THE QUEENSLAND CRIMINAL CODE: FROM ITALY TO ZANZIBAR
ADDRESS AT OPENING OF EXHIBITION
SUPREME COURT LIBRARY

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The Queensland Criminal Code, which was drafted by Sir Samuel Griffith in 1897, has been an enduring part of the law of this State. It has however another aspect, as this Exhibition, organised by the Library of the Supreme Court, demonstrates. It is part of an intercontinental web of criminal codes, each of which has influenced or has been influenced by others, so that the Queensland Code derives in part from those of Italy and New York, and itself has had echoes in Zanzibar and Israel.

There is nothing new in codification of the law, as any student of Roman law should remember, although the word "codification" has been attributed to the invention of Jeremy Bentham. However, in modern times the reduction to a code of the criminal laws of the nations of Europe and their colonies or former colonies commenced at the end of the eighteenth century. The intellectual ferment which had developed in Europe at the end of the eighteenth and the beginning of the nineteenth century led people to examine rationally existing institutions and to seek to change those that they found defective. At that time, the criminal laws of the continental nations of Europe were confused, harsh and barbarous and those of England were little better. They cried out for reform.

The most influential advocate of reform of the criminal law was Jeremy Bentham. In his view a codification was a statement of the whole of the law so fully that there would be no need to refer to reported cases. Further, he considered that it was not

enough to restate the law in clear and accessible terms without making any important alteration in its substance; he considered that a codification should go further and remove any technicalities , anomalies or other objectionable features. Not all of Bentham's arguments would command acceptance today, and indeed they did not meet with general agreement at the time when he wrote. He thought, first, that if the law was codified everyone would be able to know and understand it, and, secondly, that codification would make the laws so simple that judges and lawyers would be left with little to do. He disliked judicial law-making, and one of his concerns was that a judge who decided for the first time that particular facts constituted a crime would be making the law retrospectively and would punish the accused by applying a retrospective law.

Bentham's advocacy proved more effective on the Continent than in England. He was consulted by the framers of the French Penal Code, which came into effect as part of the Code Napoleon in 1811 (1) It was drafted with notable clarity. The great French novelist, who wrote under the name of Stendhal (the author of "Le *Rouge et le Noir*" and *"La Chartreuse de Parma")*, regarded the Code as a model of prose style, and read passages daily for the benefit of his own style. I once asked a member of the Cour de Cassation with whom I was acquainted, whether he agreed with Stendhal's opinion; he evaded an answer, merely saying that he found the Code difficult to apply in practice. Less enthusiasm was shown for the substance of this Code than for its style; for one thing, it was exceedingly severe and included punishments such as branding and mutilation. However, it recognised the necessity for *mens rea* and was systematically arranged and for more than half of the nineteenth century it was more influential on the Continent than any other code, being, for example, the model for

codes in Prussia, the Netherlands and Belgium. Later in that century the model most frequently used was the Italian Code of 1889, known as the Zanardelli Code after the Minister for Justice (and later Prime Minister) responsible for its production. That was the code which Griffith described as "in many respects the most complete and perfect Penal Code in existence"[(2)]. I shall refer to it again.

In England, attempts made to codify the law of crime for that country proved unsuccessful [(3)]. The judges were hostile to codification, preferring they said, the flexibility of the common law. However, the followers of Bentham succeeded in ensuring that a Penal Code was brought into effect in India. That Code was drafted principally by Thomas Babington Macaulay [(4)] between 1835 and 1837 and came into effect in 1860 after some revision; the Mutiny had intervened. Macaulay was a public official and politician rather than a practising lawyer, and professed to have little regard for the technical rules of the law. He felt himself free to depart from the language of the existing law and from doctrines which he thought irrational, and acknowledged the assistance which he had obtained from the French Penal Code, and also from a code which had been drafted by Edward Livingstone [(5)] and submitted in 1826 to the legislature of Louisiana although not enacted there. Amongst other innovations, he rejected the principle of felony-murder and enlarged the scope of provocation and self defence, made truth a defence to criminal defamation, and provided that nothing is an offence if it causes harm so slight that no ordinary person would complain of it. He was of course a distinguished author of, amongst other works, his History and Lays of Ancient Rome. His command of words was foreshadowed when he was a four year old child and hot coffee was spilt over his legs. In response to an anxious enquiry as to his condition, he replied. "Thank you

Madam, the agony is abated". As we would expect, his Code was perspicuously drafted. It proved to be an effective statute, not only in India, but also in a number of former British Colonies in Asia and (for a time) in Africa.

