former? As was the case with Italy, which was, in fact, an enlarged state of Sardinia, so India and Pakistan should be treated as an enlargement, and as such continued the former personality.

As regards the Rights and obligations resulting from the annexation of Indian states by the Dominions of India and Pakistan, it may be said that they were devoid of all political treaties which came to an end with the lapse of paramountcy and besides these political rights and duties there was hardly anything that could be said important enough to be discussed in this context. As regards civil servants and other similar matters there were various clauses of safeguard entered into, the instruments of accession of the other contractual matters, it may be said that, in the majority of cases, the states did not lose their legal identity even after annexation as they merely became federated states. There were states which merged into other adjoining provinces or formed separate unions; of these it is necessary to say that the matters were dealt with at the time of the effecting of the mergers and must be studied separately in each case.

THE TERRITORIES OF THE NEW DOMINIONS.

I.

The Indian Independence Act can be said to be a treaty in one sense, i.e. it contains clauses governing the division of the territories of India and the demarcation of boundaries. "A boundary treaty, when completed, is not a contract but a conveyance, and the boundaries established are, as in the case of private law, good against the world"(1). The Act itself contains clauses defining the conveyance of sovreignty as well as the partition of the territories of pre-aprtition India. As has been set forth, the Indian Independence Act is also a document of conveyance. The difficulty in this case arises from the fact that the state, Pakistan, cannot be treated as arising from a secession because it was not the Government of India which was a party to the arrangements effecting the partition but the British Parliament which, in its capacity of trustees and supervisors as has already been established, brought about this partition with the consent of the natural recipients of the sovreignty. In this sense, it can justifiably be held that it was an arrangement for future effect among the three parties, i.e., the British Government on behalf of Parliament, Congress on behalf of the future India, and the Muslim League on behalf of the people of future Pakistan; and the British Government had actually recognised the Congress and the Muslim League for practical purposes as successors. It is only in this sense that the Indian Independence Act is also a Treaty, though not in the sense of a contract, but a conveyance in itself.

The question may arise that there can be no treaty without two sovreign parties, but there are instances in support of the fact that it is possible that one or more parties may become sovreign through the treaty itself, and in this case the treaty will be classed with the transitory type of treaty and will be

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(1) The Theory of State Succession: Keith. p.27.

said to effect a conveyance. "There must, indeed, be two parties to a contract, but it is quite possible that one of these parties becomes a sovreign state merely through the contract itself. It is true that such a contract belongs to the so-called transitory type of treaty that it effects a conveyance and gives the state created a right to its position as a right 'in rem' good against the world and not revocable by the other state"(1). Keith relies on the instances in which the British Government was a party.(2) But the case of Poland may be cited as an example. Poland had no existence as a state before the Treaty of Versailles and it was the Treaty of Versailles itself to which it owes its legal recognition. Therefore it may be safely deducted that the clauses for the conveyance of sovreignty and the partitioning of territories can be understood on the analogy of the cases of the Sand River Convention of 1852 and the Bloemfontein Convention of 1854, which have been cited by Keith with only one qualification. The Act is not in the form of a convention, but it is common ground that there is no form or procedure prescribed for a treaty in international law nor does the law of the United Kingdom prescribe any particular form.(3) It follows that the resolutions(4) passed by the Congress and the Muslim League accepting partition on behalf of the future India and Pakistan and the statement of the Cabinet setting forth the scheme of partition followed by a legal measure, the Indian Independence Act on behalf of the British Government are solemn declarations to this effect.

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(1) Ibid p.28.

(2) Ibid p.28.

(3) See McNair, op.cit. Chapter "Form and Language".

(4) Resolutions of acceptance; Congress: 15th June, 1947; Muslim League, 9th June, 1949. (See Proceedings Expert Committee, Vol.I, pp.6-8)

II.

Coming to the Act, the provision for the territories of the New Dominions have been dealt with in Sections 2, 3 and 4. These Sections define not only the means and procedure for partitioning and demarcating the pre-partition Indian territories that were to be considered parts of the New Dominions till the boundary commission determined them finally. Section 2 deals with the territories that were to be part of the territories of Pakistan, subject to the clauses mentioned therein, in which the possibilities of the decision of the referendum in the North Western Frontier and in Sylhet were also taken into consideration. Section 3 provides, in the first place, for the dissolution of the province of Bengal as constituted in the Government of India Act, 1935, and instead makes provision for the constitution of two new provinces viz. East and West Bengal. The province of Assam was also in a sense to be dissolved as the district of Sylhet was to be treated as territory of the new province - East Bengal. Section 4 provides for the dissolution of the province of the Punjab as constituted in the Government of India Act, 1935, and makes provisions for setting up two new provinces viz. East and West Punjab. In sub-section 3 (3) and section 4 (2) provisions for boundary commissions for Bengal and Assam and the Punjab have been laid down. The main question after passing the Act was only in regard to the boundary commission which was to be appointed by the Governor-General. The decision of the Legislatures of Bengal and the Punjab and that of referendums in the North Western province and Sylhet were made known while the Act was passing through the various stages in Parliament. In other words there was no controversy as far as the partition of India in general and of the Provinces in particular was concerned. The Indian Independence Act was drafted in such a way as to be able to meet every situation. In this chapter,

after the above observations, it is necessary to deal with the boundary commissions, their awards and the controversies thereon, and the subsequent settlement, through the Bagey, Indo-Pakistan Boundary Disputes Tribunal. The matters relating to state succession in relation to territory have been noticed in general terms in the above paragraph, and will be dealt with in more detail subsequently.

The Bengal boundary commission (1) was constituted by the Governor-General on the 30th June, 1947, that is, before the Indian Independence Act came into force. The members of the commission thereby appointed were:-

Mr. Justice Bijan Kurran Mukherjea.
" " C. J. Biswas.
" " Abu Saleh Muhammed Akram and
" " S. A. Rehman with

Sir Cyril Radcliffe K.C. who, in view of the agreement of the parties, was appointed chairman.

The terms of reference of the commission were as follows; "The boundary commission is instructed to demarcate the boundaries of the two parts of Bengal on the basis of ascertaining the contiguous areas of Muslims and non-Muslims. In doing so, it will also take into account other factors". It was also desired that the decision should be announced before the 15th August which was the appointed day for bringing the new Dominions into existence.

There was another Bengal boundary commission relating to Sylhet district and the adjoining district of Assam appointed by the same order and with the same personnel. The terms of reference of the Commission in this case were:- "In the event of the referendum in the district of Sylhet, resulting in favour of amalgamation with Eastern Bengal, the boundary commission will

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(1) Gazette of India Extra Ordinary, August 14, 1947
Ref. No. D.50/7/47R.

also demarcate the Muslim majority areas of Sylhet district and the contiguous Muslim majority areas of the adjoining districts of Assam."

The Punjab boundary commission was constituted by the announcement of the Governor-General above cited, and in this case the members were:

Mr. Justice Din Muhammed,
" " Muhammed Munir,
" " Meher Chand Mahajin and
" " Teja Singh,

and Sir Cyril Radcliffe was the Chairman. The terms of reference in this case were: "the boundary commission is instructed to demarcate the boundaries of the two parts of the Punjab, on the basis of ascertaining the contiguous majority areas of Muslims and non-Muslims. In doing so, it will also take into account other factors." In this case also, it was desired that the decision should be announced before the appointed day.

It is not necessary for the purposes of this thesis to reproduce the awards of the Chairman in detail. What is desired here is to ascertain the principles which emerged from the awards thus given by the Chairman of the commission in view of the controversies over the terms of reference existing not only among the parties but also among the members of the commission representing them.

All interested parties, the Congress, The Muslim League, the Hindu Maha Sabha, and other such organisations were heard. There was no unanimity in any of the three cases in question and in view of the differences existing among the members of these Commissions, the Chairman gave his award. The Chairman for the purposes of giving his award took certain basic questions into consideration which were in themselves indicative of the points of controversy. There were undoubtedly large areas about which no controversy existed. For the sake of convenience the basic questions formulated by the Chairman will be dealt with in the order of the Commissions described above. Then references will be made as to how they are

related to the points of controversy, thereby the principles will be deduced from the award pronounced in consideration of these basic questions.

In the first case, Sir Cyril Radcliffe said, "In my view, the demarcation of a boundary line between East and West Bengal depended on the answer to be given to certain basic questions, which may be stated as follows:

1. To which state was the city of Calcutta to be assigned, or was it possible to adopt any method of dividing the city between the two states?
2. If the city must be assigned as a whole, to one or the other of the states, what were the indispensable claims to the control of territory, such as all or part of the Nadia river system, or the Kulti rivers upon which the life of Calcutta as a city and port depended?
3. Could the attractions of the Ganges-Padma-Madhumati River line displace the strong claims of the heavy concentration of Muslim majorities in the districts of Jessore and Nadia without doing too great violence to the principles of our terms of reference?
4. Could the district of Khulna usefully be held by a state different from that which held the district of Jessore?
5. Was it right to assign to Eastern Bengal the considerable block of non-Muslim majorities in the districts of Malda and Dinajpur?
6. Which state's claim ought to prevail in respect of the districts Darjeeling and Jalpaiguri in which the Muslim population amounted to 2.42% of the whole in the case of Darjeeling and to 23.08% of the whole in the case of Jalpaiguri, but which constituted an area not in any natural sense contiguous to another non-Muslim area of Bengal?
7. To which state should the Chittagong hill tracts be assigned, an area in which the Muslim population

was only 3% of the whole but which it was difficult to assign to a state different from that which controlled the district of Chittagong itself.

As regards the Sylhet and adjoining district areas, there was a difference of opinion among the members of the commission in regard to the interpretation of the terms of reference. Two members on Pakistan's side maintained that the commission was entrusted with authority to detatch from Assam, any Muslim areas of any part of Assam that comes under the description of contiguous areas to East Bengal. They contended that the words 'adjoining districts of Assam', could only be interpreted as meaning any districts of Assam that adjoined East Bengal, the other two members held that the powers of the commission were limited to the district of Sylhet, and the contiguous Muslim majority areas (if any) of other districts of Assam that adjoin Sylhet. Sir Cyril Radcliffe concurred with the view of limited construction of the terms. "In my view the question is limited to the district of Sylhet and Cachar, since of the other districts of Assam, that can be said to adjoin Sylhet, neither the Gavo Hills nor the Khasi and Jaintia Hills, nor the Lushai Hills have anything approaching a Muslim majority of population in respect of which, a claim could be made." There was another aspect of the question. Out of 35'Thanas' in Sylhet, 8 were non-Muslim majority 'thanas' Out of these 8, Sulla and Ajmeriganj 'thanas' were evenly divided between Muslims and non-Muslims, but actively surrounded by preponderatingly Muslim areas. The other 6 stretched continuously along part of the Southern border of Sylhet district and were divided between two sub-divisions, one of the sub-divisions, known as South Sylhet with a non-Muslim majority, whereas the other subdivision Karimganj with a Muslim majority larger than the first one (1). In other words, when considered from the point of view of the sub-division only, South Sylhet had a non-

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(1) The figures given in the Award of Sir Cyril Radcliffe, seemed inconsistent, and so have been dropped.

Muslim majority in Sylhet district, with regard to the district of Cachar, one 'Thana', Hailakandi, had a Muslim majority and was contiguous to other Muslim 'thanas' of Sylhet district. This 'thana', with the 'thana' of Katlichara lying to the south, formed the sub-division of Hailakandi, in which Muslims formed a majority of 51%. It was essential for "normal communications", that the area should be under one jurisdiction, and to borrow Radcliffe's phrase, "the Muslims would have, at any rate, a strong presumptive claim for the transfer of the subdivision of Hailakandi, comprising a population of 166,536, from the province of Assam to the province of East Bengal.

In view of the above description any boundary would have created difficulties and therefore reference to other factors was made necessary. To quote Radcliffe, ".....a study of the map shows, ...that a division on these lines would present problems of administration that might gravely affect the future welfare and happiness of the whold district. Not only would the six non-Muslim "thanas" of Sylhet be completely divorced from the rest of Assam, if the Muslim claim to Haila khandi were recognised, but they formed a strip running east and west, whereas the natural division of the land is north and south, and they effect an awkward severance of the railway line through Sylhet, so that, for instance, the junction for the town of Sylhet itself, the capital of the district, would lie in Assam, and not in East Bengal.

"In these circumstances I think that some exchange of territories must be effected if a workable division is to result. Some of the non-Muslim territory and Hailakhandi must be retained by Assam." (1)

Now coming to the award of the Punjab boundary commission, again there was disagreement among the members of the Commission.

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(1) Sir Cyril Radcliffe's Award, dated 13th August, 1947, paras. 12 and 13. Gazette of India Extra-Ordinary, 17th August, 1947.

The differences of opinion largely centred round the significance of the term, 'other factors', and especially round the weight and value to be attached to them. In the case of the Punjab, representations were made to the Commission on behalf of the states of Bikaner and Bahawalpur, both of which were interested in canals, whose head works were situated in the Punjab province. On this point Radcliffe observed, "Interest of this sort cannot weigh directly in the question before us as to the division of the Punjab between the Indian Union and Pakistan, since the territorial division of the province does not affect rights of private property, and I think that I am entitled to assume, with confidence that any agreements that either of those states has made with the provincial government as to the sharing of water from these canals or otherwise will be respected by whatever government hereafter assumes jurisdiction over the headworks concerned. I wish also to make it plain that no decision that is made by this commission is intended to affect whatever territorial claim the State of Bahawalpur may have in respect of a number of villages lying between Sulemarke Weir and Gurka Ferry."(1)

The demarcation of the boundary in the Punjab was complicated by two-fold difficulties; firstly, there were a number of rivers, and secondly by the canal system which was developed under the conception of a single administration. In addition to this there was the difficulty of road and rail communications. Further, "there was also the stubborn geographical fact of the respective situations of Lahore and Amritsar, and the claims to each or both of these cities, which each side vigorously maintained." Besides this, there were large areas in respect of which the parties maintained claims, and again to cite Radcliffe, "the truly debatable ground in the end proved to lie in and around the area between the Beas and Sutlej rivers on the one hand, and the river Ravi on the other." In view of these difficulties, it was found impossible to enforce the principle

(1) Gazette, op.cit. Award of the Punjab boundary commission, para. 8.

of the contiguous majority areas. It was also found difficult "to envisage a satisfactory arrangement, for the joint-control of the intake of the different canals dependent on the head works", which would have resulted if the territories of the West Punjab were extended to a strip on the far side of the Sutlej. It is of great importance to refer here, especially in view of the present controversy over the distribution of canal waters, to Sir C. Radcliffe's observation in this respect....."although I made small adjustments of the Lahore and Amritsar district boundary to mitigate some of the consequences of this severance; nor can I see any means of preserving under one territorial jurisdiction the Mandi hydro-electric scheme which supplies power to the district of Kangra, Gurdaspur, Amritsar, Lahore, Jullunder, Ludhiana, Ferozepore, Sheildapur and Lyallpur. I think it only right to express the hope that, where the drawing of a boundary line cannot avoid disrupting such unities as canal irrigation, railways, and electric power transmission, a solution may be found by agreement between the two states for some joint control of what has hitherto been a valuable common service." (1)

It may be noted here that this is mainly said about the upper Bari Doab Canal of which the headwork now as a result of the demarcation of the boundary lies on the side of India, which it runs into the territory of Pakistan. Thus forming a point of contention.

Another point of great importance along with the summary of these awards which is common in all of them is the fact that in case the description that Radcliffe has given of the boundaries differ from his delineation of the boundary illustrated on the maps, the description was to prevail. It may also be noted here that Radcliffe did not hear the cases prescribed by the parties in person nor was he able to make local inspection or demarcate (2) the

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(1) Gazette op.cit. Punjab Award, para.11.

(2) The terms 'demarcation' and 'delineation' in these pages are used in the sense of marking out the boundary lines on paper.

boundary on the spot. He relied on the maps, which, in most cases, were old and did not, therefore, represent the actual situation. The defects were soon obvious and disputes arose between India and Pakistan, both in regard to a number of points in the Bengal and Sylhet boundaries as well as about the distribution of water of the canals and the definition of the rivers which ran through both states. Before the intricacies of the contoversies and the awards on the disputes concerning Bengal and Sylhet can be assessed, it is desirable to say a word or two about the term 'other factors' and then analyse the awards above described with a view to deducing the principles that the arbitrator seems to have followed.

III.

As regards the term 'other factors', a question was put to Lord Mountbatten at the Press Conference held at New Delhi on the occasion of the announcement of the partition plan, Lord Mountbatten replied as follows; "The term 'other factors' was put in for the purpose of allowing the Commission the maximum latitude in dealing with this problem." Referring to concrete examples in this respect, he observed, "In the district of Gurdaspur, in the Punjab, the population is 50.4% Muslim, I think, and 49.6% non-Muslim, with a difference of 0.8%. You will see at once that it is unlikely that the boundary commission will throw the whole of the district into the Muslim majority areas. In Bengal the district of Khulna is the reverse case; by a very small fraction of percentage it falls into a non-Muslim majority area, so you cannot say that the whole of the district will go into the non-Muslim area. The point is that we have adopted these districts for one purpose, and one purpose only. It is the simple way by which you can divide the members of a legislative assembley."(1) It is clear from this statement that the term, 'other factors', was intended to cover the need to effect the division of the districts and also this was obviously necessary in view of the fact that the 'district basis' was taken into consideration for

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(1) Mountbatten's Speeches, op.cit. p.30, Press Conference, New Delhi, 4th June, 1947.

dividing the members of the leglislatures conveniently. But the question is, was it the only consideration intended to be covered by the term 'other factors', or was the arbitrator given ample latitude to rely on this term in order to apply it to other considerations as well? Radcliffe's awards establish beyond dispute that he took a rather liberal view of the construction of this term. He was not even reluctant to effect the exchange of territories. The exchange of territory involved, in a sense, divergence from the terms of reference because the demarcation was not to be made on the principle of contiguous areas alone, but on those which were Muslim or non-Muslim majority areas. Radcliffe in this sense was bound to draw a line which would have certainly created enclaves of one state within another, or, in most cases, the demarcation of the boundary would have had to be made not on a natural geographical basis but on the principle of majority areas and thus would have caused disruption of communications and economies, and would have created administrative difficulties. The question how far he succeeded in adhering to the principle of liberal construction for mitigating the chances of disruption by adopting other alternatives, and if so, what were the problems then existing is something quite different. He, undoubtedly, had to perform the duties of an arbitrator in view of the lack of unanimity among the members. The duty of the demarcation of boundaries in itself is an arduous job and goes back to ancient times. The Romans developed the idea of boundary making into a cult, the worship of the God, Terminus. The common landmark was sprinkled with the blood of a slain lamb.(1) The difficulties of boundary making, especially that of solving the conflict between natural features, for example Mountains, rivers, economic factors and the factors of race, language and culture, were paramount for the boundary makers of Europe and America. Radcliffe's work was further complicated by the vigorous claims of the parties. He could rely on the liberal construction of the terms, of course, to borrow his own

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(1) International Boundaries, Jesse S. Reeves, The American Journal of Internation Law, Vol.38, 1944, pp.533-544.

phrase, "without doing too great violence to the principle of the terms of reference."

Radcliffe has used, to a great extent, a precise legal language in describing the boundaries. He was cautious not to use ambiguous words in describing the boundaries; however, differences arose over the interpretation of his description especially because there was divergence between his description and illustration. The parties, i.e. India and Pakistan, very soon realised that the task of interpreting the awards was more difficult than that of giving the awards themselves. It was further complicated by the fact that certain portions of the boundary both in Eastern and Western Pakistan, appeared at least in Pakistan's view, to have been drawn without regard for the natural considerations, for example the boundary crossing the Upper Bari Doab Canal and the river Ravi could have been taken to the north-eastern side along the course of Ravi river, instead of, for some distance parallel to the course of the river and then towards the north-western side and where it joined to the boundary of Kashmir State. Had he followed the Ravi river course it would have been more natural. (1) There are other such complaints on each side, and Radcliffe's decision being an award there was no chance of claiming an alteration in the boundaries themselves and thus, the parties contended on the interpretation of the awards. ".....but it is difficult to think that it is in fact drawn on the principle of contiguous majority areas which Sir Cyril Radcliffe's report accepts as the fundamental basis.....clearly too, Tehsils boundaries are not sacrosanct since Kasur Tehsil is split for no clear reason. This being so it is difficult to see why Gurdaspur should not have been allotted to west Punjab, with the boundaries modified in the North and South to give contiguous non-Muslim majority areas beyond the Madhupur headworks and joining Amritsar Tehsil to East Punjab. It is true that communally Gurdaspur

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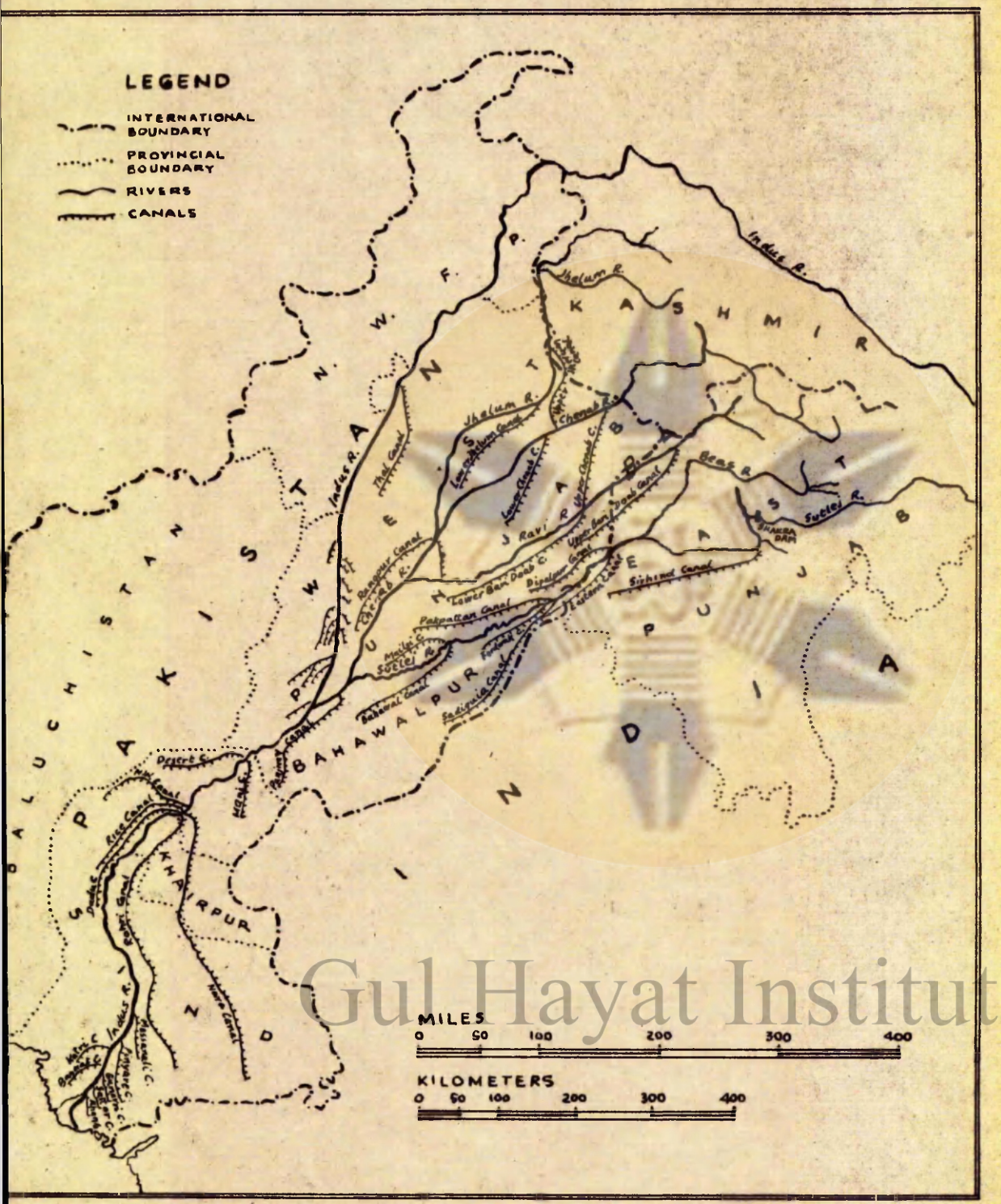
(1) See map points A, B, showing the course of the river and A, C, showing the boundary drawn by Radcliffe.



has a bare Muslim majority but culturally it was overwhelmingly Muslim, and it was perhaps the only area in the Bari Doab where the Muslims were in the lead industrially." (1) Such are the remarks of a geographer who has actually participated in the case; or "we have accepted the award though, speaking frankly, I must admit that I have not been able to follow the logic or the justice behind the Punjab Award. It has deliberately handed over to the East Punjab tracts which are clearly contiguous to the West Punjab with an overwhelming majority of Muslims thus going against the fundamental basis of the terms of reference to the Commission"(2); those of the Pakistan spokesman.

It may be pointed out here that "although the demarcation of a boundary is a political question, the settlement of conflict by an international tribunal is a judicious question"; (3); therefore, the award had to prevail without regard to other political consideration. Both the Governments have accepted it. It may be asked that the Boundary Commission owe their existence to the Indian Independence Act and as such how could it be an international Commission. As explained earlier, the Indian Independence Act, is, in reality, a legal expression of the agreements reached among the three parties, namely the British Government on behalf of Parliament, the Congress on behalf of the future Indian Government and the Muslim League on behalf of the future Government of Pakistan. The Commission, besides this contractual basis, was entrusted with the task of adjudicating between the two sovreign states and the nature of the work implies that the principles applicable to the interpretation of award could be nothing else but those of the law of nations. Stuyt emphasises, in the light of the principles laid down by the international tribunals, two points. Firstly, "whenever the Royal Acts and dispositions do not define the dominion of a

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(1) Dr. Oskar Spate, The Punjab Boundary Award - Asiatic Review, January, 1948.

(2) H.E. Habib Ibrahm Rahmatoola; High Commission for Pakistan The Ideals and Prospects of Pakistan; Asiatic Review, January, 1948.

(3) Stuyt, A.M., The General Principles of Law, p.24.

territory in clear terms, the arbitrator/shall decide the question according to equity, keeping as near as possible to the meaning of the documents and to the spirit which inspired them"(1); and secondly, in arriving at their decisions the Commission will take into account ethnographical, historical principles, political interests of each party, military, strategical and economic factors as well as the local interests of the population"(2).

IV.

The divergence in the interpretation of the boundaries was due to the fact that there was divergence between the description and the illustration of the boundaries on the maps which did not represent the actual situation, as they happened to be old and inaccurate. Besides there were rivers in Bengal which were always changing their courses, and thus the maps drawn in 1926 were very different from the situation that existed in 1947.

Radcliffe has not laid down in detail all the legal consequences of demarcating the boundaries, but it would be wrong to say that he had not taken cognisance of such legal problems. At least in the case of the Punjab boundary he has definitely envisaged the possibilities of establishing joint control over the headworks in which both parties were interested. This clearly indicates the fact that though such matters did not fall within the scope of the terms of reference of the Boundary Commissions, he, nevertheless, took cognisance of such matters of common interest and made them binding on both parties. His terms of reference were wide enough and it is not too far wrong to say that such matters for which no definite rules of international law existed, he has indicated them in explicit terms, in his award. The matters governed by international law were unnecessary and amounted to too wide a construction of the terms of reference to be included in his award.

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(1) Ibid, No.80.

(2) Ibid.

India and Pakistan took possession of certain territories which both parties claimed as their own. This was the case in Bengal and Assam. In one case (1) the matter came up before the Federal Court of India, for a decision whether territory claimed by India but in the possession of Pakistan could be said to be included within the jurisdiction of the Federal Court of India. It was held that any territory which the government of India certified to be within the Dominion of India was also within the jurisdiction of the Federal Court. The fact that it was possessed by Pakistan was not a matter affecting the jurisdiction of the Court. This case is cited here only to show that problems of this nature were accumulating and in view of these facts, by a special agreement concluded between India and Pakistan on the 14th December, 1948 at the inter-Dominion Conference held at New Delhi, an Indo-Pakistan Boundary Disputes Tribunal was set up. The two Dominions agreed to the settlement of the disputes as follows:(2)

1. A tribunal to be set up at as early a date as possible, and not later than January 31st, 1949 for the adjudication and final settlement of the following boundary disputes, arising out of the interpretation of the Radcliffe award and for demarcating the boundary accordingly:-

   (a) The East Bengal Disputes concerning:

      (i) The boundary between the district of Murshidabad (West Bengal) and the district of Rajshahi including the 'thanas' of Nawabgunj and Shibgunj of pre-partition Malda district (East Bengal), and

      (ii) The portion of the common boundary between the two Dominions which lies between the point on the Ganges where the channel of the river Mathabhanga diverges according to Radcliffe's award and the northernmost point where the channel meets the boundary between the 'thanas' of Daulatpur and Karimpur according to the award.

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(1) Midnapur Zamindari Co.Ltd., Vs. Province of Bengal and others. Federal Court Law Report, 1949.

(2) Gazette of India Extra Ordinary, dated 2nd May, 1950, pp.56 - 103.

(b) The East Bengal-Assam disputes concerning:-

(i) The Patharia hill reserve forest; and

(ii) The course of the Kusiyara river.

(2) The Tribunal shall consist of three members, one member nominated by each of the two Dominions of India and Pakistan, such person being one who is holding or has held high judicial office and is acceptable to both Dominions. In the event of disagreement between the members, the decision of the chairman shall be final in all matters. The Tribunal shall report within three months from the date of its sitting.

(3) After the Tribunal has adjudicated upon the disputes, the boundaries shall be demarcated jointly by the experts of both Dominions. If there is any disagreement between the experts regarding the actual demarcation of the boundary in situ, such disagreement shall be referred to the Tribunal for decision, and the boundary shall be demarcated finally in accordance with such decision.

(4) The Tribunal shall prescribe procedure to be followed for adjudicating upon the disputes as well as for deciding the point of points of disagreement, if any, arising from the demarcation of the boundary.

The cost of the Tribunal and of implementing the agreement, in addition to the staff normally employed by the two governments was to be equally borne by the two Dominions.

The Government of India nominated the Hon. Chandrasekhara Aiyer, retired judge of Madras High Court, and the Government of Pakistan, the Hon. Shahabuddin, judge of the Dacca High Court in East Bengal, and with the agreement of both governments, the Hon. Algot Bagge, former member of the Supreme Court of Sweden, was appointed Chairman.

The Tribunal, thus constituted, in its informal meeting of 3rd December, 1949, laid down rules for procedure in pursuance of the agreement of the two governments. They were:-

1. That the Tribunal would be known as the Indo-Pakistan

Boundary Dispute Tribunal;

2. That the hearings concerning East and West Bengal disputes should take place at Calcutta and the hearings concerning East Bengal-Assam should take place at Dacca;
3. That the hearings should be open to the public, the Tribunal reserving to themselves the right to make exceptions to this rule;
4. That the Tribunal should hear oral arguments by Counsel of each party, in the dispute concerning the boundary between the district of Murshidabad and Rajshahi, the Indian Government beginning and the Pakistan Government replying; in the dispute concerning the river Mathabhanga, the Pakistan Government beginning and the Indian Government replying; in the dispute concerning the Patharia hill reserve forest the Indian Government beginning and the Pakistan Government replying; and in the dispute concerning the river Kusiyara the Pakistan Government beginning and the Indian Government replying;
5. That the procedure should be informal;
6. That the proceedings should be recorded by the secretary-general appointed by the Tribunal, a full shorthand report being also made.

The Hon. G. de Sydow, Judge of the Court of Appeal at Stockholm, was appointed secretary-general by the Tribunal. On the side of India spoke the Advocate-General of West Bengal S.M. Bose, assisted by Messrs. M.N. Ghosh, M.M. Sen, K. Bagchi and K.K.Sen, and on the side of Pakistan the case was presented by Mr.W.W.K.Page,K.C assisted by Messrs. Fayyaz Ali, Advocate General of East Bengal, and Mr. Meshbahuddin, but later on, Mr. Page was dropped and Mr. Fayyaz Ali assisted by Messrs. Mansur Alam and Meshbahuddin continued.

