MALAYSIAN LAW By R. H. HICKLING. [Kuala Lumpur: Professional Law Books Publishers. 1987. ix + 222 pp. Softcover: M$45.00]

THERE is only one thing wrong with this splendid book: and that is the title (of which more anon). If that be the first comment, the second must be that Professor Hickling has written it in a style which one thought had disappeared from legal writing with F.W. Maitland: it is a joy to read. Not only is the book a joy to read, it is also important because of Professor Hickling's approach to his subject. He commences in a critical vein and writes:[1]

> Compelled to view jurisprudential thought as originating and developed in an exclusively Western environment, the Malaysian law student is seldom referred to Asia as a source of legal theory and, when he is so referred, the reference is usually in slighting terms. The basic concept of law seems to be that it is a kind of gift from the West to the East, originating in European philosophy, practice and politics. This is an absurd fallacy, and it is time the boundaries of Malaysian jurisprudence were altered, to put Malaysia at their centre.

[1] At p. ii

Now this is well said, and long overdue. Moreover, not only are the boundaries of Malaysian jurisprudence to be altered, but warning is given to "Western" jurisprudes to learn their place:[2]

> A writer such as Hart considers law entirely within a European context. Primitive societies may merit a footnote, and overseas legal systems wise enough to derive their inspiration from European sources earn a mention: but the reader will look in vain in *Hart's Concept of Law,* or even in such an admirable work as *Friedmann's Legal Theory,* for reference to any Asian or African legal system. Law is, it seems, a gift of Western civilization to the rest of the world. The fact that law as a concept was known in Asia long before it developed elsewhere is unobserved, unregarded. Were such a book simply a study in analytical European jurisprudence, well and good; but when the author suggests that it is also an essay in universal principles then its limitations soon become apparent.

Now the relevance of English law to Malaysian society has frequently been doubted (of which, again, more anon) and Professor Hickling is naturally one of the doubters. His thesis in this book, however, goes much further than that; he is not concerned with the relevance of this or that piece of substantive law: he is questioning the relevance of the English concept of law, of English notions of the function of law and its place in society. In short this book is a call for a Malaysian jurisprudence, *i.e.,* a jurisprudence which draws upon the earlier and older traditions which constitute the palimpsest which is the Malaysian legal system. Now since this involves changing the paradigm, as it were, it is an inherently difficulty task. The difficulty was pointed out by Ruth Benedict who, speaking of culture in general, observed:[3]

> In culture too we must imagine a great arc on which are ranged the possible interest provided by the human age cycle or by the environment or by man's various activities. A culture that capitalized a considerable portion of these would be as unintelligible as a language that used all the clicks, all the glottal stops, all the labials, dentals, sibilants and gutterals from voiceless to voiced and from oral to nasal. Its identity as a culture depends upon the selection of some segments of this arc. Every human society everywhere has made such a selection in its cultural institutions.

It is obvious, of course, that cultures and civilizations have been exerting influence on each other, with varying degrees of compulsion, for rather a long time now. Gordon Childe used to explain several millenia of pre-history as "the irradiation of European barbarism by Oriental civilization",- and it is a good many years now since Juvenal complained that the Orentes was flowing into the Tiber.[5] Over the last few hundred years the waters have, as it were, reversed their flow. What Professor Hickling is exploring is the possibility of mixing the waters; drawing on the accumulated experience of two separate traditions without producing a Benedictine cacophony. Hence the

[2] At p. 4
[3] *Patterns of Culture* (1961) at p. 17.
[4] "Retrospect" (1958) 32 *Antiquity* at p.70
[5] *Iam pridem Syrus in Tiberim dejluxit Orontes.*

difficulty of his task and the importance of his book, whose title should be something like *The Concept of Law in Malaysia* or *Introduction to Malaysian Jurisprudence,* for no less than that is the task that Professor Hickling has set for himself.

