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MUCH of the credit for the present state of development of the concept of "denial of justice" must go to Latin America. Step by step the efforts of her statesmen, lawmakers and publicists in the spheres of diplomacy, legislation and doctrine, have given the concept a more definite juridical form, and outlined more clearly its frontiers of legitimate action. The concept, far from being now the occasion for diplomatic coercion which it formerly was, is narrowed down to a judicial connotation; and, in this sense, it means that justice has not been done where it should have been.

Its evolution is not yet complete. It has not attained that degree of maturity which would satisfy the ends of political equation and social justice. It is still in transition, in flux, as are all the historical principles of international law, from the nebula of the political and legal theories which has been its traditional dwelling-place, to a greater measure of conformance with the realities of international life.

DEFINITION

Usually, the concept, "denial of justice," is defined as the refusal to a foreigner of free access to the tribunals of the country.[1] This definition deals solely with procedural matters, and ignores defects of substantive law. Even the *Convención relativa á los Derechos de Extranjería* of 1902,[2] stresses the procedural element of this narrow definition, in providing that no diplomatic claims shall be made by a foreigner "except in the cases where there shall have been, *on the part of the tribunal*, manifest denial of justice, or abnormal delay, or evident violation of the principles of International Law."

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[1] J. GUSTAVO GUERRERO, LA RESPONSABILIDAD INTERNACIONAL DE LOS ESTADOS POR DANOS CAUSADOS EN SU TERRITORIO A LA PERSONA O BIENES DE LOS EXTRANJEROS 39 (Paris, 1926).

[2] Art. 3, Convención relativa a los derechos de extranjería, Actas y documentos de la Segunda Conferencia Pan-Americana 825 at 826 (Mexico City, 1902). (Italics supplied).

The inadequacy of the definition is obvious. According to it, the alien can have recourse to his government only to complain of what the *judiciary* have done, or failed to do, within the scope of their legal competency. But, there are circumstances springing from the act or failure to act of a coordinate department of the government—the executive or legislative—which constitute denial of justice. In order to meet such contingencies, the expression should be given a broad signification, to describe circumstances of form as well as of substance, executive and legislative as well as judicial, which may affect a foreigner who applies to the courts for an adjudication of his rights in a civil, criminal or administrative proceeding. The expression should, as someone has suggested already,[3] receive—

> "a most liberal construction causing it to embrace all cases where a state fails to furnish the guarantees which it ought to assure to all individual rights. The failure of guarantees does not arise solely from the judicial acts of a state. It results also from the act or omission of other public authorities, legislative and administrative. When a state legislates in disregard of rights, or when, although they are recognized in its legislation, the administrative or judicial authorities fail to make them effective, in either of these cases the international responsibility of the state arises. In all those cases, inasmuch as it is understood that the laws and the authorities do not assure to the foreigner the necessary protection, there arises contempt for the human personality and disrespect for the sovereign personality of the other state, and, by consequence, a violation of duty of an international character, all of which constitutes for nations a denial of justice."

In this broad sense, the expression "denial of justice" can be defined as the failure of the state, in an appropriate action instituted by a foreigner to determine his legal rights, thereby preventing him from making them effective, either because he has been refused access to its courts; or, because there is no law, or existing law is inadequate, to govern his case; or, because the courts have refused or delayed to give judgment, or have disregarded the law, or misapplied it to the facts; or, because the authorities of the government have failed to carry out the decisions or judgments of its courts.

[3] Gastão Da Cunha, Brazil, at the Fourth International Conference of American States, App. MM, pp. 280-281 (Government Printing Office, Washington, 1911).

". . . e déni de justice comprend tous les cas où un Etat manquerait aux garanties qui doivent assurer les droits individuels des étrangers." Yepes, "Les problèmes fondamentaux du droit des gens en Amérique," 47 ACAD. DE DR. INT., 1934-I, 113-114.

In the relations of nation to nation, the rule is mutual respect for their respective sovereignties as represented in the authority of their courts and their decisions. This respect is forfeited when the claim to diplomatic protection is based on a denial of justice.[4] But to make the claim on this ground effective, conformably with the principles and usages of international law, it is necessary that the case where it is made be one of utmost gravity, that is to say, that the denial of justice be *manifest* or *notorious*, as it is called,—that the hearing which the alien claims, or the recourse he interposes has been refused him, and, in general, that the exercise of his rights and actions is interfered with or denied him, contrary to law, or is subjected to unwarranted delay.[5]

CONDITIONS PRECEDENT TO CLAIM

There is general consensus of opinion and practice that no government can espouse a claim on the ground of denial of justice, unless these two conditions concur:

First.—That the person whose claim it espouses is a national, since it is only to its own nationals that the state owes protection.[6] The burden of proof rests on the claimant. His nationality is not to be assumed or conjectured, but proved,[7] and may take the form of a certificate of

[4] Claim of L.F.H. Neer, No. 136, Opinions of the Commissioners, Claims Commission, United States-Mexico 71 at 78 (1926); 1 HERNANDEZ RON, TRATADO ELEMENTAL DE DERECHO ADMINISTRATIVO 418 (Caracas, 1937).

[5] Peru—Herrera v. Saco y Flores, 23 C.S., AN. JUD. 493 at 501; El Salvador—Ley sobre Reclamaciones Pecuniarias de Extranjeros y Nacionales contra el Estado, May 30, 1910, art. 18, 1 Nueva Recompilación de Leyes Administrativas 270 at 274; Brazil-Italy—Protocol of 1896, art. 5, Relatorio do Ministerio das Relações Exteriores, Annexo No. 1, p. 160 (1896).

VALLARTA, EXPOSICION DE MOTIVOS DEL PROYECTO DE LEY SOBRE EXTRANJERIA Y NATURALIZACION, § 218, p. 191 (Mexico, 1890):

"International Law provides that 'the sovereign cannot intervene in the causes of subjects who reside abroad and give them his protection, except in the cases of denial of justice, or of evident and palpable injustice, or of a manifest violation of the forms or in the procedure; or, in fine, of an odious distinction made to the prejudice of his subjects or of foreigners in general'; and it is never lawful to the sovereign to inquire into the justness of foreign definitive judgments on the pretext of evident injustice; and the Constitution cannot erase that principle."

[6] El Salvador—Ley de Extranjería, September 29, 1886, art. 39, as amended by laws of May 22, 1897 and April 16, 1900, 1 Nueva Recopilación de Leyes Administrativas 59; Honduras—Ley de Extranjería, February 8, 1906, art. 13, 31 LA GACETA 179; 1 INFORMES DE LOS CONSEJEROS LEGALES DEL PODER EJECUTIVO 305 (Buenos Aires, 1890). See Lessing, "La protección diplomática y la nacionalidad," 4 REV. ARG. DE DER. INT., ser. 2, p. 330 (1941).

[7] Claims of Heirs of Jean Mannat, No. 3, Ralston's Report of French-Venezuelan Mixed Claims Commission of 1902, p. 72 (Washington, 1906).

alienage, or, in fact, any other form authorized under international law.[8]

Second.—That the alien has exhausted the judicial and administrative recourses available to him under the local law, to enforce his rights and redress the wrongs of which he complains.[9] This has now acquired the authority of a general principle of international law.[10] A government which presses a claim in disregard of this condition is guilty of a serious offense against the sovereignty of the local state,[11] since it presupposes that the state cannot, or will not, recognize its obligations or do justice, without foreign interference.[12] "This rule," we are told,

[8] Ecuador-Chile-Bolivia—Tratado sobre Derecho Internacional, May 16, 1867, art. 3, 2 NOBOA, COLECCION DE TRATADOS 77 at 78 (Guayaquil, 1902); El Salvador—Ley sobre Reclamaciones Pecuniarias de Extranjeros y Nacionales contra el Estado, May 30, 1910, art. 23, 1 Nueva Recopilación de Leyes administrativas 270 at 274; Venezuela—Ley de Extranjeros, July 19, 1928, art. 45, 51 Recopilación de Leyes y Decretos, Ley Num 16.476, p. 386 at 390.

[9] Uruguay—Attorney General Vasquez Acevedo, 1 REV. DER. JURIS. ADM. 168 (1874); note of foreign minister of Argentina, Jan. 22, 1872, to British Charge d'Affaires, in 19 POLITICA EXTERIOR DE LA REPUBLIC ARGENTINA (Estudios editados por la Facultad de Derecho y Ciencias Sociales) 320 (Buenos Aires, 1931).

