

### 3. Types of Reception\*

At the meeting of the International Association of Legal Science, which was held in Istanbul September 1955, one of the most vividly discussed problems was that of deciding whether in the great legal reforms of the 1926's Turkey had received the legal system of Switzerland or just the Swiss Civil Code. The problem, to which no final answer was given at the meeting, might perhaps be clarified by an attempt more closely to define the meaning of the term "reception."

It will be seen that there are various types of reception which ought to be distinguished from each other. If we have these various types before our minds, it may be easier for us to determine the role of Swiss law in Turkey.

A comprehensive typology of receptions would, of course, require extensive research. All we can do here is state some categories which impress themselves upon a general observer of legal history.

If we look over the total range of events which are referred to as *receptions*, we find as the general characteristic that a certain legal phenomenon developed in a given legal climate is consciously put into effect in another legal climate. We must use the indefinite term "legal climate" in order to cover the great variety of possible situations. It occurs not only that a legal phenomenon developed in one country, for instance Switzerland, is adopted in another country, such as Turkey. It may also happen that in the same place, | for instance Italy, a legal phenomenon of a past age, for instance during the Roman Empire of antiquity, is readopted at a later time, such as the high Middle Ages. Or within the same country a legal phenomenon of one religious, racial, professional or social group is adopted as part of the law of another such group. An illustration is presented by the well-known adoption as the general law of the land of contractual and other institutions originally developed as the special law of the merchants; or the adoption as the general procedural law in certain continental countries of the methods of procedure developed in the ecclesiastical courts of the Roman-Catholic Church.

\* In: *Annales de la Faculté de Droit d'Istanbul* 5 (1956), 31-40.

[Ins Deutsche übersetzt und neu bearbeitet in: MAX RHEINSTEIN, Einführung in die Rechtsvergleichung, bearbeitet und herausgegeben von REIMER VON BORRIES, München: Beck 1974, 124-131 (§ 16 Fußn. 1).]

Essential in all cases in which it is justified to speak of reception is the consciousness of the process. Consciousness in this connection does not mean that the adoption must necessarily be achieved by one single act intentionally performed. The adoption of the ecclesiastical procedure by the secular courts of 16th century Europe was a slow process, but it was done with some degree of consciousness. All we mean to say by emphasizing the element of consciousness is that we must eliminate from the scope of the term "reception" those situations in which similar or almost identical institutions have developed in different legal climates independent of each other. Comparative observation indicates that human beings tend to react to certain needs in similar ways even if they know nothing of each other. The institutions of individual property, contract, pledge, succession on death, servitude, etc. have arisen independently of each other in the most diverse parts of the world. Similarities due to *independent parallel development* may often be striking even as to matters of detail. When Torrens invented his system of registration of land titles in Australia he seems to have been unaware of that system of registration which had been developed along similar, although not identical, lines in Germany. The charitable trust of Anglo-American and the wakf of Islamic law are similar in many respects, but neither was developed in imitation of the other. Both grew up in independent response to identical needs. If we wish to light out homes we can choose between candles, oil lamps, gas light, and electricity. Perhaps there are a few additional methods, but the range of methods by which the need for lighting can be satisfied, is not unlimited. The same situation exists in the field of the law. Wherever a society wishes to establish a scheme by which a creditor can obtain security for his claim of debt, it must develop the institutions of suretyship, pledge, and mortgage. It cannot go much beyond these. A good many variations are possible as to matters of detail, but in their basic outlines the institutions are determined by the needs for which they are created. Similarity without imitation is thus frequent where no borrowing of ideas has, or even could have, taken place. All such cases of independent parallelism must be eliminated from the scope of reception.

