# "A STUDY OF LEGAL TRANSPLANTS: LEGAL TRANSPLANTS ARE MORE COMMON THAN WE THOUGHT AND ALMOST ALL LEGAL SYSTEMS ARE A MIXTURE OF DIFFERENT LEGAL TRADITIONS"

MANAN PARMAR

## INTRODUCTION

The concept of 'Legal Transplants' has come a long way since Alan Watson introduced it in 1974.[1] In the span of more than forty years, this concept has been subject to various commendations as well as criticisms. But this appraisal and critique can be considered only in relation to Watson's understanding of the concept. In present, I believe, this concept is no longer confined to the old perspective and that it is not the term, which needs substitution, but the definition, which needs some modification.

The fact that there exists a viewpoint**,** that even Roman law was considered to be a mixture of cultures from different civilizations[2], helps us conclude that legal transplants were already in existence, conceptually, way before the actual coinage of the term. Imagine the amount of such borrowing that has taken place since then till date. And that the frequency of the same must have increased exponentially with time, owing to the fact that the world has only become smaller and more complex with time. Therefore, it further helps in concretizing the view, to which I do agree, that most legal systems are actually mixed. And that it is the degree of heterogeneity, which helps us determine how mixed or pure they are.

[1] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1st edn, Edinburgh: Scottish Academic Press, 1974).

[2] PP Monateri, 'Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition' (2000) 51(3) Hastings LJ 479, at 484 ("a multicultural product effort of different, largely African and Semitic, Mediterranean civilizations").

This paper aims to establish how authentic and relevant the aforementioned viewpoint is by way of a practical analysis, by trying to discover foreign influences in some of the legal systems of the world. But before I do that, it is important to give such an analysis a firm theoretical footing and for that, I would first discuss the concept of 'Legal Transplants' and try giving it a newer and a better understanding.

## UNDERSTANDING 'LEGAL TRANSPLANTS'

The term, in its literal sense or per se, gives us an idea, analogous to the scientific meaning of a 'transplant', which is defined as to *"transplant, or move something, especially an organ."*[3] Alan Watson defines a legal transplant as *"the moving of a rule… from one country to another, or from one people to another"*[4], which justifies this analogy, but to what extent? If the analogy is taken a bit further, it is observed that just like medical transplants, which sometimes do not work in the body of the donee, even legal transplants tend to be rejected; and that the frequency of the latter is faster than that of the former. Another point of difference, however, can also be raised, that when a medical transplant takes place, there is a substitution and the previous organ no longer exists. But this is seldom the case with legal transplants, where such rules or ideas co-exist and it is the pattern of hegemony that makes all the difference.[5] The main problem, according to me, is that how can the concept be defined, while enveloping all the attempts made at the same along with the criticisms that it has remained subject to. For this, I am going to consider, briefly, what some of the authors and researchers have had to say on the topic and then try to formulate a definition, which can encompass all the perspectives in a logical manner. The main objective of this modification is to augment our understanding in regard to the mixed legal systems in today's world, where such transplants take place much often, if not regularly, owing to the fact that now there are 197 countries in it.

Some comparatists have also raised concerns and objections regarding the terminology of the same and attempts have been made to find terms, which can

[3] 'transplant', *Cambridge Advanced Learner's Dictionary* (4th edn, CUP 2013).

[4] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press, 1993) 21; see also Legrand Pierre, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht J Eur & Comp L 111, at 112.

[5] Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems* (1997) 45 Am J Comp L 5, at 16.

be used as substitutes or synonyms to it. Terms like 'legal transfers', 'legal reception', '*circulation of legal models*', 'legal influence', 'legal inspiration', and 'legal cross-fertilization' have been suggested or referred to.[6] This, however, is not the approach I wish to adopt.

