

Book Review: Chiba, M. (ed.), **Asian Indigenous Law in Interaction with Received Law** (KPI. London and New York) 1986; Smith, J. C., and Weisstub, D.N., **The Western Idea of Law** (Butterworths, Toronto) 1983.

Reviewed by Lyndel V. Prott*

Masaji Chiba, the editor of **Asian Indigenous Law**, rightly comments that the study of non-Western legal systems has too often been made on the basis of Western jurisprudential concepts, though he concedes that this is partly due to the fact that scholars from non-Western countries "have not succeeded [in presenting] nor even attempted to present the achievements of their jurisprudence before the world centre of legal science forcibly enough to cause the proponents of Western jurisprudence to doubt their conviction of its universality" (p.2). So often narrative accounts of the "reception of Western law" stop short of the kind of analysis which Chiba seeks to provide - and not all the authors in this volume attempt it: Kasemsup's contribution on Thailand, though informative and filling a gap in current literature, falls well short of it.

The two most illuminating authors on the conceptual level are Baxi (on India) and Chiba (on Japan and, especially, in the Introduction and Conclusion). Chiba's emphasis on the need to examine the legal postulates against values which justify the law - official or unofficial - describes a useful tool in assessing the effectiveness, or likely effectiveness, of an imported set of norms. But, while this does not reflect the concepts of the positivist strand of Western jurisprudence, it is an approach followed for decades by Western sociological jurists. A description of any of the six Asian systems in this book on the basis of a state-based positivism would be manifestly incomplete: the usefulness of a "living law" approach (and this is, after all, to go back to Ehrlich), seems, however, to provide a useful framework.

Apart from the theoretical issues raised, this book abounds in facts, insights and comparisons which stimulate. It is notable, for example, that in some cases the "indigenous law" had itself been received and had replaced an earlier system: thus Islamic law in Egypt

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replaced the Roman law which itself replaced the Pharaonic system; in Iran it replaced the Sassanid law - some elements of which appear to have been incorporated in the new system. Again in some cases, notably Egypt and India, legal pluralism did not begin with the reception of a Western style legalism, which simply added another legal system to the plurality, already co-existing and sometimes conflicting, within the society. A further corrective to a simplistic view of "reception" is the evidence of the very long process of this reception, e.g. in Egypt, India and Iran, where the most recent Western style codes and enactments followed well over a hundred years of attempted Westernisation of law, nor are they necessarily the end of that process. Particularly perceptive are the studies of Baxi (India) and Taleh (Iran) in describing how the establishment of courts and the function of the judiciary have had a cardinal role in the success or defects of the implantation.

Baxi has given some detail of the lack of penetration of the state-centred legal system to all levels of Indian society, and his study provides some warnings for those who favour increased centralisation of legal power at the international level. For example, "consensus" is currently regarded as a prime method of law-making within international organisations - we should heed his warning that it needs very critical analysis, since in India, which has a long tradition of decision by consensus, consensual style decisions often effectively serve the dominant interest because the "consensus" is "pre-fabricated, contrived or manipulated". The durability of caste-oriented values at the village and other levels, despite the Indian constitution's espousal of equality, and even benign discrimination for certain groups, shows the resilience of non-Western values and suggests that legal pluralism prevents greater dislocation than would occur if the national legal system were more effective. Taleh concludes, in respect of Iran, that Western inspired premisses of legal capacity, individual rights, judicial rationalism, popular sovereignty and a host of similar Western inspired premisses were almost totally alien to and incompatible with the religious traditional values to which that society was deeply committed and was thus at the centre of discontents which gave rise to the 1978 revolution.

One conclusion from all six studies seems clear: the most successful transplantations are those which met the interests of the dominant groups. This explains, for example, the apparent smoother acceptance of Western law in Egypt with its stormy career in Iran.

An interesting contrast to Chiba's volume is Smith and Weisstub's The Western Idea of Law. These authors seek to show, by means of extracts from over 200 authors, that the radical changes which they see as necessary to meet human and cultural needs over the next millenium, are probably no more impossible than the transformation of the Graeco-Roman and Judaic law, and even the pre-literate mythological origins of law, in the shaping of the present Western idea of law. In tracing this historical evolution, the authors draw on the writings of legal philosophers, anthropologists, legalhistorians, sociologists, philosophers (ancient and modern), comparative lawyers, theologians, kings, judges, and statesmen, politicians, feminists, metaphysicians and social-theorists of almost every type, as well as on ancient laws and classics. The extracts are organised in four main divisions; law and culture, the mythological origins of law, the foundations of Western law and law and state. Each of these divisions has a brief, though dense, introduction by the authors. The difficulty with this structure is to know exactly how best to use such a volume. To be persuaded, for example, of the interpretation placed on the development of the Western legal tradition (especially, for example, in the richly suggestive section on the mythological origins of law), I would need a fuller argument, a more developed theory, than the authors can provide in such necessarily brief introductory notes. The authors argue that Western legal systems reflect the dominance of patriarchal systems of social control which arose after the breakdown of matriarchal systems in pre-historic times, and that the present crisis in Western legal theory is due to the breakdown of the patriarchy. The idea of law will need to accommodate, the authors say, androgeny, and this will only be possible if it can digest the impact of psychology on the twentieth century mind. A series of linked extracts, of varying lengths and written for widely divergent purposes, may illustrate, but can hardly formulate, such an argument. On the other hand, if used as teaching materials, they would have to be presented by the teacher with such an argument, since the coherence planned by the authors may not be obvious to undergraduates. In other words, the book may be too general for the specialist and somewhat too specialised for the student.

Though my preference would be for rather more commentary, at the expense of some of the extracts, there is no doubt that there is some excellent and far-ranging teaching material here. The thirty pages on the development of the concepts of property law, particularly the separation of title and possession, well illustrate the way in which legal concepts and fictions are developed

to meet the needs of particular societies. The section on the integration of later philosophies into Christianity and their consequent influence on law is interesting, though to be complete, surely some reference to Weber's work on impersonality and individualism is necessary. The concluding sections of the book, dealing with the individuation of the human personality and freedom, are some of the most difficult and some of the most tantalising, for it is here, most of all, that the reader needs the authors to present their own views or at least make some suggestions as to how the necessary synthesis of psychological and legal theory is to be made. The great merit of the volume consists in representing well-known themes of legal history from unusual perspectives and bringing together the serious stuff of disciplines other than law in illustrating them.

The whole work is indeed a direct refutation of Chiba's assumption that Western jurisprudence is a monoculture - positivism. Smith and Weisstub show just how many divergent strands, have made up the Western idea of law - and these authors' compilation is a further example of the dynamism and innovation in contemporary Western legal theory.