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Legal Transplant and the ‘Dialogue of Deaf’: Revisiting the Debate between Transferists and Culturalists

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Abstract: In comparative law, legal transplant has been a subject matter of great attention and concern leading to discourse between two factions of legal ideologists. The debate revolved between *Transferists* and *Culturalists*, which is popularly known as “dialogue of deaf”. On one hand, Transferists argue that in almost all countries very small portion of law is original and in order to have legal change in the society, borrowing of law from other countries is a must. Legal transplant has been perceived by the comparative law scholars as the most prolific tool for legal development. Watson asserts that the moving of rule or a system of law from one country to another has been shown to be the most fertile source of legal development since most changes in most systems are the result of borrowing of law. On the other hand, Culturalists do not see any link between law and the society and perceive it as two separate ideas, independent of each other. Globalization is perceived as the main factor for the growth of legal transplants in the world. The possibility on the transplantability of the law, where and why it has been transplanted, and its successes and failures have been subject matter to lengthy discussions among the comparative law lawyers. In this paper, the authors analyze the Cultrulists’ and Transferists’ point of views on legal transplant and determine the possible degree of transplantability of laws. For this, the paper looks into the positions of transplantability of laws in some selected countries such as Turkey, Tunisia and Malaysia, Pakistan. In case of zero transplants, the paper examines the reasons behind the failure of legal transplant; and if there were some successes, the paper explores the reasons behind that. The problem with the legal transplant is that in vast majority of cases, the

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transplantability took place because of colonization without any regard to social, political, historical and religious values in colonized countries. It is because of this reason that many countries, in order to make law suited to their people, are going back to formulating laws distinct from the laws imposed by colonial masters.

Key Words: Comparative law, legal transplant, dialogue of deaf, transferists, culturalists, legal development, globalization.

I. INTRODUCTION

“At all stages of comparative research (data acquisition, analysis and interpretation of the data, and actual in-depth comparison and eventual evaluation), the real problems are the lack of full knowledge and understanding of foreign legal rules and cultures. They (*comparatists*) must know something about the historical, social, economic, political, cultural and psychological context which has made a rule or proposition what it is. We must look not only at rules but at legal cultures, traditions, ideals, ideologies, identities, and entire legal discourses.”¹

In comparative law, legal transplant has been a subject matter of great concerns and endless discussions. Culturalists argue that to a large extent the successes and failures of legal transplant are contingent upon firstly where it has originated from and secondly where it is going to be implemented. Conversely, Transferists draw a line between law and culture and see them both as autonomous and believe that a good law is always exchangeable irrespective of differences in cultures.²

An explanatory definition is therefore needed to describe the development of legal transplant. For this purpose, Watson described legal transplants as “the moving of a rule or a system of law from one country to another, of from one people to another”.³

‘Rules not just statutory rules institutions, legal concepts and structures that are borrowed, not the spirit of the legal system’⁴are considered as objects of legal transplant for Watson. Transferists see no relationship between law and society and call it as fallacy.⁵Therefore, they say that changing the law in a society is

¹ Anne Peters and Heiner Schwenke, “Comparative Law beyond Post-Modernism,” 49(4) *International and Comparative Law Quarterly*, 2000, at 832

² Nicholas H.D. Foster, “Transmigration and Transferability of Commercial Law in a Globalised World,” 2002

³ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974) at 21

⁴ Alan Watson and Ius Commune, *Legal Transplants and European Private Law*, Vol. 4 (Metro Maastricht, 2000)

⁵ *Id.*, at 108

completely independent of historical, cultural and social substratum and it is rather rule's function extracted from different legal systems. Clearly, Watson believes on the simplicity and easiness of legal rule's transplantability.⁶ He further claims: "it would be a relatively easy task to frame a single basic code of private law to operate throughout the whole of the western world."⁷In addition to that, the main concern of comparatists should only be "the existence of similar rules' and 'not with how they operate within society."⁸

Former Scottish Law Commissioner quote is worth-mentioning here. He asserted that:

"Account has necessarily to be taken of English solutions even if these are eventually rejected as unsuitable for reception into Scots law. Indeed in many contexts English solutions have to be studied to identify fundamental differences from Scots law cloaked by superficial similarity. Endeavors to achieve unified solutions in the field of Contract law have in particular revealed that what has been assumed to be common ground was approached by members of the Scottish and English Contracts Teams through conceptually opposed habits of thought. Whereas English comparative research relied particularly on American and Commonwealth sources, the background of some of the Scottish proposals derived from French, Greek, Italian and Netherlands sources - and from the Ethiopian Civil Code, which was, of course, drafted by a distinguished French comparative lawyer. Now this, to me, is rather too academic. If the *rules* of contract law of the two countries are already similar (as they are) it should be no obstacle to their unification or harmonisation that the legal *principles* involved come ultimately from different sources, or that the habits of thought of the commission teams are rather different. It is scholarly law reformers who are deeply troubled by historical factors and habits of thought. Commercial lawyers and businessmen in Scotland and England do not in general perceive differences in habits of thought, but only - and often with irritation - differences in rules."⁹

II. THEORIES OF LEGAL TRANSPLANT

Whether is it possible for law to be transplanted, why it is transplanted, where it has been transplanted and the success and failure of this transplantation has been a

⁶ *Id.*, at 95

⁷ *Id.*, pp.100-101

⁸ *Id.*, at 96

⁹ *Id.*, pp.96-97 [emphasis original]

subject of constant debate since 1700. It has been claimed by Alan Watson that Code of Hammurabi in the 7th century is the first recorded legal transplant.¹⁰

