LEGAL INSTITUTIONS IN MANCHU CHINA. By Sybille van der Sprenkel. [London: The Athlone Press. 1962. viii + 178 pp. £1. 0s. 0d.]

This book, which is based upon a thesis submitted for a master's degree of the University of London, is sub-titled 'A Sociological Analysis' and is published in the London School of Economics series on Social Anthropology. It is important to stress these facts at the outset if only to underline that this is not. and does not purport to be, a legal study. The author, in her introduction, writes (p. 5) :

> I hope that what I have written will be of interest to sinologists, but I must remind them that this is primarily a sociological study and does not pretend to deal fully with all the questions that would occur to sinologists.

She could well have entered the same caveat with regard to the lawyers, for it is abundantly clear that she does not deal with all the questions that would occur to a lawyer.

We are, of course, not competant to assess this work as a contribution to sociological literature, and can only report upon it from the point of view of the impact that it made upon one who is, loosely speaking, a lawyer of the common or garden variety, and who is neither a sinologist nor a sociologist.

Speaking from this point of view, however, one picks up a volume with a title such as this with high hopes, for so little is available in English upon Chinese law, and these hopes are hightened by reading the first sentence of the introduction in which the author writes (p. 1) :

> One of the aims of this book was to find out what has to be studied on the Chinese side before valid comparisons can be made between the Chinese and other systems of law.

Any book which attempted to integrate Chinese law within the scope of comparative legal studies would be welcome indeed, for little has been attempted in this direction and comparative law urgently needs to be emancipated from the limitations imposed

by the comparison of the common and civil law systems to which for so long it has been confined.

Chinese law presents a number of *puzzles* to the Occidental enquirer. One of these is simply the lack of development in China of what, in the Occident, would be called 'legal theory' or 'jurisprudence'. Thus Escarra has written:

> there lacked in China that tradition of jurisconsultes succeeding one another through the centuries, whose opinions, independent of the positive law and whatever its practical application might be, built up, on account of their methodology, doctrinal and scientific character, the 'theory' or speculative part of law. China had no 'institutes', manuals, or treatises. A jurisconsult such as Thung Chung-Shu, liturgiologists like the elder and younger Tai, codifiers like Chhang-sun Wu-Chi . . . did not accomplish works parallel to those of a Gaius, a Cujas, a Pothier, or a Gierke.

Why, one wonders, was this so. What was it in Chinese history that caused this state of affairs. Again, why was it, in China, that insofar as 'law' in its occidental sense, existed at all, it was of such limited scope. This point has been commented upon by most Occidental legal observers. Thus Jamieson, writing in the preface to his *Chinese Family and Commercial Law,* commented:

> In truth the conception of civil as distinguished from criminal proceedings is entirely absent in Chinese legislation. . . . There is an all comprehensive section of the code which makes it a criminal offence to 'do what you ought not to do'. . . . It was therefore hopeless to attempt to construct a system of mercantile law from the books. Inquiries among those who might be expected to know what were the principles which guided Chinese courts in cases, for instance, of partnership, bankruptcy and so forth, elicited the reply that every case was decided on its merits, and there was no general rule.

Again, Werner, writing in the *Encyclopaedia Sinica* noted that:

> laws were not primarily enacted with the object of ensuring justice between man and man, but had for their prime motive the securing of subordination of the ruled to the ruler; and that the laws executed were primitive, vindictive and the result of ex cathedra declaration, rather than reformatory and made by consultative bodies after mature deliberation and discussion .... With the maintenance of private rights in civil or industrial questions the state had thus generally no concern .... There are very few of the various branches of European systems without which modern western law would hardly seem to be law at all. Legislative, judicial and executive functions have never been completely differentiated in the Chinese system. It has remained during almost its whole course what we know as public law (constitutional and criminal).

Now here, one would have thought, would be material indeed for someone who was interested in discovering what has to be known about the Chinese side in order that valid comparisons may be made between Chinese law and European law, but of these matters the reader will learn but little from this book. The author's aim may well have been to discover what has to be studied on the Chinese side but she appears to have done little towards accomplishing this. She is rarely concerned to take in any wider comparative issues, and on the few occasions when she attempts a comparative reference she is singularly unsuccessful. Thus on page 29, after quoting from Meadows to the effect that:

> Vice is, with the Chinese, nothing but an infringement of the harmonious order of the universe which, being punished by the operation of that order leads to misery.

she adds in a footnote:

> Generally similar ideas seem to be found among the communities in the Indonesian archipelago where, in *adat* law concern for the recovery of the cosmic equilibrium is the ground for the punishment of delicts.

and the only authority she relies upon for this proposition is the English translation of ter Haar's book on *adat,* although ter Haar seems to have been speaking of something a good deal more prosaic than cosmic equilibrium. What ter Haar actually said was simply:

> In the legal order of the small law-communities, a delict is to be considered as a unilateral disturbance of the equilibrium: a unilateral encroachment on the material and incorporeal property of an individual or group.

