INTRODUCTION

To delve among the laws of India is like bathing in the holy waters of Triveni.[1] It leaves one refreshed and delighted; refreshed from the pleasant contact with almost all the legal systems of the contemporary world, and delighted at the hopeful realization that here in the Indian legal system lie the seeds of a unified, eclectic legal order which may soon grow into maturity and spread its branches, like a banyan tree, all over south and southeast Asia.

Three main streams join together to form the Indian legal system. That of the common law is perhaps the most dominant among them. Then there is the stream of laws springing from religion. The third is that of the civil ('romanist') law which energizes the system with unruffled ethical verse and accords comeliness to its contours. Trickles of customary laws cherished by tribal societies and other ethnic communities also flow into the main stream. Like the Sarasvati near Prayag, the element of the civil law is not easily perceptible, though it permeates the entire structure. So a word of explanation is perhaps warranted.

The very idea of a code appears to have been derived from the codes of continental Europe. When in 1788 a codification of Hindu law on contracts and succession was proposed by Sir William Jones to Lord Cornwallis, it was conceived to be on the model of the "inestimable Pandects of Justinian". On 18 May 1793 "A Regulation for forming into a Regular Code all Regulations that may be enacted for the internal Government of the British Territories in Bengal" was passed by the Governor General and Council.[2] Some eight years earlier, in 1775 Warren Hastings had *A Code of Gentoo Laws or Ordinations of the Pundits* prepared and translated by Halhed, a judge of the Supreme Court at Calcutta.[3] The same year, Bentham offered to act "as a sort of Indian Solon" and thought of "constructing an Indian constitutional code".[4] James Mill, one of his disciples at India House thought that his *Draught of a New Plan for the Organisation of a Judicial Establishment in France* was applicable to India. Speaking on the Charter Bill of 1833 Macaulay said :[5]

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1. Confluence of three rivers; "the place near Prayaga where the Ganges joins the Yamuna and receives underground the Sarasvati." V. S. Apte, II *The Practical Sanskrit-English Dictionary*, p. 791.
2. B. K. Acharyya, *Codification in British India*, 1914, p. 75.
3. *Id.*, at 401.
4. Eric Strokes, *The English Utilitarians and India*, 1959, p. 51.
5. Speech, House of Commons, 10 July 1833, quoted in A. C. Banerjee, I *Constitutional History of India*, 1977, p. 301.

> I believe that no country ever stood so much in need of a code of laws as India, and I believe also that never was a country in which the want might so easily be supplied.

Section 53 of the Charter Act, 1853 declared that it was expedient

> that such laws as may be applicable in common to all classes of the inhabitants.....due regard being had to the rights, feelings and peculiar usages of the people, should be enacted; and that all laws and customs having the force of law.....should be ascertained and consolidated, and, as occasion may require, amended.[6]

The first Law Commission, immediately after its appointment in 1833 with Macaulay as its President, took up the task of codification. Under Macaulay's personal direction it prepared its first draft of the Indian Penal Code and submitted it to the Governor-General in Council on 14 October 1837.[7] When there were complaints that the progress of the Commission's work was unsatisfactory, Macaulay compared its progress with that of the authors of the French codes.[8] He pointed out that though the French Criminal Code was begun in March 1801, the Code of Criminal Procedure was not completed till 1808 and the Penal Code not till 1810.[9] It is also interesting to find that the Indian Codes enacted in the latter half of the last century were on the same branches of law as were the French codes enacted earlier. Neither in India nor in France was enacted a code on the law of civil wrongs.[10] It is true that there was no comprehensive enactment on torts in England, but then, there were no comprehensive enactments in England on any of the subjects covered by the Indian codes.

It is not only in cherishing the idea of codification that the British Indian authorities – executive as well as legislative bodies – appear to have been indebted on continental codes.