The approaches to the issue of legal transplant has revolved around two contradictory theories of culturalist and transferist theory¹¹ a “dialogue of the deaf,”¹² and it has provided a useful platform for the study of legal transplant.¹³

Watson is the one championing for notion of Transferist approach as opposed to its Culturalist counterparts; he purports that law and society are independent of each other and are separate notions. Watson asserts that if lawmakers happen to perceive other laws to be good, they would transplant or import it into their own system.¹⁴ He maintains that legal rules borrowing may successfully be done even though there are big differences in political, social, and economic circumstances and gives the Reception of Roman law in Western Europe as an example.¹⁵ Watson has been subject to William Ewald’s criticism by saying that Watson has been unable to “provide an adequate foundation for a full-blown theory of law and society”;¹⁶ nonetheless, sums up that “even the weak versions of Watson’s theses are adequate to scupper the traditional mirror culturalist theories that have so dominated modern legal thought”.¹⁷

Therefore, Transferists¹⁸ claim that for a legal change borrowing other laws are necessary and very nominal parts in law remains original. Watson follows them by saying that “the moving of a rule or a system of law from one country to another has been shown to be the most fertile source of legal development since most changes in most systems are the result of borrowing.”¹⁹

Transferists perceive the legal history as a history that is dependent on legal borrowings. For instance, Sacco sees the imitation and borrowing as a major legal change and believes that very rarely new rules and institution will emerge.²⁰

¹⁰ Watson Alan, *Supra* note 3 pp.22–24

¹¹ Foster, “Transmigration and Transferability of Commercial Law in a Globalised World” *Supra* note 2.

¹² Nicholas H.D. Foster, “Company Law Theory in Comparative Perspective: England and France,” *The American Journal of Comparative Law*, 2000, pp.573–621

¹³ Richard G. Small, “Towards a Theory of Contextual Transplants”, 19 *Emory Int’l L. Rev.*, 2005, at 1431

¹⁴ Alan Watson, “Comparative Law and Legal Change”, 37(2) *The Cambridge Law Journal*, 1978, pp.313-36

¹⁵ Alan Watson, “Legal Transplants and Law Reform”, 92 *Law Quarterly Review*, 1976, pp.82–83

¹⁶ William Ewald, “Comparative Jurisprudence (II): The Logic of Legal Transplants”, *The American Journal of Comparative Law*, 1995, pp.489–510. *See also*, William Ewald, “Comparative Jurisprudence (I): What Was It Like to Try a Rat?”, *University of Pennsylvania Law Review*, 1995, pp.1889–2149

¹⁷ Ewald, *Supra* note 16 at 508

¹⁸ Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academy Press, 1974)

¹⁹ Watson, *Supra* note 15

²⁰ Rodolfo Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (installment II of II)”, *The American Journal of Comparative Law*, 1991, pp.343–401

Moreover, for Watson, “legal rules may be successfully borrowed where the relevant social, economic, geographical and political circumstances of the recipient are very different from those of the donor system.”²¹

On the other hand, Montesquieu championed the Culturalism and maintains that laws cannot overpass the limits of the different cultures. He propounded that laws are deeply rooted and embedded in the spirit of nations and cannot be separated from their political, customary and geographic context. He believes that manners and customs must evolve and cannot be changed and that transfer would constitute a “grand hazard”.²²

Culturalists claim that laws are ‘felt needs’ of the society and there is a low probability that it will induce the same behavior in different cultures and societies. The *transplantation* of doctrinal and statutory rules do not really transfer the entire law because there is much ‘law’ beyond *legal* rules. It has been argued that rules lie on the surface of *legal* systems and do not properly portray profound fundamental sociopolitical characters.²³ Therefore, they insist that development of law and modernization must take place within that particular society. Their assertion is that “in introducing foreign legal and political norms into any society, those norms will become effective and take root only if they incorporate also a part at least of the norms and philosophy of the native society”.²⁴

III. KAHN-FREUND VS ALAN WATSON

Kahn-Freund for determining the degree of transplantibility of rules and institutions proposes a set of standards, referring to Montesquieu, by asserting that law created for the people of one country is only appropriate for the citizens of that specific nation and not any other; and if it happens that laws of two nations are the same, that is just a coincidence.²⁵ It means certain laws of a country only suit that particular country and it is difficult to transplant it to another country. Montesquieu, thus, said, “Laws are the necessary relations arising from the nature of things.”²⁶ He then stressed that these obstacles were determined by two groups of variables: one being environmental factor, including geographical, socio-economic and cultural factors; and the other being “purely political” factor.²⁷

²¹ Watson and Commune, *Legal Transplants and European Private Law*, *Supra* note 4 pp.79–80

²² John Gillespie, “Globalisation and Legal Transplantation: Lessons from the Past”, 6 *Deakin L. Rev.*, 2001, at 286

²³ *Ibid.*

²⁴ Pierre Legrand, “Against a European Civil Code”, 60(1) *The Modern Law Review*, 1997, pp.44–63

²⁵ Zongling Shen, “Légal Transplant and Comparative Law”, 51(4) *Revue Internationale de Droit Comparé*, 1999, at 853

²⁶ Charles-Louis De Montesquieu, *The Spirit of the Laws* (Simon and Schuster, 1970)

²⁷ Shen, “Légal Transplant and Comparative Law”, *Supra* note 25.

