THE NOTARIAL INSTITUTION AND THE LAND REGISTRATION SYSTEM UNDER THE PORTUGUESE AND INDIAN LEGAL FRAME WORKS IN GOA, DAMAN AND DIU SOME GLIMPSES

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1. REMOTE AND PAST HISTORY

A (*a*) The Notarial Institution whose vestiges in remote ages have been detected in different places, cultures and forms like Assyria, Babylon, India, Phoenicia, Palestine and Greece, has subsequently involved itself in classical Rome chiefly in the golden age of the Roman Law in the 2nd and 3rd. Centuries A.D. From the Roman conquest of England in the lst Century (till the year 1410) from the English soil it disseminated to the British colonies and other common Law countries of America, Africa, Australia and Asia in its English contours of minor jurisdiction. This influence covered naturally the then undivided British India including Ceylon with the only exception in the Indian subcontinent of the French establishments of Pondicherry, Chandernagor and others under the Latin system of France, and the former "Estado da India" and other Portuguese colonies, under similar Latin model, the former historically comprising – Goa, Daman and Diu (till 18-12--1961) now the state of Goa, of the Indian Union and the Union Territory of Daman and Diu as from 30/05/1987 and Dadra and Nagar Haveli (till 1954) and afterwards the Union Territory of Dadra and Nagar Haveli the common inheritance from Rome where the of the first centuries of the Empire (forwriting in Tabulae orthin wooden plants covered with wax began being skilled slaves of the contracting parties who charged them with drafting and recording important acts and contracts for future evidence, and thereafter slaves of the State for similar purposes, became freed men by edict of the Emperors - Horatius and Arcadius (401 A. D), with the character of public officers who should be jurists well able in

the arts of speaking and writing and of acknowledged probity. They formed a college or guild and the old "Tabullari" passed to be called *amanuenses* of the guild members taking short notes of the declaration of the parties. Hence it came the designation of "Notarii" or "Notaries", also called "Logographi" equivalent to the present day "Stenographers" and on these Notes the "Tabelliones" of the college drafted the definitive documents or say with the character of "heterographic" documents and not merely antographic yet, the authenticity of the latter only results from its registration "apud acta", or say in a Court.

(*b*) From the Roman law the "Tabellionus" transited to the Vissigothic law and thence to the Portuguese Law. In the beginning of the Portuguese Monarchy (12th Century), not only the "Tabelião" (*) (Portuguese word for "Tabellinus") became synonymous with Notario (Portuguese for "Notorius") but the function was of private character like that of the primitive scribes of the Roman law and the more remote antiquity. However during the reign of king Afonso II (1211 - 1223) public officers known as 'Tabeliaes" were created intervening in acts of Civil or private law by documents in the nature of authentic documents.

During the 13th century the "Tabelionato" was given a rudimentary organisation, there being "Tabelães publicos" in the main cities and township (besides general "Tabelães" for the whole country and privative "Tabeliaes" (Royal for the acts of the Royal House and "Senhoriais"/or certain warlords and landlords (Princes, Dukes, Counts, Prelates, etc.) besides the "Apostolic Notaries" appointed by the Pope, however all commonly called "Tabeleaes d'El Rei (Tabeliaes" of the king). Successive Regulations were made for them in the 14th century from that of 1340, with a secular character borrowed from the church, later on they were compiled and reframed in the "Ordenações Afonsinas" (of king Afonso III) with influences from the Justiniean Law and the French and Italian laws and customs, "Manuelinas" (of king Manuel I) and

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(*) Still today the Notary in the Konkani language of Goa is mostly referred to as "Tabelião".

"Filipinas" (of king Filipe III, IV of Spain, during the Spanish domination of Portugal from 1580 to 1640), being the embryo of the present day Notaries in Portugal and those of Goa, Daman and Diu up to at least 31/10/1965, with public faith and full jurisdiction.

(*c*) With the regime of the Ordenações Filipinas" and other regulations, the "Tabeliaes" continued till the publication of the Portuguese Civil Code, 1867, based on the Code Napoleon of 1804, which was extended to the Overseas Provinces or Colonies from 1/7/1870. It may be not out of place to recollect that Napoleon, "Il Corso" and the promulgator of the Code Civil was the son of Notary of Corsica.

It was in France, truly the motherland of the modern law, that the Latin Notarial organization as a public organized institution was shaped with such character "circa" the beginning of the 9th century, where it developed from the incipient "Capitulares" (Chapters) of Charlemagne, the Carolingean king of the Franks and the founder of the "Holy Roman Empire" and in the beginning of the 13th Century the "Capitulares" with the appointment of Notaries for the city of Paris.

(*d*) The first enactment after the civil code, 1867, was the Decree dated 23/12/1899, which is the precursor law of the movement to free the Notarial institution from the imprecise and nebulous formulas of the ancient "Tabelionato", giving a new structure of legal technique, with more precise and accurate rules. When under the prior Decree dt. 7.9.1882, art 2, for the appointment of as a "Tabelão" was only to possess the primary complementary education and to pass a test consisting in the drafting of a testament and a public deed, the Act of 1899 interalia requires the incumbents to be Law Graduates in some cases designated as "Notarious" who need no more be Court Clerks, so elevating the new incumbents to the category of "Magistrados de Jurisdição Voluntaria" as so called, or makers of the law of contracts, transfers of immovables and wills, etc. They are appointed in first instance for 3 years and could be made permanent with hearing of a Superior Council of "Notariado" created for supervisory functions. Then

with the experience gained it came the Decree dated 14-10-1900 giving more teeth to the Decree of 1899. The Notaries, Law graduates, or Possessing the special diploma of course of "Notariado" are permanently appointed (in "Nomeação definitiva") but should pass also a practical test and approved in an examination of diplomacy. They are all called Notaries with subordinate staff-Assistant and Clerks remunerated by them by way of prescribed table of fees which was then the one approved by king Luís dated 30/06/1864, common for Portugal and the Portuguese Colonies or Overseas.

This Decree reestablished the subordination of the Notaries to the Judicial Power (High Court and Judicial Courts), they take the oath of office before the President of the High Court and a security deposit or "Caução" to secure eventual responsibility for losses and damages caused in the discharge of the Notarial function and the payment of taxes due for the post.

The profession of Notary is generally incompatible with any other public employment, attorney or businessman, however with hearing of the Supreme Council of "Notariado", the Government may allow a Notary duly qualified to exercise also the professions of Advocate or Law Attorney alongwith the Notarial one (Art. 4 and Parag. 2)

For the first time women Law Graduates are allowed to enter the profession which had been a male preserve (Art 16). Prior to this, under the Decree No.4676 of 11/7/1918 they could be appointed as Assistants of the Notaries.

Subsequently there came the Decree No.8373 dated 18/9/1992 for Portugal and the Archipels of Azores and Madeira (the "Adjacent Islands") and all the Overseas Colonies, only the table of fees annexed applied only to Portugal and Adjacent Island, while for the colonies including this "Estado da India" continued the old table of fees of 30/6/1864 of the good king Luís. This Decree continued in an improved and renacted manner all the provisions of the Decree of 19/9/1900 and those of the decree No. 5462 dated 10/6/1919, made after the Portuguese Republic installed after the Revolution of 5-10-1910 which were expressey repealed (Art 154).

Meanwhile, traditionally the territorial unit of a Notary was the "Comarca" (Judicial Division) in the old law with appointment

in some cases of more than one Notary for the same area or due to the extension of work, this was changed under the Decree No.8373 and the Notarial Code in 1935 for Portugal, where the minor unit of a "Concelho" or say at the Taluka level, was made the territorial jurisdiction of each Notary perhaps with the laudable objective of bringing the Notarial services at the door steps of the local populace. This system was also introduced for the Land Registration though traditionally at the Civil Registration (subject outside the scope of this article) there have been offices also at the village level ("postos") namely to facilitate the services of registration of births and deaths.

(*e*) On the Notarial organization specifically in Goa, Daman and Diu the first "Tabeleães das Notas" were created by Queen Maria the Second by Law dt. 30/8/1853, two posts in each of the main "Comarcas" (Judicial Division) of Ilhas de Goa (Panjim), Salcete (Margão) and Bardez (Mapusa) and the notarial functions assigned to such Notaries, ceasing the Court Officers to discharge such duties as before, which was a relevant step in the structuration of the institution in this territory, subsequently, posts of Notaries were created at Quepem, Bicholim and Daman "Comarca". Only in Mormugão and Diu, the Court Clerk-cum-Notary ("Escrivão Notário) did exist till late in the "Julgados Municipais" or mini Judicial Divisions of Mormugão and Diu, under "Juízes Municipais".

