The Future of Comparative Law: Towards A Sustainable Interaction of the Major World Legal Systems

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1.1 Abstract

Comparative law is an alternative way to harmonize the interaction between different legal systems. The future of comparative law can be determined by its ability to function as a connecting method between those legal systems. This research focuses on the interaction between three major world legal systems; civil law, Islamic law and common law. It critically provides illustrations on the influence of these three major systems on each other. The research, however, briefly discusses different methods used by the comparative law to interconnect between those major systems, which are: legal transplant, harmonization of law, convergence and unification of law. Lastly, the research finds that the interaction among the major world legal systemss is best understood through the concept of globalization which functions as a reality, a theory, and an ideology.

Keywords: Comparative law, major world legal systems, interaction, legal transplant, harmonization, convergence, unification and globalization.

1.2 Introduction

The history of the major world legal system has left a large gap of unwritten past development of those systems. Thus, looking back to the history it can be found that there were abundance of evidences which prove the interaction between the major world legal systems. The interaction is a necessity for the development of laws. However, comparative Law's methods are used as a means to develop laws. Montesquieu can be regarded as an early founding figure of comparative law in the 18th century. This research aims to find the future of comparative law: towards a sustainable interaction among the

major world legal systems, in order to see how these different systems can work together within the same jurisdiction without contradiction or conflict.

1.3 Legal System

The word legal system has been defined by the different scholars and it interpreted in the various approaches. However, John Henry Merryman has defined a legal system as: "An operating set of legal institutions, procedures and rules."[1] Merry man definition clearly suggested that the legal system is more concerned with lawmakers and law interpreters. Indeed, the meaning of the legal system can be wider than that, it may be referred to the nature and content of the law generally, its structures and methods whereby it is legislated upon, adjudicated upon and administered, within a given jurisdiction.[2]

Why is it regarded as a major world legal system?

According to Gamal Moursi Badr, those systems are considered as major world legal systems because "its application extended far beyond the confines of their original birth places and whose influence, through the reception of their principles, techniques or specific provisions has been both widespread in space and enduring in time."[3] Looking to the Gamal's definition of major world legal systems we can say the only legal systems which can be categorized as major are: Civil law, Islamic law and common law. The concepts of those three legal traditions will be elaborated below.

1.4 Brief History of the major World Legal System

1.4.1 Civil Law System

The civil law system can be defined as a traditional of legal concepts, principles, the role of law, and methods which has its origin in Roman law and applied by the judicial authorities.[4]

The civil law tradition is the oldest and most widely spread legal system, dating back to 450 B.C. in its origins. The history of the development of the civil law can be traced back to two periods.

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[1] Merryman, John Henry, and Rogelio Pérez-Perdomo. *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, (Stanford University Press, 2007), p. 1

[2] Tetley, William. "Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)." *La. L. Rev*. 60 (1999), p. 595

[3] Badr, Gamal Moursi. "Islamic law: Its Relation to other Legal Systems." *The American Journal of Comparative Law* (1978), p. 187

[4] Barham, Mack E. "Renaissance of the Civilian Tradition in Louisiana, A." *La. L. Rev*. 33 (1972), p.357.

The first period was 450 B.C., which is designated as the beginning of the development of the civil law because this is the year of the Twelve Tablets, the first written law and rudimentary system of dispute resolution in Ancient Rome. The second period was 6th century A.D., when the Emperor Justinian of Constantinople commissioned the *Corpus Juris Civilis* to be written, which would codify the Roman law on family, inheritance, property, and contracts, among other areas of law.[5]

1.4.2 Expansion of Civil Law

The application of the civil law extended to the world beyond its original place of birth in the Continental Latin America (except Guyana and Belize), Quebec, all of East Asia (except Hong Kong), Congo, Azerbaijan, Kuwait, Iraq, Russia, Turkey, Egypt, Madagascar, Lebanon, Switzerland, Indonesia and Vietnam.