It is a little difficult to see the basis of a comparison between the infringement of the harmonious order of the universe, and an encroachment upon the property of the the individual or the group.

On page 106 she attempts a comparison between a *tien mai* transaction and a sale with provision for re-purchase as known in Indonesian *adat.* She even throws in, on the authority of Wigmore, a comparison with the Japanese *teito, shichi ire* and *ten.* It is difficult to see quite what is the significance of this sort of footnote juxtaposition of different systems of law without any regard to the nature of the relationship between them. She seems, however, to have a predeliction for the *adat* law of Indonesia, for ter Haar puts in yet another footnote appearance on page 121 with yet again no indication of what the possible significance of the reference could be.

On page 126 she makes what is a quite disastrous attempt to draw comparisons between the distinction between the high morality of the Chinese Code and the more 'practical nature' of customary law, and that between canon law and feudal law in mediaval Europe. It is difficult to see quite what the force of this is supposed to be, for it is surely self-evident that the two situations are vastly different, and any comparison seems to be more misleading than helpful. This is certainly so when she attempts to bring in also the distinction between the *jus civile* and the *leges* of Roman law before the Empire which she admits is a 'slightly different case'. A lawyer might be forgiven for thinking that it was so different as to be totally irrelevent.

This sort of thing cannot be regarded as comparative work of a very high order and it does little to enhance the value of the work. Leaving aside then these footnote forays into comparison we may turn to consider the bulk of the work which is limited to a consideration of the subject-matter described by the title of the book.

After a slightly 'sociological' first chapter in which she is concerned with social stratification, kinship groups and the like, the bulk of the book is taken up with a very general description of what a lawyer might refer to as the Manchu 'legal system', which she describes in a series of chapters entitled 'The Theory and Functions of Government in China'; 'The Structure of the Administration'; 'The Personnel of the Administration'; 'Codified Law'; 'Judicial Procedure'; 'Jurisdictional Aspects of the *Tsu* and the Guild' and 'Local and Customary Jurisdiction'. The material for these chapters is drawn almost entirely from European language books and articles dealing with Chinese law and is almost entirely descriptive: there is very little in these chapters which would seem to qualify for the title 'sociological analysis'. It does not appear that these chapters add very much to our knowledge of this subject and the material has not even been put together in any very critical spirit: few problems are suggested. These chapters may be regarded as an interesting introduction to the study of Chinese law, but they are not very stimulating reading.

With the last two chapters we seem to get back to sociology again, and the legal reader finds his interest waning. We are told, for example:

> Theoretically at the point when private bargaining gives place to acceptance of formal group authority we are in the presence of law (on the definition of Roscoe Pound as 'social control through the systematic application of the force of politically organized society').

She then quotes 'defiitions' of law from Marrett and Radcliffe-Brown, and adds:

> It seems that, even on the definition quoted, we might be justified in giving the whole complex of adjudication and mediation the name of legal institutions, and the ordered system of relationships they upheld that of legal order.

Now this seems to be an admirable conclusion to reach, but it is a pity that the author seems to be totally unaware of the mass of recent or relatively recent jurisprudential writing upon the question of the definition of law, and the use of the adjective 'legal'. Five minutes with the writings of Glanville Williams or Hart and the author would have been much better equipped to write & book such as this.

What, above all else, a reading of this book suggests is the urgent need for the channels of communication between sociologists and anthropologists on the one hand and lawyers on the other to be opened. Law is one of the great social institutions and it is both natural, right and proper that it should be studied by sociologists using their own techniques. It is also necessary that lawyers should take note of the findings of the sociologists. This, at the moment, is hindered simply because the channels of communication are blocked. Whilst sociologists complain that lawyers make no effort to try to understand what they are doing, lawyers complain that sociologists do not take the trouble to inform themselves sufficiently about what it is that they are trying to study, and this book is a good illustration of the extent to which sociological work in the field of law which is not backed by competent understanding of law and legal problems produces work of very dubious value.

Mrs. van der Sprenkel's book may have value as a contribution to sociological literature but to lawyers, it must be admitted, that it is of little interest save as a very general introduction to the study of Chinese law with a useful bibliography of books and articles in European languages.

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