" WHAT CANNOT BE DONE DIRECTLY CANNOT BE DONE INDIRECTLY ": ITS MEANING AND LOGICAL STATUS IN CONSTITUTIONALISM

VAST problems of a legal nature are posed in the observance of prohibitions and limitations imposed on legislative powers in a federal state where the legislative jurisdiction is divided between the central and regional governments; similar problems are also likely to arise in a unitary state having a written constitution, *e.g.*, the South Africa Act of 1909. Presumably the solution to such problems has to be found in the working of judicial machinery, courts being the watchdogs of constitutional provisions; hardly anyone today would deny the role played by courts in the growth and development of constitutionalism. In the judicial process are involved a set of " unwritten " rules for the guidance of judges in the understanding, what is known as interpretation or construction, of " written " laws including written constitutions. Such rules are frequently resorted to in determining the validity of laws by reference to the provisions of a constitution. One of such rules is that if a legislature is prohibited from doing something, it may not do so even under the " guise or pretence " of doing something that appears to be within its lawful jurisdiction; a legislature may prima facie purport to act within the limits of its powers, yet it may in *substance and reality* be transgressing those powers, their purported exercise being merely a " guise or pretence." This rule may broadly be explained as the observance of " good faith " in the exercise of legislative powers, and it is implied in the operation of the maxim " what cannot be done directly cannot be done indirectly." It may, however, be stated that the force of the maxim in general depends on a large number of variants from the personal outlook of judges to the terms in which powers and prohibitions are framed. It is also likely to vary greatly as between different branches of law; in the field of public law the maxim may find its application in administrative cases, but for the most part they do not involve the analytical difficulties of constitutional cases being more readily related to *factual* problems of " good faith." Moreover, it is rarely that such an issue can be isolated as the only and the decisive one. Nevertheless, one could with reasonable certainty pick out examples in which the maxim, or a principle similar to it, was argued or could reasonably have been argued and applied—where it was in some form or another an important issue.[1] In this

[1] See generally Singh, " What Cannot be Done Directly Cannot be Done Indirectly " (1958–59) 32 A.L.J. 374, (1959–60) 33 A.L.J. 3. For the operation of

paper an attempt is made to understand the meaning of this maxim and work out its logical status in constitutional contexts.

A. THE MEANING OF THE MAXIM

I

The maxim itself contains a number of ambiguous terms or terms having blurred edges. By the time these are analysed and their permutations and combinations taken into account, the resulting variation in meaning is sufficient in itself to explain the apparent conflicts between decisions. A linguistic philosopher could probably take this type of analysis very far, and the following discussion is pitched only at the " common sense " level. It is proposed here to take the main terms of the maxim *seriatim*.

" *What* "

This is the subject of the maxim and in the present context it refers to some legal act which has to be *characterised*. In a constitutional setting, " what " must be expanded into a legally significant act specified in a constitution which contains positive statements laying down propositions as to acts or forbearances, and it is approved or disapproved as being consistent or inconsistent with those propositions.

However, some vagueness or ambiguity always exists as to the meaning of words or phrases and to that extent there is likely to be a certain amount of indeterminacy in testing the validity of statutes. To deal with this " open-endedness " courts have resorted to " supra-constitutional " principles and sought guidance in common law or natural law or some such other concept.[2] However, such principles or concepts are related to the " ideology " or " public opinion " reflecting social, economic or political attitudes prevailing in a community. As these factors undergo a change with the times, the meaning of words and phrases which are to be understood by reference to those factors also undergoes a change. Thus no interpretation could be decisive for all times.[3]

Then characterisation of " what " assumes that a certain meaning can be given to constitutional provisions and its validity

the maxim in particular jurisdictions see Singh, " What Cannot be Done Directly Cannot be Done Indirectly: A Study of the South African Constitution in Retrospect " [1962] *Public Law* 436; " What Cannot be Done Directly Cannot be Done Indirectly: Some Illustrations of its Operation in the Australian Constitutional Law " (1963) 5 J.I.L.I. 433.

[2] See Cooley, *Constitutional Limitations* (8th ed.), Vol. I, pp. 342–344; Jones, *Historical Introduction to the Theory of Law* (1940), p. 134.

In the United States courts' function in the handling of " police power " cases is that of an arbitral body: see Corwin, *The Constitution and What It Means Today* (1954), p. 52; in Canada a " practical business sense " was once taken into account in finding a bill *ultra vires*: *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada* [1939] A.C. 117 at p. 132.

