The Impossibility of a Grand Transplant Theory

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ABSTRACT

This paper examines legal transplant theories in comparative law and in particular, the Turkish legal transplant experience through the example of reception of a civil law system in Turkey in the 1920s. Although not looking for an answer that finds either culturalists or transferists right, the author argues that a comparativist should avoid falling into the trap of either/or binary thinking about legal transplants and avoid being necessarily either transferist or culturalist, or a middle ground theorist. The author argues that comparativists need a separate interpretation for each individual legal transplant case that they study by applying social science methodology without providing a “grand theory of transplantation”. This methodology requires a move away from simplicity to the complexities of real experiences situated in historical, social and cultural contexts.

ÖZET

Bu makale, karlaştırmalı hukuktaki hukuk iktibası konusunu, özellikle, Türk hukuk iktibası deneyimi çerçevesinde, 1920’lerde Türk hukukundaki medeni hukuk sistemi resепsiyonu örneğini de ele alarak incelemektedir. Makaledede gelenekçi veya iktibas yanlısı görüşün hangisinin daha haklı olduğu sorusuna cevap aranmamakla birlikte, yazar, bir karlaştırmalı hukukçunun hukuk iktibası konusundaki ikili yaklaşım tuzagına düşmemesi ve iktibas yanlısı veya gelenekçi ya da orta çizgideki bir teorisyen


olma seçeneklerinden birini seçme durumundan kaçınıması gerektiğini savunmaktadır. Yazara göre, karşılaştırmalı hukukçular, her bir iktibas olayını ayrı bir bakış açısıyla yorumlalayarak bunu yaparken de “muazzam bir iktibas teorisi” tedarik etmekten ziyade sosyal bilimler metodolojisini uygulamalıdır. Bu metodoloji, basitlikten uzaklaşmayı ve gerçek deneyimlerin tarihi, sosyal ve kültürel bağlamdaki karmaşıklığına yaklaştmayı gerektirmektedir.

**KEYWORDS:** Transplant theory, comparative law, law in Turkish society.

**ANAHTAR KELİMELER:** İktibas teorisi, karşılaştırmalı hukuk, Türk toplumunda hukuk kavramı.

**INTRODUCTION**

When one examines comparative law in general, and legal transplant theories in particular, the Turkish experience provides an interesting example that reveals both the weaknesses and strengths of the arguments in the debate on legal transplants. In this paper, while I intend to test ‘transplant theories’ through the example of the reception of a civil law system in Turkey in the 1920s, I will not be looking for an answer that finds either culturalists or transferists right. I believe that a comparativist should avoid falling into a trap of either/or binary thinking about legal transplants and avoid being necessarily either transferist or culturalist, or a middle ground theorist. Through the example of Turkey, I attempt to demonstrate that all three (transferist, culturalist, and the middle ground) theoretical analyses are possible in the Turkish case, in particular, and in any given transplantation case, in general. My intention is, through testing these theories, to bring my interpretation of the Turkish experience by placing it in its historical, social and legal context. In order to better understand the total reception of the civil law system in Turkey, one needs to look at the legal and social structure of Turkey, in its historical context, prior and after the reception of civil law.

Therefore, I first provide a short account of Turkish history. A brief survey in Turkish history informs us that the social and legal life of the Turks can be analyzed through four radically different phases: (1) prior to Islam as a nomadic and Shamanist society; (2) after conversion to Islam as a Muslim society; (3) the revolutionary Ottoman era between 1839-1920 wherein institutions based on Western models began to emerge side-by-side with long established Islamic institutions, as a legally and culturally dualist society; and (4) the modern era since the reception of civil law system in 1920s to the present day as a modern, Western, secular and civilian society. Even though I mainly analyze the legal reforms made in the modern era, a deep understanding of Turkish experience requires, at least, a brief look at the former periods.
In the second section of my paper, I briefly provide the debate on legal transplants by dividing the modern literature into three main camps: “culturalist,” “transferist”² and “the middle ground.”

In the third section of my paper, I examine the Turkish experience of legal transplantation in general. I look at the Turkish family and criminal laws, in particular, and give specific rules as examples – protection of secular values through the creation of civil marriages in the Civil Code, and the rejection of religious unions by criminalizing them in the Turkish Penal Code. I anticipate that looking at the Turkish law in its historical, social and cultural context will bring a deep and comprehensive knowledge of transplanted rules and their interactions in the Turkish societies. This approach necessitates an intermingling of law, legal history and social science. Without taking this approach, my conclusion from studying the Turkish experience would have been simplistic -- transferists are right³ and culturalists are wrong. Since a comparativist can easily find a specific example to prove that either culturalists or transferists are right, I believe that comparativists need a separate interpretation for each individual legal transplant case that they study by applying social science methodology without providing a “grand theory of transplantation.”⁴ This methodology requires a move away from simplicity to complexity of real experience situated in its historical, social and cultural context.

In the fourth section of this paper, I provide my interpretation of the Turkish experience by using social science methodology – where three theories (culturalist, transferist, and the middle ground) have application. I argue that the revolutionary period influenced and changed only the social and legal culture of the elite in Turkish society, who then engineered a social change through law. In this instant, the law led, or was utilized to lead, social change; however, one can easily find another example where law followed social change.⁵ Thus law can

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³ Id. Nicholas Foster has written an article where he looks at the legal transplantation of the English floating charge in France and Quebec. In looking at the French example, his conclusion is that the culturalists are right; however, when looking at the Quebec example he reaches an opposite conclusion. Foster, argues that transplants vary too much that broad generalizations cannot be made. Id.


