II

PARAMOUNTCY AND THE CLAIM OF THE INDIAN STATES TO BE INDEPENDENT

The announcement by Travancore and Hyderabad to declare themselves Independent Sovereign States on 15th of August when India becomes a dominion and the inclination shown by other States to follow their example has created a new problem. The problem is a crucial one and requires to be seriously considered. There are two aspects to the question. Can the States declare themselves Independent ? Should they declare themselves Independent?

To begin with the first. The basis of the claim made by the States for a right to declare themselves independent lies in the Statement of 12th May 1946 issued by the Cabinet Mission in which they say that the British Government could not and will not in any circumstances transfer paramountcy to an Indian Government which means that the rights of the States which follow from their relationship to the Crown will no longer exist and that all the rights surrendered by the States to the paramount power will return to the States. The Statement of the Cabinet Mission that the Crown could not transfer paramountcy is obviously not a statement of political policy. It is a statement of law. The question is, is this a correct statement of the law as it applies to the States ?

There is nothing original in the proposition set out by the Cabinet Mission. It is a mere repetition of the view propounded by the Butler Committee appointed in 1929 to examine the relationship between the Crown and the Indian States.

As students of the subject know the Princes in the stand they took before the Butler Committee contended for two propositions:—

(i) That Paramountcy could not override the terms and conditions contained in the Treaties between the Princes and the States but was limited by them.

(ii) That the relations embodied in Paramountcy were of a personal nature between the Crown and the Princes and could not, therefore, be

transferred by the Crown to an Indian Government without the consent of the Princes.

The Butler Committee repudiated the first of these two contentions. It put the matter in most ruthless language by declaring that Paramountcy was Paramount and was not limited by any terms contained in the Treaties. As regards the second contention, strangely enough, the Butler Committee upheld. Whether it was to appease the Princes who were annoyed with the Committee for turning down the Princes' contention regarding Paramountcy it is no use speculating. The fact, however, remains that it gave immense satisfaction to the Political Department of the Government of India and to the Princes.

The doctrine that Paramountcy cannot be transferred to an Indian Government is a most mischievous doctrine and is based upon an utter misunderstanding of the issues involved. The doctrine is so unnatural that the late Prof. Holdsworth, author of the History of English Law, had to exercise a great deal of ingenuity in defending it in the pages of the Law Quarterly Review for October 1930. Unfortunately, no Indian student of Constitutional Law has ever bothered to controvert his views with the result that they have remained as the last and final word on the subject. No wonder the Cabinet Mission adopted them as valid and acted upon them in settling the issue of British India *vs.* Indian States. It is a pity that the Congress Working Committee, which was negotiating with the Cabinet Mission for a settlement, did not challenge the proposition enunciated by the Mission in regard to Paramountcy. But these circumstances cannot take away the right of Indians to examine the matter *de novo* and come to their own independent judgment and stand for it if they are convinced that their view is the right view, no matter what the Cabinet Mission has said.

The case against the position taken by the Cabinet Mission in regard to Paramountcy can be stated in the following propositions :—

(1) Paramountcy merely is another name for what is called the prerogative of the Crown. It is true that Paramountcy as a prerogative of the Crown differs from the ordinary prerogative of the Crown in two respects—(a) The basis of the ordinary prerogative of the Crown lies in

Common Law as distinguished from Statute Law while the basis of the Prerogative arising from Paramountcy lies in treaties supplemented by usage, (b) the Common Law prerogative of the Crown extends to all the subjects of the Crown resident in the King's dominions and over aliens temporarily resident therein while Paramountcy as a prerogative extends only over the Indian States. Paramountcy is no doubt a distinct part of the prerogative of the Crown. Nonetheless, the fact remains that Paramountcy is a prerogative of the Crown.

(2) Being the prerogative of the King, the exercise of Paramountcy is subject to that part of the Municipal Law which is called the law of the Constitution

(3) According to the principle of the Constitutional Law, while the prerogative vests in the King, the King has no discretion in the exercise of his prerogative but can exercise it only in accordance with the advice given to him by his Ministers. The King cannot exercise it independently of the advice of his Ministers.

The last proposition enunciated above requires further elaboration, For, it may be asked on the advice of which Ministry is the Crown to act. The answer is on the advice of the Ministry of the Dominion concerned. Before the Statute of Westminster the British Empire constituted one single Dominion. Consequently, in the matter of the exercise of its prerogative rights, the Crown acted on the advice of the British Cabinet. After the passing of the Statute of Westminster which carved out Canada, Australia, South Africa and Ireland as separate Dominions, the Crown, in the exercise of its prerogative rights acts on the advice of the Cabinet of the Dominion concerned. It is bound to do so. It cannot do otherwise. It follows that when India becomes a Dominion, the Crown will be bound to act in the exercise of its prerogative rights, *i.e.,* Paramountcy on the advice of the Indian Cabinet.

