

INDIAN STATES & Responsible Government

**By
K. R. R. SASTRY**

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K. R. R. SASTRY, M.A., M.L.

READER, LAW DEPARTMENT, UNIVERSITY OF ALLAHABAD;
ADVOCATE, MADRAS HIGH COURT; MEMBER, GROTIUS
SOCIETY, LONDON; AUTHOR OF "LEAGUE OF NATIONS
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TO
THE RT. HON SIR T. B. SAPRU
A PERFECT GENTLEMAN AND AN EMINENT LAWYER

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AUTHOR'S PREFACE

Five hundred and sixty-two and odd Protected States and Jagirs persist in India owing to the might of the Paramount Power. Most of these States are medieval autocracies. In a desert of denial of civil liberty, one happily comes across the few oases in the progressive States of Mysore, Cochin, Travancore and Baroda. This medley of States, Jagirs and petty principalities makes the suggestion of different remedies indispensable.

But, there should certainly *be a minimum standard of civilised administration in all the States*. The time has come when the petty Orissa States should set their houses in order lest most of them be wiped out of existence.

The establishment of responsible government in the States is the only way of "restricting paramountcy to its proper field of action." The Princes as a class have not yet realized this aspect of the question.

The States voluntarily moving with the times,

as e.g., Aundh, Cochin and Mysore will be assisting in the birth of a renascent federal India assisted by a Paramount Power which will play its new rôle begun at Rajkot in actively fostering such an array and development of centripetal forces.

In such a hope this book has been written. The author is not in favour of abolition of Indian States which have an important rôle to play in the birth of a Federal India. If the States persist in their medieval folly, nemesis will overtake most of the petty states which cannot ensure by themselves the minimum of civilised administration.

The author thanks the Editor of the "*New Review*" Calcutta, where the Chapter on '*Paramountcy*' had been published as a special article.

University of Allahabad
September 1, 1939

K. R. R. SASTRY

CHAPTER I

QUASI-INTERNATIONAL STATUS OF INDIAN STATES

Problems relating to the position of the Indian States cannot be satisfactorily discussed with reference to purely juristic criteria. In view of the admitted facts, any attempt to evolve a formula must be a failure. Thus, judgment on the matter on one side or the other must be more or less arbitrary.

The status of Indian States has had examination by a bewildering variety of writers from the shallow globe-trotter upto the serene constitutional expert. Nor can it be forgotten that protagonists of State-rights have contributed works with a special bias. The Indian States' Committee's examination of the legal position of the Indian States has been jejune as admitted by Mr. D. B. Somervell, K. C. in a later contribution of his¹.

It is necessary to have a short historical re-

¹ *British Yearbook of International Law*, 1930, p. 55.

trospect before discussing the status of the Indian States. Sir Benjamin Lindsay has correctly summed up this historical background that the passage deserves repetition. The Indian States are "for the most part survivals of former dynasties and powers, which in one way or another, contrived to prolong their existence after the collapse of the Moghul Empire and the ensuing struggle for supremacy which ended in favour of the British. Some of them while the Moghul Empire still stood, had been able to establish themselves in a position of practical independence, yielding only a nominal allegiance to the Emperors of Delhi, and were able later to secure recognition from the British power. Others of them, such as the Rajput States of Central India had been engaged for centuries in conflict first with the Moghuls later with the Mahrattas and were only rescued from extinction by British intervention which secured them in possession of such territories as they had been able to retain. Still others were principalities carved out during the short-lived period of Mahratta domination in Western India by soldiers of fortune who came to terms with the British forces which broke up the Mahratta Confederation.

By the beginning of the nineteenth century,

British supremacy had been consolidated over the major portion of India, and by the year 1818 there was no power in India, except the Sikh State of Ranjit Singh, in a position to claim independence. With the extinction of the Sikh Kingdom after the second Sikh War (1848-9) all State-territory in India was under British suzerainty.

After the suppression of the Mutiny (1857-8) which was effected with the timely and substantial aid of many of the State rulers, the British Crown assumed the direct government of India as being in the words of Lord Canning, the first Viceroy, the "unquestioned ruler and Paramount Power in India."¹

There are "nearly 600" States graded into three classes by the Indian States' Committee.²

- I. States, the rulers of which are members of the Chamber of Princes in their own right.

109

- II. States, the rulers of which are represented in the Chamber of Princes by twelve members

¹ *Journal of Comparative Legislation and International Law*, Feb. 1938, pp. 91-92.

² Para 10. Indian States' Committee gives the number at 562, though the J.P.C. Report at p. 2 mentions it as "nearly 600."

of their order elected by themselves ...	126
III. Estates, Jagirs, and others ...	327

The first two classes have "in greater or less degree, political power, legislative, executive, and judicial over their subjects."

The petty States of Kathiawar and Gujerat numbering 286 out of 327 in the third class are organized in groups called *thanas* under officers appointed by the local representatives of the Paramount Power who exercise various kinds and degrees of criminal, revenue, and civil jurisdiction.

Sirdar D. K. Sen has classified Indian States under seven divisions graded according to their respective *de jure* and *de facto* status. It has become a moot question whether these series of relationships that have grown up between the Crown and the Indian Princes "under widely differing historical conditions" have not been made gradually to conform to "a single type."¹ Anyway Sirdar Sen's classification gives a correct insight into the widely differing status of these States varying from Baroda, Gwalior, Indore, Bhopal and the Phulkian States of the Punjab which were sovereign

¹ Lord Curzon's Bahawalpur Speech, 1903.

de jure and *de facto* to the States which form the class of mediatized and guaranteed States. States which lost their independence for a period but which were restored to their former status as Mysore and some Simla Hill States have to be specially noted when the question of treaty-responsibility to the Paramount Power is discussed *vis-a-vis* grant of responsible government. The Sanad States of Bundelkhand and some states of C. P. are subordinate *de jure* and *de facto* to other States. What one fails to appreciate in Sirdar D. K. Sen's classification is resurrecting the dead past in his classification of States which paid tribute to other States as Jodhpur, Kotah, Bundi, and Jaipur. An examination of their treaties does not at all put them a whit lower in status for the matter of this historical fact.

It is relevant to remember amidst this diversity of classification of Indian States that 30 States have Legislative Councils. 40 States have High Courts. 34 States have separated executive from judicial functions. 56 States have a fixed privy purse. 46 States have a graded civil list of officials. 54 States have pension or provident fund schemes.¹

¹ Indian States' Committee. Para 15. This information

Only 212 out of 562 make regular cash payments as tributes. There is great force in the observation that "these are both arbitrary and unequal in their incidence on individual states."¹

Legal Theory—Grotius, Pufendorf, and Vattel agree that in unequal alliances the inferior power remains a Sovereign State. Over the disputes and internal dissensions of its subjects, the Suzerain power has no jurisdiction as such. Vattel says a weak State which in order to provide for its safety places itself under the protection of a more powerful one and engages to perform in return several offices equivalent to that protection without however divesting itself of the right of government and Sovereignty, does not cease to rank among the Sovereigns who acknowledge no other law than the law of nations.² The eminent lawyer Mr. Evans had developed this opinion of text-writers on International Law in his argument in *Lachmi Narain v. Raja Pratap Singh*³ while he stated

has to be read along with the Reforms at Aundh and Banskara and the further contemplated ones at Mysore, Rajkot, Hyderabad and Benares.

¹ M. K. Varadarajan: "*The Indian States and the Federation*", p. 133.

² Also cited in *Statham v. Statham and H. H. Gaekwar of Baroda*, 1912, P. 92, at pp. 95 and 96.

³ 2 A. 1 at p. 3.

that "it is clearly recognized by the text-writers on international law that a State may exist *qua* state viz., retain its '*political personality*' notwithstanding a very great "*immunitio imperii*" resulting from its relation with other States."

In his celebrated minute in the Kathiawar case (1864) Sir Henry Maine has argued out the position of divisibility of Sovereignty. There is not anything in international law to prevent "some of the sovereign rights being lodged with one possessor and some with another."

One of the eminent officials admitted to a full knowledge of the relations between the Governor-General and these states, Sir Charles Tupper, was responsible for the theory of feudal relationship between the suzerain and the feudatory princes.¹ But this theory though assiduously developed to cover the minority administrations in Indian States is not found quite satisfactory even by authoritative writers like Sir William Lee Warner and Sir Sydney Low.² "It is the superficial resemblance confined to a very few of the petty chiefs, which makes the employment of the phrase

¹ Sir Charles Tupper, *Our Indian Protectorate*, 1893.

² Sydney Low, *Indian States and Ruling Princes*, p. 12.

'feudatory' so dangerous to the rights of the great bulk of the protected princes of India."¹ No doubt, the fifteen chiefs in the C. P. to whom adoption sanads were granted in 1865 executed an agreement which commenced as follows:—

"I am a chieftain under the administration of the Chief Commissioner of the C. P. I have now been recognised by the British Government as a feudatory subject to the political control of the Chief Commissioner or of such officer as he may direct me to subordinate myself to."² King Edward VII's Coronation message is addressed to "feudatories". King George V's Proclamation of 1911 contains also the term "feudatories". From 1919 onwards, in royal messages the phrase "Princes of India" occurs. Indeed certain States of Kathiawar, Bundelkhand and Simla Hills are feudatories. Chiefs of Mahikanta agency and Southern Mahratta Jagirdars were no more than officials of the Peshwa.

According to Sir W. Lee Warner, "no uniform or consistent practice has been observed by the Paramount Power in describing the States as a

¹ Lee Warner, "*Native States of India*," II Ed., p. 394.

² Aitchison, IV Ed., Vol. I, pp. 445 ff.

whole. On the contrary different language has been used in despatches and in treaties at different periods and even in the same period one ruler has been distinguished from another, each case being treated on its own merits.¹ Sindhia and Holkar as also Alwar and Bhopal could lay claim to the title of independent and Sovereign States when they came into contact with Britain. [Vide Art. IV, Treaty with Gwalior, 1804; Treaty of 1806 with Indore; Treaty of 1818 with Bhopal; Treaty of 1803 with Alwar]. From 1766-1799 the status of Hyderabad was that of an equal power with whom the East India Company made a treaty of "alliance and friendship."² [Treaty with Nizam dated 12-11-1766]. Though Sir W. Lee Warner admitted generally the internal sovereignty of the Indian States, he was responsible for a view which had been fully developed by imperialistic Curzon and Lord Reading who was stressing the "hard fact" in his letter to H. E. H. the Nizam (1926). According to Lee Warner "Treaties and grants held by the protected princes and the precedents of British Government's dealings with them

¹ Lee Warner, "*The Native States of India*", II Ed., pp. 387-388.

² Aitchison, Vol. IX, p. 22.

and with the protected princes who hold no treaties or grants must be read as a whole, like the decisions of English Courts of Justice."

Prof. Westlake, the eminent international lawyer, held that "the imperial right over the protected States appears to present a peculiar case of conquest, operating by assumption and acquiescence."¹ In Statute 39 and 40 Vict. C. 46, these States were described as "Several princes and States in India in alliance with Her Majesty." The doctrine of paramountcy developed by Prof. Westlake has got added weight by its adoption by the Indian States' Committee. "There is a paramount power in the British Crown of which the extent is wisely left undefined. There is a subordination in the Native States which is understood but not explained." Prof. Westlake also illustrates from the Proclamation of 13th Jan. 1875 for trial of the then Gaekwar of Baroda. The development of the imperial doctrine "that the position of all the native princes is to be ascertained from the principles latest adopted in dealing with any of them, as the position of all vendors and purchasers of property, or of all drawers and

¹ Westlake, *Collected Papers*, p. 214.

endorsers of bills of exchange is to be ascertained from the latest decisions with regard to any of them."¹ In the Manipur case, (1891) the trial and punishment for breach of the conditions of loyalty were extended to subjects of a Native State, one of whom had indeed usurped the Throne. The growth of the *modus vivendi* has been "gradual, like that of the Indian Empire itself; that its particulars have in the same manner been imperceptibly shifted from an international to an imperial basis; and that the process has been veiled by the prudence of statesmen, the conservatism of lawyers; and the prevalence of certain theories about Sovereignty."² Westlake regarded the rules which regulated the status of the Indian States as part of the constitutional law of the Empire.

Professor Pollock observed that in cases of doubtful interpretation, the analogy of international law might be found useful and persuasive.³ Long ago, Phillimore had stated that the principles of international justice are "binding, for instance, upon Great Britain in her intercourse with the

¹ Westlake, *Collected Papers*, p. 222.

² Westlake, *Collected Papers*, p. 232.

³ *Law Quarterly*, XXVII, pp. 88. 89.

native powers of India."¹

Professor Hall's view is found in a footnote² where it is laid down that the "Indian Native States are theoretically in possession of internal Sovereignty and their relations to the British Empire are in all cases more or less defined by treaty." When Prof. Hall follows this up by stating that in matters not provided for by treaty a "residuary jurisdiction" on the part of the Imperial Government is considered to exist, his view becomes open to strong criticism and appears unsupportable from an examination of treaties. Then follows a brilliant observation where one detects in a disguised form the application of the *Rebus Sic Stantibus* doctrine with reference to these treaties, advertence to which will be made later.

Sir Leslie Scott and four other eminent counsel engaged by the Princes stated as their opinion that "as each State was originally independent, so each remains independent except to the extent to which any part of the ruler's sovereignty has been transferred to the Crown. To the extent of such transfer, the sovereignty of the state becomes vested in the Crown; while all sovereign rights,

¹ Phillimore, *International Law*, Vol. I, p. 23.

² Hall, *International Law*, VI Ed., p. 27.

privileges, and dignities not so transferred remain vested in the ruler of the State.” In their view, the State and not the Crown has all residuary jurisdiction. In fact, the pronouncements of the Crown themselves had recognized the sovereignty of the States:—The Sanads issued after the Mutiny refer to “governments of several Princes and chiefs who now govern their own territories.” The proclamation of 19th April, 1875 states that the Gaekwar is deposed from the “Sovereignty” of Baroda. The Montague-Chelmsford Report stresses “the independence of the States in matters of internal administration.”

The Indian States’ Committee held that the States are “*sui generis*, that there is no parallel to their position in history, that they are governed by a body of convention and usage not quite like anything in the world. They fall outside both international and municipal law.” The points of agreement between the Indian States’ Committee and the opinion of Sir Leslie Scott deserve to be noted:—

- (a) The relationship of the States to the Paramount Power is a relationship to the Crown,

- (b) The treaties made with them are treaties made with the Crown,
- (c) Those treaties are of continuing and binding force as between the States which made them and the Crown,
- (d) It is not correct to say that "the treaties with the Native States must be read as a whole." There are only forty States with treaties but the term in the context covers "engagements and sanads."
- (e) Cases affecting individual States should be considered with reference to those states individually, their treaty rights, their history and local circumstances and traditions and the general necessities of the case as bearing upon them.

The opinion of two eminent German Professors, Dr. Viktor Bruns and Dr. Carl Bilfinger (available through the courtesy of Sir Mirza Ismail to the present author, and also quoted by Sirdar K. M. Panikkar in his "*Interstate Law*", p. 31) is that "the Paramount Power of the British Crown is not incompatible with the independent status of the Indian States as international persons. States which are under the paramountcy of another

state remain independent international persons so long as they are not incorporated in the other state."