A decade later a curious contest arose in England between two Criminal Codes. The Colonial Office decided to prepare a Penal Code for use in all colonies, (6) apparently with the hope that it might be adopted in England itself. In 1871 a circular was sent to all colonies asking them if they would contribute to the expenditure on the project. Queensland's reply is unknown, but it may safely be assumed that it did not agree to contribute, for that was the general response. It is not clear why the Colonial Office did not use Macaulay's Code as a basis for this endeavour. Perhaps it was regarded as too adventurous. However, the Colonial Office commissioned Mr R S Wright (later Mr Justice Wright, and a co-author of Pollock and Wright on Possession) to draft a code. He completed the draft in 1874. The Colonial Office considered that the draft should be revised, and commissioned James Fitzjames Stephen who had already written his A General View of the Criminal Law, to do the revision. He completed that task later that year. He made a number of objections to Wright's draft. One was that Wright had defined generally the mental elements of crimes. After some changes had been made to Wright's draft, the Criminal Code. was sent to the legislature of Jamaica, which passed it. The Code was not brought into effect there, because in the meantime, as I shall shortly mention, Stephen had produced his own Code and the Colonial Office waited to see what Parliament would do with Stephen's Code. Nevertheless, for reasons that are not clear, perhaps because officials are not always consistent, Wright's Code was brought into effect in British Honduras, Tobago,

St Lucia and later the Gold Coast. However, in England it was pigeon-holed. One reason was that it was a liberal code, particularly in its definition of sedition and conspiracy; this commended itself to the Trade Unions, but not to the Conservative Government that had come into power. Another reason may have simply been that Stephen's Code had been produced for the Lord Chancellor's Office and Wright's for the Colonial Office. Some competent critics considered Wright's to be the better code. A copy had probably been sent to Queensland, but Griffith did not mention it.

At about the same time as he was revising Wright's Code, Stephen [7] commenced work on a Code of his own. In 1877 he produced a Digest of Criminal Law as a precursor to a Criminal Code (Indictable Offences) Bill which was introduced into the House of Commons in 1878. The Bill was referred to a Royal Commission constituted by four judges of whom Stephen was one – he had by this time become a Queen's Bench Judge. The Commission made many changes and produced an amended Bill which made little progress in Parliament and was never enacted. It was, however, substantially followed by laws in Canada (1892) and New Zealand (1893).

Stephen's Code was generally conservative, but it did make a number of innovations many of which were reflected in Griffith's Code. It abolished the distinction between felonies and misdemeanours, redefined murder without the concept of malice aforethought, simplified the law of theft, recognised that words might constitute provocation and, perhaps most controversially at that time, provided that the accused might be a competent witness. It also provided for the establishment of a Court of Criminal Appeal. It provided that all common law defences should remain in force,

and this was a particular ground of criticism made by Lord Chief Justice Cockburn who condemned the Bill as unsatisfactory for that and other reasons.

Griffith stated [8] that in preparing his draft Code he drew freely on the labours of the Commissioners who revised Stephen's Code, but that he (unlike Stephen) had attempted to state exhaustively the conditions which operate as justification or excuse for acts otherwise criminal. He said that he had included a good many provisions not found in Stephen's Code which he believed to be either correct statements of the common law or propositions that ought to be recognised as the law. He followed Stephen's method of first producing a Digest (completed in 1896) and sent his completed Code to the Attorney-General (in 1897). It seems inappropriate to modern eyes that a Chief Justice in writing to an Attorney-General should describe himself as he did, as "Your most obedient, humble servant". That was, however, the fashion of the time. Following the precedent set in England with regard to Stephen's Code, a Royal Commission (of which Griffith was a member) was appointed to revise the Code. It made few and mostly minor revisions. The Code as revised came into law on the first of January 1901.

