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Legal Transplantation to the Muslim World: A Case Study of the Iraqi Civil Code under the Auspices of al-Sanhūrī's Legal Approaches

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Abstract

"Legal Transplantation," the process of transferring a rule or legal system from one country to another, is a concept introduced by Scottish legal scholar Alan Watson in the 1970s. Legal scholars hold diverse opinions on legal transplantation, with some advocating for it and others opposing it, each providing evidence to support their stance. The Iraqi civil law incorporated legal transplantation through the efforts of the esteemed jurist Abd al-Razzāq al-Sanhūrī. However, al-Sanhūrī's transplantations did not achieve the expected success in all instances. In several key areas, the transplantations did not function as anticipated and remain underutilized. This paper investigates the failures of legal transplantation by examining two specific examples: the foundation system and the consensual subrogation system. The primary reason for the unsuccessful transplantation in Iraqi civil law is the lack of originality in the transplanted material when compared to the originality and comprehensiveness of Islamic jurisprudence.

Keywords: Legal Transplantation, Legal Culture, Foundation System, Consensual Subrogation System.

Introduction

Generally, globalization favors the circulation and dissemination of uniform legal concepts across different normative spaces. If that is the case, the fact remains that there is still a tendency to single out concepts when they are received in each normative area. The Iraqi legal system has experienced various phases of the circulation of doctrinal models of Romano-Germanic origin and common law, whether original or derived (French, British, and American). The Iraqi Civil Code was prepared and drafted when most Arab countries sought to codify their legal systems. Al-Sanhūrī played an essential role in transplanting the French civil code into the Iraqi legal system (Stigall, 2006). He adheres to the premise of the historical school that the law evolves in symbiosis with the social environment. Assuming that Al-Sanhūrī accepts the idea that a codification should not freeze this development means that he takes an evolutionary perspective to assert that the state of the law must be recorded at the time of its development; it is an inevitable term. The Iraqi Civil Code No. 40 of 1951 includes provisions borrowed from the Majalla (Arkoun, 1973); other requirements have been borrowed from the French Civil Code.

The transplantation of the French civil code into the Iraqi civil code can involve simply introducing a concept, instrument, or legal rule, or more broadly, adapting it for optimal assimilation in the recipient country.

The transplantation of French civil law into Iraqi civil law was carried out in two ways:

First. Flexible Transplantation

The drafters of the Civil Code preferred foreign solutions to make adjustments and adaptations to comply with the spirit and logic of the code. We can distinguish different ways in which this reception was carried out.

Adaptation of the French model considering national specificities: For example, concerning the validity of contracts, the legislator did not see fit to adopt the mechanism of relative nullity specific to French law; instead, the notion of Aqd Mawquf's "pending Contract" from Sharia' was substituted.[1]

Transposition of solutions from case law and French doctrine: The Iraqi Civil Code retained institutions that were developed after 1804 based on French jurisprudence and doctrine. This is particularly evident in the codification of the general principle of unjust enrichment in Article 243 and the legislation recognizing the right of superficies as an absolute right in Article 1266 of the civil code.

Borrowing from attempts at international codifications involving France: A reference to borrowing can be found in Article 125, which discusses exploitation as a defect of consent.

1. Refer to articles 133-136 of the Iraqi Civil Code.

The selection of Sharia rules that align with the Romano-Germanic model: For example, the Iraqi legislator retained a definition of the right to property in Article 1048 of the Iraqi Civil Code inspired by Islamic law, similar to Article 544 of the French Civil Code.

Secondly. Strict Transplantation

Strict transplantation involves the direct reproduction of a rule or legal concept without any modification. In the Iraqi Civil Code, one can find articles that are essentially a modest translation of the articles in the French Civil Code. For example, articles 150-2, 294-1, 321-2, 325, 336, 380-2, 1117, 1052, 579-2 of the Iraqi Civil Code are almost exact replicas of articles 1135, 1187, 1208, 1209, 1217, 1250-2, 553, 640, 1613 of the French Civil Code. The total and servile transplantation of foreign law has its drawbacks in that the received law may not be compliant with the social and economic environment of the country (Mattei, 1994). Our study thoroughly focused on the effectiveness of transplanting foreign law into the Iraqi civil code. To achieve this goal, we must first examine the relationship between comparative law and legal transplantation. Then, we have to address the theories of legal transplantation and the reasons behind it. Finally, we are seeking applications for unsuccessful legal transplants in Iraqi Civil Law. Whether there are opportunities for successful legal transplantation in Iraqi civil law is beyond the scope of our research, and we will address it in future studies.

1. Comparative Law and Legal Transplants

Current trends in modern comparative law extend beyond traditional studies of the legal family. Today, a more holistic approach is taken. New terms such as "legal culture," "cross-fertilization," or "legal transplantation" are studied with great interest by modern comparativists. The relationship between comparative law and the reasoning behind the existence of legal culture is explored to deepen our understanding of the ideological foundation of law and legal practice in the contemporary world (Mosquera Valderrama, 2004). Furthermore, globalization is sometimes analyzed as a process of circulating and disseminating uniform legal concepts across different normative spaces. Indeed, although the hierarchical relationships between the different areas within the international legal order are weak or non-existent, these areas influence each other in their functioning. Cross-borrowing of normative values, implementation techniques, interpretative models, and legal concepts can then be observed (Gerber, 2000).