When Professor Watson put forth this concept, the perspectives and opinions contained therein were more historically influenced, owing to his field of expertise.[7] This might have been the reason that certain aspects of it remained untouched, which, nonetheless, were equally important. Most of the criticisms to the work also relate to those aspects. Comparatively, the work has attracted more criticism from sociologists, legal and otherwise, for not exploring its connection with the social and cultural sphere, which, to a certain extent, is true. Professor Siedman of the Boston University School of Law, while reviewing his work, observed that whatever was put forth therein was not new or innovative, but dull and boring, owing to the fact that 'social variables' or factors were left completely ignored.[8] This raises the question that whether every legal transplant is subject to these factors? I would soon be providing an answer to this. Another dimension was added to it by Sir Otto Kahn-Freund's emphasis on the importance of the political aspect connected to it. He argued, that,

*"Any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection…its use requires a knowledge not only of the foreign law, but also of its social, and above all its political context."*[9]

This perspective seems to be true when we observe the fact, which should go unopposed, that such transplants are more likely to occur between legal systems, which share a particular political ideology. A legal rule or idea existing in a Communist/Socialist country, like China, would have better chances of survival in a country like Russia. Similar would be the case between capitalist countries, or

[6] Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*. in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (1st edn, Oxford University Press, 2006) at 443.

[7] John W Cairns, *Watson, Walton, and the History of Legal Transplants* (2013) 41 Ga J Int'l & Comp L 637, at 648; see also Eric Stein, *Misuses and Nonuses of Comparative Law* (1997) 72 NW U L Rev 198, at 199-203; see also Mathias Siems, *Comparative Law* (1st edn, Cambridge University Press, 2014) at 195.

[8] *Id* at 641; see also RB Seidman, Book Review, at [n 1] (1975) 55 BUL Rev 682, at 683.

[9] *Id* at 645; see also Otto Kahn-Freund, *On Uses and Misuses of Comparative Law* (1974) 37 Mod L Rev 1, at 27.

between Politico-Religious countries. But again, it seems implausible that this aspect too affects every legal transplant that takes place. Graziadei also supports this view,[10] but adds that it affects only those transplants that take place on a 'grand scale'.[11]

Graziadei, in his paper tries to classify such transplants into two categories, namely *Macro-Level Transplants* and *Micro-Level Transplants,*[12] owing to the argument that it is not only the institutions and governments, but individuals as well, who play a role in such borrowings. He undertakes another analogy of mediated action, which was originally a study in cultural-historical psychology,[13] by studying an experiment undertaken by Lev Vygotsky and applying it to the field of legal transplants.[14] Cole and Wertsch summarize the concept of mediated action as follows:

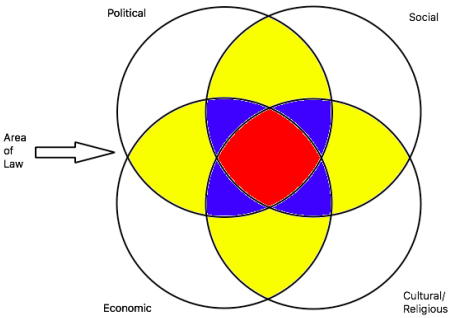
*"Higher mental functions are…involve not a 'direct' action on the world, but an indirect action, one that takes a bit of material matter used previously and incorporates it as an aspect of action."*[15]

When applied in our field, tools such as *'original legal materials'*,[16] language, culture, religion, a common legal ideology, come out to be the tools of mediated action when micro-level transplants are taking place. But in the end, what I feel is that although this theory seems true and applicable, the author fails to provide any satisfactory practical evidence to support it. After all this discussion about the existing literature about legal transplants**,** I return to discussing the two questions that I have already mentioned. Firstly**,** can there be a better definition for the term? And secondly, what is the extent of the influence of external factors (economic, social etc.) upon the success of a particular legal transplant? The questions were left unanswered till now because both of them are interconnected and should be understood in that way.

