MAJOR LEGAL SYSTEMS IN THE WORLD TODAY. By René David and John E.C. Brierley. 1978. Stevens and Sons, London. Distributors: N. M. Tripathi, Bombay. Pp. xv+ 584. Price £ 9.00.

RENE DAVID, the author of the original French text of which the book under review is a translation and adaptation by John E.C. Brierley, is one of the best-known comparatists in the world today. His is a name not unfamiliar to legal scholars in this part of the world, not only because of his writings, but also because of his presence here and his meeting with a number of academics and lawyers when he was in Delhi. In 1973 he conducted a seminar on comparative law for the benefit of a select group of law teachers at the Indian Law Institute.

The present volume under review is the second edition of *Major Legal Systems in the World Today*. The first edition was published in 1968 and it was a translation and adaptation of the second edition of Renè David's *Les Grands Systems de droit contemporains* which appeared in 1966. The present edition of the *Major Legal Systems* is based on the sixth French edition of 1974. The changes made in the French text of 1974 have been incorporated in this new edition. There has also been adaptation to a greater extent in this edition resulting in certain changes in the text as well as alterations and additions to the notes and bibliography.

In the preface to the first English edition René David had stated that "it is absolutely essential at the present time to develop comparative legal studies." He had also claimed in very modest terms that the book "provides the necessary basis for a study of comparative law." One could easily say that the present edition of the book under review provides much more than a necessary basis. Many of the points he deals with he discusses in depth. For instance, in the part entitled 'Law of India' one can see section headings like '*Dharmasastras* and *Nibandhas*', '*Lex Loci* in the Presidency Towns', '*Lex Loci* in the mofussil: first period'. If such details are mentioned in a book dealing with laws in the whole world, it would be difficult to say that the author is content with providing only a basis.

The introductory chapter by itself provides a general basis for study of comparative law; almost everything that a student should know *about* comparative law is given there. David's favourite theme, "international unification of law" is touched upon. He says :

> The international unification of the law touching international legal relations is undoubtedly a major contemporary challenge.... It is not, after all, a matter of replacing any one national law with a uniform supranational law enacted by some world-wide legislator; without going so far, some progress towards a gradual improve-

> ment of international relations can be made through a variety of other techniques. But some international unification of law is required now and more will be necessary in the future. And the harmonization implied by international unification cannot be carried out without the help of comparative law. It is the means whereby the points of real agreement and disagreement between national laws can be revealed and the limits to any unification, geographical or otherwise, which have to be recognised, can be established.[1]

The introduction also gives an idea of what David calls 'a family of laws'. The authors explain the idea of family of laws by observing :

> In law, as in other sciences, one can detect the existence of a limited number of types or categories within which ... (the diversity of laws) can be organised. Just as the theologian or the political scientist recognises types of religious or governmental regimes, so too the comparatist can classify laws by reducing them to a limited number of *families*.[2]

How this classification of laws into families is made is later on explained. The authors state :

> The classification of laws into families should not be made on the basis of the similarity or dissimilarity of any particular legal rules, important as they may be : this contingent factor is, in effect, inappropriate when highlighting what is truly significant in the characteristics of a given system of law.[3]

These characteristics can be detected by examining those fundamental elements of the system through which the rules to be applied are themselves discovered, interpreted and evaluated. While the rules may be infinitely various, the techniques of their enunciation, the way in which they are classified, the methods of reasoning in their interpretation are, on the contrary, limited to a number of types. It is, therefore, possible to group laws into "families" and to compare and contrast them when they adopt or reject common principles as to substance, technique or form.

On the basis of this classification, three distinct families are first discussed in detail. They are the Romano-Germanic family, the common law family and the family of socialist law.

The term Romano-Germanic is used by the authors, in preference to the more common 'romanist', with a view to rendering "homage to the joint effort of the universities of both Latin and Germanic countries"[4]

1. René David and J.E.C. Brierley, *Major Legal Systems in the World Today* 10 (1978, hereinafter referred to as David and Brierley).
2. *Id.* at 17.
3. *Id.* at 19.
4. *Id.* at 22.

in the development of this system of law. In this system "the rule of law is conceived as a rule of conduct intimately linked to ideas of justice and morality".[5]

In the family of socialist laws are found those countries which formerly belonged to the Romano-Germanic family. They have preserved some of the characteristics of Romano-Germanic law, for instance, the legal rule is still conceived in the form of a general rule of conduct.[6] But there are striking differences which make it proper to consider the socialist legal system as detached from the Romano-Germanic family. The authors state:

> The originality of the socialist laws is particularly evident because of the revolutionary nature attributed to them; in opposition to the somewhat static character of Romano-Germanic laws, the proclaimed ambition of socialist jurists is to overturn society and create the conditions of a new social order in which the very concepts of state and law will disappear.[7]

They proceed to point out how a new concept of the socialist system subtracts from the realm of law a whole series of rules which jurists of bourgeois countries would consider legal rules. They observe :