It is, therefore, possible to associate the idea of the globalization of legal concepts not only with their transfer from international law to national legal systems (vertical dimension) but also with their circulation among the various normative spaces that coexist at the international level (horizontal dimension). Legal theory can identify the spaces where society obtains information from

the legal system and the actors involved in it. The law reflects its environment. The law governs its jurisdiction. But it cannot determine whether the normative programs used by the law to shape them align with society's expectations or values. Or, at least, we should say this with more caution than social groups would like to admit (Moor, 2010).

Some authors argue that there is no competition among legal systems. According to this opinion, the transplantation of a system or a rule is impossible. It is impossible to consider the law as something disconnected from its context and interchangeable (Paris & Veltz, 2010). On the other hand, there is another tendency in comparative legal theory that views law as a subject of competition and believes that legal rules can be transplanted.

2. Theories of Legal Transplantation

2.1. Theories of Pro-Transplants

2.1.1. Watson's Theory: The Ease of Legal Transplants

According to Watson, legal transplants, the desirability, and feasibility of borrowing from another legal system are the essence of comparative law in its practical conception, offering the prospect of improving one's legal system (Watson, 1978). Watson's theory on legal transplantation makes two essential points. Legal transplants are commonly practiced, as he argues. For example, according to him, borrowing (with adaptation) has been the typical legal development in the Western world (Watson, 1978).

However, Watson's second central claim, which involves the transplantation of legal rules that do not hinder the smooth running of society, has sparked even more controversy and lies at the core of the legal transplantation debate (Watson, 1978). According to Watson, laws are swiftly adopted and readily accepted in other legal systems. Thus, the law is quite distinct from other social systems (Watson, 1978).

Watson observes that the success of a legal transplant primarily relies on the recipient country's willingness to adopt the foreign legal standard rather than on an understanding of its similarities with the local context (Watson, 1978).

However, we agree with Watson that other factors may come into play, such as pressure against legal change assessed by groups and individuals in society, the force of opposition, and the receptivity of a legal system to foreign law due to differences in linguistic traditions or legal experience with another system (transplantation bias).

2.1.2. Kahn-Freund: Contextual Factors of Transferability

In contrast to Watson's theory, Kahn-Freund identifies a strong inherent relationship between law and society. The law should not be separated from its purposes or the circumstances in which it is made (Kahn-Freund, 1974).

However, Kahn-Freund believes that there are degrees of transferability. The risk of rejection of the transplanted foreign law in another environment will depend on several factors (Kahn-Freund, 1974). These factors include geographic, economic, social, and, most importantly, political aspects. The law drafted for any country should be adapted to the social environment of that country. If the direction of one country matches that of another, it is merely a coincidence. In this, Kahn-Freund proceeded with the famous declaration of Montesquieu, which states that "laws are the necessary relations that derive from the nature of things." However, organized groups, such as large corporations, unions, and cultural and religious groups, have significantly expanded their involvement in manufacturing and upholding legal institutions. Kahn-Freund argues that a potential law reformer should closely examine a foreign institution where the law is linked to a power distribution in the foreign country that differs from that in the beneficiary country. It is important to consider how this law reform is likely to be perceived by the organization of interest groups within its new framework (Kahn-Freund, 1974).

Kahn-Freund argued that the transferability of legal rules or institutions should not be assumed. Only if the application of laws outside their original context risks rejection. The use of comparative law for purposes and practices becomes abusive only if it is informed by a legalistic mindset that ignores the context of the law. Unlike Watson, Kahn-Freund considers knowledge of foreign law necessary for utilizing the comparative method. But also, knowledge of the social aspects of foreign law and, more importantly, its political context is essential (Kahn-Freund, 1974).

2.1.3. Örücü: Transposition of Laws

For Esin Örücü, the use of the concept of legal transplantation, as mentioned by Watson, is the most appropriate (Örücü, 2002). Each time a rule is introduced into the recipient's system, such as in the model's system, transposition also necessarily occurs based on the culture, especially the socio-legal culture, and the requirements of the recipient's legal system. The real advantage of adopting foreign legal models is only obtained through the proper transposition of foreign law, which requires the "tuning" by participants (such as judges) in the legal recipient system. However, the transposition process is not easy, especially when values and cultures are exported along with the substance of the law, even between systems within the same legal tradition. Therefore, a transplantation that has not been successful is likely due to the inability to accurately position the transplanted organ.

On the other hand, transmigration can work well due to the essential similarities in structure, substance, culture, fine-tuning, and intense pressure from a ruling elite or the legal professions (Örücü & Nelken, 2007). In summary, Örücü suggests that some level of irritation caused by the

transplanted law in its new environment may be necessary for successful transposition. The real benefit of adopting foreign legal models is only achieved through the proper transposition of foreign law, which necessitates adjustments by participants in the recipient's legal system. However, the transposition process is not easy, even between systems within the same legal tradition, especially when the substance and culture of law are exported simultaneously (Örücü & Nelken, 2007).

2.2. Theories of Anti-Transplants

As its name suggests, the anti-transplant doctrine unites individuals who oppose any type of transplantation or even the attempt to transplant between jurisdictions. We think here of authors such as Pierre Legrand, Teubner, and Seidman.

