LAW OF TREATIES IN THE CONTEMPORARY PRACTICE OF INDIA

By

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I
PERSPECTIVES

No apology is needed, it is hoped, for an examination of
current Indian practice—executive, legislative and
judicial—in the field of international law. It may well be that
a study of such practice would not yield always anything so signi-
ficant as ‘rules’ of international law. Nonetheless, such a
study can have some significance in revealing the dynamics of inter-
national law. The points at which a legal system of a country
converges with and diverges from international law and the effect
of such congruence and divergence always provides a fascinating
and fruitful field of study. This study can be undertaken from
several perspectives. In the first place, such a study may well
be a part of a general enquiry seeking to identify the various phases
of development of international law in the newly independent
Afro-Asian countries. Secondly, there is a need for comparative
studies in international law though this might seem paradoxical.

As has been observed:

‘... the services of a prae tor peregrinus or of the Courts at
Westminster have yet to be performed internationally, and so,
besides opportunities for regional comparisons, there exist both
the opportunity and the need for comparisons of what might
be described as national systems of international law.’

* The writer is extremely grateful to Prof. Stefan A. Riesenfeld, Emanuel
S. Heller, Professor of Law, University of California, Berkeley, for his
able guidance. The writer, however, is solely responsible for the views
expressed in this article.

1 See M. K. Nawaz, "International Law in the Contemporary Practice of
India: Some Perspectives"—Proceedings of the American Society of Inter-

2 Erades and Gould, International Law and Municipal Law, Netherlands and
A modest attempt to survey the contemporary practice of a nation in the field of international law might help eventually the future 'practor peregrinus' of international law. Again, at some specific points, the requirements of conventional international law can best be known and fulfilled by a recourse to the field of study such as ours. For example, the Draft Articles on the Law of Treaties in Article 31 provide for the binding force of treaties unless the 'violation of internal law was manifest.' It, therefore, becomes imperative to search for such restrictions on treaty-making power which may be justifiably relied upon by nations in impugning the validity of treaties. Such a search can only begin in the actual practice of States with regard to making of treaties.

The two specific aspects of study attempted here, namely, the treaty-making power and succession to treaties in India, can be studied from several perspectives. The treaty-making power, for example, can be studied from the point of view of comparative federalism. Thus, as Mr. Looper observed:

'The experience of India although it has not received so far much attention is of great interest for two reasons. First, it is the largest federation in the world in terms of population, and this combined with its present crucial position in international affairs, makes the study of its treaty power important. Secondly, since India is the most recent of the world's main federations, and has evolved through two constitutions, a study of the Indian experience is a case study in nascent federalism. India is unique among existing federations in exhibiting the evolution of treaty power from the restrictive Canadian model to the fuller American-Australian model.'

Studies can also be made to ascertain how far Indian practice is divergent from the British practice in the sphere of international law and to define India's present approach. Likewise, the problem of state succession to treaties can be examined historically, taking as the basis the gradual progress towards Independence; or can be analysed from a doctrinal level as in terms of types of succession, categories of heritability of treaties, succession to multilateral treaties and what might be called devolution of 'organizational treaties' where membership of international organizations is involved. The peculiar position of India since 1919 gives rise to various analytical questions which, as we shall see, can have some modulatory impact on the traditional international law of succession.

II

THE SCOPE AND LIMITATIONS OF TREATY MAKING POWER OF INDIA

1. Limitations under Rules of International Law

The power of the states to enter into treaties or international agreements has always been held subject to the general rules of international law, nonrecognition or violation of which makes a treaty 'illegal' or 'void'. The formulation of the relevant general norms of international law, however, has varied, the fact-situations giving rise to such illegality are often disputed, and the rationale of such norms has been often debated on the level of the freedom of states in the exercise of their sovereignty and the controls emerging from the general rules of international law.

States have also sometimes expressly stipulated that inconsistency with provisions of some multilateral treaties shall avoid the treaty in conflict with such provisions.

Thus, under the terms of Covenant of the League of Nations, the members severally agreed that the Covenant abrogated all obligations or understandings inter se which were inconsistent with its terms. They also agreed not to enter into any engagement

* See O'Connell, "Independence and Succession to Treaties", B.Y.I.L., Vol. XXXVII, 1962, pp. 84-180 and the work now being done by the International Law Commission. See specially Report by Mr. Manfred Lachs, Chairman of the Sub-committee on Succession of States and Governments, A/CN.4/160, 7 June 1963, discussed in Y.B. of Int. Law Commission 1963, Vol. 1, at 702nd meeting, p. 189. For brevity's sake, the former will be hereafter cited as 'O'Connell' and the latter, as 'UN Doc. A/CN.4/160'.

The writer's debt to these is very great.

... it has been suggested that in so far as instruments such as the Declarations of Paris of 1865 which abolished privatizing, or the Slavery Convention of 1926, obliging the parties to prevent and suppress trade in slaves have become expressive of a principle of customary international law, a treaty obliging parties to violate these principles would be void on account of illegality of its object... It would thus appear that the test whether the object of the treaty is illegal and whether the treaty is void for that reason is not consistency with customary international law but simple but inconsistent with such overriding principles of international law which may be regarded as constituting principles of international public policy (Ordre International public)." (Emphasis added) Sir H. Lauterpacht: "Report on the Law of Treaties, United Nations, General Assembly, A/CN.4/63, 24 March 1953, pp. 195-96: also C.G. Fitzmaurice, "Third Report on the Law of Treaties," UN A/CN.4/115, (18) March 1958, pp. 63-65 Cf. Hans Kelsen, Principles of International Law, 1952, pp. 322-23.
in future inconsistent with the Covenant. Similarly, Art. 103 of the
United Nations Charter clearly provides:

‘In the event of a conflict between obligations of the
Members of the United Nations under the present Charter
and their obligations under any other international agree-
ment, their obligations under the present Charter shall prevail.’

The International Law Commission in its recent Draft
Articles on the Law of Treaties provides as follows:?

‘A treaty is void if it conflicts with a peremptory norm of
general international law from which no derogation can be
permitted and which is modified only by a subsequent
norm of general international law having the same character.’

Needless to say, India’s treaty making power is restricted by
such general rules of international law.

2. Constitutional Limitations on Treaty making Power: Their
Effects on International Validity of Treaties

Citation of these provisions is illustrative only of the limits of treaty-making
powers of States under international law. The question of the legality of
treaties is a separate issue.

It should be noted that this Article only applies to the Member States. Its
character as a ’jus cogens’ was questioned by some Governments
in their response to the present formulation, vide the Report of Sir H.
Waldock, note 8, infra.


8 See the Commentary to Article 37, in 58 Am. Jl. of Int. Law (1964): p. 264
Although the Commission did not find it desirable to enumerate such
norms the following were mentioned in the Commentary to this article:
(a) a treaty contemplating unlawful use of force contrary to principles
of the Charter; (b) a treaty contemplating performance of any other
act criminal under international law; (c) a treaty contemplating
commimiration of acts such as trade in slaves, piracy,
genocide, in the suppression of which every state is called upon to
co-operate. Treaties violating human rights or the principle of self-
determination were also mentioned in this context.

But See the Fifth Report on the Law of Treaties by Sir Humphry Waldock,
Special Rapporteur, L.C., UN. Doc. A/CM/183/Add. 1: 4 December, 1964,
pp. 15-26. While the principle contained in this article appears to have met
a large measure of approval, its existence was doubted by the Government of
Luxembourg and the Netherlands Government suggested that it may be a
pleonasm to refer to a peremptory norm from which no derogation
is permitted .

The present formulation has also come under strong criticism from
Dr. G. Schwarzenberger, ’International Law Jus Cogens,’ Texet L. Rev.,
p. 453-478 (1965), but see, A. Verdross, ’Jus Dispositivum and Jus Cogens in
International Law,’ 60, Am. J. Int. Law, p. 55 (1966), and also Sir Waldock’s
Observations and Proposals in the above mentioned Report (pp. 22-27).