[3] See Levy, *An Introduction to Legal Reasoning* (1961), pp. 51–104. Also refer to Justice Holmes in *Lochner* v. *New York*, 198 U.S. 45 at pp. 75, 76 (1905).

oscillates between wide and narrow interpretations depending upon the judicial attitude which, in turn, is influenced by " extra-positive " concepts. For example, the maxim has more opportunities of its application in Australia when the Constitution is given a restrictive interpretation based on the concept of " dual sovereignty " than when the Constitution is given an expansive interpretation based on the concept of " plenary " powers.[4] If a case in which the maxim has found its application has been overruled, it does not necessarily mean that the maxim has fallen into disuse or become redundant; it may only signify a change or shift in the meaning of a provision or rule whose construction is a prerequisite in the application of the maxim.[5]

" *Cannot* "

On a simple assumption that legal acts are either *commanded* or *prohibited* this would raise no difficulty, but in fact as Hohfeld's tables show the range of legal categories is much wider, and probably even Hohfeld over-simplified the position. In practice, legal norms may be said to exhibit a continuous range of " attitudes " towards given conduct from outright prohibition at one end to specific command at the other, with positions in between at which one may speak of the norm having a " flavour of disapproval " or being " neutral." In constitutional contexts, there are two distinctions of practical importance; there may be a constitutional prohibition, or there may be an area of power not granted to the authority in question. In the " *ultra vires* " situation, where no specific prohibition is concerned, the judicial attitude may be affected by the answer to the question—what happens in the area of power not *intra vires* the authority in question? Is it within the power of no authority (when the position may be considered as approximating that of a prohibition, with an inference that no law should touch that area at all), or is it within the competence of another legislature in the system? If the latter, is it expressly so (a multi-list system); or residually so (a single list system)? Where there is a division between several legislatures, it may also be important to consider general judicial assumptions concerning the balance of the system: do they try to hold a balance, or have they an assumption in favour of one authority or the other? All these distinctions can affect the significance to be given the term " cannot."

" *Be done* "

The word " done " is not especially suited to legal contexts; it is more typical of non-legal language where it refers to a complex

[4] *e.g.*, see *D'Emden* v. *Pedder* (1904) 1 C.L.R. 91, and *cf. Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129. Similar examples may be found in the decisions of the Supreme Court of the United States: *e.g.*, see *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918), and *cf. U.S.* v. *Darby*, 312 U.S. 100 (1941).

[5] *Cf.* Ross, "The Constitutional Law of Federalism in the United States and Australia " (1943) 29 Virginia L.R. 881 at pp. 916, 917.

real-life situation. In ordinary language, no one would think of denying that what the Acts dealt with in the *Uniform Tax Cases* [6] in Australia " did " was to expel the states from the income-tax field. Courts, however, usually restrict their view of what a law " does " to a relatively narrow range of consequences of the law. They may even take a purely Kelsenian view and regard the " doing " as the norm and nothing else so that any social, economic or political consequences are irrelevant. In practice, their view is rarely as narrow as that even if their language might suggest it. The difficulties arising from this overlap with those arising from the expressions " directly " and " indirectly."

" *Directly* "

This requires the characterisation of some legal act which is in conformity with the provisions of a constitution. But how can one say that an act conforms to something that is commanded or prohibited? Mere intuition or even common sense would not appeal to anyone as a criterion, even though in some cases these might appear to be the only possible explanation. Political considerations in terms of social, economic or political consequences may possibly at times supply an answer, but there would always be the difficulty of reconciling conflicting opinions; moreover, as noticed earlier, courts apparently do not profess to accept it. Expressions such as " pith and substance " or " true nature and character " have also been coined but they have not met with much success especially in a borderline case which presents the problem of characterisation in a difficult form. However, one thing appears to be certain that the Kelsenian method in confining our attention to a formal hierarchy of norms would not suffice, and a reference may have to be made to the setting or context of a legal act in order to characterise an " achievement " as " direct." This problem is discussed further under " indirectly."

" *Cannot be done* "

This has been discussed above in parts as " cannot " and " be done," but it may be noted that in this part of the maxim this expression need not have the same meaning as in the earlier part because of the following word " indirectly." What one regards as " doing " something can be coloured by the following adverb.