[10] Panama-United States, Claims Convention, July 28, 1926, art. 5, U. S. TREATY SERIES, No. 842; Minister for Foreign Affairs of Costa Rica to British Minister, January 4, 1921, in Documentos relativos a las reclamaciones del Royal Bank of Canada, Secretaria de Relaciones Exteriores de Costa Rica, pp. 24-25: "It is now a principle recognized and accepted by contemporary International Law, that diplomatic claims do not arise between States which enjoy the attributes of sovereignty and independence, except as a last recourse, when judicial discussion has been exhausted, or when, by way of exception, there exists the case of manifest denial of justice."

[11] Brazil—VIVIERES DE CASTRO, TRATADO DE SCIENCIA DA ADMINISTRAÇAO E DIREITO ADMINISTRATIVO, 2d ed., 696 (Rio de Janeiro, 1912).

[12] Brazilian minister for foreign affairs to British minister, Relatorio do Ministro de Estado das Relações Exteriores, No. IV, p. 12 (1896); Uruguay—Attorney General Vasquez Acevado, 1 REV. DER. JURIS. ADM. 168 (1874); Attorney General Paz Soldan of Peru (1864), 1 GASTON, COMPILACION DE VISTAS FISCALES 159 (Lima, 1873); Bolivia—Decreto sobre Reclamaciones Diplomáticas, May 8, 1871, art. 1, Anuario of 1871, p. 144; 1 ORDONEZ LOPEZ, CONSTITUCION POLITICA DE LA REPUBLICA DE BOLIVIA 97 (La Paz, 1917); Costa Rica—Ley de Extranjería y Naturalización, art. 16, Leyes de 1886, Decreto Num. 23, p. 638 at 643; Ecuador—Decreto, November 3, 1880, art. 1, 2 Noboa, Recompilación de Leyes 111-112; Guatemala—Ley de Extranjería, February 15, 1936, art. 84, 54 Recopilación de Leyes, Decreto Num. 1781, p. 640 at 654; El Salvador—Ley sobre Reclamaciones Pecuniarias de Extranjeros y Nacionales contra el Estado, May 30, 1910, art. 4, 1 Neuva Recopilación de Leyes Administrativas 270; Mexico—Ley de Extranjería y Naturalización, May 28, 1886, art. 35, DIARIO OFICIAL (June 7, 1886); Peru—Decreto Ejecutivo, April 17, 1846, art. 1, 10 Colección de Leyes, Decretos y Ordenes, Num. 89, p. 136; Venezuela—Ley de Extranjeros, July 19, 1928, art. 50, 51 Recopilación de Leyes y Decretos, Ley Num. 16.476, p. 386 at 390; Central American Treaty of Peace, Amity, Commerce and Arbitration (1887) art. 9; Brazil-Italy—Protocol of 1896, art 5,

"is an homage to national sovereignty, as no one can claim indemnity from the State for acts of authority (or decree of the prince, as some writers put it), unless such indemnity has been discussed and settled beforehand in the competent tribunal, in a contested suit between the claimant and the government which it seeks to make responsible. To demand indemnity by other means than the judicial, is to inflict an injury to the sovereign rights of the State upon which the claim is made."[13]

In years gone by, before this principle was adopted, there was no more deplorable page in the relations of Latin America with foreign powers, than that which records the history of diplomatic claims,—branded by the Supreme Court of Brazil in one case, as the "terrorism of the indemnities,"[14] and by the Supreme Court of Peru, as an "unfortunate history," which shows "naught but the constant display of might over weakness."[15] In this exhibition of international lawlessness, all of the great powers, and some of the small ones, too, joined; and the history of these claims constitutes a most sinister chapter in the relations of the strong toward the weak. Somewhere the comment is made that:[16]

> "No one in Europe and America ignores the abuses which strong nations have committed in the so-called diplomatic claims for indemnities on account of damages and injuries, in favor of foreigners who have come to settle in the republics of Latin America.
>
> "Not only American publicists, such as Calvo, but also eminent internationalists, as Professor Martens, of St. Petersburg, have spoken against the injustices which those proceedings embody, and which, if they were to be continued, would make European immigration to the fertile soil of Spanish America odious and inacceptable in every respect."

Some claims, undoubtedly, have been just and admissible for what have been called "evident errors" of the local legislation; but most of

Relatorio do Ministerio das Relações Exteriores (1896) Annexo No. 1, p. 160; Convención relativa a los derechos de extranjería, art. 3, Actas y documentos de la Segunda Conferencia Pan-Americana, p. 825 at 826 (Mexico City, 1902).

[13] El Salvador—Exposición de Motivos de la Ley sobre Reclamaciones Pecuniarias (1910), Libro Rosado 7.

[14] Brazil—Araujo Góes v. União Federal, 87 REV. DIR. CIV. COM. CRIM. 51 at 54.

[15] Peru—Herrera v. Saco y Flores, 23 C. S., AN JUD. 493 at 495.

[16] El Salvador—Exposición de Motivos, Ley sobre Reclamaciones Pecuniarias (1910), Libro Rosado 3.

them were founded, as one historian says, "upon the privilege which, notwithstanding equity and the stipulations of public treaties, the great powers asserted by force in their relations with the weak and, unhappily, turbulent Spanish American republics."[17]

With his customary simplicity and clearness of statement Attorney General Montt, of Chile, pointed out the practice which governments should adopt in this matter, and to which his own government adhered. Said he:[18]

> "The Government of Chile, in its desire to maintain its foreign relations, especially those which it maintains with neighboring nations, and of the same origin, on a footing of the most strict equity and justice, will not extend its protection except to the claims of its nationals which are fully verified as to their bases, which have been initiated after having exhausted the remedies of the internal legislation of the country where the grievance arose, and have also the support of the principles and practices of International Law. . . .
>
> "There is nothing more dangerous than the ready espousal by a government of the complaints carried to it by nationals domiciled or residing in a foreign country. They should be listened to with reserve, even with healthy distrust lending them ear and protection only in rare and exceptional circumstances."

EQUALITY

The civil assimilation of the citizen and the alien has long since become current constitutional doctrine in Latin America.[19] As understood by the Supreme Court of Argentina,[20] this principle of equality before the law consists "in that no exceptions or privileges be established which exclude one from what is granted to others under similar circumstances, from which it necessarily follows that true equality con-

[17] 3 GIL FORTOUL, HISTORIA CONSTITUCIONAL DE VENEZUELA, 2d ed., 236 (Caracas, 1930). See also, PLANAS-SUAREZ, LOS EXTRANJEROS EN VENEZUELA 182 (Lisboa, 1917).

[18] 1 MONTT, DICTAMENES DEL FISCAL DE LA CORTE SUPREMA DE JUSTICIA DE CHILE 263-64 (Santiago, 1894).

[19] Portugal—"Habeas Corpus de Olivia Soares Silveira," 52 O DIREITO 274, 276; Yepes, "Les problèmes fondamentaux du droit des gens en Amérique," 47 ACAD. DE DR. INT. 1934-I, 91; HORMANN MONTT, DERECHO CONSTITUCIONAL, 2d. ed., 52 et seq. (Santiago, 1939); 1 CAMPILLO, TRATADO ELEMENTAL DE DERECHO CONSTITUCIONAL MEXICANO 278 et seq. (Jalapa, 1928); ARAGON, NOCIONES DE DERECHO PUBLICO INTERNO, § 153, p. 195, (Popayan, 1921).

[20] Argentina—La Nación v. Olivar (1875), 16 (7 of 2d ser.) S.C. Fallos 118.

sists in applying the law in the cases which come up according to their constitutive differences, and that any other understanding or meaning of this right is contrary to its own nature and social interest."

This juridical equality yields the following corollaries:

(1) The alien can claim indemnity from the state only in the cases and form in which the citizen can do it.[21] The alien can demand no greater remedial rights against the state, and no more favorable procedure to enforce them, than the local legislation gives the citizen. To grant the alien a preferential position in this regard would go far toward nullifying the principle of civil equality.

(2) The property, rights and acts of the alien are subject to the same judicial or administrative authorities as those of the citizen.[22] "Foreigners," said the Argentine foreign minister on one occasion,[23] "from the moment they go into a country, are subject to its laws and authorities. Those laws are not alike everywhere, but be as they may, whether favorable or not to the foreigner, they bind him equally. Consequently, the foreigner, for the exercise of his rights, as for the civil or criminal complaints to which he may be entitled, must have recourse, as the citizens, to those authorities, invoke those laws, and wait for and accept their decisions."

