

THE ISTANBUL CONFERENCE

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PRELIMINARY REPORT

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The International Committee of Comparative Law has put in the fore-front of its programme the study of the conditions and circumstances under which a foreign system of law has in modern times been received in a country having a cultural background and tradition different from that of the country in which the system was originally developed.

The reason for the selection of the subject is that this phenomenon of reception is one of the most striking juridical events during the last one hundred and fifty years. The system of law which is received has usually been one of West European origin or inspiration, but the circumstances, and the antecedent culture, of the countries into which it has been received have been remarkably different.

The expansion of West European systems of law, and especially of the Common Law, has been due in part to European settlers carrying with them into their new settlements the law of their own homeland. The law so transported has, in the process of its adaption to the settlers' new circumstances, suffered alteration or development of much significance, and a study of these alterations is without doubt of much importance. But sometimes the number or the power of the European settlers has been so considerable that they have

themselves formed the main cultural element in the new society. This is the situation in the United States of America and Canada, in Australia and New Zealand and to a greater or lesser extent in parts of South Africa and South America. In such cases the phenomenon we observe is the development of a system of law by persons who themselves share the law's cultural origin and who themselves attempt to adapt it to their new circumstances rather than that reception of a foreign system which is the subject primarily proposed for study.

Again, within Europe itself there has during the last one hundred and fifty years been a notable inter-reception of law between the countries composing the European community, the Napoleonic codes in particular having had a very widespread influence. In these instances there has been a true reception, and again the circumstances of such receptions are undoubtedly of importance and interest. But for our present purposes the degree of difference in culture between European nations, though great enough to serve as the basis of most fruitful comparative studies, is not we believe sufficiently great to enable us to take such receptions as the best or the most profitable examples in this enquiry which is concerned with the possibility and the effect of the transplantation of a system of law into a significantly different culture.

A prominent example of the transplantation in question is to be found in those European colonies where the former indigenous populations remain the predominant cultural element. Indeed it is in part the extent of European colonisation which gives to our enquiry its importance and its urgency ; for the course taken by those colonies in the very near future is likely to be of capital significance in the history of our own civilisation, and in that course the success or failure of the transplantation of a European system of law will be a critical factor. It is of the utmost urgency and importance that those European nations in particular which still remain important colonial powers should put in hand studies of the real effect and the possible future of the systems of law which they have introduced into subject territories often with little reflection and sometimes without much consideration of their integration with the existing social and cultural environment. Yet while colonies remain colonies they are perhaps

not suitable subjects for investigation by an international body such as this committee which has purely and exclusively scientific purposes. The situation in the colonies, and especially perhaps in African colonies, is of an extreme complexity ; for in addition to the already sufficient difficulty of the study of the interaction of a foreign system of law with a pre-existing social culture we are faced with the political complications arising between an imperial power and a subject territory, with the rivalry between settlers and the indigenous population and frequently with the problems of colour and race. It should be our purpose to avoid far as may be these additional complications in order the better to concentrate upon the subject, itself of sufficient complexity, which we have selected for study. We do not therefore propose, as an international committee, to attack in the first instance the problems arising from the introduction of European law into territories which still continue as colonies, but we believe that the knowledge which we shall acquire from our enquiry will enable us in due course profitably to turn our attention to those problems also.

Much more immediately appropriate to our study is the situation in those territories which having been formerly under the influence or control of a European power have now fully attained their independence. Most notable among such territories, if only because of its extent and the number of its inhabitants, is the former Indian Empire: in which we include Burma and Ceylon as well as India and Pakistan. The present condition and the future course of English law and of the English system of the administration of justice in these countries is of utmost significance to any real understanding of what the true possibilities may be of fruitful inter-relation between European civilisation, which is notably embedded in its law, and non European cultures. To what extent will the peoples of the former Indian Empire continue to find in the English law, which was in some degree arbitrarily imported into the country, a real satisfaction of their own aspirations and desires now that they are entirely at liberty to maintain, to abolish or to alter that system in any manner they may wish? It may be judged inevitable, and it is perhaps desirable, that there should be some alteration — indeed some measure of alteration may be the sign of a genuine adaptation of the principles of that system