" *Indirectly* "

This denotes a characterisation of some legal act which is *not* in conformity with the provisions of a constitution. " Directly " and " indirectly " may to a certain extent involve similar problems of characterisation as what is " directly " is not " indirectly " and what is " indirectly " is not " directly." However, " indirectly "

[6] *South Australia* v. *Commonwealth* (1942) 65 C.L.R. 373; *Victoria* v. *Commonwealth* (1957) 99 C.L.R. 575.

is not exactly the opposite of " directly " because " indirectness " is not simple straightforward " invalidation " but arises under some " guise or pretence " of doing something that gives, on the face of it, the appearance of " validation." Thus " indirectly " raises characterisation problems in a new form.

The problem of " indirectness " may arise when a piece of legislation actually operates in two or more classes of subjects and it is often treated as a problem of attributing a single classification, assuming that the legislation either belongs to a class, or it does not. To attribute one characterisation to a law involves the ascertainment, in some way, of the line of demarcation between the legislative powers of several sets of governments, or between the legislative powers and the prohibitions imposed upon them. Nevertheless, it is by no means an easy task to decide whether a particular enactment belongs to a certain class which the Constitution has specified for that enactment's validity or invalidity. To take a convenient Australian illustration, *R.* v. *Barger*,[7] where the High Court invalidated an Act of the Commonwealth Parliament which provided for the imposition of excise duties on certain goods but made an exemption in case of a manufacturer who observed certain prescribed conditions, it was thought by the majority that the Act in question could only be passed by the state legislature; it meant that the Commonwealth Parliament was not competent to do so. But this opinion rested on the assumption that the purpose, as distinguished from motive, of the Act was regulation of the conditions of labour and not taxation. Yet, it must be conceded, to distinguish between purpose and motive is easier in theory than it may become in practice.

In an article Mr. G. W. C. Ross advocated that it was futile to say that a law belonged " really " or " primarily " to one " field " and only " secondarily " to the other: what it " really " did was to deal with each field *in relation to* the other.[8] To take his example, suppose the Constitution (of Australia) authorised the federal Parliament to legislate " with respect to parks "; the state legislatures have the field of " dogs," nothing being said in the Constitution about dogs. Is it constitutional for the Parliament to enact a law which forbids taking of dogs into parks? In other words, is such a law with respect to " parks," or with respect to " dogs " ? Mr. Ross characterised it as dealing with dogs *in relation to* parks. But why not characterise it as dealing with parks in relation to dogs? Perhaps Mr. Ross may be right but why it was so was not explained. Suppose a law forbids the entry into parks of all persons accompanied by dogs. Is it a law with respect to parks, or persons, or dogs? It is not easy to find an answer with

[7] (1908) 6 C.L.R. 41.

[8] " The Constitutional Law of Federalism in the United States and Australia " (1943) 29 Virginia L.R. 881 at pp. 918–921.

some certainty. Once Professor Sawer explained the problem in the Australian context thus:

> " The cases that reach the higher courts are almost by definition marginal cases. Sometimes they can be solved by reference to the ordinary usage of language, or the customary nomenclature found in British, Dominion and U.S. legislation, and constitutional documents. Frequently the court is compelled to act on an ' intuitive ' appreciation of the primary ' object ' of the law, when its essentially political judgment has to be wrapped up in such question-begging phrases as ' pith and substance,' or ' true nature,' phrases depending on a fallacious identification of fluid man-made norms with immutable Aristotelian natural types or Platonic ideal forms. As decisions multiply, types are established which provide precedents for future guidance. Of course, this kind of quasi-legislation is not peculiar to the field of constitutional law. But it is in that field that the official myth of mechanical ' application ' of the law by the judges is most strongly maintained, while the political importance of the question makes a critical examination of the actual situation a particularly delicate situation." [9]

II

The above discussion suggests that the main difficulty with understanding and applying the maxim arises from the words " directly " and " indirectly " which may now be considered in more detail.

In the public law field, the maxim becomes relevant only in relation to a governmental authority whose competence is in some degree limited. A unitary sovereign in the Diceyan sense of sovereignty could not be affected by the maxim. The maxim then assumes the following circumstance: a governmental authority which has power to " do " something " directly," but which might also (but for the restraining effect of the maxim) employ those powers so as to " do " *other* things in a way which would ordinarily be described as " indirect." But this formulation involves some vague and even question-begging expressions and it is desirable to attempt a more precise analysis.

