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CIVIL LAW IN INDIA†

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I. INTRODUCTION

The viability of a country's legal system in the face of the rapid changes in social and economic conditions is often a function of the variety of solutions which can be suggested and accommodated within the framework of law adopted by that society. The two supposed systems of law—the civil law and the common law—are often spoken of as mutually exclusive alternatives. In fact, however, there has in many jurisdictions been a very fruitful interplay between the two. The interrelationship of common law and civil law in India, for example, offers a fascinating field of study for comparative lawyers.

That Roman law and the thinking of continental legal systems did play, and have continued to play,¹ a not altogether insignificant role

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1. The Law Commission found it too late to shift to some of the continental institutions to avoid some procedural delays. LAW COMM'N OF INDIA, REP. NO. 14, REFORM OF JUDICIAL ADMINISTRATION 677-94 (1958). However, under the Village Panchayat Acts of various states, enacted in pursuance of the directive principle of the Constitution, the dispute-solving organ of the *panchayat* (*nyaya panchayat*) is free from the rule of the "bindingness" of precedents and normally does not permit the parties to be represented by lawyers. It can seek their assistance as non-partisan lawyers only. These departures from the common law practice partake of some of the attributes of the continental system.

in Indian jurisprudence is a phenomenon hardly noticed by authors of Indian legal history² or by scholars engaged in the study of reception of foreign laws³ on Indian soil. The seepage of civilian features into the Indian legal system was barely perceptible owing to the dominance of common law⁴ which has molded Indian legal thought for more than two centuries. The post-independence attempts at codification⁵ and consolidation,⁶ along with the avowed objective of the Constitution in securing a uniform civil code for the entire population of India,⁷ are perhaps characteristic of the civil law concepts used to neutralize the inelegant excrescences of the imported common law.

In this paper an effort is made to trace the extent of civil law influence on Indian law and to indicate the need for the teaching of civil law in Indian law schools. Studying the civil law system will not only enlarge the knowledge of a student's storehouse of alternatives

2. See, e.g., H. DUBEY, *A SHORT HISTORY OF THE JUDICIAL SYSTEMS OF INDIA AND SOME FOREIGN COUNTRIES* (1968); M. JAIN, *OUTLINES OF INDIAN LEGAL HISTORY* (2d rev. ed. 1966); B. MISRA, *THE CENTRAL ADMINISTRATION OF THE EAST INDIA COMPANY 1773-1834* (1959); B. PANDEY, *THE INTRODUCTION OF ENGLISH LAW IN INDIA* (1967). One of the major gaps in Indian studies today is the relative absence of studies in the area of legal history. Rarely are historians trained in the law and still more rarely are they experienced in legal practice. Lawyers, on the other hand, lack the time to double as historians. With few exceptions, lawyers have not shown much interest in the complex historical circumstances—social, political, intellectual—that have given rise to legal change. As a consequence, there has been little produced in India in the field of legal history.

3. Significantly, the Indian Law Institute, in its research project on the degree and depth of received foreign law, has not even considered the possibility of contact with civil law. See also Lipstein, *The Reception of Western Law in India*, 9 *UNESCO INTERNATIONAL SOCIAL SCIENCE BULL.* 85 (1957).

4. Professor R. W. Lee, in his painstaking study *The Civil Law and the Common Law—A World Survey*, has pointed out the great reliance of Indian law upon English law, leaving the implication that the continental European law had little or no effect on the growth of Indian law; 14 *MICH. L. REV.* 89, 92 (1915). See M. SETALVAD, *THE COMMON LAW IN INDIA passim* (1960); C. Amerasinghe, *Roman Law Thinking and the Modern World*, 21 *U. CEYLON REV.* 14 (1963).

5. See, e.g., the attempts in the area of personal laws.

6. MINISTRY OF LAW, GOVERNMENT OF INDIA, *INDIA CODE* (8 vols. 1955—). It is interesting to note that as early as 1872, Andrew Lyon preferred the French classification for giving "a complete view of the whole of the statute law in force." "No existing classification of law has succeeded [*sic*] better . . . than that of the law of France. . . . So successful has it been, that nearly every nation of Europe has followed its arrangement with only slight deviations. For these reasons I have taken the French law as the basis for the classification of the law of India. . . ." A. LYON, *GUIDE TO THE LAW OF INDIA* 9-10 (1872) (footnotes omitted).

7. INDIA CONST. art. 44 (1950). See also Husein, *Unified Code for India*, 36 *ALL INDIA RPTR. (JOURNAL SECTION)* 68, 71-72 (1944); Nigam, *A Plea for a Uniform Law of Divorce*, 5 *J. IND. L. INST.* 47 (1963); Ramchandran, *Uniform Civil Code for India—Its Scope and Practicability*, 39 *ALL INDIA RPTR. (JOURNAL SECTION)* 12, 14, 19, 22 (1952).

but will also enrich his understanding of the common law itself. The importance of the historical events of the annexation of former Portuguese and French possessions into the Union of India, and the fact that civilian thinking was not too infrequently utilized by judges and lawyers in British India, are demonstrative of the need for the comparative scholar to appreciate the relevance of the infusion of civil law elements into the Indian legal system.

II. CIVILIAN THINKING IN BRITISH INDIA

A. *Early Tinkerings of Civil Law*

Out of a plethora of sometimes conflicting details relating to the administration of justice over a period of two centuries, relevant evidence must be culled to trace the contact with civil law. Until 1661 (when Bombay became British territory by cession under Charles II's marriage treaty with Portugal), responsibility for the administration of justice to Indians was not considered. Charles II leased Bombay in 1668 to the East India Company for the princely sum of £10 a year. The same year he granted a charter empowering the Company, *inter alia*, to make laws and establish law courts in this newly-acquired British possession "consonant to reason, and not repugnant or contrary to, but as near as may be agreeable to the laws of England."⁸

Before the British takeover, Bombay for more than a century and a quarter had been a Portuguese possession, under Portuguese law. Briefly thereafter (for a period of three and a half years), it had been under English rule. The view that during this period English laws superseded Portuguese is not a sound one.⁹ The Governor, Humphrey Cooke, initially toyed with the idea of introducing English law,¹⁰ but ultimately dropped the idea.

8. See W. MORLEY, *THE ADMINISTRATION OF JUSTICE IN BRITISH INDIA* 5 (1858). The island had been since its cession by the Sultan of Gujarat in 1534 under Portuguese rule. See A. KEITH, *A CONSTITUTIONAL HISTORY OF INDIA 1600-1935*, at 31-35 (1936). See also Mitra, *Administration of Justice in India*, 4 INDIAN L. REV. 209 (1950).

9. C. FAWCETT, *FIRST CENTURY OF BRITISH JUSTICE IN INDIA* 2-7 (1934). It was erroneously held in *Advocate-General v. Richmond*, E. PERRY, *CASES ILLUSTRATIVE OF ORIENTAL LIFE* 566, 573 (1853): "[T]here is not the least vestige of Portuguese Law or Courts at any time after the cession by the King of Portugal; . . . English law was the law of the place." Also, the treaty of cession did not stipulate the continuance of Portuguese laws.

10. S. KHAN, *ANGLO-PORTUGUESE NEGOTIATIONS RELATING TO BOMBAY 1660-1667* (1922), quoting Cooke's first official report of March 3, 1665:

In this Island was neither Government nor Justice, but all cases of Law was carried to Tannay and Bassin, now it is in his Majesties Jurisdiction there must bee a settlement of Justice, according to such Lawes as his Majestie shall think fitt. . . . [T]he

The Portugalls on the Maine and Neighbouring places in these parts, have some lands on this Island, and many Inhabitants heere, have lands ther, so that I have been forced to (to excuse a confusion) settle the *Civill law among them in this Island*, the which hath hugely pleased boath partys; among overselves is marshall law, and for religion liberty of conscience is given to all.¹¹

Cooke preserved the continuance of the Portuguese civil law to "excuse a confusion" (perhaps precipitous change may have been resisted bitterly). His successor, Sir Gervase Lucas, and Henry Gary, who succeeded Lucas, did not alter these arrangements.¹²

The Portuguese laws and customs, left untouched in 1670 when the first judicial system was created, were formally abolished on August 1, 1672.¹³ The new court of Judicature was inaugurated on August 8, 1672. Gerald Aungier stated in his address¹⁴ on that occasion that some people wondered "why the English having had possession of this Island now seaven years have not in all this time governed by their own laws."¹⁵ The comment leaves little room for doubt about the continuance of Portuguese law from 1661-1668. They were, as has been seen, also left intact from 1668-1672. The court of Judicature became a prelude to the creation of a new judicial system.

Aungier pressed the Company to send out a judge-advocate to insure a more systematic functioning of the courts of judicature. The Company declined the request for a man learned in civil law, since it feared that he might be disposed to stir up strife, contention and litigation in the nascent settlement.¹⁶ (The Company's apprehension was prophetic!)

generall Language is Portugueez, soe that it will be necessary the Statutes and Lawes should bee Translated into that Language. . . .

Id. at 467.

11. *Id.* at 476, quoting Cooke's second report of Dec. 23, 1665 (emphasis added). See also A. KEITH, *supra* note 8, at 31-35. It must be conceded however that this term "civill law" has been interpreted also as being in contradistinction to military law instead of as opposed to the common law. See *Naoroji Beramji v. Rogers*, [1866-67] 4 Bombay High Court Reports (Original Civil Jurisdiction) 1, 47 (1866) [hereinafter cited as Bomb. H. Ct. (O.C.J.)].

12. See W. FOSTER, *THE ENGLISH FACTORIES IN INDIA 1665-1667*, at 70 (1925): "All cases of law and processes having bein determined heere by the lawes of Portugall, it will be very requisit that His Majesty send hither a civilian. . . ." See also C. ILBERT, *THE GOVERNMENT OF INDIA* 19 (3d ed. 1915); A. KEITH, *supra* note 8, at 32.

13. S. KHAN, *supra* note 10, at 490-91, reproducing George Wilcox's Report.

14. *Id.* at 497.

15. *Id.*

16. P. ANDERSON, *THE ENGLISH IN WESTERN INDIA* 130 (1856); 2 J. BRUCE, *ANNALS OF THE HONORABLE EAST-INDIA COMPANY* 279 (1810). While refusing to send a lawyer from England, the Company asked Aungier to select someone expert in the laws from amongst its existing servants in India.

The refusal amounted to requiring Aungier to institute a law court without lawyers. However, before his departure Aungier appointed Simon Serron, a Portuguese lawyer, the chief law officer of the Company. Serron was "well read in the civill and Imperiall lawes and one who by his experience and practice in the Lawes and customes of Portugalls is ably qualified to doe the Company effectuall service in discovering their Just rights and priviledges."¹⁷ This learned attorney's advice was so profound as to be embarrassing to other judges: "[H]e quotes so many Authors and spins out his advice into so many hard words, that the Justices of the Peace are so startled at the perusall of it, that being not able to contradict what therein contained they agree with his opinion though never so unjust. . . ."¹⁸ In the absence of proper or sufficient libraries, the unfortunate judges had difficulties in verifying the quotations from "so many learned authors," with which Simon Serron fortified and embellished his arguments.

The next phase of the possibilities of infusion of civil law opened with the Charter of 1683. The charter provided for the establishment of an admiralty court consisting of one person learned in the civil law. This court, therefore, was established in Bombay in 1684; Dr. John St. John, D.C.L., a Roman law scholar, was sent from England to preside as judge-advocate. Strained relations with the Governor, Sir Child, culminated in his dismissal in 1687. Probably, this unpleasant experience of the Company with the civilian judge-advocate abated any enthusiasm for the reception of civil law,¹⁹ for which attempts were afoot.²⁰

B. Fascination for Civilian Models

Further evidence of civilian influence²¹ must be gleaned from the Warren Hastings' judicial plan of 1772 and the events following. Reg-

17. Bombay Consultation of Feb. 12, 1670 (3 FACTORY RECORDS SURAT 48, 49).

18. Complaint about Simon Serron in a Bombay letter of May 18, 1672 (106 FACTORY RECORDS SURAT 106, 107). The career of this learned lawyer ended with his dismissal for "various cheats."

19. After the departure of Dr. St. John, there is no positive evidence that another person, learned in the civil law, was sent from England to succeed him. C. FAWCETT, *supra* note 9, at 128; P. MALABARI, BOMBAY IN THE MAKING 169 (1910).

