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Political Transition in Post-Colonial Societies

Goa in Perspective*

Most post-colonial and post-modernist formulation of nations-states, certainly those that emerged with the collapse and shrinking of western colonial empires in Asia and Africa, mid twentieth-century onwards, necessarily retrospect on imperialism in an attempt to draw out the asymmetrical relationship of interdependence, past and present, between the materially advanced colonizing powers and themselves especially in the former's hegemonic ascendancy. These articulations, discursive and at times engagingly political, contextualize the multidimensional and ever growing complexities within colonial societies in their engagement with the construction of a cohesive political community.

Historically, these societies were not devoid of complexities as colonial dominions, but in recent times there has emerged what François Godement (1997) calls the « Asian Renaissance », which poses a fundamental challenge to Eurocentric, monolithic and unitary conceptions of state, nationalism and « rational » politico-administrative systems that have been operative here ever since they were negotiated in place in the post-colonial polity.

Most accounts of transitions inextricably emphasize the rise and fall of empires British, Spanish… and I may add Portuguese, clearly falling short of placing the process in a wider contemporary context (Low 1991). « The eclipse of empire is seen to constitute a major development in the history of the world », virtually marginalising the establishment of a new international system and the intense and at times potentially explosive and fragile and continuous negotiations and revisions that went into the making of « new political orders in which the greater part of humanity lives » (Low 1991). The new political orders entrenched in a colonial past had not only to redefine society to create a space for the varied culture world of its people, asserting diversity, but at times they had to engage with a problematique which was distinctly a formulation of imperialism. A problematique that involved the occupation and subsequent liberation at different time periods of fragments of the same nation, by multiple colonial powers, framing them

in diverse histories, systems, processes and spaces. A problematique that is the operative point of conflict, in post-colonial societies, even to this day.

This paper is a modest attempt to encapsulate the problems surrounding the liberation, transition and integration of smaller, diversely governed, former colonial pockets, into India. Goa, a former Portuguese possession is offered as a symptomatic case in point, embodying the empirical vicissitudes of transition, with a particularistic emphasis on politico-legal problems, in the aftermath of the end of Portuguese empire and the evolution of a new polity. The merit of such an exercise, besides analyzing the political character of the state marked by the conflictive co-existence of opposing systems – dictatorial and democratic – lies in the fact that it implicitly attempts to emphasize the limitations of colonial historiographies and their epistemic approaches. These approaches make a fundamentally debatable assumption that the transition and integration of smaller, former colonial encrustation, in India, was without substantive problems in the absence of serious armed conflict (as in the case of Portuguese Goa) or smooth transfer of power (as was the case with French Pondicherry on the east coast). This assumption which actually narrows the framework of understanding the dynamics of human politico-cultural encounters, emerges partly owing to perceived critical similarities in the civilizational undercurrents, geo-political and historical settings, socio-cultural, linguistic and religious affinities[1] between India and these smaller territories, apart from the European intellectual preoccupation with « collapse of empire ».

The problems of transition of Goa from a Portuguese colony to an entity within the Indian Union could be structured at three stages within the historical narrative the Integration of Goa into the Indian Union on 19th December 1961 ; the Political Transition from a « highly centralized and autocratic (regime) comparable only to that existing in the pre-war Nazi regime in Germany »[2] to a democratic polity and the co-existence of essentially two ideologically and potentially conflictive systems and the search for a definition of state ; the post-colonial state.

The Integration of Goa

As anti-colonial nationalism took root in Asia and Africa and as India, as an independent political entity came into existence in 1947, with the cessation of the British imperial regime, the issue of Goa's integration became the nodal point of discussions on Indian nationalism and sovereignty. Between 1510 and 1947, colonialism segmented India into multiple imperial possessions. Goa's integration then seemed largely irrelevant to the national freedom movement. But after the French withdrew through diplomatic negotiations by signing the « Treaty of Succession of the French establishments of Pondicherry, Karikal, Mahe and

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1. H.S. CHOPRA (1999) argues that it is debatable to claim difficulties in discussing South Asian and European attempts at regional integration and cooperation even if there may not be similarities in civilizational variables.
2. Dispatch of the American Consulate General, Bombay, to United States Secretary of State, 5, March 1947 : 1-4, State Department Central Files 853.00 / 3-547, as cited in Rubinoff 1998.

Yanam » (*IYIA* 1956), Portugal came under increasing pressure to cede control over its

colonies, which it frantically held, even fourteen years after Indian Independence.

Nationalism itself was considered European in essence. It was argued that the historical experiences of nationalism in Western Europe, the Americas and Russia provided « modular » forms for the construction of post-colonial political systems[3]. The most powerful as well as the most creative results of the nationalist imagination… were posited not on any identity but rather on a *difference* with the « modular » forms of the national society propagated by Europe and the West[4]. European nationalism seemed to inhere in itself an inbuilt logic of extension of state power and therefore colonialism. While Indian nationalism seemed to have been catalyzed on the « form » initiated by the British colonial rule, it had a powerful imaginative and creative dimension. Post-colonial India was disinclined to be a perpetual consumer of modernity and to follow the script of colonial enlightenment and state formation (Chatterjee 1994).

India envisaged into its nationalism the assimilation of all its encrustations in the sub-continent, which it imagined as its sovereign domain. The Portuguese government on the other hand considered its overseas territories as part of the mother country (Portugal), and as indicative of its nomenclature « Portuguese State of India ».

The fundamental points of departure in the definition of the two nationalism – Indian and Portuguese – produced sufficient tensions which could be disaggregated in three attempts at integration of Goa the attempted integration of Goa into the Portuguese Union through constitutional amendment and enlisting it as a « Province » of Portugal ; the attempted integration of Goa into the Indian Union through diplomacy and rubrics of the United Nations intervention ; the attempted integration of Goa, into the Indian Union through armed intervention.