[10] Michele Graziadei, *Legal Tranplants and the Frontier's of Legal Knowledge* (2009) 10 Theoretical Inq L 723, at 734.
[11] *Id* at 735.
[12] *Id* at 723, 725.
[13] *Id* at 736.
[14] *Ibid.*
[15] *Id* at 736; see also Michael Cole and James V Wertsch, *Beyond the Individual-Social Antimony in Discussions of Piaget and Vygotsky* (1996) 39 Hum Dev 250, at 252.
[16] *Id* at 737.

The concept of legal transplant can be understood as 'an adoption of legal rules, legislations, institutions, and even ideas, which is accompanied by adaption of the same, the degree of which may range from nil to being completely transformed, depending upon the external factors that affect it.' The external factors mentioned vary from one legal system to another and are the same as those mentioned in the second question. There is, however, one important aspect that needs to be emphasized. The area of law to which the transplant relates ascertains everything, ranging from the nature of the legal transplant to the factors that might determine its success rate.

In response to the second question, I was able to figure out four major factors that affect legal transplants, namely Political, Economic, Social and Cultural/Religious. Let us take help of the following diagram (Fig 2.1.) to understand it better.




The first step is to choose the area of law, to which the transplant belongs and the next step is to try and place it in the Venn diagram, according to how closely it is connected to the four factors, firstly in the legal system that is on the receiving end, and then in the system of origin. The distance between the two points, and the degree of adaptation that the transplant has to undergo, are directly proportional. The four closed curves represent the four factors mentioned before. The right half can be considered trickier than the left one. It means that if an area of law is influenced by social and religious factors in a country, the process of transplantation will be more complex, comparatively. Furthermore, the inherent complexity of the transplant itself decreases as we move further away from the center. Talking about labor laws for instance, it is supposed to be political, as legislative authority is derived from sovereignty, which in turn is politically influenced; culturally or religiously on the other hand, not so much. Now the degree of influence of the social factor would depend upon the political ideology. For a socialist state, it is a considerable factor, but not for a capitalist state as it concerns itself with a certain group of the society, and not the society as a whole. So, if transplants relating to labor laws were to be made in a socialist country, then it would be easier if the origin country were also socialist. The same applies to capitalist countries as well. Also, the degree of complexity in the transplant would be considerably more in the socialist country,

because, as mentioned earlier, it involves the social factor. If any other areas of law are considered, such as company laws, family laws or contract laws**,** similar conclusions could be arrived at. The debate as to what legal transplants are and what they should be, how do they and should they take place and so on and so forth, seems to be never-ending, but every contribution to this literature helps shed some light on the topic and adds something valuable to it. One thing, however, that cannot be refuted, is that legal transplants do take place, and not only consciously, but subconsciously as well, and that every transplant is inherently different from the other.

## A COMPARATIVE ANALYSIS OF DIFFERENT LEGAL TRADITIONS

The origin of law can be considered as old as that of the societies. It, however, might not have been formally recognized. Some sort of governance was always present, as early as when humans started forming families, further proceeding to the formation of a society.[17] Despite the fact that the world today seems so small, it has not always been the case. All these interactions between different societies, across different continents were possible only after the advent of science, and then technology. They remained isolated from each other, developing their own principles and ways of governance. But then, they came into contact with each other and ideas started travelling across borders and the high seas. This enabled them to consider the foreign ideas, and adopt and adapt them according to their own social, economic and political conditions.

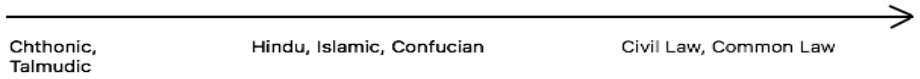
Law, as we know it today**,** is different from its understanding and application in the past. These principles were recognized as customs and traditions rather than as laws, before law was developed into a field of study, and before different societies started interacting with each other. What it means is that when the cross fertilization of ideas started taking place in societies, it started with customs and traditions rather than laws,[18] and that before this eastern-western divide took place between the countries, everyone was governed by these so-called traditions.[19]

[17] Lloyd Duhaime, '*Timetable of World Legal History*' (*Duhaime*, 29 June 2007) <http://www.duhaime.org/LawMuseum/LawArticle-133/Origin-of-Law.aspx> accessed 1 January 2018.