He affirmed that the developments in communication, urbanization and industrialization reduced the environmental obstacles such as geographical, socio-economic and cultural conditions and lost its significance; but on the other hand, political differentiation caused divisions and gave birth to different political ideologies ranging from communist and non-communist bloc, democracies and dictatorships, parliamentary and presidential forms of governance and the roles played for making and maintenance of the law by their organized interests. Kahn Freund in this perspective said that in order to use comparative law methods, in addition to foreign law knowledge, proper understanding of social and political context was required too; otherwise if one doesn't do so, its usage becomes a misuse.²⁸

Kahn Freund's idea is challenged by Professor Watson with regards to legal transplant.²⁹ He rejected the arguments leveled by Kahn by saying that history had clearly shown that successful transplantation has taken place from a very different legal system to the other; and he do not see any necessity for having knowledge of foreign systems. He gives the example of Roman law reception by the Western Europe as a proof for prosperous legal transplantation.³⁰

It is stated by Professor Eric Steini on the debate between Kahn-Fruend and Watson that their differences on transplant were due to particular focus of their inquiry where Watson, as a historical lawyer, took the "macro-legal" view which believed in a massive transplant; whereas, Kahn Fruend, the sociological lawyer, took the "macro-legal" view that primarily focuses on modern reform legislation.³¹

As to the objects or contents of legal transplant, we may divide what kind of law we intend to transplant. It is a whole legal system, a whole code or a whole branch of law of the foreign country, or only individual legal rule or institution? Is law closely related to a foreign country's basic social system, ideology and of value or is it not or only marginally related with them? Is it a law tending to be internationalized or to be nationalized? So far as the same rule or institute is concerned, we may divide its political purposes and its social functions.³²

a. Causes of Legal Transplant

One of the main reasons in the development of legal transplant in the world is mainly due to Globalization.³³ Accordingly, globalization brings more straight forward, close, frequent and often stressed and complicated contact between law and legal

²⁸ Otto Kahn-Freund, "On Uses and Misuses of Comparative Law", 37(1) *The Modern Law Review*, 1974, pp.1-27

²⁹ Watson, *Supra* note 15

³⁰ *Ibid.*

³¹ Eric Stein, "Uses, Misuses—and Nonuses of Comparative Law", 72 *Nw. UL Rev.*, 1977, at 198

³² *Id.*, at 855

³³ Irma Johanna Mosquera Valderrama, "Legal Transplants and Comparative Law", 2 *International Law: Revista Colombiana de Derecho Internacional*, 2004, pp.264–65

cultures. It increases and assists the knowledge of legal professionals on what they want and need to know about foreign law, obtain and process information, how their transfer takes place, and how decisions are being made. Understanding globalization and its effects on development of the laws and strategies and how to deal with them is what is expected of comparative law field.³⁴

Globalization has substantially increased the need for the legal scholars to have knowledge of foreign laws. Substantial advancements in technologies have created a global village where people are more connected to each other more than ever. Thus, globalization has caused the need for new and unified laws more imminent than ever.

In addition to that, the below factors are being discussed as the main causes of legal transplant as stated by legal scholars. Legal transplant may find its way through “authority, prestige and imposition, chance and necessity, expected efficacy of the law, political, economic and reputational incentives from the countries and third parties.”³⁵

First and the foremost, according to Watson, authority is needed for the explanation of the development of legal transplant. He goes on and says: “In the absence of legislation, which typically has been scarce for private law, law making is left to subordinates judges and jurists— who, however, are not given power to make law. They must justify their opinion. It will not do to say ‘This is my decision because I like the result’. They must seek authority.”³⁶

Prestige and imitation has been classified as the next reason. Sacco is the one who developed this theory by categorizing the reasons behind imitation of legal transplantation into two, which are namely; imposition and prestige and asserts that anyone with the authority and power tends to impose its institution over others and one only can put an end to the reception (imposition) once the force is removed.³⁷

Furthermore, it may also take place due to enthusiasm to follow the work of others because of the intrinsic qualities that it possesses and thus it has become very prestigious.³⁸ Orucu explained that chances and necessity is another reason for legal transplantation and that the borrowing may not only take place out of luck but rather out of necessity. And he has given the example of criteria needed to be met by Eastern Europe to join the European Union.³⁹

³⁴ David J. Gerber, “Globalization and Legal Knowledge: Implications for Comparative Law”, 2001, at 950

³⁵ *Id.*, at 265

³⁶ Watson, Alan, “Legal culture v. Legal tradition”, paper presented at the Conference of Epistemology and Methodology of Comparative Law in the Light of European Integration, Brussels, October 24-26, 2002, at 2

³⁷ Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (installment II of II)”, *Supra* note 20 at 398

³⁸ *Ibid.*

³⁹ Esin Orucu, “Family Trees for Legal Systems: Towards a Contemporary Approach”, 2004, at 9

The theory of 'Expected Efficacy of the Law' has been claimed as another reason behind legal transplantation. It has been detailed out by Walsh in these words: "The way in which a formal legal order incubated in Europe was transplanted into other countries was a far more important predictor of the effectiveness of legal institutions than the association of that transplant with any particular legal family. The quality of transplantation process counted far more than the content of the transplant effect".⁴⁰

This idea of 'Political and Economic Reputational Incentives' was developed by Schauer. He asserted that: "The transnational and cross-border spread of law and legal ideas is not, as it may be for scientific, technical, and economic ideas, largely a matter of the power and value of the ideas themselves, but may instead be substantially dependent, both on the supply side and on the demand side, on political and symbolic factors that may have more explanatory power in determining how law migrates than do factors that relate to the intrinsic or instrumental value of the migrating law itself".⁴¹

Hence, as it could be seen, legal transplant may find its way to any legal system through voluntary, i.e. prestige, necessity, expected efficacy of the law, political, economic and reputational incentives or involuntary means such as imposition. Involuntary means are the worst type of legal transplantation and in numerous cases it has resulted into chaotic and disastrous situations.