The attempted integration of Goa into the Portuguese Union

Goa was historically a part of a number of state formations in medieval India, prominently, the Hindu Vijayanagar empire in 14th century, the Muslim Bahamani kingdom, whose disintegration made way for Yusuf Adil Shah to extend the Bijapur Sultanate over Goa, until the invasion of Goa, in 1510 by Afonso de Albuquerque. Although the Portuguese conquered by force, their conquest gained part legitimacy since they were invited to oust the Mohammedans « whose dominion and acts of oppression weighed heavily on local populations eager for liberation from their yoke » (Salazar 1956 2). Progressively though as they contravened the indigenous mores through forced conversions to Christianity, demolished Hindu temples and, in their most bitter act of repression, induced the Inquisition, between 1560-1814, the Portuguese had completely alienated the native population.

3. Benedict Anderson as cited *in* CHATTERJEE 1994.
4. This is the basic point of departure between Benedict Anderson and Partha Chatterjee in defining nations as imagined into existence.

Unlike the British in India[5] and Uganda[6], the Portuguese did not follow the policy of assuagement. And even as the process of consolidation of its possessions in India (Goa) was on, in the form of addition of new-conquests, by 18th Century the Portuguese empire was already on the decline. In the post Second World War scenario, when the grandiose nomenclature of « Portuguese State of India » could be irreducibly defined in terms of its possessions of Goa Daman Diu, Dadra and Nagar Haveli, Portugal was under tremendous pressure especially from its Western allies, against the backdrop of the Charter of the United Nations which categorically rejected colonialism and had solemnly affirmed the right of subject peoples to independence[7]. Without ceding Goa and giving up its colonies, the Portuguese membership of the United Nations would be in jeopardy. Portugal, therefore, sought complete integration of its overseas colonies by incorporating the Colonial Act of 1930 into the Portuguese Constitution, and attempted a virtual creolization of Goa as a Portuguese « Province »[8].

In so doing, Oliveira Salazar, the Portuguese dictator, argued that colonialism as a thesis did not augur for Goa, since it necessarily engaged an economic matrix of benefit for the colonising power ; discrimination between citizens and subjects, especially difference in rights, and political or military advantage. « Financially, Goa has always been a burden on the metropolitan treasury […] From the economic point of view neither the metropolitan people nor the metropolitan capital [Portugal] exploit Goa […] the Goans enjoy all rights and have access to all posts » (Salazar 1956 8).

Politically, Salazar argued, Goa was an integral part of the Portuguese nation with Goans participating in government formation in Portugal on the basis of equality with Portuguese nationals. Moreover, Goans, Salazar projected, had no wish to be freed from Portuguese sovereignty owing to their patriotism and for reasons of their own interest (*ibid.* 9). Hence the Portuguese Government was morally and juridically unable to negotiate the cessation of Goa and was duty bound to defend it. Effectively, therefore, Portuguese identified loss of empire with contraction of dominion, power, national pride and stroke of self flagellation, little realising that the process (of decolonization) could not be halted or reversed […] It was only possible to secure reasonable delay but clearly the pace was determined by nationalist feeling and development of political consciousness within the territory…[9]

The attempted integration of Goa into the Indian Union through diplomacy

5. The British were quick to assuage peasant uprisings in Champaran (1917) and Bardoli (1928), in India.
6. Here the British reacted to the murder of Chief Minister and riots against rural rent restriction act by democratising local councils and reforms in Uganda's cotton and coffee industries which averted the crisis reaching a flashpoint.
7. Article 73 of the Charter of the United Nations as quoted in Goa and the Charter of the United Nations, Ministry of External Affairs, Government of India, undated.
8. The Ministry of External Affairs, Government of India, termed this change of terminology by the Portuguese (through Law n° 2048, dated 11th June 1951) from « Colonies » to « Province » as unique, among colonial countries, in jugglery of words and quibbling over designation.
9. Sir Norman Brook, British Cabinet Secretary, disclosing the contrasting view held by the British as opposed to the Portuguese, as cited *in* LOW 1991 : 10.

The Indian attempt at the integration of Goa, presumptuous of territorial, socio-cultural, linguistic and religious affinities, right from 1947, had been grounded in a Gandhian logic. Having won its independence largely, if not wholly, through the Gandhian philosophy of *Satyagraha* (commitment to truth and non violence), India had to press for a diplomatic solution for the integration of Goa. India's recognised position as a protagonist of pacifism, anti-colonialism and leader of the Non Aligned Movement (NAM) was at stake if any military solution was pursued towards the Goa issue. Jawaharlal Nehru, the Indian Prime Minister, who dominated Indian foreign policy, was single-handedly responsible for India's prolonged pacifism. The Congress Party and the entire opposition claimed that Nehru's policy, especially that of curtailing Indian *Satyagrahis* (non-violent demonstrators) from marching into Goa and cautioning that such an is act would be presumed to be directed against his own administration, not the Portuguese (Rubinoff 1998), and lack of proactive collaboration with citizen-liberators of Dadra and Nagar Haveli, had demoralised the freedom movement.

Nehru, while working within the rubrics of United Nations diplomacy, argued that the international dimension of the Goa problem constrained a diplomatic solution and invited the Portuguese to do the same and transfer their colonies on the subcontinent to India. The diplomatic attempt was in many ways akin to the unifying tendencies of nations in Europe today. It was a negotiation with the colonial powers to construct various colonial possessions into a single entity called « India ». It was an appeal to reinterpret the meaning of European nationalism and make space for the creation of an Indian nationalism which had inbuilt into it a self effacing logic of withdrawal of European Sovereignties. Political and economic stability and geo-political concerns of India were crucial to this withdrawal.