B. (*f*) Regarding the Land Registration, ("Registo Predial") this institution in many aspects connected with the institution, however, always State organized or as a branch of the Public Administration, is meant to publish the legal - territorial position of the landed property under the control and guarantee of the State. Originally, it was designated by a "Registo hipotecário" (Mortgage Registration) as the Registration of Mortgages, or loans mainly granted by private creditors, secured by mortgage of immovables, were its main activity, thereafter in constant evolution made more comprehensive with the inclusion of many legal acts or transactions made subject to registration. The first enactment structuring the Land registration and imported from France was the Decree dt. 26.10.1836 of the strong legislator and Law reformer of the time of

King Pedro IV of Portugal, with the advent of the Liberalism, Mousinho da Silveira. The prior miscellaneous Legislations regarding mortgages and certain few acts was alien to or unconnected with such system, and based on the Roman and Canonical Laws like for instance the Roman "Tabulae", certifying whether the property was free or encumbered, namely the first law on pledge of King Afonso IV; the "Ordenações" Manuelinas" in Book II, Title 31, Book III, Title 77 and Book IV, Title 33 and "Filipinas" – Book II, Title 52, Book III, Title 84 and Book IV, Title 3, 9 and 10. The law dt. 22.12.1761 which reestablished the preferential rights of the State Revenue, and that dt. 20/6/1744 which regulated the gradation of the mortgages and enlarged the privilege of the preferences to all the creditors in analogous circumstances, and even the Commercial Code of 18-9-1833, which in regard to registration, refers only to the mortgage of ships.

In this first phase one may mention as worth noting the "Alvará" dt. 9/6/1801, charging the Cosonographs of the Kingdom, with the Organisation of the "Cadastro e Livro de Registo da Propriedade" (Cadaster and General Book of Property), making it compulsory to the Creditors to register their claims by inscriptions, under penalty of seizure of the documents, though this character could not have practical execution for several reasons including the impact of the Roman tradition. This is the reason why the Mortgage and thereafter the Land Registration were organised in Portugal on the basis of the precarious description of the properties, made by the functionary in charge of registration, without reference to any Cadastral Survey (introduced much later on first by the introduction of the "Cadastro Fiscal" of "Matrizes" since no other was existing or was made) their precise identification by experts by geomatrical Survey of immovables.

With the second phase initiated by the Decree dt. 26-10-1836 which created the "Registo de Hipotecas" (Registration of Mortgages or Hypotecs), the Napoleon Code is observed, some of its provisions are copied from the said French Code Civil.

The same defects of the Napoleonic Code, which aimed at the conciliation of two antagonic registrations that of simple theory with that of the publicity and speciality (the latter of Germanic origin), setting out the system thereafter known as "French System"

are also evident in the Decree of 1836, which was criticised in some other aspects by some commentators like Corrêa Teles.

The Decree of 1836 created a "Tabelião Privativo" (Privative Notary) charged with the processing of the Books of Registration in the "Julgados" (Courts) where there did exist a judge (Art 1st). As regards the registration of Mortgages the "Tabelião Privativo" was replaced by the Admistrator of the respective Taluka by the Law dt. 29/10/1840. The Decree of 3/1/1837 was enforced by the Decree of 1836. Thereafter, we may mention the regulation of the Land Credit of 1858, authored by the jurist Castro Leite Neto, the Bill of a Land Registration Code of 29/2/1860 moulded markedly by the so called German System after some alterations by further bills of Morais de Carvalho (1862) and Gaspar Pereira da Silva (1863) the "Lei of Hipotecaria" dt. 1/7/1863, dealing only with the registration of Mortgages, was the end result.

This law, which was regulated by the Regulation (Rules) dt. 4/8/1854, opens the third phase of the Portuguese mortgage history and I will deal with the several relevant principles in the next chapter 2.

However, only by Decree dt. 13/2/1867 the registration of Mortgages and other land encumbrances the 1st April 1967 was fixed as the appointed day for commencement of the enforcement of the law of 1863 and the Regulation of 1864.

(*g*) Meanwhile there came the Portuguese Civil Code, 1867 which incorporated with minor alternations the provisions of the Law of 1863, which was repealed, and the respective Regulatory legislation dt. 14/5/1868.

Then came the Regulation of 1870 and the following dt. 20/1/1898 and in the meantime the Civil Procedure Code of 8/11/1876, which was like the Civil Code extended to all the colonies, was enacted, containing certain provisions connected with land registration, namely the special proceeding for reforms of books of the Land Registration Offices and the Appeals from the decisions (of refusal/doubts) of the Land Registrars (Art 572 & foll. and 788 to 791), complemented in some particular aspects in the Regulation of 1898.

The Regulation of 1898 contains all the Mortgage and registration principles which till today would be the system of Portuguese Land Registration, through all its vicissitudes.

By the Decree dt. 17/12/1869 the recruitment for the posts of Land Registrars came to be made by competitive examination among the "Bachareis em Direito" (Law Graduates who were not "Licenciados" with a higher Law degree). But only the Regulations of 1898, attempted to elevate the level, as far as possible, intellectual as well as moral of the functionaries entrusted with the Land Registration, making the entrance and appointment of the respective officials dependent of appropriate tests, subjecting them to possible control, granting them suitable stability of tenure and independence, and demanding from them the maximum responsibility (as per the preamble of the regulations of 1898).

The Regulations of 1898 was modified by several Laws, Decree and orders of 1918 to 1921 and hence, a new regulation of Land Registration was made by Decree No.8437 dt. 21/10/1922 with the declared purpose of making a "small codification of the provisions concerning the diverse acts of land registration". This Regulation was followed by another approved by Decree No. 15113 dt. 6/3/1928 and republished on 31/3/1928 with the designation of "Code of Land Registration", however soon on 29/9/1928 it was published a new Land Registration Code followed on 4/6/1929 by the Code of Land Registration approved by Decree No.17070, when an appended table of fees, which returned to the traditional system of of optional registration, as we shall see hereinafter. This Code of 1929 was amended by many other subsequent legislation, including the code of Civil Procedure, 1939 which interalia, created the Judicial Mortgages (Art 676).

(*h*) The Code of Land Registration of 1929, the prior Code and Regulations and subsequent Legislation (except the relative provisions of the CPCS, of 1876 and 1939 have not been extended to the Overseas Colonies, which had been governed in this regard substantially the relative provision on land registration embodied in the Civil Code 1867 namely in Arts. 949 onwards (enforced in the Colonies from 1/7/1870), as transplanted from the Law of 1863 with minor modifications, as stated in clause (g) above.

However, it was enacted in Portugal for the Colonies the Code for Land Registration approved by Decree No.38804 dated 27/6/1952, published in the "Diario do Governo", Lisbon ,I series, no 142 dated 4/6/1952 and in supplement to Bol. of Estado da India, (Govt gaz. of State of India), I series No.35, dated 1/9/1952) which modified or remodelled the relative provisions of the Civil Code 1867, containing also provisions of the services organisations, prescribed Books of land Registration, and modes of reemitment of the Land Registrars and subordinate Staff and their discipline.

This Code of 1952 was in full force till the enforcement of the new Portuguese Code of Land registration of 1959, extended to the Colonies.