2.2.1. Pierre Legrand: The Impossibility of Legal Transplantation

Legrand argues that legal transplants are fundamentally impossible due to legal rules being unable to "travel through all legal systems." According to Legrand, "the rule of law from the United States that settles in France, Italy, or elsewhere cannot be established as is." To be welcomed and to "make sense" at the local level, to fit into the web of meanings that inevitably constitute the unique historical fabric of a specific society, this American rule of law must, so to speak, undergo metabolism. At the very moment when the American legal tradition is claimed to be integrated into French law, French law transforms it, altering its essence from the American rule of law it once was. It is, at best, a French rule of American law, which is not the same thing and not equivalent. Thus, any trend assumes that the shifting of norms across boundaries is ill-founded because it fails to consider models as actively constituted by the life of interpretive communities. Yet, it fails to see standards as the product of competing and conflicting societal interests (Legrand, 2001).

2.2.2. Gunther Teubner: Legal Irritant

The researcher focuses on legal irritation, which is more applicable than legal transplantation because organ transplants are logical in the organism and not about transferring legal institutions. According to Teubner, legal institutions cannot be easily transferred from one context to another as legal transplants may create a misleading impression. They need careful transplantation in the environment (Teubner & Irritants).

Teubner argues that when a foreign legal rule is imposed on a culture, rather than fostering interaction or repulsion in its new environment, something else happens to the law:

"It is not transplanted into another organism." Rather, it is a fundamental irritation that triggers a series of new and unexpected events. It irritates the law's binding arrangements. An external noise disrupts the dynamic

interactions of discussions within these structures. It forces them to reconstruct their own rules internally and rebuild the alien element from scratch. "Legal irritants cannot be domesticated." (Teubner & Irritants).

Teubner, like Kahn-Freund, emphasizes the enduring importance of economic and social factors in the transplantation process. The reason is that legal institutions have a close relationship with economic and social aspects, including technology, health, science, and culture. Teubner, therefore, observes that the ease or difficulty of legal transplantation depends on the degree of connection between the law and its social context. Legal transplants can become legal irritants, depending on whether there is a loose or tight coupling between the law and other social discourses (Teubner & Irritants).

2.2.3. Robert Seidman

In his book "The State and Law in the Development Process," Seidman argues that law forms the foundation of organized societies and serves as a mechanism for institutional change. Unfortunately, many governments in developing countries have attempted to replicate the legal systems of developed nations, but legal transplantation has proven to be ineffective. In other words, legal transplantation cannot create rules that produce the same desired effect in the recipient and donor countries. This is because legal environments vary depending on the location and period.

Seidman provided numerous examples, such as Ethiopia's endeavor to adopt Hong Kong law and Turkey's adoption of French civil law. These legal norms were not as integrated into their new environments as they were in their places of birth. People choose how to act in response to laws, customs, and various social, political, historical, and other factors present in their countries (Seidman, 2016).

3. Reasons for Legal Transplantation

Specialists have given different reasons as predominant factors in determining transplanted laws. Legal transplantation occurs due to efficiency (1), prestige and imposition (2), and finally, chance and necessity (3).

3.1. Efficiency

Law is an instrument that is part of social, political, and economic organization. It drives development and brings about social change (Persadie, 2012). To ensure the proper functioning of the law, legal standards should reflect the societies that created them, meaning that individuals must recognize, accept, and willingly adhere to them. The leading reason for transferring rights is their economic efficiency (Laithier, 2010). If you identify an element from one legal system or rule that can be transplanted to another, it is more economically efficient than the law of the importing country (Laramée & Affaki, 2008).

Discussing the effectiveness or efficiency of a legal system presupposes specifying which criteria are used to measure this efficiency. Often, the analysis of the efficiency of a legal system involves an economic analysis of the law. At least, this is the analysis favored in common law for several decades. Economic analyses of legal phenomena, whether descriptive or prescriptive, do not necessarily or directly address the relationship between law and economics. By approaching the legal standard through an economic framework, typically focusing on efficiency, a solid foundation is established for a transdisciplinary study that assesses the influence of legal regulations on organizational performance and the economy (Frydman, 2001). This analysis aims to examine the rule of law from an economic perspective. Therefore, the legal standard is viewed instrumentally as a tool that must be mobilized to achieve objectives defined in economic terms. As a result, it loses its autonomy. It acquires a practical dimension: this type of analysis aims to guide the development and interpretation of the rule of law towards optimal efficiency, measured in terms of its economic performance (Mallet-Bricout, 2007).

In a persuasive argument, economic efficiency can be initially presented as the foundation of the rule of law. From this perspective, economic efficiency intervenes in legal discourse as an argument to explain the relevance of the solution. In fact, just like morality, equity, justice, or human dignity, economic efficiency naturally serves as a factor that can persuade the legislator during the process of drafting laws, influence the decisions of judges, and garner support from legal scholars in their efforts to systematize positive law (Ammar, 2015). Measuring the economic effects of a legal standard is a significant scientific endeavor. The field of "Law and Economics" embodies this powerful concept. It is built on purely ideological postulates, specifically claiming the superiority of common law over any other legal and market system in regulating behavior, and purports to demonstrate scientifically acquired results. This romantic setting, of which the annual "Doing Business" reports constitute the most spectacular manifestation, also bears its share of responsibility in the global financial crisis. The economic analysis of law remains primarily a discipline that needs to be developed from a truly scientific perspective, with a significant focus on the adequacy of reality. This is an essential step for rationalized debate.[1]

