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COMPARATIVE LAW IN THE NON-WESTERN NATIONS: A BRIEF SURVEY

Comparative law has a long, and well-documented, history in the Western world, but it is only in the last century that non-Western nations have come to realize the advantages of the study of legal and political developments beyond their borders. In many countries this study was, at first, an offshoot of, and dependent upon, comparative law study in the colonizing power. But with the coming of political independence, the new nations themselves have recognized the wisdom of adopting, and adapting to their own societies, legal wisdom developed elsewhere. Moreover, they have observed that the interchange of ideas is a two-way street, with benefit to both sides.

The rôle of the comparative lawyer in the developing nations extends beyond the study of foreign legal ideas; the diversity of their societies, and the numerous legal systems operating in them, provide fertile soil for jurists seeking to unify and modernize their countries, and educate the next generation of lawyers.

While there have been many studies of the introduction of Western legal concepts into particular Asian and African nations, there have been few general studies of the rôle of comparative lawyers in the non-Western world. This brief article seeks to examine that question.

1. *Ethnic Groups*

Many of the new nations comprise a number of ethnic and religious groups, each with its own laws and, often, its own courts.[1] In the course of their daily lives, citizens from these groups interact with citizens from other groups, thereby creating difficult conflict of laws problems which often result in the same person being subject to different legal systems while engaged in different activities. Dr Cooray provides an illustration from Sri Lanka:

> A Tamil living in Jaffna district would inherit property on his father's death according to Tamil law; he might be called upon to be trustee of a Hindu temple in which case principles which originated in the English courts of equity and Hindu religious law would be relevant to determine his power, rights and duties; he would mortgage his properties according to Roman-Dutch principles; he has a choice to contract a marriage according to the statute law of the land or custom but his capacity to marry would be determined by statute law; if he brought an action for divorce, he would, to some extent, be subject to principles of law originally developed in England, but his claim to custody of children would depend on Roman-Dutch law and his wife's right to retain the property she had brought into the marriage community and any property she may have acquired subsequently would be governed by Tamil law.[2]

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1 Lebanon, for instance, has sixteen different legal systems and Sri Lanka has eight.
2 L J M Cooray, THE PROTECTION IN CEYLON OF THE ENGLISH TRUST, 1-2 (1971).

Obviously, in a country such as Sri Lanka or India the education of every law student must include the study of a number of different laws on the same subject and the only feasible method of studying such laws is the comparative method.[3] Moreover, a comparative knowledge of the laws of the country is a pre-requisite to any future uniformity of law, such as that envisaged by article 44 of the Indian Constitution.[4]

In countries with as heterogeneous a legal system as India's, ethnic and religious laws present special problems for modernization. Amendment or repeal of a law imposed by colonialists, or enacted after independence, is relatively easy compared to the problems of modernizing the law of religious minorities; to tamper with the law of a religious or ethnic minority could cause the rupture of the entire fabric of society. It is not surprising, therefore, to find that Islamic law in India and Hindu law in Pakistan remain where the British left them in 1947.[5]

That Hindu law and Islamic law have been modernized in India and Pakistan respectively since 1947 suggests that comparative law has a vital function in multi-religious societies. While the Moslems of India may riot at attempts to amend their law along independent lines, they are unlikely to find too much objection—although some conservatives will always object—if their law follows Pakistani improvements.[6] There is, therefore, a great need for the comparative study of religious laws in the non-Western nations: Hindu law could be compared in India (including Pondicherry[7] and Goa), Pakistan, Bangladesh, Nepal and East Africa, and Islamic law in India, Pakistan, Bangladesh, Malaya[8] and the Middle East.[9] In this way, religious laws could be modernized in countries in which that religious group is in the minority, and substantial international co-operation and friendship could be an important by-product. Another useful comparative study would be a consideration of the manner in which some countries with religious and ethnic minorities have succeeded in altering the laws of those minorities; examples are Lebanon, Israel, Sri Lanka and Singapore.

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3 Students at Ceylon Law College study Roman, Kandyan, the savalami and Islamic laws as well as the usual legal subjects: B Metzger, *Lexpatriate in Serendib,* 21 Harv Law School Bulletin 26 (August 1970).

The Bar Council of India has prescribed Hindu and Islamic Law for every law student: A N Veeraraghaven, *Legal Profession and the Advocates Act 1961,* 14 J Indian L Institute 228 at 245 (1972).

4 Article 44 provides: 'The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India'. For an illustration of the problems the different moral views of India's religions would present to the drafter of a Civil Code, see B N Sampath, *Book Review,* 14 J Indian Institute 443 at 449 (1972).

5 Tahir Mahmood, *Personal Laws in Bangladesh—A Comparative Perspective,* 14 J Indian L Institute 583 at 584-585 (1972).

6 Some East African nations have been able to amend the law applying to their Hindus by following Indian legislation: ibid 587-588.

7 It is interesting to note that 'Anglo-Hindu' law is somewhat different from 'Franco-Hindu' law: see S C Jain, *French Legal System in Pondicherry: An Introduction,* 12 J Indian L Institute 573 at 599 (1970).

8 See Ahmad Ibraham, *The Administration of Muslim Law in South-East Asia* 13 Malaya L Rev 124 at 177 (1971).

9 See Tahir Mahmood, Supra note 5 at 588.

2. *Colonial Legacy*

The law of the colonizing power was introduced, to a greater or lesser extent, in every colony[10] and countries, such as Sri Lanka, South Africa and Mauritius, which were colonized by a number of European powers, have elements of the laws of each colonizer in their legal systems.[11] Some countries have resulted from the combination of two or more former colonies—Cameroun is a good example[12]—and their legal systems, accordingly, include a number of disparate European elements. While most former colonies have retained at least the core of the legal system they inherited at independence, some, notably the Sudan,[13] have felt that such a situation constitutes a continuation of colonialism and have adopted a different system, creating much work and many problems for comparative lawyers.

The colonial element of a non-Western legal system will usually be the easiest part of it to change, or even abolish, for it can always be branded as continued imperialism and few groups in the country are emotionally attached to it. However, the business community in many newly-independent nations often favours retention of much of the colonial law as it is familiar with it and knowledge of it is a help in dealing with European and American trading partners.[14]

3. *Modernization*

Many newly independent nations have made a determined effort to modernize their legal systems, as well as other institutions, although this effort has not always been pursued in an organized and informed manner. One outstanding example of an informed consideration of other legal systems, and its beneficial results, is the work of the Indian Constituent Assembly, which drafted the Constitution between December 1946 and December 1949. Gran-

10 A factor causing legal confusion was the frequently unsophisticated interpretation of local custom by colonial judges: for an example, see D C Buxbaum, *Chinese Family Law in a Common-Law Setting. A Note on the Institutional Environment and the Substantive Family Law of the Chinese in Singapore and Malaysia,* 25 J of Asian Studies 621 at 630 (1966).

11 Analogous to problems arising from the colonial judges' interpretation of customary laws are those stemming from their interpretation of the laws of the colonial predecessor; an example is the common-law judges' interpretation of Spanish statutes in the Philippines. See re Shoop, 41 Phil Rep 213 at 220 (1920).

12 Another example is India, though Goa and Pondicherry are so small as to have had little overall impact on the Indian legal system.

13 In October 1971 the government ordered the discontinuance of the common-law as part of the Sudan's legal system: see J S Bainbridge, THE STUDY AND TEACHING OF LAW IN AFRICA, (1972).

14 The practical advantages of European law were recognised by Emperor Haile Sellassie I when explaining, in 1954, his decision to invite European jurists to modernize Ethopia's legal system. He referred to '(t)he necessity of resolutely pursuing Our programme of social advancement and integration in the larger world community (which makes) inevitable the closer integration of the legal system of Ehtopia with those of other countries with whom we have cultural, commercial and maritime connections . . .' Ethopia Herald, March 27 1954 at 3 col 1 quoted in N J Singer, *Modernization of Law in Ethopia: A Study in Process and Personal values,* 11 Harv Int'l LJ 73 at 80 (1970).

ville Austin, in a fine study of the work of the Constituent Assembly, has written:

> . . . Assembly members, drawing on the experience of the great federations like the United States, Canada, Switzerland and Australia, pursued 'the policy of pick and choose to see (what) would suit (them) best, (what) would suit the genius of the nation best . . .'. This process produced new modifications of established ideas about the construction of federal governments and their relations with the governments of their constituent units. The assembly, in fact, produced a new kind of federalism to meet India's peculiar needs.[15]

In view of the genesis of the constitution, Indian law teachers find they can teach constitutional law adequately only by treating it comparatively.[16]

The experiences of under-developed countries seeking to modernize their legal systems and unify their societies are diverse, but they tend to follow the same general pattern. As comparative law has had, and will continue to have, a very important rôle in such modernization,[17] it is appropriate to consider briefly the experiences of two nations which adopted foreign models earlier than most; this permits us to look back at their efforts with the critical eye hindsight affords us.

The modernization of the legal systems of Japan and China[18] follow a similar pattern: both undertook modernization to escape the degrading extra-territorial system[19] and both followed a number of Western models. Additionally, China's modernization was, of course, strongly influenced by that of Japan.

Traditional Japanese law had been influenced, to some extent, by Chinese law: in the early eighth-century, T'ang codes had served as models for Japanese codes, but these codes declined by about 900 and, in the eighteenth-century, Ming codes exerted some influence on Japan.[20] However, apart from Chinese influence, Japanese law was of relatively indigenous origin when Japanese leaders decided to modernize their country in the middle of the last century.

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15 THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION, 186 (1966). (Mr Austin was quoting L K Maitra in the Constituent Assembly). There was of course, criticism that the constitution was 'not Indian enough': ibid, 325-326.

16 Proceedings of Seminar on Comparative Law, 12 J Indian L Institute 511 at 513 (1970).

17 See P Könz, *Legal Development in Developing Countries,* Proc of AM Soc of Int'l L 91 (1969).

18 We refer here to the late Ch'ing and Kuomintang periods, that is approximately 1870-1949. The People's Republic of China is discussed, with the other Marxist countries, below.

19 Thailand modernized its legal system under the same impetus, and in a similar manner. The 1902 revised commercial treaty between China and Great Britain provided: 'China having expressed a strong desire to reform her judicial system and to bring it into accord with that of Western nations . . . Great Britain agrees to give every assistance to such reform, and she will also be prepared to relinquish her extraterritorial rights when she is satisfied that the state of the Chinese laws, the arrangements for their administration and other considerations warrant her in so doing.' (1903) Gr Brit TS No 17, article 12. For the identical provisions in the United States—China commercial treaty of 1903, see 33 Stat 2215 (1904).

20 See D F Henderson, *Chinese Legal Studies in Early 18th Century Japan: Scholars and Sources,* 30 J of Asian Studies 21 (1970).