A modification has been suggested by the Rapporteur to the present Article
in view of some doubts as to the temporal element. It was felt desirable
that a clarification must be made as to the time at which a conflict
with ’jus cogens’ will void a treaty. It has been proposed that the above quoted
articles must now be prefaced by these words: , A treaty is void ’ab initio
if at the time of its conclusion it conflicts . . . etc.’

For an excellent study of this subject see: Hendry J.H., Treaties and Federal
Constitutions (Public Affairs Press, 1955); specially Chap. 7 dealing with
the above mentioned distinctions and other aspects of the controversy. See
also Hans Blix, Treaty Making Policy (Stevens 1960).

^ Article 31 of the Draft Code on Treaties, Also see Commentary, op. cit.,
n. 7, at p. 246.

11 Speech of Mr. de Luna, 697th meeting—7th May 1963; See Summary Record

^ Op. cit., note 7, at p. 250; the Commission was fortified in its view by several
other considerations such as, procedures for ratification, device of signature
’ad referendum’, etc. These, it was felt, will help a responsible decision
on the parts of signatories upon which other states were entitled to rely.
Indian state practice may make the 'violation of internal law manifest'.


The Indian Constitution clearly states that:
- The State shall endeavour to
  - (a) promote international peace and security;
  - (b) maintain just and honourable relations between nations;
  - (c) foster respect for international law and treaty obligations in dealings of organised people with one another;
  - (d) encourage settlement of international disputes by arbitration.\textsuperscript{13}

This article, however, is in Part IV of the Constitution which lays down the Directive Principles of State Policy and by Article 37 of the same Part, these principles are held not justiciable; but, 'the principles laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making the laws.' These principles do not confer any legislative power on the legislature and are mere statements of policy, and a law contrary to these may still be held valid.

The Indian Constitution gives plenary law-making power to the Union Legislature. Parliament has exclusive power to make laws in respect to the entries in the Union List.\textsuperscript{14} The Union List in its entry 14, (Schedule VII of the Constitution) mentions:
- Entering into treaties and agreements, with foreign countries and implementing of treaties, agreements, and conventions with foreign countries. (Emphasis added).

Parliament has also an overriding power to make any law for the whole or part of the territory of India for 'implementing any treaty, agreement or convention with any other country or countries, or any decision made at any international conference, association, or other body.'\textsuperscript{15}

\textsuperscript{13} Art. 51, Constitution of India, Part IV; for discussion of the various phrases in this article, see Naveen, \textit{op. cit.}, n. 1 who dwells on the phrase 'foster respect'; and Prof. Alexandrowicz, 2 \textit{Int. and Comp. L.Q.}, p. 299 (1955) re. possible interpretation of the phrase 'organised people'.

\textsuperscript{14} Art. 246 (1).

\textsuperscript{15} Art. 253. It is interesting to note here in passing that the Constitution speaks of 'treaty obligations' 'treaties', 'agreements' and even 'decisions' of any international conference, association or body.

\textsuperscript{16} Article 73.

\textsuperscript{17} M. P. Jain, \textit{Indian Constitutional Law}, p. 115 (1962).
ratification rests with the President, this matter should have been brought before the House. It is because ... our Municipal Law requires power in order to implement them. There are certain rule making powers sought to be taken in this Bill. The Bill also seeks to confer upon our courts certain powers in regard to offences committed in violation of this Bill. The same spokesman also observed: 22

'... Most of the obligations that this country undertakes under this Convention can be dealt with at an administrative level. It was possible to do so with most of them. But since it involves certain inroads or certain modifications of our jurisprudence, since it involves provisions of penalties of a severe character and other provisions for protection of emblems, it has been necessary to bring this Bill.' (Emphasis added.)

It would appear then that while the Government considers that both under Articles 73 and 53 of the Indian Constitution, it has a plenary executive power to make treaties and agreements, in so far as such treaties and agreements involve making laws in respect thereof, it has to proceed through the Parliament. 22 It would also seem to be believed by the Executive that Parliamentary disapproval of a proposed Bill containing provisions seeking to make effective the terms of a treaty or convention, does not impair the international validity of a treaty or an agreement. 23 It would be apt to say that the Executive regards the existence of parliamentary power as more of a 'performance limitation' than a 'capacity' limitation on its treaty making power. 24

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19 Laws and Practices concerning the Conclusion of Treaties', United Nations Leg Series ST.//Leg./Ser/B/3, 1953, p. 63. (Emphasis added.)
20 Thus announcements regarding treaties and agreements are usually made through Press notes, Gazettes or Bulletins, and in response to questions asked by the members of the Indian Parliament. Sometimes copies of agreements and treaties are placed before the Parliament and invariably texts of such treaties and agreements are placed in the Library of Parliament to which Members are usually referred to for details. On some occasions, the Members of the Government refuse to disclose details of a treaty or an agreement under negotiation or awaiting ratification. The ratifications of international conventions are also not usually brought to the notice of Parliament. Statements regarding the same, however, are made in response to questions asked during parliamentary sessions, and more particularly during the annual debate on grants for the External Affairs Ministry of the Government. A cursory look at the Reports of Debates of the Lok Sabha (House of People) and of the Rajya Sabha (House of Representatives) will confirm the general pattern of executive practice outlined above. Vide, Lok Sabha Debates, Rajya Sabha Debates, and the Foreign Affairs Record, published by the Government of India.

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S. The Judicial View of Executive Treaty Making Power

The fact that India is an independent sovereign state empowered to make treaties as an international person seems too obvious to call for a judicial enunciation and yet, occasionally Indian courts have been asked to adjudicate on this fundamental issue in differing fact-situations. The courts have, of course, held that treaty-making power is an attribute of sovereignty which cannot be validly questioned.  

The first important case considered by an Indian court concerned only indirectly the aspects of the executive power now under discussion. The case, Birma v. State of Rajasthan, is however, a very significant one in that it deals with (i) the validity of a treaty when in conflict with a constitutional norm and (ii) the extent to which treaties are laws of the land. The significance of the case, is always to be considered in light of the fact that the court in litigation here was an extradition treaty between a native state and the then British Indian Government.

In a habeas corpus petition, Birma contended that there was no law in force in the area of the Dholpur State relating to extradition of fugitive criminals. The District Magistrate, Dholpur, had, therefore, no authority to order their arrest or surrender. It was further contended on his behalf that although there was a treaty entered into between the British Government and the authorities of Dholpur State regarding extradition of fugitive criminals, such a treaty did not constitute 'a law' because it was not incorporated in any law within the meaning of Art. 21 of the Indian Constitution.

The Government argued that there being no other law in force, the treaty between the British Government and the Dholpur State must be regarded as having the force of law and the arrest and detention of petitioner should be deemed legal under that treaty.

The Court, after an elaborate citation from Halsbury's Laws of England and other authorities, concluded that:

'Treaties which are part of international law do not form part of law of the land unless expressly made so by the legislative authority. In the present case, the treaty remained a treaty only and no action was taken to incorporate it into a law. That treaty cannot, therefore, be regarded as a part of the municipal law of the then Dholpur State. . . .'

This being so, the conclusion followed that the extradition treaty of Dholpur State 'not being a law in force' cannot justify deprivation of personal liberty of a citizen of India under Art. 21 of the Indian Constitution.

Viewed in its fact setting, this decision only seems to state that there are certain treaties, such as extradition, which do not have the 'force of law' as understood by the Indian Constitution unless and until they are incorporated in the municipal law of India or any territory of India, and mere executive implementation of such a treaty although unchallenged and in the absence of any other

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77 Art. 21 of Indian Constitution says: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.' The definition of the term 'law' herein is provided by Art. 13 of the Constitution as follows:

(3) In this Article, unless the context otherwise requires,—

(a) 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

(b) 'laws in force' includes laws passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that such law or any part thereof may not be in operation either at all or in particular areas. The term 'law' in Art. 21 has been interpreted by the Supreme Court to mean statute law in A. K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 29.