Due to the effectiveness of Islamic law, the accelerated development of Islamic financial institutions, and the proliferation of financial products following the principles of Islamic Sharia law offered by both conventional

1. Since 2004, the World Bank has published an annual report, Doing Business, which claims to assess different legal systems worldwide based on a summary description of the legal environment in which companies operate. This report establishes an annual ranking intended to guide the actions of public authorities and investors. Civil law systems, primarily French law, are seriously criticized and poorly ranked.

financial institutions and those that are purely Islamic, the range of investment vehicles offered to investors has radically changed in recent years. Initially confined to the markets of the Middle East and Southeast Asia, Islamic investments and banks have significantly increased their visibility in Europe. This growth is particularly notable following the adoption of the Finance Act 2005 by the British Parliament. This act establishes conditions for real competition, especially from a tax perspective, between certain Islamic investments and their conventional counterparts. Furthermore, the approval of several Islamic retail banks by the Financial Services Authority in the United Kingdom has also solidified the presence of Islamic banks in Europe. Beyond retail banking, this presence is now evident in investment banking. Under the freedom to provide services in the banking and financial sector, credit institutions established in the European Community can now operate under the "European passport" anywhere in Europe and access Islamic investors in France and elsewhere in the European Community. These changes should soon ensure that French savers have access to the new range of Islamic investments.

3.2. Prestige and Imposition

Comparative studies today acknowledge that the evolution of legal models is primarily driven by a dynamic of imitation, which is fueled by prestige (Allouch, 2016). Sacco developed this theory and identified two root causes of fraud (legal transplantation): constraint and prestige. If a culture believes in its values, it tends to implement its legal models, and those with the power to do so impose their models on others. Of course, the affinity of cultural, social, and economic situations can be decisive in determining or enabling an imitation. However, just as some legal solutions remain unchanged through cultural and political revolutions, imitations can occur across cultural and political boundaries.

Receptions due to pure force are reversible; their effects cease as soon as the balance of power changes. Receptions due to pure acts of energy are also quite rare in history (Sacco, 1991). The element that typically initiates reception is the desire to adopt the qualities of others when these qualities are enhanced with a certain prestige that we can only describe as "prestige." The distinction is not very pronounced if the two legal systems are similar. A lacunar system can mimic other methods, regardless of the model borrowed, as long as the void is filled (Bode, 2010). The prestige-oriented explanation is, truthfully, tautological, and comparative law does not define "prestige" (the analysis of which is the responsibility of other disciplines). Prestige assisted in its conquest of Europe by common law; it propelled the Napoleonic Code beyond the borders of the Romanist area. Prestige has also made the adoption of English or French legal models in Africa irreversible. The prestige of Sharia law is responsible for the erosion of many African customs (Sacco, 1991).

For his part, Sacco notes that "prestige attaches to a system perceived as responding more adequately to the objectives most valued by the international or regional community at a given time." Therefore, prestige is an essential concept for interpreting the transplantation of many legal models (Sacco, 1991). Thus, for example, prestige has driven American law to conquer the world because it is "seen to be in tune with the needs of the economy."

Economic prosperity has always been a natural source of prestige for the law, enabling it to flourish. The United States' technological advances naturally imply an advancement in legal thinking related to technical innovations. The United States entered the post-industrial era before Europe, transitioning into computers and intangibles. This led to the rapid development of laws on new technologies, a reflection on scientific expertise, and a stance on the relationship between the market and bioethics. The positions adopted are not necessarily those that Europe will adopt in the long term, but they serve as an obligatory reference (which represents a clinical symptom of prestige). In this regard, the strength of American law undoubtedly lies in the fact that no inertia from tradition impedes its rapid adaptation to new situations (Watson, 1978).

3.3. Chance and Necessity

As Örücü explained, transplantation is not imposed as a choice but rather as a necessity. Örücü developed this new approach with primary reference to the criteria by which Eastern European systems must join the European Union (Orucu, 2004). The substance-over-form principle, well known to Anglo-Saxons, was endorsed by the International Accounting Standards Committee. The substance of taxation in civil law countries has roots in the Roman notion of provisions in fraud legis (Ammar, 2015). In common law countries such as the United States, the judiciary developed the concept of substance over form for tax law purposes. In the United States, as in other federal states with various private law rules between states, the need for substance over form for tax law concepts is more evident (Ammar, 2015). The result is that the legal transposition of the substance over form principle has taken place differently in different countries. The reasons for these differences may argue the need for a specific legislative provision or the development of this doctrine by the judiciary for private and tax law purposes.

4. Applications of Unsuccessful Legal Transplant in Iraqi Civil Law

Chairman of the Iraqi civil law preparation committee, Al-Sanhūrī, believes that no nation can be isolated from the codification of other countries, otherwise depriving the fruits of the experiences of these nations without benefiting from their isolation (AlJubory, 2021). Therefore, he said in his approach to the preparation of the draft Iraqi Civil Law: "The optimal plan in

our view is that the new codification setter will go to Western codifications, choose the latest and most perfect, and formulate from all this a model for the best legislation he sees, without looking at a particular country or traditions" (Abedi, Al-Shoroei, Qabuli, & Bakhshi, 2023).