(a) Let it be assumed that governmental powers and limitations on such powers are defined only by reference to purposes. Our governmental authority is authorised to achieve purposes, say, A-Q. As to purposes R-Z, there are two possibilities:

> (i) The authority is expressly prohibited from achieving purposes R-Z. This should be the simplest case, since a literal application of the constitutional restriction will necessarily invalidate any action tending to achieve the prohibited purposes. A conflict between the authorisation to achieve A-Q, and the prohibition against achieving R-Z, can occur because probably particular measures adopted by the authority may

[9] Paton (ed.), *The Commonwealth of Australia* (1952), p. 61.

tend to achieve both B (within power) and S (prohibited). Unless the constitutional document provided some rule for solving such conflicts, the courts would be faced with a task of constructive interpretation so as to provide a solution. Such a solution need not be simple or all-embracing; it may sometimes give priority to the power to achieve B, or sometimes give priority to the prohibition against achieving S.

The maxim may be cited in such contexts, because an attempt will probably be made to argue that achieving B is the " indirect " or " incidental " matter, while achieving S is the thing which may not be achieved " directly." Strictly, however, the maxim has no relevance, because it is assumed that purposes B and S are both *directly* achieved by the measure in question, and the problem is, therefore, simply one of interpreting the constitutional document to see whether the purpose S may never be achieved under any circumstances whatsoever, or simply something that may not be achieved in isolation.

(ii) Nothing is said about purposes R-Z. Then to achieve those purposes is simply *ultra vires*, and a measure tending solely to achieve S would be invalid. What of a measure tending to achieve both B and S? Logically, this is no different to the situation in (i) above; it should be a question of ascertaining by interpretation whether the constitutional document intends to empower only achieving A-Q when unmixed with any R-Zs, or extends to achieving anything in which there is an A-Q. Hence once again there is no need for the maxim.

(b) Actually governmental powers and limitations on them are not always defined by reference to achieving a purpose, and even where they are difficulties can arise over differences between " direct " and " indirect " purposes, or between " immediate " and " ultimate " purposes, or between " legal " and " social " purposes, etc. Thus a power may be given by reference to a class of transaction which is to be " regulated," with an inference that the purpose of the regulation is irrelevant, and with an assumption that the class may be recognised by attributes or grounds of characterisation having no connection with purpose. Or if distinctions are drawn between purposes, then such distinctions must themselves be non-purposive if the definition is not to be circular or productive of an infinite regress.

These non-purposive definitions of power and limitation on power may further be subdivided into many characterisation types,[10] but for the present discussion it is sufficient to treat all non-purpose types together. The governmental authority then is authorised to deal with non-purposive circumstances a-q. As to non-purposive circumstances r-z, the same two possibilities exist as those

[10] *e.g.*, See Dixon J.'s classification in *Stenhouse* v. *Coleman* (1944) 69 C.L.R. 457 at p. 471.

considered under (a) above, and theoretically there is a again no need for the maxim. It is a matter for specific constitutional provision, or failing it for constructive interpretation, to decide whether the presence of characteristic b validates a measure, notwithstanding the concurrent presence of characteristics whose presence is either prohibited or is in isolation insufficient to validate.

(c) Now take a case where some powers are defined by reference to purpose and others by reference to non-purpose characteristics, these being respectively A-Q, and a-q; similarly the residue of possible powers and circumstances are purposive R-Z, and/or non-purposive r-z. Then there are the following possibilities:

(i) There is a prohibition against achieving purposes R-Z. The possible clash between this and the power as to A-Q has been dealt with above. But what of a transaction dealing with non-purpose matter b, when the transaction also tends to achieve purpose S? The same considerations apply. Either the constitutional document or constructive interpretation must decide whether characterisation as b or achieving S is to be regarded as the dominant consideration. The maxim has no logical place.

(ii) There is a prohibition against dealing with non-purpose matters r-z. The case which is not yet dealt with is where a transaction having characterisation s tends to achieve B. Again the solution is provided by the considerations which have been discussed above.

