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# THE RECEPTION OF HIGHLY DEVELOPED LEGAL SYSTEMS BY PEOPLES OF DIFFERENT CULTURES

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THE RECEPTION of legal ideas of one people by another is a universal phenomenon in world history Wherever the civilization of a tribe or nation reaches a stage enabling it to build up a legal system, the conditions of a reception are at hand. The march of ideas, legal as well as cultural, often follows in the path of material goods. Already the Code of Hammurabi of about 1750 B.C., which long was held to be the oldest code of mankind, displays strong Sumerian influences along with the native Semitic elements. Receptions permeate the following thousands of years; they have been at work to the present day The tendency toward and urge for reception are even growing. As the world has become smaller and every civilized country is more sensitive to political, economic, and cultural happenings in foreign lands, so, in the province of law, do institutions and devices spread far beyond the boundaries of neighboring nations. Moreover, modern processes of constitutional legislation are apt to make intentional receptions more easily accomplished. In the nineteenth century there was almost no codification of the private law that did not show a decisive influence of the Code Napoleon. And in the twentieth century a leading, though not quite comparable role fell to the German and Swiss Civil Codes. Japan and Brazil, Turkey and Mexico, China and Greece, and even the Soviet Union furnish the evidence. Today a comparison of legal institutions and techniques is indispensable to any project of codification, and comparison, in turn, opens the door toward reception.

The universality of occurrences of reception, however, is by no

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means to be understood as identity or similarity As products of individual historical developments they are as varied and colorful as history itself. Neither in their premises nor in their effects do they have a common denominator. The only fact in common has been that the adopted law was available in writing. But that does not mean that it had to be statutory law It might equally be "juristic law," laid down either unofficially in private expositions (authoritative treatises on the law) or officially in reported decisions (case law). For the latter the diffusion of the English common law in the United States and nearly all English-speaking areas provides the prominent illustration, for the former, the influences of the medieval *Sachsenspiegel* (Saxon Mirror) in Germany and beyond is notable. Only so much is true that case laws and code laws exercised a different power of attraction on reception-minded nations. Where such a nation had its free choice between a system embodied in a code and one speaking through thousands of cases, it was likely to prefer the first, as a matter of expedience. This is why, *e.g.*, in the last hundred years the civil law as a subject of reception qualified so much better than the common law

Otherwise the history of receptions displays a wealth of varieties. The initiative may move from either outside or inside the adopting people. A conqueror may impose his law upon the conquered. A colonizing nation may bring its system and make it prevail, with or without resistance on the part of the natives. Where, on the other hand, a country receives a foreign law of its own free will, it may either proceed by a positive act of legislation or in legal practice through the activities of bench and bar. In the latter instance, the process of penetration may take decades or longer. It may even happen that the people or its lawyers are not aware of the fact that it is foreign thought they apply; they take its authority for granted. Such a situation, however, would not easily occur where the adopting people possessed a satisfactory legal system. The prospects are still smaller where there is a legal profession firmly established and eager to defend its interests, which normally are closely tied up with the given order.

These statements are primarily true of total receptions in which a people adopts the private law of another as a whole and not only in regard to a set of rules. The distinction of wholesale and piecemeal receptions is in common use, and rightly so. It is an entirely different

thing whether a country in introducing or amending a group of specific provisions has a foreign model in mind or transforms its whole system after that model. When, *e.g.,* our own law with respect to workmen's compensation or in some statutes adopting the principle of comparative negligence took lessons from the Continent, these measures did not affect the innate character of the American system. Such partial receptions have been remarkably frequent. They are going on continuously A new type, both significant and promising, has recently made its appearance. Under the auspices of the League of Nations, an International Institute for the Unification of Private Law was founded in Rome. In 1935, it published drafts on the international sale of goods and the civil liability of innkeepers which naturally were based on various systems of law in force. Uniform laws on an international scale were expected to result, but political tension and the war prevented them. Another draft, however, has indeed been put on the statute books of most European countries. I refer to the Uniform Law on Bills of Exchange and Checks as drawn up at Geneva in 1930 and 1931. While part of their provisions are original in character, the great majority constitutes a collective reception, as we may call it, of hitherto national laws. The chief model was the German regulation which, during the nineteenth century, had won many adherents, but French law also made contributions.