He applied this plan in practice, saying in another resource: "I went through my work on two roles. I put in the first stage a model of sales provisions, which I chose from among many old and modern regulations, like ancient French law and Egyptian law. The contemporary was represented by German law, Swiss law (along with Turkish law), Soviet law, Franco-Italian law, Moroccan law, Lebanese law, Bolognese law, and the international project."

Al-Sanhūrī's expansion of the scope of the selection of legal texts from Western laws can be explained by his legal philosophy, as it revolves around the issue of unity, in which the influence of Edward Lamper and European comparative legal scholars who were supporters of that issue at the beginning of the twentieth century. They promoted laws characterized by generality, issued by a legislative body, and capable of bringing different peoples together. So Al-Sanhūrī was influenced by Lamper's vision, which is about the foundations of laws in the world, which almost do not differ. Despite the different places and times, the legal industry is meant to wear extra clothes. Its miscellaneous ramifications and details make it seem strange to the superficial view of each other, but it does not deceive the piercing eye, as they all refer to the same or similar origins.

Regardless of the discussion of Al-Sanhūrī's approach to the preparation of Iraqi civil law, we traced his cultivated materials and monitored many unsuccessful applications of legal transplantation. We will only present two models of them, namely the transplantation of the foundation system and the transplantation of the agreement replace the system, as follows:

4.1. Transplantation of the Foundation System in the Iraqi Civil Law

The Iraqi civil law organizes the foundation system from Article 51 to Article 60. These articles deal with the definition of the foundation, procedures for its establishment, methods of controlling it, amending it, and ultimately canceling it.

We divide the research into three points: the purpose of the transplantation of the foundation system, the reasons for the failure of its implantation, and finally, the future of the foundation system in Iraq.

4.1.1. The Purpose of the Transplantation of the Foundation System

Article 51 of the amended Iraqi Civil Law No. 40 of 1951 defines a foundation as "a legal entity created by allocating property for an indefinite period for philanthropic, religious, scientific, technical, or sports activities without the intent of deriving material gain." This definition mirrors the definition found in

the Egyptian civil law Article 69 before its abolition and is quoted from Article 27 of the Belgian legislation issued in 1921 (Hill, 1988).

The late Munir al-Qadhi believed that the law does not provide a definition of something in its chapters unless its meaning is necessary, as meanings and definitions pertain to jurisprudence, not law (Stigall, 2004). The foundation system's significance in Iraqi civil law is crucial because it is a Western system, distant from the norms of Iraqi society, with which we were previously unfamiliar. This indicates that the Iraqi civil law vigorously sought to support the system of foundation because its authors believed it would significantly contribute to social development (Safa Kadem Ghazi, 2023).

Al-Qadhi states, "The concept of foundation is not recognized in our legal system and is not explored in Islamic law because it is replaced by the Alwaqf system, a comprehensive system that, if properly administered and protected from theft, could greatly disseminate knowledge throughout the nation." And it would significantly reduce the burden of poverty. The foundation system is well-known in the West, unlike the Alwaqf system. Nevertheless, the foundation method has provided remarkable services in Europe and America. Some foundations have elevated science to its peak, while artistic foundations, funded by generous individuals, have generated numerous religious, historical, geographical, and sports initiatives. These foundations have been entrusted to trustworthy individuals, resulting in valuable and beneficial outcomes. Therefore, the legislator will introduce this system in our land and encourage us to work with it, being generous to us as he did with others. He elaborated on the adoption process, explaining its establishment, conditions, provisions, and all other related aspects (Stigall, 2004). And he added in another place: The system of foundation is on which the essential part of progress in Western countries is based (Stigall, 2004).

Through this, it is clear that Al-Qadhi, as one of the prominent members of the Iraqi Civil Law Committee, believes that the purpose of establishing the foundation system is to reap its benefits, similar to practices in Western countries. Still, he recognizes the great importance of Alwaqf as a vital system in our present time. He made it clear that the impediment to reaping the yields of Alwaqf is its poor management and prevalence of theft. Therefore, the issue lies not in the Alwaqf system itself but in the inadequacy of its management. Therefore, he and his comrades in the Iraqi Civil Law Committee should have addressed these obstacles. Importing the foundation system as an alternative to the Alwaqf system would not solve the problem without addressing the impediments to harvesting the yields of Awqaf. The Awqaf system is one of the ancient Islamic systems and was the primary basis for financing many social and economic requirements that are now managed by public departments and sectors, such as education and health. Unfortunately, the remnants of its vast properties, including lands, orchards, and buildings, still

bear witness to that, despite all that it has been subjected to - narrowing, marginalization, and sometimes looting (Huq & Khan, 2017).

However, in the first half of the twentieth century, many economic objections were raised to the atomic Waqf system, almost wiping out the charitable Waqf (Huq & Khan, 2017). The idea of importing the Western foundation system was conceived as an alternative to the Alwaqf system, as well as for administrative and political reasons. The state worked to liquidate Alwaqf to extend its central control, but it did not allow the existence of a social or organizational entity independent of it. So, it spread cultural and institutional Westernization and supported it, finding the appropriate cultural and organizational formulation to establish the state's control and comprehensiveness (Tawfiq, 1998). Thus, a paradox emerged between the decentralization of Alwaqf and the centralization of the state. However, the competition was unequal between the traditional inherited Waqf system and the modern incoming foundation (Tawfiq, 1998).

