THE CONCEPT OF LEGAL FICTIONS

The ingenuity of social order is such that it is capable of conjuring up the most preposterous hypothesis and unworkable principle to justify its actions. Indeed deep down at the dawn of primitive thinking, there was that instinctive desire to conform to notions and norms solely on account of their long usage. In such situations, validity of an action did not depend on verifiability. Law recognised the propensity of the community to accept or reject values. As an inevitable consequence, there had been a good deal of myths and taboos in the mainstream of law-making process. Undoubtedly, a lot of them are so inter-woven in the general fabric of social life with the result that any attempt to reform the process must be done with the greatest of caution.

It is in the aforesaid context that legal fictions have proved themselves expedient to justify actions which otherwise lack authority. Legal fictions take the form of statements or suppositions introduced into the legal process, which are nevertheless not allowed to be denied in order that some difficulty or lacuna may be got over with the ultimate purpose of achieving a measure of better justice.

The use of fiction in conventional legal terminology is as old as the beginnings of Roman Law. If we look into the evolution of Roman Law, the most important stage occures firstly around the time of the introduction of the Twelve Tables.[1] The period is reckoned as 5th Century B.C., and the administration of justice in Rome at that time was controlled by Consuls, who were then nominees of the Patrician wing of the population. Already there was a sort of power struggle between the Patricians — the so called blue-blooded gentry — and

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1. R.W. Lee (ed.) *Digest of Roman Law* Ref. 1, 2, 6.

the Plebeians — recognised as the common people of Rome. In the year 462 B. C., Gaius Terentilius Arsa proposed major measures of law reform, which was stated to be the origin of the Twelve Tables. By this time, the civic life in Rome was characterised on the one hand, by the institution of slavery subsisting in a society of free men, and on the other, by the recognised practice of tutlege of women and minors, who were under the control of *pater families* or head of the families. The Twelve Tables were collectivly referred to as the Code, even though it was far from being a developed system of law. The influence of primitive religion and the taboos of the time was still evident. For about a century after the introduction of the Twelve Tables, the interpretation of the law and of the legal action based thereon was in the hands of a college of pontiffs. It was during this period that the law was able to develop through legal fictions.

The *modus operandi* of introducing legal fictions was aimed at diverting a particular legal rule or institution from its original purpose with a view to accomplishing some other purpose. This sort of applying legal fiction within the frame work of Roman Law may be cited as follows:—

Adoption.

This was effected by a series of sales and manumissions[2] terminating in a decree of the magistrate declaring the child to be the issue of the adopting father. This was a fictitious application of the provision under the Twelve Tables. Accordingly if a father sells his son three times, the son shall be free from his father's power, that is to say, from the legal authority of the father in terms of the father's role as *pater familia.*

Emancipation

This was effected by a fictitious process similar to that was used in regard to adoption.

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2. *Manumission.* The Physical act of conferring freedom to a slave, which is formally effected by means of a fictitious suit and informally by oral declaration or by writing by the master of the slave.

Jure Cessio Procedure

This is a fictitious action or vindication, resembling the Common Recovery procedure under English Law, but arrested in its initial stage by the alienor who plays the part of the defendant, admitting the claim of the alienee, who is the fictitious plaintiff. This sort of conveyance was used for the purpose of (a) the alienation of corporeal property of every kind (b) transference of incorporeal things other than obligations, such as inheritance (c) creation and extinguishment of servitudes and usufructs.[3]

In English Law

Legal fictions were accorded a significant place in the English Legal System from a rather early period, when Common Law was afflicted by an inordinate degree of rigidity.

The impact of precedents was such that lower courts were precluded from departing from set practices. In course of time, as Sir Henry Maine[4] points out, three innovations were brought into being which had the effect of blunting the rigour of law. These included (1) legal fictions (2) the doctrine of equity and (3) fresh legislation. The only innate technique of avoiding the rigidity of the Common Law was, of course, the liberal use of legal fiction. Its use was general and salutory since the judges themselves were in charge of the process.

Land Law

The hereditary entails were allowed to be terminated by a legal fiction known as Common Recovery.[5] Likewise, the deficiencies of the old and ineffective actions of "Debt" and "Detinue" for the recovery of money or goods were overcome by fictitious claims of "Indebitatus Assumpsit" and "Trover."

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3. *Usufructs.* The right of enjoyment to the fruits or proceeds of cultivation.

4. Sir Henry Maine, *Ancient Law* (Pollock Edition,) 29.

5. H. Potter, *A Historical Introduction to English Law,* 519. (3rd ed. 1948).

The first rested on an imaginary process to pay a debt and the second on accidental loss and finding of goods which had actually been borrowed or hired. The cumbersome and dilatory remedies for the recovery of land were replaced by a speedy and effective action known as "Ejectment," which called upon two imaginary characters to take part in the action.

The application of fiction can also be discerned in the Common Law practice governing prescriptive rights.[6] In the case of such rights, there is a presumption that a formal grant by the owner in regard to easement or profit had been made at some historic past. Originally such a grant would be presumed only where user as of right had continued from time immemorial, or in other words, "from time where of the memory of man runneth not to the contrary." However, by a convenient legal dispensation, the year 1189 was fixed for the purpose as the limit of legal memory so that any right enjoyed from that date was not to be challenged in a court of law. In course of time, this doctrine was revised by a further technicality, known as the "Lost Modern Grant" by alleging that a long user had actually been enjoyed, but the deed of grant in supporting the claim had been lost. The above are curious examples of how a fiction can be made to serve the legal requirements in regard to an alleged plea of long use of a given land.

