

EUROPEAN INFLUENCES ON AUSTRALIAN CRIMINAL CODES

In preparing this paper I acknowledge my indebtedness to Professor Cadoppi, Professor of Law at the University of Parma for the assistance which two articles written by him have provided. The first is Dalla Judge Made Law al Criminal Code (From Judge Made Law to Criminal Code) published in the *Rivista Italiana Diritto Procedura Penale* (Italian Review of Criminal Law and Procedure) of 1992 and Il Codice Zanardelli e la Codificazione nei Paesi di Common Law (The Zanardelli Code and Codification in Countries of the Common Law) which was published in the same review in 1996. In the former, he writes on the subject generally of the movement in common law jurisdictions away from judge made law whilst the latter article is largely concerned with the specific influence of the Zanardelli code upon criminal codes in common law jurisdictions and in particular, the Griffiths code of Queensland and through it a large number of other codes. This article has been translated by me and the translation appears in the just published James Cook University Law Review.

As every comparative law student is told, codification of laws represents one of the defining distinctions between the civil law system and the common law. It is at the heart of the inductive/deductive dichotomy which students are taught about. With the civil law process involving the application of the general principles to be found in codified laws to the particular circumstances of the case whilst in the common law general principles are derived from the judgments of the court pronounced upon particular circumstances of an individual case.

The civilian systems of Europe have their origins in ancient codes whereas the common law developed through the law making role of the courts in individual cases.

And yet, as we all know, codification is now commonplace in the common law jurisdictions and especially in the field of criminal law. It is in the field of penal law that codification is said to have a particular importance and value because of the significance of this area of law to the whole community and the need for certainty and clarity and ease of understanding as well as accessibility by those subject to it.

Codification then generally and in the field of criminal law represents one of the most significant historical cross overs from the methodology of the common law to that of the civil law.

Notwithstanding the origins of the civil law, codification in both systems is, in a real sense, little more than two centuries old. Whilst there were earlier codes in various parts of Europe, the great development of codified laws occurred on the continent with the Napoleonic code shortly after the turn of the 19th century. The Code Penale of 1810 became as a result of the Napoleonic conquests either the law or the basis of the criminal law throughout a great deal of Europe and remained so for upwards of a century and in some places for longer. Even today its influence can be seen.

Subsequent developments in Europe saw the techniques of code making developed to higher levels and as a scientific approach was adopted to the drafting of such laws.

Codification in common law countries is much more recent with most of the movement to codified laws having occurred in the 20th century. In the United States the mid-century saw the appearance of a model criminal code which was adopted in many American states. There is no federal code in America. A number of countries which to this day have no criminal codes have nonetheless undertaken the preparation of draft codes with a view to their adoption. In Australia, three states and one territory have criminal codes. The Commonwealth has had a draft criminal code under consideration for some time.

Nonetheless whilst a substantial move towards codified criminal laws in common law countries occurred in the 20th century there were some earlier attempts at codification. The earliest proponent of codified laws in England was Jeremy Bentham to whom is attributed the very word “codification” He vehemently criticised judge made laws in his writings on the subject towards the end of the 18th century and advocated written codified laws even before the appearance of the Napoleonic codes. He was made an honorary citizen of France by the revolutionary government but his advocacy of codified laws fell on deaf ears in his own country.

In the 18th century in England there were a number of attempts to simplify and clarify the criminal law which was in a somewhat chaotic condition being found in a vast number of judgments of courts and some statutes. Some consolidation occurred during this time. In addition there were in the common law world during the 18th century some attempts at codification which bore at least some

resemblance to the codified laws found on the continent although still bearing some of the characteristics of the traditional expressions in common law jurisdictions.

The continental concept of the code which involved a scientific approach to the expression of law was characterised by the inclusion of a general part in which the principles of criminal responsibility, defences and matters of extenuation were expressed in broad comprehensive terms applicable to all offences whilst the special part consisted of the description of the individual offences in precise and circumscribed rather thanlanguage. The legislative technique involved in the preparation of such codes emphasised the importance between the two parts.

The common law on the other hand was inclined to attach specific defences and matters of extenuation to individual offences with the result that each separate offence was both lengthy and complex in its definition and expression. In some areas of the law, a large number of separate instances of offences had been developed. Definitions and examples tended also to multiply.