As early as 1686 in a letter sent to Bombay[11] the Directors of the East India Company had expressed the view that :

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6. Quoted in C. Ilbert, *The Government of India,* 3rd ed., 1915, p. 86.
7. G. C. Rankin, *Background to Indian Law,* 1946, p. 196.
8. He wrote: "Bonaparte had at his command the services of experienced jurists to any extent to which he chose to call for them. Yet his legislation proceeded at a far slower rate than ours." C. D. Dharker, *Lord Macaulay's Legislative Minutes,* p. 254.
9. C. D. Dharker, *Ibid.*
10. This has been pointed out by Rene David. See David and Brierley, *Major Legal Systems in the World Today,* 2nd Ed., 1978, p. 468.
11. Letter Books, 8 *Factory Records*, p. 168. By 'civil law' Roman law is meant. See J. Minattur, "Legal Systems in British Indian Settlements", 15 *Journal of the Indian Law Institute,* 1973, p. 582 at 590.

> 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.

The first Law Commission which drafted the Indian Penal Code acknowledged its indebtedness to the French Penal Code. In a letter of 2 May 1837 addressed to the Governor-General the Commission stated that it

> derived much valuable assistance from the French Code and from the decisions of the French Courts of justice on questions touching the construction of that Code.[11]

It "derived assistance still more valuable from the Code of Louisiana prepared by the late Mr. Livingston."[12]

The second Law Commission which sat in London from 1853 to 1856 expressed its view that[13]

> What India wants is a body of substantive civil law in preparing which the law of England should be used as a basis.

It, however, emphasized that such a body of law ought to be prepared "with a constant regard to the conditions and institutions of India, and the character, religions and usages of the population.[14] It also stated that in the social condition existing in India it was

> necessary to allow certain general classes of persons to have special laws, recognized and enforced by our courts of justice, with respect to certain kinds of transactions among themselves.[15]

The Commission gave final shape to Macaulay's Penal Code; it also prepared drafts of the Code of Civil Procedure and the Code of Criminal Procedure incorporating into them materials left by the first Law Commission. The Legislative Council adopted the Code of Civil Procedure in 1859, the Penal Code in 1860 and the Code of Criminal Procedure in 1861.

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11. See C. D. Dharker, *supra* note 8 at 263.
12. *Ibid.* In spite of this acknowledgement Whitley Stokes and James Stephen, both successors of Macaulay in the office of the fourth ordinary member of the Governor-General in Council were of the opinion that the basis of the Penal Code was the Law of England. Stephen described it as "the criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars (they are surprisingly few) to suit the circumstances of British India." (Stephen, III *History of the Criminal Law* 1893, p. 332. Vesey-FitzGerald, however, thinks that this view is probably exaggerated. (*Jeremy Bentham and the Law*, p. 329 cited in A. C, Banerjee, *supra* note 5 at 310.
13. Quoted in A. C. Banerjee, *id.*, at 314.
14. *Id.*, at 314-315.
15. *Id.*, at 315.

The third Law Commission, appointed in 1861, was enjoined to prepare for India a body of substantive law, in preparing which the law of England should be used as a basis. The fourth Law Commission expressed a similar view when it recommended in 1879 that[16]

> 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.

It, however, added that in recasting those materials due regard should be had to native habits and modes of thought.

The influence of Scots and their law on the framing and adoption of the early British Indian codes and other enactments deserves to be mentioned. For a number of Scots in the 19th century their prospects were not only along the highway to London, but from there across the high seas to Indian ports. Macaulay himself was of Scottish descent.[17] Even when Scots were members of the English Bar, they were imbued with concepts derived from the civil law system. In the same way as they would prefer to preserve Scots law untainted by English notions of legal rules, they were inclined to keep Indian law unsullied by intrusions and erosions by English rules of law and tended to give due regard to native habits and modes of thought.

We shall refer to a few instances where the influence of the civil law is clearly discernible. Section 11 of the Indian Evidence Act adopted in 1872 could not have been enacted in a fit of absent-mindedness. The section[18] which lays down guidelines to determine relevance in the admissibility of evidence is a clear, and presumably a deliberate, departure from the English rule and brings the Indian law in this respect very near to what the French would consider relevant and fair. Another[19] provision, which is of interest in this regard, is section 165 of the Act. Commenting on it, Stephen has said:[20]

> Section 165 is intended to arm the judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that in order to get to the bottom of the matter before it the court will be able to look at and enquire into every fact whatever.