In the dispute concerning Murshidabad-Rajshahi-Malda, the question was whether the boundary line, running along the river was flexible or rigid. This dispute arose from Radcliffe's award, whhbh said, "The line shall then turn south-east down the river Ganges along the boundary between the districts of Malda and Murshidabad; Rajshahi and Murshidabad; Rajshahi and Nadia, to the

point in the north-western corner of Nadia where the channel of the river Mathabhanga takes off from the river Ganges. The district boundaries, and not the actual course of the river Ganges, shall constitute the boundary between East and West Bengal"(1). The other question connected with this dispute was what the district boundaries thus defined were. The fact was that the district boundaries were constituted under the government notifications in accordance with the Bengal District Act (No.4 of 1866) (2). Under these notifications the district boundary in the disputed area was the river Ganges or Padma, except in the Rampurboalia area where the boundary was on land. It may be noted here that the island known as the Rampurboalia area was situated in the river under question, and the boundary line drawn by Radcliffe went over it. In other words the boundary line on this island was a boundary on the land, whereas the other parts were along the course of the river Ganges, which was always changing its course. If this dispute is studied with reference to the sketch-map (3) given, it will appear that the boundary line along the river is marked A, B, and the extension of this line from B to C is on land, and then again from point C to D and onwards the boundary is along the course of the river. Pakistan claimed that the line from A to D, except the boundary on land B to C was flexible. India held that the line was fixed and this line had to be determined as it existed on the date of the award.

The members disagreed and gave their divergent opinions and in view of this the Chairman gave his opinion, which, in accordance, with the agreement, was to be final. According to him, "the first question to examine is whether the district notification line in the river Ganges consisting in 'the mid-stream of the main channel of the river Ganges' or 'the mid-stream of the river Ganges' was rigid and subject to correction only through a new notification, or if this

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(1) Radcliffe award, op. cit. para 5.

(2) See Boundary Dispute Between India and Pakistan by M.M. Sen, in the Judicial Review of India, 1951.

(3) Map No.1.

Indian Law Review,

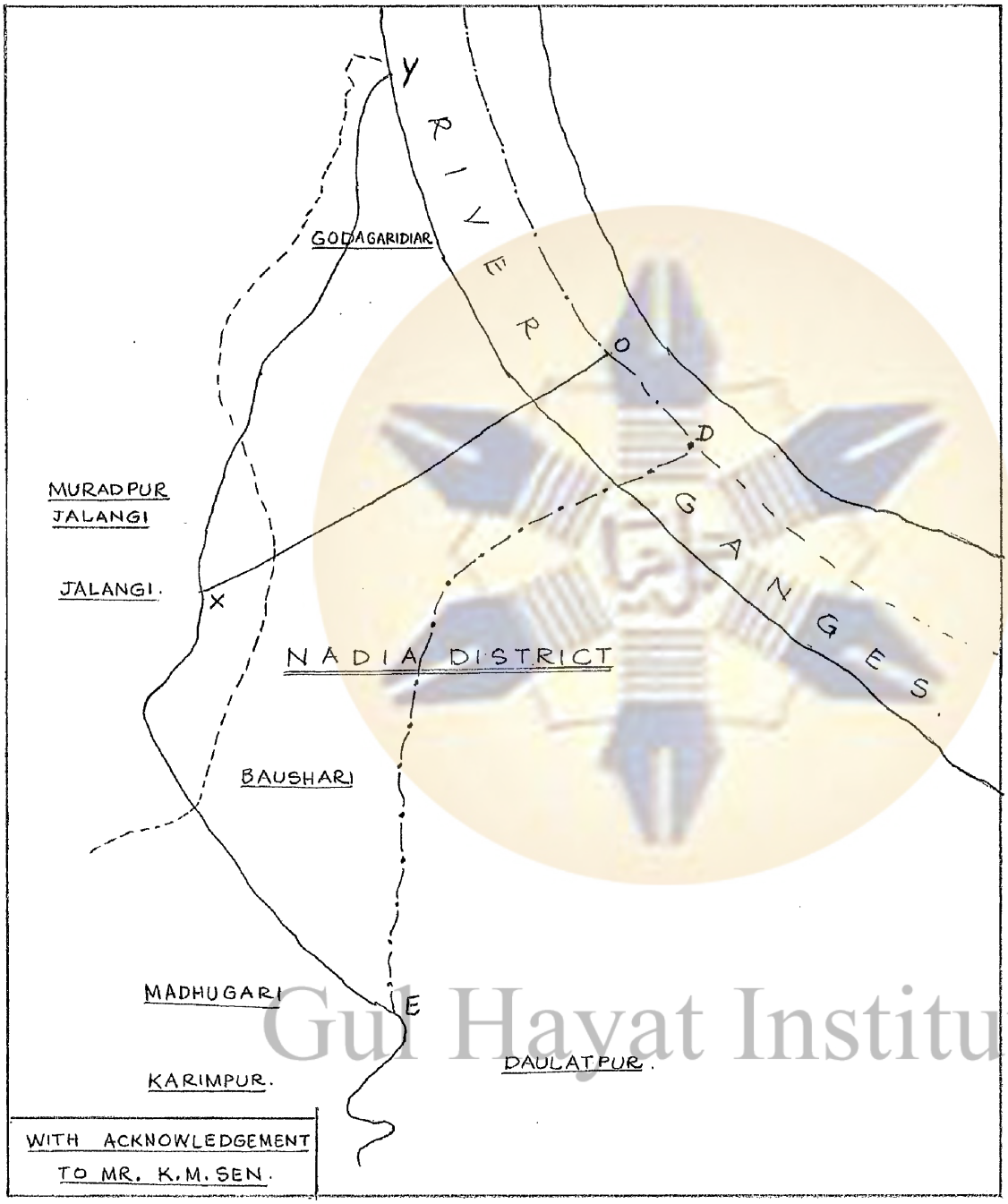
SKETCH MAP No 1.

(SEE PAGE)

WITH ACKNOWLEDGEMENT TO MR. K.M. SEN.

SKETCH MAP No 2.

(SEE PAGE)



NOTE. SKETCH ILLUSTRATING THE "MATHABHANGA" DISPUTE

D - E : LINE DRAWN BY RADCLIFFE AS "MATHABHANGA"

Y - E : STREAM CLAIMED BY PAKISTAN AS "MATHABHANGA"

X : JALANGI POLICE STATION.

line in the river Ganges was a fluid line."

He came to the conclusion that the district boundary in the river Ganges was not a rigid line. Another question which he discussed was whether the boundary between India and Pakistan as established in the award was embodying the flexible line of the district boundaries or whether the boundary between India and Pakistan is a stationary line. He concluded that in the area in dispute the district boundary line consisting of the land boundary portion of the district as well and the boundary following the course of the river was the boundary between India and Pakistan, and it was a fixed one. He further held that if the demarcation of the line of the boundary was to be as it existed at the time ofaward, that is, 12th August, 1947, then it should be the one as existing on the date of demarcation and that should be at the latest within one year of the publication of his decision.

The question in the Mathabhanga dispute was to determine, the point of take-off of Mathabhanga from the main river Ganges. Failing that, what should be deemed to be the point of take-off and how should it be determined. India in this case put forward the argument that if the arbitrator once draws a line, stating that the line drawn by him is a river indicating the boundary, then it should be a boundary without consideration whether the line thus drawn was on land or water, or was rightly or wrongly drawn. On the other hand, Pakistan contended that there was a divergence between the boudary as described in the award and the one delineated and illustrated in the map, and, therefore, the position of the take-off in accordance with the temms of paragraph 10 of his award the description must prevail. Radcliffe had laid down, "if there should be any divergence between the boundary as described .....and as delineated on the map, ... the description .....is to prevail." In this case, Bagge observed that, "it must be held that the awards makes a difference between the description and the delineation on the map .....so far as it is possible to get a solution from the description.....the delineation on the map is only an illustration of that solution."

Coupled with the question of the point of take-off was the need to determine whether the boundary along the course of the river was fixed or fluid.

As regards the first point, Pakistan claimed that the take-off of the river Mathabhanga was further north and therefore the boundary should be from further north, shown in the sketch map point 7, and not point D as drawn by Radcliffe. In other words, Pakistan claimed that/the main river Ganges the river should be from point Y to E instead of D to E as drawn by Radcliffe (1).

Bagge held that the boundary line, "Between India and Pakistan shall run along the middle line of the main channel of the river Mathabhanga, which takes off from the river Ganges, in or close to the north-western corner of the district of Nadia at a point West-South-West of the police station and the camping ground of the village Jalangi.....and then flows southwards to the northern-most point of the boundaries of the 'thanas' of Darlatpur and Karimpur.....The point of the take-off of the river Mathabhanga shall be connected by a straight and short line with a point in the mid-stream of the main channel of the river Ganges..(2)....." In the sketch map the given point X represents the point of take-off and from that point a straight line to the mid-stream of the river Ganges which will be the shortest line, which is represented by point O and thus the boundary will be represented by the line OXE and not YXE as claimed by Pakistan, or the line DE as claimed by India. As regards the second point, it was decided, in concurrence with the decision of the first dispute that the boundary running alomg the stream should be rigid, or the line from E to X should be rigid.

The third dispute was about Pathania Hill Forest. The facts of the case were:-

In 1920 the Forest was proclaimed a Reserved Forest with defined boundaries. Before 1940 there was only one 'thana', Jaldhup, but

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(1) See sketch map No.2.

(2) Bagge's opinion, Dispute 2, p.87.

in 1940 by the notification of the Government of Assam the 'thana' Jaldhup was abolished and the 'thanas' of Beanibazar and Barlekha were created instead. And according to the notification of the same year, the Reserve Forest area was excluded from the 'thana' Barlekha, but it was not included in the adjoining 'thana' of Patharkandi. Radcliffe delineated a boundary cutting the forest area into two parts. The map on which Radcliffe drew the lines was prepared in 1937 and reprinted without any alterations in 1947. India claimed that the portion of the forest shown on the side of Pakistan should come to India. The measures given by her were:-

(1) There being divergence between Radcliffe's description and delineation the description must prevail.

(2) The forest was definitely excluded from the 'thana' Barlekha and, therefore, by necessary implidation and on the proper construction of the award, it should go to Patharkhandi, a 'thana' on the Indian side.

Pakistan's claim was that Barlekha included the Forest area for all administrative purposes and it was never given to Patharkhandi and, therefore, the whole of the Forest area must come to Pakistan.

In this case, not only was there divergence between the description of the boundary in the award and its illustration on the map, but the description itself was incomplete. Therefore, the Chairman observed, "If the description is incomplete, we must be allowed to use the map not only as an illustration to the description but also as affording the necessary completion of the description,"(1) and the Chairman held that for this demarcation the illustration of Radcliffe was to prevail and, therefore, the forest was partitioned as delineated on the map. The other two members also came to the same conclusion though their reasoning differed.

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(1) Bagge's opinion, Dispute No. 3. Gazette op.cit.p.97.

The fourth dispute was about the Kusiyara river and it arose from Radcliffe's award in the following words. "In those circumstances, I think that some exchange of territories must be effected if a workable division is to result. Some of the non-Muslim 'thanas' must go to East Bengal and some Muslim territory and Hailakandi must be retained by Assam. Accordingly, I decide and award as follows:

> A line shall be drawn from the point where the boundary between the 'thanas' of Patharkandi and Kulaura meets the frontier of Tripura State and shall run North along the boundary between those 'thanas', then along the boundary between the 'thanas' of Patharkandi and Barlekha and then along the boundary between the 'thanas of Karimgunj and Beanibazar to the point where the boundary meets the river Kusiyara. The line shall then turn to the East, taking the river Kusiyara as the boundary and run to the point where the river meets the boundary between the districts of Sylhet and Cachar. The centre line of the main stream or channel shall constitute the boundary.....".

The case for Pakistan was that the river Kusiyara was not the one named on the map as Kusiyara, but was the one named as Sonai. India on the other hand contended that the river shown as Kusiyara is also known as Boglia and, therefore, there was no divergence between the award and the map, and the boundary delineated should be followed as the correct boundary. It may be noted here that the Kusiyara as shown on the map was on the northern side whereas the Sonai river, which Pakistan claimed to be the Kusiyara was on the South. There was thus confusion as regards the name of the river. but there was no difference between India and Pakistan on the point that the Kusiyara river was not the one shown on the map. Bagge observed, "It seems to me that under such circumstances the name of the river used in the description does not give in itself a sufficient guidance. The fact that, Sir Cyril Radcliffe has, in delineating the boundary, followed the first-mentioned river must then be taken as a sufficient proof that this river is the river referred to in the description.

"My conclusion is, therefore, that from the point where the 'thanas' of Karimgunj and Beanibazar meets, the river described as the Sonai river on the map.....is the boundary between India and Pakistan." (1).

Thus the disputes between India and Pakistan over the boundaries were resolved with the help of the Tribunal in a peaceful manner. The Tribunal's powers in accordance with the terms of reference were limited to the interpretation of the clauses of the award which formed points of controversy between the two Governments. They were not a Court of Appeal to set right the defects of the decision of a lower court. They were obviously bound by the 10th paragraph of Radcliffe's award which laid down that in case divergence between description and illustration arose, the description was to prevail. The question here is whether the Tribunal has crossed the limit of these terms. The description would certainly prevail if there was no defect in it. But if the description was incomplete, then the illustration was called in for help to make it complete, and the results arising therefrom should be construed as the description prevailing over the illustration as was the case in the third dispute. Suppose the illustration and description are both defective, then with a view to making the description prevail, it was found necessary to seek help from other relevant evidence and equity to interpret the intentions as accurately as possible. It may be argued (2) that the decision of the Chairman in the second dispute was not within the terms of reference, but it is clear that the decision to find a new boundary was based on the observation that "it must be held that the award makes a difference between the description and the delineation on the map.... So far it is possible to get a solution from the description....the delineation on the map is only an illustration of that solution." In view of the completeness of the description and inaccuracy of delineation in this case a solution was found. Stuyt states, "The arbitrators shall

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(1) Bagge's opinion on Dispute 4, Gazette op.cit. pp.102-103.
(2) See Sen's article op.cit.

determine the dividing line in accordance with existing treaties and the modifications established by the conditions, but they may, leaving to one side strict law, adopt an equitable line in accordance with the necessities and convenience of the two countries." (1) The principle of equity applied in this case is not so wide as Stuyt establishes. This was a solution to make the terms of description more accurate and definite, thereby bringing them into correspondence with the actual facts. It may be concluded that the description has prevailed in every case over the illustration, and if anything different from the illustration has resulted, it was due to the fact that the maps used were defective. Bagge, whenever the description was incomplete, sought to complete it with the help of the illustration, and to make it more definite and to correspond with the situation on the basis of other evidence.

Coming to the demarcation by the Punjab Boundary Commission, it may be noted that, controversies rage between India and Pakistan, and it will be of interest to note some of the main features of these controversies. There is no difference on the interpretation of the boundary line drawn in this area, but the problems have emerged out of the consequences of the demarcation of the boundary. With a view to appreciating the controversial issues, it is necessary to recall certain facts connected with these issues.

The pre-partition Punjab, meaning the land of five rivers, viz., Sutlej, Beās, Ravi, Chenab, Jhelum, from time immemorial had been dependent on the irrigation system based on these rivers. The irrigation system under British rule, was further developed, the rivers being dammed at suitable placed by means of 'headworks' from which one or more great canals as large as major rivers were taken out, which swept across the lands. The rivers were interlinked by a series of link-canals which enabled a canal to draw supplies from a river other than that from which it took off; and apart from floods, all the water thus available was utilised for irrigation purposes. Before partition the irrigation system was developed

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(1) Stuyt, op.cit. p. 26 (No.80.)

in view of the natural advantages offered by the province as being a unit, and besides this, other provinces also, e.g., North West Frontier province, including the states of Bahawalpur and Khairpur were inter-linked in this system.. With the partition of Punjab, the boundary was drawn in such a way that it cut the rivers and some canals as well. Three rivers of the Indus basin, viz., Sutlej, Beas and Ravi, flow through East Punjab, (Indian territory) into West Punjab (Pakistan territory). The Beas merges with the Sutlej a short distance from the territories of Pakistan, and the upper Bari-Doab Canal (see map 1), which comes from the river Ravi, runs through both Indian and Pakistan territories. Further, the head-works on the combined Beas and Sutlej rivers thus have come within the jurisdiction of East Punjab, while Pakistan, including the Khairpur state which has acceded to Pakistan, are mainly dependent on these rivers. It may also be noted here that the other three rivers, Indus, Jhelum and Chanab, are within Pakistan's jurisdiction, while their sources lie in Jammu and Kashmir states. The headworks, of the upper Jhelum Canal are also located at Mangla, seventeen miles within the state of Jammu and Kashmir.

The Pakistan Government claims that in accordance with international law, Pakistan is entitled to an equitable apportionment of the waters of these rivers. In other words, Pakistan should receive not only supplies of water as it did before partition, but also have a right to share equitably in the increased use of the basin's water made possible by engineering works that are under consideration by the Indian Government. They also claim that in demarcating the boundaries between East and West Punjab, the Punjab Boundary Commission proceeded on the assumption that the arrangement for the distribution of waters as it existed before partition, would continue even after partition. On the other hand, India claims that the exploitation of the rivers that lie within her jurisdiction, as for example, the Beas that merges with the Sutlej, is India's sovereign right. It is understood that India is also contemplating the construction of huge dams on the upper reaches of the Sutlej river which flows on into Pakistan territory and Pakistan, on this

point claims that by demarcating an international boundary this river has been rendered "hot a national river" or 'pluri-national', and, therefore, India has no right to exploit the river in such a way as to divert the waters of this river thereby depriving Pakistan of its share of the supply of water from the Sutlej. There is also the complaint that the East Punjab Government is building up a headwork where the Beas and Sutlej meet.

After partition in view of the differences on the division of the assets of the province, a Statutory Arbitral Tribunal was set up. The East Pakistan Government had claimed that the province was one and the development of irrigation for the province was made from the finances of the province and therefore the irrigation system on the West Punjab should be valued and the assets divided. It was decided by the Arbitral tribunal that the assets should be valued at twice their original cost, with a view to dividing them and this decision was accepted.

The Punjab Boundary Commission had a difficult task in demarcating the boundary in the face of these controversies. Radcliffe had explicitly referred to the Upper-Bari-Doab Canal and the Muslim majority areas of the angle formed by the Beas and Sutlej rivers. He had also taken cognisance of the common interest of both the states in some of the canals and their headworks and had thus envisaged a sort of joint control of the two states in order to preserve the common service of water. He was also aware of the difficulties created by the demarcation of the boundary in a province connected with chains of rivers and canals. It is obvious that the above-cited paragraph of his award has suggested in plain words the lines on which the successor states were bound to form agreements on the distribution of the waters of the rivers and canals. As regards the rivers, there are definite rules laid down in international law that:-

(a) If the river lies wholly, that is, from the source to the mouth, within the boundaries of one state, such states own it exclusively.

(b) When they run through the territories of more than one state

and are, therefore, named 'not national' rivers; such rivers are owned by more than one state. (1)

It may also be noted that "the flow of 'not national' and international rivers is not within the arbitrary power of one of the riparian States, for it is a rule of international law that no state is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of a territory of a neightbouring state." (2) In view of these principles it is not difficult to find a solution acceptable to both parties. The temporary agreements with regard to the sharing of water that have been accepted by both parties for some time can reasonably provide a ground for permanent agreement. Radcliffe has even given to the extent of envisaging joint control of headworks in which both were interested. He did not lay down details of the principles of law defining the rivers and their canals thus running in the territories of the two states in the first place, because it was out of the scope of his terms of reference; and secondly, because such matters were too complicated and wide to be brought within the scope of the Commission; thirdly there are rules of international law governing such matters. The Bagge Commission on The Bengal and Sylhet controversies regarding the interpretation of the Radcliffe awards in respect of these boundaries could also be a sound ground for the matters to be settled by negotiation and arbitration.

The other important question which has come to the fore after the partition of India is to the Durand line. This boundary line is being disputed by Afghanistan. The Durand line was delimited in an agreement between Afghanistan and undivided India (3), dated 12th November, 1893.

This boundary was laid down as making the limis between the claims of pre-partition India and Afghanistan to authority over the border tribes, and so forms the boundary of the area within which the

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(1) Oppenheim: Vol. I, p.361.
(2) Ibid. p,370.
(3) Aitchison's: Treaties, Engagements and Sanads, 1933 Vol.XIII, pp.256-237.

Indian Government was directly responsible. The Afghan Government contends that the boundary thus demarcated was not an international boundary, in other words, they are contemplating setting up a buffer state between what is now Pakistan and Afghanistan, viz., Pukhoonistan.

The fact is that the boundary of pre-partition India on this delimiting Afghanistan and pre-partition India was laid down in accordance with an international agreement between two sovreign states. The boundary thus laid down after an international agreement is not affected by changes within a state. The Government of the United Kingdom (1) also recognises the Durand Line as the boundary between Afghanistan and present-day Pakistan.

The frontiers on the North-west of India are, to borrow Lord Curzon's (2) phrase "three-fold". After the Durand line, next comes the inner administrative boundary which limits the territory of the autonomous tribes within the responsibility of pre-partition India lying between the international boundary and the settled districts of the North-West Frontier province. Apart from this, there is the northern boundary of Afghanistan itself, which was demarcated by Britain and Russia jointly, and formed the limits between the areas respectively under the influence of these two powers. In this respect this strategic frontier or boundary "includes the protected buffer state of Afghanistan, hence that coundry is for some purposes within the Indian Empire." (3) This is what Lord Curzon meant by threefold frontier. The Pakistan government, as far as is known from the press, does not claim the extension of protection over Afghanistan, though Afghanistan by its geographical situation happens to be a buffer state for Russia, Pakistan and Iran. Now the policy of the Pakistan Government with the tribes is not the same as that

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(1) Letter dated 9th May, 1951, from the Commonwealth Relations Office, London, addressed to the writer in reply to the query.

(2) Fawcett: Frontiers, pp.86 and 87. See also Bagge: International Boundaries.

(3) Ibid. p.87.

of pre-partition India under the British rule. They have already removed their faces from this area.

It may also be recalled that the pre-partition boundaries were laid down on the other frontiers of India under most uncertain geographical knowledge and on inadequate maps. However, there is hardly anything left undefined and it may safely be concluded that India and Pakistan are well demarcated, not only between themselves but also in relation to their neighbours (1) on all sides. Tibet also provides some interest, as India and Pakistan are concerned not only in view of the boundary uncertainty (2) but also the changes that are likely to take place there. With the exception of these minor points of interest, there does not exist any controversy challenging international peace.

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(1) See Holdwitch: Indian Borderland;
Haberton: Anglo-Russian Relations concerning Afghanistan.

(2) The bounderies between India and Kashmir on one side and Tibet on the other are undefined.

The Indian States and The Act.

It may be recalled here that the Indian States were fully sovereign in law and their legal status though "sui generis" was closer to that of protectorates than of vassal states. It is true that the text-book writers on international law have treated them as vassal states, but that was a mistake of fact rather than of law. It has also been noted that the term suzerainty in relation to Indian states has to be interpreted so as to mean the supremacy of a powerful state over a weaker state amounting to protection. In this sense the relations were contractual and the states had surrendered external relations and defence to the paramount power, as it was known, through treaties and therefore the international personality was not extinguished but was placed under servitude. In other words the attributes of sovereignty in the matters concerning the Indian states exercised by the paramount power were the result of delegation rather than subtraction as is the case in a federation. There was no super-state on the parallel of a federation created as a legal person in consequence of such subtraction of the attributes of sovereignty.

The Indian states were foreign territories both for the British governments in Great Britain and India. There was no legal remedy available to the states for actions taken against them. Such acts were Acts of State. The Indian states had not lost their international personalities, but at the same time, they did not enjoy them as they had surrendered these rights to the paramount power. If considered purely from the political point of view they lacked in independence.

It has also been noted that there existed a good deal of controversy over the theory of personal relationship between the Princes and the Crown. The Indian view, especially that of the nationalists, was that the paramountcy of the British Crown was not co-extensive with the rights of the Crown flowing from

treaties. It has been established that the connection of the Crown with the government of India after the disappearance of the Moghul Emperor was only for the purposes of the government of this territory thus passing under trust. It was distinct from the Crown of Great Britain, hence the divisibility of the Crown. The relation of the crown therefore, with the Indian states whatever be their title, was for purposes of Indian government. The relation-ship was personal because the parties to the treaties were on the one hand the Indian Princes and on the other hand the Emperor of India. This personal relationship did not amount to the detachment of the affairs from Indian territories.

With this back-ground the clauses of the Indian Independence Act connected with the Indian states may be investigated. Clause 7.1(b) runs, "The suzerainty of His Majesty over Indian states lapses and with it all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian states, all functions exercisable by His Majesty at that date with respect to Indian states, all obligations of His Majesty existing at that date towards Indian states on the rulers thereof and all powers, rights, authority jurisdiction exercisable by His Majesty at that date, in or in relation to Indian States by treaty grant, or usage, sufferance or otherwise" (1). Explaining this clause, the Prime Minister observed in the House of Commons at the second reading that, "His Majesty's Government could not and will not in any circumstances transfer paramountcy to an Indian Government. With the transfer of power to two Indian Dominions, it is necessary to terminate the paramountcy and suzerainty of the Crown over the Indian States, and, with them the political engagements concluded under paramountcy and the mutual rights and obligations of the Crown and states which derive thereof". He, further referring to the termination of such political engagements, stated that ".....they depended for

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(1) Indian Independence Act. 10 and 11 George VI C.30.

their implementation on our part, and on the continuance of the responsibility of Great Britain for the government of India, and with the transfer of power to two Dominion governments, it would be impossible for the British government to carry out these obligations"(1).

The question arises, in the first place, whether the termination of treaties was necessary only because the government of India was being handed over to (have new government as the Prime Minister observed or was it necessary because the British Government was surrendering responsibility for the government of India. In other words termination of treaties would have been equally necessary if India without division had become a Dominion. According to the views expressed by the Butler Committee and expounded by the theory of personal contract, it was claimed that any change in the government, which would be responsible to the legislature instead of the Crown, would make it necessary either to provide arrangements for the continuity of such personal relationship or terminate them all together. In the case of Indian independence there were two Dominions set up in consequence of the partition of India and according to this theory the very fact that the governments were thus set up without predudice to the number, made it obligatory on the part of British Government to terminate them as in accordance with the Indian Independence Act, no provision was made for their continuity.

In the second place it may be asked to what extent this denunciation may be said to be applicable; and whether this also terminates the treaties in regard to the leased territories, exercise of jurisdiction and other similar matters. And if all these matters and the treaties governing them were thus denounced, did they also affect the situation in fact? Was it with the denunciation of the treaty obligatory on the part

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(1) Hansard: July 10th, 1949, Col. 2463.

of the British Government to create a situation in fact consistent with the legal denunciation of the treaties? To cite one out of many examples, was it necessary for the British Government to hand over the territories of some of the Indian States that were administered under the treaties of lease, which were thus terminated?

Then comes the question, whether these treaties governing the relationship which had a long history could unilaterally be terminated, or were the states also willing to bring them to an end.

The Congress and the nationalist writers (1) claim that paramountcy has passed on to the successor governments and, therefore, no termination whatsoever effects the relationship between the Indian Government and the Indian States.

In order to prove this, they rely on the arguments put forward by the British Government for the justification of their imperial policy and the Congress Leaders and nationalist writers dondemned them while British paramountcy existed. Now to rely on the arguments which they once condemned themselves sounds like a new imperialism. The attempt to distinguish between foreign imperialism which relied on the strength of the paramountcy of the Crown, and the Indian Government relying on its own paramountcy does not make any substantial change as far as the peoples of the states are concerned. In view of these arguments put forward for the continuity of paramountcy, it is necessary to examine the issue both under the clauses of the Act as well as other constitutional changes that had taken place in India up to the time of independence. Before considering these factors it is first necessary to settle the legal issue involved.

II

Paramountcy, as has already been established even in its political aspect was based on two factors: firstly, the Indian

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(1) Naik: Paramountcy, op. cit.

states came into contact with the East India Company through treaties and as a result of the military strength, the Company had gained, they gradually accepted the military paramountcy; then, the Company became 'Vakil-ul-Mutlaq' or the paramount ministers of the empire, and on the strength of this relationship, they claimed paramountcy 'de jure' and when the government passed to the Crown, the same claim was continued. But on the side of the Indian Princes, with the disappearance of the Moghul Emperor, there was no recognition of the Company or the British Crown as replacing the Moghul Emperor. They always believed and accepted the view that their relations were governed by the treaties they had entered into with the East India Company, and the acceptance of their obligation by the British Crown through Queen Victoria's proclamation. They undoubtedly rejected all the prerogative rights of the Moghul Emperor passing on to the British Crown. They confined the supremacy of the Crown to the explicit terms of the treaties. There was nothing more and nothing less than that. Even the terms 'usage' and 'sufferance' were used to convey contracts accepted by the parties by custom and practice or even acquiescence, as distinct from the instruments of treaties. If there was any difference between treaties, and sufferance and usage, it was only in the form of expression and acceptance of contracts. Both were fundamentally contracts.

The Butler Committee expounded the theory of personal contract as a means of providing a compromise between the claim of the Crown succeeding to the prerogatives of the Crown and the contention of the Princes that the Crown succeeded only to the rights of the East India Company and that the position of 'Vakil-ul-Mutlaq' or paramount ministership came to an end with the disappearance of the Moghul Emperor. The compromise was successful only in one sense, that it was defined in a term lacking in legal precision. The ambiguous term 'personal contract' was satisfying to the Princes, because it was a compromise in another respect as well. The Princes claimed that their relations were with the Crown, independent of the Indian Government, therefore a Government responsible to an Indian leglislature could not succeed to those. The Indian national leaders and writers opposed this view and contended that they were

only in relation to India and, therefore, the successor government should succeed to them as well.

So much for the historical background and the controversies raging around it, but the Indian Independence Act has got to be interpreted in the light of the legal position as it was defined in the Act of 1935. According to this Act, the head of the Indian Government acted in a double capacity. He was the governor-general as well as the Viceroy. The term Viceroy, first used by Queen Victoria, was for the first time legalised through the Government of India Act of 1935. With this legalisation the relationship also was implicitly defined in legal terms. No interpretation of the clause governing the termination of treaties in the Indian Independence Act would be complete without reference to the Act of 1935. Whatever be the fact in history the legal position was definite and therefore the theory of personal contract has got to be taken into consideration for the purposes of the construction of this Act. It is difficult, of course to confine this theory to the conventional relationship established through treaties, sufferange and usage, rather than to extend it to the prerogative of the Moghul Empire. With this qualification, it can safely be deduced that the relationship was with the Crown, for the purposes of India only and they were entirely of a political character. There was nothing of prerogative rights involved in it. As a result of state-succession, the treaties must necessarily have been terminated even if they were not denounced through the Indian Independence Act. It is an established rule that no treaties of a political character are inherited as far as the successor governments are concerned. The case of the administrative matters has been noticed in the Indian Independence Act in the provisions for the arrangements of the transitory period. It is said that "provided that, notwithstanding anything in paragraph B or C of this section, effect shall, as nearly as may be, continue to be given to the provision of any such agreement as is therein referred to which relate to customs, transit and communications, posts and telegraphs, or other like matters, until the provisions in question are denounced by the

ruler of the Indian state or person having authority in the tribal areas on the one hand, or by the Dominion or the Province or other part thereof concerned on the other hand or one superseded by subsequent agreements."(1)

The partition of India thereby setting up two Dominions not only involved vital changes of circumstances in which the continuity of treaties which were mostly 'inter alia' guarantee treaties, became impossible to carry out the obligations of these treaties but also with partition the personality of India for the purposes of which these treaties were concluded with the Indiam states (was) extinguished (2). ".....treaties of alliance or of arbitration or of neutrality or of any other political nature fall to the ground with the extinction of the state which concluded them." (3) Even if the views expressed by the national writers claiming the continuity of paramountcy to the Dominion Government is accepted the question arises whether, under the changed circumstances caused by the setting up of a national government in India, would it have been possible to fulfil the obligations which guaranteed not only protection of dynastic rule but also the privileges attributed thereto. The national government, in view of the life-long policy of the Congress whom it represented, would not have been able to accept the treaties 'in toto'. Succession to paramountcy partially excluding all such obligations, would not only have been illogical but would have also amounted to dissolving of existing treaties followed by the entry into new ones. The doctrine of 'rebus sic stantibus' is revoked in special circumstances, and the principle that "when a state is of opinion that the obligations of a treaty have through a vital change of circumstances become unbearable, it should approach the other party or parties and request them to abrogate the treaties", both can be proved to have been strictly observed. Although change in the form of a ~~state~~ government

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(1) 10 & 11 George 6. C.30 Section 7. 1.
(2) See chapter on Succession of International personality.
(3) Oppenheim: Vol.1, p.48; see also paras., 539, 550, 575.

does not in itself justify a resort to the clause 'rebus sic stantibus', but in the Case of Indian Independence, the changes have amounted to a conflict between the ideology of the successor governments and the nature of the guarantee treaties and obligations involved therein. The only logical conclusion that can be reached is that the changes were so vital as to revoke the doctrine 'rebus sic stantibus'. It may further be established that the termination of the treaties as explained by the Prime Minister was brought about only because there was a change of government or because there was a change in the form of state (1) as was claimed by the theory of personal contract. Strictly speaking, though there was change of state as it broke up into two, therefwas no change in the form of state, because the Crown continued according to the Act. It is doubtful if this point was present in the mind of the Prime Minister when he referred to the setting up of two Dominions because the British Government seemed to have favoured the theory that the international personality of prepartition India continued in the Indian Dominion. Under this theory the termination of treaties does not seem to be justified on the ground of the extinction of personality.