2. GENERAL PRINCIPLES OF THE NOTARIAL AND REGISTRATION SYSTEMS. EMPHASIS ON A PUBLICISTIC CONCEPTION.

A-(*a*) In the Portuguese notarial system, which evolution has been described in Chapter I-A above, lately the essence is contained in the Act of Decree no.8373 dated 19.9.1922 referred to therein, on the notarial powers and the Jurisdiction. It stated that the Notaries were Public or Government Officials appointed by the Government for life, being empowered generally to authenticate with their intervention all the extra-judicial acts and contracts which the parties should or intend to clothe with the character of authenticity and especially the following: Recording of Public wills, deeds of approval of closed or secret wills (the kinds of wills are detailed in the Civil Code 1867 in Part III of Book 2 on Land Succession which by the way was abolished for the future the testament "de sue Comum" or joint wills of the act or legislation (Art 1753), extra judicial protests of negotiable instruments and revocation of wills, and all other authentic extra official instruments and documents (namely "escrituras publicas" or public notarial deeds besides the Powers of Attorney for certain purposes) or intervening in their making; keeping on deposit the closed wills entrusted for safe keeping by the testators to the Notaries; filing

and recording in the Notarial Office any documents in terms of law or at the request of the parties; issuing "verbatim" or partial certified copies of documents under their custody or presented by the parties (see letter called "Publicas Formas"); passing the Certificates of existence of notarial acts filed in their offices, life and identity certificates, certificates of discharge of public posts or of direction or of management of any establishments or societies, attesting or authentication of signatures or documents by way of attestation and discharging of any other notarial duties and acts as provided by law, like to make translations from foreign languages to Portuguese and vice versa as it was clarified later on. Art 63 made compulsory the form of authentic extra judicial document say notarial public deed for all kinds of transfers of moveable property, contractual mortgages, assignments of mortgage credits, transfers of shares of convencial societies, curtail leases subject to compulsory registration, transfers of business of commercial or industrial establishments, amicable partitions and divisions of movable and immovable assets and other acts for which the law so provided expressly. For instance, the Commercial Code, 1888, required this Form for constitution, modification and dissolution of commercial societies and companies of all types governed by that Code and likewise the same was provided for the limited "per quota" Societies ("Sociedades por Quotas", regulated by the Law of 14.4.1901 after its Germanix matrix. The code of Civil Registration of the then "Estado da India", approved by decree dated 9/11/1912 and enforced from 1/1/1914, provides also that the adoptions (allowed in Goa, Daman and Diu under the respective Codes of Usages and Customs of the non-Christian inhabitants of Goa of 16/12/ 1880 of the non-Christian habitants of Daman of 31/8/1854 and of the non Christians habitants of Diu of 18/1/1894, though now almost obsolete, should be made with the conditions prescribed by the notarial deed. Similar provision was made in regard to "perfilhação" (recognition of illegitimate children) under the Portuguese Civil Code, 1867 and the connected subsequent law of Protection of Children-Decree no 2 dated 25/10/191 0 (one of the Laws of Family of the Portuguese Republic after the Revolution of 5/10/1910), the ante-nuptial contracts and settlements under the Civil Code renunciations or releases of rights to inheritances under

the same code; declaration of heirship or succession Certificates in case of single heirship in case of major heir and not under disability extended to cases of plural heirship, introduced by Art.165 of the Notarial Code of 1935 for Portugal, extended to Goa and other Portuguese colonies alongwith Art. 79 of the law No.2049 dated 6/8/1951 with some alterations by Decree Law No.32033 dated 22/5/1942 and Government Order (Portaria) No.14157 dated 14.11.1952, published in the Goa Official Gazette I, Series no.7, dated 12/2/1953, Notaried Justification for purposes of registration of landed property based on the "Matriz" certificate in case of absence of other documents of the title (as prescribed in the C.L. Reg. of 1959), etc. The Public Deed should be attested by two witnesses and the Public wills and approval of Closed Wills by three (doing away with the five witnesses required by the Civil Code (Art. 1912), though by the Notarial Code of 1935 for Portugal the number had been reduced to two also – Art 174) and those Wills and Deeds should be read aloud by the Notary in the presence of the parties and the witnesses before their signing including by the Notary, after the instrument being hand written continuously in the Record Books "Livros de Notas" (Will book or Deed book) by the Notary or his Assistant or Clerk. Some instruments like the Power of Attorney were recorded in the books "Fora de Notas" or written in the "Livros de Notas". The Notary was also charged to check compliance of fiscal law of Stamp duty, "Sisa"/transfer take by onerous titles of immovables, etc. The Notary should give free legal advice and to check on the legality of all acts and contracts required to be made, but should refuse his intervention when the intended acts were expressly prohibited by law or against the good morals or against the public order; or when certain relatives of the Notary were the interested parties (Art. 270 of the Decree No 8373). By Law he was also liable to disciplinary, civil and criminal responsibility for the official acts performed by him as Notary. He was assisted by the Collectorator, subordinate staff, Assistants, Clerks and Copyists of his confidence and paid by him, though the assistant was proposed by him and appointed by the Governor General or Governor of the Colony.

The notarial acts performed by the notary were for evidenciary purposes deemed as public acts and public documents ("documentos autênticos extra oficiais" as stated) enjoying public faiths in Courts of law and outside, if fact everywhere in the world as per the legal principle of "locus regit actum" accepted by the committee of the Nations, subject to prescribed formalities by treaty of law of legalisation and stamping if any of notarial documents issued in Portuguese territories or received from Foreign Countries.

It may thus be seen that under the Portuguese system, the main activity of the Notary was to draw and to execute wills and all sorts of conveyances and therefore it can be that the Law of Wills and the Law of Contracts and Transfer of Property were the exclusive creation and the province of the Notary as the maker of law in peace as a responsible Government Conveyance and qualified legal expert and Public Officer, doing public acts and documents.

The system was similar to the one under the French Law in force in Pond icherry and the other French settlements in India as per the Decree dated 22/11/1 887 (Organisation of the Profession of a Notary in the French Settlements in India), up to their successive integration within the India

Union, by treaties with France, namely the "Traité of Cession of 1956 and the "Crocis-Verbal" of 1956 and other instruments regarding specifically the Free town of Chandernagar has been acquired by India by the Indo-French Treaty in Paris dated 2/2/1951, though the "de facto" transfer had been effected earlier by an Agreement dated 2/5/1950. Thereafter this territory was administered under the Chandernagar (Administration) Regulation 1952 (1 of 1952) until its merger into the State of West Bengal by the Chandernagar (Merger) Act, 1954 (36 of 1954) with effect from 2/10/1954.

The French Decree of 1887 in Art.2 defines Notaries in terms as under: "*Notaires* are Public Officers set up to entertain all deeds and contracts, to which the parties could not intend to clothe with the Character of the authenticity attached to the Acts of the Public Authority and to attest their date to preserve them in deposit, to deliver "Grosses Copies and Copies of them".

(*b*) The Decree No.43899 of 6/9/1961, on the lines of the system already enforced in Portugal and adjacent Islands by Law No.2049 of 1951 (Called the Reorganisation of the Registration and Notarial Services) carried in the Colonies a similar major reform of the Notarial institution on modern lines, giving shape to the last phase of the evolution of the National servicies under the Portuguese Latin system long back aimed at the nationalisation in the interest of the general public and also of the employees concerned. The major benefit was to give the Notaries and the Subordinate staff the rights to salaries and pension to full fledged Government Servants, counting the past services under the provisions of the "Estatuto do Funcionalismo Ultramarino" (E.F.U.) of 1956 and respective regulation of pay-scales though the revenues were traditionally collected on Table of Fees or emoluments fixed by the local Governments, however the entire responsibility of the Notary to bear all the expenses of running the office ceased. The Notarial Offices were fully integrated in the Government Organisation, under the "Procurador da República"(Advocate General Cum Government Legal Adviser) of the Judicial district, instead of the Chief Justice of the High Court as before and all the Notarial Officers were brought under the discipline of rights and obligations of Government Servants. By the same Decree, the Notaries as Law Graduates were made the legal substitutes of the "Delegado do Procurador da República" (Delegate of the Advocate General) in the respective Comarca in the absences or leave of the incumbent and when more than one Notary exist in the same, the Advocate General should designate one of the Notaries for such functions. The Notaries also granted the right to practice Law in the Courts within their Jurisdiction or the High Court, with some restrictions like not pleading the causes against the Government, etc., this also is an addition to their Government Salaries and in attention to their technical preparation and high level qualifications required for the post of Notary.

B-(*c*) In the Portuguese legal set up, the Land Registrar purported to register the rights to the land or immovable property and their transfer and modifications and to give publicity to such rights towards the third parties and the general public. The principle of

publicity, along that of speciality, were based on the German System which first appeared in the Regulation of Land Credit of 1858 of Silva as already noted and the Bill of Land Registration Code of 1860 of Carvalho Martins, had been adapted in the Hypotecary or Mortgage Law of 1/7/1863 as also noted down in Parag. 1-B above. The principle of speciality was the identification called description, physical and legal, of the property, means that, contrary to the prior technique of Decrees of 1836 and 1837, the "Descrição Predial" is made separately for each party and no longer is a part of the "inscrição"(inscription) and is now the basis for the land registration. The extract should contain the real elements necessary to distinguish the property from the other properties and are those indicated in Art.45 of this Law of 1863 or in Art.89 of the Regulation of 1864.