Once Japan decided to modernize with the assistance of Western concepts the task was pursued with characteristic efficiency. Japanese students were sent to the West to study international law as early as 1862[21]—a decade before China took such action—and European scholars were invited to teach in Japan; by 1874 English law was being taught at the University of Tokyo.[22]

Foreign concepts were introduced into the legal system in many areas, two of the most important being the constitution and the civil code. To prepare the former, Japanese councillors were sent abroad to study Western developments, and memoranda, based on their observations overseas, were prepared for the Emperor. In 1881 one of the leading political figures, Prince Iwakura Tomomi, wrote:

> If we plan to establish a constitutional government in our country and open a parliament, we will be creating something new. The problem is: shall we follow the English model and establish a party government, making the parliamentary majority responsible for the administration? Or shall we, following the principle of gradualism, grant only legislative power and reserve the executive power to the Emperor, according to the Prussian model? Today's decision between these two alternatives will establish a permanent foundation and determine the interests of the country for a hundred years. It is, therefore, an extremely important problem.[23]

Japan chose the Prussian model, of course;[24] a decision Professor Sansom regarded as inevitable in the circumstances.[25]

The preparation of a civil code was a lengthy, carefully undertaken task extending over forty years.[26] The code, adopted in 1898, was prepared by a commission presided over by the Prime Minister and including representatives of the legislature, the law, commerce and industry. Academic lawyers representing each of the foreign schools of jurisprudence were appointed and the commission studied more than thirty foreign codes or draft codes. In the words of Professor Hozumi Nobushige, who had studied in London and Berlin, it 'gathered materials from all parts of the civilized world and freely adopted rules or principles from the laws of any country, whenever it saw advantage

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21 Hungdah Chiu, *The Development of Chinese International Law Terms and the Problem of their Translation into English*, 27 J of Asian Studies 485 at 489 (1968), reprinted in J A Cohen (ed) CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES, 139 at 144 (1970).

22 G B Sansom, THE WESTERN WORLD AND JAPAN, 445 (Vintage Books, 1949).

23 Quoted in J Pittau, POLITICAL THOUGHT IN EARLY MEIJI JAPAN 1868-1889, 88 (1967).

24 G B Sansom, supra note 22 at 315, 363.

25 Ibid, 358.

26 'Thus, in a two-stage process extending over nearly forty years until 1899, the Japanese developed a corps of comparative lawyers, assimilated Western concepts, translated Western Laws, drafted tentative codes of their own with the help of foreign advisers and at last enacted eclectic codes of their own': D F Henderson, *Japanese Influences on Communist Chinese Legal Language*, in J A Cohen (ed) supra 21, 158 at 177. See also Yosiyuki Noda, INTRODUCTION AU DROIT JAPONAIS 49-69 ('La Reception des Droits Occidentaux') (1966); ZENTARO KITAGAWA, REZEPTION UND FORTBILDUNG DES EUROPAISCHEN ZIVILRECHTS IN JAPAN, (1970); Kenyo Takayanagi assisted by T L Blakemore A CENTURY OF INNOVATION: THE DEVELOPMENT OF JAPANESE LAW, 1868-1961 in A T Von Mehren (ed), LAW IN JAPAN, 5 at 23-31 (1963).

in doing so'.[27] The introduction into Japanese law of many foreign concepts, such as the idea of 'rights'[28] and the publication of the statutes, led Professor Hozumi to declare that Japanese civil law had 'passed from the Chinese to the European family of law'.[29]

The introduction of Western concepts into China followed a generally similar path; although Chinese had begun to study abroad in 1872, China found it easier to absorb Western legal concepts via Japan. Professor Dan Henderson, in a masterly discussion of the subject, suggests three reasons for Chinese willingness to accept Western ideas at second-hand from Japan: firstly, Japan was nearer, cheaper for students to visit and culturally closer than the West; secondly, she shared China's script and, thirdly, Japan could transmit 'the essentials without confusing refinements'.[30]

Chinese students first went to Japan in 1896; of the thirteen who arrived, only nine stayed. There was a steady increase in the number of Chinese students in Japan to two hundred in 1899, five hundred in 1902, one thousand in 1903 and eight thousand in 1906.[31] Law and government were the courses usually taken by the students,[32] and by 1908 there had been one thousand and seventy chinese graduates from the Hosei University division of law and politics alone.[33] After reaching a peak in 1906, the number of students fell to five hundred by 1909 and in 1911 the revolution brought nearly all home. Nevertheless, between 1913 and 1931 an average of three hundred to four hundred students graduated annually and, although the number of students studying in the West increased after the revolution, by 1931 forty-two percent of all Chinese foreign students (they were not all law students, of course) were studying in Japan.[34]

By 1909 there were about forty-five Japanese law teachers in China[35] and a large number of Japanese legal works were translated into Chinese by Japanese scholars, especially after 1900.[36] An American law teacher in China observed, in 1923, that Japanese law books lined one wall of the Supreme Court library in Peking, and American law books the other.[37]

Western influence in China grew also, especially after the 1911 revolution. Chinese students went to Europe and America to study and many Europeans and Americans began teaching law in China. In a speech at Manila in 1923, the Rev. Blume, Dean of the Comparative Law School of Soochow University, Shanghai, reported that by 1915-1916 there were forty-nine law schools scat-

27 G B Sansom, supra note 22 at 446.
28 See ibid.
29 Ibid, 447.
30 D F Henderson supra note 26 at 160.
31 Some sources put the 1906 figure at thirteen thousand: ibid.
32 Ibid, 165-166.
33 Ibid, 161.
34 The figures of the principal countries taking Chinese students were: Japan 303, USA 146, France 138, Germany 67, Belgium 34 and UK 28. The total abroad was 728 and it is interesting to note that one student even went to India that year: ibid, 162.
35 Ibid, 163.
36 For example, in 1904 all eighty volumes of Japan's six codes (the Constitution and the Civil, Civil Procedures, Criminal, Criminal Procedure and Commercial codes) were translated into Chinese: ibid, 166.
37 W W Blume, *Legal Education in China,* 1 China L Rev 305 at 307 (1923).

tered throughout China, twenty-four of them under government control. Disillusionment with the inadequacy of the graduates and their inability to affect the chaos of China set in, however, and by 1921 the number of students fell by half and eighteen law schools had closed.[38]

Among law schools then operating, three deserve mention, as they illustrate the extent of Western influence in Chinese legal education:

(a) The law department of Peking National University was divided into English, French and German law sections. Students, of which there were four hundred and twenty-five in 1923, elected one section and were required to become proficient in the relevant language, although the main medium of instruction was Chinese.[39]

(b) Aurora University at Shanghai, directed by French Jesuits, used the French codes as the basis of instruction, some of which was given by French lawyers practicing at Shanghai. French and English were taught, although French was the medium of instruction. There were fifty-odd students enrolled in 1923.[40]

(c) The Comparative Law School at Soochow University, Shanghai, was established by American protestant missionaries in 1915, with the goal of giving students 'a thorough mastery of the fundamental principles of the world's chief legal systems'. Instruction at the school, which had eighty students by fall 1922, was given mainly by American lawyers practicing in Shanghai.[41]

With Western and Japanese[42] assistance, China drafted a series of codes based on the European and Japanese codes and Anglo-American legal concepts. The Penal Code of 1911 was revised and finally promulgated in 1935; it was based on the German, Hungarian, Dutch, Italian, Egyptian, Siamese and Japanese codes. Other codes included the Code of Maritime Law (1929), the Negotiable Instrument Law (1929), the Insurance Law (1929), the Company Law (1929), the Civil Code (1931), the Civil Procedure Code (1935), the Criminal Procedure Code (1935), and the Trade Mark Law (1936).[43] This body of legislation looks very impressive on paper and even Roscoe Pound spoke highly of the Chinese Codes.[44] As early as 1930, Judge Cheng had written:

> [China] has accomplished so much within so short a time that her record may well be termed Justinian. During the last twelve months . . . she has quietly and unostentatiously promulgated volumes of laws touching upon the daily life of the people, that are literally a legislative revolution.[45]

38 Ibid, 308.
39 Ibid, 306.
40 Ibid, 305.
41 Ibid, 306. See also L T Lee, *Communist Chinese Law: Its Background and Development,* 60 MICH L REV 439 at 462 (1962).
42 For an account of Japanese assistance in preparation of the codes, see D F Henderson, supra note 26 at 173-180.
43 See C S Lobingier, *The Corpus Juris of New China,* 19 Tul L Rev 512 (1945).
44 See R Pound, *Comparative Law and History as Bases for Chinese Law,* 61 Harv L Rev 749 at 752 (1948). See also R Pound, *The Chinese Civil Code in Action,* 29 Tul L Rev 277 (1955).
45 F T Cheng, *Recent Legislation in China,* 4 China L Rev 117 (1931). Taiwan has retained the legal reforms of Kuomintang China and has 'on the whole, amended

However, as happens quite frequently in under-developed countries,[46] China's new laws did not really operate effectively; as Professor Jerome Cohen of Harvard has said, 'the Chiang Kai-Shek regime found it expedient to borrow Western European legal institutions largely as a facade for dictatorial practices'.[47]

The experiences of China and Japan are instructive, especially when compared. Both countries enacted a wide range of laws based on Western legal concepts with a view to ending extra-territoriality and modernizing their political, economic, legal and social institutions. This is no place for a discussion of modern Japanese and Chinese history but the success of Japan, compared to the relative failure of Kuomintang China, suggests that the mere enactment of a set of modern laws, even if carefully attuned to the indigenous culture, achieves nothing; it is the implementation of them,[48] a function of the political institutions, that is all-important.

Almost all non-Western nations now study foreign legal developments before introducing major legal reforms; for example, when the Sudan's legal officers were asked to draft an instalment purchases statute they wrote to the embassies in Khartoum requesting a copy of each country's relevant legislation.[49] Unfortunately, as the Sudan example suggests, not all countries take the same care that Japan did in carefully selecting some foreign concepts as suitable for adoption and discarding others as unsuitable. Some of the dangers involved in adopting foreign legal concepts should be mentioned briefly.

Firstly, foreign legal concepts which contravene the cultural traditions of the society will either be ineffectual or be changed into something unintended.[50]

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and revised its laws in an increasingly Western spirit'. A Erh-Soon Tay, *Law in Communist China—Part 1*, 6 Sydney L Rev 153 at 165 note 31 (1969).

46 See P Stirling, *Land, Marriage and the Law in Turkish Villages*, 9 Int'l Soc Sci Bull 21 (1957); M R Belgesay, *Social, Economic and Technical Difficulties Experienced as a result of the Reception of Foreign Law, ibid*, 49; K Lipstein, *Reception of Foreign Law in Turkey*, ibid 70.

47 J A Cohen, *Notes on Legal Education in China*, 24 Harv Law School Bulletin, No 3, 18 at 20 (February 1973). See also V H Li, *The Rôle of Law in Communist China*, The China Quarterly, No 44, 66 at 92 (October-December 1970).

48 Implementation, especially in rural areas, will inevitably be a lengthy task; see N J Singer, supra note 14 at 124-125.

49 C F Thompson, *The Sources of Law in the New Nations of Africa: A Case Study from the Republic of the Sudan*, 1966 Wis L Rev 1146 at 1177.

