

Reprinted from The Madras Law Journal.

INDIAN FEDERATION

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Law was the possession of clerics in both East and West and has affinities with scholasticism in the west and its equivalent the *mimamsa*, in the east. Law and scholasticism are alike in the native temper of the average Indian intellectual. Politics has, for some time, been, and at the moment is, our major pre-occupation. The Government of India Act and all the legal and quasi-legal and political questions arising from it engage much of our attention. That part of the Act that relates to the Federation of the States and Provinces has a peculiar fascination for the lawyers. It has a juristic interest for them. Their *mimamsa* has full scope for exercise. Constitutional law and the dubious territory that lies between it and international law justly claim both their interest and attention. One of the vigorous and thoughtful contributions to the elucidation of this topic of Federation is now before us. The author, Mr. N. D. Varadachariar, one of our young intellectuals, delivered three lectures on the topic under the auspices of the Madras University in March, 1936. They have since been made available to the public in the form of a book of over one hundred and fifty pages published by the Oxford University Press under the title, "The Indian States in the Federation". Though we may not agree with all the viewpoints of the author, his book must be recognised as an able contribution to the study of a knotty subject. The author wields an attractive and persuasive style. His book deserves the attentive study of all who are interested in politico-legal thought and furnishes a good introduction to the study of the Indian Federation.

No one is likely to enthuse over the Indian Federation in the Act. Its weak points are well brought out in the book. Few will disagree with the author's estimate of its character. In one passage he had almost pronounced it to be no real Federation at all. That it is unlike any Federation hitherto

known cannot be gainsaid. It lacks symmetry. The relation between the Federation and its component units is unequal. The States do not occupy, in relation to the Federation, the same position as the Provinces. Even the States need not all bear the same relation to the Federation. Their instruments of accession may vary in terms. These instruments do not stop with their primary function of bringing the States into the Federation. They remain to regulate and control the further development of the Federation. While the Imperial Parliament can amend the Act as to the Provinces in any manner they like, they cannot amend it in regard to the States except within the limits authorised by the instruments of accession. While the States that enter the Federation have no right to secede from it at any time at their option, it is possible that, in conceivable circumstances, they may be thrown out of the Federation. The people of the States are nowhere in the picture and had no say in the matter. They are within the Federation, but are, in every respect, represented by the Princes. They have no direct relation with the Federation. These and other peculiar features to which the author refers in detail amply justify his criticism. The peculiar character of the Federation is, without doubt, due to the fact that the Indian Princes, the Imperial Parliament and the British Indian Peoples had different aims and ambitions and purposes to serve and pulled different ways. The Indian nation that the author refers to in some passages does not yet exist even in embryo. The ultimate unification of India and establishment of Indian freedom figured in the talks as the goal, but had very little influence in the shaping of the actual conduct of the parties concerned. This Federation will probably remain for ever unique and in a category all by itself.

In the exposition of the unique character of the Federation and of the contending forces that gave it that character, the author has left nothing unsaid; but in the course of the disquisition he makes some points of a very controversial character. These points revolve round the three words "Sovereignty," "Treaty" and "Federation." Before I advert to these points, I wish to make some general observations calculated to indicate the nature of my criticism.

I think it is Mr. H. G. Wells that says somewhere that lawyers are more concerned with words than with things or

facts. The first reaction to the criticism is naturally angry repudiation in the minds of lawyers. It does seem at first sight strange and inexplicable how that impression arose in relation to a profession which is concerned with the most real thing as the world understands it. Not having the passage at this moment, I cannot say what the provocation was for that comment. Occasionally however when we come to consider some basic or fundamental conceptions, discussion may, and often does, take a form which, if it does not justify the sweeping criticism, at any rate, explains how an adverse critic came to form that impression. Terms and meticulous definitions may dominate the discussion and essential facts may be lost sight of.