Totally diverse is the aspect where the whole body of the private law is at stake. All European nations, at one time or another, came to face the fascinating power of Roman law Should they adopt it or not? Roughly speaking, England in the thirteenth century answered in the negative, Germany in the fifteenth and sixteenth centuries in the affirmative. Also the recent reception of the Swiss law by Turkey was total rather than partial in character. And yet we must be careful not to overdo this antithesis. There is no mathematically strict dividing line. The boundaries between a far-reaching partial reception and a limited full reception are often fluid. There were, to be sure, total receptions in the almost exact meaning of the term: the code accepted by the Rhineland and the archduchy of Baden after the Napoleonic conquest was, in fact, essentially a translation of the French civil code. The codes of Belgium and Italy were not much more independent. But even in such extreme cases qualifications are not wanting. Moreover, the interpretation in the receiving

country takes its own course, so that what at the outset was identical gradually ceases to be it.

Regularly, however, a total reception is total only in a greater or lesser degree. A reception *in complexu,* to begin with, does not exist, where the burden of proof is on the party to a lawsuit who insists on a foreign system as established by custom. But even an undisputed reception is sometimes merely subsidiary, *i.e.,* filling the gaps left by native customary jurisprudence, as it happened, if only in principle, with the reception of Roman law in Germany More frequently, mixed formations emerged, especially in the sense that some areas of private law, as the law of contracts and of personal property, were strongly affected by the reception, while others, as the law of domestic relations and of real property, maintained a preponderance of the native law It is this juxtaposition and interaction of native and foreign elements which I wish to illustrate with a far-reaching event, *viz.,* that reception of the Roman law which took place when for the first time Germanic states arose on Roman soil.

Their earliest codifications are particularly impressive because, in legal history, they mark the end of antiquity and the beginning of the Middle Ages in Western civilization, and, at the same time, they signify the first clash between the Roman and the Germanic worlds. The movement started from the Visigoths after they had conquered southern France and all Spain. About 475, their king Euric issued a code which, as time went on, wielded great influence on many other groups, on Burgundians, Bavarians, Alemanni, and also the most successful and original among those peoples, the Lombards and the Franks. Each of these legislations showed a different blend of Roman and Germanic elements, and the general tendency was that with the gradual growth and increasing maturity of Germanic ideas the Roman element shrank and thus the reception receded. I shall therefore deal primarily with the law of the Visigoths and, in particular, with the period preceding their contact with the Corpus Juris of Justinian (529-534)

In regard to formal characteristics the code of Euric certainly shows traits of a total reception. Roman, to start with, was the very idea of and incentive to a codification. Roman was the language, the conceptual structure, the techniques, the composition of certain fact patterns, the organization of the material, the whole legislative style. The professional draftsmen, certainly Roman by descent like many higher officers of the royal court, were familiar with the prominent

sources of the age, and these sources, of course, were Roman. Since Gothic custom, if ever reduced to writing, was not likely to be accurately defined in the Gothic tongue, it could not be the subject of a learned study or of such a work as the ruler of the Goths, ambitious if uncultivated, was striving to attain.

These conditions which formed a background basically favorable to reception were greatly supported by economic factors such as developed early in the fifth century, when the Visigoths definitely settled in France. The division of every single estate between the Goth assigned to it and the Roman possessor implied the recognition of individual ownership in land and opened the door to large areas of the Roman law of property The close neighborly relation thus created between the two populations entailed the use of Roman coinage: a money economy replaced the natural economy of the earlier Goths; the Roman law of sales, loans, and interest became accessible and inviting. Through the same channel the use of writing made its entrance; writing consequently came to play a principal part in major legal transactions whether designed to transfer rights or produce obligations. Moreover, the share in the land allotted to a Goth included his share in the slaves belonging to the Roman possessor. And even before this partition, the victorious push of the Visigoths across Europe from the Black Sea to Spain had immensely added to the originally small number of slaves in their hands. Slaves were now prominently active in the households, in agriculture and commerce, in manual work and higher services, in war and peace, exactly as they had been among the conquered Romans. No wonder, then, that the elaborate body of rules the Romans had worked out to regulate the position of slaves and their qualification to do business offered much attraction to the victor.