⁵ First example that comes to mind is the French codification in the eighteenth century.
be a reactor to social change or its initiator. Through careful engineering on the part of the elite, the legislature, and the judiciary – and a concurrent restructuring in education system – legal reform (transplantation) in the Turkish experience brought about social change. In connection with the given examples, I argue that the legal system and its engineers have been successfully accommodating culture and religion, and have been producing answers to social needs within the imposed legal system. While doing this accommodation, the legal system has also sought to remove Islamic laws from public and private domain, and to erase indigenous cultures and therefore, created, to a certain extent, a new culture envisioned by its engineers – Western and secular.

I. Turkish History

Since the history of Turkish societies span over two thousand years, to give a meaningful account of the history of Turkey is an enormous task which would take volumes of books. Thus, I will only provide a brief account of the history to give an understanding of the radical changes in the legal and social organizations in Turkish society. A brief survey of Turkish history informs us that the legal life and social institutions of the Turks can be analyzed through four radically different phases: (1) prior to Islam as a nomadic and Shamanist society; (2) after conversion to Islam as a Muslim society; (3) the revolutionary Ottoman era, wherein Western institutions emerged along with Ottoman ones as a legally and culturally dualist society; and (4) the modern era since the reception of civil law system in 1920s to the present day as a modern, Western, secular and civilian society.

(1) The Shamanist Era

In the earlier period, prior to Islam, the ancient Turks lived as nomadic tribes over a vast region in Central Asia, and were animists, worshipping a sky god and deities of soil and water. Their social life and legal system was mainly based on unwritten rules of customary law and Shamanist rules. The gods were mediated by Shamans (male and female witch doctors). Even today, the folk culture of the Alevi community in Anatolia can be traced back to Shamanist customs and practices. The first milestone in Turkish history occurred in the eleventh century when Turks moved from Central Asia to Asia Minor (Anatolia) by fighting against the Byzantine Empire. Although the exact time is unknown, by this time, Turks had already converted to Islam from Shamanism. During the migration to Anatolia (today’s Turkey) around the 10th and 11th centuries, Turks had had relations with Arabs and Persians and were influenced by their cultures. As a result of this strong influence, they gradually left their customs and laws, and finally substituted most of them with Islamic ones. With

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the migration from central Asia to Anatolia, a new phase of intermingling emerged, this time with the people of Anatolia. “The nomadic Turkish conquerors did not displace the original local inhabitants: Hellenized Anatolians (or simply Greeks), Armenians, people of Caucasian origins, Kurds, and – in the Balkans – Slavs, Albanians and others. They intermarried with them, while many local people converted to Islam and “turned Turk.”

(2) The Classical Era

Before the Ottoman Empire, the Seljuks were the first Turkish state in Anatolia. The Seljuks’ legal system was entirely based on Islamic law. Because the Ottoman Empire descended from the Seljuks, there were no important changes in the legal system. Ottomans gained enormous power by conquering Constantinople, today’s Istanbul, where the European continent is divided from Asia by the Bosphorus Strait. This was the end of Byzantium as an empire, as well as the beginning of a strong Ottoman voice, in the European continent. In the fifteenth century, the Ottoman Sultans adopted the title of ‘Caliphate’ and the Turks became the leaders of the Muslim world. The legal system of the Ottoman Empire had been founded solidly on the principles of Islamic law, with absolute power belonging to the Sultan. The power of the Ottoman Empire continued until the end of seventeenth century. The Black Sea, Aegean Sea and East-Mediterranean Sea were Ottoman lakes. From Eastern Europe to Vienna, a large part of the Middle-East and North Africa were almost entirely Ottoman lands.

To the Ottoman Turk, the Empire was Islam itself. It contained all the sacred places of Islam, and Ottoman chronicles referred to its territories as “lands of Islam,” its sovereign as “the Padishah of Islam,” its armies as “the soldiers of Islam,” its religious head as “the şeyh of Islam,” and its “people thought of themselves first and foremost as Muslims.” This Empire was the center of the Islamic world, housing its fundamental institutions, the caliphate and the Şeyhülislam.8

In classical Islamic theory, “law is a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society.”9 The law was the revealed will of God, and the Sultan was the “Shadow of God” in this world and the next, the Favorite of God on the Two

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7 Andrew Mango, THE TURKS TODAY 17 (The Overlook Press, 2004).
east and west. The Sultan was his instrument and representative on earth. In principle, the Şeriat\(^{11}\) covered all aspects of Muslim life, public and private. The main function of the state was to maintain and enforce the divine rules. Thus, in theory, there was no legislative power to regulate any aspect of social or political life. However, in reality, the Sultans could not find answers to their complex government and society in revelation. When the Empire grew enormously, it became impossible to govern it by enforcing only Şeriat, which had only a few rules concerning public law. As a result, “in order to rule their wide lands by filling the vacuum in the field of public law, Ottoman Sultans made local and sui generis arrangements.”\(^{12}\) Accordingly, Muslim jurists tried to find answers to many problems for which revelation provided no explicit answers. If they came from society, they were called gelenek (custom). If they came from Muslim jurists, they were called ictihad (interpretation). If the answers came from the Sultan, they were kanuns (regulations). Kanuns were imperial directives rather than legislative enactments for the Ottomans. Even though disguised, it was, in fact, the making of new laws (kanuns). However, kanuns were justified since they covered areas not mentioned in the Şeriat. “In earlier centuries [of the Empire], the Ottomans had developed secular civil law (kanuns) in terms of administrative categories and rules to an extent unmatched in other Islamic states.”\(^{13}\) Thus, early forms of secular administrative law, even commercial law, came from the directives of the Sultan,\(^{14}\) but for the private or social life, the Şeriat was the answer.