Now, the question arises whether the principle of approaching the parties with a request to abrogate the treaties had been observed. The answer to this question is undoubtedly in the affirmative. The Cabinet Mission presented a memorandum to the Chancellor of the Chamber of Princes, and made a recommendation to the following effect: "it is quite clear that with the attainment of independence by British India whether inside or outside the British Commonwealth the relationship which has hitherto existed between the rulers of the states and the British Crown will no longer be possible. Paramountcy can neither be retained by the British Crown nor be transferred to the new government. This fact has been fully recognised

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(1) Holdsworth: op. cit.

by those whom we interviewed from the states."(1) Or, "When a new fully self-governing or independent Government or Governments come into being in British India, His Majesty's Government's influence with these governments will not be such as to enable them to carry out the obligations of paramountcy. Moreover they cannot contemplate that British troops would be retained in India for this purpose. Thus, as a logical consequence, and in view of the desires expressed to them on behalf of the Indian states, His Majesty's Government will cease to exercise the powers of paramountcy."(2) It is quite clear from these quotations that the states agreed to the termination of the treaties and even the standing committee of the Chamber of Princes stated that "They are of the view that the plan provides the necessary machinery for the attainment by India of Independence as well as a fair basis for further negotiations. They welcome the Declaration of the Cabinet Mission in regard to paramountcy, but certain adjustments for the interim period will be necessary." (3)

It may be argued that the Indian states had no international personalities and, therefore, international law is not applicable to them. The only straigthforward reply that can be advanced is that the non-applicability of international law to the Indian states does not exclude the use of the principles of international law. This was admitted by Westlake also. (4) In view of these facts it can be stated that the treaties were neither terminated unilaterally as claimed by the Nizam nor were they dissolved with any disregard for the principles of international law. (5)

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(1) Statement by the Cabinet Mission: White Paper on Indian state, Govt. of India: Oppenheim, Appendix III, p.154.

(2) Memorandum on States, Cmd. 6835, para. 5, p.12.

(3) Cmd. 6862, Enclosure 1, p.6.

(4) Papers: p.p. 620-632.

(5) Government of India's White Paper on Hyderabad, Nizam's letter op. cit.

III.

The geographical situation of the Indian States was such that their participation in the all-Indian schemes of communications and other economic matters had made it obligatory on their part not only to extend their co-operation in political matters and defence, but also to co-operate in other fields, thereby developing an all-India administration., In all these matters, their autonomy and legal sovereignty was respected but at the same time development was made in a spirit of co-operation. For instance, the jurisdiction over the railway lines passing through the territories of Indian States was delegated to the Indian Government in the interests of the uniformity of administration. Similar was the case with all such matters. The termination of treaties included "all powers, rights, authority or jurisdiction which amounted to include all such matters as well", but it would have also amounted to disruption of the whole administration. The Indian Independence Act, in view of this fact, provided for the continuity of any such agreements which related to "customs, transit, communications, posts, and telegraphs or other like matters". This was with a view to maintaining the 'status quo' for the immediate purpose of administrative matters to avoid disruption but at the same time contemplated the possibility of agreements for transitional periods, after the coming into being of the government of India. The need for such arrangements was explained by the Cabinet mission on several occasions, and all the parties concerned with the administrative matters were impressed by the need for temporary arrangements, the agreements of which were styled "standstill agreements". The purpose of standstill agreements was to provide for the legal basis for the 'status quo'.

From the negotiations preceding the Indian Independence Act and the exchange of correspondence that took place between the Cabinet Mission and the representatives of the States, it is clear that the standstill agreement was contemplated with a view to giving time to the parties concerned to arrive at some basis of agreement to replace the treaties with the Crown. The idea of establishing a

relationship on some sound basis has been predominant in the minds of both the Indian rulers and the Indian leaders. The necessity for changing the basis of relationship was justified because of the changed circumstances in which the will of the people provided the basis for the government rather than the commands of the rulers. It has been observed that the changes of a constitutional character in India directly influenced the situation in the Indian states, thereby inspiring the people to responsible government. Indian independence was the direct result of the recognition of the demand for self-government and, as such, a change in the Indian states themselves was a natural consequence. The demand for responsible government in the Indian states and the claims for self-governance were basically one and the same. In both cases the people formed the centre of all changes. Nothing could possibly be done without taking the people into consideration. From 1917, when, for the first time, Dominion Status was declared for Indiaand political and constitutional changes on a federal basis were being contemplated, the Indian states also were included in the schemes. The federal constitution of 1935 was the first effort to provide the constitutional relationship between the Indian states and the government of India on a federal basis. The accession was to be effected by an Instrument of Accession to be executed bythe ruler of the state and accepted by the Crown. In view of the treaties with the paramount powers and especially from the standpoint of the theory of personal contract there could have been no other way. In recognition of the sovereignty of the states the accession was only confined to foreign affairs, defence and communications, and each state was given the choice of executing varied instruments. The people of the states were represented on the legislature of the federal government, but the mode of their selection or election was a matter outside the jurisdiction of the federal government. The same basic principle was also recognised in the Cripps Plan. This was again a compromise and, therefore, was not favoured by the Indian national leaders.

The only solution, therefore, was to dissolve the relationship with the Crown without affecting the situation in fact. It was expected that negotiations between the successor governments and the Indian states would take place and some sound basis of relationship would be found without involving the British Government or the Crown. This amounted only to a nullification of law which had become obsolete in itself under the changed circumstances.

India was given independence and Dominion Status in fact a few months earlier than 15th August, 1947. The denunciation of treaties was made through the Indian Independence Act and during this period the Viceroy continued to act as the Viceroy in relation to Indian States, but his status as a Governor-General, at least in fact, was a constitutional one. During this period the 'status quo' was maintained and in respect of all matters concerning the Indian Government on the one hand and the Indian States on the other, the Governor-General acted on the advice of the Indian Government. What was, therefore, left for him as viceroy, was only the residuum of paramountcy after excluding all administrative matters, and matters concerned with leased territories and jurisdictional function. To put it in other words, the residuum of paramountcy consisted of the legality of matters that had, in fact, passed into the control of the Indian Government. The denunciation of treaties in the Indian Independence Act amounted to annulling the legality that had already become obsolete., How far the British Government and Parliament were justified in creating a situation of this nature may be better answered by referring to the fact that the nature of the law of the constitution of the British Empire has been such. The legal position has nowhere changed in the first instance. First law becomes obsolete by the force of political understanding and practice which is expressed by the term convention and then follows the process of legalisation of the new situation thereby annulling the previous one. In the case of India, the same process was repeated, of course, within a short span of time,

and, therefore, the consequences of changes in fact could not be avoided . It would be entirely wrong, however, sympathetic one be towards the states, to say that the British Government or the Crown as the personal relationship connoted acted in bad faith. They could neither act in favour of legality which had lost its force nor in favour of political considerations which still lacked legality.

From the foregoing consideration, it is evident that the British Parliament on behalf of the Crown denounced the treaties thereby terminating the legal basis of the relationship that had subsisted but could not, and did not, effect any changes in the 'de facto' situation. From this, it may be concluded that the Indian states were bound to come to an agreement with the successor government without prejudice to the nature of the relationship. Failing this they would have created a vacuum, not only in law, but also in fact. The British Parliament was justified in annulling the treaties without any consideration of the situation in fact, because the majority of the Princes agreed to send their representatives to the constituent assembly which clearly indicated their intention to participate in the constitution making. This involved time, and in view of this necessity the Parliament envisaged, and provided for, the interim arrangements.

IV.

Two questions arise in this connection. First, in view of the partition, how did the Indian states stand in relation to the two new Dominions? What were the factors that influenced this relationship? Were the states free to choose for accession to either of the two Dominions, or was there something binding on them? In the second place, how far were the rulers free to act on their own discretion in coming into relationship with either of the two Dominions? Was their legal capacity in any way subject to any other consideration?

The views expressed during the debates by the Prime Minister, the Secretary of State and other members of Parliament with regard to the accession of Indian states to the Dominion were to the effect

that the states were free to join either of the two Dominions or remain independent. Any clause in the Act with the effect of advising the states would have certainly been 'ultra vires' the Parliament. But such advice was in fact extressed during the debates on the Bill. Lord Listowel in the House of Lords, observed that, from the date when the new dominions were set up, "the appointments and the functions of the Crown representative and his officers will terminate and the states will be the masters of their own fate. They will then be entirely free to choose whether to associate with one or other Dominion Government or to stand alone and His Majesty's Government will not use the slightest pressure to influence their momentous and voluntary decision." (1) The Prime Minister observed, "after the transfer of power, more detailed and binding arrangements will need to be concluded between the Dominions and the state governments, and it may well be that these arrangments will, in their turn be superseded by a more organic co-operation between the states and Dominions. But these latter arrangements will, of course, take time to work out, and the transition of the states from the lapse of paramountcy into a free association with the new Dominions, will require proper discussion and deliberation". The Attorney-General remarked, "As a matter of international practice, so far as one can see, and as a matter of practical international recognition, the position will probably remain very much as it is until the states have decided whether or not to accede to a Dominion, and if they do not decide to accede to a Dominion, until other states have decided whether or not to recognise them as enjoying the status of independent states. But this at least can be said with certainty that we do not propose to recognise the states as separate international entities on 15th August, when the Bill comes into force. We hope, as I have said, that the states will associate themselves with one or other of the new Dominions in a federal or treaty relationship on fair terms, fairly and amicably negotiated."(2)

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(1) Hansard, op.cit.Col.2464.

(2) Hansard, op.cit.Col. 103.

From these remarks, it was concluded (and action was taken on the basis of this conclusion) that the Indian states were free to accede to either of the two Dominions and accession could be on a federal basis or on the basis of a treaty. The ruler of the Junagadh state taking advantage of these observations acceded to Pakistan as the ruler himself was a Muslim, but the majority of his people was Hindu, and the state itself was surrounded by the territory of of Indian Dominion. The Maharaja of Kashmir, acceded to India in view of the attack of the tribesmen instead of declaring independence as he was intending. The Maharaja himself was a Hindu, whereas the over-whelming majority, i.e. 80% of his people were Muslims. The Nizam of Hyderabad himself a Muslim declared independence on the strength of the argument that the division of India being on a communal basis, he could join neither. The population of Hyderabad consisted of a Hindu majority with 14% of Muslims. In the case of these three states, there was conflict and disagreement between the Dominions on the one hand, and the rulers on the other.

As far as the legal position is concerned, it is quite clear that, after the lapse of paramountcy, the states were freed from all legal restrictions that had been imposed on them, but with regard to administrative and economic matters, they had undertaken the obligations of maintaiing the 'status quo' on the one hand, with the successor governments on the other. Both, in this sense had undertaken to come to some understanding to fill in the vacuum thus created in law. But the legal capacity of the rulers of the states was limited by two factors; first in the changes of a democratic nature in which the peoples' will had become predominant the rulers as well were obliged to abide by the paramount will, or the common consent of the people which had taken the place of the source of law. The source of law was changing in the states. The rulers were bound to act on the common consent of the people which had become conscious and active. Any disregard would have

created a situation in which not only the source of law but its form also would have to be finally determined. Thus the rulers who in the changed circumstances were only able to give the form to law; if they disregarded its source and force, would have placed themselves in a dilemma. In other words, they had become 'de facto' constitutional monarchs.

In the second place the interests of the states in view of geographical and economic considerations were affiliated with one or other Dominion. The states were in fact maintaining administrative matters on the basis of common consent. Thus the states in view of their geographical situation and economic interests, were divided into two categories; one, affiliated to the Indian Dominion and the other to Pakistan.

The situation was further complicated by the fact that the division of India had taken place on a communal basis. The principle of self-determination which developed out of the problems of minorities into a two-nation theory established the fact that the division was to be made on the basis of territorial majorities of Muslims and non-Muslims. The states were also divided into two categories, those in which Muslims were in the majority and the others with a Hindu majority. The rulers, of course, were not always Muslims for Muslim majority states, and Hindus for Hindu majority states, as it was the case in Kashmir, Bikaner and Hyderabad. In view of this fact, the legal capacity of the rulers was further limited by the natural tendencies of the majority of the population of the states to join India or Pakistan. The mimorities of the states favoured the view of joining the Dominion which had a majority of their co-religionists. Thus the people were divided and thereby their will as well.

Under these circumstances, every party tried to justify its action claiming that the people of the states were in favour of their action. The Dominion of India claimed the accession of all the states within her territorial jurisdiction, on the ground that

the people or at least their majority was in favour of joining the Indian Dominion. The ruler of Hyderabad state claimed independence on the ground that the people were in favour of it, and any other action would have divided them. Pakistan claimed Kashmir because the majority of the state was Muslim and therefore wanted to join Pakistan. Further the economy was dependent on Pakistan and had geographical affinity. Thus at least in three cases there was controversy over two major issues. The first question was whether the choice of the ruler or the will of the people was to prevail on the question of accession or independence, as the other states had joined in such a way that there was no conflict at all. As has been stated, the will of the people had become paramount and in the case of a conflict, it was to prevail. Both the Dominions and the states themselves agreed on the question that the final decision must rest with the people, which was to be ascertained through a plebiscite on the basis of adult franchise. The correspondence (1) that has taken place between the two Dominions and Hyderabad and the Indian government establish it beyond dispute that they have committed themselves to a plebiscite. It may thus be concluded that all the parties had solemnly undertaken to abide by the result of a plebiscite. The government of India made their acceptance of the Instrument of Accession of the ruler of Kashmir conditional, that is, it would be finally decided by the plebiscite of the people. Unfortunately this democratic principle of plebiscite undertaken by them both by the individual proclamations and correspondence with one another, could not be enforced and controversy still raged.

V.

Taking first the question of Kashmir it is necessary to note some legal issues involved. Avoiding the history of the question as it was referred to the Security Council by the Indian Government it may be stated that India complained that Pakistan had helped the tribesmen in attacking a territory which had legally become a part of India. Pakistan replied that the question involved a long history

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(1) White Paper on Hyderabad, op. cit.

of misrule and oppression. The people had in fact revolted against the Maharaja's government, and the Indian Government accepted the Instrument of Accession with a view to helping the Maharaja to maintain his rule and thereby his oppression of the people, who were Muslims.

The Security Council, having heard the case from both sides adopted a resolution. (1) This resolution set up a commission with dual functions:

(a) to investigate facts pursuant to article 34 of the Charter;

(b) to exercise without interrupting the work of the Security Council any mediatory influence, and also to carry out the directions of the Security Council;

Then followed the resolution (2) of April 21st, 1948 which provided for:

(a) the cessation of all fighting;

(b) a decision on the question of accession by plebiscite;

(c) The re-affirmation of the resolution of 17th January;

(d) a Commission to go at once to India and the membership thereof to be increased.

As regards the plebiscite which is the most important part of the resolution, it was provided that the government of India should undertake to ensure that the state government would invite major political parties to designate responsible representatives to share equitably and fully in the conduct of administration at the ministerial level, while the plebiscite is being prepared and carried out. The plebiscite administrator who was to act in the capacity of a state officer was to be empowered to nominate his own subordinates and draft regulations governing the plebiscite. The conditions of an impartial plebiscite, that is without coercion, threatening, undue pressure or undesirable influences

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(1) dated 17th January, 1948. See United Nations Bulletin 1st February, 1948, p.87.

(2) See United Nations Bulletin, May 1st, 1948.

were to be ansured and magistrates were to be appointed to hear cases of divergence from these rules. Political prisoners were to be released; people who had left the state under disturbed conditions were to be allowed to come back without any fear; there was to be no victimisation; and the minorities were to be protected in all areas.

The Indian Government accepted the resolution with reservations. It asked for an assurance from the Commission that the sovereignty of the state would be respected. Pakistan undertook to use its good offices to persuade Azad Kashmir (the free Kashmir Government) to cease fire and abide by the resolution. The commission arrived in India and on 13th August, 1948, after a good deal of negotiation it adopted a resolution proposing that each government issue separate and simultaneous cease fire orders. They also set forth certain principles as a basis for discovering the truth. Hostilities ceased on 1st January, 1949.

In March, the Secretary-General nominated Admiral Chester W. Nimitz of the United States Navy, and he was approved by the state government.

No truce agreement was possible in view of the differences existing on both sides, especially on political aspects of the truce, and only a cease-fire line was drawn. The Commission worked for a good deal of time, and finally submitted its report(1), suggesting the appointment of a mediator in its place. Dr. Chyle, Czechoslovakian member, gave a minority report in which he attacked the Commission for working under the influence of the United States and the United Kingdom.

Sir Owen Dixon was appointed a mediator and he also was unable to bring the parties together on a common agreement and submitted a report(2) in which he gave all the details of his plans for demilitarisation and the reactions of the Prime Minister of India and Pakistan thereto. At the end of almost every item it was stated that the Prime Minister of India rejected his plans, both

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(1) 5th December, 1949, third Interim Report (U.N.D; S/1430.)
(2) U.N.B. October 1st, 1950.

for the plebiscite of the whole state of Jammu and Kashmir or the partial plebiscite in the valley of Kashmir, but did not put forward any alternative plans. He also expressed his conviction "that India's agreement would never be obtained to demilitarisation in any such forms or to provisions governing the principle of the plebiscite of any such character, as would, in my opinion, permit of the plebiscite being conducted under conditions sufficiently guarded against intimidation and other forms of influence and abuse by which the freedom and fairness of the plebiscite might be imperilled"(1). He finally came to the conclusion that the partition of the state was inevitable. He stated: "At all events I have formed the opinion that if there is any chance of settling the dispute over Kashmir between India and Pakistan, it now lies in partition and in some means of allocating the valley rather than in any over-all plebiscite.(2)

In view of this report and also of the fact that the all-Jammu and Kashmir national Conference that has been in favour of accession to India, recommended the convening of a constituent assembley for only a part of the whole territory of the state, the Security Council adopted a resolution proposed by British-U.S. representatives, originally submitted on 1st February, but renewed and adopted on March, 21st, 1951. In this resolution, it was recalled that, "the governments of India and Pakistan have accepted the provisions of the United Nations Commission for India and Pakistan's resolutions of 13th August, 1940 and 5th January, 1941; and have re-affirmed their desire that the future of the state of Jammu and Kashmir shall be decided through democratic method of free and impartial plebiscite conducted under the auspices of the United Nations."(3)

In this resolution it was also stated that the main points

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(1) Ibid.
(2) Ibid.
(3) U.N.B. March and April, 1951 for details of discussions.

of differences were:-

a. The procedure for, and the extent of, de-militarisation of the state, preparatory to the holding of a plebiscite;

b. The degree of control of the function of government to ensure a free and fair plebiscite;

It was also proposed to appoint a representative to work for de-militarisation and to report to the Security Council within three months from the date of his arrival on the sub-continent of India. In case of his failing to bring the parties to a common understanding for effecting de-militarisation, he should report to the Security Council in regard to the points of difference on the interpretation and execution of the agreed resolutions of 13th August, 1948 and 5th January, 1949. The parties have been asked to accept arbitration on all points of difference, and the arbitration had to be carried out by an arbitrator or panel of arbitrators to be appointed by the President of the International Court of Justice.

This resolution has taken an effective step towards solving the problem of Kashmir which so far has been delayed by the different political forces. The question was referred to the Security Council by India, which is a political body. The fact that disputes between states have been very often dealt with as political problems has failed to obtain judicial solution. In international law, the distinction between legal and political disputes and the necessity for judicious solution has been realised by eminent writers.(1) The doctrine to remove the limitations of the applicability of international law in respect of the sovereignty of a state is also gaining currency and favour. It is not desired here to go into the details of this doctrine, especially because the fact that both the parties concerned with the dispute have committed themselves not only through their individual proclamations in favour of a plebiscite,

(1) See The Function of Law in the International Community, by H. Lauterpacht (1933).

but have also accepted the resolutions of the United Nations Commission of the 15th.August, 1948, and of 5th.January, 1949, which have definitely laid down the principle of a free and impartial plebiscite. The term plebiscite itself is such that it needs to be qualified by no adjectives. The two governments have thus agreed to abide by the decision of the people. The issue therefore is no more political and has rather become a legal one, not because the accession to the Indian Dominion by the Maharaja who had the formal legal power of effecting it, was made so without any regard to the people's will which had, as explained, become a source and root of his formal authority; but both for the reason that two sovereigns in international law have agreed to the resolutions of the Commission of the Security Council giving all details of the procedure and factors involved in it. There are differences in regard to the interpretation of these resolutions but having committed themselves to these resolutions, they can no more reject them on any ground of difference in regard to interpretation. There is the international Court of Justice for such purposes. Any action in respect of holding a partial plebiscite under the supervision of the interested party itself on either side would amount to a breach of good faith and international law as well. Even from the point of view of municipal law such accession will be illegal because the accession[1] of the state has been accepted on the condition of ascertaining the will of the people. Strictly speaking, the territory of Kashmir under such conditional accession remains a trust in the hands of the Indian government which is bound to fulfil the conditions, and so long as they remain unfulfilled, the legality of the accession even in municipal law will be subject to question. From

(1) See Instrument of Accession: (White Paper on States, op.cit.)

the point of view of international law the accession will not and cannot be recognised by sovereign independent status so long as the undertaking and the commitments remained unfulfilled. The Security Council itself is bound to enforce the undertakings of the resolutions in accordance with the interpretation given by the International Court of Justice without any consideration for the fact that either or both the parties reject it as long as there is danger to international peace.

VI.

The Nizam declared independence through his 'Firman', stating that he could not accede to either of the Dominions as the division was on a communal basis. The Nizam in his letter to the Governor-General stated, "This was because I felt that my Muslim and non-Muslim subjects will feel disappointed if I join one or the other of the two Dominions, the division being on a communal line".(1)

He was, however, prepared to enter into treaty relations with India, short of accession (to use his own words). He states, "I have naturally and necessarily taken into account the fact that the Dominion of India is my neighbour and I am fully prepared to enter into a treaty with them whereby a suitable arrangement is made in respect of land communications, so that all India standards are recognised, and through communications and mutual interchange facilities are assured and Hyderabad contributes an agreed number of troops to the defence of the Dominion. Moreover I should be willing to agree in this treaty to conduct the external affairs of my state, in general conformity with the foreign policy of the Dominion of India"(2).

1 Letter dated 30th.Oct. 1940. White Paper on Hyderabad Supplement, p.10.

2 Ibid, p.2.

The Government of India on the other hand pressed for accession . To quote the Governon-General's words, "The anxiety of the Dominion is to achieve stability which they feel cannot be adequately secured unless all the states which are situated within their border are prepared to come into organic union with them. I, (Lord Mountbatten) myself as I have told your negotiating committee and your adviser (Sir Walter Monckton) believe that accession to the Union would be to the mutual advantage of the Dominion and your state".[1] Negotiations continued but no desirable agreement could be reached, and in regard to administrative matters a Standstill Agreement was entered into. This Standstill Agreement was not confined to administrative matters only. There were other political issues covered by this agreement with a view to providing a basis for the future treaty relations between Hyderabad and India. In the first article, it was laid down that "all matters and administrative arrangements as to the matters of common concern including external affairs, defence and communications which existed between the Crown and the Nizam immediately before the 15th.August, 1947, shall, in so far as may be appropriate continue as between the Dominion of India or any part thereof, and the Nizam". The Nizam had also conceded that in time of war he would allow the Indian Army to be stationed in Hyderabad with his consent provided that it be withdrawn within six months after the termination of hostilities. No obligations or rights of paramountcy were to be continued and any dispute arising out of this agreement was to be referred to the arbitration of two arbitrators, one appointed by each of the parties and an umpire by those arbitrators. This agreement was to last for one year.

1 Ibid, p.3.

Soon after the signing of the agreement the parties began to complain against each other of disregard and breach of this agreement. The Hyderabad government complained that the Indian government stopped arms and ammunition and other necessary equipment for the army and imposed an economic blockade[1]. The government of India claimed that the action of the Nizam's government -

(a) in making the circulation of Indian currency in the state illegal;

(b) in prohibiting the export of bullion and precious stones and metals from the state;

(c) in granting a loan of 20 crores to the government of Pakistan;

was a breach of the Standstill Agreement.[2] The complaints and the charge sheets thereof against each other went on increasing and both the parties published all the details of the border incidents and other such matters in white papers[3].

Among the complaints the question of the Razakars (the volunteers of the Muslim political party known as Itte-had-ul-Musleman) formed a serious issue. The Indian government complained of this organisation as a danger to peace, as they were armed and raided the Indian territory, and terrorised the Hindu population of the state. The Nizam's government on the other hand replied that the organisation was an old political party and the government had nothing to do with them, and they also stated that this organisation of the volunteers came into existence under the pressure of the Indian government that was brought to bear upon the state to join the Dominion. "The question of the Razakars could not be considered in isolation and a policy to ban them could only be

1 For details see Letter of Prime Minister of Hyderabad to Prime Minister of India, 5th.April 1948, (Ibid, p.24)

3 See White Papers of Hyderabad Government and those of Indian Government official publication.

2 Demi official letter from the additional secretary Ministry of States Government of India, (Ibid, p.17)

carried out as a part of a concerted scheme for dealing with the situation as a whole. I had also said that, if the Hyderabad army and police were adequately armed and equipped to enable them to cope with raiders and local subversive elements (the Hyderabad government complained that the Indian government was encouraging raids from its territory into Hyderabad and also the subversive activities of the Hindu population of the state, thereby creating danger to peace and order within the state) and if provincial governments co-operated with Hyderabad, the "raison d' être" of the Razakars would disappear"[1]. The differences became acute and in spite of all efforts nothing could be amicably settled. The Hyderabad government suggested that the difference as regards the breach of agreement alleged by India should be referred to the arbitration of the tribunal[2] as provided in the agreement. The Indian government rejected this on the ground that the agreement was only for a period of one year and the time left was not enough to refer the matter to the tribunal. "The government of H.E.H. have suggested that the points in dispute should be referred to arbitration and it is no doubt true that the standstill agreement provides for such references. But, considering the large number of points on which differences have already emerged it is clear that arbitration on these points would take up all that remains of the period of one year for which the agreement is to run, leaving little scope for the implementation of the award of the arbitrator"[3].

At last the government of India took "police action" against Hyderabad State on 13th.September, 1948. The Hyderabad government had complained to the Security Council on August

1 Letter from the Prime Minister of Hyderabad, 23rd.May, 1948. (Ibid, p.42)

2 Ibid

3 Letter Sent.Ministry of States Govt.of India dated 15th.May, 1948., para.4. (Ibid, p.39)

21st. 1948, under Article 35(a) of the Charter which provides for a state which is not a member of the United Nations bringing the dispute to the attention of the Council or the General Assembly. It was explained that the police action was meant for meeting the situation within the State which was endangering[1] peace in India. The case was included in the agenda of the Security Council and debated twice and is still on it.

For the first time in recent history, the Dutch government used the term "police action" for the military action against the Indonesian Republic. The Dutch government's representative, justifying this action in law, stated at the United Nations that "The Republic of Indonesia, no more than the state of Eastern Indonesia or Borneo is no (sic) sovereign state. It has never been a sovereign state. It is a political entity to be affiliated ultimately with the two other states I have named, and to be part of a federation. It has a government which is only "de facto". But a government of what? Of the sovereign state? No, not of a sovereign state but a state in the name of, let us say, New York, or Utah, or New South Wales or Paraiba in Brazil, or a state in the United States of Venezuela".[2] The arguments put forward on the lines suggested by this quotation were not accepted by the United Nations and, as a result of the efforts made by the Good Offices Committee, the Indonesian Republic was not only able to settle her differences amicably but was also recognised as a sovereign independent state. The term "police action" in this context was a breach of the principles, of international law. Even if it be taken for granted that the military action thus taken was justified in the case of the Indonesian Republic it is much less justifiable in the case of Hyderabad on two grounds.

1 U.N.B. June 15th. 1949.

2 U.N.doc. S/P.U. 171, pp.41, 42, July 31, 1947. As quoted by Dr.Ali Sastuoamidjoyo and Robert Nelson: The Status of the Republic of Indonesia.

Hyderabad State was the biggest of all the Indian States which had been recognised as sovereign[1] states by the British Courts. There is nothing to suggest that the Indian States were not sovereign in law. The fact that they were under the protection of British paramountcy signifies that they were lacking in independence which was a political aspect of the question. Hyderabad, after the lapse of paramountcy, had reverted to its position of independence as it stood before accepting British protection. What was lacking after the paramountcy was only recognition by any sovereign independent state. The recognition of statehood in international law is a controversial question. There are two theories put forward on this issue. There is one which is called constitutive according to which a newly created entity, although possessing all the attributes of statehood becomes a state in international law only when, and in so far as it is recognised by other states, others hold the (viz.) declaratory theory and opine that a state becomes a person of international law by fulfilling the requirements of statehood. They assert that, "Every new state becomes a member of the family of nations", "ipso facto", by its rising into existence, and that recognition supplies only the necessary evidence for this fact"[2].

Hyderabad state after the lapse of paramountcy reverted to its original status of independence. The British government according to the Attorney-General's statement in Parliament was not prepared to recognise any of the states as independent states in international law on 15th.August when the Act came into force.[3] This clearly indicates that the

1 See Chapter on Indian States.

2 Oppenheim, op.cit.

3 Hansard, op.cit., col.103.

British government did not commit itself to recognising the Indian states as independent international entities only on 15th.August, but this did not and should not mean that they could not take any decision other than this after 15th.August. The purpose of this statement was only to state that the Indian states and the Dominion concerned should have time to settle the nature of their relations.

Hyderabad state came into treaty relations, though of a temporary character, by signing the standstill agreement. In accordance with this agreement provision was made for arbitration. The arbitration clearly indicates that the agreement was that of international law. Even differences between the federal government and the states constituting it are treated as matters of quasi international law[1]. Hyderabad even if not a fully recognised person in international law was at the same time not a federated state of India. Even from this point of view the relations between India and Hyderabad during the currency of the agreement were matters of international law. If it is recognised that the Hyderabad state (as set forth above) was neither a federated part of India as was the claim of the Dutch representative in the case of Indonesia nor were the relations as settled by the standstill agreement, matters of municipal law, the police action of the Indian government against Hyderabad was certainly a breach of contract and also a wrong in international law. There is another aspect of the military action of India against Hyderabad. India claimed that the action taken by India was directed against not the head of the state nor the people but against particular ministers who were kept in power by a military organisation known

1 Lauterpacht, op.cit. See Chapter on quasi international dispute.

as the Razakars[1]. This meant that the Indian government was obliged to take action against the government which was supported by the Razakars who were alleged to be causing disturbances in the state thereby creating the necessity for intervention in the affairs of the neighbouring state. The lists of raids by both sides seems to have been made to support the argument of this point. It is true that every state can take action against another state in the interest of self-preservation and this doctrine though not much favoured, has been recognised in international law. But at the same time warning has been given that a violation of international law under the guise of self-preservation would not be tolerated.[2] If the Indian government considered that the conditions in the state of Hyderabad warranted police action, then it should also have adopted some method of informing some impartial states and justifying the action taken. The Indian government failed to do anything of this sort.

There was another point put forward by the Indian government. They said that the majority of the people of the state had invited their help as they were helpless under the Razakar regime.

If this argument is strictly adhered to and the police action thus taken against Hyderabad is to be justified in the name of humanity for the purpose of stopping cruelties within the state, then it was obligatory on the part of India to set up an interim government of the people of the state excluding the Razakars and to give them a free choice in deciding their future without any pressure or influence. The Indian government set up a military government after the police action

1 B.N.Rao's statement. U.N.B. June 15th. 1949.

2 Oppenheim, op.cit. p.245.

and ignoring the people they sought authority for this government from the Nizam. Even if the military government was necessary immediately after the police action, there was no justification for continuing it for more than a year. The military government in fact was directed and controlled from New Delhi while it sought legal sanction from the Nizam.

Hyderabad question must in its natural sequence include Berar as well. Mr.Henderson, the Under-Secretary of State for India, explained the situation in this way - "I should like to make the position of the government clear with regard to Berar. Section 47 of the Government of India Act, 1935, does in these terms, recognise the sovereignty of the Nizam of Hyderabad and says:-

"Whereas certain territory (in this Act referred to as Berar) is under the sovereignty of His Exalted Highness the Nizam of Hyderabad but is at the date of the passing of this Act, by virtue of certain agreements subsisting between His Majesty and His Exalted Highness, administered together with the central provinces".