78 Particularly paras 677 and 678.

79 In a similar case, the High Court of Rajasthan said: 'It is true that in the then state of affairs, His Highness, the Maharaja Rana was the highest executive as well as the legislative authority. This, however, does not mean that any executive act of the Maharaja Rana amounted to a legislative act. Entering into a treaty with British India was an executive act and the treaty, to have a binding effect on the subject had to be incorporated into a Municipal law.' Vide Nanga v. Govt. of Rajasthan, A.I.R. 1951, Rajasthan 155, para (9). (Emphasis added.)
law, does not make it a "law in force", or, legally binding. It is true that the general formulation that "treaties which are a part of international law do not form part of law of land unless expressly made so by legislature" is misleading as Professor Alexandrowicz has pointed out.30

In several cases, Indian courts have, however, held quite the opposite and thus justified Prof. Alexandrowicz's hopes that the Common Law rules regarding the status of treaties will be followed in India. Thus, in Union of India v. Manmull Jain,31 the litigation centred round the treaty by which Chandernagore, a French possession in India, was transferred to India. The Union of India sought the Court's permission to prosecute appeals against the respondents in place of the Perceiver and Municipal Reserver of Chandernagore in respect of a sum of money payable to this authority. The Union of India inter alia contended that these rights become vested in it with effect from the date of treaty with the French Government. The respondents contended that the treaty was not valid and binding on the courts as the Parliament had not legislated on the treaty. The issues for adjudication were whether a treaty was legally valid without parliamentary legislation and whether such question could be litigated in the High Court. The Court upheld the treaty maintaining:

'...there is absolutely no reason...for thinking that the treaty was not legally valid... (The) contention that without parliamentary legislation making the treaty an Act of Parliament, the treaty cannot have any legal force or validity, is based... on a misconception of the nature of a treaty. Making a treaty is an executive act and not a legislative act. Legislation may be and is often required to give effect to terms of a treaty... but the treaty is complete without the legislation.'

Referring to Item 14 of the Union List of the Constitution, the Court further stated:

'Undoubtedly, this provides for all legislation in connection with entering into treaties. This cannot... however justify

30 Prof. Alexandrowicz-Alexander, I.C.L.Q., 1952, p. 296. He states:

'Read in the context with the whole judgment, the statement seems a misformulation. The court expressly quotes the English common law principle that certain treaties such as treaties affecting private rights must be enacted by Parliament to become enforceable. This principle does not apply to all treaties. Thus, it can be safely assumed that no deviation from English Common Law rules relating to international law was intended and that subsequent judgments of Indian courts will follow the same line.'

31 A.I.R. 1954 Calcutta 615.

the conclusion that the makers of the Constitution intended that no treaty should be entered into unless the Parliament has legislated on the matter. The power of legislation on this matter leaves untouched the executive power of entering into treaties... The President makes a treaty in exercise of his executive power and no court of law can question its validity.32

The question of constitutional limitations came sharply in the focus when the legality of an Agreement by Secretaries of India and Pakistan, subsequently confirmed by the respective Prime Ministers in a joint communiqué, was challenged. This agreement, called the Nehru-Noon Agreement (named after the two Prime Ministers), provided, inter alia, that approximately half of the total area of Berubari Union (total area being 8.75 square miles) should go to Pakistan. The total population of Berubari being 10,000 to 12,000, approximately 5,000 to 6,000 people were affected by this Agreement.

In its first phase, the question as to the validity of this procedure of treaty-making came up before the Calcutta High Court in the Nirmal Bose case. The learned Judge categorically stated therein:

'... where an action of the executive government affects the property of one who now enjoys the status of an Indian citizen it does not follow that by a pure executive action, the right of property or other rights guaranteed to a citizen by the Constitution can be affected and the right of the citizen to have recourse to the municipal courts taken away. In such a case, the rights of property and other rights being assured by the Constitution, the executive must at all times be ready to show to the Courts that the action is in consonance with the Constitution and the law and cannot escape on the ground that it is an act of State.'33

32 (Emphasis added.) Undoubtedly the Court's position (emphasised above) goes to another extreme and does not seem to be warranted in the light of the limited question presented to it. The court here perhaps only wished to state that until the Parliament by virtue of its power restricts the executive power constitutionally in respect to treaty-making by a law duly passed, no court can question a treaty when the Executive has acted within the scope of its power, without violating constitutional limitations imposed on the Executive. See Nirmal Bose v. Union of India, A.I.R. 1959 Calcutta 506.

There, inter alia, the Judge said: 'This decision (i.e., Manmull Jain's) is of course binding on me but it must be taken to have decided the case before the Court. It was a case of acquisition of territory by consent under a treaty. In this particular case, the facts are in reverse.' (Para 17, p. 513.)

In addition, the Court observed:

'... Under Article 3 (of the Constitution) there is a specific provision for legislation being passed by Parliament under five headings. In so far as the specific power is given to Parliament, the executive power is curtailed and qualified.'

While the application for the issue of a writ against the Government of India was dismissed as, *inter alia*, no case was made out at that stage, and the materials were insufficient to warrant any conclusion on merits, this case has a great significance in that it clarifies to a great extent the inherent constitutional limitations of the treaty-making power of the Executive. The Supreme Court of India was subsequently asked to render an advisory opinion on the Nehru-Noon Agreement. The Court preface its consideration of the issues by a significant enunciation of principles:*4

'... there can be no doubt that a sovereign state can exercise its right to cede a part of its territory to a foreign state. This power... is of course subject to the limitations which the Constitution of the State may either expressly or by necessary implication impose in that behalf.... Stated broadly, the treaty making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it. Whether a treaty may be implemented by ordinary legislation or by constitutional amendment will naturally depend on the provisions of the Constitution itself.'

After an extensive survey of the relevant constitutional provisions, the Court held that Art. 3 of the Constitution authorises enactment of laws sanctioning merely transfers of territory from one Indian State to another Indian State and not cession of Indian territory to foreign states. It advised that the implementation of the present agreement ceding part of the Indian territory to Pakistan will either require a constitutional amendment of Article 1 (which specifies the territory of India) or an amendment of Article 3 of the Constitution so as to authorise enactment of laws providing for cession of territory in favour of a foreign state. The Parliament followed the former course and amended the Schedule to Article 1 specifying the territory of India.

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6. Conclusions

'In all the literature on the subject of treaties, perhaps no statement appears more often, in one form or another than that which asserts that although the treaty power is limited, there is no general statement that can be made which accurately describes its limitation. This is a profoundly wise, yet a deceptive judgment.'*38

Had we not been thus warned, we too would have been tempted to conclude with profound wisdom and none too transparent deception, that a search for explicit limitations on treaty making power of the Executive in India is perhaps futile. We still feel, however, that such a search can only yield limited results because a federal constitution, so elaborately written as the Indian Constitution,*39* may contain provisions which might be judicially construed as implying an inherent limitation on the executive treaty making power. We have seen that the Constitution of India endows the Union Executive with the same power as the Union Legislature, and in reality, the nature of the executive power, if it is possible to describe it in one word, is 'residuary'. Therefore, this power is subject to limitation by Parliament, which is empowered to make 'any' law pertaining both to 'entering into' treaties and other agreements as well as 'implementing' them. Theoretically, therefore, if the Parliament passes a law subjecting the Executive ability to enter into treaties to a particular procedure or limiting it within particular confines, the Executive can no longer validly enter into treaties in violation thereof. It would then be, it is believed, a limitation manifest in the internal law of the country.