The Attempted Integration of Goa, into the Indian Union, Through Armed Intervention

After a decade and a half of diplomacy and failure of the US diplomatic intervention on the « Goa Question », and due to widespread uprisings and mobilisations in Goa, by December 1961 the question was not whether violence would be inevitable but how bloodless the use of force by India would be (Fisher 1962 9).

At the Belgrade Conference (September 1961) the African leaders claimed that whatever happens in Goa affects and even makes easier the African revolution. When perceived in the wider perspective of colonialism and the third world, the liberation of Goa had axiomatic dimensions for other colonised countries of Africa and Asia. In Africa the Portuguese empire would collapse the moment Goa became free (Singhal undated). Within the Indian Parliament, Prime Minister Jawaharlal Nehru was under increasing pressure from leaders and political parties to use the military option in asserting Indian sovereignty over its territories. Failure to act would mean a loss of leadership of the Afro-Asian nations and would send a wrong signal to belligerent neighbours like Pakistan and China, who had by now a well established rapprochement with the United States.

The armed action code-named « Operation Vijaya » ruptured the heuristics of diplomacy and finally integrated Goa, Daman and Diu, into

the Indian Union with its liberation after 451 years of Portuguese rule, on 19 December 1961. It marked a turning point in the fortunes of colonialism in Asia and Africa and the definition of a new nationalism in India. It signaled the emergence of a new territorial space, at the end of a prolonged, self conscious search for actualization of a political entity, albeit towards integration into the Indian Union.

But had India, while trying to define its nationalism, sacrificed a foundational moral principle and devotion to Gandhian non violence, which was the cornerstone in the construction of the Indian Nation ? The United States, which was severely critical of Nehru who while being a lifelong disciple of the one of the world's great saints of peace had ordered the invasion of Goa, even claimed it was the first act in a drama which could end with (the United Nation's) death[10]. The barrage of criticism from Europe and America, over the occupation of Goa, surprised and embittered Nehru.

The Indian contestation was that the United States and Britain had refused to persuade Portugal to vacate Goa. Indians inhered a feeling that they were the victim of « imperialism of (manipulated) categories » (Nandy 1990 69) applied by the West, in defining the state. Nehru claimed he derived no satisfaction from the invasion of Goa but « the Portuguese ultimately left no choice open to us »[11]. Nehru's position of using force, after exhausting all peaceful methods, in the consolidation of India's multiple encrustations was solely appreciated by the Communist countries, cially, the USSR, but only as far as Goa got projected as an issue within the larger parameters of the Cold War.

Political Transition and Defining the Character of the State

Problematising the relationship between the transnationality of « the state » and the necessarily localized instantiation of the state in post-colonial societies, in its special character, is an absorbing area of research on the state. Dominantly, western scholarship on state allows for a « particular cultural configuration of "state and civil society" arising from the specific historical experience of Europe to be naturalised and applied universally » (Gupta 1995 376). The point of contestation is its utility in transitional and post-colonial societies. The political transition of Goa from fascist colonial regime to a liberal democratic political order, and for a considerable period, the co-existence of essentially contravening ideological and potentially conflictive systems, instead of being viewed as dysfunctional aspect or « breakdown » of state organisation, provides a point of departure for comprehending how states come to be constructed and represented in post-colonial societies. Underlying this perspective is the liberal assumption that political institutional encounters are events of mutual incorporation of the other's systemic excellences, which favour the sharpening of the essence or potency of one's own political systems and structures. This is at variance with the more cliché representation of Goa as the « Rome of the East », or a dominantly Lusotopic remnant of a society – or according the Marxist

10. *United States Department of State Bulletin* (Washington), XLVI, January 2, 1962 : 145, 149 as cited *in* RUBINOFF 1998 : 76.
11. *New York Times,* 28 December 1961, *in* RUBINOFF : *ibid.*

formulation it is a form created by imperialism to perpetuate its existence in a post-colonial form.

In developing my analysis, I will look at the prevalence of kinds of Portuguese laws in Goa, the process of repeal of Portuguese laws and extension of Indian laws, in the interregnum between the liberation of Goa and initiation of a democratic political process, and the challenges posed to the hegemonic concept of state and bureaucracy due to the conflictive co-existence of contravening legal systems.

The Colonial Legal Structure

Contemporaneous with the takeover of Goa by India, military rule was imposed for a period of six months to facilitate the transfer of power bring normalcy and create conditions for the introduction of a civil administration (Fernandes 1997 1). Prior to the integration of Goa, Daman and Diu, the Portuguese legislative pattern based on the continental system of laws was effective in the territory, at par with the prevailing political, social, economic, juridical and administrative institutions of the system. A cursory glance at the legislative processes and legislation of the Portuguese system, prevalent in Goa in December 1961, would provide a better understanding of the conflictive co-existence.

The entire politico-administrative-legal system was operative within the parameters of the political Constitution of 1933, approved after the national Revolution of May 1926. Essentially a written and rigid constitution in the continental tradition, it contained within its ambit general provisions on composition and constitution of territories of the Portuguese republic[12] and provisions for overseas territories. Others species of legislation which were extended to Portugal and overseas territories included

– *Leis* or *Leis Ordinárias* Laws or ordinary laws enacted by National Assembly in Lisbon, which set guiding principles on matters of national defence, weights, coinage, banks etc.

– *Decretos Leis* decree-laws made by central government under delegated legislation for Portugal or the overseas provinces.

– *Decretos, Regulamentos* and *Diplomas Legislativos Ministeriais* Decrees, regulations, and ministerial legislative diplomas[13].