The protagonists of the theory, that Paramountcy cannot be transferred to the Government of India, rely on the omission from the Government of India Act 1935 of the provisions of section 39 of the Government of India Act of 1933 (they were reproduced in section 33 of the Government of India Acts, 1915—19) according to which the civil and military Government of India (as distinguished from the civil and military Government of British India) is vested in the Governor-General in Council and argue that the omission is evidence in support of the

conclusion that Paramountcy could not be transferred to an Indian Government. To say the least the argument is purile. The Existence or non-Existence of such a provision in the Government of India Act is quite beside the point and proves nothing. The non-existance of the clause does not prove that India can under no circumstances claim the right to advice the Crown in regard to the exercise of Paramountcy. Its existence in the Government of India Act does not mean that such a power was vested in it during 1833 to 1935 when it formed part of the Act for, that very clause contained the proviso whereby the Governor-General in Council was required to pay due obedience to all such orders as may be issued from the Secretary of State which means, even during 1833 to 1935, the ultimate authority to advice the Crown in the matter of the exercise of the prerogative was the Secretary of State for India in British India.

The different methods of disposing of Paramountcy adopted in the various Acts passed by Parliament relating to the governance of India between the 1833 to 1935 do not and cannot in any way affect the claim of the Indian people to advise the Crown in the exercise of Paramountcy. Under the Constitutional Law of the Empire only when a country has become a dominion, that it can claim the right to advise the Crown and the fact that before it became a dominion the Crown was differently advised is no bar to its claim. In the 1935 Act, India was not a country with responsible Government. But even if it was, India could not have claimed to advise the Crown in regard to the exercise of its prerogative rights regarding Indian States. This is because the Constitutional Law of the British Empire makes difference between responsible Government and Dominion Status. In responsible Government, the right of the Cabinet to advise the Crown and the obligation of the Crown to accept it is confined to cases of the exercise of the prerogative arising out of the internal affairs of the country. As to external affairs the British Cabinet retained the right to advise the Crown. But in the case of a Dominion, the Crown is bound to accept the advise of the Ministry with regard to all cases of the exercise of the prerogative whether it relates to internal affairs or external affairs. That is

why a dominion can make a treaty with a foreign country without the intervention of the British Cabinet. The fact that the Government of India was not permitted to advise the Crown in the exercise of its rights of Paramountcy does not mean that there is any inherent Constitutional incapacity which disentitles her from claiming the right to advise. The moment India gets the Status of a Dominion it automatically acquires the capacity to advise the Crown on Paramountcy. What has been stated above is no more than a summary of the Constitutional Law of the British Empire and the process of its evolution showing how a part of the Empire which acquires the Status of a Dominion becomes vested with the exclusive right to advise the Crown in the exercise of its prerogative. Why should this right be denied to India when she becomes a Dominion it is difficult to understand. On parity of reasoning, India should get the right to advise the Crown in the exercise of its prerogative as did Canada, Australia, South Africa and Ireland. That Prof. Holdsworth came to a different conclusion is due not to any difference in the fundamental propositions of Constitutional Law stated above. Indeed he accepts them in toto. The reason why he came to a different conclusion is because he posed quite a different question for argument. The question posed by Prof. Holdsworth was whether the Crown could cede or transfer Paramountcy to an Indian Government. This is not the real issue. The real issue is whether the Indian Dominion can claim the advise to the Crown in the exercise of Paramountcy. In other words, we are not concerned with the question whether Paramountcy could be transferred. The issue with which we are concerned is how Paramountcy can be exercised. I am sure that if Prof. Holdsworth had realised what the real issue was, he could not have come to a different conclusion.

So far I have dealt with one part of the Cabinet Mission's statement where they say that the Crown could not transfer Paramountcy to an Indian Government. There remains for consideration the other parts of their statement in which they say that the Crown will not transfer Paramountcy to an Indian Government. According to the Cabinet Mission, Paramountcy will lapse. This is a most astounding statement and runs

contrary to another well-established principle of the Constitutional Law. According to this principle, the King cannot surrender or abandon his prerogative rights. If the Crown cannot transfer Paramountcy the Crown cannot also abandon it. The validity of this principle was admitted by the Privy Council in The Queen *vs.* Eduljee Byramjee decided in 1840 and reported in 5 Moore's P.C. p. 276 wherein they said (p. 294) that the Crown could not even by charter part with its prerogative. It is, therefore, obvious that the statement made by the Cabinet Mission that the Crown will not exercise Paramountcy is contrary to the Constitutional Law by which the Empire is governed. The Crown must continue to exercise Paramountcy. It is of course true that the Crown can surrender its prerogative if permitted to do so by express statutory authority. The question is whether it would be legal and proper for the British Parliament to make a Law permitting the abandoning of Paramountcy. It would be open, I am sure, for Indians to argue that such a step by the British Parliament would neither be proper nor legal. It would not be legal for the simple reason that after India becomes Dominion, the Statute abrogating Paramountcy can be passed by the Dominion Parliament of India and the British Parliament would have no jurisdiction in this matter at all. Again a Statute passed by the Parliament of the Great Britain abrogating Paramountcy would be improper. The reason is obvious. The army is the ultimate sanction for Paramountcy. This army has been the Indian Army for which British India has paid all along. Without the powerful army maintained by British India which was placed at the disposal of the Crown through his agent the Viceroy and Governor-General of India, the Crown would never have been able to build up and conserve the powers of Paramountcy. These powers are of the nature of a Trust held by the Crown for the benefit of the people of India and it would be a gross breach of trust on the part of the British Parliament to pass a statute destroying this trust. Paramountcy is an advantage which is secured to it by treaty with the Princes. Independent India can, therefore, make valid claim for the inheritance of Paramountcy.