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10 Soon after the conquest of Constantinople, Sultan Mehmet II initiated the construction of a palace and mosque complex which completely transformed the city from a Byzantine capital (Constantinople) into an Ottoman one (Istanbul). The accomplishment of this complex was attributed to the Sultan on the two gilded inscriptions over the portal of the outer gate which read: “By the help of God, and by his approval, the foundations of this auspicious Castle were laid, and its parts were joined together solidly for strengthening peace and tranquility, by the command of the Sultan of the two Continents, and the Emperor of the two seas, the Shadow of God in this world and the next, the Favorite of God on the Two Horizons [East and West], …may God make eternal his empire, and exalt his residence above the most lucid stars of the firmament, in the blessed month of Ramadan of the year 1478/883.” M.E. Meeker, A NATION OF EMPIRE: THE OTTOMAN LEGACY OF TURKISH MODERNITY 140 (University of California Press, 2002).

11 Shar’iah in Arabic. Throughout the paper, Arabic derived terms are spelled according to their Turkish transliteration.


14 Starr, *supra* note 9 at 27.
Thus, in classical era, Islamic laws dominated the legal system in the Ottoman Empire. However, it is important to recognize the difference between private and public law during this period. While the Ottomans adopted the Islamic private law in full, Islamic laws were supplemented with local and sui generis arrangements in the areas of public law. In conclusion, Islamic legal and social patterns, which the Ottoman Empire itself helped to perfect, functioned very efficiently during the rising years of the empire. As Joseph Schact argued, the Ottoman Empire gave the Şeriat the greatest degree of actual efficiency it had ever possessed.15 Later, Findley pointed to the paradox in Ottoman legal development that the same Empire “ultimately evolved in such a way as to prepare the legal and judicial foundations for the most secular Islamic state of the twentieth century.”16

(3) The Revolutionary Ottoman Era

The gradual decline of Ottoman power started at the end of the seventeenth century with the gradual increase of Ottoman Sultans’ reforms towards Europeanization/modernization. The 1839 Charter of Liberties, in which Ottoman citizens were granted some fundamental rights and freedoms, is considered to be the start of these reforms.17 The first Turkish Constitution was promulgated in 1876 and re-promulgated in 1908. Furthermore, the cultural influence of the states of continental Europe, especially France, showed itself in a broad movement towards codification.18 Many laws were adopted from France, including commercial, penal and administrative laws; France became the country to which the Ottomans looked in search of models of change and reform. “Young Turks” were sent to Paris by the Sultans and they came back with their ideals of civilization, modernization, nationalism and secularism. Although some Sultans succeeded for a short-term in these reform efforts, their successes were only temporary. They tried to rehabilitate the existing system with a patchwork of reforms, instead of having major systematical changes. Furthermore, reforms in this era introduced some European legal concepts – such as ‘rule of law,’ ‘public service,’ ‘equality’ and ‘parliamentary regime’ – into the Ottoman legal system. This was a period in which two entirely different legal and social ideas and institutions (Islamic and Western) coexisted. In spite of the law reforms, which were transplanted from the continental European

16 Findley, supra note 14, at 5-6.
legal systems, Islamic Law remained in force until the end of the Ottoman
Empire. This created legal and cultural duality, wherein institutions based on
Western models began to emerge side-by-side with the long established Islamic
institutions. Even though this legal and cultural dualism caused uncertainty in
theory and practice, it paved the way for the total reception of civil law system
in the modern era.

(4) The Modern Era

The modern era started when the Turkish Republic was established in
1923, after a four-year war of independence against British, French, Italian, and
Greek troops. The leader of the independence movement was Mustafa Kemal
(one of the ‘Young Turks’). The Republic had a Parliament which had already
been established in 1920. Radical changes were introduced into the lives of
Muslim Turks. Under the revolution led by Mustafa Kemal (later named Atatürk19),
every feature of Turkish life began anew. Again, the wave of
westernization was rising without the West. Under Atatürk’s leadership, the
new regime abolished the Caliphate that belonged to Sultan (the Turks were no
longer the leader of the Muslim world), Arab calligraphy, Arabic numerals, the
Islamic educational system, Shari’ah (Islamic law according to the Koran), and
polygamy (which was allowed under Shari’ah). Instead, the regime introduced a
secular democracy with a parliament, Latin characters (alphabet), Western
numerals, secular public education, and the civil law tradition of continental
Europe (with a penal code modeled on the Italian Penal Code and a Civil Code
modeled on the Swiss Code). The new regime’s desire for
modernization/Westernization was reflected in these and many other reforms.
“Atatürk also began introducing more egalitarian gender relationships. His
reforms were so revolutionary that hearth, home, the business firm, and public
spaces were virtually reconstructed from the bottom.”20

Ironically, these reforms
were imported from the West and at the same
time were the products of the
independence war against the West. During the following two decades, Turkey
changed more than it had been changed in the previous two centuries.