Similar views are heard also from Brazil,[24] Chile,[25] Guatemala,[26] Mexico,[27] and Peru.[28]

These views have ceased to be mere expressions of national policy: they have now become part of the body of Inter-American Interna-

[21] Honduras—Const. (1936), art. 18; Nicaragua—Const. (1911), art. 14.

[22] Colombia—Const. (1886), art. 19; Guatemala—Ley de Extranjería, February 15, 1936, art. 11, par. 3, 54 Recopilación de Leyes, Decreto Num. 1781, p. 640; Panama—Ley sobre Extranjería y Naturalización, December 19, 1914, art. 13, Leyes de 1914, Ley Num. 3, p. 51; Peru—Const. (1919), art. 39. In Herrera v. Saco y Flores (1927), 23 C.S., AN. JUD. 493 at 497, the Supreme Court of Peru said: "Equality between citizens and aliens in Civil Law, implies their equality before the judicial jurisdiction and form of procedure in the same subject-matter."

[23] To British chargé d'affaires, 19 POLITICA EXTERIOR DE LA REPUBLICA ARGENTINA (Estudios editados por la Facultad de Derecho y Ciencias Sociales de la Universidad de Buenos Aires) 321 (Buenos Aires, 1931).

[24] Minister for Foreign Affairs, to Italian Minister, December 3, 1895, Relatorio do Ministerio das Relações Exteriores (1896), Annexo l, n. 61, pp. 146-47.

[25] DICTAMENES FISCALES 263-264 (Santiago, 1894).

[26] Ley de Extranjería, February 15, 1936, art. 54 Recopilación de Leyes, Decreto Num. 1781, p. 640 at 654.

[27] NEW YORK TIMES, September 5, 1938, 1:3, 11.

[28] Peru—Memorias del Ministerio de Relaciones Exteriores 9-10 (1898); Herrera v. Saco y Flores (1927) 23 C.S., AN. JUD. 493 at 495; Const. (1919), art. 39.

tional Law. The Montevideo Convention on Rights and Duties of States has formulated the principle thus:[29]

> "Nationals and foreigners are under the same protection of the law and national authorities, and foreigners may not claim other or more extensive rights than those of the nationals."

(3) The alien, in the actions he may institute, cannot invoke other recourses than the laws grant to the citizen, and, except in the event of denial of justice, cannot establish a diplomatic claim against a definitive judgment of the courts.[30] The "recourses" to which this rule refers are those which the civil law—the internal legislation of each country—affords, that is, all the common and ordinary remedies, civil as well as constitutional, established in favor of those who reside in the country. They do not refer to those remedies which international law gives, since no state can legislate for another state, or deprive an alien of the right to demand of his own government that it invoke in his behalf the measures of redress which international law authorizes.[31]

There is, we are sure, hardly a proposition on which more complete agreement exists in Latin America than this: that the final judgments of the courts of justice of a country are entitled to respect as self-

[29] "Los nacionales y los extranjeros se hallan bajo la misma protección de la legislación y de las autoridades nacionales y los extranjeros no podrán pretender derechos diferentes, ni más extensos que los de los nacionales." Art. 9, found in SEPTIMA CONFERENCIA INTERNACIONAL AMERICANA 192 at 197 (1933).

[30] Colombia—Cod. Fiscal Nacional (Ley Num. 110 de 1912), art. 42; Costa Rica—Ley de Extranjería y Naturalización, art. 16, Leyes de 1886, Decreto Num. 23, p. 638 at 643; Ecuador—Const. (1928-1929), art. 153; Ley Extranjería, August 25, 1892, arts. 10, 14, REGISTRO OFICIAL (1892-1893) Ley Num. 100, p. 112; El Salvador—Ley de Extranjería, September 29, 1886, art. 57, as amended by laws of May 12, 1897, and April 16, 1900, 1 Neuva Recopilación de Leyes Administrativas 59; Ley sobre Reclamaciones Pecuniarias de Extranjeros y Nacionales contra el Estado, May 30, 1910, art. 2, 1 Nueva Recopilación de Leyes Administrativas 270; Mexico—Ley de Extranjería y Naturalización, May 28, 1886, art. 35, DIARIO OFICIAL (June 7, 1886); Nicaragua—Const. (1911), art. 14; Panama—Ley sobre Extranjería y Naturalización, December 19, 1914, art. 14, Leyes de 1914, Ley Num. 32, p. 51; Cod. Admin., art. 164; Peru—Decreto Ejectivo, April 17, 1846, art. 1, 10 Colección de Leyes, Decretos y Ordenes, Decreto Num. 89, p. 136; Peru—Circular al cuerpo diplomático extranjero, Lima, 26 de Octubre de 1897; Venezuela—Ley de Extranjeros, July 19, 1928, art. 50, 51 Recopilación de Leyes y Decretos, Ley Num. 16.476, p. 386 at 390; Argentina-Bolivia—Tratado de Amistad, Comercio y Navegación, July 9, 1868, art. 6, 2 COLECCION DE TRATADOS 259 (Buenos Aires, 1884); Argentina-Chile—Convención, April 5, 1865, art. 2, 2 COLECCION DE TRATADOS (Buenos Aires, 1884) 60; 1 MONTT, DICTAMENES FISCALES DEL FISCAL DE LA CORTE SUPREMA 264 (Santiago, 1894).

[31] VALLARTA, EXPOSICION DE MOTIVOS DEL PROYECTO DE LEY SOBRE EXTRANJERIA Y NATURALIZACION, § 218, p. 190 (Mexico, 1890).

evident legal truths.[32] The authority of the thing adjudged has been raised, so we are told, "to the category of an international law."[33]

One who has devoted his recognized talents to a thorough study of this question has this to say:[34]

> "If there is a principle about which differences are not permitted, it is that which proclaims the respect due the Majesty of Justice. And if there is an intolerable offense among States which are conscious of their duties, it is that which puts in doubt the good faith of the local magistrates in charge of administering that justice."

The law presumes, with a presumption *juris et de jure*, that the question adjudicated embodies the legal truth, not because the court which passes on it in the last resort is shielded entirely from error, but because the methods which regulate the proof and the legal procedure, the guarantee of wisdom and impartiality which the courts offer, and the social necessity of putting an end to litigation, justify the presumption.[35] Hence, it is accepted doctrine in Latin America that the state, whether as a person of international law, or of the civil law, does not incur responsibility for the acts or erroneous decisions of its courts which have become *res judicata*, and which are injurious to a foreigner,[36] except in those instances where such responsibility has been

[32] Mexico—Cod. de Proc. Civ., art. 621; Peru—Cod. de Proc. Civ., arts. 317(3), 1082, 1085(12); Cantero Herrera v. Saco y Flores (1927), 23 C.S., AN. JUD. 493 at 499.

[33] "A la categoría de ley internacional." Peru—Cantero Herrera v. Saco y Flores (1927), 23 C. S., AN. JUD. 493 at 500. Maúrtua, "Principios que deben inspirar la codificación del derecho internacional en materia de responsabilidad de los estados," 2 REV. DER. CIEN. POL. 136 (Lima, 1937): "The international value of judgments is a sanction derived from the right of jurisdiction recognized among States."

[34] GUSTAVO GUERRERO, LA RESPONSABILIDAD INTERNACIONAL DE LOS ESTADOS POR DANOS CAUSADOS EN SU TERRITORIO A LA PERSONA O BIENES DE LOS EXTRANJEROS, 33 (Paris, 1926).

[35] Peru—Cantero Herrera v. Saco y Flores (1927), 23 C. S., AN. JUD. 493 at 499; Mexico—Cod. de Proc. Civ., art. 621.