20. See C. FAWCETT, *supra* note 9 at 132, 133, 134, 138.

21. In 1726, English law was introduced in three settlements: Madras, Bombay and Calcutta (then known as presidency towns), by the charters which established Mayors' Courts. The Charter of 1753 provided that these courts were not to try actions between Indians, such actions being left to be determined amongst themselves, unless both parties, by consent, submitted the litigation for determination by the Mayors' Courts. However, in order to place matter beyond doubt the Act of 1781 directed the Supreme

ulation II of 1772, section 22, directed that in suits regarding inheritance, marriage, caste, religious usage and institution, Hindus and Muslims were to be governed by their personal laws. These laws were to be expounded to the courts by the *pandits* and *maulvies*. In adopting this secular approach, Hastings seems to have been inspired by the example of the Romans, who "allowed to their foreign subjects the free exercise of their own religion."²²

Subsequent enactments reiterated this rule. In matters for which neither the authority of Hindu or Muslim textbooks or advisers nor the regulations or enactments of government offered appropriate guidance, the court was to act according to "justice, equity, and good conscience."²³ The application of differing systems of law in the presidency towns and the surrounding areas in the *mofussil* created a great deal of conflict.²⁴ The multiplicity of divergent personal laws, secreted in Sanskrit and Arabic languages, presented unusual difficulties for European judges. Invariably, though grudgingly, they had to depend on the advice of native lawyers and scholars. Sir William Jones²⁵ looked for a solution in the Roman practice:

If we had complete Digest of Hindu and Muhammedan laws, after the model of JUSTINIAN'S inestimable Pandects, compiled by most learned of the native lawyers, with an accute verbal translation of it into English . . . , we should rarely be at a loss for principles . . . and rules of law, applicable to the cases before us, and

Court at Calcutta, by section 17, that questions of inheritance and succession, and all matters of contract and dealing between party and party, should be determined in the case of Muhammedans and Hindus by their respective laws. Where only one of the parties was a Muhammedan or Hindu, the determination was to be "by the laws and usages of the defendant." Provisions on the same lines were made for other presidency towns and were reiterated with slight variations. Thus in *Durand v. Boilard*, [1830-1834] 5 Ben. Sud. Dew. Rep. 176 (1833) and *Joanna Fernandez v. Domingo de Silva*, [1812-1819] 2 Ben. Sud. Dew. Rep. 227 (1817) the succession was governed by French and Portuguese law respectively. See also G. RANKIN, *BACKGROUND TO INDIAN LAW* 13 (1946).

22. N. HALHED, *A CODE OF GENTOO LAWS* (1776). This code was compiled at the instance of Hastings to enable English judges to ascertain Hindu law. See also W. MARKBY, *AN INTRODUCTION TO HINDU AND MOHAMMEDAN LAW* 7 (1906).

23. See notes 31-37, *infra* and accompanying text.

24. In 1861 the dichotomy between the Supreme Courts and the Sudder Diwani Adalats was abolished; they were amalgamated into a single system to form the new High Courts. After this amalgamation the English rule of judicial precedent was firmly established.

25. In 1783 Sir William Jones came as a judge of the Supreme Court at Calcutta. Pothier, the French lawyer (1699-1772), was the major source of his book *AN ESSAY ON THE LAW OF BAILMENTS* (1781). "He praised and imitated Pothier, frequently in his essay, giving 'invincible reasons' for the rejection of all systems except that of Pothier." G. CANNON, *SIR WILLIAM JONES* . . . 29 (1952). See also G. CANNON, *ORIENTAL JONES* 86-87 (1964).

should never perhaps be led astray by the *Pandits* and *Maulavis*, who would hardly venture to impose on us, when their imposition might so easily be detected. . . . It would not be unworthy of a British Government to give the Natives . . . a permanent security for the due administration of justice among them, similar to that which JUSTINIAN gave to his Greek and Roman subjects. . . .²⁶

Although Jones did not envision himself as the "potential Justinian of India," Lord Cornwallis perceived the immense value of the suggestion and accepted it with grateful appreciation.²⁷ The work was compiled by a learned *pandit* Jagannatha under the direction and supervision of Jones. Jones undertook to translate the work into English when it was completed in 1794, but he was not destined to see its completion; he passed away in the same year. Henry Thomas Colebrooke, who was to become a renowned orientalist and the architect of Hindu law, was entrusted with the gigantic task of translating the Digest—so ably initiated by his great predecessor.

From the annexation of French and Dutch possessions,²⁸ Colebrooke had an experience of applying Dutch and Roman law for governance of parties. Although Hindu law was his primary passion, his work *Treatise on Obligations and Contracts* (1818) discloses evidence of his unusually rich scholarship in Roman law.²⁹ References to French law and other principles of Roman law permeate the book, though it is

26. Letter from Sir William Jones to Lord Marquis Cornwallis, March 19, 1788, quoted in 1 H. COLEBROOKE, *DIGEST OF HINDU LAW* vi-vii (4th ed. 1874).

27. For a critique of Sir Jones' comparison of Hindu law and Roman law, see Venkatasubrahmanya Aiyar, *Three Pioneers in the British Evolution of Hindu Law*, 80 *MADRAS L.J.* 122, 123-24 (1914).

28. See letter, from Henry Colebrooke to his father, Oct. 22, 1805:

Apropos of English law, I must defend my commissioning the continuation of the statutes at large. . . . [A]ll British subjects residing out of Calcutta are amenable to the Courts subordinate to mine . . . ; that all other Europeans, and descendants of Europeans, are wholly amenable to our Courts . . . ; and, in short, that we have to administer English, French, and Dutch Law, as well as Hindu and Mohammedan; you will not be surprised that I am provided with books of reference in the English and Civil Law. I think you would not object to the commission in question, if you saw my law library, containing a motely collection, from the *Corpus Juris* to the attorney's *vade mecum*.

T. COLEBROOKE, *THE LIFE OF H. T. COLEBROOKE* 223 (1873). As judge of the Bengal Sudder Diwani Adalat for several years from 1801, and as trusted adviser of judges and officials in other provinces, notably of Sir Thomas Strange, Chief Justice of the Madras Supreme Court, Colebrooke had various opportunities to influence the development of Hindu law in its day-to-day administration.

29. *Id.* at 315: "He . . . compressed into the space of 250 closely printed pages an elaborate compendium of legal principles derived chiefly from the Roman jurisprudence" See also G. RANKIN, *supra* note 21, at 89.

doubtful that the *Treatise* made any noticeable impact in the popularization of civil law.³⁰

C. Justice, Equity and Good Conscience

The principles of English law infiltrated the jurisprudence administered by the courts in the guise of rules of "justice, equity and good conscience."³¹ But the predominantly held assumption that these principles were interpreted to mean only the rules of English law found reasonably applicable to Indian society and circumstances³² is an overstatement. Without underrating the great role of common law in India, it must be noted that courts did refer to Roman law and the writings of French, Dutch and German civilians in order to fill interspaces and harmonize differences, as well as to develop the law as a system of general principles.³³ An exploration³⁴ of the judgments of the Bombay,³⁵

30. The absence of comparative lawyers was the reason of this neglect. Otherwise, the law of contract might have reflected some Romanist ideas instead of English legal ideas exclusively. Cf. 1 R. WEST & J. BUHLER, *HINDU LAW* vii (1884): "[L]arge number of comparisons . . . between the Hindu law and the Roman, English, and other laws . . . [have been made] partly to show that the Hindu system stands much less isolated than is usually supposed, but more especially to awaken the interest of Native scholars if possible in the subject of comparative law." (Emphasis added.) For comparisons with French law see *id.* at 204, 597, 771. See also G. SARKAR, *HINDU LAW* 148, 159, 489 (8th ed. 1940); C. SASTRI, *FICCTIONS IN THE DEVELOPMENT OF HINDU LAW TEXTS* *passim* (1926) for a comparative and critical study of the Roman, Hindu and English law; F.R.V., *HINDU LAW IN BOMBAY* 17 *et seq.* (1892).

31. See generally M. JAIN, *supra* note 2, at 576-90.

32. *Per* Lord Hobhouse in *Waghela Rajsanji v. Shekh Masulidin*, 14 I.A. 89, 96 (1887). M. SETALVAD, *supra* note 4, at 23; M. SETALVAD, *THE ROLE OF ENGLISH LAW IN INDIA* 11, 12, 13 (1966).

33. A marked influence of continental law is discernible in the law relating to riparian rights. See T. GHOSE, *THE LAW OF ALLUVION AND DILUVION* (2 vols. 1920). As far back as 1881, J. H. Nelson invited attention to the complex provisions of the French Code dealing with the rights and duties of the Family Council:

In England the individual is everything, the family of no account. Consequently Englishmen can hardly be expected sufficiently to sympathise with Indians in adjusting the delicate relations of the family. But the French have thought out the whole matter, and we should go to them for instruction about it.

J. NELSON, *A PROSPECTUS OF THE SCIENTIFIC STUDY OF THE HINDU LAW* 192-93 (1881).

34. In fact, Privy Council itself had consulted Roman law. See B. HOLLANDER, *COLONIAL JUSTICE* 43 (1961).

35. *Whateley v. Palanji Pestanji*, [1865-67] 3 Bomb. H. Ct. (O.C.J.) 137, 140 (1866); *Pranjivan Goven v. Jaishankar Bhagvan*, [1866-67] 4 Bomb. H. Ct. (A.J.C.) 46, 47 (1867); *Dhondu M. Naik v. Ramji Hanmanta*, [1866-67] 4 Bomb. H. Ct. (A.J.C.) 114, 115-16 (1867); *Secretary of State for India v. Bombay Landing & Shipping Co.*, [1868-69] 5 Bomb. H. Ct. (O.C.J.) 23, 24, 28, 47, 48, 49 (1868); *Dadabhai Narsidas v. Sub-Collector of Broach*, 7 Bomb. H. Ct. (A.J.C.) 82, 84, 85, 86, 87 (1870); *Keshavrav K. Joshi v. Bhavanji*, 8 Bomb. H. Ct. (A.J.C.) 142, 146 (1871); *Collector of Surat v. Daji Jogi*, 8 Bomb. H. Ct. (A.J.C.) 166, 171 (1871); *Balvantrav T. Bapaji v. Purshotam Sidheshvar*, 9 Bomb. H. Ct. 99, 103

Calcutta,³⁶ and Madras³⁷ courts reveals instances where judges drew significantly from the great reservoir of Romanist jurisprudence.

(1872); Padu Malharr v. Rakhmai, 10 Bomb. H. Ct. 435, 438 (1873); Reg. v. Dod Basaya, 11 Bomb. H. Ct. 13, 15 (1874); Vyakunta Bapuji v. Government of Bombay, 12 Bomb. H. Ct. (Ex. O.C.J.) 1, 42 (1875); Baban Mayacha v. Nagu Shrivachya, [1878] 2 Indian L.R. (Bomb.) 19, 27-28, 48 (1876); Lalubhai Surchand v. Bai Amrit, [1878] 2 Indian L.R. (Bomb.) 299, 306, 313 (1877); Mathura Naikin v. Esu Naikin, 4 Indian L.R. (Bomb.) 545, 557 (1880); Badhabai and Ramchandra Kanher v. Anantrav Bhagvant Deshpande, 9 Indian L.R. (Bomb.) 198, 223, 224, 226 (1885). Justice Raymond West was a great scholar "well versed in Roman Law and comparative jurisprudence." P. VACHHA, FAMOUS JUDGES, LAWYERS AND CASES OF BOMBAY 74 (1962).

