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THE IMPACT OF THE COMMON LAW ON LATIN AMERICA

PHANOR JAMES EDER *

The unification of the law in the Americas has many ardent advocates. Sceptics, though less vociferous, are more numerous. Some recognize the imperious necessity of mutual comprehension and interpenetration of the common law and the Roman law systems. Before they can be converted into adherents of uniformity, they will have to be convinced, in the light of experience, that its advantages will not hinder the sound growth of law in accordance with peculiar national requirements, due to diversity of geographical and economic conditions, of race, language and historical traditions. A search for a panacea by world or regional process may well tend to weaken efforts for local reform of the law.

These brief notes are intended as an invitation to scholars to study the impact heretofore of common law concepts and institutions on Latin America and to appraise their value in the light of realities. Their influence, both direct and through Continental sources, has been much greater than is generally recognized.

The most marked influence has been in the field of constitutional law. The early Latin American constitutions were framed on the model of either the United States or the French constitution. Our federal system, especially, attracted the attention of enthusiastic idealists.¹ To some extent, at least, the political instability of Latin America in the 19th century was due to the attempt to incorporate alien concepts into the political system. The revived unrest in recent years may also be attributable to the failure to find suitable constitutional norms. The frequent changes of constitutions have been a marked feature in many countries. In others, such as Venezuela and Mexico, the federal system has existed on paper only, and never took root.

On the other hand, Argentina enjoyed constitutional stability for nearly a century. While a few of its writers in recent years minimize the American influence, the great majority of them give it its due weight. The Argentine Supreme Court over a long period accorded persuasive authority to our own Supreme Court decisions.² So did the Supreme Court of Bra-

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1. At the beginning of the struggle for independence, Miguel Pombo's annotated translation, Bogotá 1811, of the Constitution of the United States and of the Declaration of Independence, "together with a preliminary discourse on the federal system" wielded an important influence.

2. There is an excellent study by AMADEO, ARGENTINE CONSTITUTIONAL LAW (1943).

zil. In every country, writers on constitutional law discuss our system.³ Many of our authorities on constitutional and administrative law have been translated into Spanish or Portuguese; a few others have reached Latin America through French or Italian translations. Among others: *The Federalist*, Robert Livingston, Paine, Adams, Marshall, Story, Kent, Calhoun, Lieber, Paschall, Bump, Curtis, Tiffany, Cooley, Horace Davis, Simon Sterne, Bryce, Beck, Hughes, Willoughby, Friedrich, Corwin, Burgess, Goodnow, Garner, Cocker, Conklin. The translations of the Constitution itself have been innumerable; and several of the state constitutions have also been translated. The English parliamentary and cabinet system has also had considerable weight. There have been translations of Locke, Blackstone, John Stuart Mill, Bagehot, Sir Henry Sumner Maine, Gladstone, Freeman, Dicey, Jenks, and more recently of Anson, A. Lawrence Lowell, Sir Maurice Amos, Jennings, Todd and Laski. In parliamentary law our system has conquered the field; translations of Jefferson's and Cushing's *Manuals* were widely used and May's *Parliament* has also been translated.

Our doctrine of judicial supremacy has been gradually adopted everywhere, sometimes with interesting modifications, as in Colombia and Panama, with their *acción popular*,⁴ to provide an immediate test of the constitutionality of statutes and executive acts. Advisory opinions, following the practice of a few of our state courts, have also been occasionally provided for.⁵

Our Bill of Rights, taken either from our constitution or through the French Declaration, which in its turn was influenced by the American Constitution, has been universally adopted in the written texts of the constitutions. Several of its provisions were already part of the common law of Spain and of the Indies. Others were new, and it is therefore not surprising that they have not always been lived up to in practice. The underlying reasons for this misfortune need careful study.

Our writ of *habeas corpus* has been adopted, either under that name or some other, in most countries and enlarged to give protection not only to personal liberty, but to other rights. The name *habeas corpus* persists in Cuba and some other countries; in Brazil it has been changed to *mandado de segurança*, and in Mexico and Central America, to the more comprehensive *amparo*. In Mexico it has had an extraordinary and interesting development and the *amparo* perhaps furnishes the best illustration of the

3. "If we are to study comparative constitutional law, it is a practical necessity for us to consult the law of the United States, in view of the resemblance of our institutions to theirs." Vasquez, CURSO DE DERECHO PUBLICO 558 (Mexico, 1879).