It was in the colonies and the United States that the first attempts were made to bring into effect penal codes which drew at least in part their inspiration from the codifications of Europe. In New York the Field code was drafted in 1864 whilst in Jamaica the Wright code appeared in 1970 whilst as early Edward Livingstone had completed a draft penal codification for Louisiana, a state with civil law origins. Perhaps the most significant development in this area outside of England was Macauley's code in India. This was completed in 1837 but remained a draft until

1860 when it was enacted. The colonial office viewed such development with acceptance and as a means of ensuring that colonial judges did not develop their own laws. The Indian penal code served as a model for penal codification at a later date in a number of former British colonies.

In England itself the major development in this field occurred with the preparation of a criminal code by Sir James Fitzjames Stephen, generally regarded as the greatest criminal lawyer of his time. The code was an amalgam of civil law and common law influences but after a long and somewhat acrimonious struggle, the Parliament rejected the draft.

It was to be in the antipodes that the most influential of the criminal codes in the common law world was conceived and drafted. This code was to be followed through many parts of the colonial world and beyond it during the 50 years following its enactment in 1891. Even today in the post independence states which were once colonies one can find many criminal codes still modelled upon this code.

I speak of course of Sir Samuel Griffith's Queensland criminal code. You will see its migration throughout the world in the attached map.

Griffith's contribution both to the state of Queensland and to the Commonwealth of Australia are well known. He was one of the architects of the constitution and the first Chief Justice of the High Court of Australia. He served Queensland both as Premier and Chief Justice.

Griffiths italophilia is well known. He had visited Italy as a student, having one a bursary ????. He there learnt Italian and in later life translated Dante's "Divine Comedy" and poems "Vita Nuova". There has been some denigration of the quality of the translation of the Divine Comedy, it being said that he was a much better lawyer than he was a translator.

After becoming Chief Justice Griffith was asked by the then Premier to undertake the task of codifying the criminal law of Queensland. He commenced this by initially commencing to compile a digest in which he summarised and arranged all of the examples of the offences then in force in Queensland. These amounted to more than 8,000 and in his report accompanying the digest indicated that codification or consolidation with extensive amendments was necessary.

It is plain however that Griffith was well aware of the difference between a code and a consolidation. In addressing the Australasian Association for the Advancement of Science on 12th January 1898 on the subject of criminal responsibility ??? he said: "It should be remarked that codification is a very different thing from consolidation. The latter is a comparatively though laborious work, consisting merely in the collection and orderly arrangement of existing statutory provisions. Codification includes all this, but includes also a complete statement of all the principles and rules of law applicable to the subject matter".

One then must ask what were the influences that exercised Griffith as he undertook the task. Undoubtedly the Stephen report was a major influence as he acknowledged. However he looked beyond the common law world as he made clear in his explanatory letter of 29th October 1897 which accompanied the draft code.

In that he said:

"In 1888, the Parliament of Italy enacted a penal code, the result of labours initiated in the year 1862 and continued by a series of parliamentary committees and Royal Commissions under the guidance of eminent lawyers. I have derived very great assistance from this code, which is, I believe, considered to be, in many respects the most complete and perfect penal code in existence. I have also derived much help from the masterly ministerial explanation (Relazione) of Signor Zanardelli who had charge of this code during its passage through Parliament in 1888".

He also referred to some of the other influences such as the penal code of New York.

It is desirable at this time to look at what was happening in Europe in the field of penal codification to gain an understanding of some of the factors which shaped Griffith's code and through it, many of the codes of the common law world.

On the 22nd November 1978, the then attorney general of Italy (which was at that time only someyears after unification) presented a report to the house of deputies together with the final draft of the code.

The final draft which has come to be known as the Zanardelli draft was not presented until 1887. ??? The report which accompanied the draft was a document of great importance. Its significance can be understood by what an American commentator, T. Boston Bruce said about it in an article, *The New Italian Criminal Code in Law Quart. Rev.* Vol 5 1889 p 287:

"It represents the combined work of the judiciary, of the legal profession, of the legal and medical schools, of the principle universities and of those savants who had carried out special studies of psychology and sociology and their links with crime. The penal laws of the other European states, of many American states and of Egypt have been examined --- and have been analysed with such thoroughness together with the work of foreign jurists that the numerous official reports which summarised these researches form an instructed encyclopaedia of comparative criminal legislation and jurisprudence. With the result of such studies it is not too much to affirm that the present code fully repays all the time spent on it and that the Italians are able to congratulate themselves for possessing a body of penal laws which is second to none in Europe for technical excellence and for the elevation of their"

Some of those who had major input into the report were of the positivist school and some were of the classical school.

