# THE BANARAS LAW JOURNAL

Vol. 9 January—December 1973 Nos. 1 & 2

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# THE BANARAS LAW JOURNAL

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# THE GROWING PROTECTION OF HUMAN RIGHTS AND LABOUR STANDARDS BY THE INTERNATIONAL LABOUR ORGANIZATION*

W. PAUL GORMLEY†

## I. THE AIMS OF THE I.L.O.

Contemporaneously with the League experiments in Upper Silesia and the Mandates System, the International Labour Organization was established by virtue of Part XIII of the Treaty of Versailles.[1] This section, repeated in several of the post war peace treaties[2], was to become the constitution of the International Labour Organization[3] and the basic document from which the elaborate system of human rights protection was to be built. The aims of the I.L.O. were indicated in the Preamble to Part XIII of the of the Versailles Treaty, which stated:

> "Whereas the League of Nations has for its object the establishment of universal peace, and such peace can be established only if it is based upon *the prosperity and contentment of all classes in all nations;* (emphasis supplied).

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*This paper examines the role of I.L.O. in the protection of human rights and preserving the minimum international labour standards. It further advocates the extension of the I.L.O. mechanism to other U.N. Agencies.

—THE EDITOR.

†A. B. San Jose; M.A., University of Southern California, Ph.D. University of Denver; J.D. (Honors), LL.M., George Washington, Univ. LL.D. Manchester, Ford Foundation Fellow, New York University, Member of the District of Columbia and United States Supreme Court Bars, Associate Professor of Law, The University of Tulsa, Senior Simon Research Fellow at the Faculty of Law, University of Manchester England; Professor of Law, Law School, Wilmington, Delaware, U.S.A.

1 Treaty of Versailles, articles 315-355, 13 Am. J. Int'l L. Supp. 361 (1919). See Doc. 755, "Peace Conference: Report of the Commission on International Labour Legislation", reproduced in 8 D.H. Miller, *My Diary at the Conference of Paris,* With Documents 9-22 (Private publication, n.d. c.a. 1924-1925) (Contains the Draft Convention creating a permanent organization for the promotion of international regulation of labour conditions). See also Vol. 1 id. at 241.

M. Guerreau, L'Organisation Permanente du Travail (Paris: 1923). A. Alcock, *History of the International Labour Organisation* (London: 1971).

2 Treaty of St. Germain, articles 332-72; Treaty of Trianon, articles 315-355; and Treaty of Neuilly articles 249-289. See the discussion by C. Norgaard, *The Position of the Individual In International Law* 139-58 (Copenhagen: 1-62), and 2 A. Peaslee, *International Governmental Organizations* 1230-1232 (The Hague: 1956).

3 The original text of the I.L.O. Constitution of 1919 has been modified by the amendments of 1922, 1945, 1946, 1953, and 1962. Rice, The Revision of an International Constitution: The New Era for the International Labour Organization, [1947] Wisc. L. Rev. 514.

The High Contracting Parties (are) moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world.....[4]"

These aims remain the basis of the I.L.O.'s activities over a half century later, although they have been expanded considerably. But one modification of the above "draft preamble" has proved to be very significant. Even though the Preamble to the I.L.O. constitution does not contain positive law, as does the specific treaty articles, the deletion of the words, "such peace can be established only if it is based upon the prosperity and contentment of all classes in all nations" was replaced by the notion of "social justice." Thus, the first paragraph of the Preamble to the I.L.O. constitution now reads: "[U]niversal and lasting peace can be established only if it is based upon social justice."[5] The notion of *Social Justice* was to be interpreted after the Second World War to include the protection of human rights. A clearly discernable constitutional development has taken place, both in the positive law as exemplified in the International Labour Code[6] and in the development of procedural law. The interrelationship between sovereign States in the promotion and the implementation of human rights finds expression in the concluding paragraph of the Preamble to the I.L.O. Constitution, i.e. in "sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world."

## II. ANTECEDENT INSTITUTIONS

Without examining the history of the international labour movement[7], it is well to note in passing the Geneva Congress of 1866, the Berlin Conference

4 See note 5 infra.

5 With regard to the changes made in the Preamble to include the notion of "Social Justice," Phelan observes that the words "such peace can be established only if it is based upon the prosperity and contentment of all classes in all nations" were changed to "such peace can be established only if it is based on social justice". E. Phelan, "The Commission of International Labour Legislation," in: 1 The Origins of the International Labour Organization 132 (JJ. Shotwell ed., New York: 1934) [Hereinafter cited as Origins of I.L.O.].

6 Infra note 124 et. seq.

For a more recent expression of the role of the I.L.O. in developing a legal system dedicated to the protection of human rights, see C. Jenks, *Social Justice in the Law of Nations: The I.L.O. Impact After Fifty Years* (Oxford: 1970). C. Jenks, *A New World of Law* 186-89 (London: 1969).

7 E.g., the work of Robert Owen. See J. Follows, *Antecedents of the International Labour Organization* 1-9 (Oxford: 1951). See e.g., E. Mahaim, "*The Historical and Social Importance of International Labour Legislation*," in 1 Origins of the I.L.O. supra note 5, at 3-18; M. Delevingne, "*The Pre-War History of International Labour Legislation*," id. at 19-54; and A. Fontaine, "*A Review of International Labour Legislation*," id. at 161-97. See, Labour As An International Problem (E. Solano ed., London: 1920). See especially, J. McMahon, "*The International Labour Organization*," *The Evolution of International Organizations* 177, 178-79 (E. Luard ed. London: 1966). W. Tayler, *Federal States and Labor Treaties: Relations of Federal States to the International Labour Organization* 17-28 (New York: 1935).



of 1890, the Brussels International Congress on Labour Legislation of 1897, and the two Berne Conferences of 1905 and 1906, which resulted in the 1906 Berne Convention dealing with the use of white phosphorus in industry[8]. An additional example is the International Labour Office established in Basle[9]. This pre-World War One institution has no relationship to the present I.L.O.[10]

During the period of the Great War private groups worked to perfect proposals that might be implemented at such time as peace was established[11]. The realization of these efforts culminated at the Paris Peace Conference[12]. Nonetheless labour rights were not included within the corpus of traditional

8 International Convention Respecting the Prohibition of the Use of White Phosphorus in the Manufacture of Matches (Berne: 1906).

9 2 A. Peaslee, supra note 2, at 1230-32. In 1897 the private group called the International Association for Labour Legislation was formed. The group founded the International Labour Office at Basle in 1901, and in 1905 an official conference of governments was held. This private group continued to function until World War I.

10 B. Lowe, The International Protection of Labour (New York: 1921). He lists the following international conferences as the first efforts leading to the creation of the I.L.O. in 1919: Conference of Berlin, March 15-29, 1890; Congress of Zurich, August 1897; Congress of Brussels, September 27, 1897; Congress of Paris, July 25-29, 1900; First Delegates' Meeting of the International Association, Basle, September 27-28, 1901; and the Second Delegates Meeting, Cologne, September 23-24, 1902.

11 C. Riegelman, "*War-Time Trade-Union and Socialist Proposals*," 1 Origins of I.L.O., supra note 5, at 55-79; and J. Shotwell, "*Historical Significance of the International Labour Conference*, id. at 41-68.

12 See D. H. Miller, supra note 1, and Jenks, *The Relationship Between Membership of the League of Nations and Membership of the International Labour Organization*, 16 Brit. Y.B. Int'l L. 79 (1935).

The very interesting history reveals that the relatively limited objectives, the raising of working standards and the recognition of such fringe benefits as medical care, insurance, and pensions evolved into a system of global human rights protection. Gormley, *The Emerging Protection of Human Rights by the International Labour Organization*, 30 Albany L. Rev. 13 (1966). N. Valticos, *Un Systeme de Controle International: la mise en Oeuvre des Conventions Internationales du Travail*, 123 Recueil des Cours 311 (1968 I).

C. Picquenard, "*The Preliminaries of the Peace Conference*", id. at 83-126. S. Lindsay, "*The Problem of American Cooperation*," 2 Origins of I.L.O., id 331-67.

The United States has ratified very few I.L.O. Conventions, largely because their labour standards are considerably above the international minimums. The U.S. has been a member since 1934. Most ratifications have been in the area of maritime conventions. Phelan, *The United States and the International Labour Organization*, 50 Am. Pol. Sci. Q. 187 (1935); J. B. Tipton, *Participation of the United States in the International Labour Organization* (Champaign, Illinois: 1959); L. Calhoun, *The International Labour Organization and the United States Domestic Law* (New York: 1953); and Bennett, *Constitutional Problems of the International Labour Organization*, 5 Miami L.Q. 260 (1950).

international law. During the inter-war period, the I.L.O. was concerned primarily with the creation of minimum industrial standards, and a glance at those conventions (numbers 1-67) reveals that broader concepts of human rights were not stressed. Such enlightened phrases as the Freedom of Association Convention[13] were not realized until the 1950's.

Whereas the other human rights experiments of the League terminated, even before the demise of the parent organization, the I.L.O. has survived and, at the same time, expanded its jurisdiction. Today the I.L.O. possesses the most advanced system of positive law in the form of its International Labour Code[14] and "I.L.O. Common Law."[15]

## III. THE GROUP AS A PARTICIPANT:

### THE TRIPARTITE STRUCTURE OF THE I.L.O.

The unique characteristic of the organizational structure and the membership is that private delegates, representing associations of workers and employers, have a representation equal to that of governments. Upon joining the I.L.O. each State becomes entitled to have four delegates in the General Conference.[16] Of its delegation".....two shall be Government delegates and the two others shall be delegates representing respectively the employers and the working people of each of the Members."[17] From this basic provision has sprung what Landy has termed "The Tripartite Tradition."[18] Other organs, even to the smallest *adhoc* committee, give at least recognition to "tripartism". For instance, a simlar proportionment is to be found in the Conference Committee and the Committee of Experts. Even the committees of independent experts attempt to retain this balance, and the other major organs, particularly the Governing Body carry forward the division of one-half individual delegates, who represent private groups rather than their governments.[19] Regardless of the terms of their original appointments, all delegates are deemed, *at least in theory*, to be free from governmental control or instructions from any other source. Their "independence" is carried over into all phases of I.L.O.'s work, and of special importance is the fact that this

13 Freedom of Association and Protection of the Right to Organize Convention, No. 87 (1948). Seventy-seven States are parties to this Convention.

14 Infra note 31 et. seq. See also, notes 41, 53 and 54, and Section V.

15 Infra note 40 et. seq.

16 Constitution of the International Labour Organization, art. 1.

17 Id. article 3, para, 2.

18 E. Landy, *The Effectiveness of International Supervision: Thirty Years of I.L.O. Experience 181* (London, New York: 1966).

19 P. Perigord, *The International Labour Organization: A Study of Labor and Captial in Cooperation* (New York: 1926).



spirit of independence is carried over into the investigatory and conciliatory functions.[20]

This basic organization is evaluated by Dr. Jenks:—

> "[T]he tripartite character of the Organization has unquestionably proved to be its dominant characteristic. It is not simply a matter of non-governmental elements being represented in the Conference and thereby participating in the discussions preparatory to the adoption of conventions. Employers and workers are associated in some way with all the more important stages in the life-history of a Convention with the exception of its approval by national competent authorities and the act of ratification. They play a full part in determining the content of the conventions which Members are required to submit to national competent authorities and to ratify in the event of obtaining consent; they play a large part in the process of international supervision over the application of conventions which have been ratified; and certainly no feature of the Organization has had a greater formative influence upon the evolution of its constitutional practice than its tripartite character. It is therefore impossible to regard international labour conventions as being solely the creation of States and consequently the creature of the will of State....."[21]

Not only are individuals protected by I.L.O., but these private representatives are an integral part of the Organization and its sub-divisions. These non-governmental delegates do not represent their respective States but those of non-governmental groups, and these delegates enjoy freedom from interference by any government.[22] Delegates from labour unions have led the way for international labour reforms, which in turn have increased the protection of the labour movement within their own countries. Such tripartite representation has resulted in considerable pressure being brought against member governments. In 1919, the founders intended to achieve this highly satisfactory result by giving equal standing to the partners (member States and groups of employers and trade unions). Because of the tripartite nature of the I.L.O. structure, the individual is not only a beneficiary, he is also a

20 See the discussion of *Ghana v. Portugal* infra note 106. *Portugal v. Liberia* infra note 107, and Freedom of Association in Japan infra note 126.

21 C. Jenks, *The International Labour Organization As a Subject of Study for International Lawyers*, 22 J. Comp. Leg. & Int'l L. 36, 49-50 (3d set. 1940). See generally B. Beguin, *I.L.O. and the Tripartite System*, Int'l Con. No. 523, at p.401 (1959). See especially his discussion of some of the difficulties that have arisen in the selection of private delegates to the General Conference: "Early Chinks in Tripartitism" id. at 420-26.

22 In very few instances have the states violated their treaty commitments and prevented duly elected delegates from taking up their positions in Geneva.

direct participant.[23] Therefore, a system has been evolved by which the partners to disputes can work together at the international level.

Since the Second World War a trend has become more pronounced: notwithstanding the source of their appointment, all delegates work together as a team.

In theory governments do not control the I.L.O.; however, in practice they exercise considerable influence in the organization by virtue of their power to appoint four delegates. "Troublesome" labour leaders will often not be chosen. Only in those countries possessing free trade union movements can the true spirit of the I.L.O. function be discussed. In 1955, at least twenty of the seventy countries, members of I.L.O., dominated and controlled the employers' and workers' organizations.[24] The degree of governmental control in Russia and its East European Satellites is obvious on account of the absence of non-Communist trade unions. In a similar way there is a strong possibility of racial prejudice in the selection of delegates from Southern Africa. Some of the most serious violations of the I.L.O. legal order have been perpetrated by a few Latin American dictatorships.

Pursuant to Article 3 (9) of the I.L.O. Constitution,[25] any nominee improperly chosen may be rejected by a two-thirds negative vote of the Conference. In practice, however, few delegates are rejected, pursuant to Article 3 (9), which provides:—

> "The credentials of delegates and their advisers shall be subject to scrutiny by the Conference, which may, by two-thirds of the votes cast by the delegates present, refuse to admit any delegate or adviser whom it deems not to have been nominated in accordance with this article."

However, the I.L.O. could not function if delegates from major powers or a sizeable number of smaller States were rejected.[26] Despite this major weakness in its composition, the I.L.O. has been able to carry out its functions.

23 Jenks, *The Significance for International Law of the Tripartite Character of the International Labour Organization*, 22 Trans. Grotius Soc. 45 (1936). He maintains that "……the International Labour Organization is typical of the general evolution of international law from 'a law between States only and exclusively' towards the common law of mankind." Id., at 81. c. Jenks, *The Common Law of Mankind* (London: 1958).

24 E. Landy, supra note 18, at 181 n. 4, citing "McNair Committee Report," Report of th Committee on Freedom of Employers' and Workers' Organizations, 39 I.L.O. Off. Bull. 475 (1956).

25 In connection with art. 3, para. 5, I.L.O. Const.

26 The very significant procedure by which private delegates in the General Conference can challenge the seating of newly appointed delegates, and thereby regulate the membership, is a bit specialized to be recounted here. See the discussion by C. Norgaard, *The Position of the Individual in International Law* 144-48 (Copenhagen: 1962).



## IV. ORGANIZATIONAL STRUCTURE

Prior to considering the implementing procedures, brief notice must be taken of the organizational structure, which has produced the International Labour Code and International Labour Legislation.

The largest, and the primary organ, is the International Labour Conference composed of four representatives from each Member State, plus advisers. The "General Conference of Representatives of Members", to use its official title, can be compared to the U. N. General Assembly, as the Conference exercises the final supervisory authority of the I.L.O. scheme. It will be remembered that the U. N. General Assembly exercises final supervision over the Trusteeship system. From this analogy it can be seen that the Conference is the final authority in the hierarchy of supervision. It must pass by a two-thirds vote all draft conventions and all recommendations. Conventions are then submitted to governments for ratification. These conventions become binding treaties. Recommendations are not ratified, consequently they serve as a guide.

The General Conference approves or rejects the efforts of all other organs as part of its general supervisory functions. The more precise supervision, as this notion is examined in the present study, is exercised by the Governing Body. Pursuant to the authority of Article 7 of the I.L.O. constitution, the tripartite structure is maintained: twenty-four governmental representatives are balanced by twelve representing employers, and twelve representing workers. A further division is set forth within the class of twenty-four governmental representatives, since fourteen of them "shall be appointed by the Members of chief industrial importance."[27]

The International Labour Office has the duty of handling the information received from governments, in the form of biennial reports, answers to special inquiries, reports on legislative measures, and questions directed to governments. Information received is organized and classified by the International Labour Office for the benefit of the Director-General, the Conference, and the Governing Body. Article 10 of the I.L.O. Constitution sets forth the basis of the supervisory scheme, which constitutes the main interest of this Chapter.

Special committees, i.e. the Conference Committee and the Committee of Experts, play a significant role in carrying out the detailed work in connection with the complaints procedure. Small specialized working units must resolve details (especially the screening and examination of petitions), which would be too cumbersome for the larger membership. The functions of specialized organs, and the committees of inquiry and the Committee of Experts,

27 I.L.O. Constitution, art. 7, para 2, in connection with para. 3.

can best be understood along with their role within the larger complaints procedure, discussed below.

The I.L.O. possessing a world-wide membership of 121 nations has developed a very simple and effective operational system. Beginning from the basic outlines of the I.L.O. constitution, which stipulates the division of membership of the Conference Committee and the Governing Body (based on tripartitism), the necessary supporting committees have been created in an efficient manner. These agencies exercise their duties in a spirit consistent with the aims set forth in the Preamble of the I.L.O. Constitution, i.e. social justice. When compared with the complicated structural apparatus of the, League's experiments of Minority and Mandates protection, I.L.O.'s simplified scheme is impressive. It will be recalled that all of the major League agencies, including the Council and the Assembly, were required to implement the administration of mandated territories and protect minorities. A comparison with the U. N. Trusteeship Council, and the numerous permanent and special committees created to deal with problems arising in the Southern African region, reveals even more startling results. In the case of the U.N., the organizational scheme is so complicated that mere description, let alone analysis, becomes extremely difficult. Perhaps the greater efficiency can be traced to the influence exerted by private delegates, representing workers and employers. It seems probable that labour unionists and industrial managers may have eliminated the type of waste and confusion found within strictly governmental organizations. If this generalization be accepted, a further hypothesis is worthy of examination namely, participation by private persons and groups can have a beneficial influence on the development of human rights protection.

## V. THE INTERNATIONAL LABOUR CODE

The unique tripartite structure of the Organization is reflected in the international standards that have been perfected, because private delegates have exercised a law-making function, in the first stage of the promulgation of I.L.O. legislation.[28] Traditionally, the main function of I.L.O., as was true of pre-World War One experiments such as the Bern Convention of 1906, was the setting of labour standards. During the inter-war period only subsidiary attention was devoted to supervision or enforcement. While the I.L.O. is still concerned with the creation of higher minimum standards, the perfection of implementing machinery during the present era represents a decided shift in emphasis.

28 See J. van der Cen, "*Some Organizational Aspects of the I.L.O.*" Symbolae Verzijl 403, 408 (The Hague: 1958) (Private delegates do not function as a distinct pressure group).



At first no supranational labour law existed, and it was not contained within traditional international law. Therefore the new humanitarian concepts had to be codified by means of international conventions. The reason for this choice of treaty instruments, as opposed to the improvement of national legislation, was to create a "higher duty" upon governments. National laws can easily be repealed or modified if a dictatorial regime comes to power. Treaties, however, are much more dfficult to renounce; hence, the philosophy of I.L.O. (later emulated by the Council of Europe in its European Treaty Series) is that international obligations are more permanent and exert greater force.

The concept of Social Justice set forth in the I.L.O. constitution and in the Declaration of Philadelphia[29] has been brought to life by 130 Conventions and 134 Recommendations.[30] Collectively the growing body of adopted Conventions and Recommendations, along with draft Conventions in the process of ratification, add up to what Dr. C. Wilfred Jenks has termed The International Labour Code.[31] These I.L.O. Conventions have received over 3,500 ratifications and over 1,100 declarations. As Dr. Nicholas Valticos concludes this International Labour Code "has progressively built up and now constitutes a coherent set of standards covering most of the labour questions, both general and technical, encountered throughout the world".[32] A full review of I.L.O.'s standard setting, its international legislation, its I. L.O. Common Law,and its perfected International Labour Code is impractical in a study devoted primarily to implementing procedures. The literature, celebrating the Fiftieth Anniversary, has covered this phase of positive law.[33]

The most important consideration for the purpose of this study is the fact that all ratified conventions incorporate the provisions of the I.L.O. constitution. They are not self-contained documents as are public law treaties. As such,they cannot function (or even have an existence) apart from the I.L.O.

29 The moral obligations assumed at the time a State assumes membership in the I.L.O., so that the norm of *pacta sunt servanda* will apply, is set forth in: Declaration and Resolutions of the International Labour Conference, Philadelphia, 1944, 21 I.L.O. Off. Bull. (1944); 38 Am. J. Int'l L. Supp. 203 (1944).

30 See the discussion of the humanitarian efforts by the I.L.O. in: Valticos, Fifty Years of Standard-Setting Activities by the International Labour Organization, 100 Int'l Labour Rev. 3,5 (1969).

31 The primary discussion of the International Labour Code is foud in C. Jenks, The International Protection of Trade Union Freedom (London: 1957).

32 Valticos, supra note 30, at 3.

33 C. Jenks, Human Rights and International Labour Standards (London: 1960), and C. Jenks, The Law of Freedom and Welfare (London: 1963). A. McNair, "The International Labour Conventions," The Expansion of International Law (Jerusalem: 1962).

constitution[34]. More precisely "social justice" and genuine international labour law have been created by a series of international instruments, which collectively add up to a body of substantive law. Evolving from the I.L.O. constitution, these conventions and recommendations all contribute toward the "concerted policy of economic and social development[35]". The interrelationship between individual labour conventions becomes increasingly important, as a calculated policy of raising previously adopted minimums is pursued[36].

The distinction between recommendation s and conventions is important. As the name implies, Conventions are binding inter national treaties and, thereby, impose a higher obligation on ratifying States. They must, as collective international instruments[37] be approved by a two-thirds majority of the delegates of the International Labour Conference rather than by a unanimous vote. The I.L.O. has specifically rejected the rule o f unanimity[38], considered so important to the support of State sovereignty[39].

Some conventions, which are still only drafts may, nevertheless, be accepted as recommendations. At a later date, States may become willing to ratify recommendations as conventions and, thereby, assume higher obligations.

The goal of I.L.O. is to establish an effective minimum standard of labour and human rights protection below which governments may not fall. The primary method of achieving this goal is the promulgation of new conventions

34 Valticos, The International Labour Organization, Its Contribution to the Rule of Law and the International Protection of Human Rights (to mark the Fiftieth Anniversary of the International Labour Organization), 9 J. Int'l Comm'n of Jurists 3, 5 (1968).

35 Id. at 9.

36 F. Wolf, L'Interdependance des Conventions Internationales du Travail, 121 Recueil des Cours 121 (1967 II).

37 Valticos, I.L.O. and Protection of Human Rights, supra note 34, at 5.

38 As already noted, recommendations must also be approved by a two thirds vote; but, in view of the fact they are not ratified by member States, legal obligations are not imposed. They do, however, exericse a valuable function, since they serve as guide-lines for appropriate action.

39 The E.E.C. Commission can only make decisions by a unanimous vote. The E.E.C. has not been able to proceed to the Second Stage, wherein decisions can be made by a two-thirds vote, because of the French veto. There have been proposals that working commissions of a tripartite membership be created by the E.E.C.; they would introduce a system of consultation with governments.

Proposals were made that tripartite committees, copied from I.L.O. practice, be set up to supervise the European Social Charter, E.T.S. No. 35 (1961), 529 U.N.T.S. 89, The member states of the Council of Europe rejected these draft proposals, because it was felt that State sovereignty would be endangered. See Tennfjord. The European Social Charter: An Instrument of Social Collaboration In Europe, 9 European Y.B. 71, 74 (1962). Discussed infra Ch's 10 & 11.



by the International Labour Conference. The mere passage of a convention has ramifications for all member States, even those not ratifying. Upon assuming the duties of membership, upon ratification of the I.L.O. constitution, the government becomes subject to actions subsequently taken by the Organization. Dr. Jenks speaks of an "I.L.O. Common Law" that binds all members. This legal norm of "automatic application" is contrary to traditional international law, under which only ratifying States were bound by multilateral treaties. No suggestion is being made that an unratified convention has the same legal force as one duly ratified. But if a State is strongly opposed to a particular convention or recommendation (or to the total effect of the network of labour legislation) the only course open is not to ratify. In extreme cases it will be forced to withdraw from the organization. A state may not completely reject the "civilized standards" adhered to by other members. A completely despotic government becomes so "out of place" that it is necessarily compelled to remain outside of the organization, as can be seen from the recent withdrawal of the Union of South Africa. During the inter-war period, Nazi Germany and Fascist Italy resigned[40].

A sovereign State can become subject to an international obligation against its will in yet another fashion. Upon acceptance, of a convention or recommendation by the International Labour Conference a rule of automatic submission arises. All such instruments must be submitted by the competent national authorities (usually the executive branch) for ratification by the legislature. Consequently, a major displacement of national competence (indeed national sovereignty) has resulted upon the assumption of membership. Unlike the rule in international law, the Executive Branch cannot prevent the Legislative Branch from approving the treaty. No longer is the Foreign Office supreme, in that a convention can be withheld from Parliamentary organs. That is to say, the texts of conventions and recommendations have been approved by the International Labour Conference. They have not been signed by governmental agents. These texts, however, must be submitted to the legislative branch for ratification.

The sum total of these instruments, both ratified and unratified, is the International Labour Code. This term, introduced by Dr. Jenks,[41] is now accepted along with the newer concept of International Legislation.[42] The content is universal and of importance to all peoples. Aside from its sphere of jurisdiction, I.L.O. is influencing positive international law by developing human rights and trade union freedom. That is to say, social and economic

40 A State cannot be suspended or expelled. See the discussion of this problem as a phase of sanctioning infra note 159, et. seq.

In 1956 South Africa withdrew from U.N.E.S.C.O. in protest against U.N.E.S.C.O.'s policy against racial discrimination.

rights have been incorporated within other organizations, i.e. the Council of Europe and U.N.E.S.C.O., as well as the U.N. by means of Human Rights Conventions. As already indicated, prior to the founding of I.L.O. and indeed even prior to 1948 (the date of the Freedom of Association Convention)[43] labour protection was a phase of municipal law, having no place within public international law. A complete reversal has taken place in that minimum standards of "Social Justice" are clearly within the province of regional and international law.

Unique procedural methods have been developed to achieve these international minimums. Since reservations are not permitted, alternative escalation devices have had to be made available.[44] Developing nations are not capable of adopting European Labour standards; therefore, some form of modification had to be "built into" I.L.O. Conventions. Many of the newer and non-industrialized States could not possibly adopt all of the desirable improvements immediately, without crippling their embryonic industries. Though seeking to adopt the higher I.L.O. standards, some governments are often compelled by sheer economic necessity to continue substandard working conditions, improper safeguards of health, lower social security protection, employment of young persons, excessive hours of work, direct governmental control of labour unions, unequal educational opportunities, employment of women and children in heavy industry, etc. In spite of the fact these governments desire immediate improvements, they must proceed cautiously, so as to avoid sanctions of the Governing Body for not carrying out the obligations contained in ratified conventions.[45] Very often the adoption of higher international labour standards is dependent on external financial aid.

Each convention submitted for ratification contains mandatory provisions that must be adopted if a State desires to become a party to the

41. C. Jenks, International Protection of Trade Union Freedom, supra note 31.

42 Valticos, I.L.O. and Human Rights, supra note 34, at 5.

43 Infra note 119.

44 This vital topic of flexibility and escalation devices, which replace reservations and understandings to treaties, cannot be explored here. See Gormley, "The International Labour Organization", The Influence of the United States and the Organization of American States on the International Law of Reservations, 7 Inter-American L. Rev. 127, 152-53 (1965); and Gormley, Protection of Human Rights, supra note 12, at 30-32. Valticos, Standard-Setting Activities, supra note 30, at 18-20. McMahon, The Legislative Techniques of the International Labour Organization, 41 Brit. Y.B. Int'l L. 1 (1965-1966). Gormley, The Modification of Multilateral Conventions by Means of "Negotiated Reservations" and Other "Alternatives": A Comparative Study of the I.L.O. and Council of Europe, 39 Fordham L. Rev. 59, 65 (1970).

45 See e.g., the references in the "Special Problems" (or the Black List) contained in the Report of the International Labour Conference, infra note 171, et. seq., as to hastily ratified conventions.



Convention. But there are also optional clauses, incorporating higher standards, that can subsequently be adopted, as the government becomes capable of assuming heavier responsibilities.[46]

This scheme of allowing ratification in parts is set forth in Article 19 (3) of the constitution.[47] Thus the State is protected against exceptionally high standards, which cannot be implemented. This alternative was first employed in 1938; however, it remained for the Post World War Two period for the spread of the escalation device as an alternative to reservations. For example, of forty-seven conventions, only three lacked optional articles. But it is significant that conventions dealing with the most fundamental human rights deliberately excluded lower criteria, specifically the *Freedom of Association and Protection of the Right to Organize Convention*, 1948; the Abolition of Penal Sanctions (Indigenous Workers) Convention, 1955, and the Abolition of Forced Labour Convention, 1957.[48] The entire text must be

46 Perhaps a single example is in order.

The modification of the general standard authorized by these special clauses either provide for a narrower scope of application or for a lower age of protection or for a combination of both relaxations. International Labour Standards and Asian Countries, 83 Int'l Labour Rev. 303, 307 (1961).

Also Article 19, para. 3, of the I.L.O. constitution can be used to modify standards because of certain industrial conditions. For instance, the Night Work Convention, 1919, (No. 4) (Women)., provides that

> ".....in countries where the climate renders work by day particularly trying to the health, the night period may be shorter than prescribed in the above article, provided that compensatory rest is accorded during the day. (Similarly, the Night Work of Young Persons Convention, 1919, (No 6) lays down that) in those tropical countries in which work is suspended during the middleof the day, the night period may be shorter than 11 hours if compensatory rest is accorded during the day." Id., at 307.

One further example, there are twelve parts in the Plantation Convention, 1968. (No. 110). A State must comply with the three compulsory parts plus two of the nine optional portions; therefore, considerable latitude remains as to the degree of obligation assumed.

47 The special provision allowing for modifications because of special local conditions is as follows:

> "In framing any Convention or Recommendations of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances, make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries."

Article 19, para. 3, I.L.O. constitution.

48 A similar type of problem had to be resolved by the International Court of Justice. See Advisory Opinion on Reservations to the Convention on Genocide, [1951] I.J.C. 15. See also U.N. Secretary General, Memorandum of 20 Sept. 1950, U.N. Doc. A/1372. See also the Convention on the Abolition of the Crime of Genocide. See the analyses of these conventions in C. Jenks, The International Protection of Freedom of Association For Trade Union Purposes, 87 Recueil des Cours 1 (1953 I).

accepted. Aside from the basic authorization by Article 19 of the I.L.O. Constitution, it must not be lost sight of the fact that the *extensive use* of flexibility techniques actually represents a constitutional development with a resulting effect much greater than originally intended by the framers of basic I.L.O. instruments. From the practices of I.L.O., the U.N. and Council of Europe have begun to employ similar practices.[49] The I.L.O. continues to serve as the leader in the promulgation of universal minimum standards, that will continually be upgraded.[50] In particular, the developing nations are benefiting from I.L.O.'s universal criteria, and these new States are adopting higher standards, largely because of pressure from private associations of workers within their respective countries.[51] Upon achieving independance former colonies assume the obligations of I.L.O. Conventions; indeed the largest number of ratifications are presently coming from developing States. The tendency is for States to raise their level of commitment by the adoption of additional optional clauses and the ratification of newer conventions, containing higher criteria than, for example, those adopted during the inter-war period.[52]

The International Labour Code is not static; it continues not only to develop its own system of labour legislation, but it has also changed public international law. For example, Dr. Jenks maintains that freedom of association is now an international obligation, binding even those States which have not adopted the I.L.O. constitution.[53] Thus, the I.L.O. by creating international law, through a series of conventions, has raised freedom of association to a "general principle of international law."[54]

49 See e.g., European Social Charter, E.T.S. No. 35 (entered into force 1965). The Council of Europe was sided by I.L.O. in drafting nineteen specific labour and social rights.

A. H. Robertson, Human Rights in Europe 140-50 (Manchester, New York: 1963). W. Gormley, "The European Social Charter," The Procedural Status of the Individual before International and Supranational Tribunals 87-91 (The Hague: 1966). Tennfjord, supra note 39.

50 Jenks, The Revision of International Labour Conventions, 14 Brit. Y.B. Int'l L. 43 (1933).

51 See discussion in Gormley, I.L.O. Protection of Human Rights, supra note 12, at 31-32.

52 See especially, K. Dahl, "Revised Conventions" and "Frequency of Ratifications by Individual States", in: The Role of I.L.O., Standards in Global Integration Process, [1968] J. of Peace Research (Oslo, Norway) 310, at 323 & 324.

See e.g., Constitution of the International Labour Organization: Instrument of Amendment No. 1 (1964) (Application of I.L.O. Conventions in Self-Governing Territories); reprinted in 3 Int'l Legal Materials 844 (1964). C. Alexandrowicz, World Economic Agencies: Law and Practice, supra note 54, at 103-09.

53 See infra note 119 et. seq. for the discussion of Freedom of Association, as this new right exists within the I.L.O. and also in public international law.



## VI. IMPLEMENTATION OF THE INTERNATIONAL LABOUR CODE

*The primary need today is to implement existing guarantees.*[55] Whereas the United Nations was unable to implement the Universal Declaration of Human Rights by means of an International Bill of Human Rights,[56] or a U.N. Court of Human Rights,[57] the International Labour Organization did provide the means of implementation in its Constitution in 1919. It has already been shown that I.L.O. conventions are all related to, and incorporate, its constitution; the system of supervision is automatically incorporated within each convention.

Four methods of *supervision* are at the disposal of the I.L.O.:—

(1) the system of biennial reports from governments,

(2) the contentious proceedings, comprising representations from private groups (and member States filing inter-state complaints),

(3) complaints under the Freedom of Association Convention, and

(4) specific requests from governments, asking that inspections be made of local labour conditions.[58]

It would be desirable to indicate a fifth and "catch all" category to include a few other activities of a supervisory function with such agencies as U.N.E.S.C.O. and E.C.O.S.O.C. But in view of the fact that these newer approaches are based on voluntary cooperation with members, the special procedures can be treated as a phase of the final category.

It is important to distinguish the constitutional provisions setting forth the system of annual reports, which constitute a system of *periodic and automatic supervision*, as opposed to the complaints procedure, which is *ad hoc* ,i.e. brought into operation for a specific controversy. Some

54 As this concept is used in Article 38, para. c, Stat. I.C.J. Accord, C. Jenks, Protection of Trade Union Freedom, supra note 31, at 62; and C. Alexandrowicz, World Economic Agencies: Law and Practice 107-08( London: 1962). Professor Alexandrowicz states: "There is no reason to doubt that I.L.O. action has influenced the municipal laws of member countries at least to the extent of preparing the ground for new principles of (labour) law recognized by civilized nations." Id. at 108. See also Gormley, Protection of Human Rights, supra note 12, at 29-30.

55 N. Valticos, supra note 19; F. Ermacora, "The Protection of Human Rights by the United Nations (Declarations and Conventions)", Human Rights and Domestic Jurisdiction (Article 2 & 7, of the Charter), 124 Recueil des Cours 371, 401-06 (1968 II). See also, id. at 441 et. seq.

56 E.g., L. M. Goodrich, The United Nations 243, 247 (London: 1960); and N. Bentwich & A. Martin, Charter of the United Nations 130-31 (London: 1950).

57 The meritorious plans for Courts of Human Rights offered by Australia and Colombia can be noted in passing.

58 As will be shown below, inspections have been made in Spain and Japan. Two inspections have been made of labour conditions in Greece.

authorities[59] consider all I.L.O.'s supervisory systems to fall within one or the other of these two classifications. They speak first of the constitutional provisions and the complaints procedure. Within the second category two distinct remedies are available: (1) representations from associations of workers, and (2) inter-state complaints between governments.

An additional method by which a complaint can be submitted to the I.L.O., and an on-the-spot inspection made by a Special Commission on Freedom of Association, is available under the Freedom of Association Convention.[60] The Freedom of Association proceeding is a co-operative effort between the U.N. and the I.L.O. This joint effort is an additional remedy to the procedures arising from the I.L.O. Constitution. The Freedom of Association Convention has an existence separate and apart from the I.L.O. constitution; moreover the Second Greek Inspection demonstrated a unique method by which the complaint was instituted. The sum total of the above mentioned procedures results in a system of supervision. Although the four distinct complaint procedures are encompassed within its scheme, the I.L.O. lacks a judicial system. There is no Court of Justice as found in the Council of Europe and E.E.C., although the I.L.O. can obtain an advisory opinion from the International Court of Justice, pursuant to Article 96 (2) of the U.N. Charter. Neither the Council of Europe nor the E.E.C. can obtain an opinion from the I.C.J.

A. Reports From Governments

The basic procedural device by which Conventions (and to a growing degree Recommendations) are enforced is the requirement that each member State submit an annual report, pursuant to Article 22 of the constitution.[61]

The requirement of annual reports was modified, because of the heavy work load placed on member governments, and especially on the International Labour Office and the Governing Body. At present a system of biennial reports is followed so that intensive study may be made of each submission. Quite properly, the Governing Body refuses to simplify the system of inspections; they are not a mere formality, as was true of the League's Mandate System. Any supervisory system must make a choice between frequent reports, followed by fairly cursory examinations, and intensive examinations. The I.L.O. chose the latter alternative. The I.L.O.'s system of supervision was contemporaneous with the Mandates. Unlike the Permanent Mandates Commission, the I.L.O. has been free from governmental interference; it has been able to perfect its own instruments and procedures. The I.L.O. was

59 E.g., N. Valticos, supra note 19.

60 Supra note 13, and infra note 124.

61 In connection with the detailed provisions set forth in Article 19. They are too lengthy to reproduce here. Articles 19 through 34 are applicable.



independent of the League; moreover the tripartite structure reduced governmental control. Whereas the Permanent Mandates Commission (and the present Trusteeship Council) served a superior organ (the Assembly), the I.L.O. is independent and its own master. The I.L.O. is thus free to perfect its own questionnaires upon which the reports are based.[62] Questionnaires form the basis of the biennial reports. Failure to answer fully any particular question will result in severe questioning by the series of agencies, including the Governing Body. No mention is made in Articles 22 or 23 of the constitution of the use of a questionnaire; nonetheless I.L.O. has developed a detailed instrument far superior to that used by the Permanent Mandates Commission or by the Trusteeship Council.

The primary organ in the supervisory scheme is the International Labour office. Therefore, reports from member governments are to be sent to the International Labour Office, but the major examination is conducted by two specialized agencies: the Committee of Experts on the Application of the Convention [hereinafter referred to as the Committee of Experts],[63] composed of independent experts. These individuals are appointed by the Governing Body on the recommendation of the Director-General, and they serve on a permanent basis. The second agency, the Conference Committee is *ad hoc*; that is to say, a new committee of a tripartite character is appointed each year. While there is some tendency to reappoint former members, especially for the positions of Chairman or the two Vice-Chairmen, the majority of the delegates are newly elected each year. The first committees were set up in 1927 by the I.L.O. acting on its own authority. As might be expected, considerable protest resulted from Member States, who argued that the International Labour Office and the Governing Body lacked the competence to create agencies, not specified in the constitution. The arguments are similar to those raised against the League and U.N. supervisory agencies when they were established. In the case of I.L.O., the larger organs were not in a position to examine individual reports from governments, dealing with hundreds of separate ratifications and adherences to Conventions. Groups comprising the full membership of the organization (or even a large proportion of the total membership) are incapable of exercising continuing long-term supervision.

62 The Trusteeship Council has copied portions of the I.L.O. instruments. Indeed, I.L.O.'s questionnaire is the most sophisticated that has been developed by any agency; it has been helpful to many other organizations, including the Council of Europe, U.N.E.S.C.O. and E.C.O.S.O.C. In fact, E.C.O.S.O.C. sought aid from I.L.O. while drafting the procedural Articles of the International Covenant on Economic Social, and Cultural Rights. Adopted and opened for signature at New York, December 16, 1966. G. A. Res. Annex. A/RES/2200 (XXI); 61 Am. J. Int'l L. 861 (1967).

63 See explanation in E. Landy, supra note 18, at 36-51.

The forty member Governing Body cannot deal with the constantly changing level of labour standards. Consequently two specialized groups, one devoted primarily to an examination of recently submitted reports (Committee of Experts) and a counterpart concerned with supervision (Conference Committee) were created. Both of these committees serve a special function, and both are indispensable.

*1. The Committee of Experts :*

This paramount organ is charged with the examination of biennial reports.[64] The role of the Committee is essentially "critical,"[65] even approaching an inquisitorial proceeding. It looks for shortcomings in national legislation.[66] The Committee is charged with deliberately detecting weaknesses in the implentation of specific conventions and areas in need of improvement. This examination has not degenerated into a mere ceremonial function, as happened with the Permanent Mandates Commission. Indeed the biennial system of reports was adopted in 1959 in order to avoid weakening the inspection process. Experts from the International Labour Office frequently lend assistance to the Committee.

States have hesitated to appear before the Committee,[67] perhaps out of fear that a repecition might occur of the type of interrogation that has taken place before the Permanent Mandates Commission and the Trusteeship Council. The Committee of Experts, therefore, relies exclusively on the written record, plus information sent from private sources.

The second practice worthy of note is that the Committee renders a particularly "searching examination" when the first report of a recently ratified convention is received. Any shortcomings will be highlighted for the benefit of the International Labour Office and the Conference Committee (discussed below), in order that the original findings can be referred to in subsequent years.[68]

As a result of the work of the Committee of Experts, the Governing Body requests that a number of Conventions be selected for an intensive examination. Since 1948 nearly one-hundred conventions and recommenda-

64 Id. at 19-34.

65 Id. at 28.

66 F. van Asbeck "Une Commission d'Experts" in : Symbolae Verzijl 9-21 (The Hague : 1958). See especially, "Valeur et Efficacité du controle" id. at 18-21.

67 A single exception occurred in 1937. A French Representative appeared to defend the Government's position. Noted in E. Landy, supra note 18, at 33 n.7.

68 "Each year, these two Committees re-examine cases that have not yet been settled as a result of their earlier comments ; this continuity is an essential element in the efficacity of the system."

Valticos, I.L.O. and Human Rights, supra note 34, at 23.



tions have been selected for "special treatment."[69] The precise method by which certain areas are selected for intensive investigation depends on a number of factors ; to some degree random sampling methods are employed. Primarily the experience of the two committees is taken into account.

One significant variation in the supervisory process was begun in 1969. Additional reports are requested from Governments concerning the present status of seventeen major conventions. Information is sought as to unratified conventions ; if ratified the extent of acceptance must be reported. For instance how many of the optional portions have been accepted ?[70]

The Committee of Experts seems to have moved beyond the mere finding of facts, and it has progressed to a stage of handing down a quasi-judicial opinion.[71] This statement does not imply that a judicial role is exercised ;

69 Valticos, Standard-Setting Activities, supra note 30 at 32.

70 Id. at 32. This major thrust was adopted on I.L.O.'s fiftieth anniversary.

71 Pursuant to article 19 of the ILO constitution, the Governing Body requested (in 1967) that an in-depth survey be made concerning the application of the forced labour conventions. Therefore, member states were requested—as a phase of their participation in Human Rights Year activites—"..... to make a general review of the situation in the field covered by the forced labour Conventions, both in ratifying States and in countries which have not ratified both or either of these Conventions." Report of the Committee of Experts on the Application of Conventions and Recommendations : Information and Reports on the Application of Conventions and Recommendations, 52d Sess. Geneva 1968 Part 3, Forced Labour, Ch. 1, 91 1, at 177 (examining General Suvery of Reports concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105).

The forced labour Conventions were chosen by the Governing Body for reports under article 19 procedure as part of the action undertaken by the I.L.O. on the occasion of the International Year for Human Rights, to review the effectiveness of the measures taken by the Organization to promote and safeguard human rights and to explore new avenue of advance. Such a review was called for in the 1966 Conference resolution on the contribution of the I.L.O. to the International Year for Human Rights, and will be at the centre of the discussion to be undertaken by the Conference at its 1968 session..... Id. at 177.

The Report of the Committee of Experts on the Application of Conventions and Recommendations then indicates the significance of the topic of forced labour to the U.N. Human Rights Covenants.

The present survey also acquires added significance in view of the adoption by the United Nations General Assembly in December 1966 of the Human Rights Covenant. The Covenant on Civil and Political Rights contains specific provisions against forced or compulsory labour [art. 8, para. 3], and the Covenant on Economic, Social and Cultural Rights recognises the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts [art. 6]. The work of the International Labour Organization in analysing the problems arising in the implementation of its own Conventions dealing with forced labour accordingly serves to clarify issues which are liable to arise also in relation to the putting into effect of obligations under the Covenants.

rather an attempt is being made to draw attention to a similar but more startling development in the European Commission of Human Rights of the Council of Europe, which now functions almost as a court of first instance.

*The Conference Committee on the Application of Conventions and Recommendations*

Following the submission of its report, the work of the Committee of Experts is completed, except as the International Labour Office may refer the Committee to its prior reports. Another organ, the Conference committee,[72] has the task of exercising continuing supervision, in order to relieve the General Conference from drawing up a final report dealing with three sets of data : (1) summary of reports from governments, prepared by the International Labour Office, (2) reports from the Committee of Experts, and (3) additional information provided by governments (and often private sources).[73] Representatives of member States are given the opportunity to present oral arguments in defence of their government's position. Officially these accredited representatives add additional observations and clear up obscure points ; in practice they defend their governments, unlike the Committee of Experts, which is composed of independent delegates.

In order to obtain a true picture, and indeed to safeguard member-States frequent requests are made for additional information. This is an especially delicate task, in view of the fact that there is no provision in the constitution for this procedure or for that matter even the Committee's existence. Landy goes so far as to state : "This tripartite discussion constitutes the final and crucial instalment of the supervision procedure."[74]

While the government has the option to refuse to supply additional written information and to decline to send a representative to take part in the oral discussion, such a step would be publicized by the Governing Body. This whole follow up investigation has been termed "the Conference Committee's most original and fruitful activity."[75] On the other hand, it is also possible

72 See discussion by E. Landy, supra note 18, at 36-51.

73 Id. at 36.

74 Id. at 42.

75 A significant example of the expanding role of the Governing Body can be seen in the continuing spervision of the findings in the Second Greek case, infra note 130. As of March 1972, the Governing Body assumed a direct supervisory function of the application of ILO standards (as to the Freedom of Association Conventions, supra notes 53 & 54, discussed infra notes 124-130). In the prior cases, e.g. Japan (infra note 126), the Committee on the Application of Conventions examined the validity of subsequent action taken by Governments pursuant to the Conclusions of Fact-Finding and Conciliation Commissions. However, because of the serious nature of freedom of association in Greece, it is felt desirable for the Governing Body not only to make a more intensive examination than is usually required but also to lend the enormous prestige of the ILO's most authoritative organ in seeking co-operation with the Greek Government. The actions of the Governing Body represent a major step forward in the enforcement of awards and, likewise, of the application of a moral sanction.



to speak of cooperation between member States and the Conference Committee.[76] The unique feature of the I.L.O.'s supervisory machinery is that private delegates function on the basis of equality with government representatives. The voluntary cooperation of all parties attests to the success of the tripartite membership.

B. Complaints Procedure

The complaint procedure originating from the I.L.O. constitution, does not include individual petitions. Article 24 provides for representations to be made to the International Labour Office "by an industrial association of employers or of workers". Such representations would deal with alleged failures by member States to observe obligations contained in conventions. Largely because of the difficulty experienced in administering minority complaints from the Upper Silesia area, the founders of I.L.O. believed that special safeguards were required in order to:( 1) protect States from embarrassment and (2) prevent a flood of petitions to the Director-General and to the International Labour Office. The experience of the League Council (which had to restrict the right of direct petition) stands in sharp contrast to the procedure developed by I.L.O. to implement Articles 24 and 25.[77] Only recognized industrial associations of employers or workers may file petitions. Not every labour union or association has the *locus standi* to send a petition, and this rule is given a restrictive interpretation, which curtails the number of complaints.[78] It is assumed that recognized associations will act responsibly and not file worthless representations.

An additional restriction is becoming increasingly significant : an alleged non-observance of a Convention must be of direct interest to the petitioning organization. Not every group (even though recognized) may file a complaint under every conceivable circumstance. On the other hand, this limitation is not as severe as might at first appear, because of the interest of all labour organizations in the observance by national governments of the

76 See E. Landy, supra note 18, at 43-47 for a discussion of the procedure by which accredited representatives from governments are utilized. See also, "Committee Atmosphere" id. at 47-49.

77 Article 24 of the I.L.O. Constitution authorizes the complaint procedure, as follows :

"In the event of any representations being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this represetation to the Government against which it is made, and may invite that Government to make such statement on the subject as it may think fit."

78 The numerous cases in which it was held that particular labour unions lacked standing need not be recounted here ; see C. Alexandrowicz, supra note 54 at 94-103.

rather an attempt is being made to draw attention to a similar but more startling development in the European Commission of Human Rights of the Council of Europe, which now functions almost as a court of first instance.

*The Conference Committee on the Application of Conventions and Recommendations*

Following the submission of its report, the work of the Committee of Experts is completed, except as the International Labour Office may refer the Committee to its prior reports. Another organ, the Conference committee,[72] has the task of exercising continuing supervision, in order to relieve the General Conference from drawing up a final report dealing with three sets of data : (1) summary of reports from governments, prepared by the International Labour Office, (2) reports from the Committee of Experts, and (3) additional information provided by governments (and often private sources).[73] Representatives of member States are given the opportunity to present oral arguments in defence of their government's position. Officially these accredited representatives add additional observations and clear up obscure points ; in practice they defend their governments, unlike the Committee of Experts, which is composed of independent delegates.