Again, both the executive and legislative powers are subject to the provisions of the Constitution. This would mean that Parliament can pass no laws in contravention of the existing provisions of the Constitution. Co-extensively, the Executive cannot also exercise power in violation of constitutional provisions and yet claim legal validity for such actions. Thus, for example, 'the State shall not make any law' which takes away or abridges fundamental rights. Such a law, if made, is void

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*39 The Indian Constitution has a Preamble, 393 articles, 7 schedules. It has undergone 17 amendments since 26 Jan. 1950.
to the extent of its inconsistency. 36 But the fundamental rights guaranteed by the Constitution are not immune from constitutional amendments. The Supreme Court of India has so held often. Therefore, if Parliament, or through it, the Executive seeks to enter into or enforce any treaty, it has to be immune from the charge of collision with provisions of the Constitution. 37 Parliament may amend the Constitution, as it has several times done, and amendment can in most cases be made by simple majority. But a special procedure of amendment has to be followed in cases involving the federal structure of the Constitution. 37

It is submitted, with great awareness of the distinction so often made between the 'internal' and the 'international' validity of treaties, that the executive power of treaty making is subject to constitutional limitations described above and that States dealing with India, (although they are not required to go behind the ostensible authority) are expected to know them.

While this position is consistent with the compromise solution of the International Law Commission, controversies will continue about the nature of the impact of constitutional provisions on international law. To this controversy, this paper has no answer. Our analysis is directed within the framework of the general consensus now reflected in the International Law Commission's Draft.

III

SUCCESSION TO TREATIES

1. Indira's Status in International Law

The study of state succession to treaties in Commonwealth countries has justifiably attracted the attention of many scholars of international law. 38 The slow transition to independence by some of the colonies of the British Crown, their governance by the so-called inter se doctrine of the Commonwealth, the peculiar legislative and executive modes of devolution of treaties adopted by the independent Commonwealth nations, offer a rich and varied material in which perhaps starting points for new developments in the doctrine of state succession to treaties can be found. In the none too settled law of state succession to treaties, the infusion of this rich data may also have an upsetting effect. As Prof. D. P. O'Connell has so very aptly observed: 39

'It is clear... that this problem is new, and the rules of law suitable for its solution are at the formative stage. Practice is inconsistent, perplexing and difficult either to ascertain or evaluate. New hypotheses must be proposed and tested by experience. Nationalist sentiment has added a formidable dynamic to the problem. 39

The search for 'criterion of heritability' has given rise to the hypothesis that:

'. . . independence as a category of factual succession constitutes an exception to or modification of the traditional law of State succession. Historically, there is little relevant practice to guide a solution. 40

Perhaps, the Indian experience has some value in the doctrinal development of international law in this field. The Indian experience was unique in that India was the only colony of the Crown which, without having any semblance of self-governance, participated in international organizations and entered into treaties and other agreements in her own separate identity. India was an original member of the League of Nations and named as such in the Annex to the Covenant of the League.
Analysis of the provisions of the League of Nations Covenant clearly establishes, in the words of Fischer Williams, that:

'the whole structure of the Covenant implies that its members at any rate when they join the League should not be in a state of legal political dependence.'

India was also a separate member in the International Labour Organization prior to her becoming independent. The Governing Body of the International Labour Organization had recognized India:

'as one of the eight State members of the International Labour Organization of chief industrial importance.'

India was also one of the signatories to the Treaty of Versailles. And, she was an original member of the United Nations.

The views of scholars are not unanimous as to India's status in international law prior to her independence. Stewart found the situation 'highly anomalous' and thought it was 'impossible to harmonize this international status of India with the existing constitutional relations between India and His Majesty's Government.' Commenting on the question in which the International Labour Organization was involved, Mr. C. Wilfred Jenks observed that:

'India achieved what I should describe as complete autonomy long ago, and certainly since the introduction of provincial autonomy last year (1937) there can be no further doubt on the question.'

This question was, for all practical purposes, decided by the United Nations and the Indian State practice at the time of, and since, India's independence in 1947. The United Nations Secretariat was called upon to consider the implications of the Indian Independence Act, 1947, which gave rise to a 'trans-

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42 For a very able and interesting analysis of the position of India in International Law with particular reference to treaty law, see Stewart op. cit., n. 37, and J. E. S. Pawlett, The British Commonwealth in International Law (1963).
43 In a letter to Stewart, op. cit., supra n. 38 at p. 319. Also see infra, p. 167 where the position regarding native states is discussed.

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with the Indian Independence (International Arrangements) Order, 1947, recording an 'agreements as to devolution of International Rights and Obligations upon the Dominions of India and Pakistan'. In its relevant parts, it reads as follows:

(i) The International rights and obligations to which India is entitled and subject immediately before 15th day of August 1947, will devolve in accordance with the provisions of this Agreement.

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

2. Some Doctrinal Considerations

Doctrinally, however, the question arises whether by virtue of retention of her international personality of pre-independence days, we can justifiably speak of a process of succession at all in relation to India. If, as Dr. Kerno opined, such a fundamental fact of the transfer of sovereignty ('constitutional transfer of power') did not affect the international status of India, would it not be logical to conclude that there being no succession in law, India was automatically, bound by all treaties that were concluded in her name and such other pre-British or Pre-1919 treaties which the British Government either accepted as valid or entered into in its own name?

The question is not at all easy to answer. The heart of the difficulty here lies in the nebulous notions of 'succession in fact' and 'succession in law' (or 'de facto' and 'de jure' succession) as well as in the notion of 'identity of international personality.'

The context of our discussion here does not warrant a full jurisprudential analysis; but it would almost amount to an intellectual default if we were not to mention the doctrinal perplexities surrounding the problem of international personality and succession in international law.

According to the traditional theory, state succession arises 'when one state is substituted for another in sovereignty over a specific territory.'

Difficult questions arise, however, when a determination of the identity or continuity is involved. Theories of total and partial succession do not adequately meet such situations. It is equally difficult to distinguish between 'state' and 'government' in this context. In any specific fact-situation, do we have any criteria to judge that the constitutional transfer of power and sovereignty, as in the case of India, creates a new state or merely a new government? Attempts have been made to answer this and other questions by recourse to the notion of 'identity of state', especially in relation to succession to treaties.

As Hall observed in an oft quoted passage, 'personality is the 'key' to the problem of succession. Insofar as the law of succession to treaties is concerned, 'personality' has relevance only because it determines the identity of a state as a state continuing in existence, or as a new state. Almost every writer on this subject, has expressed an inability to discover or to formulate a norm of international law, with its subnorms, which can enable us to decide juridically the question of identity of states. With regard to succession to treaties, efforts have been made to deal with the inherent complexities involved in the notions of 'succession' and 'identity of States.' The 1959 Draft Code on the Law of Treaties prepared by the International Law Commission contained the following provision on the Continuity of

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47 Indian Independence (International Arrangements) Order (1947) Schedule. The text of this document was sent to the United Nations by India with the comment: 'You will observe from the agreement that the Govt. of Pakistan accepts the position that membership of all International Organisations devolves solely upon the Dominion of India. This agreement further strengthens the statement, Asst. Secretary General in charge of Legal Dept. has already made in this connection,' vide U.N. Doc. A/ C 6/16/Oct. 6, 1947. Also see our discussion, infra, and note 93, infra.


49 It is still controversial doctrinally whether the break up of Austro-Hungarian Empire in 1919 meant 'dismemberment' or 'extinction'. See note 51, infra.

50 Hall, International Law, p. 114 (5th ed. 1926).

State and the Obligatory Character of Treaties.\(^8\) The Draft Code viewed the Government as an agent of the State and thus provided:

'2. In consequence, the treaty obligation once assumed by or on behalf of the state, is not affected in respect of its international validity or operative force, by any of the following circumstances:

(a) That there has been a change of government or regime in any State party to the treaty;
(b) That some particular organ of the State ... is responsible for any breach of the treaty;
(c) That a diminution in the assets of the State or territorial changes affecting the extent of the area of the State by loss or transfer of territory (but not affecting its existence or identity as a State) have occurred, unless the treaty itself specifically relates to the particular assets or territory concerned.

In all such cases, the treaty obligation remains internationally valid, and the State will incur responsibility for any failure to carry it out.'\(^9\)

It seems that this article proceeds on an unstated criterion of the continuation of the identity of the State. It seems to presume agreement on the vexed questions of the nature and sufficiency of changes which can be regarded as having the requisite qualitative impact\(^10\) as changing, destroying, or transforming—the existence or continuity of state.\(^5\) On this basis it also makes a distinction between 'State' and 'government' which may not, as we shall see, always be easy to sustain or justify.

