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# FOREWORD

Jurists have a natural tendency to concentrate on positive law. The practising lawyer has to solve, according to prevailing law, the daily problems which face him in his profession. The academics regard it as their duty to come to his assistance in this task. Thus it is only at unfrequent intervals that they find the leisure to devote themselves to problems *de lege ferenda*. Such a state of affairs also prevails in a country such as Israel where the law is at a transitional stage and in the process of continuous change. This Institute, however, would be failing in one of its main purposes, were it not to encourage the investigation of problems of legislative policy and to endeavour to assist the Israel legislator in the crystallisation of such a policy. Hence, among other initiatives, the present volume.

The editors have not considered it their task to adopt any definite view of their own — or even a common outlook among themselves — with regard to the questions treated in this volume, nor to insure that any such view be presented to the reader. They have left the contributors entirely free to express their respective inclinations. The reader will discover the variety of approaches. The editors' designs are to bring forward fundamental questions in different branches of law, and, at the same moment, to present the various opinions of the contributors.

We wish to express our sincere thanks to Dr I. Englard for his valuable help in connection with the editing and printing of this volume.

We are happy that this volume appears in the series of "Scripta Hierosolymitana" of the Hebrew University, since, as the old adage has it, "...Scripta manent".

The Institute for Legislative
Research and Comparative Law, Jerusalem

The Editors

# ON RECEPTION AND ON THE LEGISLATIVE POLICY OF ISRAEL

by GUIDO (GAD) TEDESCHI*

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## I

1. In law, as in other spheres of culture, 'reception' is in one sense a natural and normal phenomenon which is common everywhere, particularly today. Ideas show little respect for national boundaries. Under normal conditions they tend to circulate freely and cannot be confined within arbitrary limits. Moreover, since neither legislators nor judges function in a vacuum they necessarily partake of the views and opinions around them and imbibe ideas which originated outside their own countries — either receiving them directly from abroad or obtaining them locally after their reception by others.[1]

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1. Cf. R. David, "*Réflexions sur le Colloque d'Istanbul*," in VI (1956) *Annales de la Faculté de Droit d'Istanbul*, p. 239 f.

In much the same way every literary or scientific work contains elements which are derived from something read by its author or heard from others. It is only when central and important parts of a work have this origin, while lacking any clear imprint of the author's own creative activity, that the work will not be considered original work but plagiarism.

The borrowings and appropriations of legislators and judges cannot be called plagiarisms — at least not in the sense in which this implies a legal wrong. But they will not even be regarded as a reception unless they are exceptionally striking, either because of their scope (as where a whole statute or code is taken over) or because the imported provisions are peculiar to a particular system and have no parallels in other systems.

2. In the law of the State of Israel the foreign elements predominate, and their foreign origin is obvious and unmistakable. This is the case to such an extent that in most spheres it is difficult to point to any significant contributions of our own. But if we are to be precise we cannot speak of a reception every time we are faced with provisions of foreign derivation. To characterize the importation of law as a reception it is not enough to show that the provisions in question were imported from a given foreign system; it is also necessary to show *how* they were imported. There is no reception where the law is not received from within a society by its people or legislator but is imposed from without.

In dwelling upon this requirement in the definition of a true reception some writers refuse to regard an importation of law as a reception whenever it is induced by outside pressure. Thus, for instance, if, in the days of the British rule in India, an Indian prince on the "advice" of the British resident adopted a criminal code modelled on English law, there was no true reception but a cross between an imposition and a reception which has been called an 'imposed reception'.[2] There are some who even go so far as to assert that English law, as unenacted law or *Juristenrecht*, is incapable of reception and has in fact never been received anywhere but has, as it were, conquered its territories.[3]

2. Cf. M. Rheinstein, "Types of Reception," in VI (1956) *Annales*, *cit.*, p. 33 f.

3. Cf. A. Kocourek, "Factors in the Reception of Law", in *Studi in memoria di A. Albertoni*, III, Padova, 1938 (p. 251: "The Anglican system (...) is beyond the possibility of foreign assimilation or reception"); P. Koschaker, *Europa und das roemische Recht*, 2 ed., Muenchen und Berlin, 1953, p. 161 f: "Man rezipiert Gesetzbuecher, aber nicht Rechte als solche, insbesondere kein Juristenrecht (...). Nichtsdestoweniger hat sich das englische Recht ueber weite Gebiete ausgedehnt, allerdings nicht durch