In order to obtain a true picture, and indeed to safeguard member-States frequent requests are made for additional information. This is an especially delicate task, in view of the fact that there is no provision in the constitution for this procedure or for that matter even the Committee's existence. Landy goes so far as to state : "This tripartite discussion constitutes the final and crucial instalment of the supervision procedure."[74]

While the government has the option to refuse to supply additional written information and to decline to send a representative to take part in the oral discussion, such a step would be publicized by the Governing Body. This whole follow up investigation has been termed "the Conference Committee's most original and fruitful activity."[75] On the other hand, it is also possible

72 See discussion by E. Landy, supra note 18, at 36-51.

73 Id. at 36.

74 Id. at 42.

75 A significant example of the expanding role of the Governing Body can be seen in the continuing spervision of the findings in the Second Greek case, infra note 130. As of March 1972, the Governing Body assumed a direct supervisory function of the application of ILO standards (as to the Freedom of Association Conventions, supra notes 53 & 54, discussed infra notes 124-130). In the prior cases, e.g. Japan (infra note 126), the Committee on the Application of Conventions examined the validity of subsequent action taken by Governments pursuant to the Conclusions of Fact-Finding and Conciliation Commissions. However, because of the serious nature of freedom of association in Greece, it is felt desirable for the Governing Body not only to make a more intensive examination than is usually required but also to lend the enormous prestige of the ILO's most authoritative organ in seeking co-operation with the Greek Government. The actions of the Governing Body represent a major step forward in the enforcement of awards and, likewise, of the application of a moral sanction.



to speak of cooperation between member States and the Conference Committee.[76] The unique feature of the I.L.O.'s supervisory machinery is that private delegates function on the basis of equality with government representatives. The voluntary cooperation of all parties attests to the success of the tripartite membership.

B. Complaints Procedure

The complaint procedure originating from the I.L.O. constitution, does not include individual petitions. Article 24 provides for representations to be made to the International Labour Office "by an industrial association of employers or of workers". Such representations would deal with alleged failures by member States to observe obligations contained in conventions. Largely because of the difficulty experienced in administering minority complaints from the Upper Silesia area, the founders of I.L.O. believed that special safeguards were required in order to:( 1) protect States from embarrassment and (2) prevent a flood of petitions to the Director-General and to the International Labour Office. The experience of the League Council (which had to restrict the right of direct petition) stands in sharp contrast to the procedure developed by I.L.O. to implement Articles 24 and 25.[77] Only recognized industrial associations of employers or workers may file petitions. Not every labour union or association has the *locus standi* to send a petition, and this rule is given a restrictive interpretation, which curtails the number of complaints.[78] It is assumed that recognized associations will act responsibly and not file worthless representations.

An additional restriction is becoming increasingly significant : an alleged non-observance of a Convention must be of direct interest to the petitioning organization. Not every group (even though recognized) may file a complaint under every conceivable circumstance. On the other hand, this limitation is not as severe as might at first appear, because of the interest of all labour organizations in the observance by national governments of the

76 See E. Landy, supra note 18, at 43-47 for a discussion of the procedure by which accredited representatives from governments are utilized. See also, "Committee Atmosphere" id. at 47-49.

77 Article 24 of the I.L.O. Constitution authorizes the complaint procedure, as follows :

"In the event of any representations being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this represetation to the Government against which it is made, and may invite that Government to make such statement on the subject as it may think fit."

78 The numerous cases in which it was held that particular labour unions lacked standing need not be recounted here ; see C. Alexandrowicz, supra note 54 at 94-103.

International Labour Code.[79] In practice, any worker who believes his rights have been violated will experience little difficulty in finding a labour union to espouse his cause before a commission of inquiry. Hence the requirement that only organizations are subjects of the law does not prove to be a completely effective deterrent to individual complaints. It is submitted that the private individual is an indirect subject of the growing body of case law of I.L.O. He is not a mere beneficiary, but instead a person who can acquire the status of a complainant by his choice of a particular labour union.

A definite organizational structure and procedure has been set up to give effect to the basic commands of Articles 24[81] and 25.[82] The main organ charged with the representations is the Governing Body. Ultimately it is this forty member organ that must decide if a violation has in fact taken place; what remedial steps, if any, need to be taken; whether or not subsequent governmental actions are sufficient; and whether the original representation and answer from the government should be published. This discretionary competence is provided in Article 25, as means of coercion and sanction.[83]

On its own authority, the I.L.O. has created special committees to examine petitions. These commissions are often referred to as "commissions of inquiry," but they must not be confused with the Commissions of Inquiry set up under the inter-state procedures or with the special conciliation commissions set up by the U.N. and I.L.O. pursuant to the Freedom of Association Convention. Considerable confusion necessarily results when several distinct committees and commissions exercise overlapping functions on behalf of the Governing Body. For instance, the Governing Body may also examine a representation, simultaneously with the committee.[84]

These special committees are composed of three members, divided between the three groups. One member is a governmental representative; one is from a labour union; and the third is a representative of employers. All three individuals are drawn from the membership of the Governing Body.

79 Cf., the very restrictive interpretation of Article 173, E.E C. Treaty, by the Court of the European Economic Community. W. Gormley, supra note 49, at 148-56, and Gormley, Individual Petition to the Commission of the European Economic Community, 1 Valpariso I. Rev. 255, 256-5 (1967).

80 Gormley, supra note 12, at 38-39.

81 Text reproduced supra note 77.

82 Article 25, I.L.O. const., provides the sanction of publication, as follows: "If no statement is received within a reasonable time from the Government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it."

83 Id.

84 Seven cases were brought prior to World War II. See C. No regard, supra note 26, at 141-44.



They are not considered to be independent experts, as are the personnel of some of the other committees. The aim in their selection is to preserve the tripartite structure. Moreover, the function of these delegates is to advise the Governing Body, namely, complete the groundwork upon which the Governing Body can render its final decision. Yet the Committee does not hand down a judgment or an opinion; it merely advises the Governing Body, as to the validity of the charges set forth in a representation.

The Director-General has the task of notifying the petitioner that his communication has been received. It is then transmitted to the Governing Body,[85] which renders the decision as to admissibility. In the first stage, a type of screening takes place. Only after the Committee and the Governing Body have declared the representation receivable, do these organs conduct what amounts to a second examination: an evaluation of the merits. Upon further consideration the Governing Body may decide that the complaint is not well-founded.[86] The government involved is then notified.

At any stage the Governing Body may request further information. If it is not provided or if unsatisfactory, the entire case may be published as a form of sanction. The authority for such publication is contained in Article 25 of the constitution. Before reaching such a decision to publish, the defendant State is invited to send a representative to take part in discussions of the Governing Body. The Governing Body makes all decisions.[87]

The association presenting the claim may also be asked for additional information; however, it is not considered as a party to a contentious proceeding, though it is notified of the results taken by the Governing Body. The private group may be asked for additional information, but it has no right to refute the data provided by the State. Private groups are not full procedural subjects of the complaints procedure, for they can not exercise all the rights of sovereign States. Petitioners must be informed of any action taken; hence groups cannot be ignored as in proceedings before other organizations.[88]

The complaints procedure described above represented a major breakthrough in the object theory of the individual. In 1919 even indirect procedural rights constituted a powerful procedural remedy in the hands of private associations. Fifty years after the inauguration of the practice, it still constitutes a significant innovation in international law. The mere fact that the I.L.O.'s complaint procedure has outlived the League's other human rights

85 The rules of procedure are contained in the Standing Orders of the General Conference.

86 This procedure is somewhat similar to the sub-commission practice of the European Commission of Human Rights by which a complaint approved by the three member screening committee is later rejected.

87 C. Alexandrowicz supra note 54 at 90-92.

88 e.g., under the procedures of the Permanent Mandates Commission.

schemes of direct and indirect individual petitioning gives some indication of its usefulness. Today it represents the main example of the protection of international group rights.

C. THE INTER-STATE COMPLAINT

The second major procedural remedy contained within the complaint procedure involves actions between member States, pursuant to Articles 26-34. The I.L.O. constitution has devoted much more attention to inter-state actions than representations, for the reason that the commencement of a proceeding against a sovereign State tends to be treated as an unfriendly act. Nine Articles specify the procedure and the committees, which will be charged with implementing constitutional provisions. The basic authority for the inter-state complaint is found in Article 26(1), and it is reminiscent of the provisions contained in Mandate and Trust agreements.

"Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified...."[89]

Within the scheme of I.L.O. protection, the technical requirements governing the application of diplomatic protection have been removed. The inter-state complaint has removed the nationality link, i.e. injury to a national or the interest of a national. The complaining State is not required to prove the existence of a legal dispute or controversy. None of these requirements from traditional international law may, therefore, be raised by way of preliminary objection to the jurisdiction of I.L.O.'s investigatory organs or of its Governing Body. Fortunately there has not been any occasion to refer a case involving Article 26 (1) to the present International Court for an advisory opinion.

As in representation actions, the main organ charged with supervising the procedure is the Governing Body. But unlike the private actions, the Commissions of Inquiry are set up pursuant to the constitution.

In the first instance, the Governing Body, prior to referring the complaint to a Commission of Inquiry, may communicate with the Governments.[90] The provisions of Article 24, reproduced above,[91] are brought into play. Accordingly the defendant government may be invited to offer a statement.

The main investigatory group is the Commission of Inquiry, which is charged with considering the complaint. The composition of the Commission

89 Article 26, para 1, I.L.O. Const.

90 Article 26, para 2.

91 See the text of Art. 24, I.L.O. Const., reproduced supra note 77.



is similar in nature to those created under the representation procedure. Moreover, its function is identical; a report is made for the benefit of the Governing Body.[92] A judicial finding is not pronounced; it is not a conciliation commission and must not be confused with the Fact-Finding and Conciliation Commission which is set up under the Freedom of Association Convention.[93] Nonetheless, pursuant to Article 28 the final report embodies "findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps that should be taken...."[94] The Commission of Inquiry under the inter-state complaint procedure has a greater responsibility than those dealing with private complaints, because of the contents of the Final Report. This report is subsequently communicated-by the Director General to the Governing Body and each of the governments concerned.

One additional possibility must be noted, because of its employment in the special procedures under the Freedom of Association Convention. "The Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference," to cite Article 26 (4). In practice such a motion must result from an action by a delegate. As will be shown in connection with the "Second Greek Case,"[95] a delegate (usually one representing private interests) will advance the original complaint that is subsequently adopted by the full membership.

The provisions of Article 26(4) are even being applied to the Freedom of Association Convention; and in the example of the "Second Greek Case," this provision became applicable to a State which had not ratified the Convention. In this single area a constitutional evolution of tremendous potential is taking place. As might be anticipated, many more inter-state actions will originate from the Governing Body than from member States.

In dealing with these inter-state actions, the I.L.O. constitution makes provision for the accused State. Any matters arising out of Article 25 (the representation procedure) or Article 26 become subject to the requirement that "the Government in question shall, if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body...."[96] Moreover, all members of the Governing Body have

92 Art. 26, para. 3, I.L.O. Const.

93 See discussion of the Fact-Finding and Conciliation Commission on Freedom of Association infra notes 119-121 et. seq.

94 Art. 28., I.L.O. Const.

95 Discussed in connection with the Freedom of Association Convention. A "borrowing" from the procedures used under the inter-state complaint has taken place.

96 Art. 26, para. 5, I.L.O. Const.

an obligation "whether directly concerned in the complaint or not, to place at the disposal of the Commission all the information in their possession which bears upon the subject-matter of the complaint." (Article 26(5).)

The quasi-judicial nature of the Committees' findings can be seen from the fact that its report is binding unless specifically challenged before the International Court of Justice. Article 28 requires that the Commission of Inquiry will

> "prepare a report embodying its findings on all questions of fact relevant to determining the issues between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken."

A strict reading of the above text might indicate that the Commission of Inquiry was competent only to fulfil an investigatory role; however, in practice the Commission functions as a Court.

Dr. Valticos observes, as to the Commission of Inquiry—

> "The quasi-judicial nature of their procedure and the independence of their members was emphasized by the Governing Body as well as by the Commissions themselves. Their members were called upon to make a solemn oath similar to that sworn by the judges at the International Court of Justice."[97]

Its decisions are binding, and the Director-General has the task of publishing the final report.

The judicial nature of the entire I.L.O. proceedings, under its various phases, can be seen from the provisions in its constitution relating to the use of the International Court of Justice as an appellate body and also as a court of first instance.

Article 37(1) provides that—

> "Any question or dispute relating to the interpretation of this Convention or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice."

The major innovation involves the right of the I.L.O., under the authority of Article 96 (2) of the U. N. Charter, to seek an advisory opinion. Obviously a specialized agency of the U. N. cannot be deemed a subject of international law, so as to qualify under the provisions of Article 34 (1) of the Statute of the International Court of Justice.[98] Consequently, the

97 Valticos, I.L.O. and Human Rights, supra note 34, at 24.

96 See the more detailed discussion in Gormley, Protection of Human Rights, supra note 12, at 43-45.



advisory jurisdiction of the Court must be invoked, as a type of "indirect appeal." The judges of the International Court have repeatedly reiterated their position that they never function as an appellate tribunal. In practice, however, several cases have dealt with phases of judgments handed down by other tribunals.[99] It can be argued that the I.C.J. has in fact served as a court of appeal in several prior cases. It is submitted that the International Court should be given appellate jurisdiction.[100]

The I.L.O. constitution in Articles 29-32 provides that a dissatisfied party may "refer the complaint to the International Court of Justice.[101] Usually an aggrieved State will utilize this remedy. Whether this procedure be deemed a trial of first instance or an appeal, dealing with non-observance of I.L.O. conventions, is not of primary importance. As a practical matter, the dissatisfied party can have an additional day in court, provided the I.C.J. is willing to assume jurisdiction. The ever present problem, now intensified by the judgment in *Barcelona Traction*[102] is that other parties (and private interests) may become involved in the dispute; consequently the I.C.J. may find grounds to reject the case on the theory that non-governmental entities lack *locus standi* before the Court, even in advisory proceedings.

Provided that the jurisdictional requirements set forth in the Statute of the I.C.J. are met, States and the I.L.O. are assured of an authoritative hearing.

The phrase "advisory", as contained in Chapter IV of the Statute *refers only to the jurisdiction of the International Court. In no sense is such an opinion advisory as to its legal effect on the I.L.O. or to the participating State.* Because of I.L.O.'s establishing treaty, the holding in the advisory proceeding has binding force and must be implemented. Article 31 of the I.L.O. constitution provides that "The decision of the International Court of Justice in regard to a complaint or matter which has been referred to it in pursuance of Article 29 shall be final." Article 33 enables the Governing Body to ".... 

99 Theoretically, the International Court of Justice is strictly a forum of first instance, and it has repeatedly taken the position that it will not pass upon the validity of prior decisions. For example see Peter Pazamany University v. State of Czechoslovakia, (1934) P.C.I.J. Ser. A/B No. 61, 208; Interpretation of Peace Treaties with Bulgaria, Hungary, and Rumania (1950) I.C.J. 65 (Advisory Opinion); and Case Concerning the Arbitral Award Made by the King of Spain (Honduras v. Nicaragua), (1960) I.C.J. 192; 55 Am. J. Int'l L. 478 (1961). Presently this entire problem of appeals brought before the I.C.J. is in the process of reexamination.

100 Gormley. The Status of Awards of International Tribunals, 10 How. L.J. 33, 97-107 (1964) (proposals are offered to confer appellate jurisdication as to both institutional decisions and arbitral awards).

101 I.L.O. Constitution, art. 29, para. 2.

102 Barcelona Traction, Light and Power Company, Limited, (Second Phase). (1970) I.C.J. 3.

recommend to the Conference such action as it may deem wise and expedient to secure compliance...." with "....the decision of the International Court.... ."[103] Thus, in the event an affected State fails to comply, certain steps can be taken by way of sanction,[104] as will be shown in a subsequent section.

The complaint procedure remained dormant during the inter-war period. In fact forty years elapsed until two actual cases arose. It is interesting to note that whereas the representation procedure was used between the two wars, the present decade is witnessing a use of the inter-state complaint and the special procedures under the *Freedom of Association Convention.*[105]

In the politically inspired case of *Ghana v. Portugal*[106] and the retaliatory action of *Portugal v. Liberia*[107] it was alleged that two of the forced labour conventions had been violated.[108] The charges were that national legislation was inconsistent with treaty obligations, in that fundamental human rights, as contained in the I.L.O. conventions, were being infringed. The issue in the two cases was whether local laws were consistent with treaty obligations. Following the submission of representations under Article 26 (1) in 1961, Commissions of Inquiry were established. The lengthy procedures which followed involved: (1) the submission of written reports by governments; (2) of primary significance, the dispatch of a commission of inquiry for an on-the-spot inspection of conditions in Mozambique; (3) oral hearings in Africa and Geneva in which the testimony of witnesses was taken; (4) the constant participation of the Governments of Portugal and Liberia, and (5) the drafting of the final reports by the Commission of Inquriy. These reports were examined by the Governing Body.[109] The "Findings and Recommendations"[110] held that Liberia's internal legislation had violated the

103 In connection with art. 34, I.L.O. Constitution.

104 Id. art. 33.

105 Supra note 13, discussed infra note 124.

106 Report of the Commission Appointed under Articles 26 of the Constitution of the International Labour Organization to Examine the Complaint Filed by the Government of Ghana concerning the Observance by the Government of Portugal of the Abolitionof Forced Labour Convention, 1957 (No. 105), 45, I.L.O. Off. Bull., Supp. II April 1962 (Hereinfater cited as Ghana v. Portugal).

107 Report of the Commission Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Complaint Filed by the Government of Portugal concerning the Observance by the Government of Liberia of the Forced Labour Convention, 1930 (No. 29), 46 I.L.O. Off. Bull., Supp. II, April 1963 (Hereinafter cited as Portugal v. Liberia).

108 Conventions No. 29, 1930; and No. 105, 1957, supra notes 106 and 107.

109 Part V of Final Reports, Ghana v. Portugal, supra note 106, at 97 ff.; and Portugal v. Liberia, supra note 107, at 117 ff,

110 Portugal v. Liberia 176-181,



Forced Labour Convention.[111] It was also held that significant improvement had not been made until May, 1962.[112]

The defence offered by Liberia and rejected by the Commission of Inquiry demonstrates the importance of compliance with the requirement that Conventions approved by the General Conference must be submitted to the legislative branch for ratification. The Government argued that the Convention, as a binding treaty, automatically prevailed over local law; therefore no implementing legislation was required.[113] This type of defence might have prevailed if the rules of traditional international law had been applied.

In the earlier case of *Ghana V. Portugal*, involving the Abolition of the Forced Labour Convention,[114] within the Portuguese territories of Angola, Guinea, and Mozambique, it was held that Portugal had not met all of the requirements of the Convention. Notwithstanding the fact the important strides had been taken "....further steps are necessary to give full effect to the provisions of the Convention."[115] As in the 1963 action, the Commission complimented the respondent Government, Portugal, for its full cooperation with the I.L.O. throughout the entire investigation.[116]

Aside from the resulting improvement in the internal legislation within Portuguese territories and Liberia, the significance of the two cases is that Member Governments were able to institute conciliation procedures on behalf of foreign nationals. These African peoples were unable to espouse their own cause and obtain redress before municipal forums. They could not proceed before an international tribunal or obtain diplomatic protection from another State. Yet an international action was possible under I.L.O. documents, binding on respondent governments. Individuals, though not procedural subjects under the terms of the conventions on forced-labour, were aided by foreign States (admittedly acting for political purposes).

111 No. 29, (1930).

112 Portugal v. Liberia, supra note 107, at 179. See also id., at 169-76. It was argued that many of the violations, no longer present, were the result of poor economic conditions, which made it impossible for Liberia to meet minimum I.L.O. standards. Id. at 179-81.

113 This position, in addition to representing the correct view as regards self-executing treaties in public international law, has been adopted by the European Economic Community. Community law is superior to national constitutional law; hence, neither implementing legislation nor constitutional amendments are required. Societa Accialeric San Michele v. High Authority, Case No. 98, [1967] Comm. Mkt. L. Rep. 160, Vol. VI, part 26. See Annot. 4 C.M.L. Rev. 238-42 (1966-1967).

114 No. 105 (1957).

115 Ghana v. Portugal, supra note 106, at 234. The improvement made is set forth id. at 234-36. See also id. at 241-45, for the Recommendations of the Commission.

116 Id. para. 779, at 247.

These two cases constitute a breakthrough in the object theory, and represent sound precedent for the future. However, as concerns any future use of the complaint procedures, one very powerful alternative remains available to a defeated State. As already indicated, pursuant to Article 29(2), the complaint may be referred to the International Court of Justice. Such action was not pursued by Liberia, which State was condemned more forcefully than Portugal. Such action can no longer be instigated by virtue of a three month time limit allowed for appeals.

In view of the decisions of the International Court of Justice in the *South West Africa*[117] and *Barcelona Traction*[118] *cases* it seems that findings and recommendations of the Commission might be set aside on the ground that a State may only espouse the interests of its nationals. Accordingly, the rules of diplomatic protection would be imposed. Any State would be exceedingly foolish not to press such an action.

A third case brought under the representation procedure, against the Greek Government, has come up recently. The complaint was sponsored by delegates in the Governing Body, which were representing private interests. The three member Commission of Inquiry (appointed pursuant to Article 26 (3) of the I.L.O. constitution) was headed by Lord Devlin of Great Britain. Their report was accepted by the Greek military dictatorship. Subsequently the findings were debated by the Governing Body, and the significant point is that the representation procedure was used to check on the observance of the main conventions on freedom of association. The reason for not employing the special procedures under the *Freedom of Association Convention* was that the prior permission of the Greek dictatorship would have been required. No such prior permission of the defendant State is required under Article 26 of the I.L.O. constitution.

D. Freedom of Association

A comparatively new remedy has been established by the *Freedom of Association Convention*[119]. This international treaty is not exclusively an I.L.O. Convention ; rather it is a joint treaty between the I.L.O. and the United

117 South-West Africa Cases (Second Phase), [1966] I.C.J. 6.

118 Supra note 102.

119 Freedom of Association and Protection of the Right to Organize Convention, No. 87 (1948).

C. Wilfred Jenks presents the early history, especially the main I.L.O. conventions leading up to the right of Freedom of Association, e.g. The Freedom of Association and the Righ to Organize Convention, 1948 ; The Right of Association (Non-Metropolitan Territories) Convention, 1947, C. Jenks, The International Protection of Freedom of Association For Trade Union Purposes, 87 Recueil des Cours 1, 20-22 (1953 I). See Jenks' review of the other applicable conventions id. at 26-27.



Nations for the protection of the right to organize. This Convention was negotiated between I.L.O. and E.C.O.S.O.C., and it represents a binding treaty between the two major international organizations. The negotiating agencies were the International Labour Office and the General Conference of E.C.O.S.O. C.and the agreement was approved by the International Labour Conference and E.C.O.S.O.C. The Convention has been deposited with the U.N. Secretary General.

The administration of the *Freedom* of *Association Convention* has fallen upon I.L.O. That is to say, I.L.O. has established the implementing machinery and developed the procedures. Similarities can be detected with the supervisory complaints procedures. In particular the roles of the General Conference the Governing Body, and the International Labour Office are, generally speaking, quite similar, to these other procedures. However, special committees have been established to implement the Convention and conduct the necessary investigations, namely The Committee on Freedom of Association and, secondly, the Fact-Finding and Conciliation Commission on Freedom of Association.

The supervisory body is the Committee on Freedom of Association. It is appointed by the Governing Body, and its membership of nine individuals preserves the tripartite structure, with three representatives from labour, three from employers, and six from governments. This committee has assumed all of the functions, including the screening of complaints, except in the few instances where a special three-man fact-finding and conciliation commission has been established, often to make an on-the-spot inspection. One basic distinction between the two main committees and the three member fact-finding and conciliation commissions must be noted. It is essential that the several special organs created under the authority of the *Freedom of Association Convention* not be confused with each other or with the committees and commissions, discussed above, that are created under the I.L.O. constitution. The two committees are : (1) The Committee on Freedom of Association of the Governing Body and (2) the Fact-Finding and Conciliation Commission on Freedom of Association. This latter Commission consists of ten elected members. A panel of three is chosen from their ranks by the Governing Body to deal with a particular case. To date two such committees have been established.

These two organs function on a permanent basis whereas the three-member panels are *ad hoc* and can only be set up with the permission of the defendant State. The Committee on Freedom of Association makes the preliminary evaluation of all complaints received ; further it has extended its activities to encompass an examination on the merits.[120] As such, it serves

120 In a manner similar to the sub-commission of the European Commission of Human Rights.

as an alternative to the conciliation commission, in those instances wherein a conciliation commission might experience difficulty.[121]

The Committee, therefore, is the main organ enforcing the body of conventions protecting labour's right to organize. It is important to note that the Committee deals with all phases of freedom of association.

Of primary significance to the present study is the fact that 600 complaints have been considered, and, as part of this practice, a major corpus of case law has been created.

The second organ, authorized by the machinery created in 1950, is the Fact-Finding and Conciliation Commission on Freedom of Association. As will become apparent from a discussion of the cases, very distinguished persons (and chairmen) have been selected. The personnel are equal in status to the judges on international and regional courts.[122]

The machinery for the appointment of these committees was set up jointly by the Governing Body ; E.C.O.S.O.C. accepted the services of I.L.O. on behalf of the U.N. The reason that the conciliation commission has had a much lighter case load (approximately eighty cases) is that the Fact-Finding Commission can only assume jurisdiction if the State has given its prior consent. The basic principle, even as to States that have ratified the Freedom of Association Convention, is that no case may be referred to the Fact-Finding and Conciliation Commission without the consent of the Government. One exception may be noted ; if a ratified convention is at issue a commission of inquiry under the representation procedure (Article 26) may be designated. The first situation in which compulsory jurisdiction has been assumed has not given rise to any litigation. On the other hand, in two cases the non-ratifying State has given permission, i.e. Japan and Greece. Such voluntary compliance, representing a significant surrender of national sovereignty, demonstrates the force of I.L.O. Common Law, and the respect accorded by States. Earlier it has been made out that the Right of Freedom of Association for Trade Union Purposes has become a recognized human right under international law, because the major industrialized nations have adopted a number of related I.L.O. conventions, the total effect of which have created a new international obliga-

121 Valticos, I.L.O. and Human Rights, supra note 34, at 26.

122 See discussion of cases in C. Alexandrowicz, supra note 54, at 94-103. As Dr. Valticos points out :

"In an appreciable number of cases the recommendations of the Committee have been acted upon ; laws have been repealed or amended, and factual situations have been remedied.....[B] y introducing in this area a general obligation on states to account for their actions, even if they have not ratified the particular Conventions, this procedure has had a wider effect and has indirectly influenced the conduct of governments."

Valticos, I.L.O. and Human Rights, supra note 34, at 27.



tion binding on all nations.[123] This belief was originally advanced by C. Wilfred Jenks. He has consistently argued that the right of association not only exists but continues to grow in scope.[124] Other writers now carry forward this basic concept :[125] their opinions are reinforced by the growing body of case law. It would be impractical to attempt a review of the six to seven hundred complaints referred to the two committees on Freedom of Association. Of particular interest, aside from the structure and functions of the two committees, are the procedural implications. As is true of the representation practice under the constitution, individuals have become "indirect" subjects of the law because of the fact that recognized labour associations can complain to the International Labour Office. Member governments can send complaints as can the General Assembly of the Economic and Social Council.

If a complaint is deemed acceptable, the State is under a legal duty to justify its actions, consistent with its rights as a sovereign under the I.L.O.

123 Gormley, Protection of Human Rights, supra not 12, at 39-40.

124 C. Jenks, The International Protection of Trade Union Freedom 530-62 (London : 1957). He concludes : "Conventions relating to freedom of association and related matters—civil liberties, including in particular freedom of association, have ceased to be a matter of domestic jurisdiction and have become a matter of international concern." Id. at 531. Jenks, The Scope of International Law, 31 Brit. Y. B. Int'l L. 1, 3 (1954).

As concerns pre-1951 actions see Jenks, supra "Introduction," International Protection of Trade Union Freedom.

In arriving at the conclusion that freedom of association is now incorporated within public international law, the following conventions are relied upon : (1) art. 20 in connection with articles 3, 8, 10, 11(2) of the Universal Declaration of Human Rights ; (2) the Covenants of Human and Economic Rights ; (3) AmericanDeclaration of the Rights and Duties of Man (Ninth International Conference of American States Bogota, 1948) ; (4) article 11, para. 1, of the European Convention of Human Rights and Fundamental Freedoms ; (5) the constitution of the I.L.O. and the Philadelphia Declaration ; (6) I.L.O. Conventions, and (7) I.L.O. Recommendations. For instance, the American Declaration of the Rights of Man provides in article 22 : ".....every person has the right to associate with others to promote, exercise, and protect his legitimate interests of a political, economic, religious, social, cultural, professional labour union or other nature.,' See United Nations Year Book of Human Rights 442 (1948).

The most recent international treaty codifying the legal right of freedom of association is : Inter-American Convention on Human Rights [Pact of San Jose, Costa Rica] (Opened for signature November 22, 1969). O.A.S. Off. Rec. OEA/Ser. K/XVI/1.1, Doc. 65. Rev. 1, Corr. 1 of January 7, 1970 ; 9 Int'l Legal Materials 673 (1970). Article 16 sets forth the right to Freedom of Association, and art. 15 deals with the right of assembly.

125 E.g., Valticos, supra notes 30 & 34.

Largely as the result of the receipt of the Nobel Peace Prize by I.L.O. in 1969, a number of recent publications have dealt with Freedom of Association. E.g., G.A. Johnston, "Freedom of Association," The Intenational Labour Organization : Its work for Social and Economic Progress 150-57 (London : 1970).

constitution. There are instances in which a State can withhold its consent to be inspected by a visiting commission. If the Conciliation Commission does not obtain the needed permission, the other agency, the Committee on Freedom of Association, will be forced to act. Consequently, the refusing State will not only lose the opportunity to defend itself, but the sanction of publicity through the publication will result. While a State is legally entitled to withhold its consent to an inspection by a conciliation commission, it remains bound by substantive law as set forth in a series of conventions. Furthermore it must comply with the special procedures, for there is no way to escape the actions of the Committee on Freedom of Association or the Governing Body of I.L.O., even though it has not ratified the Freedom of Association Convention.

This result is contrary to the public international law standard of treaty implementation, under which only States ratifying or adhering to a Convention can be subjected to the disputes-resolution Articles (or protocols). Under the "I.L.O. common law," mere membership (upon acceptance of the constitution) subjects the State to certain minimum standards, through the force of the constitution.

Considerable insight might be gained from an examination of the "nature of the I.L.O. common law" and *International Labour Code*, but the problem of the nature of the legal obligation arising under the Freedom of Association Convention would not be resolved because it is an agreement between international organizations. Consequently, what body of law governs this convention? For example, does it incorporate the constitution of I.L.O., as do other conventions? Does international law or United Nations law apply and if so to what degree and in what circumstances? It seems as if a special body of public international law is emerging. At the same time a body of international social and economic law is coming into being, which in turn will prove applicable to other conventions.

The primary example of compliance by a non-ratifying government was in the case of *Freedom of Association in Japan*.[126] Japanese trade unions lodged a complaint that gave rise to an important legal precedent. In spite of the fact that Japan has not ratified the Convention on Freedom of Association, it gave consent to the investigation by the conciliation commission. Of even greater significance, the Japanese Government consented to the on-the-spot inspection. Such compliance with a type of "common law" is a rarity in international life.

126 Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning Persons Employed in the Public Sector in Japan, 49 I.L.O. Off. Bull., No. 1, Spec. Supp. (1966).



The inspection team was headed by Erik Dreyer of Denmark, former Permanent Secretary to the Danish Ministry of Social Affairs and former President of his State's Mediation Board.[127]

The Japanese Government agreed to the inspection in April of 1964, and in May of that year the Fact-Finding and Conciliation Commission held its first session in Geneva. A second meeting was held at I.L.O. Headquarters from September 9th to 26th, at which time the Commission heard witnesses representing, on the one hand, the complaining organizations and, on the other, the Japanese Government. These Geneva meetings were conducted prior to the visit on Japanese soil. The team went to Japan in January of 1965 and conducted an on-the-spot inspection of labour conditions. Representatives of labour unions were consulted, as were officials of the Japanese Government.

This case represents a major advance in the development of international procedural law and also a significant step in the evolution of the World Rule of Law. Specifically, the *Case of Freedom of Association in Japan* constitutes a major step forward in the development of substantive law. Both procedural rules and substantive norms brought to light in this inspection will be of value to the interpretation of the U.N. Human Rights Covenants.[128] In consenting to the visitation, the Japanese Govenment brought great credit to itself in much the same manner as those European States fulfilling obligations under the European Convention of Human Rights. Such respect for the rule of law and the recognition of human rights shows the direction in which international law is evolving. The precedent will have ramifications far beyond the I.L.O. network.

A second application of the *Freedom of Association Convention* can be seen in the 1964 to 1966 *Case Concerning the Trade Union Situation in Greece*.[129] This action is commonly referred to as the First Greek Case, in order to avoid confusing it with the inspection instituted pursuant to the representation procedure,[130] several years later. Although this second investigation, "completed" in 1969, was not brought under the *Freedom of Association Convention*, it is

127 The other two members were the well-known American David Cole, former Director of the United States Federal Mediation and Conciliation Service, and Sir Arthur Tyndall, judge of the New Zealand Court of Arbitration. These three members were accompanied by C.Wilfred Jenks, who acted as a representative of the Director General, David A. Morse.

128 Cf. the use of inter-state complaint in the U.N. Human Rights Covenant on Civil and Political Rights, art. 41· Of. Supra note 71.

129 Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Trade Union Situation in Greece, 49 I.L.O. Off. Bull. Spec. Supp. 1 (1966). [Hereinafter referred to as the Greek Case].

130 Report of the Commission Appointed under Article 26 of the International Labour organization concerning the observance by the Government of Greece of Freedom of Association, 54 I.L.O. Off. Bull. Spec. Supp. No. 2 (1969).

referred to as the Second Greek Case. But it is essential to note that the two inspections of labour conditions in Greece have brought different procedural remedies into play. This first case, then, commenced in September of 1964, at which time complaints were submitted to the Governing Body by Greek labour organizations, alleging interference by the government with labour unions, coercive actions against labour officials, financial reprisals, and the passage of legislation that violated the rights set forth in the conventions.

One special feature of Greece's acceptance of I.L.O. proceedings has caused some confusion. Not only did Greece give its consent to an investigation and an on-the-spot inspection, "the government itself suggested that the question be referred to the Fact-Finding and Conciliation Commission."[131] But such request does not change the nature of the action ; it is still a complaint procedure, rather than a request from a government for an inspection.[132]

Specific allegations advanced by the Greek General Confederation of Labour [G.G.C.L.] involved the Greek Legislative Decree,[133] which, it was charged, the Greek Government ".... sought to place the trade union movement under government control, and to this end had interfered in a high-handed manner in trade union affairs, in complete disregard of the obligations imposed on it by Greece's ratification of the Freedom of Association.... Convention...."[134] Specific allegations related to governmental financing of trade unions on a discriminatory basis, and interference with trade unions and especially their officials.

Specifically, the G.G.C.L. refused to join forces with the Government in power (during 1964) but insisted on retaining its policy of political impartiality. Thereupon an opposition trade union, the Independent Trade Union Association of the Centre Union, was established ".... with a view to splitting the Greek trade union movement."[135]

The Greek Government consented to the establishment of the commission of inquiry, and it chose to defend on the merits. The government began its reply by reviewing the history of the trade union movement. Emphasis was placed on the war time conditions, enemy occupation, civil war and the abnormal situation resulting, that were still being felt. Moreover, the Government contended that the union leaders were neither authentic nor representative;

131 Greek case, supra note 129, at 2.

132 As was true in the earlier inspection of labour conditions in Spain, The Spanish Government requested the investigation by the I.L.O. See the discussion of this case, infra note 147.

133 No. 4361. Entered into force 2 Septeber 1964.

134 Greek Case, supra note 129, p 28, at 7.

135 Id. P 30, at 7. See also the allegations of financial pressure, id. P's 31-32, at 7-8. See also P's 33-42 for the allegations of the G.G.C.L. and the Government.



they had been installed by a prior government, and held their positions by force and intimidation. Accordingly the new legislation and governmental action was designed to restore (or ereate in the first instance) a democratic labour movement and, thereby, remove injustices.[136]

The Government defended its Decree. It ".... had introduced certain legal measures designed firstly to rid the country's legislation of all provisions which were in contradiction with the concept of free trade unionism, and second to create conditions in which the workers could elect their union executives without hindrance and in full freedom."[137]

Therefore the Committee of Inquiry examined the text of Legislative Decree No. 4361, in the light of the comments made by both sides.

The procedure for the examination of complaints was similar to that employed in the Japanese case. Thus the necessary precedent has been established ; it is merely followed in subsequent cases.

The complaint was examined by the Committee on Freedom of Association, and it was determined that an actual dispute was present. A three member panel was selected from the Fact-Finding and Conciliation Commission on Freedom of Association. Erik Dreyer was again selected to head the three man panel. He was joined by extremely distinguished French and Uruguayan colleagues.[138] The Commission held its first meeting in Geneva from 22 to 26 July 1965 in order to determine its program and procedure. At this stage plans were made for the second meeting in Geneva at which time witnesses would be granted an oral hearing. Subsequently a visit would have been made to Greece, and at the final meeting a report would have been prepared.

The planned second meeting never took place because the Greek Government requested, and was granted, a delay. Before the postponed meeting could be held in July of 1966, a dramatic development, that was ultimately to be of far greater sigificance to the law making role of I.L.O. than would have been a final holding on the merits, took place. The complaining organization, the G.G.C.L., sought to withdraw its complaint and terminate the action, before the Committee of Inquiry could render its findings. The G.G.C.L. also requested that the examination by the Commission be terminated.[139] This issue, the right of a complainant to terminate its action, had not been faced by a conciliation commission acting under authority of the Freedom of Association Convention, although it had arisen under the representation procedures. The precise issue, then, became : does the mere request by a plaintiff to discon-

136 Greek Case, supra note 129, Ch. 5, P 102, at 20 et. seq.

137 Id. at 9.

138 Membership of the three member commission id. P 8, at 2.

139 Id. Ch. 10, at p. 65.

tinue an action, automatically terminate the proceedings? Could a State (especially one that was obviously faring badly during an inspection) withdraw its consent to the existence of the conciliation commission or to an on-the-spot inspection? This second issue, the right of a State to rescind its consent, was introduced-by way of *dictum*. The Greek Government did not seek to suspend the investigation. The potential damage that such a termination could produce to the whole scheme of I.L.O. supervision is enormous, although the organization could do little to commence an inspection (or continue with one that had already begun) if the State withdrew its permission.[140] Nonetheless the I.L.O. has avoided the complete breakdown of its implementation procedures; the type of default that resulted from attempts to enforce the 1947 Peace Treaties on Communist Satellite States—has not occurred, as can be seen from a prior instance, that confronted the Committee on Freedom of Association. It was held that, while full account would be taken of such request, it ".... was not sufficient in itself for the Committee automatically to cease to proceed further with the case."[141]

Acting on the basis of the principle formulated by the Governing Body, the Committee on Freedom of Association decided that it alone was competent to evaluate in full freedom the reason put forward to explain the withdrawal of a complaint and to endeavour to establish whether these appeared to be sufficiently plausible so that it might be concluded that the withdrawal was made in full independence."[142]

Therefore the I.L.O. has adopted a position that is identical to that of the Council of Europe. It may however be pointed out by way of illustra-

140 E. g., the I.L.O. has not been able to protect private delegates to the General Conference. Examples exist where they have been prevented by their governments from attending sessions in Geneva.

The Commission noted the prior example from the representation procedure. In 1937 an Indian Labour Association sought to terminate a complaint.

"[T] he Governing Body had formulated the principle that, once a representation had been submitted to it, it alone was competent to decide what effect should be given to it and that the withdrawal by the organization making the representation is not always proof that the representation is not receivable or is not well founded." Greek Case, supra note 129 P 418, at 80.

141 Id. By way of example, see the discussion of the three Balkan states, Bulgaria, Hungary, Romania, as to their obligations under the 1947 Peace Treaties, in: Gormley, The Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith, 14 St. Louis U. L.J. 367, 420 (1970).

Advisory Opinion on the Interpretation of the Peace Treaties With Bulgaria, Hungary and Romania (Second Phase), [1950] I.C.J. 221 (opinion of July 18, 1950); 44 Am. J. Int'l L. 752 (1950). See also, Kertz, Human Rights in the Peace Treaties, 14 Law & Contemp. Prob. 627 (1949); G. Fitzmaurice, The Juridical Clauses of the Peace Treaties, 73 Recueil des Cours 259 (1948 II).

142 Greek Case, supra note 129, 420, at 80.



tion, that the Court of Human Rights in *De Becker v. Belgium*[143] refused to discontinue a case merely on a request from petitioner.

There is always the danger that the private groups and their representatives might be subjected to coercion and intimidation; consequently, an investigation must be made by the Committee of Inquiry to determine whether or not the deficiencies originally complained of have, in fact, been corrected? Thus, the basic rule has been established; it will govern future actions. Additional considerations may arise in the future, e.g. can the Committee on Freedom of Association or the Governing Body subsequently reopen a proceeding that has been terminated, perhaps on the "legal fiction" that a follow-up examination of labour standards is taking place? In the Greek case, such an alternative is implied, for the Commission indicated[144] that the opportunity would be taken to observe future legislative texts, safeguarding trade union rights.[145]

The basis of the termination of the complaint was a series of promises that steps would be taken and that additional legislation would be enacted. This is not to say that no improvements had been made; some of the repressive legislation had been repealed. Moreover, communication and working relationships had been established between the Government and Labour Organizations. The key factor was that the request to discontinue the investigation had been freely undertaken. Thus the termination of the action can be compared to that of the Council of Europe in the *De Becker case*. Yet the reality of the political situation confronting I.L.O. in November of 1965[146] was recognized. Little could have been accomplished by a continuation of the fact-finding and conciliation effort.

The investigation of labour conditions in Greece, brought under the representation procedures, which was completed in 1969 and the final report of which was debated-by the Governing Body in 1970, should be contrasted with the 1964-1966 action. Specifically, the Second Greek Case, was brought under the representation procedures, rather than the Convention on Freedom of Association, for two reasons. First, no labour association was in a position to communicate, let alone petition, an international organization, after 1967.

143 "De Becker" Case[1962] Eur. Conv. on Human Rights Y.B. 320 (merits).

144 "Conclusions, "Greek Case, supra note 129 P 442. at 83.

145 Id. P 442 at 83.

146 Id. P 139 at 27.

In its Conclusions the Commission held:

"[I]t appears from the statements of his representative that the withdrawal has been made freely by th complainant, as a result of various considerations relating to developments in the trade union situation [and], the marked lessening of the tension which had previously existed....."

Id. P 434, at 82, in connection with P 441, at 83.

Under the representation procedures the original complaint was made by delegates in the Governing Body. Second, the permission of the accused government is not required under Article 26 of the constitution. The present case, then, utilizes a commission of inquiry, functioning under the authority of the Governing Body (and the I.L.O. constitution), not the Freedom of Association Convention. Had the ruling military government in Greece not cooperated with the Commission ofInquiry it would have been placed in position of violating its obligations under the I.L.O. constitution and implementing labour conventions. Despite the fact that Greece withdrew from the Council of Europe in December 1969, it accepted the findings of the Commission of Inquiry and took part in subsequent proceedings at Geneva.

### E. Specific Requests from Governments, and Newer Procedures

The basis of much of I.L.O.'s work is to be found in simple cooperation with member States. On the one hand, I.L.O. gradually extends its competence over such areas as unratified conventions and recommendations; but, at the same time, it quickly responds to requests from governments, even though no specific grant of jurisdiction is to be found in the constitution. Both of these trends are evident in the recent investigation of Labour Conditions in Spain.[147] The Spanish Government sent a request to the International Labour Office for an inspection of labour conditions. The Spanish Government requested the aid of the I.L.O. because local authorities lacked the knowledge and resources to deal with very technical labour questions. This request was approved by the Governing Body. The law-making impact of this decision must not be minimized: a new procedural remedy has been recognized. Specifically, the three member commission headed by Paul Ruegger of Switzerland (a member of the Permanent Court of Arbitration) served as a "study group." It recommended that the whole question of labour reform in Spain be freely discussed and that the report of the study group be circulated throughout Spain and also throughout the international trade union movement. Emphasis was placed on Spanish initiative; i.e. that the Spaniards determine the future course of their labour movement, but with the added factor of world publicity.

No specific constitutional provision sets out the request procedure. No convention is devoted to this area. Consequently, I.L.O. could have refused to assume jurisdiction; in fact, international insitutions, especially judicial and quasi-judicial organs, refuse to extend their competence. Yet the I.L.O. takes the position that it can undertake any actions, with the permission of the States in question. The only limitations would involve the obvious

147 Towards Reform of Trade Union Law, Report of the Study Group of Conditions In Spain, 1968 [beeinafter cited as Spanish Casej, 51 I.L.O. Off. Bull. Spec. Supp. (1968).



limits of its resources, the very imprecise outer limits set forth in the constitution, or the general norms of international law.

In terms of I.L.O.'s general competence, the requests procedure (and many technical services)[148] are in one sense the oldest procedures. Article 10(1) (in conjunction with Articles 11 and 12) provide:

> "The functions of the International Labour Office shall include the collection and distribution of information on all subjects relating to the international adjustment of conditions of industrial life and labour, and particularly the examination of subjects which it is proposed to bring before the Conference with a view to the conclusion of international Conventions, and the conduct of such special investigations as may be ordered by the Conference or by the Governing Body."

From the general authority set forth in the constitution, a number of special procedures have been developed during the last several years for the purpose of increasing the cooperation with governments, by means of direct, and often continual, contacts.[149] The aim is to secure more effective compliance with conventions; but of even greater sigificance, many nations are in need of advice and technical assistance in order to raise their standards. As is true of many other systems, including regional efforts, assistance and advice are required, rather than coercion, as shown by the Spanish request and the cooperation of the Greek Government in the recent action. Numerous developing States, including older nations such as Greece and Spain, because of their lack of prior industrial experience, are often unable to determine if they are meeting current standards. As shown in the Spanish inspection, labour conditions are changing at an unprecedented rate. Moreover, as States adopt a greater number of the optional and escalation provisions in I.L.O. conventions, the standards of human rights protection are raised. In particular, the new nations are unable to adequatly cope with the sophisticated industrial and labour criteria, as can western European and North American Governments.[150]

Dr. Valticos speaks of "a more fruitful dialogue with governments."[151] The ramifications of this newer approach are enormous, for all phases of I.L.O. supervision are being expanded to reflect the shift in emphasis taking place

148 The expanding program of I.L.O. technical services, which is being decentralized into regional groupings, is not related to the topics under discussion here. The human rights activities will remain in Geneva and be administered by the general organs of I.L.O.

149 Relatively little information is available concerning the functioning of the special procedures, since they are still at an embryonic stage. See Valticos, I.L.O. and Human Rights, supra note 34, at 28 & 29; and Valticos, supra note 30, at 36-37.

150 See supra note 148. These examples of technical assistance represent one phase of the increasing degree of cooperation with governments.

151 Valticos, Standard Setting Activities, supra note 30, at 36.

in the whole U. N. sphere of human rights protection. Greater emphasis is being placed on the protection of human rights rather than the mere promotion of standards (and declarations).[152] Without weakening the existing program of advancing international labour legislation and supervisory schemes, a more aggressive approach is being taken, so as to deal more forcefully with those shortcomings in need of special attention, as for example the seventeen basic conventions. A special survey of these key conventions was made to coincide with I.L.O.'s fiftieth anniversary. Since these special procedures date from 1968, it is impossible to evaluate them in detail ; yet one analogy may be helpful. The I.L.O. has frequently collaborated with other institutions, especially E.C.O.S.O.C., U.N.E.S.C.O., the U.N., and the Council of Europe. Notice may be taken of the 1960 Convention Against Discrimination in Teaching,[153] and the 1962 Protocol. The I.L.O. and U.N.E.S.C.O. each contributed six experts who worked together.[154] Likewise the European Social Charter was drafted in Geneva on behalf of the Council of Europe,[155] and I.L.O. experts played a major part in drafting the United Nations Covenant on Economic, Social, and Cultural Rights.[156] This notion of cooperation is now being applied to member governments. Indeed it becomes difficult to define the precise boundaries between cooperation, collaboration, and inspiration. The I.L.O. will make its greatest contribution in the future as it provides inspiration to other organizations. Precisely, the I.L.O. provided the main inspiration (and legal precedent) to E.C.O.S.O.C. and its sub-commission on human rights, during the twenty years the U. N. Covenants were being drafted. Inspiration and help may prove to be equally significant to duplication, since very few organizations will be in a position to copy I.L.O. techniques. They lack a tripartite structure, but they can gain inspiration from I.L.O. successes.[157] The present writer has

152 "[P]rogress in supervisory procedures has lead to an enlargement in two respects. In the first place the scope of the supervision has been extended, since it does not confine itself to checking observance of the obligations arising out of ratification of the Conventions but promotes application of the standards more generally, irrespective of the formal obligations assumed. Secondly, the methods have been diversified to meet the variety of situations and needs encountered."
Id. at 37.

153 Discussed in N. Valticos, supra note 12.

154 See also the U.N.E.S.C.O. Protocol on the Elimination of Discrimination In Education (1962).

155 Tennfjord, The European Social Charter : An Instrument of Social Collaboration in Europe, 7 European Y.B. 71 (1962). Smyth, The Implementation of the European Social Charter in: Melanges Modinos 290 (1968). N.A.M. Green, Droits Sociaux et Normes Regionales, 9 J. du Droit International 58 (1969) ; W. Gormley, supra note 49, at 87-89.