Following the passage of the 1935 Act, the necessary agreement was entered into with the Nizam in 1936. The effect of Clause 7(1,b) of this bill is to terminate the 1936 Agreement. There can be no doubt that it removes the legal basis for Berar's administration, as a federated part of British India. In other words, Berar will "de jure" revert to Hyderabad. That is the legal position. But we have to face the realities of the position. This province of three or four million inhabitants, is administered entirely by officials of the government of India and of the provincial government of the central

provinces and Berar. Any change involving the taking away of the administrative machine and its replacement by the official of the Nizama would take some time. Therefore it would obviously be necessary for the government of India to enter into negotiations with the Nizam, either to continue the existing arrangements or to replace the present set-up in the light of the legal position.

In the light of these observations it is of interest to note the reference to Berar as it occurred in the correspondence between the Nizam and the Governor-General of India and also the change that was brought about in the clause of the government of India Act 1935 as adopted in accordance with the Indian Independence Act.

The Nizam raised the question of Berar in his letter dated 8th.August, 1947 and said, "It is more surprising that negotiations should be refused on the subject of Berar. H.M. Government and the new state Department have unequivocally recognised my sovereignty over Berar and also my legal right to the reversion of administration over that territory on the 15th.August, 1947. I should be prepared to arrange for the continuance of the status quo for the time being to enable the whole problem to be reasonably and amicably settled. But those responsible for the new Dominion wholly refuse to negotiate in the matter unless I first agree to accede and this, for reasons which I have already explained, I decline to do. I learn (though I find it hard to believe) that in defiance of my admitted rights the New Dominion of India mean to start their career by seizing my territory"[1].

1 White Paper Letter, Nizam's, 8th.August, 1947, para.(b). Ibid, p.2.

Replying to this complaint the Governor-General said - " I am in a position to assure you that the Dominion of India are quite agreeable to the continuance of the status quo in Berar for the time being, while negotiations continue, and to the continuance of existing administrative arrangements, whether or not a formal agreement is reached dealing with this subject[1]."

The article 1 that refers to the treaties subsisting between the Nizam and the paramount power, must be interpreted as if it includes Berar within its contaxt. It is obvious that the purpose of this agreement was to give legal force to the status quo. The reference in the article 1 to all agreements in regard to administrative matters definitely covers the matter in respect of Berar as well. Berar agreement of 1936 was in fact as well as in law an agreement for the purposes of administration. The attempt to exclude Berar from the scope of this agreement is somewhat untenable before law, especially in view of the fact that the reference to maintain status quo was offered and accepted by the correspondence that has passed between the Nizam and the Government of India. Even if it is suggested, as some Indian writers seem to have done, that Berar should be excluded from the terms of agreement, then it also becomes rather imperative to regard correspondence and the terms thereto offered and accepted, binding on the relations of Hyderabad and India in regard to Berar.

It has been suggested that the territories of Berar have been ruled not in accordance with the Clause of 47 of the Government of India Act, 1935, but according to the clause as

1 Ibid, p.4, dated 12th August, 1947. The Governor General's letter, para. 2.

2 See white paper op. cit. App. II. p. 43.

adopted in accordance with the Indian Independence Act. A glance at these clauses will make it clear.

Old Sec. 47 of the Government of India Act

"Whereas certain territory (in this Act referred to as 'Berar') is under the sovereignty of His Exalted Highness the Nizam of Hyderabad, but is at the date of the passing of this Act, by virtue of certain agreements subsisting between His Majesty and His Exalted Highness, administered together with the Central Provinces:

And whereas it is in contemplation than an agreement shall be concluded between His Majesty and His Exalted Highness whereby, notwithstanding the continuance of the sovereignty of His Exalted Highness over Berar, the Central Provinces and Berar may be governed together as one Governor's Province under this Act by the name of the Central Provinces and Berar:

Now, therefore -

(1) While any such agreement is in force -

(a) Berar and the Central Provinces shall, notwithstanding the continuance of the sovereignty of His Exalted Highness, be deemed to be one Governor's Province by the name of the Central Provinces and Berar;

(b) Any reference in this Act or in any other Act to British India shall be construed as a reference to British India and Berar, and any reference in this Act to subjects of His Majesty shall, except for the purposes of any oath of allegiance, be deemed to include a reference to Berari subjects of His Exalted Highness:

(c) Any provision made under this Act with respect to the qualifications of the voters for the Provincial Legislature of the Central Provinces and Berar, or the voters for the Council of State, shall be such as to give effect to any provisions with respect to those matters contained in the agreement".

New Section 47.

Berar shall continue to be governed together with the Central Provinces as one Governor's province under this Act (Indian Independance Act) by the name of the Central Provinces and in the same manner as immediately before the establishment of the Dominion and any reference to this Act to

the Dominion of India shall be construed as including a reference to Berar.

One writer suggests that it is the manner of governing and not the authority to govern that is indicated. The old authority to govern Berar was derived from the manner. Rather ambiguous words have been used to denote the mode of governance. If it was desired to mention the mode of governance rather than the authority there was no need to mention the manner of governing separately, the only need in that case was to make the provision to include Berar in the province and leave off the rest of the matter of the manner of ruling to those covered by those which were meant for the province itself. There was no need of any separate mention of the manner in this respect. The separate mention of the manner of ruling with respect to the past clearly shows that the purpose of maintaining the status quo was predominant. There is no escape of saying that the words used were ambiguous and also suggest that they were meant to evade the legal obligation. How far the draftsmanship has succeeded in this object is quite clear and it has certainly failed in its object, besides its legal and moral obligation.

The arrangements made for the administration of Berar in accordance with the Agreement of 1936, strictly speaking cannot be interpreted as an instrument of Accession for the purposes of Berar, because the sovereignty of the Nizam was recognised, which rendered it a condomium. The standstill agreement referred to all agreements with the Crown prior to independence hence included the Berar agreement as well.

At long last the Nizam issued a 'Firman' dated 23rd.November, 1949, declaring that Hyderabad thereby became a constituent part of the Indian federation. Again there was an agreement[1] between the Nizam of Hyderabad and the

1 White Paper on States, pp.386-387.

government of India about the private property, privileges and rights of the Nizam, signed on January 23rd. 1950.

In the 'Fiyman' acceding to the Indian Dominion the Nizam further laid down that "in order to ensure for the people of Hyderabad the benefits of an honourable partnership in a united and democratic India shall, in view of its far reaching consequences, be subject to ratification by the people of this state whose will as expressed through the constituent Assembly of the state proposed to be constituted shortly, must finally determine the nature of the relationship between this state and the union of India, as also the constitution of the state itself"[1]. This Fiyman is a declaration and the Nizam simultaneously surrenders to the people his sovereign rights not only to decide on the question of the relationship between Hyderabad and India but also by framing the constitution of the state. He thereby becomes a constitutional head. There is nothing left for him except acting on the advice of the people. Any government set up after this Fiuman without consultation of the people, especially if it be composed of people from outside the territory of the state, if not strictly illegal, is at least extra constitutional. The accession itself is not complete and any action by the people of the state other than accession would certainly be legal. From the time of the police action, so far neither has a constituent assembly been set up in the state, nor has any decision been taken by the people to the effect that Hyderabad should join India. To make the accession of the Nizam permanent, by any other provision of the constitution or otherwise without any impartial decision by free plebiscite, will be illegal. This will be the case of the accession of Hyderabad

1 Fiyman dated 23rd.November, 1949. White Paper, pp.369-370.

to the Indian Dominion in Municipal law. Even from the point of view of international law the accession will not go beyond a "fait accompli" until any other foreign state recognises the accession,[1] and no foreign state will be able to recognise the accession of Hyderabad as long as the case remains on the agenda of the Security Council. Therefore it may be concluded that the accession of Hyderabad will remain only temporary (subject to the decision of the people to make it permanent) in Municipal law and without legal sanction in international law so long as the case remains on the agenda.

This statement from legal stand point is made to show that the action taken by the Indian government and the procedure adopted thereafter constituted ~~was~~ a breach of law as well as of faith. The desirability of the inclusion of Hyderabad within the all India scheme cannot be denied and therefore the stand taken by Hyderabad to remain legally independent while associating with the Indian government in all matters of foreign affairs, communication and defence was reasonable. It is true that any attempt on the part of Hyderabad to disregard the de facto affinities with the Dominion of India would have been equally wrong. Even the inclusion of Hyderabad within the federal scheme of India had a strong claim so far as the interest of the people of India as a whole was concerned. But unfortunately the method and the procedure adopted by the Indian government, in spite of all the progressive and sympathetic feelings for the unity of India cannot be left uncriticised. What is to be condemned is not the commendable aspiration for unity and therefore for an organic relation of Hyderabad with India, but the fact that

1 The Ramava Case 20, Annual Digest, 1941-1942.

the Indian government took such an action which deprived the people of the state of their natural right, for which the action was claimed to be justified.

The Indian government's policy in regard to the state is highly objectionable because Indian independence has not materially affected the people at large. The Congress during the British regime condemned British policy as being imperialistic and protecting the rulers against the will of the people. But after coming into power the Indian government preferred to settle terms with the Indian rulers over the head of the people and claimed that the people of the states were not fit for responsible government. In view of this policy the Indian government is changing the state into chief Commissioners' provinces thus taking the whole administration into its hands and ruling the state through its civil servants.

As regards Junagadh there is only one point which needs to be mentioned here. The Indian government should either recognise the choice of the rulers, on their own discrimination, to join one or other Dominion as has been the case with other Indian rulers, or it should recognise the will of the people,- but not either of the two at its convenience. In the case of Kashmir the choice of the ruler and its legality has been stressed, and the will of the people subordinated to it. Whereas in the case of Junagadh it is "vice versa". The principle of self-determination, its evolution and assertion as seen already have made the legality of the ruler's choice subject to the will of the people and a frank recognition of this fact must be made by the Indian and Pakistan governments, without consideration of the fact that one or the other is the loser. This is only the fundamental principle on which not only legality but also the moral values involved in the issues are justified. The disregard of this principle so

far allowed in respect of the Indian states can only be rectified by taking the decision of the people and abiding by it. The Hyderabad case needs only rectification of the procedure and compensation for the loss of the people's wealth which was allowed to be exported from the state not only by including Berar in Madhya Pardesh but also by liquidating the Nizam's (the richest man of the world) wealth which was in fact the people's wealth and could have been very well utilized for the exploitation of the State's natural resources. In all such arrangements the Indian government has been a party with the rulers in agreements in which the people had hardly any voice.

VII.

The Indian Independence Act has also a clause[1] governing the nullification of treaties or agreements entered into by His Majesty's Government and the authorities in the tribal area. These treaties also were nullified only "de jure", and the "de facto" position did not change in any way. This clause in the Act terminates the treaties and thereby removed the legal basis as it stood between the British government and the tribal authorities but in fact this only made it obligatory on the part of the successor governments and the tribal areas to replace them with new ones. Strictly speaking the agreements thus nullified were not treaties, because the authorities of the tribal areas were not sovereign states, but were rather administrative authorities enjoying autonomy in certain administrative matters under the control of the political agents. The successor government of Pakistan placing more confidence in the religious affinity decided to remove the troops from this area and extended the hand of co-operation and partnership. The India Government on the other hand decided to extend the benefits of settled administrations to the tribes in the North Eastern part of India.

1 Se 7.1.C.

THE ACT AND THE LEGAL STATUS OF THE NEW DOMINIONS.

The Indian National Congress had pledged to Complete Independence outside the British Commonwealth of Nations when it had rejected the Nehru Report presenting a model Constitution for Indian Independence within the British Commonwealth.(1) In recent times this pledge was reiterated by Mr. Nehru in his address to the All India Convention held in Delhi on March 17th, 1937. He remarked: "Independence means national freedom in the fullest sense of the word; it means, as our pledge has stated, a severance of the British connection. ..... words are hurled at us, - dominion status, Statute of Westminster, British Commonwealth of Nations, and we quibble about their meaning. I see no real Commonwealth anywhere....etc."(2) The Muslim League on the other hand had left this question more or less vague. The question arises why the Congress rejected Dominion Status all the time and was prepared to accept the same through the Indian Independence Act in 1947, especially so when it was possible for her to go out of this relationship as Burma did? Was the change of heart in any way due to the fact that the Indian Independence Act had placed India and Pakistan in any better position than the Dominions on whom were conferred Dominion Status under the Statute of Westminster of 1931. Then there arises the question, why a separate Act, instead of a mere extension of the Statute to India and Pakistan was necessary? Again, what actual differences of legal significance exist between the Indian Independence Act and the Ceylon Independence Act? Such are questions that demand a detailed study of the legal status of the new Dominions vis-a-vis the Independence Act.

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(1) See Chapter on "The Evolution of self-determination".

(2) Quoted by Prof. Shibban Lal Saksena in his speech in the Constituent Assembly of India, 16th May 1949, p. 12.

In the foregoing chapter a comparative study of the circumstances that led to the enactment of the Indian Independence Act, and the circumstances preceding the Statute of Westminster as far as they suggested the scope of the Act have been reviewed. It has been seen during these observations that the Statute and the Indian Independence Act both were declaratory because India like the Dominions, obtained Dominion status, in fact, before the Act came into force. The other point observed,was that the Statute was not aimed at bringing about a uniformity of law in the relations of the United Kingdom and the Dominions as "the force of strict law was extended to those Dominions to which Sections 2-6 of the Statute extended, viz. Canada, South Africa, and the Irish Free State, while Australia, New Zealand, and Newfoundland obtained powers in the Statute in virtue of Section 10 (1), (2) and (3), to contract out Sections 2-6 until such time as each saw fit to adopt them. Canada and Australia of their own accord accepted limitations on the powers of their Parliaments to amend their Constitutions. The South African and Irish Nationalist sentiments prompted them to take a different attitude towards the Commonwealth. As a result of this South Africa re-enacted the Statute of Westminster with necessary modifications. It also incorporated the Preamble of the Statute in a Schedule. The Acts, known as the Status of Union Act as well as the Royal Executive Functions and Seals Act, 1934,were necessary from the South African standpoint, because the extension of the Statute without the modifications made thereto did not confer sovereign status on the South African Parliament. In other words the object was to make the Parliament of South Africa as much omnipotent as the Parliament of the United Kingdom.

The Irish Free State had asked for no provisions restricting the scope of the operation of the Statute as some of the other Dominions had done, hence acquired the fullest powers which the Statute was capable of bestowing. But controversy arose as to the extent the Oireachtas had powers to amend the Constitution which, in the British view, was limited by the terms of the Scheduled Treaty, and according to the Irish point of view, no such limitations existed as authority was derived from the people. These two divergent views were expressed in two famous cases. Ryan's case, exppunded the legal basis of the Irish Free State Constitution, and Moore's case on the other hand held that the Irish Free State acquired constituent powers under the Statute.

II.

It is, therefore, proposed first to examine Sections 2-6 of the Statute. The Statute is preceded by the Preamble which lays down the Constitutional Conventions or non-legal rules. It is also necessary to see whether these Conventions are binding on India and Pakistan or not. But before these Sections are examined in detail, it is necessary to answer the question already raised: Why a separate enactment for India was necessary. Was it not possible to add India and Pakistan to the list of the Dominions enumerated in the Statute of Westminster? In Sir Dhiren Mittra's words, "Does Parliament want to make a distinction between the two new Dominions and the older Dominions, perhaps to the disadvantage of the former?" In his reply to this question Sir Dhiren Mittra asserts that "The Statute of Westminster was declaratory of rights which were claimed by the Dominions

and the claim to (sic) which was admitted by the Mother Country. India's status before the passing of the Indian Independence Act was certainly less than Dominion status and a separate Act conferring Dominion status as distinguished from a declaratory Act was inevitable."(1) This answer, it is submitted, does not seem to be satisfactory on two grounds. First, India acquired Dominion status de facto and in this sense Indian Independence was as much declaratory of the rights and status as the Statute of Westminster itself. This was recognised by the British Government.(2) Secondly, the term 'Dominion' did not specifically define the status of the Dominions with any legal precision. Newfoundland continued to be enumerated in the list of Dominions even after it surrendered this status in 1933. India, even before acquiring the de facto Dominion status was not in any sense inferior in status to that of Newfoundland after it surrendered Dominion status. A separate Act, therefore, can not be said to have been necessary as India was inferior in status or because the Statute was declaratory.

Among the other factors which necessitated separate enactment, one undoubtedly was the fact that India was to undergo the process of partition. Not only the machinery and the details of partition had to be provided in this act but also had to make a temporary provision for the administration of the Country. These details required a separate enactment with legal precision. Besides this, the terms of the Statute were not appropriate for India or Pakistan. First, because India was not a Colony and as such the Colonial Laws Validity Act, 1865, was not applicable to India. The Statute of Westminster, inter alia, had to replace its rule of construction with a new one. The Colonial Laws

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(1) Sir Dhiren Mittra: The Indian Independence Act: Past, Present and Future Status of India Perspective, Vol.2, No.4, p.7.

(2) See Chapter on "Assertion of Self-determination."

Validity Act 1865, had laid down as the rule of construction that an Act of Parliament of the United Kingdom should be deemed to extend to a Colony if it was made applicable to a Colony by express words or necessary intendment. The rule of construction enacted by the Statute of Westminster said that "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that the Dominion has requested and consented to the enactment thereof."(1) The rule of construction thus enacted was adopted with certain alterations in the Status of the Union Act, 1934. It runs: "The Parliament of the Union shall be the sovereign legislative power in or over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after the eleventh day of December 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union."(2) The fact that India was not a Colony and hence outside the purview of the Colonial Laws Validity Act 1865, necessitated a separate Act but at the same time it was, probably obvious that the rule of construction as provided in the Statute which had failed to satisfy South Africa could not be fit for India.

The Government of India Act 1935, had imposed certain restrictions both in regard to powers of reservation and disallowance and extra territoriality. It is true that the Federal Court in Governor-General v. Raleigs(3) case had taken a liberal view and expressed, obiter, that the powers

(1) 22 Geo.5, C.4 S (4).
(2) The Status of the Union Act, 1934, No. 69. S.2.
(3) Supra.

of the Indian legislature should in this respect be construed in the light of the requirements of a State with international personality but it did not establish any rule of law ruling out the necessity of an enactment conferring such powers. The Indian national sentiments were in favour of abolishing the powers of reservation and disallowance completely but the Statute of Westminster did not make such a complete repeal, although it conferred powers which could be used to effect such a repeal.(1)

The Statute of Westminster removed restrictions imposed on the Parliaments of the Dominions and as a result of which they could enact laws repugnant to the Acts of the Imperial Parliament as they formed part of the law of the Dominions. Section 2 (2) runs: "No laws and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion." It is interesting to note that this Clause has been enacted in Section 6 (2) of the Indian Independence Act which runs: "No law and no provision of any law made by the legislature of either of the new Dominions shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of this or any existing or future Act of Parliament of the United Kingdom, or to any order, rule of regulation made under any such Act,

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(1) Wheare: Some Constitutional Changes in the British Commonwealth. Journal of Comparative Legislation and International Law. 1947-48.

and the powers of the legislature of each Dominion include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the Dominion." It is evident that the whole Section 2 of the Statute of Westminster has been reproduced word for word except the addition of the word 'this' underlined and omission of 'shall' before the word 'include' and 'it' instead of 'the same'. The omission of 'shall' as far as it is clear from the wording of the Act hardly has any significance in construing this section in some other way than the one that appeared in the Statute. The same applies to 'it' which has been used in place of 'the same'. As regards the addition of 'this' it is proposed to postpone discussion on this point till this question is dealt with subsequently.

A comparison on this point of the related sections of the Ceylon Independence Act would certainly be helpful for further discussion. It will be observed that the resemblance to the Statute in the Ceylon Independence Act on these points is closer and more striking. This, as stated at the outset, may be owing to the fact that Ceylon was a Colony and hence was included within the purview of the Colonial Laws Validity Act 1865. Section I of the First Schedule of the Ceylon Act is almost a word for word repetition of Sections 2 (1) and 2 (2) of the Statute.

As regards extra-territoriality, it has been enacted that "The legislatures of the new Dominions shall have full power to make laws for that Dominion, including laws having extra-territorial operation" but strangely enough it further states that "the power referred to in Sub-Section (1) of Section 6 extends to making of laws limiting for the future the powers of the legislatures of the Dominion." This clearly means that the legislatures of the new Dominions will be

entitled to limit their own sovereignty for the future. It is sufficient here to point out the main differences that exist in the Indian Independence Act on the one hand and the Ceylon Independence Act and the Statute of Westminster on the other.

As already pointed out the Statute of Westminster has a Preamble which inter alia lays down the Convention that "it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom": The Indian Independence Bill necessitated change in the Royal Style and Titles. It runs: "The assent of the Parliament of the United Kingdom is hereby given to the omission from the Royal Style and Titles of the words "Indiae Imperator" and the words "Emperor of India" and to the issue by His Majesty for that purpose of His Royal Proclamation under the Great Seal of the Realm."(1) The assent of the Parliaments of the Dominions in view of these obligations was to be obtained subsequently to which the Prime Minister referred during the debates on the Independence Bill and till then the Section did not come into operation, but in the words of Wheare, "The position of India and Pakistan is obscure. They were not members of the Imperial Conference. India which was admitted to the Imperial Conference in 1947, is not the India of today - and even if it had been the resolutions that were adopted on this topic applied to Great Britain and the Dominions alone. Nor do they appear to have adopted, as Ceylon has done, the resolutions that might apply to them.

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(1) S 7 (2)

Y et it is reasonable to assume that since India and Pakistan have accepted the status of self-governing members of the Commonwealth, these rights do in fact apply to them. Be that as it may it would appear that the assents of the Parliaments of India and Pakistan was not sought or obtained."(1) This indicated that besides the Clauses of the Indian Independence Act which confer Dominion status on the new Dominions and make other connected provisions of law, the Conventions of the Commonwealth too form an important part and the Conventions therefore, should necessarily be taken into consideration/to see whether they lend any help for the purpose of determining the status of the new Dominions under the Independence Act.

III.

Coming to the question, the status of the new Dominions, as already stated, the question arises whether the new Dominions have been placed in any better position than the Dominions under the Statute on the one hand and whether they are in any sense inferior to the other sovereign and Independent Countries that are outside the Commonwealth on the other. The last question may be put in other words like this: What are the limitations implied in the membership of the Commonwealth that a sovereign state has to accept in order to continue its membership of the Commonwealth. For this purpose it is necessary first to consider what the term Dominion purports:

Wheare asserts: "The Statute, taken along with other rules of strict law, could supply an adequate definition of the legal status of the Dominions; the Reports of the Imperial Conferences, taken along with other non-legal rules,

(1) Wheare: op.cit.

could supply an adequate definition of the conventional status of the Dominion but it requires a correlation of the two elements to describe the Constitutional status of the Dominions, and it is the Constitutional status which is denoted by the term 'Dominion Status'."(1) By the definition of the term in the Interpretation Act 1889, the Dominions were included in the term 'Colony'. This Act provided an interpretation for all purposes. But again by the Statute of Westminster which defined the term for the purposes of the same Act, it was said: "In this Act the expression 'Dominion' means any of the following Dominions, that is to say

(1) The Dominion of Canada
(2) The Commonwealth of Australia
(3) The Dominion of New Zealand
(4) The Union of South Africa
(5) The Irish Free State
(6) And Newfoundland."

The terms as defined by the Interpreting Act or the Statute of Westminster do not in fact throw light on the nature of status that the term 'Dominion' implies. For example, when the Irish Free State was to become a Dominion, reference to Canada was made in order to define her relations with the Commonwealth Countries. In other words the Irish Free State acquired exactly the same position which Canada had assumed, and in the future her progress was to be identical with that of Canada. It is true therefore, in the words of Sir Dhiren Mittra that "the word 'Dominion' whatever may be its etymological meaning, has acquired a secondary significance, namely a sovereign state with the qualifications that it is a member of the British Commonwealth of Nations."(2) The term, as it is

(1) Wheare: The Statute and Dominion Status. op.cit. p.4.
(2) Sir Dhiren Mittra: op.cit. p.9.

understood today, undoubtedly has acquired a secondary significance but as Sir Dhiren Mittra too accepts, the term is a misnomer. It was observed, during the debates on the Indian Independence Bill,"that 'Dominion' as used in this clause, is a temporary appellation. I believe that the word 'Dominions' is subject to several misconceptions, and I do not think it is suitable in this case. I should have liked to see the words 'Two sovereign states within the British Commonwealth of Nations hereinafter to be known for the purpose of this Act as the new Dominions."(1) In reply to this suggestion, the Prime Minister remarked: "I think we need the word 'Dominion' here just for the reason ..... that we understand what 'Dominion' means under the Statute of Westminster. Whatever alterations of the Statute of Westminster may be in the future, the Statute today does define this position. .....It means complete autonomy."(2) Again, Mr. Nicholson pointed out that it was "rather paradoxical that we should invite perpetuity for the name 'Dominion', launching two large new parts of the Empire which, whatever happens, will be on a slightly different footing to other Dominions. .....I do not know whether every party in India interprets the word 'Dominion' in the way in which we interpret it..... I can not help feeling that a revision of the Statute of Westminster must be overdue as soon as there is any retreating from or turning against the use of the word 'Dominion'". The Prime Minister in reply to these points explained, "It may well be that in the future we may consider some other different term. The word 'Dominion' is not always frightfully popular with our own Dominions..... obviously this is a matter which we should have to take up with the Dominions at some future Conference."(3) It, therefore, can not be deduced

(1) Hansard: op.cit. (14th July 1947). Col.41.
(2) Ibid. Col. 43.
(3) Ibid. Col. 45.

that the term 'Dominions' is disliked by the Indians or Burmese.(1) It is considered, on the other hand, as a misnomer both in Great Britain and other Dominions where such psychological considerations are absent. It is not, however, denied that there is a psychological aspect of the question as well but it is not so important as to outweigh other factors which are more or less common in all Dominions and therefore suggest the need of a change. The change is all the more necessary because the lack of legal precision, and its etymological sense savour of domination render the conception of Dominion Status confusing and indefinite.

Scott(2) had long ago suggested that the term 'Dominion' used to describe the King's Dominions enjoying differing degrees of self government, was incorrect and misleading. The word 'Dominion' as a term describing the independent status that the Dominions have assumed as a result of the developments within the Commonwealth and in the international sphere was inappropriate. Even Wheare speaking on "Is Dominion status obsolescent?" had suggested in 1948 that we have to be ready for a situation in which the notion of Dominion, as we have understood it up to now, may seem inadequate to the needs and aspirations of these new Dominions, as it has been for a member of British family like Ireland."(3)

It was, probably, in view of the above considerations that on July 2nd, 1947, Mr. Attlee announced in the House of Commons that the titles of the Secretary of State for Dominion Affairs and of the Dominion Office were to be changed to Secretary of State for Commonwealth Relations and Commonwealth Relations Office respectively. It was explained

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(1) Mansergh: op.cit. pp.19-23, wherein he discusses psychological reasons for lack of understanding of the term 'Dominion'.
(2) Scott, F.R. The end of Dominion Status. American Journal of International Law, Jan.1944.
(3) Wheare. Is Dominion Status obsolescent? B.B.C. Third Programme, Listener, Feby.1948. pp.287-8.

that the old titles were misleading.(1) This change, especially, with the omission of the adjective "British" suggested in itself a wholehearted co-operation in every quarter of the Commonwealth t o adjust the institutions of the Commonwealth to the ever changing circumstances. It will not be far from true to say that the use of the term 'Dominion' in the Indian Independence Act implied, not the legal and conventional meanings attached to it in virtue of the Statute of Westminster and the resolutions of the Imperial Conferences, but the significance of the fact that the limitations or qualifications of being a member of the Commonwealth - was something different from what it had so far been. In other words the limitations of membership as understood under the Statute or Conventions had lost its implied applicability to all that accepted that relationship. This certainly indicated a sort of desire on the part of the new Dominions to be within the relationship but without commitments to all that the term implied in view of its legal and conventional significance. Suffice it here to mention that the Indian Independence Act conferring Dominion status on India and Pakistan signified the desire of these new Dominions to share the membership of the Commonwealth which could be reconciled with their sovereign status as well as their own interpretation of the changing conception of that relationship. The other aspect of this issue can conveniently be dealt with in the general perspective of the Commonwealth relationship. However it may be asserted that the term 'Dominion' as used in the Indian Independence Bill signifies all that has been conferred on other Dominions by the Statute plus all that the Independence Act gives.

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(1) Hansard, H.C. Vol.439. Col.1320. 2nd July 1947.

IV.

After the consideration of the term 'Dominion' it seems justified to examine the legislative powers and constituent powers bestowed on the legislatures of India and Pakistan. As there existed an appreciable difference among the Dominions on the question of availing themselves of the advantages of removing the legal inequalities provided by the Statute, the method of approach of the Dominions also differed from one another. As remarked already, the Dominions of Australia and New Zealand did not want to remove inequalities till they thought fit to adopt Clauses 2-6 for themselves. For the purposes of comparison a reference to the method adopted by South Africa and the Irish Free State would be enough as any attempt to seek implications of the clauses in the Indian Independence Act in the light of the considerations that determined the policies of South Africa and the Irish Free State would be of great interest.

The first question that strikes one in this context is why South Africa was obliged to take a step different to the other Dominions. Did South Africa bring about any substantial change in her status by adopting this method?

The provisions of the Statute were intended to empower the Parliaments of the Dominions to remove inequalities. The enactment by the Imperial Parliament for the Dominions was made subject to the request and consent of the Dominions, but to borrow Wheare's expression "in enacting Section 4, the United Kingdom Parliament has not attempted in strict law to diminish or abolish its powers to legislate for the Dominions." Further, he states that "Section 4..... is not a rule restricting power; it is a rule of construction. It is not directed against the United Kingdom Parliament. It is directed to the Courts.

And so long as it remains unrepealed, it is effective for that purpose. But it does not render it legally impossible for the United Kingdom Parliament to legislate for a Dominion without the request and consent of the Dominion. On the basis of the theory of sovereignty which was accepted by the Courts of the United Kingdom and of all the Dominions except the Irish Free State in 1931, there seems no doubt that Section 4 of the Statute is ineffective in law to restrict the United Kingdom Parliament in the sphere of legislating for a Dominion only with the request and consent of that Dominion.(1) Or again, the observation in the Coal Corporation(2) case Lord Sankey's observation that the sovereignty of the Parliament in abstract law remained unimpaired. This abstract theory in the words of Sir Owen Dixon was "indestructible sovereignty"(3) of the King in Parliament over the law throughout the King's Dominions. The theory of sovereignty is indestructible because the Courts held so and it would be rendered destructible if the Courts decided so.(4) For example, the Courts may go to the extent of saying that the Parliament of the United Kingdom has thus renounced all power to make laws for the Dominions. Mr. McGillian speaking in the Dail Eireann on the 15th July 1931, observed: "so sweeping was the declaration that it put the British Parliament in a worse position vis-a-vis the members of the Commonwealth than that in which the Parliament of any State (not a member of the Commonwealth) stands in relation to other States generally."(5) This was not the interpretation of a Court, but it suggests the possible view one can take in interpreting the aspirations of the nations for the complete legislative sovereignty. A liberal construction is both in accord with the Commonwealth constitutional practice and the

(1) Wheare: The Statute. op.cit. p. 153.
(2) Supra.
(3) Wheare: op.cit. p.155. Reference to Sir Owen Dixon's article, Australian Law Journal, Vol.X. Supp.p.98.
(4) Ibidem. p.156.
(5) As quoted by Sir Dhiren Mittra.op.cit. p.7.

needs of a sovereign State. Even on the limited or conservative view, the applicability of any enactment of the Parliament of Great Britain could be rejected by the Courts of any Dominion on the ground that the enactment was not carried out in accordance with the requirements of Section 4. It is possible for the Courts to take this view but the fact remains that the Parliament of the United Kingdom in strict law could still enact for another State, though only in accordance with the requirements of Section 4. A sovereign Parliament within the operative scope of another sovereign Parliament, would be a legal anomaly.

It seems, in view of these considerations, and the doubts of the 'legal effectiveness and permanence' of Section 4 as a rule of construction, the Union of South Africa was prompted to take a different line of approach to the problems of removing the inequality of the Union Parliament vis-a-vis the Parliament of the United Kingdom. The main purpose of the Status of the Union Act 1934, was to provide a rule of construction to the Courts of South Africa so as to render the Union Parliament independent of the Parliament of the United Kingdom.

V.

Now it remains to be examined how far the Union of South Africa succeeded in attaining this purpose of making its Parliament entirely independent of the Parliament of the United Kingdom. In the first place, the Constitution of the Union of South Africa had certain safeguards to protect the rights of the original Colonies which joined the Union. These Sections, known as 'entrenched Clauses', in general, safeguarded the continuance of the native Franchise in Cape Province. In the second place, the Union was subject to disallowance,

to discretionary reservation and obligatory reservation under the instructions and also in virtue of certain provisions of the Act.