The above discussion suggests that if the "primary" or "direct" characterisation attributes of an exercise of power include both attributes indicating validity and attributes indicating invalidity, the solution of the resulting conflict does not require the maxim or anything resembling it. This conclusion might have been reached from the maxim itself, since the maxim requires a circumstance which can be described as "indirect" achieving of a prohibited matter or a matter otherwise beyond power, whereas the circumstances examined in (a), (b), and (c) above involved no "indirections." For example, say in *Barger's* case, it was assumed that the tax was imposed for a genuine purpose of raising revenue, and for a concurrent genuine purpose of discouraging an activity, *viz.*, certain labour practice in an industry, which was not otherwise within an area of Commonwealth power, and that so far as characterisation types are concerned, the law from its contents and legal operation would be classified both as a taxation law and as a law regulating the labour conditions. Suppose in addition the law burdened the inter-state sale of products produced in prohibited conditions, an essential feature of inter-state trade, then it might come within the prohibition of section 92 of the Constitution,[11] that

[11] It provides: "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States . . . shall be absolutely free."

prohibition may be given primacy. But throughout the assumption is that these attributes are *actually* present.

How then can there be any room for consideration of " indirectness "? The first possible answer is that the maxim assumes for every law one exclusive or predominant characterisation attribute, and any other attributes actually present are then to be classified as " indirect," even though those attributes are actually present and no question of " *mala fides* " or " disguises " is involved. This principle would amount to a dogmatic direction to the courts that they must attribute one and only one characterisation attribute to a law, and its validity or invalidity will then follow as a matter of course in accordance with the constitutional distribution of power and the constitutional prohibitions. The maxim would then merely explain to those puzzled by the decisions of the courts why the genuine though (as found) subordinate existence of a characteristic making for validity was disregarded. An attempt to apply such an approach might be represented as requiring the discovery of " primary " as against " subsidiary," or " principal " as against " incident," or " essence " as against " accident," or " purpose " as against " motive," etc., of a measure. The maxim could then be rephrased thus:

> Characterisation of a legal act is determined by reference to a feature characterised as primary, principal, essence, purpose, etc., of the act; if that feature does not attract validity then the act will be validated by the presence of a feature characterised as subsidiary, incident, accident, motive, etc., of the act, even though when considered alone would attract validity.

Thus the difficulty may not be to distinguish the " direct " from the " indirect," but to distinguish the " direct " from the " less direct." In *Barger's* case, it may be said that the regulation of the wages of employees was regarded as the " direct " achievement and the imposition and remission of an excise duty as the " less direct." If the maxim is applied, then the legislation failed because the former achievement was considered by the court as the " purpose " of the Act in question, it being virtually prohibited on account of the then attitude to the " reserved " powers of the states. But in a latter case *Osborne* v. *Commonwealth*,[12] where an Act, which provided for the imposition of progressive tax on land throughout the Commonwealth, was upheld by the High Court, can it be said that the maxim was not applied, or simply that the breaking up of large estates was not even an " indirect " achievement? Probably the latter. The courts put a limit on the purposes or consequences or other attributes of legislation which they will regard as legally relevant at all, whether " directly " or " indirectly," but where they draw this line varies from system to system and even from court to court within a system.

[12] (1911) 12 C.L.R. 321.

One may often suspect in constitutional contexts that if a court relies on such an approach, it has actually come to the conclusion that there is bad faith—the inclusion of the incidental validating material is a mere blind. That, however, is not necessarily the case. The incidental factor may be quite genuine and necessary to the legislative plan. If bad faith is excluded, then there is the obvious difficulty of deciding which feature of a complex legal act, such as a statute, is to be regarded as " primary," " principal," etc., and which as " secondary," " incident," etc. Evidence from the legislative process, if admissible, might help to solve such problems, but often it is not admissible and often it is not helpful. Thus we usually come back by yet another route to the fundamental problem of characterisation.

The next possible answer is that the maxim does not relate to circumstances where mixed characterisation attributes are objectively or genuinely present, but is concerned in some way with " *mala fides* " or " disguises." If the measure on its face has characterisation attributes A-Q, or a-q, making for its validity, but a court is able to establish by some process of inquiry that these attributes are falsely asserted, and the attributes of the measure are actually and exclusively within R-Z, or r-z, then the measure may be held invalid. The " indirection " is in the dressing up. The maxim might then be rephrased:

> Measures will be judged by the attributes they actually possess, not by those which are falsely attributed to them.