156 Supra note 62 ; 61 Am. J. Int'l L. 861 (1967).

157 C. Alexandrowicz, The Contribution of the U.P.U., I.T.U. and I.L.O. to the Development of Principles of International Law, Volkenrechtelijke Opstellen Aangeboden ann Prof. Gesina H. J. van der Molen [Molen Collection] 12-27 (1962).



advocated that the U. N. adopt some of the reporting, supervisory, and inspection techniques (perhaps in a modified form) even though the structure of the institutions is not identical.[158]

## VII

## SANCTIONS

The shifting emphasis toward cooperation and technical assistance has in no respect been accompanied by a weakening of the supervisory machinery. As already noted in the preceding discussion, the major sanction available to the I.L.O. is publicity but with one added factor. The International Labour Organization places stress on publication of violations of convention standards. The League of Nations (in its minorities and mandates systems) and the U.N. Trusteeship system rely on public debate in the General Assembly (and some of its committees) ; I.L.O. produces a permanent record, that can be analogized to the *Book of the Dead* on the basis of which a final judgment is pronounced. The concept that "nothing shall remain unpublished" was the foundation of the moral sanction from classical international law. As mentioned in the Second Chapter to the present study, the moral sanction was administered by the Christian Church ; it held a position superior to sovereign kings and princes.[159] Modern day sanctioning must depend on the news media ; therefore, the rather specialized approach of I.L.O. is worthy of note, because of the fact that the U.N. Covenants have copied much of the publishing techniques through a system of transmitting reports.[160] It will be recalled that in addition to the records perfected under the reporting system, the complaint procedure incorporates a specific provision for publication as a means of sanctioning. Article 25 of the constitution provides that if a State fails to submit an answer to a representation, within a reasonable time, or if such reply is deemed unsatisfactory, the Governing Body shall have the right to publish the complaint and any answer. Such sanction forces compliance in the majority of cases.

The complaint procedure has a stronger sense of establishing a permanent record than do the supervisory Articles. Article 29 provides that the report of the Commission of Inquiry shall be published.

158 Gormley, The Use of Public Opinion and Reporting Devices to Achieve World Law : Adoption of I.L.O. Practices by the U.N., 32 Albany L. Rev. 273 (1968).

159 Damas, Sanctions of International Arbitration, 5 Am. J. Int'l L. 934 (1911). Scott, The Legal Nature of International Law, I Am. J. Int'l L. 831 (1907) ; and particularly Sloan, Comparative International and Municipal Law Sanctions, 127 Neb. L. Rev. 1 (1947). See also Sanctions Symposium, 49 Iowa L. Rev. 229 (1964).

160 The U.N. Covenants contain several references to the publication of reports and their transfer to other agencies. See supra note 71. C. Jenks, "Methods of Securing Compliance with International Decisions and Awards," The Prospects of International Adjudication 663-726 (London : 1964).

An identical result can be seen in the procedures existing under the Freedom of Association Convention. All proceedings and the report of the Committee of Inquiry are published.

The present efforts of I.L.O. are being directed toward those areas in need of greater attention. A special listing is made of those States failing to fulfil substantive obligations, or have not provided the required information in their reports or in answers to inquiries from the Governing Body.

The *Special Problems* constituting the Third Section of the Report of the International Labour Conference,[161] can be deemed to constitute a sanction.

Under the special procedures (more corectly special investigations) the government involved is given every encouragement to supply additional information and to send representatives to participate in the Committee's investigations.

The Committee on the Application of Conventions and Recommendations then begins to list the defaulting States under appropriate categories. Those States that did not participate in the Committee's examination are noted. In 1968 Afghanistan, Bolivia, Dahomey, Haiti, Iceland and Laos "had been unable to participate."[162]

> "It [the Committee] agreed that any comments on cases relating to those countries should, where appropriate, be incorporated in the special list and in the appendices to the Committee's report and communicated to the countries concerned, in accordance with the usual procedure."[163]

161 The example cited in the present study is: International Labour Conference, Provisional Record. 52d Sess: No. 27, Appendices [Hereinafter cited as "Special Problems"].

A similar type of publication as a means of sanctioning can be seen in the permanent record of the International Labour Conference. E.g., International Labour Conference, 52d. Sess., Geneva 1968, Third Item on the Agenda, Information and Reports on the Application of Conventions and Recommendations, Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the constitution) (Geneva: 1968). See e.g., Special Problems, supra P 32, at p.V.

By way of comparison, the Trusteeship Council publishes records of States failing to fulfil obligations. One of the most frequent violations by administering powers is the failure to submit complete reports to the Trusteeship Council.

162 Id. IP. 28, at p. IV.

The opening paragraph of Section 3, "Special Problems," devotes ".....a separate section [of the Report] drawing the attention of the Conference to cases where governments apparently encountered serious difficulties in discharging certain of their obligations under the I.L.O constitution or under Conventions they have ratified." Id. P 26, at p. IV.

163 Id. P 28, at p. IV.



The "Black List" is then broken down into three general classes of defaults (with appropriate sub-divisions). First, *Constitutional Obligations* are treated. The four sub-groupings: (*a*) instances where no reports as to ratified conventions have been supplied, during the two year period;[164] *b*) those cases where first reports as to recently ratified conventions have not been supplied;[165] *c*) the States that have not submitted reports on unratified conventions and recommendations, during the preceding five years;[166] and, finally, (*d*) the examples of States that have not submitted conventions and recommendations approved at Geneva to their legislative authorities,[167] are listed.

The Second category covers *Application of Ratified Conventions*. Those States failing to supply the required information, based on the questionnaires prepared by the International Labour Office, are designated. Included within this category are cases where direct requests have been made for supplemental information. If "[n]o information has been received as regards all or most of the observations and direct requests to which a reply was requested...."[168] such failure to respond is noted.[169]

A further classification lists the most serious breaches of convention obligations. The supervision exercised by the Conference Committee reveals that particular States are violating their treaty commitments under one or more conventions; therefore, the States are listed along with the conventions in question. For example, in 1968 the following States were "blacklisted" "....*Argentina* (Conventions Nos. 8,32, 87, 88), *Greece* (Convention No. 87), *Liberia* (Convention No. 29), *Pakistan* (Convention No. 96), *Portugal* (convention No. 105)."[170]

Additional provisions are contained in the reports of "Special Problems," but a full review need not be given.[171]

Other sanctions are at least potentially available in Articles 30-34 of the I.L.O. constitution.[172] The right of appeal to the International Court of Justice has already been noted in another connection. In terms of enforcement, the juridical sanction is brought into play. The prestige of the Court

164 E.g., in 1968 Indonesia and El Salvador.

165 In 1968, Ecuador and Honduras.

166 As required by art. 19, para's 5-7, I.L.O. const. In 1968 Lebanon and El Salvador.

167 As required by art. 19, I.L.O. const. In 1968 Lebanon and Panama.

168 Special Problem, supra note 161, P E, at p. IV.

169 In 1968 Argentina, P 31, at p. V.

170 Id. P F, at p. V.

171 See e.g., id. P's 30-31, and the full text of P 32, in connection with P 33. See generally the Hague Lectures of Dr. N. Valticos, supra note 12.

172 H. Saba, L'Activité Quasi Législative des Institutions Spécialisées des Nations Unies, 111 Recueil des Cours 604 (1964 I).

handing down the decision adds coercive force to its decision.[173] A holding of the I.C.J. must be implemented. The requirement of automatic enforcement is similar to that found within the E.E.C., wherein all judicial verdicts "shall have executive force."[174] Further enforcement measures are set forth in Article 33, but the precise sanctions are not spelled out; rather Article 33 refers to general standards of international law, as they may be brought into play by the Governing Body. The inportant consideration is that organs of the I.L.O. have a reserve of power to take some measures to guarantee compliance, if such steps become necessary.[175]

One particular weakness in the I.L.O.'s sanctioning procedure is that no authority is set forth in the constitution for the suspension or expulsion of a member.[176] The omission is deliberate, the aim is to keep States in the Organization, so that continual pressure can be applied. It is, however, possible for a State to withdraw, as has been true of South Africa (and Nazi Germany, during the inter-war period). To remedy this situation, two constitutional amendments were proposed in 1964 that would have made it possible for a member to be suspended or expelled. In reality, South Africa withdrew before being "thrown out". While the two constitutional amendments have not been adopted, there is always the possibility that they could be revived in an appropriate situation. Nonetheless, I.L.O. continues to rely on constant pressure to secure eventual compliance. To this end, Article 34 recognizes a later compliance, probably in situations where a State lacks the resources to immediately effect the necessary improvements.

"The defaulting Government may at any time inform the Governing Body that it has taken the steps necessary to comply with the recommendations of the Commission of Inquiry or with those in the decision of the International Court of Justice...."

173 Article 37, para. 2, I.L.O. constitution, reinforces article 31 by stating:

".....Any applicable judgment or advisory opinion of the International Court of Justice shall be binding upon any tribunal estabilished in virture of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be brought before the Conference."

174 Article 92, para. 1, Treaty Establishing the European Coal and Steel Community. Likewise, Article 53 of the European Convention of HumanRights and Fundamental Freedoms provides that "The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties."

175 Supra note 103, and the text of art. 33, reproduced in part.

176 The E.E.C. Treaty is similar; therefore, any dispute between a State and the E.E.C. over a possible withdrawal must be resolved by international law. Discussed in Gormley, "International and Regional Organizations Compared," The Codification of Pacta Sunt Servanda, 14 St. Louis U. L. J. 367, 407-09 (1970).



The latter portion of Article 34 provides for a follow-up examination by a Commission of Inquiry, specially constituted to verify the factual situation. This provision, however, is not mandatory: the request *may* be made.[177] In the majority of instances such inquiry would not be necessary, for the Good Faith shown by the State would assure compliance. Pacta Sunt Servanda stands behind the I.L.O.'s scheme of enforcement.[178]

## VIII. CONCLUSIONS

1. The main source of precedent for the imple mentation of the U.N. Human Rights Covenants will be the supervisory system, reports and complaint procedure, perfected by the I.L.O. The International Labour Organization has developed the practice of continual supervision of ratified international legislation to the highest degree of perfection of any multilateral organization. By way of comparison, the Council of Europe does not have comprehensive machinery to supervise the implementation of the sixty conventions in its European Treaty Series. Rather, the Council of Europe has a judicial system but lacks the competence to appear before the International Court or request an advisory opinion. An identical situation will exist when the U.N. Human Rights Covenants are ratified, because supervisory organs will be created but not a judicial regime. The reporting practices of I.L.O. will be emulated, in the first instance.

A parallel structure and practice can be detected between the Trusteeship System and the Covenants, primarily because the use of such U.N. organs as the Office of Secretary-General, the Secretariat, the General Assembly, and its Committees. The U.N. General Assembly will be utilized; however, the actual implementation of the rights codified in the two Covenants will be accomplished by special committees and commissions (and sub-commissions) set up by the Committee on Human Rights. These "working agencies" will

177 The State ".....may request it [the Governing Body] to constitute a Commission of Inquiry to verify its contention. In this case the provisions of Articles 27, 28, 29, 31, and 32 shall apply....." Art. 34, I.L.O. const.

178 E. Landy, supra note 18, at 2.

In summing up the total effect of several sanctioning techniques Mahaim maintains:

"All of them [labour laws and legislation] represent a strengthening of the public conscience, since they impose compulsory regulations, prohibitions, and restrictions on the private interests of manufacturers, in the interest of what are regarded as higher considerations: the life, health, safety, morals, and liberty of the workers..... [T]he need for legislation arises from the union of two social postulates—the requirements of public morality and the administrative necessity for compulsion."

E. Mahaim, "The Historical and Social Importance of International Labour Legislation", in: 1 The Origins of the I.L.O. supra note 5, at 13.

be patterned on the Commissions of Inquiry and the various committees on Application of Labour standards set up at Geneva. Many of the techniques developed by League agencies and the Trusteeship System will be employed; however, these institutions have not achieved such a high degree of positive results in the realm of supervision. However, I.L.O. has not perfected a method of individual petition or a judicial order.

Of all the systems examined in the present study, I.L.O. has evolved *the most sophisticated supervisory machinery* found within the U.N. sphere; furthermore, it rivals, and for the most part surpasses, even the Council of Human Rights Covenants, i.e. annual reports, study commissions, special surveys of selected groups of conventions, examination of specific subject matter areas, interrogations of national representatives, and in a few pressing situations on-the-spot inspections. Sanctioning machinery is also available as is the right to verify compliance with opinions of the Governing Body and the International Court of Justice.

The importance of the newer techniques developed jointly by the U.N. and the I.L.O. in connection with the Freedom of Association Convention will constitute valuable precedent when the Covenants come into force. In particular, the success of the Commissions of Inquiry of Freedom of Association can serve as a guide for the future.

2. The application of I.L.O. supervisory and enforcement techniques to the U.N. Covenants was stressed by the International Labour conference, during the 1968 Human Rights Year Observances.[179] The 1968 "Report of the Committee on the Application of Conventions and Recommendations" stated that—

> "It was directly concerned with the protection of human rights in several respects. In the first place international Labour Conventions, the application of which the Committee was required to supervise, related for the most part and in a more detailed manner to the rights enshrined also in the Universal Declaration of Human Rights of 1948 and the International Covenants of Human Rights of 1966. In the second place the system of supervision, of which the Committee was an important element, and which was without any doubt the most advanced in the organisations of the United Nations family, could play an important role in the application of the Covenants once they had come into force, and particularly of the Covenant on Economic, Social and Cultural Rights, which provided specifically for arrangements of this type between the United Nations and the specialized agencies.

179 The I.L.O. and Human Rights: Report of the Director-General (Part I) to the International Labour Conference. Report Presented by the I.L.O. to the International Conference on Human Rights, 1968 (Geneva: 1968).



> The work of the Committee, therefore, was not only of fundamental importance to the realisation of the objectives of the I.L.O.; it could also make an important contribution to the work of the United Nations in the international protection of human rights".[180]

The International Labour Conference also suggested in the subsequent paragraph that I.L.O. encourage member States to ratify labour conventions in order to strengthen the global development of human rights.[181]

The reason that the above statement is being incorporated as a conclusion in this study is: the I.L.O. has reached the maximum degree of supervision of internal labour standards and human rights,[182] consistent with national sovereignty. That is to say, the sovereign State is still supreme, and any regime of human rights protection must be geared to this reality. This is not to suggest that new and more desirable solutions will not be forthcoming; rather the I.L.O. has had considerable experience in dealing with all types of governments, including totalitarian powers that will not cooperate with the U.N. Therefore a situation has been reached in which labour unions have achieved some voice in the settling of labour standards, working conditions, social services, and human rights protection. Prior to international efforts, culminating in the establishment of I.L.O. in 1919, municipal law had exclusive jurisdiction over labour law. However, the other extreme, anarcho-syndicalism, wherein the trade union emerges as the dominant power and takes charge and directs the running of industry has not been reached.[183] Indeed such extreme has never been advocated by an inter-governmental organization. Yet the extreme alternative, a phase of anarchy, can be seen in actions of some labour leaders and political movements, designed to destroy the national legal order. In achieving a corpus of international law, namely the "International Labour Code" and "I.LO.. Common Law," protection has been given to private interests, while at the same time preserving the integrity of governments. Thus, a middle-ground has been reached within I.L.O. organs, for the reason that private labour representatives are participants in developing new law and procedural remedies. Because of the contributions of these private interests, the evolution of the resulting substantive law, arising from multinational conventions, must not be minimized, when procedural remedies are examined.

3. Many specifics in the adoption of I.L.O. standards by the U.N. to implement the Covenants and other U.N. Human Rights Conventions have

180 Special Problems, supra note 161, P 3, at 1.

181 Id. P 4, at 1.

182 Aside from human rights guarantees, examples can be cited in which international institutions exercise almost dictatorial authority but only as to selected areas. An example would be W.H.O.

183 B. Wortley, Jurisprudence 17-18 (Manchester: 1967).

been noted; however, attention should be given to specific devices. The creation of committees to carry out the work of the parent organization has been stressed. In turn these smaller groups evolve new procedural remedies, supervisory machinery, and sanctioning devices. In this regard, special notice must be taken of the newer phase of I.L.O. supervision and sanctioning, e.g. the Special Problems (Black List) and, since 1968, more direct cooperation with governments. These newer approaches will be used in the scheme of the Covenants. In particular, the Covenants rely on the published record and its transmission to several agencies; moreover it is possible to suppose that attempts will be made to develop a spirit of cooperation (and conciliation procedures) to bring the U.N. Covenants to life in much the same manner in which the I.L.O. has moved from the philosophical notion of "Social Justice" to an "I.L.O. Common Law" and a more precise "International Labour Code." C. Wilfred Jenks, conceives of the concepts of "Social Justice" and "I.L.O. Common Law" as constituting a modern *Jus Gentium.*[184] He maintains:

> "The International Labour Code has been and remains the backbone of the work of the International Labour Organization and its impact on the social legislation of industrial societies has been, and may be expected to remain, comparable with that of the *corpus juris* or the civil law."[185]

4. The limitations inherent in the I.L.O. system must be noted, primarily as analogies are drawn to the U.N. Covenants. The inhibiting factor in attempting to duplicate I.L.O. procedures is the difference in structure and composition of membership between the I.L.O. and other inter-governmental institutions. The tripartite structure has given rise to the special jurisdiction; therefore, plans seeking to copy I.L.O. practices must take account of the different elements involved, e.g. private groups have a representation equal to that of governments.[186] Dr. Valticos, one of the more scientific

184 C. Jenks, "The Corpus of Social Justice," Law Freedom and Welfare, 103-36 (London: 1963).

185 Id. at 136. This concept of a modern *corpus juris* is included in his nine principles constituting a Universal Legal Order: C. Jenks, The Common Law of Mankind 120-21 (London: 1958). See the discussion of two of his principles, i.e. *pacta sunt servanda* and human rights, reviewed in Gormley, supra note 176, at 374-75. See also supra note 144.

186 The present writer is a strong advocate of the duplication, indeed of copying, those procedural devices that have been previously tested. In short, the U.N. benefits from the success of its specialized agencies: Gormley, The Use of Public Opinion and Reporting Devices to Achieve World Law: Adoption of I.L.O. Practices by the U.N.' 32 Albany L. Review 273 (1968), See also C. Alexandrowicz, "The Contribution of the U.P.U., I.T.U. and I.L.O. to the Development of Principles of International Law, " in Volkenrechteljike Opostellen Aangeboden ann Prof. Gesina H.J. van der Molen [Molen Collection] 12-27 (1962).



scholars, who feels that proposals seeking to duplicate I.L.O. success often tend to overlook these special characteristics of I.L.O., suggests that I.L.O. cannot be copied. Yet some of the devices (such as biennial reporting, conciliation commissions, and on-the-spot inspections) have already been duplicated. Of greater significance, I.L.O. has *inspired* other organizations:[187] consequently, I.L.O. can serve as a guide. The inspiration provided, based on prior success, will prove to be I.L.O.'s greatest contribution. In addition, techniques of conciliation and co-operation presently being explored by I.L.O. will be helpful when the U.N. Covenants come into force.

In noting the shortcomings of I.L.O., it needs to be recognized that no Judicial Branch has been perfected, although the I.C.J. can be used. I.L.O., then, does not represent a complete system. Because of this limitation, it is closer to the U.N. programs, rather than to the regional organizations.

5. The position taken by I.L.O. is that international supervision is superior to competing regional systems. Their approach is that too many regional organizations will, necessarily, result in lower standards of protection being applied in some regions, a fact that becomes apparent from the comparisons made in this study. While regional differences are not inherently undesirable,[188] because human rights protection must evolve from the practice of States, the value of I.L.O.'s minimum global standards must not be minimized. They are continually being raised, through the use of escalation devices, incorporated within the conventions. No regression in the evolution of the International Labour Code has been evident. Temporary setbacks (caused by local difficulties often the result of warfare) have not had a significant impact on the progress achieved at Geneva, despite antagonism shown by a few States.

A similar evolution of human rights protection can be anticipated when the U.N. Covenants enter into force. They will set forth codified minimum human rights guarantees. Once these international minimums have been adopted, regional institutions can render a valuable contribution by imposing more sophisticated requirements, as can be seen from the European experience.

6. The I.L.O. success in creating effective minimum international standards may prove to be of value to other organizations (and regions), as they in turn develop new methods of protecting human rights. For example, the 130 I.L.O. conventions (plus recommendations and unratified conventions) have resulted in an International Labour code and I.L.O. Common Law, which is being incorporated into positive international law.

187 N. Valticos, Hague Lectures, supra note 12, and F. Wolf, supra note 36.

188 E.g., The Inter-American Convention on Human Rights, supra note 124, differs from the U.N. Covenants, the European Convention on Human Rights, and the European Social Charter. The Inter-American Convention can be deemed superior in some respects.

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But of even greater significance, the *Convention on freedom of Association* is indicative of the type of human rights protection that can be established by the cooperative efforts of two organizations. The future trend of human rights protection is toward greater use of cooperative efforts between the U.N., I.L.O., U.N.E.S.C.O., E.C.O.S.O.C., and committees of the U.N. General Assembly. Sad to say, a regression must be conceded. There seems to be little support for further utilization of the International Court of Justice.

The reason for the success of such agreements between multinational organizations is that member governments are not in a position to restrain the creation of implementing machinery and procedural remedies, although States must ratify such Conventions. Much of the success of I.L.O. can be traced to the fact that it was in a position to develop its techniques (e.g. questionnaires) free from interference. For this reason, I.L.O. surpassed the Minorities and Mandates experiments of the League and has achieved a much greater success than other U.N. organs, such as The Trusteeship Council, E.C.O.S.O.C., and U.N.E.S.C.O.

7. As a postscript to the above conclusions, the recent action by the House of Representatives of the United States Congress must be conceded. The House voted not to pay America's share of financial support for the first half of 1971. Yet the U.S. remains a member of the organization and will retain its vote for two years.[189] This action can more properly be considered as one phase of growing American isolationism. But may it be suggested that the U.S. will "eventually" pay its contribution to the maintenance of I.L.O. In the immediate future, however, the reaction against I.L.O. by the U.S.[190] can be treated as one phase of its growing opposition to the United Nations. Taking a longer-range view, however, the U.S. (probably following negotiations with the organizations concerned) will retain its membership. Such political moves do not have a direct effect on the protection of human rights or in any way weaken the supporting supervisory structure.

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189 N. Y. Times, Oct. 7, 1970, at 15, col. 1-2.

190 E.g., Schwebel, The United States Assaults the I.L.O., 65 Am. J. Int'l L. 136 (1971).

# SOME ASPECTS OF GOVERNMENTAL LIABILITY FOR POLICE TORTS IN INDIA AND CALIFORNIA

VIJAY K. BHARDWAJ*

## I. INTRODUCTION

The history of governmental responsibility for police torts in India begins,[1] as it hitherto ends,[2] with immunity. Roots stretching out from the advent of British rule have trapped the courts of independent India and even where judges have discovered injustices and decried them, they have felt bound by century old decisions to declare themselves unable to remedy the situation.[3] Decisions proceed on "legalistic" bases[4] and policy considerations are not even as mentioned in the decision-making process. The courts parrot the language of text writers[5] and invoke meaningless categorizations and labels. The Supreme Court has shied away from abrogating or even modifying the rule of governmental immunity relating to police torts.[6] The government[7] and the legislature[8] have also been lethargic, if not indifferent, in bringing about a change in this area.

In California, on the other hand, the concept of sovereign immunity was judicially abrogated.[9] The legislature enacted the California Tort Claims Act, 1963 which provides the mechanism of distributing and adjusting losses arising, inter alia, out of police torts.

An attempt is made in the following pages to trace the reasons for the adoption of the sovereign immunity doctrine in India and the U.S. and delineate

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1 Section 8, Act of Settlement of 1781 (21 Sec. III c. 70).

2 *K. L. Jain* v. *State of U.P.*, A.I.R. (1965) S. C. 1039; See also *Hira Lal Jain* v. *Union of India*, A.I.R. (1968) Tripura 63.

3 See *ibid*, at 1048.

4 See, e.g. *Ram Gulam* v. *U.P.*, A.I.R. (1950) All. 206; *K. L. Jain* v. *State of U.P.*, A.I.R. (1965) S. C. 1039.

5 See, e.g., *Mata Prasad* v. *Secretary of State*, I.L.R. (1930) 5 Luck 157.

6 *K. L. Jain* v. *State of U.P.*, A.I.R. (1965) S. C. 1039, 1048.

7 The Law Commission of India submitted its report on "Liability of the State in Tort" in May 1956 to the Ministry of Law and it was still "under active consideration of the government" in 1964 when the Supreme Court pronounced opinion in *K. L. Jain's* case.

8 The Government (Liability in Tort) Bill was introduced in parliament in August 1965 but was not passed until 1967 when the parliament was dissolved for general elections and with that the bill lapsed. See Art. 107 (5) of the Constitution of India.

9 *Muskopf* v. *Corning Hosp. Dist.*, 55c 2d 211 (1961).

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1 Section 8, Act of Settlement of 1781 (21 Sec. III c. 70).

2 *K. L. Jain* v. *State of U.P.*, A.I.R. (1965) S. C. 1039; See also *Hira Lal Jain* v. *Union of India*, A.I.R. (1968) Tripura 63.

3 See *ibid*, at 1048.

4 See, e.g. *Ram Gulam* v. *U.P.*, A.I.R. (1950) All. 206; *K. L. Jain* v. *State of U.P.*, A.I.R. (1965) S. C. 1039.

5 See, e.g., *Mata Prasad* v. *Secretary of State*, I.L.R. (1930) 5 Luck 157.

6 *K. L. Jain* v. *State of U.P.*, A.I.R. (1965) S. C. 1039, 1048.

7 The Law Commission of India submitted its report on "Liability of the State in Tort" in May 1956 to the Ministry of Law and it was still "under active consideration of the government" in 1964 when the Supreme Court pronounced opinion in *K. L. Jain's* case.

8 The Government (Liability in Tort) Bill was introduced in parliament in August 1965 but was not passed until 1967 when the parliament was dissolved for general elections and with that the bill lapsed. See Art. 107 (5) of the Constitution of India.

9 *Muskopf* v. *Corning Hosp. Dist.*, 55c 2d 211 (1961).

the present law relating to governmental liability for the torts of police officers in India and California. This paper further indicates the desirability of applying the loss distributing function of the tort law to the state for police torts without unduly frustrating or interfering with the desirable purposes for which the police exists. At the conclusion some suggestions are offered, urging legislative action in India and California.

## II

## ORIGINS AND DEVELOPMENT OF THE SOVEREIGN IMMUNITY CONCEPT IN INDIA

The categorical immunity from tort liability of the British Crown, rooted deeply in political theory 'the King can do no wrong'[10] migrated to India in stages and was planted so firmly by judicial decisions that it has survived even after the waning of the concept in the country of its origin.

The liability of the State for actionable wrongs committed by its servants is governed by Article 300 (1) which runs as follows:

> The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces of the corresponding Indian States might have sued or been sued if this Constitution had not been enacted..... ([11]).

The words "had not this Constitution been enacted" indicate that the basis of the suability of the State of India is historical[12] and indeed the scope of this article is delineated even today in terms of what the position would have been if the Constitution did not exist. In applying article 300 to a given set of circumstances today, the courts have to look back out of sheer necessity to the provisions pertaining to the suability of the State of India under the Government of India Act of 1935. Section 176 (1) of the Government of India Act, 1935, is again similarly worded and it says —

> "The Dominion may sue or be sued.....*in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not* been passed....."([13]) (emphasis supplied).

10 Fleming: *An Introduction to the Law of Torts*, 12 (1967); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev. 476; Wright, *The Federal Tort Claims Act*, 1 (1957); Borchard, *Governmental Responsibility in Torts*, 36 Yale L. J. 1, 35.

11 Basu: Commentary on the Constitution of India, Vol. 4, 386 (1963).

12 *Ibid.*, 395

13 *Ibid.*, 393.



The Court is then led backwards in history to find the law before 1935 and is confronted with S. 32 of the Government of India Act of 1915. Section 32 provides:

> (1) The Secretary of State in Council may sue and be sued by the name of the Secretary in Council as a body corporate.
>
> (2) Every person shall have the same remedies against the Secretary of State in Council as they might have had against the East India Company if the Government of India Act, 1858, and this Act had not been passed.[14]

The 1858 Act in its turn lays down in Section 65:

> The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the *same suits, remedies and proceedings, legal and equitable* against the Secretary of State in Council of India as they could have done against the said (East India) Company.....[15].

It appears that like S. 65 of the Government of India Act, 1858, S. 32 (2) of the Government of India Act of 1915, and S. 176 (1) of the Government of India Act, 1935, Article 300 is a provision relating to "parties and procedure" where the plaintiff has otherwise a right enforceable by action and it does not lay down the substantive law relating to liability of the State. So, whether under the Constitution or prior to it, in order to make the Government liable in a suit brought by a citizen, in the absence of a statutory provision relating to the matter, the question that has to be answered is "Would such a suit lie against the East India Company, had the case arisen prior to 1858?" This obviously prompts us to ask whether the East India Company enjoyed sovereign immunity prior to 1858.

*The Birth of the Concept.*

It is interesting to note that in all the cases pertaining to the doctrine of sovereign immunity in India, the farthest the courts go back to is the case of *P & O Steam Navigation* (1861),[16] and it is in this case that the distinction between sovereign and non-sovereign functions of the East India Company appears to have been first made after the Government of India Act, 1858. Indeed, the general liability of the East India Company for suit either in England or in India or to be subjected to prerogative was never in doubt. In *Bank of Bengal* v. *East India Company*[17] the Company had put forth an argument for exemption from suit on the general right of sovereignty. Rejecting it Grey, C. J., said:

14 *Ibid.*

15 *Ibid.*

16 *The Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State for India* (1861), 5 Bom. H.C.R. App. A.

17 *Bank of Bengal* v. *East India Company* (1831), Bignell Rep. 120; and see Markose: Judicial Control of Administrative Action in India, 78 (1956).

There is nothing whatever in the political rights of the East India Company which can make it wrong to sue them in a Municipal Court, even as to matters of Government. It is the King alone who has the exemption, and the Company stand in a similar situation to that in which all individuals are placed who are Governors of Colonies. They are not necessarily exempt from actions on account of any sovereign character belonging to them. But even as to matters of Government they may be liable to an action, if it has been the intention of the Statute to make them so liable; or in matters of contract they would be liable if it has been the intention of Statute to make them so liable....[18]

The only statute which did provide for the immunity of the East India Company and its officers was the Act of settlement of 1781 (21 Geo. III 6.70) and it provided immunity only for "acts done in connection with the collection of revenue".[19] In 1765 the East India Company obtained the rights of "Dewani"[20] i.e., collection of revenue for the provinces of Bengal, Bihar and Orissa and in 1773 the Regulating Act established, among other things, the Supreme Court in Calcutta. This Court claimed jurisdiction over the English and Native officers of the Company for their corrupt and oppressive acts done by them in pursuance to the collection of revenue which obviously gave rise to a conflict between the executive and the judiciary. The Executive however attempted to dispute the jurisdiction of the Supreme Court over the officers of the company by relying on Section 8 of the Regulating Act[21] which according to them gave complete exemption to the officers of the Company from the jurisdiction of the Supreme Court in respect of any act done by them in connection with the collection of the revenue. But Supreme Court exercised its jurisdiction effectively in the famous Patna Case (1777-1779)[22] wherein it gave heavy damages to a native plaintiff in an action against the Judicial officers of the Patna Provincial Council. The result was almost a complete deadlock. If the rule of law was to prevail in Bengal, Bihar, and Orissa, the Company could not have collected its revenue. According to the contemporary ideas an empire could be held for purposes other than the benefit of its inhabitants, and in the conflict between abstract justice to an alien people and the pragmatic needs of the empire builders, it was only natural that the latter should prevail. The

18 *Ibid.*

19 Section 8 "And.....the said Supreme Court shall not have or exercise any jurisdiction in any matter concerning the revenue, or concerning any act or acts ordered or done in the collection thereof according to the usage and practice of the country, or the regulations of the governor-general and council." See, A Collection of Statutes Relating to India, Vol. 1, 20 (1889).

20 Jain: Indian Legal History, 82 (1966).

21 *Supra*, n. 10.

22 See Jain, *supra* n. 11, pp. 133-138.



British parliament therefore passed the Act of 1781 (21 Geo. III C. 70) giving immunity to the officers of the Company pertaining to acts done in connection with the collection of revenue. The preamble stated that:

"Whereas it is expedient that the lawful Government of Bengal, Bihar and Orissa should be supported, *that the revenue thereof should be collected with certainty*"[23] (emphasis supplied)

they were persuaded to pass that statute. Thus, certainty of revenue collection was the object and expediency the justification for the Act of 1781. This Act excluded the jurisdiction of the Supreme Court from matters concerning the revenue or any act done in the collection thereof according to the usage and practice of the country or the regulation of the Governor-General in Council. The net result was that a suit could not be brought by the aggrieved natives pertaining to any wrong committed by the servants of the Company in the process of revenue collection.

In *P & O Steam Navigation* case,[24] the cause celebre, government workmen employed in the government dockyard at Kidderpore were carrying a newly-rivetted piece of iron funneling from one part of the dockyard to another in order to take it on board the government steamer they were repairing. To do this they had to cross a public highway running through the dockyard area. While they were passing on the roadway, they encountered a horse-drawn carriage owned by the plaintiff company, and in the ensuing confusion one of the horses of the plaintiff was injured. The question for decision was whether, assuming the workmen's negligence, the government was liable in damages for the loss of the horse. The Supreme Court referred early in the course of its judgment,[25] to S.25 of the Small Causes Court Act which provided, inter alia, that the court had:

"no jurisdiction in any matter concerning the revenue, or concerning any act ordered or done by the Governor, or Governor-General, or any member of the Council of India, or of any Presidency, in his public capacity or done by any person by order of the Governor-General or Governor in Council...."

and observed that this case did not fall in the said category as it was not a case concerning the revenue.[26] The judgment then laid down that the question of liability in the case must depend on whether the East India Company would have been so liable prior to 1858, when in the wake of the Indian Mutiny the structure of Britain's presence in the subcontinent finally shifted from that of a mercantile enterprise with wide governmental functions to frankly govern-

23 A Collection of Statutes Relating to India, Vol. 1, 18 (1889).

24 *Supra*, n. 7.

25 5 Bom. H.C.R. App. A, p. 3.

26 *Id.*, pp. 4.

(iii) Administration of justice;[36]

(iv) Improper arrest, negligence or trespass by police officers;[37]

(v) Negligence of officers of the Court of wards in the administration of an estate under its charge;[38]

(vi) Wrongs committed by officers in the performance of duties imposed upon them by Legislature.[39]

No case, however, precisely defines the meaning of "sovereign functions". Sir Barnes Peacock himself defined them in the P & O case thus, "Sovereign powers are powers which cannot be lawfully exercised except by a sovereign power."[40] But this is a circular definition which begs the question "What are the powers which can be exercised by a sovereign or a private individual delegated by Sovereign?" The answer to this question is indeed more elusive today than it was a hundred years ago because of the multifarious functions the government is now performing. The functions are neither purely sovereign, nor purely commercial, nor for profit alone, so that these tests for determining liability are unsatisfactory. The liability of the state today cannot be confined to commercial operations or functions which could be done only by a trading corporation. There may be other acts which may be non commercial and could not have been undertaken by a private person, and yet the State should be held liable, because the function is not "strictly governmental".

*A Ray of Hope*

The attitude of the judiciary was traditional in this matter until the case of *State of Rajasthan* v. *Vidhyawati*.[41] In this case the plaintiff's deceased husband was negligently knocked down by a rashly driven government jeep which was being driven from the garage to the collector's residence for his official use. The Supreme Court, while saying that this case was "governed" by the P & O decision, held the State liable for the tort of the jeep driver and observed in the course of its judgment:

> "It was impossible by reason of the maxim 'The King can do no wrong,' to sue the Crown for the tortious act of its servant. But it was realized in the United Kingdom that the rule had become outmoded in the context of modern developments in the statecraft, and Parliament intervened by enacting the Crown Proceedings Act, 1947. Hence, the very citadel of the absolute rule of immunity of the sovereign has

36 *Mata Prasad* v. *Secretary of State* (1929), 5 Luck. 157.

37 *Kader Zillany* v. *Secretary of State* (1931), 9Rang.376. *Shivabhajan*v. *Secretary of State* (1904), 28 Bom. 319.

38 *Secretary of State* v. *Sreegovinda* (1932), 36 C.W.N. 606.

39 *Shivabhajan* v. *Secretary of State* (1904), 28 Bom. 314.

40 5 Bom. H.C.R. App. A 14.

41 *State of Rajasthan* v. *Vidhyawati*, A.I.R. (1962) S.C. 933.



> now been blown up.... /T/ he law applicable to India in respect of torts committed by a servant of the Government was very much in advance of the common law, before the enactment of the Crown Proceedings Act, 1947, which has revolutionized the law in the United Kingdom, .... Now that we have, by our Constitution, established a republican form of Government, and one of the objectives is to establish a Socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification, in principle or in public interest, that the state should not be held liable vicariously for the tortious act of its servant."[42]

*The Supreme Court Succumbs to the Ghost of P & O Case.*

But only two years after the Supreme Court had rejected the theory of sovereign immunity as "feudalistic" and inapplicable to our republican Constitution, it was again revived in *Kasturi Lal* v. *State of U.P.*,[43] wherein the Supreme Court held that the State was not liable for the tortious actions of its employees if such actions were in the exercise of sovereign powers of the State. In this case a bullion dealer was arrested and put in the lockup at midnight on suspicion of being in possession of contraband gold and the gold was kept in police custody. As no case could be made out against him he was acquitted. On demanding back his gold, he was told that the gold had been misappropriated by a constable who had fled to Pakistan. He filed a claim against the State of U.P. for the return of gold or its price. The U.P. Government repudiated liability to pay compensation for misappropriation. Two substantial questions arose between the parties: (1) Whether the police officers were negligent in the safe custody of the gold, and (2) whether the State of U.P. was liable to compensate the appellant for the loss caused by the negligence of its public servants. On both these issues the trial court decided in favour of the appellant and passed a money decree. The Allahabad High Court reversed the trial Court's decision and held that eventhough negligence had been established against the police officers, the state would not be liable for the loss of the gold. On appeal to the Supreme Court, the Court unanimously concluded on the issue of negligence that the police officers were grossly negligent in taking care of the gold seized from the appellant but on the second issue, the Court held that the *State of U.P. was not liable for the negligence of police officers in the exercise of their statutory powers which "in the last analysis" were powers which could properly be characterized as sovereign powers.*[44] *(emphasis supplied)*

42 *Id.*, p. 940.

43 A.I.R. (1965) S.C. 1039.

44 *Id.*, p. 1048.

In arriving at this conclusion, the Supreme Court placed exclusive reliance on the *P & O* case. The appellant, relying on *Vidhyawati's*[45] *case*, contended that his claim against the State for damages for the loss caused by the misappropriation by a police constable for gold seized from him could not be defeated on the plea that the seizure was an action in exercise of sovereign powers. The Supreme Court while conceding that there were certain observations made in *Vidhyawati's case* which supported appellant's contentions, reviewed the law and held that, subject to any law which the competent legislature may make hereafter, *Government could be sued for the tortious actions of its servants only where such actions could not be attributed to the exercise of Sovereign powers of the State*[46].

Gajendragadkar, C J., who has been hailed as a "great judge" and who is known for his "progressive" ideas, which are reflected in his out-of-court speeches and works, who thinks that

> "the Constitution must be treated as a progressive document, not static, and its provisions *have to be and must be so construed as to meet the needs and challenge of changing times*[47]". (emphasis supplied)

put the clock back by a hundred years while interpreting Article 300 of the Constitution. He not only traced the "pedigree" of Article 300, but succumbed to the ghost of the East India Company. At the same time he felt oppressed that such an immunity should prevail now in India under the Constitution and exhorted the legislatures to seriously consider the enactment of statutes regulating States' claims from immunity on the same lines as the Crown Proceedings Act, 1947.[48] In the Course of his judgment, Gajendragadkar, C. J., also adverted to the assumption that the principles laid down by the *P & O case* have been consistently followed by all judicial decisions in India.[49]

It is indeed unfortunate that the court accepted the dictum in the *P & O* case as the principle enunciated in that case. As suggested earlier, this *was not* the ratio of that case . It is also unfortunate that the court was influenced by a mistaken belief that the principle which it had extracted from the *P & O* case had been consistently followed[50]. *Hari Bhanji's*[51] case had interpreted P & O differently and was endorsed by the Supreme Court in *Province of Bombay* v. *Khushaldas.*[52] It was followed in *Rup Ram* v.

45 *Supra* n. 41.
46 A.I.R. (1965) S. C. 1039 at 1049, emphasis supplied.
47 Gajendragadkar, Foreword to Tope's *Constitution of India*, x (1963).
48 A.I.R. (1965) S.C. 1039, at 1049.
49 *Id.*, at 1046.
50 See Jacob, Vicarious Liability of Government in Torts, 7 J.I.L.I. 247.
51 *Supra*, n. 24.
52 A.I.R. (1950) S. C. 222.



*Punjab.*[53] *Union of India* v. *Murlidhar*[54] and *Prem Lal* v. *U.P.*[55] Indeed Mukherjea J., (as he then was) observed in *Province of Bombay* v. *Khushaldas :*

> The liability of the East India Company to be sued was not restricted altogether to claims arising out of undertakings which might be carried on by private persons but other claims *if not arising out of acts of State* could be entertained by Civil courts, if the acts were done under sanction of Municipal law and in exercise of powers conferred by such laws.[56] (emphasis supplied).

However, this formidable body of legal opinion finds no mention in *Kasturi Lal's case.* On the contrary, the Court erroneously believed that the principle of the *P & O* case had been uniformly followed.

## III

## HISTORY OF SOVEREIGN IMMUNITY DOCTRINE IN THE U.S.

The ancient maxim traceable to Bracton[57] that "the king can do no wrong has been the keystone of the doctrine of sovereign immunity. Although it seems to rest on an insecure historical foundation[58], the judges by formal legalistic reasoning have made it not only the basis for the royal immunity in torts[59] but after the passing from the Anglo-American scene of the omnipotent personal monarch, have transformed it to read that the "crown" or "state" can do no wrong, nor for that matter, authorize others to do wrong. Thus the state is not vicariously liable on ordinary agency principles for the acts of its servants. Just how this English theory of sovereign immunity, in origin personal to the king, came to be applied in the United States is

53 A.I.R. (1952) Punj. 336.
54 A.I.R. (1952) Assam. 141.
55 A.I.R. (1936) All. 233.
56 A.I.R. (1950) S.C. 222, at 248-49,
57 Bracton, f. 107a.
58 Street, Governmental Liability, A Comparative Study (1953) 2.
59 The judicial approach is perhaps best illustrated in the judgment of Cockburn, C. J., in *Feather* v. *Reg.* (1865) 6 B & S 257, at 295-96, thus : "..... a petition of right in respect of a wrong, in the legal sense of the term, shows no right to legal redress against the Sovereign. For the maxim that the king can do no wrong applies to personal as well as political wrongs ; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign. For from the maxim that the king cannot do wrong it follows as a necessary consequence that the king cannot auhorize wrong ..... As in the eye of the law no such wrong can be done, so in law, no right to redress can arise, and the peition, therefore, which rests on such a foundation falls at once to the ground. See generally, Street, *Governmental Liability, A Comparative Study* (1953) 2.

considered as one of the mysteries of legal evolution[60], the discussion of which must characterize obscurity and uncertainty[61] especially because the break away with Britain was belligerent and bitter. Since the days of the Declaration of Independence, the foundation of American political thought has been responsible government and the entire history of the American Revolution would seem to negate the applicability in the United States of the English maxim the "king can do no wrong." However, despite the absence of historical or philosophical justification, the doctrine of sovereign immunity made an inroad in American law perhaps because of *necessity, expediency and syllogistic reasoning*.

The states of the United States of America owed huge debts, contracted in the prosecution of the war and were much concerned that the federal courts might force the payment of these obligations. The phrase of Article III, Section 26, that the "judicial power shall extend to controversies between a state and a citizen of another state" was for this reason the center of much heated discussion. However Hamilton, Madison and Marshall answered the States that this in no way meant that a state should be subject to suit at the hands of a citizen. Madison argued

> "Its [Supreme Court's] jurisdiction in controversies between state and citizen of another state is much objected to, and perhaps without reason. *It is not in the power of individual to call any state into its courts.* The only operation it can have is that if a state should wish to bring a suit against a citizen it must be brought before the federal court....."[62]. (emphasis supplied).

Marshall expressed similar views when he said,—

> "I hope that no gentlemen will think that state will be called to the bar of the federal court. Is there no such case at present ? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued ? *It is not rational to suppose that the sovereign power should be dragged before a court.*"[63] (emphasis supplied).

Marshall iterated these views later on from the bench in the historic case of *Cohens* v. *Virginia*[64] which marks the beginning of sovereign immunity doctrine in the United States by reversing an earlier decision of the Supreme Court in *Chisholm* v. *Georgia*[65] which had held that a citizen of one state

60 Street, *Tort Liability of the State : The Federal Tort Claims Act and The Crown Proceedings Act*, 47 Mich. L. Rev. 341 (1949).
61 Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev. 476, 477 (1953).
62 3 Elliot's Debates on the Federal Constitution 533.
63 3 Elliot's Debates on the Federal Constitution 555-556.
64 19 U.S. 264 (1821).
65 (1793), U.S. 2 Call. 419.



had a right to sue another state in assumpsit. Marshall said that the *Universal received opinion was that no suit could be commenced or prosecuted against the United States*[66].

The reasoning of Marshall and Madison may appear to be strained and illogical but it was pragmatic for it saved the state from becoming bankrupt. This principle fostered by the doctrine of precedents became firmly entrenched in the American legal system within fifty years of its pronouncement. It was stated in more positive and emphatic words by Justice Miller of the U.S. Supreme Court in Gibbons v. U.S.[67] :

> "..... no government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers or agents."[68]

Justice Holmes also reaffirmed the concept of sovereign immunity in more logical than practical language when he said in *Kawanankoo* v. *Polyblack*[69] that—

> ".... a sovereign is exempt from suit, not because of any formal conception on absolute theory but on the *logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.*"[70] (emphasis supplied).

It seems that the concept of sovereignty as propounded by Hobbes is the bedrock on which the court based the doctrine of sovereign immunity. Indeed the maxim traceable to Bracton is only a partial interpretation of the Hobbesian concept of sovereign immunity, for Hobbes did not conceive of only the "king" as a "sovereign" but also of an *assembly of men* as sovereign. Hobbes describes the formation of a sovereign political commonwealth as follows :

> "A Commonwealth is said to be instituted, when a Multitude of men do agree and Covenant, every one, with every one, that to whatsoever Man, or Assembly of Men, shall be given by the major part, the Right to present the person of them all, [that is to say, to be their Representative] everyone one, as well he that voted for it, as that voted against it, shall Authorize all the Actions and Judgments, of that Man, or Assembly of Men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men."[71]

He then goes on to explain the implications of sovereignty and logically expounds the concept of sovereign immunity thus :

66 19 U.S. 264 (1821).
67 75 U.S. 269 (1868).
68 *Id.*, at 276.
69 205 .S. 347.
70 *Ibid.*
71 Hobbes, *Leviathan* [Introduction by Henry Morley] 84 (1887).

"....because every subject is by this institution author of all the actions, and judgments of the sovereign instituted; it follows, that whatsoever the sovereign doth, it can be no injury to any of his subjects, nor ought he [sovereign] to be by any of them accused of injustice. For he that doth anything by authority from another, doth therein no injury to him by whose authority he acteth: by this institution of a commonwealth, every particular man is author of all the sovereign doth; and consequently he that complaineth of injury from his sovereign complaineth of that where of he himself is author; and therefore ought not to accuse any man but himself; no, nor himself of injury; because to do injury to one's self is impossible. It is true that they that have sovereign power, may commit inequity; but not injustice, or injury in the proper signification."[72]

Thus Hobbes created not one but two "persons" clothed with the aura of sovereignty and hence immunity from legal process, the Monarch (Man) and the State or Government (Assembly of Men). His philosophy became part of the contemporary political philosophy in his own day and came fullblown with the pilgrims to the shores of what was to be the United States of America. It is fully reflected in the arguments and decisions of Hamilton, Madison, Marshall, Miller and Holmes, and in Holmes' letter to Laski. He wrote:

If you should say that the courts ought in these days to assume a consent of the U.S. to be sued, or to be liable in tort on the same principle as those governing private persons, I should have my reason for thinking you wrong..... What I can't understand is the suggestion that the United States is bound by law even though it does not assent. What I mean by law in this connection is that which is or should be enforced by the courts and I can't understand how anyone should think that an instrumentality established by the United States to carry out its will, and that it can depose upon a failure to do so, should undertake to enforce something that ex-hypothesis is against its will. It seems to me like shaking one's fist at the sky, when the sky furnishes the energy that enables one to raise the fist.[73]

When the states contended and the courts upheld that the state could not be sued without its consent because it was sovereign, the positivists were more than satisfied and the theologians could not disagree either as they preached that in Heaven God was sovereign and on earth the Caesar. Obviously Caesar was replaced by a popular government, it was the popular government which then became clothed with the regalia of sovereignty, and hence immunity.

72 *Ibid* at 86.

73 2 Holmes—Laski Letters 222 (1953).



In most of the early cases on sovereign immunity, the farthest the American courts go back in common law is the case of *Russell* v. *Men of Devon*,[74] which was given great weight by the American courts perhaps, because it did not refer to the king or the monarchical doctrine that the king can do no wrong. While it satisfied the American disrelish for the institution of kingship, it also presented a practical solution for the problem then faced by the states of the United States of America, viz. of repaying the debts.

The fact that all the legal materials available in the 18th and early 19th century in America were English is of no small significance in relation to the development of the concept of sovereign immunity in America. Although, Kent's commentaries were available quite early in the 19th century besides Blackstone, the fact remains that the former was a commentary on Blackstone. Hence, the source materials for decision-making in the United States were essentially English. The judges were all trained in the English legal system and hence often looked for the English precedents; even where they referred to American decisions, they were generally traceable to English decisions. It is not surprising therefore that with the help of the doctrine of precedent the English principle of royal irresponsibility crossed the Atlantic through the medium of syllogistic reasoning.

Indeed when *Russell* v. *Men of Devon*[75] was decided, namely, in 1798 the idea of the municipal corporate entity was still in a nebulous state and the action in effect was against the population of a whole country. In addition to lack of precedent and the fear of an infinity of actions, the decision was influenced by the fact that there were no corporate funds out of which satisfaction could be obtained.