(*d*) We may depart from Art.49 of the Civil Code, 1867, which first detailed in a systematic, though then summary in number, the fact, subject to registration:

"They are subject to registration:"

1st The real rights on immovable properties,
2nd The real onuses(encumbrances),
3rd The real actions over designated immovable properties and any others meant to recover ownership and possession of the same; the actions over nullity of the registration or its cancellation; and the judgments pronounced and becoming final (res judicata) over any of such actions.
4th The transfers of immovable property by title gratuitous or onerous and all the transfers of assets or rights over immovables.
5th The simple (mere) possession.

The subsequent Land Registration Codes and the Regulations, including the Codes of Civil Procedure of the 1876 and 1939 increased the number of the registrable properties, like Art.2 of the Code of 1959 here in force.

In regard to the value of the inscriptions, the solutions in the doctrine and adopted by the various legislative systems, oscillate fundamentally, between the one which recognizes to the registration constitutive efficacy (this was the doctrine of the Code dated 29/9/1928, the acts producing effects even "inner parties"; and the others, classical among the legislations of the Latin type, only give to the registration a declaratory effect. That is, the registration produces effects between the parties, their heirs and representatives, even or irrespective of registration of the transaction; but, towards third parties, the effects of such titles or rights begin only from the registration. This legal positions was accepted in Art. 951 of the Civil code.

(*e*) Several advantages derive from the registration, even facultative or optional; the first has been stated above, that no fact has efficacy or can be offered against third parties without registration made.

Also, without prior registration of certain facts relating to immovable property certain proceedings or measures could not be applied in Court, like the proceeding of "posse judicial avulsa" ('miscellaneous judicial possession') branded in Art. 1043-Part, C.P.C. 1939 as a special proceeding.

The registration also accelerates the time limit or prescribed period for the acquisitive or positive prescription of immovables (Arts. 526, No. 2 and 527 Civil Code), bestowing on the applicant of registration a very right, and in all cases, a privileged position – that of a third party – to whom the facts not registered cannot be opposed, and a preferential right in relation to acts which are subsequently registered (summarised in the Latin legal maxim "qui primus in tempore, patian in jure"); finally the legal presumption, taken in the French System, that the property or right inscribed (registered) belong to the registering person (vide Art. 953, Civil code, 1867, Art. 267 C.L.Reg. of Portugal of 1929 and Art. 8 of the C.L.Reg., 1959), the last one in force in this Territory and case - law like decision of STJ, Lisbon, in BMJ No. 99, the onus of proof in Court to prove the contrary falling upon the bypassed person, party to a title deed. However, certain acts without the registration even "inter-parties" do not become perfectly constituted, as for ins-

tance the mortgage and the pledge of mortgage credits (Arts.888, 1106 and 1018, Civil Code, 1867 and Parag. 5 of Art.164 of the Notorial Code of 1935).

(*f*) From the several provisions and principles from the civil code till the subsequent more modern legislation, the following principles may be evolved and described, which mould the whole Portuguese System of land registration.

They are eight in number, and in the now distant days of our legal training for the common examinations for the post of Notary, Land Registrar, Civil Registrar, etc., after the Law graduation, they used to be learnt through a suitable mnemonic beginning with the initial letters of the principles in Portuguese language as VPELITPI (vide pgs. 19 to 32 of the excellent work "Registo Predial - Sistema - Organizaçõs - Técnica - Efeitos", by Dr. Arthur Lopes Cardoso, Coimbra, Portugal 1943, 193, which we will follow closely:

These principles may be explained briefly:

1. "Voluntariedade" (Voluntariness)

As per the law, the inscription is voluntary, only indirectly compulsory , or more precisely necessary for the full details of the facts subject to registration.

Our Code (of 1929) and subsequent Codes, as I add, accepted therefore, the so called principle of Voluntariness and it is not surprising that this happened so, as, even in Germany, where the registration is constitutive, the inscription is optional. Especially, as per the principle of claiming of the legal acts, the law made compulsory the registration of the previous transfers (Art. 269 CLR 1929) and the registration of the acts constituted simultaneously in favour of the transferor or of the third parties (Art. 228 CLR 1929), respectively.

2. "Publicidade" (Publicity)

This principle requires in the first place, the subjection to registration of almost all the facts regarding immovable properties, the disappearance or recognizance of Occult Acts (not disclosed)

in benefit of the transactions and the development of the real credit. By two procedures the legislator may attain such purpose: Ordering a compulsory registration, indispensable to the constitution of the acts subject to it, or leading the holders of rights to inscribe them in a voluntary (optional) registration by indirect means, giving to the inscription a lesser value, but penalising the omission in the registration of the facts subject to them with the inefficacy in relation to third parties, in such manner impeding that the carelessness of the one who failed to apply for the registration causing loss to the future acquirer of the immovable property, or of the one who over the same lent his finances.... It was by the second method that the Principles of Publicity was adopted in our legislation as verified from the provision of Arts. 180 (of the Code of 1929, similar to that of Art. 8 of the CLR of 1959, which determines the acts subject to registration.) Art. 267 (similar to Art. 8 of the Code of 1959) which gives the registration based on the possession transferred with the property by virtue of granting to the registering person of a property or right, the legal presumption that the same property or right belongs to him, and 274 (similar to Art. 7 of said Code of 1959) which provides for inefficacy of the acts subject to registration in relation to third parties, when not registered.

As the principle of publicity demands, also, that the registrations should be known by all, in the Code it has provided facility of free consultation by examination or by means of Certificate (Arts. 171 and 173, para 2nd, of CLR of 1929 and similar to Arts. 259 and 260, No. 1 of the CLR of 1959 for the Overseas.

3. "Especialidade" (Especiality).

By especiality one should understand the clear and precise determination of the immovable properties and of the rights and encumbrances charging them - the Description of the properties and the inscription of the rights, with all the indispensable requirements.

As noted by Martinez (in Princípios Hipotecarios, Madrid, 1931) the publicity is born out of the necessity to end the clandestine hypotees, and the especiality is a reaction against the general hypotees. The principle of especiality requires that be determined

the properties, rights and encumbrances falling upon them in all their characteristic particulars (physical and legal especiality).

The description should indentify the properties and in the inscriptions they should appear duly identified, the subject person or title holder of the right, the object or properties or properties over which the described right falls on and, finally, the inscribed right, its nature, extension, conditions, etc.

The principle of the physical especiality is the duly consacrated in Art. 214 of the CLR, 1929, as under: "the system of registration is based essentially and invariably in the identification of the immovables over which the inscription falls on" (corresponding to Art. 143 of the CLR, 1959), which more clearly states that "the descriptions purport exclusively to record the physical economical and fiscal identification of the property to which the inscribed facts relate".

Other projections of this principle are found in the said Code of 1929, namely in Arts.215, 230 and 231 which determine, respectively, which are the requirements of the descriptions and what sould contain the inscriptions in general and especially (Arts. 145, 178 and 179 of CLR,1959

Also Art. 198, accepting the same principle, sets out that the specification of the properties, necessary for the registration of the General Mortgage should be made by means of a complementary declaration; and Art. 197 of the same Code prescribes that by a complementary declaration it shall be made the complete specification of the properties when the documents be, in such part, insufficient (see Arts. 109 No.2 and 107 No. 2 LRC, 1959).

4. "Legalidade" (Legality):

By this principle they are admissible to registration only the acts validly constituted.

It is well understood that this should be as the registration should correspond to a legal reality; the inscription should accept only the titles legal and sufficient to prove the rights which are intended to be registered.

A logical corollary of this principle is the awarding to the Land Registrars of the powers to scrutinize the titles presented for registration, in order to inscribe only those which possess all the above requirements and to refuse them when so does not happen.

This is the more important function of the Land Registrars. By the same, as said by Fernando Campuzama Y Horma in "Nociones de Leg. Hipotecaria" Madrid, 1934, pg. 196, it is proved, so to say, a comparison between the title and the legal provisions which be applicable, in order that the inscription congregates all the possible guarantees of stability and certainty. This principle is manifested in several provisions of Code of 1929:

A) Art. 191. They are exclusively admissible to definitive registration. The documents and legal sufficient for the proof of the acts the registration where it is applied for.