– *Portarias Ministeriais* Ministerial government notifications were legislative orders issued by overseas minister containing rules regulating some decree / decreelaw or matters of minor importance of his portfolio.

– *Diplomas Legislativos* Of overseas or provincial government were enactment's made under the authority of governor general or governors on subjects pertaining to provinces.

– *Portarias* were Government Notifications issued in exercise of executive functions.

12. Including fundamental rights and guarantees, and their restriction in the national interest, public and private domain, defence, political organisation of state, legislative, executive and juridical functioning of the state. Directive principles of state policy, family, religious, economic, financial, tax and administrative matters.
13. Decree was a law made by one or more ministers on matters pertaining to his own portfolio and would be signed by the prime minister and promulgated by the President. Regulations were rules for the good execution of laws or decrees-laws and decrees. The legislative ministerial diplomas were laws made by overseas minister with previous approval of the Cabinet or under urgent circumstances

The entire gamut of Portuguese legislation was fully represented in this territory on December 1961, the date of integration. Illustrative of these law were

(i) Constitutional law, Public administration & judicial laws[14].

(ii) Penal and Penal procedure laws were contained in Penal Code of 1886 and the Penal Procedure Code of 1929 which reorganised matters of investigation and inquiry in criminal offenses and direction of judicial inquiry.

(iii) Provincial legislation on fiscal system which was defined in a number of provincialpieces of legislation and separate for each category of taxes / duties[15].

(iv) Civil private law and procedure including commercial law[16].

Within the framework of the Portuguese civil private laws, the Portuguese Civil Code of 1867, known as « Seabra's Code » modeled after the Code of Napoleon, extended to Goa in 1870, is « the most important and comprehensive piece of legislation of Portuguese legal system in civil law » (Usgaonkar forthc.). Comprising general principles and provision of civil nature, the law of contract and obligations, the law of persons, the law of property rights and law of torts, it was a common and uniform law applicable to all communities in Goa[17] and epitomized Portuguese legislation permeated into the democratic regime.

Conflictive Co-Existence of Two Legal Systems

The transition from a colonial to a new democratic domain in Goa, which in fact began in December 1961 itself, necessitated a displacement of the structures of inequality and took place through a multiprolonged process

(a) *The 12th Amendment to the Indian Constitution Act 1962*, integrated Goa, Daman and Diu into the Indian Union.

(b) *The Presidential Ordinances for establishing an administrative system* paradoxically posed a fundamental challenge to the definition of a democratic state. The Goa, Daman and Diu (Administration) Ordinance 1962 not only provided for the continuance of functionaries of the former colonial administration but of « all laws in force immediately before 20th December 1961 or any part thereof until amended or repealed by a competent legislature or competent authority » (Colaco 1997 35).

14. Besides the Political Constitution of 1933, the Organic Law of Overseas of 1953, Estatuto do Estado de India of 1955, the Overseas Administrative Reforma of 1933 and Statute of Overseas Employees of 1956 regarding matters of administration, public services and government employees, and *Organização Judiciária do Ultramar* were also applicable to Goa.
15. Such as *Regulamento da contribuição de Registo* or Regulation of tax or transfer by onerous title. Regulation and general table of stamp duty, Regulation of industrial tax, Regulation of land tax or property, Regulation of profit tax, Regulation of tax on unearned income, Regulation of complementary tax on incomes, Regulation of income of public offices charging tax on salaries of government servants.
16. Other civil and commercial laws included : (i) Law of divorce introduced under the Decree of 1910. (ii) Codes of usages and customs regulating certain relations between non Christians of Goa Daman and Diu ; (iii) Notarial and registration laws ; (iv) Civil Procedure Code of 1939 determines the procedural machinery for enforcement through courts of the violated private civil rights ; (v) The commercial laws viz. the Portuguese Commercial Code 1888, the Law of perquota societies *(Sociedade por quotas)* : (vi) Miscellaneous or typical legislation (pertaining to mining, forests, land and land acquisition, urban lease, labour, health, etc.)
17. It underwent a general revision in 1930 in Portugal itself and was replaced by the New Portuguese Civil Code of 1966.

Effectively, it created a continuum of the colonial legal framework. The Ordinance also gave power to the central government to remove difficulties in the execution of ordinances or in administration of the territory and hence the Goa, Daman and Diu (Administration) Removal of Difficulties Order 1962 was passed. Under this order the Lt. Governor was equated with the Governor General and other authorities were equated with the colonial structure so as to facilitate the day to day functioning of administration[18]. The repertoire of coercive apparatus of colonial hegemony, therefore, continued to persist at least formally.

Section 5 of the Ordinance the Citizenship Act of 1955 was to Goa (later replaced by the Goa, Daman and Diu [Administration] Act 1962) which extended twenty-two central and state acts to Goa.

Towards further consolidation of the integrative process and creation of a civil society, a civil administration was introduced under Lieutenant Governor Tumkur ShivShankar by June 1962. The instrumentality was symbolically representative as the Lieutenant Governor governed with the assistance of a twenty-nine member informal consultative council, constituted on 24 September 1962, consisting of prominent Goans, and the Lieutenant Governor was ultimately accountable to the President of India (Sá 1986 112).

(c) *Extension of central and state acts*[19] *through a process of implied repeal.* The bulk of Indian legislation was extended to Goa by two regulations promulgated by the President of India under Article 240 (1) of the Constitution of India

– The Goa, Daman and Diu (Laws) Regulation 1962 which extended 105 central and state acts to Goa[20].

– The Goa, Daman and Diu (Laws) n° 2 Regulation 1963, which extended 68 central and state acts[21].