The arguments in *Russell* v. *Men of Devon*, coupled with the theory that King can do no wrong and the Hobbesian concept of sovereignty, lead to the conclusion that sovereign immunity is essentially based on public policy; the absurdity of a wrong committed by an entire people; the idea that whatever the state, which has replaced the King, does must be lawful, just as the king who could do no wrong; reluctance to divert public funds for compensating private injuries, and the inconvenience and embarrassment which would descend upon the government if it is subjected to such liability.[76]

Soon after the decision in *Cohen* v. *Virginia*,[77] it became established that the government could not be sued without its consent.[78] Consent, however, was soon forthcoming in the form of legislation and with the

74 100 Eng. Rep. 359.

75 *Id.*

76 See, *Poindexter* v. *Greenhorn*, 114 U.S. 270 (1884); *State* v. *Hill*, 32 Ala. 67 (1865) *Bourn* v. *Hart*, 93 Cal. 321 (1892); and see also, Prosser, *Law of Torts* 996 (1964).

77 19 U.S. 264 (1821).

78 *Osborn* v. *Bank of U.S.* 22 U.S. 738 (1824).

establishment of a Court of Claims to hear contract cases and various other minor provisions permitting even some actions in tort,[79] a measure of relief was obtainable for those with grievances against the United States. The courts were unwilling to hold the State liable in tort as is reflected in *Gibbons* v. *U.S.*,[80]

> "..... it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officers, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents."[81]

Further, quoting Judge Story, the court went on to say—

> "..... it (state) does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments and difficulties, and losses, which would be subversive of the public interests."[82]

However, a very important and major step was taken in 1946 when the U.S. waived its immunity from liability in tort, and provided for litigation of tort claims against it in the federal courts, by the Federal Tort Claims Act. This Act makes the United States liable under the local law of the place where the tort occurs for the negligent or wrongful acts or omissions of federal employees within the scope of their employment in the same manner and to the same extent as a private individual under like circumstances.[83] But the Act provides a number of exceptions to its general rule of tort liability of the United States, two of which are very comprehensive. One of these excludes international torts, such as assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.[84] The other exception is more sweeping. So far as statutory duties are concerned, it says, the U.S. is not liable for any tort committed in the discharge of such duties so long as the duties are performed with due care. In respect of discretionary functions and duties conferred on a Federal Agency or an employee of the Government, the state is not liable even if the discretion is abused or even if there is negligence.[85]

79 Prosser, 997.
80 75 U.S. 269 (1868).
81 But see Borchard, *Government Liability in Tort*, 34 Yale L. J. 1 (1924); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev, 476, 477, 488 (1953).
82 *Gibbons* v. *U.S.*, 75 U.S. 269 at 276.
83 28 U.S.C.A. 1346 (*b*), 2674.
84 28 U.S.C.A. 2680 (*h*).
85 28 U.S.C.A. 2680 (*a*).



A part of this large chronicle of sovereign immunity is the story of the immunity of the state for torts of its police officers. Under the aegis of sovereign immunity, most of the state, municipal and other local government entities, of which "the police" are agencies, are generally held immune from tort liability growing out of police law-enforcement activity.[86] Police torts range over a wide variety of situations, the most frequent being false imprisonment,[87] assault and battery,[88] cases of shootings,[89] police administration of jails[90] and negligent operations of vehicles.[91] Rationalizing the police immunity, the courts characterize police functions to be "governmental" as distinguished from "proprietary" in nature.[92] Indeed, this distinction between "governmental" and "proprietary" functions was first declared by a New York court in 1842[93] and has become accepted in every jurisdiction except South Carolina and Florida.[94] Exercise of police power being in the public interest and for public purposes, rather than in the interest of the governmental entity in its corporate capacity, so it is said, such entities are entitled to the same immunity as the sovereign—"the people"—granting that power.[95] The idea that there is dichotomy of functions of the city namely, the "governmental" and the "proprietary" runs all through immunity cases and is recited in most police cases. The distinction is accepted as almost an a *priori* category and the courts eventually think it unnecessary to recite the distinction between the city as a corporation which seeks profit, and the "governmental" agency thus treating

86 Mathes & Jones: *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 Geo, L. J. 889 (1965).
87 E.g., *Butterick* v. *City of Lowell*, 79 Am. Dec. 721 (Mass. 1861); *Town of Odell* v. *Schrolder*, 58 III. 353 (1871).
88 *Craig* v. *City of Charleston*, 180 III. 154; *Simpson* v. *Poindexter*, 241 Miss. 854.
89 *O'Quin* v. *Baptist Memorial Hospital*, 184 Tenn. 570; *Gonzales* v. *City of El Paso*, 316 S.W. 2d 176; *Kelley* v. *Mayor of Wilmington*, 156 Atl. 867.
90 *Valdez* v. *Amaya*, 327 S.W. 2d 708; *Gentry* v. *Town of Hotsprings*, 227 N.C. 665; *Evans*. v. *City of Kankakee*, 231 III. 223; *Lewis* v. *City of Miami*, 127 Fla. 426.
91 *Taylor* v. *City of Berwyn*, 372 III. 124; *Periz* v. *City and County of Honolulu*, 29 Haw. 656.
92 See, e.g., *Sanders* v. *City of Long Beach*, 54 Cal. App. 2d 651.
93 *Bailey* v. *City of New York*, 3 Hill, N.Y. 531 (1842). See Barnett, *The Foundations of of the Distinction Between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations*, 16 Or. L. Rev. 250 (1936-37). Barnett's suggestion that the English decision in *Mandalay* v. *Morton*, 27 Eng. Rep. 425 (Ch. 1705), "that even a corporation exercising 'Sovereign power' (The East India Co.) might be sued ..... may have been the basis of the opinion of Chief Justice Marshall (little given to citations of precedents) in *Bank of United States* v. *Planters Bank* in 1824 in which a similar view was reached", has no bearing on the law relating to immunity in tort as well as on Marshall's views on sovereignty which were aired earlier in *Cohen* v. *Virginia*. See *Supra* nn. 8 and 9.
94 Prosser, *Law of Torts* (1964) 1005.
95 *Chafer* v. *City of Long Beach*, 174 Cal. 478; *Elrod* v. *City of Dayton Beach*, 132 Fla. 24.

the distinction as a concrete thing with an independent existence. And it is common knowledge that once a principle is thus frozen, it is a simple matter for the courts to retreat to syllogism in the common law system. The decision then goes like this: Immunity exists for "governmental" function. Police work is a "governmental" function. Therefore there is no liability.[96]

*Policy Considerations*

The "public", "sovereign", "state", "governmental" but not "private", "corporation", "proprietary", "commercial"' distinctions might appear to a lay man to be the outcome of the preverse ingenuity of the judicial mind,[97] but the courts however used these distinctions only as a tool to spell out some notions like, (1) public entities should not be stifled or impeded by the burden of the threat of liability in carrying out their law enforcement duties.[98] This is what has been called the "Dampen the Ardor"[99] approach by Judge Learned Hand in *Gregoire* v. *Biddle*,[100] and in a recent California case it was paraphrased thus.

> "The subjugation of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject the honest officials to the constant dread of retaliation."[101]

(2) Fraud and excessive litigation might ensue if such entities were made liable and this would mean diverting public funds for the liquidation of private damages[102] resulting in "unbearable cost" to the public[103] and (3) it is better for an individual to suffer than for the public to be inconvenienced.[104]

The strongest argument advanced against these considerations is that if the public is to receive the benefits of police protection, it should be willing to take the burden flowing therefrom, too, and this argument is in consonance

96 See *City of Phoenix* v. *Greer* 43 Ariz. 214; *Broose* v *Springfield Twp.* 377 Pa. 109

97 See Barnett, supra, no. 93. He suggests, not very convincingly, that the distinction might have originated chiefly in a combination of misguided logic and misapplied precedent rather than any consideration of justice.

98 See, e.g., *The Siren*, 74 U.S. 152.

99 See, Roberts, *The Discretionary Immunity Doctrine in California*, 19 Hastings L.J. 561, 566.

100 177 F. 2d 579.

101 *Lipmans* case, 55 Cal. 2d at 229. See *infra*; *Muskopf's* case, 359 p. 2d 457, 462.But see Van Alstyne, *Government Tort Liability: A Public Police Prospectus*, 10 U.C.L.A. L. Rev. 463, 477.

102 *Devers* v. *City of Scranton*, 161 Atl. 540; *Scibilia* v. *Philadelphia*, 124 Atl. 273.

103 Cf. *Murdosk Parlor Grate Co.* v. *Commonwealth*, 24 NE. 854.

104 See, e.g., *Chifer* v. *City of Long Beach*, 174 Cal. 478; *Evans* v. *Berry*, 186 N.E. 203.



with modern theories of enterprise liability and workmen's compensation.[105] Though this argument has been, of recent, well received by some courts[106] and New York,[107] Wisconsin[108] and California[109] have waived (the latter two only partially) the rule of immunity for public entities, the immunity rule nonetheless continues to ride high with the state courts.[110] Indeed the Federal Tort Claims Act is no exception, for it expressly exempts the usual torts committed by the police like battery, false imprisonment, false arrest, malicious prosecution from that statute's waiver of sovereign immunity.[111]

This distinction of "governmental" and "proprietary" functions of the city or state is, it is submitted, an unsatisfactory one known to the law.[112] Indeed it was declared rightly by the Supreme Court of the United States:

> "There probably is no topic of the law in respect of which the decisions of the State courts are in greater conflict and confusion than that which deals with the differentiation between the governmental and corporate powers of municipal corporations. This conviction of conflict and confusion is confined in the main to decision relating to liability in tort for the negligence of officers and agents of the municipality. In that field, no definite rule can be extracted from the decisions."[113]

Besides this foregoing "governmental" and "proprietary" test, another cliche used by the courts, and now incorporated in the various Acts allowing tort claims against the State,[114] is the semantic approach of distinguishing the "discretionary"[115] functions of the officer from the "ministerial". However, in attempting to define "discretionary functions", one is initially met with the intrinsic vagueness of the phrase itself. The courts hold that an officer is not liable for any tort arising out of his discretionary function nor is the State

105 Cf. Calabrese, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L. J. 499 (1961); Calabrese, *The Decision for Accidents: An Approach to Non-Fault Allocation of Costs*, 78 Harv. L. Rev. 713 (1965).

106 E.g., *Hargrove* v. *Town of Cocoa Beach*, 96 So. 2d 130.

107 N.Y. Ct. Cl. Act 8.

108 Wis. Stat. 270.58.

109 Cal. Govt. Code 815.2.

110 See Shapo, *Municipal Liability for Police Torts*, 17 Miami L. Rev. 475 (1963).

111 28 U.S.C.A. 2680 (*h*).

112 See Davis, *Administrative Law*, Text 459 (1959).

113 *Brush* v. *C.I.R.*, 300 U.S. 352, 362.

114 E.g., Federal Tort Claims Act, 28 U.S.C.A., 2680 (d); California Tort Claims Act, Govt. Code, 820.2.

115 This broad privilege was developed in actions against judicial officers, but has been extended by weight of American case law to a host of administrative officers. See 2 Harper & James, *Torts* 29.6 at 1619 (1956) and also, David, *The Tort Liability of Public Officers* 22 (1940).

liable.[116] But if the term "discretionary function" were construed to refer to any *conscious* decision, the State would not incur liability for any act of negligence other than inadvertence and any attempt to clarify the limits of the exception is complicated by the existence of a continuum of possible types of discretionary actions ranging from narrow, routine exercises of discretion to high level policy decisions.[117] The criteria distinguishing acts under the protection of discretionary immunity from those outside it are, therefore, not clear. The problem, however, is not new. According to a recent decision,

> "discretionary acts are those wherein there is no hard and fast rule as to the course of conduct that one must or must not take and, if there is a clearly defined rule, such would eliminate discretion.[119] By way of contrast, it has been said that a ministerial duty exists if "its performance is unqualifiedly required.... even though the manner of its performance may be discretionary."[120] Apparently the distinction lies between "merely.... ministerial" official duties and those in which it is the official's duty "to exercise judgment and discretion".[121] The "nature of the duty" is the controlling factor ; if it is "absolute, certain, and imperative, involving merely the execution of a set task, "it is deemed "ministerial" but if the powers vested in the officer are" to be exerted or withheld according to his own judgment as to what is necessary and proper," they are classified as "discretionary."[122]

Until the 1955 term of the Supreme Court the leading case on the meaning of the discretionary function exception of the Federal Tort Claims Act was *Dalehite* v. *U.S.*,[123] a test case for the many claims arising out of the explosion at Texas City. The Supreme Court held that the discretionary function exception barred recovery and observed that—

> "the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion."[124]

116 *Muskopf* v. *Corning Hosp. Dist.* (1961) 349 P. 2d 472, 55 C. 2d 211.
117 See, The Discretionary Function Exception of the Federal Tort Claims Act (1953), 66 Harv. L. Rev. 488 (1953)..
118 Van Alstyne, *California Govt. Tort Liability* 160 (1964).
119 *Elder* v. *Anderson*, 205 C.A. 2d 326, 331 (1962).
120 *Ham* v. *County of Los Angeles*, 46 Cal. 148, 1962 (1920).
121 *People* v. *Stancard Acc. Inc. Col.*, 42 C.A. 2d 409, 411 (1961).
122 *Tomlinson* v. *Pierce*, 178 C.A. 2d 112, 166 (1960).
123 346 U.S. 15 (1953).
124 346 U.S. 15, 35-36 (1953).



The United States was held not liable, under this view, for injuries sustained as a result of an explosion during the loading of nitrate aboard ships for a government fertilizer aid programme, even though the evidence tended to show negligence in determining how the explosive nitrates should be handled. Justice Reed observed in this case,

> "The decisions held culpable were all responsibility made at a *planning* rather than *operational level* and involved considerations more or less important to the practicability of the Government's fertilizer program."[125]

And this suggested distinction between immunity for negligence at the "planning" level, and liability for negligence at the "operational" level has been approved in later decisions under the Federal Tort Claims Act.[126]

In claims against the public entities for police torts all those tests have been applied by the courts to strike a balance between the conflicting interests of the state (interest in keeping peace and order), police (duty of law enforcement) and the victim (freedom from injury and compensation if unjustly injured).

## IV

## LIABILITY FOR POLICE TORTS IN INDIA

Police in India, perhaps because of its unpleasant role since the inception of the British Raj, is a feared institution. During the British regime it was the symbol of sovereign power, for, any upsurge or clamour for political independence was crushed ruthlessly through the instrumentality of police. The freedom of person and property of an individual which today form his jealously guarded fundamental rights in the Indian Constitution,[127] was subject to the "security of the State" which obviously meant the preservation of the colonial rule. The overriding policy regulating the resolution of all conflicts of interest was the preservation of His Majesty's rule and police was the main instrumentality for stalling or crushing any movement against the British rule. It is therefore not surprising that police was insulated from liability for its wrongful acts and so was the State. The police officer, it was suggested, performs "governmental functions", neither he nor his employer, the State, was liable.

### *False Arrest or Imprisonment*

Inspite of a Privy Council obiter in *Mohammed Yusufuddin* v. *The Secretary of State*[128] that action will lie for false imprisonment and illegal arrest by

125 346 U.S. 15, at 42.
126 See, e. g., *Eastern Air Lines* v. *Union Trust Co.*, 221 F. 2d 62 ; *California* v. *United States*, 151 F. Supp. 570.
127 See Part III of the Constitution of India titled, "Fundamental Rights".
128 (1903) I.L.R. 30 Cal. 872 (P.C.).

the police against the State[129], the Rangoon High Court came to the conclusion that the State was not liable for false imprisonment or malicious and unlawful arrest by its police officers. Police activity was equated with act of State and *Tobin* v. *The Queen*[130] was cited by the court in support of its conclusion. In this Rangoon case[131] the plaintiff alleged that he was maliciously and unlawfully arrested and for six days falsely imprisoned-by a police sub-inspector and head constable. The government advocate filed a preliminary written statement pleading that the facts alleged did not disclose a cause of action against the Secretary of State because the Secretary of state is not liable in damages for the tortious acts of police officers. And the court observed:

> "It seems to me that an arrest by a police Officer may well be an act done by a person appointed for and in the course of providing for public safety and thus be outside the municipal law."[132]

When the attention of the court was drawn to the cases such as *Haribhanji*[133] and *Shivabhajan*,[134] the court said,

> "These cases seem to me to show that.....so far as mere jurisdiction goes, the courts have jurisdiction to entertain suits against government for tortious acts done by government or by officers acting under its orders in respect of matters regulated by 'municipal law,' but they do not, in my opinion, show that there is a cause of action against the Secretary of State for tortious acts committed by all public officers, *and particularly by subordinate* Police Officers. (emphasis supplied) It seems clear that suits may be brought against government in respect of the acts of officers of government employed in the collection of revenue and in financial or commercial concerns of the public and it is possible that in certain circumstances government may be liable for torts committed by such officers. *But Police Officers are not such officers* and the general rule seems to be that government is not liable for wrongs done by its officers unless the wrongful act is done either by its order, or on its behalf being subsequently ratified or adopted by

129 Lord Mcnaghten: "The question in this case is a very short one. It really comes to this: Is a prisoner, who has been released on bail, under imprisonment still so long as he is out of bail? .....The [prisoner's] appellant's imprisonment did not last one moment after he was liberated on bail. *Immediately after his liberation he might have brought a suit for false imprisonment and possibly he might have succeeded in obtaining some damages.* Having failed to bring his suit within one year from the date of his liberation, he is now barred by the law of limitation." *Ibid.* at 879, 880.

130 *Tobin* v. *The Queen* (1864), 33 L.J.C.P. 119. See *infra*.

131 *M. A. Kader Zailany* v. *The Secretary of State*, I. L. R. (1931), 9 Rang. 372.

132 *Ibid* at 382. Is it an act of State? The court seems to suggest so without any reason.

133 *Secretary of State for India* v. *Hari Bhanji*, I.L.R. (1882) 5 Mad. 273.

134 *Shivabhajan Durgaprasad* v. *Secretary of State for India*, I.L.R. (1904) 28 Bom. 314.



> it, and is not ordinarily liable for wrongs done by subordinate public officers in the exercise of powers given to them by law."[135] (emphasis supplied)

Thus while laying down that the State is liable for the wrongful acts of its officers if the act (1) was done by its order, or (2) was subsequently ratified by it, or (3) did not originate from the exercise of powers given to them by law, the court almost said that "police officers" do not commit actionable wrongs. The police officer, when he arrests somebody, is only exercising a power given to him by law. In *Maharani of Nabha* v. *Province of Madras*[136] the wife and daughter of the ex-Maharaja of Nabha filed a suit for damages for false imprisonment against the Province of Madras through the collector of Madura and four police officials (viz. the district superintendent of police, a sub-inspector of police, a head constable and a constable). The plaintiffs complained that on the arrival of the train at Kodiakanal Road Railway Station by which they intended to leave for Madras, they were prevented by the police sub-inspector acting under the orders of the district superintendent of police from boarding it and that the gate and the iron fencing at the railway station were also closed by the sub-inspector of police and constables were posted near the gates which resulted in the wrongful confinement of the plaintiffs. It appeared, however, that the police officers had intended to detain the ex-Maharaja of Nabha and not the plaintiffs, and that the latter were prevented from boarding the train owing to a misunderstanding of a telephonic message sent by the district superintendent of police. The Madras High Court held that the suit was barred by limitation and after a lengthy examination of facts came to the conclusion that—

> "Government could not be held liable either where an officer takes an action in pursuance of a statutory duty or when the act committed by him happens to be in excess of his authority unless in the latter case the act is either done by the government's express orders or is subsequently ratified and adopted by it. Nor could any action be maintained against the government for a tort committed by its servants if in passing the order in the performance of which the tort was committed the government was discharging its governmental function as a sovereign.[137]

On appeal this judgment was upheld by the Privy Council.[138]

*Alternate Remedy*

However, in most of the cases of false imprisonment and false arrest, the victim can initiate criminal proceedings against the individual police

135 I.L.R. (1931) 9 Ran. 375, 391.

136 (1942) II M.L.J. 14.

137 *Ibid* at 36.

138 *Maharani of Nabha* v. *Province of Madras* (1944), I.M.L.J. 399 (P.C.).

officer who commits the wrongful act. This is true largely in theory only and the only reported case is *Baistab* v. *R.*[139] In that case, on his refusal to have an enema administered to him, a prisoner was illegally confined in cell. The prison official responsible for his illegal confinement was held liable for false imprisonment, not civilly but criminally. While the prescription of sanction for false imprisonment or false arrest may have deterrent effect on the offending police officers, the victim does not get any solace by their being punished. If this remedy is used effectively, it will dampen the ardour of the police officers in discharging their law-enforcement duties effectively. The Criminal Procedure Code (S. 54) confers on a police officer the power of arrest without a warrant in a number of cases, e.g., on reasonable suspicion or complaint or credible information of a cognisable offence (i.e., an offence of the status of a felony). In the case of a non-cognisable offence, he can arrest only with a warrant of a magistrate. Arrest in such a case without warrant or for a cognisable offence without grounds of reasonable suspicion would be illegal and make the police officer liable. While we do have cases to this effect in England and the U.S.A.[141], there is only one in the Indian reports and in that the police officers were held personally liable.[142] In this case the plaintiff was charged with a cognisable offence and during the period of his trial, he was enlarged on bail. His sureties, however, approached the District Superintendent of Police who was in the town seeking the discharge of their bonds for the plaintiff. The Superintendent of Police, who had no statutory authority to discharge a bond, discharged the bonds. He further made an order for the re-arrest of the plaintiff and directed a sub-inspector to re-arrest the plaintiff. The Plaintiff filed a suit against the Superintendent of Police and the Sub-Inspector for false imprisonment and the high court held them jointly liable.

*Conviction of the Innocent Plaintiff*

A more serious wrongful act of the police is where a police officer arrests a person on a specific charge, adduces evidence to substantiate the charge and the man is convicted and sentenced and after he has served his sentence, it is found that the real culprit was somebody else. The law in India provides no remedy to such an innocent convict. Thus in *Mata Prasad* v. *Secretary of State*,[143] plaintiff was charged with embezzlement of post office funds by the

139 (1903) I.L.R. 30 Cal. 95.

140 *Shearer* v. *Shields* (1914), A.C. 808 (Police officer held liable for absence of reasonable grounds of suspicion). *Dumbell* v. *Roberts* (1944), I. All. E. R. 326.

141 See, e.g., *Dragna* v. *White*, 45 Cal. 2d 469 (A police Officer who makes an arrest without a warrant and without justification may be held civilly liable for false arrest and imprisonment.

142 *Kundan Lal* v. *Des Raj*. A.I.R. 1955 Punj 51.

143 (1930) I.L.R. 5 Luck 157.



police and was convicted and sentenced to a term of imprisonment. When he had served the prison term, it was found that he had not embezzled and that the funds had actually been taken away by dacoits, as the plantiff had alleged. He then filed a suit for damages against the Secretary of State, for the wrongful conviction and resulting mental suffering. But the High Court held that he had no cause of action and observed during the course of judgment:

> "We would further like to observe that the rule which makes masters or principals responsible for the torts committed by their servants or agents in the course of their employment is inapplicable in the case of the Crown.....It is plain that government itself is not responsible for the misfeasance or wrongs or negligence or omissions of duty of the subordinate officers or agents engaged in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs since that would involve it in all its operations in endless embarrassments and difficulties and losses which would be subversive of the public interest."[144]

The result is more unfortunate in India than it would be in the United States as in the U.S. remedy can, and generally is, given by a private bill but in India that is not done.

*Search and Seizure of Property*

Another instance of governmental irresponsibility is in the area of search and seizure of property. If goods are seized by a police officer and are lost due to his negligence, the State is not liable. It is true that the police officer personally would be liable, as in California,[145] but it would be idle to have a money decree say for 10,000 rupees against a constable whose annual income is 1000 rupees. In one of the earliest cases in this area, *Shivabhajan* v. *Secretary of State for India*,[146] the Secretary of State was sued for the negligence of the Chief constable. The claim arose out of the seizure by the Chief Constable of 62,500 bundles of hay in the possession of the plaintiff on getting complaints against him of having stolen this hay. The charge of theft was not sustained, and when the plaintiff demanded return of the hay only about 15,000 bundles were restored to him. About 50,000 bundles were not returned because they were "lost" and "not available". It was held that the suit was not maintainable in as much as the chief constable seized the

144 *Ibid.* at 163. Indeed, it is a quotation from 319, Story on Agency. It has been used by the American courts also for immunizing the city for officer's torts. See, e.g., *Devers* v. *City of Scranton*, 161 Atl. 540; *Murdock Parlor Grate Co.* v.. *Commonwealth*, 24 N.E. 854.

145 See Cal. Govt. Code 822.

146 I.L.R. (1904) 28 Bom. 314.

goods not in obedience to an order of the executive government but in performance of a statutory power vested in him by the Legislature. The court said that it was "settled law" that where the duty to be prerformed was imposed by law and not by the will of the party employing the agent, the employer was not liable for the wrong done by the agent in such employment.[147] The court, in order to rationalize the immunity of the State for the negligence of the chief constable went on to say,

> "the appointment of the Chief Constable was made not by the Bombay Government but by an officer clothed by the Legislature with a power in that behalf; the seizure of the hay was not in any sense productive of benefit to the revenues of the Bombay Government, nor was it in a transaction out of which profit could be derived."[148]

In the instant case, the chief constable was the first defendant and the Secretary of State for India the second defendant. During the pendency of the litigation, the first defendant died and the plaintiff then proceeded against the second defendant only. And the court while citing with approval what was said by the Privy Council in *Rogers* v. *Rangendro Dutt*[149] viz.

> "the civil irresponsibility of the Supreme power for tortious acts could not be maintained with any show of justice if its agents were not personally responsible for them; *in such cases the Government is morally bound to indemnify its agent and it is hard on such agent when this obligation is not satisfied*, (emphasis supplied) but the right to compensation in the party injured is paramount to this consideration."[150]

held that State was not liable for the negligence of the deceased chief constable. The victim, therefore, was left without any remedy.

In yet another case *Babu Lal* v. *Province of Orissa*,[151] police officers had seized a number of rice bags belonging to plaintiff with a view to prevent their export from Orissa to Bengal inspite of the plaintiff showing them a valid license for such export. The court, while conceding that the police

147 *Ibid.* at 325, citing *Tobin* v. *The Queen* (1864), 33 L.J.C.P. 199. In this case a petition of right had been presented to the Queen of England for damages for an act of a Captain of Her Majesty's ship who had seized a vessel belonging to the applicant believing her to be engaged in slave trade. The petition was rejected on the ground, inter alia, that the Captain in seizing the vessel was not acting in obedience to a command from Her Majesty but in the supposed performance of a duty imposed upon him by an Act of Parliament.

148 *Id.* Apparently, the court was applying agency principles as it was interpreting S. 65 Govt. of India Act 1858 which laid down that the State can sue and be sued in all those matters in which the East India Company could sue or be sued.

149 (1860) 8 M.I.A. 103.

150 I.L.R. (1904) 28 Bom. 314, 323, 324.

151 A.I.R. (1954) Orissa 225; commenced in 1943 and finally disposed of in 1954.



officers had acted in a high handed manner,[152] held them personally liable but came to the conclusion that the State was not liable for their tortious actions.

> "It cannot be held that the unwarranted seizure of the goods of the plaintiff by the police officers was either authorized by the State or was done under the sanction of any municipal law nor was it done for the purpose, of the government. The state also neither ratified the same nor derived any benefit from such seizure."

And so the government could not be held liable.

It is submitted that the sale by the State authorities of the rice bags seized by the police officers, amounted to ratification of the wrongful act. The court did order the State to restore to the plaintiff all sums of money thus realized by selling the plaintiff's rice, and yet came to the conclusion that the State was not vicariously liable for police tort in this case. Eventhough this was a case decided before independence, the post-independence period does not show any change in the judicial approach towards the problems of governmental liability for police torts.

The Orissa High Court soon found the Allahabad High Court in company. In *Mohammed Murad Ibrahim Khan* v. *U.P.*[153] under orders of the District Judge, jewellery belonging to the plaintiffs, who were then minors, was deposited with the court for safe custody and due to the negligence of the Nazir[154], a court official, it was stolen. When the plaintiffs after attaining majority claimed their jewellery, they were told that it had been stolen from the court custody. When they sued the Nazir, the District Judge[155] and the State, they were told that the State was not liable for tortious acts of its officers arising out of their duties imposed on them by law. "The rules had the force of statutory rules and in purporting to discharge the obligation imposed by these rules the Nazir was doing a duty imposed by law. If he committed a default in the performance of that duty and was guilty of negligence, he committed a tortious act in the performance of the duty imposed on him by law." There is no mention of the Nazir being held personally liable though, it is submitted, even if he had been held liable it would have been futile to have a decree for 25,000 rupees against a person whose annual income is around 1,200 rupees.

An earlier case *Ram Gulam* v. *U.P.*[156] decided by the Allahabad High Court was indeed an instance of patent miscarriage of justice. In this case ornaments stolen from the house of the plaintiff were recovered from another

152 *Ibid* at 232.

153 A.I.R. (1956) All. 75; commenced in 1944 and disposed of in 1956.

154 Nazir is strictly speaking not a police officer.

155 Judges are of course immune from liability by express enactment, Judicial Officers Protection Act of 1950.

156 A.I.R. (1950) All. 206.

house on a search made by the police and seized as stolen property in exercise of powers conferred in that behalf by the Criminal Procedure Code. They were produced as exhibits at the trial of those who were prosecuted in connection with the theft and were kept in the collectorate *malkhana* (Strong room in charge of the police) from where they were again stolen. The plaintiffs filed a suit for recovery of the stolen ornaments or their price from the State and the court dismissed their claim. Justice Seth observed:

> "The suit *is liable to fail* (emphasis supplied) on the ground that the alleged tortious act was performed in discharge of an obligation imposed by law." The plaintiff had no remedy against the police officers also possibly because he could not identify them. It is indeed too much to expect from a common man to name the police officers from whose custody his property was stolen. The State is in the best position to lay hands on such irresponsible and negligent police officers.

These cases of mere mechanical administration of justice, resulting in patent injustice to the victims of the negligent acts of police committed during the discharge of duties imposed on it by law, reached the climax in the latest pronouncement of the Supreme Court of India in *Kasturi Lal* v. *State of U.P.*[157] The Supreme Court observed:

> ".....There can be no escape from the conclusion that the police officers were negligent in dealing with Ralia Ram's (plaintiff appellant) property after it was seized from him. Not only was the property not kept in safe custody in the treasury, but the manner in which it was dealt with at the *Malkhana* shows gross negligence on the part of the police officers. In the present case, the act of negligence was committed by the police officers while dealing with the property of Ralia Ram (plaintiff appellant) which they had seized in exercise of their statutory powers. Now, the power to arrest a person, to search him, and to seize property found with him, *are powers conferred on the specified officers by statute and* (emphasis supplied) in the last analysis, they are powers which can be properly *characterised as sovereign powers;* (emphasis supplied) and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employee of the respondent during the course of its employment, but the employment in question being of the category which can claim the special characteristic of sovereign power the claim cannot be sustained; *and so we inevitably hark back to what Chief Justice Peacock decided in 1861* (emphasis supplied) and hold that the present claim is not sustainable."[159]

157 A.I.R. (1965) S.C. 1039; original suit filed in 1947 and finally diposed of in 1964.

158 *Ibid.* at 1043-44.



How helpless the judges of "the most powerful court in the world"[160] felt is evident from this decision. That they felt "bound" by a decision of a "high court" pronounced in 1861 is a paradox, to say the least. The Chief Justice observed:

> "in dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law, has to be told when he seeks a remedy in a court of law on the ground that his property has not been returned to him, that he can make no claim against the State. That we think is not a very satisfactory position in law. The remedy to cure this position, however, lies in the hands of the Legislature."[161]

The approach of the Supreme Court was indeed "theoretic," it was neither "practical" nor "pragmatic".[162]

*Hard Facts and Bad Law:*

On the basis of the foregoing discussion, following propositions can be safely stated regarding governmental liability for the torts of its police officers:

(1) Police in India being a ruthless and powerful force can, if it so chooses harass a person to intolerable limits. Iliteracy and general poverty of the masses and the fear of involvement in the processes of the law have encouraged in the emergence of the police force in its present form. Indeed a common man dare not bring a suit against the police and through it against the Government even if he is wronged by them. Even after two decades of independence the attitudes have not changed significantly. A person who is

159 A.I.R. (1964) S.C. 1038, 1048.

160 The Supreme Court of India has been described as the House of Lords and the Judicial Committee rolled into one. See Pylee, India's Constitution Ch. 23 (1962).

161 A.I.R. (1965) S.C. 1039, 1049, but see the approach of California Supreme Court in Muskopf and Lipman cases.

162 Cf. M. Hidayatullah, Democracy in India and the Judicial Process (1966) wherein he said: "We must avoid too much theory and become practical and pragmatic." (p. 82) And Justice Hidayatullah (as he then was) was one of the five judges who decided this case.

163 The fact that out of four cases of false imprisonment the plaintiffs in two of them were members of royal families of the princely states and the third, a local politician with considerable influence substantiates the surmise of the writer, See (a) *Mohammed Yusufaddin* v. *The Secretary of State*(1903) I.L.R. 30 Cal. 872 (P.C.); (b) *M.A. Kadir Zailany* v. *Secretary of State*, I.L.R. (1931) 9 Rang. 375; (c) *Maharani of Nabha* v. *Province of Madras* (1944), I.M.L.J. 399 (P.C.); (d) *Kundan Lal* v. *Des Raj*, A.I.R. (1955) Punj. 51.

wronged by the police, considers even to-day, it to be sound policy to accept the loss rather than file a suit against the police officer and the State and multiply his miseries.

(2) Where the victim of the police tort gathers courage to go ahead and file a suit against the police and the State, his desire to vindicate his right is immediately dampened by the high court fees, lawyer's fees and above all by the time-consuming civil litigation which might take years before the claim is finally settled. It is instructive to note that the cases involving seizure of property by police which were not restored to the owners due to the negligence of the police have taken eight to fourteen years, to be finally decided. There would hardly be a man of limited means who would venture to file a suit for damages against the police and the State and wait for ten years or even more especially in view of the present piling up of cases[164] in the High Courts to vindicate his right and get redress.

(3) However, if the wrongful act of the police officer results in some serious harm to person, property or reputation of the victim, and he files a suit against the police officer and through him the State as his employer, he finds that the State is not vicariously liable on ordinary agency principles for the acts of its police officers, though the police officer may be personally liable. Unfortunately such a defendant is judgment proof. The successful plaintiff with a 20,000 rupees judgment will find little solace in the personal liability of the head constable whose life's earnings will not come to 20,000 rupees.

(4) There is no police fund for the purposes of satisfying the judgments against police officers nor is there statutory insurance of any kind to mitigate the hardships of the police officer as well as the judgment plaintiff.

(5) One of the important justifications given for granting immunity to the State is that public entities should not be stifled or impeded by the burden or threat of liability in carrying out their law enforcement duties.[165] But what happens in practice is that while the State gets the immunity, the police officers are held personally liable. This dampens the ardor of the police officers in carrying out their

164 According to an official count, more than 350,000 cases were pending in 16 state High Courts at the beginning of 1969. The Supreme Court had a backlog of 5,300 cases. Roughly 20,000 cases are added annually. See, San Francisco Chronicle, Fri., April 11, 1969.

165 See the observations of Judge Learned Hand in *Gregoire* v. *Biddle*, 177 F. 2d 579. "Dampen the Ardor" argument.



law enforcement duties. Surely something is wrong with the system if it holds a police constable personally liable for conscientiously carrying out the orders of his superiors. A policeman should not be required to get legal advice before following orders.[166] The State wriggles out of vicarious responsibility by using a double-edged argument, viz. if the wrongful act was committed in the discharge of "governmental functions," the State is not liable;[167] and if it was committed by the officer while exercising excessive powers, it was not committed in the scope of employment, and hence the State is not liable.[168] It is said that the officers do not work for any profit for the State and so the State is not liable for their torts committed during the course of employment.[169] It is indeed strange that while the State owns all the lawful acts of its officers, controls them effectively by exercising powers of appointment, transfer, promotion, reduction in rank and dismissal, and pays them their salary like any employer,[170] it refuses to own the wrongful conduct of these officers arising in the course of employment. It has been held in some cases that the State will be liable for the tortious acts of its police officers arising during the course of employment only if the wrongful act was subsequently ratified by the State or was, in the first place authorized by the State.[171] It is difficult to accept this reasoning, as vicarious liability does not rest on the principle of implied authority. Much less does it require express authority or ratification by the employer. This requirement is intelligible in the case of a superior servant sought to be held liable for an act of his subordinate but has no meaning in the case of the State who is the ultimate employer.

(6) The "sovereign" and "non-sovereign" or "governmental" and "proprietary" functions distinction appears to be a myth in the twentieth century municipal law. Indeed, as has been more recently held by the Supreme Court of India sovereignty lies with the people.[172] With the expansion of State activity embracing almost all the enterprises and the tendency towards State monopoly, the

166 See David, Officer's Tort Liability, 55 Mich. L. Rev. 201, 217 (1956).

167 See *K. L. Jain* v. *State of U.P.*, A.I.R. (1965) S.C. 1039.

168 See *Bibu Lal* v. *Province of Orissa*, A.I.R. (1954) Orissa 225.

169 See *Shivabhajan* v. *Secretary of State*, I.L.R. (1904) 28 Bom. 314.

170 Hooda, *The Constitutional and Legal Position of the Police in India*, A.I.R. (1968) J.L. 127, 133.

171 See *M.A. Kader Zailany* v. *The Secretary of State*, I.L.R. (1931) 9 Rang. 375

172 *State of West Bengal* v. *Corporation of Calcutta*, A.I.R. (1967) S.C. 997.

aforesaid distinction in functions appears to be unrealistic.[173] The concept of sovereignty should not be invoked in cases of municipal law and it should be used only in public international law cases.

(7) If we bring in the concept of justice,[174] can we really say with any semblance of satisfaction that the victim gets "justice" in actions for the wrongs suffered at the hands of the police? Unless the state is made liable there is little to chose between letting down a deserving plaintiff or imposing liability upon the individual officer who has usually no means to meet it.

(8) The justification for the immunity of the State given by Story and accepted both by courts in India and the United States, i.e.,

"that the government itself is not responsible for the misfeasance or wrongs or negligence or omissions of duty of the subordinate officers or agents engaged in the public service for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs since that would involve it in all its operations in endless embarrassments, and difficulties and losses which would be subversive of the public interest,"[175]

seems to be unethical in the modern context especially when State has assumed the dimensions of a giant corporation. The fear of the State being involved in "endless embarrassments" is only imaginary for even in England it was once believed that if the dogma of sovereign immunity were breached, civilization would fall and with that the departments. However in spite of the enactment of the Crown Proceedings Act, 1947, civilization and mercifully the departments too survive.[176] If the State can nationalize life insurance business,[177] and banks,[178] it can certainly undertake liability insurance for the wrongful acts of its police officers. It should however, assume vicarious liability, as a first step, for the torts of its police officers committed in the course of employment.

173 The State was originally regarded as merely concerned with the maintenance of law and order, not with any trading activity. However that theory has become obsolete. The State does and is required in modern times to enter into many trading activities. Hence, there is no sufficient reason to draw any distinction between sovereign authority and trading authority. *State of West Bengal* v. *Corporation of Calcutta*, A.I.R. (1967) S.C. 997, 1014.

174 On the instinctive sense that "it is not fair."

175 See *supra*, n. 143.

176 Chapman, *Statutes on the Law of Torts*, 383 (1962).

177 Life Insurance Corporation of India is a state-owned statutory corporation doing life insurance business to the complete exclusion of all other companies, and is controlled by the Ministry of Finance.

178 Fourteen major banks were nationalized in July 1969.



## V

## LIABILITY FOR POLICE TORTS IN CALIFORNIA

It was indeed settled in California,[179] as elsewhere in the United States that operation of police department by a municipality was a "governmental function,"[180] and in the absence of a special statute, the activities of police officers in the enforcement of criminal law were within the ambit of sovereign immunity. The logical result of that doctrine, however, has been modified by statute with respect to various aspects of police and law enforcement activities in California.[181]

### *Municipal Liability Predicated on Personal Liability of the Police Officer*

#### *False Arrest or Imprisonment*

A police officer, of course, cannot be held liable for doing in a proper manner an act which is commanded or authorized by a valid law.[182] Arrest under a warrant, or the levy of civil process is considered a "ministerial act" for which the officer will not be liable if he acts duly and properly. However, police officers are normally held liable for de facto false arrests, arrest without warrant unless the arrested person has committed an offence in the presence of the officer or there is "reasonable cause" to believe the person arrested has committed a crime with the status of a felony.[183] The burden is upon the police officer to show that he had "reasonable cause" once the plaintiff has shown that he was arrested without a warrant.[184] "Reasonable cause," or "probable cause" as it is sometimes called, means that "a man of ordinary care and prudence, knowing what the officer knows would be led to believe or conscientiously entertain a strong suspicion that the arrested person is guilty of a crime, even if there is room for doubt."[195] If, therefore, an arrest is made without warrant, the arrested person gets a cause of action for false arrest if he alleges merely that there was an arrest without warrant, followed by imprisonment and damages.[186] Once these are proved, the burden of justifying the arrest is on the defendant.[187]

179 *Chapelle* v. *City of Concord*, 144 C.A. 2d 822 (1956); *Bryant* v. *County of Monterey*, 125 C.A. 2d 470; and see 5 Cal. L. Rev. Comm. Rep. Rec. and Studies, 404 (1963).

180 18 Mc Quillin, Municipal Corporations, 53.79, 53.80; 2 Harper & James 29.6; 5 Cal. L. Rev. Comm. Rep. Rec. & Studies 404 (1963).

181 Cal. Govt. Code 820.4 and 844.6.

182 Prosser, Law of Torts 129 (1964).

183 Cal. Pen. Code 836; *Stadmen* v. *City and County of San Francisco*, 63 Cal. 193 (1883); *Chapelle* v. *City of Concord*, 14 C.A. 2d 822 (1966).

184 *Dragna* v. *White*, 45 C. 2d 469 (1955).

185 *Cole* v. *Johnson*, 197 C.A. 2d 788 (1961); *Coverstone* v. *Davis*, 38 C. 2d 315.

186 *Dragna* v. *White*, 45 C. 2d 469, 471 (1955); *Lincoln* v. *Grazer*, 163 C.A. 2d 758; but see *Stedman* v. *City and County of San Francisco*, 63. Cal 163 (1883); *Whaley* v. *Jansen*, 208 C.A. 2d 222 (1962)

187 *Dragna* v. *White*, 45 C. 2d 469, 471 (1955); Hughes v. Oreb, 36 C. 2d 854, 858 (1951).

Traditionally, even though the police officer was held personally liable for damages for false arrest and false imprisonment, the governmental entity employing him was held immune from liability.[188] But now, under the California Tort Claims Act, 1963, [189] the public employer is liable on respondeat superior principle[190] and this indeed is a significant departure from prior law. While it might appear that S. 815 of the California Government Code abolishes all common law declared forms of liability for public entities, S. 815. 2 makes the public entities vicariously liable for the tortious acts and omissions of their employees. The cumulative effect of Ss. 815, 2, 820.2 and S. 820.4[191] is to hoist liability on the public entity for false arrest or imprisonment,[192] provided the police officer has acted within the scope of his employment.

The problem has been considered in three reported cases[193] since the adoption of the Tort Claims Act. In the Pasadena cases,[194] a mother and son, brought an action each against the city for damages for false arrest and false imprisonment allegedly committed by the police officers. According to the complaints, both plaintiffs had been arrested for trespass by a private citizen and taken into custody by police officers. The following day, the police officers represented to them that only enough money was delivered to free one of them on bail, the fact being that sufficient money had been delivered for the release of both. Only

188 *Stedman* v. *City and County of San Francisco*, 63 Cal. 193 (1883); *Chapelle* v. *City of Concord*, 144 C.A. 2d 822 (1956); *Oppenheimer* v. *City of Los Angeles*, 104 C.A. 2d 545.

189 Cal. Govt. Code 810-996, 6. Added by Cal. Stats. 193, Ch. 1, 1681, at 3266-89.

190 Van Alstyne, *Cal. Govt. Tort Liability* 286 (1964); Note, Civil Liability for Illegal Arrest and Confinements in California, 19 Hast. L. J. 974 (1963).

191 Cal. Govt. Code 815.2, 820.4.

815.2(*a*) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

(*b*) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

820.2 Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

820.4 A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

192 It is difficult to arrive at a valid distinction between false arrest and false imprisonment. The two causes of action are practically indistinguishable. See Manos, *Police Liability for False Arrests or Imprisonment*, 16 Clev.—Mar. L. Rev. 415 (1967). But see also *Dragna* v. *White*, 45 C. 2d 469.

193 (*a*) *Shakespeare* v. *City of Pasadena*, 230 C.A. 2d 375 (1964);
(*b*) *Shakespeare* v. *City of Pasadena*, 230 C.A. 2d 387 (1964);
(*c*) *Culbertson* v. *City of Santa Clara*, 67 Cal. Rptr. 752 (1968).

194 *Supra*



the mother was released and the son remained in jail. Both mother and son were tried and acquitted of trespass charge. Their suits against the city were dismissed for failure to state a cause of action, and both plaintiffs appealed.

The court held, in both cases, that the complaint stated no cause of action against the city for false arrest. The arrests were citizen's arrests, made by a private citizen to begin with, and the police officers, under those circumstances were not liable for their actions (Cal. Pen. Codes 847) and in fact, the officers would themselves have been criminally liable had they refused to take plaintiffs into custody,[195] the actions of the police officers were discretionary and covered by immunity.[196] However, in the son's case, the court held that he had a cause of action against the city for false imprisonment.[197] The court reasoned that since the jailor has a mandatory duty to release a prisoner for whom bail has been posted[198] and since false imprisonment is specifically excepted from the immunity granted to public employees by Government Code S.820.4, the jailor would be personally liable, and therefore by virtue of S815.2. the city is vicariously liable. In addition, as the mandatory duty to release on bail is "designed to protect against the particular injury" herein involved, the city is independently liable under S815.6.[199]

In another case, *Culbertson* v. *County of Santa Clara*,[200] the complaint alleged that upon the filing of a petition by a deputy sheriff,[201] an order for examination and detention of plaintiff was issued[202] by the superior court. Plaintiff was never served with this order of detention or petition for examination, but was picked up and delivered to a hospital. A hearing was noticed and held. Plaintiff was released and the proceedings dismissed, without adjudication of mental illness. He brought this action for damages for false imprisonment against the county. The county's general demurrer was sustained and plaintiff appealed. The court held that the count for false imprisonment stated a cause of action. A specific requirement of the statute directs service of order and petition upon the person alleged to be mentally

195 Cal. Pen. Code, 142; *Gene Shakespeare* v. *City of Pasadena*, 230 C.A. 2d 375, 382; *Marguerite Shakespeare* v. *City of Pasadena*, 230 C.A. 2d 387, 389.

196 *Shakespeare* v. *City of Pasadena*, 230 C.A. 2d 387, 390.

197 *Gene Shakespeare* v. *City of Pasadena*, 230 C.A. 2d 375, 383.

198 Cal. Pen. Code 1295

199 *Shakespeare* v. *City of Pasadena*, 230 C.A. 2d 375, 386; Cal. Govt. Code 815.6 reads: *Mandatory duty of public entity to protect against particular kinds of injuries.* Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

200 67 Cal. Rptr. 752 (1963); 261 A.C.A. 304 (1968).

201 Welf. Inst. Code 5551.

202 Welf. Inst. Code 5554.

ill.[203] Failure of the deputy sheriff to effect such service, if proven, necessarily renders wrongful his detention of the plaintiff. The gravamen of the complaint is his personal failure to comply with the statutory mandate. Although the officer is no longer a party defendant it is conceded that the county is liable if he would be.[204]

A reading of the Pasadena and Santa Clara cases,[205] especially the remarks of the court in the mother's case namely, "unlike the violation of a mandatory duty suggested in her son's case, the actions of the police officer here were discretionary and exactly the kind of conduct for which the officer (and therefore his employer) are granted immunity by S. 820.2 of the Govt. Code as adopted in 1963,"[206] may give an impression that if there, had been false arrest only, neither the police officers nor the city would have been liable. However, it is not so in the light of S. 820.2 read with S. 820.4.[207] The two sections taken together lead to the conclusion that if a false arrest and/or false imprisonment had actually taken place, the discretionary immunity would not apply and the city would be vicariously liable.[208]

*Negligence*

The legislative committee comment accompanying S.820.2[209] states that this section reenacts the discretionary immunity rule and, unless otherwise provided by statute, public employees will continue to remain immune from liability for their discretionary acts within the scope of their employment.[210] However this section does not providea blanket of immunity to the police officers in the discharge of their discretionary duties under all circumstances. An act in exercise of discretionary duty is clothed with immunity up to a particular stage but once that point has been reached any subsequent conduct of the police officer (it may even appear as the continuation of the original act) would not be of shielded by the doctrine of immunity.[211] This distinction, which has the effect of severely limiting the doctrine of discretionary immunity of the police officer, can be found in *Mc-*

203 Welf. Inst. Code 50502.

204 Cal. Govt. Code 815.2; *Culbertson* v. *County of Santa Clara*, 67 Cal. Rptr. 752, 753.

205 *Supra*, no. 193.

206 *Marguerite Shakespeare* v. *City of Pasadena*, 230 C.A. 2d 387, 390 (1964).