B) Art. 207. The cancellations shall be made in the face of the documents necessary and sufficient to prove the estinguishment of the act, the cancellation whereof is intended to.

C) Art. 250. The Land Registrar should refuse to make the applied for act in the cases enumerated in this provision

D) Art. 251. That the Land Registrars should do personally the registration applied for, in the cases provided in this Article.

E) Art. 246. Certain errors of registration may be rectified ex-officio by initiative of the Land Registrar or on application of any interested party.

F) Art. 275. The irregularities of any act of registration, when its substance is technically cognizable or its extinguishment, do not amount to nullify. This provision on legality has been incorporated mainly in Article 5 of LRC, 1959 and other corresponding provisions.

5. "Inscrição" (Inscription):

This principle requires the determination of the legal value of inscription, its immediate effects, its compulsoriness, volountariness or necessity. Also it requires the enunciation of registrable acts.

According to our System, the inscription in a general way is not, by itself an essential factor creator of rights.

In fact, only exceptionally, it presents to us as constitutive - that is, as indespensable for the constitution of rights – in the case of mortgage and in that of pledge of mortgage credits(as already pointed out in Parag. B(e) above and *vide* pages 131 and foll. of Dane Work of A. Lopes Cardoso).

To publish situation already in existence – even though through them, they become extensive or efficacious in relation to third parties. It may be clarified that this presumption is a "tantum juris" and can be rebutted by the prior owner and we recollect here also the advantages of registration mentioned in the above said Parag. B(e) above.

The facts subject to registration are those of Art 180 CLR of 1929 and Art. 2 of CLR 1959.

6. "Trato Sucessivo" (Successive chain of title) or (of chain of the legal acts)

Contrarily to the Hypotecary or Mortgage System, as the Torrens System and its German precedents, which confer an alodial ownership "ex-novo" to the acquirer, without legal nexus with other transferor which be not the State, from which he receives the title (investiture) – so state the Spanish Authors (J. Gonzalez y Martinez, Principios Hipotecarios, pg. 231 and F. Camuzano y Harma, Nociones de Leg. Hip., pg. 50) that the Successive Chain is the basic principle of the Spanish legislation. The same happens with the Portuguese legislation. This principle requires that the successive transfers appear as derived one from the others, without solution of continuity, constituting a logical chain of title in which the transferor be always the person who figures as Owner in the registration. This is to avoid intermediate transfers not registered, and possible frauds.

In this manner, the registration files the complete history of the property since the moment that it was always subject to registration.

This principle, one of the most important has given place to a constant remodelation of the provision which reflects it in our Code of 1929, consecrating the same in Art 269 (corresponding to Art. 13 of CLR of 1959 and vide also Arts. 197 and 215 as new suppletive procedure in some cases when the chain of the title in the registration books is broken).

In some cases this principle will not apply for reasons of public order, as regards the inscriptions of attachement and seizure, giving to a true owner effected by a wrong attachment/seizure. The possibility of filing objections by a mere application, under Parag. 3 of Art. 269 of the Code of 1929, without need to apply for "embargos" of third party - see decision of the SDJ Lisbon dated 3/12/1940 in Rev. de Not. e Reg. Predial, Year 13, pg 184.

7. "Prioridade" Priority.

This principle imposes that the registration grants to the one who first applied to its benefits, a degree or place of preference over the adversaries. This principle is basic of the institution of the registration in attention to the Latin maxim already expounded of "prior in temper potior in jure"

The priority gave rise to the creation of the book "Diário" (Daily Book).

It is by the date and chronological order of the presentations in the Daily Book that the priority of the inscriptions is decided.

It is worth to note that, as wisely made by Dr. Mário de Paiva Jácome (in Rev. de Not. e Reg. Predial, year 8, No. 8 pg. 113, and No. 9, pg. 129), that the preference derived from the priority is not a general and natural effect of the registration, but an exceptional effect, an effect which is verified only in special cases in which the law provides for it and which cannot exist unless when by exception the law expressly so prescribes.

The preference of the priority is not a rule of the land registration: it is the exception. However it is based in the priority that the registration grants to the first one who inscribes his right, the preferences that the law, exceptionally, or casually and eventually confer.

8. "Instância, petição ou requerimento para Inscrição" (Application or petition for Inscription)

This principle is a consequence of the principles already explained.

The registration in a general manner should be applied for the interested parties. Only exceptionally the Land Registrar may do, ex-officio, certain acts referring to the registration. It is the application of the interested party which sets out in motion that activity of the registering functionary; the presentation of the application and of the titles in the Land Registration Office; later on a careful analysis of the application and the accompanying documents; and only thereafter, as a consequence, the practice of the acts of the registration applied for, or its refusal, or its provisional registration. The principle is expressed in Art. 173 of the LRC of 1929 which prescribes: "The act of registration or relating to it shall not be done ex-officio by the Land Registrar but only by virtue of an application from a person of a legitimacy (lotus standi), directly or through Attorney". The same principle finds expression in Art. 4 of the CLR, 1959 as under: "Principle of application – save in the cases especially provided in law, the registration shall not be made ex-officio, but on application of the "interested parties", which is clarified in Art 185. And the lack of "Locus Standi" is an obstacle entailing refusal of the registration applied for in Art 250, No. 3 of the Code of 1929. Under the CLR of 1959, the doubt can be raised and once a valid Power of Attorney is presented, the registration applied for may be made.

(*g*) The registration shall be applied in the Land Registration Office territorially with the jurisdiction, depending of the situation of the property. If the property or the properties are situated within the jurisdiction of more than one Land Registration office, in all of them and concerning the whole property or properties the registration should be made. The registration applied for in an Office not competent should be refused, and if so made, will be null and void (Art. 182 and 250 No. 5 CLR 1929 reflected in similar provisions of Arts. 27 and 241, No 1-e) of the CLR, 1959 and are traditional in the land registration legislation.

(h) Books of Registration.

Throughout the legislations, there have been Books of Registration under the custody of the Land Registrar, which in the last CLR of 1959 are detailed in Arts. 38 and 39, prescribed models.

Art. 38 provides for the following books in each "Conservatoria":

a) Daily Book (Book A),
b) Book of descriptions (Book B),
c) Book of inscriptions of Ownership(Book G),
d) Book of Mortgage inscriptions (Book D),
e) Book of diverse inscription (Book F),
f) Book on Real Index (Book D),
g) Book of personal Index (Book E),
h) Book of registration of doubts and refusals;
i) Book of registration of fees.

In the Land Registration Offices divided into Sections there should be privative books for each Section.

Art. 39 provides further for the following additional books:

a) Book" Copiador" for forwarded correspondence (Copying Book).
b) Book of Inventory of the L.R. Office.
c) Book for taking charges("Posses")'
d) Book of "Ponto"(Attendence of Staff Book).

The liaison of the land descriptions (Book B) with the inscriptions (Books C, F and G) is made by the "Cotas de referência" (Reference endorsements in Book B), vide Art. 172.

Each property ordinarily should have a separate and only description, to which one or more inscriptions may refer (Art. 144) and such description once made, shall never be cancelled but only be completed, rectified, restricted, enlarged or made inoperative by virtue of supervening circumstances by means of "Averbamentos" (endorsements) (Art. 153), which requirements are detailed in Art. 154.

On its turn the inscription are dealt with minutely in Arts. 171 to 196. They are meant to define the legal spectrum of the properties described, through extract of the facts subject to registration, referring to each one of them and no inscription can be recorded without a prior opening or making of description of the properties to which it may refer (Art. 171, N.os 1 and 2).

Certain inscriptions are made exceptionally by the means of simple endorsement like attachment, seizure, assignment of mortgage credits, etc. (Art. 188).

Also the inscriptions may be ordinarily completed, actualised, restricted are enlarged by means of "Averbamentos" (Endorsements) – Art. 189.

The public character of the registration is embodied in Art. 259 which states that "the land registration is a public one" and therefore any person may obtain certificates of any act of registration and informations, verbal or in writing, on the contents, as also to consult in the L.R. Office, the Books of the registration during the prescribed timings.

The evidence of the registrations made is provided by means of Certificates and certified copies and even by "notas" (short notes) issued by the Land Registrar – Art. 260.