Hence, on the part of the Goths, a great many factors combined to prepare the ground for a reception. But in those times, Roman law, too, had gone through an evolution. It is more than doubtful whether Roman law would have given the Goths a chance if they had entered the scene 200 or 250 years earlier. The then flourishing classical jurisprudence was too complicated and required too high a level of legal training to impress men who lacked adequate legal minds. From the early fourth century, however, this great system came to disintegrate. A different Roman law began to unfold which, unconcerned with the traditional niceties, was governed by social and economic

rather than legal considerations, a law averse to strict concepts and neither able nor inclined to live up to the standards of classical jurisprudence with respect to artistic elaboration or logical construction. It is this "vulgar law" which the Germanic tribes were to face. Its rules were not beyond their understanding; it seemed to appeal to their curiosity and ambition. An amalgamation of the vulgar law and Germanic customs was the result, a consequence of lasting importance. As medieval culture, in general, rested on ancient ideas in that pattern which the outgoing antiquity had shaped, so did the Roman elements in early Germanic legal thought appear in the form they had received after the peak of their development was passed. It was to take many more centuries before the world at large experienced the influence of classical Greek culture and before the legal world found access to classical Roman jurisprudence.

Three significant examples may elucidate this situation. In classical Roman law a sale was solely a contract to sell. The seller agreed to transfer the land or the article sold; the buyer agreed to pay the price. It follows that neither transfer nor payment was part of the sale. These effects were attained rather by separate transactions designed to perform what in the contract of sale had merely been promised. Hence, failure to transfer title or to pay the price could plainly not affect the validity and binding force of the contract. To the vulgar law, however, a sale was simply an exchange of price and goods, a simultaneous act implying both transfer and payment. Such a cash sale was the normal type familiar to practically every people who had not yet arrived at a higher standard of legal analysis. It was no doubt well known to the Visigoths too. But they were inexperienced in formulating general rules. These they found in contemporary Roman law Accordingly, they considered payment as the backbone and *conditio sine qua non* of a sale. Payment had to be proved by documents or witnesses. Absence of payment, even if the parties assumed it was made, frustrated the sale. If, on the other hand, the stated price was paid, the transaction could not be attacked by the allegation that the goods were sold below value. In consequence, the legislator barred sales on credit, subject to a single qualification likewise borrowed from the vulgar law If the price was paid in part, it would save the contract from being voided, and the buyer, if in default of the rest, would only have to pay interest, unless the vendor was granted a right of rescission under the terms of the sale. But such a part payment had to be a substantial one. A mere giving of earnest

money was not enough. Consent and payment were sufficient to transfer title. Conveyance or delivery did not constitute an independent requisite. In lieu of delivery a vendor who could not obviously be relied upon might be requested to furnish a surety and thereby validate the contract.

Likewise shaped upon the model of the vulgar law were the basic concepts underlying the law of property The classical jurists conceived *dominium* (ownership) as the right of, in principle, total mastery over a thing, a right exclusively vested in the owner. So they contrasted *dominium* (1) with *possessio,* the mere actual control, and (2) with *iura in re aliena,* limited rights in another man's property, such as a *servitus* (easement) or a *ususfructus,* the right to take the fruits without impairing the substance. The vulgar law, however, failed to maintain this lucid structure. Neither *possessio* nor *dominium* remained limited to their former meanings, and the notion of *iura in re aliena* disappeared completely A more popular pattern took its turn. *Possessio,* while continuing to connote factual holding, came also to be the common denominator of any right *in re.* It might indicate unqualified ownership, it might refer to a usufructuary or a perpetual lessee: what particular right it meant to indicate was either stated in clarifying clauses or left to the context to tell. Nor were *dominium* and *ususfructus* any longer carefully kept apart. Both were held to be types of ownership, and the difference, comparable with our distinction of estates in fee-simple and for life, lay solely in scope and duration. Moreover, a variety of real rights evolved, fuller than usufruct, but narrower than ownership in their classical senses. A donation might not, as usual, entitle the donee to sell the gift or to leave it to others except in certain cases. Veterans, *e.g.,* could transfer conquered land, awarded them by the emperor, only to men who would equally enter the service for the defense of the frontier, a case evidently heralding feudal developments. The Germanic tribes adopted and expanded all these approaches of the vulgar law The fact that they thus managed with possession or ownership where Roman law, both earlier and later, differentiated various *iura in re aliena,* has commonly been looked upon as a Germanic trait. But it may be validly doubted, whether the Germanic draftsmen would have started there, if they had found the discrimination of *dominium* and *iura in re aliena* in the vulgar law Its absence is not only accounted for by the youthfulness of Germanic thought, but at least in the same degree motivated by the decadence of Roman legal techniques.