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16. *Id.*, at 316.
17. T. B. Macaulay (later Lord Macaulay) was the grandson of a Hebridean minister. The members of the Commission who were of great assistance to Macaulay in drafting the Penal Code were J.M. Macleod and J. H. Cameron. According to David and Brierley, a Scottish influence is most noticeable in the Indian Penal Code. (Rene David and J.E.C. Brierley, *supra* note 10 at 469).
18. See *infra* at 269.
19. See *infra* at 299.
20. James FitzJames Stephen, *The Evidence Act with an Introduction on the Principles of Judicial Evidence*, 1972, p. 124.

The Indian judge appears to be invested with ample powers under the Act to get at the truth and form his own *conviction in time.*

It is not unfamiliar learning that the framers of the Indian Contract Act adopted several provisions of the Draft New York Civil Code.[21] The Contract Act which does not purport to be a complete code, only defines and amends certain parts of the law of contract, so that a rule of the Hindu law of contract like *damdupat* is not abrogated. The rule stipulates that interest exceeding the amount of principle cannot be recovered at any time. It is still in force in some parts of India.[22] The reason for not interfering with a rule like this must have been the sense of fairness cherished by the framers of the Act, though no such rule existed in English law.

In the law of contract, consideration plays a significant role in India as in England. But the words of section 25 of the Indian Contract Act which accords validity to a registered agreement, induced by natural love and affection, even though without consideration, appears to reflect the concept of *cause* in French law.

In this brief introduction it is not intended to indicate all departures from English law in the Indian statutes. It may, however, be emphasized that when such departures were made, the legislators were generally induced to do so on considerations of what they thought suited Indian conditions or on considerations of equity.

It is generally assumed that India is a common law country. This assumption may[23] have been justified to a certain extent if applied to British India. It is true that many of the concepts and most of the judicial techniques are of common law origin.[24] But there is more than a sprinkling of other concepts and techniques which cannot be overlooked. Indian codes of judicial procedure owe a great deal to procedure in England. But with the introduction of *nyaya panchayats* (village tribunals) which are indigenous in origin the English procedure has been virtually replaced at the grass root level. The functioning of *nyaya panchayats* may not be as widespread as is desired; the fact, however, remains, that at present there is a less formal procedure than the one followed until recent years. There is also general dissatisfaction, if not hostility, to the complex, protracted procedure derived

21. See B. K. Acharyya, *supra* note 2 at 239.
22. It is in force in Maharashtra, Gujarat, parts of Karnataka, parts of Madhya Pradesh, Calcutta, Berar and Santhal Parganas. See Paras Diwan, *Modern Hindu Law*, 2nd ed., 1974, p. 441.
23. Rene David, among others, holds this view. He says: "India continues to be a member of the Commonwealth and remains a Common law country." (Rene David and J.E.C. Brierley, *supra* note 10 at 472.
24. David and Brierley stated: "Indian law, shaped by English lawyers and judges, is necessarily a part of the Common law family." (*supra* note 10 at 470; emphasis added).

from the common law system. With the reign of *dharma* which may be equated with equity while it comprises the concept of law unopposed to justice, there was no need in India to think of a separate branch of law known as equity detached from common law.

We have already adverted to certain departures from English law even when rules of English law were believed to have been codified for the benefit of the Indian people. Neither the expression "justice and right" in the Charter of 1726 nor the phrase 'equity and good conscience' or 'justice, equity and good conscience' in several regulations and Acts could have meant the principles of English law.[25] The Judicial Committee of the Privy Council was careful in its use of words when it pointed out that equity and good conscience had been "generally interpreted to mean rules of English law if found applicable to Indian society and circumstances."[26] It has been observed that from 1880 or there abouts to the present day "the formula has meant consultation of various systems of law according to the context".[27] At present the Supreme Court of India is inclined to think the phrase has to be given a connotation consonant with Indian conditions.[28]

