

India, Rev. Mons. Monteiro v. State of Goa

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Part 1

[Source: *India, Supreme Court Reports*, 87-102 (1970); footnotes omitted.]

REV. MONS. SEBASTIAO FRANCISCO XAVIER DOSREMEDIOS MONTEIROv.

STATE OF GOA

March 26, 1969

[...]

The Judgment of the Court was delivered by

Hidayatullah, C.J. The appellant (Rev. Father Monteiro) is a resident of Goa. After the annexation of Goa by India, he had the choice of becoming an Indian national or retaining Portuguese nationality. He choose the latter and was registered as a foreigner. He also obtained a temporary residential permit [...]. The period of stay expired and he did not ask for its extension or renewal. He was ordered to leave India by the Lt. Governor of Goa. [...] Rev. Father Monteiro disobeyed the order, and in consequence was prosecuted [...]. He was convicted and sentenced [...]. He now appeals by special leave of this Court [...].

The defence of Rev. Father Monteiro was that he was protected by the Geneva Conventions Act, 1960, that the order of the Lt. Governor for his deportation was ultra vires the Act and that he had committed no offence. The Judicial Commissioner and the two courts below have held, for different reasons, that the Geneva Conventions ceased to apply after Goa became a part of India and that the Municipal Courts in India can give him no redress against an Act of State. In the appeal before us Mr. Edward Gardner Q. C. appeared for Rev.

Father Monteiro with the leave of this Court.

To understand the case, a brief history of the annexation of Goa and what happened thereafter is necessary. Goa was a Portuguese colony for about 450 years, having been seized by force of arms. On December 19, 1961 Goa was occupied by the Indian Armed Forces following a short military action. It then came under Indian Administration [...], March 27 1962, the Constitution (Twelfth Amendment) Act, 1962 was enacted and deemed to have come into force on December 20, 1961. By this amendment Goa was included in Union Territories and a reference to Goa was inserted in Art. 240 of the Constitution. Many Acts in force in India were then extended to Goa and many Regulations and Orders were promulgated. [...]

At the outset it may be stated that Mr. Gardner [the defence attorney] concedes that he does not question the legality of the military action or the annexation. In fact, he is quite clear that we may consider the annexation to be legal. His contention, in brief, is that the order of the Lt. Governor is tantamount to deportation of Rev. Father Monteiro and the Geneva Conventions Act gives protection against such deportation during occupation which has not validly come to an end, and, therefore, no offence was committed by him.

The argument overlooks one cardinal principle of International Law and it is this. Rev. Father Monteiro by his declaration retained his Portuguese nationality. His sojourn in India was subject to such laws as existed in India in general and in Goa in particular. It cannot be doubted that the reception and residence of an alien is a matter of discretion and every State has, by reason of its own territorial supremacy, not only the legal right but also the competence to exclude aliens from the whole or any part of its territory. [...]

This proposition being settled, Mr. Gardner sought support for his plea from the provisions of the Geneva Conventions Act of 1960. That Act was passed to enable effect to be given to the International Conventions done at Geneva in 1949. Both India and Portugal have signed and ratified the Conventions. Mr. Gardner relies on the provisions of the Fourth Schedule relative to the protection of certain persons in time of war. He refers in particular to Articles 1, 2, 4, 6, 8, 47 and 49. By Arts. 1 and 2 there is an undertaking to respect and ensure respect for the Conventions in all circumstances of declared war or any other armed conflict even if the state of war is not recognised by one of the parties and to all cases of partial or total occupation of the territory of a High Contracting Party even if the occupation meets with no armed resistance. Article 4 defines a protected person and the expression includes those who at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Article 6 then lays down the beginning and end of application of the Convention. The Convention applies from the outset of any conflict or occupation. In the territory of Parties to the conflict, the application of the Convention ceases on the general close of Military operations. In the case of occupied territories it ceases one year after the general close of military operations but the occupying Power is bound for the duration of occupation, to the extent that such Power exercises the functions of Government in such territory, by Arts. 1-12, 27, 29-34, 47, 49, 51, 52, 53, 59, 61-73 and 143.