b. Successes and Failure of Legal Transplant

As to the effect of legal transplant, we usually divide it into failure and success. There are remarkable cases where it proved that legal transplant can successfully take place as the ombudsman and trust system, the French Civil Code and Administrative Court, the Anti-trust legislation and judicial review in the United States. Kahn specifically cited the attempted introduction of 1971 British industrial relation and English jury system to the continent in the 19th century as an example of misuse of comparative law, a kind of failure of legal transplant due to the opposition of the continent legal profession.⁴²

c. Problems of Legal Transplant in some Countries

(1) Turkey

As in Turkey the family law was tightly attached to Islam even during the uprising of Ottoman Empire, which was done through compilation of legal code named

⁴⁰ Catherine Walsh, "Law in Transition, Advancing Legal Reform", 2000, at 10

⁴¹ Frederick Schauer, *The Politics and Incentives of Legal Transplantation* (Center for International Development at Harvard University, 2000) at 2

⁴² Shen, "Légal Transplant and Comparative Law", *Supra* note 25 at 856

Mejelle and the Shari‘ah concerning family laws, and which remained unchanged. Under that men were allowed legally to have four wives as it connotes that polygamy was an accepted practice during that time. In 1917, the Ottoman Law of Family Rights Act was enacted in which new requirements were added. It required that:

- i. The law required that state procedures must be strictly followed for every marriage and divorce in which both marriage and divorce had to be registered with the state.
- ii. New age limit for marriage was set up which was 9 for females and 12 for males.
- iii. The marriage needed to be solemnized before the judge or deputy and simple marriage renunciation which traditionally was done in the presence of two witnesses was not enough any longer.
- iv. Females were given two grounds for divorce of their husbands which were epidemic sickness or leaving her without providing maintenance for her.⁴³

And more importantly, women were allowed to insert a clause in a marriage contract at the time of betrothal which would render marriage null and void if the husband would take another wife. It interfered in an area that was previously dominated by Islamic law and tradition.⁴⁴

Subsequently, the Shari‘ah law was entirely replaced by the European civil law, a radical move taken by Mustafa Kemal (Atatürk) in form of the Civil Code of 1926, in which

- i. Polygamy was prohibited.
- ii. Methods of Civil Law were used in order to prove the grounds of divorce in the presence of two witnesses.
- iii. In the matters of custody and inheritance, both were given the equal rights.
- iv. 18 for males and 17 for females were new age limit for marriage.
- v. In order to legitimize marriage, it was not sufficient to be performed and solemnized before imam but state civil servant.
- vi. No religious marriages were allowed to happen before the official civil marriage.
- vii. Religious ceremony had to take place strictly after civil marriage as stated in Section 110 (later 143/2).⁴⁵

⁴³ Nursel Atar, "The Impossibility of a Grand Transplant Theory", 4(2) *Ankara Law Review*, 2007, pp.177-97

⁴⁴ June Starr, *Law as Metaphor: From Islamic Courts to the Palace of Justice* (Sunny Press, 1992) at 40

⁴⁵ *Ibid.*

However, this Code, led to a lot of social problems, as the majority of people were still performing religious marriages in the society. Seven years after, by passing the Amnesty Act 1933, legislature was forced to recognize the religious marriages, which was previously considered illegal and the children as the outcome of those marriages were considered illegitimate. The enactment took place due to the following problems:

- i. Religious marriages were still taking place without complying with civil marriages which was legally prohibited and their cohabitation was not recognized.
- ii. Husband and wife were not given the right of inheritance from each other and their children were considered illegitimate.

Even after the Amnesty Act was passed, in order to give people time to assimilate the civil law rules with regards to marriages, the above-mentioned problems persisted until 1936. Frustrated over this social problem, legislature took another shocking step and added section 237/3-4 into the Criminal Code in which religious marriages were criminalized if it was taken place without prior civil marriage and non-compliance would result in two to six year's imprisonment. The Imams who conducted these types of marriages were not immune from criminal prosecution and could face up to one to three months imprisonment if they were to solemnize a marriage without looking at the proof of its civil marriage.⁴⁶

(2) Tunisia

Tunisia went through drastic reforms same as Turkey. In Tunisia, initially laws were determined by the state and religious principles, and it had gone through waves of reforms especially after its independence in 1956. In 1956, the Code of Personal Status (CPS) was adopted under Habib Bourguiba the former president in which it included series of laws that were inconsistent with the Sahri'ah. These law reforms were as follow:

- i. It abolished polygamy even though the head of household were still males.
- ii. CPS increase the minimum age for marriage.
- iii. Marriages had to be registered and it recognized child adoption.
- iv. In the middle of 1960s contraception was available and in 1970s it legalized abortion.⁴⁷

⁴⁶ Atar, *supra* note 43, at 188

⁴⁷ Mounira M. Charrad, "Tunisia at the Forefront of the Arab World: Two Waves of Gender Legislation", 64 *Wash. & Lee L. Rev.*, 2007, at 1513

Thus, the authority on family law, was taken out of Ulamas' hands and was usurped by the authorities and eventually instituted a secular alternative to the Shari'ah.⁴⁸ Secularization of the court system, dismantling of Zitouna's religious university and conformity with the western's calendar were among other steps which were taken by the government for further secularization of the country.⁴⁹ Therefore a secular form of dictatorship was established under Bourgiba's leadership. It was continued by Ben Ali, his successor, who's regime lasted until Arab Spring.