The case in *R. v. Christian*¹ is relevant for the observations of Innes C. J. The Court held that high treason can be committed against a State which possesses internal sovereignty even though its external powers may be restricted to some extent, and that South Africa did possess sufficient internal sovereignty in South-West Africa to sustain the charge. Innes C. J. made the observation that "curtailment of external sovereignty and dependence upon another power are not in themselves fatal to the sovereignty of the State concerned." Further the "distinction between internal and external sovereignty is inherent and of the two the internal is the more important; for a law-making and law-enforcing authority is essential to the very existence of a State." Or again as was observed in the same case by De Villiers, J. A. "the limitation of the exercise of sovereign rights in certain directions does not deprive the sovereign of *majestas*, so long as there is no abdication of sove-

¹ (1924) S. A. L. R. (A.D.) 101. Also for a discussion of the case, *Transactions of the Grotius Society*. London. Vol. 23, p. 89.

reignty in favour of another." The bearing of these observations on the sovereign status of Indian States is direct.

The eminent Indian Jurist, Sir P. S. Sivaswamy Iyer has described the status of the Indian States thus—"The precise category to be assigned to the Indian States in international law is to the academic lawyer as fascinating as it is baffling. The fact is that for various purposes including the administration of justice, the Indian States are treated as foreign territory beyond the jurisdiction of the British Indian Courts. They are in other respects subject to the suzerainty of the British Government with all its practical implications and corollaries. The body of law applicable to them can at best be spoken of only as quasi-international law. To the rulers themselves and their counsel, the letter of the treaties may possess a predominant interest; but to the practical statesman and to the subjects of the Indian States, the vital issue is what are the rules and usages by which the relations of the British Government and the States are and have been governed."¹

¹ From the Foreword of Sir P. S. Sivaswamier to Dr. Mehta's valuable work on "*Lord Hastings and Indian States*" p. vii.

So far as the Government of India Act (1935) is concerned, §311 defines an Indian State following the English Interpretation Act of 1889, (§18) thus:—“Indian State” includes any territory, whether described as a State, an Estate, a Jagir, or otherwise, belonging to or under the suzerainty of His Majesty and not being part of British India. It is significant that the term “alliance” familiar to readers of earlier Acts of Parliament, is not found in the Government of India Act, 1935. The word found instead—to describe the nexus between the Crown and the States is “relationship”—(Vide §3). As Prof. J. H. Morgan pointed out the new term “relationship” may excite “doubt but it cannot provoke dispute.” The term “Sovereignty” with reference to the status of the Indian States which occurs in the Instrument of Instructions and the Instrument of Accession (Draft) appears only once in the Act in another context to describe the authority of His Exalted Highness the Nizam over the Berar (§47). Further, the term used in connection with accession is “instrument” and not “treaty”. The validity of instruments of accession to be executed by the Indian States, as distinct from their scope and interpretation by the Federal Court cannot be subject to question in Courts

since under §6(9) "all Courts shall take judicial notice of every such instrument and acceptance."

"Is the term "*suzerainty*" correct to describe the relations between the Crown and the different classes of Indian States? What is meant by *suzerainty*? The term has come for examination in Courts of Law which in the main have followed the definitions of text-book writers of International Law. While construing the definition of the Indian State in the English Interpretation Act of 1889, Bargrave Deane J. has pointed out 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 the other. Such a relation may be either 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 with an express grant of jurisdiction."¹

According to Prof. Westlake, the word "*suzerainty*" is used in the Treaty of Berlin to express the

¹ *Statham v. Statham and H. H. The Gaekwar of Baroda*, 1912, P. 92, at pp. 95-96.

relation of the sublime *Porte* to the principality of Bulgaria, which it created. That was the proper term in the Middle Ages for the relation of a feudal superior to his vassal, while "Sovereignty" was more properly superiority in jurisdiction, the highest Court in a territory which was distinct for judicial purposes being called a *Cour Souveraine*. A modern description of a State as subject to a suzerainty does not by itself shut it out from any of the rights that were enjoyed by the States of the Holy Roman Empire, which were internationally accepted as Sovereign States, and were so called, while they recognized the Empire as their Suzerain Power. How many of these rights it is intended that the State in question shall enjoy must be ascertained from the more detailed provisions of its constitution."¹

Prof. Hall formulates that "a State under the suzerainty of another being confessedly part of another state, has those rights only which have been expressly granted to it, and the assumption of larger powers of external action than those which have been distinctly conceded to it is an act of rebellion against the sovereign."²

¹ Westlake, *Collected Papers*, p. 90.

² Hall, *International Law*, VI Ed., p. 29.

Wheaton gives the examples of the principalities of Moldavia, Wallachia, and Servia, under the *suzerainete* of the Ottoman Porte and the protectorate of Russia, as defined by the successive treaties between these two powers, confirmed by the treaty of Adrianople, 1829.¹

Fiore defines a treaty of suzerainty as one concluded between a civilized and an uncivilised state in which the former imposes on the latter (which accepts it) every obligation of mediate and immediate dependency in the exercise of its rights of sovereignty within the State.

According to Oppenheim, modern suzerainty involves only a few rights of suzerain state over the vassal State which can be called constitutional rights. The rights of the suzerain over the Vassal States are principally international rights of whatever they may consist. Suzerainty is by no means sovereignty. Suzerainty is a kind of international guardianship, since the vassal state is either absolutely or mainly represented internationally by the Suzerain State. This is the position of the Indian Vassal States of Great Britain which have no inter-

¹ Wheaton, IV Ed. by Atlay, p. 55.

national relations.”¹

An examination of the above definitions by text-writers leads to the conclusion that “having regard to its numerous applications in practice, the term “*Suzerain*” would scarcely seem to imply any definite relations in law.”² Though its legal implications appear to lack precision, the following political characteristics of “Suzerainty” pointed out by Sirdar D. K. Sen flow out of the definitions of the eminent international text-writers:—

(i) “The Suzerain State is under an obligation to protect the vassal state,

(ii) The vassal State is under an obligation to observe the following conditions:—

(a) It must be loyal and faithful to the Suzerain: *fiducia*,

(b) It must render service in time of war: *Servitium*,

(c) The title of the Vassal State is not original, it is derived from the Suzerain State,

(d) In almost all cases, the Vassal State pays tribute to the Suzerain,

¹ Oppenheim, V Ed., Vol. I, p. 165.

² Pitt-Cobbett, “*Leading Cases in International Law*”, Vol. I, p. 59.

- (e) In all its external affairs, the Vassal State is governed and guided by its Suzerain.¹

The implication that the title of the Vassal State is derived from the Suzerain State is manifestly inapplicable to States like Travancore, Kashmir, Gwalior, Hyderabad and Baroda. But, in cases of conquest and retrocession or regrant this implication is applicable. These Indian States have a status which is *quasi-international* in character. Looked at internationally "from the outside by foreign powers, they are British. Looked at however from within they are not British. Parliament which has full legislative power over all British territory cannot legislate for the Indian States."²

The amendment of the definition of "*Indian State*" in §311 of the Government of India Act (1935) is significant. The deletion of the term "Suzerainty" may satisfy the hypersensitive states; but the shifting of the status to depend purely on "recognition by His Majesty" reduces all states to one level. It is presumed that this simplified definition will not disturb the existing relation-

¹ Sirdar D. K. Sen, *Indian States*, pp. 36-37.

² *British Yearbook of International Law*, 1930, pp. 55-56.

ship of suzerainty as between certain States and their subordinate Jagirs. The amended definition in the Act. runs as follows—

“Indian State” means any territory, not being part of British India, which His Majesty recognises as being such a State, whether described as a State, an estate, a Jagir or otherwise.”

CHAPTER II

CONSTITUTIONAL CHARACTERISTICS

Indian States are *political communities*. This constitutional position can be taken as having been recognized all round. The following treaty-provisions abundantly illustrate this view. Art. 9 of the Treaty with Udaipur, dated 13th January 1818 runs as follows:—"The Maharana of Oudeypore shall always be absolute ruler of his own country, and the British jurisdiction shall not be introduced into that principality." The Proclamation of war against Coorg dated 15th March 1834 notified that "a British army is about to invade the Coorg territory." Art. 9 of the Treaty with Bikaner dated 9-3-1818 states that "The Maharajah and his heirs and successors shall be absolute rulers of their country and the British jurisdiction shall not be introduced into that principality." Under Article 3 of the Treaty with Alwar dated 19th December 1803, "the Honourable Company shall not interfere with the country of the Maha Rao Raja nor shall demand any tribute from him."

Article 9 of the Treaty with Jodhpur dated 6th January 1818 assures that "the Maharajah and his heirs and successors will remain absolute rulers of their own country and the jurisdiction of the British Government shall not be introduced into that principality." Likewise, Art. 9 of the Treaty with Bhopal of 1818 states that "The Nawab and his heirs and successors shall remain absolute rulers of their country and the jurisdiction of the British Government shall not in any manner be introduced into that principality." Art. 8 of the Treaty with Jaipur dated 2nd April, 1818 runs as follows:—"The Maharajah and his heirs and successors shall remain absolute rulers of their territory and their dependents according to long-established usage; and the British Civil and Criminal Jurisdiction shall not be introduced into that principality."¹ In fact, Art. VI of the Treaty with the Gaekwar of 8th March 1802 clinches the position: "For the cultivation and promoting the permanency of the good understanding between the *two States*, (*italics mine*) there shall be a constant good correspondence kept up between them, and agents reciprocally appointed

¹ Aitchison, Vol. III, IV Ed., p. 105. The clauses in the treaties, engagements and sanads cited in this work have been extracted from Aitchison's Volumes.

to reside with each." Again in a letter from the Governor of Bombay to H. H. the Gaekwar dated 8-2-1841, one reads that "the British Government in no way wishes to interfere in the internal administration of Your Highness' territory, of which it acknowledges you to be the Sole Sovereign."¹ Further, in the treaty with Jammu and Kashmir dated 16th March, 1846, it is stated in Art. IX that "The British Government will give its aid to Maharajah Golab Singh in protecting his territories from external enemies." The Instrument of transfer of the Benares State expressly declares that "the Family Domains of the Rajas of Benares... should be constituted as a *State* under the suzerainty of His Majesty."

The territory of Indian States is not British territory.² The certificate which the India Office gave to assist the Court in assessing the status of the Gaekwar of Baroda as a foreign Ruling Prince illumines this position—"The Gaekwar of Baroda has been recognized by the Government of India as a ruling chief governing his own territories under the suzerainty of His Majesty. He is treated

¹ Aitchison, Vol. VIII, IV Ed., p. 89.

² *Empress v. Keshub Mahajan and others*, 8 C. 985 F.B.
The territory of Mohurbhunj is not within the limits of British India.

as falling within the class referred to in the Interpretation Act, 1889, §18, Sub.§5, as that of native princes or chiefs under the suzerainty of His Majesty exercised through the Governor-General of India. The British Government does not regard or treat His Highness' territory as being part of British India or His Majesty's dominions, and it does not regard or treat him or his subjects as subjects of His Majesty.

But, though His Highness is thus not independent, he exercises as ruler of his State various attributes of sovereignty, including internal sovereignty which is not derived from British law, but is inherent in the ruling Chief of Baroda, subject however to the suzerainty of His Majesty The King of England....."¹

In this connection reference may be made to the remarks of Lord Halsbury regarding jurisdiction over railway territory of States. In the particular case, their Lordships were of opinion that "the railway territory has never become part of British India, and is still part of the dominions of the Nizam. The authority therefore to execute

¹ Certificate extracted in *Statham v. Statham etc.*, 1912, P. 92.

any criminal process must be derived in some way or another from the sovereign of that territory.”¹ Questions of jurisdiction in Cantonment areas, Railways, and Residency bazaars will be examined while studying the growth of powers of the Paramount Power.

The subjects of Indian States are *not British subjects*. In fact, Kashmir has defined its State nationality by passing a law that no one who has settled in Kashmir after 1886 is considered a hereditary subject of the State. The question of the status of the subjects of Western India Agency was raised in the House of Commons through a question on the 19th November 1928 when the Under-Secretary of State for India answered that the people of the territories included in the Western India States Agency “are not considered British subjects but owe allegiance to the Rulers of the various States and no question arises therefore of their having rights of representation as British subjects.”

Most Indian States have their legislation, administration, and Civil and Criminal Jurisdic-

¹ Lord Halsbury in *Muhammad Yusuf-ud-Din v. Queen Empress*, 1897, 24 I.A., 137.

tion. As the Joint Parliamentary Committee put it, "the more important States enjoy within their own territories all the principal attributes of sovereignty, but their external relations are in the hands of the Paramount Power. The sovereignty of others is of a more restricted kind and over others again the Paramount Power exercises in varying degrees an administrative control."¹

The division of Indian States according to their jurisdictional authority can be made with reference to persons and offences. The Rajputana States and the Phulkian States of the Punjab can be cited as instances of full-powered States. In a State like Kutch which was governed by a treaty of protection and guarantee the jurisdiction over the Jhariya chieftains was reserved to the British Government. One also learns that till 1922, the authority of the first class Kathiawar States was restricted. The criminal jurisdiction over European British subjects in Kashmir does not vest in the Kashmir State. In the Sanad States of Bundelkhand, Panna, and Simla Hill States, sentences on capital offences were subject to the confirmation of the representative of the British Government. Restrictions are

¹ J. P. C. Report, Vol. I, Part I, p. 2.

found in jurisdiction over persons and offences in the Behar and Orissa States and the Kathiawar States except those belonging to first and second class.

An examination of illustrative clauses from the treaties of some of these States may be made at this stage. In the Treaty with Patiala dated 5th May 1860 Cl. I runs as follows—"The Maharaja Saheb and his successors will.....exercise sovereignty with peace of mind and in perfect security, in accordance with ancient custom." In Cl. VII of the same Treaty one reads that 'complaints against the Maharaja Sahib from his subjects, muafidars, jagirdars, dependants, brothers and servants, etc. will on no account be listened to by the powerful British Government.' Likewise in the Gwalior Treaty of Alliance of 27-2-1804 in Art. 8 are found the words, "and it is further agreed that no officer of the Honourable Company shall ever interfere in the internal affairs of the Maharaja's government." Art. 10 of the Indore Treaty of 1818 also runs thus:—"The British Government hereby declares that it has no manner of concern with any of the Maharaja's children, relatives, dependants, subjects or servants with respect to whom the Maharaja is absolute." In the Treaty of general defence and

protection with the Nizam of Hyderabad of 12-10-1800, the Company's government states through Art. XV that they "have no manner of concern with any of H. H.'s children, relations, subjects or servants with respect to whom H. H. is absolute."

Following Sirdar D. K. Sen's classification in the second class the exercise of internal sovereignty is found subject to "following or listening to the advice of the British Government." The Gaekwar of Baroda under the Treaty of 8th March 1802 (Art. 5) is to "listen to advice" of the British Government in all "that may appear to be for the good of the country." Under the Treaty with Kolhapur of 1862, "in all matters of importance the Raja of Kolhapur agrees to follow the advice of the British Government as conveyed by the political officer representing that government at Kolhapur." This is carried to great detail in the Treaty of Perpetual Friendship and Alliance with Travancore dated 1805. Under Art. 9 H. H. "promises to pay at all times the utmost attention to such advice as the English government shall occasionally judge it necessary to offer to him, with a view to the economy of his finances, the better collection of his revenues, the administration of

justice, the extension of commerce, the encouragement of trade, agriculture, and industry or any other objects connected with the advancement of H. H's interests, the happiness of his people and the mutual welfare of both States." Again Cl. 9 of the Cochin Treaty of perpetual friendship of 1809, certainly restricts the power of the prince to introduce material changes in the administration without the advice of the British Government. Even in the Mysore Treaty revised in 1913 there is a clause that no material change in the administration in force should be introduced without the consent of the Governor-General in Council.