Taking first the question of 'entrenched Clauses', it is necessary to see how far these limitations were removed by the adoption of the modified Section 4 in the Status Act. The line of argument on this point followed by Wheare is as follows: "Section 2 of the Statute gave power to a Dominion Parliament to repeal or amend any existing or future Act of Parliament of the United Kingdom, to which a Dominion law, passed after the enactment of the Statute, is repugnant. Section 2 of the Status Act might be described, therefore, as no more than the repeal in advance of hypothetical future Acts of the United Kingdom Parliament in so far as they purport to extend to the Union as part of the law of the Union, unless and until such Acts are extended to the Union by the Union Parliament."(1) Relying on this line of argument he holds that it would be effective to prevent the operation in the Union, until extended thereto by the Union Parliament, of any United Kingdom Acts whether passed in accordance with the provisions of Section 4 of the Statute in fact as well as in form, or whether passed in accordance with the provisions of Section 4 in form only or whether amounting to a repeal or amendment, express or implied, of the provisions of Section 4.(2) But, suppose Sections 2 and 4 as adopted in the Status Act conflict with each other, then the question arises as to which of the two would prevail. He, however, concludes that the 'legal inequality of the Union Parliament in relation to the Powers of the United Kingdom Parliament to make laws for the Union remains even after the passing of the Status Act because the United Kingdom Parliament may, in law, repeal Section 2 of

(1) Wheare: op.cit.p.246.
(2) Ibidem.

the Statute."(1)

In recent times, the question came to the forefront when the Speaker of the South African House of Assembly ruled that the Union Parliament was competent to pass the Representation of Non-Europeans Bill by its ordinary procedure, that is, disregarding the provisions made in the Imperial Act of 1909.(2) The opposition in the House of Assembly challenged this contention. This involved the question: how far the Parliament is omnicompetent vis-a-vis the Parliament of the United Kingdom, or in other words can or can not the Act passed by the Parliament of the Union of South Africa without regard to the provision of safeguards of the Imperial Act 1909, be challenged in the Courts in virtue of its omnicompetence. It is interesting to note that the crux of the problem was "the power of Parliament to vary the instrument which created it; because the South Africa Constitution Act was enacted by the Parliament at Westminster, it could not be varied by its creator - the South African Parliament - except in terms of the amending powers which it conferred."(3) This would have been the case in virtue of the Colonial Laws Validity Act 1865, that is, any Union Act amending the 'entrenched Clauses' would have been void for repugnancy. "But," one writer argues, "in 1931, the Statute of Westminster abolished this restraint, and provided that any Dominion Parliament should have power to amend any United Kingdom Act in so far as it was part of the law of that Dominion."(4) It is, however, quite different, he asserts, to say that "it flies in the face of the mutual undertakings given and required by the four Colonies before their merger," or to say that "The Bill (was) a violation..... of a valid constitutional convention."

(1) Wheare: op.cit. 247.
(2) The Times, Lond; 13.4.1951; Editorial.
(3) John Coaker; Letter to The Times, Lond; 20.4.1951.
(4) Ibidem.

Without prejudice to the legal force of the Constitutional Convention and their use by the Courts for the purposes of construction, it may be stated that in strict law, in view of the writer, the Union Parliament has been rendered competent to amend the Act of the Imperial Parliament, in virtue of the Statute of Westminster. Needless to repeat the argument set forth already, that in strict law the Parliament of the United Kingdom may repeal Section 2 of the Statute and therefore despite the altered wording of the Section 4, as adopted in the Status Act, the legal inequality of Status of the Union Parliament in relation to the powers of the Parliament of the United Kingdom could not be removed.(1)

VI.

Before the connected clauses of the Indian Independence Act, in the light of the foregoing considerations, are discussed, it seems desirable to become acquainted with the Status of the Irish Free State under the Statute.

It may be recalled that the Treaty between Great Britain and Ireland was signed in London, on December 6th, 1921, and on March 31st, 1922, the Irish Free State (Agreement) Act 1922(1) was passed by the Imperial Parliament giving to the Treaty the force of law. The Irish Free State also passed Acts to abolish the Oath of Allegiance, the appeal to the Privy Council, and the office of the Governor-General, and in 1937 enacted a new Constitution which was approved in a referendum by the electorate. It is unnecessary for the purposes of this thesis to give all the details of the controversy about the source of the authority of the constituent powers of the Irish Free State because the only reference intended is to the views

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(1) Geo.5.C.4. (1) Wheare's view.

expressed by the Judicial Committee in the case of Moore v. The Attorney General for the Irish Free State.(1) It may, therefore, be stated straight away that the question at issue was whether or not the Irish Free State was competent to abolish the right of Appeal to the Judicial Committee which was effected by the Irish Free State Constitution (Amendment) Act 1933. In the opinion of the Judicial Committee, the Constitution of the Irish Free State derived its validity from the Act of the Imperial Parliament, the Irish Free Constitution Act, 1922. This Act established the Constitution subject to the provisions of the Constituent Act. Lord Sankey, while discussing this point, observed that, "The position may be summed up as follows:

(1) The Treaty and the Constituent Act respectively form parts of the Statute Law of the United Kingdom, each of them being part of an Imperial Act.

(2) Before the passing of the Statute of Westminster, it was not competent for the Irish Free State Parliament to pass an Act abrogating the Treaty because the Colonial Laws Validity Act forbade a Dominion Legislature to pass a law repugnant to an Imperial Act.

(3) The effect of the Statute was to remove the fetter which lay upon the Irish Free State Legislature by reason of the Colonial Laws Validity Act. That Legislature can now pass Acts repugnant to an Imperial Act. In this case they have done so."(2)

Wheare, discussing the effect of the passing of the Statute on the Irish Free State's authority states that "on the conservative interpretation which has been preferred in this book (The Statute of Westminster and Dominion Status) all that Section 2 (2) of the Statute did was to empower the Oireachtas

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(1) A.C. (1935) 484.

(2) Ibidem. p. 498.

to repeal or amend any Act of the United Kingdom Parliament (so far as it was part of the law of the Free State) to which an Act of the Oireachtas, passed after the enactment of the Statute and otherwise valid, was repugnant. It did not empower the Oireachtas to repeal or amend every Act whatsoever of the United Kingdom Parliament so far as it was part of the law of the FreeState."(1) But further he asserts a nice point: "Now an Act of the Oireachtas to be 'otherwise valid' must be intra vires, and to be intra vires it must not purport to amend the Constitutional Act not to go beyond the terms of the Scheduled Treaty."(2) He concludes on this view that the Oireachtas, even after the passing of the Statute, remained within the fetters imposed by the terms of the Treaty. Remarking on the decision of the Judicial Committee and relying on the fact that the Irish Free State was accorded the same Constitutional status that was assumed by Canada, he says that "a decision in the Irish question based upon the Canadian case would have been natural." "Instead," he says, "their Lordships adopted what appears to be the liberal interpretation of Section 2 (2) of the Statute..... The language here is ambiguous. If by 'Imperial Act' is meant any Imperial Act, then it is possible that the Judicial Committee regarded Section 2 (2) of the Statute as extending the area of the powers of the Dominion Legislature, and abolishing the former restrictions of ultra vires. But if by 'Imperial Act' is meant any Imperial Act to which a Dominion Law otherwise valid and intra vires, is repugnant, then it must be assumed that in Moore's case, their Lordships did not recognise a restriction upon the powers of the Oireachtas other than that imposed by the Colonial Laws Validity Act; they did not recognise, that is to say, a separate ground of invalidity, viz. ultra vires, which prevented the

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(1) Wheare: op.cit. 267.
(2) Ibidem.

Oireachtas from amending the Constituent Act or from transgressing the area marked out by the terms of the Scheduled Treaty."(1) The judicial Committee, in short, recognised the principle that the Statute removed all fetters in strict law imposed on her, though there existed a power in the Parliament to legislate for the Irish Free State. Moreover, the fetters emerging from the Agreement, being of international character, in municipal law, could be removed in virtue of the powers conferred by the Statute.(2) On the strength of these arguments it may be concluded that the Constitution (Removal of Oath) Act, 1933, which purported to repeal Section 2 of the Constituent Act and delete the words 'within the terms of the Scheduled Treaty' from Article 50 of the Constitution was valid.(3) Similarly, the Act of 1933(4) repealing reservation and power of the Governor-General to refuse to assent to Bills, or the Act of 1933(5) abolishing the appeal by special leave and the Act of 1936(6) abolishing the office of Governor-General were valid enactments even if they happened to be repugnant to the terms of agreement.(7) Still more important is the conclusion that "any enactment of the Oireachtas to abolish the Monarchy, or to provide for secession from the Commonwealth, or to declare neutrality, would in strict law be valid."(8)

There remains, the question of the new Constitution, adopted in 1937, under which the Irish Free State was named Eire; and was declared to be a sovereign Independent Republic, and also the question of the provision, made in the Constitution, that, for the purposes of the exercise of any executive function of the State in, or in connection with, its external relations, the Government may to such extent and subject to such conditions,

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(1) Wheare: op.cit. pp.268-9.
(2) Ibidem.
(3) Ibidem, in Liberal view only which was adopted by P.C.
(4) No. 44, 1933. (5) No. 45, 1933.
(6) No. 57, 1936.
(7) Ibidem. p. 270. (8) Ibidem. (Liberal view)

if any, as may be determined by law, avail itself of or adopt for the like purpose by the members of any group or League of Nations with which the State is or becomes associated for the purposes of international co-operation in matters of common concern." It may be asserted without any difficulty that Eire, though an Independent Sovereign Republic, still continued to be a member of the British Commonwealth in virtue of the above cited provision in Eire's Constitution. The King, though uhknown to the municipal law of Eire, still continued to function as a King in her external affairs and in virtue of this fact, it would not be far wrong to say that the allegiance to the King in this respect disappeared from the sphere of municipal law. The Irish view on this point will be discussed subsequently.

VII.

The Indian Independence Act has been described as a Conveyance of Sovereignty.(1) Now it is proposed here to see, in the light of the provisions of the Act, how far this statement is correct. Section 6 (2) of the Indian Independence Act runs as follows: "No law and no provision of any law made by the Legislature of either of the new Dominions shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of "this" or to any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Legislature of each Dominion include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the Dominion." It is evident that this Section 6 (2) is word for word the same as Section 2 (2) of the Statute of Westminster except

(1) See Chapternon the Title and the Scope of the Act.
(2) Inverted commas mine.

the word "this" which is not found in the Section of the Statute of Westminster. In contrast to the Indian Independence Act the word "this" does not appear in the Ceylon Independence Act. In other words, the First Schedule, Section 1 of the Ceylon Independence Act is nothing more or less than a mere reproduction of Section 2 of the Statute. The question arises whether the inserting of "this" makes any difference in the powers of the legislatures of the new Dominions and those of the Legislature of the Dominion of Ceylon or those of other Dominions. In other words, "this" clearly means the Independence Act itself which in virtue of "this" can be amended or repealed by the Legislatures of the new Dominions but the same can not be effected by the Legislatures of Ceylon or those of other Dominions.

This question can not be answered without reference to the divergent viewww expressed on this point by different authorities. Keith opined that "the rule laid down applies only to an Act existing when the Statute was passed or enacted in future; it does not apply to the Statute itself, which can not be varied by Dominion Legislation, since this would destroy the safeguards for the Canadian and Australian Constitutions."(1) Jennings states that "it is arguable, however, that Section 2 does not apply to any Act which itself defines Legislative powers. It may be said that if a Legislature has power to legislate on subjects A, B.....E. by Imperial Act, a Power to repeal Imperial Act is a power to repeal Imperial Acts on subjects A, B.....E. and does not include the power to amend the Act creating the Legislative powers so as to apply it to subjects F..... It must be admitted that the express saving of the British North America Acts, the Constitution and Constitution Act of Australia and the Constitution Act of New Zealand weakens this argument.

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(1) Keith: The Dominions as Sovereign States. p.75.

It is nevertheless not without force."(1) Latham, in a very characteristic sentence, points out that the Statute, however creative in the political sphere, brought purely a negative contribution in law.(2)

But the Privy Council in Moore's case has recognised that the Irish Free State was competent to go beyond the limitations imposed by the Treaty. This has been criticised on the ground that the language used by the Privy Council was both ambiguous and careless.(3) Wheare(4) raises a very subtle point in this respect. Is the Independence Act (in the case of Ceylon) or the Statute of Westminster an existing Act of Parliament? If it is - and the case for this view seems sound - why was it thought necessary to include "this" in the Indian Independence Act? He further argues:- if "this" was put in to resolve doubts for India and Pakistan, why was it not for Ceylon also? Is some limitation intended upon Ceylon's legislative competence? It may not console the people of Ceylon to know that the difference is probably due to nothing more than a diffefence of draftsmen."(5)

In the light of foregoing quotations of the eminent authorities on this subject and differences existing on the point of construction it can not be denied that Section 2 of the Statute is inconclusive. There was, at least, room left for doubts.

The Indian Independence Act, if it does nothing else, at least removes the doubts expressed on this point. It is quite obvious that those authorities expressing doubt outweigh those who hold that the Dominion Parliaments acquired powers to amend or repeal the Statute itself. From the standpoint of India and Pakistan it was necessary to acquire

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(1) Jenning and Young: Constitutional Law of the British Empire (1938), p.265.
(2) Latham: Law and the Commonwealth.
(3) Keith: The Dominions as Sovereign States, p.182 ref. Letters on Current Imperial and International Problems (1935-1936) pp.38.
(4) Wheare: The Constitutional Changes in the British Commonwealth.
(5) Ibidem.

those rights in definite, precise and certain terms.

It is very strange that the Ceylon Independence Act once again has been drafted in uncertain terms. This kind of draftsmanship raises suspicion. Section (2) of the Statute which has been reproduced word for word in First Schedule S.I. of the Ceylon Independence Act, had undergone considerable criticism, and doubts were expressed whether the Dominions could amend or repeal the Statute itself. It was probably in view of these doubts that in the Indian Independence Act the word "this", precisely referring to the Act itself, was inserted. It may, in the light of the above considerations, be asserted that as far as the Indian Independence Act is concerned the Legislative powers transferred to the new Dominions' Legislatures were precise and certain and any interpretation of Section 6 (2) on its own strength is conclusive.

According to Wheare; "Section 2 (2) empowers a Dominion Parliament to repeal or amend those United Kingdom Acts only to which a Dominion Law is repugnant. But no Dominion law is a law unless it is intra vires; and the issue of repugnancy does not arise, therefore, unless the law is already intra vires."(1) To put it in another way; the Acts of the Dominions should be within the powers of the Dominion Parliaments. Suppose a certain Act of a Dominion Parliament is repugnant to an Act of the Parliament of the United Kingdom but the Act of the Parliament of that Dominion is ultra vires, it will in itself be effective to prevent the operation of the Act in that Dominion, unless it is rendered intra vires. In the case of India or Pakistan, in virtue of the Clause 6 (2),the question of competence does not arise at all. Whatever the Legislatures of the new

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(1) Wheare: op.cit. p. 163.

Dominions enact whether extra vires or repugnant to the Act of the Parliament of the United Kingdom, would become the law of the new Dominions. The former prevail over the latter.

VIII.

The Statute, as already explained, had to replace the rule of construction in the S.I. of the laws of the Colonial Laws Validity Act, 1865. It was: "An Act of Parliament, or any provision thereof, shall, in construing this Act, be said to extend to any Colony by the express words or necessary Intendment of any Act of Parliament." The Colonial Laws Validity Act, itself an important measure in the direction of self-government in the Colonies, had become out of date and new measures, first in the form of Conventions which rendered laws obsolete, then in the form of the Statute replacing the limited measure of Legislative independence conferred by the former Act, were imperative. No such legislation would have been complete without a new rule of construction. Section 4 was incorporated in the Act to fulfil this need. The rule of construction appeared in Section 4 of the Statute.

In the preamble of the Statute(1) it was declared that "it is in accordance with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion." But as it appeared in the preamble it did not establish this rule on a legal basis, hence the necessity of including

(1) 3rd paragraph.

it in the body of the Statute. The same principle appeared in Section 4 of the Statute: "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."(1) It is interesting here to note that reference to the "established position" was omitted from Section4.

It has already been observed that owing to doubts and uncertainties about the legal effectiveness of the Section 4 of the Statute, the Union of South Africa re-enacted this Section. This runs: "The Parliament of the Union shall be the sovereign Legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after the eleventh day of December 1931, shall extend to be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union."(2)

But Section 3 giving legal effect to the Statute of Westminster was: "The parts of the Statute of Westminster 1931 22 Geo.C.4 and the Afrikaans version thereof, set forth in the Schedule to this Act, shall be deemed to be an Act of the Parliament of the Union and shall be construed accordingly."(3)

Some points are raised on the question of the re-enactment and modification. The first point of interest is; how far Sections 2 and 3 agree with each other because Section 3 gives legal effect to the entire Statute of

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(1) Section 4 (22 Geo.5, C.4.)

(2) The Status of the Union Act 1934. No. 69 of 1934 (S.2.)

(3) Section 3: It may be noted here that the complete Preamble and Sections 1,2,3,4,5,6,11 and 12 of the Statute with the modifications in Sections 1,4 and 11, were scheduled to the Act.

Westminster including the Preamble. In Jennings' words: "The effect is that Sections 2 and 3 of the Union Act are in part contradictory."(1) He further concludes that Section 2 is the governing provision, since Section 4 of the Statute of Westminster is merely incorporated. It would therefore be effective as a partial amendment of Section 4 of the Statute of Westminster which had conferred power to repeal or to amend the Acts of the Parliament. But, seeing that there is no express provision to empower the Union Parliament to repeal or amend the Statute itself, he asserts that no positive answer can be given.

Latham suggested that "it is of course from the orthodox point of view, invalid. But on the assumption that not the Imperial but the nationalist theory is true, it only requires the re-enactment of the South African Act by the Union Parliament..... and there will be no need to look beyond the Union Statute Book for the whole of the written Constitutional Law of the Union."

It appears from the points raised in the above discussion that the Status of the Union Act is, from the orthodox point of view, invalid on the ground that Sections 2 and 3 of the Act as explained above are contradictory.

In Nalhwana v. Hofmeyr(2) the Supreme Court of the Union of South Africa decided that with the repeal of the Colonial Laws Validity Act, the Parliament of the Union had become a Sovereign Legislature of the same status as the Parliament of the United Kingdom. The Court declined to question the Validity of the Act of the Parliament of the Union on the ground of its being ultra vires the Union of South Africa Act 1909. The Court remarked that the Bill, having received the Royal assent, was binding on the Courts

(1) Jennings. op.cit. p.266

(2) (1937) A.D. 229; Journal of Comparative Legislation & International Law. Ser. III, XIX. 271.

who would accept a King's Printer's Copy as conclusive evidence. The Court asserted that in Section 2 of the Status of the Union Act, 1934, the Parliament of the Union had been declared to be a Sovereign Legislative Power in and over the Union; and only bound by those enactments of the Parliament of the United Kingdom which were extended to the Union by an Act of the Union Parliament. In Krause v. Commissioner for Revenue(1) the appellate Division held that the South African Act 1909 was amended by implication "pro tanto". The Statute of Westminster in its own right became law of the Union. If the Statute of Westminster was law in the Union then it implied that any reference to the Statute in any subsequent enactment of the Parliament should mean the Statute (22 Geo.5.C.4) and nothing else.

Now turning to the Indian Independence Act; Section 4 of the Statute as modified for the purposes of the Status Act of the Union of South Africa, 1934, appeared in Section 6 (4) in these words: "No Act of Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to either of the new Dominions as part of the law of that Dominion unless it is extended thereto by a law of the Legislature of the Dominion."(2)

The most important thing about Section 6 (4) is that the rule of construction incorporated in the Statute of Westminster with the modifications made in it for the purposes of the re-enactment in The Status of the Union of South Africa Act, appeared in the Indian Independence Act of the Imperial Parliament. This Section, as regards its validity, is beyond question as it is enacted by the Imperial Parliament. It would aldo have been possible that this Section if left as it appeared in the Statute of Westminster could be altered in virtue of Section 6 (2) in any way the Legislatures of

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(2) 10 & 11 Geo. 6. C.30. Section 4.

India and Pakistan thought suitable for these countries. As explained already, Section 6 (2) bestowed on the Legislatures of the New Dominions powers to alter the Indian Independence Act itself. It was, therefore, immaterial whether Section 6 (4) was incorporated as it originally appeared in the Statute or with the modifications which were made in it for the purposes of the Status Act of the Union. In view of the fundamental change brought about with the insertion of the word "this" in Section 6 (2) of the Indian Independence Act, it was probably thought more appropriate to follow the wording of the Status Act rather than the Statute of Westminster in which case the Legislatures of the New Dominions would have taken steps soon after independence to amend the Act itself. This would have, certainly, added to the difficulties that the Eastern people encountered in understanding the complex nature of the Dominion Status. It was a wise gesture that the wording of the Status Act was adopted in Section 6 (4) of the Indian Independence Act.

It is evident that the Union of South Africa replaced the Statute of Westminster as far as the Union was concerned with the Status Act and thereby invited the Courts to follow a new line of construction. In other words, they were provided with a new theory not to look beyond the Union of South Africa. To borrow Latham's expression - "the Courts were invited to assert a local root to South African law and jurisdiction in place of the Imperial one" - but they did not succeed in their objective. At least, in the view of some eminent writers, the theoretical basis of the Imperial Supremacy remained unaffected. It would have been possible to attain this objective if there appeared no conflict between the Sections 2 and 3 of the Status Act but as explained the Act became self-contradictory. It is quite a different thing to say that there is no difference between India and Pakistan on

the one side and South Africa on the other. From a practical point of view there is no difference between Canada and South Africa too. It is also true that the Courts in South Africa have adhered to the rule of construction provided in the Status Act, but it was at the same time open for the Courts to take a different line of argument and conclude that the Status Act was ultra vires. It is unnecessary for the purposes of comparison with the Indian Independence Act, to go into details and examine whether there existed any "bastion against parliamentary recklessness". But considering the question purely in the light of the above discussion, one can not help concluding that the Union Parliament has failed at least in theory to attain the objective of sovereign status through the procedure adopted for the purposes of enacting the Status Act. But no such limitations are implied in the Indian Independence Act. When Sections 6 (2) and 6 (4) are read together it becomes obvious that the Legislatures of the New Dominions have gained not only the Status bestowed upon the Dominions by the Statute of Westminster but also that which South Africa failed to attain through the re-enactment. What was doubtful in the case of South Africa is certain and definite in the case of India and Pakistan.

Comparing Section 6 (4) of the Indian Independence Act with its counterpart in the Ceylon Independence Act, especially in the light of the fact that "this" is included in Section 6 (2) of the Indian Independence Act whereas it does not appear in the First Schedule Section 1 of the Ceylon Act, it appears doubtful whether the Legislature of Ceylon has become, at least from a theoretical point of view, as much independent of the Imperial Parliament as the Legislature of the new Dominions. It appears more sound to hold that the Parliament of the United Kingdom has not lost its legal supremacy over the Legislature of Ceylon. This difference

becomes more significant when this question is considered from the standpoint of the Sovereignty of the Imperial Parliament.

There is an interesting question raised on the basis of the sovereignty of the Imperial Parliament. Has the Imperial Parliament accepted any limitations on its sovereignty? Has it abolished it altogether through the Statute of Westminster? If it has accepted any limitations or abolished it for the purposes of the Legislation for the Dominion in the future; was it right for a sovereign body like the Imperial Parliament to do this? On the strength of the well established theory of the sovereignty of the Parliament that has been accepted by the Courts of the United Kingdom and all the Dominions such a gesture as to bind the Imperial Parliaments sovereign action in the future according to the terms of Section 4 of the Statute would be negation of the very theory. It was, therefore, held that Section 4 of the Statute was a rule of construction directed to the Courts but not to the Imperial Parliament.(1) To put it another way, the Imperial Parliament by enacting Section 4 of the Statute of Westminster, did not in strict law, diminish or abolish its power to legislate for the Dominions. The Imperial Parliament, in strict law, in the future could pass an Act with disregard to the procedure laid down in Section 4 or that declared in the third paragraph of the Preamble, that is without declaring that the request and consent of the Dominion Parliament has been obtained. This Act, if in sufficiently express terms, indicates that it should apply to a Dominion in spite of its being repugnant to any lawof the Dominion, the Act of the Imperial Parliament would be accepted to be prevailing over that of the Dominions and thus would amount to repeal "pro tanto" of Section 4 of the Statute of Westminster.

(1) Wheare op.cit. p. 153.

"On this accepted theory of the sovereignty of the United Kingdom Parliament, no law it makes can deprive it of supremacy over that law."(1) "It was argued in the Irish Parliament that the fact that the Imperial Parliament can remove restrictions implies that it can at will re-impose them."(2) This theory was accepted by the Judicial Committee in the British Coal Corporation case. Lord Sankey observed: "It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired; indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard Section 4 of the Statute."(3)

The Courts have certainly accepted the theory as a legal doctrine and "it is in itself a result of the alliance between 17th Century Common lawyers and Parliament"; and there is no Statute to cite as its source. It however, can not be denied that there do exist controversies(4) within the Empire as regards the right of the Imperial Parliament to legislate for the Colonies. The American Revolution, in substance, was the result of the assertion of the sovereignty of the Imperial Parliament in the Colonies, and equally emphatic had been its extension in Ireland, but in both cases the assertion was met with revolutions, indeed of some difference. In spite of these controversies there exists the legal doctrine and it was accepted in the Imperial Conferences. The fact that measures to remove these restrictions were recommended by these Conferences, implied that the sovereignty of the Imperial Parliament was recognised by the parties. The Resolutions of the Conference to this effect makes it all the more emphatic.

(1) Wheare op.cit. 154. Cf.Keith: The Constitutional Law of the Dominions op.cit. p.38-9.
(2) Keith: loc.cit. p.38.
(3) (1935) A.C.p.520.
(4) Schuyler: Parliament and the British Empire, wherein he discusses the American and Irish points of view.

The British sovereignty over the possessions of the East India Company was formally declared in 1813, but as already observed the scope of its operation was left indefinite.(1) When the Parliament enacted in 1858 for the direct administration of India under the Crown thereby putting an end to the Government of the Company, it did nothing more than replace the Company's administration with that of the Secretary of India who also happened to be a member of the Cabinet. This did not amount to annexation in the strict sense of the word. On the other hand it is obvious that the international personality of India, as it existed after the disappearance of the Moghul Emperor, under the East India Company, was allowed to continue. The evidence of continuity of India's international personality was recognised by other sovereign States when India joined the Universal Postal Union in 1876.(2) The procedure of admission was exactly the same as for sovereign States. This instance is all the more important because a common representative signed the Convention of 1878 both for Great Britain and Canada whereas a separate representative signed for India.(3) Would it be far wrong to conclude that India possessed complete international personality which of course was a continuity of its personality under the Company when the Company itself was recognised both in India and in Great Britain as sovereign in its own right, while the international personality of the senior Dominion Canada was still incomplete. India's admission, therefore, to the League of Nations was nothing more than a further step towards accepting what in fact existed.

It may also be recalled here that the direct administration of India in the name of the Crown, in substance was based on the theory of trust propounded by Burke in his

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(1) See Chapter on "Sanctions behind British Sovereignty in India."
(2) See Chapter on "The Evolution of Self-determination"
(3) Ibidem. Cf. Stewart R.B. Treaty Relations of the British Commonwealth. p. 117.
(4) See Chapter on British Sovereignty.

famous speeches.(1) Under such circumstances it can not be said that the sovereignty of the Imperial Parliament over India was of the kind that existed over the Colonies. The fact that the East India Company, a British subject, was recognised by the British Government as a sovereign in India set the relations of the Company on a different footing than would have otherwise been the case. The Raja of Sarawak, Sir James Brooke, both a servant and a subject of the British Crown, was placed on the equal footing of a sovereign, thereby establishing diplomatic relations and demanding compensations for the damage caused to one of the ships of the Sarawak Government.(2) The position of the East India Company was slightly different in the fact that the British Parliament had set up a Committee to exercise a sort of check, but nonetheless the identity of the Company was distinct. The proclamation of sovereignty in 1813 was made without any previous declaration to this effect; but still did not go beyond declaration. The administration of the Country and the exercise of sovereignty remained within the jurisdiction of the Company.

The British Government was bound in good faith to guarantee the performance of the obligations of Trust placed in the Company by the Moghul Emperor because they allowed their subject, the East India Company, to accept the office of Vakil-ul-Mutlaq. The fact that the Company on the Enquiry was found guilty of maladministration aswell as breach of trust, under these circumstances, forced the British Government and Parliament to assume direct administration. The arrangements made for the administration of India, in substance, were analogous to those made for the administration of the mandated territories. The administration arrangements made "for the time being" can not justifiably be continued for ever. These arrangements had to come to an end as was the

(1) See Chapter on British Soversignty.
(2) See details: McNair; Aspects of State Sovereignty, British Year Book of Inter. Law.

administration of Palestine terminated. The theory of the sovereignty of the Imperial Parliament does not, therefore, apply to India; in the first place India has nerver been a Colony hence no theory applicable to them is equally sound for India, and in the second place, the Indian Independence Act in spirit is more analogous in this respect to the termination of the administration of the mandated countries. While India was under the administration of the Crown, the sovereignty, in its executive aspect, was exercised in the name of the Crown so it belonged to it, but there was one condition, that is; the sovereignty belonged to the Crown only in its executive aspect while the creative sovereignty was with the people; maybe that this remained under suspense. The controversy over sovereignty over the mandated area is in international law, as much controversial as is the question of ownership of trust in private law. Whatever be the controversial aspects of this question, the premis is sound at least in equity if not in strict law.

The theory of the sovereignty of the Imperial Parliament, therefore, was not a bar, for the transfer of sovereignty over India to the natural heirs with whom the creative sovereignty remained in suspense. The question that the Imperial Parliament can not bind itself by any Act for the future not to enact for the Dominions without regard to Section 4, does not arise in the case of India. The Indian Independence Act is, in this sense, a conveyance of sovereignty.

It may be recalled that the Indian Independence Act is nothing more than a mere legal expression of the agreements reached by the three parties, namely, The Congress, The Muslim League and the British Government. It was announced more than once during the debates on the Indian Independence Bill that the changes in the draft of the Bill were made in accordance with the agreement with the Indian parties or on

the suggestion of the Partition Council, which, as has been seen in the preceding chapters, was a representative body acting on behalf of the Congress and the Muslim League to take final decision on the issues involved in the partition of the country, its assets, etc. At least one amendment was, in fact, made by the Government entirely on the suggestion of the Partition Council.

It will be argued that the Indian Independence Act does not say that the Parliament of the United Kingdom has abolished its power to legislate for India and Pakistan. It, on the other hand, definitely speaks of legislating for India and Pakistan and lays down a rule of construction that the Acts thus enacted by the Imperial Parliament can be extended to the new Dominion by the Acts of the legislatures of the new Dominions and as such the provision made in Section 6 (4) is nothing more than a mere rule of construction. This being a rule of construction, can not be said to be directed to the Imperial Parliament but is rather directed to the Courts of the new Dominion.

The first and most important point that need be mentioned in this context is that the Imperial Resolutions had admitted the legal supremacy of the sovereignty of the Imperial Parliament, All Dominions were committed to the theory of the sovereignty of the Imperial Parliament and its implications, not only in virtue of the theory but also conventionally / because they as sovereign States recognised it in the resolutions. The matter was not left to the resolutions only which owed its existence to the consensus of the parties but some of them were incorporated in the preamble of the Statute. Keith went to the extent of saying that the Preamble to the Statute has the effect of rendering secession of the Dominions from the Commonwealth conventionally impossible.(1)

(1) Keith: The King and the Imperial Crown. p.449.

In the words of Wheare, India was neither the India which was admitted to these Conferences nor the resolutions of the Imperial Conferences were intended to extend to India. It followe, therefore, that India and Pakistan are not committed to the resolutions.(1) Further, there is no Preamble attached to the Indian Independence Act which sets forth the resolutions or other conventions. The Statute of Westminster in the third paragraph declares the resolution that no Act of the Imperial Parliament would be deemed to extend to the Dominions unless declared therein that the Act was enacted on the request and with the consent of the Dominions. The same declaration appears in the body of the Statute thereby providing a rule of construction. It is obvious that there are no such considerations attached to Section 6 (4). There is no reference whatsoever in the Act either to the Statute of Westminster or the Conferences. Nor there is any contractual binding as is found in the case of Ceylon which has accepted all resolutions and conventions by a separate agreement.(2) Now the fact that no where in the Act is said in express terms or suggested in any other way that the Imperial Parliament shall not or can not enact for the new Dominions must be considered from a different and an independent angle. India and Pakistan became Dominions and continued to be Dominions until they decided otherwise. The fact that there were certain laws common to all the members of the Commonwealth, such as the law of nationality made it imperative that the Parliament of the United Kingdom, of course not as the Imperial Parliament, should take the initiative in the field of the common legislation. The advantages of such provisions will be discussed in detail in the subsequent chapter; however, it may be remarked that

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(1) Wheare holds that India and Pakistan being Dominions, it would be reasonable to assume that they are bound by the resolutions.