207 See *supra*, no. 191.

208 Civil Liability for Illegal Arrests and Confinements in California, 19 Hast. L.J. 674 (1968).

209 See *supra*, n. 191.

210 Cal. Govt. Code 820.2 comment; 1963 Journal of the Senate 1889.

211 The Discretionary Im nunity Doctrine in California, 19 Hast. L.J. 561 (1968).



*Corkle* v. *City of Los Angeles*.[212] Holding the city liable the court observed that classification of the act of a public employee as "discretionary" will not produce immunity under S.820.2 if the injury to another results, not from the employee's exercise of discretion vested in him "to undertake the act, but from his negligence in performing it after having made the discretionary decision to do so."[213] Accordingly, the court held that even if the police officer exercised discretion in undertaking his investigation of the first accident, S.820.2 did not clothe him with immunity for his negligent acts in conducting the investigation. He would have been immune if plaintiff's injury had been the result of his-police officer's-exercise of discretion. It was not: it resulted from his negligence after the discretion had been exercised. Because the essential requirement of S. 820.2. a causal connection between the exercise of discretion and the injury did not exist, the statutory immunity did not apply. Since the police officer was not immune from liability under S.820.2, so was the city not immune under S.815.2 (a) and therefore it was liable under S.815.2(b).[214]

*Assault and Battery*

The discretionary immunitydoctrine did not, prior to the California Tort Claim Act of 1963,[215] protect a police officer from liability for the use of "unrea sonable force"in making an arrest and since the statute re-enacted the former law of discretionary immunity, it did not create a defence where none had existed[216] Thus where a police officer used unreasonable force and thereby committed an assault and battery, he was not immune from liability under Govt. Code S. 820.2 which provided that a public employee was not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, and it followed that the city employing him was not immune under Govt. Code S.815.2(a).[217]

The law in California appears at a cursory glance to have gone too far in imposing liability upon the police officer for false arrest or imprisonment, negligence or assault and battery. It might be contended that this imposition of liability will dampen the ardour of the police officer who has to act with "snap judgment" many a time under difficult conditions. Indeed,

212 265 A. C.A. 401 (1969), 70 A.C. 262 (1969). In this case, while the police officer was trying to reconstruct the accident during his investigation, he failed to light the flares and there was a second accident which injured the plaintiff. The plaintiff filed a suit against the city for damages resulting from the officer's negligence.

213 *Johnson* v. *State of California*, 69 A.C. 813 (1969); *McCorkle* v. *City of Los Angeles*, 70 A.C. 262 (1969).

214 *McCorkle* v. *City of Los Angeles*, 265 A.C.A. 401, 409 (1969).

215 Cal. Govt. Code 810 et seq.

216 *Scruggs* v. *Haynes*, 252 C.A. 2d 256 (1967).

217 *Ibid.*

these factors were considered by the California Law Revision Commission[218] while recommending the adoption of the California Tort Claims Act of 1963. The indemnity provisions in the Code enable the police officer to overcome the hardships of personal liability. His liability is only theoretical and is used as a mere conduit for passing the loss suffered by the plaintiff on to the public entity except when the police officer is guilty of actual fraud, corruption or actual malice.[219] Thus the police officer can discharge his duties undaunted by imposition of personal liability so long as he acts honestly and without malice and if injury occurs to an innocent victim, such victim can be compensated by the public entity in accordance with the provisions of the Government Code.

*A Just Balance of Municipal Liability and Personal Immunity of Officer : Operation of Police Vehicle in Emergency.*

In California legislative relaxation of governmental tort immunity, prior to 1963, had established a significant but very uneven range of activities for which public entities were liable in tort[220]. One such activity was the operation of motor vehicles by state agencies in the discharge of "governmental functions". Since no statutory waiver of immunity was needed for "proprietary" functions, cities, counties and school districts could be held liable under tort rules governing private individuals[221]. But the operation of motor vehicles by police officers was labelled as "governmental"[222] function and the city was not liable for an injury inflicted by a police car in the line of duty[223]. The police officer, at common law, was not immune from liability in motor vehicle accident cases[224]. The police officer was, therefore, faced with a dilemma. He was under a duty to arrest and detain a person found violating the law. On the other hand, if he got involved in a motor vehicle accident while in the process of making an arrest, he was subjected to the burden of paying damages to the victim while his employer, the city or the municipality, enjoyed immunity[225]. If the police officer was also immunized from liability, the loss would fall entirely on the victim. The problem required a pragmatic balancing of interests in effective government against humanitarian interests and it was finally

218 5 Cal. Rev. Comm. Rep. Recs. & Studies, 404 et seq. (1963).

219 See Cal. Govt. Code Ss. 825.4 and 825.6.

220 Van Alstyne, *California Government Tort Liability* 34 (1964).

221 *Sanders* v. *City of Long Beach*, 54 C.A. 2d 651 (1942).

222 18 McQuillin, 53.81 (1963).

223 *Lucas* v. *Los Angeles*, 10 Cal. 2d 476 ; *Coltman* v. *Beverly Hills*, 40 C.A. 2d 570.

224 Morrison, *Negligent Operation of a Police Vehicle*, 16 Clev. Mar. L. Rev. 442 (1964).

225 *Balthasar* v. *Pacific Elec. Ry. Co.* 187 Cal. 302 ; *Lucas* v. *Los Angeles*, 10 Cal. 2d 476 ; *Armas* v. *City of Oakland*, 135 C.A. 411 ; *Tuten* v. *Town of Emeryville*, 139 C.A. 745



resolved in 1965 with the enactment of Chapter 1527[226] of Statutes of California. Section 17001 of the Vehicle Code, originally enacted in 1929[227], now reads as follows :

> A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment.[228]

Section 17004, originally enacted in 1929[229] now reads as follows :

> A public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or other emergency call.[230]

Further, a police officer engaged in the operation of an authorized emergency vehicle[231] is exempt from compliance with certain speed laws, rules of the road and other traffic regulations, provided certain statutory conditions, including the use of both siren and a red light, are satisfied[232]. Liability cannot be imposed on the public entity for negligence per se, consisting of violations of the speed and other traffic rules for which compliance is excused during emergency runs, and liability cannot be imposed at all on the officer operating the vehicle. But nothing in the statutes purports to exonerate public entities from tort liability for negligence as

226 Before this enactment, the solution of the problem was not satisfactory because S. 17002 of the Vehicle Code provided for subrogation of public agency and it could recover from the officer the total amount of judgment and costs recovered against the public agency. See 4 Cal. Law Revision Commission Rep. Rec. and Studies 1406 (1963).

227 Cal. Vehicle Code 17001 is a recodification of former Cal. Vehicle Code S. 400 which was based upon Cal. Civ. Code S. 1714 1/2 enacted by Cal. Stat. 1929, Ch. 260 1, p. 565. Indeed, the Cal. Veh. Code appears to be the only law which waived sovereign immunity with respect to public entities of all types. See 5 Cal. Rev. Comm. Rep. Rec. and Studies 36 (1963).

228 Cal. Stats. 1965, Ch. 1527, S. 2, p. 3620.

229 Cal. Veh. Code 17004 is a recodification of former Cal. Veh. Code S. 401 which was based on Cal. Stats. 1929, Ch. 263, S. 1 p. 568.

230 Cal. Stats. 1965, Ch. 1527, S. 5, p. 3620.

231 Authorized emergency vehicle is (for our purposes) defined in Veh. Code 165 thus. "An authorized emergency vehicle is : (*a*).....(*b*) Any publicly owned vehicle operated by the following persons, agencies or organizations : (*a*).....(2) Any police department, including those of the University of California, California State Colleges, Sheriff's departments, or the California Highway Patrol."

232 Veh. Code 21055.

measured by ordinary common law standards, other than what is covered by the exempted traffic regulations.[233]

These sections raise an important question as to how the liability for the negligent operation of a police car could be fastened to the public employer especially when the police officer himself is absolved of liability.[234] Indeed, some of the decisions of the appellate court have adopted a view that a law which released the employee from liability must of necessity relieve the employer from liability, the basis of such reasoning being the common law rule that, after an employee had been adjudicated free from negligence, the employer could not be held liable in an action for his employee's negligence.[235] This view was based solely on the doctrine of respondeat superior. However, there is, a distinction between the common law rule as stated above, and a statute which does not declare the employee free from negligence, but declares that he shall not be liable even though he is guilty of negligence.[236] Under the common law rule, if the employee is not negligent, it follows logically, under the theory of respondeat superior, that his employer cannot be liable. In the application of the statute, however, the employee may be negligent, but, by the declaration of the statute, he is free from liability. From this it does not logically follow that the employer may not be liable.[237]

The invocation of that meaningless phrase[238] "respondeat superior" cannot explain the principle of vicarious liability as reflected by SS. 17001 and 17004 of the Vehicle Code. The imposition of liability on the public entity and immunization of the public officer from liability for damage arising out of the operation of authorized emergency vehicle cannot be predicated on the traditional doctrines. It has its basis in a combination of policy considerations. The damage caused by speeding police vehicles on emergency calls is a by product of a desirable but dangerous activity undertaken for the benefit of the community and "if a certain type of loss is looked upon as a more or less inevitable by-product of a desirable but dangerous activity ; it may well be just to distribute

233 Van Alstyne, *Cal. Govt. Tort Liability* 351 (1964) ; and see *Torres* v. *City of Los Angeles*, 58 C. 2d 35 *West* v. *City of San Diego*, 54 C. 2d 469.

234 This question did arise in the past in the application of SS. 400 and 401 of the Veh. Code 1935. The decisions of the California district courts of appeal have not been in harmony in answering this question. See, e.g., *Lossman* v. *City of Stockton*, 6 C.A. 2d 324 ; *Rogers* v. *City of Los Angeles*, 6 C.A. 2d 476 ; *Lucas* v. *City of Los Angeles* 10 Cal. 2d 476 ; *Stone* v. *City and County of San Francisco*, 27 C.A. 2d 34. And see David, *Municipal Liability in Torts*, 6 So. Cal. L.R. 269 (1931) ; *Municipal Liability—Effect of Veh. Code 401 on Liability under Veh. Code 400*, 21 So. Cal. L.R. 405 (1939).

235 E. g., *Armas* v. *City of Oakland*, 135 C.A. 411.

236 See *Raynor* v. *City of Arcata*, 11 Cal. 2d 113.

237 See Van Alstyne, *California Govt. Tort Liability* 64 (1964).

238 Fleming, *The Law of Torts* 336 (1965).



its costs among all who benefit from that activity although it would be unfair to impose it upon each or any one of those individuals who happened to be the faultless instruments causing it."[239] The public entity has a "deeper pocket" than the impecunious police officer and is better able to compensate the accident victim.[240]

It may be contended, as has been done in the past,[241] that imposition of liability on the public entity might impoverish the public entity and lead to its bankruptcy. This argument has been well taken care of by two other provisions viz. S. 17002 of the Vehicle Code and S. 825 of the Government Code Section 17002 equates the liability of the public entity for death or injury to person or property with that of a private person under the provisions of Article 2 (commencing with S. 17150) of the Vehicle Code.[242] The most important provision in Article 2 is S. 17151 which places limitation on the liability. It limits the amount of liability to fifteen thousand dollars ($ 15,000) for the death of or injury to one person in any one accident and to the amount of thirty thousand dollars ($ 30,000) for the death of or injury to more than one person in any one accident and is limited to the amount of five thousand dollars ($ 5,000) for damages to property of others in any accident.[243] Section S. 825.6 of the Government Code[244] gives a right to the public entity to get indemnity from the public employee if his act was prompted by 'actual fraud', 'corruption'

239 *Id* at 10.

240 Prosser, *Law of Torts* 471 (1964).

241 This financial argument is one of the oldest rationalizations for immunity used first in *Russell* v. *Men of Devon*, 100 Eng Rep. 359 (K.B. 1788). For a less obvious reference to this rationale, see *Lucas* v. *City of Los Angeles*, 10 Cal. 2d 476. See, Shapo, *Municipal Liability for Police Torts : An Analysis of a Strand of American Legal History*, 17 U. of Miam. L.R. 475 (1963), and see *O'Connell* v. *Merchants & Police Dist. Tel. Co.*, 167 Ky. 468.

242 Cal. Stat. 1965, Ch. 1527, S. 4, p. 2620.

243 S. 17151. Limitation of Liability.

(*a*) The liability of an owner, bailee of an owner, or personal representative of a decedent imposed by this chapter and not arising through the relationship of principal and agent or master and servant is limited to the amount of fifteen thousand dollars ($ 15,000) for the death of or injury to one person in any one accident and subject to the limit as to one person, is limited to the amount of thirty thousand dollars ($ 30,000) for the death or injury to more than one person in any one accident and is limited to the amount of five thousand dollars ($ 5,000) for damage to property of others in any one accident. Cal. Stats. 1967, Ch. 862, S. 8.5, p. 2307.

244 S. 825.6. Grounds for Indemnification of Public Entity by Employee. (*a*) If a public entity pays any claim or judgment, or any portion thereof, either against itself or against an employee or former employee of the public entity, for an injury arising out of an act or omission of the employee or former employee of the public entity, the public entity may recover from the employee or former employee the amount of such payment if he acted or failed to act because of actual fraud, corruption or actual malice.....

or 'actual malice.' This is bound to deter the police officers from committing intentional injury under the pretext of using a motor vehicle in emergency.

The legal mechanism of distributing and adjusting losses arising out of the operation of vehicles by police officers in emergency in California very much resembles the German law relating to the liability of the state or public entity for the torts of its officers—including police officers committed within the scope of their employment. Article 34[245] of the Constitution of the Federal Republic of Germany states, inter alia, that in principle the state shall be liable for the wrongful acts of its officers committed in the exercise of powers conferred on them by their office but in the event of wilful intent or gross carelessness, the state may claim indemnity from them. Similar provisions, which would be in consonance with modern theories of enterprise liability,[246] would have been desirable in other areas of police torts too.

*Polarization in Municipal Liability: From Absolute to Non-Liability Riot Damage.*

The protection of life and property within its jurisdiction by a municipality or county is considered as a "governmental" function[247] and traditional notions of sovereign immunity shield local government from liability for failures which are purely "governmental".[248] Therefore, in the absence of a statute abrogating this immunity, an injured citizen has no action against his municipality no matter how derelict it has been in maintaining law and order.[249]

In California, however, to enable persons damaged by public disorder to recover from the municipality, the California riot damage statute was enacted in 1868. This also represents the first statutory waiver of sovereign immunity in California.[250] It applied to property damage only, imposed absolute liability on the municipality and allowed full recovery. This statute, however,

245 Art. 34. If any person, in the exercise of a public office entrusted to him, violates his official obligations to a third party, liability shall rest in principle on the state or the public authority which employs him. In the case of wilful intent or gross carelessness the right of recourse is reserved. In respect of the claim for compensation or the right of recourse, the jurisdiction of the ordinary courts must not be excluded; see also 839 B.G.B.

246 See Calabrese, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L. J. 499; Calabrese, *The Decision for Accidents; An Approach to Non-Fault Allocation of Costs*, 78 Harv. L. Rev. 713.

247 18 McQuillin, *Municipal Corporations* 53.145 (1963); 38 Am. Jur. Munic. Corp., 652 (1941).

248 James, *Tort Liability of Local Governmental Units and their Officers*, 22 U.Chi. L. Rev. 610 (1955); Smith, *Municipal Tort Liability* 48 Mich. L. Rev. 41 (1949); Sengstock *Mob Action: Who Shall Pay the Price* 44 J. Urban L. 407, 412 (1966-67).

249 *Clear Lake Water Works Co.* v. *Lake County*, 45 Cal. 90 (1872): See Note, Municipal Liability for Riot Damage, 16 Hast. L. J. 459 (1965).

250 See David, *Municipal Tort Liability in California*, 7 So. Cal. L. Rev. 372, 380 (1934).



was called upon rarely and seems to have been the basis of relief in about half a dozen cases[251] over a period of one hundred years. It was typical of the communal liability laws which trace their pedigree to the Statute of Winchester[252] in England. The policy argument behind the Statute of Winchester was that primary responsibility for keeping the peace rested on the people of the "hundred" who were obliged to pursue felons by hue and cry and bring them to trial. If they chose to be less than diligent in their pursuit, let them pay for their laches. The loss caused to a person was thus spread over the community. It was probably this appeal of communal liability as an equitable method of spreading the loss, and as a stimulus for public interest in law enforcement which prompted California to create that liability by statute in 1868. In 1963, after almost a century of living with municipal liability for riot damage, the California legislature repealed the statute[253] as one of the many consequences of the Muskopf case.[254] Muskopf had held that the sovereign immunity doctrine was "mistaken and unjust" and would no longer protect governmental entities from civil liability for their torts. Thus most California statutes dealing with Governmental immunity became anamolies. They had been drafted under the assumption that the underlying rule was immunity. Now immunity, where it existed, was to be the exception and the underlying rule was liability.[255] The California Law Revision Commission undertook a study of the effects of the Muskopf decision and its recommendations called for a repeal of the now anamolous waivers of immunity and a reestablishment of immunity by statute in selected areas.[256] The Commission recommended, inter alia, the repeal of the Riot Damage Act on the ground that any imposition of absolute liability was inconsistent with the new standards of immunity urged in its report. The Commission noted:

> Sections 50140 through 50145 of the Government Code are inconsistent with the foregoing recommendations (relating to non-liability for failure to preserve health and safety). These sections impose absolute liability upon cities and counties for property damage caused by mobs or riots within their boundaries. These sections are *an anachronism in modern law.* They are derived from similar English laws that date back to a time when the government relied on local townspeople to

251 *Wing Chung* v. *Los Angeles*, 47 Cal. 531 (1874); *Bartlett* v. *San Francisco*, 63 Cal. 156 (1883); *Bank of California* v. *Shaber*, 55 Cal. 322 (1880); *Clear Lake Water Works Co.* v. *Lake County*, 45 Cal. 90 (1872); *Agudo* v. *Monterey County*, 13 Cal. 2d 285 (1939).

252 13 Edw. 1, Stat. 2, c. 2, 3 (1285); This was followed by the English Riot Act 1714 and finally the present statute, the Riot (Damages) Act, 1886.

253 Cal. Stats. 1963, ch. 1681, S. 18.

254 *Muskopf* v. *Corning Hosp. Dist.*, 55 Cal. 2d 211 (1961).

255 See Coby, *The New California Governmental Liability Statutes*, 1 Harv. J. Legislation 16 (1964); Note, Municipal Liability for Riot Damage, 16 Hast. L. J. 459 (1965).

256 4 Cal. Law Revision Comm. Rep. Recommendations and Studies 801 (1963).

suppress riots. *The risk of property loss from mob or riot activity is now spread through standard provisions of insurance policies.* (emphasis supplied) Accordingly these sections should be repealed.[257]

Most of the Commission's recommendations were enacted as law in 1963.[258] The Riot Damage Act was repealed[259] and provisions were enacted saving public entities and their employees from liability for failure to enforce any law.[260]

This combination of repeal and enactment, it is submited, is a retrograde step which has put the clock back by a hundred years so far as municipal liability for riot damage is concerned. On the one hand, it has abolished absolute communal liability for mob violence and on the other it has stifled the chances of basing liability on fault. A California property owner whose property has been damaged by riot, now cannot recover from his local government on any theory. He has no claim against them based on strict liability because such liability does not exist unless supported by statute,[261] and California no longer has a riot damage statute. He has no claim based on the government's negligent or intentional failure to enforce the law because the new statute has established immunity from liability for such failures.[262] He now has only two courses open to get relief. He may recover from the rioter or any individual rioter, the full amount of damages.[263] But this is not a meaningful remedy as it involves the difficult tasks of identifying the rioters, locating them for service of process and if they have sufficient assets, to make the collection of a judgment possible. It is indeed unpractical. The other course for recovery is the one mentioned by the Law Revision Commission, viz. "standard provisions of insurance policies."[264] Private insurance is the most obvious and the most common, but by no means the ideal source of relief for people whose property

257 *Id.* at 818.

258 Cal. Stats. 1963, ch. 1681.

259 *Id.* at S. 18.

260 Cal. Govt. Code 818.2, 821, 846:

S.818.2–Adoption or failure to adopt or enforce enactment. A public employee is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.

S.821—Adoption or failure to adopt or enforce enactment. A public employee is not liable for an injury caused by his adoption or failure to adopt an enactment or by his failure to enforce an enactment.

S.846—Failure to make arrest or to retain person arrested in custody. Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody.

261 See *supra*, notes 179 and 180.

262 *Supra* n. 192.

263 *DeVries* v. *Brumback*, 53 Cal. 2d 643 (1960); *Shaefer* v. *Berintein*, 140 C.A. 2d 278 (1956).

264 *Supra* n. 189.



has been damaged in riots. "It would be unfortunate for all concerned if private insurance were the only hope for riot victims."[265] This remedy too is not very satisfactory. While it will burden the property owners with heavy premiums, it will have no deterrent effect on the rioters and will not prompt the municipality to have a more efficient law-enforcement department. Moreover, the insurance remedy may not be available in riot-prone localities except on very high premiums. If, on the other hand, communal liability for riot damage is restored, the municipality can finance it by taxing the community thus spreading the cost of riot damage broadly[266] and it can further exhort its police officers to be more diligent in the prevention of such riots. Local taxation will deter the rioters from indulging in destruction.

The provisions of the Riot Damage Act in S. 50140-S 50145 of the Government Code which were branded as "an anachronism in modern law" by the Law Revision Commission,[267] are not indeed an anachronism at the operational level. In view of the rising number of riots and the prospects of more riot damage in the offing, it is submitted that the communal liability as provided under the now repealed riot damage statute was more efficacious than insurance coverage for such damage. The municipality should be made liable for riot damage and the victim of riot damage should be allowed full recovery. However, to prop up the loss bearing and loss spreading capacity of the municipality, a program of passing over a part of local liability to state coupled with federal insurance at subsidized rates would appear to provide the best solution under the present situation.[268]

## VI

## CONCLUSION

The Law Commission of India examined in detail the law relating to the liability of the government for the torts of its servants and recommended that legislation should be undertaken for defining such liability, and formulated specific proposals in that direction.[269] This report, submitted in May 1956 to the ministry of law, was under "active consideration of the government"[270] even until 1964 when the Supreme Court exhorted the legislature to enact suita-

265 Compensation for victims of urban riots, 68 Colum. L. Rev. 57 (1968).

266 See Sengstock, *Mob Action: Who Shall Pay the Price?* J. Urban L. 407 (1966-67).

267 *Supra*, n. 189. It is not an anachronism in England even now and is effectively used. See *Ford* v. *Metropolitan Police Dist. Receiver* (1921), 2 K.B. 344; *Munday* v. *Metropolitan Dist Receiver* (1949) 1 All. E.R. 337.

268 Riot Insurance, 77 Yale L.J. 541, 548 (1968); and see Rottmen, *Municipal Liability for Riot Losses*, 5 Trial 49 (1969); Broach, *Municipal Liability for a Policy of Permitting Riot Damage.* 47 Tex. L. Rev. 633 (1969).

269 Law Commission of India: First Report, Liability of the State in Tort 38-42 (1956).

270 The Government (Liability in Tort) Bill, 1965 (Bill No. 54 of 1965) 9.

ble law removing the rigours of the sovereign immunity doctrine.[271] Finally, in August 1965 the Government (Liability in Tort) Bill was introduced in the Parliament but was not enacted until 1967 when the Parliament was dissolved for the general elections and the bill lapsed.[272] The Law Commission, after reviewing the Crown Proceedings Act, 1947, the Federal Tort Claims Act, 1946, and the law relating to governmental liability for torts in Australia, came to the conclusion that the liability of the state in America for torts committed by its servants was "very restricted."[273] In Australia, which was the first to give the lead in reducing the immunity of the Crown, a simpler formula that the "rights of the parties shall as nearly as possible be the same....as in a suit between subject and subject" was adopted. It was however, judicially interpreted to exclude liability for "discretionary acts" and it was therefore, the Law Commission concluded, "not certain and definite."[274] The Crown Proceedings Act, the Commission concluded, was more liberal than the legislation in the United States but in respect of statutory duties and powers, the scope was "very restricted."[275] The Act is silent regarding discretionary powers and duties but that may be on the principle that the officer who committed the tort was not liable at common law in the absence of additional damage caused by negligence in the exercise of discretion. The Law Commission therefore concluded :

> It would, therefore, not be advisable to adopt the legislation in this respect as in England, America or Australia. *It is necessary that the law should, as far as possible, be made certain and definite instead of leaving it to courts to develop the law according to the view of the judges. The citizen must be in a position to know the law definitely.*[276] (emphasis supplied)

Although the Law Commission did examine French materials[277] it however did not make any mention of it in its conclusions or proposals. The proposals made by the Commission are indeed laudable and if enacted into law, some of the hardships accompanying the sovereign immunity doctrine would be removed.

The Commission recommended, inter alia, the following principles on which legislation ought to proceed :[278]

271 See *K. L. Jain* v. *State of U.P.*, A.I.R. (1965) S.C. 1033, 1049.
272 See Art. 107 (5) of the Constitution of India.
273 Law Commission of India : First Report Liability of the State in Tort 37 (1956).
274 *Ibid.*
275 *Ibid.*
276 *Ibid.*
277 Law Commission of India, First Report, Liability of State in Tort 29-31 (1956).
278 *Id.* at 38, 39 (1956).



(i) The State as an employer should be liable for the torts committed by its employees and agents while acting within the scope of their office or employment.

(ii) The State should be liable, without proof of negligence, for breach of a statutory duty imposed on it or its employees which causes damage.

(iii) The State should be liable if in the discharge of statutory duties imposed upon it or its employees, the employees act negligently or maliciously, whether or not discretion is involved, in the exercise of such duty.

(iv) The State should be liable if in the exercise of the powers conferred upon it or its employees the power is so exercised as to cause nuisance or trespass or the power is exercised negligently or maliciously causing damage.

The ministry of law, however, thought that two of these foregoing recommendations, viz. (ii) and (iii), were "rather too wide" and did not include them in the Bill.[279] If the Bill were enacted in its present form, the liability of the State for the torts of police officers would be governed by the following provisions :

1. (3) Subject to the provisions of this Act, the Government shall be liable in respect of any tort—

(*a*) committed by an employee of the Governmet or an agent employed by the Government,—

(i) while acting beyond the course of his employment ; or

(ii) while acting beyond the course of his employment if the act constituting the tort was done by the employee or agent on behalf of the Government *and* is ratified by the Government ;

2. (5) The Government shall be liable in respect of any personal injury or any damage to property caused by any dangerous thing in the possession of the Government or over which the Government exercises control in the same manner and to the same extent as a private person of full age and capacity would be liable in similar circumstances if he were in possession of or exercised control over, such thing.

(11) Nothing contained in this Act shall render the Government liable in respect of—

(*a*) any act done by—

(i) a member of the police force, or

279 See, The Government (Lability in Tort) Bill (1965) 14.

(ii) a public servant whose duty it is to preserve peace and order in any area or place or who is engaged on guard, sentry, patrol, watch and ward, or other similar duty in relation to any area or place

for the prevention or suppression of a breach of the peace, or a disturbance of the public tranquility, or a riot, or an affray, or for the prevention of any offences against public property;

It is submitted that these provisions would not provide a satisfactory solution and State immunity for police torts will con tinue inspite of these provisions. In fact, the provisions of 3(*a*) (ii) merely incorporate what was held in the *Rangoon* case,[280] viz. the government is not liable for wrongs done by its officers unless the wrongful act is done either by its order, or on its behalf being subsequently ratified or adopted by it. Further, though 3(*a*)(i) lays down that government is liable for the torts committed by an employee while "acting in the course of his employment," it would not mean that the state will be liable for any harm arising out of the "discretionary" functions of the employee. This is evident from the recommendations of the law commission which, while criticizing the provisions of the Crown Proceedings Act observed that Act was silent regarding discretionary powers and duties which might be due to the acceptance of the principle that the officer who committed the tort was not liable at comon law in the absence of additional damage caused by negligence in the exercise of discretion[281]. In most of the seizure of property cases, the property is generally seized in exercise of discretionary power. Once they had taken possession of the property, they have exercised their discretion and the safe-custody of the property is not covered by any discretionary function. There is indeed no causal connection between the exercise of discretion and loss of property, the loss being entirely due to subsequent negligent conduct of the officers. It is regrettable that when the property is lost due to their negligence, the blanket of immunity is sought to cover their act of negligence. In this respect the Supreme Court of California has been pragmatic for in a recent case[283] the court held that this immunity defence would be available to the officer and the state only if there was a causal connection between the exercise of discretion and the injury. The mere classification of the act of public employees as "discretionary" will not produce immunity if the injury to another results, not from the employee's exercise of "discretion vested in him" to undertake the act, but from his negligence in performing it after having made the discretionary decision to do so.[284]

280 *M. A. Kader Zailany* v. *The Secretary of State*, I.L.R. (1931) 9 Rang. 375;

281 Law Commission of India First Report, Liability of the State in Tort 37 (1956).

282 *Supra.*

283 *McCorkle* v. *City of Los Angeles*, 70 A.C. 262 (1969).

284 *Johnson* v. *State of California*, 69 A.C. 813.



With the lapse of the Government (Liability in Tort) Bill of 1965, the law relating to governmental liability for police torts in India is as uncertain and unjust as ever. Injuries to life, limb or liberty are still required to be borne mainly by the injured individual except in the presumably rare cases in which financially responsible police officers could be held liable. This might tempt us to jump to the conclusion on humanitarian grounds, that all injuries sustained from torts of police officers in the line of their duty should be actionable. But a moment's reflection, however, reveals that the problem cannot be resolved in such a simple way. It is however suggested that the law in Califouia strikes a balance between the interests of the victim of a police tort on the one hand and the interests of the community and the law enforcement officer on the other. The risk of injury involved in the law enforcement function is one which the society has accepted in the United States as indispensable for the preservation of peace and good order. But in India society has been willing to accept the benefits of the system of police protection but has not been willing to assume all the burdens flowing therefrom. It is therefore suggested that India adopt legislation regulating the liability of the state for police torts on the lines of the law in California, but keeping in view the purse of the states in India limit the liability of the state to not more than twenty-five thousand rupees in one action.

285 *Supra.*

# THE ENGLISH ORIGINS OF CHOICE OF LAW IN CONTRACTS

MICHAEL CHARLES PRYLES*

For many centuries the common law did not take cognizance of foreign cases. Debts contracted abroad as well as wrongs committed abroad long remained beyond the jurisdiction of the common law courts.[1] This resulted from the fact that juries were selected from local men familiar with the matter in dispute. Hence pleadings were required to show the locality where the acts occurred so that the sheriff would know from where to summon the jurors. Moreover the rule became established that a jury could not inquire into any matter that did not take place within the given locality.[2] Gradually, however, attempts were made to try foreign cases, initially by the use of fictions. Thus the Fourteenth and Fifteenth century Year Books disclose actions being brought on deeds made in French cities alleged to be "in the county of Kent".[3]

In the Sixteenth Century juries began to decide questions not so much on their own knowledge as on the deposition of witnesses. At first the testimony of witnesses was voluntary but after 1562 their attendance could be compelled. It thus became possible for juries to try matters which were not strictly local. In 1586 *Bulwer's Case*[4] decided that actions involving more than one county could be sued upon in any one of them and soon the concept

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1 For Example, in an *Anonymous* case reported in Y.B., 2 Edw. 11 (1308) (reproduced in 17 *Selden Society* 110-11) John brought a writ of debt against William on a deed made at Berwick, Scotland. It was held that as the deed was made at Berwick "Where this Court has not cognizance, it was awarded that John took nothing by his writ etc.". Similarly another *Anonymous* case in Y.B. 14 Edw. 11 (1321) (reproduced in 86 *Selden Society* 347) indicated enforcement of a bond made overseas was not possible. The interesting and curious report is short enough to reproduce in full:

> A man entered into a bond beyond the sea to be bound to me in a hundred marks by his deed, and we both came to England, I demand the debt by a writ against him, and he asks what (evidence) I have of the debt, and I put forward his deed drawn up in France, and he denies it. I shall never get the debt, and the cause is that folk of this land will not be able to try the deed.

2 *See generally*, Sack, *Conflicts of Laws in the History of the English Law*, in 3 *Law, A Century of Progress* 1835-1935-342, 346 (1937) who cites several Fourteenth Century cases including one, decided in 1374, where Belknap C.J. declared "those of one county Cannot try a thing which is in another county" (TY.B. 48 Edw. 111, 30, 17).

3 *See e.g.*, Y.B. Itil. 48 Edw. 111, pl. 6, fo. 2-3 (1375); Y.B. 15 Edw. IV, pl. 18, fo. 14 (1476) discussed by Sack, *supra* n. 2, at 346, 406.

4 *Bulwer's Case*, (1586) 7 Co. Rep. la, 77 E.R. 411.



of the transitory action, liable in any place where the defendant resided, was born. Unless something inherently local was involved an action was regarded as transitory and not traversable by the defendant on the ground that it was not laid in the county where it arose.[5] Actions involving non-English elements similarly became triable in England. Though it was necessary to allege that the action arose in England, a foreign action could be given a fictitious English venue which, in the case of a transitory action, could not be traversed.[6]

So long as only local actions were tried at common law no question of conflict of laws arose. However the evolution of the principle of transitory actions enabled jurisdiction to be exercised over cases involving significant foreign elements. Though the common law courts had shown a reluctance to exercise jurisdiction over foreign cases, such cases gradually came to be tried. This was necessitated by the reception of the law merchant into the common law and the reduction of Admiralty jurisdiction over foreign actions at a time when British commerce and the British possessionswere expanding. The acceptance of foreign cases in the Eighteenth century gave rise to the problem of choice of law and introduced conflict of laws into the common law.[7]

An initial, and perhaps understandable, solution to the choice of law problem was to deny it and apply the lex fori in all cases. But this reaction did not meet with wide and long acceptance. The existence of established conflictual systems in other countries[8] and the influence of judges of the calibre of Lord Mansfield at the vital formative stage proved decisive.

The conflict between the invariable application of the lex fori and the view that foreign law might be applicable in appropriate circumstances can be seen in *Robinson v. Bland*.[9] There the plaintiff sought to obtain the pay-

5 *See R v. Lord Vaux* (1586) 1 Leon. 37, 74 E.R. 35; *Bullock v. Smith* (1589) Cro. Eliz 174, 78 E.R. 431;

6 *Mostyn* v. *Fabrigas* (1774) 1 Corp. 161, 98 E.R. 1021; *Ilderton* v. *Ilderton* (1793) 2 H.B. 1 145; 126 E.R. 476; Sack, *supra n.* 2, 370.

7 Sack, *supra* n. 2, at 385-86; Potter's *Historical Introduction to English Law and its Institutions*, 207 (4th ed. Kiralfy, 1958).

8 *See* Yntema, *The Historic Bases of Private International Law*, (1953) 2 Am. J. Comp. L. 297. Foreign treatises had existed from an early date. Huber, a professor and judge in Friesland, had published works in the Seventeenth Century. Story's *Commentaries on the Conflict of Laws*, which was first published in 1834, drew much from Huber's writings. But the first work in English was apparently that of Livermore whose *Dissertations on the Questions which arose from the Contrariety of the Positive laws of Different States and Nations* was published in New Orleans in 1828. Livermore had in turn been influenced by Boullenois, *Dissertations sur des questions qui naissent de la contrariete des loix et des coutumes* (Paris, 1732). In England Dicey's famous treatise on *The Conflict of Laws* first appeared in 1896. In his preface Dicey stated that this branch of the law had been created within little more than a century. But his treatise was not the first English work. Westlabe's book had been published in 1898 and Dicey acknowledged the prior English, several American and many Continental works.

9 (1760) 2 Burr. 1077, 97 E.R. 717.

ment of debts incurred by one Sir John Bland during the course of a gaming transaction in France. Part of the monies had been lent by the plaintiff to Bland and part had been won by the plaintiff. As security Bland had drawn a bill of exchange in France. The plantiff based his action on three counts; one on the bill of exchange and the other two on the loan and money won separately. Under English law the claim based on the bill of exchange and the claim based on the money won could not be maintained because they involved consideration of gaming nature. However the loan was enforecable. Under French law the loan was similarly recoverable as a debt. Money won at play, though not recoverable in the courts of justice, could be recovered as a debt of honour before the marshals of France, the object being to prevent duelling. The court held that the plaintiff could succeed only in respect of the loan.

The fact that money won at play could be recovered as a debt ofhonour in France was of no assistance to the plaintiff, in the view of two justices because only the lex fori was relevant. Denison J. considered the action "a plain, clear, short case: it is determinable by the rules of the common law, and no other law. And the plaintiff has appealed to the laws of England, by bringing his action here; and ought to be determined by them".[10] Wilmot J. did not think that the possibility of eforcement in the French Court of Honour deserved any respect, describing that tribunal as "wild, illegal, fantastical" and "contrary to the universal and general laws even of the country where the transaction happened" as well as "contrary to the genius and spirit of our own law too".[11] In his honour's view the possibility of recovery in that court could not be made the foundatiton for maintaining an action in England upon a matter prohibited by the laws of both countries.[12] But even if gaming debts had been recoverable in the ordinary French courts, Wilmot J. indicated that the plaintiff would nevertheless have failed for it was the lex fori that applied: "I cannot help thinking, that where a person appeals to the law of England, he must take his remedy according to the law of England" "Though law of the place where the thing happens" some times prevailed, it was usually applied indirectly by the enforcement of foreign judgments rendered in that place. In an original action, however, it was the lex fori that governed:

10 *Id.* at 1081, 720.

11 *Id.* at 1083, 721.

12 Whether gaming transactions were actually prohibited in France, as distinct from being unenforceable, may be questioned in view of the fact that the marshals of France, who enforced such debts, had power to order imprisonment to compel obedience to their sentences. *See id.* at 1077, 717.

13 *Id.* at 1084, 721.



> The sentences of foreign Courts have always some degree of regard paid to them, by the Courts of Justice here; and it is very right that an attention should be paid to them, as far as they ought to have weight in the case depending. But if a man *originally* appeals to the law of England for redress, he must take his redress according to that law to which he has appealed for such redress. Therefore if this rule of determination was different, by the law of France, from our rule here, yet I should incline, that the law of England, where the action was brought, should prevail against the law of France, if they did really clash with each other; because the party seeking redress has chosen to apply here. But I give no opinion at all, on this point.[14]

Lord Mansfield, like Wilmot J., thought there was no conflict between French and English law. His Lordship's judgment commenced by stating this conclusion in the very first sentence and it is averred to throughout. But unlike Wilmot J. Lord Mansfield did not indicate that the lex fori would necessarily have been applied had there been a conflict. This is the essential difference between the judgments of Lord Mansfield and those of Wilmot and Denison JJ.[15] In fact Lord Mansfield's judgment contains a rudimentary and brief but farsighted discussion of the principles of choice of law. It would be going too far to say that the seeds of the English conflictual rules are to be found there.

Lord Mansfield first considered the claim based on the bill of exchange. In his Lordship's view the plaintiff could not recover for three reasons. They are interesting and important enough to reproduce in full:

> 1st. The parties had a view to the laws of England. The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed. Huberi Praelectiones, lib. 1, tit. 3, pa. 34, is clear and distinct; "verum tamen, & c. locus in quo contractus, &c. potius considerand', &c. se obligavit." Voet Speaks to the same effect.
>
> Now here, the payment is to be in England: it is an English security, and so intended by the parties.
>
> 2nd reason—Mr. Coxe has argued very rightly, "that Sir John Bland could never be called upon abroad for payment of this bill, till there had been a wilful default of payment in England." The bill was drawn by Sir John Bland on himself, in England, payable ten days after sight.

14 *Id.* Emphasis added.

15 In regard to this point there is a difference between Wilmot and Dennison JJ. The former justice expressed no concluded opinion on it while Denison J. expressly rested his decision on the basis that the *lex fori* invariably governed.

In every disposition or contract where the subject matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus, a conveyance or will of land, a mortgage, a contract concerning stocks, must be all sued upon in England; and the local nature of the thing requires them to be carried into execution according to the law here.

3rd reason—The case does not leave room for a question. For the law of both countries is the same. The consideration of the bill of exchange might, in an action upon it, be gone into there, as well as here. And as to the money won at play, it could not be recovered in any Court of Justice there, notwithstanding the bill of exchange.

This writing is, as a security, void, (being for a gaming debt,) both in France and in England. We may therefore lay the bill of exchange out of the case: it is very clear, the plaintiff cannot recover upon that count.[16]

The third reason is the one stressed throughout the judgment—that there was no conflict between French and English law. But the first two are the most informative as to the place of the lex fori. English law governed the bill because the parties intended it to govern. The bill was connected with England and it was there that it was to be paid. The lex fori didnot govern, and the lex loci contractus was not excluded, simply because the lex fori always governed. It governed because the parties intended it to and because the transaction was esentially connected with England—it was the lex loci solutionis. Unlike Denison J. and Wilmot J., Lord Mansfield did not indicate that a foreign lex loci contractus would always be excluded and the lex fori constantly applied in original actions. When later considering the claim for the money won alone, Lord Mansfield also expressly refrained from saying that foreign law would always be excluded. The money won could not be recovered even before the marshals of France. They had no jurisdiction over the present matter for there was no breach of honour in France as the money was payable in England. In addition the marshals could only proceed personally against the debtor and had no power over his estate or representatives.[17] Thus "as to the money won, the contract is to be considered void by the law of France, as well as by the law of England: which makes it unnecessary to consider 'how far the law of France ought to be regarded'."[18]

The fact that it was necessary to lay a fictitious venue in England did not prevent the courts acknowledging that a contract had actually been made overseas. As Lord Mansfield acknowledged in *Holman v. Johnson* "Debt follows

16 *Supra* n. 9 at 1078-79, 718.

17 The action had been brought against Sir John Bland's administratrix, Sir John Bland having died before the action commenced.

18 *Supra* n. 9 at 1080, 719.



the person, and may be recovered in England, let the contract of debt be made where it will; and the law allows a fiction for the sake of expediting the remedy"[19] In *Robinson v. Bland* Lord Mansfield acknowledged that the law of the place where the transaction was actually entered into (not the fictitious English venue) might govern, though it did not in that case at least in respect of the bill of exchange. The applicability of the lex loci contractus was again suggested by Lord Mansfield in *Holman v. Johnson* where his Lordship observed:

> There can be no doubt, but that every action tried here must be tried by the law of England; but the law of England says, that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern. There are a great many cases which every country says shall be determined by the laws of foreign countries where they arise.[20]

Once it was conceded that the lex fori should not invariably govern, and that foreign law should sometimes be applied, it was quite understandable that the lex loci contractus should have been looked to. In the first place, the loci contractus had been the basis of jurisdiction before the advent of the transitory action. Thus when conflicts problems had been solved not by applying foreign laws but by declining jurisdiction over "foreign" cases, the place of contracting has been the decisive factor.[21] Moreover non-common law jurisdictions in England had previously attached some importance to the lex loci contractus. Though Chancery acted on the conscience of the defendant and did not apply foreign law as such, regard was sometimes had to the lex loci contractus. Thus in *Ranelaugh v. Champante*[22] it was established that interest had to be paid according to the law of the country where the debt was contracted and not according to the lex fori with the proviso that if securities had been executed in another country,interest had to be paid according to the law of the country where the securities were executed[23]. Admiralty apparently also paid

19 (1775) 1 Cowp. 341, 344, 98 E.R. 1120, 1121.

20 *Id.* at 343, 1121. *Holman* v. *Johnson* was not really concerned with choice of law but with the question of whether the enforcement of a Dunkrik contract was illegal or against public policy. Hence Lord Mansfield's remarks are only obiter dicta. However see *York Buildings Co.* v. *Meers* (1728) 2 Eq. Cas. Abr. 476; 22 E.R. 405 where the House of Lords declared that contracts were to be adjudged according to the law of the place where they were made.

21 See *supra* n. 1. Note also 6 Rich. 11, c. 2 (1383) which attempted to ensure that debt, account and like actions be brought in the county where the contract was made by providing that the writ would abate if it appeared that the contract was made in a county other than that where the writ was brought.

22 (1700) 2 Vern. 395, 23 E.R. 855.

23 *See also Dungannon* v. *Hackett* (1702) Eq. Ca. Abr. 289; *Ekins* v. *East-India Co.* (1717) 1 P. Wms. 394, 24 E.R. 441. For cases dealing with interest payable on legacies etc. *see, Saunders* v. *Drake* (1742) 2 Atk. 465. 26 E.R. 681; *Raymond* v. *Brodbelt* (1800) 5 Ves. Jun. 199, 31 E.R. 545; *Connor* v. *Bellamont*, (1742) 2 Atk. 382, 26 E.R. 631.

some regard to the lex loci contractus when it exercised jurisdiction over foreign contracts. In *Greenway and Barker's* Case, where prohibition was soughtin Common Pleas to the Court of Admiralty an expert called to give opinion declared "if contracts be made according to other laws, the same must be tried according to the law of the country the contract is made..'.[24]

*The Century Following Robinson v. Bland*

From the mid Eighteenth Century well into the Nineteenth Century the lex loci contractus was frequently applied. For example in *Melan v. Fitzjames* it was held that French law governed a deed acknowledging a debt which had been made and executed in France. Eyre Ch. J. declared:

> But it is a very different case when the ground of the debt is a transaction in a foreign country. It does not then originate in our law, but in the law of the country which creates the obligation. That law must be laid before us by evidence....It must therefore be shown what the laws of France are, and that they create an obligation which the laws of England will enforce. What would be a defence there, will be a defence here. The whole therefore turns on the laws of a foreign country.[25]

Fifteen years later Lord Ellenborough similarly declared "A contract must be available by the law of the place where it is entered into, or it is void all over the world".[26] Even in relation to the enforcement of foreign judgments, approval of the lex loci contractus rule found some scope. In *Scott v. Pilkington*[27] the defendants, an English firm, agreed in New York to allow an American firm to draw exchanges upon them. A letter to that effect was executed so that prospective purchasers of bills of exchange drawn by the American firm could know that they would be accepted in London. In an action upon a New York judgment obtained against the defendants it was contended that the judgment should not be enforced in England because the New York court failed to properly apply English law. That law was applicable as the law of the place of perfor-

24 (1612) Godbolt 260, 261, 78 E.R. 151, 152.

25 (1797) 1 Bos. & P. 138, 141, 126 E.R. 822, 824.

26 *Clegg* v. *Levy*, (1812) 3 Camp. 166, 170 E.R. 1343. *C.f. Trimbey* v. *Vignier* (1834) 1 Bing. (N.C.) 151, 159, 131 E.R. 1075, 1079:

> "The rule which applies to the case of contracts made in one country, and put in suit in the courts of law of another country appears to be this: that the interpretation of the contract must be governed by the law of the country where the contract is made (lex loci contractus), the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought ....."

*See also, Arnott* v. *Redfern*, (1825) 2 Car. & P. 88, 172 E.R. 40; *Pattison* v. *Mills*, (1928) 1 Dow & Cl. 342, 6 E.R. 553; *Allen* v. Kembl,e (1848) 6 Mov. P.C. 314, 13 E.R. 704.

27 (1862) 2 B. & S. 11, 121 E.R. 978.



mance, it was argued, because acceptance of the bills was to take place in England. Cockburn C. J. held that it was not necessary to decide how far these objections would prevail if founded on fact, and thus how far a foreign judgment was examinable, because the New York court was correct in applying New York law:

> We are of a contrary opinion, it appearing to us that the question of the defendants' liability must be determined by the lex loci contractus.
>
> The question at issue has no relation to the manner of performing the contract, or to the consequences of non-performance. It relates entirely to the effect of the transaction at New York, and the document signed there by one of the defendants on behalf of the rest (his authority to bind the partnership not being called in question), in creating a liability in the defendants to the purchasers of the bills, which by the document the defendants were bound to accept in favour of Messrs. Fleming & Alden. Now, the transaction having taken place at New York, and the the document in question having been executed there, and having been intended to operate there (the purpose of the defendants themselves having been, as stated by the referee, that the letter containing the contract with Messrs. Fleming & Alden should be exhibited by them to enable them to get rid of the bills), we are of opinion that the effect of the circumstances in question in creating a liability on the part of the defendants to the buyers of the bills must depend on the law of New York.'[28]

During this period not only English Courts but Colonial Courts also looked to the lex loci contractus. In *Gilchrist v. Davidson*[29] an action was brought by the indorsee of a promissory note made by the defendant.Owing to the fact that it was insufficiently stamped as required by an English statute it was not enforceable in any English court. The Australian Court found for the defendant on two grounds:

(i) As *Alves v. Hodgson*[30] established that English courts on an objection to the validity of a contract made in a British Colony will give effect to the revenue laws of that colony, the same respect must a *fortiori* be extended to the revenue laws of the parent state.

(ii) Two justices also rested their decision on the broader ground that "According to Mr. Justice Story (Conflict of Laws, sections 237 to 243, and 260 to 262, inclusively)....contracts which are void or illegal, by the law of the place of the contract, are held void and illegal everywhere: and that law governs...."

28 *Id.* at 44, 990.

29 (1849) 1 Legge 539, Syndney Morning Herald, Oct. 13, Nov. 17 (N.S.W.).

30 (1797) 7 T.R. 241, 101 E.R. 953.

The wide acceptance of the lex loci contractus rule in the early Nineteenth Century was followed in the middle of that Century by the realization that the lex loci solutionis should also be given a place. In some cases where the contract had been made in one country but was to be performed in another, the court really had no option but to refer to the lex loci solutionis. In *Robertson v. Jackson*[31] a charter party made in England required a vessel to proceed to the Tyne, there load coal, and deliver it at Algiers. The owners of the vessel brought an action against the charterers to recover damages for her detention at Algiers from when she was ready to deliver the cargo until when her discharge actually commenced. Under the charter party the charterer was liable for detention "from the time of the vessel being ready to unload, and in turn deliver". The question which thus arose concerned the time when the vessel was ready to unload and "in turn deliver". The court held that "No judge or jury, looking at the contract itself can discover when it is that the ship 'Cambria's turn to deliver will arrive....Evidence, therefore, is necessary to explain how those words apply themselves to the regulations and practice of the part of Algiers, where the delivery of the cargo was to be made".[32] The court thus found it necessary to refer to the lex loci solutionis to determine the mode of performing the contract. However there is no suggestion in its judgment that the court considered that the law of the place of performance generally governed all aspects of the contract.

In an earlier case the lex loci solutionis had actually been applied as the governing law in preference to the true lex loci contractus on the basis that the former was the deemed lex loci contractus. Hence resort to the law of the place of performance was not justified on the ground that the lex loci solutionis governed but the actual lex loci solutionis should be taken to be the lex loci contractus. *Rothschild v. Currie*[33] concerned an action by the indorsee against the payee and indorser of a bill of exchange. The bill had been drawn in England, and accepted by, a French house. Subsequently a notice of dishonour had been given and its effect was in issue. Denman C. J. held that the matter was governed by French law:

> The second point [whether French law governed] was admitted properly to depend on this, whether the notification of the dishonour be parcel of the contract, or only an incident to the remedy at law for the breach of it; if it be the former, the lex loci contractus will prevail; if the latter, the lex loci fori in which the remedy is sought. And this bill, being payable in France, is a foreign bill; and, although actually made in England, must be taken, as between the drawer and payee, to

31 (1845) 2 C.B. 412, 135 E.R. 1006.