Under the third class some States "have either permanently or temporarily granted to the Crown important rights of internal sovereignty or have accepted either expressly or tacitly, restrictions on their internal sovereignty."—The Kathiawar States other than the first class States fall into this category. Sanad States of Bundelkhand and some Simla Hill States are further instances. The Sanads restoring full criminal jurisdiction to the States of Bundelkhand provide that "sentence of death shall be immediately reported to the Agent to the G. G. and be subject to confirmation by the Agent; and that periodical reports shall be sub-

mitted by the Chief to the local British Police Officer of all cases in which sentences of transportation or imprisonment for life are passed by him."

The fourth class of States have restricted internal sovereignty subject to the control of the British Government whenever deemed necessary. Cl. 3 of the Sanads of 1915—issued to Behar and Orissa Tributary and Vassal States—their legality has been questioned—demands that the ruler "shall conform in all matters concerning the preservation of law and order and the administration of justice generally, within the limits of (his) State, to the instructions issued from time to time for (his) guidance by the Lieutenant Governor of Behar and Orissa in Council." Art. 8 expects "compliance with the wishes" of any officer duly vested with authority in this behalf by the Lieutenant Governor of Behar and Orissa in Council "in all important matters of administration." Cl. 2. Ikrarnamah entered into by the Rajah of Nalagarh (a Simla Hill State) recognizes the right of the subjects of the State to appeal to the local British Agent against oppression and injustice and under Art. 3 the Raja engaged himself "on pain of forfeiture of the grant to pay implicit obedience to any advice or remonstrance which the British Agent may have occasion

to offer." In the Sanad of Bushair if the Raja neglects in showing submission and obedience to the British authorities.....he "shall incur displeasure and will be deposed."

An examination of the changes in the status effected in the State of Mayurbhunj reinforces the irresistible conclusion that since 1894, the Paramount Power has been making an increasing number of inroads into the undoubted internal sovereignty of Mayurbhunj. In a decision of the Calcutta High Court, (1882) the Full Bench has held that "no direct civil jurisdiction has ever been exercised in the territory by the Executive government of India. Lord Canning's Sanad distinctly deals with the territory as independent and not British territory."¹ So far as the Sanad of 1894 is concerned, it made a serious encroachment on the rights of the chiefs. The then ruler of Mayurbhunj Maharaja Sriram Chandra Bhanj Deo, obtained the opinion of the Hon'ble Mr. J. T. Woodroffe, then Advocate-General of Bengal, on the Sanad and was advised by him that the Sanad "in various ways derogates from his rights as the ruler of a Tributary State possessing under the

¹ *Per Pontifex J.*, 8 C. 985 F.B. at p. 990.

suzerainty of the Queen-Empress of India, sovereign powers, which though not unlimited are yet of considerable extent and that the Raja should, without delay memorialize His Excellency with respect to that Sanad and ask for its withdrawal or amendment." The provisions in the Sanad relating to criminal powers and the clause which required the chief to "comply with the wishes" of the Superintendent even in matters of detail of almost all the branches of administration—these two curtailments, it is submitted, could not be justified either from past history of the State, the Treaty of 1829, or any other source of legal rights. The memorial of the Maharaja failed to achieve its object. It is learnt however that the criminal powers of the Maharaja were extended under the discretionary provisions of the Sanad. Further revisions of the Sanad were made in 1908, 1915, and 1937.

At every point of study of the status of Indian States, one finds purely legal ideas or jural concepts made inapplicable owing to the inroads made by the tentacles of paramountcy or by more subtle applications of the doctrine of act of State "defying jural analysis." Prof. Hall has made an astounding

observation in a footnote¹ that in matters "not provided for by Treaty, a 'residuary jurisdiction' on the part of the Imperial Government is considered to exist." Lee Warner has also developed the theory of a 'residuary jurisdiction' of the British Government in all matters. The shadows and repercussions of Paramountcy which is undefined permeate everywhere. The argument ably developed by Sir Leslie Scott was that "The Crown has no sovereignty over any State by virtue of the prerogative or any source other than cession from the ruler of the State"—This argument gets added support from the preamble to the Foreign Jurisdiction Act, 1890. The extra-territorial jurisdiction exercised by the British Crown within the territories of foreign States is founded upon "Treaty, capitulation, grant, usage, sufferance and other lawful means." If the stand were to be taken on consent, it may be expressed in various ways. Per Dr. Lushington in the *Laconia*², consent may be expressed by (a) "constant usage, permitted and acquiesced in by the authorities of the State; (b) active assent; or (c) silent acquiescence where there must be full knowledge." Such facts as are avail-

¹ Hall, *International Law*, VI Ed., p. 27.

² 2 Moo. P. C. N. S. 183.

able are sufficient to torpedo fully any acquiescence by the States. In 1863, the Bhopal ruler protested against the exercise of jurisdiction by the representative of the British Government over British subjects resident in the principality of Bhopal and relied very properly on Art. 9 of the Bhopal Treaty of 1818 whereby "the jurisdiction of the British Government shall not in any manner be introduced into the principality." An unsuccessful attempt at taking away the jurisdiction of the Court of Travancore in 1871 met with the repudiation of John D. Mayne who put the case of Travancore thus:—"Parliament is as incapable of taking away the powers of a Court in Travancore as it is of dealing with the courts of France." Legally, the argument can be successfully maintained that the jurisdiction exercised by the representatives of the Paramount Power in cantonment areas, residency areas, and railways is in excess of the grant or cession. The fiscal hardship that can be caused by the growth of big centres of trade in residency bazaars is illustrated by the residency bazaars in Indore which cannot be in any view legally justified under Art. 14 of the Indore Treaty of 1880.¹

¹ The Residency bazaars of Indore and Hyderabad have been retroceded to the States recently.

In law Paramountcy cannot be a source of the extra-territorial jurisdiction of the Crown. As Piggott has tersely put it, "the exact position involved in ex-territoriality may be shortly stated thus: Such powers alone as are surrendered by the sovereign of the country can be exercised by the sovereign of the Treaty Power (viz.—The sovereign to whom the grant has been made); all those powers which are not surrendered are retained."¹

It is necessary to have a correct idea of the constitutional steps taken by different States to associate the people in the administration of the country. Joseph Chailley's division of the rulers of Indian States into three classes has to some extent been altered particularly after the introduction of provincial autonomy in British India. The classification is still juridically correct since in the atmosphere of a Federation-to-come, the Princes "were always preoccupied with the theory of Paramountcy, their own Treaty-rights, and the economic grievances under which they had been labouring for a long time."² Joseph Chailley's classification ran thus:—

¹ Piggott, *Ex-Territoriality*, pp. 18-21. The reader is referred to the able examination of this topic in D. K. Sen's "*Indian States*."

² This observation has been made by the Maharaj Kumar of Sitamau (C. I.) in his "*Indian States*", 1938, p. 196.

1. "The very few who govern according to European ideas of order and justice and who seem to take a personal interest in the welfare of the people:
2. Those who have introduced the elements of a reformed organization, have enacted laws, have appointed judges and have then appointed a Wazir to govern for them and relieve them of responsibility.
3. Those who still imagine that they are the State, that its resources are private property, that its inhabitants are their slaves, and that their chief business is pleasure." Though the number of States introducing reforms has increased, the basis of division is still sound.

The States which have impressed the author with their constitutional progress and which are here examined have to be taken as illustrative and not exhaustive. The political consciousness in the Southern States as Mysore, Travancore and Cochin, is at a high level thanks to the continued prevalence of civilized and efficient administration.

MYSORE

Mysore, a model State in many respects has

had the rare advantage of being piloted by a galaxy of able and tactful Dewans. Though the constitution of local municipal committees goes back to 1862, the Representative Assembly was inaugurated in 1881, as a first step in the direction of ensuring that the "actions of the Government should be brought into greater harmony with the wishes and interests of the people." This was carried a step further in 1907 when the Legislative Council was constituted to associate in the "actual process of the making of laws and regulations non-official gentlemen qualified by practical experience and knowledge of local conditions and requirements." The question of constitutional developments in Mysore was examined by a Committee presided over by Sir Brajendra Nath Seal in 1923 and important reforms were introduced on the recommendations of that Committee. Standing Committees were appointed for Finance, Railways, and Public Works, Local Self-Government, Medicine and Public Health. The Committee on Public Accounts is empowered to scrutinise the expenditure of the State and to submit its observations to the Legislative Council. By an Act of 1926, village panchayats have been revived and nearly 11600 of these bodies exercise their full functions, levying

taxes, and contributing in a large measure to the processes of rural reconstruction. A special Committee has been appointed with a preponderating non-official majority for the purpose of examining the development and working of the representative bodies in the State, and to formulate proposals as to the further changes which may be desirable in order to secure the constitutional progress of the State. One really finds no difference between an advanced British Indian Province as Madras and enlightened Mysore; only the industrial development and artistic beauty of the latter have added definite improvements owing to the "personal" touch of administration at the top. The High Court at Mysore has built a tradition and its decisions have been referred to and cited even outside the State.

The latest Constitution Reforms Committee has decided that "in the opinion of the committee [the goal of the Reforms to be kept in view should be Responsible Government subject to certain conditions and subject to preserving the prerogative and sovereignty rights of His Highness the Maharaja of Mysore."

TRAVANCORE

The Legislative Council in progressive Tra-

vancore was brought into existence in 1888, the ruler's right of direct legislation independently of the Council remaining unimpaired. The first Council had a minimum of five members and a maximum of eight, of whom no less than two were non-officials. The non-officials were nominated by Government. The Council was purely a deliberative body for purposes of legislation and had no administrative functions. But it had plenary powers of legislation subject to the ruler's assent before a measure could pass into law. In introducing any measure affecting the public revenues of the State or by which any charge was imposed on such revenues, the member introducing it had to obtain the previous sanction of the Dewan.

In 1898, the Council was enlarged, the minimum number of members being 8 and maximum 15, the proportion of non-officials being fixed at $\frac{2}{5}$ of the total number. The Council was not allowed to entertain any measure affecting the Royal family or relations with the Paramount Power.

The State Council was again remodelled in 1919. Provision was made for granting the people the right of electing members to the Council while reserving to the Government the right of nominating some members to the Council. In

1921, it was again enlarged. After the Regulation II of 1108 M. E. (1932-33) the Sri Chitra State Council consists of 37 members, 22 of whom are elected and out of 15 nominated 10 are officials. The Dewan is the President of the Council. A panel of Chairmen is also nominated.

The Sri Mulam Popular Assembly constituted in October 1904 consists of 72 members of whom 62 are non-officials and 10 officials. 14 of the non-officials are nominated. The Dewan is the President; but a Deputy President elected by the Assembly is empowered to preside at meetings in the absence of the President. A panel of Chairmen is also nominated.

Both houses are empowered to initiate and pass legislation, to discuss the budget, to ask questions and move resolutions. The Assembly has a larger measure of control over finance than the Council.

There is a well-developed system of judiciary with the State High Court at the head.

BARODA

The power of making laws in the State of Baroda is one of the prerogatives of the Maharajah, who is assisted in this important task both by his

ministers and by the Legislative Council on many important occasions. The Legislative Council consists of 31 members, including the Dewan who is the President, the Karma Sachiv, the Mantra Sachiv, the Nyayamantri, the Sar Subha, and the Government Pleader of the Varisht Court—the six ex-officio members of the Council. 15 are nominated of whom one is from the Ruling family, six are officials and eight are non-officials. The remaining ten are elected by members of the Prant *panchayats*. The members enjoy the right of interpellation and of moving resolutions on matters of general public interest. The decisions are in the nature of recommendations to His Highness.

The Varisht or High Court is the Highest Court in the State in all judicial matters. Provision has been made for appeals against its decisions to the Huzur Nyaya Sabha. (Corresponding to the Privy Council).

The State has carried out the separation of executive and judicial functions. Primary education is free and compulsory in the State. There is also a net-work of district, village and travelling libraries. There are in the State one Central Library, 46 Town libraries, 1017 village libraries, and 276 travelling libraries.

In a Proclamation issued on February 20th 1939, accepting the recommendations of the committee, was announced the creation of an enlarged *Dhara Sabha* of 55 members of which 37 will be elected and of the remaining, nine officials and nine non-officials will be nominated. The appointment of a non-official from the *Dhara Sabha* to the Executive Council and two others as Parliamentary Secretaries was also announced in the Proclamation.

COCHIN

The experiment of associating one elected Minister in a form of dyarchy with the Dewan has taken Cochin legitimately to a high level of constitutional development. The Dewan is assisted by a Secretariat and a Civil Service. The Legislative Council inaugurated in 1925 now consists of 58 members of whom 38 are elected,¹ 12 are officials and Heads of Departments, and 8 are nominated by the Ruler to represent minorities. It is of interest to note here that the Paramount Power's attitude towards constitutional reforms in Indian States was not the same in 1912 as it is now after the declaration of Earl Winterton in the

¹ Government of Cochin Act, S. 13, (17-6-1938).

House of Commons. Sir Albion Banerji, an eminent ex-Indian administrator disclosed this information in a discussion on the paper by Sir Shanmukham Chetty under the auspices of the East India Association, London on 18-10-1938. When Sir A. R. Banerji as Diwan of Cochin submitted in 1912 a Scheme for the establishment of an Advisory Council in Cochin, with a majority of nearly 2 to 1 of elected members, the Ruler of Cochin who had administered the State with great success for 25 years had to listen to the advice of the Paramount Power couched in the following terms:—"My Government are unable to think that His Highness has fully realised to what extent the powers of the Darbar (with which those of the Dewan are inseparably identified) will suffer by this very definite detraction from them or how far the integrity of those powers, which His Highness holds in trust for his successors and which is the very basis of his Treaty obligations to the Paramount Power, will thereby be endangered."¹

Under §24 of the Government of Cochin Act, the Cochin Legislative Council is precluded from

¹ *Journal of the East India Association*, Jan. 1939, p. 32. Also from the kind letter of Sir Albion Bannerjee to the present writer, dated 23rd March, 1939.

deliberating on the following among other topics:—

- (a) Ruling Family of Cochin.
- (b) Relations of the Ruler with the Crown or with foreign Princes and States.
- (c) Matters governed by the Treaties with the Crown.
- (d) Military forces of the State.
- (e) Conduct of the Judges of the High Court in discharging their official duties.
- (f) Matters relating to the management of temples in the control of His Highness and a few other minor matters.
- (g) Extradition of criminals.

The Dewan is ex-officio President and in his absence a Deputy President who is elected by the Council presides over the meetings.

Under the Cochin Constitution of June 1938, the Ruler has entrusted the administration of certain departments to a minister chosen by the Ruler from amongst the elected members of the Legislative Council.¹ The Minister is responsible to the Council for his action. The Minister is in charge of agriculture, cooperation, development of cottage industries, public health, administration

¹ *Papers connected with the New Constitution of Cochin*, p. 2.

of panchayats, and uplift of the depressed classes.

At the head of the judicial administration in the State is the High Court. Subordinate to it, there are District Courts and Munsiff's Courts to exercise Civil jurisdiction. Criminal jurisdiction is exercised and controlled by Sessions Courts and sub-magistrate's courts. Litigation up to a value of Rs. 50 is decided in village panchayat courts.