(d) *Regulations on specific subjects for good government and explicit repeal of Portuguese laws.* Article 240 was also used to pass presidential regulations for legislative facilitation of good government. One case of explicit repeal by the Central Government was the Goa, Daman and Diu (Repeal of Post and Telegraph Laws) Regulation 1962, which repealed all Portuguese decrees, legislative diplomas and orders on postal and allied matters.

(e) *Laws passed by Parliament.* Besides all laws passed by Parliament after 1961 were automatically applicable to this territory.

(f) *Acts passed by Goa Legislative Assembly.* Implied and explicit repeal through acts passed by the Goa, Daman and Diu Legislative Assembly All acts passed by the Goa, Daman and Diu Legislative Assembly (constituted after 1963) implicitly repealed all Portuguese legislation in those areas. The only case of explicit repeal by State Act was the extension of the Goa, Daman and Diu (Extension of Code of Civil Procedure and Arbitration Act) Act 1965 which repealed the Portuguese civil procedure Code 1939.

18. Interview with Mr. B.S. Subbanna, Secretary (Law), Government of Goa. 19th February 1999.
19. For a detailed list see COLACO 1997 : Appendix I to IV, 92.
20. Published in *Goa Government Gazzette* I Series, n° 41, of 6 December 1962.
21. Published in *Goa Government Gazzette* I Series n° 22, of 29 May 1964.
21. The Goa, Daman and Diu Evacuees Property Act 1964, the Goa, Daman and Diu Agricultural Tenancy Act 1964, the Goa, Daman and Diu Land Revenue Code 1968, the Goa, Daman and Diu Protection of Rights of Tenants (Cashewnut and Arecanut Gardens) Act 1971 and such other crucial legislation was passed by the Goa, Daman and Diu Legislative Assembly after its constitution in 1963.

The multiprolonged, almost retributive process of incremental replacement of Portuguese legislation in Goa, contrary to effecting a smooth politico-administrative transition actually created a duality of conflictive systems of law[22] generating quantum contractions in the key arena of administration, a sphere where citizens encountered and forged an imagery of the state.

The government bureaucracy – offices of the Registrar for civil marriages, the Registrar land records, the District collector therefore became the embodied points of citizens' encounters with the state – a point where systemic contradictions got translated into the personal lives of citizens and which in turn became an instrumentality for perceiving the state. The practices and interpretations of the bureaucracy, amid these contradictions, determined the bounded notions of state that are critical to citizens' allegiance especially in a post-colonial scenario.

Immediately after the transfer of sovereignty, the Indian administration, operating with duality of administrative laws[23] and practices was confronted with interpretative ambivalence to the extent that although employees of colonial administration were absorbed and continued into the Indian administration, for a period of time, they could voluntarily opt for service conditions, especially pension rules, that existed in other Portuguese colonies like Mozambique. More, the Goa, Daman and Diu (Administration) Removal of Difficulties Order 1962 equated colonial office and authorities to those of Indian administration for purpose of implementation of Portuguese laws, jeopardising the very perception of a democratic political order.

The interpretative ambivalence constituted an affront on certain democratic axioms of administration such as « Equality before the law », as a few individuals manipulated the system towards individual ends, while a counterpoising majority encountered an adversarial system. « Efficiency », another cardinal axiom for judging the « performative state », came in for compromise as the efforts of the administration to concur with Indian and Portuguese laws in handing out administrative decisions, had a telling effect on the expeditious disposal of cases. These contexts of encounters between citizens and the state, not only cement a certain negativist perception of the state, but had the potential of incrementalizing a kind of disillusionment towards the new order.

At this juncture it is pertinent to cite some cases of exchanges between the administration (including judicial administration) which showcase the range of relationships. The first case concerns the conflictive dual system of laws and administrative interpretation, or misinterpretation, regarding the freedom of citizens to contract and dissolve a marriage. The second represents this fragmentary system *vis-à-vis* the citizen's right to ownership and lease, and the varied judgments that can emanate against the foreground of two legal systems, in place in a federal component in a single nation-state.

22. Portuguese (continental) and Indian (Anglo-Saxon tradition) system of laws have substantive differences. The Portuguese civil code is modeled on the Napoleanic Code and even the usage « code » has a vast interpretative difference form the one in Indian statutes.
23. The Portuguese Laws – *Reforma Administrativa do Ultramar* (Overseas Administrative Reforms 1933), the Statutes of overseas employees of 1956 and *Estatuto do Estado da India* of 1955 were all extended to Goa even after December 1961 by the Goa, Daman and Diu (Administration) Ordinance 1962 counterposing it with Central and State Acts, regarding administration.

The third case involves what civil procedures constitute a « legal and valid » marriage and its implications for succession and sharing of property by the heirs.

While scrutinizing these cases, it must be noted that the problems that arise out of the system are mediated by bureaucrats and judges, which poses an epistemic limitation on data collection and analysis, to the extent that the decisions on these cases have to be taken by using one system of law or the other, and that these are not recorded explicitly as difficulties.

1. The Portuguese Civil Code of 1967 was extended to Goa within the theocratic monarchic context in Portugal. Post 1910, the secular republican laws such as the Laws of Family of 1910 (Law of Civil Marriage or Decree n° 1) read with Code of Civil Registration mandated that only marriages performed before the Civil Registrar (Civil Marriages) were valid while religious marriages, which were previously held as valid were not held so now, thus striking a fundamental difference between Civil Code and Indian Law. As per the laws of divorce, within the Portuguese legal system, marriage was a contract, dissoluble on grounds specified by law and applicable to inhabitants of Goa. Consequent to the « Concordata », it was thought fit to terminate the practice of two marriages by catholics and legal sanction was given to Catholic religious marriage provided they were « celebrated in conformity to canonical law and the record of marriage was transcribed in the competent registration of the civil status »[24].