[36] 1 CLOVIS BEVILAQUA, DIREITO PUBLICO INTERNACIONAL, 2d ed., § 37, p. 177 (Rio de Janeiro, 1939); 1 ACCIOLY, TRATADO DE DIREITO INTERNACIONAL PUBLICO, § 410, p. 294 (Rio de Janeiro, 1933-35); 1 PAREJA, CURSO DE DERECHO ADMINISTRATIVO TEORICO Y PRACTICO 501 (Bogotá, 1939); J. GUSTAVO GUERRERO, LA RESPONSABILIDAD INTERNACIONAL DE LOS ESTADOS POR DAÑOS CAUSADOS EN SU TERRITORIO A LA PERSONA O BIENES DE LOS EXTRANJEROS 38; 1 BIDAU, DERECHO INTERNACIONAL PUBLICO 303 (Buenos Aires, 1924); Brazil—Julio Wolff Levin v. União Federal, Appellação Civel Num. 2.390, 8 S. T., REV. 231; Appellação Civel Num. 2.539, 24 S. T., REV. 233; Bernardo Davila v. União Federal (1920), 31 S. T., REV. 168; Appellação Civel Num. 3.310, 2 PANDECTAS BRASILEIRAS, Part 3, 43 (1928); Bolivia

expressly provided by law.[37] In *Henry Lowndes v. Bank of Brazil*, the action was against the bank and the Federal Union for damages on account of the illegal sequestration of plaintiff's property under a court order, and declaration of bankruptcy. The Supreme Court of Brazil ruled that:

> "The sequestration and bankruptcy, although unjust and injurious to the rights of plaintiff, do not, in any way, give a right of action against the Federal Union, because, in principle, the acts of the Judiciary do not engage the responsibility of the State: the method to redress the wrong which they occasion consisting in recourse to the courts *a quo*, or to the courts of higher jurisdiction; and, in addition to the publicity, the exposition of motives of the judgments, and the audience of the parties, the latter can join, either in a positive way, or by omission or negligence, so that the damages suffered can be recouped;
>
> "That, according to all legislation and the best known jurisconsults, it is in the public interest to guarantee at the same time the prestige of the courts and the safety of the parties, and only in the cases expressly provided by law can judicial acts give rise to responsibility, thereby constituting a derogation of the common law, recommended, in the phrase of Mattirolo, by decorum, the dignity of the judiciary, and the special character of the power with which it is entrusted; in the discharge of which functions, as Ruy Barbosa says, the error in the majority of cases is nothing else than the effect of diversity of views on controversial matters, —without initiative, but being the mere executor of the written

—Decreto sobre Reclamaciones Diplomáticas, May 8, 1871, art. 3, Anuario of 1871, p. 144; I ORDONEZ LOPEZ, CONSTITUCION POLITICA DE LA REPUBLICA DE BOLIVIA 97 (La Paz, 1917). The reason assigned in one case (Appellação Civel Num. 3.310, supra) for this rule is that the judiciary is not the agent or representative of the state, but one of its organs of national sovereignty. The reason is not convincing, since it has also been held that the state is responsible not only for the acts of its agents or representatives, but also for those of its organs. Article 5 of the Treaty on Arbitration, Judicial Adjustment and Conciliation, April 5, 1933, between Venezuela and the Low Countries provides:

"If a controversy is involved which arises out of a claim of a national of one of the two States against the other State, the object of which, according to the internal legislation of the latter State, corresponds to the competency of its national tribunals, the provisions of the present Treaty are not applicable except: in the case of denial of justice, including in this concept abusive delay by the Tribunals; and in the case of a judicial decision which is not appealable and which is incompatible with the obligations incurred under a treaty or with the other international obligations of the State, or which is manifestly unjust." GACETA OFICIAL DE VENEZUELA, p. 96.950 (February, 1934).

[37] Brazil—Bernardo Davila v. União Federal (1920), 31 S. T. REV. 168; Mexico—Cod. de Proc. Civ., art. 621.

law, the judge cannot violate it except by a wrong understanding of it, or criminal intent to transgress it; and we have in the first case an error which is the child of the understanding, and its correction in the means of redress, and therefore he renders himself liable to punishment only in the second case, where there is an act of the will (*Razoes na Rev. Crim., n. 215, decided on February 10, 1897, by the Federal Supreme Court*)."[38]

The *Lowndes* case, which was an action in the Brazilian courts, passed upon the question of the responsibility of the state as a juristic person for the acts of the judiciary; but the principle it laid down is applicable, subject to the qualification that there has been no denial of justice, when international responsibility is sought to be fastened upon the state for the acts of its courts. This is the import of the note of the Venezuelan minister for foreign affairs to the Italian minister, in 1918, in the matter of the *Claim of Martini & Company*.[39] Said he:

"It would be unusual to think that such expressions[40] authorize an interpretation which might justify diplomatic intervention every time that an objection of injustice is made against a judicial decision. Such allegation would be made each time an adverse judgment is given against an alien, the stability of decisions would disappear, and while the natives of the country would be bound by the definitive authority of the thing adjudged, the alien would enjoy the privilege of a final revision of the judgment before an international tribunal.

"An interpretation that would lead to this result is inadmissible. The alien can hope that private law shall recognize in him a civil condition equal to that of the national, but he cannot hope that he should be given a privileged situation. . . .

"Diplomatic intervention against a judgment tends to substitute the criterion of a political authority for that of the judicial authority on matters which are within the jurisdiction of the latter. When the claim is based on a denial of justice, the diplomatic intervention has a rational basis, and the reasons upon which it is founded are facts contrary to the international duty of the State."

The state, then, according to the Latin American thesis, is not answerable in damages to a foreigner for the injuries which he may

[38] Brazil—22 REV. DIR. CIV. COM. CRIM. 527 (1911).

[39] Venezuela—7 REV. DE DER. Y LEG. 143 (Caracas, 1918).

[40] "Denial of justice, or notorious injustice, or evident violation of the principles of International Law." Venezuela—Ley sobre Derechos y Deberes de los Extranjeros, April 11, 1903, art. 11, 26 Recopilación de Leyes y Decretos, Ley Num. 8905, p. 66.

sustain as the result of an unjust judgment of its courts,[41] or for the acts of a public functionary in carrying out the void order of a competent tribunal, since the foreigner is lacking in authority to question its legality.[42]

In Latin America the judiciary is independent of the executive,[43] and the latter cannot exercise the functions entrusted to the former, assume jurisdiction of pending causes, suspend the course of judicial proceedings, or reopen closed cases;[44] but must respect the judgments of the courts and carry them out as *res judicata*.[45] In one case, it was remarked that the principle of the separation of powers had been embodied in the constitution of the country, and that:

> "It can occur to no one to ask the Executive Power, for instance, that he assume the authority to declare, by means of a decree, that a judgment of the Supreme Court is unjust, illegal or unconstitutional, even though there be some basis for the imputation and complaint, and ask him to exercise the power to disregard it. If the judgment is unjust, illegal, or unconstitutional, there can be against it no human remedy, aside from revision, except that which may come from accusing the magistrates before some other Public Power,—the National Assembly,—in order that the latter may demand the consequent civil and criminal responsibilities. But, even in this case, the National Assembly, which may condemn the magistrates, does not revoke the unjust and illegal judgment; it may make the judges civilly responsible for the results of the decision and condemn them to the payment of

[41] Visconde de Caravellos, Minister for Foreign Affairs of Brazil, Relatorio de Repartição dos Negocios Estrangeiros 21 (Rio de Janeiro, 1875): "Considerando a questão em geral, sem attender a nacionalidades, ninquem dirá que o Estado é responsavel aos particulares pelos prejuizos provenientes de sentenças injustas dos tribunaes; e, si isto é exacto em these, não se comprehende que deixe de o ser sómente porque o queixoso não é natural do paiz. O estrangeiro, subdito temporario, que alli se veio estabelecer voluntariamente e que goza das mesmas facilidades que o nacional para reparaçao de aggravos, não pode ter um privilegio que se não concede áquelle. A egualdade a ambos garantida perante a lei deve ter por consequencia egualdade em relação ao Estado. Si este não indemnisa o nacional, não deve indemnisar o estrangeiro."

[42] Brazil—The London & River Plate Bank v. União Federal (1922), 71 REV. DIR. CIV. COM. CRIM. 66.

[43] Argentina—Const., art. 95 (1853); Honduras—Ley de Organización y Atribuciones de los Tribunales, art. 11 (1906); Peru—Decreto Ejecutivo, April 17, 1846, art. 3, 10 Colección de Leyes, Decretos y Ordenes, Decreto Num. 89, p. 136 at 137.

[44] Argentina—Const., art. 95 (1853); Ecuador—Const., art. 84 (1928-1929); Peru—Decreto Ejecutivo, Num. 89, April 17, 1846, art. 3, 10 Colección de Leyes, Decretos y Ordenes, Decreto Num. 89, p. 136 at 137.