The legal reforms were an attempt to reconstruct a new culture and society
through radical legal reforms. Law was an instrument to lead a complete change
and rearrangement of not only legal, but also social, life. In 1925, at the opening
ceremony of the first law school of the Republic, University of Ankara —
Faculty of Law, Atatürk candidly stated his purpose: “The greatest and at the
same time the most insidious enemies of the revolutionaries are unjust laws and

19 Because Mustafa Kemal was respected very much for creating the modern Republic, he was
given the title “Atatürk” or “father of the Turks.” See Law No. 2587 and dated 24 Nov. 1934.

20 See Starr, supra note 9.
their decrepit upholders... It is our purpose to create completely new laws and thus to tear up the very foundations of the old legal system.”

Like the secular system of education that began under the Ottoman Empire, Atatürk’s secular system of government was firmly based on the European tradition. For his minister of justice, Atatürk chose Mahmut Es’ad Bey, who had been trained in law at Lausanne, Switzerland. He became the chair of the committee that would overturn Islamic family law and create a new civil family law.

The new secular civil code was meant to change domestic life of Turkish families, the smallest units in society. Marriage was not a private matter anymore, as under the Şeriat, but it was to be under state control. In order to be legitimate, the marriage ceremony had to be performed by a state official and be registered with the state. For the first time, the Civil Code required a minimum age for marriage, both for men and women, and it allowed a Muslim woman to marry a non-Muslim.

The European model was essential to [Mahmut Es’ad] Bey’s thinking... By 1926 an entirely secular legal system was in place... The paradox cannot be ignored that secular law and courts represent a configuration of cultural ideas in opposition to Islamic culture. A secular legal system ... symbolizes a fundamental reorientation of values and a disassociation or disavowal of values inherent in Islam ... Turkey’s secular court system asserts universal legal norms of individuality and equality and, like other civil law countries, uses established norms of proof and systemic legal procedures, required by the rule of law.

II. Theories of Legal Transplantation

Transferists argue that very little in law is original and borrowing other laws is necessary for legal change. Watson states 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.” For culturalists, the history of law is the history of legal borrowings. For example, Sacco argues that birth of a new rule or institution happens rarely, and borrowing and imitation is the major source for legal

21 Starr, supra note 9 at 27. See also Lewis, supra note 18, at 269.

22 Id. note 9 at 17-19.

23 Id.

24 See Alan Watson, Legal Transplants: An Approach to Comparative Law (Scottish Academy Press, 1974).

change.\textsuperscript{26} 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.”\textsuperscript{27} Watson also argues that legal culture must be distinguished into that of lay people, lawyers and lawmakers. Furthermore, for him, legal culture is a powerful and autonomous factor of legal change.

Culturalism on the other hand, originates from Montesquieu’s skepticism that laws cannot traverse cultural boundaries. He proposed that laws express the spirit of nations and are consequently deeply embedded in, and inseparable from their geographic, customary and political context. The transfer of laws across cultural boundaries constitutes a “grand hasard”, because laws can not change manners and customs, which must evolve.\textsuperscript{28}

Culturalists argue that since laws are cultural artifacts that mirror the ‘felt needs’ of society, they are unlikely to induce the same behavior in different societies. Put differently, there is much 'law' beyond legal rules and the transplantation of statutory and doctrinal rules does not necessarily transfer the ‘whole law.’ Rules, it is argued, lie on the surface of legal systems and do not accurately represent deeper underlying sociopolitical dynamics.\textsuperscript{29}

Thus, they contend that law can only develop within itself and modernization must be achieved internally. Their claim 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.”\textsuperscript{30}

The late Otto Kahn-Freund offered the valuable insight to the debate that there are “degrees of transferability” – the extent which any rule can be borrowed depends on how closely it is linked with the foreign power structure.\textsuperscript{31} His focus is on contemporary borrowings of institutions and of rules of foreign


\textsuperscript{27} Watson, \emph{supra} note 26 at 79-80.


\textsuperscript{29} Id.

\textsuperscript{30} F.S.C. Northrop, \emph{quoted in} P. LeGrand, Against a European Civil Code, 60 MODERN LAW REVIEW 44 (1997).

\textsuperscript{31} O. Kahn-Freund, Uses and Misuses of Comparative Law, 37 MODERN LAW REVIEW 1 (1974).
law with or without proper attention to their suitability in their new political, economic, and cultural environments. He argued that some areas of laws are more closely linked to society than others and he called them organic areas of law. For him, success of transplants of more organic areas of law depends mainly on the political system. For example, policymaking power remains deeply embedded in social institutions and is unlikely to be transplanted easily. Thus, since foreign policy-making power cannot be transplanted, some laws are more likely to survive the transplantation than others. Similarly, Teubner, also representing the middle ground theory, argued that some areas of law are more or less “coupled” to “social processes,” and that the degree of success of a transplant depends on the degree of coupling. He also argues that the interaction between the host and the received rules produces “new divergences.” Thus, the middle ground theory represents the argument that if legal systems must look at each other for law reform purposes, then the best systems likely to benefit from each other’s experience are those closely related historically, legally, politically, socio-culturally and legal-culturally diverse.