The difficulty of applying conceptions such as " *mala fides* " varies with the kind of governmental authority concerned. It is relatively simple to apply the distinction between " genuine " and " fraudulent," or " *bona fide* " and " *mala fide* " in private law and many administrative law contexts, but relatively difficult in constitutional contexts because in the systems with which we are concerned the courts will not readily attribute " fraud " or " *mala fides* " to Parliaments, Monarchs, Presidents, etc., nor will they readily scrutinise the evidence (parliamentary debates, etc.) on which such findings might be based.

Suppose that in a constitutional context, a court will not allow allegations of bad faith against a Parliament and rejects any identification of " directness " or " indirectness " with distinction between " principal " and " incident," etc. If a statute is with respect to topics A and Q, then the court regards it as a statute dealing with both matters and does not inquire in what degree it affects them; Q may be a relatively unimportant feature on some standard of importance, but the court still says it is nevertheless a statute touching Q and this must be considered for deciding on validity. Suppose the legislature in question has powers with respect to topics A-P, but topics Q-Z are not within its power. The system would then, it appears, gain no help from the maxim. It would,

however, require some rule to solve the problem. The rule might be that the presence of an *ultra vires* factor invalidates all, or the presence of an *intra vires* factor validates all, or distinctions might be drawn between cases where Q-Z are *prohibited*, or are committed to another legislature in the system, or are higher or lower in some hierarchy of judicial values.

B. THE LOGICAL STATUS OF THE MAXIM

I

The maxim, like any other legal principle, may involve the study of two entirely separate areas posing distinct and distinctive types of problems. One is in terms of " description " dealing with facts and consequences. The other is in terms of " attitudes " dealing with the specific role played by value judgments. The two areas are not completely unrelated, but a reference to both of them separately does provide a basis for the proper understanding of a legal principle.[13]

Descriptive analysis may appeal more to a lawyer with a practical approach than the analysis based on value judgments, but the importance of the latter should not be underestimated. Many of the controversial problems that confront the courts are marginal cases and they may often be understood properly only in the light of conflicts between arguments based on value judgments which are logically deduced not only from a system of moral or social relations but also from the realm of political ideologies; this is particularly so in the field of constitutional law. There is a hierarchy of values which so far as accepted is a guide to the solution of a problem.

However, value judgments are the intellectual tools to be used for the purpose of persuasion and play a secondary role as an aid to arriving at a decision. Moreover, their usefulness is most fully appreciated in the sphere of unenacted law where issues involving concepts which have ethical or emotive content become predominant. For example, in the law of torts, which is not yet codified in Commonwealth countries, words such as " good," " wicked," " harm," " duty " and many others, and generalisations, classifications or categories based on them could properly be understood only by reference to values relating to a system of moral or social relations. On the other hand, in the sphere of " written " or " enacted " law there tends to be a reasonably determinate set of legal principles which provide a basis for the making of a decision and the necessity of resorting to value judgments may not be so frequent. Thus for purposes of the maxim in the area of written constitutions it is the descriptive analysis that is more fruitful than

[13] See Stoljar, " The Logical Status of a Legal Principle " (1953) 20 Uni. of Chicago L.R. 101. Also refer to Stone, *The Province and Function of Law* (1946), pp. 137–145.

the analysis based on value judgments. Hence in the study of constitutional cases emphasis is generally put on the analysis of facts and situations and the approach is rather analytical than evaluative.

II

The desirability of codification was felt long ago in order to avoid uncertainty of the unwritten law which might be susceptible to different interpretations resulting in unnecessary litigation and, therefore, much vexation and trouble.[14] However, no code could possibly be concise or exact in words, because of the very nature of human language which is full of ambiguities and obscurities.[15] Thus there has been an endeavour to understand the meaning of law that has been reduced to writing and make sense out of it, and this process came to be known as interpretation (or construction). In Roman law the term *interpretatio* corresponded to interpretation (and/or construction) and Roman jurists used it in the widest possible sense so that a very large part of that law was formed by a gradual extension of the provisions of the Twelve Tables. Its influence was then seen in the discussions upon the French Code, and also in the early English law.[16] Modern practice on the Continent is to treat statutes as the basis of the law, and the task of the courts is to " fill gaps " by arguments based on *travaux préparatoires* [17] and analogy [18] (as the last resort) so extending the basis for logical inference of legislative intention. However, the English approach tends to be concerned more with the verbal expression of the statute.[19]