[45] Ibid.

damages, but it cannot alter the situation created by the decision itself between the civil parties."[46]

PERMISSIBILITY OF CLAIM

The constitutive elements of the broad definition of denial of justice suggested above are four, any one of which is sufficient in international law to warrant the alien's recourse to the protection of his government. These elements are:

1. *Refusal of access to courts.* There is denial of justice if the courts decline, without adequate legal justification, to entertain an action brought by the alien. There is none, however, if the courts merely decide, as a matter of law, according to the local forms of procedure applicable alike to the citizen and the alien, that the action is inadmissible.[47] The state discharges its duty to the alien the moment the courts pass on the question submitted, and the claim of denial of justice cannot be made if the legal remedies which the alien could employ in the courts, under the local legislation, have been made available to him.[48]

2. *Refusal to decide, delay in deciding, or misapplying the law to a case.* We have here three possible situations:

(*a*). *Refusal to render decision*

There is denial of justice if the court which has jurisdiction of a case refuses, without legal excuse, to render a formal decision.[49] Such refusal, after the court has entertained the action, is tantamount to an implicit judicial declaration that the court cannot, or does not care to, do justice. The moment the alien brings the action, and the court entertains it, the court forfeits its legal authority to refuse a judgment upon the law and the facts.

(*b*). *Delay in rendering decision*

If the court has been guilty of voluntary, abnormal, or culpable delay in administering justice, that is, if it has delayed the decision

[46] Panama—Juez Ejecutor de la Provincia de Colon v. Luiz F. Estenoz (1924), 22 REG. JUD. 16.

[47] F. GUSTAVO GUERRERO, LA RESPONSABILIDAD INTERNACIONAL DE LOS ESTADOS POR DANOS CAUSADOS EN SU TERRITORIO A LA PERSONA O BIENES DE LOS EXTRANJEROS, 39 (Paris, 1926); Venezuela—Cod. de Proc. Civ., art. 1.

[48] Colombia—Cod. Fiscal Nacional (Ley Num. 110 de 1912), art. 42.

[49] Guatemala—Ley de Extranjería, February 15, 1936, art. 84, 54 Recopilación de Leyes, Decreto Num. 1781, p. 640 at 654; Paraguay—Cod. de Proc. Civ. y Com., art. 59.

beyond the time authorized by law, there undoubtedly is denial of justice.[50] "No doubt it is a general rule," said Commissioner Nielsen in one case,[51] "that a denial of justice can not be predicated upon the decision of a court of last resort with which no grave fault can be found. It seems to me, however, that there may be an exception, where during the course of legal proceedings a person may be the victim of action which in no sense can ultimately be redressed by a final decision, and that an illustration of such an exception may be found in proceedings which are delayed beyond all reason and beyond periods prescribed by provisions of constitutional law." There is, however, no denial of justice, if there has been a legal reason for the delay, or if it has resulted from some physical obstacle which it was not within the power of the court to remove.[52]

Not infrequently, the local legislation points out the method for correcting judicial acts which have the color of delay of justice.[53]

[50] Bolivia—Decreto sobre Reclamaciones Diplomáticas, May 8, 1871, art. 2, Anuario of 1871, p. 144; Costa Rica—Ley de Extranjería y Naturalización, Leyes de 1886, Decreto Num. 23, art. 16, p. 638 at 643; El Salvador—Ley sobre Reclamaciones Pecuniarias de Extranjeros y Nacionales contra el Estado, May 30, 1910, art. 18, 1 Nueva Recopilación de Leyes Administrativas 270 at 274; Guatemala—Ley de Extranjeria, art. 84, February 15, 1936, 54 Recopilación de Leyes, Decreto Num. 1781, p. 640 at 654; Honduras—Ley de Extranjería, art. 35, February 8, 1906, 31 LA GACETA 179; Mexico—Ley de Extranjería y Naturalización, art. 35, May 28, 1886, DIARIO OFICIAL (June 7, 1886); Peru—Decreto Ejecutivo, April 17, 1846, art. 1, 10 Colección de Leyes, Decretos y Ordenes, Decreto Num. 89, p. 136; Venezuela—Cod. de Proc. Civ., art. 9; Argentina-Bolivia—Tratado de Paz, Amistad, Comercio y Navegación, July 9, 1868, art. 6, 2 COLECCION DE TRATADOS 259 (Buenos Aires, 1884); Argentina-Chile—Convención, April 5, 1865, art. 2, 2 COLECCION DE TRATADOS 59, 60 (Buenos Aires, 1884); Brazil-Italy—Protocol (1896) art. 5, Relatorio do Ministerio das Relações Exteriores (1896), Annexo No. 1, p. 160; Tratado Centro-Americano de Paz, Amistad y Comercio (1887) art. 9; Colombia-Germany—Tratado de Amistad, Comercio y Navegación, July 23, 1892, art. 20, 6 ANALES DIPLOMATICOS Y CONSULARES 373 at 378 (Bogotá, 1920); Ecuado-Chile-Bolivia—Tratado sobre Dercho Internacional, May 16, 1867, art. 5, 2 NOBOA, COLECCION DE TRATADOS 77 at 79 (Guayaquil, 1905); Mexico—Convención relativa a los derechos de extranjería, art. 3, Actas y documentas de la Segunda Conferencia Pan-Americana, p. 825 at 826 (Mexico City, 1902).

[51] Claim of Clyde Dyches, No. 460, United States-Mexico Claims Commission, Opinions of the Commissioners 193 at 198 (1929). In that case there was a delay of two years in passing sentence on claimant, of which Commissioner Fernandez MacGregor, of Mexico, said (p. 197): "This long and unjustified delay constitutes denial of justice."

[52] Guatemala—Ley de Extranjería, art. 84, February 15, 1936, 54 Recopilación de Leyes, Decreto Num. 1781, p. 640 at 654; Mexico-Germany—Tratado de Amistad, Comercio y Navegación, December 5, 1882, art. 18 (2), TRATADOS Y CONVENCIONES VIGENTES 63 at 71 (Mexico, 1904).

[53] Argentina—Cod. de Proc. Civ. y Com. de la Capital, tit. V, arts. 275-280; Paraguay—Cod. de Proc. Civ. y Com., art. 59.

(c). *Disregard or misapplication of law*

Justice is denied if the decision or judgment of the court is notoriously unjust,[54] because the court has misapplied the law to the facts,[55] or the decision or judgment is in evident disregard or violation of a law,[56] a treaty,[57] or the principles of international law;[58] and the legal remedies given by the local legislation have been exhausted without obtaining its revocation or redress for the damage sustained.[59] But the mere fact that a judgment is not in favor of the claimant cannot be regarded as a denial of justice.[60] Of course, a claim of this sort is not admitted unless the clearest case has been made out within the terms of the pertinent law, treaty or principle of international law. In a note

[54] Brazil-Italy—Protocol of February 12, 1896, art. 5, Relatorio do Ministerio das Relações Exteriores (1896), Annexo I, n. 68, p. 159; Tratado Centro-Americano de Paz, Amistad y Comercio (1887) art. 9; Ecuador-Chile-Bolivia—Tratado sobre Derecho Internacional, May 16, 1867, art. 5, 2 NOBOA, COLECCION DE TRATADOS 77 at 79 (Guayaquil, 1902).

[55] Solomon Claim, Docket Registry No. 12, American-Panamanian General Claims Arbitration, (16 U.S. Dept. of State Arbitration Series) Report of Bert L. Hunt, Agent for the United States, pp. 478, 479 (1934).

[56] Guatemala—Ley de Extranjería, February 15, 1936, art. 84, 54 Recopilación de Leyes, Decreto Num. 1781, p. 640 at 654.

[57] Colombia-Germany—Tratado de Amistad, Comercio y Navegación, July 23, 1892, art. 20, 6 ANALES DIPLOMATICOS Y CONSULARES 373 at 378 (Bogotá, 1920); Mexico-Germany—Tratado de Amistad, Comercio y Navegación, December 5, 1882, art. 18(2) TRATADOS Y CONVENCIONES VIGENTES, 63 at 71 (Mexico, 1904).