36. Evidence of the reliance on civilian jurisprudence is relatively sparse in the earlier judgments of the Calcutta High Court. See John Syars Jebb v. Charles Lefevre, 1 Morton's Decisions 152, 169, 170 (1826) (2d ed. Montriou 1851) (Grey, C.J., dissenting); Sibchunder Ghose v. Russick Chunder Neoghy (1842), 1 Fulton's Reports 36, 42-43, 44, 45, 46, 47, 52 (1845); Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb, [1869] 2 Beng. L.R. (O.C.) 11, 26-27 (1868); Lopez v. Muddun Mohun Thakoor, [1869-70] 13 M.I.A. 467, 473 (1870); Hemendro Coomar Mullick v. Rajendro Lal Moonshree, Indian L.R. (Calc.) 353, 362 (1878). One is, however, struck by a characteristic fascination for such thinking in the judgments of Sir Asutosh Mookerjee. Sir Asutosh Mookerjee's interest in Roman Law, evident in his stress for its study, obviously was projected in his judgments:

[T]he Indian student of law must acquire a competent knowledge of the principles of the Roman Law which has pervaded the jurisprudence of every civilised nation. . . . The Roman jurists assimilated theory and practice in a remarkable manner. Their theory was so thoroughly worked out as to be fit for immediate application. . . . [A] discriminating study of the principles of Roman law is of inestimable value, not merely as a mental discipline, but as a broad foundation for the full appreciation of comparative jurisprudence.

Asutosh Mookerjee, *The Study of Law*, 38 CALCUTTA L.J. 9, 34 (1923). Some of his judgments are: Satish Chandra v. Ram Doyal De, [1921] All India Rptr. (Calc.) 1, 7; Bhudeb v. Kalachand Mallik, [1921] All India Rptr. (Calc.) 129, 130; E.A. Gubray v. Ramjusroy Golabroy, [1921] All India Rptr. (Calc.) 305, 309; Sarojini v. Krista Lal, [1923] All India Rptr., (Calc.) 256, 259.

37. An unusually impressive amount of evidence of the extensive use of Roman law and other continental thinking is found in the judgments of the Madras High Court (1863-1879), particularly in the opinions of Justice Holloway: Ramagopal v. Majeti Mallikarjanudu, [1862-63] 1 Madras High Court Reports 396, 397 (1863) [hereinafter cited as Mad. H. Ct.]; Crinivasammal v. Vijaymmal, [1864-65] 2 Mad. H. Ct. 37, 38 (1864); Mayna Bai v. Uttaram, [1864-65] 2 Mad. H. Ct. 196, 203, 204 (1864); Collector of Madura v. M. Ramalinga Sethupati, [1864-65] 2 Mad. H. Ct. 206, 215, 233, 234 (1864); Yarakalamma v. A. Naramma, [1864-65] 2 Mad. H. Ct. 276, 278, 279, 282, 283, 284, 285, 288 (1864); Komathi v. Gurunada Pillai, [1866-68] 3 Mad. H. Ct. 141, 143 (1866); Chinniya Mudali v. Vankatachella Pillai, [1866-68] 3 Mad. H. Ct. 320, 327, 329-33 (1867); Desouza v. Coles, [1866-68] 3 Mad. H. Ct. 384, 403, 408-09, 410, 413, 414, 415, 418, 419 (1868); S. Namasevayam Pillay v. Annammai Ummal, [1868-69] 4 Mad. H. Ct. 342 (1869); Ponnusawmi Tevar v. Collector of Madura, [1869-70] 5 Mad. H. Ct. 6, 12, 20-21 (1869); Arunachella Thudayan v. Veludayan, [1869-70] 5 Mad. H. Ct. 215, 222 (1870); Pattaravy Mudali v. Audimula Mudali, [1869-70] 5 Mad. H. Ct. 419, 423-24 (1870); Ibrahim Saib v. Muni Mir Udin Saib, [1870-71] 6 Mad. H. Ct. 26, 30, 31, (1870); Akilandammal v. Venkatachala Mudali, [1870-71] 6 Mad. H. Ct. 112, 115, 116 (1871); N. Visalatchni Ammal v. N. Subbu Pillai, [1870-71] 6 Mad. H. Ct. 270, 276 (1871); J. D. Robinson v. Ayya Krishama Chariyar, [1871-74] 7

The reference to continental jurisprudence through the residual clause of "justice, equity and good conscience," however, tended to decline as a result of three operative factors. First, the incoming common-law-trained judges, lawyers of the Privy Council and the higher judiciary in India brought to bear the imprint of the English outlook and techniques upon the judicial administration of India. They were naturally disposed first to look to the legal tradition to which they had been "accustomed for a lifetime" and only secondly to turn to continental tradition. This factor, though perhaps imperceptible, was in no way insignificant in the reception of English law in India. Second, the doctrine of *stare decisis*, firmly entrenched in India after the passing of the High Courts Act of 1861, can be said to have precluded reference to other judicial systems. In 1887, the Privy Council in *Waghela Rajsanji v. Shekh Masuldin*³⁸ held that "justice, equity and good conscience" meant the application of the rules of English law if found suitable to Indian conditions. In a rigidly precedent-oriented judiciary, as India's, the effect of this decision, it is fair to assume, was to discourage reliance on principles of other judicial thinking, especially when the Privy Council itself did not commend such a practice.³⁹ The *Waghela* observations—cited in subsequent Indian decisions with remarkable frequency—have because of their precedential character, so heavily shifted the lawyer's attention toward the contribution of English law as to almost entirely obscure the role played by civil law. Third, in addition to the assimilation of the rules of English law into the texture of Indian law by the judiciary, a planned effort was made, beginning in 1833, to introduce English law through codification. The law commissions of 1833, 1861 and 1879 were directed to frame for India "a

Mad. H. Ct. 37, 44, 45 (1872); *Thathu Baputty v. Chakayath Chathu*, [1871-74] 7 Mad. H. Ct. 179, 181 (1873); *Namasivaya Gaundan v. Kylasa Guandan*, [1871-74] 7 Mad. H. Ct. 200, 209 (1873); *Ramu Naikan v. Subbaraya Mudali*, [1871-74] 7 Mad. H. Ct. 229, 231 (1873); *Eathamukala Subbammah v. Ragiah*, [1871-74] 7 Mad. H. Ct. 293, 295-96 (1873); *C. Vencataramanier v. Manche Reddy*, [1871-74] 7 Mad. H. Ct. 298, 300 (1874); *P. Krishnen Numbudry v. K. Kunhunni Kurup*, [1871-74] 7 Mad. H. Ct. 378, 385-86 (1874); *Chinna Nagayya v. Pedda Nagayya*, [1876-78] 1 Indian L. R. (Mad.) 62, 65 (1875); *Mathappa Chetti v. Chellappa Chetti*, [1876-78] 1 Indian L. R. (Mad.) 196, 199, 200, 201, 202 (1876); *Valia Tamburatti v. Vira Rayan*, [1876-78] 1 Indian L. R. (Mad.) 228, 230, 231, 233, 234 (1876); *Secy. of State v. Arathoon*, [1880] 5 Indian L. R. (Mad.) 173, 175-76 (1879).

38. [1887] 14 I.A. 89. See also M. SETALVAD, *supra* note 4, at 23-24.

39. See, e.g., *Imambandi v. Mutsaddi*, [1818] 45 I.A. 73:

Their Lordships cannot help deprecating the practice which seems to be growing in some of the Indian Courts of referring largely to foreign decisions. However useful in the scientific study of comparative jurisprudence, reference to judgments of foreign Courts . . . is only likely to confuse the administration of justice.

Id. at 93.

body of substantive law, in preparing which the law of England should be used as a basis.”⁴⁰ Large areas of laws were codified by these law commissions, generally based on English law.⁴¹ It is, however, interesting to note the influence of civilian thinking in the enactment of some of these codes.⁴²

This brief sketch of the flavorings of Romanist jurisprudence in Indian law during the British regime may appear simply as a curiosity of Indian legal history rather than offering practical significance in the modern context. But the Portuguese and French systems of law, founded as they are on a civil law base, cannot adequately be understood without an acquaintance with Roman law.⁴³ Roman law and, in turn, continental law are thus fundamental to jurisprudence and comparative legal study; they have a functional significance in the period after the merger of the former Portuguese and French possessions into the territory of India.

III. PORTUGUESE LAW PROBLEMS

A. *Historical Bases*

The first Portuguese expedition to the Indian subcontinent was led by Vasco de Gama, who landed on the Malabar coast in 1498. By 1571, the Portuguese had captured Goa as well as other territories. For the

40. See B. ACHARYYA, *CODIFICATION IN BRITISH INDIA passim* (1914).

41. As Rankin observes:

The influence of the common law in India is due not so much to a “reception,” though that has played no inconsiderable part, as to a process of codification carried out on the grand scale. . . .

G. RANKIN, *supra* note 21, at 19-20.

42. The observations of the authors of the Indian Penal Code, 1860, need be noted:

We have derived much valuable assistance from the French Penal Code, and from the decisions of the French Courts of Justice on questions touching the construction of that Code. We have derived assistance still more valuable from the Code of Louisiana, prepared by the late Mr. Livingston.

INDIA, A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS 6 (1837). See also Keshavray K. Joshi v. Bhavanji Babaji, 8 Bomb. H. Ct. (A.J.C.) 142, 146 (1871). Although the influences in the matter of form are discernible, research is necessary in order to trace the influence of actual French rules in the finished product of the Indian Penal Code.

Likewise, a study of the marginal notes (along with proposed provisions) of the draft of the law of torts in India shows that had the law of civil wrongs been codified, it would have offered an excellent example of a statute embodying many Roman and continental law principles. See INDIA, DRAFT LAW OF TORTS *passim* (undated).

43. Cf. von Mehren, *Roscoe Pound and Comparative Law*, 13 AM. J. COMP. L. 507 (1964):

Scholars in the comparative field are today in very large agreement that, at least for beginning students, study of contemporary civil-law system such as those of France and Germany is much more rewarding and practical than study of the Corpus Juris.

Id. at 509.

next 250 years, the Portuguese, Dutch, French and British struggled for supremacy. By the mid-nineteenth century, Britain eliminated its western rivals, subdued the Indian rulers, and assumed dominion over India (now, India and Pakistan). During the British rule in India, Portugal retained Goa, Diu and Daman, and its enclaves, Dadra and Nagar Haveli.⁴⁴ The system of laws, education, administrative machinery and social institutions in these possessions all developed in a pattern quite different from those that evolved in India under the influence of the British.⁴⁵

In July, 1954, "nationalist volunteers" occupied Dadra and Nagar Haveli. A pro-Indian administration was formed and requested incorporation into the Indian Union. Under the tenth amendment to the Constitution, these territories became a centrally administered territory on August 11, 1961.

Goa, Daman and Diu were incorporated into the Indian Union in December, 1961 (following conquest by military action), through article 1(3)(c) of the Constitution.⁴⁶ The Goa, Daman and Diu (Administration) Ordinance, 1961, the Goa, Daman and Diu (Administration) Act, 1962, and the Goa, Daman, and Diu (Laws) Regulation, 1962, were effective in 1962 to extend both the administration and the rule of certain laws in force in the rest of India. The scheme of this legislation⁴⁷ was both to continue the operation of laws in force before the appointed day (*i.e.*, December 20, 1961) until amended or repealed, and also to enable judges and other authorities to continue to exercise lawful functions in connection with the administration of the territory until any further provisions were enacted.

The *Tribunal de Relacao*⁴⁸ continued to exercise its vested jurisdic-

44. For a story of Goa from the earliest times to the integration of the former Portuguese colonies into the Indian Union, see R. RAO, *PORTUGUESE RULE IN INDIA* (1963). See also F. DANVERS, *HISTORY OF THE PORTUGUESE IN INDIA* (1894); C. KLOGUEN, *AN HISTORICAL SKETCH OF GOA* (1831). France also retained small enclaves known collectively as Pondicherry. This terminated in a 1954 accord by which France agreed to yield administration of the enclaves to India. See notes 65-66 *infra* and accompanying text.

45. Aiyar & Sinha, *The Problem of Transition in Goa*, in *THE PROBLEM OF TRANSITION* 9 (A. Shah ed. 1965). For a "symposium of the many facets of this territory's [Goa's] crisis of transition" see 69 *SEMINAR* (1965). Both of these works, however, throw no light on problems of law and judicial administration in this territory.

46. The article *inter alia* provides that the territory of India shall comprise "(a) the territories of the states; (b) the Union territories specified in the First schedule; and (c) such other territories as may be acquired." See also INDIA CONST. art. 240 (1950).

47. Identical laws were enacted almost contemporaneously for the governance and judicial administration of Dadra and Nagar Haveli enclaves.