JAMMU AND KASHMIR

The Praja Sabha consists of 75 members, 59 of whom hold office for three years and the remaining 16, designated State Councillors, are summoned by His Highness for a period of 4½ years. There is a large non-official majority in the Sabha, 33 of whom are elected from, and 14 are nominated to represent the different communities in the State on a territorial basis. By a Proclamation dated 11th February, 1939, 7 more seats were thrown open to election by certain important interests. As a result, there will be 40 elective and 30 non-elective seats. An office of Deputy President has also been created for the Praja Sabha, to be filled by election by the members of the Sabha. Provision is made in para. 13 of this Procla-

mation for the appointment of Praja Sabha Under-Secretaries to be attached to the Ministers and whose work will be confined to matters for discussion in the Sabha, whether Bills, Resolutions or Questions. It was also directed by the Proclamation that the proposals of the Council of Ministers for the appropriation of the revenues and other monies in any year for expenditure on items which are votable be submitted to the vote of the Sabha in the form of demands. But the Council of Ministers shall have power "in relation to any such demand to act as if it had been assented to notwithstanding the withholding of such assent or the reduction of the amount of any demand, if the Council considers that the expenditure proposed by it is necessary for the carrying on of any department or for the discharge of the Council's responsibility for its administration.

It was also directed that "in modification of the existing provisions, legislation regarding taxes, as distinguished from fees and penalties, should in future, subject to the safeguards relating to the initiation of, or previous consent to such legislation, be passed by the Praja Sabha—instead of as now by the Council of Ministers after merely placing it before the Sabha and taking into con-

sideration the resolutions passed by it therein."¹

The subjects that have been reserved from the jurisdiction of the Praja Sabha are:—

- (a) Matters regarding the Ruler, his family and their household,
- (b) Relations between the State and the Paramount Power or with Foreign Powers or the Government of any State in India,
- (c) Matters concerning the Gilgit and Ladakh frontiers,
- (d) Rights specifically granted to the Jagirdars by their Sanads,
- (e) Organization, discipline and control of the State army,
- (f) State-Departments dealing with Ceremonial, State Garage, Palace Guards, State Stables, Palaces, Reception and *Shikarkhana*,
- (g) *Dharmarth* Department.²

HYDERABAD

The biggest of the States, Hyderabad, had

¹ Proclamation of H. H. the Maharaja Bahadur of Jammu and Kashmir, dated 11-2-1939, para. 16.

² *Vide* §7, Regulation 1 of 1991, Jammu and Kashmir.

its Legislative Council established in 1893. It originally consisted of the Chief Justice, a Puisne Judge of the High Court, the Inspector General of Revenue, the Director of Public Instruction, the Inspector General of Police and the Financial Secretary. Its present strength is 20. Of these seven are non-officials; two are elected by the jagirdars and landowners, two by the pleaders of the High Court and the other three are nominated from among the subjects of the State. A State Executive Council was created in 1919 whose President is also the President of the Legislative Council. In 1921, the Nizam issued an extraordinary *Jarida* ordering the complete separation of the judicial from the executive functions, and establishing a High Court of Judicature with an appellate jurisdiction.

A Reforms Committee was constituted in September, 1937 with Dewan Bahadur S. Aravamudu Iyengar, the eminent lawyer of Hyderabad as President. The long-awaited Government Order on Reforms was released to the Press on July 20, 1939. The constitutional position of the Ruler has been left in its old 'autocratic' character. The Ruler is according to the Government Order, "both the supreme head of the State and

an embodiment of the people's sovereignty." An unicameral legislature has been recommended. The Legislative Assembly is to consist of 85 members, of whom 42 shall be elected; 28 shall be nominated, of whom 14 will be officials and 14 non-officials; 3 shall represent Crown lands and 5 the principal landed estates. A progressive feature in these Reforms is the inauguration of joint electorates and the rejection of the demand for separate electorates.

Unlike the other constitutions in Mysore, Travancore, Cochin, Gwalior or Kashmir, the subjects of legislation have been divided into four lists by the Reforms Committee. The first list comprises subjects where the Assembly would have the power of initiating legislation without the previous permission of the Government. An examination of this list indicates that all departments of national development are included in it. The second list includes subjects as Criminal Law and Procedure, Welfare of Labour, etc. Herein the initiation of legislation is subject to the previous permission of Government. The inclusion of Local Self-Government, Agricultural lands and forests in this list is in no sense a progressive feature. The third list includes subjects as the

Public Services, Osmania University, Imports and Exports, Railways, Posts and Telegraphs, Air-navigation, Taxes other than local taxes. The fourth list of subjects can be called the expressly excluded list. It has been left to His Exalted Highness' Government to add the following to the usual list of Reserved Subjects in progressive Indian States as Mysore, Travancore, and Cochin:—Currency, coinage, and legal tender. The Government of India Act, 1935, clumsy and difficult as it is, had need for only three lists, but it has been left to the premier State of Hyderabad to evolve a fourfold classification.

A debatable feature is that the Muslims who constitute a small minority of the population are to be given equal representation with the Hindus both among the elected and nominated members.

Territorial constituencies have been ruled out, and instead occupational constituencies based on the economic *motif* are envisaged. The arguments of the able Chairman of the Reforms Committee in favour of functional representation are masterly and this interesting experiment in the premier State of Hyderabad deserves careful study of publicists and constitutional lawyers.

AUNDH

Three other proclamations with regard to Aundh, a Satara Jagir, Banswara a Rajputana State, and Orchha, the oldest of the Bundela States deserve examination. *The Aundh State Constitution Act* 1 of 1939 is unique in many respects. It is a Swadeshi Constitution *in excelcis*. In Article 2, the principles of "non-violence and public morality" are given a controlling place. It is striking that the residuary power or preservation of prerogative powers of the Ruler is not reserved to the Ruler but all "right authority and jurisdiction heretofore belonging to Shree Raja Saheb which appertain or incidental to the Government of Aundh State are exercisable by him in such a manner as may be provided by or under this Act or as may be directed by the Legislature in matters for which no provision is made hereunder."

The Legislative Assembly shall consist of 15 members and the Presidents of the Taluka Council will be ex-officio members of the Legislative Assembly. The Presidents of all village and town Panchayats situated within a Taluka shall together constitute the Taluka Council and will elect the President of the Taluka Council. The

State Legislature is to consist of Shrimant Raja Saheb and the Legislative Assembly. The Legislative Assembly shall be "the supreme authority in the State and will pass such laws and rules as are necessary for the good government of the State. It will exercise supreme control over the revenues of the State." (Art. 9). All Bills shall be passed by a majority of members of the Legislative Assembly present and voting and shall become law only on receiving the assent of Shrimant Raja Saheb. (Art. 15). Shrimant Raja Saheb can withhold his consent only thrice. The ministry of three shall be nominated by Shrimant Raja Saheb from amongst the members of the Legislative Assembly and the ministry is responsible to the Legislative Assembly.

The Panchayat Justice, it is significant, shall be free of charge. (Art. 20). The High Court Judge and the Chief Auditor shall be appointed by Shrimant Raja Saheb. Art. 24 puts in bold characters that "Shrimant Raja Saheb is the first servant and the bearer of conscience of the people of Aundh."

The other special powers reserved to the Ruler are—

1. Relations with the P.P. and other States.
2. Right of summoning an extraordinary Session of the Legislative Assembly.
3. Subject to ratification by the Legislative Assembly, the Ruler can promulgate regulations for maintenance of peace and order.
4. Power of suspending the Government.
5. Right of cancelling the election of member of the Panchayat or Legislative Assembly within one month from the date of election.

Another salutary feature is that all disputes regarding the interpretation of any of the provisions of this Act shall be decided by the High Court whose judgment "shall be final." (Art. 28).

This is a striking illustration of a Swaraj constitution taking its mainsprings of activity from the Panchayats at the villages. The constitution is remarkable in the irreducible minimum of powers reserved to the Ruler. It is an omission that the prerogative of mercy is not found vested in the Ruler; nor does one find the power of dissolution of the Legislative Assembly in an emergency. A few more residuary clauses would be necessary to incorporate these and save the other prerogatives

of the Ruler and it is expected that the Raja Saheb will incorporate these.¹

BANSWARA

On February 3rd, 1939, H. H. The Maharawal of Banswara inaugurated the new State Legislative Council (Rajya Parishad), consisting of 34 members, including the Dewan as President, there being seven official members. The functions and powers of the Council include the making of laws, moving of resolutions to convey and recommend to the State the views and feelings of the people and putting of interpellations for obtaining information from the Government. Matters relating to the person and the family of the Ruler, his prerogative powers, State's relations with the British Government and other States and military affairs are excluded from the scope of the Council. The right of promulgating ordinances in times of emergency is retained. The period for which an ordinance can be enacted is limited to one year. The life of the Council is to be three years, after which it will again be reconstituted.

¹ From the reply of the Dewan to the author, dated 18th Feb., 1939.

REFORMS IN THE ORCHHA STATE

On April 15th, 1939, H. H. The Maharaja of Orchha—the oldest and the highest in rank of all the Bundela States—announced in a Proclamation the following reforms in his State for the “happy and closer association of his people with the administration of the State in the future.” The following points emerge out of the Proclamation:—

- (a) Remodelling of village punchayats on a popular basis and giving them enhanced powers.
- (b) Creation of an Orchha Praja Mandal consisting of the Presidents of the Tappa Praja Mandals and some nominated members with a non-official majority. The functions of the Mandal will be advisory.
- (c) Establishment of a Rajya Parishad (Orchha State Legislative Council) consisting of 12 members including the president who along with six members would be nominated. The remaining five would be elected by different constituencies.
- (d) Inauguration of a full-fledged and independent High Court from October 1, 1939.

- (e) This Scheme of reforms is to take effect from Oct. 1st, 1939.

In order to provide for the added expenditure consequent on the inauguration of the Reforms, the Ruler decided wisely to curtail his Privy Purse by about 50%.

GWALIOR

On June 14th, 1939, His Highness the Maharaja of Gwalior announced in a Proclamation that his "subjects are entitled to the fundamental rights of good citizens"—viz.: Liberty of speech and of the press, liberty of conscience, and liberty of association "subject to the limitations and duties laid down by law for the maintenance of peace and order." The Majlis-i-Am and the Majlis-i-Kanoon shall be replaced by the Praja Sabha and the Samant Sabha, each of which enjoying three years. The Praja Sabha is to be enlarged to a membership of 85 out of whom 50 members will be duly elected and 35 members, including but not exceeding 15 officials would be nominated. A Franchise Committee is to be appointed and the method of election to both the Houses shall be direct. The Samant Sabha or Upper House shall be 40, 20 elected and the rest

nominated including officials not exceeding 12.

The lower house is entrusted with the powers of interpellation, passing resolutions, initiating legislation and discussing the main heads of the State budget. The following topics are excluded from the purview of legislation:—

- (a) The Ruler, his family, the household and the privy purse.
- (b) Foreign and Political Affairs.
- (c) Army including its budget.
- (d) Ecclesiastical Affairs.
- (e) The Constitution.

The inherent powers of the Ruler are preserved:—

- (a) Rulers' power of amendment, suspension and repeal of the Constitution.
- (b) Power of Veto.
- (c) Power of Emergency Legislation.
- (d) Power of Certification.

Legislation initiated in the Praja Sabha will not become law unless approved by the Samant Sabha and unless it ultimately receives the assent of the Ruler. Legislation initiated in the Samant Sabha will become law if assented to and in the form assented to by the Ruler. This is certainly an

undemocratic feature in the Constitution.

SOME OTHER FEATURES

The Laws of England do not apply to the inhabitants of the States. The King in Parliament is precluded from legislating for the Indian States. The Secretary of State for India's letter, dated 28-9-1927 to the Secretary-General of the League of Nations relating to the ratification of conventions of the International Labour Organization by Indian States, makes this abundantly clear:—"The exact relations between the various States and the Paramount Power are determined by a series of engagements and by long-established political practice. These relations are by no means identical, but broadly speaking, they have this in common, that those branches of internal administration which might be affected by decisions reached at International Labour Conferences are the concern of the Rulers of the States and are not controlled by the Paramount Power. The legislature of British India, moreover, cannot legislate for the States nor can any matter relating to the affairs of a State form the subject of a question or motion in the Indian Legislature."

Indian States are outside the jurisdiction of the British Courts. Within the domain of private international law these States are to be regarded as "separate political societies and as possessed of an independent Civil, Criminal, and Fiscal jurisdiction."¹ At this stage, the law relating to property in cantonments in Indian States may be briefly examined. Here as elsewhere the Paramount Power has successfully clutched at jurisdiction. The Paramount Power has expressed that it has "no proprietary right over the soil but that so long as the cantonment is maintained, the land assigned to the cantonment should be under their control as absolutely and completely as if it were part of British territory." The following principles may be justified as applicable to this branch of law :—

1. The proprietary and sovereign rights belong to the State.
2. Jurisdiction over this area is being exercised by the British officer as a "political right."

¹ *Sirdar Gurdayal Singh v. The Raja of Faridkot*: 1894 A.C. 670. *Vide* also on the Status of Indian States in K. R. R. Sastry's "*International Law*", 1937, pp. 38-39.

3. *A fortiori* the right to tax the non-exempted classes in the cantonment areas belongs to the Indian State and not to the Paramount Power. Sirdar K. M. Panikkar has ably discussed this part of the law with a good deal of inside knowledge.

The principle of State-Sovereignty over air¹ has been recognized so far as air sovereignty of Indian States is concerned. This is of course subject to the necessary limitations of international relations and the paramount needs of defence. The Air Navigation Agreement is a striking instance of the new procedure in matters affecting Indian States and the Paramount Power.

The law relating to extradition from and to Indian States is governed by many extradition treaties with Indian States. The Extradition Treaty with Hyderabad, dated 8-5-1887 as also the Treaty with "Ulwar" (Alwar) dated 26-8-1867 along with the supplementary agreement of 1887 may

¹ *Vide* Art. I. International Convention for Aerial Navigation 1919 and the Air Navigation Act of 1920 (England). Also Carriage by Air Act, 1932. 22 and 23 Geo. V. Cap. 36. Air Navigation Act, 1936. 26 Geo. V and 1 Ed. VIII C. 44.

be taken as typical.¹ Rules made under §22 of the Indian Extradition Act, (XV of 1903) regulate the procedure of political agents for surrender of accused persons to Indian States. The obligation to extradite foreign criminals is a type of duty which flows from the junction of the royal prerogative and Acts of Parliament. "With the sanction of Parliament, the Crown has agreed to surrender certain fugitive accused persons to Austria, Belgium, Brazil, Denmark, France, Germany and other nations." These Treaties have been published in the Gazette of India and if the accused finds shelter in an Indian State, "that State is bound to surrender him to the British authorities without any express engagement on that behalf." Sir W. Lee Warner also states that the source of this obligation is the connexion of the Indian State "with the British Government and its delegation to the Government of all rights of negotiation." There is point in the criticism by Prof. Westlake of the use of the term "delegation;" for the source of this obligation is "the absence of any *persona standi*" towards the foreign State which should make nego-

¹ Aitchison, Vol. III, IV Edition. For Extradition Treaties as between foreign countries. Piggott: *Extradition*, Appendix II.

tiation by or on behalf of the native state possible.”¹

With reference to the law of extradition between the Paramount Power *vis-a-vis* the Indian States, Mr. K. M. Panikkar points out certain difficulties which deserve careful attention. It was only after long correspondence that the Government agreed “that the extradition of persons other than British subjects may be granted from railway lands for all cases of offences and not merely those enumerated in or specified by the Governor-General in Council under the schedule of the Indian Extradition Act of 1903 as applied to these lands for which alone the extradition of British subjects will usually be granted.”

Thus, with many States there are extradition treaties which govern the surrender of criminals. A *prima facie* case has to be established and British India or the Indian State concerned surrenders the criminal to the jurisdiction of the *delicto loci*. This may appear on the face of it an equitable arrangement, but in fact it is not so. It has been claimed that the *prima facie* evidence which British Indian authorities should submit is for the satisfaction not of the State but of the political officer. As Colonel

¹Westlake: *Collected Papers*, p. 629.