Again it is not the classical but the vulgar law that furnished the pattern for the rules concerning a mother's estate that moved to her children (*bona materna*) Formerly the children subject to the power of their father could not own property Anything they acquired went straight to the father, and he as the sole owner might dispose of it at will. He maintained these rights until he died, regardless of the age of the children. From the fourth century, however, this typically Roman paternal power disintegrated under the impact of popular custom. Consequently, the title went to the children. The father could administer the property and take its fruits, but he could no longer sell or otherwise dispose of it. Nor did his position continue through his lifetime. He had to pass the whole estate to the children in case of his remarriage; he must hand over half of their portion when they were twenty years of age, and two-thirds if they were emancipated, *i.e.,* released from the father's power by legal transaction. This was the state of imperial legislation as the Visigoths found it. They copied all with the one truly Germanic qualification that an emancipation would occur *ipso jure* when the child married.

In regard to a number of broad maxims the borrowing of the Visigoths is particularly obvious. Euric's Code included rules such as these: An immoral or unlawful transaction shall be void. A sale or gift made under violence or threat shall be invalid. A debtor in default shall pay interest on his debt. Property which is the subject of a pending lawsuit shall not be sold or given to another person. No primitive people has, on its own account, ever arrived at such generalizations. They signify the end of a development, not its beginnings. In fact, those rules were worked out and gradually refined at a time when the Goths had not even entered their historic age. They were a work of Roman jurisprudence.

In the instances hitherto discussed the Visigoths followed the lead of the vulgar law with virtually no qualifications. In other places they contributed elements of their own. The law of wills and succession offers a pertinent example. Germanic peoples originally did not know of the unilateral and revocable declaration of a person designed to arrange for his succession. Only where he left no members of his household or sib, he might, in a publicly performed act, create a successor by a kind of adoption. Later he might also proceed by way of a gift: either he transferred title in his property while reserving the usufruct for his lifetime, or he retained the ownership with the trans-

fer not becoming effective until his death. In neither way could he withdraw at discretion. the donation was a contract. This was the situation when Euric intervened. He made the latter type of donation revocable, because, as he stated in so many words, it resembled a testament. But this reception of the Roman testament did not carry very far. Deviating from it, the Visigothic will did not necessarily cover the whole estate; it could be limited to a specifically determined piece of property In other words, testate and intestate succession became compatible, and the basic difference between the institution of an heir and a mere bequest was dropped. Nor, as in Roman law, did the will of the deceased rule supreme, slightly restricted by statutory benefits of the next of kin. Only in sporadic instances could the Visigothic testator dispose freely, as the widow in regard to property given her by her late husband. Otherwise he was bound by rights in expectancy vested in his children and other direct descendants. Equally different from Roman law was the legal order of succession which called descendants first, ascendants second, and collaterals third; different the remaining though greatly relaxed discrimination against females of equal degree of relationship, different the unlike treatment of real and personal property as parts of the estate. Only minor segments in this order of succession showed Roman characteristics: the right of grandchildren to enter in the place of their predeceased father or mother, the succession by the spouse in the absence of relatives within the seventh degree, and the succession of the church to clerics who failed to leave such close relatives.