48. For a detailed description of the working of this court, see C. PEREIRA, *TRIBUNAL DA RELACAO DE GOA* (1964).

tion under the laws in force until December 16, 1963, when the Goa, Daman and Diu (Judicial Commissioner's Court) Regulation, 1963, was promulgated "to provide for the constitution of a Judicial Commissioner's Court in Goa, Daman and Diu and for certain other matters." The court was established under section 3, effective December 16, 1963. Section 8 states that the court shall be the highest civil and criminal court of appeal and revision, and shall have all such jurisdiction as was vested in the *Tribunal*. This jurisdiction is in addition to the jurisdiction exercisable under Indian laws. Section 22(i) provides for abolition of the *Tribunal*, although under section 23(1), its abolition shall not prejudicially affect the continued operation of any notice served, injunction issued, direction made or proceedings taken by the *Tribunal* under the powers then conferred upon it. Section 23(3) then, resorting to another legal fiction, provides that every decree, order made, or sentence passed by the *Tribunal* shall be deemed for the purposes of execution to have been made or passed by the Judicial Commissioner's Court.

The 1963 regulation was followed by the Goa, Daman and Diu Judicial Commissioner's Court (Declaration as High Court) Act, 1964, which was enacted by Parliament on May 16, 1964, and applied retroactively from December 16, 1963. The purpose of this act was to declare the Judicial Commissioner's Court a high court for certain purposes and to apply the provisions of chapter V of part VI of the Constitution with certain exceptions and modifications.

B. Replacement of Portuguese Laws

The Portuguese laws, based on Code Napoleon and other continental systems,⁴⁹ have been and are being replaced. Details on the introduction of various Portuguese laws can be found elsewhere,⁵⁰ but the history of personal laws deserves brief reference. Non-Christians were governed by a customary law which apparently corresponded with pre-

49. See obiter observations of Judicial Commissioner Mr. Jetley in *Xec Ayub v. Goa*, [1967] All India Rptr. (Goa) 102:

[W]hen called upon to deal with Portuguese Laws in accordance with their system we have to pass from an environment of case law into a "World governed by Codes." The Portuguese system is based on Code Napoleon and generally follows the pattern of the Continental system of law. The Continental Judges have somewhat wider powers of interpretation than those enjoyed by Judges in England and in our Country. This is so because the Continental Legislatures ordinarily are content to lay down a principle and leave it to Judges to work out the details. The Continental Judges can mitigate the rigidity of the rule or to prevent it from coming into collision with moral dictates.

Id. at 110.

50. C. PEREIRA, *HISTORIA DA ADMINISTRACAO DA JUSTICE NO ESTADO DA INDIA* (2 vols. 1964, 1965). See also P. MALABARI, *supra* note 19, at 26 *et seq.*

Mitakshara law. Afonso Mexia codified this law (*Foral*) in 1526; it served as a code of Hindu law for many years. By the middle of the seventeenth century the Hindu inhabitants of Goa had begun voicing their strong dissatisfaction with the law of escheat; strictly administered by the old Hindu kings and their Muslim successors, it denied the right of testamentary disposition, limited succession to male descendants only, and allowed widows only a restricted right to maintenance.⁵¹ To avoid this draconian law, they petitioned the King of Portugal for the application of Portuguese law to Hindus as well. The petitions were not granted for more than a century. Ultimately Hindu law was abolished in the Portuguese possessions in the latter half of the nineteenth century and the Portuguese Civil Code was applied to all inhabitants without discrimination.⁵²

Since 1961 the laws extending particular Indian enactments to the territories of former Portuguese possessions have invariably empowered the courts (or any adjudicating authorities) to construe the law introduced in such a manner as may be necessary or proper to adapt it to a given fact situation without contravening the substance of the law.⁵³ Such a provision, which expects judicial adaptation of the new law to the background of the old Portuguese legal system so as to avoid injustice and at the same time forward the cause of unification, asks much of the judiciary. As yet the courts in India have not faced fact situations involving major problems of Portuguese law pressing for application or adaptation in the common-law context. The significance of the few reported decisions⁵⁴ can at best be seen in the occasional comparison

51. AZEVEDO, AS COMUNIDADES DE GOA 179-82 (1830) shows how until 1691 Hindus circumvented the *Foral* in respect of escheat. See Derrett, *Hindu Law in Goa*, 67 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 203 (1965).

52. For an excellent account of how "minds trained in the pre-Napoleonic Civil (Roman) Law handled . . . typical, barely penetrable, oriental 'mystery'" of Hindu law problems see Derrett, *supra* note 51. Our summary reproduces Professor Derrett's scholarly treatment.

53. See, e.g., Goa, Daman and Diu (Extension of the Code of Civil Procedure and Arbitration) Act, 1965, § 5 (2).

54. See, e.g., *Data Xiva v. State*, [1967] All India Rptr. (Goa) 4, 5, 7, 8 (comparing the provision relating to the admissibility of statements made to a police official in the Portuguese Criminal Procedure Code, the Indian Code of Criminal Procedure, and the law as to *corpus delicti*, etc., in both the systems). In the case the court referred to the decisions of the Portuguese Supreme Court of Justice which "after liberation have only persuasive value." *Id.* at 10. See also *V.V. Kamble v. P.A. Mascarenhas*, [1967] All India Rptr. (Goa) 97; *A.E.N. Fernandes v. J.A.D. Fernandes*, [1967] All India Rptr. (Goa) 100; *Parxurama v. Jaia*, [1967] All India Rptr. (Goa) 120; *Ministerio Publico v. Filomeno*, [1967] All India Rptr. (Goa) 51 (citing many decisions of the Portuguese Supreme Court).

the judges have made between the Portuguese and Indian law rules. Two cases may be noted.

In *Xec Ayub v. State*,⁵⁵ the accused was charged under section 368 of the Portuguese Penal Code for involuntary homicide of four persons. Xec Ayub, owner of a mine, entrusted the actual work of supervising the mine to a supervisor (co-accused who did not appeal). On the fateful day when the laborers were away on lunchbreak, a part of the mining site (between 50 and 125 feet from where the work of mining was actually being done) was blasted with dynamite. There had been excessive rain between 12 a.m. and 2 p.m.; at 4 p.m. a considerable part of the rock and other material from the face of the mine tumbled down, seriously injuring four workers who, despite quick hospitalization, succumbed to their respective injuries. Experts who probed the tragic occurrence concluded that it was attributable to *vis major* and also because the works-in-charge failed to take proper care to verify that the site (where the victims were working) was safe in the context of the blasting operations and the heavy showers. Section 368, translated, reads:

The involuntary homicide which any person commits or causes due to his lack of skill; to his lack of attention; to his negligence; to his lack of expert knowledge or to his lack of obedience to the provisions of any regulation shall be punished with imprisonment from the month to two years and the corresponding fine.

The accused contended that the evidence marshaled against him did not warrant the conclusion that he was guilty under the above section: the experts had not put any blame against him, nor was it the contention of the prosecution that he was present at the scene of the accident.

The majority found the facts insufficient to warrant section 368:

[I]n view of the wording and tenor of section 368 of the Code, the master cannot be held criminally liable for any of the acts of his servant made punishable by that section. One can easily visualize situations where the master may be liable civilly for those acts of his employee where the latter can be hauled up criminally as well as in damages. But to make the master liable criminally for the acts which can justify a criminal charge against his servant, phraseology more explicit than used in section 368 shall have to be pressed into service.⁵⁶

The court therefore quashed the order of the magistrate which ac-

55. [1956] All India Rptr. (Goa) 17. See also *Xec Ayub v. Goa*, [1967] All India Rptr. (Goa) 102.

56. [1966] All India Rptr. (Goa) at 20.

cepted the charge against Xec Ayub and fixed the date for his trial.

The dissenting judge, Mr. Jetley, however, held that before *vis major* can be used as a defense, a party must have done all that he was bound to do. The defense of *vis major* is not a complete answer when there is want of reasonable care on the part of the defendant. He read the words "causes due to his lack of skill; lack of attention; failure to follow the provisions of any regulation" in section 368 as eliminating the requirement of *mens rea*:

This section seems to make the master criminally liable for the acts of his servants. If it were not so, masters in accident cases in mines would escape punishment by saying that they are not criminally responsible for the acts of their servants. . . . The absence of personal guilt seems to be immaterial in this case. The statute may make the master liable for the acts of his servants unless he can prove that he himself is not in default.⁵⁷

Under the Portuguese law, he maintained, reports of the experts are treated as substantive evidence; but discretion rests with the magistrate to question the experts in order to scrutinize their conclusions. In the absence of an examination of the experts, it was unsafe to accept their conclusions with regard to *vis major* and the failure to take proper precautions. It was for the court to determine whether or not the accident was really attributable to *vis major*, and it was improper to accept uncritically the findings of experts (who are hardly expected to know the legal concept of *vis major*).

In *State v. Sebastiao Fernandez*,⁵⁸ one is struck by the presence of a provision in Portuguese criminal law (in contradistinction to its Indian counterpart) reflecting a concern for the protection of familial institutions. The accused and a girl, close neighbors, were in love and had had sexual intimacies on more than one occasion. He promised the girl that he would marry her and on this basis persuaded her to have pre-marital relations. After some time the accused (probably at the instance of his parents) showed an unwillingness to marry her. The police examined the complainant, her father, and other witnesses and prosecuted the accused for an offense of rape under section 292 of the Portuguese Penal Code. Before the conclusion of the trial the accused married the girl; but since he was less than 18 years old when the offense was committed, the magistrate had no option but to convict. The magistrate, however, suspended the sentence in view of the marriage, relying on the

57. *Id.* at 22.

58. [1967] All India Rptr. (Goa) 86.

provisions of article 400(1) of the Portuguese Penal Code; and the court approved the action. Article 400 also puts a check on husbands who might divorce their wives after sentences are suspended by providing for service of the sentence if the accused obtains a divorce within a five year period. The Indian Penal Code does not have such a provision. Were an analogous case to appear in the courts now that the Indian act has been introduced, much would depend on whether or not the particular judge were prepared to take into account the fact of the subsequent marriage in awarding punishment, in order to strike a balance between the needs of society and the purposes of criminal law.⁵⁹

As a practical matter, however, the necessity for special considerations in the application of Indian laws in the former Portuguese territories is fast decreasing. Nearly all of the Portuguese laws have now been replaced by their Indian counterparts. In time one can expect the relevant pattern of life in these small territories to conform to the rest of the Indian mainland. Except in those cases calling for the application of Portuguese conflicts of law⁶⁰ or inheritance rules, or which involve a party claiming his rights as a Portuguese citizen, the Portuguese legal system will not be significant in the future.

IV. FRENCH LAW IN INDIA

A. *Introductory Observations*

It is unnecessary to consider the details of the confusing struggles of the French and British in attempts to extend their influence in India. Unlike the British, French success was only partial, being limited ultimately only to a small segment in the south, known as Pondicherry.⁶¹ Founded by the French in 1674, taken by the Dutch in 1693, and restored to the French in 1699, the English took it in 1761, restored it in 1765, retook it in 1778, restored it a second time in 1785, retook it again in 1793, and finally gave it to the French in 1814. England's dominion was too short and casual to have any material weakening effect upon the continued prevalence of French civil law in this region.

59. An alternative more in keeping with the admonition to preserve the substance of the introduced Indian Penal Code might be accomplished through liberal use of the Probation of Offenders Act, 1958.

60. See, e.g., *Pires v. Pires*, [1967] All India Rptr. (Goa) 113.

61. There was another very small French settlement near Calcutta known as Chandra-nagore. It was transferred by a separate treaty in 1952. See *Union of India v. Manmull Jain*, [1954] All India Rptr. (Calc.) 615.