III. The Turkish Experience of Legal Transplantation

(1) The Legal Background for the Sample Case

Even during the revolutionary period in Ottoman Empire, family relationships and family law were closely associated with Islam. While the law of obligations was compiled into a legal code, called the Meccelle (1867-1876), the Şeriat concerning family law was left unchanged. Under the Şeriat, men were allowed to have four wives, and could divorce any one of the wives at their discretion; also, polygamy was an accepted practice. In 1917, the Ottoman Law of Family Rights Act was enacted. It was the first officially adopted codification of Muslim family law with some new requirements. The law required that every marriage and divorce had to follow state procedures, such as registering both marriage and divorce with the state. It set, for the first time, an age limit for marriage: 9 for females and 12 for males. The male practice of simple renunciation of the marriage in front of two witnesses was not sufficient anymore and the presence of a judge or deputy was required. Although the male could divorce any one of the wives at his discretion, now with the new law, the female had two grounds for divorce of her husband: contagious disease or a desertion without providing maintenance.

Perhaps the most important, the new family law allowed women, at the time of betrothal, to write into the written marriage contract that should the husband take another wife, her marriage was immediately null and void... Ottoman reformers had definitely moved into an arena previously controlled by Islamic law and custom.33

A much more radical move was taken by Atatürk who replaced the entire body of the Şeriat laws with various codes modeled on the European civil law. The Civil Code of 1926 forbid polygamy, and introduced gender equality in marriage. It gave the female the same rights as the male. The grounds for divorce had to be proven by witnesses in the state secular courts, which were to utilize the methods of civil law. It granted equal rights in matters of inheritance, and child custody for both sexes. It set a new age limit for marriage: 17 for females and 18 for males. To be legitimate, a marriage had to be registered with the state and performed not by an imam, but a civil servant of the state. While civil marriage without a religious ceremony was valid, religious marriage was not allowed to take place before the official civil marriage. Section 110 (later 143/2) of the Code strictly stated that a religious ceremony can only be held after the civil ceremony.

However, religious marriages were still being performed by imams without prior civil marriage, especially in the villages. There was no legal recognition of the cohabitation based on religious marriage. Spouses could not inherit from each other, and the children were illegitimate as to the father. In 1933, seven years after the enactment of the Civil Code, the legislature had to accept the social reality and passed “Amnesty Acts” to legitimize illegal marriages and illegitimate children. The legislature felt that it was necessary to legalize religious marriages until the new system of the Code could be assimilated over time. However, the problem persisted; religious marriages were still common practice until 1936. Faced with the continuing social reality of the difficulty of changing people’s adherence from religious marriage to secular-civil marriage, in 1936, the legislature inserted Section 237/3-4 to the Criminal Code which criminalized religious unions entered into without prior civil marriage. The aim was to provide support to the civil marriage sections of the Civil Code. The section provided that “man and woman who caused a religious ceremony to be performed prior to being lawfully married shall be punished with two to six years imprisonment.” Moreover, if a religious ceremony is conducted without a written proof of the prior civil marriage, the person who conducts it shall also be punished by one month to three months imprisonment.

33 Starr, supra note 9 at 40.
After giving a number of criminal cases for the prosecution of Section 237, Örücü concludes that the offence was not a vigorously prosecuted offence. She argues that while there was a strong concern to legitimize ‘illegitimate’ children, there was also a reluctance to enforce criminal sanctions against religious marriage. Since 1933, eight Amnesty Acts have been passed. Finally, perhaps because the legislature was tired of the attempts to legitimize “illegitimate” children, the 1981 Amnesty Act declared that “even a child of a father who is legally married to a woman other than the mother can be registered as legitimate if the mother is not married to another man.” Between 1933 and 1991, Amnesty Acts registered 2,739,379 religious marriages, and legitimized 10,006,452 children.

Clearly, even though the greater part of the Code was assimilated by the society, the problem with the religious marriages still remained. “In 2001, 126 womens’ groups throughout the country joined forces to campaign for the new Civil Code.” The new Civil Code, which came into effect in January 2002, was in accordance with Turkey’s obligations under the United Nations Convention on the Elimination of All Forms of Discrimination Against Women. The terms “head of the family,” “husband” and “wife” in the 1926 Code were replaced by the term “spouse.” The new Code gave the spouses equal rights over property acquired during the marriage regardless of the legal ownership on the title. However, this provision was applicable only to marriages entered into after the Code entered into force. Spouses had equal rights in representing the family unit, to petition for divorce and to claim alimony. Wives were allowed to keep their family names (to place it after their husbands’ names). Whether born out of wedlock or not, all children had equal rights, and this effectively eliminated the need for further amnesties. However, the new Code still considered religious marriages irrelevant and without legal consequences. Later, when an Islamist party came in power in November 2002, it suggested that imams should be allowed to register marriages. Even though this attempt to allow religious marriages failed in 2002, it demonstrates the Turkish reality: while legal reforms were successful in large parts, Islamic family traditions and

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35 Id., at 97.
36 To a lesser extent than religious marriages, there is also the problem with polygamy which still remains. “There are no recent reliable statistics but a survey conducted in 1963 found that 2.7 per cent of marriages in villages were polygamous. The incidence was lowest in the western part of the country (0.2 percent), and highest in Eastern Anatolia (5 per cent).” See Mango, supra note 8, at 117.
37 Mango, supra note 8, at 119.
values did not completely disappear despite the 72-year time period since the first requirement of civil marriage.

