BOOK REVIEWS

CREDIT SECURITY IN INDONESIA — THE LEGAL PROBLEMS OF DEVELOPMENT FINANCE

by S. GAUTAMA (GOUWGIOKSIONG), ALLAN, HISCOCK AND ROEBUCK (The University of Queensland Press, 1973, VIII and 155 pp. Rec. Price: $6.00)

This work is part of a series on Law and Development Finance in Asia under the general editorship of Professor D. E. Allan of Monash University, Miss M. E. Hiscock of the University of Melbourne and Professor D. Roebuck of the University of Tasmania. This series of ten volumes is being produced under the auspices of the Law Association of Asia and the Western Pacific, commonly known as LAWASIA, and the Asian Development Bank. The specialist contributor to this particular volume is Dr. Sudargo Gautama, Professor of Law at the University of Indonesia as well as at other leading Indonesian academic institutions. As one of the most eminent commercial lawyers in private practice in Jakarta, Professor Gautama is well qualified to write on this subject.

Under the 'Old Order' of President Sukarno development finance was hardly a relevant subject in Indonesia. Foreign investment, with the notable exception of oil exploration and exploitation, was discouraged and indeed expropriated. However, since 1966 Indonesia has pursued an active policy of encouraging the influx of foreign capital and indeed is relying upon that influx to a great extent to finance its ambitious five-year development plans. Investors, however, want legal security and this, as the author concludes at page 128, is sadly lacking in Indonesia to-day.

Not that there is any lack of written law in Indonesia. Indeed, as the book illustrates, in relatively few, but well-written, pages, Indonesia has a surfeit of laws and legal systems. There is in the first place the indigenous *adat* law which has endured amongst the autocthonous population for centuries and is overlaid with strong Hindu and Muslim influences. There is also the civil law introduced by the Dutch during their colonial rule originally only for the European population, but gradually extended first to cover the Chinese and other foreign immigrants and now slowly percolating to the bulk of the Indonesian population, at least in commercial intercourse where, as Professor Gautama remarks at p. 13, the '*adat* law is inept, being primarily meant to suit the needs of a closed village community not engaged in the wider world of business'. Nevertheless problems can still arise between the various legal systems and Professor Gautama deals very adequately in chapter 5 with the internal conflicts which arise when persons from one population group deal with members of another group.

This diversity of laws is obvious even in the narrow field of security. One has to distinguish between security according to European law (chapter 6), security according to *adat* law (chapter 7) and the mixed form: security arrangements according to interpersonal law (chapter 8) which are relevant when a bank, constituted under the European Commercial Code, lends money on the security of a rice paddy held by an autochthonous Indonesian under customary *adat* law title. The attempt in the Basic Agrarian Law of 1960 to bring a measure of uniformity to land titles has been only partly successful because of slowness in its implementation.

Then there are innumerable post-war statutes, ordinances, presidential decrees and ministerial directions which clutter the legal scene. Many of these are contradictory, some revoke earlier laws without putting anything in their place, others introduce sweeping new principles without defining the exact details of operation. Still others leave it to the Minister responsible to fill in essential details of the law by a circular published only to his departmental subordinates.

Even such an important enactment as the Law on Foreign Capital Investment of 1967 does not have binding force, for the Government in its several departments may negotiate with each prospective investor and can grant him such exemptions from the investment, taxation and customs laws at it sees fit. As the author states at p. 66, 'it is clear that everything related to foreign investment in Indonesia may be negotiated'.

It is not surprising that in such a situation the administration of Indonesian justice is floundering and that many lawyers, including judges, are uncertain as to what the law actually is. The failure of the legislature to move with reasonable speed to modernise the law which still largely reflects social and economic conditions at the turn of the century, has led some courts to amend the law by judicial fiat simply by declaring portions of the inherited Dutch law to be 'inapplicable' or even to introduce amendments made to the Netherlands Commercial Code but never formally introduced into Indonesia.

The book falls into three parts. The first part, consisting of chapters 1 and 2, gives what in the circumstances can only be a bird's eye view of the entire legal system, including the Constitution, system of courts, private law, tax, labour and investment laws of Indonesia. It will be of interest to those who wish to know something about the legal background but, needless to say, does not pretend to give any detailed information.