[58] Bolivia—Decreto sobre Reclamaciones Diplomáticas, art. 4, May 8, 1871, Anuario of 1871, p. 144; El Salvador—Ley sobre Reclamaciones Pecuniarias de Extranjeros y Nacionales contra el Estado, May 30, 1910, art. 18, 1 Nueva Recopilación de Leyes Administrativas 270 at 274; Ley de Extranjería, September 29, 1886, art. 9, as amended by laws of May 22, 1897 and April 16, 1900, 1 Nueva Recopilación de Leyes Administrativas 59; Honduras—Ley de Extranjería, arts. 13, 3, February 8, 1906, 31 LA GACETA 179; Argentina-Bolivia—Tratado de Paz, Amistad, Comercio y Navegación, July 9, 1868, art. 6, 2 COLECCION DE TRATADOS 259 (Buenos Aires, 1884); Brazil-Italy—Protocol of February 12, 1896, art. 5, Relatorio (1896), Annexo I, n. 68, p. 159; Colombia-Germany—Tratado de Amistad, Comercio y Navegación, July 23, 1892, art. 20, 6 ANALES DIPLOMATICAS Y CONSULARES 373 at 378 (Bogotá, 1920); Mexico-Germany—Tratado de Amistad, Comercio y Navegación, December 5, 1882, art. 18(2), TRATADOS Y CONVENCIONES VIGENTES 63 at 71 (Mexico, 1904); Convención relativa a los derechos de extranjería, art. 3, Actas y documentos de la Segunda Conferencia Pan-Americana, p. 825 at 826 (Mexico City, 1902).

[59] Guatemala—Ley de Extranjería, February 15, 1936, art. 84, 54 Recopilación de Leyes, Decreto Num. 1781, p. 640 at 654.

[60] Guatemala—Ley de Extranjería, art. 84, February 15, 1936, 54 Recopilación de Leyes, Decreto Num. 1781, p. 640 at 654; Honduras—Const. (1936), art. 19; Ley de Extranjería, art. 35, February 8, 1906, 31 LA GACETA 179; Nicaragua—Const. (1911), art. 14.

of the minister for foreign affairs of Colombia to the Spanish minister in 1913, he said:[61]

> "I can do no less than to reject as unjustly offensive to the highest Tribunal of the Nation, the designation of 'unjust in every respect' (*a todas luces injusta*) which Your Excellency has given to the judgment of the Supreme Court of Justice in the suit against the Republic brought by the Spanish subject Antonio Llobell, for the alleged violation of the contracts to supply paper for the cigarettes made by the Government in the use of the powers conferred upon it by the law on the matter. . . .
>
> "I must further state to Your Excellency that in no case shall the Government of Colombia accept a diplomatic claim founded on the alleged notorious injustice of the judgment, since such claim would be unacceptable according to the express and clear terms of article 6[62] of the Treaty of April 28, 1894, supplementing the Treaty of Peace between Colombia and Spain, upon which Your Excellency relies to bring a claim of this character in the name of the Government of His Catholic Majesty.
>
> "In the case of Mr. Llobell there has not been, on the part of the Tribunal charged with administering that justice, either refusal or negligence in doing it, because it handed down its judgment upon the terms which it deemed to conform with the law applicable, according to its own ideas, without incurring unjustifiable delays which would constitute negligence in the administration of justice."

The local legislation often provides suitable recourse for judicial decisions or judgments handed down in disregard or misapplication of express law or legal doctrine.[63]

3. *Lack of, or inadequacy in, law.* The judgments of the courts should rest, whenever possible, upon the express text of the law.[64] But it may sometimes be that there is no express law, or that whatever law there is, is inadequate to meet the needs of the case. In Latin

[61] Colombia—Tratados, convenciones y acuerdos aprobados por el Congreso Nacional en 1913, pp. 223, 224, 228, 229.

[62] "The judgments, decrees or legal orders rendered in one of the two Nations on the petitions, complaints or actions brought by nationals of the other, which have acquired definitive character, in accordance with the remedies, process and proceedings which the local legislation offers, shall have the effects and shall be carried out in like manner as with respect to the citizens of the country. Spaniards in Colombia and Columbians in Spain shall have no right to diplomatic intervention except in the case of manifest denial of justice, or refusal or neglect in the administration of justice."

[63] Argentina—Cod. de Proc. Civ. y Com. de la Capital, art. 217.

[64] Argentina—Cod. de Proc. Civ. y Com. de la Capital, art. 217.

America, however, this could hardly happen, for there the courts "cannot fail to decide on the pretext of silence, vagueness or insufficiency of the laws."[65] Their refusal to decide a matter on these grounds would, according to our definition, constitute denial of justice.[66] To overcome any of these defects in the local legislation, the courts may have recourse (i) to the spirit of the law;[67] (ii) to the juridical principles of analogous laws;[68] (iii) to the general principles of equity and justice;[69] and (iv) to the principles of foreign legislation.[70]

4. *Administrative failure.* There is denial of justice if the government declines, without justifiable legal reasons, to meet its obligations toward the alien, after they have been recognized by its courts.[71] "It

[65] Argentina—Cod. Civ., art. 15; Colombia—Cod. Jud. (1922), art. 201; Cuba—Cod. Civ., art. 6; Guatemala—Ley Constitutiva del Poder Judicial, Decreto Num. 1862 (1942), art. 15; Peru—Cod. Civ., Tit. Preliminar, art. 9; Venezuela—Cod. de Proc. Civ., art. 9; 1 MACHADO, EXPOSICION Y COMENTARIO DEL CODIGO CIVIL ARGENTINO 48 (Buenos Aires, 1898); 1 MARCANO RODRIGUEZ, APUNTACIONES ANALITICAS SOBRE LAS MATERIAS FUNDAMENTALES Y GENERALES DEL CODIGO DE PROCEDIMIENTO CIVIL VENEZOLANO 53-65 (Caracas, 1941).

[66] Colombia—Cod. Jud. (1922), art. 201; Venezuela—Cod. de Proc. Civ., art 9.

[67] Argentina—Cod. Civ., art. 16; Paraguay—Cod. de Proc. Civ. y Com., art. 63; Peru—Cod. Civ., Tit. Preliminar, art 9; 1 MACHADO, EXPOSICION Y COMENTARIO DEL CODIGO CIVIL ARGENTINO 50 (Buenos Aires, 1898).

[68] Argentina—Cod. Civ., art. 16; Cod. de Proc. Civ. y Com. de la Capital, art. 217; Peru—Cod. Civ., Tit. Preliminar, art. 9; 1 MACHADO, EXPOSICION Y COMENTARIO DEL CODIGO CIVIL ARGENTINO 50-51 (Buenos Aires, 1898).

[69] Argentina—Cod. Civ., art. 16; Cod. de Proc. Civ. y Com. de la Capital, art. 217; Fisco Nacional v. Varios Comerciantes de Mendoza (1868), 5 S. C. Fallos 74 at 85; Colombia—Cod. Jud. (1922), art. 201; Cuba—Cod. Civ., art. 6; Panama—Acuerdo Num. 54 (1905), 2 REG. JUD. 342, No. 78, Supreme Court; Paraguay—Cod. de Proc. Civ. y Com., art. 63; Peru—Cod. Civ., Tit. Preliminar, art. 9. For full discussion of the general principles of law, see 1 NUÑEZ Y NUÑEZ CODIGO CIVIL (Habana, 1934).

[70] ". . . que, comquanto não haja lei patria expressamente applicavel á especie dos autos, todavia existem, inspirados no principio geral acima exposto, muitos subsidios do direito extranho, que se lhe adaptam;

". . . que se deve recorrer ás normas do direito extranho para a solução dos casos omissos na nossa legislação, sendo os preceitos do Direito Romano, applicados de accôrdo com a *boa razão* e as leis das Nações christãs, as fontes subsidiarias do nosso direito, (*Ord. L. 3, tit.* 64, pr.; Lei de 18 de Agosto de 1769, § 1°; BORGES CARNEIRO —*Dir Civil Port. Parte 8ª* § *18;* RIBAS—*Dir. Civil Brazileiro vol. 1° pag. 189*)." Brazil—Clara Maria da Conceição v. Companhia Ferro Carrilvilla Izabel (1908), 8 REV. DIR. CIV. COM. CRIM. 137 at 145.

