Professor Gurelli, in the concluding paragraphs of his introduction, maintains that the Turkish Code, based on the Italian Penal Code of 1889, is no longer capable of serving the needs of present-day Turkish society.[10] The fact that the Code has had to be amended piecemeal twenty times brings home this inadequacy. The stability of the Republic and the progress of the country have made many of the old offences redundant. Criminal law must reflect not only the fundamental values of the country but also meet the requirements of a developing society and therefore the adoption of a foreign code, however well drafted, can never really take roots in a different soil with different traditions.[11]

Today the availability in translation of many of the foreign penal codes brought out by the Comparative Criminal Law Project of the New York Law School makes the task of the drafters somewhat easier. It enables them to study not only the forms of the various codes but also the penal laws of societies with more or less similar traditions and political development.

Professor Gurelli, who is well-acquainted with the conditions of Turkey, is of the opinion that without adequate research in criminology resulting in an awareness of the crime problems of the country, revision of the Penal Code, even though it is greatly out of date, would not be of lasting value. It is, however, hoped that when Turkey does decide to revise the Penal Code it will rectify, among other things, the present approach to punishment and incorporate in the Code some of the principles accepted by the Congress of the Prevention of Crime and Treatment of Offenders, 1955. This would be a much-needed step forward towards universal principles of criminal law.

*Lotika Sarkar**

THE CIVIL LAW IN THE MODERN WORLD. Edited by A. Yiannopolos. Louisiana State University Press. 1965. Pp. xvi, 197. $ 7:50.

A collection of erudite essays on the "Civil Law in the Modern World" will surely evoke different responses. In this review, our approach has been to assess the significance of these essays in terms of the theory of comparative law or more aptly, comparative jurisprudence and to stress the tasks which await the Indian legal scholarship in this area.

The essays reproduced in this book were first presented to a colloquium on "Civil Law in the Modern World" at the first Annual

10. Gurelli, "Introduction" to *Turkish Code* 8.

11. *Ibid.*

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Meeting of Civil Law Section of the Louisiana Law Institute in 1963. The objectives of the Section on the Civil Law, in the words of the editor of this book, may be summarized in two broad propositions: "[T]he development of Civil Law studies in Louisiana and the accomplishment of the revision of the Civil Code." [1]

The Code is not revised since 1825 (except for minor "editorial" alterations in 1870) and the usual problems of an aging code are pre-eminent in the minds of those in charge of its revision. These problems are: the "conceptual overhauling" of an "analytically deficient" code, accretion of judicial gloss, random accumulation of supplementing enactments, and changed and changing conditions of civilized life. As the editor, Yiannopolos, acknowledges at the outset that the approach is pragmatic, the concern is more to revise a fast dilapidating legal structure as envisaged in the Code and not to settle "the question of disability of codification which is by no means settled in comparative legal theory."[2]

The first essay by Professor Smith is entitled "The Preservation of the Civilian Law Tradition in the Mixed Jurisdictions." The essay is marked with candour, not usual in academic writings, and abounds in fresh insights in the nature of comparative law. The first is explained by Smith himself when he says that he is speaking as it were "in a family circle." The second may be explained by the fact that Smith is not so much interested in the theory of comparative law as in a missionary advocation of the need to "preserve" and develop the "civil law tradition" in his native Scotland, as in other "mixed jurisdictions."

Smith refers to "mixed jurisdictions" in a special sense, namely, one in which a basically civilian system has been under pressure from the Anglo-American common law and has been in part overlaid by that rival system of jurisprudence. There are, of course, mixed jurisdictions even more complex and we too often overlook the fact that the world phenomenon is not partitioned between the heirs of Rome and Westminster. [3]

One of the most important parts of this essay is the enlightened analysis of "the factors which favour or frustrate the subversion of civil law tradition in mixed jurisdictions." Notwithstanding the strong epithets and the emotional ardour behind everything that Smith says, his recognition that the role of a civilian in the modern mixed jurisdictions is merely to assert "our own legal ethos" is significant, in that it reveals the modest, though important, task that a civilian lawyer has to perform.