For over 150 years the French legal system has been present in the former colonies of Pondicherry, Karikal, Mahe, and Yanam.⁶² Nonetheless there remain major differences between the effect of the French and the Portuguese on the Hindu law in territories under their possession. First (unlike in the latter territories where Afonso's *Foral* had exhaustively codified the Hindu rules of law), the French administration left the law for the most part in its traditional, uncoded state. Remaining as custom, the Hindu legal system under the French was able to adapt itself to changes more easily than could its counterpart under the Portuguese, frozen in the pages of Afonso's tomes. Moreover, the flexibility of this custom-based approach allowed easy access to the wealth of material in the ancient *shastras* and in the modern commentaries written by Indian and English masters in various parts of British India.⁶³ Secondly, whereas there was strong pressure from the Hindus in the Portuguese territories to modernize and "civilianize" their laws, the fact that Hindu citizens in French territories were able to opt to be governed by French law obviated the necessity to undertake major reforms in Hindu law itself. Instead, the French Hindu who desired to adopt western modes of living needed only to declare himself subject to the French Civil Code. As a result of these two major distinctions, Hindu law survived and continued to flourish in the former French colonies in a much more real sense than was the case in the former Portuguese colonies.⁶⁴

Administration of Pondicherry was transferred to India on November 1, 1954.⁶⁵ A treaty of cession, signed on May 28, 1956, was ratified

62. For a brief but "careful exposition" of the constitutional history of the French settlement of Pondicherry, see the opinion of Anantanarayanan, J., in *Gobalously v. Pondicherry*, [1967] 2 Indian L.R. (Mad.) 10, 18-20.

63. See J. NELSON, A PROSPECTUS OF THE SCIENTIFIC STUDY OF THE HINDU LAW (1881).

64. For a good description of Franco-Hindu law see G. DIAGOU, *PRINCIPES DE DROIT HINDOU* (1932); L. SORG, *INTRODUCTION À L'ÉTUDE DU DROIT HINDOU* (1895); L. SORG, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT HINDOU* (1897); Herchenroder, *Study of the Law Applicable to Native Christians in the French Dependencies and in India*, 18 J. COMP. LEG. & INT'L L. (3d Ser.) 186, 189-90 (1936).

65. By an agreement dated Oct. 21, 1954, the Government of France transferred, and the Government of India took over, administration of the territory of all French establishments in India with effect from Nov. 1, 1954. Thereafter in exercise of the powers conferred by the Foreign Jurisdiction Act, 1947, the Government of India appointed a Chief Commissioner for Pondicherry and extended 22 enactments in force in India to the French establishments by virtue of the French Establishment (Application of Laws) Order, 1954. For a discussion of some of the constitutional problems arising out of these developments see *N. Masthan Sahib v. Chief Commissioner, Pondicherry*, [1962] All India Rptr. (S. Ct.) 797; *N. Masthan Sahib v. Chief Commissioner, Pondicherry*, [1963] All India Rptr. (S. Ct.) 533; *K.S. Ramamurthy Redien v. Chief Commissioner, Pondicherry*, [1963] All India Rptr. (S. Ct.) 1464.

on August 16, 1962 (from which date by the fourteenth amendment to the Indian Constitution Pondicherry, comprising the four territories, became a Union Territory). The treaty of cession which ended French sovereignty over Pondicherry stipulated that:

Legal proceedings instituted prior to the 1st of November 1954 shall be judged in conformity with the basic legislation and procedure in force at that time in the Establishments.

To this end, and up to final settlement of such proceedings, the existing courts in the Establishments shall continue to function. Officers of the Court shall be law graduates, habitually domiciled in the Establishments, honourably known and selected in accordance with the French regulations governing the designation of temporary judicial officers.

The interested parties shall be entitled, if they so decide by common agreement, to transfer to the competent Indian Courts, the said proceedings as well as proceedings which, though already open, are not yet entered with the Registrars of the French Courts, and also proceedings which constitute an ordinary or extraordinary appeal.

Judgments, decrees and orders passed by the French Courts, prior to the 1st November of 1954, which are final or may become so by expiration of the delays of appeal, shall be executed by the competent Indian authorities. Judgments, decrees and orders passed after the 1st November 1954 in conformity with the competent Indian authorities, irrespective of the courts which exercise the jurisdiction.

Acts or deeds constitutive of rights established prior to the 1st of November 1954 in conformity with French law, shall retain the value and validity conferred at that time by the same law. . . .⁶⁶

As these provisions suggest, the Government of India did not contemplate any sudden reform of the judicial organization and administration of laws in Pondicherry.

B. *Supreme Court and French Law*

An example of the conflict between the existing French and Indian laws appeared in the Supreme Court decision *Universal Imports Agency v. Chief Controller*.⁶⁷ By the Indo-French Agreement of 21 October 1954, the Government of India had passed the French Estab-

66. FRANCE-INDIA, TREATY OF CESSION OF THE FRENCH ESTABLISHMENTS OF PONDICHERRY, KARIKAL, MAHE AND YANAM, WITH PROTOCOL AND AGREED PROCES-VERBAL art. 14 (1962).

67. [1961] All India Rptr. (S. Ct.) 41. The petitions were filed under article 32 of the Constitution. This case was followed in the two subsequent cases. See *French India Importing Corp. v. Chief Comptroller of Imports & Exports*, [1961] All India Rptr. (S. Ct.) 1752; *Pioneer Traders v. Chief Comptroller of Imports & Exports*, [1963] All India Rptr. (S. Ct.) 734.

lishments (Application of Laws) Order, 1954, under the Foreign Jurisdiction Act, 1947, applying the Indian laws to Pondicherry. The effect of that order was to repeal French laws by application of Indian law in the same field, subject to a saving clause.

[A]ll laws in force in the French Establishments immediately before the commencement of this Order, which correspond to the enactments specified in the schedule, shall cease to have effect, save as respects things done or omitted to be done before such commencement.⁶⁸

The petitioners in Pondicherry entered into firm contracts of sales by import with foreign sellers before the merger of the territories made foreign exchange available under letters of credit or otherwise. The goods were shipped either before or after the merger, reaching Pondicherry after it. These goods were confiscated by the Collector of Customs on the ground that they were imported without the license required under Indian law. The petitioners contended that their transactions with the foreign dealers were "things done" within the meaning of paragraph 6, quoted above, thereby saving them from the operation of the order. The respondent argued that since the confiscated goods were brought into India after the commencement of the order, the goods confiscated were outside the pale of the saving clause.

In order to determine the application of paragraph 6, the majority, speaking through Mr. Justice Subba Rao (as he was then), examined the following facts:

- (1) What are the laws specified in the schedule?
- (2) What were the laws in force in the French Establishment before the commencement of the order corresponding to the enactments so specified?
- (3) What were the "things done" or omitted to be done under the said laws?

On examination of the laws specified in the schedule, the learned Justice concluded that imports into India without a license were prohibited, that the goods so imported in contravention of the restrictions imposed were liable to be confiscated, that the foreign exchange could not be obtained otherwise than under the provisions of the act, and that the persons infringing upon the laws were susceptible to prosecution in addition to confiscation of the goods involved.

68. French Establishments (Application of Laws) Order, 1954, para. 6.

Concerning the “pre-existing French laws in Pondicherry corresponding to the enactments specified in the schedule,” the Justice, on the basis of affidavits⁶⁹ filed by the rival parties, stated that Pondicherry was a free port without any restrictions on imports, except a few items, and that importers could acquire foreign exchange either at the official rate for some transactions or in the open market for others.

The determination of the question of what were the “things done” under the pre-existing French law was crucial to the decision of the case. Pursuant to the terms of the contracts, the sellers had placed the goods on board the various ships and the goods arrived at Pondicherry port after its merger with India. Payment was made in full to the foreign sellers and delivery was taken by the buyers after examination upon arrival. Before the merger, if the customs authorities had imposed any restriction not authorized by law, the affected party could have enforced the free entry of the goods in a court of law. While the petitioners contended that “things done” take in not only *things done* but also their legal consequences, the state contended that once the goods were brought into India before the merger, it was not a “thing done” before the merger and, therefore, would be governed by the enactments specified in the schedule.

Justice Subba Rao, however, did not find it necessary to consider whether the concept of import takes in (in addition to the factual bringing of goods into India) the entire process of import commencing from the date of the application for permission to import and ending with the crossing of the customs barrier into India. Instead, the words “things done” in paragraph 6 must be reasonably interpreted, he said, to mean “not only things done but also the legal consequences flowing therefrom.”⁷⁰ Otherwise, the saving clause would become unnecessary:

If what it saves is only the executed contracts, i.e., the contracts whereunder the goods have been imported and received by the buyer before the merger, no further protection is necessary as ordinarily no question of enforcement of the contracts under the pre-existing law would arise.⁷¹

The phraseology “things done,” the learned Judge said, was not an innovation but was copied from other statutory clauses:

69. Neither the acts governing the imports nor any authoritative textbooks disclosing the relevant French law were placed before the Court. *Universal Imports Agency v. Chief Comptroller of Imports & Exports*, [1961] All India Rptr. (S. Ct.) 41, 45.

70. *Id.* at 46.

71. *Id.*

Section 6 of the General Clauses Act (X of 1827) says that unless a different intention appears, the repeal of an Act shall not affect anything duly done or suffered thereunder. So too, the Public Health Act of 1875 . . . which repealed the Public Health Act of 1848 contained a provision to S. 343 to the effect that the repeal "shall not affect anything duly done or suffered under the enactment hereby repealed." This provision came under judicial scrutiny in . . . *Queen v. Justices of the West Riding of Yorkshire*, (1876) 1 Q B D 220. There was notice given by a local board of health of intention to make a similar notice. The board, in ignorance of the repeal, made a rate purporting to be made under the repealed Acts. It was contended that as the rate was made after the repealing Act, the notice given under the repealed Act was not valid. The learned Judges held that as the notice was given before the Act, the making of the rate was also saved by the words "anything duly done" under the repealed enactments. This case illustrates the point that it is not necessary that an impugned thing in itself should have been done before the Act was repealed, but it would be enough if it was integrally connected with and was a legal consequence of a thing done before the said repeal. Under similar circumstances *Lindley L.J.*, in *Heston and Ilseworth Urban District Council v. Grout*, (1897) 2 Ch 306 confirmed the validity of the rate made pursuant to a notice issued prior to the repeal. Adverting to the saving clause, the learned judge tersely states the principle thus at p. 313: "That to my mind preserves that notice and the effect of it." On that principle the Court of Appeal held that the rate which was the effect of the notice was good.⁷²

The dissenting Justices suggested that the phraseology of the saving clause of the English statutes and of the General Clauses Act, 1827, were of wider import than that of paragraph 6 of the order and that, therefore, the English decisions do not provide any assistance in considering the scope of the saving clause. And, they said, the English decisions apply only to a saving clause of an act which repeals another but preserves the right created by it.

Judge Subba Rao saw no reason why the same construction could not be placed upon the wording of paragraph 6, which is practically similar in terms to those found in the relevant saving clause of the English statute and that of the General Clauses Act. Likewise, since by reason of the Indo-French Agreement, the Government of India had made the order under the Foreign Jurisdiction Act, 1947, applying the Indian laws to Pondicherry, its effect was to repeal the French laws by application of Indian laws in the same field, subject to a saving clause.

72. *Id.* at 46-47.

The position was analogous to that of a statute repealing another with a saving clause. If the English decisions apply to the latter situation, it was difficult to see why they do not apply to the former. In both cases the pre-existing law continues to govern the things done before a particular date. Therefore, the Court held, the words "things done" were comprehensive enough to take in a transaction effected before the merger, though some of its legal effects and consequences projected into the post-merger period.

The majority judgment failed to appreciate the real character of the contract in the present case. Physical delivery of goods after their inspection is not an essential ingredient of a standard C.I.F. contract: it is not consistent with C.I.F. obligations. Variations in the standard terms may destroy the C.I.F. nature of the contract. Thus, a C.I.F. sale loses its character and becomes a simple contract to deliver when the parties have provided for verification of the goods upon arrival.⁷³ In the instant case it would have been enough for the Court to determine the date of physical delivery, *i.e.*, a date on which the contract would have become final. Goods coming under a contract, delivery of which had not even taken place under its terms before the merger, could not have been excepted from the operation of enactments specified in the schedule. By no stretch of imagination are they "things done" under the French law. The Court's holding that "things done" were comprehensive enough to take in a transaction effected before the merger, though some of its legal effects and consequences projected into the post-merger period, is tenuous for a transaction which has not yet *legally* taken place.

The Court, in order to avoid the burdensome result indicated in the present case, in which the petitioners would have had to pay a heavy customs duty, obviously introduced in a subtle form the usual concept of C.I.F. contract. The Court took resort in the sophisticated technique of relying on the provisions of the General Clauses Act, 1827, to interpret the term "things done." Apart from the doctrinal objections raised by the minority against such a reference, unnecessary to recapitulate here, it is submitted that section 6 of the General Clauses Act has no application when the Court is called upon to determine the effect of supersession of French law by the application of specified statutes under clause 6 of the French Establishments (Application of Laws) Order,

73. See, *e.g.*, *Comptoir d'Achat et de Vente du Boerenbond Belge S.A. v. Luis de Ridder Limitada*, [1949] A.C. 293; Commercial Court of Antwerp, August 16, 1919, *Jurisprudence du Port d'Anvers*, 1921, 34.