In the early 1960s a number of territories where the civil law system prevailed became parts of Indian Union. In the Union Territory of Goa, Daman and Diu, Portuguese civil law was in force. Even after the extension of several British Indian enactments to the territory, it is generally the provisions of the Portuguese Civil Code which apply to the people of this territory in matters of personal law. In the former French settlements of Pondicherry, Karaikal, Mahe and Yanam which, when ceded, were formed into the Union territory now known as Pondicherry, there are Indian citizens who are governed in matters of personal law by the provision of the French civil code as they existed at the time of the cession. There are also other *renoncants* who are French citizens living in Pondicherry to whom provisions of the French Civil Code relating to personal law will apply with all subsequent amendments. In these circumstances, the element of the civil law in the fabric of Indian law cannot be brushed aside as negligible. And this element affects domestic relations which are no negligible part of a citizen's life. The customary laws of various tribal communities and other ethnic groups also form part of the law administered in India. To cite one instance: matriliny among the mappila Muslims of Kerala, though not

25. Regulation VII of 1832 for Bengal specified that the formula "justice, equity and good conscience" was not to be interpreted so as to justify the application of English law or some other foreign legal system. (David and Brierlay, *supra* note 10 at 466). See also J.D.M. Derrett, "Justice, Equity and Good Conscience" in J.N.D. Anderson (ed.), *Changing Law in Developing Countries,* 114 at 142.
26. *Waghela Rajsanji* v. *Shekh Masludin* 14 I. A. 89 at 96 (1887).
27. J.D.M. Derrett, *supra* note 25 at 143.
28. See *Rattan Lal* v. *Vardesh Chander* AIR 1976 SC 588, 597.

favoured by the tenets of Islam, is permitted to play a decisive role in the rules of succession applicable to them.[29]

In the light of the presence and prevalence of French and Portuguese civil laws, customary laws of various ethnic groups and laws based on religion of the several communities, the introduction of indigenous judicial procedures in village tribunals and several other factors, one cannot possibly close one's eyes and regard the Indian legal system as belonging to the common law family. It would be more justified to regard it as a mixed system. If Indonesian law with its admixture of customary laws and laws based on religion could be regarded as a mixed system,[30] there is no reason why Indian law should not be so regarded. Though the provisions of the French and the Portuguese civil codes relating to domestic relations are in operation in certain regions only, laws grounded in religion or custom are followed all over the country. The mosaic if Indian law may have a large number of common law pieces; but marble quarried from France and Portugal, gold leaves brought from Arabia and clusters of precious stones gleaned from Indian fields do not deserve to be disregarded.

When India adopts a civil code, under the directives in the Constitution,[31] it is likely to be eclectic in character; it may have in it a harmonious admixture of various laws based on religion and customary laws, as well as provisions derived from western codes and the English common law. Owing to its eclectic character and especially because it would attempt to harmonise provisions of personal laws derived from religions prevalent in the region, the civil code may be found worthy of emulation in south and southeast Asia. It may thus pave the way for unification of laws, though perhaps limited geographically in extent. If in ancient days, Indian culture was permitted, without any hitch or demur, to permeate social and political institutions and life in general in this region,[32] there is no reason why Indian legal culture cannot play a similar role in the near future as well. The (then) Indian Prime Minister has expressed his hope that in the next few years, India would achieve significant progress in every field and would

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29. A similar social institution exists in Indonesia and Malaysia. See B. ter Haar, *Adat Law in Indonesia* (1948); also J. Minattur, "*The Nature of Malay Customary law*", in D. C. Buxbaum, *Family Law and Customary law in Asia,* 1968, p. 17.
30. See David and Brierley, *supra* note 10 at 73. The authors consider the Philippines law also a mixed system (*ibid.*).
31. Article 44 of the Constitution reads:
The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.
32. See N. B. Hooker, "The Indian-derived Law Texts of Southeast Asia", 37 *Journal of Asian Studies,* 1978, p. 201. During the days of British administration, certain British Indian enactments were adopted with modifications in the Malay States, in Sudan and East Africa and heavily borrowed from in parts of West Africa.

provide guidance and inspiration to other countries. He also stressed that India's influence had been increasing in southeast Asia and west Asia.[33] One can hopefully assume that if an Indian civil code is adopted soon, it may tend to guide and inspire legislators in the neighbouring states. What the Napoleonic code has done for continental Europe, the Americas, and parts of Asia and Africa, a well-framed Indian civil code may easily do for south and Southeast Asia.

Joseph Minattur

33. *The Times of India*, 26 May 1978, p. 7.