> [L]aw, according to Marxism-Leninism—a scientific truth—is strictly subordinate to the task of creating a new economic structure. In execution of its teachings, all means of production have been collectivised. As a result the field of possible private law relationships between citizens is extraordinarily limited compared to the pre-Marxist period; private law has lost its pre-eminence—all has now become public law.[8]

The common law family includes the law of E ngland and those laws modelled on the English law. It was formed primarily by judges who had to resolve individual disputes. The authors observe :

> The Common Law legal rule is one which seeks to provide the solution to a trial rather than to formulate a general rule of conduct for the future. It is, then, much less abstract than the characteristic legal rule of the Romano-Germanic family. Matters relating to the administration of justice, procedure, evidence and execution of judicial decisions have, for Common Law lawyers, an interest equal, or even superior, to substantive rules of law because

5. *Id.* at 21.
6. *Id.* at 25.
7. *Ibid.*
8. *Ibid.*

> historically their immediate preoccupation has been to reestablish peace rather than articulate a moral basis for the social order.[9]

In the third part of the book which deals with common law, a separate title is devoted to the laws of the United States of America.

"Law of India" is discussed in a title in part IV dealing with "Other Conceptions of Law and the Social Order." Muslim law, Indian law, laws of the Far East and laws of Africa and Malagasy are discussed here. The authors say that the sole justification for grouping them together is the fact that "all of them are based upon conceptions of law and the social order which are altogether different from those prevailing in the West."[10]

This, however, does not mean that they consider Indian law to be outside the common law family. They state categorically that:

> The concepts and legal techniques of any law are the factors determining its classification in one family or another. Indian law, shaped by English lawyers and judges, is necessarily a part of the common law family.[11]

As an example they cite the Indian Penal Code and point out that though Macaulay and his colleagues who were responsible for the drafting of the code attempted to free themselves of established legal systems and endeavoured not to follow English law with a view to providing solutions suited to Indian conditions and needs, they "unconsciously but inevitably followed the line of principles in which they had been educated and with which they were familiar.[12] They also refer, among other things, to the rule of precedent followed by the Indian courts, the concept of the judicial function in India and the importance India attaches to the administration of justice, matters of procedure and the rule of law.[13]

While conceding all these points with some reservation in certain instances such as the importance attached to matters of procedure, one may incline to think that to regard India as a common law country at present has more than an inconsiderable element of anachronism about it. British India could perhaps have been considered a common law country. What present day India presents is a mosaic of laws and legal systems, with perhaps a large number of common law pieces; but the presence of other pieces which go to form the mosaic cannot be disregarded.

Judicial procedures derived from the common law are followed in the regular courts; but in *nyaya panchayats* (village tribunals) which are

9. *Id.* at 23.
10. *Ibid.*
11. *Id.* at 470.
12. *Ibid.*
13. *Ibid.*

envisaged to handle a large number of petty offences and small causes, an informal procedure is introduced. At the grass root level, therefore, it is not the English system that is followed. Further, owing to the delay actually caused in following the English-derived procedure, the common man is very unhappy with it. It is the awareness of this delay that induced Parliament to introduce a new Code of Criminal Procedure in 1973 which again is basically English-oriented. The common man's dissatisfaction persists.

India has undoubtedly received a large number of English legal concepts; but they form only a fraction—perhaps a sizable fraction—of legal concepts prevalent in India. The common man's life is attuned to his acceptance of concepts from the *Dharmashastra* and Kautilya's *Arthshastra*. The pronouncements of Coke or Blackstone have not entered his soul. In his concept of *dharma*, equity and common law completely merge, with the result that he cannot easily conceive of a law which is opposed to his idea of justice. The average man, however, is not overburdened with a sense of *dharma*; he has infirmities, his prejudices and predilictions. He may find justification for them, for his selfish ways,[13a] in precepts of worldly wisdom like those of Kautilya. He may also incline to rely on 'custom' in defence of his ways. And law, English as well as Indian, recognises custom. Further, customary laws of tribal communities and other ethnic groups form part of Indian law; these may not have even nodding acquaintance with the English legal concepts.

Laws grounded in religion govern the lives of various religious communities in their domestic relations. As these relations very often determine the quality and tenor of life of the vast majority of the Indian people more than, say, the law relative to taxes which they may be exempted from paying, family law is no negligible matter. In this area of law, it is only Christians who are subject to the reign of English legal concepts prevalent in England over a century ago. All others have their own laws derived mostly from their respective religions and in some instances from their customs. Christians also can opt out of the special Victorian legal rules which bind them by marrying under the Special Marriage Act, 1954 or by registering their marriage under the Act. The Special Marriage Act, in spite of the provision made in it for dissolution of marriage at a time when the law of the majority community did not permit it, cannot be considered to be totally English-inspired. By permitting divorce by consent, its departure from the English concept of collusion is significant.