Newmarch wrote to the Gwalior Durbar, "If I consider the *prima facie* evidence sufficient, that opinion should be enough to justify the extradition and trial of accused persons by a British Court."

A few of the other difficulties which have been experienced in regard to the existing extradition relation between the Indian States and the Government of India may also be mentioned here:—

1. The provisions of §§8A and 15 of India Act XV of 1903 leave it entirely to the discretion of the Local Governments to decline to surrender offenders in spite of a warrant having been duly issued by the Political Agent.
2. Distinction is made for purposes of the surrender of deserters from Imperial Service Troops and the military forces of States.
3. The British Indian Government often demand surrender of persons accused of offences which they themselves do not treat as extraditable for purposes of surrender to Indian States.

Generally put, the actual position is that in regard to the major States which have no treaty

of extradition, arrangements are on the basis of reciprocity; but that principle is subject to the right claimed by the Crown as Paramount Power to demand the surrender of any class of criminals and the right to refuse extradition in cases referred to in Rules 3 and 5 of the Extradition Rules framed under §22, Indian Extradition Act.¹

Treaties of the Crown with third States "are not applicable *ipso jure* to the territory of the Indian States, but only if in these Treaties the application to these States is expressly agreed upon."² The Crown has itself recognized this aspect of the status of Indian States in notes addressed to third States. The following passage is extracted from a letter of the Marquess of Salisbury to the Marquess of Dufferin, dated April 25th, 1896:—

"The protected States of India are not annexed to, nor incorporated in, the possessions of the Crown. The rulers have the right of internal administration subject to the control of the Protecting Power for the maintenance of peace and order and the suppression of abuses. The latter conducts

¹ *Gazette of India*, 1904, Part I, p. 364.

² This writer is indebted to the correct exposition of these legal results of status of Indian States by Professors Viktor Bruns and Carl Bilfinger.

all external relations. The position has been defined as that of subordinate alliance. It has, however, never been contended that if those Estates had had pre-existing Treaties with Foreign Powers the assumption of Protectorate by Great Britain would have abrogated those Treaties. It could not have had, and in no case has had, such consequences."¹ Examples are furnished by the Treaties entered into by the State of Jammu and Kashmir with Tibet and China at the time of the Conquest of Ludakh by Maharaja Gulab Singh. These Treaties are now enforced through the medium of the Crown.

It has been stated in books written by distinguished publicists connected with Indian States that Rulers of Indian States are sovereigns enjoying ex-territoriality. Put in such a form, the statement is too wide. The Law of Nations "gives a right to every State to claim so-called ex-territoriality, and therefore exemption from local jurisdiction, chiefly for its Head, its diplomatic envoys, the men of war and its armed forces abroad."² This branch

¹ *British and Foreign State Papers*, Vol. 89, p. 1053.

² Oppenheim, Vol. I, IV Ed., pp. 280-281. *Vide also* *Migbell v. Sultan of Johore*, 1894, 1 Q. B. 149. *Hullet v. King of Spain*, 1828, 1 D. and Cl. 174. "*The Parlement Belge*," 1878 L. R. 5 P. D. 197. *The Cristina*, 54 (1938) T. L. R. 512.

of law has for the first time had in 1938 the benefit of the decision of a Supreme Tribunal in England. Lord Atkin has thus summed up the two distinct immunities appertaining to foreign sovereigns:—

1. "The courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
2. The second is that they will not by their process, whether a sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle—whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country, it is in my opinion well settled that it applies to both."¹

¹ *The Cristina*, 54 (1938) T. L. R. 512 at p. 513.

So far as the Indian States are concerned, it is well established that while travelling abroad, these princes enjoy the status of a foreign ruling prince and are exempt from municipal jurisdiction.¹ But this rule of international law which is based on the principle of "absolute independence of the sovereign to recognize any superior authority" cannot be applied to the Rulers in India since they are subordinate to the authority of the Crown. The rule of International Law has been modified by the provisions of §86 Civil Procedure Code (V of 1908) under which alone the Rulers can claim exemption. Under §86, a Ruler cannot be sued without "the consent of the Crown Representative" and no execution can be issued against him without such consent. This consent shall not be given unless the Prince

- (a) has instituted a suit in the Court against the person desiring to sue him or
- (b) by himself or another trades within the local limits of the jurisdiction of the Court or,
- (c) is in possession of immovable property situate within those limits and is to be

¹ *Statbam v. Statbam etc.*, 1912. P. 92.

sued with reference to such property or for money charged thereon.

It may be here noted that in cases of grave misconduct of a prince, the Crown under its prerogative powers has punished Rulers. The modern practice is after trial by a Commission consisting of a judicial officer not lower in rank than a High Court Judge and four other persons of high status of whom not less than two will be the ruling princes. As Lord Curzon put it "in cases of flagrant misdemeanour or crime, the Viceroy retains, on behalf of the Paramount Power, the inalienable prerogative of deposition, though it is only with extreme reluctance and after the fullest enquiry and consultation with the Secretary of State that he would decide to exercise it."¹

IMPLICATIONS OF PARAMOUNTCY

Before discussing the powers of Paramountcy, it becomes necessary to indicate the stages by which Paramountcy as a hard fact was driven home to the most exalted of the Rulers by Lord Reading in 1926. The "Ringfence" policy of the much-maligned Warren Hastings, the subsidiary system of

¹ *Leaves from a Viceroy's Note Book*, Curzon, p. 41.

Wellesley, the subordinate cooperation under Lord Hastings, Lord Curzon's policy of patronage and intensive surveillance, and the period of cordial cooperation since 1905 indicate distinctly the well-marked stages in the policy followed in reference to these States.¹ Thus the earlier Treaties contain the following among other phrases "mutual amity, friendly cooperation, reciprocal obligation, alliance, true friendship, good understanding, perpetual friendship, firm alliance." (*Vide* Art. I, Treaty with Nizam, 12-11-1766; Art. V, Treaty with Baròda, 8-3-1802; Art. IX, Treaty with Travancore of 1805; Art. I, Treaty with Gwalior, 30-12-1803). The character of independence possessed by the States prior to 1813 is clear for example from Art. 14 of the Gwalior Treaty of 1803 which runs as follows:—"In order to secure and improve the relations of amity and peace hereby established between the Governments, it is agreed that accredited ministers from each shall reside at the Court of the other."

It has to be remembered that the supremacy of the British Government in "the international politics of India was at first dictated by practical

¹ Sydney Low: "*Indian States and Ruling Princes*," pp. 22-33.

considerations.”¹ The shifting from an international to an imperial plane is clearly indicated from the administration of Lord Hastings. Treaties have had introduced the obligation of “acting in subordinate cooperation with the British Government and acknowledging its supremacy” [*Vide* e.g. Art. III, Treaty with Udaipur, dated 13-1-1818; Art. III, Treaty with Jodhpur, dated 6-1-1818; Art. III, Treaty with Bikaner, dated 9-3-1818].

The forty years from 1818 to 1858 witness the “growth and establishment of the imperial idea” (Westlake). The Indian States have lost the “character of independence not through any epoch-making declaration of British Sovereignty, but by a gradual change in the policy pursued towards them by the British Government.”² Active administrators and political agents had a fascinating temptation to reduce the “enfeebled Rulers to further dependence.”³ In 1814, the Marquis of Hastings wrote in his private Journal—“In our Treaties with them (the Princes of India) we recognize them as independent sovereigns. Then we send a

¹ Ruthnaswamy, *British Administrative System in India*: p. 592.

² Westlake, *Collected Papers*: p. 205.

³ Sydney Low: “*Indian States and Ruling Princes*,” p. 30.

Resident to the Courts. Instead of acting in the character of ambassador, he assumes the functions of a dictator: interferes in all their private concerns, countenances refractory subjects against them and makes the most ostentatious exhibition of his exercise of authority." Colonel Macaulay no wonder wrote thus to the Raja of Cochin "the Resident will be glad to learn that on his arrival near Cochin the Raja will find it convenient to wait upon him."¹ The Prince of Wales (in 1875) was also struck with "the rude and rough manner of these English political officers."² The old bullying tone has been substituted generally by a salutary change in recent times.

Political practice reduced all the States "to conform to a single type"³ by extending the protecting powers of the Paramount Power. The Baroda case of 1873-75, the Manipur Case (1891-92), the Hyderabad Case of 1926, and the Bharatpur Case are significant landmarks. The conditions of the Proclamation of 13th January, 1875 were never to be found in any prior treaty with the Gaekwar. Removal by administrative order of any person

¹ *Cochin State Manual*, p. 138.

² Prince of Wales' letter to Queen Victoria, (1875).

³ Lord Curzon's Speech at Bahawalpur, 1903.

whose presence in the State may seem objectionable—as in the arrest, trial and sentence of Jubraj of Manipur—could never be justified as an “unquestioned right” as Sir W. Lee Warner would have it, but only as an “act of prerogative justified by necessity rather than a legal power vested in the Government of India.” (Sydney Low). The Hyderabad case led to the enunciation by Lord Reading in 1926 of the doctrine of sovereignty of the British Crown as being supreme in India under which “no Ruler can justifiably claim to negotiate with the British Government on an equal footing.” The Bharatpur case has left behind the query, “Can mere financial extravagance justify intervention by the Paramount Power?”

Before passing on to the Indian States' Committee's view of Paramountcy, it is necessary to state the doctrine of Paramountcy as visualised by the eminent international lawyer, Prof. Westlake, whose views have been followed with deference by the Indian States' Committee. Sir W. Lee Warner wrote thus of it:—

“There is a paramount power in the British Crown of which the extent is wisely left undefined. There is a subordination in the Indian States which is understood but not explained. The Paramount

Power intervenes on grounds of general policy, where the interests of the Indian people or the safety of the British Power are at stake. Irrespective of those features of sovereign right which Indian States have for the most part ceded or circumscribed by treaty, there are certainly some of which they have been silently but effectually deprived." On this authoritative statement, Prof. Westlake commented that "a paramount power such as this is defined by being, wisely or not, left undefined. That to which no limits are set is unlimited. It is a power in India like that of the Parliament in the United Kingdom, restrained in its exercise by considerations of morality and expediency, but not bounded by another political power meeting it at any frontier line, whether of territories or of affairs."¹ The Indian States' Committee would not improve upon this but stated that "Paramountcy must remain paramount; it must fulfil its obligations defining or adapting itself according to the shifting necessities of the time and the progressive development of the States."

¹ Westlake, *Collected Papers*, p. 212.

BASIS OF PARAMOUNTCY

According to the Indian States' Committee, Paramountcy is based upon "treaties, engagements, and sanads supplemented by usage and sufferance and by decisions of the Government of India and the Secretary of State embodied in political practice." It was advanced by Sir Leslie Scott that "mere usage cannot vary the treaties or agreements between the States and the Crown" for no "agreement can underlie usage unless both the contracting parties intend to make one." It was also argued that usage is *per se* "sterile" in municipal law since it creates neither rights nor obligations. If by usage was meant practice commonly followed by independent nations, it was answered that Indian States are protected by the Crown. No usage in an international law sense can emerge as by the very terms of the basic agreement with the Crown, the Indian States "have given up the rights of diplomatic negotiation with and of war against or pressure upon other Indian States, and have entrusted to the Crown the regulation of their external relations in return for the Crown's guarantee that it will maintain in their integrity their constitutional rights, privileges and dignities,

their territory and their throne." Political practice, Sir Leslie Scott stated, "as such has no binding force, still less individual precedents or rulings of the Government of India." From a legal point of view, the efficacy of sufferance is no greater than usage. Though the Indian States' Committee dissented from these views of the eminent counsel, admittedly they "did not examine the legal position at any length." The basis of this *imperial right* is essentially political and any effort at reconstructing these legal-cum-political bases will always remain vulnerable. The Princes who were still pressing for a definition of Paramountcy were authoritatively answered thus by the Secretary of State for India in the House of Commons:—"In the ultimate analysis, however, the Crown's relationship with the States is not merely one of contract, and so there must remain in the hands of the Viceroy an element of discretion in his dealings with the States. No successful attempt could be made to define exactly the right of the Crown's Representative to intervene."¹

The Indian States' Committee on the Activities of the Paramount Power—The activities of the Para-

¹ House of Commons Debates, 20th March, 1935, p. 1236.

mount Power are concerned with the following departments:—

“I. *External Affairs*—For international purposes, State territory is in the same position as British territory and State subjects are in the same position as British subjects.” Surrendering foreigners in accordance with the Extradition Treaties of the Paramount Power, cooperation with the Paramount Power to fulfil its obligations of neutrality, assistance to enforce the duties of the Paramount Power in relation to suppression of slave trade, duty not to injure any subject of a foreign power within its territory—all these obligations are to be respected by the States.

II. *Interstatal Relations*—With regard to interstatal relations the States cannot cede, sell, exchange or part with their territories to other States without the approval of the Paramount Power.

III. *Defence of India*—The Paramount Power is responsible for the defence of both British India and the Indian States and as such has the final voice, in all matters connected with defence, including establishments, war-materials, communications, etc. It follows that “the Paramount Power should have means of securing what is necessary for *strategical purposes* (italics mine) in regard to

roads, railways, aviation, posts, telegraphs, telephones, and wireless, cantonments, forts, passage of troops, and the supply of arms and ammunitions."

IV. *Occasions of Intervention*—Intervention for the benefit of the Prince, for benefit of the State, and for benefit of India as a whole has been claimed as a right of the Paramount Power. Intervention for the benefit of the Prince included recognition of succession by the Paramount Power since 1917, in case of natural heir, an exchange of formal communication between the Prince and the Crown representative is sufficient. The Paramount Power has the right to decide cases of disputed succession. Adoption of an heir requires the consent of the Paramount Power. The obligations of the Paramount Power during the minority regime also remain. The theory of feudal overlordship, it is expected, will no longer be set up. The surrendering of the right of coinage during the minority regimes in Bikaner and Alwar could not be justified on equitable grounds since a guardian or a trustee would be guilty of breach of trust if the existing rights of the ward or beneficiary were given up during minority. New rules of minority administration have been recently framed by the

Government of India.

Intervention for the benefit of the State may arise out of gross misrule, disloyalty, serious crime, or existence of barbarous practices. For gross misrule, intervention must take place in the form of deposition, curtailment of authority or appointment of officers to supervise. It has been held a condition precedent to have the report of a commission. A Ruler guilty of disloyalty or of a serious crime courts the intervention by the Paramount Power. Intervention for suppression of *Suttee*, infanticide, torture and other barbarous punishment by the Paramount Power can be justified on broad humanitarian grounds.

Intervention for "settlement and pacification" has had a laboured support by Sir H. Maine in his famous Kathiawar Minute of 1864. It is essentially political just as the doctrine of Balance of Power in international relations.

Intervention for the economic good of India has had a mixed reception in the Indian States.

The following Treaties contain clauses providing that British jurisdiction should not be introduced. [*Vide* Letter from the Governor of Bombay to the Gaekwar, dated 8-2-1841; Art. 9. Treaty with Udaipur, 13-1-1818; Art. 8. Treaty with

Gwalior, 27-2-1804; Art. 8. Treaty with Jaipur, 2-4-1818; Art. 9. Treaty with Jodhpur, 6-1-1818; Art. 9. Treaty with Bikaner, 9-3-1818; Art. 9. Treaty with Bhopal, 1818.]

V. *Certain other cases*—Under certain other cases, the Indian States' Committee examines the intervention of the Paramount Power which has introduced the jurisdiction of its officers in cases of

- (a) Troops in cantonments.
- (b) Other special areas in Indian States.
- (c) European British subjects.
- (d) Servants of the Crown in certain circumstances.