So far so good. Precisely what is involved here, however, needs careful consideration, for the significance of Professor Hickling's perspective should not be allowed to go unappreciated through over-enthusiastic enunciation. Thus when we read, as in the above passage: "the fact that law as a concept was known in Asia long before it developed elsewhere is unobserved", we are inclined to wonder. If *ubi societas ibi ius,* which seems a reasonable proposition, then assertions as the origins of law are as futile as assertions as to the origins of language.[6] When we further read that: "I have endeavoured to cut myself off from Western sources of jurisprudence as much as possible" one is inclined to wonder whether this is not a case of throwing the baby out with the bathwater, for if this means that insights are to be rejected merely because they are of Western provenance, then the approach seems somewhat unnecessarily austere. Professor Hickling is critical of a tradition in which:[7] "the student is taught to admire the verbal idiosyncracies of Kelsen, Weber, Pound, Olivecrona, Hart, Rawls and those others who haunt the textbooks of modern jurisprudence". That some at least of the writers mentioned should be placed upon the index of Malaysian jurisprudence would not necessarily raise much *angst*; but why Weber? One would have thought that the Malaysian legal system cried out for somewhat rather like Weberian analysis.[8]

The point which Professor Hickling is making is akin to that which perturbed historians some years ago. The charge was that the history of South East Asia was being written from a Eurocentric point of view. The charge appears first to have been laid by van Leur who, in a review first published in 1939, complained that, after the arrival of ships from Western Europe:[9] "the Indies are observed from the deck of the ship, the ramparts of the fortress, the high gallery of the trading house". Hall, in the first edition of his *History of South East Asia,* inveighed against the practice.[10]

> What is attempted here is first and foremost to present South-East Asia historically as an area worthy of consideration in its own right, and not merely when brought into contact with China, India or the West. Its history cannot be safely viewed from any other perspective until seen from its own.

Subsequently Professor Bastin entered a *caveat* and thereafter the pages of the *Journal of South East Asian History* were enlivened with

6 As Professor Hickling himself points out at p. 15.
7 At p.ii.
8 To which one might add F. Tonnies, *Gemeinschaft und Gesellschaft* (1887) trans C.P. Loomis as *Community and Association* (1955) or E. Ehrlich *Grundlegung der Soziologie des Rechts* (1913) trans W.M. Moll as *Fundamental Principles of the Sociology of Law* (1936).
9 *Indonesian Trade and Society: Essays in Asian Social and Economic History* (1955)
10 See the Fourth Edition (1981) at p.xxix.

many contributions on the subject."

Professor Hickling makes much the same point complaining that the legal history of Malaysia has tended to start with the arrival of Captain Light in 1786, and he adds:[12]

> What is important to note, perhaps, is that there were kingdoms and sultenates long before the common law arrived in the Straits Settlements between 1786 and 1824, and that Malaysia possessed its own legal systems long before any Westerners appeared on the scene.

Again the point is well made, and although Hall's *apologia* is not without force:[13] "the *apparatus scholasticus* required by the researcher into the earlier period takes a lifetime to acquire", the need for such research is undoubted.

Underlying much of the criticism, as it is applied to law, appears to be the notion that there exists a "western" (or European) idea of law which is different from an "eastern" (or Oriental or Asiatic) idea of law. This is a notion which needs closer examination than it has. hitherto received. Any consideration of the history of "western" legal philosophy reveals a great diversity of schools and it would be difficult to determine which should be regarded as quintessentially "western". Professor Hickling has written: "For a lawyer of my generation, jurisprudence ended with the precepts of Austin and the insights of Salmond". That may be so but it is a judgment which reflects on the inadequacies of the English legal education, and there seems to be no reason for identifying "western" notions of law with positivism, which is but one of many approaches thrown up within the "western" tradition.