4. BACKUS AND EDER, GUIDE TO THE LAW AND LEGAL LITERATURE OF COLOMBIA 18-21 (1943).

5. Eder, *Advisory Opinions and Declaratory Judgments with respect to Constitutional Questions*. SIXTH CONFERENCE INTER-AMERICAN BAR ASSOCIATION (Detroit, May 1949) (also in Spanish).

adaptation and thorough digestion of an imported idea, followed by a purely local evolution and growth. It is one of the best fruits of comparative law in action.

In the field of civil law, based fundamentally on the Spanish law and the Code Napoleon, one would naturally not expect to find any Anglo-American law at all, but even here there are traces, and further research would, I believe, disclose more than is at first sight evident.

The first original civil code was that of Chile, which was copied by Colombia and Ecuador and in greater or less part by subsequent codes. Its author, Andrés Bello, spent many of his formative years in England and it would be strange if his thought did not show some reflection of his long residence there. The chapter on fiduciary executors seems to bear some of the marks of the testamentary trustee of our law. The Argentine codifier, Velez Sarsfield, had an Irish grandfather and his leading biographer says that spiritually Velez was in effect the son of his grandfather. "From him he inherited his habits of order and economy and the really Saxon frugidity of his temperament."⁶ The practicality of the code may be a result of this inheritance. In his library he possessed several English law books, and his semi-official notes to the code indicate Story, Kent⁷ and the Louisiana code among the minor sources. The concept of *mandato* in this code comes much closer to the common law "agency" than do the codes of other countries. Clovis de Bevalicqua, the chief draftsman of the Brazilian code, was a lawyer of equally vast erudition, acquainted with our system. Another of Brazil's most famous jurists, Ruy Barbosa, spent some time in England.⁸

It is in more recent legislation, however, that we note the influence of our ways and institutions. Our homestead has been borrowed, either directly or through European adaptations, and is to be found in the legislation of most of the countries to the south.⁹ The English word homestead is to be found in the literature, but in the statutes it is styled with a native name: *hogar de familia*, *bien de familia*, *bem do familia*. The Torrens system, itself borrowed in part from continental practice, has been the subject of several treatises, and some of its features have influenced the law. The legislation of Cuba and Guatemala has, in essence, adopted our common-law marriage. Pre-nuptial medical certificates seem to stem from the United States. The enactment of divorce legislation, exotic to these

6. CHANETON, *HISTORIA DE VELEZ SANSFIELD* 17 (2d ed. 1938).

7. Velez Sarsfield's *COMMERCIAL CODE* borrowed more substantially from Kent's *COMMENTARIES*.

8. His argument in 1892, which decided that acts of the legislature and of the executive are subject to judicial review is a classic of the law.

9. 4 *ENCYC. SOC. SCI.* 436 *et. seq.* (1937); Cockburn, *El Homestead*, 25 *REVISTA DEL FORO* 173, 389, 724 (Lima 1938).

Catholic countries, can be partly attributed to North American influence; in Mexico the liberality of some of the state divorce laws has served as a bait to lure the errant gringo; recent decisions of the Supreme Court have been a natural reaction to this scandal. Freedom of testation, permitted in Mexico and Panama, in contradistinction to the forced heirship generally prevalent, was directly due to the example of the common law.

The most striking recent development has been the adoption of our express trust. Its chief propagandist has been Dr. Ricardo J. Alfaro, of Panama, who secured the passage of the law in 1924 in his country. The trust has also been adopted in Puerto Rico and in Mexico, where there is already an extensive literature on the subject, some of it, the works of Rabasa and Molina Pasquel and others of outstanding merit. Upon the recommendations of the Banking Commissions headed by Professor Kammerer, banks were authorized to open trust departments in Colombia, Peru, Chile and Bolivia. In Chile especially the "comisiones de confianza" have had a substantial growth, and the trust has taken firm root in Mexico. The topic of trusts is a hardy perennial at the Inter-American Bar Association meetings.¹⁰ Alfaro and Patton have proved conclusively that there is no inherent obstacle in civil law concepts to the introduction of the express trust and its further propagation can be looked to with assurance.

Even before the statutory adoption of the trust, the requirements of British and American investors in bond issues had made the corporate trust known in practice. Several countries adopted legislation to provide for a general or common representative of bondholders whose functions correspond to those of a trustee under a corporate indenture. Even without such legislation, the validity of a foreign trust has been recognized in Cuba and has rarely been questioned elsewhere. In the Argentine the English word "debenture" has been taken over without change.