Regarding the realms where cooperation between British India and Indian States is necessary on grounds of efficiency, Mr. D. B. Somervell K. C. specifies the following:—"Non-strategic railways and telegraphs, postal arrangements, coinage, extradition of criminals."¹ It has to be stated that in the "financial, economic and administrative sphere the requests or demands of the Paramount Power most frequently impinge on State Sovereignty."

¹ B. Y. I. L. 1930, p. 60.

ORISSA STATES

It is doubly unfortunate that the Rulers of the 26 Orissa States should have declined to cooperate with the Orissa States Enquiry Committee consisting of Sri Hari Krishna Mahtab and two others. The findings of this Committee would have received added strength if the evidence on the peoples' side had been tested by the Governments. The theft of important evidence collected in the Dhenkanal and Keonjhar files has created a *prima facie* bad impression on the administration of the two States.

With the above observations, it is necessary to appraise the valuable material collected in the Orissa Enquiry Committee Report. "Civil liberties are non-existent in these States. It is only recently that a few States like Mayurbhunj and Nilgiri have allowed the people to exercise partial civil liberty in the form of public meetings and *praja-mandals*" (p. 14). Another intriguing observation which has to be cleared by these States is found in the Report:—"Besides the sums earmarked in the State Budgets for the 'domestic department' there are various other devices which the Rulers and their advisers have found out by

which a good portion of public money is diverted to the private treasury of the Raja.”¹

Forced labour to the State in the form of *Bethi* comes in for well-deserved criticism. A peasant is found “spending over one hundred days of the year in doing forced labour for the States or its officials.”²

So far as the recommendations of the Committee are concerned, a strong case has been made for ensuring the minimum of civilized administration long ago stressed in the Irwin Memorandum of 1927 and reiterated now by Mahatma Gandhi. The Committee in sheer disgust at the uncivilized administration in the Orissa States (excluding Mayurbhunj and the Nilgiris) recommend “cancellation of the sanads granted to the Rulers of the States” and treating them “as landlords of permanently settled estates.”

If these Orissa States would not bestir themselves immediately to ensure the minimum of civilised administration in their States, any amount of argument based on sanads could hardly be supported either by canons of interpretation of these

¹ *Orissa States Enquiry Committee Report*, p. 10.

² *Ibid.* p. 15

sanads (which had been revised in 1937) or on grounds of high policy. The Orissa States have been too much in the lime-light recently. The exodus of 30,000 people from Talchar, the troop movements in Dhenkanal, the rising at Ranpur, and tragic events at Gangpur—all these incidents, have clearly demonstrated the medieval administration in these petty States.

CHAPTER III

INTERPRETATION OF TREATIES, ENGAGEMENTS AND SANADS

The vital question that has to be faced is this:—

Is the letter of the treaties to be stuck to in spite of changes of the status of the States from an international to an imperial plane?

The doctrine of *rebus sic stantibus* has been applied to these treaties by Lee Warner. Under this doctrine "every treaty is understood to apply only so long as the circumstances contemplated by it continue to exist." Before a discussion of this doctrine, it is essential to appraise the place of these treaties in a scientific classification of treaties. International treaties are conventions or contracts "between two or more States concerning various matters of interest." A treaty must not be confused "with various documents having relation to treaties but not in themselves treaties."—These various ancillary documents may be "*memoires*", "*proposals*", "*notes verbal*", "*proces*

verbal" or "protocols". By far the best classification of treaties is that given by Dr. McNair:¹

1. Treaties having the character of conveyances: [e.g. Treaty between Great Britain and U. S. A. 1783].
2. Treaties having the character of Contracts.
3. Law-making treaties which are divisible into treaties creating constitutional law and pure law-making treaties. Prof. Westlake calls these "a part of the permanent system of Europe." [e.g. *The League of Nations' Covenant*; *The Statute of the Permanent Court of International Justice*.]
4. Treaties akin to charters of incorporation. [e.g. *The Universal Postal Union*, 1874.]

What is the nature of the treaties between the Crown and the States? Sirdar D. K. Sen states that these treaties are of a personal character. This is not correct. But, the nearest correct analogy to the rights and obligations under the treaties with the Princes is furnished by "Covenants running with the land or praedial servitudes." (per Sir P. S. Sivaswamy Iyer).

¹ B. Y. I. L. 1930, pp. 100-118.

The general principles governing praedial servitudes were well-developed in Rome. The right secured in a praedial servitude must be an advantage to the ruling estate not to its owner merely.¹ Covenants running with the land play an important part in English law. It is often a difficult question "whether or not a covenant is so connected with the land as to run with it—i.e. bind each successive assignee of the land."² The common law rules and the equitable gloss developed by a long line of cases are discussed by Prof. Maitland in his "*Lectures on Equity*."³ Lord Birkenhead's "*Law of Property Act*" 1922, (12 and 13 Geo. V. C. 16) puts it thus consolidating common law and equity:—"A covenant runs with the land when the benefit or burden of it, whether at law or in equity passes to the successors in title or the covenantee or the covenantor as the case may be." (§96(4)).

Just applying this analogy, "the benefit or burden" of the treaties passes to the "successors in title," who are the Rulers recognized as such by

¹ Buckland: *Text Book of Roman Law*, I Ed., pp. 259-260.

² Digby: *History of the Law of Real Property*, V Ed., p.

415.

³ Maitland: *Lectures on Equity*, pp. 163-170.

the Paramount Power. If these treaties are taken to be personal in character, it unhappily cuts juristically at the very root of title of the present Rulers the enhancement of whose status is so dear to an eminent writer like Sirdar D. K. Sen.

These treaties have not the character of conveyances except perhaps the Rendition Treaty of 1881 with Mysore. They are not law-making treaties nor are they treaties akin to charters of incorporation. They are treaties having the character of contracts. The fact is that these treaties, engagements and sanads were made on a basis of equality in the eighteenth century. The Court of Chancery in the *Nabob of the Carnatic v. East India Company*¹ held that the treaty "was the same as if it was a treaty between two sovereigns." But from the beginning of the nineteenth century, we have treaties of "submission, of obedience, of protection and of subordinate cooperation." According to Professor Hall, the "treaties really amount to little more than statements of limitations which the Imperial Government, except in very exceptional circumstances, places on its own action. No doubt this was not the original intention of many

¹ 2 Ves. at p. 60.

of the treaties, but the conditions of English sovereignty in India have greatly changed since these were concluded and the modifications of their effect which the changed conditions have rendered necessary are thoroughly well understood and acknowledged."¹

It is the opinion of Dr. A. D. McNair that when one turns to the "contractual kind of treaties, those which embody bargains between the parties regulating their future conduct or confer mutual rights of trading or fishing for their respective subjects, ex-territoriality treaties, treaties creating rights in the nature of servitudes of a non-political nature,"² one is in the realm of different ideas from true law-making treaties. It is in the sphere of this kind of treaty that the "*rebus sic stantibus* doctrine will find its development on the legal side."

Like the doctrine of frustration of contract in British municipal law, *rebus sic stantibus* is really a device by which the rules as to absolute contracts are reconciled with "a special exception which justice demands", in the words of Lord Sumner.

¹ Hall: *International Law*, VI Ed., p. 27.

² B. Y. I. L. 1930, pp. 111-112.

It is considered a legal and not a diplomatic doctrine by Sir John Fischer Williams.¹ But Brierly calls it "a pseudo-legal principle."

The attitude of International Law to oppressive or obsolete treaty obligations is attempted to be solved by many text-book writers through applying the doctrine of *clausula rebus sic stantibus*.²

Three instances are found cited by Prof. Bryce. In the Treaty of Paris (1856) Russia had promised to maintain no navy in the Black Sea. But in 1871, she announced that she would no longer respect this provision at the time of war between France and Germany. Further, a clause in the Treaty of Berlin (1878) bound Russia not to fortify the harbour of Batum on the Black Sea. But in 1886, Russia declared that she would disregard this provision. The comment of Bryce is that "both these treaty obligations had been

¹ *American Journal of International Law*, Vol. XXII, pp. 89-104.

² For English cases on frustration in municipal law. Vide *Hirji Mulji et al v. Cheong Yue Steamship Co. Ltd.*, 1926, A.C. 497; *In re Badische Co.*, *In re Bayer Co. etc.*, 1921, 2 Ch. 331.

For a discussion of the topic in International Law, K. R. R. Sastry's article in the *Canadian Bar Review*, Vol. XIII (1935) pp. 227-229. Also the Chapter on "Interpretation of Treaties" in K. R. R. Sastry's "*International Law*," pp. 177-200.

imposed upon Russia at a time when the forces arrayed against her were too strong to be resisted. She accepted them under a sort of duress."¹ Again, Count Von Aehrenthol, the Foreign Minister of Austria-Hungary, declared his intention to annex Bosnia "which had been assigned to Austria under the Treaty of Berlin," to be occupied by her without prejudice to the sovereignty of Turkey.

This doctrine has been considered by the German Court in *The Free Hansa City of Bremen v. Prussia* (on June 19th, 1925). The Court is reported to have held in the case that "international law recognizes to a large extent the possibility of the termination of treaties in accordance with the principle of *Rebus Sic Stantibus*; but it negated the applicability of the principle in the particular case."²

Among the distinguished writers, Prof. Hall had noted that these "treaties themselves are subject to the reservation that they may be disregarded when the supreme interests of the Empire are involved or even when the interests of the subjects

¹ Bryce: *International Relations*, p. 168 following.

² For a discussion of this case, vide "*Chapters on Current International Law and League of Nations*": Sir John Fischer Williams, p. 111.

of the native princes are gravely affected.”¹ Sir William Lee Warner developed the theme of applicability of the doctrine of *rebus sic stantibus* thus:—
 “Treaties and engagements of the Indian States cannot be fully understood either without reference to the relations of the parties at the time of their conclusion or without reference to the relations since established between them. As Wheaton observes: “The moment those relations cease to exist by means of change in the social organisation of one of the contracting parties of such a nature and of such importance as would have prevented the other party from entering into the contract had he foreseen the change, the treaty ceases to be obligatory upon him. The resignation by the Peshwa of Sovereignty in 1818, the trial of the Emperor of Delhi, the transfer of the Company’s rule to the Crown, and the deposition of the Gaekwar of Baroda are the historical events which affect Indian States and modify phrases of equality or reciprocity.”

For the applicability of this doctrine there are two limitations. The changes in the circumstances must be vital and the State trying to release

¹ Hall: *International Law*, VI Ed., p. 27.

itself must give "reasonably sufficient" notice. The political changes between 1818 and 1858 were real and vital. The case for the applicability of the *clausula* would be complete were it not for the statutory ratification of the treaties and the wide proclamation 'respecting "their dignities, rights, and privileges" in 1858, 1903, 1911, 1919 and 1921. Later ratification really cuts across the application of this pseudo-legal principle of text-writers.

Dr. Mehta among recent writers states that "as regards treaties, it will be conceded that they alone can neither obstruct development nor prevent a change in the relative position of the contracting parties. The actual relations therefore have to be estimated in the light of the conditions prevailing at the time of the interpretation of the treaties and not at the time when they were made."¹ This is the proper view, for the practical statesman and the subjects of Indian States are concerned only "with the rules and usages by which the relations of the British Government and the States are and have been governed." (Sir P. S. S. Iyer). This is stressed again by my learned friend Mr. N. D.

¹ Dr. Mehta: *Lord Hastings and the Indian States*, p. 246.

Varadachariar when he lays down that treaties are to be regarded as "guides of political conduct rather than sources of legal rights."¹ A sanad stands for "a diploma, patent, or deed of grant by a sovereign of an office, privilege or right."²

As regards thus the interpretation of these treaties, engagements, and *sanads*, excepting with regard to specific rights or prerogatives which have been specially granted to individual princes, these treaties which have been entered into at a time, when the political status of both the British Government and the Princes was far different from what it is at present, have to be interpreted according to the political relationship that exists at present in practice.³

INSTRUMENTS OF ACCESSION

§6, Government of India Act 1935 prescribes the method of which "the State may accede and the legal consequences which flow from the accession." The Government of India Bill used the following

¹ N. D. Varadachariar: *Indian States in the Federation*, pp. 29-21.

² Lee Warner: *The Native States of India*, p. 38.

³ The author is indebted to the eminent lawyer Dewan Bahadur S. Aravamuda Iyengar of Hyderabad for valuable suggestions.

words:—"His Majesty has signified the acceptance of a declaration made by the Ruler thereof." The alteration in the Act into an "instrument of accession" was introduced to "make it clear that the instrument of accession is the operative document," which all courts are bound to take judicial notice of. As a recent writer has aptly put it, "the instrument is a source of federal constitutional law defining the field within which the Federation may exercise its powers in the State."¹

It has been already noted that the term "instrument" used in the Act clearly differentiates it from the term "treaty". The rules of interpretation that will be applicable to these instruments of accession will be those which govern statutes. "No extrinsic evidence of the intention of the parties to the instrument, whether at the time of executing the instrument or before or after that time is admissible."² Even if these instruments were deemed to be akin to treaties—they certainly are not treaties which can be registered at Geneva or interpreted at the Hague—an English Court does not in general regard itself as "being at liberty to

¹ *The Indian States and the Federation*, Varadarajan, p. 23.

² *Shore v. Wilson*, (1842), 4 St. Tr. N. S. App. 1370.

examine the negotiations preceding the formation of a written contract or the proceedings in Parliament during the passage of a Bill for the purpose of ascertaining the meaning of the contract or the statute and the practice is apparently the same when the court is invited to construe a treaty.”¹

It is a well established doctrine of the constitutional law of the British Empire as evident from the catena of decisions starting with “*The Queen v. Burah*”² that the grant by Parliament of legislative powers to colonial and Indian legislatures implies “plenary powers.” In this setting, the interpretation of the Instrument of Accession far from being narrow, is bound to be affected by the doctrine of “implied” powers in determining the extent and validity of federal legislation on federal subjects as “accepted” by the States.

¹ *Porter v. Freudenburg*, 1915, 1 K. B. 876.

² 1878 (3) A. C. 889.

CHAPTER IV

PRINCES AND PEOPLE

There is a well recognized duty of the Paramount Power to protect the States against rebellion and insurrection. This is derived from treaties, engagements and sanads, usage, and the promise of the Crown to maintain unimpaired the privileges, rights and dignities of the Princes, made in the Proclamation of 1858, Edward VII's Coronation Message, George V's Coronation Message of 1911, and the Proclamations of 1919 and 1921. As the Indian States' Committee put it, "this duty imposes on the Paramount Power corresponding obligations in cases where its intervention is asked for or has become necessary. The guarantee to protect a prince against insurrection carries with it an obligation to enquire into the causes of the insurrection and to demand that the Prince shall remedy legitimate grievances and an obligation to prescribe the measures necessary to this result."¹

¹ Para 49. Indian States' Committee.

The case at Jodhpur in 1827 when there was an insurrection of important nobles of the Jodhpur State serves at once as a warning and demarcation of the boundary. While the Ruler of Jodhpur demanded assistance of the Paramount Power, the British Government declared "that although it might perhaps be required to protect the Maharaja against unjust usurpation or wanton, but too powerful rebellion, there was no obligation to support him against universal disaffection, and insurrection caused by his own injustice, incapacity and misrule."