(2) cmd.

the Indian Independence Act has suggested a new line of approach towards the Commonwealth. Section 4 is the rule of construction for Section 6 (2) of the Act. This Section as seen already has bestowed on the legislatures of India and Pakistan all that was conferred on the Dominions by the Statute plus all that South Africa would have gained by the re-enactment, had there been no doubts as regards its validity, and also all that India or Pakistan would like to attain through some amendment or repeal. For example, the abolition of oath of allegiance for the purposes of municipal law, and the abolition of the reference to the King in the assent of the Governor-General to the Bills, were matters which in fact have made some substantial difference within the sphere of the Commonwealth.

The difference lies in the fact that India and Pakistan in virtue of the Independence Act were able to accomplish all that the Irish Free State did through revolutionary measures; at least in the Irish view, or South Africa by adopting a divergent line of approach. As in Section 6 (2) powers to amend or repeal the Act itself were conferred, and in Section 6 (4) wording of the Status Act was adopted without, of course, the problems of conflict in Sections 2 and 3 of the Status Act, all this was possible without disturbing law. The significant changes that were brought about in these two new Dominions while remaining within the legal orbit, when compared with other Dominions which still have status quo or have gone out of the relationship, make the difference more appreciable.

The difference further lies in the fact that the transfer of sovereignty to India and Pakistan has been effected in strictly express terms and unreservedly hence there is no need to call in the conventions for the support to establish equality of the Dominions vis-a-vis the United Kingdom.

IX.

The Statute of Westminster conferred powers on the Parliaments of the Dominions to make laws having extra-territorial operation.(1) The Parliament of Canada passed the Extra-territorial Act in 1933.(2) The purpose of this Act was to remove doubts that were raised in the case of Croft v. Dunphy.(3) The Judicial Committee had to decide, in this case, "whether or not certain Canadian legislation passed before the commencement of the Statute of Westminster had extra-territorial operation." Their Lordships held that the legislation passed by the Parliament had extra-territorial effect, but their decision was based on the British North America Act and therefore did not consider it necessary to decide whether the Section 3 of the Statute was retrospective in effect or not. It is obvious from the decision in this case that the considerations of a sovereign State were given weight and the decision was based on this principle only.

As regards India, it has been discussed at some length,(4) that the Federal Court of India in the cases of (1) Governor-General in Council v. Raleigh Investment Co. Ltd. and (2) Wallace Bros. & Co.Ltd. v. Commissioners of Income Tax, declared "obiter" that "though the Statute of Westminster is not applicable to India, the Constitution Act of 1935 had to be interpreted in the light of the discussions on the subject that had been taking place between 1926 and 1935, and therefore the powers of the Federal Legislature of India was not limited to the cases specified in clauses (a) to (b) of Subsection E.1. of Section 99.(5) of the Government of India Act, 1935."

(1) Section 3.
(2) Cap. 39 of 1932-3.
(3) (1933) A.C. 156.
(4) See Chapter on "The Title and the Scope of the Act."
(5) Ibid.

Observations of the Court in these cases though "obiter" were justified on the principles of international considerations on which the case of Croft v. Dunphy was decided. India acted as an international person even before Canada did. The reference to India's admission to the universal postal union has been made already.

The Indian Independence Act, in Section 6 (1), confers powers on the Legislatures of the new Dominions to make laws having extra-territorial operation. It runs: "The Legislature of each of the new Dominions shall have power to make laws for that Dominion, including laws having extra-territorial operation." There is a slight difference in the wording of this Section when compared with its counter-part in the Statute but it is of no significance. The Indian Independence Act sets the declaration of the Federal Court in the above cited cases on a legal basis, as was done by the Statute. The Legislatures of India and Pakistan acquired power in legal terms under this Section to make laws having extra-territorial operation.

In Section 6 (6) it has further been clarified that "the power referred to in Sub-Section (1) of this Section extends to the making of laws limiting for the future the powers of the Legislature of the Dominion." On this point Wheare[1] raises, indeed, a very interesting question: How can a sovereign Parliament bind itself? The Attorney-General, replying to a question raised on this sub-Section, said that "the position in regard to sub-Section (6) was that it would be open to the Legislature to provide for a Federal Court of Constitution under which the powers of the different Legislatures are limited; certain subjects being assigned to the one and certain subjects to the other.

(1) Wheare: Constitutional Changes in the Commonwealth, op.cit.

If it did that, it would need to make provision that the powers of the particular provincial Legislatures should be limited. That is the object of the Sub-Section."(1) The wording of the Sub-Section (6) being in general terms, appears to be rather misleading and one is lead to conclude that the Legislatures of the Dominions will have powers to bind themselves in respect of laws having extra-territorial operation. The Sub-Section states "that the power referred to in Sub-Section (1) (that is of making laws having extra-territorial operation) of this Section extends to the making of laws limiting for the future the powers of the Legislature of the Dominion." But why this limitation was necessary and in respect to what particular subject? Is it owing to the fact that Indian Constitution happened to be federal and the subjects allotted to the provincial Legislatures included certain subjects that involved extra-territorial questions? It is doubtful if this Section was necessary at all. The Legislatures of the new Dominions were rendered sovereign in every respect in virtue of Sections 6 (2) and 6 (4) and further clarification was made in respect of law of extra-territorial effect. The new Dominions assumed powers, constituent powers, both for the transition period as well as for a permanent Constitution. There was no need of clarification on this point. The new Dominions acquired every power to make and adopt Constututions for the Countries hence it implied every power of sovereign character. In view of these considerations it may be construed that the effect of Section 6 (6) is nothing more than making powers of the Legislatures, which were both express and implied in other Sections, further emphatic. It must however be admitted that the wording is rather misleading. The intention of this Sub-Section as explained by the Attorney General was to make provisions to bestow powers for the transition period

(1) Hansard: op.cit. Cols.82-3.

to make change in the subjects distributed between the Centre and the Provinces.

The Government of India Act,1935 had certain provisions entitling the Governor-General and the Governors of the Provinces to use their discretionary powers, but as a matter of convention they used these powers rarely and reluctantly. After India and Pakistan assumed Dominion status, "de facto" these provisions became obsolete, but it was necessary to abolish them altogether. In the Section 6 (3) it is declared: "The Governor-General of the new Dominions shall have full power to assent in His Majesty's name to any law of the Legislature of that Dominion and so much of any Act as relates to the disallowance of laws by His Majesty or the reservation of laws for the significance of laws by His Majesty's pleasure thereon or the suspension of the operation of laws until the signification of His Majesty's pleasure thereon, shall not apply to laws of the Legislature of either of the new Dominions." It may be noted here that the Statute of Westminster did not make a complete repeal. It is true that the Dominion Parliaments were given powers to effect such a repeal; but in the case of India and Pakisatn, as appears from the above cited Sub-Section, it was considered undesirable to continue the status quo. The repeal in this respect for India and Pakistan is complete and exhaustive.

It was reported that a very interesting case came before some Court of Pakistan.(1) In that case the question was raised whether or not the Act which the Governor-General of Pakistan assented to without signifying that he was doing so in the name of His Majesty, was valid. The Court is said to have held that such Act was invalid. In view of this decision the provision to this effect was abolished, or

(1) The writer tried his level best to secure details of the case but could not. They are yet awaited. This contention holds good even if the case is considered as a hypothetical one.

in other words, the Indian Independence Act was amended to that extent. This evidently establishes that the Governor-General's dependence on the advice of his minister is entirely like that of a Constitutional monarch. Even the reference to the King has become unnecessary and thereby the King seems to have disappeared altogether from the municipal law of Pakistan. The powers of discretion, of disallowance and of reservation altogether disappeared. The Statute of Westminster did not repeal them to this extent. Ceylon again in this respect is analogous to other Dominions.

The provision for the Instruments of Instruction to the Governor General or the Governor of provinces was repealed in Section 18 (4). The Governor-General of the new Dominions and the Governors of the provinces of the new Dominions were required to act entirely on the advice of their ministers and there were no Instruments of Instruction to guide them in their conduct.

X.

In the Irish Free State, the authority for Constituent powers was claimed to be derived from the people. This view was expressed in the Ryan case[1] by the Judges of the Supreme Court of the Irish Free State. According to this view the authority for the constituent powers exercised by the third Dail as Constituent Assembly were derived from the people and also exercised in their name. The British view expressed in Moore's case[2] was that the Irish Free State Parliament acquired powers to enact laws repugnant to the terms of the Treaty in virtue of the Statute of Westminster. The people were not

(1) (1931) I.R,P. 170. (The State v. Ryan) and others v. Lennon and others.)

(2) Supra.

recognised to possess supreme legal authority to amend or abolish the Constitution or the Constituent Act. But after the enactment of the Statute, the Oireachtas acquired full power to amend or repeal the Constitution even if it was repugnant to the terms of the Treaty. In their Lordships' view the authority came from the Statute and thus from the Imperial Parliament. When the Irish Free State enactted the new Constitution in 1937, it was approved in a referendum by the electorate,

Before the Indian Independence Act was enacted, the Constituent Assembly was set up in 1946 in accordance with the Cabinet[1] Mission plan. The Constituent Assembly then in view of the difference existing between the Congress and the Muslim League on the interpretation of paragraph 19 of the Cabinet Mission plan which obliged the British Government to give their ruling in accordance with the legal opinion of the authors of the plan in favour of the view held by the Muslim League, was divided into two parts: one for India and the other for Pakistan.[2] The Constituent Assemblies of India and Pakistan thus formed were not sovereign bodies. Now it is proposed to examine the status of the Constituent Assembles under the Indian Independence Act.

The Prime Minister explaining the nature of the Act during the debates on the Bill at the time of the Second Reading observed: "It will be the object of my Right Hon. Friends and myself to give the House the fullest information and explanation in our power, but there will inevitably be some matters on which it will not be possible to answer with precision, for this Bill is unlike other Bills dealing with India. It does not lay down, as in the 1935 Act, a new Constitution for India, providing for every detail. It is far more in the nature of

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(1) See Chapter on "The Assertion of Self-Determination."
(2) Ibidem.

an enabling Bill - a Bill to enable the representatives of India and Pakistan to frame their own Constitutions, and to provide for the exceedingly difficult period of transition. Ever since the Cripps' Mission it has been the desire of successive Governments that the future Constitution of India should be framed by Indians and not by the British.(1) This clearly signifies that the purpose of the Indian Independence Bill "inter alia" was to give the legal force to the Constituent Assemblies of India and Pakistan set up under the Cabinet Mission Plan. The Indian Independence Act in Section 19 (3) defines the Constituent Assemblies of the new Dominions. This Section as is evident from its wording, was drafted as such so as to suit any situation resulting from the referendum in the North-West Province and that of Assam as well as the decision in respect of the partition of the provinces of Bengal and the Punjab. Besides this, there is nothing in this Section about the powers of the Constituent Assemblies. It deals only with their definition.

Section 8 (1) runs as follows: "In the case of each of the new Dominions, the Powers of the Legislature of the Dominion shall, for the purpose of making provision as to the Constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of that Dominion, and references in this Act to the Legislature of the Dominion shall be construed accordingly."

Sub-section (2) of this Section makes further clarification in this way: "Except in so far as other provision is made or in accordance with a law made by the Constituent Assembly of the Dominion under Sub-Section (1) of this Section, each of the new Dominions and all the Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935; and the

(1) Hansard. op.cit. Col. 2473.

provisions of that Act, and of the orders in Council, rules and other instruments made thereunder, shall, so far as applicable and subject to any express provision of this Act, and with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor-General under the next succeeding Section, have effect accordingly"; or again Sub-Section 2 (e) of this Section makes provisions that "the powers of the Federal Legislature under the Act of 1935, in the first instance, shall be exercisable by Constituent Assembly of the Dominion in addition to the Powers exercisable by that Assembly under Sub-Section (1) of this Section."

It is obvious from these provisions that the Constituent Assemblies of the new Dominions were the creation of the Imperial Parliament. It is also quite evident that the Constituent Assemblies of the Dominions derived their legal force from the Indian Independence Act. The point of interest in the light of the above cited Sections of the Act, is to fix the source of authority for the Constituent Assemblies of India and Pakistan and also of the procedure of adopting the Constitutions framed by them. To put it in another way, it is desired here to enquire whether or not the Constituent Assemblies were sovereign in the strict sense of the term to frame as well as to adopt Constitutions for the new Dominions. Then there is another point closely connected with the first one. The Judicial Committee never said that the Oireachtas could not adopt a Constitution repugnant to the terms of the Treaty. Their Lordships held that the Oireachtas had powers to amend or repeal the Constitution repugnant to the terms of the Treaty but such powers were derived from the Statute. What is the position of the Constituent Assemblies of India and Pakistan? Are they fully sovereign both in regard to framing as well as adopting Constitutions for the new Dominions. If so, what isthe source

of their sovereignty? Will they be entitled to adopt the Constitutions relying on the authority of the people instead of the Indian Independence Act?

It may here be clarified that there is nothing to prevent India or Pakistan to take any step within or without the scope of their legal competence and Britain would not interfere even if they transgressed the boundaries of law. This was equally true of the Irish Free State. The point under consideration is whether or not, within the scope of the legal competence, that is, without transgressing or disturbing law, or in other words without creating revolution in law, the Constituent Assemblies of India and Pakistan could adopt the Constitutions of India or Pakistan in the name of the people thereby asserting the supreme authority of the people. India has in fact done this.

The Powers of the Legislatures of the Dominions for the purposes of making provisions as to the Constitution shall be exercisable by the Constituent Assemblies of the Dominions. The Constituent Assemblies were given all the powers for the purposes of making Constitutions that were conferred on the Legislatures of the Dominions in virtue of the other Sections already discussed in the above paragraphs. The Constituent Assemblies, therefore, were as much sovereign as the Legislatures of the Dominions for making laws for the Dominions. The Legislatures as seen already were empowered to amend or repeal the Indian Independence Act itself. It follows from this that the Constituent Assemblies of the Dominions will have, for the purposes of making provisions as to the Constitution of the Dominions, powers to repeal or amend the Indian Independence Act itself if it became necessary. This would be entirely within the legal competence of the Constituent Assemblies to amend or repeal the Indian Independence

Act; and as such became the sovereign bodies of the Dominions. There was nothing fettering their action as sovereign bodies. On the other hand, if any Act of the Imperial Parliament becomes repugnant to Acts passed by the Constituent Assemblies or the Legislatures of the Dominion, they are repealed "pro tanto". They had, thus, powers not only to frame their Constitutions but also to adopt them. It appears questionable what the words "for the purpose of making provision as to the Constitution" purport. The Constituent Assemblies as such also had powers to lay down the procedure which the Indian and Pakistan Constituent Assemblies have done through the Objective Resolutions.

Section 6 (3) asserts that the Governor-General of the new Dominions shall have power to assent in His Majesty's name to any law of the Legislature of that Dominion and as a result of this all powers relating to disallowance of discretion and of reservation were abolished. Section 6 (5) abolished the authority of the United Kingdom Government and further in corroboration of this Section 8 (2) (b),(c),(d) brings to an end all the arrangements on these points.

The Governor-General thus was rendered bound to give assent to any Bills presented to him in the name of His Majesty. But the Constituent Assemblies in virtue of Section 8 were empowered to make provisions as to the Constitutions of the Dominions and were free to adopt their own procedures. In other words these bodies were sovereign even to the extent of providing for their own procedure. They preferred to have a President for each of them and thus they came out of the purview of the Indian Independence Act and as a result of that they could adopt the Constitution in whatever way they liked. The Constitution of India was declared: "We, the people of India, having solemnly resolved to Constitute India into a Sovereign Democratic Republic and to secure to all its citizens:

Justice, social, economic and political;

Liberty of thought, expression, belief, faith and worship;

Equality of status and of opportunity;

and to promote among them all

Fraternity, assuring the dignity of the individual and the unity of the Nation;

in our Constituent Assembly this twenty sixth day of November, Nineteen hundred and Forty nine, do hereby adopt enact and give to ourselves this Constitution."

This Constitution came into force with the repeals of the Indian Independence Act, 1947.

The Constitution of India came into existence under the authority of the Constituent Assembly of India which certainly owed its origin to the Indian Independence Act, but adopted the Constitution under the authority exercised by it in the name of the people. The authority of the people came in virtue of the repeal of the Indian Independence Act. This change came into being without any legal revolution or disturbing the law.

It may be argued that the Constituent Assemblies were representative of the peoples but not their creation. It follows from this argument that the Constituent Assemblies being the creation of the Independence Act, they can not derive authority from the people. Even in the case of the Irish Free State the theory of the people's sovereignty has been accepted by the British Courts. The Constitution was adopted by the people which was expressed at a referendum of the electorate. No such referendum was held in India. As explained already it was not necessary because the Independence Act was in fact as well as in law a deed of transfer of sovereignty and such transfer was not, in the case of India, inconsistent with the theory of the sovereignty of the Imperial Parliament, for the reasons already set forth.

The adoption of the Constitution by the Constituent Assembly may be criticised on the ground that it was not constituted on the basis of adult franchise and as such did not truly represent the people of India. This argument certainly has force but be it as it is, this is a political standpoint and has no bearing on the legal authority of the Constituent Assembly. It may be a strong political slogan for the political party opposing the ideals on which the Constitution is based but does not change the legal position.

Could the Constituent Assemblies adopt Constitutions repugnant to the term Dominion, without affecting its membership of the Commonwealth? This undoubtedly was not possible without evolving a formula to this effect. A formula was adopted for India. This will be discussed in the subsequent chapter.

XI.

It is proposed next to examine the question of secession and neutrality of the new Dominions under the Independence Act. "The Statute of Westminster" observed Latham, "standing alone, was open to a construction which makes secession legal but it could not be contended that it unequivocally did so."(1) Wheare, discussing the legal status of the Irish Free State, at least in one view, concludes that any enactment of the Oireachtas to abolish monarchy, or to provide for secession from the Commonwealth or to declare neutrality, would in strict law be valid."(2)

To take the question of secession first: the fact that the Indian Independence Act has conferred powers on the

(1) Latham: op.cit. p. 529.

(2) Wheare: op.cit. p. 270.

new Dominions in more explicit terms, establish it beyond doubt that any enactment by the Legislatures of the new Dominions would be, in strict law, valid. India and Pakistan are at liberty to go out of the Commonwealth any time they think fit.

Keith holds that the Conventions declared in the Preamble of the Statute has the effect of rendering secession Conventionally impossible.(1) It is needless to say that, first, there is no legal force in the Preamble as it does not form an integral part of the Act. When the Statute is in clear and non-ambiguous terms, the Preamble can not control or extend(2) it. The Preamble is a declaration of objects, or in the words of Latham,"is a declaration of Convention. But since such declaration derives any force it has from the consensus of the Parties. It is notorious that two(3) at least of the Dominions who in 1930 consented to the draft of this Preamble, did not regard it as establishing a Convention prohibiting secession and would not have consented to it in that sense."(4) India and Pakistan are not committed to them at all.

The same holds good in respect of neutrality. Neutrality and war being the questions of international law should not be made dependent on the considerations of municipal law. The Dominions ever since they became international persons, had the right of declaring war or remaining neutral as they thought fit. Any fetter in municipal law on their neutrality could not be a bar to neutrality, which in international law, is an attribute of sovereignty. There can be no perfect international person without possessing the attributes of sovereignty like those of declaring war and peace. There are other considerations(5) which can be called in for the

(1) Keith: The King and the Imperial Crown (1935). p.449.
(2) Badri Rasad v. Ram Narain Singh, A.I.R.1939. 157.
(3) South Africa and Irish Free State. Cf.Latham. op.cit.
(4) Ibidem.
(5) Schlosberg: op.cit.pp.45-50.

support of this argument but suffice it to state that Eire was legally quite justified in remaining neutral while the whole Commonwealth was at war; especially so in view of the theory of the divisibility of the Crown.

The Statute of Westminster was not only the result of the Conventions established through the resolutions of the Imperial Conferences but also contains some of these Conventions incorporated in its Preamble. There is no Preamble attached to the Indian Independence Act. It was suggested, during the debates on the Bill, that the Bill should have had a Preamble. Now the question arises whether or not the Conventions are binding on India and Pakistan. The Ceylon Independence Act has no Preamble but through a separate Agreement entered into with the United Kingdom, it has been agreed that Ceylon will abide by all the Conventions or non-legal rules that govern the relationship of the Commonwealth. Wheare holds that in spite of the fact that India and Pakistan are new States and even pre-partition India though a member of the Imperial Conferences was not committed to them as they were mainly resolved for the Dominions, it would nevertheless be "reasonable to assume that since India and Pakistan have accepted the status of self-governing members of the Commonwealth, these rights do in fact apply to them."(1) During the debates on the Bill, the Prime Minister replied to a question whether or not the Conventions applied to the new Dominions observed: "We are dealing here with a particular status not with agreements made by those enjoying that status. Whether the new Dominions accede to these agreements would be a matter for their consideration."(2)

The legal force of these conventions is in the consensus of the parties. Though India and Pakistan attained

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(1) Wheare: Constitutional Changes. op.cit.

(2) Hansard: op.cit.

Dominion status de facto first, they were not committed to these resolutions by any express terms. It is therefore, left for the new Dominions to join them or not. India, in taking the complaints against Pakistan and South Africa, the other two members of the Commonwealth, to the Security Council, has already expressed the view that she is not committed to them. Whether it is desirable is another question. What is the residuum of the laws of the Commonwealth, and what part Conventions are likely to play in the future development of the Commonwealth, are points that may more conveniently be dealt with in the next Chapter,

The Indian Independence Act conferred on India and Pakistan Dominion status and thus the allegiance to the King of India and the King of Pakistan also was implied, but both Dominions have changed completely or partially the oath and thus the very basis of allegiance has changed. (1)

Both the Dominions soon after independence abolished the appeal to the Privy Council and both the Acts of abolishing the oath of allegiance and the appeal by special leave to the Privy Council were within the competence of the Legislatures of the new Dominions for the reasons discussed in the above paragraphs and no repetition is either necessary or desirable.

XII.

Now it seems proper to sum up the foregoing discussion and see what is the residuum of the laws of the Commonwealth if viewed from the standpoint of the Indian Independence Act. This will certainly help in evaluating the changing conception of Dominion Status, which is replacing the legal basis with that of the political one. It would not be far wrong to predict

(1) In Pakistan the new Governors of Provinces and other officers on taking office will take an oath to the Constitution, Law and Government of Pakistan. The Times, London, Sept.6th, 1951.

that the future of the Commonwealth, in view of the changes that have already taken place, and also those which will come in the future, depends on the true appreciation of the difference of the legal and political bases.

First, it has been established that a separate enactment for bestowing Dominion Status on India and Pakistan was necessary not only because India, not being a Colony, was outside the scope of the Colonial Laws Validity Act, which the Statute, inter alia, amended, but also because the Statute was not fit for India for the following reasons.

1. The term Dominion as defined in the Statute or Interpretation Act did not define the scope and status envisaged by it. The understanding of the legal and conventional status of the Dominions depends on the Statute and the Conventions embodied in the Resolutions of the Imperial Conference, some of which have been produced in the Preamble of the Statute, respectively.

2. The Statute alone did not succeed in its purpose of removing all inequalities existing between the United Kingdom on the one hand and the Dominion on the other. The inequalities existed in respect of:

... The Powers of the Parliaments of the Dominions vis-a-vis the Imperial Parliament. The theory of the Imperial Parliament created a great difficulty and an attempt to reconcile the theory with the objective of establishing legal equality was not successful and the Imperial Parliament was, in strict law, still capable of legislating for the Dominions. Therefore:

(a) The national sentiments in South Africa and in the Irish Free State prompted them to take a divergent view. South Africa re-enacted the

Statute of the Union of South Africa Act. The Irish Free State not only made some amendments in the Constitution and abolished the oath of allegiance, appeal to the Privy Council, the office of the Governor-General, but also adopted a republican Constitution approved by the people in a referendum. The theory of the people's sovereignty, however revolutionary in the realm of the Commonwealth law, was made the basis of the Constitution. But:

(b) The Union of South Africa, due to the conflict existing in Sections 2 and 3 of the Status Act, failed, in strict law, to attain the object of making the Union Parliament as sovereign as the Parliament of the United Kingdom, though the Courts of South Africa held that it became sovereign and omni-competent.

3. The powers of the Governor-General in respect of disallowance, of reservation and of discretion, were abolished entirely which was not done by the Statute though the Dominions acquired the powers to abolish them whenever they liked.

4. The Statute, owing to the above reasons, was not fit for India and Pakistan and what was needed was an enactment in definite and precise terms to transfer complete sovereignty including the right to amend or repeal the Act itself. This being doubtful in the Statute, the word "this" was included to make it more precise in Section 6 (2).

5. The rule of Construction in Section 4 of the Statute was dropped in favour of the wording of the Status of the Union Act.

6. As a result of the changes made in Section 6 (2) and (4) of the Statute, a complete sovereignty was conveyed to India and Pakistan. This was done by removing all the uncertainties and doubts expressed about the Statute or the Status of the Union Act.

7. The theory of the Imperial Parliament was not a bar to the transfer of sovereignty to the Legislature of India and Pakistan because the principle on which the administration was based was analogous to that of the mandate-territories.

8. India and Pakistan were given Constituent Assemblies. These Assemblies though the creation of the Imperial Parliament were free to derive the authority to adopt Constitutions from the people as they were given the right to repeal the Independence Act itself.

9. These rights also make cession and neutrality legally possible though the latter being a question of international law is assumed by a State as soon as it becomes an international person.

10. The Conventions are not binding on India and Pakistan unless they agree to accept them. The validity of the Conventions lies in the consensus of the parties.

11. The new Dominions also abolished the appeal to the Privy Council by special leave and also the oath of allegiance to the King, (with some difference) but without transgressing their powers or creating any controversies.

The new Dominions have thus obtained all through legal means what the other Dominions, in strict law, failed to attain within the legal sphere and at least one of them

took revolutionary measures thereby disturbing the legal basis.

As a result of the enactment of the Indian Independence Act, the Commonwealth has been rendered an association of freewill and its legal basis which was already disrupted as a result of various changes, has further been completely removed but has been replaced by a political system of partnership which will be discussed in the next Chapter.

THE NEW DOMINIONS AND THE FUTURE OF THE COMMONWEALTH OF NATIONS.

The discussion under the rubric "The Legal Status of the New Dominions" concluded with the assertion that the changes that were taking place within the Commonwealth as a result of the revolutionary tendencies of the Irish Free State on the one side and the British attitude to adjust these revolutionary steps with innovations on the other, were conceded in the case of India and Pakistan in explicit terms, thereby rendering the Legislatures and the Constituent Assemblies legally competent to define the nature of their membership of the Commonwealth. This was not an innovation in itself as all that was conceded in the Indian Independence Act, from the standpoint of the Commonwealth, had taken place in the case of the Irish Free State and, in a sense, in South Africa as well. What was effected by the Indian Independence Act was that the consent was expressed in explicit legal terms. There is no need to borrow any support from the Conventions in order to define the status of the new Dominions, either in legal or Constitutional terms. The Independence Act enabled the new Dominions to define this status in the terms and in the way they thought fit for their own purposes. The only difference, as compared with the Irish precedent, lies in the fact that Eire took all the steps creating revolution in law which were subsequently conceded by the members of the Commonwealth, thereby adjusting the revolutionary changes within the terms of the Commonwealth laws; the consent to all changes no matter how revolutionary, was given in advance in the case of India and Pakistan. It is the task of a future historian to judge the wisdom of such a daring step on the part of the United Kingdom and other members of the Commonwealth

but it may be stated that this step, however bold it may appear, when studied in the context of the Irish history vis-a-vis the Commonwealth of Nations, is quite in keeping with the characteristically British spirit of cautious compromise and is not without the foundation of precedent. It appears, as subsequent events have proved, that it was a wise step. Probably no one, and least of all Lloyd George himself, had realised in 1921 that the British Commonwealth of Nations with the Irish Free State included, had implicitly pledged themselves to the changing concept of the Commonwealth relationship. Every step taken by the Irish Nationalists was sooner or later, with or without conflict, followed by other Dominions. This may also be the future of the relationship that was made possible for the new Dominions. The new Dominions remained "Dominions" in the sense that they were prepared to give to the term, and were able to replace it with, some other relationship that suited their purposes. India has already evolved a formula through which the King has been recognised as the head of the Commonwealth and India has thus been able to continue her membership of the Commonwealth. Pakistan is still busy in solving some more delicate and complicated problems necessary for the enactment of a Constitution fit to serve a State with Islamic ideal as an end, and modernism as a means, and therefore would naturally take more time. And Pakistan too, may ultimately adopt the same formula or may find out some other.

It is very often queried, Why this complicated method of rendering the new Dominions fully sovereign and independent? Was there no other simple method of transferring sovereignty to India and Pakistan? These questions become all the more important since the term "Dominion" is applicable both to India and Pakistan on the one hand, and Ceylon on the other.

Again the term "Dominion" was used to define the status of the Dominions which were in some way or other dependent on the United Kingdom, and were subject to the theory of the sovereignty of the Imperial Parliament. Canada and Australia were, owing to the differences existing among the provinces on the question of constituent powers, obliged to leave these powers with the Imperial Parliament. This inequality certainly existed of their own accord but the fact of inequality remained. It would not be becoming of India and Pakistan to be defined by terms which implied such inequalities. The inequality in the case of Ceylon, in matters of defence and other constitutional conventions, though accepted by the Dominion willingly, is not without some political strings attached to it.

This raises the question whether any laws of the Commonwealth exist, and if the answer to this question is in the affirmative, what is their nature and whether they imply any subordination or binding which does not fit a Sovereign and Independent Republic? Then it is asked further: What is the need of the Commonwealth at all when an international organisation like U.N.O. is already in existence to serve the purposes of all nations of the world. In other words, what place can justifiably be accorded to a sub-caste system of the Commonwealth in an international community? Still forcibly is put the question: Why did Eire leave this relationship if it was of any worth? If it does not suit a neighbourly nation like the Irish, how could it be of any advantage to the Eastern people who are basically different from the Western nations of the Commonwealth?

These or other similar questions can not be answered without reference to two facts. -
First, how the British Empire was gradually and steadily

transformed into the Commonwealth of Nations. No study of historical details is called for but a brief reference to the underlying spirit of this transformation is necessary. Secondly, to assess if there exists any system of law that can be applied to the regulating of the intra-Commonwealth relationship. The fact that there existed a "sui-generis" system consisting both of legal and conventional rules makes this query all the more necessary. The future of the Commonwealth greatly depends on these two considerations and this will be discussed in the last part of this Chapter.

II.

The term "Empire" was used by Parliament long before any external territories came into English possession, to assert Henry VIII's claim that England, after throwing off Papal Supremacy, had become wholly independent of any foreign sovereignty(1) and in Keith's words "the attainment of overseas possessions added to her stature not to her status."(2) The expansion of English supremacy started with the Union, first, of England and Scotland and secondly, of the United Kingdom and Ireland. The Union which secured independent international sovereignty of the units was replaced by the sovereignty of a United Realm. The expansion of trade and new economic forces stimulated the British people to find new regions. The efforts of individuals were soon centralised and the British Government, willingly or unwillingly, took possession of these territories and provided for their government. There was no coherent plan, principle or system that was strictly adhered to in the management of these affairs. The Colonies, as they came to be

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(1) Keith: The Dominions as Sovereign States, p.3.

(2) Ibidem.

known in political terms, formed parts of the British Empire which in fact was declared in Henry VIII's reign.

The first struggle between the Imperial Parliament and the Colonizers resulted in the Declaration of American Independence in 1776. The final recognition of the independence of the thirteen Colonies was extended in 1782-3. British Statesmanship was either at its height and hence unmindful of new revolutionary forces or was still politically too immature to adjust itself to new patterns. The American revolution forced the British Government to review their Colonial policy. This reconsideration resulted in two changes. Lord Durham(1) in his famous report, on the one hand, advocated responsible government in internal affairs, and reservation of Foreign relations, trade and defence for the Imperial authority on the other. This report proved to be the key to Dominion Status. After some hesitation Durham's plan was adopted in Canada.(2) It worked well and provided a pattern for other Colonies, namely Australia, New Zealand and South Africa.