The code was characterised by its liberal and humanitarian spirit. The penalty of death was abolished. Provision was made for the suspended sentences, distinctions were made in the penalties to be imposed in the case of those with no previous criminal history and recidivists and certain attenuating circumstances were provided for. A number of other European countries were influenced by the code. In some instances such as in relation to the abolition of the penalty of death other countries such as France set up a commission to consider this but ultimately rejected it. This was a step too far to be taken at that time in other countries in Europe and indeed in common law including Queensland.

The Zanardelli code exercised great influence on the new codes which were introduced at the end of the 18th and beginning of the 19th centuries in Latin America. The codes as Professor Lutke ??? points out in his article the Italian contribution to penal law at the end of the century are the codes of Venezuela Uruguay, Cuba, Argentina and Chile were all in large part influenced by the Zanardelli code.

Professor Cadoppi has undertaken a detailed comparative analysis of the Zanardelli code and the Griffith code.

In addition to the express reference set out above found in the explanatory letter, Griffith in the draft code itself, where beside many of the provisions he set out the source or sources from which he had taken the draft provision refers to the Zanardelli code beside 20 of those provisions. Curiously enough Professor Cadoppi says that in some instances the Zanardelli code was not the source from which Griffith took such provisions. Whilst there are other provisions which Griffith does

not acknowledge the Italian code as the source of which clearly in his view come from it.

In any case, says Professor Cadoppi, the main influence of the Zanardelli code on Griffith's code is qualitative rather than quantitative.

The general structure of the code (*impianto complessivo*) is, according to Cadoppi, based upon the Zanardelli code. One would not find a similarly structured code amongst the written penal laws of the common law world. The general provisions with their broad and comprehensive principles of criminal responsibility, exculpations and attenuations balanced with the specific instances of offences in the special part expressed in precise and simple language is plainly based upon a code of the European character.

Chapter 5 of Griffith's draft code is headed "Criminal Responsibility" whilst title IV of Book 1 of Zanardelli's code is headed "Of Imputability and the Causes which Exclude or Mitigate". The extensive provisions in relation to each of the individual offences together with their own specific exculpatory circumstances disappear as does the use of terms like "malice" and "maliciously" in the special part.

Offences are divided into crimes and misdemeanours rather than the historic categorisation of the common law into of offences into felonies and misdemeanours. Cadoppi says that the derivation of this **bi-partition** comes directly from the Zanardelli code and the works preparatory to it which emphasise the difference in essence or nature between crimes on the one hand and transgressions or misdemeanours on the other hand.

The definition of attempt has a reference to the Italian penal code in the column beside it as well as the reference to the common law. Cadoppi argues that the Zanardelli code is the obvious source from which this provision is taken with a significant part of the provision being adopted in toto as he demonstrates and as can be seen from the attached document.

An extreme example of a statutory provision for an offence at common law is the Queensland legislation dealing with blasphemy. A copy of this is attached.

In the case of those provisions dealing with the extra-territorial operation of the code Griffith refers only to the Italian penal code in relation to these provisions. This however is one area in which Cadoppi thinks he has overstated the effect of the Italian criminal code on his draft and thinks that the English Bill of 1880 (which followed the Stephen draft).

In Chapter 5 a number of the general provisions are expressly taken from the Zanardelli code

Side 2 - ... draft s.23 and which has given rise to much difficulty in its interpretation is taken from the Italian penal code. This of course deals with the question of intention. In one of the Australian judgments, Windier J bemoaned the fact that the English language is not a sufficiently subtle instrument to give proper expression to these concepts. See??

The Italian penal code is given by Griffith as the source of this provision and also included in the draft provision was bona fide claim of right.

Whereas Griffith in his draft code beside the provision dealing with insanity shows common law but includes very extensive reference to the manner in which this subject is dealt with in the "continental nations of Europe" Cadoppi argues that a comparison with the Zanardelli code with Griffith's draft shows a substantial coincidence of the language used by Griffith with that used in the Zanardelli code with some only very minor changes to the text of article 467 of the Italian code. There are nonetheless between the two provisions taken as a whole some significant differences since the Zanardelli code does not have any exculpatory provision for a person who is unable to control his actions.