Religious political parties were banned to be formed in Tunisia throughout Ben Ali's era in order to curb their influence in the society.⁵⁰ After the revolution of 2011 in Tunisia, the role of religious based political parties were enhanced and were allowed to contest general elections which led to the wining of al-Nahda an Islamic political party in October 2011 for the Constituent Assembly.⁵¹

The need for the representation of an Islamic party was apparent because the process of securitization went simultaneously with political compression. Under Habib Bourguiba's leadership from 1957 till 1987, formation of any Islamic political party was prohibited and his dissenters were imprisoned, he on a live television show, drank orange juice during Ramadan, meaning to say that fasting prevents development and it reported to have said that "We cannot advance... with an empty stomach", and all these happened in a country with Islam as the dominant religion with 99 percent Muslims. This action was followed by his successor Ben Ali as well. Therefore, the discussion about the role of Islam with law was new concept and freedom which was still hammered for over 50 years in Tunisia.⁵²

Subsequently, after the winning of al-Nahda, there were calls for drafting a new constitution and legalizing polygamous marriages in line the constitution with Islamic principles.⁵³ These law-reforms were mainly enhancing the role of Islamic law in the Tunisian constitution as well as its domestic laws and criminalizing blasphemy in both constitution as well as its penal code.⁵⁴

⁴⁸ Abdelbaki Hermassi, "The Political and the Religious in the Modern History of the Maghrib", *Islamism and Secularism in North Africa*, 1994, pp. 92–93

⁴⁹ *Ibid.*

⁵⁰ Colleen McCullough, "Tunisia: Islamists and the Upcoming Election | The Maghreb Center Student Blog on WordPress.com," 2011, available at: <https://themaghrebcenter.wordpress.com/2011/06/24/tunisia-islamists-and-the-upcoming-election/>

⁵¹ Bureau Chief Habib Toumi, "Al Nahda Wins Historic Tunisia Elections | GulfNews.com," 2011, available at: <http://gulfnews.com/news/mena/tunisia/al-nahda-wins-historic-tunisia-elections-1.919988>

⁵² McCullough, *supra* note 51

⁵³ Lamia Ajabi, "Tunisian World: No to Polygamy in Tunisia", 2012, available at: <http://tunisianworld.blogspot.my/2012/09/no-to-polygamy-in-tunisia.html>

⁵⁴ George Sadek, "The Role of Islamic Law in Tunisia's Constitution and Legislation Post-Arab Spring," 2013, available at: <http://www.loc.gov/law/help/tunisia.php>

Problems which arose out of this legal transplantation in Tunisia were as follows:

- i. Religious marriages were still taking place without complying with civil marriage requirements in which non-compliance was legally prohibited and any cohabitation was strictly not recognized.
- ii. Husband and wife were not given the right of inheritance from each other and their children were considered illegitimate.
- iii. Laws enacted were non-compliant to *Sharia*'s rules in a country with over 90% Muslim population.

(3) Pakistan

The judicial system of Pakistan has evolved over a long period of time and the root of the current judicial system can be traced back to the medieval period and even before. The system has gone through several eras, ranging from the Hindu era, Muslim period comprising of the Mughal Empire, British colonial period and the current post-independence era. The following changes in its rules and dynasties were the natural result of political and socio-economic transformation of the Indian society. Generally, the judicial system sustained a gradual advance and a stable growth towards consolidation and improvement, without really, having to experience any major disturbance or breakdown.⁵⁵

Before the creation of Pakistan (as it was part of India), the Charter of 1623 authorized the East India Company to resolve the cases of its English employees which led to the establishment of its own court. All the cases of criminal and civil nature were heard by the President and Council of the Company. The Charter of 1661 further brought about the expansion of such powers such as authorizing the council and the governors to not only hear cases of East Indian Company's employee but rather those people who reside in the settlement. Therefore, the English law was applied when they were adjudicating on those cases. With the result of this, there was shift in the character of the Company from a trading company into a territorial power; thus, in course of its territorial expansion it established additional courts for the settlement of disputes of its employees and the subjects. Therefore, these courts were comprised of English judges and English laws were generally applied.⁵⁶

As a provisional Constitution, Government of India Act 1935 was retained on independence. Consequently, with modifications and adaptation, the legal and judicial system of the British period was continued to suit the requirements of the new Republic. Therefore, the operation of the legal system's operation continued without any interruption and breakdown and the judicial structure also remained the same.⁵⁷

⁵⁵ Faqir Hussain, "The Judicial System of Pakistan", *Federal Judicial Academy Islamabad*, 2015

⁵⁶ *Ibid.*

⁵⁷ By the High Court (Bengal) Order 1947

Similarly, for Pakistan, a new Supreme Court was also established.⁵⁸ Through the Government of India Act 1935, the powers, jurisdictions and authorities of the Supreme Court and High Courts remained intact.⁵⁹

The British colonization brought nothing but division between the different segments of the society. Indian National Congress became the representative body of the whole county and it was heavily criticized by the prominent Muslims who allegedly saw the coming bitter split between the communities. They stressed that the Indians did not form one nationality which was the basic requirement for a successful democracy in any nation. They further added that the current model of the governance is unworkable as the Muslims and Hindus are divided and are far unequal in their strengths and national representation.⁶⁰ Accordingly, creating a distinct identity for the Muslims was the motivating factor behind the creation of an independent Pakistan.⁶¹

It was argued by Maulana Maududi that from the start of the struggle for Pakistan, there was a belief among the people demanding a separate country that it would be an Islamic state and the law and policy will be based on the Shari'ah. It would result in the revival of Islamic law as well as Islamic culture. Muslim League leaders were always giving that impression in their speeches. Therefore after the independence of the Pakistan, special position was given to Islam in its constitution. Article 1 of the Pakistan's constitution with this regards states that: "Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan, hereinafter referred to as Pakistan. Islam shall be the State religion of Pakistan." Because of this, the colonial laws were Islamized so that they could be in line with the Qur'an and Sunnah.