It might be appropriate also to eliminate those numerous cases in which legal phenomena of a given legal climate are consciously introduced into a different one, but without voluntary adoption. In other words the imposition of a law upon a conquered or otherwise dependent by a dominant other group should not be called reception. "Imposition" as we might call this situation, can occur in various ways. Upon conquest the conqueror may impose his law upon the conquered group, as it was done, for instance, upon the Napoleonic conquest of the Netherlands; or the dominant power imposes upon the sub-

jected group a special law different from both that which the former uses for itself, and that which the latter had developed in its own midst. Such imposition of special laws has frequently been practiced in situations of colonial rule. In both types of imposition, that of the rulers' own law and that of a special law for the ruled, the quantum of the imposed law may vary over the whole range between the extremes of imposition of a complete legal order and that of the regulation of just one small, single matter. In distinguishing between imposition and reception one must also recognize that what in fact is an imposition may be dressed up as a reception. If in the days of the British rule in India a native prince by his own decree adopted for his State a criminal code of the English pattern, the outward form does not indicate whether he has done so entirely upon his own initiative, or whether he has followed the more or less emphatic advice of the British resident, or whether he has yielded to pressure more or less subtle. The dividing line between imposition and reception is not clear cut. The two concepts rather constitute the two ends of a scale along which innumerable forms of transition and combination are possible. Perhaps it may be permissible in some such cases to speak of *imposed reception*.

From reception in the strict sense of the word one should finally distinguish that situation which might be called *transplantation* of a legal phenomenon, i. e. the situation in which a group of migrants takes with it its old law from its former to its new surroundings. Again we should distinguish two different situations. Law may be basically conceived as being a personal or a territorial order. By the Germanic peoples of the periods of the late Roman or the Frankish empires, law was basically conceived to be personal. Each of the Germanic tribes, such as the Salic or Ribuarian Franks, the Ostro- and the Visigoths, the Vandals, the Langobards, the Burgundians, etc. had its own laws, and it took those laws with it wherever it went on its migrations from Northern and Eastern Europe into France, Spain, Italy, Africa or Britain. When these tribes established themselves on formerly Roman soil each group continued to live under its own law, but it also took for granted that the subjected Roman or other groups would continue to live under their respective laws. But when the tribes had become firmly settled, in each territory, the law of the ruling group tended to transform itself into a law generally applicable to all inhabitants of the territory irrespective of ethnic origin. In most parts the transition from a system of personal to one of territorial law was concluded by the middle of the 11th century. In the countries of the Near and Middle East such a transition from a system of personal to one of territorial law has been under way for the last sixty or seventy years; it has assumed great impetus during the last few decades, but it has not yet run its full course.

Wherever under a *system of personal law* a group migrates from one habitat to another, it takes its law with it as a matter of course. One might thus be justified in such a case to speak of transplantation. However, the characteristics of that situation are not exactly the same as those which are encountered in surroundings in which the *territorial nature of the law* is taken for granted. In such surroundings transplantation can occur only where a group migrates from an old, settled country in to what may be called empty or virgin soil. Emptiness does not indicate the complete absence of human beings. When British settlers came to Australia they found there quite a few bands of native aborigines. But the sparse native population is being ignored or driven into reservations by the white immigrants who establish their own, new communities as if the country were entirely uninhabited. Of such kind was the situation of the white man's settlement on the continent of North America. The English who settled in those thirteen colonies which were later to become the *United States of America* brought with them those laws under which they had lived at home. These laws simply were for them *the law*, beside which it would have been difficult for them to imagine that there might be any others under which they could live, except, perhaps, for some of them, the law of God as revealed in the Old Testament. The transplantation was, of course, not complete. Much of the laws of England did not fit in with the different geographical, social and political conditions of the New World. Also, the law that was transplanted was, at least in the early period, not so much the law that was administered by the professional lawyers and the higher courts, but the popular law of the villages and boroughs as it was actually lived by those little people from among whom there came the great majority of the settlers. It was not until the late 18th and early 19th centuries that the lawyers' law of England came to be of consequence in America, and insofar as this lawyers' law was consciously imported by American lawyers and legislatures we are faced with a reception in the technical sense of the word. What happened in the American colonies and later the United States thus constitutes a *combination of a transplantation* of one kind of English law, and the reception of another. The history of this complex course of events has not been fully explored; many phases of it are still waiting for elucidation.

Imposition and transplantation thus constitute phenomena which produce effects similar to those of reception, but in their inception they are different. The term "*reception*" should preferably be preserved to those situations in which legal phenomena of one legal climate are consciously adopted into another legal climate.