1.4.3 Source of Civil Law

Generally, in civil law jurisdictions the main source or basis of the law is legislation and large areas are codified in a systematic manner. These codes constitute a very distinctive feature of a Roman legal system, or the so-called civil law. Although in the form of statutes duly enacted by the proper legislative procedure, these codes are quite different from ordinary statutes.[6]

1.4.4 Islamic Law System

Islamic law can be defined as the rules and principles revealed by Allah to be applied to mankind concerning worship, dealings and other aspects of life.

The Islamic law system is the second oldest system in the world. Islam arose in the 7th century A.D. in the Arabian Peninsula and in the lower part of Mesopotamia.[7] Indeed, someone can argue that Islamic law is the first law in human life. It can partially be true if it is discussed on the first religion come into the world, but the discussion here is on the comprehensive and perfect law which, considered in the modern world as codified Islamic law,

[5] O'Connor, Vivienne. "Common Law and Civil Law Traditions." Available at SSRN 2665675, (2012), p. 9
[6] Joseph, Dainow. "The Civil Law and the Common Law: Some Points of Comparison‖." *AM. J. Comp. L* 15: (1966 - 1967), p. 424
[7] Badr, Gamal Moursi. (1978), p. 187

so this is the law which has been revealed to the Prophet Muhammad in the 7th century A.D.[8]

Historically, Islamic law can be considered as unwritten law, because there are a number of unwritten records of judicial proceedings or decisions in Islamic law; Islamic judges are not required to justify their decisions in writing.

1.4.5 Expansion of Islamic Law

The application of Islamic law spread far beyond its original place of birth, it extends to Egypt, Mauritania, Sudan, Afghanistan, Iran, Iraq, the Maldives, Pakistan, Qatar, Saudi Arabia, Yemen, and certain regions in Indonesia, Malaysia, Nigeria, and UAE.

1.4.6 Source of Islamic Law

The primary sources of Islamic law are: The Qur'an, the Sunnah of the Prophet, judicial consensus, and analogical reasoning. However, only 190 of the 6,237 verses in the Qur'an contain legal provisions which are only 3 per cent of the Qur'an verses,[9] most of the legal rules derived from the traditions of the Prophet Muhammad and judicial consensus, and most of the contemporary issues to be solved by analogical reasoning of modern Muslim scholars.

1.4.7 Common Law System

The common law can be defined as a legal tradition which developed in England from the 11th century onwards. Its principles appear for the most part in reported judgments, usually of the higher courts, in relation to specific fact situations arising in disputes which courts have adjudicated.[10]

The common law is considered as a third legal system to have existed in the world after civil law and Islamic law. Common law system arose 11th century following the military conquest of England in 1066.

[8] Mitchell, Sara McLaughlin, Jonathan J. Ring, and Mary K. Spellman. "Domestic Legal Traditions and States' Human Rights Practices." *Journal of Peace Research* 50, No. 2 (2013), p. 5-6
[9] Ibid, p. 5-6
[10] Tetley, William, (1999), p. 597

1.4.8 Expansion of Common Law

The application of common law system has expanded beyond the borders of England, where about 24 percent of countries in the world today have applied common law systems, because the majority of former British colonies countries currently practice common law, which include Guyana, the Panama Canal Zone, Florida, California, New Mexico, Arizona, Texas, Australia, UK (except Scotland), India, Nigeria, Ireland, Singapore, Hong Kong, USA (except Louisiana), Canada (except Quebec), New Zealand, Pakistan, Malaysia and Bangladesh.

1.4.9 Source of Common Law

The common law developed historically on a case-by-case basis, it relied on oral argumentation and less on writing procedural rules English judges came to be bound by the judicial precedents.

2.1 Historical Background of the Interaction between Major World Legal Systems

2.1.1 Islamic Law's influence on Common Law

Makdisi suggests that the origins of the common law may be found in Islamic law. He argues that the institutions that together helped to form a common law by introducing the concepts of contract law, property rights and trial by jury may have their origins in three analogous institutions in Islamic law, the *ᶜaqd,* the *istihqāq* and the *lafīf*.

2.1.1.1 The Islamic *ᶜAqd*

Under the Islamic principle of ownership in the property, whether it was movable or immovable can be established at the time of concluding an agreement, even though the goods yet to be physically transferred to the buyer. This idea was unknown to western legal systems in the 12th century, but it was known in Islam,[11] however, this principle now practices under the common law system.