Equally important is Smith's admission that the scope of the civilian tradition is severely restricted in the mixed jurisdictions: "The civilian tradition...has been confined mainly to familiar categories of private law." [4] But even there "private law is overshadowed by public law."

1. *The Civil Law in the Modern World* v (Yiannopolos ed. 1965) [hereinafter cited as *Yiannopolos*].
2. *Ibid.*
3. *Id.* at 5.
4. *Id.* at 9.

Both national and international unification activities generate pressures which a civil law tradition finds hard to bear. Again, in the areas of conflicts law and the criminal law, the impact of Anglo-American law is considerable. Indeed, " so much of a lawyer's life in a mixed jurisdiction is preoccupied with problems which owe little of their inspiration or solution to the civil law that the sceptic might question whether there is sufficient civilian leaven to permeate and animate the dough of daily practice." [5]

This much, then, for the crisis of identity that civilian tradition seems to be facing in the mixed jurisdictions. What about the prospects of its expansion ? The example of Ethiopia given by Smith is enough to answer this. To one reconciled with the realities of power politics, it is not surprising that after the great David had drafted the Civil Code of Ethiopia, and the initial phases of operation of that Code, the Emperor welcomed the American law teachers, encouraged the establishment of Law School modelled after American law schools and had the Code once translated from French to Amharic, translated again in English for the American teachers. These facts speak for themselves as to the future of " pure " civilian tradition in mixed jurisdictions.

Another interesting observation of Smith is that

> the American common law has by comparative methods improved on the English common law in many ways and has moved closer to civil law solutions. Although both the English and the American common lawyer tend to think of the law primarily in terms of cases, the creative role of the jurist, which gives scope to the comparative scholar both in teaching and formulating law, seems to be more clearly recognized in the United States.[6]

This should be more than a sidelight in the study of comparative jurisprudence. Besides illustrating important directions of development in the future of " human law," to borrow an apt phrase from Julius Stone,[7] it points out a new approach for a comparatist. And that is : How important it is for the theorists in comparative jurisprudence to insist on a rigid dichotomy between the civil law and the common law or to proceed on delineating workable lines of distinction between them?

For the Indian legal scholars, this emphasizes the need for conscious development of a legal tradition. Search for new solutions to old problems may well be called for. Is it not imperative for the infusion of " Indianness " in the present legal system that the Indian scholars evaluate the normative significance and the social efficacy of newer approaches within the common law ? As it is, a vast proliferation of American law influence is occurring through many of the helmsman of legal education in India being specially trained in the United States and the large number of students receiving their advanced degrees there. The

5. *Id.* at 10.
6. *Id.* at 7-8.
7. See Stone, *Human Law and Human Justice* (1965).

task of Indian scholars in this context is surely to articulate the extent and the need, if not the desirability, of this interaction with American common law and by a constant and vigilant study of the social realities provide guidelines for the creation of a more effective legal culture.

Chief among the handicaps that Professor Smith mentions to the existence and growth of a civilian tradition in mixed jurisdictions are: the problem of language and terminology (interesting parallels to Louisiana are to be found in Ceylon and Israel as well as the African countries) and the nature and quality of legal education. Finally, he suggests the methods and the means to consolidate the civil law tradition in these enclaves. The handicaps of the civilian law tradition may well be those of the common law also. While one need not idly speculate, the reality of the language problem in India, its ultimate impact on the system of legal education and patterns of advanced legal education and research [8] are all factors that should occupy the attention of the Indian law scholars. Procrastination only aggravates the problems but complacence renders them almost insoluble.

It is impossible to do justice to Smith's article in a review of this kind. It has a depth of conviction and a breadth of erudition that one can hardly reflect in a review. The value of his contribution lies in its pugnaciousness, as much as in its occasional humility. From now on, it is an indispensable preface to a beginner's course in comparative law.

Professor Max Rheinstein's paper entitled "The Law of Family and Succession" is equally interesting. Although he is sceptical of handling properly the task of evaluing and describing the law of family and succession in the civil law system, the concise and lucid exposition of the "family law" offered by him is, perhaps, the best available in the literature in the field.