Chapter 3 supplies basic economic information about the sources of finance, including banking and other financial institutions and details of the First Five-Year Plan which began in 1968. The essence of the book is found in chapters 4 to 8 which deal in very useful detail with the various forms of security available under the various systems of law operative in Indonesia. The most remarkable aspect of it all is the absence of any effective sanctions. The courts are clearly of no use for,

as it is said at p.89, 'most judgments in Indonesia are never executed'. For that reason registered mortgages are rare to-day since they are virtually useless. The practice has grown up of giving the lender an irrevocable power of attorney to sell the property of the debtor. But this too is practically useless since tenancy laws make it impossible for the seller to guarantee vacant possession of the real estate he sells. One sanction which was obviously so drastic as to be useless was the punishment introduced in 1964 of persons issuing cheques knowing that they could not be met. This, says the author at p. 101, was treated 'as a serious economic crime for which the maximum penalty was death'. One wonders to what extent this draconic measure reduced the number of bad cheques between 1964 and 1971, when it was repealed.

It is somewhat depressing to read a book on the legal system of a foreign country from which one can only conclude that that system is in effect paralysed. One can only admire the author for the utter honesty with which he has set out the problems of his country. The book, which is well written and of very great interest, can be recommended as an ideal text to illustrate the problems of a developing economy plagued by an antiquated and alien system of law and a shortage of the type of legal talent which Professor Gautama has so impressively displayed.

P. E. Nygh

UTILITÉ ET MÉTHODES DU DROIT COMPARÉ

by MARC ANCEL

(Editions Ides et Calendes, Neuchatel 1971, pp. 138)

Marc Ancel is an exemplar of that rare and precious hybrid, the jurist-judge: Président du Centre Français de Droit Comparé and Président de Chambre à la Cour de Cassation (Paris). His lifetime has spanned the infant years of the science of comparative law. The signs of childhood's end are in this elegant synthesis of experience and study.

It was advisable and perhaps inevitable that the scholars who first used the comparative method to study law, working in the universities of Western Europe, should have examined the laws of Western Europe. They compared first the things they knew. Preponderantly the comparisons were drawn between civil law and common law or between two civil law systems, usually French, German or Italian. The differences were big enough to provide an object which the pioneers of the science could usefully study. But much has happened in this century. The socialist countries are now governed by a family of laws which to some degree has broken away from the development in other countries and provides a new object of fruitful comparative study. M. Ancel's own active encouragement of and participation in the work of scholars from socialist and non-socialist countries has contributed a great deal.

He chronicles the infancy of comparative law in this way. In 1900, scholars were concerned with finding *choses comparables* and with restricting comparative law to the study of them. By 1925, comparatists were concerned with *rapprochement unificateur*, so full of satisfaction for the scholar and hope for the lover of peace. After the Second World War, a harder headed outlook prevailed, of *l'opposition* or *comparaison contrastée*. It is hoped that this view will prevail, though there appears to be a renaissance of neo-romantic unifiers. There may well be two schools, the European survival of traditional unifiers and the American revival of academic exporter-missionaries who believe, as the British used to believe, that the excellence of any legal system can be judged by the closeness of its approximation to their own. Those who, like M. Ancel, favour the *comparaison contrastée* are concerned to study a legal system in the context of the society it serves, to see whether it meets the needs it professes to meet. Differences from other systems are noted and examined to find out whether they are accidental or exist for a present or former purpose. It is sometimes possible to suggest reforms, but this must be done with an understanding of overall political, social and economic objectives; shortages of money and personnel adequately trained and motivated; religious and other traditional attitudes; and the suspicions that foreign meddlers arouse in countries which are economically exploited by the countries from which the meddlers come. In his conclusion, M. Ancel expresses the present hopes of the comparatist. He quotes UNESCO's charge to the International Association of Juridical Sciences: 'to foster knowledge and understanding of nations' by the 'development of juridical sciences throughout the world by the study of foreign laws and the use of the comparative method'. This is to be an aid to intelligent and tolerant co-existence. 'But this, of course, does not stop the comparatist trying to find the best solution, the one which is socially and humanely the most appropriate, of a given problem, in a defined socio-cultural context, by an objective study of systems in action.'