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\(^8\) The final draft of 1963 however, omits this aspect from consideration because the I.L.C. felt that this can better be studied in the context of State responsibilities. The Sub-committee on Succession of States and Governments has included succession to its treaties in its ambit: see U.N. Gen. Ass. Doc. A/CN.4/160, 7 June, 1963.

\(^9\) Art. 6, Ch. II, II Year Book of the International Law Commission, p. 43. See comments of Sir Gerald Fitzmaurice (p. 54-55) citing Hall, A Treatise on International Law, 1924, p. 21, in support of this Article and his view that: 'the change of Government has in no way affected the continuity of the State and therefore, at no point has the treaty obligation been diminished or terminated.' (Emphases added.)

\(^10\) See n. 51 and the literature cited therein—especially Kunz's article.


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The conceptual complexities of this matter are well revealed in the different approaches to be found in the working papers submitted to the 'Sub-committee on Succession of States and Governments'. Mr. A. H. Tabbibi, suggested:

'The International Law Commission should try not to be confused with doctrine but should search devices on the basis of the practices of the States .... The International Law Commission should draw a distinction between State and its Government. As Willoughby states in his "Fundamental Concepts of Public Law", by the term 'State' is understood the political person or entity which possesses the law-making right. By the term 'Government' is understood the agency through which the will of the state is formulated, expressed, and executed ... In governmental changes there are no shifts of boundaries, no transfer of sovereignty, and therefore, the effects of governmental transformations are usually different.'\(^1\)

While every one would accept the admonition of Mr. Tabbibi so as 'not to be confused with doctrines', his elucidation is applicable only to a highly simplified model of political events. He seems to have in mind only routine changes of governments involving no boundary changes, and no transfer of sovereignty. This simple distinction obviously does not hold good in situations which recurring arise in international law where a change of governments is accompanied by either or both the change in frontier and transfer of sovereignty (as, for example, India on her independence). This was well brought out in Mr. Shabtai Rosenne's views:

'Common to the process in all types of emancipation and independence is the fact that as one of the consequences of achievement of independence, the political, social, economic, cultural, aims of the State change: and in the light of that, the prospect of a successful outcome for a project of codification based upon technical distinctions between succession of states and succession of governments may be taken to be problematical. For, the urgency demonstrated by the General Assembly is to be found precisely in the far reaching practical consequences of independence, and not in the purely legal occasions occasioned by the distinction between succession of State and succes-
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sion of governments, as rubrics in the formal exposition of rules of international law.\(^7\)

Inherent in this conflict of views may be a jurisprudential controversy ('purely legal' and 'formal exposition' v. 'social change' and 'practical consequences'). But the foregoing is illustrative of the search for criteria for state succession on several analytically different levels, reconciliation of which is indeed a formidable, if not impossible, task. Our approach here will be confined to the actual analysis of Indian practice in this connection.

3. Did State succession occur in India?

The nature of state succession, as we have seen, is hard to define. The basis of succession is a factual situation in which the identity of states is affected. Questions of succession only arise when certain fact-situations require us to decide whether a particular state exists or is extinct and whether a new state has come to being.\(^8\) Traditional analysis of state succession operates on three doctrinally different levels of ascertainment and evaluation: (a) identity of State; (b) whether succession in fact has occurred and; (c) impact of such changes upon the obligations and rights of the states involved. We shall, therefore, examine the question of state succession in relation to India on these levels.

(a) Identity of India

Previous discussion has shown that India was regarded as having international personality since 1919 at least, even though she had not attained either internal or external independence till 1947. With the attainment of Dominion status in 1947, and the status of Sovereign Democratic Republic in 1950, India achieved full statehood as is traditionally understood. Blandly put, the question is whether juridically India after 1947 can be regarded as 'identical' with pre-1947 India.

\(^7\) See working paper of Mr. Shabtai Rosenne, A/CN.4/Annex 11, p. 10.

\(^8\) This writer adopts the traditional terms with great discomfiture. In view of the brief doctrinal discussion preceding this section, he has grave doubts as to whether the ends of intellectual integrity can be served by uneasy compromises such as retention of old doctrinal flavour and terminology when the same convey different implications all of which may not be valid. Unfortunately, a jurisprudential analysis of the problem (which this writer hopes to undertake eventually) will be largely irrelevant here. In this limitation, he finds a slight justification for the compromise. See infra, n. 103.

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The legal basis of India's independence was the Indian Independence Act, 1947, passed by the British Parliament. The question of identity can best be solved by an analysis of the objects and impact of that Act. The Act created two independent Dominions known as India and Pakistan (section 1). It provided for territories, partition and the boundaries of the 'new Dominions' carved out of British India (sections 2, 3, 4). Section 6 gave each Dominion complete authority to legislate for the Dominion, including making laws having extraterritorial operation. Henceforward, the legislative power of the New Dominion Parliaments will be as comprehensive as our own (the British Parliament) or that of any Dominion Parliament under the Statute of Westminster.\(^9\) Section 7 of the Act describing the 'consequences of the setting up of the new Dominions' provided that: the British Government should have no responsibility for territory formerly called British India; that suzerainty over native states will lapse, and with it, all treaties and agreements with native states and tribes, (except those relating to customs, transit and communications, unless denounced by the states or tribes) shall also lapse; that the words 'India Imperator' and 'Emperor of India' shall be dropped from the Royal Style and titles by a Royal Proclamation. The Act contained other provisions as regards the Governor-General, the British Forces, etc.

What was the significance in international law of this Act in terms of 'identity' of India as an 'international person'? Relying on a subsequent Act of 1949 by the British Parliament\(^10\) De Murlat considers that this was a change in Government and not a change in State.

He observes:

'It is clear that the change which took place in 1949 is at most a change of government. Thus, India remains


\(^10\) 'On and after the date of India's becoming a Republic, all existing laws ... have the same operation in relation to India, and to persons and things in any way belonging to or connected with India, as if it had been for it to be a Republic': Art. 1 (12, 13, and 14, Geo. VI, Chapter 52). This was pursuant to the decision of the Commonwealth Conference held in London in 1949 to the effect that India on becoming a Republic could stay in the Commonwealth.'
bound by former treaties. . . . India was already recognised as an Independent State, responsible as such for the execution of her treaties; . . . When the words 'Her Majesty's Dominions' appear in treaties, they are still applicable to India. . . . (Emphasis added.)

The practice of India after 1947 would seem to confirm the fact that she accepts the basic continuance of her identity as an international person, and considers herself bound by all the treaties entered into by the British Government as also perhaps by Governments preceding the British Government. The 'Partition Proceedings' of India list about 627 treaties binding on India as on 1947. Prof. Alexandrowicz also mentions a large number of pre-British treaties, some of which were made by the Native Princes with foreign powers, including the British East India Company.

One of the issues involved in the case of the 'Right of Passage over Indian territory', was Portugal's claim that the Treaty of Poona of 1779 and Ranakpur (decree) issued by the Maratha Ruler in 1783 and 1785 conferred sovereignty over Portugal. It is significant that India chose to argue that (i) the Treaty of 1779 was not binding on Marathas as it was not 'validly' entered into; and (ii) presuming its validity, the treaty and the 'sanads' did not operate as a transfer of sovereignty to Portugal but only conferred upon her with respect to them, revenue grant to the value of Rs. 12,000 per annum, called 'jagir' or 'Saranjam.' While the International Court of Justice rejected the first contention, it upheld the second. The court recognised also that the British Government had not done anything to confer the sovereignty on Portugal. In his dissenting opinion, Judge Quintana, however, pointed out:

'India as a territorial successor was not acquiring the territory for the first time, but was recovering an independence lost long since. Its legal position at once reverted to what it had been more than a hundred years before as though the British occupation had made no difference.' (Emphasis added.)

More recently India has relied on old treaties and agreements in her border dispute with China as governing or illustrating her right to the territory in dispute. In several other instances, it is clearly brought out that India considers herself bound by the pre-British and British treaties.