[71] Uruguay—Attorney General Vazquez Acevedo of Uruguay, 1 REV. DER. JURIS. ADM. 168 (1874); 1 MONTT, DICTAMENES FISCALES DEL FISCAL DE LA CORTE SUPREMA 264 (Santiago, 1894); Colombia-Germany, Tratado de Amistad, Comercio y Navegación, July 23, 1892, art. 20, 6 ANALES DIPLOMATICOS Y CONSULARES 373 at 378 (Bogotá, 1920): "*por falta de ejecución de una sentencia definitiva*" (italics supplied);

appears to be a well-established principle of International Law," said Commissioner Van Vollenhoven in one case,[72] "that a denial of justice may be predicated on the failure of the authorities of a government to give effecct to the decisions of its courts."

When any of the foregoing elements in the definition of denial of justice exists, the offense to the individual is transformed into an offense to his state, and the demand for reparation assumes a complexion much more odious than the injury itself, and leads to one of these alternatives: either the discontinuance of the claim, or its recognition to the detriment of the dignity of the country and government which admits it.[73]

WHEN CLAIM IS BARRED

The alien's right to invoke the protection of his government for denial of justice is barred: (i) if the right to enforce his rights in the local courts is outlawed by the statute of limitations;[74] (ii) if the right to prosecute the claim diplomatically is voluntarily restricted, sus-

Mexico-Germany—Tratado de Amistad, Comercio y Navegación, December 5, 1882, art 18(2), TRATADOS Y CONVENCIONES VIGENTES 63 at 71 (Mexico, 1904).

[72] The H. G. Venable Claim, No. 603, United States-Mexico Claims Commission, Opinions of the Commissioners 331 at 368-369 (1927).

[73] 1 MONTT, DICTAMENES FISCALES DEL FISCAL DE LA CORTE SUPREMA 269 (Santiago, 1894); 1 RUIZ MORENO, LECCIONES DE DERECHO INTERNACIONAL PUBLICO 271 (Buenos Aires, 1934); 1 ACCIOLY, TRATADO DE DIREITO INTERNACIONAL PUBLICO, § 398, p. 288, § 415, p. 301 (Rio de Janeiro, 1933-35); 1 CLOVIS BEVILAQUA, DIREITO PUBLICO INTERNACIONAL, 2d ed., § 32, p. 165 (Rio de Janeiro, 1939); Maúrtua, "Principios que deben inspirar la codificación del derecho internacional en materia de responsabilidad de los estados," 2 REV. DER. CIEN. POL. 97 at 135-143 (Lima, 1937); 2 CALVO, LE DROIT INTERNATIONAL, 3 ed., § 1045, p. 225 (Paris, 1880); Bolivia—Decreto sobre Reclamaciones Diplomáticas, art. 4, May 8, 1871, Anuario of 1871, p. 144; El Salvador—Ley de Extranjería, September 29, 1886, arts. 9, 29, as amended by laws of May 22, 1897 and April 16, 1900, 1 Nueva Recopilación de Leyes Administrativas 59; Honduras—Ley de Extranjería, February 8, 1906, art. 13, 31 LA GACETA 179; Peru—Decreto Ejectivo, April 17, 1846, art. 2, 10 Colección de Leyes, Decretos y Ordenes, Decreto Num. 89, p. 136.

[74] Bolivia—Decreto sobre Reclamaciones Diplomáticas, May 8, 1871, art. 3, Anuario of 1871, p. 144; Brazil—Lowndes v. Banco de Brazil (1911), 22 REV. DER. CIV. COM. CRIM. 527 at 529:

"Considerando que, por consequencia, não póde mais agora o autor fundar no facto da sua prisão e desterro pedido de indemnização, por já ter incorrido de muito tal supposto direito *a ser declarado credor do Estado* na prescripção de que trata o art. 2°, n. 1 do decreto n. 857, de 12 de Novembro de 1851, e se opera total e absoluta pelo decurso de mais de cinco annos da data do acto considerado lesivo do direito, desde que não tenha sido interrompida nos expressos termos da lei—'Esta prescipção comprehende: 1°, o direito que alguem pretenda ter *a ser declarado credor do Estado*, sob qualquer titulo que seja . . .'"

pended or waived by the alien, except in case of denial of justice.[75] This is the well-known "Calvo Clause," which is in vogue in Bolivia,[76] Chile,[77] Colombia,[78] Costa Rica,[79] Ecuador,[80] El Salvador,[81] Mexico,[82] Panama,[83] and Venezuela;[84] and which has often been upheld by international tribunals.[85] (iii) If the judgment of the court has become *res judicata*.[86]

CONCLUSIONS

Up to now we have discussed, in a factual way, the positive legislation and jurisprudence of Latin America. It is possible to say that, notwithstanding the progress made, there are grave defects in the state of the law on so important a subject. Much improvement and greater generalization of its basic principles is possible. Diversity of views on a question which vitally affects the sovereignty of each country should be reduced as much as practicable. The matter, it would seem, is ready for codification as part of the body of inter-American international law.

[75] Panama—Cod. Admin., art. 164; Ley sobre Extranjería y Naturalización, December 19, 1914, art. 14, Leyes de 1914, Ley Num. 32, p. 51.

[76] Ley Organica de Petróleo, July 20, 1921, art. 42, Anuario of 1921, p. 340 at 351; 5 FERNANDEZ, LEGISLACION MINERS, PETROLERA Y SOCIAL 295 (La Paz, 1928).

[77] Ley Num. 2073, January 8, 1908, art. 19, 5 Recompilación de Leyes 23 at 25.

[78] Cod. Fiscal Nacional (Ley Num. 110 de 1912) arts. 42, 43; Ley sobre Extranjería y Naturalización, November 26, 1888, art. 15, Leyes de 1888, Ley Num. 145, p. 129.

[79] Decreto Num. 22, November 5, 1920, art. 20.

[80] Ley de Extranjería, August 25, 1892, art. 14, REGISTRO OFICIAL (1892-1893), Ley Num. 100, p. 112; Const. (1928-1929), art. 153.

[81] Ley de Extranjería, September 29, 1886, art. 57, as amended by laws of May 22, 1897 and April 16, 1900, 1 Nueva Recompilación de Leyes Administrativas 59.

[82] Claim of North American Dredging Co. of Texas, No. 1223, United States-Mexico General Claims Commission, Opinions of the Commissioners 21 at 22-23 (1927).

[83] Cod. Admin., art. 164; Ley sobre Extranjería y Naturalización, December 19, 1914, art. 14, Leyes de 1914, Ley Num. 32, p. 51.

[84] Const. (1936), art. 49.

[85] Reclamación Num. 34, the Nitrate Railways Co., Ltd., Informe del ajente de Chile ante el Tribunal Árbitral Anglo-Chileno (1893) 128 (Santiago, 1896); Claim of North American Dredging Co. of Texas, No. 1223, United States-Mexico General Claims Commission, Opinions of the Commissioners 21 at 22-23 (1926); Decision No. 21, Mexican Union Railway, Ltd., Claims Commission, Great Britain-Mexico, Decisions & Opinions of the Commissioners 157 (London, 1931); DE BEUS, THE JURISPRUDENCE OF THE GENERAL CLAIMS COMMISSION, UNITED STATES AND MEXICO, c. 4 (The Hague, 1938).

[86] Bolivia—Decreto sobre Reclamaciones Diplomáticas, May 8, 1871, art. 3, Anuario of 1871, p. 144.

Let us offer here some suggestions:

I. The expression, "denial of justice," should be defined with amplitude to include the acts or omissions of *all* departments of government—executive, legislative and judicial. The concept cannot be restricted to the actions or omissions of any one department. The administration of justice is not a *departmental* matter; it is *governmental*, and includes these elements: (1) the availability of applicable legislation; (2) its application by the courts; and (3) its enforcement by the executive. To give the concept a merely departmental meaning, —usually, judicial,—is to license the legislative and executive branches of the government to deny justice to the alien, and to take away from him the right to the protection of his government for its acts or omissions. There can be no justice to the alien as long as his rights fail of effective recognition and enforcement for want of a conscientious judiciary, an indifferent legislature, or an arbitrary executive. A system of legislation should, as completely as possible, lay upon a government, acting through its various departments and subordinate agencies, the obligation to function coordinately toward the administration of *full* justice to the individual.