32 *Id.* at 427, 1012. *See also, Tapscott v. Balfour* (1872) L.R. 8 C.P. 53.

33 (1841) 1 Q.B. 43, 113 E.R. 1045.



> have been made in France, according to the principle embodied in the civil law maxim, contraxisse unusquisque in eo loco intelligitur in quo, ut solverit, se obligavit. Dig. lib. xliv. tit. VII. 21. And if this be so as between the drawer and payee, it is equally true as between the indorser and the indorsee; the former of whom must be considered as the drawer of a new bill, payable at the same place, in favour of the indorsee. [The Court then went on to hold that the notice of dishonour was "parcel of the contract"][34]

Eventually in the second half of the Nineteenth century the lex loci solutionis was applied as such, as the general governing law, in a number of cases Thus in *Burgess v. Richardson*[35] W, an Englishman resident in Brussels, was indebted to H, a London resident. On one occasion H went to Brussels and obtained a bond as security for the debt. Distrusting the validity of this security H returned to Brussels where W executed an annuity deed. Subsequently it was claimed that the deed not being enrolled as required by the Annuity Act was void. Counsel for H argued that English Law did not govern but that Belgian Law, as the lex loci contractus, determined the matter. The Court held that as "the whole performance of the contract was to take place in this country" English law governed.[36]

In 1865 the Privy Council had cause to consider choice of law in contracts. It's opinion in *The Peninsular and Orient Steam Navigation Co. v. Shand*[37] constitutes one of the classic decisions in English Conflicts law. The case involved a contract for the carriage of passengers and their baggage from Southampton to Mauritius. The contract had been made in England and involved passage on two of the English carrier's ships as well as conveyance by railway from one Egyptian post to another. On route some baggage was lost and the question of the carrier's liability arose. Under English law an

34 *Id.* at 49, 1048. *Note* this case was subsequently disapproved of in *Allen* v. *Kemble* (1848) 6 Moo P.C. 314, 13 E.R. 704 where it was held that if a bill of exchange is drawn in one country and payable in another, and the Bill is dishonoured, the drawer is liable according to the lex loci contractus and not the law of the country where the Bill was made payable. *But c.f., Hirschfeld v. Smith* (1866) L.R. 1 C.P. 340 where a bill drawn in England, accepted by the drawee and payable in France, was indorsed a number of times in England and finally presented in France. It was held that the notice of dishonour was a good notice either because 1. French law governed, according to *Rothschild v. Currie* or 2. If that case was not to be followed, and English law applied, the notice constituted a good notice according to English law.

35 (1861) 29 Beav. 487, 54 E.R. 716.

36 *See also; De la Rosa v. Prieto* (1864) 16 C.B. (N.S.) 578, 583, 143 E.R. 1253, 1256 ("generally speaking, a contract is to be governed by the law of the country where it is to be performed."); *Maunder v. Lloyd* (1862) 2 J. & H. 718, 70 E.R. 1248.

37 (1865) 3 Moo. P.C. (N.S.) 272, 16 E.R. 103 (P.C.) (Mauritius).

exemption clause in the contract afforded protection but it appeared that French law, which was generally in force in Mauritius, may have regarded the exemption void. The Privy Council held that English law governed. Their Lordships noted the conflicting authority on the question of which law governed a contract made in one country but to be performed wholly or partly in another, but careful examination revealed to their Lordships that:

> The general rule is, that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the Power there ruling or as temporary residents owe it a temporary allegiance: in either case equally they must be understood to submit to the law there prevailing, and to agree to its actions upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed de jure, and a foreign Court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations. Their Lordships are speaking of the general rule; there are, no doubt, exceptions and limitations on its applicability, but the present case is not affected by these, and seems perfectly clear as to the actual intention of the contracting parties.[38]

This passage of their Lordships' opinion is most revealing. It shows that the lex loci contractus generally governed because the contractors must have intended to enter into legal relations according to the law of the place where the agreement was made. The choice of law rule, then, was not the application of the lex loci contractus but the application of the laws under which the parties intended to contract which must usually be presumed to be the lex loci contractus. Continually their Lordships inquired as to the intention of the parties and concluded that "The actual intention of the parties, therefore, must be taken clearly to have been to treat this as an English contract, to be interpreted according to the rules of English law; and ..... there is no rule of general law a policy setting up a contrary presumption".[39] That intention was clearly borne out by the fact that the contract had been made between British subjects in England and was to be performed in English vessels "which for this purpose carry their country with them".[40]

The express foundation of the contract choice of law rule on the intention of the parties was a significant development. It meant that neither the lex loci contractus, nor the lex loci solutionis constituted the choice of law

38 *Id.* at 290-91, 110.

39 *Id.* at 292, 111.

40 *Id.* at 291, 110.



rule. True the Privy Council did seem to indicate that prima facie the lex loci contractus governed. But this was no more than a presumption, albeit a strong presumption, to assist in ascertaining the contractors' intention. Moreover the adoption of the intention rule enabled the prior cases to be reconciled to an extent. If the lex loci contractus had been applied in one case while the lex loci solutionis was effectuated in another, this could be explained on the ground of differing intentions. It could be said that there was no conflict as to the choice of law rule which centred on intention of the parties.

After the decision in the *Peninsular and Orient Steam Navigation Co.* case and to the present day, the intention of the parties has been accepted as the English choice of law rule.[41] Debate has centred around how the contractors' intention should be ascertained not whether intention of the parties was the choice of law rule. But it should be remembered that reference to the contractors' intention was not an original innovation made by the Privy Council in the *Peninsular and Orient Steam Navigation Co.* case. A century before, when the question of whether any foreign law should ever be applied was still unresolved, Lord Mansfield had referred to the contractors' intention as determinative of the governing law.[42]

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41 *See e.g., Mount Albert B.C.* v. *Australian T. & G and Mut. Life Assur. Soc. Ltd.*, (1938) A.C. 224; *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.*, (1939) A.C. 277; *Bonython* v. *Commonwealth of Australia*, (1951) A.C. 201; *Pick* v. *Manufacturers Life Assurance*, (1958) 2 Lloyd's Rep. 93.

42 See the extract of *Robinson v. Bland* reproduced above.

# LUÍZ DA CUNHA GONÇALVES (1875-1956): JURIST, COMPARATIVE LAWYER, AND ORIENTALIST*

J. DUNCAN M. DERRETT†

## THE GENESIS OF THIS STUDY.

This study began in chagrin. I had written an article entitled 'Hindu Law in Goa: A contact between Natural, Roman, and Hindu Laws', which appeared in *Z.V.R.* 67/2 (1965), 203-236. It occurred to me that the status and history of Hindu law in Goa and other Portuguese Indian territories was still of interest, despite the Indian conquest in 1961-62. Most of the material which I used was obtained during, or as a result of, a visit I made to Goa early in 1952. At that time P. S. S. Pissurlencar gave me a list of works on what I subsequently called Luso-Hindu law, a list in which the name Cunha Gonçalves did not figure. This must have been by oversight, but I had no means of knowing that. Many of the documents I reprinted or printed for the first time had already been discussed, in a work which I had never seen, and which Pissurlencar, the great historian of Portuguese India, did not bring to my attention. This was bad enough, but in 1969 I noticed the case of *Lilavati Naique* v. *Sundori Godecar* A.I.R. 1968 Goa 101.[1] In that case reliance was placed upon the opinion of Cunha Gonçalves, expressed in a work entitled *Direito hindu e mahometano*, a work of which I had never heard. The full bibliographical particulars were not given, but a request to the University Library at Coimbra revealed that such a work was available there, though it soon became clear that there was no copy in Britain in public hands. An enquiry sent to the Government Archivist at Nova Goa [Dr. Gune], who had given some assistance in the making of the article mentioned above, produced evidence that information about the book was by no means commonly available even in Goa: the particulars came, but very late. Feeling very depressed that so interesting, and so comparatively recent a publication had escaped me, and knowing that British libraries are but indifferently equipped in Portuguese juridical literature, I determined to find out more, and to publish the results by way of apology for the defect in the *Z.V.R.* article of 1965. But meanwhile further developments shifted the study onto a more constructive plane of thought. In 1969 I studied the life and work of Giuseppe

*Due to typographical exigencies only a few of the diacritical marks have been used and it is hoped that the reader will not be inconvenienced thereby.

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1 I have referred to this case (on illegitimates, illustrating the interlocking of the *Decreto* of 1880 with the general law of Portugal) at §. 394 of my *Critique of Modern Hindu Law* (Bombay, Tripathi, 1970).



Mazzarella (1868-1958); and shortly thereafter translated the short but masterly work on classical Indian law by Robert Lingat, whose biography (in short) I acquired as a by-product. It became evident that the writing of descriptions of Asian laws by Europeans was a phenomenon of peculiar interest. So far, only that portion which concerned South Asia came within my view, but a concern for what the further development of our intellectual life might portend for such research led me to believe that these rare personalities deserved closer scrutiny while there was still time.

An enquiry from the Portuguese Embassy at London produced an immediate response. A photographic copy of the entry for Luiz da Cunha Gonçalves in the *Grande Enciclopedia Portuguesa e Brasileira*[2] (a very substantial entry, compiled with the subject's own assistance) indicated that the *Direito hindu'e mahometano* was not the only work on oriental laws by that author, while, on the other hand, it was a fragment of a much larger juridical output, which appeared to have phenomenal proportions. A lawyer fascinated by India might well devote considerable effort to writing about the laws of that country: there are several examples amongst the British and a few foreigners who have been inspired by their example. But why should a prominent Portuguese jurist, who has all civil and commercial law of his own country and Brazil within his grasp, an active writer, apparently involved in political and intellectual life in Portugal at the highest level, spend his time upon the laws of a few square miles of the far-off territory, soon to be called Estado da India? The Portuguese Embassy were able to tell me that a 'relative' of Cunha Gonçalves was traceable in Lisbon, and, realising that I might be more fortunate even than I was in the case of Mazzarella, I contacted him. He turned out to be Dr. Mario Ramos da Cunha Gonçalves, a law graduate and former diplomat, only son of the jurist, who in a frank and ingenuous manner placed his father's library and archives at my disposal. This extraordinary facility enabled me to understand a great deal about Goa which had previously been obscure to me, as I had approached the subject exclusively through Anglo-Indian eyes, and I am particularly grateful to Dr. Mario for showing me family photographs, which speak volumes, telling me a great deal more than they could tell Dr. Mario himself. Furthermore, he was able to show me the bust[2a] of his father, a copy of the bronze original

2 Vol. 12, p. 277.

2a. For Portuguese it is sufficient to be told that that bust was made by the sculptor who made the tremendous statue of the Condestavel Dom Nuno Alvares Pereira (14th cent.). Leopoldo de Almeida is also the artist who made the striking monument to the Explorers on the bank of the Tagus, and is even better known for his work on the 500 $ banknote. But the equestrian statue tells the quality of the artist, and gurantees his skill: the Portuguese, a nation of taste, have placed it alone beside the great church of Santa Mariada Vitoria commonly called A Batalha. That monument, the national shrine, is beyond comparison; if it were not I should say that the beautiful statue was like placed beside like.

sent as a present by its subject to the University at Rio de Janeiro in recognition of the magnificent hospitality which he enjoyed on his triumphal tour of Brazil at the invitation of the Brazilian government. The bust of a simple human being is a very different matter, but coming from the same hand I found it as informative as the photographs, and in some ways more so.

*Oriental Laws in Western Intellectual Life.*

With the maturing of Independence for Asian territories and African territories in which Asian legal systems figured, two upward movements began for the native peoples, now free to determine their destinies; and one downward movement began for their former rulers. The 'natives' gained the impression that their laws had been inadequately handled or administered by the former rulers; and that either in point of specific rules, in spirit or technique, or conception of what the native populations really needed, the British, French, and other imperial nations had more or less failed to hit the mark. The tendency of all imperial or colonial powers was naturally conservative, it was not their business to interfere drastically with the laws and customs of the natives, except so far as the needs of peaceful administration required. Thus Independence meant for many territories not only new constitutions, but also new programmes of law reform, and even unification of the different systems of law previously applied in those territories. Some of the programmes have been radical and optimistic to a degree which conservative observers would regard as visionary,[3] but movement and lively criticism of developments is surely healthy. While this has been going on, not least of all in India or even the less adventurous Pakistan, the effects of independence upon the imperial powers have not been smaller, though far less dramatic. Since lawyers and judges either rapidly or gradually withdrew from the territories in question, and since, in one way or another, responsibility for the application and development of non-European laws disappeared, the imperial nations, depriving themselves, or otherwise deprived of their empires, dropped oriental laws like a hot brick. Overnight it became evident that there was no money in such subjects, which were unfamiliar to students and involved acquaintance with countries and histories, and even languages, for which no schoolboy in west could be remotely prepared. 'Anything rather' was the universal reaction, and in no time at all, since imitation is such a force in life (particularly young life), the very possibility of studying, and acquiring proficiency in Asian laws was forgotten.

Returning judges occupied themselves with purely western legal duties, or passed into business or premature retirement. A very few went into the

3 I have in mind the projects of reform of marriage and succession laws in Kenya, 1968 (see *East African Law Journal*, 5, 1969, nos. 1-2).



Universities, sometimes not in legal departments, but into departments for the study of languages, which were by no means hit in the same way by overseas Independence. London is the outstanding example of the continual recruitment of teachers to research into and teach oriental laws, but London's ability to continue this function has been based, not upon indigenous interest, but upon the fact that numerous Asians, in spite of financial stringency, needed to acquire British legal degrees for the sake of their own careers in India, Pakistan and elsewhere, and imagined it would be easier to pass examinations held partly in subjects with which they originally obtained a superficial familiarity while reading for their first degree in the country of origin. Furthermore, the United States being interested in oil, and in the political potentiality of Asian territories, there has been a thin but steady stream of requests for teaching American students, whose optimism, adaptability, and capacity for hard work, enable them in a very short time to prove that the indifference, and diffidence, of European students is unjustified.

Meanwhile the climate is evidenced by the way their teachers occupy themselves. J. N. D. Anderson has confined himself for many years to the current reform movements in Islamic countries, which show the principles of Islamic juridical thinking in action. The demand for such information is naturally limited, and this leaves time for other activities. A. Gledhill, in spite of his unique and detailed acquaintance with Burmese 'Buddhist' law, has been able to make contributions with regard to it on the rarist occasions (notably the work of the Societe Jean Bodin and the bibliography being produced by J. Gilissen), and his teaching and major publications concerned constitutional law, which is a 'modern', comparative, and essentially non-Asian subject. Noel J. Coulson's Succession in the Muslim Family (1971) carries on the old tradition of accurate scholarship in the literature of the fiqh, combined with up-to-date concern with how Islamic law is lived and worked in the developing countries of Asia and Africa. The productivity of savants of the future can hardly be surmised to any advantage now: but it is worth stating that in 1972 the heavy temptation operating in London, which is the last surviving centre of continuous concern for tradition and actual law in combination (I exclude the question of Chinese law and Japanese law which has effective centres in the United States), is to abandon classical studies, to keep close to day-to-day developments in the Asian and African territories from which students continue to come, and to devote time left over from teaching to matters in which our compatriots are really interested, whether they be intellectual or non-intellectual. The large number of teachers of African law tends to add weight to the process, since African legal studies began hardly a century ago, and the laws of Africa, for all their intricacy and complexity, have no literary (and some would say hardly any intellectual) sub-stratum.

Meanwhile in other parts of the world scholars do touch from time to time, notably in the pages of the *Z.V.R.*, upon legal aspects of Asian civilisations: but it is one thing for a litterateur to take up a legal theme, and it is very different for a lawyer or jurist to handle the same, especially if the latter has a responsiblity towards the practising profession in the country or countries concerned, and must answer for his opinions to the students emanating from those countries who will return and, in many cases, teach, practise, and judge there.

Thus, Independence has brought to the emerging territories a slow and continuous programme of development and reform; but to the former imperial or colonial powers it has brought a sudden and dramatic collapse of interest in the same subject. The exception of London is a peculiar one, in that it is sustained by possibly evanescent American interest, and by the indirect (one hesitates to say 'corrupt') demand from overseas students. The question how long this state of affairs will continue is open. It might be argued, indeed, that anthropologists, whose interest in overseas traditional societies shows no signs of abating, need the cooperation of lawyers. With the exception Louis Dumount I know of no anthropologist who welcomes legal knowledge; the characteristic response is that written law is artificial and does not represent current life, and that study of even the legal aspects of life is better done in the field, from the mouths of the people, and that attempting to learn the techniques of law (let alone its literature or a dead language) would do the anthropologist positive harm. The recent appearance of works by the New Zealander M. B. Hooker supports the theory that it is very remarkable for legal research to progress (his field is Malaysia and Singapore) without intimate knowledge of language and customs on the spot: Hooker's remarkable versatility and success rather support than weaken the anthropologists' case.

Accordingly, a study of the lives and work of those few Europeans who found Asian laws intellectually worthwhile, and devoted time and trouble to them when they could easily have done otherwise, will be valuable when the time comes to make a fresh start. The writings on Hindu law, for example by Léon Sorg, or J. D. Mayne, and the writings on Islamic law by S. G. Vesey-Fitz Gerald or his French counterparts, and even the works on Adatrecht by Dutch specialists, were the fruit of a practical concern with administration, which has disappeared. If the possibility of making a career directly or indirectly in such a field had not arisen, none of these writers would have troubled himself. That stage is over. If a fresh start is to be made it must be when Europe wakes up once again to the intrinsic value of oriental legal sources and techniques, when she can look back to the life and work of men whose activity in that field was not inspired by personal involvement in



administration, however indirectly. But yet they were jurists, and knew what law was about. This gave their writing a particular quality and significance, and the fact that Asians either do not know of their work, or care nothing for it, is neither here nor there. Though comparisons are invidious they are sometimes illuminating, and a comparison between Mazzarella and Cunha Gonçalves may throw light not only on what might have been done during their lifetime (they were virtually contemporaries) but also on what can be done in the future. This study is thus, in a sense, a sequel to my 'Juridical Ethnology: the Life and Work of Giuseppe Mazzarella (1868-1958)' *Z.V.R.* 71/1 (1969), 1-44, but it takes the theme, through the study of a very different man, into a new phase.

*The Biography of Cunha Goncalves and his Motivation.*

Materials for this biography consist of 'Luiz da Cunha Gonçalves' by Waldemar Ferreira (12 April 1956), pp. xiv, a foreword to vol. I, pt. 2, *Tratado de Direito Civil* (Sao Paulo, 1956); the entry in the *Enciclopedia;* an autobiographical survey entitled 'Luiz da Cunha Gonçalves, Notas Bio-bibliograficas', written when the author was an old man, and curiously incompelete on the bibliographical side; another communicated to his nephew Nuno Gonçalves in 1936 which is a little more frank; a book on the author by a friend and admirer, a judge who, unfortunately, had not the juridical skill to penetrate the author's juristic productions but was otherwise sympathetically inclined as well as artistically gifted[4]; a privately printed family history, *Francisco Caetano da Cunha e sua Familia* (Nova Goa, 1925);[5] a family tree compiled by Cunha Gonçalves himself and in the possession of Mario da Cunha Gonçalves; and a collection of letters and documents extending from Cunha Gonçalves' (hereafter C.G.) departure from Beira until his death. The collection is very extensive, but it was consciously selected, containing some drafts of letters by C.G. himself, but consisting mostly of testimonies to moments in his life of sentimental significance and one sees that his intellectual work was of prime sentimental significance for him. A number of cuttings from Portuguese, Goan, and Brazilian newspapers complete the picture. C.G.'s bookplate was designed by an English artist, Clifford Cowl, and bears the significant mottoe, *Honor et Labour.* It is interesting that the Notas Bio-bibliograficas give not the slightest indication of the author's motivation, nor the slightest hint of the dramatic and pathetic movements which made him a jurist

4 Antonio Ferreira, *O Doutor Luis da Cunha Concalves* (Lisbon, 1963), 175 pp. (posthumous). Ferreira was a poet, a prose-author, as well as a judge. Ch. 6 deals with the book on the *Decreto* of 1880.

5 The beginnings of the work can be traced in a manuscript of Júlio Goncalves (dated 17 May 1894). The printed copy (in the possession of Mario da Cunha Goncalves) bears C.G.'s notes.

of renown, and so made him (indirectly) a significant author in the field of oriental laws. This was due in part to reticence, and in part to a selfview which minimises the factors clarifying motivation, as one might expect of a man born before psychological interpretations of behaviour began to become commonplace. The biography dictated in 1936, however, was much more revealing.

C.G. was born in Nova Goa, the capital of Goa, then a colony of Portugal and later the Portuguese Estado da India, on 24 Aug. 1875. As his family and its history are of conclusive importance for this study we must enter into some detail, which would otherwise have been out of place. A socio-psychological study of C.G.'s family is essential for an appreciation of C.G. himself, and of the questions how he came to write the *Direito hindu e mahometano* and why he wrote it as he did.

C.G.'s original name was Luis Gonzaga Vitor Bartolomeu Gonçalves, with which he was baptised in the church at Panjim (Panji=Nova Goa). He was one of *fourteen* children. After he had been a student at Coimbra for four years (March, 1906) he was authorised by the Portuguese Government to call himself Luiz da Cunha Gonçalves. This was a significant step, because it signalised his intention to identify himself with his mother's as well as his father's family. At the risk of boring the reader with a number of unfamiliar names it is desirable to give some indication of what the Gonçalves family and the da Cunha family were like, and then enter into the question why they were so. Neither of these surnames is rare in Portugal old or new: but in Goa they are celebrated and outstanding people.

C. G.'s father was Luis Manuel Julio Frederico Gonçalves. He was born in 1846, was qualified as an advocate, became a professor of geography and history at the Central Licee of Nova Goa, and was Director of the Public Library there. The Institute of Coimbra made him a corresponding fellow and he was a provincial associate of the Royal Academy of Sciences of Lisbon. He wrote seven monographs, and edited a literary review 1864-6. He died prematurely in 1896, a fact of significance in C. G.'s career. Julio was a litterateur and a legal practitioner, and was particularly interested in genealogy.[6] The issue of the *Heraldo* (Goa) for 13 July 1946 devotes its front page and all but two other pages to a celebration of the centenary of his birth and a bibliography of his works. C. G.'s mother was Leocadia Maria da Cunha, born 1852, married 1867; she died in 1921. C. G.'s elder brother Caetano F. C. E. Gonçalves (b. 1868) was a public man of note; he became ultimately a judge of the Supreme Tribunal of Portugal, a jurist of some note, and a writer. He left

6 *Gr. Enci. Port. & Bras.*, Vol. 12, p. 560. He was responsible for C.G.'s intellectual interests, and his interest in the history of the Brahmins of Goa played its part. 'Historia do Uma Famīlia': see last note.



Goa for Coimbra in 1885, graduating in 1890.[7] In a family of fourteen children, with dowries to be found for the daughters, the resources will not have been ample, and Caetano will have had access to what there was, since he left India in his father's lifetime. C. G.'s younger brother (bearing the father's name), L. M. Julio F. Gonçalves, became a medical man in the Portuguese navy, and after his retirement, with incredible versatility, began a new life as a historian, producing a massive *opus*[8] which obtained international fame, apart from minor contributions of note.[9] Two of C. G.'s nephews, Armando Gonçalves Pereira, and Carlos Renato Gonçalves Pereira, were trained as lawyers, and became well-known writers: the former of them was remarkable both as an advocate and as a professor of economics in the University of Lisbon.[10] The latter[11] was exceptionally brilliant as a youth, and after legal and administrative achievements was posted to Goa, and thus returned to the family's homeland, where he served as a judge, and later reached the heights of the judiciary in Portugal, having contributed to the legal history of India in the meanwhile.[12] The two sons of the former continue to make remarkable careers, and indeed all branches of the family show expertise in law and/or literature in a remarkable way. What bearing has this on C. G.'s career? We shall see. The elder L. M. Julio F. Gonçalves was directly descended through eight generations from one Antonio Gonçalves, a landlord of the village of Navelim in the Island of Divar, a contemporary of St. Francis Xavier. Antonio's son Luiz Gonçalves is mentioned in a testament of 1580. The earlier history of the family is not of documentary, but of oral origin, but since the subject-matter was of intense interest and importance to every succeeding generation there is no reason whatever to doubt its accuracy. We return to it presently. All C. G.'s male lineal ancestors held official positions in the Portuguese administration of Goa, adding to them either ranks in the army or orders of chivalry, the most frequently recurring title being that of Oficialmaior da Fazenda, as would be appropriate, given the background. C. G.'s mother belonged to the da Cunha family which had a similar history. She was the sixth child of one Francisco Caetano da Cunha. Her eldest brother was José Gerson da Cunha, the famous physician more famous as an orientalist, historian and numismatist (1844-1900). J. Gerson da Cunha resided in Bombay and

7 *G. E. P. & B.*, vol. 12, p. 553. Rémy refers to the family as examples of the want of discrimination against Goans.

8 *Os Portugueses e o Mar Das Indias. Da India Antiga e sua Historia* (Lisbon, 1947).

9 *G. E. P. & B.*, vol. 12, p. 559.

10 Armando Goncalves Pereira, *India Portuguesa* (Lisbon, Agencia Geral do Ultramar, 1953). The book deals with Hindu law at pp. 417-25, without mentioning C.G.'s *opus!*

11 *G. E. P & B.*, vol. 12, p. 568.

12 *Historia da Administracao da Justica no Estado da India. Seculo XVI*, 2 vols. (Lisbon, 1965).

utilised his income from his medical practice to collect objects d'art, to build a library, to research into the history of India, and in particular of Bombay and the Portuguese period, and to associate on terms of equality with the intellectual aristocracy of Europe.[13] Francisco Caetano da Cunha was born in 1799. His parents were both from Bardes, an area of Goa within the Old Conquests, to the north of Goa proper.[14] The tradition in his family was that he was a direct descendant of one Balsa (=Balakrishna) Sinai, originally from Cortalim in Salcete (Salsette), a region which was conquered by the Portuguese and annexed to Goa proper in the period 1510-50. Balsa, with his uncle Manguexa (=Maṅgeśa) Sinai fled to Arpora in Bardes. They were later employed in the administration of Bardes, Balsa being converted to Christianity and taking the name Cunha from, presumably, his god-father. It is perfectly obvious, and is not doubted, that this Balsa and his descendants were Brahmins, of the Sinai (or Shenvi) sub-caste, which is akin to the Sārasvat and other Koṅkaṇastha Brahmins from amongst whom the Peshwai family of Poona came and other members of the intellectual and administrative aristocracy of Western India. There are a great many Hindu Sinais in Goa and other parts of the Western coastal strip still, even as far south as Kerala. The Sārasvat Brahmin community, who regard themselves as originating from Bengal, are a very go-ahead and versatile community amongst the Hindus of India, less orthodox than many other Brahmin sects, and thus much more adaptable.

It is time to return to the Gonçalves family. Antonio Gonçalves was its first Christian. The pattern of conversions from the Brahmins of Goa in the period after 1510 is fairly well known, though not without its minor gaps.[15] Antonio can be traced to the Malvaddo ( ? Malvattu) ward of Navelim, later Piedade, in the Island of Divar, only 8 Km. East by North from Nova Goa. This Island is midway between Goa and Bardes, and it is well known that the Hindu-ness of the Brahmins of Goa increases, or their Portuguese-Christian-ness diminishes, as one proceeds from Goa northwards and eastwards and southwards. The inhabitants of the regions remoter from Goa are more closely identified with the indigenous traditions and ways, as we can see now

13 *The Origins of Bombay* (*J. B. B. R. A. S.*, extra no. 1900), 368 pp. G. M. Moraes, 'Dr José Gerson Da Cunha 1844-1900', *J. As. Soc.* (Bombay), N.S., 39-40 (1964-5), 1-50 (bibliography).

14 For a detailed geography of Goa see Raquel Soeiro de Brito, *Goa, e as Pracas do Norte* (Lisbon, Junta de Investiga ces do Ultramar, 1966). I owe a copy of this most useful ethnographical survey to Arthur Lobo.

15 A valuable genealogical work is J. H. Da Cunha Rivara, *A Conjuracao de 1787 em Goa* (Nova Goa, 1875), to which C.G.'s father contributed a genealogy from Naru Sinay through more than a hundred Pintos in ten generations. Naru Sinay's widow was baptised along with her sons. Santu Sinay became Salvador Pinto on 3 Nov. 1585 at the age of 8.



that those very regions have a higher Hindu than Christian population.[16] The tradition which C.G.'s father noted in a manuscript I have inspected[17] is as follows: some time prior to 1541 the intensive drive to convert Hindus, and particularly Brahmins, in the Old Conquests (Goa, Bardes, and Salsette), caused numbers of wealthy landowning families to decamp, leaving their lands in the hands of their lower-caste tenants. A great many Hindus had already embraced Christianity, and their motives for doing so can be conjectured with some certainty: they regarded Christianity as only another variety of Hinduism (Hindu scriptures spoke of Yavanas as Hindus who had lapsed from caste);[18] they welcomed the Portuguese as cultivated people, and as sworn enemies of the 'Moors'. i.e. the Muslims then ruling in the Deccan, from whose rule the Portuguese had freed them; and they believed (perhaps they were misled) that on joining the ranks of the Christians they merely added to their own prestige without ceasing to be Brahmins and without disturbance to their social life. Two centuries afterwards they were still practising a great many Hindu customs, to the alarm of the Holy office.[19] The families which had always contributed at least one member to the ranks of the Hindu sages and scholars soon began to provide one or even more sons to be trained as priests (a proposition which conveniently limited the possible fragmentation of the family's land-holdings); and as most Brahmin households had family shrines or temples there was little problem in removing some if not all Hindu idols and installing images of the Virgin Mary, the infant Christ resembling the infant Krishṇa, who had by this time accumulated a great many Christian myths.[20] Brahmin Christians to this day are proud of their unmixed ancestry (the Luso-Indians being another caste), and kept their blood pure by refusing intermarriage with others from that day to this.[21] The purity of the Hindu descent is evidenced convincingly by the fact that even when their sons have married one or more Portuguese ladies in Portugual in successive generations the inherited aptitudes remain, and the Indian features are obviously recognisable. Most curious testimony to this is provided by cases of individuals who have never visited India, nor mixed with Indian society, but manifest incontrovertibly Indian characteristics. In spite of the objections based upon methodological grounds, or fears that his conclusions are unfair or impolitic, I strongly concur with the conclusions of H. J. Eysenck, that the Intelligence Quotient, at least, is derived by heredity.[22]

16 De Brito, *op. cit.*, folding map 1, distribution of population in 1950.

17 N. above.

18 Sources cited and quoted by me, 'Can a Christian be a member of a Hindu coparcenary', *Madras Law Journal*, Journal section, 1970, vol. 2, pp. 1-8, esp. 6.

19 'Notas etnograficas', *O Oriente Portuguez* 4 (1907), 231-9.

20 Derrett at *Zeits. fur Religions—und Geistsgeschichte*, 22 (1970), 19-44.

21 My own knowledge, contact with the family Ferrao of Aldona (Bardes) and recent experience of Prof. Antonio da Silva Rego.

22 *Race, Intelligence and Education* (London, 1971).

But to revert to Antonio: his family lands were confiscated by the Portuguese treasury, and conveyed to the College of Santa Fé, which was intended to train up former Hindu youths in Christianity, the Portuguese language, and European culture, in order, amongst other things, that native priests should be bred up, and conversions to Christianity speeded. It is clear that some Hindu families abandoned their lands and remained in the territories as yet free from Portuguese rule. But some temporised, and Antonio's was one. They had been Naiks, that is to say government officials by hereditary occupation in the region of Divar; they belonged to the Vāsishṭha *gotra*[23]; their home was a hundred paces from the mangotree of the *gancaria*, i.e. common assembly of the *gancars*, or (Brahmin) shareholders of the village of Navelim. Unless they temporised they would lose lands and function. They were persuaded by Fernao Rodrigues Castello-Branco, Vedor Geral of the Fazenda (Treasury) to enter into an assignment of part of the income of their lands to the College and to the maintenance of the Catholic faith in the village temples in exchange for restitution of the lands which had been confiscated (agreement of 28 June 1541). This blackmail did the trick, and the Naik's eldest son was baptised Antonio, the missionaries who baptised him cherishing the particulars of the event. It is important to remember that the Gonçalves family, whilst cherishing their memory of a Hindu past, being in every sense pround of it, by no means resented the methods adopted to convert them to Christianity, and accepted the development as entirely satisfactory. The psychology of these people, pure Indians on both sides through every generation back to the sixteenth century, boasting priests even in that century, yet partaking in the fullest measure of the character of Europeans, must be understood if one is to comprehend C.G.'s life and work.

C.G., as the portraits of his immediate family show beyond doubt, was a pure Indian by race. Originally his ancestors spoke Koṅkaṇī, but gradually Portuguese was added until the point was reached, possibly in the eighteenth century, when instead of Portuguese being learnt only by males, and spoken only amongst themselves, the family was bilingual in Koṅkaṇī and Portuguese and females also spoke, wrote and thought in Portuguese. The style of Portuguese agreed with that of Old Portugal, with which it kept pace, so that it did not develop the characteristics of Brazilian Portuguese, for example; but it was (as it still is) spoken with a recognisable Goan accent, and the timbre of speech would naturally incline to the dramatic style characteristic of India. All these families can also speak Koṅkaṇī, in order to communicate with their own servants and the lower castes in their villages. They can without difficulty learn and follow Marāthī a kindred

23 For the meaning of *gotra* (patrilineage) see P. V. Kane, *History of Dharmasastra* vol. 2/2 (Poona, 1941), general index, 1305 refs.).



language to Koṅkaṇī, and I found a well-thumbed Marāṭhī lexicon in C.G.'s library. C.G. oce wrote Koṅkaṇī in the Devanāgarī and Modī scripts in front of an audience in Portugal, so it is evident that he, like so many of his compatriots, had no aversion whatever for the native culture of his motherland, and this, like many other features, distinguishes the Christian Brahmins from the Eurasian Anglo-Indians, who made (until 1947) a great parade of knowing and caring nothing about 'native' India.

The Brahmins of Goa never 'did a hand's turn'. All manual labour or crafts were forbidden to them under the rules of the caste system. For at least a thousand years none of them had earnt his living by what we call 'work'. Intellectual endeavour, and administration in government service, and occasionally spiritual and religious teaching, had been their exclusive vocation. Consequently when it became obvious that Christians of Goa were partakers of what Portugal, and (through Protugal) Europe, had to offer, and when it became clear that influence and respect were to be obtained amongst Portuguese through the learned professions, these families took up the traditional careers of lawyer, priest, and physician, and from law went on to serve their country in the administration, especially its financial side. There are many respects in which the hereditary aptitudes and tendencies of the Brahmins resemble those of Jews, and the analogy will occur to the reader more than once in this story. If in any sense Goa was subject to Portugal the people could obtain prominence in religion and the law, and they did so mightily. From the middle of the nineteenth century it became obvious that one of the avenues to repute amongst Portuguese was literature, and, having the Portuguese language at their disposal, and taught by Portuguese teachers or teachers who took their higher training in Portugal (Goa having no University), they avidly took to the Arts, and produced phenomena like Gerson da Cunha, whose appetite for recognition was assuaged by membership of practically every learned society in Europe. The appetite for prestige and recognition is a distincly Indian characteristic, producing at times ludicrous results, but the Goans were in a position to succeed in a way not open to the Indians of British India because their rulers, the Portuguese, had, from the commencement, treated them as men like themselves, a situation which never quite arose in British India and which, after the tragedy of 1857, had no chance to arise. The present status of British Indians or Indians of the Union of India in Britain and some of the former British territories has not yet reached the status which was long ago achieved by Goans in Portugal, though there are signs that it will not be long in coming in Canada, and the precise problem has never existed for them in the United States, where they have always competed on their merits.

But to revert to Antonio: his family lands were confiscated by the Portuguese treasury, and conveyed to the College of Santa Fé, which was intended to train up former Hindu youths in Christianity, the Portuguese language, and European culture, in order, amongst other things, that native priests should be bred up, and conversions to Christianity speeded. It is clear that some Hindu families abandoned their lands and remained in the territories as yet free from Portuguese rule. But some temporised, and Antonio's was one. They had been Naiks, that is to say government officials by hereditary occupation in the region of Divar; they belonged to the Vāsishṭha *gotra*[23]; their home was a hundred paces from the mangotree of the *gancaria*, i.e. common assembly of the *gancars*, or (Brahmin) shareholders of the village of Navelim. Unless they temporised they would lose lands and function. They were persuaded by Fernao Rodrigues Castello-Branco, Vedor Geral of the Fazenda (Treasury) to enter into an assignment of part of the income of their lands to the College and to the maintenance of the Catholic faith in the village temples in exchange for restitution of the lands which had been confiscated (agreement of 28 June 1541). This blackmail did the trick, and the Naik's eldest son was baptised Antonio, the missionaries who baptised him cherishing the particulars of the event. It is important to remember that the Gonçalves family, whilst cherishing their memory of a Hindu past, being in every sense pround of it, by no means resented the methods adopted to convert them to Christianity, and accepted the development as entirely satisfactory. The psychology of these people, pure Indians on both sides through every generation back to the sixteenth century, boasting priests even in that century, yet partaking in the fullest measure of the character of Europeans, must be understood if one is to comprehend C.G.'s life and work.

C.G., as the portraits of his immediate family show beyond doubt, was a pure Indian by race. Originally his ancestors spoke Koṅkaṇī, but gradually Portuguese was added until the point was reached, possibly in the eighteenth century, when instead of Portuguese being learnt only by males, and spoken only amongst themselves, the family was bilingual in Koṅkaṇī and Portuguese and females also spoke, wrote and thought in Portuguese. The style of Portuguese agreed with that of Old Portugal, with which it kept pace, so that it did not develop the characteristics of Brazilian Portuguese, for example; but it was (as it still is) spoken with a recognisable Goan accent, and the timbre of speech would naturally incline to the dramatic style characteristic of India. All these families can also speak Koṅkaṇī, in order to communicate with their own servants and the lower castes in their villages. They can without difficulty learn and follow Marāthī a kindred

23 For the meaning of *gotra* (patrilineage) see P. V. Kane, *History of Dharmasastra* vol. 2/2 (Poona, 1941), general index, 1305 refs.).



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It was into a highly competitive literary and scientific family, then, that C.G. was born, and he will have known of his relatives' intellectual prowess and social success when he was a youngster. He obtained the first prize at his primary school when hardly 7, and had to wait until he was 9 before he could enter the Licée. During those two years he boarded at the college at Mapuça where he began to learn Latin. He passed out of the 'Lyceu Nacional de Nova Goa' on 25 June 1891, having won prizes or high grades in every subject, including English and (N.B.) Marāthī (in which he was exceptionally brilliant); he turned at once to the study of law, and passed the examinations at the age of 18 and his licence as an advocate (advogado provisionario) is dated 6 May 1896. The Raja of Sundém and many Dessais (who of course spoke Marāthī) became his clients. When his father died he lost a teacher and master in law as well as a parent; he assumed headship at the age of 21 over a numerous and suddenly impoverished family and all he had was his native talent. All the while he had been thinking of his country's (i.e. Portugal's) fame and the exciting story of her explorers' enterprise and the spread of her civilisation. He had the good fortune to discover the tomb of Albuquerque, the man who laid down the foundation of Portuguese policy towards the natives (i.e. his own ancestors), namely slow and peaceful *assimilation* (quite other than the British Indian ambition for the natives of British India). He was the first to publish the inscription on this tomb, and his début in literature was an essay on this subject which appeared in 1896, when (as we have seen) he was only 21. This work, of 32 pages,[24] already reveals the artistic tastes of the young man, at once a Brahmin and a Portuguese. In the next year a similar work on the antiquities of Goa was prepared.[25] It became evident that neither sufficient income nor sufficient scope would be available to him in Goa as an advocate. What he later called 'assiduous collaboration' with four newspapers, and co-editorship of the *Era Nova* founded by his cousin J. M. Pereira, were not entirely satisfying. Nor was it enough for him to be appointed judge-substitute of the *comarca* of the Isles of Goa, and chairman of the administration of the village of Navelim (whence his ancestors came). Goans have often had to emigrate; Goa exports her talent. There were already many Goans in the service of the British Indian Empire, and the number of Goans employed in India grew steadily until today. C.G. decided to go to Coimbra for higher studies, but he lacked funds. His elder brother had exhausted the family's resources; his father had developed diabetes soon after he left; and C.G.'s further education (for all his evident precocity) was problematical. He moved to Beira in East Africa in August 1898, when he was just 23, on the initiative of his brother Antonio,

24 No. 25 in the Bibliography below.

25 No. 26.



who was a commercial agent there. He intended to keep in touch with his home. He had already completed, or was about to complete several monographs in law, or in history. A study of the Cathedral of Goa appeared in 1901, having been submitted for publication to the Geographic Society of Lisbon.[26] A legal treatise on the law relating to the Goan village communities, Direito gaocarial,[27] appeared in 1898, and in 1901 a work on the decisions of the court of Relaçao of Nova Goa. This latter was almost certainly finished with the aid of books taken with him to Beira, but presumably was begun while he was hoping to develop his practice in Goa.[28] While he was still in Goa he formed the project, with the optimism of youth, of writing two works, which indicate his dominant interests so far as his Goan domicile was concerned, and he invited subscriptions for these two projects: (1) a bibliographical Indo-Portuguese dictionary; (2) 'The Usages and Customs of the Indians, or an annotated edition of the Decreto of the 16th Dec. 1880'. Towards that Decreto his father had, as commissioner, made a significant contribution. Even while C.G. was in Beira he sent a copy of his work on the decisions of the Relaçao court to a celebrated professor in Coimbra, inviting him to write the foreword to project (2) if and when it was completed.[29]

Between 1898 and 1902 he worked hard in Beira rapidly accumulating the means wherewith to live and study at Coimbra. He also obtained a small administrative post under the Procurador da Coroa. He might have remained a littel longer, but the jealousy of the Portuguese Bachelors of Law there made life miserable. They taunted him for his want of a Bachelor's degree claiming that he might not wear a gown and hence might not represent in court the important and wealthy clients he had accumulated. He determined to be *more* than a Bachelor—indeed to be a Doctor and a maker of Doctors! He arrived in Coimbra in 1902, and thus began the long period of five years' study which culminated in the licenciate, i.e. the Bachelor's degree in law (the diploma is dated 9 Oct. 1907). It was a remarkable class, that of 1902-7, since it contained five eventual professors. Besides C.G. there were Fernando Abranches Ferrao, Fernando Emigdio da Silva, Jose Gabriel Pinto Coelho, and Jose Lobo d'Avila Lima. C.G. and Jose Gabriel Pinto Coelho, his nearest rival, went forward to the doctorate, very rarely taken in Portugal. In the concluding 'acts' of 26-27 Feb. 1909 Jose Gabriel, whose marks had been level

26 No. 27.

27 No. 52.

28 No. 54.

29 Letter from José Dias Ferreira (1837-1909) eminent professor (*G. E. P. & B.*, vol. 8, pp. 948ff.) dated 30th April 1902. Seeming to decline the honour, he fancies he might accept it rather as a compliment to himself than as a service to the book!

pegging with C.G.'s all along throughout their fellow-studentship,[30] was given 'muito bom' with 18/20, and C.G. 'bom' with 17/20. And so it was that Jose Gabriel was given the only professorship then vacant, and C.G. failed to obtain it. C.G. sent telegrams to Goa quickly : the doctorates of both the rivals were conferred on 21 March 1909 ; letters of congratulation came back to him dated 24 and 25 March 1909 : the doctorate was 'an intellectual, moral, and *social* triumph reflecting on the family and the native land'. Sad words. The tremendous efforts needed to stay the course from 1902 until 1909, with fantastically high marks throughout, were rewarded with the coveted doctorate, true enough ; but the professor's chair for which he was obviously fit was denied him, the prize eluded him. Jose Gabriel's subsequent career, which is well enough known, has its own distinctions, but neither in literary nor in juridical terms was he within any distance of rivalling his 'Indian' fellowstudent.[31]

The competition which the examinations were,in effect, left a deep mark on C.G.'s life. In his own mind he was penalised at that moment for being an Indian. The insults offered to him at Beira seemed renewed. To him it was a tragedy and an injustice.[32] Whether it was really a tragedy who can tell ? The subsequent hardships of C.G. and his family, as we shall see, were to be attributed to quite other causes, in which his own lack of foresight could conceivably have figured. If we are to place ourselves in the position of those who had to make a choice between C.G. and Jose Gabriel in 1909, there are certain facts we cannot ignore. Jose Gabriel, whose results were exactly the same as C.G.'s was ten years younger : he was born on 18 March 1886. He was thus 23 years and three days old. C.G. was nearly 34. Between 23 and 34 there is a vast difference. The fact that Jose Gabriel was a pure Portuguese, with a white complexion, and without a 'colonial' accent, would be by no means so relevant as the fact that he had achieved such amazing marks (many 19/20s) at so early an age, and *without* practical experience. C.G., moreover, had several years' actual practice in Goa and Beira ; he knew what law and administration were about, and thus his phenomenal examination successes could be discounted when in competition with a tiro.

There is another factor, which, since the disappointment of 1909 had so dramatic an effect on C.G.'s future career, we must not overlook. The Goans

30 The details of the marks of the leading scholars of this remarkable class were obtained officially from the Rectorate of Coimbra in August 1971. C.G. himself told Nuno Goncalves that in the forensic medicine class he outstripped medical students who attended the same lectures, including some who became professors.

31 *G. E. P. & B.*, vol. 21 (two publications are specifically mentioned).

32 See his *Palavras Previas* to the *Comentario ao Codigo Comercial Portugues*, vol. 1 (Lisbon, 1914) and the 'Préfacio' to the *Tratado de Direito Civil*, vol. 1 (Coimbra, 1929) : 'Escrever, estudar, teem side para mim a melhor forma de esquecer as injusticas dos homens e os males inerentes a vida social'.



had an enviable (even formidable) reputation in Portugal. Since the vast majority of them were pure Indians by race they reached puberty sooner than the Portuguese and thus had more years of mental maturity to their credit in any competition, even if exact parity of age was maintained. Further, the dreadful climate of the western seaboard of India enabled them, if they were active at all, to achieve a much higher degree of activity when they came to the dry and temperate climate of Portugal. Moreover they enjoyed the I.Q. factor by heredity which I have discussed above. Taken collectively, since they came from the oldest civilization in the whole of the Portuguese dominions, including Old Portugal (I must ignore Macau), they were at an advantage over the native Portuguese in intellectual potential. They were within a little of being able to patronise the Portuguese themselves. In every profession, especially the legal and medical, they came to the top. The King, Dom Carlos I, sat Goans near him when he entertained the Prince of Wales (later King Edward VII), and their dark complexion both embarrassed and astonished the English guest. This exemplifies the Portuguese policy of treating coloured peoples on their merits, in terms of their education : not that there was no sense of colour, or that dark-skinned overseas Portuguese were not considered different or socially distinct[33] ; but the colour difference did not in itself create any bar to advancement. As a result Goans often had a self-assured and over-confident demeanour, and the photographs of C.G. as a young man bear the unmistakeable expression of the Indian, of whom we know so much in Britain, who has come to Europe in order to do as his relatives had in fact done, namely to take all possible prizes—it is the expression of boundless confidence and expectation. In a photograph of Goan students at Coimbra (no photograph of the law students as such has been shown to me), C.G. alone wears the Kaiser Wilhelm moustache. The Kaiser Bill' moustache, which has never been worn since the first world war, was not so objectionable in 1902 because, after all, it (or something very like it) could be worn by intelligent and charming people, such as Dom Carlos himself (whom, no doubt, C.G. was imitating). That harmless and intellectual monarch could reasonably set such a fashion. But the significance of this moustache is that it gives the face an expression of defiant optimism and, though this was hardly in keeping with C.G.'s personality, it must have joined other features so as to hinder his appointment. To make matters worse, no sooner had his professors marked his essays 'bom', or 'muito bom' but he sent them out for printing and circulation, presenting copies to his friends and would be patrons.[34] A young man in his late twenties, many times an author already,

33 C. R. Boxer, *Portuguese Society in the Tropics*.....(University of Wisconsin Press, 1965), also his lecture to the British Academy, 1961, 'The Colonial Question in the Portuguese Empire, 1415-1825' (*Proc. Brit. Ac.*, 47 : Oxford Univ. Press, London, 1962) ; *Race Relations in the Portuguese Colonial Empire*, 1415-1825 (Oxford, 1963).

34 Congratulations returned from Goa (letter of 5 July 1905, ditto 21 April 1909) for his having 'nobilitando a terra do seu berco'.

might well do this, and as he advanced into his thirties it was reasonable that he should do all he could to make his reputation. But his fellow students must have been irritated. The climate of opinion must have been damaged still further, when a sarcastic comment from a professor in class set him off on a long and well presented series of lectures on how the law of Portugal could be improved. It seems he was right, but ordinary mortals resent the rightness of others in certain circumstances.

Meanwhile his literary activities did not abate. Apart from his legal essays several historical studies appeared before he took his doctorate.[35] At Evora he discovered an unpublished manuscript on Christians in Goa which appealed to him. The circumstances in which he went there lead to the next chapter in the story. In 1907 about the time when he took his Bachelor's degree and thus became qualified to practice law, he married Ofelia I. Peres Ramos. She was the only daughter of a cultivated and well-to-do gentleman farmer of Evora, who brought her up at home with an education fit for a princess. The marriage was solemnized by the Archbishop of Evora, who became a great friend of the couple, as did his successor. Not long after the marriage, when the pair were about to recover from the miserable outcome of the competition of 1909, which C.G. himself attributed solely to his being an 'Indian',[36] it transpired that Ofelia's father was not, in effect, so well-to-do as had been supposed. Whether or not he envisaged a son-in-law, he needed an active and intelligent son-in-law to look after his properties ; but he died (1905) leaving him with an enormous debt (under a possibly imprudent act of suretyship) which it took the young couple no less than fifteen years to pay off.