Although, it may seem rash to generalise about India's being 'bound' by all the pre-British and British treaties, from a study of the present state practice—and it may be more accurate to say that India continues to be bound by 'pre-existing treaties' pertaining to 'extradition, boundary problems, and debts', as Mr. Nawaz has done,—the premise that India's identity in international law has not undergone any change in 1947, makes it logically inevitable that India will be bound by all pre-existing treaties in international law.

(b) Did succession in fact occur?

Traditional methods of analysis now require us to analyse whether succession occurred as a matter of fact, though not as...
a matter of law. At the outset, our inability to jurisprudentially justify this category may be declared. But, we shall proceed on the assumption that this dichotomisation serves the purposes of our analysis to some useful extent.

It is undeniable that a profound change occurred in India on the constitutional transfer of power to it and its subsequent declaration of being a Sovereign Democratic Republic. While this did not affect the identity of India in international law, it raised questions about rights and obligations of India in view of its diminution of territory by the creation of Pakistan. With the creation of Pakistan, at least some principles of international law of succession did come into operation. Thus, the binding force of international agreements was obviously restricted by the territorial application principle. The Indian Independence (International Arrangements) Order, 1947 clearly stated the recognised principle of international law that only such rights and obligations of international agreements will devolve on India as have 'exclusive territorial application to the area comprised in the Dominion of India'. Moreover, the practice of some international organizations and the attitude of some Western States suggest important modifications to the general acknowledgement of the continued identity of India in international law.78

Thus, in considering the subject of admission of Pakistan to the International Telecommunications Conference held in 1947, the Argentine Delegate's observations were unanimously endorsed by the members in a decision to 'consider Pakistan as admitted' to the Conference. The Argentine Delegate said:

'... the fact we must face is this: a Member of the International Telecommunications Union, British India has been divided into two neighbouring states which today form part of the 'Commonwealth' of British nations under conditions of absolute legal equality... the two States are in reality legitimate successors to the rights and commitments acquired by British India within the International Telecommunications Union when it signed the Madrid convention. Therefore, it is not fitting to bring up the question of an admission, which is apart from the Madrid Convention, and still less, to limit the process of admission to one of the two successors...'.79

Similarly, in questions involving clemency arrangements for Japanese war criminals sentenced by the International Military Tribunal of the Far East, the attitude of the Tribunal members, as also of the signatories of the San Francisco Peace Treaty, (Australia, Canada, China, France, the U.K., the Netherlands, New Zealand, the Philippines, the Soviet Union and the United States) was that India had no right to participate in those proceedings because she had not signed the Treaty which conferred such a right, though India had actually participated in the trial and a judgment was delivered with the participation of an Indian judge. Instead, Pakistan, which subsequently signed the treaty, was deemed to have such a right. The Government of India, in its objections, stated:

'... the Government of India also consider that the inclusion of Pakistan in the clemency proceeding as successor of India, because Pakistan signed the San Francisco treaty and India did not, is unwarranted and legally untenable. Membership of the International Tribunal of the Far East... was limited under the terms of the Charter of the Tribunal to a certain number of countries. India was represented on the Tribunal since its inception by Dr. R. B. Pal, who pronounced judgment on Nov. 4, 1945, 15 months after the partition of the Indian sub-continent. Dr. Pal, therefore, represented only the Government of India, which in fact was a member of the Tribunal.'

77 3. (1) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of India will devolve upon that Dominion.
(2) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of Pakistan will devolve upon that Dominion.
4. Subject to Articles 2 regarding memberships in international organizations and 3 of this agreement, rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and the Dominion of Pakistan, and will, if necessary, be apportioned between the two dominions.'—Gazette of India Extraordinary, Aug. 14, 1947, pp. 911-12.

78 Thus, without exaggerating its significance, we may mention that the representatives of India on the ECOSEC and the Security Council were asked to present new credentials issued by the Head of the Government or the Foreign Minister of the New Dominion of India. Vide U.N. Press Release PM/473 Aug. 12, 1947, contained in US/LEG/75, US/SEC/77, Apr. 22, 1948.

which imposed sentences on Japanese War Criminals. Since
the power to grant clemency in international law can only
rest with the Governments which formed the Tribunal
and which imposed sentences, and, since Pakistan is not in any
sense a legal successor to India, the claim to include that country
in clemency proceedings is legally untenable.' 74
Prime Minister Nehru reiterated the above position in the
Lok Sabha on May 13, 1959, and highlighted the following aspect
of the matter:

'Moreover, by the agreement annexed to the Indian Inde-
pendence (International Arrangements) Order 1947, membership
of international organisations devolves solely on India.'
The United States, however, maintained that:

'... it is the view of the governments concerned that
Pakistan was entitled under international law to seek and be
accorded rights and obligations which attached to British India as
a participant against the war in Japan. Thus, in regard to the
Treaty of Peace itself, Pakistan acquired the position of a
power formerly at war with Japan.' 75

The significance of these incidents lies in the implication that
for some purposes, such as membership of a few international
organisations, British India was held to mean both 'India' and
'Pakistan' and that these states were regarded as having
'legally' succeeded to British India. The reality of political and
change in the polity of India thus sometimes over-
comes the subtle juridical distinction between 'succession in law'
and 'succession in fact'. The conclusion that all that happened
in 1947 was a change of Governments, India being the same as
an international person, is thus difficult of scrupulous applica-
tion in the world political process.

(c) Impact of constitutional changes on treaties and agree-
ments—interplay of succession in fact

It is difficult to assess with any degree of certainty the effect of
constitutional changes in India on the theory of the inter-
national law of state succession. We have been compelled to
conclude that if the traditional theory of state succession is
regarded as valid, no succession in international law occurred
in India. This conclusion, besides being a logical necessity,
finds considerable support in the practice of the United Nations
and of India and also of other states and international organisa-
tions as seen above.

We believe, however, that writers on state succession speak of
a 'process of succession' in India.75a This is explainable per-
haps by the fact that these writers either see a need for a new
theory (as O'Connell does) in light of the recent phenomena of
gradual emergence of colonies into independent nations within
the Commonwealth or because they regard that succession in fact
has occurred in India. We here refer to speak in terms of
'transitional change' and its 'impact' since that has the
virtue of being consistent with our logical conclusion, as well as
the accepted position of India in international law at present.

We propose to study this impact in two spheres. In the first
place, constitutional changes had a great effect on treaty relations
with native Indian States. Secondly, we will consider the
interesting, though formidable, question of the effect of these
changes on the third parties to the treaties and agreements.

(i) Effect on Treaties with the Native States75b

For the purposes of international relations, India was
during the period of British Rule, characterised as British

74 The entire episode is well recorded in M. Whiteman, Vol. 2, Digest of
International Law (1963), pp. 804-806. (Emphasis added)
75 Department of State Press Release, 246, May 12, 1954, XXX, Bulletin of the
Dept. of State, No. 778, May 24, 1954, p. 802, also cited in White, op. cit.
This in fact, is highly similar to Pakistan's attitude in this matter. In
deposing his country's adherence to the Charter, the representative of
Pakistan observed:

'Inasmuch as Pakistan had been a part of India, it was in effect, under
the latter name, a signatory to the Treaty of Versailles, and an original
member of the League of Nations... In the same sense, Pakistan,
as a part of India, participated in the San Francisco Conference in 1945
and became a signatory to the United Nations Charter. Therefore,
Pakistan is not a new member of the United Nations, but a co-success-
sor to a Member State which was one of the founders of the Organisa-
This contention seems unique in international law, and though
accepted in its entirety so far, needs a close examination.