[18] HP Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (4th edn, Oxford University Press, 2010) at 2.

[19] *Ibid* at 2-3.

Therefore, every legal system existing today can be said to adhere to a mixture of different legal traditions, rather than laws. There is no such thing as traditional law, because every principle that was termed as law was itself a tradition before. But I must remind you that by this tradition-as-law analogy, I only mean to address the laws in the initial stages, which contributed to the formation of the civil or the common law, or the Hindu law or Muslim law ideology. A timeline can be made describing the origin of the major legal traditions as follows, in three different eras. (Fig. 3.1.):




Need for a new taxonomy has been felt, one that does not undermine the religious legal traditions by placing the civil and common legal traditions on a higher footing. There is no doubt that the religious traditions came into being way before the latter ones. And rather than arguing that the civil and common legal systems are better because they were more modernly developed, what seems more plausible is that the religious systems are still surviving today because they have some elements that conform to the socio-legal conditions even today. It can even be said that such systems were better because they have managed not only to survive, but also to thrive in today's world. The taxonomy that I am suggesting classifies the legal tradition into two heads**,** namely, customary and post-customary legal traditions. The religious legal traditions are classified under post-customary head along with the civil and common legal traditions. This is because the reason that although they can be classified under customary traditions, it has not been done in order to eliminate the notion of one being better than the other, as discussed before, and also because then such a classification would put all those legal traditions in one group, which are prevalent in today's world. It, however, does not mean that customary legal traditions no longer exist. They do exist, but not as apparently as the post-customary ones. Furthermore, this paper concerns itself only with the post-customary legal traditions, with a brief mention about the customary legal traditions, where necessary.

## The Religio-Legal Traditions

*Islamic Legal Tradition*

The origin of the Islamic era is difficult to ascertain, in the sense that knowledge of the fact must have been difficult to attain by an outsider, and also because of its susceptibility to getting lost at some point in the past. Supposedly, however, it began sometime around the seventh century of the Common Era.[20] Unlike the civil and common legal traditions, this tradition is based on a religious footing, dealing more with personal laws, those governing the ways of life and concerning every single individual. Everything originates from the *Koran,* which is the word-by-word codification of what was revealed to Prophet Muhammad by the God[21], which literally covers all aspects of life.

The *Qadi*, Muslim equivalent of a judge, undertakes the system of dispute resolution in Islam. The procedure, however, is more similar to civil law than common law, because a similar concept can be found under the German civil law, namely *Rechtsfindungsversfahren,*[22] which can be translated to 'law-finding trial'. They are similar in the sense that both consider every single case particularly, and as different from others; and also because there is no case-reporting done in either one of them,[23] making the notion of judicial precedents and *stare decisis* impossible. They also share the concept of expert opinion to the courts, whereby the *mufti*[24] performs the role of roman jurists or law professors. The notions of trust under common law share their traits with *waqf,* which recognizes charitable foundations, notably educational institutions.[25] If we are to analyze the Islamic legal systems of today, every country will have some apparent traits of other legal traditions within itself. Let us take into account the Egyptian Legal System. It has a considerable amount of civil law influence, not only because it was occupied by Napoleon in 1798, but also owing to the fact that many Egyptian jurists underwent training and education in France.[26] The Egyptian Civil Code of 1948 is a mix of the French

[20] HP Glenn (n 18) at 184; see also Norman Calder, *Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993) at 12.

[21] *Id* at 183; see also I Khaldûn, *The Mugaddimah* (Princeton University Press, 1967) at 73.

[22] *Id.* at 188; see also G Strauss, *Law, Resistance and the State* (Princeton University Press, 1986) at 48.