Rheinstein raises a basic issue in his prefatory remarks: "Is there any civil law to-day?" This is a question of great conceptual and methodological significance, unfortunately, not generally dealt with in this remarkable collection of erudite essays. As Rheinstein sees it, the body of law "to which that name could be properly applied...was that common law of the continent of Europe and its dependencies overseas which grew out of the amalgam of medieval customs and the rediscovered Roman law." [9] The "unity" of that law has been broken by various codifications and the "civil law has been split into a multiplicity of independent systems of national laws. It would be difficult to discover features of modern development which would be common to legal systems as different as those of Sengal and Japan, of Germany and Paraguay, or of Nationalist China and Qubec." [10]

8. See in general 4 *Jaipur L. J.* (1964), and this reviewer's article on "Patterns of Advanced Legal Education and Legal Research" therein at 164.

9. *Yiannopolos* 27.

10. *Ibid.*

Semantic cobwebs cannot stand the evidence of history as shown in Rheinstein's brief remarks. The question "what is civil law?" may rightly be dismissed as a wrong question breeding confusion in the guise of answers as the larger question "What is law?" Nonetheless, we do need dependable criteria to determine differences among the diverse legal orders of the world and their approximate assimilation to a rough and ready typology of legal culture. In other words, we need to know for the purposes of the scientific study of comparative law, some guidelines to classify the existing and the extent legal orders in different families. This may be done by resort to history, philosophy or even anthropology. But a comparative jurist has to face this task and to give it a chief place in his labours. Looked at from this point of view, Rheinstein's very brief remarks may be misleading, unless his basic assumption that the term "civil law" describes a "body of law," unified historically and existing only by virtue of this unity, is first accepted.

Of greater interest is, however, his accurate description of the dynamics of family law in the French and German societies in the recent past. Rheinstein considers the problem of equality of sexes, martial law, divergent religious and rationalistic attitudes to divorce and the changing structure of familial authority sometimes ushered in and sometimes reflected by the shifting patterns of family law. Attention is rightly paid to the impact of industrialization on the societies under review and the interaction between law and society as evidenced by academic writings, statutory changes and judicial decisions.

Even a cursory reading of this paper should remind Indian scholarship—both legal and sociological—of the tasks that it seems to have ignored with considerable success so far. Study of family law has never been—for reasons into which we will not go here—prized by the legal scholars in India. We have always concentrated on the Hindu law and its history, with a side glance at its contemporary vicissitudes. This has, perhaps, led to an obscuring of the importance of family law as a separate field of study. Students' exposure to Hindu law is slight and mechanical and no attention is paid to the most significant interaction between society and law as so vividly manifested in the diverse patterns of family law. Studies in the various systems of interpersonal laws and those involving analysis of efficacy of the profound changes in the structure of family law are desperately needed. Research in the judicial willingness to respond to the social welfare legislation affecting the traditional family structure—both at the trial level and at the appellate level—need to be undertaken. This suggestion may sound strange to many of us who are the products of a rule-oriented legal education. But those who read Rheinstein's essay will know how clash of convictions and admiration for the passing values can unconsciously affect judicial response in translating the words on the statute-book in

the "living law."[11]

An interesting part of the family law—besides the domestic and property relations—concerns itself with the legal nature of the family itself. On this depends, very often, more mundane questions of inter-spousal torts and the torts to children, etc. Towards the end of the paper, Rheinstein endorses the view of Professor R. Savatier that family should be attributed a juristic personality. The pragmatic implication of this suggestion may not be self-evident to some, nonetheless, as an interesting legal technique, the implications of this may well be rewarding to consider from the viewpoint of the Indian society.

Hessel E. Yntema's essay on "The Law of Obligations" is a significant analysis of the civil law transactional and tort liabilities and remedies and brings to us, in his peculiar ability to telescope legal history in a few sentences, the flavour of the dim past as the matrix from which the contemporary civil law originated.