75a Jones, 'State Succession in the Matter of Treaties', XXIV, B.Y.L.L. (1947),
pp. 360, 370-372; O'Connell, The Law of State Succession (1956);
O'Connell, op. cit., n. 38, supra.
75b The term 'native states' is used here as a convenient shorthand.
India, which included all those parts of India directly administered by the British, and the Native States, under the administration of Kings or Rulers, having varying degrees of internal sovereignty. In 1947, when India became independent, there were about 567 states. The British Government during its regime had, through a variety of treaties, assumed 'paramountcy' over the states. All of the states had by these formal treaties or by political arrangements surrendered their external sovereignty to the British Empire, though under international law they can be regarded as 'sovereign political communities'. From 1858, after the First Indian War of Independence, the Crown succeeded to all the treaties entered into with the Native States by the East India Company.

The status of native Indian states has been a subject of great controversy. The Indian states exercising, though with some limitations, all those powers, which 'civilised governments exercise in regard to things and territories', were to some extent justified in seeking that some principles of international law should govern their relations with the British Government. The then Government of India categorically maintained, however, that:

'the principles of international law have no bearing upon relations between the Government of India as representing the Queen Empress on the one hand and the Native States under the suzerainty of Her Majesty on the other.' 76

76 Vide Resolution of Government of India dated Aug. 21, 1891, quoted in Ramaswamy, Law of Indian Constitution, p. 72 (1938). The citation therein of Westlake F.S Sir Henry Maine's views is interesting. Westlake observed:

'The Native Princes who acknowledge the Imperial Majesty of the United Kingdom have no international existence. That their dominions are contrasted with the dominions of the Queen, that their subjects are contrasted with the subjects of the Queen, are niceties of speech devoid of international significance though their preservation may be convenient for purposes internal to the Empire: in other words, for constitutional purposes.' (Emphasis added).

'The technical position of the States is that of territories under the suzerainty of the Crown... for all purposes in international law, the Native States have no independent individuality; their own relations inter se are regulated by the Central Government.

Earlier, the Indian Statutory Commission (vide para 103 onwards, Report of the Indian Statutory Commission presented by the Secretary of State for the Home Department to Parliament by command of His Majesty, May 1930) while describing the characteristics of the Native States said as follows:

'But for our present purposes, the essential point to bear in mind is a feature common to all Indian states alike. They are not British territories and they are not British subjects. The relations between each of them and the Paramount Power may be ascertained or deduced from Treaty, or other written instrument or usage or agreement; but however that may be, the Crown is in each case responsible for the State's external relations and for its territorial integrity.' (p. 85)

'The external relations of the States are, as we have said, entirely in the hands of the Crown. For international purposes, therefore, the territory of British India and their subjects are in the same position as British subjects.' (p. 70) See also Das, The Status of Hyderabad During and After British Rule in India, 43, Am. Jl. of Int. Law. p. 57 (1949); and Ling, 'Admission of Indian States To the United Nations', Id. p. 144.

77 Vide Ramaswamy, Law of Indian Constitution, p. 73 (1938).


79 This finds very categorical expression in the Memorandum on States' Treaties and Paramountcy presented by the Cabinet Mission to His Highness, the Chancellor of the Chamber of Princes, on 12 May, 1946:

'...His Majesty's Government will cease to exercise the powers of paramountcy. This means that the rights of states which flow 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. Political arrangements between the States on the one hand and the British Crown and British India on the other, will thus be brought to an end. The void will have to be filled either by the states entering into a federal relationship with the successor Government or Governments in British India or failing this, entering into particular political arrangements with it or them.'

80 Section 7 of the Indian Independence Act provided inter alia that:

'the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of passing of this Act between His Majesty and the rulers of Indian States.'

81 Art. 363.
Constitution 'between Rulers of Indian States and the Government of India or its predecessors.\textsuperscript{82}

It would appear from this survey that questions of state succession to treaties would not ordinarily arise as regards treaties and agreements entered into by the native states. The legal effect of the Indian Independence Act was to terminate all treaties which existed at that time between the British Government and the native states. And, the Constitution specifically bars jurisdictions of the courts, as seen above, over treaties and other agreements entered into between the native states and the predecessor or the present Indian government prior to the commencement of the Constitution and operative at present.\textsuperscript{83}

The Supreme Court of India has regarded the merger of Indian States into the Indian Union as a process of 'total succession' in the terms of traditional international law doctrine. In \textit{Ram Babu Saxena v. The State},\textsuperscript{84} one of the issues discussed by the Supreme Court was whether an Extradition Treaty between the British Government and Tonk State (a native state) would subsist after that state's merger with a group of Indian states forming a part of independent India. Justice B. K. Mukherjea who specifically dealt with this issue came to the conclusion, citing Hyde's views:

'When as a result of amalgamation or merger, a state loses its full and independent power of action over the subject-

\textsuperscript{82} A similar provision regarding the original jurisdiction of the Supreme Court is to be found in Proviso (f) to Article 131. The Indian courts have thus held that (i) the merger agreements entered into by rulers of Indian states before the commencement of the Constitution cannot be examined by the courts, being barred from their jurisdiction by this Article (\textit{Prasir v. State of M.P. A.I.R. 1953 Nag. 86}), and (ii) even where an individual has certain privileges flowing from a covenant, he cannot enforce such a covenant in a court of law whether he was a party to such a covenant or not.\textit{Ungexsingh v. State of Bombay, A.I.R. 1955 S.C. 540; Madhavan v. State of Travancore-Cochin, A.I.R. 1957 T.C. 236; Dipchand v. State of Saurashtra, A.I.R. 1951 S.C. 119.}

\textsuperscript{83} For a fuller discussion of these and other matters regarding state succession to property, contracts, obligations, see \textit{Jain, Indian Constitutional Law}, p. 555 (1962).

\textsuperscript{84} A.I.R. 1950 Supreme Court, 155.

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matter of a treaty previously concluded the treaty must necessarily lapse.\textsuperscript{85}

It is, however, to be remembered that in principle only such treaties as the Native States entered into with the British Government lapsed. Treaties of these States with other foreign powers remained unaffected. Also unaffected were treaties which Native States had made with other foreign powers and which under principles of international law, the British Government succeeded on assumption of sovereignty over the territories of the foreign powers in India.

(ii) Effect on International Agreements

In view of the preceding discussion, we may now discuss only the technical modes through which India accepted the bilateral and multilateral treaties and agreements on Independence. Given the continued identity of India as an international person, technically, it need not be stressed, India was obliged to accept these.

The best starting point for this study is the Indian Independence (International Arrangements) Order of 1947.\textsuperscript{86}

Briefly, the Order provided that membership to international organisations shall devolve on India solely; and rights and obligations under international agreements having exclusive application to areas comprised by the Dominion of India shall devolve on India and likewise, those having exclusive territorial application to areas comprising the Dominion of Pakistan shall

\textsuperscript{85} Vide, Hyde, \textit{International Law}, p. 1535. The learned Judge very ably explained the ratio decidendi of \textit{Terinden v. Ames} (1901; 184 U.S. 270) in the following words:

The decision in \textit{Terinden v. Ames} rather fortifies the view I have taken. The question there was whether an Extradition Treaty between Prussia and the United States of America, which was entered into in 1852, could be given effect to after (the former's) incorporation or passing into the German Empire. The question was answered in the affirmative... it was observed by Fuller, C.J., who delivered the opinion of the Court, that the power to execute remains unimpaired, outstanding treaties cannot be regarded as void. This is the real criterion and as obviously the power of the Tonk State to execute the treaty is altogether gone after the Covenant of merger ceased, the treaty cannot but be regarded as void.' (Emphasis added), p. 162.

\textsuperscript{86} See n. 71, supra; and also p. 156, supra.
devolve upon that dominion. Besides, such agreements to which India was a party immediately before the appointed day, were to devolve upon both India and Pakistan and if necessary be apportioned between the two countries. Such treaties were listed in ‘Partition Proceedings.’ This list mentioned 627 treaties of which it is estimated ‘11 affected India exclusively, 191 affected Pakistan, and 425 were of common interest. Of these 350 treaties were concluded after 1919.’ This list is of course not complete. But it follows the familiar Commonwealth practice of drawing up treaty lists on independence. The study of devolution lists confirms that in relation to treaties India considered itself identical with British India. This was further strengthened by Indian executive practice. Soon after independence, India notified all states with which she had treaty relations that she would continue to honour these treaties. This is evidenced by Prime Minister Nehru’s categorical statement in a letter to the Prime Minister of People’s Republic of China:

‘When the British relinquished power and India attained freedom on 15th August, 1947, the new Government of India inherited the treaty obligations of undivided India. They wished to assure all countries with which the British government of undivided India had treaties and agreements that the new Government of India would abide by the obligations arising from them.’