The next observation I desire to make is that the Indian lawyer is apt to measure and estimate all facts in the light of the categories of English Jurisprudence. Austin's analytical jurisprudence holds us still in its grip. There is something rigidly precise and logical in analytical jurisprudence that captivates the scholastic temper of the theoretic lawyer. But it is based upon the limited facts of a phase of life and institutions in one part of the west. When life moves on, confronts new situations, adapts itself to them by new devices, political and legal, and new laws emerge, jurisprudence must expand so as to accommodate itself to the new facts. Take, for example, the condition of the Commonwealth after the Statute of Westminster. The old law *seems* to remain the same, but the situation is wholly altered. In legal theory the Parliament can repeal the Statute and alter the constitution of each Dominion. But by convention based on express agreement embodied in the Statute, it is prevented. Thereby new conventions capable of transcending and controlling law have emerged. Even the conception of the origin of conventions and of their power and efficacy—I refer to it because it has come into current controversy—has become altered. Our juristic notions have all to be overhauled in the light of the new devices to meet a new situation. This is in reference to the changing facts of one and the same country.

This principle which has to be recognised in regard to the evolution of legal phenomena in the same country suggests caution in applying the notions of British jurisprudence to another country. As notions may be common to all laws,

there are bound to be elements in a jurisprudence that are of universal validity and application. There may be elements of wide, but not of universal, application. There may also be elements that cannot be applied without considerable reservations to other countries with totally different, sociological conditions and therefore with differing institutions and differing laws and basic conceptions. When we get to a country like India with institutions and facts of life unlike any in England, either the notions of jurisprudence have to be expanded so as to subsume all the new facts under its widened categories or it must be clearly recognised that it is not legitimate to draw upon it except for broad analogies and comparisons. *In any case, the new facts of one country cannot be compelled to accommodate themselves to the theories of a foreign jurisprudence erected on its own limited facts.*

Another point cognate to what has been said above is this. It is illegitimate to describe an institution of one country by a term of description applied in another country and then base on the connotation of that word of description notions as to the character which it ought to possess totally inconsistent with its known character. This will be accepted as obvious without argument. But we are all of us prone to slide into it all unconsciously. What is at first utilised merely as a rough and sufficient description is afterwards founded on, for drawing inferences which do not follow.

These three points of reflection and criticism which are really three phases of the same point arise in my mind as I try to understand and follow the viewpoints of the author. Incidentally, one may remark that these weaknesses are not peculiar to law but are exhibited in most other spheres of thought as well, and they require to be carefully watched and excluded. I must now make good these points of criticism that I have taken the liberty to make.

First there is the question whether the Indian State has sovereignty. I consider it to be largely a question of terminology. No claim of the Princes really depended on the definition of "Sovereignty" or "Federation." No enlightenment as to the true meaning of those words, as conceived by the author, would have persuaded the Princes to abate or give up

any of their claims. At some remote past they possessed what might be called sovereignty with all the powers it included. If some of these powers have been given up by them, or taken away from them, the remaining powers are conceived and treated by them as a remnant of their *sovereignty*. Whether they are right or wrong in thinking that these remaining powers could be described as their sovereignty, they wished that as little of their existing powers as possible should be taken away from them for the purposes of the Federal Government. They may be criticised for not agreeing to surrender more, but the definition of sovereignty or Federation had little or nothing to do with their attitude. The Princes often enough referred to their sovereignty, but their claims related not to any powers as flowing from their notion of sovereignty, in the abstract, but to specific existing powers. If they had been persuaded that they had no sovereignty in the juristic sense and that after they joined the Federation and surrendered some powers to the Federal Government, they had even less of sovereignty left in them, it would not, in the least, have affected their claims. They would still have said: "Never mind whether we have sovereignty or not; do not take away these powers from us." The trouble did not arise from any false conception of sovereignty which was either their own, or induced by the exposition of the Lord Chancellor, but from the unwillingness of the Princes to give up their powers for securing the lasting and ultimate interests of themselves and of India as a whole.