by its new inheritors to their own circumstances according to their own judgment. It does not seem at present probable that the system will be fundamentally altered root and branch. It is evident that an intelligent appreciation of the extent and nature of these real alterations — whether they arise from express legislation or, more importantly, from the manner in which rules, though formally remaining the same, are in fact and in practice applied with a different bias — is of critical value to the study we propose. Nevertheless it is not with the former Indian Empire or other territories in a similar condition that we decided to begin : partly because of distance and inaccessibility, partly because again the study would seem best undertaken in the first place not internationally but mutually between the former imperial power and the new independent nations, but mainly because it was thought advisable to seek in the first place an even simpler instance of the phenomenon we wished to investigate.

A simpler instance occurs where an independent nation of its own decision resolves to import into itself a system of law, or some parts of a system, which not only is foreign but is the product of a markedly different culture. There have been many such instances in the course of the last one hundred and fifty years, and it is a fact to be noted that the system imported is normally one directly or indirectly derived from the Napoleonic codes. It will be enough here to cite the cases of Tsarist Russia, of China, Japan and of several South American States. The most recent case is that of Ethiopia where a commission is at present concerned to frame for that country a code directly inspired by continental models. Among these instances it was decided to select for the pioneer study, the case of Turkey. The reasons for the selection were the following. First, it appeared to be the simplest instance : there was a fundamental revolution in Turkey after the First World War and that country decided to start so far as possible from a clean sheet with a complete reception of West European law. Secondly, the Turkish experiment has continued for a period of thirty years and there has now been an experience sufficient to enable some observations of value to be made. Thirdly, it is evident that the foreign law has not been imported into Turkey as a mere façade but that a genuine attempt has been made to work it and to adapt it to the situation in Turkey — it is but a mark of

the genuineness of that attempt that in 1950 in a country which was accustomed to absolute government, the government was peaceably altered as the result of a democratic election and the Opposition party was permitted to come into power, in which it still remains. Fourthly, Turkey was reasonably accessible and, what is of more importance, since it has developed Faculties of Law at Ankara and Istanbul with competent professors who have usually studied in European Universities also and who normally speak at least one European language, it is possible to obtain authoritatively and directly from them that scientific and realistic information which we desire to procure and which they are both able and anxious to provide.

Though the Turkish instance is no doubt the simplest instance and therefore for our purposes the most useful, it will be a mistake to treat it as unduly simplified. In particular it is a mistake to exaggerate the effect of the Revolution however thorough-going in some respects that may have been. Turkey did not in 1925 quite suddenly move from being a mediaeval Ottoman despotism into becoming a modern democratic state. The Turkish experience does not warrant the belief that any such startling and dramatic transition is possible. From our point of view it is necessary to remember that Western law has been in process of being received into Turkey however imperfectly or partially for a period of at least one hundred years. Indeed a beginning of the modern epoch may be dated from the Tanzimat in 1839 when under guise of the 're-organisation' we can observe some attempt to improve the condition of the Christian subjects of the Empire and consequently the start of some distinction between the law of the State and Islamic religious law — a distinction which marks a critical departure from classical Islamic conceptions. In 1850 a code of commercial law based upon the French Code de Commerce was introduced followed in 1865 by a Maritime Code of similar origin. In 1856 was promulgated a penal code of considerable amplitude (265 articles) again substantially based upon French law after two more limited attempts in 1835 and 1846 ; and in 1866 there was a reform of penal procedure which prepared the way for the acceptance in 1879 of a code largely reproducing the French Code d'Instruction Criminelle. In the 1870's also was produced the great Medjellé which codified the law of obligations and a part of civil

procedure, and which through the work of jurists formed in the Islamic school and imbued by its principles was nevertheless also inspired by modern ideas, at least in the sense that the law was restated in a coherent and rational manner. A similar restatement is to be found in the land law (*Arazi Kanunu*) of the middle of the last century, completed by the law of 1913 on the possession and transfer of land. Both the land law and the *medjellé* were the subject of treatises in the European style — a very famous one being composed by Ali Eşref on the *Arazi Kanunu* towards the close of the century. The laws so introduced though no doubt imperfectly applied were subjected to a good deal of revision and addition, not least after the constitution of 1908. One of the most important effects of this continuous modernisation was that in the Law Faculty especially of the University of Istanbul a generation of jurists was trained to whom the principles of European law were familiar and whose minds were formed by those principles. A notable date in this connection is again 1908, when the Turkish Ministry of Justice sent some twenty young men, many of whom subsequently became professors, to study law in European Universities. It is hard indeed to believe that what was accomplished in the 1920's could have been accomplished had there not existed this accumulated experience.