Therefore, in the case of States which have not responded negatively to such a notification, the presumption of novation, may well arise, as O’Connell points out. But, in the light of the foregoing analysis, it can be maintained that this practice of confirming agreements and treaties has no significance in inter-

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national law since under the traditional theory no question of legal succession arises in this case.

The Indian Independence (International Arrangements) represents a legislative and not an executive mode of devolution. This distinction is sought to be made by O’Connell as follows:

‘Devolution of treaties has been achieved within the Commonwealth either by act of United Kingdom Parliament or by agreement between the United Kingdom Government and the Governments of new States after their independence. The first technique may be described as legislative devolution, and the second executive devolution. The problem in the case of legislative devolution is the commitment of the new State by an act of sovereignty of its predecessor. This should achieve devolution as a matter of internal law in virtue of the continuity of the legal system. But does it achieve an assignment at the international level? And does it inhibit the successor State from terminating the commitment as an exercise of its sovereignty?’

This is a very interesting formulation of some problems connected with the technique adopted by India. In this context, O’Connell further observes:

‘This prompts the conclusion that Pakistan retained British treaties only in virtue of devolution legislation and not as a matter of international law, while British India was affected by pre-British treaties and pre-1919 British treaties in the same mysterious fashion as the other Dominions. The conclusion, however, raises more questions than it settles. How could Pakistan be committed to a devolution by legislative act of its predecessor? Was this legislative act, perhaps, a constitutional Grundnorm vesting treaties in the new State and thereby delimiting its effective sovereignty? But how could third states be affected by such legislative constitutional actions?’

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O’Connell, op. cit., at p. 113.

ibid., p. 99. (Emphasis added.) A similar concern was expressed by Mr. Tabibbi:

That agreement (embodied in the Order) was one of the strangest in the history of international law. He (Mr. Tabibbi) failed to see how the Dominion of India could confer upon Pakistan, i.e. the seceding portion of India to confer upon
It must be conceded that the Agreement embodied in the Order raises some questions in 'strict law' about the procedure by which treaty rights and obligations of British India have been assigned to Pakistan. But it is believed that a part of the perplexity arises primarily out of an ambivalence in determination of whether succession has occurred in India. If we were to understand the Order as an administrative device having no international law significance in view of the continuance of the identity of India as a state, in so far as India is concerned, questions of legitimacy of such a devolution-procedure would not arise. Nor will the question of effect of such an Order as regards third parties to treaties arise except to the extent of territorial limitation of India's performance of treaty obligations.

Difficulties however, do arise when we attempt to consider the effect of the Order in relation to Pakistan as a successor state. Even a casual analysis of Pakistan State practice in this regard shows that there is no consistency in her approach. On several occasions, Pakistan has insisted that she was a part of undivided British India and as such entitled to succeed to rights and obligations to treaties. The Agreement embodied in the Order was, however, accepted by Pakistan. On many aspects of succession to treaties, the Executive practice in Pakistan conflicts widely with judicial decisions.


Mr. Tabbibi seems to be under a misapprehension about the effect of this Order. Surely, Pakistan did not confer upon India any treaty obligations. The Agreement seems to imply that Pakistan acquiesced in the continuance of India's 'identity' in international law at the time of agreement and accepted as a successor state certain rights and obligations upon itself. Besides, the Agreement sought to apply the territorial principle to treaties in the interests of third parties rather than against them. But see Misra, op. cit., n. 46.

94 O'Connell, Law of State Succession (1956) at pp. 42-43. "In strict law, it would seem that the consent of other signatories to this novation of contractual relationship would be essential but whether or not this consent may be tacit or express has not been determined.

95 See Kamal Hussain, 'International Commercial Arbitration, State Succession and the Commonwealth', B.Y.I.L. Vol. XXXVI (1960), p. 370 and cases of the Indian and Pakistan courts thereunder; and a very illuminating analysis in O'Connell (p. 116), cf. also Pakistan's attitude on admission to United Nations of Pakistan claimed membership to the conventions relating to Obscene Publications and Traffic in Women and Children in virtue of the signature of India. Also see footnote 73, infra.

96 Apart from the apparent conflict of views between the executive and the judiciary in Pakistan on the question of international succession, the two branches of government are apparently in competition to decide whether or not reciprocity has also been achieved." O'Connell, p. 116.


(a) The 'tabula rasa' theory based "on the principle that emancipation of a territory and the creation of a new sovereign State produces a 'tabula rasa' situation as regards treaty relations, so that the new State is not generally bound by the former ties and does not inherit any contractual obligations" (p. 14).

(b) Right of option concerning the validity of treaties: According to this theory, 'the new State has the right to choose between the treaties it inherits.' Based on the theory of will of parties, Barros points out, this theory is not unknown to international law, e.g. Peace Treaties of 1946 drafted at the Paris Conference.

c) Theory of continuity with a right of denunciation: A 'much simpler theory', it is 'based on the idea that there is general succession of the new State and its government organs to the former sovereign Power and its government. The object of this approach is to prevent the new State from being left without any treaty relations with the third States, which might in certain circumstances place it in an illegal position' (p. 26).

(d) Right to a period of reflection theory: This was originally put forth by the Govt. of Tanganyika in a general declaration communicated to the Secretary-General of the United Nations. In that declaration Tanganyika recognises the validity of all the treaty obligations accepted for its territory by the former Sovereign Powers but limits the duration of its own resultant obligations to the next two years" (p. 21). For the analytic weaknesses of these doctrines the reader is referred to the excellent discussion by Mr. Bartos. If, however, emerged during the recent Annual Meeting of The American Society of International Law (April 60) that in some cases the texts of the treaties were actually not available to the Governments concerned and in those situations it will not be correct to characterise their incoherence as a reference to a period of reflection theory. See the Proceedings of the Meeting (forthcoming).

O'Connell has also recognised five attitudes towards continuity to treaties by the successor States. See O'Connell, infra, n. 102.
ence. Our brief—and undifferentiated—review of the Indian state practice has shown that not merely does India not regard herself as a "successor State" but entirely rejects the claim of Pakistan as having independent international identity before 1947. We have seen, however, there is considerable difference of institutional and scholarly opinion on this aspect which leads us to believe that succession 'in fact' can be traditionally said to have occurred.

But to some the futility of such conclusions may seem self-evident. Increasingly, we are called upon to abandon mechanistic analysis and fidelity to ageing dogmas. Both the style and the content of international law thinking beckon us to policy analysis of such problems. The exciting, but by no means easy, task of casting the familiar materials in the contemporary idiom of international law and of tentatively reordering them under competing structures of modern analysis awaits the theorists in this area.

98 Our disloyalty to the traditional mode of analysis should be quite obvious (e.g. n. 38, supra). We have neither differentiated, as is usual, between the types of treaties (e.g. personal, depository) nor the types of succession (universal, partial). These facets of traditional analysis have only been incidentally noted during the present discussion.

99 See Part II: 3 b of our analysis, supra.

100 Ibid. Also Art 4 of the Indian Independence (International Arrangements) Order, n. 71, supra. For Pakistan's attitude see O'Connell, n. 96, infra; and Mirza, op. cit. n. 46, supra.

101 See, in general, Pt. III of the present paper.

102 In the context of problems of state succession see Pt. III, supra. See also O'Connell's comments, Independence and Problems of State Succession, in O'Brien (Ed.), The New Nations in International Law and Diplomacy, at pp. 1-26 (1965), and Caffiach, The Law of State Succession: Theoretical Observations, 10 Nederlands Tijdschrift voor International Recht, p. 33 also (1963); also see infra.