(*i*) We gave in some detail the principles of land registration and the relevant provisions of the Code of the Land Registration of 1959, which was approved by Decree Law No. 12565 dated 8/10/1959, and enforced in the then Estado da India with some modifications, by Portaria (Order) No. 18757 dated 29/9/1961, published in the Goa Government Gazette, I Series No. 47 dated 28/11/1961, as this was the law in force in December1961.

(*j*) In short, the Portuguese law, the Land Registrar with the assistance of subordinate staff (as a Government branch) purported to register the rights to land or immovable property and their transfers and modifications and to give publicity to such rights towards the third parties and the general public. The Code of 1959, (like the prior ones and the Civil code 1867) deals substantially with the technique of Land Registration. The organisation of the Services was taken care of by the above quoteed Decree No. 43899 of the

Central Government at Lisboa which is called also the Reorganisation of the Registration and the Notarial services and Service of Registration of Land, Civil Registration, Commercial Registration and Motor Vehicle Property Registrations. In the Portuguese Land registration System the respective "Conservador do Registo Predial" or Land Registrar has to verify not only the requirements of the fiscal law especially the Stamp duty in Deeds(Public Notarial deeds, Judgments/Decrees of Courts, etc.) presented for registration but also the formal and substantial validity of such titles, testing their legality as a double check and shall refuse the registration, or make it only provisional, if they are not in conformity with the substantive law. If the objections are removed the provisional registration may be converted into definitive by endorsement. In this sense the Land Registrar was a sort of a Judge and such system intended "inter alia" to avert or reduce litigation in Courts. In each "Comarca" or Judicial Division there was a Land Registrar, similarly as in the case of a Notary public. He should be a Law Graduate and by virtue of his Office, was the "ex-officio" substitute of the "Comarca" Judge. The CLR of 1959 provided also for compulsory registration after the geometrical Survey being carried out (Art. 14) but as in 1961 no such geometrical survey had been made and said directives were never enforced, the registration remained optional as per the traditional or original system. The optional registration was possible since the Notarial documents dealing with conveyance of properties must be "escrituras públicas" enjoying the value of and having the character of public documents by themselves once recorded and executed by the Notary Public for all purposes and therefore dispensing with any other further registration (Notarial law of Decree No. 8373 dated 18/9/1922 and part C.P.C. 1939).

3. The transition in December, 1961 and thereafter. Problems of dual situation.

(*a*) When the "Estado da India" became Indian territory by "de facto" annexation in December 1961, and integrated with the Union of India as an Union Territory then by virtue of of the 12th

constitutional Amendment with effect from 20/12/1961 (Formalised "de jure" by the Treaty India-Portugal signed at New Delhi on 30/12/1974 after the Portugese Revolution of 25/4/1 974), all the Portugese laws have been continued as Indian Laws till repealed or modified by the Legislature or other competent authority, as per the G.D.D. administration Ordinance 1962, Sec. 4 and the G.D.D. Administration Act, 1962 Sec. 5, both of March 1962 with effect from 20/12/1961. One process of replacement of those laws was by way of Regulations 12 of 1962 and 2 1963 under Art. 240 of the Constitution of India, containing lists of Indian Acts and Laws, mostly non personal, to be enforced in the acquired territories by Notifications at suitable times, causing the implied repeal of the "Corresponding law" and saving vested rights or past liabilities.

(*b*) decree No.43899 of 6/9/1961 could not be enforced till december 1961 due to budgetory reasons, the Notarial and Registration panorama continued. Thereafter, till after some representations, the Decree No 43899 was finally enforced, with some modifications, regarding the Notarial institution, by Government Order GAD/74/621/2331 of 7.11.1963, alongwith the new Table of Notarial Fees approved by the Leg. Dipl. No 2095 dated 24/6/1961 (Goa Govt. Gazette Series I Suppl. No. 35 dated 24/6/1961) with some accepted reduction in the rates, so replacing the old Table of Fees of 1864 with increase of 20% operated by a Central Decree of 3/4/1933, and giving the long awaited relief to the Notarial class of pay and retirement benefits as full fledged Government Servants though the Notary was paid by 5/6th of the rank pay and 1/6th as active service pay by way of a percentage of the emoluments, with the maximum limit of 95% of the total pay of the Advocate General, his hierarchic superior. The major percentage reverted always to the Government, to which it was credited at the end of the each month as State revenues.

(*b*) However, as from 1/11/1965 in Goa, and 25/4/1966 in Daman and Diu, they were extended and made applicable the Transfer of Property Act, 1882, and the Indian Registration act, 1908, with the Rules 1965, and from 1/12/1965, the Indian contract Act, 1872, laws enlisted in the Regulation 12 of 1962. These Acts

replaced "pro tanto" the Portugese laws on Contracts and Transfer of Property and registration, mainly contained in the Portuguese Civil Code, 1867 and the Notarial Decree No.8373 dated 18/9/1922 and the Code of the Land Registration dated 8/10/1959 with drastic reduction of the emoluments income. Afterwards, by another Notification under the Regulation 12 of 1962, the Notaries Act, 1952 in force in the rest of India, with the Notaries Rules, 1956, made under Sec. 15(1) and (2) of the said Act, was extended to the then Union Territory with effect from 1/7/1971.

(*c*) Now I will deal with the advantages and the disadvantages of the Indian system based on the English System of conveyancing and compulsory registration inherited from the British rule in India, towards the Portugese Continental System of conveyancing and wills and the registration or better, saying the recording of Notarial Deeds and the wills being a consolidated domain of the Government entrusted to skilled, responsible and highly qualified men called Notaries with all the rights and the responsibilities of Public Office, enjoying their acts, the Notarial acts, drawn up on proper books under their charge, the value of the public documents and complete title deeds with public faith for all purposes, even the mortgage Deeds being excutable straightaway in the Courts without resource to a suit, at par with executable decrees of a Court and enabling also a system of Registration apart of this, as a double check of the legal registerable transactions and aiming also at the pulicity of the acts towards third parties.

(*d*) Even before the extension of the Notaries Act, 1952 and the Notaries Rules, 1956 with effect from 1/7/1971, the reduction of jurisdiction of the Notaries under the Portugese law and the consequent loss of this source for the reasons of extension of the Transfer of Property Act and the Registration Act, made it necessary for the Government of Goa, Daman and Diu to take a number of economy and policy measures to adjust the facts to the new reality. So, first the number of the Notaries and other staff was restricted, one of the Notaries of Ilhas Comarca, Panaji, was apppointed as the Land Registrar of the Comarca, fresh vacancies of retired Notaries were not filled up, the services of one Notary of Salsete

and of the Notary of Quepem were disperised with and the last post of the Notary of Panaji still existing was abolished with effect from 1st March, 1971. Meanwhile, by Govt. Notification No. LD/N/U/68 dated 4/4/1968, the Land Registrars or Sub-Registrars (these appointed by the Indian Registration Act, 1908) in each "Comarca" (jurisdiction of a Junior Division Court) and the Civil Registrar in Julgado Municipal of Marmugão, were made the "ex-officio" Notaries in the respective jurisdiction, and so these Officers are doing since the residual notarial work of the Notaries under the old regime above referred to, consolidated with normal duties of registration work under the old Portuguese and the Indian systems and other official duties assigned to them (registration of Partnerships, for instance). This arrangement has been in effect up to now, being revised from time to time namely when new sub-registration areas under the Indian Registration Act are created or modified. This naturally creates doubts and legal problems due to various reasons including ignorance of law, for instance, some Sub-Registrars in Daman and Goa had been registering Wills made within these territories drafted by advocataes or parties as private documents, which are absolutely null and void as per the law of succession of the Civil Code of 1867 and the Decree No. 8373 of 1922 still in force regarding that the same be done only by the Notaries, now the Notaries ex-officio, at the Will Books as public documents, as per the principle incorporated in these laws and laws on Form of Acts of "locus regit actum".

Notaries have been also appointed under the Notaries Act, 1952 and Rules 1956, which for the Goa Territory (now State of Goa from 30/5/1987), though under a quota fixed by the Central Government, are approximately 95 at present, performing the notarial duties assigned to them under Sec. 8 of the Notaries Act, 1952.