A question may be asked : What happens when India become Independent. The Crown disappears and the question of advising

the Crown does not remain. Can Independent India claim to inherit the prerogative rights of the Crown ? The answer is yes. She can. Independent India will be a succession State. For an answer to this question one must look to the provisions of International Law relating to succession among States. Oppenheim admits that a succeeding State can inherit certain rights of the preceding State. From Hall's International Law, it would appear that among other things, property and advantages secured to it by treaty can be inherited by a succession State. India as a succession State she can inherit certain rights. On this point the following extracts from Hall's International Law are relevant :

> "And as the old State continues its life uninterruptedly, it possesses everything belonging to it as a person, which it has not expressly lost; so that property and advantages secured to it by treaty, which are enjoyed by it as a personal whole, or by its subjects in virtue of their being members of that whole, continue to belong to it. On the other hand, rights possessed in respect of the lost territory, including rights under treaties relating to cessions of territory and demarcations of boundary, obligations contracted with reference to it alone, and property which is within it, and has, therefore, a local character, or which, though not within it, belongs to state institutions localised there, transfer themselves to the new state person."

The conclusion is that the Indian States will continue to be in the same position when India becomes Independent as they are now. They will be sovereign States to the extent they are, but they cannot be independent States so long as they remain under the suzerainty, as they must be, either of the Crown, if India remains a Dominion and under the suzerainty of the succession State, if India becomes independent. While the suzerainty remains they can never be independent. The States may declare themselves independent. But they must realise that while the suzerainty lasts and it must continue even when India becomes independent, India will not recognize their independence nor can a foreign State accord them the status of an independent State. The only way by which the Indian States can be free themselves from Paramountcy would be to bring about a merger of sovereignty and suzerainty. That can happen only when the States join the Indian Union as constituent units thereof. The States' spokesmen ought to know this. But as they seem to have

forgotten it is necessary to remind them of what happened at the R T C. In the beginning, the States were not prepared to join the Federation. They agreed to join the Federation when they came to know that the Butler Committee had laid down the doctrine that Paramountcy was Paramount. This change of attitude was due to the realization that to the extent the powers comprised in Paramountcy were handed over to the Federation to that extent Paramountcy would vanish. In fact, as most of us know, the Princes did raise the question to the then Secretary of State and asked him that the scope of Paramountcy should be limited to, by excluding the subjects included in List No. I. The then Secretary of State had no answer to give and silenced the Princes by frowning upon them. Apart from the attitude of the then Secretary of State, the point remains that the Princes had seen the point that the dissolution of Paramountcy lay in joining the Federation. That point remains as valid now as it was then. It would be wise on the part of the Indian States to follow that line and not to pursue the mirage of independence. The people of India should, therefore, repudiate the proposition enunciated by the Cabinet Mission that Paramountcy will lapse. They should insist that Paramountcy cannot lapse and that they are the heirs to that Paramountcy and will continue to exercise it, *vis-a-vis* such Indian States as do not join the Union even after the British have left. The States, on the other hand, should realize that their existence as Sovereign Indian States will not be worth 5 years purchase. It is in the interest of the Princes that they should join the Union and become Constitutional monarchs. Any Dewan who advises his Prince not to join the Union is really acting as the enemy of the Prince. The joining of the Federation will no doubt involve the introduction of responsible Government but it has this advantage, viz., that the Union will guarantee to the Princes the rights relating to dynastic succession which is the most that a Prince can expect. To be independent and to hope to get recognition and protection from the UNO is to live in one's own paradise. It is doubtful if the UNO will give recognition to Indian States ignoring the claim by India of suzerainty over them. But even if that happens, the UNO will never grant any assistance to an Indian State from external aggression or internal commotion without insisting that the State should first introduce responsible

Government within its area. All these things are writ large on the wall. He who runs may read it. Those who refuse to read it will no doubt share the fate which befalls all those who are blinded by their self-interest

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PART IV

NOTES ON ACTS AND LAWS

1. The Common Law.
2. The Dominion Status.
3. The Law of Specific Relief.
4. The Law of Trust.
5. The Law of Limitation.
6. The Law of Criminal Procedure.
7. The Transfer of Property Act.
8. The Law of Evidence.