The promise of the King-Emperor to maintain unimpaired, the privileges, rights and dignities of the Princes carries with it a duty to protect the Princes against attempts "to eliminate him and to substitute another form of government." If these attempts were due to misgovernment on the part of the Prince, protection would only be given on the conditions of inquiring into the causes and remedying legitimate grievances. If the attempts are due to a widespread demand for change, the Indian States' Committee state, that "the Paramount Power would be bound to maintain the rights privileges, and dignity of the Prince but it would also be bound "to suggest such measures as would

satisfy this demand without eliminating the prince.”¹ It has to be stated that the Indian States’ Committee could not deal with the problem of the States’ subjects as it was outside their terms of reference.

The relevant treaty provisions in this behalf which *ex facie* contain an agreement on the part of the Paramount Power not to “interfere in the internal affairs” of the Indian States can be extracted from the following typical treaties:—[Art. 15. Treaty of 1800 with Hyderabad. But the Company’s Government did interfere in 1804 and 1820. Chandu Lal’s regime and the highly questionable financial transactions of Palmer and Co. strike one as suggestive landmarks. Art. I of the Treaty with Kashmir of 16th March, 1846; Letter from the Governor of Bombay to the Gaekwar, 8-2-1841; Art. 9 of the Treaty with Udaipur 1818; Art. 8 of the Treaty with Jaipur, dated 2nd April, 1818; Art. 3 of the Treaty with Jodhpur, dated 15th January, 1804 and Art. 9 of the Treaty with Jodhpur, dated 6th January, 1818; Art. 3 of the Treaty of Bahawalpur, dated 22nd Feb., 1833; Art. 9 of the Treaty with Bikaner of 9th March, 1818; Art. 8 of the Treaty

¹ Para 30. Indian States’ Committee.

of Alliance with Gwalior, dated 27-2-1804; Art. 3 of the Treaty with Alwar of 19th December, 1803; Art. 9 of the Treaty of 1818 with Bhopal; Art. 10 of the Treaty of Protection and guarantee with Kutch in 1819.]

In the treaty with Travancore of 1805 there is in Art. 9 "a promise to pay at all times the utmost attention to such advice as the English Government shall occasionally judge it necessary to offer to him" in a number of specified and general matters which *ex facie* cover all branches of internal administration. Colonel Munro combined in himself both the inconsistent posts of Dewan and Resident. A succession of petty third-rate Dewans till Sir T. Madhava Rao's times must have helped such detailed interference by the political agents in a State belonging to an ancient and loyal ally.

Clause 9 of the Treaty with Cochin of 1809, which is a treaty of perpetual friendship, certainly restricts the power of the Princes to introduce material changes in the administration without the advice of the British Government. While the experienced Ruler of Cochin ably aided by the talented Sir Albion R. Bannerji could not introduce reforms in 1912 owing to the stern warning of the Paramount Power, real reforms could be had only from

1925 when Cochin got her Legislative Council.

So far as Mysore is concerned Art. 14 of the Treaty with Mysore, dated 22nd June, 1799 containing detailed provisions of interference in internal administration, has supplied the verbatim original to Art. 9 of the Treaty with Travancore of 1805. In the Instrument of Transfer of 1881, under clause 20 "no material change in the system of administration, as established when the Maharaja Chamarajendra Wadiar Bahadur was placed in possession of the territories, shall be made without the consent of the Governor General in Council." Even under the Mysore Treaty revised in 1913 there is a clause that no material change in the administration in force should be introduced without the consent of the Governor-General in Council.

Typical of an engagement of vassalage and suzerainty is the Mundee Sanad of 1846. The Preamble states *inter alia* that "the British Government shall be at liberty to remove any one from the *guddee* of Mundee who may prove to be of worthless character and incapable of properly conducting the administration of his State, and to appoint such other nearest heir." Article 5 of the Sanad reminds one of "*servitium*" when it directs that the Ruler "shall.....whenever required, join the British

army and be ready to execute whatever orders may be issued to him by the British authorities and supply provisions according to his means."

In any dispassionate study of this question it is necessary to remember the consequences of an aggressive policy of reducing all the States "to conform to a single type." When the British Government brought the States under its protection "it must be admitted that the British weakened the efficacy of checks" on the abuse of autocracy.¹ At the same time a galaxy of British officers and statesmen as Lord Metcalfe, Malcolm, Munro, Lord Minto, Lord Reading, Lord Irwin (now Marquiss of Halifax) and the Marquiss of Linlithgow have done not a little to introduce civilized forms of administration in Indian States. Political propaganda has produced such unbalanced literature regarding the condition of State subjects on either side that it is hardly realized that conditions in Indian States might have been infinitely worse if the Paramount Power had not interfered on behalf of State subjects. "For the way in which one man of honour must treat another read Lord

¹ Sir Sydney Low: *The Indian States and Ruling Princes*, p. 22.

Minto":—This is a very just tribute to Lord Minto.¹ The Irwin Memorandum circulated to Indian States in 1927 is a model of advice persuading the mediæval-minded among the Princes to have a civilized, incorruptible administration with an "efficient judicial system secure from arbitrary interference by the executive." The canons of taxation were reiterated and it was stated that "every Government should have some machinery by which it can inform itself of the needs and desires of its subjects and by which these can make their voice heard." The proportion of revenue allotted to the personal expenditure of the Ruler should be, it was wisely stated, "as moderate as will suffice to maintain his position and dignity." This was very properly called the "minimum of good government applicable to all States."

The Chamber of Princes, an advisory and consultative body, was established in 1921 as a recommendation of the Montagu-Chelmsford Report. It illustrates the abandonment of the old policy of isolating the States from each other. The remark of Sir P. S. Sivaswamier that the Princes are "afraid of the levelling tendency of any organization of

¹ MacMunn: *The Indian States and Princes*, p. 165.

this sort" has had confirmation from the Princely order itself. In February 1928 in response to the Irwin Memorandum, the Chamber of Princes passed a Resolution which urged on the Princes—

- (a) "a definite Code of Law guaranteeing liberty of persons and safety of property, administered by a judiciary independent of the executive."
- and (b) "the settlement upon a reasonable basis of the purely personal expenditure of a Ruler as distinguished from the public charges of administration."

Mere passing of a resolution with "utter disregard shown by the majority of the Princes in carrying out the terms of the resolution" has been properly characterized as "a political blunder", which later was "to weaken their position at least from a moral point of view."¹

The demand of the State subjects for responsible government was bound to be made with the working of national governments in British Indian provinces. The Government of India Act 1935 has had criticism all round from the Liberals, the

¹ Maharaj Kumar Raghubir Singh, *Indian States: 1938*, p. 89.

Congress, and the Princely Order. It was the result of compromise and many adjustments. All the progressive forces in the country along with eminent constitutional lawyers as Professor A. B. Keith, have been criticising the federal plan on two among other grounds. The nominees of the Rulers would be a sort of deadweight on the political progress of the country and this would be accentuated by the apprehension that the representatives of the States would be nominated by the Rulers themselves. As Sir Albion Bannerji said, "the second was the cause of the apprehension expressed in the first. Even such distinguished British statesmen as Lord Samuel and Lord Lothian have suggested that some method of selection acceptable to the people of the State has to be introduced before the Federation can ever come into being and that the Rulers have to transfer some of their sovereign authority to the representatives of their people and also allow freedom and liberty of person and of speech."¹

Earl Winterton made a famous declaration in Parliament on February 21st, 1938 on behalf of

¹ Speech of Sir Albion Bannerji at the East India Association, London on 18-10-1938.

the Secretary of State for India that the consent of the Paramount Power had not been required before any proposals for constitutional advance were approved by the Princes. This was again repeated by the Under-Secretary of State for India in a written statement on 16th December, 1938 that "the Paramount Power will not obstruct proposals for constitutional advance initiated by the Rulers. But His Majesty's Government have no intention of bringing any form of pressure to bear upon them to initiate constitutional changes. It rests with the Rulers themselves to decide what form of Government they should adopt in diverse conditions of Indian States."¹

The Under-Secretary for India gave another written reply in the House of Commons bearing on the continued obligations of Rulers to the Paramount Power on April 6th, 1939 :—"The policy indicated in the reply on December 16, 1938 does not imply and is not to be taken to imply that the Paramount Power would recognize a Ruler as having endowed any constitutional body which he may create with a greater degree of autho-

¹ Also *vide* reiteration of this policy by the Viceroy in his speech to the Chamber of Princes, 13th March, 1939

rity than that which he himself is recognized as possessing. No State would be regarded as relieved of its obligations to the Paramount Power by the fact that the Ruler divested himself of the control necessary to discharge them and the Paramount Power would remain free to take such steps as might be required to ensure their fulfilment." This clarifying statement serves to stress two points of view. Firstly, whatever be the nature and power of the representative institutions within an Indian State, that State "could not relieve itself from its obligations to the Paramount Power." It is an advice in the nature of a direction to the Ruler that even if he is willing to grant all the powers of internal sovereignty recognized to be vested in him to his Legislative Assembly, that could not relieve him of his obligations to the Paramount Power and that the Paramount Power "would remain free to take such steps as might be required to ensure their fulfilment."

Secondly, if in any constitution to be granted in a State, a Ruler creates legislative organs "with a greater degree of authority than that which he himself is recognized as possessing," it should not be taken that the Paramount Power would impliedly "recognize" such a constitutional situa-

tion through its recent policy of "not obstructing constitutional advance initiated by Rulers."

The echo of the theory of the Indian States' Committee is again heard of the Paramount Powers, view that States possess only such autonomy as "*is recognized*" (*italics mine*) by the Paramount Power who alone is the authority to delimit the 'subordination' of the Indian States, in the light of "treaties, engagements, and sanads, supplemented by usage and sufferance and by decisions of the Government of India and the Secretary of State embodied in political practice."

In a remarkably learned and subtle address in the Sri Mulam Assembly Travancore on February 2nd, 1938, Sir C. P. Ramaswami Aiyer has developed the position that "legally, it is not possible without the active concurrence of the British Government for the Ruler to divest himself of his undivided authority and jurisdiction over the governance of his State in favour of any other authority." Sir R. K. Shanmukham Chetty, though aware of the legal difficulties so well developed by Sir Ramaswamier, stated that "the problem though bristling with difficulties was not insurmountable." As Sir Shanmukham followed it up, "the necessary adjustments that will have to be made in case a

scheme of responsible government is to be introduced in the State," have to be studied afresh *vis-a-vis* the relationship between the State and the Paramount Power. After referring to §§2, 3(2), 6, 12(g), 14, 101, 125, and 145 of the Government of India Act 1935, Sir Ramaswamier evolved the proposition that the Ruler of an Indian State is the person who is a legal entity and who is alone personally responsible. The author's respectful submission is that as a bare technical proposition in law read in the context of the two treaties of 1795 and 1805, binding Travancore with the Paramount Power, the statement leads one into a dexterous cob-web of legalism.

Practical statesmanship of which Sir Ramaswamier is an illustrious representative, consists in following up the helpful declaration of Earl Winterton. Assistance has been got from the suggestion of Sir Albion Bannerji that in spite of the responsible utterance of the Earl of Winterton, the question arises who is to make the move first, the Princes or the Paramount Power? He again stated that the Treaties e.g. with Mysore, Travancore, and Cochin *have to be revised*. As he put it, "as the treaties stand, the position is somewhat different, unless the declaration referred not

to the past but to the future." This he illustrated with reference to Cl. 9 of the Cochin Treaty of 1809 and the Mysore Treaty of 1913. The legal issue is, will a statement in the House of Commons that the Paramount Power "will not obstruct" proposals for constitutional advance be held sufficient to do away with the obligations under bilateral treaties? In a narrow legalistic view, the position taken by Sir Ramaswamier is correct in the face of existing treaties governing Travancore, Cochin, and Mysore. Revision of these treaties appears thus a condition precedent in strict law.

CHAPTER V

RESTATEMENT OF LEGAL POSITION

There are two ways of looking at this legal-cum-political problem. One is a legalistic view; another is the view of practical statesmanship. The two views have been well represented by Sir Ramaswamier and Sir Shanmukham Chetty respectively.

The valuable historical narrative given out by Sir Ramaswamier himself gives the unerring clue to the path to be treaded by responsible statesmen in Indian States. The shackles of treaties of the eighteenth and nineteenth centuries—these treaties have not merely become “moth-eaten” but thanks to the farseeing statesmanship of the Rulers and their advisers at Mysore, Travancore, and Cochin, have in vital parts run into desuetude—have not as *a matter of fact* interfered with the day-to-day administration of the State. Since 1927 the “practice of the British Government being consulted in all appointments” in Travancore carrying a salary of Rs. 500 p.m. has been “given up on its own voli-

tion" by the Paramount Power. No longer are judgments of Criminal Courts involving death sentence or life imprisonment sent up to the political agent. Under the treaties at Travancore, His Highness had stipulated that he would not admit any European foreigners into his service without the concurrence of the English Government. The many important constitutional steps taken by Mysore, Travancore and Cochin under the trammels of the old treaties, indicate the pace and quantum of progress possible after persuading the Paramount Power. Cases where the advice given by the Paramount Power had to be adopted in Travancore were also illustrated by "the Interportal Convention, the Periyar lease, and various other matters." Able lawyer that Sir Ramaswamy Iyer is, he has argued with remorseless logic in a legalistic vein that "the question of responsible government (in the states) is a matter bound up with the relations between the Paramount Power and the Maharaja."

A lesson may at this stage be taken from the all-too-chequered history of Art. 19 of the League of Nations' Covenant. Under the article, the League Assembly "may from time to time advise the reconsideration by members of the League of

Treaties which have become inapplicable." Its interpretation by Lord Robert Cecil was thus stated: "As regards the legal meaning to the text of Art. XIX, there is in my opinion nothing to imply that any special class of treaties is excluded."¹ The vindictive clauses of the Versailles Treaty against Germany were never brought under this article for "reconsideration". Unilateral repudiation of treaties, development of the Nazi regime in Germany, the Austrian Anschluss, march into Sudetanland and later into the whole of Czechoslovakia—these chapters in German history were due to vindictive and impossible clauses of the abortive Treaty of Versailles. The lesson is that a mere expression of a pious hope in Art. XIX of the League, led to no results. Invaluable as Earl Winterton's declaration has been, it is equally necessary for the Paramount Power *to follow up the declaration* by suggesting to the Rulers the desirability of willingly responding to the signs of the times. The advice to the smaller States by Viceroy on March 13, 1939 is a welcome instance of this following up. Since these small States could not by themselves "provide for the requirements of

¹ *Transactions of the Grotius Society*, Vol. XVIII, p. 166.

their people in accordance with modern standards" they have been advised to "take the earliest possible steps to combine with their neighbours in the matter of administrative services so far as this is practicable." The slender resources of the numerous petty States could ill fit them separately to discharge the functions of a modern government. A confederacy of these petty States and the evolution of a Council of elected members representing different States can alone enhance the political status of the State-subjects. The decision of the Paramount Power to refer the question of "the construction of the document of the Rajkot Ruler" to the arbitration of the learned Chief Justice of India, is yet another instance of the helpful attitude of the Paramount Power.

In such a setting, building up a purely legal argument for the *status quo* is unfair to the remarkable flair for action associated with Sir Ramaswamier, the statesman. Steps on the part of the Rulers to transform themselves through their own "volition" into constitutional kings of the type of the King of England have to be taken. It is just these steps that Sir Shanmukham had in mind when he spoke "of the necessary adjustments that will have to be made."

What legally are then these "necessary adjustments?" "The final residuary power" will have to be preserved in the Ruler. Such a result can be legally achieved provided the following powers are *reserved* to the Ruler in the constitution:—

1. Matters relating to the person and family of the Ruler.
2. Prerogative powers of the Ruler e.g. right of pardon, right of summoning, proroguing, and dissolving the legislatures, right of veto to legislation.
3. The States' relations with the Paramount Power including all its admitted obligations to the Paramount Power.
4. The States' relations with other Indian States.

