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OPINIONS SUR LE COLLOQUE

PROBLEMS OF RECEPTION IN THE UNITED STATES

by

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The Istanbul conference on problems of reception of foreign law in Turkey opened many vistas for the foreign lawyers who attended. We were able to learn from the excellent reports prepared by the members of the law Faculty that a Swiss civil code and a French system of administrative courts could not be adapted without creating a conflict of cultural patterns at many points. The sharp difference between family culture in Switzerland and in Turkey were shown to have caused most of the difficulty in receiving Swiss law, but there were other important if lesser conflicts. The reception of a foreign system of law was shown to be a difficult operation. It became clear that there could be no simple adaptation of the newly received system to the ancient culture of Turkey.

In the course of the discussions it was frequently assumed by some of the delegates that problems of reception were to be found primarily when the received system had been created for a very different type of culture from the culture in which it is now being applied. It was specifically suggested that the problem of reception had been small when the colonists in North America received the English common law system and made it the law of the United States of America. It may be well to fill out the record of the Istanbul conference with a few words on the problem of reception of English common law in the United States. Reception has not been automatic or easy, and there has been constant variation to meet the special

problems of the new world. An account of the measures that have been taken to make the English common law meet the situation may give courage to those in Turkey who hesitate to take bold steps in revising the received law to meet special Turkish needs.

It is true that 47 of the 48 American states consider that the origin of their law is English common law, but no state now accepts as its law the common law of present day England. At the time of the American revolution none of the newly created states wanted to carry over into the newly independent United States of America the law of England, for England was hated, and all aspects of its governing process, including its law were subjected to abuse. Thus, by legislation the various states along the Atlantic seaboard prohibited the citation of English decisions in support of decisions in the new world.

Even before the revolution of 1776 the English colonies in the new world were refusing to accept English law in its entirety. It was considered too complicated and too alien to the conditions of the pioneer community in which the colonists lived. There were other reasons of a less theoretical nature which caused the colonists to strike out upon new paths. These reasons were practical ones. There was no library throughout all of the colonies with even a fairly complete collection of the English law books. The procurement of law books from England was extremely difficult. Finally the number of competent lawyers trained in England was very small. In consequence, the laws of the colonies were made and enforced largely by laymen who were untrained in English law and who had often only one or two books to which to turn in developnig their ideas.

Such lawyers as existed in the colonies of North America were often looked upon with distrust. Evidence of this hostile attitude is to be found in a statute of 1645 in the colony of Virginia which expelled "mercenary attorneys" from the colony, but they were readmitted by a statute of 1656 because the trial of cases had been found to be too boisterous without them. In some colonies lawyers were excluded from the legislatures as undesirable policy makers.

Law was simple during the colonial period, being based primarly upon what was thought to be common sense. No reports of the judicial decisions were published, so that there could have been no use of precedent had there been a desire to establish it. Only in the colony of Maryland did the law of England have official force. Elsewhere the law developed along original and independent lines.

Some changes were made in English law by legislation, for colonial legislators were active in devising policy for their colonies. Many thought that English court procedure was too formal, and the major legislative changes were to simplify court procedure. Other changes were made in the English law of property and inheritance, for it was felt that this law was especially unsuited to a pioneer people who believed in the equality of all children rather than in the system of primogeniture which was supported in England to preserve the great estates.

The variation in English law which had been developed during the colonial period was extended after the revolution because of the sentimental break with England. There was even talk of departing from the common law of England completely. Some lawyers argued for the reception of Roman law or of French law as a base for the law of the new United States. Legal historians such as Roscoe Pound feel that the reception of French law was prevented in considerable measure because of the absence at the time of English translation of French sources. Pothier was not translated until 1800, and there was no body of literature on Roman law available to the general practitioner. The judges rarely knew French so that they could not read few French books that existed.

In contrast to the difficulty of finding French law, the English law was made known by one important source book, namely Blackstone, which had been published in 1765. Its text was the sole encyclopedia of law for most American lawyers and judges.

The chaotic condition of the law in the new states is evidenced by a statement made from the bench by Judge Kent of the Supreme Court of the State of New York. In 1789 he said, "When I came to the bench there were few reports. The opinions from the bench

were delivered *ore tenus*. We had no law of our own, and nobody knew what it was."

As a result of these circumstances the American revolutionists had almost a clean sheet before them in 1776. The law might have moved in any direction, although the existence of Blackstone and the absence of civil law sources weighted the scales in favor of reception of the English common law, in spite of the political hostility of the time against all that was English.

Although English common law was received by the new states, it was by no means interpreted in the same manner throughout all of the new states. One must recall that at the end of the eighteenth century communication was poor with the consequence that the steps taken in one state were often unknown in the neighboring and more distant states. The states were also jealous of their sovereignty, so jealous that it was at first impossible to form a federation, and only a confederation of states was agreed upon until it became evident that closer ties were necessary to prosper and even to survive. A federal constitution was adopted in 1787.

In view of the diversity of attitudes toward reception of English common law each state established its own rule on reception. For example the state of Maryland declared that its courts would accept the law of England and such English statutes "as existed at the time of the first emigration" and such others as were in use as of june 1, 1774. The state of Pennsylvania voted to accept the common law and such English statutes as had been in force prior to 1776. The state of Vermont decided to accept "so much of the common law of England as is applicable to local circumstances".

The refusal of the states to accept English modifications of the common law after a given date did not mean that the development of English law after the date of the American revolution was not followed in the United States of America. These developments are often quoted today in American courts because they have persuasive value, especially when there are gaps in the American law. Obviously the common law of the past and the American statutes have not foreseen all problems arising daily before the courts. When American

legal scholars made a survey of the present state of the common law in the United States some twenty years ago under the auspices of the American Law Institute they discovered that there were gaps in the law in as much as 74 per cent of the situations dealt with in the study. Even in Massachusetts and New York, where there has been much litigation, there were substantial areas in which no judicial decision had been issued to establish local case law.