In earlier times emphasis was placed on the local self-government which was adopted as the solution of the tug-of-war between the Imperial authority and the Colonizers.(3) But the struggle did not stop at this point and soon after the Colonizers gained control over all internal matters, it broadened out to include the matter of control over foreign affairs. The self-governing Dominions were the product of the recognition of this demand. The first World War hastened the final phase of the long history of self-government and these Dominions emerged as new international entities. It is

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(1) Coupland, R.(ed.) Durham Report (1839).

(2) See for details of Canadian Nationalism: Neuendorff G. Studies in the Evolution of Dominion Status. London 1942.

(3) Dawson, R.M. The Development of Dominion Status (1900-1936) London 1937. p.1.

however difficult to summarize all the events which contributed to the establishment of National Sovereignty both in International and Municipal laws; and indeed without taking them into consideration it is difficult to understand the subtle differences that exist among the members of the Commonwealth in regard to their sentimental attachment and in regard to the nature of their nationalism, as well as the differences of a legal and constitutional nature, discussed at some length in the previous chapters. It would however, be suggestive of the cross-currents underlying the evolution of the Commonwealth to divide this historical development into seven periods, each denoting a certain phase of its development. Dawson(1) divides the history of the Commonwealth Dominions into five periods. They are:

I. The period before the war (1900-14), when the Dominions had achieved complete control over all domestic matters, and were beginning to make cautious advances beyond these boundaries.

II. The War and the Peace Treaty (1914-20). This period witnessed the outbreak of war and the resulting stimulus to nationalism in the Dominions, the creation of the Imperial War Cabinet, and the first assertion by the Dominions of their right to "an adequate voice" in foreign policy. It closed with the international recognition given to the Dominions by their admission to the Peace Conference and the League of Nations.

III. The period of tentative centralization (1920-2). This covers the two or three years following the Peace Treaty, when an attempt was made to perpetuate the Imperial Cabinet and to formulate and carry out a common foreign policy for the Empire.

IV. The Period of Decentralization (1922-6) extending from the Chanak incident of 1922 and including the Locarno Treaty in 1925. It is the most eventful and important period

(1) Dawson: op.cit. p.4.

of all; for it witnessed the breakdown of a common foreign policy and the abandonment of the diplomatic unity of the Empire.

V. The Period of Equal Status (1926 to 1936). The outstanding event in this period was the Report of the Imperial Conference of 1926, which gave formal recognition to the new conditions in the Empire. Subsequent constitutional developments have been, for the most part, merely elaborations or logical consequences of the principles enunciated in this report. "The enactment of the Statute of Westminster, 1931, gave legal force to some of the decisions already reached in the Imperial Conferences, 1926, 1930. This was followed by the Union of South Africa Status Act, and the Royal Executive Functions and Seals Act, and in the Irish Free State by the Constitution (Removal of Oath) Act, the Acts to abolish the appeal to the Privy Council and the Office of the Governor-General in 1936, and also the enactment of a new Constitution. The Abdication Act of Edward VIII also has considerable importance as it brought about some fundamental changes in the Commonwealth."(1)

But this classification will not be complete unless, in the light of recent developments, two further stages are shown. They are:

VI. The Second World War and the subsequent changes (1939-1948). This period is important owing to the outbreak of the Second World War and Eire's neutrality. This was the first time in British Imperial history that a Dominion remained neutral while not only the whole Commonwealth but most of the Democratic powers of the World had plunged into war. The second phase of this period started with the addition of the Eastern Dominions to the list of the members of the Commonwealth. This change was significant since for the first time alien, nay, non-European, nations were admitted to the community of

(1) Within inverted commas mine.

white people. Equally significant is the fact that a comparatively less important country, Burma, decided to leave the Commonwealth, whereas India and Pakistan preferred independence within the Commonwealth.

VII. The new Phase of the Commonwealth (1949 to the present time). The importance of this period lies in the fact that among the Eastern Dominions India was the first to evolve a formula to retain her membership of the Commonwealth, along with a Republican Constitution. Eire on the contrary, left the Commonwealth but retained arrangements to continue the reciprocal benefits of the British Nationality enactment. This event is of great importance because Eire though not a member, has still from the practical point of view, laid down a new line of approach for the possible changes that are likely to take place, and thus continues to act as if she were still a revolutionary and leading member of the Commonwealth.

If one asks what is the definition of Dominion Status, it may advantageously be pointed out that all the Countries which have passed or are still passing thr ough some of these stages are defined as enjoying Dominion status. This list is undoubtedly large enough even to include a country like Newfoundland which continued to be enumerated even after it surrendered Dominion status. It is true that after the Imperial Conferences of 1926 and 1930 and especially in the light of the Statute of Westminster, the term "Dominion" was better defined but not precisely enough. Jennings wrote: "It is indeed dangerous to make any generalization about this unique relationship without immediately adding a qualification, for Dominion status has not been cut to a pattern; it is a genus of which there were six species; and how many more there will be before this country expires only the future can tell. It is the expressed policy of His Majesty's

Government in the United Kingdom to bring the Colonies to Dominion status, but Government carefully refrained from saying what sort of Dominion status it will be. Those who have imbibed the British traditions know that it is unsafe to generalize, that a Dominion status that suits Canada will not suit South Africa; that which suits New Zealand will not satisfy Eire; it may be that no type can be devised to suit India and yet it may be possible to invent a relationship which meets the needs of Ceylon. A status of an entirely different kind may be necessary for the West Indies and Malaya, and even then there will be the problems of East and West Africa."(1)

It may be argued that this is the British standpoint and sounds characteristically diplomatic in order to tie the nations into a new sort of fetter thereby creating a "power block". For a country like India, membership of the Commonwealth would imply tolerance and acquiescence for the perpetuity of the Imperialistic regime. The Country which has emerged Independent after a long struggle should naturally be not only sympathetic but also helpful to the countries which are passing through the same process. Any participation of India in such group-activity will slow down the speed of progress in these countries.(2)

To take the first question as to whether or not membership of the Commonwealth lacking precise definition is fit for Countries like India and Pakistan; one can certainly argue forcibly that the vague terms are as advantageous for such countries as they are for Britain. If the terms are made precise, it is quite obvious that India and Pakistan will have to commit themselves to these terms; which neither of them would be prepared to do. As regards the second question, it may be stated that countries like India, Pakistan and Ceylon

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(1) Jennings: The British Commonwealth of Nations, 1948. pp.11-12.

(2) See The Debates on the Resolution regarding Ratification of the Commonwealth decision. Indian Constituent Debates: official report. Volume No.2. pp.1-72.

remaining in the Commonwealth would, on the other hand, be able to influence the progress of the Colonies and thus it is likely that the progress of these countries would be accelerated. Countries like India, Pakistan and Ceylon will also be able to put their weight into the balance against the extreme views expressed by Dr. Malan of South Africa.

Next to be considered is the question whether or not the Eastern Dominions will, because of their membership of the Commonwealth, necessarily be forced to join any particular "power block". It is obvious from the fact that the three Eastern Dominions did not take part in the Defence Conference of the Commonwealth that no such commitment is implied. It is entirely left to their own choice to decide whether or not it would be in the interests of their countries to take part in any discussions involving matters of defence and strategy. Ceylon had committed herself to the Conventions of the Commonwealth and also had entered a defence agreement with the United Kingdom. It was, probably, expected that Ceylon would certainly participate in this Conference but this expectation did not come true. It further clarifies the position that even a Dominion like Ceylon which had to a great extent agreed to ally herself with the Commonwealth, could, if considered desirable, have declined to adhere to her previous commitment. It may well be argued that the defence agreement was entered into between the United Kingdom and Ceylon and hence this did not necessarily make it obligatory on the part of Ceylon to join the Commonwealth Defence Conference. It needs hardly any clarification that the agreement, inter alia, extends the formal acceptance of the Commonwealth Conventions. It is, however, not obligatory for the very reason that Ceylon is at liberty, if the question is considered from a liberal view, to make modifications not only in the Independence Act but also, with due common consent, in the Agreement, too.

It may be questioned why the Agreement between the United Kingdom and Ceylon should be treated as applicable to the whole Commonwealth. Was the United Kingdom ever given the mandate to act on behalf of the Commonwealth? Does this not imply inequality, at least of function, if it is accepted that the Agreement under discussion is one between the members of the Commonwealth and Ceylon? There is certainly room to develop this argument further on both sides but it may be remembered that the Agreement between the Irish Free State and the United Kingdom was of such a nature, and therefore the Agreement between the United Kingdom and Ceylon is not the first of its kind.

It goes without saying that the new Dominions are at liberty to leave the Commonwealth at any time they think suitable for such action. Not only are the terms defining the relationship given meaning in accordance with the Constitutions national sentiments and aspirations, and above all other military and strategic considerations, but also the decision to leave the Commonwealth is entirely in their own hands. This post-dated document, as it is indeed, is placed in the hands of the members of the Commonwealth to use any time they consider it necessary. In short, neither are the new Dominions committed to anything which goes against the interests of these countries, nor is their liberty fettered in any way so as to render their severance from the Commonwealth difficult.

The underlying spirit of the development of Dominion status can be understood only from the angle of the gradual devolution of authority. Much can be written on both sides of the question whether or not the principle of the gradual devolution should be adhered to in the changed circumstances; but nonetheless one is able to appreciate the spirit of Dominion status only from this point of view. India, though

not a Colony and in more than one sense a sui generis case even in the British Commonwealth, still was treated on the model of the Colonies. Gokale probably was the first to think of Indian independence in terms of Dominion status. The Congress had lately pledged itself to the plan of complete independence but at the time when powers were transferred it was adopted as a temporary measure. As has been seen in the previous Chapter India, both in fact as well as in law, obtained all that any other foreign sovereign State has; but still preferred to remain a member of the Commonwealth even after adopting the republican constitution. In the case of India and Pakistan, it must be asserted, Dominion status and membership of the Commonwealth have been "Independence plus". It is, therefore, desirable to examine whether the independence of India and Pakistan is "plus" from the national point of view as well. In other words, it is proposed to examine the nature of the laws and conventions of the Commonwealth.

III.

Discussing the fundamental laws and the conventions of the Commonwealth Latham observed: "Imperial fundamental law is, however, not the only or even the chief element in the rules which govern the Commonwealth Association. The basis of the modern Commonwealth relationship is equality but the intractable sustenianism of British legal theory makes it incapable of recognising a relationship which is fundamentally equalitarian. Imperial fundamental law..... is fundamental for the Dominions but not for the United Kingdom since the United Kingdom Parliament, the ordinary legislature of Great Britain, may in law repeal any part

of it at pleasure. To redress this inequality that body of doctrine which is called Commonwealth Convention has been called in."(1) Again he divides these Conventions into two categories distinct from one another - first, those that are concerned with redressing inequalities of law and secondly, those not concerned with redressing inequality of law, and they are unalterable except by the common consent of the members of the Commonwealth and "may properly be described as fundamental to the Commonwealth Association." The Conventions of the first category operate in two ways: "by hindering the United Kingdom from altering certain rules which are essential to the Commonwealth, and by facilitating the alteration at the instance of the laws of the Dominions which though not essential to the Commonwealth, have still fundamental status.

A typical Convention of the first type is the limitation of the supremacy of the Imperial Parliament by the recital in the Statute of Westminster that no law could be altered without the consent and request of the Dominion concerned, and a typical Convention of the second type is that which obliged the Imperial Parliament to make any amendment in the British North America Act which is requested by the Dominion of Canada and all the Provinces."(2) It hardly needs any emphasis that there exist laws governing the relations of Australia with the United Kingdom so long as the Imperial Parliament is vested with powers to amend the Constitution in virtue of the provision to this effect made in the Statute of Westminster. The Commonwealth of Australia being a member of the Commonwealth, all laws governing its relations with the United Kingdom form part of the law of the Commonwealth; but it can not be treated as fundamental or essential law. This inequality has already been removed.

(1) Latham: op.cit. pp.77-8.

(2) Ibidem.

in the case of New Zealand and Canada.(1)

If the theory of the sovereignty of the Imperial however, is accepted, there still remains in strict law the supreme legal authority exercisable by Parliament in respect of all old Dominions. Is this supreme legal authority originating in the theory of sovereignty of the Imperial Parliament, applicable to all the members? Is such a law fundamental and supreme because it provides a basis for the membership of the Commonwealth? The answer, keeping aside the Indian Independence Act, indeed is in the affirmative. The Statute of Westminster when considered purely from the legal standpoint does not cause any disruption in this relationship; but if the theories asserted by South Africa and the Irish Free State thereby providing local bases or roots for the laws of the Dominions instead of that of the Imperial Parliament, be accepted, the disruption has already come in and there remains no fundamental law of the Commonwealth at all! Latham, summing up this question, asserts: "In short, the weakening of Imperial fundamental law by the Statute of Westminster and by the assertion of local roots for Dominion systems of law has had the effect in unitary Dominions of weakening or eliminating rigid elements in the local Constitutions. In the two federal Dominions, on the other hand, it has accentuated the difference between Imperial and local fundamental law, the latter being preserved in full force."(2)

It has already been discussed in the previous chapter that membership of the Commonwealth of India and Pakistan as defined by the Indian Independence Act or in accordance with the formula adopted by India, does not imply existence of any such fundamental laws. The fact that the

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(1) See New Zealand Constitution Amendment (Request and Consent Act) No. 44 of 1947, passed by the New Zealand Parliament on the authority of which the United Kingdom Parliament passed New Zealand Constitution (Amendment) Act, 1947. See also The British North American Act 1949; 12-14 Geo.6.C.81.

(2) Latham: op.cit. 581-2.

rule of construction in Section 4 of the Statute of Westminster as modified for the purposes of the Union of South Africa Status Act, has been reproduced in Section 6 (4) of the Indian Independence Act is not sufficient to place it beyond doubt that this insertion is with all the implications of the sovereignty of the Imperial Parliament, for the reasons set forth in the previous Chapter wherein the Indian Independence Act has been described as a document transferring sovereignty into Indian hands. The Indian Independence Act not only extended the area of power of the Legislatures of the new Dominions but also made them entirely independent of the Imperial Parliament thereby making them sovereign. India proclaimed people's sovereignty by repealing the Independence Act and Pakistan created the same effect in municipal law by replacing the oath of allegiance to the King by that to the Constitution, law and government of Pakistan. It is doubtful what force the rule of construction has when detached from all references to the Conventions which imply the recognition of the sovereignty of the Imperial Parliament. It may, therefore, be stated that there does not exist any fundamental law of the Commonwealth as far as India and Pakistan are concerned. If there is no fundamental law governing the relationship of all members of the Commonwealth then there are no essential laws at all. If some members are governed by certain laws whereas the others are not, such laws for obvious reasons can not be basic or fundamental. They may be fundamental in relation to those particular Dominions but not to the whole Commonwealth.

The fundamental law of the Empire in international law, for the first time came to an end when the Dominions were admitted to the League of Nations and thus gained international personality. This recognition first was followed immediately

with constant efforts on the part of the Imperial Government to formulate and carry out a common policy for the Empire. The purpose of such an attempt probably was to replace the disruption brought about in international law by a diplomatic and political pattern of common policy, but the Chanak Incident(1) of 1922 revealed that the Imperial unity in international law had come to an end. The discussion over active and passive participation in the Charnak incident was nothing more than a mere reconciliatory effort to minimise the importance of the break up of the Imperial legal unity. The Imperial Conferences of 1926, 1930 resolved that "the Dominions were autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."(2) It is notorious that the nationalists of South Africa treated this as an extension of the recognition by the Imperial Government of the sovereign and independent status of the Dominions. Keith's contention that "a mere declaration by the Imperial Conference does not suffice to bring about sovereign independence because international recognition should be sought by a formal notification sent to foreign powers by the Imperial Government, intimating the grant of independence, which these powers would then recognise if they deemed it desirable" is refuted by Schlosberg who observed that this "contention conflicts with Hall's views....., nor was there any authority as far as the author was aware to support Keith in his contention."(3) It is unnecessary here to go into a detailed discussion of the theories or recognition of States, because

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(1) See details Toynbee;A.J. Conduct of British Foreign Relations, 1928.

(2) A.M.D. 2768 p.14.

(3) See Schlosberg op.cit.pp.12-32.Cf.declatory Theory.

the subsequent development of the Imperial affairs established the case that the commencement of the international personalities of the Dominions dates from their admission to the community of nations signing the Treaty of Versailles in 1919. It is not proposed to discuss the effect of the emergence of the Dominions as international persons on the sovereignty of the Imperial Parliament, partly because this has already been discussed, partly what is desired here is only to establish that the Imperial unity in international law came to an end as a result of this phenomenon.

If the emergence of international status of the Dominions, even setting aside the theory set forth by the South African or the Irish nationalists, is considered on its own merits, it is obvious that the Dominions, as far as international law is concerned, came to be established as international persons. Their inequalities in relation to the United Kingdom thus became a domestic matter. This was certainly an anomaly but it was recognised as a "sui generis" case by the community of nations and there is nothing to say against their international status as sovereign states. All States recognised by the community of nations as states are equal in law. Having gained this international status, some Dominions like South Africa and Eire went still further thereby replacing the Imperial authority by the local authorities; while others like Australia and New Zealand, did not even feel it necessary to adopt Sections 2-6 till lately. Australia and New Zealand have greater sentimental attachment to British institutions because they are mainly from British stock. Canada is less enthusiastic about them because the Canadian nationalism derives its strength from both French and British sources. The new Dominions have hardly any sentimental attachment at all.(1)

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(1) Jennings: The Commonwealth in Asia.

If the main source of strength of the Commonwealth lies in sentimental attachment, then it is essentially wrong to ask the Eastern Dominions to remain within the Commonwealth because sentimentally their feelings are naturally those of the nations which had to suffer under an alien rule. When independent, they have, strictly speaking from a sentimental point of view, more reasons for detachment than attachment to Britain. If sentimental vestiges are the only foundations on which the structure of the Commonwealth rests, then there can be no room for people with alien culture, racial and religious differences and above all a history of subjugation and suppression followed by struggle and freedom. If the Commonwealth is to shape its future on the sentimental basis only, then there is no justification for the claim that it is elastic, and adaptable to the changing situations. Obviously the sentimental values are not the only basis and foundation of the Commonwealth. It is natural that the people with common culture, race, history and above all of common institutions, attach greater importance to sentimental vestiges than others, but in the Commonwealth "there is union without unity, similarity in diversity, variety in uniformity."(1) It certainly manifests a realistic attitude on the part of the members of the Commonwealth that the Commonwealth is no more "the British Commonwealth", the nationals of the Commonwealth may be the national of a particular Dominion and also be known as either a British subject or a citizen of the Commonwealth.

It is of some interest to note in this context how similar are the factors governing the relationship of the Commonwealth to those of the Indian Empire when the East India Company joined the ranks of the local rulers. The Emperor at Delhi, still the legal sovereign of the whole

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(1) Jennings: The British Commonwealth of Nations.

Empire, allowed, tolerated or acquiesced in independent action on the part of local rulers in his Empire. The toleration and acquiescence helped local princes in establishing their independent international relations not only with each other but with foreign nations like the Dutch, the Portuguese, the French and the British Companies. The character of the formal allegiance to the Emperor did not change, nevertheless they enjoyed independent status and conducted their international relations with other sovereign powers in exactly the same way as the British Dominions did in spite of the legal supremacy of the Imperial Parliament. It will certainly need an exhaustive research to establish how far the British Colonial policy was influenced by their contract with and knowledge of the Indian Empire, but it goes without saying that the two phenomena are strikingly similar; indeed so was the case in the Roman Empire or in other Eastern Empires.

The other point worthy of note in this connection is that the East India Company in spite of all the differences of culture, religion, race etc. which exist today in the case of the Eastern Dominions as compared with other European races of the Commonwealth, was admitted to the ranks of Indian rulers; nay, was exalted to the office of the Vakil-ul-Mutlaq and addressed as "Son".(1) The admission of the Eastern Nations to the Community of Nations of the Commonwealth is not an unusual phenomenon in the history of either Britain or of India. The sentimental vestiges were also in existence in the Indian Empire. The East India Company took advantage of every opportunity to disavow allegiance to the Emperor or to minimize the importance of his legal supremacy. The servants of the Company as has been seen in the first chapter prompted the Nizam and the Nawab Vazier of Oudh to declare

(1) See Chapter I.

independence and to assume the style of Kingship thereby disowning allegiance to the Emperor. It was nothing but sentimental attachment due to which the Nizam rejected this suggestion while the Nawab Vazier, for different reasons, adopted the style reluctantly. It is,therefore,not surprising that the nations of the British stock hold similar sentimental attachment to Great Britain and they are justified in it. But the point that ought to be borne in mind is that the loyalty of the members of the Commonwealth can not be judged on the criterion of sentimental vestiges, because such a criterion has no common appeal it even fails to attract the European non-British races of the Commonwealth. It may, therefore, be asserted that Dr. Jennings'[1] attempt to make differences among the Eastern Dominions from the standpoint of sentiment is entirely wrong and futile. They are one and the same. Certainly there exists differences of attitude towards the Commonwealth between India and Pakistan on one hand and India and Pakistan and Ceylon on the other for reasons of political and other considerations.

In short, the fundamental law of the British Empire that bound all its parts strongly, weakened with the emergence of the Dominions as international entities; the Dominions, after acquiring international status by retaining allegiance to the Crown, set up a sort of personal union in international law, though the status quo in municipal law was allowed to continue, but subsequently with the enactment of the Statute of Westminster the weakening process was carried still further, thus it was possible to replace the Imperial source with local roots. In the Indian Independence Act the possibility of snapping the legal link was explicitly provided. As explained already, setting apart,

(1) Jennings: The Commonwealth in Asia.

the consideration of constitutional inequalities in respect of self-government, the relations between India and the United Kingdom were, as far as international law is concerned, those of a personal union ever since the time Indian administration was taken under direct control. It can, justifiably be claimed that after the enforcement of Indian Independence there was no legal connection between the new Dominions and the United Kingdom save the allegiance to the Crown. This denoted a sort of personal union and was completely done away with by India when she adopted a formula of retaining the membership of the Commonwealth, whereas Pakistan confined it to the Governor-General of Pakistan when the oath of allegiance to the King for the purposes of other officers and Governors of the Provinces was replaced with that to Constitution, laws and Government of Pakistan.

There is then no fundamental law on which to test the loyalty of the members of the Commonwealth. This is not to deny that there is still some fundamental law in respect of certain Dominions but not applicable to all, and therefore can not be considered as essential law of the Commonwealth.

IV.

Now it remains to be examined what part the Conventions concerned both with inequality and co-operation play in the Commonwealth after the admission of the new Dominions. Reference has been made in the above paragraphs that the Imperial Conference of 1926 laid down resolutions thereby creating Conventions which, in the words of Latham, "bore all the marks of the United Kingdom authorship in which each paragraph, each sentence, almost each word imputing emancipation was balanced immediately by an assertion of association."(1) It is, however,

(1) Latham: op.cit. p.599.

proposed here to see what value and significance the Conventions have in regulating the relations of the Commonwealth. They are of two categories. It may be convenient first to take the question of the Conventions dealing with inequalities.

India was subject to inequalities in respect of self-Government in virtue of the Government of India Acts, 1919 and 1935; but in view of the declaration of the Dominion Status for India, the Conventions also gained significance on the model of the other Dominions. It is needless to repeat here that the Secretary of State conceded powers to the Governor-General, and the Governor-General, though legally competent to act in his own discretion, was instructed to give, conventionally, due weight to the opinions of his Councillors. The Governors of the Provinces conventionally gave word/not of honour to use their discretionary powers and hinder the work of responsible Governments in the Provinces. As regards extra-territoriality, it has been examined that the Federal Court of India followed the line of argument taken by the Judicial Committee in the case of the British Coal Corporation. Ultimately India became 'de facto' Dominion with an interim Government which was entirely based on the Conventions established in the case of Dominions. But as remarked elsewhere, the main purpose of the Conventions concerned with inequality was to give the Dominions that equality Conventionally which was either not possible or not desirable to confer in precise legal terms. In other words, the definition of the status of the Dominions was entirely dependent both on the Statute of Westminster as well as the Conventions. India and Pakistan were conferred equality in every sense of the term and hence they were rendered independent of the Conventions concerning inequalities. In other words, there was no need to call in the Conventions

to define their status of equality. They are given every power in explicit terms so it is unnecessary for the purposes of India and Pakistan to see how far they are binding on them.

The Preamble to the Statute of Westminster contains the declaration that "the Crown is the symbol of the Free Association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliament of the Dominions as of the Parliament of the United Kingdom."(1) The first occasion after passing the Statute of Westminster a change in the laws touching the succession to the Throne was effected in the shape of the Abdication Act of Edward VIII. According to Latham(2) except that the Prime Minister of the United Kingdom took initiative in this matter without consulting his colleagues, the Prime Ministers of the Dominions which was unconstitutional, everything was in order. What is most significant from the standpoint of the Unity of the Commonwealth is the fact that the Government of South Africa considered that the legislation by the Parliament of the Union to alter the succession to the Throne so far as the Union was concerned, was needed and the Union Parliament passed an Act to effect changes in the law of the succession. The abdication was dated from the time the instrument of abdication was signed and not from the moment when the Abdication Act received Royal assent. In other words George VI was enthroned in South Africa from December 10th.

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(1) The Preamble to the Statute, 2nd paragraph.

(2) Latham: op.cit.

The Government of the Irish Free State, as it was called then, expressed no assent to the alteration proposed, and notified that no extension of the Act to the Irish Free State was desired. The Oireachtas, on December 12th, passed the Executive Authority Act (External Relations), but in the view of the Irish Free State, this did not amount to enthroning George VI in the Irish Free State on 12th, but was rather a provision for the use of the King's Signature for the purposes of appointing diplomatic and consular representatives to be accredited to foreign countries. This in Mansergh's words was "an external Association."(1)

Two conclusions flow from this. First, if it is recognised that Eire by enacting the External Relations Act, and also making provision to the similar effect in the Republican Constitution which was adopted subsequently, had recognised the King, then "The Commonwealth was partly dismembered from December 10-12, 1936, and was reunited by a common allegiance to the same King, George VI, on 12th December 1936, When the Irish Free State received the assent of the Chairman of the Dail."(2)

Secondly, if the Irish view is accepted, there did not exist any allegiance on the part of Eire. In other words, the British Commonwealth of Nations, as it was called then, had sustained a fundamental change in its character according to which the last link of the Commonwealth retained in the shape of the common allegiance to the same King came to an end and a new kind of relationship described by the word "association" was discovered to replace the former basis of allegiance. In this way Commonwealth assumed a dual character.

The new Dominions owed allegiance to the King George VI in virtue of the Indian Independence Act which

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(1) See Mansergh: op.cit. pp.203-208.

(2) Wheare: op.cit. p.290.

conferred on them Dominion status. The nationals of the two Dominions also continued this allegiance in virtue of their being within the definitoon of the British subjects.(1)

In view of the fact that India and Pakistan assumed Dominion status and that the contractual connections with the Indian States were brought to an end, it was considered necessary to effect change in the Royal Style and Titles by omitting the words "Emperor of India".(2) This as explained by Mr. Attlee did not come into operation till the Dominions gave their assent, which it was not possible to obtain before the passing of the Act. In the words of Wheare the assent of the Parliaments of India and Pakistan to the change in the Royal Title was not sought or obtained. It was a Conventional rule. The Dominions, however, continued to owe allegiance to the King, George VI. There were two aspects of this allegiance. The allegiance of the Dominions and the allegiance of the people of the Dominions. India and Pakistan owed allegiance as Dominions and the nationals of the new Dominions owed allegiance in virtue of the British Nationality Act of 1914.

India, first, in order to adopt the Republican Constitution, evolved a formula which was agreed to by the members of the Commonwealth and a declaration was made to this effect in London at the end of the Conference of the Prime Ministers of the Dominions on April 27th, 1949. It runs:

"The Governments of the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon, whose countries are united as members of the British Commonwealth of Nations and owe a common allegiance to the Crown, which is also the symbol of their free association, have considered the impending Constitutional changes in India.

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(1) In virtue of the British Nationality Act, 1914.

(2) 10 & 11 Geo. 6.c.30. Sec.7 (2).

The Government of India have informed the other Governments of the Commonwealth of the intention of the Indian people that under the new Constitution which is about to be adopted, India shall become a sovereign Independent Republic. The Government of India have however declared and affirmed India's desire to continue her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of the Free Association of its independent member nations and as such as the Head of the Commonwealth.

The Governments of other countries of the Commonwealth, the basis of whose membership of the Commonwealth is hereby not changed, accept and recognise India's continuing membership in accordance with the terms of this Declaration.

Accordingly the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon hereby declare that they remain united as free and equal members of the Commonwealth of Nations, freely co-operating in the pursuit of peace, liberty and progress."

Before discussing some important consequences of this declaration, it is desirable to use the interpretation given to it by the Indian Government. The Prime Minister, Mr. Nehru, moving the Resolution to ratify the Declaration in The Indian Constituent Assembly, observed:

(a) "You will notice that while in the first paragraph that which is referred to as the British Commonwealth of Nations, in the subsequent paragraphs that is referred to only as the Commonwealth of Nations.....

(b) There is reference in connection with the Commonwealth to the King as the symbol of that Association. Observe that the reference is to the King and not to the Crown..... The point is this that so far as the Republic of India is concerned, her Constitution and her working are concerned, she has nothing

to do with any external authority with any King and none of her subjects owe any allegiance to the King or any other external authority. .....The Declaration therefore states that this is the new Republic of India.....owing no allegiance to the King as the other Commonwealth Countries do owe, will nevertheless be a full member of this Commonwealth and it agrees that as a symbol of this free partnership or association rather, the King will be recognised as such.

(c) Now some consequences flow from this. Apart from certain friendly approaches to each other, apart from a desire to co-operate which will always be conditioned by each party deciding on the measure of co-operation and following its own policy, there is no obligation. There is hardly any obligation in the nature of commitments that flow. But an attempt has been made to produce something which is entirely novel, and I can very well understand lawyers on the one hand feeling somewhat uncomfortable at a thing for which they can find no precedent or parallel."

Referring to the question of Indians in South Africa, he remarked -

(d) "It was a dangerous thing for us to bring that matter within the purview of the Commonwealth. Because then, that very thing to which you and I object, might have taken place. That is, the Commonwealth might have been considered as some kind of a superior body which sometimes acts as a tribunal or judges or in a sense supervise the activities of its member nations."(1) Remarking about the continuity of membership he said: (e) "Suppose we had been cut off from England completely and we have then desired to join the Commonwealth of Nations, it would have been a new move. Suppose a new group of nations

(1) Debates: op.cit. pp.2.

wants us to join them and we join them in this way, that would have been a new move from which various consequences would have flown. In the present instance what is happening is that a certain association has been existing for a considerable time past. A very great change came in the way of that association..... from August 15th, 1947. Now another major change is contemplated. Gradually the conception is changing yet that certain link remains in a different form."(1)

He further said: (f) obviously a Declaration of this type, or the resolution I have placed before the house is not capable of amendment.....Any treaty with any foreign power can be accepted or rejected. It is a joint Declaration of eight countries - and it can not be amended in this House."(2)

Then followed a long and heated debate on the resolution ratifying the Declaration. It is unnecessary to refer to all points raised in this connection, because more or less the debate centered round the points covered by the selected passages from Mr. Nehru's speech.

It was in the resolution of the Imperial Conference of 1926, when the allegiance as a basis of the relation of the "autonomous communities within the British Empire" was asserted. This was slightly modified when the same basis was re-asserted in the Preamble of the Statute. This was "inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth and they are united by a common allegiance." It is this basis which has been reiterated in the first paragraph of the Declaration. The Crown has two aspects. First serves the purpose of being the centre of the whole Commonwealth and secondly is regarded as a symbol of their free association. The Crown in its first aspect is plainly a basis of "common allegiance" on the part of the

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(1) Ibidem. p.8.
(2) Ibidem.

members of the Commonwealth. In other words, a sort of union, indeed personal only, was established. The King thus became the head of every member State. "Symbol" according to the Oxford Dictionary, is defined as a "thing regarded by general consent as naturally typifying or representing or recalling something by possession of analogous qualities or by association in fact or thought; mark or character taken as the conventional sign of some object or idea or process." The Crown, therefore, in its second aspect is a symbol which has been conventionally fixed as representing the free association of the member nations. This may be put in other words like this: The Crown being the centre of allegiance has its legal existence and in this aspect acts as the head of the member States and by the fact that all member States recognise the same Crown renders this as a personal union of all of them. And from this legal source flows allegiance throughout the Commonwealth. But as regards its function it has its distinguishable existence. The Crown when acting for the United Kingdom is the Crown of the United Kingdom and nothing else, when acting for South Africa it is the Crown of South Africa and nothing else.(1) Thus it has its identical existence for all members. In its relation to each member State it is a matter of municipal law; whereas its recognition as the common Crown for all member States becomes a subject of international law.(2)

As a symbol of free association it has no legal significance except that all member States treat it as a recognisable sign of their free association. The source of such a recognition is neither a subject of Constitutional law nor that of international law but merely connotes a sort of Convention in its very loose sense. This symbol becomes real

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(1) The Attorney General of Quebec v. the Attorney General of Canada. (infra)

(2) As regards inter se doctrine see subsequent discussion on this aspect.

when the legal function of the headship is assigned to it.