In the desire to deny and confute the claim of sovereignty, the author has fallen into an opposite extreme. I take it to be granted that the Imperial Parliament cannot legislate for Indian States. The Privy Council, which has general jurisdiction to hear appeals from all parts of the Empire, cannot hear appeals from the State Courts. The judgments of the State Courts are foreign judgments in British India even as the judgments of the British Indian Courts are foreign judgments in the State. The internal administration of the States is in the hands of the Princes. Thus the legislative, judicial and executive functions of the States are their own. Such interference as there may be is only political and private except in regard to criminal cases and death sentences in some States. It may be fair to say that the surrendered powers leave them no status as international

entities independent of Britain, *vis-a-vis* foreign States. But does that justify the assertion that the States or the rulers of States are *British subjects*? I know of no principle of law or jurisprudence that compels a classification of the Indian States either as British subject or as independent, but not as being neither. Every one who has attempted to describe the relation has characterised it as *sui generis* defying classification under known categories. Their attempt has always been to suggest nearest analogies. The author is aware of these differences of opinion and refers to them. Sir Frederick Pollock advises resort to the analogies of international law as likely to be persuasive. But, notwithstanding all this, the author does not hesitate to say that—

the States "are no more than subjects of the Crown" (p. 48).

the States "are subjects to all intents and purposes" (p. 49).

their assertion of formal sovereignty enables the crown to affirm that its dealings with them are acts of State (pp. 48-9).

the real anomaly in the position of the States lies in this, that these subjects of the crown are not under the protection of the law (p. 61).

the States are "delegates of the crown" or "royal instruments" (pp. 55, 61, 63).

Firstly, the phrase "subjects to all intents and purposes" is an admission that they are not subjects of the crown in strictness. Secondly, if one is really a subject, can any assertion of one party or the other take away the jurisdiction of the Courts on a matter between sovereign and subject? If no assertion can take away the jurisdiction, will the author maintain that the validity of an action of the British Government in relation to a State can be examined in the British Courts? That it cannot be examined has been already decided by the Privy Council in the case of the Tanjore Raj which the author himself refers to. Lastly, will the author maintain that the rulers of States, being mere *delegates* or *instruments* of the crown, may be put aside, as agents may be in law?

What is a mere aid to understanding should not be used to limit the thing to be understood.

Paramountcy and the indefinite extent of control which it involves, just like superior military power among independent States, are not foundation for any *legal* conclusion.

As for the theory of indivisibility of sovereignty, much may be said in its favour but more may be said against it. In the last analysis it is a matter of terminology.

Where the powers of a Federated State are divided between the centre and the component units and neither can trench on the territory reserved for the other, where is the sovereignty to be located? Modern opinion is in favour of treating sovereignty as divisible. Indivisibility is stated to be the result of limited observation. And federations are specifically referred to as showing its divisibility. Either it has to be treated as divided between them or, if indivisibility is to be preferred as the proper theory, one has to find an escape in positing the sovereignty as being in the centre and in the component states jointly. One has to say that sovereignty cannot be divided, but powers may be, and that where powers are divided and neither can trench on the other's powers, sovereignty is not with either but in both together, conceived as one body, or in the People as whose representatives the centre and the units hold the divided powers. The point on which the theory of indivisible sovereignty fails is that the omnipotence or omni-competence demanded for sovereignty is not to be found in any one body. There are modern complicated political structures which do not admit of the exact location of sovereignty.

Next take the word "treaty". The author speaks as if the essence of a treaty is that it could be broken. The Indian States prefer the word *treaty* as involving a recognition of equality between the parties to it and as adding to their dignity. The British Government allow it freely enough where they do not consider that anything turns on it, but repudiate the term when they wish to assert their unquestionable superiority. They have clearly provided in the Act, and Sir Samuel Hoare has explained, that the Princes cannot be coerced to accept what their Instruments of Accession have not conceded. (S. 101) As for the term 'treaty' involving repudiability, independent states repudiate where they can repudiate with impunity and keep to its terms where they cannot sustain repudiation by their military might. There is no lack of desire among the Princes to repudiate what will not suit them; but repudiation is not in their power. The British Government are too mighty for the Princes, individually or collectively, to defy. That the British have the might to abolish a State, if they so desired, or to compel it to act according to their dictates is obvious; but can it be contended that we can build legal conclusions on it justifying the

compulsion of the rulers to do what the British Government dictate?