(*e*) From what is stated herein before and on perusal and comparison between the Portuguese Notarial System as embodied in Decree No. 8373 dated 18/9/1922 and Decree No. 43899 of 6/9/1961 and allied laws, and the Indian Notarial System as contained in the Notaries Act, 1952 and Rule, 1956, though the Notaries underthe Indian law should be appointed among practicing Advocates and be skilled for the profession and possess qualities

of "character, integrity and ability" for the appointment or renewals (Sec. 15(2)(b), Notaries Act, 1952, and in fact an international functionary, whose notarial acts enjoy faith everywhere in the world subject to certain formalities, it may be seen that the Indian system only approximataely is the corresponding law to the previous system, the main differences being that the Notaries under the Portuguese system and Public Officers with the status, rights, duties and liabilities of Government Servants and the Notareal acts under their signature and official seal enjoy public faith and are public documents for all purposes of evidence including executability in Courts in certain cases and the jurisdiction of the Notaries being very wide, namely with the monopoly of drawing, executing and registering in proper books under their legal custody, wills and all conveyances of immovable propertty as weel as certain other important acts of the dual life of the Community in the family, marriage, adoption and succession matters, whereas the Notairies in India, though Gazetted Officers in the sense that the annual list of Practising Notaries is published in the Official Gazette, are deemed not to hold a "Civil Post "within the meaning of the Article 311 of the Constitution of India (AIR 1967 All. 173, etc) are not Government servants and bugetted employees, their "Notarial acts" not being public documents and their jurisdiction not being so extensive. In this last statement I am referring to the functions of the Notaries in India as completed by Section 8 of the Notaries Act, 1952, above referred to. Even though under the legislative delegation contained in the Sub-section (1) (I) of this provision (" any other acts which may be prescribed"), read with Rule 11(8) of the Notaries Rules 1956, the Indian Legislature has soundly marched a step forward (which could be deemed as the embryo of an evolution or reform to which I shall refer to hereinafter), enlarging the field of the Notarial Acts, in foreseeing that the Notary may" (1) draw, attest or certify documents under his official seal including Conveyance of properties;... (3) prepare awill or other testamentary documents ...", with the observation that, even so, these deeds drawn up by the Notaries in India must be registered under the Registration Act for the purpose of legal validity and evidentary value and are not public documents. This basic difference on the structural or organisational aspect as well as on the technical aspect

makes it difficult to conciliate or harmonise the system Notaries in India obtainable under the Notaries Act, 1952, of English extraction , and the system which prevailed in Goa Daman and Diu. A mere perusal of the Notaries Act, 1952, eg. Secs. sand 9 necessity of a certificate of practice with a limited validity for three years and need of renewal (even to be further restricted as per the proposed recent amendments which I will refer to in my final parag. or Chapter 4 hereafter); Sec. 1 5(2)(b) and Rule 4(3) memorial of application countersigned by "at least ten persons representatives of the Magistrates, bankers, merchants and principal inhabitants of the local area..." (also to be and even if amended); remuneration by fees which are a private issue, etc. shows that all these are features incompatible with the status of a Notary Government Servant doing official acts. To put it tersely, the privatistic and narrow conception of the Notary in India (or in England), and the publicistic conception of the constitution of Notary in the Portuguese of Continental system, as shown in general lines hereinabove, in practice may co-exist, but never inter-mingle.

In one part however the two systems have something in common besides certain other similarities, and this is on the point of the legal qualifications namely the Law degree required for the post of Notary, as detailed earlier. This is quite natural due to the nature of extensive jurisdiction of the notarial functions, in the Portuguese system and the vast potentialities and scope and progressive enlargement and importance of functions of Notaries in India, demanding an increasing knowledge not only of the Indian civil and stamp laws and other fiscal legislation but also of the foreign languages, which are aptitudes to be considered by the competent authority when recommending a candidate for appointment as a Notary.

(*f*) Differences between the Portugal Registration System of high quality of the service namely checking up the titles and refusals for formal or substantial illegalities, and the Indian system where, for instance, the Sub-Registration Office does not assume responsibility for what certifies in the Official Certificates issued, are also self-evident, derived from the distinction between the con-

veyancing systems of both the laws/legal schemes and some other peculiar facets already explained.

4. The Notarial and Land Registration Systems in the cross-roads. Major roles assignable to them. Privatisation or Nationalisation? In-depth study and solutions possible.

(*a*) The Notary, either in the system of Government Notary with wide jurisdiction of the Latin or Continental mould or in the Anglo-American model received in the Notaries Act, 1952 , and its predecessor laws under the Negotiable Instruments Act, 1881 and Public otaries appointed for towns, bazars and places of resort of the rural population in 1859 at the time of Sir G. Campbell, Judicial Commissioner (History of Registration in Oudh as given in the Registration Manual for U.P. (4th edition), with lesser jurisdiction, has always been deemed by the society and the Comity of Nations, and notwithstanding all his limitations, a man of integrity and character, having credit everywhere (Vide Sec. 14 of the Notries Act, 1952, a man/woman of the trust of the people on whom they confide their wealth and the safety of their transactions. As stated, he is an international functionary in the true sense of the word. An act done by a Notary in his official capacity under his signature and Official seal, a "Notarised" act, is presumed to be proved ("presumption veritatis et solemnitatis") i.e., presumed to be true and regular. Hence it is highly expected of a Notary, to be strictly honest, faithful, fearless and above-board, to maintain his prestige and the prestige of his work. (Notary Moolchand M:Gupta in his Commentaries relating to Law of Notaries in India, 1982, Indore, 1st ed., Pg.(vi).

A comprehensive definition of the Notary in either of the English-American concept or in the Continental system is given in the Grolier Encyclopedia, Vol.14, Pg. 267 as under: "A Notary Public is an official whose main duties, under British and American law, are to authenticate documents such as contracts and deeds. In most of the States of the United States Notaries Public are appointed by the Governor to qualify for the position a person must be of legal age, a resident of the State or Country in which appointment is sought, and of good moral character. In European

Countries a Notary is an official who supervises certain legal transactions such as the sale of real property and the settlement of estates".

(*b*) Now with all these talents, qualifications required, including mainly of character, lately it is observed that the profession of Notary, for many Law graduates a vocation, has not been sufficiently appreciated or used for the major common good.

(*c*) For instance, in India, after many panindian representations regarding the increase of the fees fixed in the Notaries Rules, 1956, at that time princely and now a pittance, and to moralise the profession, lately on 16/2/1997 it was held at Panjim under the distinct presidency of the Hon'ble Central Law Ministerwith the presence of two Honourable high legal Officers of the Law Ministry, a debate to discuss proposed amendments of Sub-Committee appointed by the Government of India to the Notarises Act, 1952 and also the long aoverdue increase of fees, to be made by the Central Government. While some amendments could be accepted by the All India Notaries assembled from all over the country, a major incroad was in the shape of porposed amendment to Sec. 5(2) of the Notaries Act, 1952, restricting the renewals to the post of Notary to notmore than 3 (now 3 years at a time).

One of the reasons given is that it is proposed also to restrict the tenure of the Advocates, under the Advocates Act, 1961. This sort of proposal besides forgetting that there are Advocates Notaries who choose that profession as their main or only vocation, would be out of the hob in the midst of their careers, with all the skills and experience gained but without the youthfulness or capacity to march for other avenues. Therefore the said amendments was unanimously not adopted by the assembly which vowed a resolution to delete the words "till he (she) continues to be an Advocate on the roll of the respective Bar Council". This also because it is not visualised why an Advocate Law Graduate should have also a limited tenure, when everywhere in the world, the Advocates gain experience and more knowledge and skill in this art with the age, provided they continue to be physically and mentally fit. The matter of fees received favourable consideration, as a

measure of due social justice, when everything in India is more costly after about 41 years. The Hon'ble Law and Justice Minister porposed also to utilize the skills of Notaries in the alternative dispute redressal system for working as arbitrators, mediators and conciliators for settling petty cases, to ease the burden of the Court and Tribunals throughout the country.

(*d*) The above position is in India. However, in Macau, the last Portuguese bastion in the far east (to be returned to China in 1999) from about 1990 developed a polemic which underwent and passed the test of the Constitutional Tribunal at Lisbon, where Private Notaries have been appointed amongst the Advocates with 5 years practice and now even without such practice provided they pass an appropriate course and examination on Notarial matters. The institute appears to have been originated by the example of the neighbouring Hong Kong and their English system and the pressure of the business affairs. These Private Notaries (Notaries Privedes") because alongwith the Public Notaries Government Servants of the Portuguese Notarial Government system of the same later model as in Portugal and all Portuguese territories. The Private Notaries were first created by Decree-Law No.80/90/M dated 31/12/ 1990 which defined their jurisdiction which does not confine only to Public Wills, Deeds of Approval of Closed Wills, Notarial Declarations of Succession, Public Antenuptioal Deeds, Releases of Inheritance which comprise immovable property, Acts when minors and other inable persons may intervene and protests their Sale Deeds, etc., also called "Escrituras" should be deposited in the Office of one of the public or Govt. Notary within 5 days. Their functions are not remunerated by Table of Fees but they can collect honoraria as Advocates. There have been some alterations upto 1993 by legislation, etc. This mixed system runs in Macau till today. It is perhaps premature to assess its merits and demerits, only time and experience will provide an answer.