Canonical marriage (Article 24), however, had an implicit renunciation of the civil faculty of applying for divorce by the spouses, and civil courts could not apply it to Catholic marriages. Since the acts in force in India like the Christian marriage act[25] have not been extended to Goa, laws relating to marriage, succession, guardianship are those that exist under Portuguese Civil Code of 1867, even after liberation.

In compliance therefore, all Catholic marriages were held as inviolable and indissoluble, unless by death only, as ruled in the Pires versus Pires case. Subsequent to this case, the Court of the Judicial Commissioner Justice, Tito Menezes, in the Especiosa Nunes versus Francisco Nicolau Fernandes case (AIR 1974 26) ruled that Article 4 of Decree n° 35461 and Article 24 of the Concordat of 1940 were declared « ultra virus » vis-à-vis the fundamental right of equality, and the corollary of equality before the law (Articles 14 and 15 of the Indian Constitution), for hostile discrimination based on religion, as divorce was permissible not only to Hindus and Muslims alike but even to Catholics contracting a civil marriage only. Since then divorce was allowed by civil courts even for Catholics married in a Catholic marriage with civil effects.

In this case the administration appears to have protected certain fundamental freedoms of an individual on the line of natural justice in pointing out a conflict with Colonial Civil Code and Indian Constitution by declaring it « ultra virus » making way for a precedent and binding case-law, impliedly overruling the Pires versus Pires case judgment.

24. Concordata is the international treaty signed between Vatican and Portugal on 7th May 1940, which provides for various matters in the religious and social sphere between the two states, one of the most important being the canonical marriage and its civil effects.
25. In the area of personal laws, the Hindu Marriage Act 1955, the Hindu Customary Law, the *Shariat* (Personal Laws of Muslims), the Indian Divorce Act 1869 and Special Marriage Act 1954 too, have not been extended to India.

2. In the arena of property rights and their numerous facets, provisions of the Portuguese Civil Code (Part III) were in force in Goa since 1961. The Civil Code makes no difference between a contract and conveyance as now exists under the Contract Act and Transfer of Property Act 1882 (of British origin). Argumentation being that « there is no valid reason why a lessee is permitted to enjoy property for a certain time or in perpetuity and no ownership is passed to the lessee ». For the purpose of the Civil Code, a lease is always for a certain duration and not perpetual. Lease in perpetuity is unknown to the common law system (English law). In India however, a lease in perpetuity is created by an express grant or by presumed grant. Such leases are generally agricultural.

A suit for possession of land had been filed by owner Ramakant Atmaram and another against licensee Mahadeo Tatu Naik (AIR 1985). Atmaram had purchased the land in 1966 (after Goa's liberation) and licensed it out to Naik's father, who although not entitled to let the house, allowed another to pursue his trade as a mechanic in that house. When requested to deliver vacant possession of the house and the land, Naik refused, claiming that his ancestors had constructed the house and he was actually a *mundkar* (lessee), not a licensee and that the court had no jurisdiction to try the suit.

The trail court's judgment in favour of Naik however was set aside by the District Court directing that Naik should produce an order of the Mamlatdar regarding his claims as a *mundkar* (lessee). The Mamlatdar ruled that Naik was not a mundkar and consequently the Civil Sub-Divisional judge at Bicholim (Taluka) decreed against Naik. When Naik appealed to the district court, Panaji (capital of Goa), Naik's counsel, S.K. Kakodkar argued that the house had been constructed by Naik's father and had paid Rs. 24/- per annum to Atmaram (the owner), and since he had been occupying the house and land with permission of the owner on payment of rent, fee or compensation, the occupation of the same could not be held in « bad faith ».

Atmaram's counsel, U. Kolwalkar, contended that only a possession preceded by transfer of title was in good faith (Art 476 of Portuguese Civil Code) and hence when Atmaram requested Naik (licensee) to vacate the land, it was presumed to have terminated the license or canceled the permission, and ceased to occupy the land in good faith. Kolwalkar also contended that the owner of land could also demand that licensee remove any cultivation, crop and works, and the land be restored to its initial condition at the cost of the licensee, if the land was held in bad faith (Article 23 of Civil Code).

The Judge, Justice G.F. Couto, upheld Kolwalkar's argument and decreed that the land was held in bad faith and that records do not clarify whether Rs. 24/- was paid as rent, fee or compensation and as such the possession of land became precarious and depended on the « sweet will of the owner » *(sic)*. Unlike in Indian Law, a lessee under Portuguese Law does not create an interest in, land in favour of the lessee and hence, Justice Couto ruled that the land was held in bad faith and should retract to the owner.

In this case it is critically interesting to note that the licensee's counsel's contention that although the Indian Easements Act, though not in force in Goa in 1966, since this case came up in 1983 (twenty-two years after

liberation), the Judge ought to have applied its principle in view of a judgment delivered in 1975 (The Goa Matches Goa Pvt. LTD, Curti Ponda v/s Shaik Kashim, Curti Ponda, Case Appeal n° 41 of 1973). Contrastingly enough, the judge upheld the precedent cited by the land owner's counsel referring to the Portuguese Supreme Court Judgment dated 29th June 1949, reported in *Boletim do Ministerio Justica* (1949)[26].

In the wake of Indian laws – Transfer of Property Act 1882 and the Easement Act and other Tenancy Legislation enacted by the State Assembly ruled as inapplicable –, the lessee was constrained to have misgivings about the new politico – administrative - judicial structure after liberation.

In a scenario of Goa having only one legal system (British-Indian), or the suit filed after 1978 (after Indian laws such as the Transfer of Property Act and the Easements Act 1882 were applicable to Goa), the interpretations of law would lead to a judgment in favour of the lessee and largely in coherence to the Constitutional axiom of establishing a socialist pattern of society. That the judgment accrues over twenty years after initiation of various tenant/lessee oriented socialistic legislation, the duality of conflicting systems, as witnessed in this and ensuing case compelled the citizen to haul the administration to court to get their rights asserted, affecting the morale and prestige of the administration. More critically, the situation prejudiced the minds of the people towards the new institutional order, especially in its capability to manage independent territories.