In all the constitutions of Indian States where there is machinery for associating the governed in the making of laws as in Mysore, Travancore, Cochin, Baroda, Jammu and Kashmir, and Aundh, these clauses of reservation are found. The "dyarchic" constitution set up in Cochin through the statesmanship of the Maharaja ably advised by Sir Shanmukham is in this setting, a land-mark, really "a startling gesture to the people of Cochin,

the first of its kind." (Sir A. Bannerji).

A harmonious understanding between the Princes, the British Indian politicians, and the State subjects is essential to bring into being the "Federal Executive" and the "Federal Legislature." The only hope lies in "a strong central all-India democratic Federal constitution at the centre, in which the Indian Princes through their democratically chosen representatives will take an honourable part."

CHAPTER VI

PARAMOUNTCY

SIR W. HOLDSWORTH'S THEORY EXAMINED

"The idea of Paramountcy is an original political idea forged by the British in the factory of experience."¹

Sir W. S. Holdsworth defends the theory propounded by the Indian States' Committee—of which he was a distinguished member—that "the Crown cannot cede its rights and duties as Paramount Power to any other State."² Further, he postulates that since the 'usage accepted by the Princes is the most important basis of Paramountcy, and since Paramountcy resting upon this basis is a source of a separate part of the Prerogative, no alteration in this usage or in the Prerogative resulting from it can be effected without the consent of the Princes.'

As an eminent jurist he is no doubt aware of

¹ M. Ruthnaswamy, *British Administration in India*, p. 605.

² *Law Quarterly*, 1930, p. 429.

the curious proposition he is thus advancing against the legal supremacy of the Parliament of Great Britain. From Lee Warner down to the Indian States' Committee, Paramountcy has been advisedly left undefined. But the boggy of a 'separate prerogative of the Crown resting upon treaties, engagements, *sanads*, usages, and sufferance,' and a curious 'usage which gives suzerainty to a Paramount Power over States possessed of some of the powers which make up sovereignty' are raised for the purpose of linking them irrevocably to the 'Crown acting through agents responsible to the Parliament of Great Britain.'

This novel theory is based on 'legal and technical grounds as well as on grounds of policy.' So far as the legal basis is concerned, three arguments have been advanced by the eminent Indian jurist, Sir P. S. Sivaswamy Iyer, in support of the correct historical position that 'the Crown acted, not in a personal capacity or in the capacity of Sovereign of England, but in the capacity of Ruler of British India, in its relations with Indian States.'¹

In spite of Prof. Holdsworth's criticism, the nearest correct analogy to the rights and obliga-

¹ *Indian Constitutional Problems*, by Sir P. S. S. Iyer, pp. 210-213.

tions under the treaties with the Princes is 'in the nature of Covenants running with the land or prædial servitudes' (according to Sir P. S. S. Iyer). These treaties generally have not the character of conveyances (except perhaps the Rendition Treaty of 1881 with Mysore); they have not the character of contracts, though they can be called treaties creating rights in the nature of servitudes of a non-political nature; they are not law-making treaties, nor are they treaties akin to charters of incorporation.¹ The fact is that these treaties, engagements, and *sanads* were made in the eighteenth century on a basis of equality. The Court of Chancery in the *Nabob of the Carnatic v. East India Company* held that the Treaty was 'the same as if it was a Treaty between two sovereigns.'² From the beginning of the nineteenth century, we have treaties of 'submission, of obedience, of protection, or of subordinate co-operation.'

Again, Prof. Holdsworth's ingenious reply to Sir P. S. Sivaswamy Iyer is couched in the statement that 'a change in the form of the govern-

¹ Cf. Dr. A. D. McNair's excellent classification of treaties in *The British Year-Book of International Law*, 1930, pp. 100-118.

² 2 Ves., p. 60.

ment of British India which gave to British India full responsible government in effect brings into existence a new and autonomous State.' To call India with Dominion Status a 'new State' *is* surprising. Prof. Holdsworth is driven to this length for the purpose of evolving the argument from Professor Hall that a contract ceases to be binding when 'anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered.'¹ Are the Dominions to be construed as *new* States after the Statute of Westminster? There is, in spite of the Statute, a singular unanimity among British constitutional writers that 'there is no deviation from the unity in the fact that the Crown appears in various aspects and that in these aspects there may be collisions of interests and of rights' (Prof. A. B. Keith). Since the passing of the two recent Acts (the *Status of Union Act*, 1934, and the *Royal Executive Functions and Seals Act*, 1934) in South Africa, it would appear that 'all the prerogatives of the Crown in relation to South Africa are capable of being distinguished and separated from those in relation either to the United Kingdom or to the rest of the

¹ Hall: *International Law*, 6th ed., pp. 342-343.

Empire, or to other self-governing Dominions,¹ In fact, the seventh contract to be entered into for India by the Crown has been anticipated by Mr. Noel Baker. The correct way to interpret it is to regard the Crown (according to Mr. Fitzgerald) 'as the same King acting in a several capacity.'

There is still some force in Sir P. S. S. Iyer's third argument based on the Government of India Act—1915-19—when the relations of the States were with the Governor-General in Council.

Besides these arguments, two remarks have to be made. There can be no limitation upon the doctrine of legal supremacy of Parliament in Great Britain. Secondly, there is not in constitutional law a single prerogative of the Crown which the Parliament cannot touch by enacting a statute for its abridgment, curtailment, or other mode of regulation. It has also been held that when the operation of a statute overlaps the exercise of a prerogative, the prerogative is superseded to the extent of the overlapping.²

The argument based on 'grounds of policy' might work so much against the inevitable develop-

¹ Evatt: *The King and His Dominion Governors*, p. 313.

² *Attorney General v. De Keyser's Royal Hotel Ltd.*, 1920 A.C., 508.

ment of India into a Dominion as understood under the Statute of Westminster, that it deserves to be knocked on the head. It looks rather strange that Prof. Holdsworth, while disagreeing with the argument of the Counsel for the Princes based on their 'treaty-sovereign rights', is building up a laboured argument on 'usage' which on his own showing has to be foisted upon a strained basis of 'implied consent'. The Counsel for the Princes strenuously argued that 'mere usage cannot vary the treaties or agreements.' Prof. Holdsworth has built up a golden chain linking the Princes for ever with 'the Crown, acting through agents responsible to Parliament,' basing one of his main arguments on the special character of usage as a source of Paramountcy.

As Mr. N. Rajagopal Iyengar has put it: 'The determination with anything like legal precision of all the prerogatives of the Crown in India, is by no means an easy task.'¹ In further complication, Prof. Holdsworth's argument is that 'Paramountcy is only a part of the prerogative.' The next step in his argument is that the 'prerogative

¹ *The Government of India Act, 1935* by N. Rajagopal Iyengar, p. 11.

is not the source of Paramountcy.' He then develops his thesis that 'the growth of Paramountcy has added a new and a distinct prerogative to the Crown.'

This hydra-headed creature, which is ever growing and whose ambit refuses definition, has at once to face juristic modifications:

- (i) Certain of the rights possessed by the Paramount Power, e.g. the right to confer honours and decorations and to decide questions of precedence, have to owe their origin 'to certain of the powers possessed by the King in virtue of his prerogative.'
- (ii) The King by virtue of his prerogative also possesses large powers 'of control over such matters as foreign affairs, national defence, justice, or trade.'¹

It may be urged that directly or indirectly all the powers of the Paramount Power, including those of deposing a Ruler for gross misrule, are *derivable* from the Crown's prerogative powers as described by an illustrious jurist like Blackstone.

In this connexion we may note the legal act

¹ Cf. Blackstone: *Commentaries*, I, 252-278.

of resumption of powers by the Crown and their redistribution in the Government of India Act of 1935. Under Section 2,

1. 'All rights, authority, and jurisdiction heretofore belonging to His Majesty the King, Emperor of India, which appertain or are incidental to the Government of the territories in India for the time being vested in him, and all rights, authority, and jurisdiction exercisable by him or in relation to any other territories in India, are exercisable by His Majesty except so far as may be otherwise provided by or under this Act or as may be otherwise directed by His Majesty: provided that any powers connected with the exercise of the functions of the Crown in its relations with Indian States shall in India, if not exercised by His Majesty, be exercised only by, or by persons acting under the authority of, His Majesty's Representative for the exercise of those functions of the Crown.
- 2. 'The said rights, authority, and jurisdiction shall include any rights, authority, or jurisdiction heretofore exercisable in or in

relation to any territories in India by the Secretary of State in Council, the Governor-General, the Governor-General in Council, any Governor or any Local Government whether by delegation from His Majesty or otherwise.'

It will certainly give satisfaction to the Indian States' Committee that the phrase '*or otherwise*' will include rights acquired through 'usage, sufferance, or political practice.'

My learned friend, N. D. Varadachariar has also ably argued from English Constitutional practice and the fact of change of agency from the East India Company to the Crown without consulting the Rulers in 1858 (*Vide* §67. Government of India Act 1858) that there is not much substance in the plea of the princes that their rights and obligations arising from the Treaties, Engagements and Sanads cannot be assigned by the Crown to any other party except with their consent. "The true position appears to be that since as a matter of law the Crown can only act on advice it is of no concern to strangers who have nothing to do with the course of development of British Constitutional Law, as to which advice it acts under at a given time."

It may be said that in a sense the discussion whether the relations of States were with the Government of India or the Crown *simpliciter* has been ended. Even after the resumption and redistribution of all powers by the Crown, from Dominion practice as well as from the Royal and Parliamentary Titles Act of 1927 (which continues the term 'Emperor of India'), the Crown has to be taken *vis-à-vis* his functions in this context as Emperor of India. Having succeeded to the East India Company, the Crown as Sovereign of British India is the legal entity which functions as Paramount Power. Dominion Status, when granted to India, will create, not a new State, but only an autonomous State. The Parliament of Great Britain is legally supreme, and a statute of Parliament can always cede the exercise of its Paramountcy to Ministers responsible to an Indian Legislature. When the Legislature becomes federal, as is envisaged under the Government of India Act of 1935, the accession of the Federating States will legally accelerate this inevitable process.

Legal cobwebs apart, the Indian States owe their subordinate co-operation, not to the Crown in his personal or individual aspect, but to 'His Majesty, the Emperor of India' in his political aspect.

CHAPTER VII

CONCLUSIONS

The Nazi reaction to the vindictive Treaty of Versailles has given birth to unilateral repudiations of treaties, allied with the Fascist regime, Hitler's Germany has successfully practised the stand-and-grab technique in Czechoslovakia; and the Italian plan has succeeded likewise in annexing Albania. In such a world where international law is regrettably under eclipse, 562 and odd Protected States and Jagirs *persist* in India owing to *the might of the Paramount Power*.

Looked at from the constitutional side, most of these States are medieval autocracies. In a desert of denial of civil liberty one happily comes across the few oases in the progressive States of Mysore, Cochin, Travancore and Baroda. As Pandit Jawaharlal Nehru has well observed: "The whole question of the States is a vast and complicated one varying in form and substance in different areas and yet having an underlying unity." All varieties and shades of internal

administration ranging from well pronounced internal autonomy to maximum administrative control by the Paramount Power are found. Only 40 States have "treaty" relationships; the more important States alone have internal sovereignty; the internal sovereignty of others is more restricted, and there are many small Jagirs over which the Paramount Power exercises varying degrees of administrative control—this medley of States, Jagirs and petty principalities makes the suggestion of different remedies indispensable. As H. H. the Jam Saheb of Nawanagar, Chancellor of the Chamber of Princes pointed out (on 10th June 1939) "No genuine well-wisher of the States can reasonably advocate any exact pattern of constitutional or administrative reforms or a uniform pace of progress for one and all the States." But, *there should certainly be a minimum standard of civilized administration in all the States.* The Irwin memorandum of 1927, and the Viceroy's recent advice¹ to small States are significant in this connection.

The fundamental civil rights of the people should be placed beyond jeopardy. The reserved resi-

¹His Excellency the Crown Representative's opening speech in the Chamber of Princes, March 13, 1939.

duary powers in the Ruler should not clash with these rights. *Liberty of person and safety of private property should be guaranteed legally.* As Sir A. R. Bannerji has well pointed out "security of life and property, an impartial judiciary, a fixed civil list, and the establishment of some form of representative government suited to the local conditions of each State should be *sine qua non* for these territories to be raised to the dignity of federal units."¹ *De facto*, these valuable rights exist in the States of Mysore, Cochin, Travancore and Baroda. One is not able to iterate the same of many other States whose prominence gets publicity in papers and periodicals.² Today constitutionally, the most advanced Indian State is the Satara Jagir of Aundh.

A Federation can alone solve the Indian Political Problem. In spite of many safeguards and provisoes in the Constitution Act of 1935, the authority of the Federal Government is bound to grow in India. It is a lesson borne out by a study of the doctrine of the constitutional law of the British Empire. When Dominion Status is granted to the Indian Federation—which is the

¹ *Indian Tangle*, p. 174.

² A valuable study of the State Subjects' disabilities is found in Chudgar—*Indian Princes*.

natural evolution—federal authority in the federated states will have to rest with the Federal Government exclusively. In the present hybrid constitution, Paramountcy can be stated to be the only sanction for the enforcement of Federal authority in the Indian States. This will disappear with the evolution of Dominion Status. India's membership of the League of Nations, and the signature of the Treaty of Versailles by the Rt. Hon'ble V. S. S. Sastry and H. H. the Maharaja of Bikaner, on behalf of India—the value of these great constitutional strides would be lost if artificial impediments are allowed to obstruct the path of evolution.

It is a hopeful sign of the times to read the following lines by the Maharaj Kumar of Sitamau:—
 “Even if one succeeds in stopping all outside interference and efforts to stir up agitation in the States, some degree of responsible self-government cannot be long denied to the subjects.”¹ The establishment of responsible Government in the States, it has been well pointed out, is the only way of “restricting Paramountcy to its proper field of

¹ *Indian States*: Maharaj Kumar Raghubir Singh. (Feb. 1938) p. 388.

action.”¹ A paramountcy which preserved “medieval autocracy” for purposes of weightage at the centre would find the federation still-born; such a development would be a precursor to a triangular struggle between the Princes, the British Indian Politicians, and the State subjects. The States voluntarily moving with the times as e.g. Aundh, Mysore, and Cochin will be assisting in the birth of a renascent federal India, assisted by a Paramount Power which will play its new rôle begun at Rajkot in “actively” *fostering* such development and array of centripetal forces.² In the latter view, the treaties of the eighteenth and nineteenth centuries would run into desuetude, political practice once again playing an overshadowing part. Amidst such a course of constitutional development alone, can India’s federal destiny of ‘substance of independence’ be reached in a non-violent manner, *a la Mahatma Gandhi*.

¹ N. D. Varadachariar, *The Indian States in the Federation*, p. 146.

² *Vide* the encouraging tone of the Marquess of Zetland’s speech at the dinner of the Liverpool Chamber of Commerce, dated 2nd March, 1939.

Prof. K. R. R. Sastry of the Allahabad University, examines the constitutional position of the Indian States with reference to their treaties, engagements and sanads in the new setting after Earl Winterton's historic declaration. He concludes that consistent with their treaty obligations adequate powers can be made to rest on popular consent in Indian States.

There are still many States with a medieval outlook where the minimum of civilized administration is yet to be found. The Indian States are bound to be further shaken out of their lethargy as a result of the present European war fought mainly and directly for preservation of freedom and democracy. The rulers of Indian States cannot offer their services in such a fateful maelstrom while they continue despots at home.