In drafting the Code, Griffith consulted a number of the Continental Codes, [9] as well as Stephen's Code. It may be inferred from the remarks which he made in an address on Criminal Responsibility in 1898 [10] that his knowledge of the Continental Codes (other than that of Italy) was gleaned from the Ministerial Explanation made by Signor Zanardelli in introducing the Italian Penal Code to the Italian Legislature in 1888. In his letter sending the draft Code to the Attorney-General, Griffith stated that he derived "very great assistance" from the Italian Penal Code produced at the

instigation of Signor Zanardelli. He stated also that he had frequent recourse to the Penal Code of the State of New York.

The New York Penal Code had been enacted in 1881. It had been prepared at the instigation of David Dudley Field [(11)] although it was not drafted by him. Field was an influential lawyer who worked enthusiastically for the codification of the common law in America, and as a result of his efforts there were produced a Civil Code which was adopted in 24 States and a Criminal Code which was adopted in 13. This Criminal Code has been described as "plain pedestrian", and it has been said that "None of the codes [drafted by Livingstone, Macaulay, Stephen and Field] "had a larger measure of influence. None deserved it less"[(12)]. It is, however, not altogether surprising that Griffith had recourse to this undistinguished code. He had met Field in 1887 when he was visiting New York.[(13)] Field was the uncle of Lucinda Musgrave, the widow of Sir Anthony Musgrave, who had been Governor of Queensland. Griffith was a close friend of Lucinda Musgrave. Politeness, and Griffith's habitual conscientiousness, would have led him to consider Field's Code. There was some good in it. Griffith based nine sections on it, including provisions dealing with the bribery of members of Parliament and witnesses. [(14)]

The influence of Zanardelli's Code was more significant. Griffith had begun to study the Italian language in 1853, when, at the age of 20, he was sailing to London to take up an overseas scholarship. He obviously maintained his proficiency in the language, because later (in the 1880s) he had begun translating Dante's Inferno. His translation of the Divine Comedy and the Vita Nuova gave much satisfaction to him, but less to the critics of his poetic style. When his translation was published he gave a copy to

that formidable New South Wales barrister, Sir Julian Salomons, who asked him to inscribe it as a gift to him and then said, "I would not like anyone to think that I had borrowed the book and still less to think that I had bought it".

It is not surprising that Griffith had the ability to translate the Zanardelli Code, as it appears that he did. What is surprising is that he had the time to make that translation and draft his Criminal Code while at the same time performing his duties as Chief Justice. He was a man of indefatigable energy. He received a copy of the Zanardelli Code in 1894,[(15)] it was sent to him by Sir William McGregor. He also had a copy of Signor Zanardelli's Ministerial Explanation of 1888. The Italian Code when enacted had made an immediate impression; a writer in the Law Quarterly Review of July 1889 [(16)] said of it that "the Italians may now congratulate themselves on possessing a body of Criminal Law second to none in Europe for technical excellence and for the loftiness of its ethical aims." That article would have brought the Italian Code to the notice of lawyers in the common law world, if they were not already aware of it.

One weakness of the Stephen Code was its failure to deal satisfactorily with the general principles of criminal responsibility – the subject with which Griffith dealt in Chapter V of the Code. On this subject, Griffith derived particular assistance from Zanardelli. The first paragraph of section 23, which stated that "subject to the express provisions of this Code relating to negligent acts or omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident" corresponded, accordingly to Griffith, with Article 45 of the Zanardelli Code. [(17)] Although a section framed in those terms might be regarded as a typical enough provision of a law in the

civil law system, its history shows that it is impossible in the common law system to frame a law which precludes the judges from giving their own meaning to it.

Although many may have thought it unlikely that the word "act" could be ambiguous, and Griffith, who was confident of his own opinions, would have thought that the words of section 23 were perfectly plain, the judges in a number of cases have grappled with the question whether an act comprehended "the external elements necessary to form a crime" [(18)] or simply meant the physical action regardless of its consequences. For example, if the accused fired a gun and wounded someone, was the act the wounding or the pulling of the trigger? I took the latter narrower view.[(19)] The section has since been amended with a view to resolving one question it was thought to raise, but it still corresponds with the provision of the Zanardelli Code.