IV. LEGAL CULTURE

The relationship between legal culture and legal tradition was put forward by Watson after the development of legal transplant theory. He stated that: "The answers for understanding the nature of law and its place in society can only be found in the legal tradition and legal culture."⁶²

Blankenburg must be referred to in order to understand the definition of "legal culture" which he puts forward in the subsequent terms on "A complex interrelationship in four levels:

- i. The level of values, beliefs and attitudes towards law.
- ii. Patterns of behavior.

⁵⁸ By the Federal Government of Pakistan Order 1948

⁵⁹ *Ibid.*

⁶⁰ Chief Justice (rtd) Qadeeruddin Ahmed, *The Demand of a Muslim Homeland*, Dawn 23.3.1992

⁶¹ *Ibid.*

⁶² Valderrama, "Legal Transplants and Comparative Law", *Supra* note 33 at 271

- iii. Institutional features.
- iv. The body of substantive as well as procedural law.”⁶³

The importance of “legal culture” can be properly understood with regard to the approach to the study of comparative law where Peter and Schwenke rightly stated that:

“At all stages of comparative research (data acquisition, analysis and interpretation of the data, and actual in-depth comparison and eventual evaluation), the real problems are the lack of full knowledge and understanding of foreign legal rules and cultures. They (*comparatists*) must know something about the historical, social, economic, political, cultural and psychological context which has made a rule or proposition what it is. We must look not only at rules but at legal cultures, traditions, ideals, ideologies, identities, and entire legal discourse.”⁶⁴

Why has the Legal Transplant’s Debate led to the “Dialogue of Deaf”?

There have been infinite discussions on legal transplant’s workability or unworkability between comparative law scholars and somehow it has led to a “dialogue of deaf”. The problem is that it has always been discussed from the perspective of Culturalists or Transferists. The discussion has always been either on legal transplant’s successes or on failures. If there are any successes, Transferist hail that. Actually, legal transplants worked and Culturalists are wrong and vice versa.

We believe that, in order to properly examine legal transplant and put an end to this partisan discussion, we should closely look at the reasons behind successes and failures of legal transplants. If it worked in one society, we cannot jump to a conclusion that the same exact legal system would work in another society. This is because the conditions in that country may not be the same.

There should not be any discussion on the workability of legal transplant and whether legal transplant is necessary or not as one can rightly say that legal transplant is a tool needed by every legislature in order to make law reforms in their societies. Therefore, we believe that there shouldn’t be any dispute on the necessity and importance of legal transplant.

Nevertheless, the most fundamental question has to be: how can legal transplant come about in a society which meets its socio-political and religious values? As Professor Sacco rightly said that ‘imposition’ or ‘prestige’ were the two main reasons behind legal transplantation. He further clarified that any powerful nation would in order to spread its own laws, would impose it on other nations or its reception may happen due to its prestige.⁶⁵

⁶³ Erhard Blankenburg, “Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany,” *The American Journal of Comparative Law*, 1998, pp.1–41

⁶⁴ Peters and Schwenke, “Comparative Law beyond Post-Modernism”, *Supra* note 1 at 832

⁶⁵ Shen, “Légal Transplant and Comparative Law”, *Supra* note 25 at 855

If a legal transplant takes place through the first classification (imposition) and forceful means, it leads to nothing but catastrophic results. If one takes a look at the failure of legal transplants in countries such as Tunisia and Turkey and Malaysia and the problem it brought afterwards in those societies, one may find a common reason behind its failure and that is imposition where the legal transplantation found its way in a society through forceful means without any regards to its social, historical and religious values.

Let's take a look on how legal transplant took place in those countries and let's start with Turkey. When Atatürk came into power, he adopted dictatorial method of governance and extreme actions were taken against his political dissenters. He substituted the whole body of *Shari'ah* enacted under Othoman Empire with various European Civil Law, specifically the Civil Code of 1926. It put an end to polygamy, the law of inheritance was changed and women would inherit the same as male, and would give child custody to both, it required the ground of divorce to be corroborated by witnesses before the secular court which would look at the matter from civil law perspective and religious marriages were not a valid form of marriage anymore and so on and so forth.

Thus, Kemalism became the official Turkey's ideology that came into existence due to anti-Islamic and ultra-secular views of Mustafa Kemal Atatürk. He disposed of the caliphate, banned Islamic education and Sufi brotherhood and removed the Arabic alphabets which were an integral part of the society.⁶⁶

These radical changes (a kind of legal transplant) took place in a dictatorial manner without any regards to the legal cultures in a country of above 90 percent Muslim population. Those who opposed these radical changes were harshly prosecuted. Therefore, decades of those impositions generated people's frustration with the legal system and paved the way for an Islamist Party Justice and Development Party (AKP) to come to power. If it wasn't for those radical changes which entirely changed the legal system and structure of the society, Justice and Development Party may have never come into power. Islam is currently going through a remarkable revival in Turkey. President Tayyip Erdogan and Prime Minister Ahmed Davutoglu are putting a lot of effort on re-awakening of Muslims and reestablishment of Islam within Turkey as well as abroad.⁶⁷The decades-long ban on wearing of headscarf in public institutions was lifted and in primary schools, no more daily pledge of allegiance is needed.⁶⁸Likewise, selling alcoholic beverages

⁶⁶ Ömer Tappýnar, "Islamist Politics in Turkey: The New Model?", 2012, available at: <http://www.brookings.edu/research/papers/2012/04/24-turkey-new-model-taspinar>