By the same token one may doubt whether there exists any monolithic "eastern" (or Oriental or Asiatic) legal tradition. One would, one suspects be hard pressed to identify that which was common to the Hindu and the classical Chinese approach to law by which they could both be distinguished from some sort of postulated "western" tradition. Furthermore even within the classical Chinese tradition there is a clear distinction between the Confucian approach and that of the *Fa Chia,* and one suspects that Han Fei Tzu would have

" See D. P. Singhal, "Some Comments on 'The Western Element in Modern Southeast Asian History' "(I960) 1 JSEAH 118; J. R. W. Smail, "On the Possibility of an Autonomous History of Modern Southeast Asia"(1961) 2 (2) JSEAH 72 and G. I. T. Machin, "Colonial Post-Mortem: A Survey of the Historical Controversy"(1962) 32 JSEAH 129. Yet a further example of much the same point which I encountered only the other day is the following passage from Antony Burgess, *Language Made Plain* (2nd ed. 1975) at p. I11: "The smugness of scholars like John Stuart Mill, who saw in the 'eight parts of speech' fundamental categories of human thought, required, and still requires, the cold douche of contact with an Asiatic language. There is nothing universal about our Western grammatical compartments, and, at best, they are somewhat shoddy and makeshift when applied to the languages for which they were formulated. There are too many assumptions, too little desire (there never is much where vested interests are involved) to look facts in the fact". An insight which all lawyers, as Professor Hickling would agree, need to bear in mind.

[12] Atp.27

[13] *Op. cit.* at p. xxiii

[14] Atp.i

more in common with, say, Hobbes (for all that he is "western") than with a Confucian scholar (for all that they were both "eastern").

The fact that some of these over-simplistic antitheses stand in need of re-examination does not affect Professor Hickling's point, for it remains true that there are more concepts of law than one — indeed there are more than two — and a study of jurisprudence which is to avoid the charge of provincialism must in effect be comparative,[15] and this remains the fundamental thrust of Professor Hickling's argument.

The cardinal fact about the contemporary Malaysian legal system is, nevertheless, the notion of the reception (or imposition)[16] of English law. Starting from that premiss generations of lawyers have looked no further. Professor Hickling is pleading for Malaysian lawyers to widen their vision and to see their law not wholly in terms of reception, but also in terms of their own culture, and to re-think the problems confronting contemporary Malaysian society in a wider perspective.

The notion of reception of law, whilst of long standing, remains mysterious. Montesquieu made the point many years ago:[17]

> the political and civil laws of each nation … should be adapted in such a manner to the people for whom they are framed that it should be a great chance *[un grand hazard}* if those of one nation suit another.
>
> They should be in relation to the nature and principle of each government: whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions.
>
> They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandment, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine they must have relations to each other, and also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered.

Were this to be so, it would be difficult to understand how reception of law could ever occur: yet it did. Thus Sir Paul Vinogradoff has commented.[18]

> Within the whole range of history there is no more momentous and puzzling problem than that connected with the fate of Roman

[15] This is implicit in Austin's notion of general jurisprudence. See his *The Province of Jurisprudence Determined* ed. H.L.A. Hart (1968) at pp. 365 *et seq.*

[16] The term "imposition" is borrowed from Tedeschi: "On Reception and the Legislative Policy of Israel" (1966) *Scripta Hierosolymitance* 11. See now S. B. Burman and B. E. Harrell-Bond, *The Imposition* o/Law (1979).

[17] *Esprit des Lois* (1748) trans, by T. Nugent as *The Spirit of The Laws* (1949) at pp. 6-7

[18] *Roman Law in Mediaeval Europe* (1909) at p. 11

> Law after the downfall of the Roman State. How is it that a system shaped to meet certain historical conditions not only survived those conditions, but has retained its vitality even to the present day, when political and social surroundings are entirely altered? Why is it still deem'ed necessary for the beginner in jurisprudence to read manuals completed for Roman students who lived more than 1500 years ago? How are we to account for the existence of such hybrid beings as Roman Dutch Law or the recently superseded modern Roman Law of Germany? How did it come about that the Germans, instead of working out their legal system in accordance with national precedents, and with the requirements of their own country, broke away from their historical jurisprudence to submit to the yoke of byone doctrines of a foreign empire?[19]

Lawson's answer to that particular problem was clear:[20]

> There is little or nothing that is purely national in the Roman law contained in Justinian's *Corpus Juris.* It was ready for reception by any people that had reached a state of civilisation which demanded it and was capable of using it.