In prefaratory remarks, Yntema recalls Sir Henry Maine's more than century-old characterization of the Louisiana Civil Code as "of all republications of Roman Law the one which appears to us the clearest, the fullest, the most philosophical and the best adapted to the exigencies of the modern society."[12] He notes in passing the contribution of the American federal system : "[N]ot the least of its benefits have been that the refined system of the Civil Law has been allowed to develop in Louisiana without serious interference from Washington."[13] This represents for us the broader problem of the impact of the constitutional system in the viability of civil law "pockets" in the common law countries. While it is generally known that the constitutionally superior legal system manages to engulf the civil law enclaves in the common law world, we lack specific comparatists' accounts of the impact of federalism on coexistence of diverse legal orders in time and space.

Yntema, however, sees two specific dangers to the perpetuation of civil law in Louisiana. One lies in "the centripetal shift of legislative power to the Federal Government" which has been "consistently sanctioned by expansive interpretations of the Welfare, Commerce, Due Process, and other Clauses of the Constitution." In an interesting but, in our opinion, alarmist manner, Yntema compares the state of present Constitution of the United States to the plight of Twelve Tables in the Roman Republic, on its "way to becoming a symbolic document,

11. There can be no worse commentary on the state of Indian legal scholarship in this field than the fact that even so versatile a scholar as Rheinstein has to rely on the 1923 edition of Mayne's *Hindu Law and Usage* for the main outlines of the Indian family law. Occasional papers that are written are more descriptive than evaluative or analytic. What we need is not textbooks—such are well provided by Mulla's *Principles of Hindu Law* (12th ed. 1959) and recently by Derrett's *Introduction to Modern Hindu Law* (1963)—but more meaningful analysis of interaction between society and law.

12. *Yiannopolos* 59. The statement was made in 1856.

13. *Id.* at 60.

revered as a source of national unity, the actual meaning of which is not to be found in the original terms, but in the constructions under which they are buried."[14] The significance of this observation is not diminished by the fact that it is far from being a constitutional truism. In fact, its real value lies in its openness to contradiction and controversy.

The second condition that must be taken into account of any evaluation of reform in the Louisiana law is the drive towards unification of law in the United States and in the world. The urge to unify is old and Yntema traces it back to the early part of the nineteenth century. The change of heart that the American Congress has undergone is well shown by Yntema when he points out that by a joint resolution on December 30, 1963, it authorized the President to accept membership for the United States Government in the Hague Conference and the Rome Institute—the two principal agencies working in the sphere of unification of international law, both private and public.

Yntema, in conclusion, stresses the importance of preserving and developing the civil law tradition in Louisiana, as "one of the principal channels for the evolution of Western culture"; emphasizes that it is not essential for a civil law system to have a code and concludes that

> the difference between the Common Law and Civil Law is not, as was supposed in the notable controversy between James C. Carter and David Dudeley Field, between he unwritten and the written—both are written—but in the technique and style in which they are formulated, recorded and arranged... The essence of Civil Law technique is...ideally, the law should be expressed in clear general terms and its equitable application in particular cases ensured by the enlightened administration of justice.[15]

These are familiar insights, assuming, perhaps, greater significance with reiteration. But at a certain level of analytic specificity they emerge merely as platitudes. What the two systems are not is both easy and nowadays, scholastically respectable thing to say, but is not so theoretically important. While the distinction between civil law and common law in terms of writtenness is as inaccurate as illogical, the overgeneralization of the civil law technique evident in the statement cited above leaves us without any specific differentia between the two systems. In other words, it can be said of many a common law systems what Yntema describes as the "essence" of the civil law technique. Aspiration to do justice, to make the law accessible as far as possible to those who are subject to it, and to secure enlightened administration of justice are as important to common law as to civil law.