We next come to Arts. 47 and 49 which are the crux of the matter and are relied upon for the protection. Mr.

Gardner points out that under Art. 8 even protected persons may in no circumstance renounce in part or in entirety the rights secured to them by the Conventions. The case, therefore, depends on whether Arts. 47 and 49 apply here. We may now read Arts. 47 and 49:

“47. Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or Government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”

“49. Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country occupied or not, are prohibited, regardless of their motive. [...]”

The point of difference between the parties before us in relation to Art. 47 is whether the occupation continues, the annexation of the territory notwithstanding; and in relation to Art. 49 whether the order of the Lt. Governor amounts to deportation of a protected person.

Mr. Gardner's submissions are: the order that has been made is a deportation order and it is therefore *ultra vires* the Geneva Conventions. These Conventions create individual rights which cannot even be waived. So long as occupation continues these rights are available and the Geneva Conventions must not be looked at in isolation but read in conjunction with International Law as part of the positive law. They should not be abandoned lightly. According to him, conquest was a method of acquiring territory in the past but after the Covenant of the League of Nations, the Charter of the United Nations and the General Treaty for the Renunciation of War, the acquisition of territory in International Law by the use of force does not confer any title. Occupation, therefore, can only be of *terra nullius*, not now possible. He [...] says that the history of the making of the Geneva Conventions shows that this was precisely the mischief sought to be met and the Conventions now become a part of the laws of India through Parliamentary Legislation. He concedes that the war of liberation of Goa and the annexation were lawful but he contends that annexation does not deprive protected persons of the protection. According to him, once there is military action and occupation, occupation cannot cease by a unilateral act of annexation by incorporating the territories of Goa with India. If India did not care to be bound by the Conventions, there was a method of denunciation in Art. 158 but since the Convention is registered under Art. 159 even denunciation at a late stage was not possible. He relies upon Art. 77 and says that “Liberated” means when the occupation comes to an end. The amendment of the Constitution only legalises annexation so far as India is concerned but in International Law the territory remains occupied. The occupation is not at an end and it cannot be brought about unilaterally. The words of Art. 47 themselves are clear enough to establish this. In short, the contention is that occupation does not come to end by annexation and, therefore, the protection continues till there is either cession of the territory or withdrawal of the Occupying Power from the territory, both of which events have not taken place. [...]

The contention on behalf of the State is that by occupation is meant occupation by armed forces or belligerent occupation and occupation comes to an end by conquest followed by subjugation. [...] We have to decide between these two submissions.

This is the first case of this kind [...]. We are of opinion that the pleas of Mr. Gardner that the Geneva Conventions Act makes punishable the conduct of Rev. Father Monteiro, must fail.

Part 2

To begin with, the Geneva Conventions Act gives no specific right to any one to approach the Court. [...] What method an aggrieved party must adopt to move the Municipal Court is not very clear but we need not consider the point because of our conclusions on the other parts of the case. We shall consider the Conventions themselves. [...]

[T]he Geneva Conventions Act of 1960 [...] is divided into five Chapters. [...] The Act then sets out the Conventions in its schedules and the Conventions which are four in number are set out in as many Schedules to the Act.

It will thus be seen that the Act by itself does not give any special remedy. It does give indirect protection by providing for penalties for breaches of Convention. The Conventions are not made enforceable by Government against itself nor does the Act give a cause of action to any party for the enforcement of Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population but there is no right created in favour of protected persons which the Court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless [...].

The appellant has, however, sought the aid of the Geneva Conventions to establish that he could not be compelled to leave Goa and thus committed no offence. We may, therefore, say a few words about the Geneva Conventions, particularly Schedule IV, which deals with the protection of civilian persons in time of war. In the past protection of civilian population was inadequately provided in Conventions and treaties. [...] The Fourth Hague Convention of 1907 contained Arts. 42-56, but this protection was restricted to occupation by an enemy army. The Regulations merely stated the principles and enjoined maintenance of law and order and regard for family rights, lives of persons and private property, and prohibited collective punishments. In effect, these were confined to the 'forward areas of war' and did not apply when 'total war' took place and the civilian population was as much exposed to the dangers of war as the military. [...]