⁶⁷ Can Erimtan, "President Erdogan and Islam: Piety and Ottomanitas- RT Op-Edge", 2014, available at: <https://www.rt.com/op-edge/208447-turkey-erdogan-religion-islam/>

⁶⁸ Elhanan Miller, "Erdogan's Turkey: Less Nationalism, More Islam | The Times of Israel", 2013, available at: <http://www.timesofisrael.com/erdogans-turkey-less-nationalism-more-islam/>

are banned between 10 pm to 6am by the retailers as well as the selling cannot take place near schools and place of worships.⁶⁹

We would agree with the Culturalists point of view in Turkey where Christians in Europe and Muslims in Turkey were politically, culturally and socio-culturally different and held dramatically different values and, therefore, the legal transplant was a mistake.⁷⁰

Thus, we can see in the case of Turkey that neither legal transplant took in a proper way (imposition) nor it was needed. A country which had codified *Shari'ah* law, which suited that society, was not in need of European civil law because their own law met the needs of the society. Ottoman Empire was defeated in the World War I and it came under the leadership of Atatürk with pro-west ideology that chose a dictatorial way of leadership.

Tunisia almost went through the same trend and transformation as well. Code of Personal Status (CPS) under president Bourguiba's leadership was adopted in 1956. It was consisted of a series of laws which led to the different illustration of the dominant law, i.e. Islamic law. It banned polygamy, it led to the legalization of child adoption, law of inheritance and male unilateral divorce (*talaq*) was changed. These laws gave no regards to the fact that above 90 percent of Tunisians were Muslims and some of these changes coming under the name law reforms were non-Shari'ah compliant.

No consideration was given to the probable consequences of this process of secularization which was implemented through dictatorship. It led to chaotic revolution not only in Tunisia but also in Arab world. It led to coming of Islamic party al-Nahda into the power in order to reform laws and once again enhance the position of Shari'ah law in Tunisian's constitution and domestic legislation.

Malaysia was not immune from this phenomenon as well. After the British colonization of Malay Peninsula, the process of secularization of the Malaysian legal system began which was previously administered by Islamic law. Therefore, through secular fiat only administration of Islamic law was validated which resulted to be only personal law applicable only to Muslims such as inheritance, marriage and divorce.⁷¹

As to address how and when did Islam was brought into Malay Peninsula, it was introduced and brought by Arab traders and Indian merchants in the Malay

⁶⁹ Güneş Kömürcüler, "Restrictions on Alcohol Sales Go into Effect Today in Turkey- Economics", 2013, available at: <http://www.hurriyetdailynews.com/restrictions-on-alcohol-sales-go-into-effect-today-in-turkey.aspx?PageID=238&NID=54074&NewsCatID=344>

⁷⁰ Atar, *supra* note 43

⁷¹ "The Position of Shariah Court in Malaysian Legal System – Rosli Dahlan and Fawza Sabila Faudzi - The Malaysian Insider", 2015, available at: <http://www.themalaysianinsider.com/sideviews/article/the-position-of-shariah-court-in-malaysian-legal-system-rosli-dahlan-and-fa>

land estimated between 7th and 12th century.⁷² Later, Islam became the official religion of the region not only applicable to rituals and rites but rather substantive and procedural law and the law was not only applicable to the residents residing in Tanah Melayu but rather the victors as well.⁷³

The position of Islamic law in Malayan Peninsula started after the “Anglo-Dutch Treaty” in 1824 and British colonization and had a major role on ramification of Islamic Law and Shari‘ah Court’s Statutes. The enactment and administration of Islamic Law was given to the states and its state legislative council.⁷⁴

In *Shaik Abdul Latif & Ors. v. Shaik Elias Bux*,⁷⁵ it was stated by Edward CJ that “before the first treaties the population of the states consisted almost solely of Mohamedan Malays with a large industrial and mining community in their midst. The only law at the time applicable to the Malays was Mohamedan modified by local custom.” In *Ramah v. Laton*⁷⁶ Thorn J. illustrated that: “Muslim law is not foreign law but local law; it is the law of the land, and the local law is a matter of which the court must take judicial notice. The court must propound the law.” In *Tengku Jaafar & Anor v. The State of Pahang*⁷⁷ the endorsement was given by the Supreme Court that before coming of Torrens system, Islamic law was the applicable law in relation to the land matters in Pahang.⁷⁸

Regardless of all these, through Civil Law Act 1956, Common Law and rules of equity was imposed into the Malaysian Legal system. Section 3 stated that:

- (1) “Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall—
 - (a) In Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;
 - (b) In Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;
 - (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in

⁷² Johan H. Meuleman, “The History of Islam in Southeast Asia: Some Questions and Debates”, *Islam in Southeast Asia: Political, Social and Strategic Challenges for the 21st Century*. Singapore: Institute of South East Asian Studies, 2005, pp.22–23

⁷³ Ramizah Wan Muhammad, “The Administration of Syariah Courts in Malaysia, 1957–2009”, 13(2-3) *Journal of Islamic Law and Culture*, 2012, pp.242–52

⁷⁴ *Ibid.*

⁷⁵ (1915) 1 FMSLR 204

⁷⁶ (1927) FMSLR 128

⁷⁷ [1978] MLJ 33

⁷⁸ [1987] 2 MLJ 74

force in England on 12 December 1949, subject however to subparagraph(3)(ii)".⁷⁹

Moreover, Article 160 of the Malaysian Federal Constitution describes "law as includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof".⁸⁰