1954. Section 6 of the General Clauses Act applies to the effect of the repeal of enactments of the Indian legislature, and there is nothing in the order which contemplates that the French law in operation before merger of the French establishment is to be regarded as a statute enacted by the Indian legislature. The French law after its supersession has not been expressly kept alive in respect to any right or privilege acquired or accrued under "things done" under that law. It would be an unwarranted incursion into the field of legislation to attempt to extend the protection of that law to transactions which have taken place after the prescribed date by relying upon the General Clauses Act.

The majority's assumption that "if what the saving clause saves is only the executed contracts no further protection is necessary as no question of enforcement of the contracts under the pre-existing law would arise" is equally assailable. The saving clause does not say that the French laws would apply to *events* following after "things done" earlier. The argument that otherwise the saving clause would be otiose is not appealing. The saving clause was meant, it is maintained, to cover such situations as suits for damages arising out of the later discovery of damage done to goods in transit or some other readjustment of rights arising out of an event occurring before the completion of the "things done." In such a situation the question would have to be decided by the French laws. In the absence of the saving clause what the effect of the transfer was on things previously done would have been open to argument.

C. Madras High Court and French Law

Having incorporated Pondicherry into its territory by the treaty of cession,⁷⁴ which stipulated the continuance of existing laws, the Government of India has been aware of the danger of precipitating a hasty changeover and has allowed the perpetuation of civil law principles. The Madras High Court, which has acquired all jurisdiction exercisable in the former French possessions by the *Cour de Cassation*, *Conseil d'Etat*, and the *Cour Supérieur d'Arbitrage*, administers French law.⁷⁵

Perhaps it is not insignificant that most of the opinions dealing with

74. See note 66 *supra*.

75. Pondicherry (Administration) Act, 1962, §§ 9, 10. Unlike the French *Conseil d'Etat* which consists of civil servants only, two judges of the court perform their functions. And, again, unlike the French practice, they hear arguments and do not have their proceedings *in camera*. It is interesting to note that, whereas in France judiciary is denied any power to interfere with the executive, in India they have been required to handle that tabooed jurisdiction.

the application of French law have been delivered by Mr. Chief Justice Anantanarayanan. That even the decisions of a judge like Mr. Anantanarayanan, richly endowed with a comparative law perspective, cannot withstand deep analysis indicates the immense difficulties involved in applying the laws and techniques of one legal system to another. The brief examination here of reported decisions in the areas of French civil code, labor code, and penal code is preceded, when necessary, by a brief reference to the major distinguishing features of civil law and Indian law principles in order to properly appreciate the role of the Madras High Court in handling these problems.

1. *Code Civil and Processual Law*

The *Code Civil*,⁷⁶ repository of the major branches of the French civil law, deals with such matters as nationality, civil rights, marriage, contract, and prescription. Unlike the Indian law, limitation (prescription) is viewed as conferring rights and not as barring remedies. The common-law doctrine of consideration in the realm of contracts (as well as offer, acceptance⁷⁷ and other elements) is alien to French law, although it has its own analogues.⁷⁸ The marked differences and similarities in the various provisions of the *Code Civil* and their Indian counterparts will be best understood when unfolded through concrete fact situations involving their adjudication. It would be interesting, though outside the scope of the present article, to observe the role played by the courts in France when they interpret the provisions of the code and to compare the solutions reached with those offered by the Indian law. The case law in this area has yet to develop; nevertheless the decision to which we shall refer offers interesting insights into the nature and pattern of problems courts in India are likely to face.⁷⁹

76. For a brief description see J. DAWSON, *THE ORACLES OF THE LAW* (1968), M. AMOS & F. WALTON, *INTRODUCTION TO FRENCH LAW* (3d ed. 1967); R. DAVID & H. DE VRIES, *THE FRENCH LEGAL SYSTEM* 13-16, 49-50 (1958).

77. See generally von Mehren, *The French Civil Code and Contract: A Comparative Analysis of Formation and Form*, 15 LA. L. REV. 687 (1955), in *THE CODE NAPOLEON AND THE COMMON LAW WORLD* 110 (1956). Although the fundamental notions of the English law have been incorporated in the Indian Contract Act, 1872, there are certain significant variations from the English law. See Rajaraman, *The Law of Contracts in India*, 8-9 REVISTA DEL INSTITUTO DE DERECHO COMPARADO 180 (1957).

78. See, e.g., Glaser, *Doctrine of Consideration and the Civil Law Principles of Cause*, 46 DICK. L. REV. 12 (1941); Henry, *Cause in the Civil Law and Consideration in the Common: Much Ado About Nothing*, 29 KY. L.J. 369 (1941); von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009 (1959).

79. One trend is obvious. Despite language barriers the court has been taking considerable pains in analyzing the involved fact-situations and in ascertaining the relevant French law applicable to them. See, e.g., *Selvaradjou v. Marie Josephine*, [1964] 2 Indian

The case *Sadasivam v. Ramadasse*,⁸⁰ instituted before the court as a *pourvoi en cassation*, concerned the rights of a bona fide subsequent purchaser who had no notice of prior agreement of sale. It also involved the question of unilateral and bilateral contracts in French law and the importance of the deposit of a document with a *notaire*. One Dr. Muruguessin executed a document in favor of a Ramadasse Padeatchy on April 27, 1958, reciting that the former understood to sell and convey certain specified properties to the latter for Rs. 8,650 as agreed to between them, of which an advance of Rs. 700 was paid on that day by the vendee to the vendor. The document was signed by Dr. Muruguessin and two witnesses, although Ramadasse was not a signatory. On May 12, 1958, the vendee Ramadasse, as required by the *Code Civil*, deposited the document before a *notaire*, the deed being formally transcribed on May 16, 1958. Two days earlier, i.e., on May 14, 1958, Dr. Murguessin had sold the same properties to one Sadasivam Pillay for Rs. 10,000, the documents being registered on May 21, 1958, and transcribed on May 24, 1958. Ramadasse instituted a writ of *distraction* on June 16, 1958, to annul the sale to Sadasivam. The *Tribunal Premiere de Instance* reasoned that the agreement relied upon by Ramadasse was a unilateral agreement in French law and, in the absence of acceptance, created no right in the properties. On appeal the *Tribunal Superieur d'Appeal* reversed the holding of the first court for two reasons. First, if the document were a unilateral private deed of sale, it need not be in double or multiple original. Second, the document itself evidenced an advance payment which was acknowledged by the vendor. This constituted an acceptance, rendering this unilateral agreement a full sale; thus its transcription was anterior to the second deed. The aggrieved party, Sadasivam, appealed to the High Court, exercising the powers of *Cour de Cassation*.

The High Court, speaking through Justice Anantanarayanan, was convinced that several vitally relevant provisions of the French procedural law were neither cited or pressed by parties nor considered by the superior court; and that the appeal itself was somewhat restricted in scope and in the manner of its presentation. The learned judge analyzed the problem in order to remit the appeal for *de novo* disposal.

L.R. (Mad.) 267 (dealing with articles 728, 729, 748, 774 and 873 of the *Code of Procedure Civil*); Nadessin v. Bharathy Mills, [1964] 2 Indian L.R. (Mad.) 468 (dealing with article 1319 of the *Code Civil*).

80. [1964] 2 Indian L.R. (Mad.) 471. For a strikingly similar Louisiana case see *Allen v. Ponchatonla Beach Development Corp.*, 137 So. 2d 649 (La. Ct. App. 1962); Comment, 23 LA. L. REV. 133 (1962).

[O]ur powers as a *Court of Cassation* to entertain any ground of law, even though such ground of law might not have been dealt with by the Superior Court of Law are not in dispute. . . . [T]he very situation presented by the facts involves those grounds, and they cannot be considered exterior to the facts in any sense.⁸¹

Under article 1589 of the French Civil Code, "A promise to sell is equivalent to sale when there is mutual agreement between the parties as to the object and the price." Such a promise is not subject to any particular written form; it could even be an oral transaction. Since under French law a sale in actuality is not required, a promise of sale alone would prevent a vendor from dealing afresh with the property.

The situation could be interpreted upon two broad alternatives: "Either we have here only a valid promise of sale, though it may be coupled with receipt of an advance by the vendor, and no sale in actuality, or we have a complete and valid sale."⁸² In the former situation, the judge said, the crucial question of whether or not a vendee like the appellant (if he be a vendee for valuable consideration without information of the earlier contract) would be allowed to validly purchase, as in Indian law, must be determined by the Superior Court of Appeal. But if the document were itself a complete sale, the situation would appear to be heavily in favor of the respondent, since French law does not require any particular form of conveyance to effect a sale of immovable property. Articles 1102 and 1103 of the *Code Civil* make it clear beyond doubt that the document was really bilateral in character because the contracting parties, as evidenced by the document, were under an obligation to each other. Such a private bilateral document of sale, the French authorities specify, must be in as many originals as there are parties. It is essential that a bilateral document of sale should not be a single document signed by one party alone (as it was in this case), but should at least be in duplicate (or in multiple) in order to make the vendee also a party thereto. Such a document becomes effective not simply on deposit with the *notaire* (as was done in this case); it is necessary for the parties to deposit it jointly.

Reducing these observations in the form of four points,⁸³ the court remitted the case for fresh disposal with the following instructions:

[T]he Tribunal Supérieur d'Appeal should not merely analyse the relevant provisions of the French Code Civil and Articles and

81. [1964] 2 Indian L.R. (Mad.) at 473.

82. *Id.* at 474.

83. *Id.* at 475.

commentaries of standard authors as Daloz, as well as the Jurisprudence on the subject, but should also furnish its conclusions in the form of a reasoned judgment, giving the process of reasoning and with a discussion of the authorities cited. . . . The Superior Court of Appeal which disposes of this appeal should be composed differently (*autrement compose*) from the Court which originally disposed of the appeal under the French law.⁸⁴

The learned judge correctly appreciated the central problem of the case relating to the rights of a bona fide subsequent purchaser who had no notice of prior sale in French law. In a situation of an executory agreement of sale in Indian law, which is parallel to French promise of sale but no sale in actuality, a vendee for valuable consideration without notice of the earlier contract could assert his right against any prior purchaser. Also, the notary (who has no correspondent under the common law) plays an important role in French law in that he has almost virtual control over documents relating to marriages, contracts, succession, conveyances and other written deeds; whereas his counterpart in India—the public notary or registrar—has a less active role.

2. *Code du Travail*⁸⁵

The opinion of Mr. Justice Ramakrishnan in *Anglo-French Textiles v. Pondicherry*⁸⁶ throws considerable light on French labor law.⁸⁷ Under the French Labor Code, enacted by the French National Assembly in 1952 for application to the overseas French territories, the parties to a collective dispute are required to notify the Inspector of Labor and Social Legislation, who thereupon can assist the parties in arriving at a settlement as provided in section 209 of that code. If this procedure is unsuccessful, the conciliation procedure must be applied. The dispute is brought before the Labor Advisory Board either at the request of one of the parties to the dispute, or in the absence of such a request, on the initiative of the chairman of the Board. The Board is empowered to delegate its duty to the Special Conciliation Board, composed of equal numbers of management and labor representatives, and under the chairmanship of the Inspector of Labor and Social Legislation. The conciliation agreement, if accepted and signed by the parties, becomes immediately enforceable. If this is also unsuccessful,

84. *Id.* at 475-76.

85. *The Code du Travail* is a collection of various statutes.

86. [1964] 1 Indian L.R. (Mad.) 771.