Intoxication which was provided for in clause 30 of Griffith's draft has beside it the notation "probably common law". However Cadoppi demonstrates that of the three provisions contained in the draft, the first two are taken almost literally from the Zanardelli code.

It is also Cadoppi's view that clause 33 headed "Justification and Excuse; Compulsion" is an area where Griffith has also taken abundantly from the Italian code, although in this case he does not expressly recognise it. One of the references in this case is to the German civil code which Cadoppi thinks must be an error.

Clause 13 of Griffith's draft which is s..... of the present criminal code provides as follows:

The Italian penal code is given as the source of this. It does not have a counterpart according to Cadoppi in any of the common law jurisdictions.

In the special part, Griffith included in the draft code which were not to be found at common law although some of the common law codes to which reference has been made contain reference to some of these. These included offences against the executive and legislative power. He refers to the Italian penal code as the inspiration for clause 55 dealing with interference with governor or ministers and also to the following provision dealing with interference with the legislature. It was to the New York penal code he referred in the margin beside the offence providing for disturbing the legislature.

These offences are concerned with the protection of the democratic institutions themselves were as Cadoppi points out an area where Griffith distanced himself from the common law and instead drew inspiration from the code of the country in which parliamentary democracy had only come quite recently. This is however an

area in which the liberal and democratic principles which inform the Zanardelli code were given expression.

Clause 78 provided for an offence of interfering with political liberty and gave the Italian penal code as the source of this.

Clause 85 which provided for the offence of disclosure of official secrets had its origins in the Zanardelli code as did other provisions dealing with abuse of office and the false assumption of authority.

Another area in which Griffith drew upon Zanardelli's code was in his provision in his draft of an offence of public attacks on religious creeds. This disappeared from the final code which was enacted by the Parliament.

Clause 243 which provides for misconduct with regard to corpses shows the Italian penal code as one of the sources of this provision but Cadoppi thinks this is an area in which Griffith probably erroneously overstated the influence of the Italian code and he thinks that it is taken from the English Bill of 1880 which provides in similar terms.

There are also some provisions dealing with the deprivation of personal liberty taken from the Italian code and as Cadoppi points out, virtually taken word for word from it.

Some other provisions which fall into this category are to be found in the area of the aggravating circumstances of theft.

As has been mentioned, not all of these provisions survived the passage from the draft of the final bill which was passed into law. However, the criminal code of Queensland which was enacted in 1891 was essentially that drafted by Griffith.

Whilst there have been changes in the century or so which have followed, these have largely been modifications brought about by changing circumstances. The basic structure and the content of the code remains very largely as it was drafted by Griffith and an attempt in 1995 to substitute an entirely new code (although still largely reflecting the provisions of the earlier code, but substantially restructured and consolidated with other criminal legislations such as the Drugs Misuse Act) failed.

Similarly in those parts of the world where the Griffith's code was copied or where criminal codes were largely based upon it (in Nigeria the code which was enacted was based upon the criminal code with those responsible rejecting the draft model penal code for the colony prepared by Stephens' son and preferred that of Griffith's was itself to become some years later the draft penal code for the colonies and was adopted in a number of places notably Cyprus whose code was in turn adopted then in Palestine and forms the basis of today's Israeli criminal code. Israeli writers on the subject acknowledge the influence of the Griffith code upon the modern Israeli code.

It is a tribute to Griffith in that he was able to draft a code which remains for all intents and purposes more than a century later not only the living law in the former colony in which it was prepared but the basis of criminal codes in many parts of the

world including nations which have developed in vastly different circumstances and different ways from the colonial circumstances which saw the introduction of the codes based upon Griffith's code. This is not to overlook the significant changes that have occurred.

The Zanardelli code was replaced by the Rocco code during the fascist period in the 1920s.

However its influence in both the common law world and the civil law world has been as will be apparent from what I have said, great. Zanardelli, who was the attorney-general and who was but one of the major influences in the preparation of the draft code and the report which preceded it later became prime minister of Italy ???. To have been such a major and enduring influence throughout the two legal families with their vastly different history and cultural background marks this criminal code as one of the most influential legal documents of any time.