3. Article 58 of the Law of Marriages by Portuguese Decree dated 25th December 1910 prescribed that marriages of Portuguese (including Goans who were deemed Portuguese citizens before 1961) in a foreign country (like India) should be contracted before a diplomatic or consular agent of Portugal or, as may be legally required, in the country where it is solemnized, provided it was not inconsistent with Portuguese public law. Article 245 of Code of Registration prescribed that in case the marriage was performed abroad then it had to be transcribed in the Portuguese State of India within three months of celebration or thirty days from the return of both or at least one of the spouses.

Sushila Pandurang Chibde was the second wife and widow of Pandurang Chibde, who had five children. After the death of Pandurang's first wife Satyavati and of his parents Ramchandra and Sitabai, inventory proceedings began in accordance with Portuguese law and suit property was allotted exclusively to the share of Pandurang. The Inquiry Officer also entered the names of Satyavati's three sons, which led to the filing of the civil suit before the Civil Judge Senior Division, at Mapusa. Sushila Chibde and her children through their lawyer argued that Satyavati and Pandurang were not legally wedded, since the marriage which was solemnized according to Hindu Customs in 1950, at Sakirval, at Sawantwadi (then part of the Bombay State), was not registered in Goa, in accordance with Article 245 of the Portuguese Code of Registration. Since the marriage was not registered and therefore null and void, the suit property should go exclusively to her and her children.

26. The Judgment of the Supreme Court of Portugal dated 24th June 1949 reported *in* PORTUGAL 1949 : 291.

On appeal, Judges Pendse and Couto of High Court of Judicature at Bombay, Panaji Branch, ruled[27] that mere failure to register the marriage within stipulated period does not lead to marriage itself being null and void. Registration of marriage is not a *sine qua non* of a valid marriage, the judges ruled. Citing Section 114 of the Indian Evidence Act that the court has to take cognizance of the couple having lived together as husband and wife for almost twenty years and procreated children through wedlock, and the marriage being solemnized as per Hindu religious rites, provisions of Article 245 were not attracted in the situation of conflict of law.

The registration of marriage which the Portuguese Civil Code held as a *sine qua non* for valid marriage was ruled as otherwise, especially when marriage was not performed before the foreign authorities and was not required to be registered in the foreign territory.

In their interaction with the state – the Inquiry Officer, the Civil Judge and the High Court Judge –, Sushila Chibde and others saw the state as contravening its own laws, adopted and existing through a complex maze of law making (implied repeal, ordinances, extension of central and state laws, explicit repeal). As evidenced by the fact the first marriage of Pandurang was not registered in accordance with Article 245 of Portuguese Code of Civil Registration and is a clear breach of procedure. Here the state can be perceived to break its own laws and acts as a hindrance to their right of succession in the suit property not being solely arrogated to her family. It deligitimises the state and law, and lends credibility to the view that state must not interfere in this arena.

These three cases represent the crucial role that administration plays in citizen's encounters with the state. « Obviously, no singular characterization of the nature and context of the interaction of citizens and state officials is possible » (Gupta 1995 381).

Especiosa Nunes perceived the state and its officials as protector of fundamental rights and sensitive to « feminist space ». In its transnational linkages, the state is perceived to be linked to the broader regime of welfare and protection of civil rights. The civic law becomes a succor in times of personal trauma and provides an embodied and meaningful essence of personal freedom.

In contrast, to the lessee, the state appears to promote a feudal-capitalist regime, biased towards the landed class. It is a potent instance of obdurate antipathy towards « little people » with « little voices ». In its most extreme perception, the state may, by subscribing to colonial laws, appear to be a « perpetuation of its colonial existence through a complex subsuming of economic, political, socio-cultural (may I add, administrative and legal) factors in a dynamic and volatile environment of international politics » (Harshe 1997 19).

In the Sushila Chibde case, the state appears as a partisan dispenser of justice, where the spatial meeting of its fragmentary and esoteric legislation on property and successions is a meiosis of its own vulnerability and contradictions.

In summation, it is difficult to experience the state through hegemonic concepts as a coherent and unified entity. What one encounters instead is a fragmentary politico-administrative-juridical and legal structure. And yet it

27. Kamlakant Chibde and other versus Sushila Chibde and others. USGAONKAR 1990 : 185D-191D.

is through these heuristics and articulations that the state comes to be projected and perceived by the citizens. The co-existence of systems makes problematic the application and interpretation of laws in a sustained uniformity.

The Post-Colonial State

The post-colonial state in its localized form portrays certain vivid tensions located in the State of Goa, a former Lusotopic province, liberated at varied point of time from other encrustations of India which were under varied colonial sovereignties.

First, the fractured administrative-legal system powerfully works towards the fracturing of the administrative-legal machinery itself. Within the juridical administration, the majority of judges in the lower courts, while were trained in the Portuguese System of Law and higher echelons of the judiciary comprises judges with Indian Law degrees and background. They intended to apply Portuguese laws within the English-Indian system even as some aspects differed from the canons of interpretation of statutes of the continental (specifically Lusotopic) system.

The administration was fractured between officials who served under Portuguese administration and were conversant with Portuguese system and language, and those engaged after liberation, who as the former faded out through retirement simply ignored the Portuguese law for want of expertise in understanding and interpretation.