[23] *Id* at 189; see also C Imber, *Ebu's-su'd [:] The Islamic Legal Tradition* (Edinburgh University Press, 1997) at 52, 53.

[24] *Id.* at 190; see also Wael B Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge University Press, 2001) at 167.

[25] Monica M Gaudiosi, *'The Influence of the Islamic Law of Waqf on the Development of Trust in England: The Case of Merton College* (1997-1998) 136 UPLR, 1231, at 1233.

[26] Abdel Mohamed Wahab, *'An Overview of the Egyptian Legal System and Legal Research'* (GlobaLex, 2012) accessed

Civil Code (majority of it), Islamic Law and various other European models.[27] Pakistan, on the other hand, was a part of India until the British rule can to an end. Its legal system therefore has a huge common law influence;[28] and it was only in 1979 that steps were taken towards *"revival of Islamic Law"* by President Mohammad Zia-ul-Haq.[29] Turkey, another Islamic State, has quite a unique legal system, in the sense that it lacks originality.[30] Almost everything is adopted from another legal system:

*"The civil law, the law of obligations and civil procedure were borrowed from Switzerland, commercial law, maritime law and criminal procedure from Germany, criminal law from Italy and administrative law from France…"*[31]

*Hindu Legal Tradition*

The concept of Hinduism, and more importantly the coinage of the term 'Hindu', is based on territory rather than on belief or religion, deriving from the word *'indoi',* which referred to the settlers on the banks of river Indus.[32] Although the *Vedas,* which contained the divine revelations, are said to have originated in between 4000 B.C. and 1500 B.C.,[33] the actual legal concepts are contained in the *Manusmriti*, the first of the *Dharmasastras,* written between 200 B.C. and 400 A.D.[34] The Vedas contain the existence of the concept of separation of powers whereby the Samiti performed the legislative role and the *Sabha* performed the judicial role. The third institution consisted of expert advisers, namely *Parishad,* which was not exactly

<http://www.nyulawglobal.org/globalex/Egypt1.html#_Primary_Materials> accessed 8 January. 2018.

[27] *Ibid.*

[28] Martin Lau, *Introduction to the Pakistani Legal System* (1994) 1 YB Islamic & Middle E L 3, at 3.

[29] Herbert Liebesny, *'English Common Law and Islamic Law in the Middle East and South Asia: Religious Influence and Secularization,* (1985-1986) 34 Clev St L Rev 19, at 29.

[30] Esin Örücü, *Mixed Legal Systems at New Frontiers* (Wildy, Simmonds and Hill Publishing, 2010) at 150.

[31] *Id* at 153.

[32] HP Glenn (n 18) at 289; see also Paras Diwan and Piyushi Diwan, *Modern Hindu Law* (11th edn, Allahabad Law Agency, 1998) at 1.

[33] *Id* at 290; see also Lingat, *Classical Law* (Berkeley: University of California Press, 1973) at 7.

[34] *Id* at 292.

similar to the Executive.[35] This is, however, considered to be the first instance when the system of appeals, in dispute resolution, came into being.[36] The *Manusmriti,* at such an early time, had already formulated *"eighteen titles of Hindu law"*[37], which supposedly covered *"every branch of jurisprudence."*[38]

India is the major country on whose legal system the Hindu legal system has had a substantial influence. Today, it shares the traits of Islamic, Civil and Common legal traditions. The need for official law was felt by the British Rule, which led to a complete codification of commercial, criminal and procedural law; and the replacement of the Hindu contract and property laws by statute.[39] It possesses the Civil law trait of codification, owing to the extensive legislation done by the British as well as after independence. The importance to judicial precedence given in the country shows some adherence to the common law. Because of Islam being the second largest religion in India, some aspects of Islamic law were also incorporated into its legal system.