50 See B N Sampath, supra note 4 at 446; Tahir Mahmood, supra note 5 at 586; L T Lee, supra note 41 at 446, quoting Escarra; supra note 46. Haile Sellassie recognised the need for continuity in Ethopia's cultural-legal tradition. He observed: 'We have never hesitated to adopt the best of what other systems of law can offer to the extent that they correspond and can be adapted to the genius of Our particular institutions. . . . The great distinction of the continental experts whom We welcome . . . should not cause us to lose sight of the principle . . . that Ethopia should endeavour to adopt and adapt the best that other legal traditions have to offer. . . . However, as We have remarked, the point of departure must remain the genius of Ethopian legal traditions, which have origins of unparalleled antiquity and continuity': supra note 14. For an account of codification in Ethopia, see N J Singer, supra note 14 at 80-91. See also J H Beckstrom, *Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethopia*, 21 Am J Comp L 557 (1973). The implementation of new concepts is inevitably easier, and therefore more rapidly accomplished, in urban than in rural areas. As this divergence between the law applied in the towns and that governing the rural inhabitants tends to exacerbate the heterogeneity of the

The legal sociologist has an important function in this regard to ensure that changes are as consistent with contemporary cultural values as possible. Secondly, concepts should not be borrowed indiscriminately from civil law and common-law countries without a careful analysis of their compatibility. Diverse borrowing has occurred recently in the Sudan[51] and Ethiopia; in the latter, the model for the Civil Code was French, the Commercial Code German, the Criminal Code Swiss, and procedure American,[52] and its lawyers are being trained at a law school staffed by American, British, Finnish, Belgian, Polish and French trained teachers.[53] A selection from diverse legal sources is commendable but the adopting country must ensure that these diverse elements will comprise a workable legal *system*. The comparative lawyer has, here, an important rôle, as he is professionally trained to compare laws and assess similarities and dissimilarities and the significance of them.

A third problem arising from the adoption of foreign legal concepts is the natural sensitivity of the Afro-Asian nations. They feel that their legal systems are an original compound of native custom and other elements and resent as 'academic imperialism' classification of their legal systems into the civil law or common-law categories.[54] Western jurists writing on Afro-Asian legal systems should bear this sensitivity in mind because, not only does it unnecessarily create international ill-will[55]—a result entirely contrary to the objectives of

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society—an undesirable development—it is important that a determined, but careful, effort be made to introduce the new ideas into rural areas; this will be achieved only if they are compatible with the people's cultural values. In some cases, however, a short-term increase in disunity may be necessary to attain greater unity of society in the long run. See N J Singer, supra note 14 at 124-125.

51 C F Thompson, supra note 49.

52 See N J Singer, supra note 14 at 80-91. A further problem experienced in many developing countries, especially those conducting their legal affairs in a non-European language, is that of finding appropriate translations for foreign legal concepts. This difficulty was recognised at an early stage of Japan's modernization (see D F Henderson, supra note 26 at 176) and is felt particularly keenly in Ethopia, where it is exaggerated by the diversity of the places of origin of the various codes. See F Abebe and S Z Fisher, Language and Law in Ethopia, 5 J of Ethopian L 553 (1968). Haile Sellassie I Law School now requires law students to study English, French and Legal French: J S Bainbridge, supra note 13 at 212-213.

53 E D Re, *Legal Exchanges and American Foreign Policy,* 21 J Legal Ed 419 at 428 (1969).

54 Dr J Vanderlinden has asserted that Professor Rene David of Paris believes that African legal systems should be made part of other existing systems and adds: 'It is with this idea in mind that (David) drafted the Ethopian Civil Code and accordingly registered Ethopian civil law in the family of Romano-Germanic legal systems. This is but a new form of colonization and it tends to deny to African legal systems a personality of their own': *Trends and Priorities in African Legal Research and Writing,* in J Vanderlinden (ed) PROCEEDINGS OF THE CONFERENCE ON 'LEGAL EDUCATION IN AFRICA' HELD IN ADDIS ABABA, October 20-24, 1968, 77 at 89.

The indigenous law of Ethopian Christians was Church Law, based on Roman law, and could, therefore, be categorized as Romano-Germanic.

55 A good illustration of European lawyers' lack of sensitivity in this regard is the assertion that, while Moslems may regard law as ordained by Allah, it is, in reality, merely 'Roman law in an Arab dress' and that 'the Arabs have added nothing to Roman law except a few mistakes': see Hamid Ali, *The Points of Similarity of Roman and Muslim Jurisprudence and the Inference to be Drawn Therefrom,* 2 YEARBOOK OF LEGAL STUDIES (India) 40 at 48, 52 (1958); S V Fitzgerald, *The Alleged Debt of Islamic to Roman Law,* 67 LQR 81 (1951). Roman law was, clearly, one of the influences on Islamic law at its formative stage and this similarity it has been sug-

comparative law—but it is also inaccurate on a sociological (rather than doctrinal) assessment of the rôle of the legal system in a non-Western country.

If, as has already been discussed, foreign legal concepts can be utilized by non-Western nations to speed the modernization and unification[56] of their countries, the law schools in such countries must equip their students for the intelligent study and application of them. In these countries it is, therefore, at least as important as it is in the United States and Western Europe, that legal education give training in the formulation of policy-objectives[57] and the best means of teaching such skills is comparative law. Indeed, comparative law is especially appropriate as the vehicle for teaching these skills as most legal (and other) reforms will be preceded by the study of the relevant practice of other nations.

Legal education for the achievement of policy objectives is best advanced by the study of comparative law from a sociological viewpoint. It is especially important for lawyers of the newly developing nations to understand the function of law in society and to see the lawyer's rôle as more than the mere bread-and-butter job of representing clients in court and preparing documents. As Professor Denis Cowen has aptly written:

> African lawyers will fail in the exacting tasks which lie before them unless their education is conceived in the grand manner and aims at being truly fundamental, truly philosophical. However short of the goal one might fall in legal education, one must aim high. And nowhere is this more imperative than in the law schools of the new nations.[58]

In the under-developed nations, as in those of the West, the sociological study of comparative law for the practical purpose of formulating and implementing policy should, it is submitted, concentrate on the legal systems of those societies whose culture and stage of development are similar to those of the students'. The problems faced by such societies will be more analogous to those of the under-developed country than those of developed nations, and the introduction of Western or Marxist concepts from a nation with a similar culture which has already adapted them to its own society will be a smoother process than their introduction direct from the developed country. Hence, comparative law courses in the Afro-Asian law schools should, it is believed, concentrate on (but should not be confined to) the legal systems of other

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gested, has made the introduction of modern civil law concepts into Middle Eastern nations easier than would otherwise have been the case: see H J Liebesny, *Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions,* 20 A J Comp L 38 at 45 (1972).

56 In some countries the adoption of foreign legal concepts is the only possible compromise between competing native legal ideas: see Discussion in J Vanderlinden (ed) supra note 54 at 99.

57 'Law provides the nuts and bolts by which state power can be hitched to the plans of the policy-makers': R B Seidman and J R Thome, *The Foreign Law Programs: The Wisconsin Idea in a World Context,* 1968 Wis L Rev 362 at 364. See also J Vanderlinden supra note 54 at 91.

58 D V Cowen, African Legal Studies—*A Survey of the Field and the Role of the United States,* 27 Law & Contemp Prob 545 at 569-570 (1962). See also Yash Ghai, *Goals of African Legal Education: A Comment* in J Vanderlinden (ed) supra note 54, 25 at 27-29; Rahmatullah Khan, *National School of Law—A Proposal,* 14 J Indian Institute 590 at 592 (1972).

developing nations—especially those somewhat more economically developed—rather than on those of the West, which is often the case at present.[59] As Professor Quintin Johnstone of Yale Law School, a former Dean of the Haile Sellassie I Law School, has written:

> It would be relatively easy for African students to understand the legal systems of similar African countries with fairly comparable legal traditions; regular exposure to the laws of those countries would increase student comprehension of the rich and varied potential of law for the solution of human problems. It is submitted that students in common-law parts of the continent, for example, would become better lawyers and judges if most of their courses were directed at common-law Africa generally and stressed less the law of the country where the teaching was being done. Individually, most African countries are too small and legally undeveloped to exhibit the range of legal alternatives that students should encounter. And, filling in with English, French, or other developed country legal source materials often is of little value, because the underlying problems and means for dealing with them in developed parts of the world can differ so drastically from what prevails in Africa.[60]

Although a number of African law schools give courses in European legal systems, Roman law and Anglo-American law, some now also offer courses in Islamic law, African legal systems, and general comparative law,[61] and in India, where the Bar Council prescribed comparative law as a compulsory subject,[62] a textbook prepared for Indian law schools by the Indian Law Institute discusses the history and function of comparative law, and then outlines the legal systems of Ceylon, China, Indonesia, Afghanistan, Malaysia and Japan.[63] These developments are commendable and it is hoped that, in addition to teaching students the sociology of law and policy-formulation, the study of the legal systems of neighbouring countries will lead to greater regional understanding and co-operation.[64]

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59 South Korean law schools, for example, offer many courses on Roman, European and Anglo-American law but only one law school offers an optional course on the History of Oriental Legal Systems: See J Murphy, LEGAL EDUCATION IN A DEVELOPING COUNTRY: THE KOREA EXPERIENCE, 94-99 (1965).

60 *American Assistance to African Legal Education,* 46 Tul L Rev 657 at 689-690 (1972). See also Rahmatullah Khan, supra note 58 at 593.

61 Of the forty-three African university law schools (there were also twenty-five law colleges) extant in 1972, five taught Islamic law, seven taught a general comparative law course and six offered courses on African legal systems: See J S Bainbridge, supra note 13 at 185 et seq.

62 A N Veeraraghaven, supra note 3 at 245.

63 Rahmatullah Klan and Sushil Kumar, AN INTRODUCTION TO THE STUDY OF COMPARATIVE LAW (1971).

64 The East African Court of Appeal has been a force for harmonization of the common-law in East Africa: see G W Kanyeihamba and J W Katende, *The Supra-National Adjudicatory Bodies and the Municipal Government Legislature and Courts: A Confrontation. The East African Experience: The Court of Appeal for East Africa,* [1972] Public Law 107 at 109. A number of African law teachers have called for the establishment of legal research institutes to encourage co-operation in legal education and research in East Africa: see J Vanderlinden (ed) supra note 54 at 27, 37 (Dean Zaki Mustafa, Kartoum); D V Cowen, supra note 58 at 550, 570. The need for such co-operation is urgent, as the African legal systems are becoming increasingly more different: see J Vanderlinden supra note 54 at 97.

The comparative law curriculum of a law school in a 'typical' underdeveloped country might well consist of three parts:
(a) A general introduction to the major legal systems of the world and the history and objectives of comparative law.
(b) A detailed study, from the sociological point of view, of the legal system of one or two technologically more developed countries of the non-Western world; in Asia this could be India, China or Japan and, in Africa, Egypt, and one of the more newly independent nations, such as Ghana or Nigeria. There is much to be said for studying the legal system of an African and an Asian country and former colonies will find it useful to study the legal system of another former colony rather than that of a nation, like Ethiopia, which has only recently sought to modernize its legal system. Comparison should frequently be made with one of the Western legal systems, ideally the one with which the students are most familiar, or that of the country with which the newly independent nation has the closest relations.
(c) A useful third part of the curriculum would be one or more advanced seminars discussing the application of policy in a number of countries (including at least one Western and one foreign non-Western country) in a few carefully chosen fields, such as judicial independence, corruption in government, judicial review of executive action, and land reform.[65]

In many African and Asian nations legal education faces immense problems —such as relatively poorly educated students[66] and language difficulties[67]—but education in comparative law is essential, for the developing nations will look beyond their borders for models and ideas, and their progress may well depend on whether these ideas are used sensibly or haphazardly. Education in comparative law is necessary to ensure that they are used wisely to build on the traditional legal order instead of destroying it without substituting anything effective in its place.

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65 See Rahmatullah Khan and Sushil Kumar, *Comparative Law Research in India,* 12 J Indian L Institute 505 at 507-510 (1970).