There are a number of other general sections in which the influence of the Zanardelli Code may be traced. [(20)] The reference, in the provision regarding insanity, to the deprivation of capacity to control one's actions, or what is known as irresistible impulse, accords in substance with the Zanardelli Code, to which Griffith specifically referred, although he seems to have thought that the common law rule was "probably" (his word) similar. [(21)] Other general provisions in which it is possible to discern a resemblance to the provisions of the Zanardelli Code include the sections that deal; with attempt, intoxication and justification or excuse. Griffith's Code also provided for a number of offences which derived wholly or partly from the Italian Code. These included interference with the Government or Ministers or with the Legislature, interference with political liberties, disclosure of official secrets, abuse of office, false assumption of authority and personating public officials. Griffith's draft Code

included also a section based on the Zanardelli Code making it an offence with intent to excite ill will by words or signs holding up the doctrines of any religious faith to public derision or contempt. This provision was however deleted from the Bill before it was presented to the Parliament.

There was one respect in which Griffith did not follow the example of the Zanardelli Code. That Code was notable in that it abolished all corporal punishment, including the death penalty. In his Report, Signor Zanardelli rightly said [(22)] that "it is absurd that the law should avenge homicide by itself perpetrating homicide" and that capital punishment is "calculated to blunt the best sensibilities of mankind." He said that corporal punishment was "derogatory to human dignity, ineffectual and demoralising". These observations did not sway Griffith. His draft included capital punishment, imprisonment in irons and whipping, although imprisonment in irons was deleted when the Bill was before Parliament. The Code as passed retained the death penalty, for murder, treason and piracy. Griffith would have retained it for rape also, but a majority of the Commissioners who considered his draft over-ruled him on that point. On the other hand the Code did include provision for the conditional suspension of punishment for first offenders; Griffith, who had introduced probation in Queensland, would have extended the provision to all offenders. These provisions were advanced in their time.

It should be added that the Zanardelli Code, although enlightened by the standards of the day, was not without its severity. The most severe punishment for which it provided, the ergastolo[(23)] was solitary confinement in which the prisoner "was cut off from all human intercourse, doomed to silence and solitude;" he might be released

from solitary confinement into ordinary imprisonment only after ten years if his conduct had been good. Some thought that this was worse than capital punishment. The Code provided for a range of lesser punishments of varying severity designed to be proportionate to the crime.

The influence of the Zanardelli Code on that of Griffith was real, but it can be exaggerated. It would not be right to say that Griffith, who was a master of the common law, had been converted to the civil law. It is true that he intended his Code to be an exhaustive statement of the law, and not merely a consolidation of part of it. There can however be no doubt that he was aware of the common law rules of interpretation applicable to a codifying statute laid down in the House of Lords, [25] not long before, namely, that although the proper course is first to examine the language of the statute, without enquiring how the law previously stood, recourse could be had to the previous law to discover the meaning when the provisions of the Code were not clear. Further, the decisions that would interpret the Code would mean that the Code was not an exclusive source of law. If the style of the Code seems to accord to that used in civil law systems, it must be remembered that it was a style typical of Griffith - clear and terse, as appears from the Constitution which he drafted. Similarly the systematic arrangement of the Code which suggests the influence of the civil law, came naturally to Griffith's orderly mind.

The Griffith Code proved to be more durable than the Zanardelli Code. The latter Code was replaced by the Rossi. Code in 1930, when Mussolini was in power. [26] The Rossi Code restored the death penalty for twenty offences. By that time the death penalty had been deleted from the Griffith Code.

Griffith was obviously proud of his work; he distributed widely copies of his Code. These seeds did not entirely fall on stony ground – the Code was adopted, with some amendments, in Western Australia in 1903 and in British New Guinea in the same year. (27) It was subsequently adopted in what became the Mandated Territory and later the Trust Territory of New Guinea, and a version of it became the law of Papua New Guinea. It was also adopted in Nauru in 1921 when that country was also a Mandated Territory.

It was natural enough that the Griffith Code should be adopted in Pacific nations, when they were under Australian control. Less predictable was the influence of the Code on the law of Africa. (28) The critical step in extending the influence of the Griffith Code was taken in Northern Nigeria, where the Chief Justice of that colony drafted a Code which substantially followed the Griffith Code. It was enacted in 1904. That Code was in 1907 adopted in Bermuda. When Northern and Southern Nigeria were united, this Code became the law of Nigeria in 1916. Northern Nigeria later reverted to a law based on the Indian Penal Code but Southern Nigeria retained the Code based on the Griffith Code. A further link with Queensland is that Professor Yorke Hedges, under whom I once studied, became a judge in Nigeria and wrote an Introduction to the Criminal Law of Nigeria.