The characteristic trait thus consists in the consciousness and voluntariness of the process on the part of the recipient, in contrast to the accidental nature

of independent parallel development, the involuntary yielding to superior power which characterizes imposition, and the one-sidedness of the process of transplantation. In the case of reception we find two legal climates, that of the model and that of the recipient, and certain legal phenomena of the model are voluntarily and consciously taken over into the legal climate of the recipient.

In our foregoing presentation we have used the term "legal phenomenon" without having explained its meaning. We have been using that vague term in order to cover the wide range of "phenomena" which can constitute the *subject-matter of an imposition, a transplantation, and a reception*. In connection with reception it becomes necessary to be more specific, because it seems that the characteristics of a reception vary greatly, depending upon what kind of legal phenomenon is being received in any particular case. As in the case of imposition the subject-matter of a reception may be constituted by just one single sentence of a single statute, or the total body of the codes and statutes of the model country, or any group of legal rules lying in between these extremes.

*Reception of some one particular statute* occurs frequently, especially among legal systems which are basically related to each other. In the United States it has been common that some statute which has been invented in one State is rapidly adopted by the legislatures of other States. When, for instance, the State of Iowa enacted a statute which made both husband and wife jointly liable for the expense of the family, similar statutes were enacted in rapid succession in some twenty other jurisdictions. When the legislature of Indiana abolished the old common law actions for breach of promise of marriage and for alienation of affections, other States quickly followed. In Europe statutes modeled upon the pattern of the German Law on Limited Liability Companies (G.m.b.H.) have been adopted in numerous countries. Such reception of an isolated statute cannot be successful, however, unless the rule or institution received can be fitted in with the body of the law of the receiving country. |

Much more far reaching consequences are, of course, to follow when the subject-matter of the *reception is an entire code*, especially a modern civil code, even where the reception does not amount to the adoption of the entire legal system of the model country. Such receptions of entire codes have been frequent ever since the Napoleonic codes of France began to constitute the subject-matter of receptions in the 19th century. These codes have been received, in some cases literally, in others with more or less extensive modifications, in numerous countries of Europe, America and Asia. In more recent times the codes of Germany and Switzerland have constituted the subject-

matter of receptions, such as those in Japan and Turkey respectively. In none of their countries of origin did the enactment of these codes constitute a radical break with the legal past. All three codes, those of France, Germany and Switzerland, rather appear to be consolidations, unifications and modernizations of pre-code traditions. The enactment of none of them required a shift totally new methods of legal thought. Similarly, their *reception in countries belonging to the same tradition* was not accompanied by any changes which would have been more far-reaching than those which had occurred in the mother countries of the codes adopted. The situation is different, however, where a Western code is received by a country where traditions of legal thought and method have been markedly different from those of modern Western Europe. It is in the context of such receptions that we are alerted to the fact that there are receptions which are characterized not so much, or not only, by the *adoption* of the contents of statutes or codes of foreign origin but by the adoption in one legal system of a *method of legal thought* which has so far been characteristic of another legal system.

It has been the achievement of *Max Weber* to show that the great legal systems of the world are characteristically different from each other not so much by the content of their rules of substantive law as by the methods in which the administration of justice is organized and the ways in which there work the minds of those men by whom the particular system of administration of justice is dominated. Weber calls these men the legal *honoratiore*s. In his great work entitled *Economy and Society*<sup>1</sup> Weber has presented and illustrated this thesis. He has shown how the characteristic features of the law of ancient Rome were determined by the fact that in its formative period its honoratiore were private gentlemen of the peculiar kind of the Roman juriconsults. He goes on to demonstrate the extent to which the special traits of the mediaeval law of Northern Europe can be explained by the fact that it was to some extent a people's law in which it is difficult to discover any particular group of honoratiore except, perhaps, those laymen who in the later Middle Ages developed some expertness and interest in matters legal. In other chapters he discusses the features of legal systems respectively characterized by the outlook of the notaries of mediaeval cities of Northern Italy, of 17th and 18th century monarchs and their staffs of trained civil servants, of English Common Law judges, and, quite particularly, of scholars such as the French and Dutch jurists of the 17th and 18th centuries, and the German Pandectists of the 19th. Finally, he discusses those laws which have been characteristically influenced by men of a religious bent, training and learning, such as the