66 As in India: see A T von Mehren, *Law and Legal Education in India*: Some Observations, 78 Harv L Rev 1180 at 1186 (1965); R B Sunshine and A L Berney, *Basic Legal Education in India: An Empirical Study of the Student Perspective at Three Law Colleges,* 12 J Indian L Institute 39 at 49-54 (1970). See also J H Beckstrom, supra note 50 at 565.

67 In India, for example, legal education is given in English, though less than ten percent of the 1967 freshman class in a leading law school (Banaras Hindu University) knew English well enough to explain the meaning of a simple sentence in a court opinion and English literacy is declining: see J G Gutman, *The Development of Indian Legal Education: The Impact of the Language Problem,* 21 J Legal Ed 513 at 517 (1969). In Sri Lanka students must pass literary tests in English, and Sinhale or Tamil before being admitted to Law School: B Metzger supra note 3 at 28. Yet, although the change to a native language may make it easier for the students to study their regular subjects, the lot of the comparative lawyer becomes more difficult. As Dean Zaki Mustafa of Khartoum lamented, when Arabic replaced English as the medium of instruction at his law school: '[English] has been our only window on legal developments outside the Sudan. . . . The switch over to Arabic may result in closing that one window without providing an immediate acceptable substitute' (*Some Thoughts About Legal Education in the Sudan,* in J Vanderlinden (ed) supra note 54, 28 at 35). It seems that, whatever is done on the language question, legal education will be adversely affected in one way or another.

4. *Marxist Nations*

Because the Marxist nations view their legal systems as largely original, and substantially unrelated to the previous legal regime, their conception of the function of comparative law differs from that of most other countries; they tend to regard legal developments in non-Marxist nations as offering little that they could beneficially adopt.

Despite the Marxist claims of originality for their legal systems, it is clear that, in every Marxist country, much of the pre-Marxist legal fabric has survived;[68] indeed most of the legal terminology has survived,[69] at least partly as a result of Stalin's decision that language is a classless institution.[70] However, it is equally inaccurate to assert that Marxism has had no influence whatever on the previous legal orders, for Soviet legal theory has influenced the legal systems of all the Marxist countries,[71] including China. In a statement of the Chinese position—which is fascinating because, apart from the date, 'Japanese' or 'European' could be substituted for 'Soviet', and the statement applied to Kuomintang China—Professor Jerome Cohen wrote recently:

> With the aid of Soviet scholars, courses were designed, Soviet law codes and legal books were translated into Chinese, law journals appeared, and, by 1957, the Chinese began to publish their own textbooks and to draft their own law codes.[72]

As in most matters, the Marxist nations' attitude toward comparative law is based on political considerations. Soviet scholars have written extensively on the law of the other Marxist countries,[73] and have treated some com-

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68 J N HAZARD, *Area Studies and Comparison of Law: The Experience with Eastern Europe,* 19 Am J Comp L 645 at 646 (1971); H J Berman, *Soviet Perspectives on Chinese Law,* in J A Cohen (ed) supra note 21 at 324-325; A Erh-Soon Tay, *Law in Communist China—Part 2,* 6 Sydney L Rev 335 at 337 note 1 (1971). Professor George Ginsburgs recently characterized the North Vietnamese legal system thus: 'The Mosaic that emerges represents an odd melange of ancient and modern, and indigenous, French and Soviet elements. . . . Other peculiar features abound, showing that the judicial organism of North Vietnam is still at an incipient stage of development, compelled to improvise and experiment with temporary solutions and trying to weave together into a coherent tapestry disparate strands plucked from the native folkways, the cultural heritage of French hegemony and the "socialist canon".' (*Soviet Sources on the Law of North Vietnam—Part 2* 13 Asian Survey 980 at 983 (1973).

69 See D Finkelstein, *The Language of Communist China's Criminal Law* 27 J of Asian Studies 503 at 508, (1968), reprinted in J A Cohen (ed) supra note 21, 188 at 194; Wu-Su P'an, *Book Review,* 30 J of Asian Studies 880 at 882 (1971).

70 D Finkelstein, ibid 504 J A Cohen (ed) at 190.

71 See I S Markovits, *Civil Law in East Germany—Its Development and Relation to Soviet Legal History* 78 YALE LJ (1968); J N HAZARD, *Unity and Diversity in Socialist Law,* 30 Law and Contempt Prob 270 (1965); J N HAZARD, COMMUNISTS AND THEIR LAW: A SEARCH FOR THE COMMON CORE OF THE LEGAL SYSTEMS OF THE MARXIAN SOCIALIST STATES, (1969); E B Weiss, *The East German Social Courts: Development and Comparison with China,* 20 Am J Comp L 266 (1972).

72 J A Cohen supra note 47 at 21. Of course, the codes have never appeared.

73 For example, between 1949 and 1969, 268 items were published on China; between 1945 and 1972, 74 on North Vietnam and between 1946 and 1971, 56 on North Korea. Studies on constitutional law predominated: 56.8% of the works on China, 56.8% of those on North Vietnam and 62.5% of those on North Korea. See G Ginsburgs, *Soviet Sources on the Law of North Vietnam—Part 1,* 13 Asian Survey 659 (1973); G Ginsburgs, *Soviet Sources on the Law of North Korea,* 1 J of Korean Affairs No 4 57 (1972).

paratively, considering what lessons might be learned for use in the Soviet Union;[74] one jurist even included a chapter on 'Developments in Other Socialist Countries' at the end of a book on a Soviet institution.[75] However, much Soviet writing can be classed as 'propaganda',[76] which is best described by saying that the 'jurist' sees what he is looking for—be it good or bad. Soviet writing on the non-Marxist legal systems and on China's since 1962[77] has been polemical, containing little objective assessment of the legal system studied.[78]

Soviet legal education has a considerable comparative element. Of the more than thirty courses which all students must study during their five years at law school, five involve elements of international or foreign law. Apart from Latin and one modern foreign language, all students must study Roman law, the History of State and Law of Foreign Countries, International Law, the Government and Law of Foreign Socialist Countries, and the Government and Law of Bourgeois Countries and Countries Liberated from Colonial Dependency.[79] Similar courses were given by the law department of Peking University[80] until it ceased functioning—as did China's five other law schools

74 G Ginsburgs, *Soviet Sources on the Law of the Chinese People's Republic,* 18 U Toronto LJ 179 at 182 (1968) and *Soviet Sources on the Law of North Vietnam—Part 1* supra not 73 at 661, 666, 669. It is interesting to note that both the Soviets and the North Vietnamese appear to have adopted some Chinese legal ideas: see G Ginsburgs, *Soviet Sources on the Chinese People's Republic,* ibid H J Berman supra note 68 at 320; G Ginsburgs supra note 68 at 984-985.

75 D S Karev Organizatsiya suda i prokiratury v USSR (kurs lektsil) (Organization of the Courts and the Procuracy in the USSR, course lectures), discussed by G Ginsburgs, *Soviet Sources on the Law of North Vietnam—Part 1,* supra not 73 at 674.

76 Ibid, 667.

77 See G Ginsburgs *Soviet Sources on the Law of the Chinese People's Republic* supra note 74 at 181. Since the Sino-Soviet split, China has developed her legal system (like her other institutions) on lines different from those of the Soviet Union.

78 For example, without explanatory material, Soviet jurists reported that they had concluded that African colonial constitutions 'are usually the results of a collusion between the bourgeoisie of metropolitan countries and the local feudal upper crust and are aimed at undermining the national liberation movement'. I V Ikonitsky, STUDY OF CONSTITUTIONAL AND OTHER LEGAL PROBLEMS OF AFRICA IN THE SOVIET UNION, 280 at 281 (Moscow 1969).

79 W Gray, *Legal Education in the Soviet Union and Eastern Europe,* 5 INTERNATIONAL LAWYER 738 at 742 (1971). For evening students legal education takes six years: ibid 739.

80 In 1965 students were taught two foreign languages (chosen from English, French, German and Russian) and History of the State and Law of China and of Foreign Countries, History of Political Thought of China and of Foreign Countries and Political Institutions of Capitalist Countries: see Tao-tai Hsia, *Chinese Legal Publications: An Appraisal,* in J A Cohen (ed) supra note 21, 20 at 62-63. An interesting comment on Chinese legal education in the early 1960s is given by four graduates of the Peking University Law Department who wrote, in November 1966, of their course: 'We have studied at Peking University for five years and never has a single person in a single class systematically and thoroughly told of the works of Chairman Mao. What have we studied? Soviet Civil Law, Soviet Criminal Law [and] Criminal Procedure, Bourgeois Public Law, the History of State and Law of China, etc . . . Several years have passed since we finished our studies, but we have not seen that any sort of "Soviet criminal and civil law" has helped to decide a single case. . . .' quoted by H J Berman supra note 68 at 321. For a Chinese comment on education for cadres at a school of law and politics, see Tzu-tan Tsao, *Several Problems in the Teaching of Politics and Law for the Service of Politics,* JOINT PUBLICATIONS RESEARCH SERVICE (US) No 17 [56], 46-63 (February 11, 1963).

—at the time of the Great Proletarian Cultural Revolution.[81]

Unfortunately, Soviet and Chinese teaching of the law of the bourgeois nations(and of each other's law) is, like the writings of their comparative lawyers, often polemical. A Soviet lawyer wrote in 1950:

> Bourgeois law must be known, not in order to borrow its ideals, but so that, knowing our own and an alien law, we may perfect our own and expose the reactionary exploiting character of bourgeois law, striking at its most sensitive spots.[82]

Inevitably, the courses given reflect this purpose.

5. *Conclusion*

As we observed at the outset, comparative law has a particularly important rôle in the developing nations, both because they frequently have extremely heterogeneous legal systems, incorporating traditional laws and relatively recently-introduced foreign concepts and institutions, and because of their need to modernize and unify their societies by the orderly adoption of foreign legal and political ideas, both Western and non-Western.

All nations, nowadays, consider foreign legal and political developments when formulating legislative, administrative and economic policies. It is vital that the adaptability of these foreign ideas be carefully assessed, because haphazard adoption of foreign legal and political concepts frequently leads to the ineffectiveness of much of the adopting country's legal system, or the foreign concepts develop in unintended directions.[83] Indeed, the concepts may become so unpopular by running counter to the people's culture, that revolution and chaos result from their imposition. Hence, it is essential that consideration of the applicability of foreign concepts and institutions be undertaken only by well-trained comparative lawyers who understand the social environment of both the adopting country and the nation whose concepts or institutions are being adopted.[84] As Roscoe Pound wrote some years ago, regarding the Kuomintang constitution in China:

> At the outset it was necessary to insist on the supreme importance of drafting a constitution with reference to the historical background and social conditions of the land for which it is designed. A constitutional government must be a gradual growth, arising out of the institutions, customs, and ideals of a people; not something borrowed and transplanted full-grown to which the people are expected to adjust themselves speedily and without friction because of its intrinsic reasonableness.[85]

Comparative law study and the education of comparative lawyers must be objective, and as free as possible from ethno-centrism. Nationalistic and politi-

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81 See J A Cohen supra note 47 at 18. For a brief account of Chinese legal education from 1949 to 1962, see L T Lee, supra note 41 at 462-467.