As an example of the chronic religious marriage problem in Turkey, I will analyze a constitutional challenge, in 1999, to Section 273/3-4 of the Criminal Code, which criminalized religious unions entered into without prior civil marriage. However, a brief account of constitutional review in Turkey is necessary. Constitutional review in Turkey relies on a centralized model. There is a special court with exclusive jurisdiction over constitutional matters. The Constitutional Court consists of eleven regular and four substitute members. It ensures that legislative enactments do not violate the Constitution. It may declare that a law is unconstitutional; if so, the law is annulled. Individuals cannot challenge the constitutionality of laws, however, constitutional challenges can be raised by a public authority, like the executive branch, a political party, a parliamentary majority, or a lower court.  

(2) A Sample Case from the Constitutional Court

As mentioned earlier, according to Section 110 of the Civil Code, a religious marriage ceremony can be performed only after the official civil ceremony. The imam performing the religious ceremony is obliged to require documents proving that a civil marriage had been performed. Furthermore, Section 237/3-4 of the Criminal Code criminalizes religious unions entered into without prior civil marriage. In 1999, the section was challenged by a lower criminal court judge as violating Article 2 (the principle of secularism), Article 10 (equality), Article 12 (the character and scope of fundamental rights and freedoms), and Article 24 (freedom to conduct religious services and ceremonies) of the Constitution.  

The lower court judge argued that the section contradicts the three dimensions of law: the ethical, the social and predetermined-norms (the rule of law). For him, the ethical dimension of the law is to make justice; the social dimension of the law is to recognize the accepted values of society; and the

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40 After his challenge to the Constitutional Court, this judge was given as an example of increasing Islamic-fundamentalist judges who refer to the Islamic religion and/or cite verses from Koran in their decisions. Four examples were cited in an article in the newspaper Radikal on 02 September 2000.
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predetermined norms dimension means to limit fundamental rights and freedoms only according to Article 13 of the Constitution (listed limits on fundamental rights and freedoms). Section 273 contradicts the social concept of law, which meant, he argued, law must recognize the living and re-born values of society. The judge based his challenge on an honor-killing decision of the High Court (Yargıtay) which recognized the social value attached to the religious marriages. He quoted the High Court’s reasoning in reducing a sentence for murder according to the Section 51 of the Criminal Code: “[i]t is a well-known fact that, society still values religious marriages as much as it does value civil marriages. Even though, the couple had a religious marriage, one must recognize the extent of the serious ache and distress of the offender, caused by his partner’s adultery since he considered the woman as his wife and they exchanged loyalty promises.” He argued that since the Criminal Code does not penalize couples living together without either religious or civil marriage, the section creates inequality between couples without any kind of marriage and couples only with religious marriages. Thus, to criminalize religious marriage not only contradicts with social concepts of law, but also contradicts with the other two dimensions of law because of this inequality and limiting the freedom of religion, not based on Article 13.

The Constitutional Court, in unanimously deciding that Section 274/4 did not violate the Constitution, decisively emphasized the secular nature of Civil Code in particular and Turkish law in general. The Court stated that Section 237 had been inserted to the Code in 1936 to provide support to civil marriage provisions of the Civil Code. The Court cited from the legislative documents reasoning the 1936 law (Section 237 of the Criminal Code):

41 By the term “re-born” the judge probably meant the religious values which survived the Kemalist reforms and that there is a re-born interest in keeping these values alive. This case is a perfect example of the clash between the Kemalists and conservative groups in Turkey, which created an immense controversy between these groups until the High Court reached its decision. The arguments of the lower court and the Constitutional Court also represent how law was being utilized for either Kemalist or for Islamist-conservative purposes.

42 Yargıtay Ceza General Kurulu (High Court General Board for Criminal Matters), Case number: 1-494/438; Decision number 1-99/159, Decision date: 24 April 1989.

43 The Chief Justice of the Constitutional Court at the time was Ahmet Necdet Sezer, a widely-known as a Kemalist, who, after his term on the Court, was the President of Turkey from 16 May 2000 – until 28 August 2007. Ironically, the current Prime Minister, Tayyip Erdoğan, is a known conservative who promised to solve the head-scarf dilemma in Turkey claiming that the ban on head scarves violates the principle of freedom of religion.
In the Civil Code, we treated religious marriage as a nullity, thus any children would be illegitimate and lose their inheritance rights. It is important to recognize that there are people who take advantage of the silence of the Criminal Code for the enforcement of the civil marriages. Now, it is necessary to take measures against religious marriage that threatens the social fabric of our society.\textsuperscript{44}

The Court stated that there is no violation of the principle of equality between the couples living together without any marriage and couples in religious marriages since the two groups are not in the same legal position. The Court stated that the Civil Code is a fundamental building block in the transition to the contemporary and secular legal system of the Turkish republic. The Court believed that the sections regarding civil marriage and their enforcement have a vital importance to the Civil Code, and lack of their enforcement would have negative effects on the women and children. Further, the Court pointed to the fact that civil marriage is also protected in Article 174\textsuperscript{45} of the Constitution. The Court stated that since the religious ceremony subsequent to the civil marriage is not banned, there is no violation of any fundamental right or the principle of secularism. Finally, the Court explained that the most fundamental prerequisite of secularism is to keep law and religion separate. If the legislature acts within the boundaries of law and the Constitution, and respects, strengthens, and protects human rights norms, it has discretion to criminalize or not to criminalize some aspects of social conduct.