*Confucian Legal Tradition*

This particular legal tradition is unique from the other traditions because at the time of its origin, and even now, it is a tradition of persuasion rather than authority,[40] as *"… the social and moral philosophy… sought to induce and persuade, rather*

[35] *Id* at 294-295; see also Varadachariar, *Hindu Judicial System* (Lucknow University Press, 1946) at 13.
[36] *Id at* 295; see also Venkataraman, *NR Raghavachariar's Hindu Law* (8th edn, Madras Law Journal Office, 1987) at 3.
[37] P Olivelle, *Manu's Code of Law [:] A Critical Edition and Translation of the Manava-Dharamasastra* (Oxford University Press, 2005) at 169 ff. ("recovery of debt, deposit, sale without ownership, partnership, resumption of gift, non-payment of wages, non-performance of agreements, rescission of sale and purchase, disputes between master and servant, boundary disputes, assault, defamation, theft, robbery and violence, adultery, mutual duties of husband and wife, partition and inheritance, and gambling and betting").
[38] HP Glenn (n 18) at 296; see also Martin Derrett, *Modern Hindu Law* (Oxford University Press, 1963) at 7.
[39] *Id* at 313; see also Marc Galanter, *Law and Society in Modern India* (Oxford University Press, 1989) at 17.
[40] *Id* at 320; see also G Rozman, *The East Asian Region [:] Confucian Heritage and its Modern Adaptation* (Princeton University Press, 1991) at vii-viii.

*than command and punish."*[41] Originally, it did not possess any of the traits of other legal traditions.

The Confucian tradition is based on the concept of *Li and Fa,* whereby the former consists of principles and philosophies of persuasion and the latter, subordinate one, contains the principle of formal law and sanctions. Until 221 BC, it was the era of *li,* and after that under the Ch'in dynasty, *fa* flourished, however, for only a period of 14 years. During this time, law making was considered to be *"an instrument of politics and public order"*[42]*,* which resulted in the formation of books of punishment in the later sixth century. These books survived the collapse of Ch'in dynasty and later adapted to the teachings of the Confucian tradition in the Han dynasty.[43] But as I mentioned before, this tradition was never about codification and adherence. They, however, did have a judicial system where the magistrates performed the role of judges, closer to the civilian nature that the common one because *"they were held strictly to the text of the codes; questions of interpretation were to be referred to the government"*[44]. China and Japan are the two major legal systems that show strong adherence to this legal tradition. They underwent the western transformation due to western colonialism[45] and the U.S. legal influence due to the Second World War, especially Japan. During the late nineteenth century, at the time of codification it was the German model of civil law that influenced the Japanese Model.[46] The U.S, on the other hand, influenced other areas of law (*"constitutional law, labor law, criminal procedure and commercial law")*.[47] There was a similar development in codification that took place in China, which followed Japan in this aspect. Six codifications took place in the Guomintang regime, on similar lines as the Japanese and German

[41] *Id* at 321.
[42] Derk Bodde and Clarence Morris, *Imperial Law in China* (Oxford University Press, 1967) at 13.
[43] HP Glenn (n 18) at 323.
[44] *Id* at 325.
[45] *Id* at 245; see also A Chen, *An Introduction to Legal System of the People's Republic of China* (LexisNexis Buttersworth, 2004) at 22-3.
[46] *Id* at 345; see also Igarashi, *Einführung in das japanische* ***Recht*** (Darmstadt: Wissenschaftliche Buchgesellschaft, 1990) at 2.
[47] D Kelemen and E Sibbitt, *'The Americanization of Japanese Law'* (2002) 23 U Pa J Int'l Econ L 269.

models.[48] Even after becoming a socialist state, the formal structure remained, and what changed was the functioning of it, now aligned with the socialist ideology.[49]