82 N V Kazantsev quoted by J N Hazard, *Comparative Law in Legal Education*, 18 U Chi L Rev 264 at 273 (1951).

83 See O Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 Mod l Rev 1 (1974).

84 See N J Singer supra note 14 at 95-97, 120.

85 The Chinese Constitution, 22 NYULQ Rev 194 at 196 (1947).

cal sentiment can easily enter into the teaching of comparative law and destroy its effectiveness as a method for studying the sociology of law and the formulation of legal policy; the Soviet study of bourgeois law, Japanese study of Soviet and Chinese law,[86] and Taiwanese study of Chinese law[87] are examples of non-objective comparative law teaching. In contrast, the orderly legal and political development of nations such as Japan, Malaysia, and India[88] demonstrate how important a part comparative lawyers can play in the modernization and unification of a relatively undeveloped and diverse society if the task is approached with care and wisdom.[89]

G G WINTERTON*

86 See Yasehei Taniguchi, *Some Characteristics of Japanese Studies of Contemporary Chinese Law,* in J A Cohen (ed) supra note 21, 294.

87 See *Tao-tai Chinese legal Publications: An Appraisal* in J A Cohen (ed) supra note 21, 20 at 64-68.

88 See K Lipstein, *The Reception of Western Law in a Country of a Different Social and Economics Background: India,* 8-9 REVISTA DEL INSTITUTO DE DERECHO COMPARADO 69, 213 (1957).

89 See M E R Nicholson, *Change Without Conflict: A Case Study of Legal Change in Tanzania,* 7 Law & Soc'y Rev 747 (1973).

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(1975) 12 UWAL Rev 64-80

THE JURISDICTION OF THE WESTERN AUSTRALIAN INDUSTRIAL COMMISSION

Introduction

There can be no doubt that the system of industrial arbitration in operation in Western Australia since the passing of the first *Industrial Arbitration Act* in 1912 provides the means for the settlement of industrial matters and industrial disputes for a large proportion of employers and workers in the State. Hitherto, nearly three quarters of all employees in Western Australia have had their conditions of employment determined and controlled by the Industrial Commission set up under the Act[1] and although there is some evidence that the proportionate coverage of the State and Australian Commissions is now approaching parity, the continuing importance of the State tribunal cannot be gainsaid.[2] In these circumstances it is, perhaps, somewhat surprising that the extent of the jurisdiction of the Western Australian Commission has for long remained a somewhat poorly charted field. Section 61 of the Act gives the Commission power to enquire into any industrial matter or industrial dispute and in respect thereof to make certain orders or awards,[3]

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1 S44 (1) Industrial Arbitration Act 1912-73.

2 The figures for the percentage incidence of employees in WA covered by a Commonwealth award, State award or no award at all are as follows:

Year	Not covered by award	Covered by Commonwealth award	Covered by State award
1954	10.2	13.9	75.9
1963	10.4	13.6	76.0
1968	11.3	16.6	72.1

Source: Australian Bureau of Statistics.

The figures for 1974 were not available at the time of going to press, but preliminary enquiries with the Australian Bureau of Statistics indicated a movement towards increased Commonwealth coverage. Some evidence in substantiation of this can be found in the latest figures giving the numbers of employees in Western Australia who were members of either State registered or Commonwealth registered unions at the time of compilation. In mid 1974 there were 170,345 members of State unions and in January 1974 there were 159,062 members of Commonwealth unions. Figures for membership of registered unions do not have any necessary connection with those for the numbers of persons bound by industrial awards, especially in view of the ability of the Western Australian Commission to award a common rule, but they do help indicate that the Commonwealth system has been coming more into favour.

3 The full text of s 61 (1) provides:

Subject to this Act, the Commission has cognisance of and power to enquire into any industrial matter or industrial dispute in any industry including any industrial matter or industrial dispute referred to it under part IV B of this Act, and in respect of that industry may, on any reference or application to it, make an order or award—

(a) fixing the prices for work done by, and the rates of wages payable to workers in in the calling or callings to which the industrial matter or industrial dispute relates;

(b) fixing the number of hours and the time to be worked in order to entitle those workers to the wages so fixed;

(c) limiting the hours of piece workers;

but the bald words of the statute have received only sporadic further attention.[4] Two recent decisions have, however, made a start towards remedying this state of affairs, the one concerned with the kind of body eligible for registration as an industrial union, the other with the kind of matters with which the Commission is empowered to deal. A curiously ambivalent result stems from a comparison of the two cases.

In the *Tertiary Education Academic Staffs Association case*[5] (referred to hereafter as the *TEASA case*) two societies were seeking registration as industrial unions under the Industrial Arbitration Act, the Tertiary Education Academic Staffs Association as representative of all academic staff teaching at tertiary level in Western Australia and the Academic Staff Association as representative of academic staff solely at the University of Western Australia. The fundamental issue for decision by the Commission in Court Session was whether persons engaged in tertiary education were engaged in an 'industry' within the meaning of s 8 of the *Industrial Arbitration Act*.[6] 'Industry' is defined in s 6 *Industrial Arbitration Act* as including, inter alia, any calling, service, employment, handicraft or industrial occupation or vocation of workers. In allowing both the applications for registration, subject to certain amendments to the societies' rules being made, the Commission simply adverted to the definition set out above and concluded that the calling followed by members of the applicant societies was plainly an 'industry' within the ordinary meaning of the words so defined.

Of particular interest is the treatment accorded by the Commission to High Court decisions on the meaning of 'industrial disputes' in the Commonwealth *Conciliation and Arbitration Act 1904-74*. It was pointed out that the instant case concerned applications for registration rather than the question of involvement in industrial disputes and, perhaps more importantly, that the legislative context of the relevant provisions of the Commonwealth Act was different from that of the State Act. The High Court has often asserted that whatever the Commonwealth industrial legislation may provide, it cannot

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(d) fixing the rates for overtime, work on holidays, shift work, week-end work and other special work, including allowances as compensation for overtime or any of such work referred to in this paragraph;
(e) determining any industrial matter;
(f) declaring what deductions may be made from the prices or wages of workers for board or residence or board and residence provided for workers and for any customary provisions or payments in kind conceded to such workers; and
(g) determining, declaring or fixing any matter or thing that by this Act, is required or permitted to be determined, declared or fixed by an order or award of the Commission.

4 Some guidance on the scope of the jurisdiction of the Commission is, however, found in ETU v Goldsworthy Mining Ltd (1969) 49 WAIG 710. See, in particular, the judgment of Kelly C at p 712.

5 (1974) 54 WAIG 1375.

6 The section provides, inter alia:
Any Society consisting:—
(b) In the case of workers, of any number of workers not less than fifteen, associated for the purpose of protecting or furthering the interests of employers or workers in or in connection with any specified industry . . . may, on passing the necessary resolution and rules, and otherwise complying with the requisitions of this Act, be registered as an industrial union under this Act.

enlarge the meaning of 'industrial dispute' beyond its constitutional sense[7]—and that where the meaning of industry is in issue, the *nature* of the occupation under scrutiny must be sufficiently 'industrial' quite apart from the statutory definition.[8] Thus despite the fact that 'industry' is defined in s 4 of the Commonwealth Act in almost identical terms to that found in the State Act, the lack of such constitutional restraints in the construction of the *Industrial Arbitration Act* enabled the Commission to regard the Commonwealth decisions as of 'little direct assistance'.

The Commission was also faced with the question of the importance of decisions made specifically with respect to applications for registration under the Commonwealth Act. In *Pitfield v Franki*[9] the High Court decided that persons employed by fire-fighting authorities in various States in or in connection with the prevention, suppression or extinguishment of fires were not employees in or in connection with any industry within the meaning of s 132(1)(b) of the *Conciliation and Arbitration Act,* nor were they engaged in an industrial pursuit or pursuits within the meaning of s 132(1)(c). The Commission said of this case that only two of the judges considered the definition of 'industry' in the Commonwealth Act, and that their observations that it could not be construed so as to remove the need for a certain relation with 'industry' (in a sense to be considered later) were influenced by the provisions of s 132, setting out the conditions to be met by applicants for registration under the Commonwealth Act, of which section there was no 'true counterpart' in the *Industrial Arbitration Act.*

The matter requiring decision in *Hospital Employees Industrial Union of Workers (WA) v St John of God Hospital*[10] was whether a demand for payroll deductions of union subscriptions by employers of the unionists concerned (referred to throughout this article as the 'check-off') was an 'industrial matter' within the meaning of the Act. The Hospital Employees Industrial Union (hereafter referred to as 'the union') had applied for this provision to be included by way of amendment of or addition to the Private Hospital Employees Award. Mr Commissioner Halliwell upheld the submission by the respondents that the amendment sought was outside the Commission's jurisdiction and from that decision the union brought an appeal to the Western Australian Industrial Appeal Court.[11] The Court was able to draw upon the wide definition of 'industrial matters' in s 6, there said to mean generally all matters affecting or relating to the work, privileges, rights and duties of employers or workers in any industry.[12] It chose, however, to follow the

7 The Commonwealth legislation is, of course, founded on s 51 (xxxv) of the Constitution, empowering the Commonwealth Parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

8 See the judgment of Knox CJ, Gavan Duffy and Starke JJ in Federated State School Teachers Association of Australia v Victoria (1928) 41 CLR 569, 575.

9 (1970) 123 CLR 448.

10 (1974) 54 WAIG 1266.

11 Pursuant to s 108 D Industrial Arbitration Act.

12 So far as is relevant to the present discussion, the definition is as follows:
'Industrial matters' means all matters affecting or relating to the work, privileges, rights, and duties of employers or workers in any industry, not involving questions

decision of the High Court in *Re Portus; ex p Australia and New Zealand Banking Group Ltd*[13] where a claim for check-off of union dues was said not to be within the jurisdiction of the Australian Commission.

Burt J reiterated in his judgment a point he first made in *Hillview Nursing Home v Hospital Employees Industrial Union of Workers (WA)*[14] that despite the terms of s 108B(4) *Industrial Arbitration Act,* expressed to make decisions of the Industrial Appeal Court final and unreviewable, the High Court does in fact wield control over the Western Australian Commission on jurisdictional questions by means of the prerogative writs.[15] Thus he maintained that decisions of the High Court which are 'directly in point' should be followed by the Western Australian Tribunals whenever applicable to the resolution of these questions. The question thus becomes whether Commonwealth decisions on the meaning of 'industrial matters' are 'directly in point' in the State sphere. The general words of the definition of 'industrial matters 'in s 4 of the Commonwealth Act refer to 'all matters pertaining to the relations of employers and employees'. In terms the Act thus requires that the matters in question pertain to the *nexus* characterising the relationship between the two, whereas the State Act refers to matters affecting or relating to the work . . . of employers *or* workers in any industry. Despite the different wording Burt J's conclusion was that 'the idea' expressed by the Commonwealth Act was 'sufficiently conveyed' by the general words used in the State definition and that the remaining paragraphs of the definition[16] 'reflect that idea'. He was therefore able to conclude 'check-off' not to be an 'industrial matter' on the reasoning of the High Court in *Re Portus*—briefly, that the relationship affected by a dispute as to check-off was the financial one of debtor and

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which are or may be the subject of proceedings for an indictable offence; and, without limiting the general nature of the above definition, includes all matters relating to—

(a) The wages, allowances, or remuneration of workers employed or usually employed or to be employed in any industry, or the prices paid or to be paid therein in respect of such employment;

(b) The hours of employment, sex, age, qualification, or status of workers, and the mode, terms and conditions of employment;

(c) The employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;

(d) Any established custom or usage of any industry; either generally or in the particular locality affected;

(e) [Deleted by No 76 of 1963, s 7 (h).]