2.1.1.2 The Islamic *Istihqāq*

The Islamic principle of *istihqāq* was known as an action of land upon usurpation. It is an action to be taken against a party who unlawfully acquired the property. The plaintiff may ask the judge to return back the

[11] Makdisi, John A. "Islamic Origins of the Common Law, The." *NCL Rev.* 77 (1999), p. 1651-1652

property to him as long as he can prove that he has better right over the property, but the action by the plaintiff will fail if he cannot prove it, and the law will presume that the property belonging to the one who has possession over the property. This principle of presumption of ownership based on possession appeared later in both common law and civil law systems.[12]

2.1.1.3 The Islamic *Lafīf*

The Islamic *lafīf* means the witnesses of good behavior and condition of the disputing parties in the society. The *lafīf* witnesses were giving from the community of the area where the party lives and the number required generally was twelve. The witnesses were permitted to give testimony in their place. Since the *lafīf* witnesses replaced the *ᶜudūl* witnesses, their testimony also was binding on the judge the royal courts instituted a rational procedure for settling disputes through trial by jury. This has been the practice of the Maliki School since 14th century A.D. The practice is quite similar to a jury in a judicial write under the common law system.[13]

It can be concluded from those three elements that on a more global plane the common law could be the true offspring of Islamic law. Therefore, it is appropriate at this point to expand this comparative study from an analysis of particular institutions to a discussion of the major characteristics that define a legal system.[14]

In Burhan Uddin's case,[15] we can see the influence of the Islamic law on the common law system, the case was decided by the Central London County Court. In this case there was a dispute between the couple; bride and groom both parties were Muslims and their marriage was solemnized under Islamic law. The bride filed an application to dissolve the marriage under Islamic law. The Islamic Shari'a Council issued a decree of Islamic divorce, so the marriage was dissolved. The groom filed an application to the court after the dissolution took place, but seeking to get back to what he had been spent to the bride and her family for the purpose of their marriage. The judge in this case had the benefit from expert evidence on Shari'a law. The trial judge held the case in favor of the bride; he further mentioned that the gifts that were made were absolute and groom could not get them back. They

[12] Ibid, p. 1665
[13] Ibid, p. 2687-1695
[14] Ibid, p. 1696
[15] Mohammed Burhan Uddin and Choudhury & Ors [2009] EWCA Civ 1205

were not returnable if the marriage failed and they were not made conditional on the marriage because they were not part of the dowry.

There are also other areas which show the influence of the Islamic law on common law, such as Islamic arbitration system and Islamic financial system, where the England common law system recognized those in their law.

2.1.2 Civil Law's Influence on Common Law

There is alsoan influence of common law on civil law, thus, it is commonly believed that Canadian common law drew very little from civil law. Yet, in the Supreme Court of Canada case law prior to repatriation of the appellate jurisdiction, there are cases in which civil law rules had an influence on common law rules. But, as H. Patrick Glenn noted, this influence generally expressed itself indirectly through the citation of English decisions that cited French civilian sources.[16]

Civil Law's Influence on Islamic Law

In some way, the Islamic written document on the Hanafi school of law; al-Majallah al-Ahkam al-Adaliyyah (The Majelle) the civil code of the Ottoman Empire, can prove the influence of civil law system on the Islamic law system, where the arrangement of the articles in this code is likely similar to the Code of Hammurabi Civil Code, which has been written 18th century B.C.

3.1 Methods of Comparative Law

The methods of the comparative law aimed at achieving sustainable interaction among the major world legal systems include narrowing their differences and applying the most effective approaches to interaction between those major systems, such as:

i. Legal transplant
ii. Harmonization
iii. Convergence
iv. Unification

[16] *The Supreme Court of Canada and its impact on the expression of bijuralism*. (Department of Justice Canada, 2001), p. 5.

3.1.1 Legal Transplant

Alan Watson, the legal historian comparativist, and founder of legal transplant defined Legal transplant as "moving of a rule or a system of law from one country to another, or from one people to another."[17]

In Alan Watson's definition there should be movement of legal system from one society to another. However, some socialists believe that legal transplant can be seen as legal acculturation, and transplants are not only legal, but also appearing in other consequence of this cultural interaction.