To fill the gaps in the law American courts will listen to the argument of lawyers urging the adoption of some foreign rule of wisdom. Most often the foreign rule comes from an English decision, but it may often be the rule of a case in Canada, or even of a case in France or in some civil law jurisdiction. We in the United States have high regard for English decisions, and many libraries in contrast to the libraries of 1776 have a complete collection of the English judicial decisions. Some libraries have a complete collection of the French and German decisions as well as a good number of the French and German treatises on law.

In spite of the readiness of American judges to look outside of the state in which they sit for inspiration in meeting the problems of a new type of legal dispute, they are cautious men. Roscoe Pound has pointed out that the courts of the United States have felt it necessary to test the traditional English materials at every point to determine whether they are applicable to the problems of the new world. It is felt that the culture of England, even with the great democratization of England since the time of the American revolution, is not identical with that of the United States. All suggested solutions from foreign countries must be considered in the light of the needs of American society.

The reforms of English law have been most noticeable in the field of legal procedure. New York State began these reforms in 1847. The expressed desire of the reformers was to break away from what were thought, to be excessively rigid common law forms of action. They introduced what they called "code pleading" so that a lawyer might state the facts of the situation and leave it to the judge to determine what was appropriate. American lawyers did not think it desirable to have a complaint dismissed because the

plaintiff's attorney had chosen incorrectly the legal form of action which he thought appropriate to the case.

In spite of the attempts to reform procedure, the changes have been made slowly in fact. As legal historians have pointed out, the forms of action have been related closely to substantive law, and a change in the forms has not put an end to the substantive law distinctions which had come into existence because of the forms of action or which were closely related to them.

The attempt to develop a system of procedure which was less formal than the early English procedure has not progressed of recent years as fast as in England itself. For an observer of the procedure presently in use in the magistrates courts of England it now seems that the English procedure in these courts at least is less formal than in the American courts of similar jurisdiction. The English magistrates are now laymen, usually without legal training, and they sit for short periods of time. No verbatim record of the proceedings is kept, but a clerk summarizes what a witness says and asks him if he wishes to authenticate it with his signature. In the United States the great bulk of civil and criminal cases are heard by professional judges, and court stenographers record every word of testimony so that a review of the proceedings by a higher court may be possible on the basis of everything that was said below by the judge, the witnesses, the parties and the lawyers. The justices of the peace who used to function in an informal manner in many rural districts of the United States are losing their importance. In West Virginia they have been abolished. In Missouri they must be lawyers. Everywhere their jurisdiction is limited.

In a sense we have abolished the apparent formality of the English courts in that we have no wigs for the judges and the lawyers, but we have retained more formality in court procedure than modern England because we feel it necessary under American conditions.

The major transformation of English law in the states of the United States has been often said to lie in the field of succession. To be sure much of the English law on the subject has now been changed in England as well because it is no longer suitable for a non-

feudal society. In consequence both England and the states of the United States have a system of succession which is considerably different from the one in existence at the time of reception of the English common law by the American states.

The English common law of crimes has been expressly abolished by several American states, so that in these states there is no crime except as provided by statute. Yet, in most states the criminal law is basically the common law, although this base has been modified over the years by many judicial decisions as well as by statute.

Broad transformation of the English common law has occurred in the law of divorce. While the English common law has been very strict until the recent Parliamentary changes initiated by A.P. Herbert, the American states have done much to liberalize the law. Only South Carolina forbids completely the granting of divorce. Elsewhere the grounds are many, and in some states there has been a trend toward recognition of systematic abuse, insults and annoyances as grounds. Elsewhere habitual drunkenness, nonsupport and incurable insanity are the grounds for which divorce will be granted.

As in every country there have been efforts on the part of conservative elements to resist social change on the ground that the received system of law is so completely a part of the culture that any departure from it will violate human rights. Thus, some lawyers resisted the development of workmen's compensation law because it introduced serious changes in the common law of torts. This argument was stated by the Supreme Court when it was called upon to decide whether the innovation deprived persons of property without due process of law. The court said, " The scheme of the act is so wide a departure from the common law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity ". Nevertheless, the court concluded that the scheme of compulsory compensation was not repugnant to the provisions of the fourteenth amendment to the Constitution. The Supreme Court has said elsewhere that the requirement of the " due process clause " of the fourteenth amendment cannot be interpreted to freeze the law of the

states of the United States at the stage of the English common law at the time of the American revolution.

The legislatures of the various states and of the United States now feel entirely free to develop the common law inherited from the colonial period to meet the needs of the citizens. The courts have indicated that they are willing to permit this development. Yet, there is always evident a tendency on the part of the courts to assume that the legislature in any new statute is merely codifying the common law. New statutes are interpreted as declaratory of the common law rather than as modifying the law unless the desire for modification is expressed so clearly as to permit of no doubt.

The pace of change is slowed further by the respect of the courts of the United States for precedent. Although Supreme Court cases of the past may be overruled by that court when changed cirmustances require a new view in the opinion of the Supreme Court, the concept of precedent is still firmly rooted. The method of the common law is, therefore, retained, for progress is made with an eye to precedent.

The English system is still much respected, and English solutions to modern problems are much studied, as with workmen's compensation and social security generally. As a result much detail of modern English law is duplicated in modern American law, but all that has come since the revolution has been accepted only because the reasons for its acceptance are persuasive. Nothing is taken automatically because it has been added to the system of law which had previously been received.

Much was said at the Istanbul conference about the reception of a code. Some challenged the idea and said that there had been reception of a system. The American experience may throw some light upon the debate which now appears to be current in Turkey.