The Constitutional Court, by upholding the ban on polygamy, subordinated religious rules to secular rules for marriage with the clear aim of protecting

\textsuperscript{44} Yüksek Yargıtay Ceza Kurulu (High Court for Criminal Matters), Case number: 1-494/438; Decision number 1-99/159, Decision date: 24 April 1989.

\textsuperscript{45} Even today the Kemalist Reform laws are preserved in the Article 174 of the Constitution:

“No provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform Laws indicated below which aim at raising the level of Turkish society above the level of contemporary civilization, and safeguarding the secular character of the Republic, and which were in effect on the date this Constitution was adopted by a popular vote: The Law of the Unification of Education (1924); The Hat Law (1925); The Law on Closing Down Dervish Convents and Mausoleums and the Abolition of the Office of Keepers of Tombs; The Law on the Abolition and Prohibition of Certain Titles (1925); The Law on the Conduct of the Act of Marriage According to the Civil Code (1926); The Law Concerning the Adaptation of International Numerals (1928); The Law Concerning the Adaptation and Application of the Turkish Alphabet (1928); The Law on the Abolition of Titles and Appellations such as ‘Efendi,’ ‘Bey,’ ‘Paşa’ (1943); The Law Concerning the Prohibition to Wear Certain Garments (1934).

See Örücü, supra note 33 at 93 n.1 [The translation of the Article 174 was by Örücü].
secularism. However, for “honor killings” or “customary murders,” the High Court found it difficult to disregard the custom and local values, thus reducing the sentences for such killings to accommodate culture and religion. In this accommodation, the High Court creatively produced an answer within the existing framework, but relying on their discretionary power in sentencing. Which theoretical framework, culturalism, transferism, or the middle ground, do we apply to understand, interpret, and explain the foregoing examples?

(3) Testing of the Transplantation Arguments

First, I will explore some possible arguments by a culturalist. She would argue that since Christian-European and Muslim-Turkish societies held radically different values, it was a mistake to transplant a legal system that was not closely related historically, legally, politically, socio-culturally and legal culturally to the Turkish one. Some laws, such as civil marriage rules, could not traverse cultural boundaries. A culturalist would argue, as some groups in Turkey and abroad do, that the success of Kemalist reforms may still be considered doubtful. There is still a possibility that Turkey may go back to the Islamic system of government. In a survey conducted in 1999, 21 per cent of respondents said that they wanted the Turkish state to be founded on the Şeriat. The prime minister of Turkey is the head of a political party which is known to be an Islamic-fundamentalist party. The majority of wives of the party members, including the prime minister’s, cover their heads. The prime minister himself, when he was the mayor of Istanbul, was imprisoned for his fundamentalist views when he recited a poem advocating a religious-based government. Thus, it seems that despite the great transplantations of civilian laws since the revolutionary period (since 1839 until now), transplantations could not change manners and beliefs of Turkish society. The culturalist would point to two facts as proof: that the accommodation of traditional and religious values by the legislature and the courts has been going on for 72 years; and that the division between Kemalist and conservative groups is a reality. Thus, the conclusion would be that the laws should evolve within society; otherwise, laws cannot change manners and customs of society, as we see in religious marriage rules in the Turkish experience.

However, as a counterargument, one can easily contend either that the Turkish legal system during the revolutionary Ottoman era, was or was not closely related to the European system. My answer would be that it depends on which area of laws/customs one is talking about. As I explained in the section I (3), Ottomans were the first Islamic society which developed secular

46 Mango, supra note 6 at 133,
47 Mango, supra note 6 at 98.
administrative and commercial rules and customs in the classical era without transplanting them from other systems. Thus, if one considers the administrative and commercial laws/customs, they were, in fact, very similar to the European ones. On the other hand, if one considers family and inheritance laws, Turkish laws were radically different from the Christian European ones. Thus, it is almost impossible to conclude that the Turkish legal system, in general, was or was not closely related to the source laws. Another counterargument would be that the reception of civil law can be considered successful since the majority of Turkish people, 79 per cent, wanted secular laws in the 1999 survey. Moreover, many of the respondents apparently had little idea of what Şeriat meant since only 1 per cent of the respondents approved of the canonical punishment of Şeriat (stoning) for adultery. Also, 79 per cent of male and 84 per cent of female respondents did not approve of the Şeriat rule that male heirs should have a larger share of inheritance than female heirs.\(^4\) Also, although the vast majority of the wives of the Islamic party in power, cover their heads, a lesser percentage of Turkish women in general do. Although it is obvious that Islam is more influential today than it was a decade ago, this is truer in the villages in Anatolia then in the major cities.\(^5\)