The paper on the "The Law of Agency" by Wolfram Muller-Freienfels is very comprehensive and authentic study of comparative law

14. *Id.* at 61.
15. *Id.* at 76.

of agency in the two systems. Difficult linguistic and semantic problems which arise in interaction of the two systems are very ably considered by the analyst. The conclusion is logical and sound. The author sees no special policy reasons or significant differences inhibitive of a *rapprochement* on a world wide scale, between the two systems. The reasoning is cogent: "Agency is not a part of the law which must preserve important religious or national peculiarities. On the contrary, that the roots of the law of agency are in the law of merchant indicates its relation to commerce and trade." The usefulness of a world-wide *rapprochement* of common law and civil law especially in this field and the necessity of achieving the best solutions of both legal systems cannot be overstressed."[16]

In the light of this analysis, Indian scholars need to direct their attention to the extent of the hospitality of the Indian legal culture to innovations from the civil law system in this important area. Attempts should be made to examine more specifically how far the law of agency, introduced at a time when legislation not always directly responsive to the peculiarities of the trade and commerce, based on a rather alien value-structure can be more rationalized by a study of solutions used by the civil law systems. To those who may say that these ideas are utopian that a legal system should and cannot be tampered by infusion of alien notions, the essay on "Trusts In Mexico" by Rodolfo Batiza will well function as an attitude-antidote. It is really remarkable that "the trust...has proved a very popular and successful legal commodity for export to civilian jurisdictions."[17] The essay proceeds to individualize this inaugural generalization in terms of the Mexican experience.

Professor Steanfan A. Riesnfeld's paper on "The Security Interests in Land in Modern Civil Law" is a very helpful historical and comparative survey of the field. Professor Riesnfeld finds that the "comparative history of land security runs a curiously meandering and multi-channeled course." In this area of comparative study, "if ever it can be truthfully said that history repeats itself, the law relating to real estate security can be cited as an example."[18] The author focuses his attention on the law of mortgages as the chief sub-area and the analysis leads him to a rather disturbing conclusion for those who would wish to preserve the purity of civil law in Louisiana. "All in all it can be said, therefore, that the modern Louisiana law of land security is, in its results harmonious with the current common law lien type of mortgages."[19]

Of great interest for the theory of comparative law is Riesnfeld's observation that "If a very broad generalization is permitted, it can be said that the comparative legal history of land security (as to both its

16 *Id.* at 126-7.
17. *Id.* at 128.
18. *Id.* at 136.
19. *Id.* at 160.

form and substance) reveals a constant race between draftsmen who strove to invest the secured creditors with vast powers and the lawmakers, judges and legislators, who intervened in the interests of oppressed debtor." [20]

While this may be true of the major European civil law countries as also of the English law, it will be worthwhile for Indian legal scholars in the area of property law to undertake theoretical enquiries as to the success of common law forms of mortgage and its value as a legal institution in a changing India.

An essay of more general nature and greater theoretical significance is "Codification in Modern Times" by Professor S.A. Bayitch. As Bayitch himself recognizes, both the systems have developed "a peculiar awareness of the problems involved in codification and, consequently, offer most useful comparative legal materials." [21] This, if not more, should finally lay to rest the mechanical academic differentiation of the two systems into code system and non-code system.

Surveying a rather formidable literature on the definition of "codification," including the Russian views, Bayitch arrives at some very useful notions which seem to constitute "the basic features" of codification. First, it signifies enacted law which is a vital distinction from customary law. Second, these rules emanate from the legislative branch, sometimes from the executive, but never from the judicial branch; as a consequence, the notion of codified law excludes not only regulations, though they are comprehensive and general in nature and enacted under the authority of judicial rule-making power but also case law in whatever form. Third, a codification contains abstract, general rules. Finally, a codification is concerned with large areas of life in society, for example, private, commercial, criminal and aviation law; it is, therefore, comprehensive in scope and systematically arranged.[22]

"From here on," says Bayitch, "various legal systems go their own ways."[23] He, however, notes that in the civil law countries the term has a precise and definite meaning and can never mean the type of codification that some modern civil law countries have, that is, "showcases of learning rather than tools handed over to the governments to cope with every-day problems."[24]

No one in the defining and differentiating business is ever immune from criticism and comparatists are all the more vulnerable to it. In this excellent analysis, one may likewise be struck with some inadequacies.

20. *Id.* at 137.
21. *Id.* at 162.
22. *Ibid.*
23. *Ibid.*
24. *Id.* at 167.