However, if foreign law which is imposed upon a people actually takes root, we must assume that it has finally met with a sufficient measure of consent on the part of that people, even if this consent was given reluctantly and after the event; that is, even if it was only submission. This consideration gives some support to those who do not distinguish between reception and imposition, or at least do not counterpoise one against the other.[4] Moreover, even in typical cases of reception there is at first only a partial or relative consent on the part of the people. The consent is that of certain sections of the community only, and it does not become general until the received law takes root and becomes part of the consciousness of the people. It is thus natural for the difference between the two phenomena to become obscured with the passage of time. On the other hand, a reception can be no less temporary than an imposition. Turkey at one time passed from the reception of French law to the reception of Swiss and other law, and Egypt too has abandoned French law in favour of a new law which is also, on the whole, of European extraction. By contrast, neither India nor Israel have shown any haste after gaining independence in abandoning the law imposed on them by their British rulers, nor have Tunisia or Morocco discarded French law. It is true, however, that the retention of foreign law after it has already been in force for a considerable time is not the same as its reception and that the motivations in such cases are different.

It is clear that the introduction of English law into this country during the British Mandate cannot be described as a true reception. This applies as much to the law which was imported by virtue of section 46 of the

Rezeption, sondern durch Eroberung, wobei dieses Wort nicht im Sinne gewaltsamer Aufdraengung des eigenen Rechtes gegenueber den Unterworfenen zu verstehen ist, sondern weit eher als pénétration pacifique." But, as against this, see the reservations of David, *op. cit.* p. 243. It must be added that Koschaker's thesis regarding English law is somewhat weakened by his assumption (in which there is some truth, though he has overstated it) that the decisive factor in all receptions of foreign legal systems (as distinguished from isolated institutions) is political power or might: "Wir ziehen aus diesen Betrachtungen den Schluss, dass die Rezeption eines Rechtssystems keine Qualitaetsfrage ist; mit anderen Worten, man rezipiert ein fremdes Recht nicht, weil man es fuer das beste haelt. Vielmehr ist die Rezeptibilitaet eines fremden Rechtssystems eine Machtfrage (...) (*op. cit.*, p. 137 f.). But see *contra* F. Ayiter, "Das Rezeptionsproblem, etc." in *L'Europa e il dir. rom., Studi in memoria di P. Koschaker*, II, Milano, 1954, p. 131 f.; Buenger, "Die Rezeption des europ. Rechts in China", in *I. Teil der Landesreferate zum III. Internat. Kongress fuer Rechtsvergleichung*, London, 1950, p. 166 ff.

4. Cf. Kocourek, *op. cit.*, p. 235.

Palestine Order in Council[5] and the frequent references to English law in Mandatory Ordinances, as to the local Ordinances themselves which were based on English law, and followed it closely. For the authorities responsible for this so-called reception were not the representatives of the local population but representatives of the Mandatory Power which introduced its own law. It must be admitted that in Palestine as in other British dependencies the 'natives' themselves often asked for the introduction of English law; that is, certain sections of the local population desired it. But even in these cases one cannot speak of a real reception, if only because a choice between English law and other law simply did not exist in the circumstances. The political situation was such that those who wanted to rid themselves of existing law could not have adopted any course other than that of requesting the introduction of English law. The British authorities would certainly not have imported any other law. At best one can describe the process as an intermediate state between a reception and an imposition, parallel to, but the reverse of, the phenomenon discussed by Professor Rheinstein: instead of an 'imposed reception' there was here a 'solicited imposition'.

In conclusion, it may be said that both the typical reception occurring on the free initiative of the receiver, and the imposition of law — whether merely suffered by those who submit to it or actually welcomed or even solicited — belong to a wider concept which may be referred to as 'penetration' (from the point of view of the dominant system) and 'absorption' (from the point of view of the servient system). As will also be seen, reception (in the narrow sense of the word) and imposition do not exhaust the ways in which provisions of one legal system may penetrate into and be absorbed by another.

3. The invasion of this country by English law was not brought about solely through its solicited or unsolicited imposition by the Mandatory legislator. Only part of the English law which is now applied in our courts and the 'English climate' which pervades our law can be related to the activities of that legislator. With us much of it is due to 'infiltration' and 'crypto-reception', not to mention the true, but fairly limited, reception which took place after the establishment of the State of Israel.

We have said that a reception must be *willed* and that where the will is absent there is no reception (in the narrow sense of the word) but an

5. Cf. The Palestine Order in Council, 1922, in Drayton, *The Laws of Palestine*, III, London, 1934, pp. 2569 ff.