It may be argued that a "Crown" is Crown in every sense of the word whether used as a symbol of free association or basis of common allegiance. It was probably in view of this particular sense that the term "the Crown" connotes, that India thought it necessary to replace the Crown with the King so that all attributes of prerogatives or governance may be eliminated.

Are these two aspects separable from one another? Was this separation ever effected before India established her relation on the latter basis? As seen already, allegiance was not done away with even when the Irish Free State abolished the oath of allegiance to the Crown and excluded it entirely from internal affairs.(1) In this sense, it may be stated, it is doubtful whether any separation was ever maintained. When considered from the viewpoint of the Irish Free State, it may be remembered that provision was made to utilize the King's signature for external purposes; but there was either no recognition of the King or was as recognised by the other Dominions. The Irish spokesman said: "We are associates of the states of the Commonwealth; but if they regard the existence of the King as a necessary link; if they consider as the bond they have, then we have not got that bond ..... we are externally associated with the States of the British Commonwealth." But associated by what? What was the basis and source of this association? The only thing that can be concluded from the arrangements made for the appointment of Foreign representatives under the signature is that the King was recognised so far as international law is concerned. Any symbol has no legal identity or function assigned to it. Therefore it may be submitted till the day the Declaration was made there was no separation between reality and symbolism of the Crown.

(1) British view.

It had these two aspects held together. It was, however, suggestive of the Crown's separable aspects. The Declaration for the first time separated not the Crown as the Crown of the Dominions and the symbol of the free association but rather as the Crown of the Dominions and the King as the symbol of their free association.

The fundamental change that was brought about by the Declaration was that the basis of membership of the Commonwealth assumed two distinct characters. One by accepting the Crown as the head of the member State as well as accepting the King as the symbol of free association, and second, merely by recognising the King as a symbol of free association.

The question arises: Is there any difference between these two kinds of members? The Declaration rules out such difference by the very fact that India has not only a member but a full member. There is, therefore, no difference of status but of the basis of membership. It has been made rather more emphatic when it was declared that the basis of the membership of other members including Pakistan and Ceylon was not thereby changed. But Pakistan as stated already, has replaced the oath of allegiance, with the exception of the Governor-General, for all other officers of the State. In view of this change it is suggested that allegiance should be treated as that of the States and not of the nationals, as the grammatical construction of the phrase suggests.(1) It is the"members of the Commonwealth of Nations united by common allegiance" who owe allegiance. Obviously it refers to the autonomous communities within the British Empire as defined in 1926 or members of the British Commonwealth as declared in 1931, or members of the Commonwealth as reiterated in 1947.

But can a State owe allegiance to some external authority and still be a sovereign? Is the Crown for the

(1) Latham: op. cit, p.

purposes of Pakistan a supra national authority? The Crown, certainly, is the Crown of a certain Dominion and hence is not an external personality. If the King is a head of a State then naturally all who act in his name and also the nationals should owe allegiance to him. It is possible that for the internal purposes Pakistan could alter the oath of allegiance as was done by Eire long ago.

There is one more point to be discussed. What does the phrase "the King as the symbol of the free association of the independent member Nations and as much as the Head of the Commonwealth" signify? Is the Commonwealth an organisation like that of the United Nations of which the King has been accepted as a head? In order to reply to this question one is obliged to assess the character of the Commonwealth in comparison with other such organizations.

The United Nations Organisation is as was its predecessor the League of Nations, an association of sovereign States which have joined together to pursue peace and peaceful settlement of all disputes. By joining the United Nations each member State does not lose or subtract its own sovereign character, but certainly undertakes an obligation to abide by the rules of the Charter. The acceptance of this obligation does not impose any limitations on the sovereign independence of States but persuades them to pursue a peaceful and reasonable course of conduct in their relations with one and another both in co-operation and in settlement of certain matters of international concern.

The other important feature of the United Nations, as was the case of the League of Nations, is that it has its own legal existence; enjoying all the attributes of a Corporation sole and thus can sue and be sued, and is given immunities. But this legal existence is not the result of any subtraction from the national sovereignty thereby setting up a supra national

State as a federal government does in the case of its constituent parts. The creation is not a result of a subtraction of national sovereignties but on the contrary is the result of a free contribution of goodwill and good faith.- The rights and duties are assigned to it in order to have a better means of building up a healthy and happy international society. To borrow Schlosberg's[1] expression, the United Nations Organization is no more a super State than a Company in private law, is a super person. A Limited Company is brought into existence by pooling shares together which are contributed by share holders in good faith, out of good will and for a certain object, and in order to give it legal personality it is duly registered. This does not subtract any significance from the shareholders personality. No iota of his personality is lost. This definition is without any reservations applicable to the United Nations Organizations. As its object is to maintain peace it has not only a big organization consisting of several branches dealing with different aspects but also has the Court of International Justice which adjudicates international law, whatever be its limitations.

In recent times, of considerable interest seems to be the Netherlands Indonesian Union which had come into[2] existence as a result of the decisions reached in "The Round Table Conference" of the delegates of:

(1) The Kingdom of the Netherlands

(2) The Government of the Republic of Indonesia

(3) The Federal Consultative Assembly.

The Draft Union Statute laid down every detail of organs of the Union and also rules governing the procedure. It also makes provision for the Head of the Union and defines the

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(1) Schlosberg op.cit. wherein he compares the Commonwealth to the League of Nations.

(2) Now this has declared to be terminated by Indonesia.

purpose, powers and procedure of the Court of Arbitration. As regards the head of the State it is stated:

(1) At the head of the Union shall be Her Majesty, Queen Juliana, Princess of Orange Nassau, and in case of succession Her lawful successors in the Crown of the Netherlands.

(2) In case of minority of the head of the Union, or in case of the Head of the Union being unable to perform his Office, both partners shall make the necessary provision in common agreement. Such provision may be made in common agreement in advance.(1)

It is obvious that the Commonwealth as it exists today has no legal personality of its own as the United States Organisation has. It can neither sue nor be sued, nor is there any elaborate organization as the U.N.O. Lord Bruce in February 1948, moved a resolution in the House of Lords that a permanent secretariat for the conduct of Commonwealth affairs, be set up but it was obvious from the reaction it met with in the Dominions that the Dominions as usual were divided in two groups and Canada was on South Africa's side, who rejected any such idea, whereas Australia and New Zealand seemed to welcome the plan which in fact was originated in Australia.(2)

The well known Colonial Conference changed into the Imperial Conference and made an attempt to lay down some rules and conventions both in respect of removing inequalities between the Dominions and the United Kingdom as well as in respect of those concerned with co-operation among the members of the Commonwealth but very soon it became evident that even this machinery had served its purpose by removing inequalities;

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(1) Official Report entitled "Round Table Conference" published by the Secretary-General of the Round Table Conference, p.11, Article 5 (1,2).

(2) See A.c. H.L. Vol. 153, 17th Feb. 1948. Cols. 1102-1163.

and was replaced by the Prime Minister's Conference. Canada does not seem to agree with any formal machinery like the Imperial Conference having broader representation. There are no rules of procedure governing these Conferences except that some ceremonial traditions have been adhered to without any objection from any quarter. There will be occasion to discuss the more formal conventions laid down by the Imperial Conference for the purposes of guiding co-operation and consultation within the Commonwealth; but suffice it here to state that elaboration of any formal machinery seems to be out of date.

The question, therefore, arises: What is meant by assigning the headship of the Commonwealth in which tendencies against formalism seem to be growing stronger? It has neither rules of procedure nor organisations, except whatever information passes between the Commonwealth office in London and its counterparts in the Dominions. It is, indeed, very difficult to state how and in what respect the head of the Commonwealth will perform his functions. For the present it appears to be entirely ceremonial and symbolic than real. The fact becomes obvious when compared with the head of the Netherlands-Indonesian Union who has some real existence with rules laid down governing its future. The British institutions have never been defined and it is against the spirit of these ever-growing and living institutions to be confined within the frame of definition. The head of the Commonwealth is real in the sense that round him revolves the whole free association as, besides this, there is no other recognisable basis of the unity.

It may as well be suggested that India by accepting the King as the symbol of free association and as such the head of the Commonwealth of which she has retained membership, has recognised the King as its head for the Commonwealth

purposes. In other words India has two kinds of heads. The President presides over matters concerned with municipal and international laws, while the King presides over matters concerned with the Commonwealth. There is indeed some logical force in this argument, but there are twofold difficulties. First, the Indian Government, as is evident from Nehru's speech, does not recognise it, and secondly the conventions of the Commonwealth do not lay down such rules as to give them the character of a coherent system of law. There is, at least at the present time, no coherent system of rules. It is not denied, however, that the membership of the Commonwealth must imply some sort of obligation. The nature and scope of such obligations will be discussed presently.

V.

Closely allied with allegiance is the question of the British nationality. Every person born within His Majesty's Dominions and allegiance was known as a British subject. The protected persons did not come within this definition; though they were treated for purposes of diplomatic protection as such. The importance of the British nationality lay in the fact that it provided a common status throughout the Commonwealth and the Empire. It may, however, be borne in mind that this formed "an indelible but important" common status in fundamental law and was not, despite the reference in the Balfour Memorandum to Common Allegiance as the basis of Commonwealth unity, a common basis running throughout the Commonwealth. Latham, commenting on this fact as it existed in 1936 wrote: "....there was in 1920 no common allegiance, in the strict sense, of the citizens of all member nations

of the Commonwealth because even at that time the incidents attached to Commonwealth in the Dominions were widely different, and the classes of persons regarded by various Dominions as within the allegiance did not exactly coincide."(1)

In 1946 Canada defined the Conditions determining the acquisition and loss of Canadian citizenship but at the same time continued to recognise the British subjects thereby retaining the common status. This departure from the Common Code by Canada made it necessary to study the question of common status at an expert level. The question was studied in the Conference of experts in London in February 1947 which was attended by representatives of all the members of the Commonwealth including Eire and also Burma and Ceylon. The role of Indian representatives was that of observers.

The question was whether or not the Dominions could legislate separately like Canada on the subject of nationality. In the view of the Government of the United Kingdom, "common status", if abolished, would amount to bringing about an end of the common allegiance. But the Report(2) recommended that there was nothing incompatible for a Dominion to enact separately for its own nationality and also make provisions for certain purposes for "common status". It declared "that the adoption of a scheme of legislation which combined citizenship with the maintenance of the common status of British subjects throughout the Commonwealth would be desirable. Such a system would give clear recognition to the separate identity of particular countries of the Commonwealth, clarifies position with regard to diplomatic protection, and enables a Government when making treaties with other countries, to define with precision who are the persons belonging to its country and on whose behalf it is negotiated. It would also enable each country to make alterations in

(1) Latham:
(2) C.M.D. 7326.

its nationality laws without having first, as under the common system, to consult the other countries of the Commonwealth and to assertain whether the alterations contemplated would impair the common status. The esential features of such a system are that each of the countries shall by its legislation determine who are its citizens, shall declarethose citizens to be British subjects and shall recognise as British subjects the citizens of the other countries. For this last purpose there is need of a "common clause" of which the substantial effect should be the same in each country, to ensure that all persons recognised as British subjects in any part of the Commonwealth shall be so recognised throughout the Commonwealth(1)." It was the acceptance of this suggestion which resulted in the abandonment of common status by the Act of 1948.(2) It is obvious that this Act in a sense met the changed situation caused by including the Eastern Dominions in the Commonwealth. Any legislation with common consultation and agreement would have been almost impossible in view of the fact that South Africa maintains racial discrimination and Canada, Australia and New Zealand are not prepared to allow Indians or other coloured races to immigrate as they do the Europeans. What is most important from the standpoint of the Commonwealth law, is the fact that the common status owing its existence to the common allegiance, was replaced by the common status, with mutual undertaking. The source of common status also disappeared as soon as it was abandoned. There is nothing against any foreign country joining such an arrangement. Eire, for example, a foreign country since the repeal of External Relations Act of 1949, has been accepted on this basis. Compare India's position in the Commonwealth in this respect, with Eire which is not a member. There was another Act, namely India (Consequential

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(1) Ibidem.

(2) The British Nationality Act, 1948.

provision) Act 1949 necessary in view of the fact that India became a Republic and recognised the King only as a symbol of free association. There is in substance no difference between India and Eire except that the latter recognises the King as a symbol. In other words a separate enactment was necessary to make provision for India. There is no difference of substance, in this respect, between Eire and India.

The Nationality Act, further, made distinction possible for the purposes of international law. In international law nationals of the Dominions are known by the name of their own State.

The term "British subject" is synonymous with Commonwealth citizen. This was obviously needed because sentimentally the Dominions were divided on this question and after dropping the adjective "British" from the Title of the Commonwealth, failure to make provision to this effect in the Commonwealth would have been grave. It was further needed because that common allegiance is no longer the legal tie as it existed in the Empire as distinct from the Commonwealth.

This enactment has undoubtedly removed a dangerous point of immediate friction which would have undermined the very basis of partnership in the Commonwealth, but the fact remains; the future of the Commonwealth entirely depends, not on any existing legal basis or system of law but entirely on mutual understanding and reciprocal benefits as is evident from this Act. Any discrimination, if allowed, would make the partners feel strange, nay antagonistic, and as a result of that the very basis of partnership will be at stake. "The time has come for old ways of thought to be discarded and the partner States in the (British) Commonwealth should take a new attitude to the Commonwealth. Until 1947, the

British Commonwealth consisted of self-governing nations of the white races, but now the partnership includes self-governing nations of coloured races. Moreover the day is not far off when other Colonial possessions, the inhabitants of which are coloured, will rightly be admitted to the partnership. Race or colour should not, so far as British subjects are concerned, in themselves be barriers to complete freedom for British subjects to settle in other parts of the Commonwealth in their attainment of equal political status with other communities in the territories where they settle. If there is discrimination how can there be equality of status."(1)

VI.

The Commonwealth as defined through the resolutions of the Imperial Conferences and as manifested by the machinery of consultation and co-operation, was based not only on the conventions concerned with iequalities but those of co-operation. It is indeed interesting to note that the emphasis has slowly been shifting from the former to the latter. The historical study of the evolution of Dominion status will reveal that greater emphasis was laid by the United Kingdom on the Conventions of co-operation while the Dominions, especially the radical one, attached greater importance to those concerned with inequalities. It is evident from the study of the Conventions of first category that they have become comparatively less important and for Countries like South Africa they are of less importance, whereas no importance is attached to them by India and Pakistan. Thus they are no more rules defining the common basis of the Commonwealth relations.

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(1) Fitzgerald C. Richard: "The Twilight of Dominion Status."
Current Legal Problems. Ed.George W.Keeton and George Schwarzenberg. London. 1949. p. 202-225.

It was declared that the Commonwealth co-operation was governed by the "inter se" doctrine. The essence of this doctrine was that relations between members of the Commonwealth were "sui generis" and more intimate than relations between other nations and for the preservation of this uniqueness and intimacy they should be separated from international relations,(1) and hence the applicability of international law to the Commonwealth relations was ruled out. In view of this, the Imperial Conference, 1930, had recommended that an "ad hoc" Tribunal, the personnel of which were to be entirely drawn from the Commonwealth should be set up to settle differences between the members of the Commonwealth whenever such a need arose. As regards the different reactions to the "inter se" doctrine Latham observed: "the inter se doctrine..... is dominant in the United Kingdom, Australia and New Zealand, and strong in Canada, on the other hand radicals in Ireland, South Africa and Canada feel that their national independence against the encroachment of Great Britain or a co-operative Commonwealth conspiracy, must not lack whatever prestige or protection the recognition of their full and perfect sovereignty in international law can bring."(2)

It is worth noting that the imperial relations began to shift slowly from the level of constitutional law towards that of international law, as the Colonies emerged as international persons, but to arrest/or at least maintain this change the intimate character of the relations, the inter se doctrine under the protection of "sui generis" definition was propounded but the struggle continued. The relations of the British Government with Indian States, on the other hand, were caused to shift slowly from the basis of international law towards that of constitutional law but stopped short of merging into

(1) Latham: op.cit.
(2) Latham: op.cit. p. 602.

it because of the reluctance on the part of the Indian rulers and to create a via media, the theory of personal relationship was propounded. The struggle between the Dominions and the United Kingdom continued but the inter se doctrine could not gain recognition. The struggle between the Indian States and the United Kingdom too continued but as the British Government in India was succeeded by the Governments of the new Dominions, the conflict was ultimately solved by their incorporation into the Dominions, thereby merging into the system of municipal law completely. In both cases, it is evident that the underlying force pressing for change has been entirely political.

It is notorious that the Irish Free State treated the intra-Commonwealth relations as international. South Africa, in General Hertzog's Government's view, held that its relations with other Commonwealth countries were essentially international, albeit the "inter se" doctrine is applied to them of free will. The Liberals in Canada also held similar views.(1) The first occasion to use the machinery of "ad hoc" Tribunal arose when in 1932-33 proposals were made to settle the dispute between the United Kingdom and the Irish Free State as to the payment of land annuities but this prpposal was turned down by the Irish Free State on the ground that the arbitrator should be a foreigner, that is from any foreign country outside the British Commonwealth.

In recent times as already referred to, India has taken the cases in respect of South African Indians and Kashmir to the Security Council. Mr. Nehru has categorically asserted that this was done because any reference to any Commonwealth Tribunal would have made the Commonwealth "a kind of superior body. Reserving the comment as to how far this contention has any validity, it is desirable to sum up the above discussion to see whether the membership of the Commonwealth has in fact,

(1) Ibidem.

entirely from the Indian National standpoint "Independence plus".

As discussed in the above paragraphs that there is neither any legal basis, nor the basis of Conventions that make conditions of membership very strict. There is no organisation and no elaborate rules for procedure. Those laid down have never been accepted by all members. Almost every rule whether legal or conventional, has been broken by Eire and subsequently conceded by the members of the Commonwealth. The Indian Independence Act being a document of transfer of sovereignty, unreservedly handed over to India and Pakistan, makes the membership of the new Dominions dependent on the meaning and definition they give to it. There is no room left for the continuity of such rules or conventions which appear to be objectionable to any member of the Commonwealth. The Commonwealth has become a sort of loose association; in Nehru's words, with no obligations or commitments except friendly gestures and approaches. The Commonwealth as such is certainly of advantage to any country and India positively has assumed Independence plus these advantages when she became a sovereign Republic and still arranged to continue her membership. The plus sign signifies all the advantages that India or Pakistan would gain by remaining within the Commonwealth and there will be nothing on the minus side to lose in return.

VII.

Some writers suggest that the British Commonwealth of Nations grew and developed without any cut and fast rules because the British genius suited it and the people constituting it were predominantly British. Now that the three Eastern nations have been included in the Commonwealth, it is highly

imperative that the unwritten rules of the Commonwealth be replaced by some sort of formal conventions or agreements. They put forward this argument to justify the formal declaration of these rules and conventions in the shape of an agreement with Ceylon.

It is already asserted that the rules governing the intra-Commonwealth relationship are such as are not unanimously agreed to. The result of the lack of agreement is that they are not fundamental rules making it necessary for the member States to abide by them. There is no sanction behind to enforce them. They have so far entirely depended on good faith and goodwill of the members. The rules having no sanction behind them are equally worthless when put in some formal way; and no such binding force is possible to give them unless a unanimous agreement is reached on them. The fact that Ceylon has agreed to give its consent in the shape of a formal agreement is not attractive enough for other Eastern Dominions to follow the example.

The Commonwealth, indeed, to make it an enduring institution, needs some sort of conventions, rules, customs or traditions as are agreed upon by all members of the Commonwealth. The conventions concerned with co-operation, even after eliminating some of those that have been objected to by one or other members, will still consist of such rules about which there will be no disagreement. Certainly such rules can form the corpus of the conventions of the intra-Commonwealth co-operation. The basis must consist of only those rules which are, without a single exception, agreed upon by all. If there are other Dominions who find some other rules to be retained advantageously, they must be at liberty to continue them but they should be excluded from the essentials of the intra-Commonwealth relations. They are, in fact,

practiced at present, and there would be no difficulty in reiterating them at some future conference.

This, once again, asserts the point made while discussing the legal basis of the Commonwealth. It may be recalled that at present there is no legal basis fundamental or essential to the Commonwealth except the fact that the King has been recognised as a symbol of the free association and as such the Head of the Commonwealth. This is the minimum qualification that is essential for any member to continue its membership or a new one to join this association with consent of the members; but it is not incompatible for other members who desire so, to make the bond more intimate and strong by acknowledging not only the allegiance to the King but in a sense the theory of the sovereignty of the Imperial Parliament. The extra-factors do not come into the category of essentials of the intra-Commonwealth relations. In the same way, the conventions concerned with co-operation agreed upon by all should form the conventional basis of the intra-Commonwealth relationship and the extra-factors of this category too should be reserved for those who find it advantageous.

It is, at this stage, desirable to examine whether or not there is a need of an impartial Tribunal[1] to adjudicate these rules and also whether or not these rules should be codified in a coherent system. But the answer to these questions depends on two facts. First, what is the reaction to such a Tribunal from the nationalist standpoint and secondly, whether the residuum of the rules thus entirely agreed on by all members is such as to need an impartial body of adjudication.

Mr. Nehru took the view that such a body would imply a kind of supra-national supervisory jurisdiction.

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(1) See for general discussion: The British Empire. Chap. XVII. The Royal Institute of International Affairs, 2nd ed. 1939.

It is not clear on what ground this implication is drawn. If the authority of such a body is defined to be derived from the King or his symbolic headship of the Commonwealth, then undoubttedly this implication has some grain of truth; but this argument withers away when the authority assigned to such body is derived from the source of the common consent of the members of the Commonwealth.

The Commonwealth was dismembered between December 10th and 12th, as far as South Africa and the Irish Free State were concerned. If the Commonwealth after this dismemberment came together once again on December 12th 1936, naturally the authority of reuniting the Commonwealth was derived not from the King but from his peoples or their representatives - the parliaments. The formula evolved by India to retain her membership of the Commonwealth snapped the legal basis of this relationship. The other arguments on the question of the sovereignty of the Imperial Parliament in respect of India, and Pakistan have already been advanced and the King was, before adopting the Republican Constitution of India and Pakistan, an external link of personal union. The sovereignty which was assigned by the Parliament of the United Kingdom fo the Crown for the purposes of the Government of India in its executive aspect, was unreservedly transferred to India and Pakistan by the Indian Independence Act. India and Pakistan could either continue the personal union in international law or could abolish it all together without any reference to the Parliament of the United Kingdom. The consent of other member States to the formula evolved by India was necessary because that was likely to affect the Commonwealth but this did not amount to a limitation on the sovereignty of India or Pakistan.

The sanction, therefore, lying behind the residue of the Commonwealth Conventions is derived from the

sovereignty of the member States and not that of the King as was the case in the Empire. This is the fundamental difference which exists between the Commonwealth on the one side and the British Empire on the other.

Any tribunal, "ad hoc" or permanent, does not imply subordination on the part of the member States because it would be a creation of their authority. As is the case of the Court of International Justice or of the Tribunal set up by the Statute of the Union of the Netherlands-Indonesia.

Is it desirable or necessary at all to have a separate tribunal side by side with the Court of International Justice? The residue of the conventions, certainly, is confined to co-operation or to friendly suggestions only, but this does not exclude the possibility of friction or conflict between member States as is in fact existing between India and Pakistan on the question of Kashmir. The Court of International Justice has its own limitations and further its existence is not a bar against other "ad hoc" or permanent tribunals because disputes are of various kinds and of varying implications. It is possible that certain issues may be settled more conveniently by some tribunal other than the Court of International Justice. The Commonwealth of free association for certain issues may provide a more friendly atmosphere than the Court of International Justice. There may be some issue which could be better settled on political level coupled with impartial juristic dealing than a purely legal handling. A Tribunal of the Commonwealth may be as well able to depend not only on the traditions of the Commonwealth relationship and the intimacy existing between the parties, but also on the fact that the ground would have been prepared by discussions on the issue, among the members to iron out differences at some other level.

Any tribunal set up for the Commonwealth will not be governed by the inter se doctrine, because that is no more an essential basis of the Commonwealth. There could be a President from some foreign country and this might remove limitations of the selection being confined to the Commonwealth and thus might become acceptable to all. The difference between the Boundary Commissions and the Bagge Commission (Indo-Pakistan disputes concerning boundaries) manifests that India and Pakistan have in fact acted and such a tribunal has been of great benefit to both countries. Why not a second for other remaining disputes?

What principles will such a tribunal apply to the disputes? "The Commonwealth law and Convention" Latham wrote in 1936, "have undergone several changes which bring them nearer in character to international law and further from municipal law." The case today is stronger than it was in 1936. The intra-Commonwealth relations are entirely international but more effective because they are based on good faith and good will of its members. There was nothing against the Commonwealth judges applying the principles of international law, or even international law, in 1936. If the force of its application to a particular group under some particular conditions and circumstances makes it more effective and satisfactory, this should be credited to the good faith of the members; but these facts of its being effective under favourable conditions and ineffective under divergent circumstances, do not change its character. The international society as it exists at present, is yet in its primacy and societies, groups and associations among the member nations is a positive sign of its growth and progress. The Commonwealth of Nations too is such a group contributing to the making of a more stable and larger society.

VII.

Sometimes it has been argued that there being no binding force of systematic laws or some centre of supreme authority and loyalty, there would be nothing to stop the member States to plunge into war against each other. The case in point is that of India and Pakistan. In 1948, a controversy arose on the question whether or not India and Pakistan being members of the Commonwealth and owing allegiance to the same Crown, could declare war against each other. The controversy originated from the gesture to this effect by the author of an article entitled "Conflict Problems" published in the Indian Law Review.(1) It was acutely criticised by the "Amrit Bazaar Patrika"; the newspaper of Calcutta in its editorial of 5th April 1948 to which two correspondents replied. Mr. S.C. Mitter in his letter posed some questions and deduced that "If the Indian Union or Pakistan can make peace or war with other independent States or with themselves, what is there to be said against what has been said in the "Conflict Problems" in the Indian Law Review? The deduction was based on the premises that "the British Crown has the common link, but does not impose any fetter on their sovereign States." (sic) Dr. Banerjee in clearer terms opined that "the doctrine of the unity of the Crown, is one of the fundamental concepts of the Constitutional system of the British Empire. It was judicially accepted in William v. Howarth(2) and used in Amalgamated Society of Engineers v. Adelaide S.S. Co.(3) It may be argued that the former case was decided at a time when the present concept of Dominion status had not emerged and even the latter case preceded the Imperial Conference of 1926. Whether a competent judicial tribunal will emphasise the doctrine of the unity of the Crown in 1948 is doubtful. Moreover if the doctrine were applied too strictly strange

(1) 1948. (Probably April).
(2) 1905 (A.C. 551)
(3) 1920, 28 C.L.R. 129.

results might follow. For instance, there could never be a legal dispute between two or more of the Governments of the British Empire..... In several cases the Courts have tried to solve this problem by distinguishing between the King acting through one Dominion or Colonial Government and the King acting through another Dominion or Colonial Government.(1) Now if the King acting through the Province of Quebec can sue the King acting through the Dominion of Canada it is difficult to see why, from the point of view of law, the King acting through the Dominion of India can not declare war against the King acting through the Dominion of Pakistan. The neutrality of Eire in the second world war seems to be a decisive repudiation of the doctrine of the unity of the Crown."(2)

Declaration of war and conclusion of peace are certainly attributes of sovereignty of an independent State; and there can be no international person in the strict sense of the term without such attributes; but the question has to be studied from other angles as well. There is nothing in the way of stopping a member State of the Commonwealth from declaring war against another member State. The theory of the unity of the Crown also has already been rejected for the reasons set out . . . . . But the Commonwealth association is a sort of alliance, indeed not resting on the unity of the Crown but on the solemn undertaking of maintaining peaceful relations with one and another, by all of its members. Alliance and remaining neutral in the conflict when the rest of the members of the Commonwealth were at war with the Axis powers, was possible because, in the first place, it does not affect this undertaking and in the second place it is not an "all or none" affair, but is determined by the terms defined by the

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(1) Attorney-General for Quebec v. Attorney-General for Canada. Exparte Silver Bros. 1932 (A.C.514).

(2) Anil Chandra Banerjee's letter to The Amrit Bazaar Patrica, Calcutta, dated 20th April, 1948.

terms of the undertaking. In the case of the Commonwealth there are no formal treaties but as has been observed, Conventions that provide basis for partnership are of the same effect. The Conventions, the sanction of which lies with the member States, are indeed vague. For example, on the question of War, South Africa by joining it included war within the purview of the alliance, whereas Eire excluded it by remaining neutral; but Eire's neutrality did not prevent it from co-operating with the Commonwealth in other fields.(1)

Now consider the question of war being declared by a member State on another member State. Alliance and neutrality, as seen in Eire's case, was not an impossibility, but contrary to this, alliance and war can not go hand in hand for the obvious reason that war suspends or destroys all friendly relations; there are certain exceptions to it. The treaties to regulate the conduct of war, for instance, continue and do not require revival after its termination. But Treaties of Alliance certainly will be "ipso facto"(2) abrogated by the declaration of war. The Dominion which declares war or attacks another Dominion, it is submitted, automatically in view of war will break off its relations from the rest of the Dominions. What is the position of Kashmir? It certainly does not form part of any Dominion, or at least is not so far recognised as such. Therefore the conflict between two Dominions should not be treated as war between the new Dominions.

The obligation not to declare war against other member States is a necessary condition for the association, but should not be treated as a limitation on the sovereignty of the Dominion. They can declare war any time if they are

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(1) See for a detailed account of Eire's co-operation with the United Kingdom during war. Mansergh.p.210.

(2) Macnair: Treaties. Chap.XLIV. For the General Discussion on the effect of war on Treaties.

prepared to bear the loss of membership. The position is exactly the same when two countries come into alliance in virtue of some treaty. Such countries can not take any action inconsistent with the treaty of Alliance without impairing the treaty itself. This is a self-imposed limitation which every country does for some or other purpose.

VIII.

In the light of the foregoing discussion one is inclined to conclude that there exists some difference in the bases of membership of the Commonwealth but does it not also imply any difference of status? India's membership being of a different nature than that of Australia, India should have been able to exert less weight than Australia. This is not true. There is absolutely no difference of status whatsoever. Such was the case with Eire too.

Then, one may query why did Eire leave the Commonwealth? Was it not possible for her, in spite of repealing the External Relations Act in 1949, to retain her membership? and was the acknowledgment of the King either as the Head of a State or as the Head of the Commonwealth, an essential condition for membership? The answer to this question certainly seems to be what Fitzgerald wrote - "Eire has preferred the Harp to the Crown, and has legally become a foreign State. If any partner State should feel that she can not accept the King as the symbol of the Commonwealth relationship, it is better for that State to renounce its membership. The membership is a privilege, not a punishment."(1) It seems now that the Commonwealth has reached its final phase of evolution. There

(1) Fitzgerald: op.cit.

is no further development or change likely. India is sitting on the fence and may go the way Eire did. For the present, as is apparent from her policy, it is advantageous for her to condone the symbolic reference to the King but tomorrow she may find some other source, say America, Russia or even she may become herself strong enough, and this symbolic reference too may trouble her. She may decide to leave the Commonwealth. This may prompt others to follow suit.

The wisdom of such rigidity is doubtful. It is equally doubtful to predict that the secession of Eire necessarily implies rigidity. What opinion was expressed by Fitzgerald, though supported by the secession of Eire, is not a safe ground to say that no change is likely to come in to change the basis of the entra-Commonwealth relationship.

The future of the Commonwealth should serve the purpose of preparing the ground for greater international understanding and not the object of delaying the disintegration of the Empire. The nature of the Commonwealth as seen already has been fundamentally flexible, and at this stage it does not appear advisable to make it rigid and rely on an effete source of strength. The world is changing fast and the new world powers are already rallying small States round them; the hope for peace is growing slender. The Commonwealth may yet play a great role in the maintenance of international peace. This is possible not in virtue of its sources and strength as a third power, but in view of its peculiar character which gives it strength and vision to act when a situation demands it.

The Commonwealth is the product of the aspirations of the Communities of the British Empire to attain nationhood, now it must live and grow upon the aspirations of establishing a world society.