According to Jean Carrbonier "acculturation occurs only when one legal institution or only one law is transferred from one legal system to another, whereas reception refers to adopting one entire legal system en bloc."[18]

3.1.2 History of Legal Transplant

The term Legal Transplant coined in 1974 by Alan Watson, a Scottish American legal scholar, he maintains that the first recorded legal transplant was the code of Hammurabi in the 17th century B.C., and it occurred in most of the countries in the world during the 19th and early 20th century.[19]

3.1.3 Example for Legal Transplant

Imposition of Common Law in Malaysia through colonization, where the English law was being adopted among the Malaysian society, even though the Malay people were ruled by the Islamic law before the arrival of British colonies.

3.1.4 Harmonization of Laws

W. J. Kamba: "Effect an approximation or coordination of different legal provisions or systems by eliminating major differences by creating minimum requirement or standard."[20]

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[17] Watson, Alan. *Legal Transplants: An Approach to Comparative Law*. University of Georgia Press, (1974), p. 21

[18] Batrićević, Ana. "Legal transplants and the code of Serbian Tsar Stephan Dushan." *University of Belgrade, Belgrade*, (2007), p. 5

[19] Berkowitz, Daniel, Katharina Pistor, and Jean-Francois Richard. "Economic development, legality, and the transplant effect." *European Economic Review* 47, no. 1 (2003), p. 2

[20] Kamba, Walter Joseph. "Comparative law: A theoretical framework." *International and Comparative Law Quarterly* 23, no. 03, (1974), p. 501

Based on Kamba's definition, it can be said that harmonization of laws can be done by the removal of discord and disagreement implying balanced attention to bringing coordination between two or more divergent principles, rules, provisions, regulations or legal systems in order to reduce and balance the major differences between them.

3.1.5 History of Harmonization of Laws

The origins of the legal harmonization process can be traced back to the second half of the 19th century. The establishment, in 1926, of the International Institute for the Unification of Private Law (UNIDROIT) came at a time when the ideal of legal unification seemed unquestionable.[21]

3.1.6 Example for Harmonization of Laws

Malaysian Islamic Financial Law Harmonization Committee can be highlighted as a good example for harmonization of laws. The body aims to promote Malaysia as reference to the International Islamic Finance Centre, and to provide the sufficient laws in Islamic financial industries in Malaysia and the forum for dispute settlement in Islamic financial transactions across the world.[22]

3.1.7 Convergence of Laws

According to Peter De Cruz: "Convergence constitutes the evolution of legal institutions within different legal systems where the institution of one system resembles the other; and, the legal norms, principles, and scholarly comments of both are used in equal measure, even regarded as authoritative as each other."[23]

Cruz's definition of convergence focused on the development of the legal system of the place to another by looking to their problems and to arrive at similar legal ways of perceiving and dealing with them, so the development of legal institutions can be seen through mutual interest.

[21] Faria, José Angelo Estrella. "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage." *Unif. L. Rev*. 14 (2009), p. 6-7

[22] Bank Negara Malaysia. The Law Harmonisation Committee Report 2013.

[23] Hermida, Dr. "Convergence of Civil Law and Common Law in the Criminal Theory Realm." *University of Miami International & Comparative Law Review* 13 (2005), p. 164

3.1.8 Example for Convergence of Laws

A good illustration of convergence of laws between common law and civil law can be found in cases where the common law has begun to make more active use of the legislative process while the civil law system has begun to rely increasingly on case law. These two laws converged because of mutual interest.

Moreover, in Burhan Uddin's case,[24] the English Court gave legal effect to Islamic law when Court of Appeal upholds the County Court verdict concerned gifts that accompanied an Islamic marriage. The implications of this legal recognition of Islamic law in the English court support this argument that there is a need for convergence of laws through the legal institutions.

3.1.9 Unification of Laws

Unification of law is a process by which conflicting rules of two or more legal systems of national laws applicable to same legal transaction are replaced by a single rule, because of the legal and economic reasons.