Thus, if in the law of succession Roman and Germanic elements combined, the matrimonial regime of property displayed a definite preponderance of Germanic thought. In Roman law, classical as well as vulgar, marriage as such did not produce any changes with respect to title or management of the wife's goods; a *dos* (dowry), if it was given, went from the bride's side to the husband, who became its owner. Among the Goths, however, it was up to the bridegroom to give the *dos* in order to win the bride, and this transaction, accordingly, was indispensable for a legal marriage. Moreover, most of the property acquired during marriage constituted a common fund managed by the husband. The conception of such a common property was nothing new to Germanic peoples, who shaped it in various devices, while advanced Roman law, more individualistic in character and averse to any haziness in legal relations, displayed a definite disinclination against joint rights and liabilities.

The Visigothic law of a daughter's marriage had a remarkable origin. There was a reception, to be sure, but one of a very peculiar nature. An enactment issued by the Roman emperor at Ravenna in 422 provided that a betrothal made by the father was binding upon his minor daughter, even after his death. The West Roman Interpretation construed this enactment as including also a major daughter. The whole rule ran counter to Roman law, where a girl could not be married without her consent and, moreover, the betrothal as a mere promise to marry was not directly binding. The rule of Ravenna complied fully, however, with Germanic custom, which held a betrothal indispensable to marriage and definitely binding, to the extent that subsequent marriage to another man was punished as adultery Besides, the party to the betrothal on the bride's side was her father, representing her sib, while her consent was legally not required, even after his death. These old observances underlie the Gothic provisions, but at the same time the decree of Ravenna appears to have been drawn upon. Thus an instructive development comes to light. The Visigoths drew upon a Roman decree which, in turn, took advantage of a Germanic custom. The Germanic custom, shaped in Roman dress, returned to its source. We may term that a rereception. And there are more indications of Germanic custom. Under Roman law, classical and vulgar, marriage required consent not only of the girl but also of the father in whose power she stood. To the Visigoths his approval though normal, was not indispensable. If, not betrothed by him, she entered a marriage of her own volition, she forfeited her right of succession, but the marriage held good.

Roman, on the other hand, was the diriment impediment of incest and, essentially, the law of divorce: its nonjudicial forms, its grounds, the right of divorce vested in either spouse and the consequences of an unlawful separation which not only entailed losses in property but also barred the party separating without legal cause from remarriage. All these traits can be gathered from imperial decrees released in the fourth and fifth centuries. Pagan Germanic custom, apart from divorce by mutual agreement, knew only of the right of the husband to repudiate the wife for certain reasons. At this point the influence of the Church made itself felt.

In conclusion, let me summarize what a discussion of the relation between law and culture may gain from a survey on receptions. And let me concentrate on those peaceful and spontaneous receptions

which, in the course of history, have been of a far greater consequence than forcible impositions of a foreign system.

1. To begin with a cultural minimum, we noted that a law is not capable of a total reception unless it appears in a written form, though not necessarily in the form of statutes or in the same language.

2. A disparity in cultural levels or a vacuum in elaborate legal concepts on the part of the less civilized people is no bar to reception.

3. Where a reception through legal practice rather than legislation is in question, the gap between the intellectual or social standards of the two nations must not be too wide. The Germanic tribes in the early Middle Ages adopted, if anything, the vulgar and not the classical Roman law Italy, France, and Germany in the high and late Middle Ages accepted, if anything, Justinian's law not in the fashion in which he had laid it down, but modified by canon and feudal institutions and developed by the Italian commentators of the thirteenth and fourteenth centuries.

4. Nor must a movement toward reception meet too potent countercurrents or handicaps. A well-organized profession determined to keep to its traditional law may counteract the invasion of foreign legal thinking, as did the English bench and bar in the thirteenth century For the same reason and in view of the numerous differences of approach in the Common Law and the Civil Law it would hardly be safe to assume that far-reaching amalgamations or assimilations may be achieved in the near future. The recent failure to arrive at an agreement in the case of bills and notes in spite of much good will on both sides serves as a caution.