These pre-revolutionary reforms had in theory at least respected Islamic Law — the substance of the Civil law especially regarding the family, marriage, succession and property had remained Islamic. The reforms were bits and pieces, introduced originally without much enthusiasm and intended perhaps mainly to conciliate hostile foreign criticism. The great innovation of the Revolution of the 1920's was to make a clean sweep, to take over en bloc, though by way of selection, an entire system of European law including the Swiss Civil Code, and to accept the change not only with determination and conviction but with a genuine and revolutionary fervour. Atatürk became the leader of a national uprising : under his guidance a people decided to re-create itself in the image of a European state, at first perhaps with more zeal than discretion. But a sufficient time has now gone past to allow that zeal to abate without detracting from the determination of the endeavour and to make it

possible for Turkish jurists to judge with an impartial realism the true sense of what has happened during the last thirty years.

Some of the information which we require from the Turkish jurists can be supplied by them relatively easily, some it is exceedingly difficult for them to supply. It may be helpful to enumerate it. First and most obviously we desire to know the extent of the express departure by Turkish law from the particular model accepted and the reasons of such departures. As much of the new codes was accepted in 1926 in great haste, the amount of express alteration made before the coming into force of the codes may be relatively small ; equally important for our purposes is the extent of modification made by the legislature after the codes had been in force. But the codes even when modified in the light of experience are skeletons only. We are concerned to discover how the Western system of law really functions in Turkey. For this purpose the Turkish jurist must attempt to explain to us the actual case law of the Turkish tribunals and indeed not merely that case law but its tendencies and spirit. In what fields particularly has the European model failed to function satisfactorily ? Which provisions have been found to be merely idle, which obstructive ? Why have those particular difficulties arisen ? How have they been or how should they be overcome ? On what points does the Swiss Federal Court, for instance, find itself at variance with the Turkish Court of cassation ? Is this variance simply a matter of a difference of opinion on technical points of law which might equally well be found between say the Italian and the French Court of Cassation when construing an identical text or does it spring from some important and fundamental, if not clearly analysed, cause ? It is probably not possible to convey to us the information which we require without going into considerable detail ; but it is not the detail as such which concerns us. From concrete cases we wish to be led to see so far as may be possible, the manner in which the institutions known to Western Europe in fact function *as institutions* in their new environment and what *characteristic* differences or tendencies to difference — for differences there must be if the transplantation is genuine — are to be observed in the functioning of these institutions. This clearly is a matter of the utmost difficulty for the Turkish, as for any other jurist : it requires a high degree of insight

into the essence of a system of law. It is relatively easy to appreciate that some of the newly imported institutions cause difficulty — for example the civil celebration of monogamous marriage, the law of succession and the law of mortgage ; but it is perhaps not in these more obvious difficulties that the characteristic differences of European law as transplanted in Turkey are to be found. However this is a question on which we seek enlightenment from the Turkish jurists.

An important element in the exposition we receive from the Turkish jurist will be an account of the historical circumstances in which the reception was made, of what may be called the technique of reception, of the purpose of that reception as judged by the Turkish authorities and of their own judgment upon its success and its cost. It will be equally important that the foreigner should be given an account of the actual set up and procedure (in the largest sense) of the Courts, of the position and condition of judges, the *ministère public*, advocates and other auxiliaries, and of the functioning of the courts (procedure in the stricter sense, with if possible some statistics of number of cases, appeals, delays etc.). But again in this matter we must refer ourselves to the discretion of the Turkish experts who alone can decide how much information can usefully be conveyed to us in the time at our disposal. What primarily we seek, in the company of the Turkish jurists, is a scientific and realistic account of the actual administration of justice in a country which as the result of its own determination freely decided to adopt as its own, and has with success so adopted, a West European system of law.