Let us next take the question of Federation. At every turn the author considers whether the Indian Federation would satisfy the conception of Federation strictly so called. Even Professor Willoughby recognises deviations from the rule of equality and proceeds to cite the example of the German Empire, thereby indicating that he takes even confederation to be a form of Federation. In dealing with the Indian Federation the author in one passage goes so far as to say that the constitution was not a federal constitution in the real sense. But he immediately gets over it with the reflection that paramountcy is there to save the Federation. That is to say, though under the provisions of the Act no amendment of the constitution was possible beyond the limits set by the Instrument of Accession, the paramountcy of the Crown may be used to enable Parliament to transcend them. If paramountcy can help to impose an amended constitution on the States without their consent, then why is an Instrument of Accession at all required in the first instance to bring them into the Federation. Parliament could have used the Crown's paramountcy to impose this very Government of India Act, without all the complications arising from the need to secure assent through various and varying Instruments of Accession. The British Government are now pressing them to join the Federation, because, I suppose, it is in the interests of all India as well as in the interests of Britain. Some have asserted that what is in British interests is also in the interest of all India. Why should not the Paramount Power impose the Act on the States in the exercise of their paramountcy, for the benefit of all concerned? If Instruments of Accession are now required, why is not a new assent, likewise, required to an amending legislation not covered by the initial Instrument of Accession?

There is a fallacy in the argument that as soon as the States have, by their Instruments of Accession, decided to come into the Federation, they have passed into the orbit of Parliamentary legislation and the last remnant of sovereignty in the States is destroyed. If the implication is, as it must be, that the legislative sovereignty has passed to Parliament, why does Parliamentary legislation still stand limited by the Instrument of Accession? If Parliamentary legislation is

limited by the Instrument, why is it not indubitable proof that the powers of Parliament are both derived from, and limited by, the Instruments of Accession? If that is demonstrably the fact, it cannot be got over either by considering what a true Federation should be and involve, or by a reflection on the saving character of paramountcy with its expansive and expansible jurisdiction, or even by explaining away the limitations on the power of amendment as mere procedure.

The expansible paramountcy is only another name for the irresistible might of the British arm on which no legal argument should be founded. Nor is it right to rely on the power of Parliament to transcend limits set by its own predecessors. Parliamentary legislation *within its own sphere* is not bound by any limitations on its powers imposed by previous legislation. This legislation, however, is not within its own sphere; nor are the limits those set by a previous Parliament. They are limit arising from the rights of States admittedly not subject to Parliamentary legislation now.

We have now constitutional analogies to disprove the validity of the argument from power. The Imperial Parliament can legally repeal the Statute of Westminster. And yet it is in the last degree improbable if not impossible. Can it be said that the equality of the Dominions and Britain which that Statute establishes can be denied, because of this theoretic legal power?

The States have a higher case than the Dominions for their claim, because Parliament never had any legal power over the States, as they had over the Dominions.

If this is not a Federation according to the author except for the existence of paramountcy and the power of coercion it confers, the proper view is to treat it as no Federation in the strict sense but as a Federation in a sense, that is, in a separate category by itself. The real facts about the Indian Federation cannot be ignored or slurred over in order to find a place for it within the category of Federations strictly so called.

When one comes to think of it, it is rather surprising that paramountcy should be, relied on as a force on the side of India or as compensating for defects in the Government of India Act. Paramountcy in the British Crown is what will always be a stumbling block in the way of Indian unity and the development of the Federation. If Britain considers the States

to be a bulwark for the preservation and perpetuation of her interests, paramountcy will not be used to advance Indian interests exclusively where they conflict with British interests. There is a point at which British and Indian interests will always diverge and conflict, and paramountcy cannot help India as against Britain. Far from helping the Federation to its ultimate goal as India sees it, paramountcy will ever be in its path. Without breaking the present conception of paramountcy, India can never come into its own. Paramountcy *may* abolish itself even as Imperial Parliament has abolished itself in relation to the Dominions and has created a Commonwealth. Political wisdom may dictate the one, as it has dictated the other. But there are thinkers that hold that what Britain has chosen to do for the people of her own stock, she will not do for the people of India. Be that as it may, we are here concerned only with this, that unless paramountcy stands abolished *in fact*, even if not in theory, just like Parliamentary Supremacy in relation to the Dominions, the political unification of India involved in the conception of Federation will not be complete.

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