Koschaker was equally uncompromising:[21]

> Foreign law is not received because it is considered the best. What makes a legal system suitable for reception is rather a question of force *[eine Machtfrage].*

Certainly the answer to the question of why there was a reception of English law overseas is straightforward: colonialism *i.e.,* imposition by the imperial power. And yet the relationship between law and society is not a purely one-way street, for whilst society undoubtedly influences law, it is equally true that law influences society, for as van Caenegam has stressed:[22]

> It is possible that national character, a vague but nevertheless real thing — that the Normans were different in type from the English is clear enough — may just as well be the product of the legal system as the other way round. There is little doubt that living for centuries under the Common Law must have produced many 'Anglo-Saxon attitudes'.

Nevertheless there is sufficient substance in the view that law should in some way reflect some sort of Savigean *Volksgeist* to cause one to ponder. And in pondering it is as well to be clear as to who are the *Volk* with whose *Geist* one is concerned. For a Malaysian lawyer sitting in his air-conditioned office in Kuala Lumpur with his fax on one side and his telex on the other negotiating syndicated loans, aircraft leasing agreements or multi-national construction contracts, the *Volk* whose *Geist* he is concerned with is that of other lawyers sitting in other offices negotiating the same sorts of agreements, *i.e.,* he is not likely to find much joy in the *Undang Undang Melaka.* Yet quite clearly there are other areas of law in which the *moeurs* of the local community are

[19] Written, of course, eighty years ago.
[20] *A Common Law Lawyer Looks at the Civil Law* (1953) at p.96
[21] *Europa und das rdmische Recht* (1947) at p. 138
[22] *The Birth ofthe English Common Law* (1973) at p. 87

crucial. Both aspects need to be taken into consideration, and Professor Hickling is claiming that the balance, as it were, needs to be held with a more even hand.

Approaching jurisprudential problems from the perspective from which he does Professor Hickling is able to bring new insights to bear on many an old problem, only some of which can be touched upon here.

Professor Hickling thus raises the issue of sovereignty, that *pons assinorum* of jurisprudence and comments:[23] "It is impossible to understand the concept of sovereignty in Malaysia except in Malaysian terms", in which he is surely correct. For a Muslim, for example, there is no real problem: sovereignty is vested in Allah, and the courts of Pakistan needed no western jurisprude to tell them that. And whatever Allah may be He is not a *Grundnorm.* Here again we see the clash of two distinct approaches to the problem. The Roman imperial position was clear: *quod principi placuit legis habet vigorem.* For Bracton however *Rex non debet esse sub homine sed sub deo et sub lege quia lexfacit regem.* Who is to be boss? The all too palpable *rex* or the impalpable *iusl* Antigone had no doubts on the matter, and paid for her conviction with her life. Are there principles of law which control even the legislative sovereign, and if there are where are they to be found? Ah! there's the rub. For if there are such principles they are *in gremio judicis,* and for the positivist this is drifting perilously close to the shoals of natural law.

The matter may be approached from a different angle. Sir Carlton Allen has spoken of "two antithetic conceptions of the growth of law":[24]

> In the one, the essence of law is that it is imposed upon society by a sovereign will. In the other, the essence of law is that it develops within society of its own vitality. In the one case, law is artificial: the picture is that of an omnipotent authority standing high above society, and issuing *downwards* its behests. In the other case, law is spontaneous, growing *upwards,* independent of any dominant will.

Now whilst it is undoubtedly true that the centre of gravity of most contemporary legal systems has shifted towards the descending thesis of law, which in practical terms means legislation, the spontaneous development of rules continues albeit in a subordinate role: not, of course, *contra legem* but *praeter* or *secundum legem.* Professor Hickling provides an example drawn from the field of mercantile custom, a concept which would indeed support a much greater weight than judges are normally prepared to put upon it. Professor Gower has provided yet a further example when he wrote:[25]

> Although we like to pretend that only Parliament and the judges make law, the fact is that the legal and accountancy professions by their interpretation (or misinterpretation) of it and by their practices and standards, do so too.