3.1.10Example for Unification of Laws

The best example of unification of laws is the European Union (EU). It was established that different legal regulations become obstacles in the usefulness of the European Union. Thus, it is an attempt to replace two or more legal systems with one single system in which European Court of Justice takes an approach of mixing civil law which is based on treaty and case law.

4.1 The Future of Comparative Law towards a Sustainable Interaction between Major World Legal Systems

The future of comparative law can be determined by its ability to function as a connecting field between law and other social sciences. However, our discussion here will focus on the concepts of globalization, globalization against nation state and the usage of comparative law as a solution.

[24] Mohammed Burhan Uddin and Choudhury & Ors [2009] EWCA Civ 1205

4.1.1 Concepts of Globalization

There is no universally accepted definition of globalization, but that does not mean no clarity can be achieved. Closer analysis of the debates suggests that three different types of concepts of globalization must be distinguished, which are; globalization as reality, globalization as theory and globalization as ideology.[25]

4.1.1.1 Globalization as Reality

Globalization refers to developments in the real world which concern the relations between states. In particular the growing interdependence, the increase in global trade, communication, travel, migration, networks, environmental destruction, climate change, increased hybridity of cultures and societies, influence of US values and culture on the rest of the world, all of these developments are undoubtedly real, and this what we mean by globalization reality.[26]

4.1.1.2 Globalization as Theory

Several theories of globalization exist in some empires, especially as related to law. What they have in common is a shift away from the paradigm that has dominated both social and legal thought over the last two hundred years. Methodological nationalism describes an approach in social theory that takes the nation state as an assumption.[27]

4.1.1.3 Globalization as Ideology

Globalization as ideology comes in a number of related variants. One variant is that of a world community in which everyone is connected with everyone. Another variant of globalization as an ideology is the idea that markets should emancipate from the states and their regulation, thereby leading to more freedom and more prosperity.[28]

4.1.2 Globalization against Nation State

Normally, to establish state the three elements must be constituted: A territory, a population, and an administrative structure. Indeed, the

[25] Michaels, Ralf. "Globalization and law: Law Beyond the State." *Law and Social Theory (Banakar & Travers eds., Oxford, Hart Publishing, 2013), Forthcoming* (2013), p. 2
[26] Ibid, p.3
[27] Ibid, p. 4-5
[28] Ibid, p. 6

transformation of the sovereign state under conditions of globalization can most productively be described as a transformation of these three elements.[29]

4.1.2.1 Territory

The general practice, laws of a state apply within the borders of that state, and the laws of that state will not be applied in another state, each state applies its laws within its own borders, this is the general application. However, the idea of territorial jurisdiction has some exceptions in the case of public and private international law. Now the practice, it is universally accepted, that in case of antitrust violation a state has jurisdiction over the issue despite the commission of the offense occurred elsewhere.[30]

4.1.2.2 Population

The designation of citizenship or the population of a state, in the traditional international community, each sovereign state has discretionary power to determine its own population, by guarantee citizenship to an individual, however, the rights and duties can be established upon the people.[31]

Administrative Structure

Administrative structure means, the state through its government, has the power to lay down binding rules as laws that do not require the specific consent of the governed. It also means, that the state is entitled to enforce its laws it has the monopoly of violence.[32]

4.1.3 Usage of Comparative Law as Solution

According to Halliday and Osinsky the usage of comparative law as a solution to the sustainable interaction between major world legal systems is "the closer that globalizing legal norms and institutions are to transformations in core local values and practices at the local level, the more likely that contestation will occur around those norms."[33]

[29] Ibid, p. 8
[30] Ibid, p. 9
[31] Ibid, p. 11
[32] Ibid, p. 12
[33] Weiner, Elaine. "Morality, biology and the free market: (De) Naturalizing the EU's gender equality agenda in the Czech Republic." *In Women's Studies International Forum*, vol. 33, no. 1, (2010), p.14

5.1 Conclusion

The reality suggested that, it is not easy to standardize one legal system globally, because of the religious and cultural differences, the spirit of nationalism and historical background of colonization. However, there is evidences in the foreseeable future towards the sustainable interaction of the major world legal systems. The comparative law will continue to become a relevant method in harmonizing and uniting those legal systems.

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