It is in the field of commercial law that the Anglo-American influence has been predominant in practice, though not always reflected in the commercial codes, many of which are antiquated. Since those codes invariably provide that commercial custom is a suppletory source of law or basis for decision, it is of lesser consequence that the statutes do not expressly incorporate it. It is a trite observation that a great part of the living law is not to be found in books. England dominated international trade for a century until the First World War, with the United States a close rival in Latin America and assuming a preponderant place thereafter. In commercial law the great role has been played by international commercial usage, as the real living law—what the civilians call international corporate law—not by the bare texts of a statute. Insurance policies, sales

10. See Patton, *The Nature of the Beneficiary's Interest in a Trust*, 4 MIAMI L.Q. 441 (1950).

contracts, charter parties, bills of lading, warehouse receipts, corporation by-laws, letters of credit and other bank documents and usages of all kinds have tended to follow British or American models. This practical incorporation has been facilitated by the historical fact that our law itself had its roots in the general law merchant of the European continent.

But our law has found its way also into express legislation. Argentina even adopted the English word "warrant" in its law on warehouse receipts, as it did "debentures." Maritime mortgages arose in England, spread to the Continent and thence to South America. Stoppage in transit of common law origin has been recognized in Brazil, Chile and elsewhere. The Argentine law of cheques was intended to be based on the English law, and the Costa Rican Bills of Exchange Act was modeled on Chalmers' codification. Our own uniform negotiable instruments law was adopted literally by Puerto Rico, Panama and Colombia. In contrast to our remarks on the Mexican *amparo*, the Colombian Negotiable Instruments Law furnishes a striking warning of how not to legislate.¹¹ It was a hasty, incomprehensible and frequently inaccurate translation, made under the spur of the Kemmerer Commission to revise the banking laws. The Revisory Commission of the Commercial Code has prepared a draft to remedy these defects, but the question still remains whether it is wise to include any common law concepts in legislation. A common meeting ground can be found for a uniform law without them. Chile, when revising its banking laws under Professor Kemmerer, who had learned a lesson from the Colombian experience, attained the practical advantages of our uniform law without sacrificing its own legal structure and traditions. Needless to say, the banking legislation of all the countries that were advised by Dr. Kemmerer and his associates shows the strong influence of our banking laws.

Several of the corporation laws, chiefly through the French law of 1867 which was inspired by the English Company Acts, show the impress of the common law. Cuba's railroad corporation law was substantially a translation of the New York law. Panama, in the successful endeavor to become a favored location for incorporation, as was Lichtenstein on the Continent, based its statute on the Arizona law; and the Mexican statute borrowed some ideas from its northern neighbor. Recent statutes authorizing conditional sales and chattel mortgages also reflect Anglo-American influence.

In criminal law, the adoption of the jury, via France, has been our most noteworthy contribution. The jury was one of the British institutions to which the French Revolution attached great importance as a safe-guard

11. Puerto Rico offers other examples, as the insular writers have not failed to point out. But the most ludicrous translations, perhaps, are to be found in the semi-official Spanish texts of the law of the State of New Mexico.

of liberty. The early work of Phillips on Juries was translated into French and from French into Spanish. De Tocqueville's work also was influential. The Argentine Constitution of 1853 provided for jury trials, but was never implemented by legislation. No adequate study, as far as I am aware, has ever been made of its suitability to local conditions in the countries where the criminal jury has been introduced. Our suspended and indeterminate sentence and probation and juvenile courts also have found their way into Latin America, but on the whole our neighbors to the south have sensed that our criminal law was one part of our system which had little fruit to offer them.

In many other fields of the law, Anglo-American influence has been felt to a greater or less degree—patents, trade marks, copyright, moving pictures, royalties, options and specific performance thereof, public utilities, anti-trust legislation, tax laws,¹² etc. All of these would repay detailed exploration.

Latin American jurists have gained deserved fame as exponents of public and private international law. Their writers on these topics have nearly all been well acquainted with our leading authorities. One of the earliest books, frequently reprinted, was by Andrés Bello whom we have previously mentioned. In his classic work on the law of nations, Bello acknowledges his debt to Chitty and Kent. Conversely, his writings largely influenced Wheaton, and Wheaton in turn was translated by Calvo. Dicey and Westlake have been translated into French as has also the Restatement of Conflict of Laws.

Formerly French was the second language of all educated Latin Americans; it is being replaced by English and, in consequence, we can expect an ever-increasing tempo in the influence that the common law will exert on Latin America. Recent drafts of codes reflect a growing attention to English and American principles, as does the greater emphasis upon case law. The Inter-American Bar Association is proving a powerful factor in this movement, but I must repeat that its effects in the past and in the present should be made the subject of real and intense research before assurance can be felt that this influence is necessarily all to the good.

12. Colombia's income tax law and regulations are in large part copied from the United States. American tax experts have been consulted by the governments of many countries.