We have a good illustration of the dangers of a narrow definition of the concept in the *Solomon Claim*,[87] before the American and Panamanian General Claims Arbitration Commission. The claimant had been charged with, and convicted of, false imprisonment, in the courts of Panama. The conviction and sentence were affirmed by a divided supreme court:—the majority holding that he had been properly tried under a certain section of the penal code; the minority holding that he should have been tried only under a different section. The majority of the commission ruled,—agreeing with the minority of the court,—that there was "no criminal act for which Solomon could be held responsible"; that "there was no justification for convicting Solomon for the particular offense of which he was found guilty";[88] and that this constituted a "palpable injustice."[89] The position of the Panamanian Commissioner, Dr. Alfaro, who filed a dissent, is expressed in the following quotation:[90]

> "There is no denial of justice when there is a probable cause or sufficient reason for arresting and trying a person as responsible

[87] (6 U. S. Department of State Arbitration Series) Docket Registry No. 12, Report by Bert L. Hunt, Agent for the United States (1934).

[88] Id. at 478.

[89] Id. at 479.

[90] Id. at 487.

for an ordinary crime. Denial of justice consists essentially in depriving a person of the means needed for him to defend himself before the courts and that by being deprived of those means of defense he is made to suffer an unjust sentence. 'Bad administration of justice alone,' says Borchard, 'is not enough to cause a government to intervene in behalf of a citizen who claims to have been unjustly treated by the courts of another country.' (*Diplomatic Protection of Citizens Abroad*, p. 197). 'Not even a decision based on an erroneous interpretation of the law will permit it. There must be fraud, corruption and denial of legal opportunity to present the case' (Borchard, work cited, p. 332; Moore, *International Arbitrations*, pp. 2134 and 3497)."

If the whole substance of the concept of denial of justice consists merely, as this dissent suggests, in "depriving a person of the means needed for him to defend himself before the courts," then it would be true that "bad administration of justice," or the "erroneous interpretation of the law," could not be grounds for diplomatic interposition on that score. This is the view, expressed in the dissent in its narrowest form, that denial of justice is only a *departmental* matter. Were it to gain general acceptance, it would be obvious that the scope of the protection which governments owe their nationals abroad would be narrowed down far beyond the respect due the sovereignty of the local state, and certainly much below the minimum requirements which international law demands of the state with respect to aliens. Under such theory, a government could not intervene if one of its nationals were prevented from effectively enforcing his rights because of deficiency in the local legislation or arbitrary executive action.

Even if the concept of denial of justice were to be regarded as a departmental matter, it would be difficult to subscribe to the view that the bad administration of justice or the erroneous interpretation of the law could not be grounds for diplomatic protection. The administration of justice, judicially regarded, involves two ingredients: it must be a *good* administration, according to the established rules of procedure; and, it must represent a *correct* interpretation of the law. The absence of either ingredient would make the decision or judgment of the court, presumptively, at least, *unjust*. Of course, not every *unjust* judgment is objectionable from the point of view of international law. To be so, its gravity must be such as to render it *notoriously unjust;* and to be thus, neither fraud nor corruption need enter into it necessarily. It may be so, even without these vices, when the rules of procedure have been openly ignored to the manifest prejudice of the alien, or the law

has been interpreted in a way that constitutes a plain corruption of its terms.

The entire question, no doubt, is a difficult one, since it involves a conflict between the legal finality or truth of a judicial judgment and the right of the alien to a fair and just determination of his case.

To lessen the unfortunate consequences of the conflict, the following procedure is suggested:

When a claim is sponsored by a government on the ground that there has been a denial of justice, and the claim is resisted, the governments concerned should immediately agree to submit the matter to an informal inquiry by a board of neutral examiners, to determine only the question of the existence of *probable cause* for the claim, before a formal demand for reparation or arbitration is made. Should the examiners find, as a matter of fact, that there is no probable cause, the claim should not be pressed; but, should they find that there is probable cause, then the whole question should be submitted to arbitration.

This procedure does not prejudge any questions of fact or law; neither does it raise a presumption against the judgment sought to be impeached. It merely finds that the facts studied by the examiners suggest that there is, or that there is not, probable cause for the claim. The procedure, however, will remove, in part, a frequent cause of friction among nations; lessen chauvinistic attitudes in the matter of claims; and expedite the disposition of differences on the score of denial of justice.

II. The "Calvo clause," which takes its name from the distinguished international jurist and foreign minister of Argentina, aims merely to safeguard the sovereignty of the state from the encroachment of foreign powers acting at the instigation of nationals with whom the state may have entered into contractual relations.[91]

The theoretical basis of the clause is this: *First.*—The state, as a *juristic person* of private law, has the legal capacity to make contracts with individuals, which are enforcible by or against the state, in the local courts.[92] When the state acts in the character of a juristic person —which it does when it makes a contract with an individual—it waives with respect to him and to all the circumstances of that contract, its

[91] For the history of the clause, see Amos S. Hershey, "The Calvo and Drago Doctrines," 1 AM. J. INT. L. 26 (1934); Percy Bordwell, "Calvo and the 'Calvo Doctrine,'" 18 THE GREEN BAG 377-382 (1906).

[92] See, by the author, "The Responsibility of the State as a Juristic Person in Latin America," 18 TULANE L. REV. 563 (1944).

sovereign rights as *public authority*, that is, as a sovereign state. There can be no doubt now that the state, if it so agrees, may discard its sovereignty, either in whole or in part, in its relations with an individual. In the civil law conception of the state, this is an established doctrine, and is gradually becoming established doctrine also in Inter-American relations.[93] *Secondly.*—The foreigner, in his contractual relations with the local state, can agree to renounce the diplomatic protection which he is entitled to claim from his government under international law. In the *Claim of The Nitrate Railways Co. Lt.*,[94] the Anglo-Chilian Arbitration Tribunal held in 1893, in passing upon the validity of the clause, thus:

> "1. That foreigners, in order to obtain from the government of another country, privileges and concessions for the construction of public works and the exploitation of means of communication, can renounce the diplomatic protection of their own governments;
>
> "2. That the grantor-governments have the right to demand, in exchange for said privileges, that foreigners place themselves upon a footing of equality with nationals, and agree not to invoke the intervention of their governments, and to submit in every respect, to the laws of the country; and no principle of International Law forbids citizens to enter into such engagement."

In other words, the right of the alien to diplomatic protection is *strictly personal*, so that his government cannot come to his aid unless he calls for it; and this he cannot do when he has renounced the right as a condition of his contract.

In short, the alien's waiver of the right to the protection of his government is fully compensated by the state's waiver of sovereign immunity, which makes it liable to an action in its own courts for a breach of its obligations.

III. Is a *definitive judgment* impeachable by the alien on the ground of denial of justice? We have no doubt it is. Such judgment may embody, presumably, self-evident legal truths; but we cannot overlook that there are times when even courts of last resort are not free altogether from error,[95] and it would be tantamount to a clear evasion of the international duty of the state, to give the erroneous judgment of its courts conclusive force *vis-à-vis* another state, simply

[93] 18 id. 421-428.

[94] Reclamación Num. 34, Informe del ajente de Chile ante el Tribunal Arbitral Anglo-Chileno (1893) 125 at 135 (Santiago, 1896).

[95] Peru—Cantero Herrera v. Saco y Flores (1927) 23 C. S., AN. JUD. 493.

because it has become definitive in character. Its conclusiveness as a domestic act may be readily admitted, whether it be just or unjust, because of the social necessity of putting an end to litigation; but it does not necessarily follow from this that it would be equally conclusive upon a foreign state when it is appraised in the light of the duty of the state to deal out justice to the alien according to international rather than national standards. The principle, then, that the definitive judgment of a court, which has become *res judicata*,[96] does not engage the responsibility of the state, must be understood as subject to the limitation that it does not deny justice to the alien, for if it does, then "the diplomatic intervention has a rational basis, and the reasons upon which it is founded are facts contrary to the international duty of the State."[97]

Let us put it this way: the legal efficacy of a final judgment, from the point of view of international law, must depend, not on local theories of social necessity, but on the international obligation of the state not to administer justice in a *notoriously unjust* manner. The sovereign right of the state to do justice cannot be perverted into a weapon for circumventing its obligations toward aliens who must seek the aid of its courts.

[96] Bolivia—Decreto sobre Reclamaciones Diplomáticas, May 8, 1871, art. 3, Anuario de 1871, p. 144. See note 36, supra.

[97] Minister for Foreign Affairs of Venezuela (1918), 7 REV. DE DER. Y LEG. 143 (Caracas, 1918).