Do not the third and the final descriptions of codification seem rather contradictory? If the codes are "large" in scope and at the same time "comprehensive" in character, it is theoretically difficult to see how they can be at the same time "general" and "abstract" unless the notion of comprehensiveness is synonymous with undetailed, equivocal expansion of law over life.

The notion that a code excludes the very idea of case law, in an unqualified form, may seem a bit too formalistic. It is submitted that the entire discussion needs a temporal and spatial context. Codification is a historical process occurring in time and space. We can speak of codification only in its *stages* and it may well be true of the very first stage of codification that it rigorously excludes case law. But later on, codification generates case law by its very generality and abstractness. So analytically implicit in the concept of a code is the necessity of judicial gloss, without which it will cease to perform the functions of regulating life or large areas of life.

Besides, the question that Bayitch seeks to answer is a wrong kind of question. His question is "What is codification" and his answer in essence is "This is a code." Codification is essentially a process, may be of a legislative kind but unlike the notion of a code is theoretically less, if at all, subject to confusion. What needs scrutiny is the very notion of a "code." Codification merely accomplishes the task of furnishing us with a code and the nature of codifying enterprise may well be determined by the characteristics which we want to see eminent in a code.

It may now be clear that the question "what is a code" cannot be more meaningfully answered than Llewellyn who said that " a code ...begins of necessity as an experiment. A successful code is an experiment that works." Bayitch does not quite like this analysis and proceeds to analyze "the basic characteristics" of a code. But this he, unfortunately, does in terms of codification. In wishing to answer the question "what is a code?" on here-and-now basis one cannot but overemphasize the formal elements in a code : that it is written, that it is a result of legislative activity of some kind and that it is officially promulgated. This unfortunately does nothing but to tell us what we already know when we ask the question. A more fruitful approach may be to view a code as a communication to the subjects of a legal order as to the regulatory power that the state has assumed over them in terms of its content. What we need is some kind of analytic definition of the notion of a code and not a descriptive enumeration of what it is.

We can only note with admiration Bayitch's analysis of motivation for codification, and the actual process of codification. The analysis is rich in significant details and is a *must* for a comparatist. In the section of "Codified Law in Action" a mention of common law as codified in India and its relative success might well have been a useful tool of

comparison for the civil law enclaves in the common law jurisdictions.

The outlook for codification as Bayitch sees it is bright. Theoretically, it is a bit of over-simplification to say, as Bayitch does in his introductory remarks to the concluding part of his essay, that "everything worth saying on the alternative solutions has been said already in great debates between Bentham and his critics, between Savigny and Thibaut and between Field and Carter."[25]

Bayitch notes the following factors which are conducive to increased codification in both the systems more particularly in the common law system : (i) In the area of civil and common law, "the massive statutory legislation" engendered in the materialization of the ideals of a "welfare state," "will increase the impact of statutory law as compared to the judge made law." (ii) The drive towards unification of law both at the national and international levels. (iii) Development of "a well-balanced relationship between the two main sources of law," viz., the judiciary and the legislature both in civil law and common law and, lastly, (iv) given the continuance of an activist approach, "the monistic societies always have had and have now a better chance to produce grand codifications while the pluralistic societies must be satisfied with some measure of attainable optimum."[26]

A very brief summary of the modern attempts at revision of the French Civil Code since last seventeen years is provided by Roger Houin and is a good corrective to an entirely abstract attitude that one often finds in comparatists' approach to codification.

A book of this kind cannot be more welcome as it fulfils the need for a periodic assessment of the developments in the two main legal "systems" of the world. We may not legitimately expect answers to ultimate jurisprudential questions from such works, for it can always be questioned whether the ramifications of dichotomy between civil and common law are products of scholastic perception of cultural reality. With the narrowing of gaps among the legal systems of the world, evidenced by historical side-glances that enrich this book, one might question whether we are after all not worshipping at a false altar by seeking to preserve one against the other and extolling the virtues of one, decrying the vices of another.

This is by no means to say that there are no significant differences in the legal systems of the world, but only to suggest that the comparatist is likely to be misled into a "heaven of his own conceptions" if he persists in a holistic approach towards them.

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25. *Id.* at 189-90.

26. *Ibid.*

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