The civil ("romanist") law also had their impact on Indian law. In the early sixties of this century, a few regions where civil law prevailed became part of the Indian union. In Goa, Daman and Diu, Portuguese civil law was in force. In spite of the extension of a multitude of British Indian laws to the territory, in the personal law applicable to the people,

13*a*. See the Hindu Gains of Learning Act, 1930.

there are still the provisions of the Portuguese civil code. In the Union Territory of Pondicherry which was under the French before its cession to the Indian union, there are Indian citizens who have accepted the provisions of the French civil code in matters of domestic relations renouncing the personal law which would otherwise be applicable to them and these *renoncants* are governed by the provisions of the French code as the provisions existed at the time of cession. There are also other *renoncants* who are French nationals and to whom the provisions of the French code relative to domestic relations would apply with all the amendments made subsequent to the cession. Though one may be inclined to disregard the prevalance of civil law as confined to certain geographical areas, the influence of civil law system on Indian law cannot be so easily overlooked. The very idea of codification for India stemmed from the success of codes on the continent of Europe, especially the Napoleonic codes. The first Law Commission acknowledged its indebtedness to the French Criminal Code and the Criminal Code of Louisiana[14] in the preparation of the draft of the Indian Penal Code. The draft of the New York Civil Code served the framers of the Indian Contract Act as a model from which they did not hesitate to borrow.[15] With the importance attached to codes and statutes, Indian judges were not in general expected to "find" the law; they were expected to administer the law laid down in the enactments. Interstitial judicial legislation is no monopoly of the common law judge; this is indulged in by judges all over the world. In the early days of their administration of the territories under them, the East India Company did not envisage the introduction of English law into India. The directors unhesitatingly expressed their view that:

> You are to govern our people there, being subject to us under His Majesty by the law martial and the civil law which is only proper to India.[16]

There was no justification for interpreting the words "justice and right" in the Charter of 1726 or the pharse "equity and good conscience" or "justice, equity and good conscience" in several other enactments as importing the principles of English law if suited to Indian conditions. Lethargy is not necessarily a non-judicial trait. If English judges in tropical India with its enervating climate, found it easy to apply principles of English law with which they were familar in preference to going about in search of the actually applicable legal rule, one has to content oneself with the thought that judicial feet also are of clay. It may, however, be

14. C.D. Dharker, *Lord Macaulay's Legislative Minutes* 263.

15. B.K. Acharyya, *Codification in British India* 239.

16. The East India Company's letter to Bombay written on 28 July 1686. Letter Books, 8 *Factory Records* 168.

mentioned that the third Law Commission appointed in 1861 was expected "to prepare for India a body of substantive law, in preparing which the law of England should be used as a basis"[17] and the fourth Law Commission recommended in 1879[18] that English law should be made the basis in a great measure of our future codes, but its materials should be recast rather than adopted without modification.

The commission was nevertheless, inclined to pay due regard to native habits and modes of thought.[19] Derrett has observed[20] that from 1880 or thereabouts to the present day the formula has meant consultation of various systems of law according to the context. The Supreme Court of India has pointed out that:

> [S]ince British and Indian ways of life vary so much that the validity of an anglo-philic bias in Bharat's justice, equity and good conscience is questionable today . . . . Free India has to find its conscience in our rugged realities and no more in alien legal thought.[21]

As we have seen, in the present day India, there have been intrusions made in judicial procedures by the proceedings adopted in *nyaya panchayats*; erosions virtually effected by judges not strictly following the provisions laid down in statutes, as in the instance indiscriminate grant of adjournments; we have also seen that English legal concepts though set out in statutes and regulations as also in judicial pronouncements have not seeped through to the common man so as to form part of his life; we have also noticed that in some of the vital aspects of an Indian's life, it is laws based on religion or social custom that have predominance and not concepts borrowed from elsewhere. In view of all these non-English elements in the legal system, it would be fairer to regard Indian law as a mixed system rather than belonging to the common law family. The same reasons as would induce one to regard legal systems of Indonesia, the Philippines, South Africa and Sri Lanka as mixed systems should incline us to consider Indian legal system also a mixed one.

The two appendices of the book are very useful to students of comparative law. The first provides with the detailed bibliographical information relative to comparative law materials. The second consisting of three sections gives useful information and references. The headings of the sections will indicate how useful is the information that is provided.

17. See A.C. Banerjee, 1 *Constitutional History of India* 315-316 (1977).
18. *Id.* at 316.
19. *Ibid.*
20. J.D.M. Derrett, Justice, Equity and Good Conscience, in J.N.D. Anderson (ed.), *Changing Law in Developing Countries* 114 at 143.
21. Krishna Iyer, J., in *Rattan Lal* v. *Vardesh Chander*, A.I.R. 1976 S.C. 588 at 597.

They are 'Centres of Comparative Law', 'Comparative Law Studies' and 'Comparative Law Libraries'. No other book on comparative law produced in English appears to be as comprehensive and informative as David and Brierley.

Anyone desirous of acquiring a general legal culture would find the book exteremely useful. It should, therefore, be prescribed reading for all students of law.

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