87. For details see W. MCPHERSON & F. MEYERS, *THE FRENCH LABOR COURTS* (1966); Reynard, *Collective Bargaining and Industrial Peace in France*, 1 AM. J. COMP. L. 215 (1952).

section 210 takes effect and the recommendation procedure provided by the code is pursued as detailed in section 211. The Labor Conciliation Board makes a record of non-conciliation (described as *proces-verbal*): the official report of proceedings or minutes. In substance this is a reference agreed to by the contesting parties, submitting the dispute for decision to an Expert. The reference must be prepared by the Conciliation Board and signed by all the parties, (preferably) stating the subject matter of the dispute and the points to be submitted. The parties have an option to appoint an Expert of their choice within four days; failing this, the Chief Officer of the territory (the Chief Commissioner) is required to appoint an Expert but has no power to formulate the dispute. The Expert is required to give his opinion on all matters set out in the record on *proces-verbal*, including all incidental considerations which might have a bearing on the dispute.

In the present case (on the construction of *proces-verbal*) the court held that the collective dispute referred to the Expert for his recommendation concerned the conditions of work and wages of spinners in the spinning department and not of other workers in that department. Further, as the matters had been clarified by defining the exact scope of the terms of the referral there was no need to quash the notification of the Chief Officer by certiorari or to give any direction by way of mandamus.

This decision is significant in that it makes an elaborate analysis of the importance of *proces-verbal* in French labor law⁸⁸—a comparable counterpart of which it is difficult to identify in Indian labor law.⁸⁹

3. *Code Penal and Code d'Instruction Criminelle*⁹⁰

The French *Code Penal* divides offenses according to their gravity (distinguishable by the maximum penalties): *crimes* (major crimes), triable in the *cour d'assizes* (composed of three judges and a jury); *delits* (minor crimes), triable in the *tribunal correctionnel* (composed

88. See [1964] 1 Indian L.R. (Mad.) at 776-79.

89. See A. AGGARWAL, INDIAN AND AMERICAN LABOR LEGISLATION AND PRACTICES *passim* (1966).

90. In 1958, the *Code de Procedure Penal* was adopted, replacing the former *Code d'Instruction Criminelle* (enacted in its original form in 1808). Since the old code is applicable to Pondicherry, our description ignores the subsequent reforms. For a discussion of later changes see FRENCH CODE OF CRIMINAL PROCEDURE (G. Kock transl. 1964); Anton, *L'Instruction Criminelle*, 9 AM. J. COMP. L. 441 (1960); Patey, *Recent Reforms in French Criminal Law and Procedure*, 9 INT'L & COMP. L.Q. 383 (1960); Pugh, *Administration of Criminal Justice in France: An Introductory Analysis*, 23 LA. L. REV. 1 (1962); Vouin, *The Privilege Against Self-Incrimination Under Foreign Law: C. France*, 51 J. CRIM. L.C. & P.S. 169 (1960).

of three judges); and *contraventions* (petty offenses), triable by the *tribunal de police* (presided over by a single justice).⁹¹

The divergence between the French and Indian systems lies more in techniques for discovering truth than in the fundamental question of what constitutes anti-social behavior. The French system is predominantly an inquisitorial with some flair of an accusatorial system.⁹² *Police judiciaire*, consisting mainly of *procureurs de la Republique* (prosecuting attorneys), *juges d'instructions* (investigating magistrates), and *juges de paix* (justices of the peace), combines the functions of investigation and prosecution. Investigation by the *juge d'instruction* is mandatory in cases involving *crimes*. He undertakes the investigation, except in *flagrant delit*, either on the report of the *procureur* or at the request of the injured party. (In a case of *flagrant delit*, the *procureur* may himself initiate a judicial investigation, normally conducted by a *juge d'instruction*.)

The *procureur* exercises two roles. First, in the case of *delits* he may either forward the case to a *juge d'instruction* or investigate it for trial himself. And, second, before the *tribunal de premiere instance* and upon presentation of the case, he acts as a public prosecutor.⁹³ When a matter reaches *juge d'instruction*, he rigorously investigates it. On the basis of all data gathered, he refers the *dossier* to *procureur general* for proceedings in the *chambre de mises en accusation*. The *chambre* sits *in camera* and decides whether or not the case should be committed to the *cour d'assizes*. (The *cour d'assizes* has jurisdiction only over persons who have been indicted for a crime by the *chambre*.) The *chambre* may nullify the entire proceedings or, if necessary, can ask for a supplemental inquiry.

The committal proceedings⁹⁴ in the magistrate's court in India are to

91. FRENCH PENAL CODE art. 1 (J. Moreau & G. Mueller transl. 1960).

92. See Ploscowe, *Development of Inquisitorial and Accusatorial Elements in French Procedure*, 23 J. CRIM. L. 372 (1932). In the Hindu or the Muhammedan system, operative before the advent of the British, the judge played a more active role in eliciting the truth as in the continental systems. See M. SETALVAD, *supra* note 4, at 45.

93. For details see Freed, *Aspects of French Criminal Procedure*, 17 LA. L. REV. 730 (1957); Grzybowski, *The Criminal Law of France*, in WASHINGTON FOREIGN LAW SOCIETY, *ESSAYS ON FRENCH LAW* 47 (1958); Hamson, *The Prosecution of the Accused—English and French Legal Methods*, 1955 CRIM. L. REV. (Eng.) 272; Keedy, *The Preliminary Investigation of Crime in France*, 88 U. PA. L. REV. 385, 692, 915 (1940); Wright, *French Criminal Procedure*, 44 L.Q. REV. 324 (1928); 45 L.Q. REV. 92 (1929).

94. See observations of Anantanarayanan, J., in *In re Rethinaswamy*, [1967] 1 Indian L.R. (Mad.) 226, 233. The accused has no constitutional guarantee to a trial by jury, and the mode of trial is determined by the trial judge and the prosecution. Code of Criminal Procedure, 1898, § 269, 3 INDIA CODE pt. 4 (1956).

some extent inquisitorial in nature and resemble the French process.⁹⁵ Only after the commencement of the trial does the process resemble an adversary proceeding. Unlike the Indian system, the *chambre* performs the dual role of investigation and adjudication.

The *dossier* (the ensemble of extensive and painstakingly prepared reports by both the police and the *juge d'instruction*) enables the presiding judge to evaluate the statements given in open court by witnesses and the defendant. He is then in a position to question them effectively and to discern any contradictions. Broad and intricately developed evidentiary rules of exclusion as to hearsay and opinion testimony, so firmly imbedded in Anglo-Indian criminal jurisprudence, are generally quite unknown in the French counterpart.⁹⁶ Unfettered by formalities, all material evidence which contributes to discovery of the truth is admissible in France. Unlike the Indian procedure, statements made to a police officer are admissible in evidence,⁹⁷ since both the judge and prosecutor represent the same arm of the judiciary.

In contradistinction to the Indian procedure, there is a virtual absence of cross-examination in the French system. An uninterrupted spontaneous narration, the French believe, offers a far more accurate picture of the knowledge of the witness than one elicited by cross-examination. In the event of any discrepancy between the accused's statements and those of the witnesses, the judge is likely to resort to a *confrontation*. He then re-interrogates the accused. This interrogation, handled exclusively by the presiding judge, might be regarded as a partial substitute for cross-examination. The active clarifying function of the judge under the Indian procedural system is a typically "inquisitorial" feature as opposed to the "accusatorial" nature of the proceedings under the adversary system.

Civil party intervention in criminal proceedings is another characteristic feature of the French procedure.⁹⁸ By this procedural mechanism, called *procedure d'adhesion*, a party who has suffered damage through an offense may instead of filing a separate civil action, interpose in the criminal proceeding against the delinquent party and de-

95. See Code of Criminal Procedure, 1898, § 173, 3 INDIA CODE pt. 4 (1956).

96. See O. BODINGTON, AN OUTLINE OF THE FRENCH LAW OF EVIDENCE 122 (1904).

97. For an excellent analysis of the law relating to confessions in India and France see Comment, *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 1106-15 (1966).

98. For general discussion of civil party and civil action see Howard, *Compensation in French Criminal Procedure*, 21 MODERN L. REV. 387 (1958); Larguier, *The Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV. 687 (1965); Pugh, *supra* note 90, at 12 *et seq.*; Vouin, *The Protection of the Accused in French Criminal Procedure*, 5 INT'L & COMP. L.Q. 1, 7, 11 (1956).

mand reparation. If the judgment is one of acquittal, the court may, in appropriate circumstances, award damages to the accused for unjustified and reckless prosecution by the *partie civile*. A verdict of guilty is an automatic finding of civil liability against the accused and the amount of damages is then decided in a subsequent hearing. This mechanism, which not only saves time and money but also takes from the victim the great burden of personally initiating a separate civil action, has no counterpart in India or in the United States.

From the *tribunal de premiere instance* (the court of the first instance) an appeal lies to *cour d'appel* in matters relating to *delits* and *contraventions*. On the ground of violation or wrong application of the law, or on the ground that the lower court transgressed its jurisdiction, the accused may secure review in the *chambre criminelle de la cour de cassation*. *Pourvoi en cassation* is the most common of these. The court can only quash the decision and remand it for retrial in a court of co-ordinate rank; unlike the Anglo-Indian practice, in France a new trial cannot be held in the court which originally decided the case. The driving consideration is that in order to safeguard the interest of the accused the court trying the case anew should be one that is free from any predisposition. Remedy to *cour de cassation*, in cases of *crime*, is available in two stages. First, the accused can question the committal order of the *chambre de mises en cassation* itself. Second, he can assail the conviction by the *tribunal criminal cour d'assizes* on a question of law. The *procureur* may appeal from an order of acquittal, but it is for the sole purpose of safeguarding principles of law and not to prejudice the acquittal of the accused.⁹⁹

With this abbreviated reference to some of the salient features of the French criminal law, several cases in which the Madras High Court was called upon to decide appeals *pourvoi en cassation* are examined below.

In *Andonissamy v. Marie*¹⁰⁰ the court was to determine whether a conviction for theft was justified under the French law. The appellant Andonissamy, in October 1959, by a written agreement, undertook to

99. Thus in *Natesa Pillai v. Public Prosecutor*, [1967] M.L.J. (Cri.) 124, the Madras High Court correctly held that it had no jurisdiction to interfere with the order of acquittal at the sole instance of the *partie civile* in the exercise of its power of cassation. If the party who moves the *Cour de Cassation* in appeal is the public prosecutor, the entire decision can be at large and the *partie civile* may also agitate his rights within the forum of such an appeal. In the case decided as a corrective matter, the acquittal of the accused will leave open to the *partie civile* a right to pursue his civil remedy in independent civil proceedings, unlike in the case of an acquittal by the Court of Assizes of an accused charged with a major crime.

100. [1964] 1 Indian L.R. (Mad.) 915.

hold the property of a convent on lease subject to the payment of a certain quantity of harvest. In 1960, he demanded the original copy of the agreement to make some entries with regard to rent; and the document was given to him by the head of the convent. The appellant, it was alleged, did not return the valuable document and misappropriated the same. He was charged under articles 379, 401, and 463 of the *Code Penal*, convicted, and sentenced by the court of the first instance to one month's imprisonment, which was modified to a probationary period of five years by the Superior Court of Appeal.

The High Court, on appeal of the question of the propriety of the conviction and sentence, held the convictions under articles 379 and 401 misconceived. Article 379 reads:

Any person who fraudulently takes away anything of which he is not the owner, is guilty of larceny.

Relying on Dalloz's *Reportoire Pratique* that *soustraction* is the fraudulent abstraction or taking away referred to in article 379, Justice Anantanarayanan held that French law, like Indian law, contemplated that the abstraction or taking away should be without the knowledge and consent of the owner in order to render it fraudulent. The act of removal per se does not constitute theft, although the offense of criminal misappropriation might be involved in the subsequent dishonest conversion of the object removed or its destruction, if such were detrimental to the true owner. Hence, on the established facts, the justice found that the present document was taken with the "knowledge, consent and willingness" of the complainant and thus was not a theft either under French law or Indian law. Since the conviction was based upon an erroneous application of the law to the facts, the court, by virtue of its powers as *Cour de Cassation*, sent the case back for rehearing and fresh judicial disposal by a court constituted otherwise than the original appeals court.