In his discussion of the 'Modern School', the author says (at p. 38):

> Comparative law thus provides a collection of understandings systematically organized: is not that the basic characteristic of a science? Comparative law may often be an art: the art of *rapprochement*, of unification or improvement of existing institutions. But it seems hard not to recognize it as a scientific discipline just because it is something more than the normative content and the technical exploitation of the system of municipal law, particularly as the very people who deny it this character are the ones who constructed it.

Of course, every reader will find something to disagree with: that is the essential quality of a thoughtful and thought provoking book. Is it quite true to say (at p. 42) that from the Conquest to the Renaissance English law owed *nothing* to Gaius or Justinian? Were the old laws of China and Japan particularly religious compared with other laws?

Understandably, M. Ancel appears to an 'Eastern' observer to have a view of the world which has Paris in the centre. The Third World is for him essentially Africa; capitulations were something to which Middle Eastern countries were subjected; and the great lessons which the ancient and contemporary laws of Eastern Asia can teach are largely ignored. The comparatist now has at least one other primary family to consider, that of socialist China, and the non-socialist Far Eastern countries, which form at least one identifiable sub-group. Japan has a facade of Western law but a sturdy indigenous reaction against allowing the graft to be successful. China has rejected the Western law, socialist or not, and has moved, and in part at least reverted, to a quite different system, where some traditional Chinese practices of resolving conflicts are employed, refined by and conceptualized in terms of Mao Tse-Tung's developments of Marxism-Leninism.

This book presents the mature thoughts of a master, with the dignified amplitude that the French (or, I suppose in this case, the Swiss) properly allow to the doyen of a discipline. Again we have to acknowledge with Juvenal:

Gallia causidicos docuit facunda Brittanos.

D. Roebuck

REZEPTION UND FORTBILDUNG DES EUROPAISCHEN ZIVILRECHTS IN JAPAN

(Arbeiten zur Rechtsvergleichung 45)

by ZENTARO KITAGAWA

(Alfred Metzner Verlag, Frankfurt/M 1970, pp. 221)

Professor Kitagawa's *Reception and Development of European Civil Law in Japan* is a work of fine scholarship on a subject of general importance to comparative lawyers. Quite a lot has been written recently to introduce Japan's law and legal system to Western lawyers. Little has been written in English by Japanese scholars. The author has the advantages of native familiarity with Japan, professional expertise in its law and the careful scholarship of the German-trained academic.

The first half of the book examines in detail the reception into Japan of the civil law. Japan has never been a colony. Professor Kitagawa shows that there were both internal and external causes at work to bring about the reception. Within Japan, the Tokugawa Shogunate lost power and on the Meiji Restoration in 1868 the feudal system gave way to the particular kind of Japanese capitalism. The Emperor swore the Charter-Oath of Five Paragraphs, the last of which was 'Knowledge shall be sought throughout the world, so that the welfare of the Empire may be promoted'. The new order needed a new law and it was natural that foreign models should be chosen. But there were also external pressures. Japan's new pride in its status as a modern nation demanded that it should be rid of foreign impositions in the nature of capitulations, consular courts and unequal customs treaties (pp. 45 to 49).

The second half of the book is entitled 'Evaluation by the Comparative Method of Japanese Civil Law and Jurisprudence' and is made up of chapters on Comparative Law and Reception of Foreign Law; The Legal History of the Country of Reception; The Development of the Law of the Country of Reception from the point of view of Sociology of Law; and Problems of Method in the Civil Law of the Country of Reception. There is a fascinating treatment of the impact on Japanese jurisprudence of movements in German jurisprudence and developments in German law.

Perhaps most interesting is the consideration of the significance of the structure of Japanese society. It has become commonplace now to confess the economic base on which the superstructure of much Western law is built. The meaning of this becomes clearer, however, when the differences from Japanese society are revealed. What are in our society entirely or at least primarily economic relations: employer and employee, landlord and tenant, even buyer and seller, were in Japanese society based on the highly developed ties of an extended family life, according to what Professor Kitagawa calls the 'Giri-Norm'. It is true, he says (p. 162), that the Rechtsnorm is becoming more and more pervasive, through the gradual loosening of the traditional ties under the influence of modernization and industrialization, but Japan's feudal past is not very long ago. His description of the problems of the coexistence of these norms gives new insights into the nature of law.

If an English translation were available, it would make this work obligatory reading for every student of comparative law in Australian universities.

D. Roebuck

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