In British East Africa, the Indian Penal Code had been in force. However, in 1926 the Colonial Office decided that the law in those colonies should conform more closely to English law. The resolve of the Colonial Office to bring about this result was hardened by two cases – one in Kenya and one in Tanganyika - in each of which a

white settler had beaten an employee to death but had been convicted only of causing grievous bodily harm and lightly sentenced. The Colonial office seems to have reached the unlikely conclusion that the Indian Penal Code could be blamed for that result. Because the colonies wished to retain the Code with which they were familiar and, proved reluctant to prepare a new Code, the Colonial Office commissioned a former judge, Mr A Eckhardt K C to prepare a Penal Code. He completed in 1935 the draft of what became a model Code for the colonies.

Mr Eckhardt had various possible precedents for his draft. The Macaulay Code was regarded as making too great a departure from English law. The Stephen Code was incomplete. The Wright Code had been rejected, and was given the *coup de grace in 1900* when a son of James Fitzjames Stephen at his own insistence, was allowed to revise it, and the revision proved quite unsatisfactory. Eckhardt in these circumstances took as his model the Nigerian Code of 1916 - in effect the Griffith Code. This model Code which he produced was not identical with the Griffith Code, but it was clearly based upon it.

The Model Code came to be adopted in many British colonies. The first to adopt it was Cyprus in 1928 , and from there it was imported to Palestine and later became the foundation of the criminal law of Israel. In 1930, the Model Code was brought into effect in Kenya, Uganda, Tanganyika and Nyasaland. In 1931, Northern Rhodesia, where the common law as affected by statutes, was still in force, adopted a Code modelled on the Tanganyikan Code. In 1934, Zanzibar and the Gambia adopted Codes modelled on the Kenya Code. The Lawyers in most of these African colonies, with typical conservatism, opposed the introduction of the New Code, preferring the

law with which they were accustomed. Once introduced, however, the Model Code proved durable. Later in 1955 the model Code was adopted in the Seychelles. When these colonies obtained independence, these Codes, based on the Griffith Code, formed the foundation of their criminal law. In the Pacific, the model code is the basis of the Criminal Law in Fiji, the Solomon Islands, Kiribati and Tuvalu, as well as PNG and Nauru. Many Australian judges sitting in the Pacific have applied laws which derived from the Griffith Code.

A prophet is not without honour, save in his own country. The Australian States other than Western Australia, have not followed the Griffith Code. Tasmania has a code which bears some similarities to it, and the Northern Territory also has a code which is derived in part from the Griffith Code.

It would be hard to persuade a Queensland lawyer that the common law has advantages over a criminal code. Some lawyers in other States take a different view. Their argument is that a Code sets the law in concrete and inhibits its natural development. One example they give is the law regarding mistake of fact. The modern view is that a person who acts under a genuine mistake should be excused if the facts as he believed them to be would have been afforded a defence, and that the question whether the belief was reasonable is relevant only to whether the mistake was honest. The Queensland Code embodies an earlier view of the law and requires a mistake to be reasonable if it is to constitute a defence. There are not many instances in which significant developments of the common law are not reflected in the Griffith Code. Some of the questions that have been ventilated in English cases do not arise under the Griffith Code because the Code has already settled them. There is no doubt

that a Code has many advantages, particularly of certainty and accessibility, qualities especially important in the criminal law, which affects so directly the liberty of the subject. In any developed system of criminal law it is essential that crimes should be defined with clarity and precision and that the principles of criminal responsibility – the degree of fault required, and the circumstances that afford a defence – should be made clear. A code is especially fitted to achieve these results, even if it cannot satisfy Bentham and render it unnecessary to refer to decided cases or leave little work for lawyers to do.

The Griffith Code has proved itself to be of practical value. With some amendments, it has been part of Queensland law for over a century and has had widespread influence elsewhere. It is one of the world's great Codes. If we cannot say that in drafting the code, Griffith has wrought a monument more enduring than bronze, at least the Code has been a lasting memorial to a great lawyer and a great man.