The court's observation that the French provision of larceny is similar to that of the Indian Penal Code¹⁰¹ is open to question. The French provision may perhaps be better comparable with its English counterpart. The Indian law of theft is different from the concept of larceny as understood in the English law. As Setalvad observes:

The Indian Code emphasises the possession of the person from whom property is stolen, whereas the English definition is concerned with the owner of the property. In India a theft may be committed though the person from whom the thing is taken has

101. Indian Penal Code, 1860, § 379.

no title to it, but in the case of larceny the owner should have some general or special ownership in it.¹⁰²

It is interesting to note that while the French judges had no difficulty in classifying theft of electric current as larceny under the French Penal Code, recourse in India has been sought under a separate statute.¹⁰³

The appeal in *In re Rethinaswamy*,¹⁰⁴ brought as *pourvoi en cassation* (and also under section 10 of the Pondicherry Administration Act, 1962), involved the murder of a young man by a group of smugglers. The deceased had acted as an informant to the customs authorities. By way of revenge, the smugglers conspired to abduct and injure him. The informant was kidnapped by the accused; he was mercilessly beaten near the seashore at Karikal and, with the assistance of some fishermen, his body was dropped into the sea.

While there was acceptable evidence concerning the abduction of the victim, the actual circumstances of the murder were "shrouded in an almost impenetrable obscurity." There was no independent evidence corroborating the charge of murder against any appellant; there were only the unreliable and mutually incriminating statements of several co-accused. The nature and the probative value of the testimony of the accomplice (who alone gave a clue as to who committed the major offense) came to be considered. As in English and Indian law, the accomplice's evidence is worthless in French law unless it is corroborated in material particulars by independent testimony.¹⁰⁵ Insofar as the *tribunal criminel* passed the maximum sentence of twenty years imprisonment on all the accused under article 344 of the *Code Penal* based on the accomplice's evidence, the High Court, speaking through Justice Anantanarayanan, held that there was no evidence to convict the accused on the capital charge and consequently reduced the sentence under article 341 to that for kidnapping alone.

Although the opinion has a marked meticulousness in its analysis of the many provisions of French law and their application to the

102. M. SETALVAD, *THE COMMON LAW IN INDIA* 134 (1960). See also R. RANCHHODDAS & D. THAKORE, *THE LAW OF CRIMES* 220 (21st ed. 1966).

103. Electricity Act, 1910, § 39. See also *Avatar Singh v. State of Punjab*, [1965] All India Rptr. (S.Ct.) 666, for a summation of rival contentions as to whether dishonest abstraction of electricity is an offense under the Indian Penal Code, 1860, § 378 or against the Electricity Act, 1910.

104. [1967] 1 Indian L.R. (Mad.) 226.

105. *Id.* at 236. The court relied upon 12 DALOZ, *REPertoire PRATIQUE* para. 102 (no date cited by the court).

present fact situation, its following obiter observations about the role of the jury in France are not wholly supportable.

As in the system of jurisprudence that has been administered in this country, from the British period, the jury would appear to be the sovereign and exclusive judges of fact, even under the French processual law.¹⁰⁶

In fact, the French jury is quite unlike the jury known to common law countries; it sits more in the capacity of lay judges than as triers of facts. The jurors deliberate and vote with the judges on both the question of guilt and the appropriate penalty.¹⁰⁷ The absolute separation of fact and law has worked badly in France.

*In re Alamelou*¹⁰⁸ offers an interesting situation where the accused's acquittal was a fortuitous circumstance. The appellant, convicted by the *cour d'assizes* of Karikal under article 300 of the *Code Penal* for having murdered her infant child born out of an allegedly promiscuous relationship, was sentenced to solitary confinement for five years. The appellant contended that either she gave birth to a dead child or the child was alive at the moment of delivery, but since she was alone at the time of delivery, it probably was the absence of any assistance that led to the death of the child. The unusual feature of the case was that the accused decided to withdraw her appeal proffered to the *Cour de Cassation* under a procedure known as *desistement* (available to parties except in matters involving grave crime). The public prosecutor drew the court's attention to the fact that *desistement* was improper in this case, since the conviction was for *grande crime*. The High Court heard the appeal and, on a perusal of the evidence, concluded:

We are unable to find any such evidence or even a shred of such testimony, which would support the conviction. . . . We cannot rule out the possibility that the child might have met with some accident at delivery It is a cardinal principle of all systems of criminal jurisprudence, including French criminal jurisprudence, that suspicion cannot displace proof, and that guilt cannot be inferred by guesswork of any kind We find from a perusal of article 694 of Dalloz *Reportoire Pratique*, volume II, that our powers in *cassation*, even apart from section 10 of the Pondicherry

106. [1967] 1 Indian L.R. (Mad.) at 232.

107. See generally Henry, *The Story of the Criminal Jury in the Civil Law and in the Common Law*, in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP McMURRAY 135 (M. Radin & A. Kidd ed. 1935); Ploscowe, *supra* note 92; Ploscowe, *Jury Trial in France*, 29 MINN. L. REV. 376 (1945); Dunbar, *The French Criminal Jury*, 3 U. OF TASMANIA L. REV. 68 (1968).

108. [1964] 2 Indian L.R. (Mad.) 811.

Administration Act, are wide enough to justify interference in appeal, where a conviction is based on material which is totally destitute of the legal elements of the crime.¹⁰⁹

Had her appeal been allowed to be withdrawn, the accused would have missed the benefit of acquittal.

*In re Ramaswami*¹¹⁰ dealt with an interesting problem regarding the application of French law. The appellant was alleged to have fabricated and forged certain bills, signatures and departmental sales during 1956 in order to obtain certain import quota rights from the Government. The investigation having been carried out in conformity with the provisions of the French Criminal Procedure Code, a prima facie case for the several offenses of fabrication and forgery was made out by the *tribunal criminel* at Karikal against the accused. Conforming to the French law, on November 20, 1961, the accused declared his intention to appeal to the *Cour de Cassation* at Paris. Following the de jure transfer of the former French Establishments to the Indian Union and the conferment on the Madras High Court of the powers of the *Cour de Cassation*, the appeal came to be heard by Mr. Justice Ramakrishnan.

The appellant contended that after the extension of the Constitution to Pondicherry, which applied from the date of the de jure transfer (*i.e.*, August 1, 1962), only the Indian Penal Code and the Code of Criminal Procedure should have been applied to his trial, and not the provisions of the French Code of Criminal Procedure or the French Penal Code. Article 21 of the Indian Constitution states that no person shall be deprived of his life or personal liberty except according to procedure established by law; article 13(3) defines "law" as including any ordinance, order, by-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

The court negated the contention of the appellant. It is a well-settled principle of international law, the court observed, that a foreign settlement, obtained in an inhabited country by conquest or cession, stands in a different position than a settlement made by colonizing an uninhabited country. In the latter case the immigrants carry with them the laws of the country of their origin, there being, of course, no *lex loci*. In the former, the native law of the country continues until the Crown or the legislature changes it.¹¹¹ This principle had been carried

109. *Id.* at 812.

110. [1965] 2 M.L.J. 332.

111. *Id.* at 334, quoting *Mayor of Lyons v. East Indian Co.*, [1836] M.I.A. 175.

out successively in section 5¹¹² of the French Establishments (Administration) Order, 1954, section 4¹¹³ of the Pondicherry (Administration) Act, 1962, and section 4(2)(d)¹¹⁴ of the Pondicherry (Laws) Regulation, 1963. By the force of these repealing and saving provisions, the pre-existing French law had become as much "the established law" in force in the territory of India within the meaning of article 13(3)(a) of the Constitution of India as any other law of the Indian Union (such as the Criminal Procedure Code or the Penal Code). That the law thus given validity was originally a law in force in what was foreign territory would not affect the question of its being an established law in the territory newly added to the Indian Union.

The pre-existing French law, preserved for enforcement in the newly added French territories, was not ad hoc legislation designed to meet a particular contingency or a particular set of persons. Instead, it was law, firmly and well established in the territory, having general acceptance under the principles of international law. The citizens of that territory had, therefore, a vested right to be governed by the French law (*i.e.*, the French Criminal Procedure and French Penal Code) until such time as competent authority introduced new patterns of legislation.

The modified provision of the *Code de Procedure Penale*, which became effective in France and other French territories after the date when the former French possessions in India came under the de facto jurisdiction of the Government of India in 1954, and before the de jure transfer of jurisdiction in 1962, would have no application in this case. Here, the case was heard after the de facto transfer in 1954 (and before the de jure transfer in 1962), the investigation by the police in a criminal case, and other processes, and a committal had been made

112. The section reads:

All laws in force in the French Establishments or any part thereof immediately before the commencement of this Order and not repealed by paragraph 6 of the French Establishments (Application of Laws) Order, 1954, shall continue to be in force until repealed or amended by a competent authority.

113. It contains an identical provision to section 5, *supra* note 112, providing for the continuance of the pre-existing laws until amended or repealed by a competent legislature or authority.

114. The section reads:

(1) Any law in force in Pondicherry or any area thereof corresponding to any Act referred to in section 3 shall stand repealed as from the coming into force of such Act in Pondicherry; and the laws specified in the second schedule are hereby repealed.

(2) Nothing in subsection (1) shall effect —

(3) Any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid.

for trial before the *tribunal criminel*. It is not the law that after the extension of the Constitution of India to Pondicherry, only the Indian Criminal Procedure and Penal Code and not French law should be applied at the trial of the accused in such a case.

Doctrinally, this is a sound analysis of the legal situation, but it would be appropriate to draw the attention of the legislature to a problem unfolded by this decision. The continuance of pre-existing laws,¹¹⁵ especially when their anomalies have been removed in the country of their origin, should be accompanied by appropriate revision. A mechanical continuation has at times resulted in anachronistic results.¹¹⁶

V. CONCLUDING REMARKS

It is evident from the foregoing discussion that had the practice of sending a civilian judge-advocate (begun by the East India Company) been continued there would have been a greater possibility of reception of civilian elements in Indian jurisprudence. The statutory embodiment of common law principles in various enactments during the nineteenth century further minimized the reception of other juridical thinking into the corpus of Indian law through judicial interpretation. In addition, the relative absence of the teaching of Roman law at Indian law schools inhibited a proper influx of continental jurisprudence.

The pervasive influence of common law tradition has thus dwarfed the civilian impact. Nevertheless, after the annexation of the former Portuguese and French possessions in the Union of India, civil law assumed a new importance. With a varying degree of modification, civil law principles have been preserved in these areas, but with the ultimate goal of gradually fusing them with the Indian common law. One of the major difficulties confronting the courts is an unfamiliarity with the structure and fabric of the civil law system, although efforts at unification have not been without merit.¹¹⁷ The presence of alien

115. For changes in the French criminal procedure, after the annexation of Pondicherry to Indian Union, see the materials cited in note 90 *supra*.

116. In India the liability of Government in torts continued to be governed by the principles of old English law based on the immunity of Crown even after the passing of the Crown Proceedings Act, 1947, in England. The situation has been recently corrected by the legislature.

117. The Madras High Court, exercising the powers of the *Cour de Cassation*, has tried to synthesize both systems. The French judgments are highly compressed in form as the codes are the fundamental source of law. The Madras High Court has adopted the technique of giving a fairly elaborate judgment interpreting the provisions of the code

legal culture within a predominantly common law country is likely to present many conflicts of laws problems to lawyers and jurists alike.

There is, therefore, a new need to utilize comparative legal studies in order to familiarize Indian lawyers with some of the more important areas of civil law. The approach should be to emphasize the advantages inherent in different methods and solutions rather than superficial variations based on diverse historical developments. The study of the institutions or phenomena of the civil law (or any other legal order), as compared with those of Indian law, is necessary in order to evaluate their respective merits. Parallels to the Indian situation are to be found in various countries throughout the world (for example: Quebec, Canada; Louisiana, United States; South Africa, Africa). In many of these jurisdictions the enclaves of civil law have been permitted to exist or flourish as separate legal cultures. In the period of assimilation of the former Portuguese and French legal systems into the Indian legal structure, these parallels indicate that with diligence a harmonious relationship can be maintained for the time being. While it is clear that the small size of these former foreign enclaves and the common ethnology with the rest of India leaves little justification for maintaining them as separate legal and judicial administrations, it is also important to remember that until the task of assimilation is complete the Indian government must take great pains to appreciate the civil law and the different conditions it has produced within these areas. Such a comparative law study would greatly assist the extraction of the best from other legal orders and contribute to a better understanding of contemporary problems.

and also giving what is known in French jurisprudence as the *motif* for its decision. Contrary to French tradition, which is marked rather by a comparative disregard of precedents, the court has in true common law fashion accorded precedential value to the judgments of the *Cour de Cassation*.