<sup>1</sup> *Wirtschaft und Gesellschaft*, 1st ed. 1922, 3rd ed. 1956. Engl. transl. of parts sub tit. *MAX WEBER on Law in Economy and Society*, ed. by M. RHEINSTEIN, 1954. [S. supra Nr. I, 2.]

legal systems of Islam, Judaism, Hinduism and Buddhism. Here we can do no more than intimate that a profound difference of technique exists between a law which has been molded by professors and civil servants and one which has been formed by theologian-jurists. A profound transition is to take place where one such group of legal honoratiore is replaced by another. Such replacement was, indeed, the essential feature of that event which is commonly referred to as *the Reception*, i. e. *the reception of Roman Law in Germany* as it took place in the period roughly from 1400 to 1550. What occurred in that process was primarily the substitution of university trained lawyer specialists for the lay element of the older type.

That older type of honoratiore and the law developed by them had served the communities well even after commerce had come to assume large proportions in the cities and vivid interchange had come to go on among them, and between them and the Levant. That law had proved itself adaptable to many changing needs of a complex character. But there were two deficiencies: firstly, the mode of procedure, especially in its irrational methods of fact finding, such as ordeal, trial by battle or wager of law, was archaic and unsatisfactory; and, secondly, the old system failed to produce men of sufficient training to take care of the needs of the administration of the monarchies which were emerging in the several territories of Germany, as well as in the expanding city republics. It was primarily to satisfy this latter need that ambitious young men, on their own initiative or on that of some prince, or city government, went to Bologna and those other universities where they could obtain training in the revived law of the Roman *Corpus Iuris*. When they returned home, they became the administrators of the cities, the principalities, and also of the Church. Since general administration was not fully separated from the administration of justice, the same man who ran the financial affairs, the public security or the military affairs of a region or city would also be active in its judicial affairs. These men would sit as judges in the courts, and with them there appeared the members of a new profession, the professional advocate, who would represent private parties before the new-type courts and would advise them on the newtype law. They, too, had acquired the new learning in Italy, or later in the new universities of Northern Europe, such as Prague, Leipzig, Heidelberg, or Leyden. With the new men, a new kind of procedure arrived and the substantive law changed its character.

Procedure was changed into an exchange of written pleadings. Of necessity the substantive law came to change, too. It was not that the old customs would have officially gone out of usage, and that on such and such a date Roman Law would have been introduced as the law of the community. The old local law remained in effect, at least most of it. But the local customs and the

local statutes as far as they existed, had been anything but comprehensive regulations of all affairs of life and state. There were vast spaces on which the local statutes were silent and on which one could not find an established custom. Up to about 1400, if it turned out that there was a gap, some new custom would be developed in accordance with the spirit of the existing general system. But now the university trained professional lawyers were anxious to make use of their learning to fill the gaps, and thus it became natural to look to the, as it came to be called, common law of the Empire, i. e. the Roman law. It came to be applied unless one or the other of the parties could prove the existence of a local custom. So the Roman Law expanded, but it never became the all prevailing system; it remained, as it was called, a subsidiary law, to be called upon to fill the gaps of the local customs and the local statuta.

But the subsidiary law was the only one which was taught and studied in the universities. The local law was tolerated, and handled with the new methods and concepts which were developed in the professorial law of the universities. The result was that the remnants of the old law were transformed and fused with the Roman law, and that there finally emerged an amalgam which was profoundly different from both the old customary law and the Roman law of the *Corpus Iuris*.

The decisive feature of the "Reception" was thus the combination of the reception of a great code with that of a new method of legal thought as brought about by the replacement of one group of legal honoratiore by another. Similar effects can be expected to occur in the Islamic countries in which there has occurred not only the adoption of Western codes but also the substitution of jurists trained in the scholarly methods of Western legal thought for the older group of theological-legal honoratiore of Islamic tradition.