Queensland in 1897 was a small and remote province. Communication was slow. Nevertheless, its Chief Justice was well informed of developments in Europe and America, and his work had a significant influence on the law in many countries far from Australia. No doubt chance played a part in these developments as it so often does in human affairs and we can only speculate whether Griffith would have had recourse to the New York Code if he had not been friendly with Lucinda Musgrave, or whether he would have been influenced by the Zanardelli Code if he had not been proficient in the Italian language. However that may have been, there was in fact a flow of ideas from Europe and America to Queensland, and from Queensland to many other countries. We are well aware now that the tide of thought washes round the

world, and that the fact that a country is small and remote does not necessarily mean that it is isolated from the ideas and opinions of the rest of the world. That, to a lesser degree, has always been true since the beginning of modern times, and was certainly true in the nineteenth century, although whereas today thoughts and theories are transmitted round the world overnight, in earlier times the process took much longer. Since the 1960s there has been a revolutionary change in social attitudes throughout the world, and it is remarkable that the Griffith Code, which makes provisions critical to society, has with comparatively few amendments, remained in force throughout a tumultuous century. As Signor Zanardelli and Sir Samuel Griffith perceived there are fundamental principles of criminal responsibility which ought to be reflected in any system of criminal law. It is no doubt because the Queensland Criminal Code does, on the whole, reflect those principles, and not merely by reason of conservatism, that it has survived so long.

The matters of which I have spoken are well illustrated by this Exhibition, so thoughtfully and thoroughly prepared by the Supreme Court Library staff whose assistance I gratefully acknowledge.

I have pleasure in declaring the Exhibition open.

H T Gibbs

FOOTNOTES

(1) See generally, Ancel, The French Penal Code (1960)

(2) Explanatory Letter, Griffith to Attorney-General of 29.10.97, pvii

(3) Randall, The Resurrection of the Criminal Law (1911) 27 L.Q.R.209

(4) See generally Kadish, Codifiers of the Criminal Law (1978) Columbia Law Review at 1106-1121, and Cross, The Making of English Criminal Law (5) Macaulay, (1978) Crim. L.R. 519

(5) Kadish, op. cit., at 1099. 1106

(6) Friedland, R.S.Wright's Model Criminal Code (1981), Oxford Journal of Legal Studies 307, Friedland, Codification in the Commonwealth: Earlier Efforts, (1992), 18 Commonwealth Law Bulletin 1172

(7) See Kadish, op.cit, at 1121-1130, Cross, The Making of English Criminal Law (6) Sir James Fitzjames Stephen 1978 Crim LR 652; Manchester, Simplifying the Sources of Law: An Essay in Law Reform Anglo-American Law Review 527

(8) Explanatory Letter, note 2, ppiv,vii (1973) 2

(9) See O'Regan: Sir Samuel Griffiths Criminal Code (1990) at 7.A.B.R. 141

(10) Criminal Responsibility – A Chapter From a Criminal Code, 12 Jan 1898

(11) See Kadish, op.cit., at 1130-1138

(12) Kadish, op.cit, at 1134,1138

(13) Joyce, Sir Samuel Walker Griffith at p142

(14) O'Regan, op.cit. at 144-5

(15) O'Regan, op.cit.at 144

(16) Bruce, The New Italian Criminal Code (1889) S L.Q.R 287

(17) Griffith, Criminal Responsibility - A Chapter from a Criminal Code, 12 Jan 1898, p897

(18) Vallance (1961) 108 CLR 56 at 59

(19) Kaporonovski (1973) 133 CLR 209

(20) See Cadoppi, The Zanardelli Code and Codification in the Countries of the Common Law 7 J.C.U.L.R. 116

(21) Griffith, op.cit., note 17, p901

(22) See Bruce, note 14, at pp294, 296

(23) Bruce, op.cit, note 14, p295

(24) Wise, The Italian Penal Code (1978)

(25) Bank of England v Vagliano [1891] A.C. 107

(26) O'Regan, The Migration of the Griffith Code – New Essays on the Australian Criminal Codes, pp103 et seq.

(27) Morris, A History of the Adoption of the Codes of Criminal Law and Practice in British Colonial Africa. (1974) 18 Journal of African Law 6

(28) Friedland, Codification in the Commonwealth: Earlier Efforts (1992) 18 Com Law Bulletin 1172 at p1178