Criminal Law

The hardship suffered under the old law, with its death sentence for all kinds of felonies was tempered by a series of fictions, such as "the benefit of clergy,"[7] where the first offender was treated as a clergy, (by his ability to recite the 51st Psalm), and as such exonerated from the consequences of his crime. Likewise, in cases of theft, the assessment of the value of stolen goods was fixed at a low figure with the result that the offence was treated as a petty one, enabling the jury to agree to an acquittal of the offender.

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6. R. E. Megarry and H.W.R. Wade, *The Law of Real Property*, (2nd ed.) 808 *et seq.*

7. Holdsworth, III *History of English Law*, (5th ed.) 292 and 367.

Admiralty and Mercantile Practice

Many mercantile transactions in the past were associated with the sea and fell within the jurisdiction of the High Court of Admiralty. Examples of these include (a) dealing as between shipmasters and shipowners in regard to ship's voyage (b) contracts of carriage of goods by sea (c) charter parties or hire of ships (d) Marine Insurance contracts to cover loss of ships or cargo at sea. In these cases, initial agreements might have been made on land, but the circumstances of breach of contract occurred at sea or abroad, outside the territorial jurisdiction of the state. This situation precluded a jury trial on land under the Common Law. As juries ceased to function as direct witnesses, the problem of venue became merely formal. The Common Law was thus enabled to offer an alternative remedy to merchants and others concerned by permitting an action to be based on a fiction that a contract was made in London.[8] This circumvented the problem of venue and gave litigants a city jury of merchants familiar with admiralty and mercantile law and the special problems associated with seafaring.

International Law

The practice that concedes legal equality to nations irrespective of their size or polititcal importance is a fictional tribute to the comity of nations in the purported name of world peace and tranquillity. The so-called prescriptive right over colonial possessions is essentially a fictional recognition of the assumed legality of such occupation.[9]

"The floating island theory" in regard to the extended sovereign rights over ocean-going ships carrying the flag of the country is another device recognised by International Law. Likewise, the so-called inviolability and sanctity of diplomatic enclaves in foreign territories may be instanced as a fictional

8. *Id.* Vol. 1 p. 554.

9. J. L. Brierly, *Law of Nations,* (5th ed.) 156, 157.

convention honoured by national states so long as no serious inconvenience is occasioned by its adherence.

Company Law

The very notion of personality to a body corporate is a fictional concept. Such expressions as the veil of corporate status, the assumed civil and ciminal liability of a company, etc., are mere fictional attributes, which have come to stay owing to their practical and commercial convenience.

Constitutional Law

Such semi-fictional expressions as 'The King never dies," "Parliament can do no wrong," "The Legislature expresses the will of the people," "Acts of State," etc., are time-honoured abstractions, bandied about in common usage by gullible citizens without seriously speculating on the fictional element therein.

Divorce Law

The assumption that a spouse unheard of for over six years is presumed to be no more is a practical application of a fictional assertion even if, in fact, the spouse is still alive somewhere. The presumption enables the interested party to surmount the awkward delays in a matrimonial suit.

Succession Law

The Commoriente principle provided in the Law of Property Act, 1925, is a clear example of a legal fiction applied to benefit particular individuals when two relatives die contemporaneously. The presumption in such situations will be that death had taken place in the order of seniority of age of the two dead people.

Tortious liabiltiy.

Proceedings against the Crown, as distinct from the person of the Sovereign, is a fictional device provided under the

Crown Proceedings Act, 1947, with a view to exempting the person of the Sovereign from being sued.

Evidence.

Many presumptions in law have a fictional element. In a legitimacy dispute, the presumption is that a child born during lawful wedock or within the period of gestation is a child of the husband. This presumption can only be rebutted by very clear evidence to the contrary. Again, the fact that a man and a woman went through a form of marriage and afterwards lived together as husband and wife may raise a rebuttable presumption that they were lawfully married.

The presumption of continuance, although based on common sense, has a fictional edge. Take such presumption of continuance, as sanity, opinions, official character, title to the property, domicile, etc., where the existence of a particular fact at a certain specified time is deemed to be inferred from their existence at a previous or subsequent time.

Such provisions in the Evidence Act,[10] as for instance, "Recitals in documents twenty years old are presumed correct," or "Documents are presumed to have been made on the day they bear the date," etc. place a strict burden of proof on those who dispute the presumption. In so far as the presumption is allowed, the fictional element in the truth or otherwise of the matter is a challenge to one who contends the presumption.

Equity.

It must be conceded that the advent of equitable principles in the realm of Common Law was able to progressively reduce the need for contrivances in the guise of legal fictions. Indeed Equity was able to bypass the rigidity of law at various points without recourse to dubious technicalities. With its specific reliefs of various kinds, relaxation of strict rules of evidence, broad-based approach towards statutory interpretation

10. Indian Evidence Act, 1938, Ss. 4, 184.

and timely remedies for new forms of wrongs, Equity was able to gain a decisive role in the administrative process of justice.[11]

Legal Fiction and Political Theory.

Before I conclude this study, it may be of advantage to the further contemplation of this subject if we allow ourselves to examine the fictional elements in the whole spectrum of political theory, bearing particularly in mind that among other core subjects, Politics was able to provide the breeding ground for the systematic growth of jurisprudence in general and law in particular. It appears to me that political theorists of the past, who went to great lenghth working out their particular hobby horse on such themes as the origin of states, divine right of kings, theory of social contract, laissez-faire ideology, principle of utilitarianism, and so forth, were in no small measure influenced by the fictional content of their thought process. It may be that some of them in their enthusiasm had lost sight of the need to distinguish between fact and fiction. The scientific pretences of dialectical materialism and class struggle constitute a present day example of how a largely fictional concept can hypnotize and create mass hysteria among otherwise well meaning people.

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11. A.K.R. Kiralfy *The English Legal System,* (2nd ed.) 73

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