(e) In Portugal also, as per TV. Commentaries in January 1997 and articles, the controversy about privatisation of the Notarial Institutions/Services is going on. It is worth to mention that in 1990 the Portuguese Ministry of Justice, with a view to revising

the Code of Land Registration of 1984 (approved by Decree-Law No.224/84 and successively amended upto 1933 and a new Code is to be created) had sent a Study mission to France, Germany and Luxemburg to study "in loco" the functions of the Notarial Services, Land Registration Services and those of Commercial registration. Notarial Offices and Offices of Land Registration and Commercial registration in the cities of Paris, Strasbourg, Luxemburg and Kehl were visited. It was observed that the Notaries as skilled law Graduates are generally assigned key or major roles of wide spectrum of responsibility and trust, besides the celebration of the authentic acts like the Public Deeds of Conveyance, etc., in which their legal expertise of Counsellors is called for. They are bound to perform in those Countries many, many other co-related activities prior to and as a follow up to the Notarial Act – to collect and obtain documents of Survey and Land Registration required for making the deed, to apply for the compulsory registration of the Deeds of transfer after their execution by him and the parties, under penalty of fine, to cause payment of the Govt. taxes due for the act, in joint liability with the party, to keep duplicate archives in the Notarial Office of the acts of land registration, in close collaboration and coordination with the Land Registrar and other Registration Services, etc. of the State. The role of a Notary Government Servant in the still consisting Portuguese legal set-up can indeed be amplified by law or reforming the law in the above directions, enlarging even more the jurisdiction and the powers-duties of the Government Notaries, instead of privatisation. On the other hand, if privatisation is sought for in an argument sometimes put forth or heard to prevent or curb corruption in the Government Notarial Offices, the argument is misconceived and perhaps forgets the human nature: corruption can also permeate the sytem of Private Notaries and percolate to the Land Registration Services under the compulsary registration system of Deeds. Instead, the existing laws to punish corruption, if enforced strictly and taking their own course would be a better panacea. The preventive effect of such laws should also not be forgotten or minimized. Corruption may exist everywhere, but may be curbed. Its prevention lies rather in principled education right back home and in the school, and on tightening up the moral fiber of the nations, through good example

and self-discipline of the Rulers. The designed clarity of transactions can always be arrived at by creating more Govt. Notarial Offices or "Secretarias Notariais", as per the demands of the public to the Notarial Services without dismantelling but rather strengthening, including by better enforcement of the controls and the inspections, and widening where advisable, the present publicistic structure the Notarial institution atained in Portugal after centuries long experiences. To go back privatisation under the pressures of the business community or perhaps the powerful multinationals or companies to imitate Foreign models is, it appears, a retrograde step and a betrayal of the common people and silent majority who may have no voice but has of course need to take recourse to the Notarial services many times in their lives, namely for petty sales of property and wills Portugal has evolved its constitution of 1976 under awoved socialist Gods and the continuation of a National or state institution and organisation will better serve such ideals instead of a change in the contrary direction. The examples collected in other countries of Europe referred to above with emphasis of utilising the skilled preparation of the Notaries and the Land Registrars for major roles in the State functions in favour of the larger interests of the community should be emulated and not discarded. The people of the Countary will thus be benefitted and protected, their silent voice and the gratitude should find expression in fit action of the Rulers.

It may not be out of place to recollect that the efforts made by the Notarial Codes of 1960, 1967 as amended till 1990 and the last Code of 1996 and the enactment or modification of the organic laws, were clearly tending to streamline a Government notarial organisation near perfection and with adequate Table of Fees which may and are revised from time to time, and of course their aims are the common good of the majority and not of few and the designed clarity of traditions can always be attained by creation of mere Notary Officers and posts and fit controls and streamlining of cadres of inspection and recomendations for betterment of this great social institution.

(*f*) In India, the Notaries Act, 1952, we noted down that there is scope in Sec. 8 and Rule 11(8) of the Rules 1956, to enlarge the Notarial jurisdiction even in the field of conveyancing and wills. My modest suggestion is that, a Welfare State which chose the Socialistic pattern of society as a constitutional and commitment in the wake of the Independence and where still the teaming millions have difficulty in finding fit leadership to fulfill their aspirations and find milk and honey of the promised land in this world, I would reiterate my modest suggestion that this whole problem of comparitive law correction with the Notarial and Registeration Organisations be placed before the Central Law Commission and the Committee on Legal Affairs and Legislation an Administrative reforms Commisssions and studied them minutely. Responsible Public opinion also be elicited. I feel personally, if I am not mistaken that the continental system of enlarged jurisdiction under the aegis of the State is more convenient to the community and the Government at large, as it assures more perfection and safety in the excution of the conveyances, contracts and wills and is more suitable to the conditions prevailing in India, for not only being drawn and recorded by specialised and qualified Law Graduates and laywers grouped in a separate Cadre and hierarchy of the public administration but also and mainly because these Officers are made responsible towards the Government and the people for their acts and deeds and more accountable for them, and in result of such system a great deal of litigation and over-burden of courts will be averted, moreover because the Land Registrar or Commercial Registrar should go into the legalityof the title deeds and the documents drawn up by the Notaries and other authorities inclusive of judgements/decrees of Courts and may refuse registration of those titles which may not accord to the relevant laws (thus there being two controls in benefit of the people's transactions, whereas the Sub-Registrar and Registrar of Assurances of the Indian system of the British complexion are not allowed to discuss or impugn the legality of the deeds and they should not be confined to examine the suffeciency of the Stamp Duty only (Sec. 35 of the Indian Stamp Act,1899) and a little more like the mental capacities of the parties.

On the other hand, such consolidated set would bring a considerable income to the State Revenue, so necessary to help the economic progress of India, the Fees collected for the Notarial acts being a Government income, the Notaries made Government Official would also benefit themselves and be more responsible and subject to the rights and the obligations of the Government servants and their discipline and their notarial acts elavated to public documents avoiding a great deal of litigation. Let us hope that such structure, conducent to better pride, protect and assure the public and mainly of the weaker sections of the societies which are the vast majority, be one day a reality, and that there will be a number of man of courage and vision – administrators, economists, financiers, sociologists, legislators and lawyers of course, with the help of man of goodwill and with a high policy decision of the Government of India to carryout such a legal reform, "de fond en comble", after in depth study. Such step will also put this sphere more in accordance with the socialistic pattern of society visualised by the founding fathers for the constitution of the Indian Republic and by the genuine friends of the people – a socialistic approach which will follow-up the Directive Principles enshrined in Articles 38 and 39-A read with Art. 37 of the Constitution of India (State to secure a Social order for promotion of welfare of the people, to eliminate inequalities in facilities and oppurtunities and to provide social justice on the basis of equal oppurtunity).

The conveyances (and wills) converted into Notarial acts and Public documents under the direct administration and control of the Government as an integrated service being done up by technical Government Servants, Law Graduates, with the assistance of Subordinate Govt. staff, and vigilant Government control, and paid according to fixed table of fees at moderate rates or by salaries which may be revised from time to time, will curb also the possibilities of any absuses or exploitation. This set up will be also a form of Statutory Legal aid, within the aims and principles of the Legal Services Authority Act, 1986, in modern times a major aim of the Government and of late a Constitutional commitment, bestowed on the genarality of the people in need of making conveyance of property and other documents and wills which are in modern times and in our present Socio-legal structure and of mixed

economy part of the daily life of the entire community. The Notaries (Public or Government Servants) may also be as assigned other legal duties or assignments of public character and interests as per the intended Government reforms.

Our brother Notaries and Advocates present and future , will certainly have no objection if this dream comes true. The present day Notaries may be absorbed in the future cadres, if qualified and fitting the minimum conditions.

Panaji, Goa 25th April, 1997.