## THE CIVIL LAW-COMMON LAW DICHOTOMY

*Civil Legal Tradition*

The exact origin of civil law cannot be traced in history, with the exception of the time when Roman Law was first codified on the Twelve Tables.[50] One of the reasons being that most of the Europe was chthonic in its approach, but internally different.[51] The fact that Roman law plays an important role in development of civil law provides us with the first indication, that civil law is indeed mixed, because Roman law itself was shaped by influence of foreign cultures, as mentioned before.[52]

Even though in today's world, most of the countries follow the civil legal tradition, it can hardly be said that any two have the same legal system. This is because every legal system has borrowed some ideas, rules, laws or characteristics from a different legal tradition, or from a country with a heterogeneous legal system in terms of tradition. The two major civil legal systems, Germany and France, for example, deal with delictual obligation differently, whereby it is right based in the former one and fault based in the latter one. The civil legal tradition, throughout its gradual development, has borrowed from as well as lent different legal ideas, rules, concepts, etc. to other legal traditions. Although codification has been given the primacy as well as the legal authority, it is not the case in administrative law, where the judge made law has contributed more than legislations, mostly concerning with the interpretation of the same.[53] This aspect of judge made law is an essential and

[48] HP Glenn (n 18) at 346.

[49] *Id* at 349; see also Perry Keller, *'Sources of Order in Chinese Law'* (1 October 1994) The American Journal of Comparative Law Vol 42 Iss 4 711-759 at 711.

[50] *Ibid* at 135; see also E Meyer, *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice* (1st edn, Oxford University Press, 2004) at 22, 39.

[51] *Ibid* at 133, 134.

[52] See [n] 2.

[53] Greg Laughton SC, *'Substantive Law Similarities and Procedural Law Differences between Common Law and Civil Law Systems: An Arbitration in Germany* (Lexology, 30 November 2015) <https://www.lexology.com/library/document.ashx?g=367b223a-8e70-46dc-93f3-56077f5f11af> accessed 2 January, 2018.

unique feature of common law. Furthermore, the concept of limited liability companies has been adopted and adapted from the common legal system as *"Gesellschaft mit beschränkter Haftung"* when the Germany Limited Liability Company Law came into effect, from November 2008. English Law. Till date, governs the law of international trade, especially through the seas, globally, with its principles being codified by way of international conventions and treaties, and being ratified and followed even by civil law countries.

Even in the religious context, civil law countries recognize different religions and their laws in regards to family matters, marriage matters, etc. Denmark, which is traditionally a civil law country, recognizes marriages performed under a religious ceremony as valid and legal as long as it is supervised by state authorized minister.[54] In the Greek part of Thrace, the Islamic muftis have been given jurisdiction to perform marriages under Islamic religious ceremonies.[55] Other civilian countries such as Lithuania[56] and Sweden[57] also recognize such marriages as long as they are *"conducted by recognized and registered religious organizations."* [58]

*Common Legal Tradition*

The common legal tradition was born with the Norman Conquest, although comparatists attribute the origin to accident or chance, because of the prevalence of Roman law, Christian religious laws, and commercial law in England during that time.[59] This makes it difficult to deny that these legal traditions, in some way or the other, might have influenced common law. The striking similarity between the English adjudication process and the way it was done in Rome further proves this line of thought.[60] Since, there was no concept of codification, most of the legal principles have survived either through judicial precedents, or through customs.

[54] Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (Oxford University Press, 2011) at 216, 217;
[55] *Id* at 217; see also *Greece: Status of Minorities* (The Law Library of Congress, 2012, Greece) at 8.
[56] Art. 38.4, Constitution of Lithuania.
[57] Act on Marriages in Denominations other than the Church of Sweden 1993, Sweden at 305.
[58] Norman Doe (n 24) at 218.
[59] HP Glenn (n 18) at 237-238; see also RC Caenegem, *Birth of Common Law* (2nd edn, Cambridge University Press, 1988) at 106-107.
[60] *Id* at 240; Fritz Pringheim, *'The Inner Relationship between English and Roman Law'* (1935) 5 The Cambridge Law Journal 347, at 359.