Second, the rule of implied repeal which was engaged in Goa for adoption of Indian laws by extension or enactment as opposed to express repeal, created divergent interpretations in law courts and administration compromising a fundamental axiom of democratic regimes, viz. equality before the law. Does one explain it in terms of the shifting contours of imperialism, in Marxian formulation ? Or are all transitional formulations caught in the problematique of systemic contradictions which leads us to the translocal disembodied notion of state.

Third, as subject peoples transgress from subjugation regimes to self determination, cultures generally see a resurgence or consolidation of identity space – endogamous language, dress codes and lifestyles. Of these, the most challenging transitions are those of language. In Lusotopic societies as Portuguese moves from the language of state to that of colonial identity, and English takes its place in higher echelons of bureaucracy and Konkani at lower and mid ranges of administration (as cultural assertion), what one confronts is the problems of translations of the text (in this case Portuguese law) and message from the language of origin to that of ultimation, without change of the meaning and always respecting the cultural and linguistic features of the language of ultimation.

In case of juridical translation, the syntax has to measure up for communication between not two languages alone but two juridical cultures. This is a pervading constraint in all Lusotopic and non Lusotopic territories. Referring to the transition of Hong Kong from British sovereignty to Chinese, Sergio de Almeida Correia and Pedro Horta e Costa (1989) wrote « Juridical translation involves a communication between juridical cultures,

it demands that the translator not only command two languages before him, but also requires a special sense of knowledge of law »[28]. The Civil Code of 1857 translated in its entirety nearly thirty years after liberation « whose original is in Portuguese and its translation made available to us in English may not be free from some mistakes »[29]. The translation of Portuguese laws and documents was a severe burden on litigants, besides delaying the course of justice[30]. Till date twenty three laws of Portuguese origin are still in force in Goa, even it they may have outlived their utility they have not been formally repealed[31].

* * *

The transitional state caught in the web of historic prolematique of diverse systemic opposites has attempted to define the state in two tautological propositions. One, it is suggested that « the scrapping of the Portuguese system and full replacement of the Portuguese laws by Indian legislation, appears to be easier and brought with less danger than otherwise », as opined by the Law Commission (of 1968) appointed to advise the post-colonial government. This augurs from the Law Commission observation that the Portuguese legal system which survives in the former colony has been destroyed by extension of two hundred Indian laws at liberation. This strategy would serve the collective interests of the whole population and the « pace of national integration of the communities of Goa, Daman and Diu into the Indian mainstream » (Colaco 1997 77)

The second argument made by some prominent lawyers is that certain instrumentalities of Portuguese legal system like the « Portuguese Civil Code of 1967 is a heritage of Goa and a legacy of the Portuguese and we must be proud of it » (Usgaonkar forthcoming). This is especially in view of the fact that Article 44 of the Indian Constitution which refers to Directive principles of state policy recommends the augmentation of a uniform Civil Code. The argument is posited on a specific identity difference of Goans vis-à-vis the other communities of India, while identifying for themselves a space within the large Indian political spectrum[32].

The first perspective seems to be hemmed in by a kind of negativism on the issue of self representation and construction of entities, like the state, or its components. To speak of one's space is the most problematic. Can the Indian state (in this case the federal component – Goa), be defined irredu-

28. In the book *Towards Legal translation and production of bilingual legislation in the present context of transitional period*, 1989.
29. Paragraph 5 of the Judgment of the Bombay High Court, Panaji Bench, in Michael Charles Souza versus Ganesh V.V. Gaunkar and Sons reported in 1991 cited in USGAONKAR forthc.
30. The process of translating all Portuguese laws in force in Goa is claimed to be completed as late as in1999, almost thirty-eight years after transition to Indian sovereignty. These translations are however with the Department of Law, Government of Goa and not easily accessible to the public.
31. The twenty-three laws in force pertain to law of persons, easements, law of torts, civil marriage, divorce, code of usages and customs of non Christians, notarial laws, commercial laws, etc. For a complete list, see COLACO 1997. Laws which are irrelevant are the code of usages and customs of Non Christian Inhabitants of Daman and Diu of 1854, Code of Land Registration approved by Decree Law of 1959 and Regulations Regard Land Tax.
32. In contravention to this was the Bahujan (agglomeration of all non-brahmin castes) mobilisation that argued that since Goa had no distinct language, culture or political history, it had to merge with Maharashtra (a contiguous federal unit).

cibly by shutting out the Lusotopic element of its history. The space a state occupies is necessarily explained by its history. It is a position into which it is written[33].

On the other hand synthesis have more problems than answers to offer. The problems associated with transition of colonial territories are diverse and dependent on their historical trajectories and cultures. Conditions under which state appears as cohesive and unitary whole, will differ. Though there may be a temptation to underline this as a further instantiation of the failure of democracy and state constitution in developing countries, in the post-modern tradition one could argue about the theoretical limitations of concepts of democracy and state, and their inability to encompass the transitional or post-colonial processes in developing countries, as western scholarship is largely inclined towards the « eclipse of empires » processes.

The state has to be conceptualized in a more desegregated and subaltern form. But to lay claim to construct exclusively indigenous theories encompassing these processes based on an ontological imperative (by the mere fact of being there), one must ignore the last few centuries of historical involvement. This would further contaminate the construction of state theories in transitional and post-colonial societies. In its conception, the state is not merely to be perceived as a space that has to be defined. The state is a provider of space. Its capacity to provide space is enhanced only when it is able to assimilate the exchanges with citizens. The state does not predetermine the outcome of these exchanges but merely ensures its continuance. Only such an accommodative and communitarian state can subsist with apparent « breakdown », that is actually an instrumentality through which it is constituted and up to now defies theoretical encapsulation.

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33. Gayatri Spivak argues that the space an individual occupies may be explained by his/her history. I hold the same argument can be extended to nation states or components.

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