[...] The 1949 Conventions are additional to the Regulations and it is expressly so laid down in Art. 154 of the Geneva Conventions.

The Hague Regulations, Arts. 42-56, contained some limited and general rules for the protection of

inhabitants of occupied territory. The Regulations are supplementary. Regulations 43 and 55 which have no counter-part in the Geneva Conventions must be read. They are not relevant here. Similarly, as there is no definition of 'occupation' in the Geneva Conventions, Art. 42 of the Regulation must be read as it contains a definition:

"42. A territory is considered as occupied when it finds itself in fact placed under authority of a hostile army".

The Regulations further charge the authority having power over the territory to take all measures to establish and assure law and order. The Regulations generally charged the occupying power to respect the persons and property of the inhabitants of the occupied territory. There was no provision showing when occupation commenced and when it came to an end. It is because of this omission that is claimed in this case that occupation continues so long as there is no cession of the territory by the conquered or withdrawal by the conqueror and that till then the protection of the Geneva Conventions [...] [continues]. However Art. 6 which provides about the beginning and end of the application of the Conventions throws some light on this matter.

The question thus remains, what is meant by occupation? This is, of course, not occupation of *terra nullius* but something else. Since there is no definition of occupation in the Geneva Conventions, we have to turn to the definition in the Hague Regulations, Article 154 of the 4th Schedule [...].

The definition of 'occupation' in the Regulations must be read since the Regulations are the original rules and the Conventions only supplement the Regulations. We have already quoted the definition and it shows that a territory is considered as occupied when it finds itself in fact placed under the authority of a hostile army. This means that occupation is by military authorities. In the *Justice* case it was stated that the laws of belligerent occupation apply only to an occupation during the course of actual warfare and that once the enemy has been totally defeated those laws do not apply to the ensuing occupation.

The question thus resolves itself into this: Is occupation in Art. 47 belligerent occupation or occupation which continues after the total defeat of the enemy? In this connection courts must take the Facts of State from the declaration of State authorities. Military occupation is a temporary *de facto* situation which does not deprive the Occupied Power of its sovereignty nor does it take away its statehood. All that happens is that *pro tempore* the Occupied Power cannot exercise its rights. In other words, belligerent occupation means that the Government cannot function and authority is exercised by the occupying force.

Annexation, on the other hand, occurs when the Occupying Power acquires and makes the occupied territory as its own. Annexation gives a *de jure* right to administer the territory. Annexation means that there is not only possession but uncontested sovereignty over the territory. [...] [M]ilitary occupation must be distinguished from subjugation, where a territory is not only conquered, but annexed by the conqueror.

There is, however, a difference between true annexation on the one hand and premature annexation, or as it

is sometimes called anticipated annexation, on the other. Jurists regard annexation as premature so long as hostilities are continuing and there is an opposing army in the field even if the Occupied Power is wholly excluded from the territory. Anticipated annexation by unilateral action is not true annexation. True annexation is only so when the territory is conquered and subjugated [...].

The Conventions rightly lay down that annexation has no effect on the protection. But they speak of premature or anticipated annexation. Premature or anticipated annexation has no effect. Such a plea was negated for the same reason by the Nuremberg Tribunal. In fact, when the Convention itself was being drafted the experts were half-inclined to add the word 'alleged' before 'annexation' in Art. 47 to distinguish between annexation following conquest and subjugation and annexation made while hostilities are going on. Subjugation puts an end to the state of war and destroys the source of authority of the existing Government. In subjugation, which is recognised as one of the modes of acquiring title, not only the *de facto* but also the *de jure* title passes to the conqueror. After subjugation the inhabitants must obey the laws such as are made and not resist them.

Thus the principle which is accepted is that the Occupying Power must apply the Convention even when it claims *during conflict* to have annexed the occupied territory. However, when the conflict is over and there is no hostile army in the field, annexation has the effect of creating a title to the territory. It may be asked why does Art. 6 then mention a period of one year ? The reason given is that if the Occupied Power turns victorious the land would be freed in one year and if the Occupying Power remains victorious, as hostilities cease, strong measures against the civilian population are no longer necessary. In this, as in other laws, a line is drawn arbitrarily and it is at the end of one year. Otherwise also, occupation, which means belligerent occupation comes to an end when hostilities cease and the territory becomes a part of the Occupying Power. [...]