(f) [Omitted]

(g) [Deleted by No 76 of 1963, s 7 (h).]

(h) What is fair and right in relation to any industrial matter, having regard to the interests of the persons immediately concerned, and the community as a whole.

13 (1972) 127 CLR 353.

14 (1974) 54 WAIG 783.

15 Presumably the decision of the Industrial Appeal Court is removable to the Supreme Court in virtue of the latter's inherent jurisdiction from whence an appeal lies to the High Court under s 73 (ii) of the Constitution. See Coal Miners Industrial Union of Workers v Amalgamated Collieries of Western Australia (1960) 104 CLR 437.

16 Supra note (12).

creditor arising from the earning of salary and not the industrial one in which the salary has been earned and become payable.[17]

A like conclusion was reached by Wallace J in his short judgment:[18]

'What the High Court determined in *Re Portus* is that an industrial matter must arise out of the relationship of an employer as such and an employee as such and in my view the various criteria set out in the definition confirm this opinion.'

The above is the sum of the argument justifying dismissal of the appeal. Wickham J delivered a minority judgment in favour of allowing it. His reasoning was that it is generally the right of a worker to receive his pay without deduction and it is the duty of his employer to pay him without deduction. Thus to alter the legal incidents of the service so that the worker has no right to receive his pay without deduction and so that the employer has a duty to make the deduction is to touch a matter affecting or relating to the rights and duties of the employers and of the workers in the relevant industry. The demand thus fell within the general words of the definition of 'industrial matters' in s 6. The judge was of the opinion that *Re Portus* was not applicable because the Comomnwealth Act requires the existence of an industrial *dispute* to found jurisdiction and as a dispute obviously enough needs disputants, it was 'not surprising' to find that the primary meaning of 'industrial matters' in the Commonwealth Act to be all matters pertaining to the relations of employers and employees. The demand for check-off did not pertain to the *relationship* of an employer as such with an employee as such, but as the State Act did not require this, the Commonwealth decision could be disregarded.

Having examined a decision of the Commission in Court Session denying significance to High Court decisions and one of the Industrial Appeal Court stating that in certain circumstances they must be followed, two important issues require discussion. Firstly it needs to be determined in principle the extent, if any, to which High Court decisions should be followed by tribunals operating under the Western Australian Act. Secondly, the consequences of following such decisions need to be made clear. The discussion on these matters will then enable some general conclusions to be drawn on the path best adopted by the Western Australian Commission for the future.

The relevance of High Court decisions to state industrial tribunals

We have seen Burt J to have enjoined the following of High Court decisions in respect of jurisdictional matters when the decisions are 'directly in point' on the basis of the High Court being the final court of appeal in such matters. The fallacy of this argument is that *no* High Court decisions interpreting the *Conciliation and Arbitration Act* are indeed in point. That the phrase 'industrial dispute' as found in s 51 (xxxv) of the Constitution has been said to

17 Menzies J's judgment at 360, Walsh J at 364, 365, Stephen J at 371-2. It is not proposed to discuss the correctness of the decision in respect of the Commonwealth Act. This has been done by G H Sorrell in (1973) 47 ALJ 42 where the result is said to involve a restrictive construction of the Constitution and the Act, and to have been achieved in the face of industrial realities that were pressed upon the Court.

18 Op cit 1269.

have an intrinsically constitutional meaning cannot be in doubt. In order to be arbitrable the Australian Commission has to be satisfied that a dispute is one involving an 'industry' and that the differences between the parties are of a nature such that the dispute may be termed industrial, or, to put the point another way, they must concern an industrial matter. The Commonwealth Act contains statutory definitions of 'industry', 'industrial dispute' and 'industrial matters'. However, the construction of the Act has been affected by the fact that its provisions can be valid only if they can be supported by s 51 (xxxv) of the Constitution.[19] Now it appears that it is a *constitutional,* not merely a *statutory* requirement that for a 'matter' to be regarded as 'industrial' it must pertain to the relations of employers and employees. In *R v Kelly; ex p State of Victoria*[20] it was affirmed that any extension of the meaning of the above phrase beyond that attributed to it—that it referred to the relation of an employer as an employer with an employee as employee —would inevitably involve an excess of the power conferred by s 51 (xxxv) of the Constitution. Thus the Court concluded that a matter did not become an 'industrial matter' or the subject of an industrial dispute simply because it was a matter with respect to which persons who were employers and employees were disputing.

Further, it should be noted that in *R v Commonwealth Industrial Court; ex p Cocks,*[21] while the decision of the Court dealt primarily with the meaning of 'industrial matters' as defined in the Act, Kitto J was of the opinion that a dispute with respect to work to be done by independent contractors was not an industrial dispute in the constitutional sense—that there was no constitutional power to tread in the area of matters not pertaining to the relation of employers and employees.[22] Indeed, in *Re Portus* itself, while most argument turned on the width of the statutory definition, the constitutional issue was always present in the background. All the judgments relied expressly or by agreement on *Kelly's case* and Walsh J referred specifically to the necessity of interpreting the Commonwealth Act bearing in mind the nature and extent of the power conferred by s 51 (xxxv) of the Constitution.[23]

No reference was made by the majority in the *Hospital Employees Union case* to the constitutional context in which High Court decisions are made. Moreover, we have seen the statutory requirement that industrial matters pertain to the relationship of employer and employee and the interpretation given to that phrase appear to have been necessary for constitutional reasons. How, then, can it be asserted that decision interpreting a statute in a jurisdiction bounded by rigid constitutional limitations can be 'directly in point' to one made in another jurisdiction lacking such limitations where the statute only has to be interpreted in the light of the plain words there used? The

19 R v Commonwealth Court of Conciliation and Arbitration; ex parte Victoria (1942) 66 CLR 488 per Latham CJ at 499: Caledonian Collieries Ltd v Australian Coal and Shale Employees Federation (1930) 42 CLR 527 per Gavan Duffy, Rich, Starke and Dixon JJ at 552.
20 (1950) 81 CLR 64.
21 (1968) 121 CLR 313.
22 Ibid 325-6
23 Op cit 367.

point is given added cogency in view of the disparate wording of the relevant statutes, which will be considered shortly.

The above argument is simply directed towards showing that decisions made in one jurisdiction should not be abstracted from it and said to be binding in another one quite different in nature. This point is backed up when one observes the nature of the control in fact vested in the High Court. In the *Hillview Nursing Home case* Burt J mentioned, but did not expand upon, the limits to the control able to be exercised by the High Court when faced with finality clauses of the type protecting decisions of the Commission[24] and the Industrial Appeal Court,[25] expressed to exclude all forms of appeal or review. While such clauses have been regarded as not setting at large the tribunals to whose decisions they relate, they have nevertheless been accorded a certain efficacy, albeit of a limited kind. The classic statement of the principles to be applied is that of Dixon J in *R v Hickman, ex p Fox and Clinton.*[26]

'Such a clause (as in s 108) is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.'

Thus it is only when an inferior tribunal manifestly disregards limits upon its jurisdiction and undertakes to do something that is altogether outside the sphere of the jurisdiction conferred upon it that the prerogative writs are afforded any room for operation.[27] Could it successfully be argued that a literal construction of the relevant words in the *Industrial Arbitration Act* could be impugned under this principle by reason of its failure to abide by a mode of construction of different words adopted in another jurisdiction of, at the very best, persuasive value only? The only duty cast on the inferior tribunal in this matter is to act *bona fide* in a way reasonably capable of reference to its source of power, and to assert that this necessitates it following *factually* rather than *legally* similar decisions of the High Court is but a poor argument.

Even if the *principle* enunciated by Burt J be accepted the question arises whether the issue in the *Hospital Employees Union case* required its application. We have already adverted to the different wording of the definition of 'industrial matters' in the two statutes and that its potential significance was brushed aside. No compelling reason was advanced to show why the disjunctive 'or' between 'employers' and 'workers' should not be accorded its natural

24 S 108 (1) and (2) Industrial Arbitration Act.
25 S 108B (4) Industrial Arbitration Act.
26 (1945) 70 CLR 598, 615.
27 The explanation of the rule was given by Menzies J in Coal Miners Industrial Union of Workers of WA v Amalgamated Collieries of WA Ltd (1960) 104 CLR 437, 454 as lying in the resolution of two conflicting provisions of the legislature, one imposing fundamental restrictions upon an inferior tribunal and the other protecting the proceedings of that tribunal from examination.

meaning. The argument that both the general words and the specific sub-paragraphs 'reflect the idea' that 'industrial matters' must pertain to the relations of employers and employees is entirely unsatisfactory, it merely enabling the majority conveniently to avoid answering hard questions on why indeed a claim for check-off is not a matter affecting or relating to the work, privileges, rights and duties of employers or workers,[28] is not a mode, term or condition of employment,[29] does not fall within jurisdiction by reason of its customary use in hospitals[30] or cannot be placed under the head of what is fair and right in relation to any industrial matter.

If decisions interpreting the Commonwealth Act are to be regarded as 'directly in point' the only safe guide to adopt would lie in a requirement that the relevant words of the statute be identical or at least essentially the same. While this test would not require like decisions on the meaning of 'industrial matters', it would, however, do so in respect of the meaning of 'industry' in the two Acts. This latter point and its implications will be examined below.

The consequences of observing High Court decisions when interpreting the Industrial Arbitration Act

It is quite apparent that the word 'industry' has been given a restricted meaning, as has the phrase 'industrial matters', the statutory definition being said to be unable to enlarge the kinds of relationships to which the constitutional phrase 'industrial disputes' is applicable. In *Federated State School Teachers Association of Australia v Victoria*[31] it was stated by Knox CJ, Gavan Duffy and Starke JJ that the definition of 'industry' in the Commonwealth Act could not enlarge the meaning of 'industrial dispute' beyond its constitutional sense. *The Queen v Commonwealth Conciliation and Arbitra-*

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28 Note that the award governing the conditions of employment of the hospital employees contained a preference clause making it mandatory for employees of the respondent hospitals to join the union and remain members while employed. The method of meeting this obligation, if not a matter between employer and employee in the relevant sense, seems at least to be a matter between the worker and the union (see, for example, Walsh J's judgment in Re Portus at 364, 368) the regulation of which relationship is prima facie covered by the definition of industrial matters in s 6. Perhaps, moreover, this result could be reached by a route open to the High Court as well. When the practice of inserting bans clauses in Commonwealth awards was challenged in Seamans Union of Australia v The Commonwealth Steamship Owners Association (1936) 54 CLR 626, their validity was upheld as they were 'plainly directed to industrial matters which are definitely related to securing the actual and effective operation of the award for the purpose of governing the industrial relations of the parties' (per Latham CJ at 640) or as they operated 'to protect the award, make it effective and prevent its frustration' (per Starke J at 644). A principle recognising a claim to be within jurisdiction if directed towards ensuring the effective operation of an award would appear to encompass a claim for the use of the check-off system if union membership were a condition of employment (and also would appear to raise a suspicion of double standards on the part of the High Court).

29 The remarks in the above note would apply with added weight if the claim were put in terms imposing a duty on all employees of the named employers to remain financial members of the union while employed, and a duty on the employers to employ or to continue to employ only such financial members.