[23] At p. 39
[24] *Law in the Making* (7th ed. 1964) at p. 1
[25] *Review of Investor Protection (*1982) cited in D. R. Miers and A.C. Page, *Legislation* (1982) at p. 177.

whilst the "practice of conveyancers" has long been recognised as a seminal field of legal development.[26]

One of the keys to any understanding of legal history — and possibly even one of the keys to an understanding of jurisprudence — is the recognition that despite the dominant role that legislation has assumed in recent years, the fact remains that all legal systems are the result, at any given time, of the operation of both modes of development. If the so-called historical school of jurisprudence is but the intellectural rationalisation of the ascending thesis of law, positivism is but the intellectual rationalisation of the descending thesis, and no legal system will ever be adequately explained save in terms of both.[27]

The centre of gravity of legal systems may have shifted towards legislation as the preferred mode of legal development, but Professor Hickling stresses that "little attention, if any, is paid to the limits of legislation" *i.e.,*[28]

> to the extent to which a policy requires, and can successfully be implemented, by a law put on the statute book. Indeed at times it seems as if the lawmakers suppose that the mere incantation of a few legal spells will, in themselves, create a world that corresponds more exactly to the Utopia of the lawmakers' dreams.

The limits of the legislative process have, of course, often been commented upon. Thus Shu-hsiang wrote[29] to the Prime Minister of Cheng on the publication of the Cheng "code" (traditionally the first of the Chinese codes) in 536 B.C., as follows:

> Originally, sir, I had hope in you, but now that is all over. Anciently, the early kings conducted their administrating by deliberating on matters [as they arose]; they did not put their punishments and penalties [into writing], fearing that this would create a contentiousness among the people which could not be checked. Therefore they used the principle of social rightness (*yi*) to keep the people in bounds, held them together through their administrative procedures, activated for them the accepted ways of behaviour (//), maintained good faith (*hsin*) towards them, and presented them with examples of benevolence (*jen.*)

"But", he continued:

> when the people know what the penalties are, they lose their fear of authority and acquire a contentiousness which causes them to make their appeal to the written words [of the penal laws], on the chance that this will bring them success [in court cases] ... Today, sir, as prime minister of the state of Cheng, you have built dikes and canals, set up an administration which evokes criticism and

[26] See J.T. Farrand, *Contract and Conveyance* (2nd ed. 1973) Cap. I

[27] The term "ascending thesis" and "descending thesis" are. of course, borrowed from W. Ullmann: See *inter alia* "Law and the Mediaeval Historian" reprinted in *Jurisprudence in the Middle Ages (*1980) at pp 1 36-7 and *A History of Political Thought. The Middle Ages* (1985) at pp. 12-14.

[28] At. p. 181

[29] D. Boddeand C. Morris. *Law in Imperial China* (*1968*) at pp. 16-17

> cast [bronze vessels inscribed with] books of punishment. Is it not going to be difficult to bring tranquillity to the people in this way? ... As soon as people know the grounds on which to conduct disputation, they will reject the [unwritten] accepted ways of behaviour (//) and make their appeal to the written word, arguing to the last over the tip of an awl or knife. Disorderly litigations will multiply and bribery will become current. By the end of your era, Cheng will be ruined.

He concluded ominously:

> I have heard it said that a state which is about to perish is sure to have many governmental regulations.

More recently Macaulay wrote:[30]

> The circumstances which have most influence on mankind, the changes of manners and morals, the transition of communities from poverty to wealth, from knowledge to ignorance *[sic],* from ferocity to humanity - these are, for the most part, noiseless revolutions. Their progress is rarely indicated by what historians are pleased to call important events. They are not achieved by armies, or enacted by senates. They are sanctioned by no treaties, and recorded in ho archives. They are carried on in every school, in every church, behind ten thousand counters, at ten thousand firesides … But we must remember how small a proportion the good or evil effected by a single stateman can bear to the good or evil of a great social system.