A law or legal rule must not be violated. But the question arises how the violation occurs. The simplest way is to do something which " obviously " or " on its face " amounts to disobedience of the law or legal rule. However, it may also occur if something prohibited is done under the " guise or pretence " of observance, and it would be the duty of courts not to allow this, otherwise the law or legal rule would become illusory. " There can be," said Lieber, " no sound interpretation without *good faith* and *common sense*;" [20] and the harmony produced by good faith and common sense, Dr. Hammond commented, would be " decisive for or against a proposed interpretation, even though all the rules that may be

14 See Lieber, *Hermeneutics* (3rd ed.), p. 30; Paton, *A Textbook of Jurisprudence* (3rd ed.), p. 51.
15 See Allen, *Law in the Making* (6th ed.), p. 493.
16 See Lieber, *loc. cit.*, pp. 260–264.
17 See Allen, *loc. cit.*, pp. 500–501.
18 See Lieber, *loc. cit.*, p. 275 *et seq.*
19 See Paton, *loc. cit.*, pp. 216–217; Salmond, *Jurisprudence* (10th ed.), p. 169. For a penetrating analysis of the theory of statutory interpretation see Cohen, *Law and Social Order* (1933), pp. 128–131, 133–134; Radin, " Statutory Interpretation " (1930) 43 Harvard L.R. 863 at pp. 869–885.
20 Lieber, *loc. cit.*, p. 109 (italics supplied).

formulated array themselves on the opposite side." [21] Thus observance of *good faith* is a cardinal principle of interpretation.

It is true that good faith is a notion which cannot be reduced to any formal rules, but it may broadly be stated that before any opinion is formed as to the violation of a law or legal rule one should look into its substance and not merely its form. This approach has received various specialised applications. For example, when the theory of the " equity of the statute " [22] was employed to mitigate the hardships flowing from rigid adherence to the letter of the law, Plowden (the greatest advocate of the theory) explained its application in terms which criticised reliance upon the form of the law and advocated adherence to its substance.[23] Similarly, *Heydon's Case*,[24] lays down that before having a look at the words of a statute one should discover " the true reason of the remedy " and give the words under interpretation the meaning " as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, for to add force and life to the cure and remedy, according to the true intent of the Act, *pro bono publico*." Here " the true reason of the remedy " is the purpose or policy for which the law was provided, and it is but one of the ways of looking into the substance of the law.

It has long been usual for English judges to examine the intention of a statute in order to find a clue to its interpretation.[25] In the Middle Ages, judges, as members of the King's Council, were generally themselves legislators and had little difficulty in deciding what the real " subjective " intention of the statute was.[26] However, after the judges had separated from the Council, the intention was to be inferred from the words of the legislative text. Attempts were made to devise rules as a guide to interpretation, but their application was somewhat arbitrary. The reason was that most statutes before the nineteenth century laid down no more than broad principles. It was during this period that the English common law was transplanted into the United States—the first federation to develop rules of constitutional interpretation. Thereafter, though the trend in England was towards detailed statutes to which the courts applied literal interpretation, the courts in the United States were inclined to continue with the old broader approach. For example, in England the theory of the " equity of the statute "

[21] *Ibid.*, p. 291.
[22] See Lenhoff, *Comments, Cases and Materials on Legislation* (1949), p. 649.
[23] Reporter's note to *Evsten* v. *Studd* (1574) 2 Plowd. 459 at p. 465.
[24] (1584) Exchequer 3 Co. 7a at p. 7b. Also refer to Denning L.J. in *Estates Ltd.* v. *Asher* [1949] 2 All E.R. 155 at p. 164; *Magor and St. Mellons R.D.C.* v. *Newport Corporation* [1950] 2 All E.R. 1226 at p. 1236 (*cf.* Lord Simonds on appeal: [1952] A.C. 189 at p. 191).
[25] See generally Plucknett, *A Concise History of the Common Law* (4th ed.), pp. 313–323.
[26] Plucknett, *Statutes and their Interpretation in the Fourteenth Century* (1922), p. 49.

fell into oblivion but the courts in the United States had not ceased to make use of the theory as furnishing a guide to interpretation.[27]

III

The maxim under consideration can operate in any field of private or of public law, being in the broadest sense merely an application of principles of "good faith." However, we are concerned more particularly with its application in public law, because here the maxim has a more precise significance and its possible application is most easily tested or illustrated.