In this charged atmosphere against the Alwaqf system, there was a need for legislative support to weaken and marginalize it from economic, administrative, and political perspectives. Al-Sanhūrī argued that the Alwaqf system often becomes limited to serving the original purposes of the foundation. He highlighted that the system lacks flexibility and does not allow for the establishment of hospitals, shelters, institutes, and other organizations that could be accommodated by a more flexible foundation system (Abdulkareem, 2023). The reasons for the Iraqi civil law regulation, prepared by Al-Sanhūrī, pointed out that the foundation is a new system introduced into the project. It exempts Alwaqf in many cases and prioritizes serving the purposes for which it was established to achieve (Stigall, 2009). This statement favors the foundation system over the Alwaqf system.

It can be said that the most prominent aspects of flexibility in the foundation system, which Al-Sanhūrī referred to when comparing it with the Alwaqf system, are what were stipulated in the Iraqi Civil Law in the following articles:

Article 53/1 states, "The creation of a foundation shall, with respect to the founder's creditors and heirs, be considered as a grant or a will."

Article 54 states, "Where an authenticated deed has established the foundation, the creator may revoke it by another authenticated deed until its registration is completed in the Court of First Instance." This provision was originally from Article 72 of the Egyptian Civil Law before its repeal and was adopted from Article 15 of the new Italian law.

Article 59: "The Court of First Instance within the jurisdiction of which the seat of the foundation lies may order the following proceedings if the Control Authority has filed an application in the form of an action:

a) Dismissal of managers who have been proven to be negligent or who have failed to perform their duties, and who have failed to fulfill the obligations imposed by the law or by the constitution of the foundation, as well as those who utilize the assets of the foundation in ways that are incompatible with the objectives or intentions of the founder of the foundation, and those who have committed gross misconduct in the performance of their duties;
b) Amending the management system of the foundation or reducing or changing the stipulations prescribed in the incorporation deed of the foundation where it is necessary to safeguard the assets of the foundation or to achieve the purpose for which the foundation was created;
c) The abolition of a foundation if it has reached a state where achieving the purpose for which it was created is impossible, or where the realization of such purpose has become incompatible with the law, public order, or morality;
d) Cancellation of the business conducted by managers beyond their authority (ultra vires) or in violation of the law or the foundation's constitution may be initiated within two years from the contested action. However, the cancellation cannot be pursued against a bona fide party who has acquired rights based on such actions. Works carried out by the managers violate the limits of their competence or contravene the provisions of the law or the foundation's system. In this case, the action for cancellation must be filed within two years from the date of the contested work, and the action for cancellation may not be brought against a bona fide third party who has gained rights based on that work.

This flexibility in the Western foundation system does not exist in the Islamic Waqf system. Thus, for example, Sayyid Abd Al-Ala al-Sabzwari, one of the religious authorities and references (Marja') of the Imami doctrine, states: "When Alwaqf is made, it becomes necessary. Alwaqf's originator may not cancel it, even if it falls into a death's illness, and the heirs are not allowed to cancel it, even if it exceeds one-third. It is not permissible for Alwaqf's originator or for others to change and replace the beneficiaries from Alwaqf by transferring it from them to others, removing some of them from it, and bringing in a foreigner with them if this is not conditioned. If that is prepared, it is correct" (Rezwani), and many contemporary Imami jurists agreed on that.

We support the jurists' view of the Imami doctrine. However, we find that the foundation system's flexibility may lead to the manipulation of its funds and subsequent theft when the opportune moment arises.

4.1.2. Reasons for Unsuccessful Transplantation for the Foundation System

The main reason for the failure to implant the foundation system in Iraqi civil law is the existence of the Islamic Waqf system, which has been present for

centuries in Iraq. The foundation system closely resembles the Waqf system in many of its aspects.

However, we argue that there are significant differences between the Alwaqf system and the foundation system, the most important of which are:

1. Alwaqf deals only with immovable property, not with movable property, except in a particular form, which is to be immovable by allocation. At the same time, the foundation consists of all properties, whether immovable or movable, cash or non-cash. This difference is inaccurate, as the majority of jurists from the schools of Islamic jurisprudence, except for the Hanafi school, agree on the permissibility of making movable property as Waqf, whether Alwaqf was independent or dependent on the immovable property (Nyazee, 2019). Not only that, but even cash flow is permissible in Islamic jurisprudence to be Waqf.
2. The purpose of Alwaqf is to have a payee, whether it is a legal or natural person. For example, in the atomic Waqf, the payee is the offspring and their descendants, and in the charitable Waqf, it includes pilgrims, individuals with low incomes, and others. At the same time, there is no such condition in the funding system because it may be intended for specific purposes, such as scientific research, and not for the recipients carrying out these purposes (such as researchers). This statement is incorrect because Alwaqf can be established for scientific research purposes (Islahi, 2004). In addition, as part of the charitable Waqf, the payee person does not need to be a natural or legal entity, and typically, a natural or legal person manages the Scientific Research Department.
3. The founder of a foundation may be a natural or legal person. However, in Alwaqf, it is only permissible if the founder is a natural person who owns the property and is also eligible for the donation. Alwaqf is only made in the form specified by Sharia, and Sharia jurists believe that the formula must meet several conditions, one of which is that it should be verbal. In contrast, a written request is required to establish the foundation, not the pronunciation of that request. According to the provision of paragraph (1) of Article 55 of the Iraqi Civil Law, "The registration of the foundation shall be effected upon application being filed by the founder, the first manager, or the authority concerned with the Control of Foundation." This distinction is inaccurate as Islamic jurisprudence acknowledges the legal personality's existence, even if it is not explicitly named (Gandomkar, Salehimazandarani, & Hamidi, 2021). Nothing impedes the legal entity from establishing Alwaqf because the legal entity also owns the property. If we agree that there is such a problem, the pronunciation question can be resolved by consulting the legal person's representative.
4. Formalism is an essential condition for establishing a foundation. According to Article 52/1 of the Iraqi Civil Law, "The creation of a