Therefore, the position of Islam degraded to the personal matters and common law became the dominant law. Since independence, in Malaysia there has been coexistence of justice system where Shari'ah courts deals with the matters related to Islam and people profess the religion of Islam whereas civil courts deals with civil and criminal matters. However even with that, the relationship between Civil and Shari'ah court has not been an amicable one where prior to 1988, the decision of Shari'ah Court was regularly reviewed by civil court by *certiorari* and overturned it.⁸¹

In order to enhance the position of the *Shari'ah* court, and to overcome the clash of jurisdictions, to protect its integrity, to free the *Shari'ah* courts from the civil courts interference and in order to avoid conflict of jurisdiction, in 1988, Parliament passed the Constitution (Amendment) Act 1988 [Act A704]. Clause (1A) was further added in the Article 121 of the Federal Constitution which provided that "the civil courts shall have no jurisdiction with respect to matters within the jurisdiction of the *Shari'ah* courts".⁸²

Even with that, new conflicts have sparked between the *Shari'ah* and Civil Courts over child custody and religious rights of children in *Deepa Subramaniam*,⁸³ *Indira Gandhi*⁸⁴ and *Subashini Rajasingam*.⁸⁵ Therefore, the problem continues and there are more amendments expected to further clarify the position of Islam and the *Shari'ah* court's jurisdiction.

In *Indira Gandhi*, the court of appeal held that Muslim convert Muhammad Riduan Abdullah's conversion of his three Hindu children to Islam without obtaining their mother's consent was not valid as it did not comply with Islamic law requirements. The three children's Hindu mother, M. Indira Gandhi, had in 2013 managed to get the civil Ipoh High Court to quash the unilateral religious conversion,

⁷⁹ Civil Law Act 1956

⁸⁰ Federal Constitution of Malaysia

⁸¹ *Myriam v. Ariff* (1971) 1 Mij 265 and *Commissioner for Religious Affairs, Terengganu & Ors v. Tengku Mariam* (1969) 1 MLJ 110

⁸² *Sukma Dermawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia* (1999) 1 CLJ 481

⁸³ *Viran Nagapan v Deepa Subramaniam* [2015] 3 CLJ 537 (CA)

⁸⁴ *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors* [2013] 5 MLJ 552

⁸⁵ *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray and other appeals* [2008] 2 MLJ 147

but the Perak Islamic Religious Department (JAIPK) and other bodies appealed against the verdict.⁸⁶

Therefore, still the problem is in existence and an immediate solution is needed to address this issue to prevent the clash of both the courts. It is undeniably better and will be in the best interest of the children if there was only one court handling this issue taking into consideration the best interest of the kids.

However on the other hand, if the legal transplant takes place through other means such as imitation due to the prestige that it possesses, then that would in our opinion be considered a perfect legal transplant. Legislature would take all aspect of societal, cultural and religious background of the society and then would enact a law that is compatible with their values.

Brunei is an example to look at where *Shari'ah* law has been fully adopted as the law of the land. *Shari'ah* law is not a new notion in Brunei where Islam was accepted in the 15th century and it has been long embedded in the country's governance and the head of state had the responsibility to promote and protect Islam. However, only Family law matters were referred to the *Shari'ah* Court but on May 2014, the first phase of the Syariah Penal Code Order 2013, came into force⁸⁷ it provided particular offences and punishments for the crimes that are prescribed by the Quran and Sunnah (prophetic tradition). Mandatory attendance of Friday prayer and offences such as disrespecting Ramadhan was also added in the Penal Code even though it was prescribed in the Quran or Sunnah.⁸⁸

For offences such as Sariqah (theft), Hirabah (robbery), Zina (adultery) Zina Bil-Jabar (rape), Liwat (sodomy), Qazaf (accusation of adultery, sodomy and rape), drinking intoxicating drinks, Irtidad (apostasy), punishment and penalties are Hadd - Punishment as ordained by Quran and Hadith, including amputation of hand (theft), death or amputation of hand/foot (robbery), stoning to death or whipping (adultery or rape) Other – Fine, imprisonment, whipping.⁸⁹

V. CONCLUSION

There is still hope on the workability of legal transplant and undoubtedly it is an essential process of law reforms in every country. As Sacco rightly said that imitation and borrowing is a major legal change and very rarely new rules and institution will emerge. It is always the question of how legal transplant takes place. If it happens through colonization (imposition) and forceful means as it happened in the past, there will not be any doubt on its unworkability and ultimate failure.

⁸⁶ Available at: <http://www.themalaymailonline.com/malaysia/article/converting-children-unilaterally-is-un-islamic-court-told-in-indira-gandhi#sthash.vktNpdAl.dpuf>

⁸⁷ Brunei Syariah Penal Code Order, 2013

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

Oliver Deneys Schreiner rightly said that: “I like the picture of the growing law, developing indefinitely into the future, not losing its roots but ever throwing out fresh branches and deriving its sustenance from any source above or below the ground that can be of use to it. Looking at it that way one can see that your legal system and mine can continue to grow in beauty side by side if one’s interest is in the harmony of the law or providing ever more appropriate and convenient rules if one is more concerned with the practical service of the community. I suggest that we can both be proud of our legal systems and of the association that has for more than a century existed between them. Long may that association continue and much may we together contribute to the strengthening of the supremacy of the law inside our respective jurisdictions and, above all, in these dangerous days, between the nations of the world”.⁹⁰

Therefore, there is no doubt on the workability of legal transplant if takes place through proper means as stated. If the legal culture, societal and religious background are taken into consideration before legal transplant takes place, there is high possibility of its workability. If those factors are ignored and legal transplant found its way through imposition, undoubtedly it leads to disastrous results.

⁹⁰ Oliver Deneys Schreiner, *The Contribution of English Law to South African Law; and the Rule of Law in South Africa* (Stevens, 1967) at 105