In order to have a proper appraisal of the constitutional government of a state, whether it be federal or unitary, it is not merely the Constitution but also its working that forms the basis of the study of constitutionalism in a state.[28] The role played by courts makes a significant contribution to the shaping of governmental machinery, especially in a federation where courts have the power to review the acts of legislatures. However, the practice in courts is, in itself, guided by a set of rules of interpretation whenever a conflict involving constitutional principles arises before them. It may be that some of the rules are less important or more controversial than the others, but certain rules such as the maxim are so fundamental that they form the very basis of judicial practice.

A constitution requires the relative permanence of the specified governmental machinery and correspondingly guarantees the relative security of the subjects; while necessarily having a good deal of flexibility, the constitution needs to be protected from *abuse* of powers conferred on a legislature, and from *arbitrary* changes in law. A constitution, therefore, *of any value*, presupposes the existence of the maxim without which its provisions would be meaningless. In other words, something like the maxim necessarily accompanies any attempt at expressing the notion of a *limited* governmental power, because without some such notion the attempt at express statement of a limited power would, except in the very simplest and narrowest circumstances, be a waste of time.

Thus, limitations upon a legislative power are not only those which are expressly provided in the constitution but also those which, though implied, are necessarily to check any abusive or arbitrary exercise of the power. "The mere grant of a constitution," observed Cooley, "does not make the government a constitutional government, until the monarch is deprived of power to set aside at will."[29] The maxim, therefore, operates as a limitation for holding laws constitutional on the ground that the legislature has, under the "guise or pretence" of doing something lawful, assumed power (or acted in a manner) not authorised by the

[27] See Lenhoff, *loc. cit.*, p. 950.
[28] See Wheare, *Federal Government* (4th ed.), pp. 17–29.
[29] Cooley, *Constitutional Limitations* (8th ed.), Vol. I, p. 5 (n. 2).

constitution or acted not in good faith. It is so even though the maxim has no legal force in the sense of not being recognised as part of a positive law.

It would seem, then, to follow that the maxim is part of the body of logical principles whose existence is presupposed by any system of law. Such principles are often in the English system treated simply as part of the common law—especially if, as in the case of the maxim, one can trace repeated statements of the principle back through decisions and other authoritative texts.[30] This incorporation of general logical (and moral) principles into the body of the common law has made it less necessary for English lawyers to concern themselves with " natural law," " extra-positive law " or other such notions; what the Continental civilians find in such meta-legal concepts may be for English lawyers simply a part of their positive law system. However, even within the common law it is possible to distinguish between principles which are general guides to legal administration and have a " meta-legal " quality, and those having more " positive " character, by the following test: how does one regard cases in which the principle in question might have been applied but has not been applied? Does one tend to say " therefore the principle has been overruled and is no longer part of the law," or does one tend to say " the principle remains and no particular example of its not being applied can remove it "? From the examples earlier, it seems probable that the maxim belongs to the latter class. It may be regarded as part of the common law, but if so, it is a part which also belongs to the general body of logical principles associated with any systematic and reasonably consistently enforced body of law.

IV

Suppose the maxim is formally recognised by express mention in the Constitution. Would it make any difference in the attitude of courts to the constitutionality of legislative acts? In its unexpressed form it might be considered as a rule of interpretation of a subsidiary character—a rule of guidance not for legislatures but for courts. It would, therefore, be used as the last resort so that the Constitution may not lose its identity. But as an express provision in the Constitution its function might become primary in character. In other words, it might have a more positive force; legislatures as well as courts would be obliged to obey it. Courts would treat it not merely as a rule of interpretation but as a part of the Constitution like any of its other provisions which are in themselves subject to interpretation. However, its effectiveness would be determined finally by courts as the process of interpretation seeks ultimately a determinant between the minimum and maximum extension. It is

[30] See Singh, " What Cannot be Done Directly Cannot be Done Indirectly " (1958–59) 32 A.L.J. 374, (1959–60) 33 A.L.J. 3.

likely that a strict interpretation of the maxim (as forming part of the Constitution) might overlap with its operation as merely a rule of constitutional interpretation: but when a strict interpretation is to be applied and when it is not is likely to depend on general historical factors, not on particular maxims whether expressed or implied. One can imagine the maxim in express form having no more significance than it has in its present position as " unwritten " or " extra-positive " law. More probably, however, an express provision would encourage courts to a stricter or more frequent application. For example, if the maxim were in the Australian Constitution, possibly there would have been no dissents in *Barger's* case.

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