The question, when does title to the new territory begin, is not easy to answer. [...] [A]lthough the United Nations Charter includes the obligation that force would not be used against the territorial integrity of other States (Art. 2 para. 4), events after the Second World War have shown that transfer of title to territory by conquest is still recognised. [...] If cession after defeat can create title, occupation combined with absence of opposition must lead to the same kind of title.

In the present case the facts are that the military engagement was only a few hours' duration and then there was no resistance at all. [...] The occupation on December 20, 1961 was neither belligerent occupation nor anticipated occupation, but true annexation by conquest and subjugation. It must be remembered that Mr. Gardner concedes that the annexation was lawful. Therefore, since occupation in the sense used in Art. 47 had ceased, the protection must cease also. We are, therefore, of opinion that in the present case there was no breach of the Geneva Conventions. [...]

The Geneva Conventions ceased to apply after December 20, 1961. The Indian Government offered Rev. Father Monteiro Indian nationality and citizenship which he refused and retained his Portuguese nationality.

As a Portuguese national he could only stay in India on taking out a permit. He was therefore, rightly prosecuted under the law applicable to him. Since no complaints is made about the trial as such; the appeal must fail. It will be dismissed.

G.C.

Appeal dismissed.

Discussion

1. When is territory considered occupied? What definition of occupation do the Geneva Conventions use? (HR, Art. 42; GC IV, Art. 154)
2.
 - a. What is the distinction between “belligerent occupation” and “occupation”? Why is this distinction relevant in the Court’s analysis of Article 47?
 - b. Does IHL prohibit the annexation of an occupied territory by the occupying power? Under IHL does annexation of a territory end its occupied status and thus the applicability of the Conventions? Does it matter whether it is “true annexation” or “premature annexation”? Does Art. 47 of Convention IV make a distinction between types of annexation, e.g., specifying application only to “premature annexations”?
 - c. Does the appellant’s concession regarding the legality of annexation actually undermine his argument? Would the Court’s decision have been different if the appellant had not conceded that the annexation was legal?
3.
 - a. Does the Court’s argument incorporating distinctions between “occupation” and “belligerent occupation” and between “true annexation” and “premature annexation” effectively address the appellant’s contention that “occupation continues so long as there is no cession of the territory by the conquered or withdrawal by the conqueror and that till then the protection of the Geneva Conventions [continues]”? How can the applicability of Convention IV end in an occupied territory? Is Art. 2 common to the Conventions consistent with the Court’s use of the distinction between “occupation” and “belligerent occupation” in determining the applicability of the Conventions?
 - b. If one does not follow the Court’s argument but that of the appellant, when would Convention IV cease to apply in Goa? What are the advantages and disadvantages of such an interpretation?
4. Does the Court provide an adequate answer to the question it posed regarding the period of one year (mentioned in Art. 6 of Convention IV) for continued application of the Conventions after the general close of military operations?
5. Is an occupying power free to regulate the presence of aliens in an occupied territory? The presence of nationals of the occupied State? That of other aliens? Under IHL, what are the possibilities and limits of an occupying power in this regard? (HR, Art. 43; GC IV, Arts 4, 48, 49 and 64)
6.
 - a. Is the prohibition of deportations out of occupied territories “self-executing”? In the Indian legal system, does it matter whether it is or not? Has Art. 49 of Convention IV been incorporated into Indian legislation? Why can’t the appellant invoke it before the Indian Supreme Court?
 - b. Does an act incorporating the Geneva Conventions into domestic law “give no specific right to any

one to approach the Court” to seek remedy against a violation? Aren’t the Conventions made enforceable through such an act “by Government against itself”? Should not a defendant in a criminal court be at least entitled to claim that his alleged crime is justified by the incorporated international treaty?

- c. What other purposes could the Act then have? According to the Court, how should the Act have been formulated in order to permit courts to enforce the Geneva Conventions?

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