foundation shall be by an authenticated deed or by will." Additionally, it should be registered with the Court of First Instance, as stated in Article 54, which mentions, "When an authenticated deed has created the foundation, the person who has created it may revoke the creation thereof by another authenticated deed up to the time of completion of its registration in the Court of First Instance." In contrast, Alwaqf can be established outside the court and can be proven by all means of proof; not being registered does not affect its legal position. This difference favors the Alwaqf system due to the formality and bureaucracy involved in preparing and registering the official document in the Court of First Instance. The informality of Alwaqf reduces the bureaucratic hurdles associated with establishing new foundations, unlike in Islamic Waqf, which can be established quickly. Staying away from formality is one of the characteristics of tolerant Islamic Sharia.

5. Alwaqf is valid from the moment of uttering the form that created it, while in the foundation system, the date of its appearance and acquisition of the status of a legal person is the moment of its registration. Also, this difference favors Alwaqf because the time allotted to harvest the yields will be increased in the Alwaqf system, and it is a marginal secondary difference.
6. It is not permissible to withdraw from Alwaqf because the property comes from the originator's hand. Therefore, it cannot be reclaimed even by those who inherit the originator of Alwaqf. In contrast, in the case of a foundation, the creditors of the originator or his heirs may demand according to the general rules, as well as the possibility of filing a lawsuit if it was established to harm the creditors following the provision of Article 53 of the Iraqi Civil Law, which states: "1- The creation of a foundation shall, with respect to the founder's creditors and heirs, be deemed a grant or will (testament). Where the foundation has been established to the detriment of the rights (interests) of the creditors' heirs, they may initiate the proceedings specified in the law regarding grants and wills.

Yes, this is the essential difference between the Alwaqf and foundation systems. In the previous section, we discussed how to establish the foundation's system while considering its flexibility. We find that this difference is also in the interest of the Alwaqf system because the Alwaqf system has been subjected to corrupt misuse, even with its restrictions and conditions. So, if we eliminate these restrictions and conditions in the foundation system, it would be much easier to manipulate them.

After reviewing the alleged differences between Alwaqf and the foundation system, we found that some of these differences are not significant, and some are not essential. Therefore, they do not impact the essence of the foundation system, which is essentially another form of the Alwaqf system with some

modifications. Therefore, the foundation was not a substitute for the Islamic Waqf.

Another factor contributing to the failure of implanting the foundation system in Iraqi civil law is the religious factor. For true believers, those who perform good deeds, and those who are religiously observant, the foundation system is a sophisticated Western system that does not fulfill their goals in the afterlife, unlike the religious Waqf system, which brings happiness in both this world and the afterlife.

4.1.3. The Future of the Foundation System in Iraq

As a result of the preceding information, we can comprehend the statement made by one of the judges who specializes in the registration of foundations in the Court of First Instance, indicating that there is only a small number of foundations in Iraq, which is nearly non-existent (Safa Kadem Ghazi, 2023).

Therefore, we expect the foundation system to be abolished when a new Iraqi civil law is enacted. This was achieved in the Iraqi Civil Law of 1986 draft, which canceled the articles related to the foundation. Also, the foundation was not considered a legal entity, as stated in Article 79 of the draft, which specifies: "Legal entities include:

First, the state.

Second, state bodies granted legal personality independent of the state, such as ministries, governorates, the capital secretariat, and municipalities, are established by law.

Third, Alwaqf.

Fourth, every group of individuals or funds granted legal personality by law, such as institutions of the socialist sector, unions, cooperatives, federations, universities, companies, and associations."

We recommend that the Iraqi legislature, at least at this stage, amend the civil law by removing the articles related to the foundation system, specifically articles 51-60, and replace them with the organization of Alwaqf by structuring its main components according to the established opinion in Islamic jurisprudence. The legislator can adopt the necessary stance by reverting to our legal heritage and codifying the Waqf according to Islamic jurisprudence, which has endured for centuries and demonstrated its effectiveness in diverse areas.

4.2. Transplanting the Consensual Subrogation System in Iraqi Civil Law

The Iraqi civil law presented the consensual subrogation system from Article (380) to Article (382), which dealt with consensual fulfillment methods, procedures, and content. We will discuss three points in this regard: the purpose of implanting the consensual subrogation system, the reasons for the

failure of its implantation, and finally, the future of the consensual subrogation system in Iraq, as follows:

4.2.1. The Purpose of the Transplantation of the Consensual Subrogation System

Article 380 of the Iraqi Civil Law states:

1. For the creditor who has received his right from someone other than the debtor, an agreement with such a third party subrogates his rights, even if the debtor does not agree to such subrogation. The agreement must be documented in a formal paper, dated no later than the time of the discharge.
2. The debtor who has borrowed money to discharge a debt may subrogate the lender into the rights of the creditor who has received his right, even without the consent of the creditor, provided that the agreement to subrogate was formalized in writing. Additionally, the debtor must specify in the loan contract that the borrowed money was intended for the discharge, and in the quit-claim, acknowledge that the discharge was facilitated by the money borrowed from the new creditor.