It cannot be said that C.G.'s project of marriage to a pure Portuguese lady was an entirely happy thing in itself. Ofelia's neighbours and the busi-bodies of Evora did not approve of the match ; before long she herself resolved never to return to her childhood home. The 'black Doctor', as the Portuguese peasants called C.G., when first he had to learn to be a gentleman farmer amongst them, was indeed her sweatheart, but her social milieu must thenceforward be Lisbon, even if it meant coupling with undeserved poverty a demanding urban life without domestic help. On the other hand, though Goans rejoiced in the fact that Portuguese did not discriminate against them professionally for their colour, they themselves objected most strongly to their sons' marrying outside their community, and especially to their marrying Europeans. A dignified letter from C.G.'s mother to Ofelia speaks all affection, but the significance of her son's step cannot have been lost on her. Though he kept close to Goa in his thoughts he had no intention of returning there, and he did not return. For Indian youths to marry Portuguese ladies was, in some sense,

35 Nos. 28-29.

36 Reminiscences of Mario da Cunha Goncalves.



a sign that they had achieved recognition in social terms. The chances that a Goan with high earning capacity would return to Goa to marry a (necessarily) less highly educated Goan girl were always slim. What especially attracted C.G. to Ofelia was the fact that, elegance apart, she was extremely gifted and artistic, and could enter into his life and ideas as fully as might be.

He set up an office in Lisbon in 1910, but he could not give his mind unreservedly either to his legal practice or to his literary interests. He was forced to undertake personal management of several farms in the Alentejo, and to become an agricultural expert. One by-product of this was a study of the language and customs of the region, which was a socio-economic contribution tion to learning.[37] Thus began a process of hardhship and endeavour which had only one explanation. In spite of debt, in spite of the hardships of travel on bad roads to Alentejo, in spite of the humiliation this inflicted upon him and his delicately nurtured wife and, first, a gifted daughter, whom poverty stunted,[38] and then a son, he would show Portugal, and if possible the world, that it was he whom the electors should have chosen in 1909.

A stream of legal works, interspersed with historical and literary studies, appeared between 1909 and 1929 when he began his monumental *Tratado de direito civil*. As a result of these he became first a corresponding member and then an effective or full member of the Academy of Sciences of Lisbon, which is the highest achievement for a scholar in Portugal. A professorial chair was still far away in spite of his efforts, but he concentrated on relatively modern subjects, and original themes. Air law, labour law, and various aspects of commercial law occupied him before he took up civil law in its entirety. As a result of these publications the gifted Jewish head of the Instituto Superior de Ciencias Economic as Financeiras of the Technical University of Lisbon, Prof. Moses Bensabat Amzalak (who surely understood the problems of a racial minority), gave him a new chair for the Law of Corporations in 1933, and he later moved to the eighteenth chair, teaching civil law, political and administrative law and associated topics until he reached the age limit in 1945. During the whole period he lectured and published on literary-historical themes,[39] and on questions relating to the controversial topic of the relations between church and state,[40] on missionary endeavour, to which he took a wholly positive attitude,[41] and on education.[42] His lectures at the Academy of Sciences were

37 No. 31.

38 Her brother's reminiscences. Her talents are evident from her published poems (Tonia, ps. ,*Cancão do Sol*, Lisbon, 1930).

39 Nos. 30-35.

40 Correspondence from the Archbishop of Evora.

41 No. 60. One of his University theses was that 'as congregacoes religiosas saoo instrumento mais eficaz da civilizacao dos indigenas'.

42 No. 65.

highly appreciated for their clarity, perspicuity, and style, even when the subject-matter was obscure or unfamiliar.[43] C.G. developed the reputation of being the only Portuguese jurist who was at one and the same time a leading jurisconsult, whose opinion was of great practical value; a leading jurist, whose treatises were standard works in their day and covered a bewildering range of topics from the law of the state to international law, from civil law to air law and a historian of Portugal and of human institutions, as well as a man of letters who could make original contributions to the study of the great poet Camoes.[44] He was a genuine Academician, which could hardly be said of the few lawyers who graced the jealously guarded ranks of the Academy, to whose credit few works of juridical science could be attributed, and fewer works in Arts.

There was no doubt but that by 1945 C.G. had eclipsed even Gerson da Cunha and his own elder brother, since whereas the former never wrote much in medicine, and nothing in law, the latter was a judge and a jurist, but never made any outstanding or lasting contributions to juridical science. It is obvious that C.G. outshone his rival Jose Gabriel Pinto Coelho—except in point of income: for the latter, as is normal in Portugal and many continental countries, gave his attention to commercial enterprises and public affairs.

But this is not to suggest that C.G. did not lead a public life as well. Even in 1912 and 1915 he was a member of the Colonial Council, chosen as representative of India. After the long years of domestic hardship his gifts became widely known through his legal practice, his publications, and his contributions to literature. He was several times elected to the National Assembly.[45] He took part in numerous public commissions, for example the Permanent Commission on Maritime Law, which would have taxed the patience of men with fewer literary undertakings than his own.[46] He alone was responsible for drafting several Decree Laws and participated in several projects of legislative reform (especially the Commercial Code). And throughout his working life he forwarded copies of his publications throughout the civil-law world, and, through friends and admirers, was elected a corresponding member, and fellow, of one learned Academy after another. This kept him in touch with the intellectual movements of three continents, not excluding the

43 Bento Carqueja, notice of C. G. attached to the *Boletim Bibliografico* of *Coimbra* Editora Lda, 3, No. 4 (Sept., 1934).

44 Nos. 33 and 43, 48.

45 1934-38, 1938-42. Membership of the Assembly interfered with his availability for the post of judge of the Supreme Tribunal: but it is not clear whether this was mooted at any time The biographical note dictated to Nuno Goncalves is obscure on the point.

46 Member of selection committees for three different class of civil servants; member-reporter of the Commission to reform the law of Copyright (see José Galhardo in *Autores*, Autumn, 1959, 5-6); judge-substitute for the district of Evora.



Anglo-Saxon world.[47] His knowledge of English was good: in the Goa of 1875-98 English was not taught intensively, still less universally, nor was it spoken in the home by educated people (as it now is), for they visualised themselves as Portuguese, and English was learnt only by those who must perforce emigrate to British India or other parts of the British Empire. But C. G. had a notable collection of English books, some of which he brought from Nova Goa,[48] and it is evident that he used them extensively for his *Direito hindu e mahometano*. He must have conversed in English with factors at Beira. He formed, however, no very high estimate of British India or its inhabitants, and was not particularly friendly towards the British people, as is evidenced by his comments to his French friend and admirer, Henri Rousseau,[49] at the time of the fall of France.

*C.G.'s identity was not that of an Indian who happened to be brought up in Goa, but of a Portuguese who happened to be of Indian origin.* This distinction is vital for understanding the standpoint with which he studied Indian affairs, his attitude, for example, to the Aryan question. When the Congress Party was striving to rid India of all foreign rule, and was about to achieve Independence from the British, an approach was made to him to get his adhesion to a programme aimed to free Goa from its Portuguese 'enslavers'. Many Goans resident in Bombay (though only a tiny fraction of the whole community there) welcomed the notion put out by the Congress Party leaders that the Portuguese and the British were indistinguishable. This greatly irritated some Goans, who were far more European in outlook and manners than any Indian community in British India or out of it. Many Goans were loyal to Portugal and wanted the Estado da India to remain Portuguese. Others hoped

47 Member of the International Law Association, 30 Sept. 1913.

48 J. H. Nelson, *Prospectus of the Scientific Study of the Hindu Law* (London, 1881); V.N. Mandlik, *The Vyavahara Mayukha and the Yajnavalkya Smriti* (Bombay, 1880); J. D. Mayne, *Treatise on Hindu Law and Usage*, 3rd edn. (Madras, 1883): all three copies were originally in the Escola Médico-Cirurgica in Nova Goa (a library containing at that time most technical classifications, Goa having no University). *Gazetteer of the Bombay Presidency*, 21 (Belgaum) (Bombay, 1884) was lent by its owner in Goa in July 1889. J. Matthai's excellent *Village Government in British India* (London 1915) was sent to C. G. from Nova Goa by M. Saldanha in 1918; he also sent him J. Jolly's important *Hindu Law and Custom* (Calcutta, 1928). A Kaegi, *The Rigveda: the Oldest Literature of the Indians* (Boston, 1898) and F. Max Müller, *The Six Systems of Indian Philosophy* (London, 1917) are in C. G.'s library. The great merit of C. G.'s thesis, in 139 pp., entitled 'O método etnograficona historia das instituicoes jurídicas em especial, da propriedade', dissertation for the fourth *cadeira* of the Faculty of Law, Coimbra, 1904, dated 14 June 1904 and marked 'Bom, 17' by the professor, was that it made the widest use of British Indian sources.

49 Of Poitiers, he was connected with the Recueil Sirey, and thus could give C.G.'s works great publicity. A vigorous correspondence survives for 1935-1946, with a gap for the war years.

for an internationally-recognised independence. In the event the Union of India, after ceaseless propaganda against the Portuguese rule which was, admittedly, totalitarian in complexion, but which was acceptable to many Portuguese in Goa and elsewhere, invaded and conquered Goa, an event from which the international reputation of Nehru suffered[50] C.G. was asked[51] to lend his support to the Liberation Movement as early as 1946 : he declined saying that he was Portuguese in thought and language and education, that the role of the Portuguese had been entirely misrepresented, and that the Union of India itself had an uncertain future to which the Goans could be unwise to commit themselves.[52] Not content with his refusal, some years later Nehru asked him to represent India in an international congress of jurists—his fame had reached so far ; but he refused.[53] Indian he might be by blood, but he was a Portuguese by nationality. Indeed this man had a dual identity, as his prodigious output and his attitude to life plainly show (see below).

He was never offered a chair in the University of Coimbra or the Faculty of Law at the University of Lisbon. His chair in the Technical University, obtained in 1933, was achieved in his 58th year, much too

50 The taking of Goa (18-20 Dec. 1961) was the outcome of the prolonged Dadra and Nagar Haveli (enclave) Case (189 sq. miles of Portuguese territory which opted for union with the Union of India). The litigation at the Hague, which gave the Indians the impression that world opinion was on their side, is fully described by M. C. Setalvad, *My Life, Law and Other Things* (Bombay, Tripathi, 1971), 295-327. Judgement was given on 12 April, 1960. The territories were incorporated by the Tenth Amendment of the Constitution of India, 16 Aug., 1961. The incorporation of Goa, Damao (Daman) and Dio(Diu) took place under the Twelfth Amendment, 27th March, 1962 (*H. L. Mehra* v. *State of Maharashtra* A.I.R. 1971 S. C. 1130). For the Portuguese view of the Indian action see Antonio da Fonseca, *Goa Damao and Diu Freedom Movement* (Paris, 1963) (Cover : 'Nehru's Aggression Condemned') Leo Lawrence, *Nehru seizes Goa* (N. Y., Pageant, 1963) ; Rémy, *Goa, Rome of the Orient* (London, Barker, 1957 ; Portuguese edition, Lisbon, N.D.). For Another view : R. P. Rao, *Portuguese Rule in Goa* (1510-1961) (London, A.P.H., 1963). See also José Bossa, *Estado da India* (Lisbon, 1965) ; A. P. Testa, *Portugal in Asia* (Rome, 1966).

51 Letter to the Secretary-General of the so-called *Comite Goes do Congresso*, dated 14 June, 1946. This fascinating document, in which C.G. said he studied with Hindus of the upper classes and that included *bottos* (i.e. *Bhaṭṭas*) and found no trace of current traditional Sanskrit learning in them, and said many other uncomplimentary things about the political self-picture of the Independence Workers, who were within a little over a year to achieve Independence for India, is to be found in the family archives at Quinta do Arcipreste, Linda-a-Velha.

52 An attempt was made by Goan students at Coimbra to form an Instituto di Estudos Indianos, C.G. was asked to speak (19 Jan. 1928) and he declined. In his view integration, progressive assimilation, the object of Albuquerque, was the correct path for Goans, from which they should not be distracted.

53 *A Voz* (Lisbon), 26 March 1956 (p. 5, col. 4).



late for even the most active man to expect a brilliant promotion, no matter how satisfactorily he utilised his eminent position. C.G. died on the 24th March 1956, full of years, shortly after despatching to friends who would appreciate the gift copies of his last work (original as ever) the *Da Propriedade Horizontal*.

## The Standing of Cunha Goncalves as a Jurist

Perhaps no branch of scholarship is so subject to the winds of chance as law. The scholar cannot teach, or write, anything which does not fall in with the immediate needs of his time ; and those needs arise from circumstances, positive and negative, utterly outside his own control. The ultimate test of a jurist would seem to be whether practitioners advise their clients in accordance with his views, whether judges follow his views and sometimes cite them, and whether his advice is sought when it comes to the drafting of new statutes or the repeal or amendment of old ones. By all these tests C.G. emerges as a front-rank figure. Naturally his successors will improve upon his work, and developments in the law (e.g. the massive changes in the Civil Code of Portugual which took place from 1967) will take much of the ground from under his feet.

As C.G.'s publications began to mount up in the legal field appreciations and encomia began to reach him, in correspondence and in the public press.[54] It would be impossible to speak of any native-born Portuguese in higher terms ; and, more important, no jurist of the continental legal world achieved more in terms of comprehensiveness, versatility, and depth of research.

The methods he followed in his commentaries on the Codes may be simply stated. He went through every commentary on analogous articles of the comparable Codes of Europe and America, including from time to time English principles on corresponding topics, and formed, computer-like, his own judgement as to the meaning and scope of the general principles of law in the field and of the particular articles. His surviving library is an immense collection of continental treatises, none so vast as his own. The great Planiol-Ripert and similar gigantic productions in the realm of civil law are not the

54 It would be tedious to copy these laudatory comments, made by professional men of various shades of opinion in C.G.'s lifetime and after his death. Writers include Francisco Manoel Ferreira Martins (1933), Emilio Guimaraes (1938), J. Crisostomo da Silveira (1939), Lopes Galvao (1940), Antonio Ferreira, Luis Perreira de Melo, De Vasconcelos Reis (1943), Henri Rousseau (1946), Marcello Caetano (1954). Note the welcome for C.G.'s *Tratado in Revista de Justica* 17, No. 386, p. 32 (25 Mar., 1932). The appearance of a volume of the *Tratado* was the subject of an allegorical presentation of a figure of Minerva in a festal procession at Coimbra in August 1936 (photographs). Necrology : *Heraldo*, 28 Mar., 1956, 18 May 1956 ; *Journal do Comercio* 20 April, 1956 ; *Voz de Portugal* 21 April 1956.

work of one man's brain, nor even of two. From this large collection and the books and articles lent him by that great book-collector and judge Dr. Joao Pinto dos Santos, and also the up-to-date material which came to him from the proceedings of international congresses in which he was interested, he was able to compile an authoritative treatment which one can simply call *Comparative-law-in-action*. At that time no one in Portugal had the time or inclination for this kind of work on that scale. Subsequently the technique has been imitated in Portugal and in Brazil, that great home for advanced and broadbased enterprises. But C.G. arose at the right moment for experimentation, and for pioneering work in the field of comparative law. If Gulbenkian was 'Mr.5%', C.G. was 'Dr. Comparative Law'.

C.G. was always sensitive to the development of law in the courts, and the case-law both in Portugal and Brazil was open to him to develop his treatises. In due course he produced separate works or separate editions to serve the needs of the home country and her fast-expanding daughter country.

So far as professors of law were concerned, the accumulating mass of authoritative material, backed, as was the fashion in those days, with the minimum of detailed citation in footnotes, was something of an embarrassment. The busy teacher and the busier student have little time for wading through such extensive treatments, however valuable the ultimate conclusions might be. A fifteen-volume treatise on civil law, produced between 1929 and 1944, is an enduring monument to the author, who must have worked almost night and day upon it, but it is daunting to the tiro. It was in Brazil that the true value of such work was perceived. Brazil, absorbing the enterprise of many continental nations, with a broad outlook and questing minds, using the Portuguese language, but avid for the latest developments in all cultured societies, keen to exploit the achievements of the United States yet eager to keep a hold upon its cultural roots in Old Portugal, understood that C.G.'s work, though in bulk it did not even then equal the output of Brazilian universities, with their many law faculties, was a window upon the best juridical thought of the Old World. Brazil could pick and choose, and C.G.'s linguistic skill and digesting ability enabled her pioneers to teach law in the way they thought most forward-looking. Unstinting admiration came from Brazil. The fact that C.G. was not a professor of a faculty of law in Portugal was irrelevant to them. In 1947 he was invited by the Brazilian government to visit Brazil. He stayed there for three months, the happiest days (he says) of his life.[55] He was feted, receiving homage, banquets, titles and honours.[56] No Portuguese had ever been honoured to this extent by the Brazilian government before, and yet he was a mere juridical writer. He was the first such to be made an Honorary Professor of the Faculty of Law of Rio de Janeiro, an honour shared with President Getulio Vargas. The Universities of Sao Paulo and Recife made him Doctor *honoris causa*, and others would have done so if the stay he made could have been prolonged. Invitations to this end were in fact received from the Universities of Parana, Belo Horizonte, Minas Gerais, Bahia, and Rio Grande do Sul!

55 'Uma visita cultural ao Brasil', *Brasilia*, vol. 4 (repr. Coimbra Editora Lda, 1948, pp. 47).

56 A beautiful tribute to him (containing some original opinions of celebrated jurists of Brazil) is entitled *Ao Prof. Cunha Goncalves Homanagem dos Juristas Brasileiros*.



Work in Portuguese is not widely read in other countries besides Brazil. Those who were able to read it in Latin countries had no doubt of C.G.'s quality, and, even when due allowance is made for the flowery style and exuberant courtesy of authors in such countries, the tributes paid to C. G. were impressive.[57]

Yet all this adds up to an Indian pursuing a typically Indian activity in a recognisably Indian way. It may be argued that the long-Christian Brahmin families of Goa were clearly distinguishable from other communities of India, even from Christians of Kerala, and this is true. It must be admitted that in directness of thought, general honesty, and dependability, and also in manners and pursuits, the Goan aristocracy was so close to those of Portugal as to merge without perceptible difficulty into the society of the Old Country something that the Hindus of British India have not yet achieved, and may not achieve for a century or more yet (should it be their desire to do so, which is not evident). But the ambition to shine in society, to achieve recognition and honours, and to leave a vast memorial in the form of scholarship, were patently traditional Brahmin features.

C.G. received two decorations,[58] which are the typical method in continental countries to reward excellence in Arts or Sciences; but it was painful that promotion to a higher rank was denied him on the ground that vacancies were not available. A comparison of the photographs of C.G. in his early 30's, and in his old age reveals a growing sense of achievement, but one could go further and say, 'achievement in spite of all'. It is notorious that the desire to write an encyclopedia, in which the author shows his competence in all branches of learning, or at least his complete mastery of one or more than one branches of learning is traditional in India and amounts to an

57 See n. 54 above. A phrase such as 'Extraordinario jurisconsulto portugues, o maior dentre os maiores do seculo' figures at *Boletim Judiciario*, 1938, p. 652. Elsewhere (1940), 'E sendo V. Ex. a um alto espirito, de reputacao cientifica sölidamente formada: tendo atraz de si um trabalho que nao duvido de chama-lo formidavel, que se impoe à admiracao de todos; tendo logar de destaque entre os melhores valores cientistas, nao deixara, estamos certos, de nos dar a sua valiosa adhesao' 'a request for a public lecture to the prestigious Geographical Society).

58 Grande Oficial da Ordem de Santiago da Espada; Grande Oficial da Ordem do Cruzeiro do Sul.

obsession, even with quite commonplace students. The vast thesis, the appetite for the denomination 'learned scholar', 'great scholar', and the complacency with which authors survey their interminable outpourings, are ubiquitous features of the intellectual scene.[59] C.G. was probably aware of the attempt of ancient Indian scholars to cope with the whole of learning, but this awareness should have recommended compression. Not that I complain that Codes consisting of hundreds of articles could or should be dealt with in a more compressed style than C.G. used: but I think it only an *unconscious* striving after the ambitions so well known amongst his ancestors that sustained C.G. in his lengthier projects. Scholarship was, in the ancient past, and is sometimes still, a way by which the obscure may revenge themselves upon an unappreciative world. The great encyclopedists of the ancient and mediaeval world were Brahmins.

Another Indian feature deserves to be noticed. In the Anglo-Saxon world legal authorship and an equal career in the Arts is an unknown combination. G. W. Keeton worked in history as well as law, but it was legal history. There are no instances of outstanding legal writers (who might well be Fellows of the British Academy) being also members of Parliament and continuous contributors to scholarship in history. In the continental world of scholarship the combination of law-professor and politician, or law-professor and businessman, is by no means rare. But to be a student of poetry, law, and politics must be an exceedingly rare combination. In India, on the other hand, even men who have risen to the bench from the practising profession as well as many who have refused judgeships, seek to retain a hold on the academic world, and publish in fields other than law. For lawyers to be patrons of the Arts, and to figure as educationists, is common. The idea of the well-rounded man seems inherently present even in the jurist who is almost submerged by his profession; and it is not thought in the least incongruous that, for example, M. Anantanarayanan should be an imaginative author, an artist, and a public man as well as a judge, and a prominent one at that, or that T. L. Venkatarama Iyer should have been a famous patron of music and no indifferent performer himself. This outlook was not learnt from Britain, it is something indigenous. The potential did not develop so well in British India as it did in Goa, because the coming of Christianity and the gradual assimilation of Goans of the upper castes to western manners gradually released Indians from inhibitions and self-consciousness, defence-mechanisms which prevented the subjects of the British Empire from rising to their true height. But the potential was undoubtedly there.

59 Amongst modern authors, Taranatha, Kane (below), K. V. Rangaswami Aiyangar, P. K. Acharya. Amongst mediaevalscholars, Bhoja-deva, Lakshmīdhara, Devanna-bhatta, Pratapa-Rudra, Cande svara, Vacaspati-Misra, Todarmal, Prithvichandra, Mitra-Misra.



Against this background of intellectual and spiritual ambitions achieved, in the face of a professional ambition thwarted some forty years before, we can recognise a parallel between what C.G. did and what his fellow-Brahmin, but a Hindu, P.V. Kane, did. Kane started on the road towards writing his massive *History of Dharmasāstra* in order to overcome the feelings of disappointment and chagrin which he felt when a European selector passed him over in order to appoint a nonentity to a minor post. The loss of that insignificant appointment led to the creation of an encyclopedia which can hardly be surpassed and will probably never be rivalled. So C.G. thought that his life has been spoiled by what happened in 1909, whereas in reality it afforded him a stimulus which created a life-work which, as a professor in Coimbra, he would probably not have attempted. To that disappointment we owe, amongst other achievements, the remarkable and unique work on Hindu and Muhammadan law in his homeland, the careful and critical production which fulfilled a promise he made to himself in the hopeful days before he left Goa.

*An Analysis and Appreciation of the 'Direito hindu mahometano' (1924).*

The study of the non-Christian laws of his native Goa and her dependencies in India had been (as we have seen) at the back of C.G.'s mind before ever he left for East Africa. It was a natural interest, since his father had collaborated in the framing of the Decreto which, along with the basic Codigo Civil of all Portugal, was the foundation of the laws of non-Christians there. His father's own modest commentary on this statute exists (for the first few articles) in the possession of Nuno Gonçalves and there can be no doubt but that C.G., as his father's literary heir, possessed other fragments, perhaps more mature in form. The whole history of the project, the long struggle of the Hindus of Goa to be both traditionally Hindu and at the same time heirs to the juridical achievements of Portugal (the status of 'honorary' Europeans, as it were, being agreeable to them) must have been known to him in detail. In his mind a full academic statement, or restatement of Portuguese law must remain incomplete while the Decreto was not authoritatively commented upon. Material in print existed,[61] but it was not up to his rigorous standards. Thus the precious years of struggle at his legal practice and in Alentejo were devoted in no small measure to the intricate anfractuosities of oriental laws, in their peculiar Portuguese dress.

60 *History of Dharmasastra*, vol. 5/2 (Poona, 1962), Epilogue, p. iv.

61 He had so little use for it that he never cites it (except of course Afonso Mexia and F. N. Xavier, the last not always with approval—for his want of accurate Indological knowledge). Titles are listed at Derrett, 'The Indian Subcontinent under European Influence' in J. Gilissen, ed., *Bibliographical Introduction to Legal History and Ethnology* (Brussels, 1969), Nos. 414-424. Nuno Goncalves was good enough to point out that item 416 appeared in 3 vols. (1840, 1850-1). He also drew my attention to José Julio Goncalves, *Sintese Bibliografica de Goa* (Lisbon, 1966-7).

The section of the book dealing with Muslim law (pp. 344-63) is worthy of a place in the bibliography of Muslim law, seeing that it summarises the position from the point of view of a Goan, not available elsewhere. C.G. sent a copy to the eminent French specialist in Islamic law, G.H. Bousquet, in 1939. But since Muslims are very few in Goa C.G. did not go into any great detail, and indeed he considered the topic of relatively little importance (he cited no secondary treatise). We too can pass over these pages. The rest of the book is at one and the same time a lawyer's exposition of the *Decreto de 16 de Dezembro de 1880* (as it stood at that time)[62] and a scholar's introduction to Hindu law itself. The fact that, to his knowledge, the Decreto might soon be modified or even abolished did not deter him : he knew such schemes move slowly. Since he was at one and the same time racially a Brahmin, spiritually continuous with the great sages who compiled and commented upon the classics of the *dharmasāstra*, and a Portuguese savant and litterateur, his approach and style is at once sympathetic, penetrating, and elegant. When J. D. Mayne wrote his Treatise on Hindu Law and Usage (1st. edn., 1878) he commenced with a historical and critical introduction, which never exceeded twelve pages until, in subsequent editions, the task devolved into Indian hands. Mayne was a renegade philosopher, who turned over to Law because it was more remunerative than teaching philosophy in Madras. He knew no Sanskrit, and was imbued with that mystification and incredulity with which most Europeans of his day viewed Hindu doings and aspirations. I cannot think of any introduction to the study of Hindu law which has satisfactory academic characteristics by modern standards, and the apology for such in the prefatory material to D. F. Mulla's classic (at the hands of a modern editor) reveals all too plainly that the banal tastes of the customers of such books (Indian practitioners) dictate how much history is needed, i.e. no more than the courts (whose approach is not historical but practical) care to lay down in their decisions. C.G.'s work is the only substantial introduction to what was then (and in part remains) current Hindu law which places the subject in its cultural setting

The exposition of the *Decreto* begins on p. 146, and all the previous study is taken up with the historical background, more than a third of the whole book. In this introduction one sees the educational equipment of the author at its most extensive. His concentration is upon the Indo-Aryan nature of the brahminical civilization (and hence its fitness for study by the most westerly representatives of the Indo-Aryan race.!). The geography, ethnography, and legal history of Goa are gone into in great detail. The religious history is outlined, and a representative collection of authors is cited (as throughout the introduction), British, Anglo-Indian, and continental. Material accumulated in India is utilised, and some evidently acquired in Coimbra. The conception of the Goan Brahmins as cousins of the Europeans is one which few sociologists would accept as meaningful today ; but its psychological value for Goans before the First World War and after must have been immense : and who is to say that its vitality is exhausted ? In rapid survey C.G. outlines the great works of native Indian jurisprudence, and shows which were authoritative in the Goa area amongst Konkani Hindus. He moves easily amongst Hindu scriptures, and Hindu customary ceremonies. His respect for the Portuguese and other missionaries does not by any means constrain him to respect their early reports, and here (as elsewhere) he ridicules the mistakes made, and judgments wrongly arrived at, by partly-educated European clerics who interfered in India's social and political life from the sixteenth century onwards. To my chagrin I find that my exposition of the legal history of the Hindu law in Goa is not entirely verified, for with characteristic concision and grace C.G. expounds the complicated particulars (at pp. 146-163) which should be added as correctives to my efforts in that respect.[63]

C. G.'s task was formidable. The *Decreto* dove-tailed with the Codigo Civil, and with other legislation of Portugal, especially the 'family law' which made a considerable impact upon it (see below). All the legislation of Portugal must be reconciled with this humane reservation of native laws and customs. Yet the exposition is never dull, or tedious. Furthermore, the law reserved to the Hindus was not merely their book-law, their dharmasastra. In a far more intelligent manner than the British, the Portuguese had regarded written and unwritten law as a whole, and preserved consciously many Hindu practices and procedures which the Anglo-Hindu law deliberately ignored, and in some cases virtually abolished. C. G. was able to bring to bear a firm conception of what Hindu society was, and what it needed to be conserved, if its legal integrity was to be taken seriously. He therefore understood where the Decreto was not adequate and where (occasionally) it was unhappily phrased. The Luso-Hindu law was a rather old-fashioned law by British standards, and still more by Independent India's standards, but it was more homogeneous, and much more genuine. C. G.'s methods and style can best be appreciated by a translation (I trust not inaccurate) of his commentary on specimen articles of the Decreto. I have chosen arts. 5-8 (pp. 213-223).

62 In 1921 Dr. A. B. De Braganca Pereira had already been given the task of drafting a new Code, or at least reforming the old. He made his recommendations but no action was taken. On 29 May 1945 the Imperial Colonial Council determined that new Codes for Damao, Dio, and Goa should be made. Instructions were issued to a committee consisting solely of Hindus to revise the Code of 1880 by the Chief Justice, Goncalves Pereira, in a Despacho dated 19 March 1952, The resulting draft also was printed in an English translation by the Tribunal da Relaçao de Goa (Goa, 1953).

63 My pp. 213-4 need correction. The Portuguese Civil Code was applied to non-Christians, saving the provisions of the Decreto of 16 Dec. 1880. From 1 July, 1966 the Civil Code was abolished (by the Union Parliament), saving the personal laws.

ART. 5

"Marriage[64] between Hindus can be dissolved only on the ground of adultery by the wife, with the following formalities :

1. the ground for dissolution having been proved judicially ;

2. the solemnities of the Hindu ritual called *gothacria* (*ghaṭakriyā*) having been performed subsequently.

Provided that in the case of dissolution the wife has a right to maintenance."

*Summary*

18. Cases of dissolution of a Hindu marriage. The formalities necessary in cases of adultery—19. Effects of dissolution. Limited cases in which the wife alone has a right to maintenance. Restitution of a dissolved marriage.

18. This article is, from one point of view, erroneous ; from another it has been profoundly modified by subsequent legislation.

It is erroneous in so far as it says that a Hindu marriage is dissolved *only* on the ground of the wife's adultery. For, even in 1880, it used to be dissolved equally by the death of either of the spouses (!). The truth may be that a *widow* cannot contract matrimony. While an adulterous wife, after the dissolution of her marriage, obtains a fuller liberty, as if she were a spinster ; and that is how we can explain that adverb 'only'.

Furthermore, since the Decree-law of the 3rd November 1910 is in force in India, and since Hindus are not excluded from its benefits, it is clear that a Hindu marriage can be dissolved in all the cases falling within the relevant art.4, exactly like a Christian marriage, and therefore equally on the ground of the husband's adultery, even though, custom being what it is, no Hindu wife would have the *unheard-of audacity* to demand a divorce on that basis ! However, it is clear that the sacred books consider the husband's adultery as a *mahāpātaka* or mortal sin, and subject the sinner to excommunication and expulsion from caste, exactly like the wife ; but in reality this never figured in practice, even though a public scandal emerged.

Nowadays, however, Hindu husbands, whose wives have committed adultery, may obtain a dissolution of their marriages either under the provisions of this article, or by means of a divorce suit which is much quicker and more efficacious, and this suit may be followed, simply for religious motives, the ceremony of *ghaṭakriyā* which is, in this context, unnecessary for civil or economic purposes.

64 This article would no longer have been part of the Luso-Hindu law if the draft *Code of the Usages and the Customs of the Hindus of Goa*, 1953, had actually become law, because it does not figure in it.



The divorce suit is preferable to the procedure laid down in the present article, since one may take advantage of it, as an adjunct to the same proceedings, to obtain an inventory and partition of the matrimonial estate, fix the amount of alimony, the custody and maintenance of the children (if there are any) : steps one does not know in what form, or at what point to take if the dissolution is to be made under the provisions of this Art. 5.

If the husband does not wish to commence an action for divorce, he can proceed to prove the adultery under the provisions of art. 598 of the Code of Civil Procedure. If the suit is contested he proceeds by an ordinary suit. After the *ghaṭakriyā* ceremony he can demand an inventory of the estate.

The preliminary proof of the adultery was laid down, likewise, by the *sāstras*, which did not allow mere suspicion or testimonial proof of vague facts, but required that the guilty couple should be caught *in flagrante delicto*, or in mutual embrace, or the confession of both-the confession of one of the guilty parties not being sufficient (Yājñavalkya).

Supposing the fact is judged proved-by judicial sentence, the religious head (svāmī) utters the religious censure and orders the *ghaṭakriyā* ceremony to proceed [from ghata, a pot, and kriyā, a rite]. This, briefly, consists in destroying a puppet made out of flour at the adultress's house-door[65] and filling a pot with water which is poured out beyond the village by a servant girl, all in the presence of the domestic priest (*purohita*). From that moment the woman is segregated from the family and from her caste, and considered as if dead.

19. As far as concerns the effects of divorce in relation to property, the Code of Usages and Customs of 1853, art. 19, provided that the wife 'loses in her husband's favour whatever she brought from the home of her parents or acquired by any other means, and has no right to maintenance'. The first of these effects, however, did not result from the adultery : for, as we have seen, a wife married in the New Conquests lost everything to her husband by the simple fact of being married to him, with the exception of her right to maintenance.[66] This is the right which she loses as a consequence of her marriage being dissolved for adultery.

However, no such rigour can be justified by the *smṛtis* or *sāstras*. On the contrary, Yājñavavalkya and other *ṛsis* insist that 'even though she be abandoned she should be mantained, otherwise a grave sin is committed', and that, if the *ghaṭakriyā* is performed 'she should be given a separate habitation near the house (of her husband ?), provided with food and clothing'.

65 This is evidently part of the Hindu custom of Goa. It does not find a precise parallel in Kane, *op. cit.*, vol. 2 (1941), p. 388, vol. 3 (1946), p. 615, 1009-1010. Ibid., vol. 4 (1953), p. 105 has material relevant to C.G.'s exposition.

66 This Hindu custom of Goa is contrary to the Hindu law of *stridhan* as described by Kane, *op. cit.*, vol. 3, ch. 30.

It is this rigour which the Proviso to art. 5 abolished, prescribing that 'the wife, after the dissolution, shall have a right to maintenance'.

But this provision, evidently, only takes effect relative to women who, under their matrimonial régime, have no right to any other property, and principally to the women married in the New Conquests *prior to 1880*, few of whom will be, at the time of writing, so placed.....as to commit adultery.

Women married to Hindus of the Old Conquests at *any* period, and those who were married in the New Conquests *after* this *Decreto* are subject, as far as concerns the régime of their matrimonial property, entirely to the general law of Portugal. It is plain that they have a right to a half of their properties, unless they were married under the regime of separation or the *dotal* regime, all the more since the Proviso to art. 1210 of the Civil Code, which deprived an adulterous wife who had been separated of any right to demand this half, was revoked by art. 50 of the *Decreto* of the 3rd of November 1910, and it cannot have any application in a case of divorce.

A Hindu adultress who has been divorced can immediately claim her moiety, if she was married under the regime of community of goods within arts. 26 and following of the said *Decreto* of 1910 ; and only when there has not been a partition of any of the matrimonial assets, nor property of her own or means whereby she could subsist, could she demand alimony conformably to the provisions of art. 29 and following of the same Decreto, or the 'appanage', under arts. 1231 and 1232 of the Civil Code.

By 'maintenance' is understood all that which is indispensible to feed, shelter, and clothe the person entitled, as defined by art. 171 of the Civil Code : and the Hindu law so understood it. The general Portuguese law is in full effect in this particular.

By chance, a marriage between Hindus, dissolved for adultery, may be restored, as permitted to separated spouse under art. 1218 of the Civil Code, and, one might ask, are divorced couples allowed the same by the said *Decreto* of 1910, which is silent on this subject ? The civil law contains no obstacle to this. From the religious point of view the *sāstras* allow excommunication to be raised and the effect of the *ghaṭakriyā* to be annulled by means of certain penances and purificatory ceremonies (Yājñavalkya, *Prāyascittādhyāya*). Granted that this is stated only with regard to an excommunicated *man*, it seems that the same doctrine is applicable to a woman who, consequently, can be reintegrated within the family and the caste.

A Hindu adultress can also marry again, but only under Portuguese civil law, and conformably to art. 55, with its provisos, of the *Decreto* of 1910. She is not permitted to undergo the religious rites appertaining to her original family. Nor will there be any Hindu who wants or even could marry her



without incurring the same expulsion from his own family, caste and religion. Finally a divorced Hindu woman will not be able to use the name which her husband gave her after the marriage, but only her spinster name, since by analogy we can apply to her proviso 2 to art. 19 of the *Decreto* of 1910. For example she will be called *Bagi* if she was called Bagi as a spinster, and Ahalya Bai after her wedding.[67]

ART. 6

Marriage emancipates the male spouse who has completed the age of 18 years, and the wife who has reached 16, except in the absence of the consent of their parents or the chief of the family.

ART. 7

Marriage celebrated between non-Catholic parties shall be entered in the relevant civil register, in conformity with the regulations in force.

*Summary :* 20. Majority or emancipation amongst Hindus. Who can authorize a Hindu marriage.—21. The civil register in India ; its legislative evolution.

20. Art. 6 is nothing more than a reproduction of the doctrine laid down in arts. 304, No. 1 and 306 of the Civil Code, and therefore would-be superfluous in a *Decreto* which aims to preserve the usages and customs of non-Christians.

Under the Hindu laws, the emancipation or majority of a male takes place, irrespective of marriage or paternal permission, at 16.

However, it is necessary that, prior to that age, the thread-ceremony (*upanayana*) shall have been performed.[68] Jagannātha, in his treatise—published in 1801 by Colebrooke under the title of *Digest*—divides the ages of man in the following way :—infancy, until the age of 4 is completed ; childhood until the age of 9 is reached ; adolescence, until the age of 15 ; and, thereafter comes manhood.

The Hindu treatise-writers differ amongst themselves as to whether majority is reached at the beginning or the end of the 16th year. That difference has no importance today. The Portuguese government, like the British, having put in force in its dominions laws which provide otherwise in this respect. The Indian [Majority] Act, 9 of 1875, in effect in British India for Hindus, places the end of minority at 18, except when minors are under *patria*

67 The Hindu custom of renaming wives at their weddings is obviously familiar to C.G. That divorce could occur, on any ground, shows that we have here the result of the Portuguese upholding of outcasting : the Anglo-Hindu law simply refused to recognise divorce on whatever ground and whether or not outcasting occurred, unless these incidents were pleaded and strictly proved *ad hoc* as custom derogating from the book-law.

68 *Upanayana*, explained at Kane, *op. cit.*, vol. 2/1, ch. 7 is not in any way related to majority as known at Anglo-Hindu law. On majority at Hindu law see Kane vol 3, pp. 573-4.

*potestas*,[69] in which case it terminates at 21. This definition, however, has no relevance to the celebration of marriage, adoption, or other ceremonies appertaining to the relevant customs.

But the emancipation of the wife is only made by means of marriage, whatever might be the age at which this takes place. However one meets in the religious books some mention of an *upanayana* or initiation peculiar to females, prior to marriage, a ceremony which is obsolete, and must have been contemporaneous with an epoch in which marriage was permitted to take place after puberty.

We have shown how art. 6 does not preserve any Hindu custom. But, in as much as it reproduces art. 306 of the Civil Code it does depart from it at the end, for the words 'provided the marriage is competently authorised', to be found in that article, we find substituted 'except in the absence of the consent of their parents or the chief of the family'. Are we entitled to conclude from this that only the parents or the chief can authorise the marriage ?

No. Since Art. 6 is not a reservation of a Hindu custom it cannot be interpreted in opposition to the general law. Now, under the Civil Code and the Decree-Law of the 25th December 1910 (art. 6 and provisos), the right to authorise the marriage of minors appertains, in default of the parents, to the grand *parent* who has been made guardian, and in default of grandparents, to the family council. The form of granting such consent is regulated by arts. 773 and 774 of the Code of Civil Procedure and art. 185 of the Code of Civil Administration of India, 1912. Those provisions must be reconciled with the provisions of this art. 6, and therefore, *I understand* that marriage can be authorized by the parents, by the grandparents, by the family council or its chief, according to the circumstances of the case.

In the cases of children having neither parent, and when the grandfather has been made guardian, or the family council has been set up, the marriage cannot be authorised by the chief, nor can he annul the authorisation granted by either of those entities. The 'chief', to my mind, can only intervene *in default of them*, especially when not all Hindus live in joint families, an essential condition for there to be a chief (or manager) of the family, as we shall see.

It is significant that according to the Hindu law marriage may be authorised by the grandparents in default of the parents, or by brothers. The relevant books (*sāstras*) make no reference to the 'chief', possibly because this status coincides, as a rule, with that blood relationship.

**21.** The civil register is not, nor could it be, required by Hindu customary law. Therefore the subject-matter of art. 7 is, more than art. 6,

69 A compendious way of stating the effect of that Act, which postponed until 21 the age of majority for all those for whom a guardian was appointed under the Guardians and Wards Act or under any of the (provincial) Court of Wards Acts.



foreign to the scope of this *Decreto* of 1880. The civil register was created by the Decreto No. 23 of the 16th May, 1832, confirmed by the Decreto of the 18th July, 1835, and by the Administrative Code of 1836 ; it was established in India only for the non-Catholic inhabitants of the Old Conquests by the Portaria Prov. of the 31st Jan., 1838, which put that Code into effect in this Province.

Soon afterwards, by an order of the 13th July, 1841, the duty was imposed upon household priests (*purohitas*) of Hindu families in the New Conquests to make the civil register of every family in which they exercised their religious functions. It should be noted that they were accustomed, from a remote period, to keep notes of domestic developments in those families. Later the Port. Prov. of the 22nd of Feb., 1851, approved by a Decreto of the 28th, Oct., 1852, established and regulated with greater detail the civil register of the New Conquests. Soon another *portaria* of December that year regulated the civil register of non-Catholics, as much in the Old as in the New Conquests, until the Regulation of the 2nd of April, 1862, modified by various other *portarias* subsequent to the Civil Code's coming into force in India, was promulgated. These are the 'regulations in force' to which art. 7 refers. At a later date the Decreto of the 17th Sept., 1901 applied to India the Regulation of the Civil Register of the mother country of the 28th Nov., 1878, for which that of the 12th July 1902 was later substituted, as was the latter by that of the 27th Jan., 1910.

According to none of these legislative acts was the civil registration an essential formality affecting the validity of the marriage. Its only purpose was to assist with the census and with demographic surveys. Nowadays civil registration cannot be merely confirmatory, or posterior to the marriage, since the marriage has no legal existence without it, ever since the Decreto of the 9th Nov., 1912 promulgated for the 'colony' of India the current Code of Civil Registration, designed for the mother country and inspired by the Decree-law No. 1 of the 25th Dec., 1910, called, like the Decreto No. 2 of the same date, the 'law of the family'.

ART. 8 :

'Polygamous marriages proved to have taken place prior to the date of this present *Decreto* irrespective of the conditions laid down in art. 3 hereof are valid as *faits accomplis* in all respects, civil and juridical."

See the commentary to arts. 3 and 4. [Here C.G. refers to pp. 195-213, where he provides an extraordinarily interesting account of Hindu polygamy, from myth, legend, and legal tradition, referring to actual Hindu custom in Goa and to the history of Portuguese legislation on the subject.]

+ +

We may now sum up the characteristics of this work and compare it with contemporary works by English and French writers. We are already clear that C.G.'s motivation differed entirely from that of J. D. Mayne and his less distinguished English seniors and contemporaries on the one hand, and Léon Sorg and his less distinguished French colleagues on the other. C.G. was a Portuguese academician, and he was a Brahmin in sympathy if not religion. Pride of birth and place of origin coexisted with satisfaction at his ancestors' conversion to Christianity. It was obvious that his production, whilst being entirely intelligible to any Portuguese or continental jurist, would be sympathetically received by any Indian reader. This could not be said of the English and French works, which were written by outsiders.

As to technique we have noticed how technical precision with regard to the technicalities of the Portuguese-Indian law goes hand in hand with a condensed presentation of Hindu law, not as a mere book-law, but as a living and moving system. C.G. writes as a Doctor in Law of Coimbra, and he does not need to lard his treatise with multiple references. The decisions of the Supreme Tribunal are of course noticed, and all legislative instruments: but detailed references to British Indian or French-Indian decisions or works of authority are avoided. This is not because they could not be traced in Portugal (though that, in its way, shortened his book, we may be sure), but because the whole basis of administration of the Hindu law of those territories was different: in the French territories there were the opinions of the native referees; in the British territories there was the mass of discordant cases, based pretentiously upon the Sanskrit texts, and without regard, at the outset, for Hindu custom. C.G. spent his best cultural efforts on the history of his people, the racial, linguistic, and religious background to the development of law in Portuguese India: and in that way provided a doctrinal basis for an otherwise unintelligible and unmanageable subject, *which still awaits reform.* C.G. did not need to bespatter his pages with references, for his distilled learning would give the judges in Goa and in the Supreme Tribunal all the introduction they needed to the solution of everyday problems.

A book of charm, on an impossibly intricate subject, not intended to reconcile Indians to Portuguese law, but assuming as a matter of course that it was *de facto* viable. The Hindus of Portuguese India accepted, worked, and believed in their personal law, the result of centuries of mutual adjustment between the mother country and the 'colony'. C.G.'s work is exempt from all the faults of remoteness, frigidity, condescension, artificiality, or indifference, and thus fits perfectly with the system itself, which took full advantage of the manageable size and coherence of the Goan population. There are no distinguished books by Indians on Hindu law: this is because the British Indian, later the Indian, system, with its multiple artificialities and obviously transitory character, is an undistinguished subject attracting no great minds.



The needs of practitioners are more or less faithfully met: and that is the best we can say. Someone of C.G.'s standing and capacity is unlikely to arise again.

At this point I return to C.G.'s biography: he died unhappy, feeling that his labours and devotion to Portugal had gone without adequate recognition. How seldom a man knows his own worth! How seldom he places in the correct perspective what he regards as a handicap, and what he values as his achievement!

### *The future of such studies*

After C.G.'s death the last link between Asian preoccupation with oriental laws and a European concept of scholarship was broken. What can we expect of the future? Mazzarella seems to have been the first and the last of his own kind. Is the same to be said of C.G., who gave so much labour and thought to the laws of his native land (India) and also to his mother country (Portugal)? A recent survey shows that colonial laws are of no more interest to Portuguese youth of today than they are to their British and French contemporaries. Even R. Lingat, culturally rounded as was C.G., leaves no pupil in law, though he has not lacked disciples in the realm of language. The 'imperialist' period is virtually over, as is well known. It is the case that the classical law, the *dharmasāstra*, will remain to be pored over, irresponsibly, by historians and philologists; while the everyday law of the Indian people proceeds oblivious of the past and perhaps contemptuous of what it has to offer?[70] This seems unlikely, since references to ancient principles are continually turning up, even in unexpected places.[71] Indians are proud that they had a legal literature long before foreigners came to their shores, and in a certain sense it is still valid for them. There is a real possibility that the study of the Sanskrit texts will be left to non-lawyers, who are not answerable for any sociological, or juridical, misinterpretation they may make. And fantasy will take over from scholarly appreciation. My own guess is that, as Indian law returns closer and closer to reality and practicality, a respect for the past will grow again, and comparative studies as between modern developments and the ancient tradition will spring up anew. India will discover that she is not a Western nation manqué. She will then have

70 Evidence of the possibly futile belief in traditional principles of *dharmasastra* and *arthasastra* in modern politics is provided by G. G. Arole, ed., *Report., Essays and Review of All-India Seminar on Comparative Study of Political Theories* (2nd June to 6th June, 1970) (Poona 30, 1971).

71 A recent example: Justice K. Sadasivan quotes *dharmasastra* ideas on punishment in his lecture 'Courts and Probation' delivered at the National Correctional Conference on Probation and Allied Measures, New Delhi, 25-27 Oct. 1971 (*Kerala Law Times*, 1972, Journal, 3-8); and see also examples cited at my *Critique of Modern Hindu Law*, xxiv (*ad* §. 9).

greater faith in what she achieved at a period when the West gave her little to imitate.[72]

But nothing will (it seems) be done so long as East and West cannot cooperate in such a project, so long as Western scholars are not trained to understand the Eastern environment in practice, so long as they adopt a condescending attitude towards it. Nor can the East cooperate so long as Eastern students believe that their future lies in aping Western attitudes, and seeking Western recognition. At the critical juncture in any young scholar's life the experiences and achievements of Cunha Gonçalves should, I submit, be enquired into very closely.

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72 Modern India is so conscious of the derivative nature of her urban civilisation and upper-crust culture, especially intellectual culture, that a portion of the educated minority requires compensation in the form of assurance of the originality of ancient Indian wisdom. So renowned a scholar as V. Raghavan was not above pandering to this myth in his 'Manu Samhita', sec. 21 in *The Cultural Heritage of India* (2nd edn.) (Calcutta, 1959), pp. 335-63. It is a study devoid of sociological curiosity, replete with adulation of Manu (who can do without it).



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73 This item does not figure in R. Lingat's bibliography of Siam in J. Gilissen, *op. cit.*, Sec. E/9, 'Siam' (1965). Incidentally, it is worth noting that C.G.'s colossal contribution to Brazilian law is selectively cited in Vandick L. da Nobrega, *ibid.*, Sec. E/15 (1970), because that bibliography was intended to emphasise contributions by Brazilian scholars. However, C.G. figures at No. 711. It is interesting to read at No. 589 that the favourite edition and commentary on the Codigo Civil (an extended essay in comparative law) is by J. M. de Carvalho Santos, in twentynine volumes, many of them in their 10th edn. No. 583 is Cl. Bevilaqua's *Codigo Civil* in six volumes, then in its 7th edn., reputed to be very important. It remains to be seen what contribution C.G. made to the development of both.



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V. Note.