30 Only 8.06% of HEU members do not pay union subscriptions by means of the check-off.

31 (1929) 41 CLR 569.

tion Commission; ex p Association of Professional Engineers[32] reaffirmed in clear terms that the nature of an employment must be industrial in the sense of the constitutional power. Barwick CJ examined in *Pitfield v Franki*[33] all the important earlier cases on the meaning of 'industrial dispute' and concluded that no definition of 'industry' or 'industrial pursuit' emerged from them.[34] That the vital issue is simply one of characterisation is apparent, however, in his view of these cases that the industrial quality of a dispute may derive either from the industrial nature of the activity carried on by the employer or from the essentially industrial character of the work performed or to be performed by the employee.

A view that for an activity to qualify as an industry it must be of an essentially industrial character is patently tautologous. However, some further guidance is to be found in Barwick CJ's opinion, the following being the factors mentioned.[35] The performance of manual labour in any employment is prima facie an industrial activity and the manufacture and distribution of goods is 'at the heart of' industry. Nevertheless, the provision of services essential to such industrial activity may constitute an industry in the requisite constitutional sense. Further, the pursuit of profit by an employer might convert work of an inherently non-industrial activity into work in an industry, school teaching being the example given. Likewise the work of a clerk may become industrial when he is employed by an employer engaged in an 'industry'.

These are the pointers as to what is meant by 'industry'. Beyond them one has to rely largely on intuition.

Should these High Court authorities be adopted in Western Australia in respect of the registration of industrial unions under the State Act on account of the statement of principle in the *HEU case*? The meaning of 'industry' is clearly a jurisdictional matter, as can be seen from the terms of s 61 *Industrial Arbitration Act*.[36] All of the earlier decisions were, however, concerned with the question whether the bodies involved were parties to an industrial dispute not whether they were associated in connection with an industry for the purposes of registration. Perhaps they could therefore be regarded as insufficiently 'in point'. This argument is difficult to maintain in view of the importance given to these decisions by the High Court in *Pitfield v Franki* when determining the fire-fighters application for registration. We have seen Barwick CJ to have referred to various decisions on whether an industrial dispute existed in the relevant sense and he did indeed observe that no question as to the validity of the registration of an organisation had been in issue. He continued:[37]

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32 (1959) 107 CLR 208.
33 (1970) 123 CLR 448.
34 The test put forward in the Municipalities case (1919) 36 CLR 508 at 554—briefly that 'industry' concerns the co-operation of capital and labour and that an industrial dispute arises when the parties dispute as to the terms of that co-operation—was said not to have gained general acceptance as an exhaustive definition of 'industry'.
35 Op cit 456-7.
36 Supra note (3).
37 Op cit 455.

'However, in deciding whether a particular dispute was within the ambit of the Constitution and the Act, the Court has necessarily considered aspects of industry relevant for resolution of the case under consideration. Accordingly expressions of judicial opinion in those cases are of significance and of some assistance in the resolution of the present problems.'

In fact the Court placed considerable reliance on these cases in determining the application before it. It is therefore certainly arguable that the different contexts in which the meaning of 'industry' has arisen should be given little significance when applying Burt J's maxim. Be that as it may, there is also, of course, the question of the relevance of decisions made specifically with respect to applications for registration under the Commonwealth Act. We have seen the Commission in the *TEASA case* to have dealt with the leading authority on this point—*Pitfield v Franki*—by stressing that only two judges considered the definition of 'industry' in the Commonwealth Act and that the decision was influenced by the provisions of s 132, the *Industrial Arbitration Act* containing no 'true counterpart' of that section. In itself this is a doubtful argument, for while it is true that s 8 *Industrial Arbitration Act,* the section setting out the conditions governing the registration of industrial unions, is framed differently to s 132 of the Commonwealth Act, both sections nevertheless refer, inter alia, to associations of workers or employees 'in or in connection with any industry' as constituting one of the requirements for registration. If the definition of 'industrial matters' in the Commonwealth Act is to be regarded as 'directly in point' when interpreting the State Act despite the different wording, it is difficult to see why an interpretation of s 132 of the Commonwealth Act should not be regarded as such when considering s 8 of the State Act where both sections use essentially similar wording. Insofar as *Pitfield v Franki* was concerned with the statutory definition of 'industry', it needs to be stressed again that the definition in the *Industrial Arbitration Act* is almost precisely the same. Moreover, it appears that decisions on registration are to be regarded as jurisdictional matters such that the prerogative writs may provide a suitable remedy. Barwick CJ has in fact confirmed the point:[38]

'On the view I have taken, there was no authority in the Commission to effect the registration (of the fire-fighters). Lack of that authority would ground equally prohibition or certiorari dependent upon the state of affairs when the prerogative writ was sought.'

For these several reasons, it is suggested that if we accept Burt J's statement of principle in the *HEU case* then Commonwealth decisions on the meaning of 'industry' should be followed by Western Australian tribunals. What are the consequences flowing from this conclusion? Unions of firemen and policemen have been registered under the *Industrial Arbitration Act* for many years and yet these occupations do not qualify as 'industries' for the purposes of the Commonwealth Act.[39] Academics have now gained registration and yet it seems they also are excluded from the Commonwealth sphere.[40] Other regis-

[38] Pitfield v Franki op cit 459-60.
[39] Pitfield v Franki itself.
[40] According to Dixon CJ in the Professional Engineers case (supra) the 'basal proposition' of the State School Teachers case was that the occupation followed by the

tered bodies may also be open to attack—for example the Prison Officers Union. Perhaps, therefore, any industrial union or person interested[41] or the Registrar could successfully apply for the de-registration of any of these bodies under s 29 *Industrial Arbitration Act.*[42] S 29(2)(a) provides as grounds for de-registration that an industrial union has been registered erroneously or by mistake. In *State of New South Wales v Australian Public Servants Association,*[43] a decision of the Commonwealth Court of Conciliation and Arbitration, one of the grounds for ordering the cancellation of the registration of the Association was that it was not, and had not applied to be registered as an association of employees in any recognised or proved specified industry or industries within the meaning of the Act. It would be strange if a like decision were not to be made by the Western Australian Commission, for otherwise it would permit the continuation of a registration which it seems the Registrar had no power to grant. Further, s 29(2)(h) provides for cancellation of registration if for 'any other reason' apart from the grounds set out in paragraphs (a) to (g) it 'ought to be cancelled'. This provision has, however, yet to receive the considered attention of the Commission or Court.

It should be noted that an order for de-registration is always a discretionary matter. It is likely that the Commission would be unwilling to make such an order in respect of any of the unions under discussion. Yet faith in the benevolent exercise of the discretion may prove to be of cold comfort to these unions, for it remains to be considered whether the Commission has jurisdiction under s 61 to deal with any matter or dispute involving any one of the unions. The Commonwealth decisions on the meaning of 'industry', involvement in such by the parties being a pre-requisite to the existence of an industrial dispute, would, on the Appeal Court's analysis, be of direct relevance. Thus no 'matter' or 'dispute' involving them would ever be relevantly 'industrial'. Moreover, s 61 refers to any industrial matter or industrial dispute *in any industry* as providing the foundation for the Commission's jurisdiction. To avoid giving effect to High Court decisions on the meaning of 'industry' with respect to the award-making powers of the Western Australian Commission consistently with the terms of the enjoinder in the *HEU case* would seem impossible.

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teachers was not by nature industrial. The decision would appear to cover university lecturers, and this in fact was the finding of the Registrar in Re Association of Professional Scientists of Australia (1961) 96 CAR 945.

41 This expression has been held to include anyone bound by the union's award, a member of the organisation concerned (see Grubb v Federated Storemen and Packers Union (1972) 20 FLR 356) and indeed any worker in the industry although not a member of the union (Bell v WA Timber Workers (1928) 8 WAIG 428).

42 The validity of a decision allowing registration has already been demonstrated to be on issue going to jurisdiction, but an order of certiorari will only lie where the application is made within six months of the date of the making of the decision sought to be quashed unless the delay is accounted for to the satisfaction of the Court or Judge to whom the application is made: RSC 0 56 r 11(1). It seems the Court will only reluctantly allow the application to succeed if the delay is longer than six months: R v Secretary of State for War; ex p Price [1949] 1 KB 1, 7; R v Criminal Injuries Compensation Board; ex p Schofield [1971] 1 WLR 926.

43 (1924) 20 CAR 115.

Quite apart from the issues at stake in the two recent Western Australian decisions, certain other consequences of local State tribunals following High Court decisions should be observed. We have already noted several cases in which it has been made clear that disputes which are arbitrable in the Commonwealth sphere are of only a limited kind. A further selection of cases which could be said to be 'directly in point' and therefore to be followed may be put forward.[44]

These are decisions which are concerned with the supposed distinction between 'managerial' and 'industrial' functions. A few examples will be given. In *Kelly's case* a clause in an award requiring retail butchers to open and close shops at certain hours was held not to be an 'industrial matter' as it impinged upon managerial prerogatives. Doubt was cast in *R v Railways Appeal Board*[45] on whether the promotion of employees in accordance with the employers standards and without reference to the consent of the union could raise a dispute as to an industrial matter within the meaning of the Act for like reasons.[46] This kind of thinking was at the root of the decision in *R v Commonwealth Conciliation and Arbitration Commission; ex p Melbourne and Metropolitan Tramways Board*[47] (*Tramways Case No 2*) where a demand that no two-man bus or tram services be converted to one-man and that existing one-man operations be converted back to two-man in certain circumstances was said not to be an industrial demand. The High Court was, perhaps, merely playing at semantics, as the claim would have been an industrial one if it was that the transport authority should not require an employee driver to operate a bus unless assisted by a conductor.[48] Indeed, the arbitrary nature of the decisions of the High Court can best be observed by noting that in *Australian Tramways Employees v Prahran*[49] a dispute as to whether unionists could wear a union badge was held to be industrial, as was the dispute in *R v Gallagher*[50] with respect to the number of cooks to be carried on specified vessels.

It is difficult to discern any on-going considerations of policy in these decisions, or indeed any rational basis for them in law. Yet if Burt J be right, they must limit the ambit of the deliberations of the Western Australian Commission in the same way as they fetter the proceedings of the Australian Commission.

The further potential impact of Commonwealth cases on the interpretation of the Western Australian Act is not confined to decisions on managerial discretion. Other important matters may be affected. For example, in *R v Wallis*[51]

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44 The following cases were all determined wholly or at least partly with respect to the general introductory words of the definition of 'industrial matters' in the Commonwealth Act although sometimes reference was made to specific sub-paragraphs which do not correspond with those in the Western Australian statute.

45 (1957) 96 CLR 429.

46 See the judgments of McTiernan J at 451 and Taylor J at 458.

47 (1966) 115 CLR 443.

48 See Melbourne and Metropolitan Tramways Board v Horan (1967) 117 CLR 78 (Tramways Case No 3).

49 (1913) 17 CLR 680.

50 (1968) 121 CLR 330.