This also indicates that the whole jurisprudence might have been influenced by all kinds of legal traditions that came into contact with common law. The Inns of Court which are known be responsible for legal education in common law have a different place of origin:

*"the origin of the inn as an institution of learning in the Christian West is historically connected with London and Paris; the inns of these two cities are in turn connected historically with the Holy City of Jerusalem. This type of inn, born in Baghdad and the eastern Caliphate, had moved westward to other great cities…"*[61]

Although the expansion of common law can mainly be attributed to military conquest and domination, however, one cannot deny the fact that it still exists it many of the states, which were former colonies under the British Empire. This is because of the flexibility and accommodating character. *"It can float around the world… and leaves much room for accommodation with other (personal) laws."*[62]

Concepts such as good faith and unjustified enrichment, which are concepts of civil law, can now be found in common law jurisdictions as well.[63] The United States Uniform Commercial Code recognizes 'good faith' as an indispensable principle governing contracts.[64] The United Kingdom has also, by way of legislation[65] and judicial precedents,[66] have incorporated the concept to a certain extent, especially in regard to international trade. The Australian Federal Court has also observed that

*"good faith… conception has been recognized (not by all courts in Australia) as an implication or feature of Australian contract law attending the performance of the bargain and its construction and implied context…"*[67]

The concept of unjust enrichment under common law has originated from the principles of Roman law; those principles, which led to formation of the concept

[61] HP Glenn (n 18) at 242; see also George Makdisi, *'The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court'* (1985) 34 Clev St L Rev 3, at 14.
[62] *Id* at 262; see also Ann L Astin, *'Embracing Tradition: Pluralism in American Family Law'* (2004) 63 Maryland L Rev 540, at 542.
[63] Greg Laughton SC (n 23) at 5, 9.
[64] Uniform Commercial Code s 1-304; see also Greg Laughton SC (n 23) at 5.
[65] Sale of Goods Act 1979 s 61(3)
[66] *Aegean Sea Trader Corpn v Respol Petroleo SA* [1998] Lloyd's Rep 39 at 60.
[67] *Paciocco and ANZ Banking Group* (2015) FCAFC 50; see also Greg Laughton SC (n 23) at

of, unjustified enrichment under civil law.[68] Religious marriages too are recognized in common law countries in somewhat similar manner as in civil law countries[69], as discussed before. The aforementioned practical instances establish beyond doubt that even those legal systems, Germany (civil law) and the United Kingdom (common law), for instance, which claim purely adhering to one particular legal tradition are in fact mixed in nature.

## CONCLUSION

The aforementioned discussion has helped in broadening the horizons of comparative law by taking into account the eastern legal systems along with the western ones for a much more detailed analysis. A close inspection of the five different traditions and the exchange of ideas and rules that take place between them reveal two important things about them:

1. The post customary traditions, namely the civil and the common traditions deal with the procedural aspects in greater detail than its substantive counterpart. Moreover, it is quite the contrary when it comes to the other traditions in the same head. This might be because both civil and common law came into the picture after all the areas were, more or less, done being religiously influenced. In other words, one or the other religion was already in existence wherever civil law or common law tried to expand. The personal ways of life were already governed by the religion, which left them only with procedure and some aspects of public law. This is further evident from the fact that almost all the practical instances of legal transplants discussed above related to procedure, when the transplant was from a civil or common legal tradition; and to the substantive law, when it was of a Hindu, Islamic or Confucian nature.
2. If we come across any similarity between the legal traditions, it is not always because of a legal transplant. It might be because the two traditions developed a particular principle or ideology on its own, without any external influence. It is possible for two legal traditions to share the same ideologies and rules without being influenced by the other.

One thing, however, which can be concluded beyond doubt, is that legal transplants and borrowing take place more often than we thought, and have been happening since a way longer time than we anticipated.

[68] Greg Laughton SC (n 23) at 9-11.
[69] Norman Doe (n 24) at 217.