Many small minutes and opinions must have escaped me. These would be found in the *Gazeta da Relaçao de Lisboa*, the *Revista dos Tribunais*, the *Revista de Justiça*, and other professional journals. Naturally, many contributions to newspapers have escaped me. The *Tratado de Direito Civil* is now in its second edition, but in order to produce this (in more than twenty volumes) the publishing house of Max Limonad in Sao Paulo, producing it in its first Brazilian edition, were obliged to seek multiple editorial help: 'Adaptaçao ao direito brasileiro completada sob a supervisao dos Ministros Orozimbo Nonato, Laudo de Camargo e Prof. Vicente Rao', and still other names appear as annotators of the several volumes. C.G. in his last biobibliographical sketch (which is inaccurate in places) notes that several works of his remained unpublished, viz. 'A mao de obra nas colonias portuguesas' (his licenciate dissertation based effectively upon his recent memories of Goa and Mozambique); 'O método etnografico na historia das instituicoes juridicas, em especial da propriedade' (the dissertation for the fourth cadeira of the faculty of law, Coimbra, 1904 [history of juridical institutions] dated 14 June 1904, marked 'Bom 17(/20)': it uses British Indian and similar sources widely, and in its 139 pp. shows some influence from the work of G. Mazzarella, whose *Les Types Sociaux* (1908) he afterwards acquired, but whose ideas never actually captivated him); 'O regime de trabalho no direito internacional privado'. I was unable to trace the first and last of these. Mr. Nuno Gonçalves possesses the manuscript of a public lecture delivered on 27 Feb. 1894 (when C.G. was only 18) under the title 'Origem e classificaçao das linguas em geral e das indianas em especial'. An article entitled 'A return to Sanskrit' appeared in *Heraldo*, an issue shortly before 15 May 1913 [not traced].

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# NOTES AND COMMENTS

## ANNULLING THE CONCEPT OF ANNULMENT

The English "Nullity of Marriage Act, 1971", while codifying the law relating to void and voidable marriages, lays down in section 5[1] that a decree of nullity passed in a voidable marriage will no longer affect the status of marriage between the date of solemnization and the date of decree, thereby rendering the decree of nullity merely prospective. It would have indeed been much better had the concept of voidable marriage itself been done away with, but the British Parliament was not prepared to take such a drastic measure. To the extent it has been enacted, section 5 puts a seal of finality to the controversy relating to the consequences ensuing an annulment decree raised in a series of cases.[2] However the English experience poses an important question to the Indian Parliament as to whether it should wait until the concept creates a situation similar to the one created in England or it should pave the way for avoiding such a situation and thereby prevent litigation in this area.

Nullity in matrimonial law is a fiction whereby a fact that has already been accomplished is theoretically undone. While law ignores the very existence of a fact[3] in a void marriage, it withdraws from the fact recognition which it had accorded earlier in a voidable marriage. Matrimonial law lays

1 "A decree of nullity granted after the commencement of this Act on the ground that a marriage is voidable shall operate to annul the marriage only as respects any time after the decree has been made absolute and the marriage shall, notwithstanding the decree be treated as if it existed up to that time."

2 *Re Wombwell's settlement* (1922) 2 Ch. 298; *Dodworth* v. *Dale* (1936) 2 K. B. 503; *Re Eaves* v. *Eaves* (1939) 4 All. E. R. 260; *De Reneville* v. *De Reneville* (1948) 1 All. E.R. 56; *R.* v. *Algar* (1953) 2 All. E.R. 1381; *Wiggins* v. *Wiggins* (1958) 2 All. E.R. 555; *Re D'Altroy's Will Trusts* (1968) 1 All E.R. 181; *Re Rodwell* (1969) 3 All E.R. 1363.

3 Bromley when he says that "(v) oid marriage is never a marriage either in fact or in law" [P.M. Bromley' Family Law' 1966, 2nd Edn. 55] is taking the term marriage in a purely legalistic sense. Marriage, indeed, involves a mixed question of fact and law. What may be conveniently termed as 'marriage in fact' (though it may involve in law some terminological inexactitude like void marriage or void contract) becomes 'marriage in law' in the absence of impediments. But for the existence of the prior marriage, a bigamons marriage is a complete marriage by itself. Due to the prior marriage such a marriage is not recognised in law. Can we, by taking the meaning of marriage in the absolute sense, deny that even factually no marriage has taken place in the case of a bigamous marriage? Adoption of such a stand would indeed be totally unreal.



down certain conditions[4] for a valid marriage. Whereas the contravention of of some of the requirements that are obligatory[5] in character renders the marriage void[6] the violation of some of the other requirements which are less obligatory[7] makes the marriage viodable.[8] It may, however, be observed that the classification of marriages into void and voidable categories on the non-fulfilment of certain requirements defies a normative conformity. The grounds, for instance, which render a marriage voidable under one system render it void under another.[9] Despite such a variance in the approach of the Indian enactments we may, however, attempt to rationalize the basis of classification in modern times.[10] Where law deems that the accomplishment of a transaction generates a reaction affecting the community interest[11] as in the case of a

4 Section 5 of the Hindu Marriage Act, 1955; Section 4 of the Special Marriage Act, 1954; Section 3 of the Parsi Marriage and Divorce Act, 1936; and Section 60 of the Indian Christian Marriage Act, 1872.

5 Some may argue that because such marriage is declared void, the rule acquires the obligatory character and not vice-versa. It is submitted that it is a mere argument in circle like the typical 'bija vriksha nyaya'.

6 See for instance section 11 of the Hindu Marriage Act, 1955 and section 24 of the Special Marriage Act, 1954.

7 The usage of the expression 'less obligatory' may be objected to on the ground that it militates against the semantics of jurisprudence. It may however be pointed out that there is no other apt expression which one can think of for designating a rule the infringement of which would lead to a less drastic consequence than rendering it void. For instance, section 5 of the Hindu Marriage Act lays down six conditions for a valid marriage, namely, (i) monogamy, (ii) soundness of mind, (iii) age limit, (iv) sapindaship, (v) prohibited degrees and (vi) parental consent in the case of a minor girl. Consequences vary when these rules are contravened. Contravention of (i), (iv) and (v) renders the marriage void; contravention of (ii) renders the marriage voidable. While the contravention of (iii) does not affect the validity of the marriage, we are not certain of the consequence ensuing the contravention of (vi).

8 Section 12 of the Hindu Marriage Act, 1955 and section 25 of the Special Marriage Act, 1954.

9 While impotence and unsoundness of mind render the marriage voidable under section 12 of the Hindu Marriage Act, 1955, the same grounds render the marriage void under the Special Marriage Act, 1954.

10 As late as 1930's Mukherji J., has expressed his surprise even at the idea of 'voidable' marriage. He says "A contract which is induced by fraud or force or coercion or misrepresentation is voidable at the instance of the party whose consent has been obtained by such influence and is not void in itself.....In the case of a marriage it is either void or good. It would be impossible to talk of a marriage as 'voidable' at the option of one of the parties while it should be binding on the other party." See *Titli* v. *Jones*, 56 All 428, 441, 442.

11 Judicial dictum, incidentally, supports this view. Wilde, J., states in *A v. B* L.R. (1868) B.D. 559, 562 "In all cases in which the incapacity to marriage is one in which society has an interest and which rests on grounds of public policy it would be wrong and illogical that validity or invalidity should depend upon the option of the parties and in all such cases the marriage is absolutely 'void' and not 'voidable'.

bigamous marriage or a marriage[12] within the prohibited degrees, it totally ignores the accomplished fact, but where it is merely detrimental to the individual interest as in the case of unsoundness of mind or impotence, law relieves the aggrieved party, at his or her choice, from the disadvantageous position. It may be observed in this connection that, while law does not compromise with regard to its former stand, it is not solicitious as to the latter.

The theoretical undoing of the fact resulting in the negation of status is achieved differently in void and voidable marriages. A void marriage is a feigned marriage in the eye of law; even though the factum of marriage has been accomplished, law neither recognises nor confers the status of husband and wife on the parties, on account of the existence of some impediment. Since no status has ever come into existence, the parties need not approach the court at all and they may quietly ignore the whole transaction. But a party intending to avoid any doubt regarding the matrimonial status may seek a decree of nullity from the court and such a decree will be purely declaratory in character.

Voidable marriage, on the other hand, is a marriage with a flaw the existence of which enables the aggrieved party to opt out of such a union by getting a decree of annulment. If the affected party does not choose to exercise the option the transaction matures into a valid marriage, which in effect means that it is the decree of annulment which sets at naught the transaction that would otherwise be a valid marriage. How does then the decree of annulment act? It must be noticed at the outset that the status of marriage exists in a voidable marriage until the passing of the decree of annulment. No sooner the decree is passed, law deems that the matrimonial status between the parties never existed at all which means that the status is exploded with retroactive effect.

Why should law deem that the status never existed between the parties? Does such a fictitious assumption serve any useful purpose? It is submitted that the sophistry relating to annulment decree could be understood only when we examine the origins of annulment. The concept of voidable marriage with its concomitant decree of annulment as found in English law is a legacy of Canon law. The indissolubility of marriage as found in the Roman Catholic Church is part of the Christian ethic. The doctrine despite its theological justification created an intolerable situation when marriages broke down in practice on account of the frailties of human nature. While disharmony,

12 One may sceptically say "How does the interest of the society suffer, say for instance, among the Hindus especially when they have put up with polygamy until 1955?" It may however be pointed out that the preponderance of societal interest is reflected in the parliamentary intent.



infidelity and capriciousness rent asunder the spouses, religion declared 'until death thou shall not part', and thereby created a real stalemate for the spouses. However, the casuistry of the clergy devised a method, which while preserving the doctrine of indissolubility, achieved the same results as divorce. Instead of terminating the marriage, which idea was religiously untenable, the clergy peered at the marriage (which might have taken place even a decade or two before) and abruptly discovered some impediment due to which the marriage between the parties should not have taken place. The newly discovered impediment would enable the clergy, with all the solemnity at his command, to fictitiously undo the marriage between the parties and it is this process which indeed is summed up by the term annulment. The artifice with which the whole drama was enacted is unique. An affluent husband who wanted to get rid off his wife would approach a corrupt bishop and swear that twenty years ago he had copulated with the sister or cousin of his wife (that lady may not even be alive to contradict such a statement) and consequently he could not have validly married his wife. Such a lame excuse was sufficient to absolve the conscience of the bishop who would declare the marriage null and void,. The adoption of the ecclesiastical concept of annulment by the common law is part of the English legal history with which we are not concerned here.

The annulment decree apart from nullifying the matrimonial status obviously led to the unfortunate consequence of bastardizing the children. This effect of annulment was taken care of by the legislature by providing that irrespective of the decree the children born of such a union are legitimate.[13] However when legal ingenuity attempted to push the concept of annulment to its logical but absurd end, the English judiciary was caught in a serious dilemma: if the concept was worked out to its logical end it would lead to preposterous results,[14] while refusing to take notice of the consequences

13 Sec. 26 of the Special Marriage Act, 1954, Sec. 16 of the Hindu Marriage Act, 1955, Sec. 21 of the Indian Divorce Act, 1869, section 9 of the Matrimonial Causes Act, 1950.

14 In *Eaves* v. *Eaves*, the widow was to continue as the beneficiary of the trust so long as she remained the widow of the testator, and in the event of her remarriage the interest was to devolve on her step son. The widow remarried ad without any hitch she and her step son wound up the trust. When the unfortunate lady found that her second husband was impotent, she secured a decree of nullity and thereafter she intended to take advantage of the decree of nullity. Her contention was that no sooner the decree of nullity came into force, her second marriage was rendered null and void from the date of marriage and therefore she was reinstated as the widow of her first husband and that would enable her to receive the benefit from the trust. The High Court, however, did nor give the relief to the lady on the ground of equity. See *Eaves* v. *Eaves*, *supra* (1939) 4 All E.R. 260. The ridiculous extent to which annulment was sought to be pushed is illustrated by *Dodworth* v. *Dale* (1936) 2 K. B. 503. A person was filing the tax returns as a married man for a number of years. When his marriage was later annulled on the ground of impotence the tax authority made the demand that the allowance given to him as a married person must be paid back for he was never a married man in the eye of law consequent to the decree of annulment. The High Court however dismissed the claim.

would be patently illogical. The Courts, however, found it difficult to escape from the impasse and therefore the intervention of the legislature became necessary to put an end to the stalemate.

In view of the statutory change brought about in England, it may pertinently be asked: what is now left of voidable marriage'? Whereas the requirement of a formal decree of a court to annul a voidable marriage distinguishes it from a void marriage, retroactive operation of the decree differentiates it from divorce. The retrospective operation of the decree and the bastardizing of the children alone distiguished voidable marriage from divorce. When these two consequences in a voidable marriage have been done away with, and voidable marriage has been practically assimilated to divorce, one wonders what useful purpose does it serve by retaining the concept of voidable marriage. No body would have shed a tear if the grounds laid down under section 2 of the Nullity of Marriage Act, 1971 for voidable marriage had been made the grounds for securing divorce and thereby given a decent burial to an obsolete concept. However, legal concepts, like traditions, die hard in the English soil.

Legislature in India when called upon to legislate in any area turn, for obvious reasons, towards the English statutes and it has been more so in the field of matrimonial law. It is regrettable that the framers of the Hindu Marriage Act 1955 and the Special Marriage Act 1954 adopted the concept of voidable marriage without making adequate investigations into its history and its relevance to the contemporary needs of the Indian society. When the English are setting their house in order, it is worth-while for the Indian legislature also to give due attention in this direction and make necessary changes in the law without waiting for the same process to repeat itself on the Indian scene. Legislature in India may go one step further by doing away with this mischievous concept without any qualms of conscience.

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# JAYVANT RAO v. CHANDRAKANT RAO: A CRITIQUE

Pursuant to the constitutional policy of continuing the laws in force prior to the commencement of the Constitution of India, 1950, a series of cases[1] have come up before the Supreme Court wherein the Court had to decide upon the nature of 'orders' issued by the sovereign rulers of native Indian States before they were merged in the Union of India. These orders were expressed in various forms and bore rather interesting, indigenous nomenclatures like *firman*, *sanad*, *khorposh* or *khanja* grant, *tharao*, *kalambandi*, *etc.*[2] Some of them had even the form of contractual agreements to which the sovereign ruler himself was a party.[3] While considering the nature of these orders, the Court discussed the jurisprudential nature and definition of law. Due to the elusiveness of its answer, the question as to what is law continues to remain an academic pastime. However, the issue in the context of the aforesaid judicial exercise did shed its sheer academic character to assume practical importance because judicial recognition of the respective rights created under these 'orders', depended upon the answer to the question whether the orders in question were law in force as required by article 372[4] of the Constitution. These cases make an interesting study,[5] because quite often in the course of its judgments the Court has attempted at defining law and laid down principles to test the legal character of such orders.

The Supreme Court in *Jayvant Rao* v. *Chandrakant Rao*[6] was once again faced with the question whether a particular order passed in 1938 by the ruler

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1 See *infra* notes 9 to 17 and 19 to 21.

2 See for *firmans* in *infra* notes 9, 10 and 13; for *sanad* in *infra* note 19; for *Khanja* or *Khorposh* grant in *infra* note 12; for *tharao* in *infra* note 17; for *Kalambandi* in *infra* note 11; and for orders in *infra* notes 20 and 21.

3 In *infra* note 14, 15 and 16.

4 Relevant provision of article 372 of the Constitution of India, 1950 reads:

Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed by a competent Legislature or other competent authority.

5 For a detailed discussion of the problem, see Mishra, D. S., "*Definition of law and the Supreme Court*", 10 *Journal of the Indian Law Institute* 434 (1968), which critically studies the jurisprudential aspects of the command of the sovereign rulers of certain native Indian States.

6 A.I.R. 1971 S.C. 910. Hereinafter referred to as *Jayvant Rao*.

of Kota, then a sovereign native State in Rajasthan and which later merged in the Union of India, was a law in force for the purposes of article 372 of the Constitution. This Order was passed to determine the nature of the *Sarola Jagir*[7] by giving it the status of an impartible estate governed by the rule of primogeniture, although in the past it had been treated as joint family property. On examination, the Order was found to be legislative in character and hence it was held to be law.[8]

The complexity of the problem of determining the nature of 'orders' of the former sovereign rulers is an outcome of the fact that when these sovereign native States merged in the Union of India, they brought with them a mediaeval legal order wherein the sovereign monarch was the supreme head of the state. The orders of the sovereign, howsoever expressed, were equally effective and treated as law. This was particularly so because the validity of the orders could neither be challenged by any one nor tested in any forum. The executive, legislative and judicial powers and functions were so blended in him that the line of demarcation was hardly discernible. Moreover, there was hardly any uniform pattern or established form or procedure of law-making, save some rudimentary form of customary practice in these States. Even the nomenclatures of such orders differed and were generally confusing. They gave very little clue in finding out the essential nature of such orders.

Under such circumstances when the first two cases, namely, *Ameer-un-Nissa Begum* v. *Mahboob Begum*[9] and *Director of Endowments, Government of Hyderabad* v. *Akram Ali*[10] came up before the Supreme Court, it merely laid down that the impugned *firmans* were law because they were expressions of the sovereign will of the Nizam. But hardly any rethinking at the conceptual level was attempted in these decisions. Later on in *Madhaorao* v. *State of M.B.*,[11] *Promod Chandra* v. *State of Orissa*,[12] and *Shri Govindlal Ji* v. *State of Rajasthan*[13] the Supreme Court examined the nature and content of the impugned *Kalambandi*, the *Khorposh* grant and the firman respectively for determining whether these could be deemed to be law. However, the distinction between

7 *Jagir* means a hereditary assignment of land and of its rent as annuity. See under JAGHEER, Yule, *Hobson—Jobson* 446 (2nd edn., 1968). See also *infra* note 39. Sarola is the name of the place where the *Jagir* is situated. Hence the name *Sarola Jagir*.

8 This observation of the Court should not be taken to mean generally that all law is legislation. The true legal position is that "legislation is law but not all law is legislation". [Wortley, *Jurisprudence* 173 (1967)] The Court herein has treated the legislative character of the impugned order only as a, and not *the only*, criterion of law.

9 A.I.R. 1955 S.C. 352.

10 A.I.R. 1956 S.C. 60.

11 A.I.R. 1961 S.C. 298. Hereinafter referred to as *Madhaorao*.

12 A.I.R. 1962 S.C. 1288. Hereinafter referred to as *Promod Chandra*.

13 A.I.R. 1963 S.C. 1638.



executive and legislative authority was either not considered, or left aside as an academic excursus without any practical bearing on the problem. When the Court found that the respective grants in question in *Madhaorao* and *Promod Chandra* were each founded on a statute or rule having the force of law it was content to treat these grants also as law on that very ground. The Court did not give any importance to the idea that these grants should have themselves been legislative in character, independently of the said statute or rule on which they were based. Then came the judicial pronouncements in *Umaid Mills Ltd.* v. *Union of India*,[14] *Bengal N. C. Mills* v. *Board of Revenue, M. P.*,[15] and *Union of India* v. *Gwalior Rayon Silk Manufacturing (Weaving) Co.*,[16] which mainly dealt with orders in nature of contractual agreements wherein the sovereign monarch concerned was himself a party; and the judgment in *State of Gujarat* v. *Vora Fiddali*[17] wherein the legality of a *tharao* was in question. These decisions generally supported the principle that only legislative orders were to be treated as law for purposes of article 372 of the Constitution. These decisions also laid down the criteria[18] for determining the legislative character of such orders.

It was in *Narsing Pratap Deo* v. *State of Orissa*[19] that a definite departure from the earlier stand was made inasmuch as the importance of the distinction between executive and legislative powers was clearly recognised. It was laid down that to be a law, the order in question must itself be legislative, independently of any other statute or rule on which it is based. In order to satisfy the logical requirement of this stand, the Court sought to distinguish a legislative order from an executive one for testing its legislative character. The judgment in *Narsing Pratap Deo* represents the latest judicial trend in deciding such cases under article 372. This trend was later followed in *State of M.P.* v. *Bhargavendra Singh*,[20] *State of M.P.* v. *Lal Rampal*[21] as also in *Jayvant Rao* discussed herein.

The judgment in *Jayvant Rao* was delivered by Mr. Justice Bhargava on behalf of Mr. Justice Sikri (as he then was) and his own. The facts surveyed by the learned judge show that primarily this case was concerned with a suit for partition of properties of the family of one Lalaji Ramchandra, the common ancestor of parties to the suit. These properties included eight villages known as the *Sarola Jagir* which were earlier granted by the then ruler of Kota,

14 A.I.R. 1963 S.C. 953.

15 A.I.R. 1964 S.C. 888. Hereinafter referred to as *Bengal N.C. Mills*.

16 (1964) 7 S.C.R. 892.

17 A.I.R. 1964 S.C. 1043.

18 See for example, *infra* notes 30 and 31.

19 A.I.R. 1964 S.C. 1793. Hereinafter referred to as *Narsing Pratap Deo*.

20 A.I.R. 1966 S.C. 704.

21 A.I.R. 1966 S.C. 820.

> operative.....all relevant factors must be considered before the question is answered; the nature of the order, the scope and effect of its provisions, its general setting and context, the method adopted by the Ruler in promulgating legislative as distinguished from executive orders, these and other allied matters will have to be examined before the character of the order is judicially determined.[30]

and also:

> A law must follow the customary form of law-making and must be expressed as a binding rule of conduct. There is generally an established method for the enactment of laws, and the laws, when enacted, have also a distinct form. It is not every indication of the will of the Ruler, however expressed, which amounts to a law. An indication of the will meant to bind as a rule of conduct and enacted with some formality either traditional or specially devised for the (sic) occasion, results in a law.....[31]

The appellants relied on these tests in support of their submission that while passing the Order, the Maharao was only exercising executive powers of directing mutation of names and not any legislative powers. But it is interesting to note that the learned judge did indeed accept the validity of this argument but not to the advantage of the appellants. The counsel for the appellant had urged that a law must be expressed as a binding rule of conduct and that it must follow the customary forms of law-making or observe special procedure, if any, adopted for the purpose. Applying these very tests, the learned judge held that the Order was legislative and not executive. It was observed that by passing the Order the Maharao intended to apply the rule of primogeniture as a binding rule for future conduct of the *Sarola Jagir*. With respect to the submission that the Order related to one single *Jagir* only and was not a general law applicable to other *Jagirs* in the State, the learned judge observed that it was so because apparently there was no other *Jagir*, except the one in question, in the State which would have required similar change in the law applicable thereto. As to the submission that the Order related to mutation of names only and that no procedure of law-making was followed in promulgation thereof, the learned judge observed that there was nothing to show that any special procedure for promulgation of laws was required to be followed by the Maharao. It may be submitted that the Court's remark that "the manner in which the Order was passed indicates that in this State, the Maharao considered himself competent to lay down the law *at any time* he liked"[32] may also be extended to include the expression *in any manner* as well.

30 *Supra* note 19 at 1798. Also cited in *supra* note 6 at 913.

31 See *supra* note 15 at 891. Cited in *supra* note 6 at 914.

32 *Supra* note 6 at 913.



The nature and contents of the impugned Order were also considered in detail by the Court. The directions contained in the Order clearly showed that it was legislative. The fact that it covered only one single *Jagir* did not, according to the Court, *ipso facto* make it executive when it generally had the characteristics of a legislative order. It did not cover the question of mutation alone. Rather, the mutation order was made in total accord with the legislative changes introduced in the *Jagir* by this Order. Similarly, the Maharao expressly desired that this *Jagir* should also be brought at par with other *Jagirs* in the State and be governed by uniform law. Thus, while the Order recognised the fact that the *Sarola Jagir* had been joint family property in the past, it laid down for the future that henceforth this *Jagir*, like other *Jagirs* in the State, was to be an impartible estate governed by the rule of primogeniture according to the custom and usage in the States of Rajputana; and was to be made liable to render the tax known as *Chakri* and to continue to do *Subhchintki*. The Order was not expressed in any established form or procedure because there was presumably none. The direction in the Order that the *Jagir* must be governed by the same customary law as all other *Jagirs*, was a binding direction governing the future conduct of this *Jagir*. The Order had, therefore, the effect "where the Maharao exercised his powers of laying down the law with respect to this one single *Jagir*".[33]

This Order had materially affected and virtually repealed various provisions of the century old *Parwana*. It may, however, be submitted that it is difficult to reconcile some of the views of the Maharao in respect of these provisions, as cited in the Order, with the original intention of the *Parwana* as well as the facts of this case. As pointed out by Mr. Justice Bhargava:

> The Order shows that the Maharao took notice of the fact that the Sanad[34] had been granted in the name of Lalaji Ramchandra and his *eldest* son Govind Rao on executing a deed of release in respect of the debt, but it added that when the unpaid debt was changed in the form of a Jagir and *no special condition* was laid down regarding it and the name of only the eldest son was written in the Sanad *though another brother was present* there, it *has to be held that* the Jagir was *intended to be given on the same rules* on which the other Jagirs were granted.[35] (Emphasis supplied).

33 *Ibid.*

34 *Sanad* means a grant, a diploma, a charter, a patent; a document conveying to an individual emoluments, titles, privileges, offices or the government rights to revenue from land, etc., under the seal of the ruling authority. The Mohammedan government had different forms of *Sanads* according to the nature of the grant. See Wilson, *Glossary of Judicial and Revenue terms* 460 (2nd edn., 1968).

35 *Supra* note 6 at 912.

Although the Court did not deem it necessary to go into the details of the evidence of the case, since the findings of the High Court were not contested,[36] it ought to have, it is submitted, at least pointed out one factual error: while citing the provisions of the *Parwana* in his Order, the Maharao was probably mistaken in emphasising the fact that the name of only the *eldest* son was written in the Sanad "though another brother was present there". On the contrary, the fact was that:

> Motilal, the second son of Lalaji Ramchandra, was *born after this grant* and his name was also mutated against the Jagir villages.[37]

It is also difficult to agree with the Maharao that no *special condition* was laid down regarding the *Jagir* when the unpaid debt was converted into it. It may be submitted that *Jagirs* were generally granted in consideration of high degree of loyalty or service or for similar other reasons.[39] The *Sarola*

36 See *ibid.*

37 In the context of the transaction relating to the grant of the *Jagir*, mention has been made of two vernacular terms, perhaps each signifying a particular document, viz., the *Parwana* dated 8-4-1838 whereby Maharao Ramsingh conferred the *Jagir*, and secondly, a *Sanad* which has been referred to only in the impugned order dated 22-1-1938. The date on which this *Sanad* was executed has nowhere been given. There is nothing in the Judgment whereby it can definitely be ascertained if these two documents are the same or seperate ones. But this point is very important in order to ascertain the correctness of the Maharao's assertion contained in the order that "the name of only the eldest son was written in the Sanad though another brother was present there." It has been clearly stated that the younger son was not born at the time the *Parwana* was issued. The *Sanad* in question is probably, a separate document which was issued after the deed of release of the debt amount was executed by Govind raoji. If at all the *Sanad* had been a separate document, it would have been issued by the state soon after the deed of release of the debt was executed. It is believed that the younger son would not have been born before this *Sanad* was issued; otherwise, there is hardly any sense in stating that the second son was born *after his grant* and that his name was also mutated against the *Jagir* villages. The use of the term "after this grant" indicates that the grant has been taken to be one complete transaction, the *Parwana*, the deed of release of the debt and the *Sanad* each forming part of this transaction. Relying on this belief, based on the analysis given herein-above, it is submitted that the assertion of the Maharao cited herein is *prima facie* fallacious.

38 Supra note 6 at 911.

39 *Jagir*: A tenure common under the Mohammadan government in which the public revenues of a given tract of land were made over to a servant of the state, together with the powers requisite to enable him to collect and appropriate such revenue, and administer the general government of the district. The assignment was either conditional or unconditional. In the former case, some public service, as the levy and maintenance of troops, or other specified duty, was engaged for; the latter was left to the entire disposal of the grantee. The assignment was either for a stated term, or, more usually, for the life-time of the holder, lapsing, on his death, to the state. For a detailed account of the provisions of this system of tenure generally see Wilson, *Glossary of Judicial and Revenue Terms* 224 (2nd edn., 1968). See also *Supra* note 7.



*Jagir* was originally granted with certain limitations *in lieu of* a huge amount of unpaid debt. A deed of release was simultaneously executed by Govind Raoji, accepting the adjustment of debt amount against this fresh grant made by the *Parwana* of 1838. This grant signified not only the grace of the sovereign but also, and rather much more, the release of the debt which might be taken to be a pecuniary consideration. Perhaps for this pecuniary consideration the earlier limitations were substituted by certain extra-ordinary privileges like the *Jagir* "being conferred in perpetuity," "to remain from sons to grandsons" and "to be free from all the taxes which were being exacted upto that time."[40] Could these not be the *special conditions* prevailing in 1838 that escaped the notice of the Maharao in 1938? It is interesting to note that in the modern jurisprudential frame work the grant made by the *Parwana* could be treated as a contractual agreement, although this hypothetical possibility could not have stood in the way of the Maharao to legislate, as he did in 1938, for changing the status of the *Sarola Jagir*. The Maharao's Order in respect of the *Parwana* could be assailed on other grounds too.[41] It may, however, be pointed out that apparently the Maharao wanted to convert the *Jagir* from a joint family property into an impartible estate

40 *Supra* note 6 at 911.

41 It may be submitted that the reference to the non-existence of 'special conditions' by Maharao in 1938 perhaps meant to state that it was nowhere expressly laid down that this *Jagir* would not be governed by the rule of primogeniture, or, conversely, that it would be treated as joint family property. Presumably this lack of clear-cut direction in the instrument of the *Jagir* has been used by the Maharao to support his own interpretation of the Parwana and/or the *Sanad*. (See *supra* note 38). But it may be suggested that the Jagir was "always to remain from *sons* to *grandsons*." (*supra* note 6 at 911. Emphasis supplied). The plurals emphasized here indicate that the *Jagir* was not to pass on exclusively to the eldest son in the eldest branch of the family. Other facts and circumstances also suggest that this *family* had, since time immemorial, not been governed by the rule of primogeniture. It had rather a different tradition. Evidently, the debt had been contracted with the "*family* of Lalaji Ramchandra even at the time of his ancestors." This suggests the importance of corporate aspect of the said family. Further, Motilal, the *younger son* of Lalaji Ramchandra, had executed a will, specifically stating therein that half of the *Jagir* property belonged to his nephew Ganapatraoji, the adopted sons of his elder brother Govindraoji, and that the latter half would belong to his own adopted son Purshottam Raoji. (See *supra* note 6 at 911). Thirdly, the said will was not only honoured by subsequent heirs but the same pattern in the property relationship of the family also continued for over a century. Resultantly, it is surprising that the latter Maharao could impute an implicit intention on the part of the former Maharao to the effect that the former Maharao wanted to confer *Jagir* "on the same rules on which other *Jagirs* were granted" i.e. on the rule of primogeniture. The facts and circumstances hardly support existence of any such intention. On the other hand, there appears to be a reasonable possibility that the latter Maharao wanted to convert the *Jagir* into the one governed by the rule of primogeniture; he only preferred to seek justification for this change even from the order of the grantor in 1838.

governed by the rule of primogeniture, and perhaps also sought to justify this change on the basis of the *Parwana*. It may be submitted with respect that the Court ought not to have accepted *verbatim*[42] such views of the Maharao in respect of the *Parwana* as gave it an apparently mistaken interpretation.

Suffice it to say for the present, however, that it is really significant that the Order should have been considered by the Court as it has been, in the context of the norms of the unique legal system under which it was passed. It is submitted that a forced and strict imposition of principles and standards falling completely outside the bounds of that particular mediaeval and feudal type of legal system, would perhaps not have done justice to that legal system and to that 'Order'.

D. S. MISHRA*

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42 It may also be submitted that the contention of the latter Maharao that the former Maharao Ramsingh intended the *Jagir* to be governed by the same rules as all other *Jagirs* was not examined by the Court. It becomes evident from the following observation of the Court:

> It appears that in order to give effect to the *original intention* that this Jagir should be governed by the same rules as all other Jagirs, the Maharao proceeded to lay down that this Jagir should also be impartible and should be held by the eldest member of the family in the eldest branch.

[*Supra* note 6 at 912. Emphasis supplied].

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# BOOK REVIEW

THE GREAT POWER AT THE BAR AND BENCH; ED. JUAN F. RIVERA, Quezon City, Philippines, 1972. pp. 1273 $ 10

Language is a powerful tool of communication for man. But to the legal profession, above all others, words and their meanings are a matter of supreme concern. Language is the marrow of the law. For the formulation of law and its exposition the only medium is language. For the professional men in law—the academic lawyer, the Counselor, the advocate, and the judge—whether one is teaching, counselling, advocating, or delivering a judgement, the beauty and efficacy of expression will always remain a great force. The goods, wares, and merchandise of the legal man are words, and his success or failure in his endeavours in the field of laws is entirely dependent on the skill and precision with which he handles that medium. But the effective use of language, in both the spoken and written media is a global problem which Professor Rivera, has sought to solve for the English speaking world, by making available this collection of articles written by distinguished specialists, a *vade mecum*, and very meticulously selected by him from standard legal periodicals.

The title of the volume expresses the belief of its editor and is inspired by the famous dictum of Daniel Webster[1] that "the power of clear statement is the great power at the bar." If the law students, the men of legal profession, and editors and contributors to legal periodicals aim to develop and acquire an effective command of legal English, in both the spoken and written media, this is the book of great value which will provide them with the tried principles of correct, forceful and intelligible language.

In the present context of language muddle in India in regard to the medium of instruction for higher education, Hindi, regional languages and English pulling in different directions, it seems that the great power of clear statement at the bar and bench is on sharp decline. The education, the training, and the linguistic communicability of the new generation of Indian lawyers, judges and teachers have been most adversely affected by the language muddle. However, to the extent the English continues to have some position as the library language, or the language of law at the bar and in the Supreme Court and the High Courts of the country, this stimulating 'work-book' will be of real value in providing the needed guidance as to writing and speaking legal English correctly, interestingly, tellingly and gracefully.

1 A short biographic account of the life of this great American lawyer and eloquent orator is given at the end of this volume, seeRoy St. George Stubbs "Daniel Webster: The Olympian". pp. 1195-1214.

An extended review of eighty-eight articles contained in the book would merely duplicate the content of this volume. This reviewer's evaluation covers the main theme running through each chapter into which the articles have been grouped. In the opening chapter of the book are grouped seven selected articles which deal with the vital continuing problems faced by the law schools, the bar, and the bench in regard to the use and command of legal English. The problems centre on the language deficiency and continuous decline in the equipment and ability of the law man. It is stressed that the Law Schools ought to bear more burden in ensuring that the novice in the legal profession is equipped with the basic linguistic tool of his craft which he has to keep in proper working order right through his professional career. To the legal educators in India the suggestion of a language programme in the law schools should be of particular interest as by and large they attract students of mediocre ability and indifferent merit. One of the articles in this chapter suggests that the Law School curriculum should also include an overall language course, comprising dialectics, rhetoric and grammar, the fundamentals of the language with historical orientation, semantics and psycholinguistics, and classical and humanistic studies—all running through the entire three years of the legal education and to be taught by skilled instructors of the language who are also graduates in law and full-time teachers of the Faculty.[2] This reviewer is in agreement with Professor Gormley's views expressed in the foot-note of his Foreword to this volume favouring courses in rhetoric, semantics, speech science, history of oratory, and speech criticism of the type offered by graduate departments in speech and Communication.[3] All the seven articles in this opening chapter, titled "The Problem at the Bar and Bench",[4] stress the need for reorganization of the present-day legal education so as to make room for a new language course, a basic and indisputable element of sound legal education.[5]

Effective oral advocacy involving the triumph of articulation and exactitude will always remain a power at the bar, but equally important is craftsmanship in writing. Therefore, Chapter II stresses the great power of skilful legal writing, which includes drafting of laws, briefs, pleadings, agreements and memorandum. It is basically concerned with language technique, namely, the knowledge of words, of sentences and their skilful arrangement.

2 Irving M. Mehler, "Language Mastery and Legal Training," pp. 1-20 at 12-16; also Donald P. Cushman and John M. Cali, Jr., "Language Mastery and Legal Training", pp. 20-29.

3 Professor W. Paul Gormley is Professor of Law at Delaware Law School, Wilmington, U.S.A. See Foreword, p. XXV, fn. 2, also his article "Lawyers Must be Effective Communicators", pp. 42-52.

4 *Id.*, 1-79.

5 See Carl McGowan, "Lawyers and the Uses of Language", pp. 29-42; W.Paul Gormley, "Lawyers Must be Effective Communicators," pp. 42-52.



In a group of nine articles[6] this Chapter seeks to give thoughtful suggestions, guide rules, and fundamentals of legal draftsmanship for improving legal writing.[7] Few subjects are more important in legal profession than learning the skill of legal writing which consists of clear, interesting, succinct and forcible style.[8] Notwithstanding the fact that some Law Schools have provided for courses on Legal Writing and Drafting of Statutes, no serious attempt has been made to teach these courses seriously. Moreover, neither the teachers are well-equipped for conducting these courses, nor the students who are involved in the language muddle are made to take any pains for the legal writing exercises. In this Chapter one comes across not only good references to books offering concrete and practical aid to any writer, but also principles of legal composition, useful hints in draftsmanship, and maxims of the art of looking up law and writing legal memoranda and opinions.

Lawyers often overlook the subtle and inconsiderable elements of style in their writing. Chapter III, therefore, covers Legal English. It comprises eight excellent articles with titles such as "The Language of the Law",[9] "On Legal Styles",[10] "Words: The Lawyer's Tools",[11] and "Word Watching for Lawyers".[12] This Chapter not only points out the common pitfalls in grammar and use of words that plague legal writings, but also lays stress on the importance of precise, correct and meaningful use of words with a view to developing the literary style of a skilled lawyer. Even doubts and mysteries of the innocuous "and/or" and the use of provisos and exceptions have been clarified.[13] This Chapter prescribes basic principles of sentence structure and grammar which the neophyte at legal writing may safely and profitably observe. In Professor Rivera's comprehensive article on "Bill Drafting As the Loom of Legislation"[14] one would find not only the basic guide lines and essentials of drafting techniques employed in framing statutes, but also, the rules of law-engineering and the salient features of the parts and language expression of a regular bill.

6 pp. 80-194.

7 Eugene C. Gerhart, "Improving Our Legal Writing," pp. 96-106; Harold K. Pickering, "On Learing to Write: suggestions For Study and Practice," pp. 107-114; A. C. Mackay, "Some General Rules of the Art of Legal Composition" pp. 115-126.

8 Sidney F. Perham Jr. "The Fundamentals of Legal Draftsmanship", pp. 127-132; Samuel A. Goldberg, "Hints on Draftsmanship" pp. 132-143; Nathaniel T. Helman, "A Guide to Skilful Drafting," pp. 143-150.

9 Two articles under this title by Urban A. Lavery pp. 195-214, 214-233.

10 George John Miller, pp. 233-274.

11 Editorial, American Bar Association Journal, 275-277.

12 Henry Weihofen, pp. 277-288.

13 Reed-Dickerson, "The Difficult Choice Between 'And' and 'Or', " pp. 288-299, Charles J. Zinn, "Provisos And Exceptions in Statutory Composition," pp. 299-306.

14 pp. 306-397.

On the art of advocacy, Chapter IV contains eight articles by such unquestioned masters as late Lord Justice Sir Norman Birkett, Sir Geoffrey Lawrence and Arthur T. Vanderbilt. Besides, explaining the essential elements of this ancient art of advocacy and its decline, it delineates a programme to be undertaken by the Law Schools for giving training in persuasive presentation of every case; in obtaining, organizing and marshalling facts; and in the fundamental techniques of examination, cross examination, and other aspects of trial practice. Sir Norman Birkett, for instance, gives a simple formula when he observes that "there are no fixed standards for forensic oratory, and there are no patterns and no types to which the advocate must conform, yet I have found that it is simple speech that makes the most powerful appeal.[15]

He adds further—

"(T)hat love of words, that discrimination in the use of words, is all essential to the advocate. The presentation of your case in the appropriate language in the inimitable language, is part of the art of persuasion, and persuasion is the whole end of it, as I understand it. The Bar is the source and guardian of the virtue of the bench. It is the good Bar that makes the good bench".[16]

On the other hand, Arthur T. Vanderbilt first enumerates six factors involved in the work of an advocate, namely, the capacity for grasping all the facts of a case; a thorough understanding of the fundamental principles and rules of law applicable to these facts; an understanding of human nature; a comprehension of the socio-economic and intellectual environment of modern litigation; the ability to reason in order to solve the pending problem satisfactorily; and the ability to express oneself clearly and cogently, orally and in writing.[17] He further examines in some detail the various types of forensic persuasion. Other articles in this chapter also give very useful hints on advocacy.

Chapter V, comprising seven articles, deals with "The Great Power At the Bar"[18] and provides the guide lines and methods for the preparation of a case for trial, the opening of the case, the direct and cross examination, and the summation. Excellent guidelines in this regard are succinctly enumerated by Justice Joseph Story in his instructive poem: "Advise to a young Lawyer",[19] which every lawyer should keep on his work-desk. Equally instructive, but more fascinating, are "Letters from a Judge to His Lawyer Son "by Justice Horace Stern of the Supreme Court of Pennsylvania[20] in which a

15 "Advocacy" pp. 398-451 at p. 433.
16 *Ibid.* p. 441.
17 "Forensic Persuasion", pp. 451-460 at 453-454.
18 pp. 498-590.
19 pp. 546-547.
20 pp. 547-574.



new entrant to the legal profession would find very precious suggestions for his success at the Bar. This chapter ends with an interesting article on medico-legal evidence and problems encountered in handling criminal cases.[21]

Chapter VI takes us to "The Great Power at the Trial Court" and contains eight articles varying from the rules of court room decorum,[22] and the fundamental elements of Trial Technique[23] to reciprocal expectations of Trial Counsel, Trial Judge and Defense Counsel,[24] including some hints on the art of cross-examination.[25]

Chapter VII deals exclusively with the writing of briefs in as many as ten articles. Since better briefs yield better decisions, the reader is taken from the art of oral argument to the art and qualities of written advocacy.[26] Giving some general suggestions on format[27] and on the technique of putting together the various parts of the briefs: the history of the case; the statement of facts, the statement of the questions involved, the argument, and the conclusion, this Chapter goes on to deal with the varieties and the authoritative function of the briefs as well as with some 'do's' and 'don'ts'.[28] Appellate practice seems more alluring to counsels as it offers greater opportunity to display the art of advocacy. Therefore, Chapters VIII and IX deal in greater detail "The Great Power In Appellate Advocacy." Chapter VIII comprising six, and chapter IX eight articles stress on the skill of advocacy of oral and written arguments in appellate courts.[29] They give various suggestions for effective preparation and presentation of cases in appellate courts.[30] One

21 Gregorio T. Lantin, "Medico-Legal Evidence," pp. 574-590.
22 Joseph H. Hinshaw, "Court Room Decorum", pp. 591-598.
23 W. D. Vance, "Trial Technique", pp. 598-602; David Goldstein, "How to Try a Case in the Trial Court, From a Lawyer's Points of View", pp. 602-629; Newell Jennings, "How to Try a Case in the Trial Court from the Judge's Point of View," pp. 630-644.
24 Joseph E. Gold, "What Trial Counsel Expects of Judge ?" pp. 645; Idem, "What a Judge Expects of Trial Counsel" pp. 650-655; Ralph H. Pharr, "On sentencing: What a Judge Expects From Defense Counsel," pp. 655-662.
25 Leo R. Friedman, "Some Gentle Hints on the Art of Cross-Examination, pp. 652-668.
26 Theodore Voorhefs, "The Art of Written Advocacy, "pp. 669-676; Alejo Labrador, "Derivation and Purpose of Briefs", pp. 676-678; Wiley B. Rutledge, "The Appellate Brief", pp. 678-690; Paxton Blair, "Appellate Brief and Advocacy" pp. 690-713; Frederick Bernays Wiener, Essentials of An Effective Appellate Brief," pp. 713-754.
27 Herman F. Selvin, "The Form and Organization of Briefs" pp. 754-762; Frank E. Cooper, "Stating the Issue in Appellate Brief" pp. 752-772; John Alan Appleman, "Tactics in Appellate Briefs" pp. 791-814.
28 Mortiner Lewitah, "Some Words That Doubt Belong In Brief's", pp. 815-825.
29 Frederick Bernays Wiener, "Oral Advocacy," pp. 826-846; George Rossman "Appellate Practice and Advocacy", pp. 847-866.
30 Orrin N. Carter, "Preparation and Presentation of Cases, " 866-882; Watson Clay, "Presenting your Case to the Court of Appeals," p. 883-911; Robert H. Jackson, "Advocacy Before the Supreme Court Suggestion for Effective Case Presentation," pp. 912-930.

of the articles, underlining the role of the advocate emphasises the view that the great advocate truly is he for whom the case before him ceases to be an episode in the affairs of a client and becomes a stone for building the great edifice of the law.[31] It is not merely his mannerism, his written or oral presentation, and mastery of the case appealing to the reason and logic of the judge, but it is his passion for justice which does wonders in accomplishing results beyond the power of argumentation. Yet, arguments of an appeal, both oral and written, have their own importance and as many as eight articles of Chapter IX prescribe cardinal rules to enable an advocate to make the court fully grasp his contentions.[32]

Judges are also merely lawyers by another name. If advocacy is the effective instrument of persuasion in the courts of law, the power of clear statement is the first cardinal virtue in the writing of a judgement. This is stressed by Chapter X in as many as twelve articles. These cover the requirements for a judge, the characteristics of the present-day judicial opinions; the art of judicial draftsmanship and suggestions for shorter and more lucid judicial opinions. A judge is assumed to be learned wise and just, but he need not prove this over and over again by writing inordinately long and rambling judgements which confuse even a clever and intelligent lawyer. The present practice of long and involved judgements setting out a long catalogue of cases and books which judges have read or glanced at, and of various judges writing individual opinions or separate opinions, is appropriately described in one of the articles "the mounting avalanche" of appellate court opinions. This indeed is appalling to the lawyers whose inadequate incomes fail to cope with the increasing price of law reports.[33] Moreover the mass of published judicial opinions coming from a multitude of courts cannot be coped with by the practising lawyers. This chapter stresses the desirability of shortening the judicial opinions, and suggests ways to ensure shorter opinions containing concise statement of facts, issues and reasons in simple language. Several articles here by experienced judges give valuable guidelines for planning an opinion, its composition and arrangement.[34] The last two articles[35] of this Chapter, though seemingly out of con-

31 Robert H. Jackson, *ibid.*, p. 930.

32 See for illustration, George Rossman, "Appellate Court Advocacy: The Importance of Oral Argument", pp. 931-947; Edward S. Dore, "Expressing the Idea—The Essentials of Oral and Written Argument", pp. 948-965 and the following interesting articles on the closing Argument, Winning on Appeal, pp. 965-1022.

33 Clarence M. Hanson, "Judicial Administration, The Avalanche of Appellate Court Opinions," pp. 1024-1032.

34 Charles A. Beardsley, "Judicial Draftsmanship", pp. 1033-1038; Conrado V. Sanchez, "The Art of Decision Making", pp. 1038-1043; Horace Stern "The Writing of Judicial Opinions", pp. 1043-1048; Carl H. Smith, "Judicial Opinion" pp. 1048-1055; George Rose Smith, "A Primer of Opinion Writing for New Judges", pp. 1081-1102.

35 Elijah Adlow, "The Materials of Adjudication", pp. 1102-1127; Jorge Bocobo, "The Cult of Legalism", pp. 1127-1139.



text, stress the role and importance of judicial legislation which in the words of Cardozo is one of the existing realities of life.[36] Though no one would deny that the noble purpose of the law should not be lost in the narrow and labyrinthine technicalities and that it is the duty of the judiciary to unfold and develop the law by liberal interpretation, yet it is worth reiterating what Madison said when proposing a toast to the American Federal judiciary in 1789; "May it remember that it is the Expositor of the Laws, not the trumpeter of Politics."

The last chapter of this *magnum opus* moves to a higher level of criticism and ideals often neglected by legal educators. It contains five carefully selected articles demonstrating the interrelationship of science, humanities and law The three disciplines represent the Trilogy of man's supreme ideals: truth, beauty and justice. It may be asserted that Scientism with its atrophying effect of extant materialism and literature seeking escape from the stark realities of life into spiritual refinement, can only be balanced by law and that too by subjecting both the disciplines to the hegemony of law. But in a refreshing article Chief Justice Cesar Bengzon of the Supreme Court of Philippines rightly concludes that science alone will not solve the problems confronting the human society, nor literature and humanities alone, nor the authority of law by itself. What is required is their interplay and interaction balancing their contribution to the enlightenment and amelioration of man.[37] The theme of this Chapter is that literature and science nourish the great power of clear statement at the bar and bench. Lord Justice Birkett,[38] Benjamin N. Cardozo[39] and Lord Macmillan[40] in their articles stress that the lawyer should be steeped in literature; should have the wider outlook and loftier range than the study of law by itself can give, and should keep his mind constantly refreshed and renewed by contact with the great thinkers of the past and the present. This is very necessary because in his professional life, he is called upon to deal with every form of human activity, and without some knowledge of literature and history he can merely play the role of a working mason and not of an architect.

This volume is indeed a scholarly and discriminating selection of subject matter relating to effective expression of law man at the bar and bench. In a work of this kind some overlapping of the topics in different articles is unavoidable, and the reviewer finds that the editor, like a jeweler selecting his gems, has accomplished his purpose by carefully selecting the articles and organizing them systematically around eleven chapter headings. The technical

36 The Nature of the Judicial Process, 1928, p. 12.

37 Cesar Bengzon, "Science, Letters and Law," pp. 1182-1195.

38 "Law and Literature: The Equipment of the Lawyer" pp. 1159-1172.

39 "Law and Literature", pp. 1140-1158.

40 "Law and Letters," pp. 1173-1182.

soundness achieved-by the editor is indeed unique and the work displays both command of material and a high sense of accuracy throughout. Its further merit lies in countless nuggets scattered through the pages just waiting to be picked up; a nine-page glossary; a forty-nine page carefully prepared index; and excellent printing and get-up of the book. All in all Professor Rivera has made a valuable contribution to legal literature, and so this collection of papers is a must book especially for the newly inducted lawyers and judges and should be on every lawyer's book shelf.

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