51 (1949) 78 CLR 529.

the High Court decided that the Australian Commission had no power to include a provision for compulsory unionism in an award. The decision turned mainly on the fact that a specific power in the *Conciliation and Arbitration Act* to award preference was inconsistent with the power to award compulsory unionism under any other provisions of the Act.[52] There is no such specific power in the Western Australian Statute. However some consideration was given to the definition of 'industrial matters', the Court being of the opinion that it did not include a power to award a monopoly of employment in any event.[53] It should also be noted that the question whether the Commonwealth Parliament has *constitutional* power to award a closed shop was raised and left open.[54] Should we conclude that the Commission in Court Session in *Food Preservers Union of WA v Peters Ice Cream WA Ltd*[55] should have followed *Wallis* instead of going its own way and deciding that both preference and compulsory unionism are industrial matters within the meaning of the Western Australian Act? The point is at least arguable, despite the absence of a specific power to award preference as in the Commonwealth Act, for this is undoubtedly a jurisdictional matter and the Commonwealth definition of 'industrial matters' was, of course, said to be 'directly in point' in the *HEU case*.

Other examples of the effect of turning to Commonwealth decisions when interpreting the State Act could be found. The above discussion does, however, suffice to illustrate the profound difficulties and problems in so doing.

Conclusions

The system of arbitration as practised in Australia is often seen as the lynch-pin on which rests the means for the orderly conduct of industrial relations and the fair resolution of industrial disputation. It is supported by the main protagonists—both unions[56] and employers[57]—as an appropriate forum for the resolution of their differences. Likewise, those charged with the application of industrial law are convinced of the systems worth.[58] There is nothing to suggest that the main political parties do not favour the continuation and smooth operation of the arbitral machinery, both Commonwealth and State. Is it not fair to conclude, therefore, that in point of policy, within the limits laid down by the appropriate legislature, the operation of the system should not be artificially or unnecessarily curtailed? Yet the judgment of the majority in the *HEU case* has undoubtedly restricted the operation of the arbitration system in Western Australia in precisely this way.

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52 Dixon J's opinion that both are of the same general subject matter compares strangely with his later judgment in R v Findlay (1950) 81 CLR 537 that an award of preference is not within the ambit of a claim for compulsory unionism.

53 Note, in particular, the judgment of Latham CJ op cit 540-1, 545-6.

54 Op cit per Latham CJ at 545-6, Dixon J at 549.

55 (1964) 44 WAIG 91.

56 See the statement of Mr R J Hawke, President of the ACTU, in *The ACTU Congress of 1971* (1971) 13 Jo of Ind Rels 398, 403.

57 See the paper presented by Mr W J Brown, Manager, Labour Relations Division WA Employers Federation, at the 1973 Convention of the Industrial Relations Society of Victoria entitled *Future Industrial Relations—Rape or Reason.*

58 See, for example, the keynote address of Robinson J at the 1974 Convention of the Industrial Relations Society of Victoria.

The possible use to be made of the prerogative orders by taking a jurisdictional point to the High Court to delimit the area of competence of the Western Australian Commission provides no foundation for asserting that High Court decisions interpreting the Commonwealth Act must be followed when 'directly in point'. Only decisions interpreting the *Western Australian Act* are in law to be regarded as relevantly in point. It is, moreover, clear that the industrial tribunals in other States have recognised the dangers of removing Commonwealth decisions from where they belong.[59] That this argument applies with added emphasis when the statutes are essentially dissimilar in wording and form is manifest. The decision in the *HEU case* that *Re Portus* was a decision which should be followed amounted to an assertion rather than an argument. There is no doubt that, freed from subservience to Commonwealth decisions, the provisions defining the jurisdiction of the Western Australian Commission are phrased in broad enough terms to enable virtually anything of concern to employers or workers in their capacity as such to be regarded as arbitrable.[60]

Perhaps it may be objected at this stage that a sledgehammer has been used to crack a nut: that all that is meant by Burt J's statement of principle, despite its peremptory form, is that it is desirable as a matter of policy that the operation of the two jurisdictions should be kept in step, that like principles should be applied and like decisions reached. Now it is not intended to suggest in this article that all decisions interpreting any part of the Commonwealth Act are never of any value outside the Commonwealth area of operations. It *is* intended to make clear, however, firstly that they are not binding and secondly that reliance on Commonwealth decisions on matters of jurisdiction is, in the light of the limited constitutional competence of the Commonwealth Parliament, positively misleading. Subject to these points, it may no doubt be useful to refer to Commonwealth decisions as aids to interpretation of like words and phrases. Yet the Industrial Appeal Court in the *HEU case* has obviously purported to do far more than that.

Moreover, while the present writer has not been concerned to make a detailed criticism of the Commonwealth decisions which set out the supposedly constitutional meaning of the phrase 'industrial dispute'[61] it is here sufficient to say that their effect is such that from a *policy* view they are best disregarded. This is on account both of the restrictions on the kind of bodies able to be registered as federal unions and of the disqualification of the Australian Commission from dealing with a variety of issues which are constant sources of friction between the parties before them.

With respect to the first point, it is worthy of note that one of the chief objects of the Commonwealth Act is expressed in s 2(e) to be to encourage

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59 Re Federated Miscellaneous Workers Union of Australia 1957 AR (NSW) 527. Re Independent Schools and Colleges Domestic Staff (State) Conciliation Committee 1963 AR (NSW) 33, 904. SA Institute of Teachers v SA Public Service Board (1974) 37 Curr. Rev. 73.

60 Subject to contain specified exclusions in s 61 (2).

61 This is not to imply that such criticisms are hard to advance. See Maher and Sexton *The High Court and Industrial Relations* (1972) 46 ALJ 109 and generally Sykes and Glasbeek LABOUR LAW IN AUSTRALIA, Book 2, Chapters 2 and 3.

the organisation of representative bodies of employers and employees and their registration under the Act. While the *Industrial Arbitration Act* contains no similar provision, it has been judicially recognised that the above kinds of objects underlie the registration provisions of the State statute.[62] The arbitrary exclusion of certain bodies of employees from making use of the arbitral system is hardly conducive to achieving these ends.

The point may be taken further. If it is a recognised policy of the Act to encourage the formation of unions, it is obviously important that the bodies which operate within the statutory system should indeed be representative and that they should speak with a concerted rather than a fragmented voice. In his comparative study of the check-off system, Cordova[63] noted the importance of it to the unions as providing financial and membership stability[64] and observed its traditional and continuing association with the goal of union security.[65] The United Kingdom Royal Commission on Trade Unions and Employees Associations 1965-8[66] considered the growth of the check-off system in England and described it as 'a token of acceptance of trade unionism, showing that the employer is willing to assist the union to be organisationally and financially strong'.[67] A denial of jurisdiction on this matter will, therefore, at least tend to hinder the achievement of these objects. The result is all the more strange insofar as both preference and compulsory unionism can be and are awarded to Western Australian registered unions,[68] although we have already seen that the exercise of jurisdiction in this area may also be open to question.[69]

Secondly, a refusal to arbitrate does not, of course, solve any particular problem. Rather, it has to be tackled by alternative means, likely to involve either negotiation or various forms of direct action—striking, going slow, imposition of bans and the like. A prime example of the latter types of conduct centred on the continuing controversy over the mode of operation of Melbourne buses, resolved after no less than three High Court actions.[70] With respect to the check-off system, it is of interest to note that it was used for many years in NSW for members of the Australian Teachers Federation until terminated unilaterally by the NSW Government in 1972. A report of the International Labour Organisation Freedom of Association Committee stated that the reintroduction of the check-off system might contribute to more harmonious industrial relations, while the union itself felt that its withdrawal provoked industrial unrest.[71] Indeed, in Western Australia itself the matter remains a

62 In re Coastal Districts Clerks Union (1914) 13 WAAR 39 per Burnside J and see infra
63 *The Check-Off System: A Comparative Study* (1969) 99 ILR 463.
64 Ibid 470-71.
65 Ibid 465, 480.
66 Cmnd 3623.
67 Ibid para 720.
68 Food Preservers Union of WA v Peters Ice Cream (WA) Ltd (1964) 44 WAIG 91
69 Supra.
70 See Sykes & Glasbeek, 521-6.
71 ATF Newsletter, June 1974, 3.

controversial one as between the unions and the hospitals and has been used as a bargaining counter by the latter.[72]

If a body of employees is said not to be associated in an 'industry', the regulation of its conditions of work will still be carried out but will involve the setting up of an alternative form of machinery for negotiation and decision making. Alternatively, the parties may choose to pursue such a course if the relevant tribunal cannot deal with their particular problems. This point is well brought out by Maher and Sexton:[73]

'It is submitted in conclusion that (an examination of) decisions of the High Court in its construction of the *Conciliation and Arbitration Act* and in its interpretation of the *Constitution* strongly suggests that any substantial innovations to the present system would be accommodated only by a *volte-face* on the part of the Court or by amendment to the *Constitution* . . . The likely consequence of this stalemate is that private agreements will be negotiated outside the system and not pursuant to Commonwealth legislation.'

Mills and Sorrell's suggestion[74] that all forms of employment involving employer-employee relationships be regarded as industrial occupations irrespective of the nature of the work and the setting in which it is performed has not been adopted in the case of the Commonwealth Act, but there is no reason why it should not be the touchstone in respect of the Western Australian Act. Likewise the width of the 'matters' with which the State Commission is competent to deal need not be limited by a supposedly constitutional meaning to 'industrial' but only by the words of the Act. There is no legal impediment decreeing otherwise and this approach presumably reflects the intentions of the legislature. It is worth pointing out that Kelly C in *ETU v Goldsworthy Mining*[75] said:

'In construing the definition (of industrial matters) and indeed, all other provisions of the Act relating to the Commission's jurisdiction and powers it is, I think, relevant to bear in mind that the purpose of the Act is the prevention and settlement of industrial disputes not in any technical sense but in a sense that will, so far as possible, produce peace in industry. It seems almost self-evident that the effectiveness of the Commission as an instrument for the achievement of that object bears a direct relationship to the scope of its jurisdiction. That is not, of course, a reason for saying that the Act means what it plainly does not mean, but it is, I think, a sound reason for saying that a liberal rather than a narrow and artificial construction should be given to the definition of 'industrial matters' and other provisions of the Act material to the present issue; and it certainly argues that we should not substitute for the ordinary and natural meaning of words some theory of what the Act means in order to restrict the scope of the jurisdiction.'

The Western Australian Commission has generally shown itself by its decisions to be receptive of the need to meet changing circumstances in order

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[72] The system does not even impose a financial disadvantage on the hospitals, the union paying them 6% of dues collected as administrative expenses.
[73] Op cit 123.
[74] FEDERAL INDUSTRIAL LAWS, 5th ed (1975), 42-3.
[75] (1969) 49 WAIG 710, 714.

to remain a relevant and effective body[76] but unfortunately, the Industrial Appeal Court, charged with hearing appeals from the Commission on points of law or jurisdiction,[77] has not done likewise. The approach of the Court will undoubtedly hinder rather than help the effective functioning of the State arbitration system by failing to support the Commission in its efforts to provide a comprehensive service ready to deal with novel claims and unfamiliar situations.[78] A demise in the extent of reliance on the arbitral machinery and a lack of success in promoting the aim stated by Kelly C of producing peace in industry is only too likely a consequence.

STEPHEN TODD*

76 The decision of Halliwell C in the check-off case itself is an exception to the rule.
77 S 108 D Industrial Arbitration Act.
78 The Australian Commission has likewise shown itself to be aware that the social and industrial implications of present technological change are likely to create industrial problems different in kind from those of the past and that the Commission should do what it can to alleviate both for employers and employees any problem which may arise: Federated Clerks Union v Aberdeen and Commonwealth Line Ltd (1970) 132 CAR 126, 131.

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