What is happening in Turkey is essentially a phenomenon common to many parts of the Third World: the entry of new classes on the political stage. In Turkey’s case, could this development lead to the restoration of an Islamic state rules according to law of Islam, the sharia? Such an eventuality is possible but, given the country’s recent history, improbable. Three generations have lived under a secular regime. They are unlikely to give up benefits of secularism especially after witnessing the fiasco of a self-proclaimed Islamic regime in neighboring Iran, Saudi Arabia and Libya, where thousands of Turks lived as migrant workers are not attractive models either… [The figures in a survey on public attitudes toward Islam] seems unusually low for a predominantly Muslim country and may be taken as an indicator of the penetration of secular values at virtually all levels of society…. Given constantly changing attitudes, especially among women whose status has changed more radically than that of the men, it is difficult to see how the country can turn its back on the transformation it has undergone.\(^6\)

Second, I will turn to some likely arguments by a transferist. He would contend that since very little in law is original, Turkish society needed to borrow other laws for legal change. He would believe that civilian legal rules, including bodies of law having a great impact on practical life, were not


\(^5\) Mango, supra note 6 at 98.
particularly devised for the Christian-European societies. Further, borrowing laws, civilian or other, is just a method of speeding up the process of finding legal solutions to similar problems. A transferist would also argue that laws reflect the legal traditions of governing elites, rather than extrinsic social, political and economic factors. These arguments would almost perfectly fit the Turkish reception of civilian laws except for the Turkish rules regarding civil marriages. Probably because of this perfect fit, transferists use the Turkish experience as an example. However, as a counterexample, one can easily point to an unsuccessful transplantation example, such as the failure of the Civil Code in Muslim Ethiopia.

Last, a middle ground theorist would argue that civil marriage rules are organic rules and more closely linked to society than others. These rules remain deeply embedded in social institutions and are unlikely to be easily transplanted. A middle ground theorist would point to the failure of the civil marriage rules in the Turkish experience. The areas of family and marriage laws are not “coupled” to Turkish “social processes,” and that is the reason for the failure of the civil-marriage-rules transplantation. Moreover, the interaction between the host Turkish system and the received civil marriage rules produced the “new divergence” of the Criminal Code section on the criminalization which does not exist in the source system. Thus, if the Turkish legal system needed to look at another system of law for reform purposes, then the best system would be that system which is closely related historically, legally, politically, socio-culturally and legal culturally to its own. Again, this theory seems valid particularly in the area of civil marriage rules. However, it fails to explain the success of the rest of the civilian Turkish system.

IV. The Author’s Interpretation of the Turkish Experience

When one examines comparative law in general, and legal transplant theories in particular, the Turkish experience provides an interesting example which reveals both weaknesses and strengths of the arguments in the debate on legal transplants. Legal transplants diverge greatly in that broad generalizations cannot be made and all three theoretical analyses are possible in any given transplant case. Thus, instead of trying to provide a grand theory of transplant for the likely success or failure, we need to provide a historical, social and legal interpretation of an individual transplant case. In this process, all theories could be valid and useful. I argue that comparativists need to reject grand narratives and return to localized, contextual and detailed studies. In any comparative law study, we need to resist the temptation to “cut and paste” theoretical templates, and provide a historical, social and legal interpretation of the individual transplant case in its context.
The brief summary of history of Turkey proves that the total reception of civil law system was a top-down experience where the elite made history and culture irrelevant to law. The aim of the reception was a total disintegration of Islamic law and its legal institutions, and an establishment of a completely new legal order based on the civil law model. In the Turkish experience, transferists are correct in saying that exporting law from one country to another or from one historical period to another is possible. On the other hand, culturalists are also correct in asserting that like the law, our thinking about the law is socially determined. The interpretation of received rules is a “function of the interpreter’s epistemological assumptions, which are themselves historically and culturally conditioned.” As a result, even in a successful legal transplant case, such as the Turkish, “received civil marriage rules” changed in character and became a symbol of secularism, which is not the case in the source system. Further, “received civil marriage rules” were supplemented with new rules, which cannot be found in the source system, to accommodate local culture until a complete assimilation of the received rules is achieved.

The revolutionary period influenced and changed only the social and legal culture of the elite in Turkish society who then engineered a social change through law. In this instant, law led (or was utilized to lead) to social change, however, one can easily find another example where law followed social change. Thus, law can be a reactor to social change or its initiator. Through careful engineering on the part of the elite, legislator, and the judiciary – and a concurrent restructuring in the education system – the transplantation in Turkish experience brought about social change. In fact, they were an attempt, to a great extent successful attempt, to reconstruct a new culture and society. Law was an instrument to lead a complete change and rearrangement of not only legal, but also social life. I argue that the Turkish legal system and its engineers have been successfully accommodating culture and religion, and have been producing answers to social needs within the imposed legal system. While doing this accommodation, the legal system has also sought to remove Islamic laws from the public and private domain, and to erase indigenous cultures and therefore created, to a certain extent, a new culture envisioned by its engineers – Western and secular.

51 Of course there is no consensus on what culture is or what the term refers to. Also there is no homogeneity in any given culture.

52 Borrowed from Esin Örücü, a Turkish comparativist, who argues that “tuners” of Turkish legal “transposition” made history irrelevant to law. See Esin Örücü, supra note 5.

Nevertheless, the preceding interpretation of the Turkish experience would not mean that transplantation of secular family laws backed by criminal sanctions – a legal transplant – is possible. As argued before, we need to reject a grand transplant theory of either the transferist or the culturalist and need to return to localized, contextual and detailed studies where all theories can be used side-by-side to understand each individual transplant case.