All contemporary evidence suggests, despite the blind faith of politicians, that the way to the millenium is not likely to be paved with pages from the statute book, nevertheless, it seems reasonable to assume that the writing down of the laws is perhaps the most significant event in the legal history of any nation, for thereafter law begins to change in nature. Thus speaking of the Greek "codes" Calhoun pointed out that:[31]

> Their historical significance lies in the fact that with written law changes become distinctly perceptible, and when made have to be made consciously and intentionally, and when they have been made once they can be made again. 'The law' is no longer something immutable, intangible, inviolate: it has become a product and instrument of human thought and purpose.

To the extent to which law assumes a written form, then to some extent its spontaneous development ceases and in so far as it changes, the changes tend to be deliberately introduced reflecting purely external factors at the expense of internal considerations.

Curiously it is the common law, of all contemporary systems, that has remained closest to its customary origins. Thus Plucknett has written:[32]

[30] "History" (1828) *Edinburgh Review* reprinted in F. Stern *The Varieties of History* (2nded. 1972) at p. 84.
[31] *An Introduction to Greek Legal Science* ed. F. de Zulueta (1944) at p. 22.
[32] *Legislation of Edward I* (1949) at p. 8

> It is easy to demonstrate, if demonstration be needed, that the common law of England is just such a custom, alive and vigorous, growing and changing. Both king and people desired amendments from time to time, and achieved them. The theorists were laying down that custom derived its force from the consent of the prince *or* of the people, -and this unresolved disjunctive is full of significance.

The disjunctive remains unresolved even today.

Professor Plucknett continues, however:[33]

> Once it is realized that what [statutes] say is important, there will soon be some keen disputant to point out that it is also important to note the things that they do not say. An so to study a text carefully soon leads to a minute textual study. Hence the whole attitude changes, and verbalism is inescapable. Our statute law has therefore become a very special sort of law, studied in a special way, and manifestly different from the common law

and once that change occurs a vital problem is raised:[34]

> As soon as that position is reached, questions of fundamental importance and considerable difficulty become apparent. The simple conception of English law as unwritten custom is replaced by the admission that there are two sources of law instead of one. The relation between these two must be settled.

The relationship between them is by no means clearly settled even now.

There are many other problems upon which Professor Hickling touches upon in this book, among which his contrast between the confrontational approach of the common law with the consensus approach of other systems is notable, but all reviews must come to an end, and it is hoped that enough has been said here to indicate the importance of this book.

We commenced this review by quoting a passage from Professor Hickling's Preface: let us, as we close, quote a passage from the end of his book:[35]

> So the Malaysian legal system must be interpreted in Malaysian terms. This should be obvious, self-evident: but the temptation to refer to the great scholarship of English and American texts is, for much of the time too great to be resisted. They sit there on the library shelves, the majesty and wisdom of past and present generations of faithful common law lawyers, and every course of training in the common law draws us to them, as moths to flame.

The temptation to do so is, of course, all the greater if there are few, if any, other texts to refer to. The existence of an independent legal liter-

[33] *Ibid.,* at p. 14.
[34] *Ibid.,* at p. 14. For the jurisprudential position of the Common Law see A. W. B. Simpson, "The Common Law and Legal Theory" in *Oxford Essays in Jurisprudence (Second Series)* ed. A.W.B. Simpson (1973) at pp. 77 *et sea.*
[35] At p. 197

ature is not some sort of optional extra for a legal system, it is one of the necessary conditions of the development of a vigorous and independent body of law. Professor Hickling's book will, I have no doubt, occupy an honourable place in the still small but growing number of works devoted to the Malaysian legal system.

Having said that, however, it is necessary to stress that the use of the adjective "Malaysian" in the title should not mislead anyone into thinking that this book has relevance only to Malaysian lawyers. Much of the material may be drawn from Malaysia, but the problems that that material is used to illuminate are perennial, and the insights that are obtained by viewing those problems from the perspective Professor Hickling has adopted are of general significance. *Ex oriente lux.*

G. W. BARTHOLOMEW.