5. A people of some indigenous cultural tradition would not indiscriminately accept a foreign law *in toto*. It would maintain institutions of its own, and the result would be a blend of native and foreign elements. Early Roman law, *e.g.*, received some devices on legislative techniques from the Greeks, preclassical law learned from them the art of making theoretical distinctions and setting up a system of legal principles. But whatever was borrowed, whether in method or substance, was organically adapted, so that something new and national Roman emerged. Centuries later a similar process on a broader scale occurred in reverse. In the eastern part of the empire many institutions were Romanized only to uphold certain features of their indigenous Hellenistic structure.

6. Not all the parts of a system are to the same extent amenable

to reception. Least inclined to give up its traditional feature is the law of the family including the rules on intestate succession. Second in order is the law of real property, especially as far as rural land is concerned. On the other hand, more loosely connected with a people's past and therefore more easily copied is the law of personal property, notably that of commercial goods, and consequently most of the law of contracts. These fungible provinces of the law, which are controlled by economic interests rather than national customs and sentiments have at all times offered the readiest seed ground for a reception.

7 If, on this background, we attempt to single out particular factors making for a reception, none seems to be more important than the urge of a nation to rise to a higher cultural level, to associate itself with one or another country leading in the field of law When, in a period of growing prosperity, self-reliance, and ambition, a people goes through an awakening, when it refuses to lag behind others and yet realizes that its own legal habits or concepts are not adequate to meet the needs of the time, it naturally turns to a superior system and checks upon the experiences had under it. "Superior" in what sense? It has lately been discussed whether such a superiority is, as a rule, due to the general authority or esteem enjoyed by a nation or rather to the inherent value of its legal structure. The question cannot be answered once and for all. Both criteria are valid, both at times overlapped or blended. When in the fifteenth and sixteenth centuries Germany adopted the Roman law, it mattered greatly that Roman law was the law of the *imperium Romanum* which seemed to have been renewed in the German empire and whose idea survived in the culture of Europe. But the qualities of Roman law likewise played a considerable part. The artistic composition of an admirably consistent system won out over the largely uncoordinated mass of rules of Germanic origin. Again, although in a lesser degree, the triumphal march of the Code Napoleon in the nineteenth century certainly owed much to the reputation and brilliance of French culture. Of an even greater attraction, however, was the lucid style and modern spirit of the Code itself.

To go further, in many instances it has been the intrinsic superiority alone that counted. Were it not for this factor, the alternative between Roman codification and English custom could hardly have arisen in the thirteenth century, and Bracton, the greatest exponent of English jurisprudence at that time, would not have been prompted

to fit English conditions into a Roman frame. His French contemporary Beaumanoir in compiling the customs of his county followed the same line. Roman law, while lacking authority in northern France, materially affected Beaumanoir's statements, because it provided him with the tools to put legal thought into writing. The impression of Roman legal wisdom was in all these cases so tremendous that adverse substantive traits were overlooked or disregarded. A Christian world accepted a system whose outstanding authors had been pagans. A feudal economy and later the incipient capitalism adapted rules of a slave economy A social order largely built on wealth in real property made use of a codification which with its urban character paid little attention to the distinction between land and movables. A society accustomed to treat human beings as members of associations, whether a village community or a craft guild, turned to a law in which the individual constituted the normal unit and relations between individuals formed the backbone of legal discussion. The explanation is supplied by the fact that the arsenal of Roman rules was rich and flexible enough to allow for selection and interpretation which made them adjustable to the needs of new times.

Passing to our own age, the contrast between authority and quality as factors of reception seems to have faded to the vanishing point. There appears to be no prestige involved except the one which is based on a superior quality of the adopted system. In the 1920's, 30's, and 40's, Soviet Russia, Mexico, China, and Greece enacted civil codes. They all drew heavily on the German code, although German power after the defeat in 1918 and German reputation under the Hitler regime were at a low ebb, indeed. What counted was only the excellence of the code. It was the more modern background, the consistent structure, the precise terminology, the clarity of legal concepts that made the German code stand out and in part prevail over the French. Most of these virtues are qualities in point of form rather than substance. And this is no coincidence. The problem whether one system is materially closer to true justice than another often defies solution. The answer, at any rate, is too difficult to form the basis for the reception or rejection of a foreign law Even a passionate champion of the civil law would not easily contend that the preference it enjoys over the common law as a subject of reception is attributable to the superior value of its substance as a whole.