Consensual subrogation is a legal system in which the payer can subrogate the creditor in their debt, guarantees, and defenses, as outlined in Article 381: "He who is subrogated in law or by an agreement into the rights of the creditor is endowed with the creditor's rights concerning attributes, accessories, securities, and defenses related to the said right…"

There are two ways of consensual subrogation: the agreement between the creditor and the payer or the agreement between the debtor and the payer. In the case of a contract between the payer and the creditor, the debtor's consent is not required. This is because the debtor benefits from this fulfillment; his debt expires, he gets rid of the creditor's claim, and it is more likely that the new creditor will be more lenient and quicker to facilitate the payment of his debt. Otherwise, he would not have volunteered to pay the debt, as he serves the debtor by settling his debt and allowing him time to repay it in the future (Ali, 2023).

The purpose of consensual implant subrogation in Iraqi civil law, even though it is a legal system derived from Roman law (Gandomkar et al., 2021), as an independent system separate from the right of transfer, is an economic rationale. In the right transfer system, the speculator aims to profit from the variance between the actual value of the debt and the price paid to the creditor. Therefore, the right transfer often involves a debt that was not yet due for payment. In contrast, consensual substitution is a service and an aid, whether for the creditor who exercises their right or the debtor who gains more time for fulfillment. The consensual substitution occurs only when the debt is due or

after that, and it only applies to current debt. In contrast, the transfer of rights pertains to both existing and deferred debts (Sewilam, 2011).

4.2.2. Reasons for Unsuccessful Transplantation of the Consensual Subrogation System

The main reason for the failure of the consensual subrogation system in Iraqi civil law was the existence of the right transfer system in Iraqi civil law, which is almost similar to the consensual subrogation system. Therefore, the mentioned differences do not distinguish them as two separate methods. Instead, they are secondary differences that do not affect the reality and essence of the rights transfer system. Therefore, the consensual subrogation system is one of the applications of the rights transfer system.

To prove this, we will review the most prominent differences mentioned by the author of the Iraqi civil law, Al-Sanhūrī (Ali, 2023), and then we will discuss their impact on changing the nature of the rights transfer system, as follows:

A. Difference in Practical Purposes

Al-Sanhūrī believes that subrogation fulfillment has been legislated to facilitate the debtor because the payer is usually a friend of the debtor. He pays his debt to save himself from the urgent demands of the creditor, then he is kind to him, so he does not return to him except when it is easy to fulfill. He replaces the creditor in his rights, guarantees, and accessories, but only for what he has paid, as stated in Article 381 of the Iraqi civil law: "...and this subrogation shall be to the extent of that which the subrogee creditor had paid." This act of fulfillment is his obligation (Aidaros, 2022). Unlike the right's transfer system, when a third party purchases the right, it typically does so for less than its value. This could be due to the fact that the time for fulfillment has not yet arrived or because of the challenges associated with completing the right. The third party then returns the debtor the total value of the request, according to Article 365 of the Iraqi Civil Code: “The right is transmitted to the assignee together with its attributes and warranties such as suretyship, privilege, and mortgage. The assignment is deemed to cover the interests and installments which had fallen due.” He is a speculator. He makes a deal to earn from it.

We find that this difference does not change the nature of the right's transfer system. We can categorize the transferee into two types: either they are a speculator, in which case they will return to the debtor with the entire debt, or they are not a speculator but a friend and benefactor to the debtor, in which case they will return with what they have paid. Therefore, this difference in the provisions of the transfer of the right, due to the difference of the transferee, does not expose us to two legal systems. We have only one legal approach.

We can compare that with the donation contract, where different types of items will be gifted to them. The gift provisions differ accordingly. For

example, Article 623/e of the Iraqi Civil Law addresses one of the obstacles to revoking a gift: "The gift must be given to close relatives or next of kin." However, if the recipient is a foreigner in relation to the donor, it is allowed to revoke the gift. Nevertheless, this distinction in the gift regulations does not alter the essence of the agreement.

Then, Al-Sanhūrī adds, "Although the payer, in the consensual subrogation, may also want to invest his money, he does the two things together: renders a service and invests money." So, the practical purposes converge between fulfillment through substitution and the transfer of rights. In this case, it causes the two systems to blend with each other.

The payer benefits from the interests and guarantees that the creditor was benefiting from. It rarely happens that a person who is a stranger to debt pays without achieving a definite benefit for himself. Thus, consensual subrogation approaches the concept of speculation, thereby eliminating the apparent difference with the right's transfer. It looks like jurists invented this idea as an appealing interpretation of the consensual subrogation system.

This is a recognition from Al-Sanhūrī that consensual subrogation and the right to transfer are integral parts of the legal system. In a specific scenario, such as when the payer invests their money, they can benefit from this presumption to expand the union, making consensual subrogation simply an application of the right's transfer system.

B. Differences in the Conditions of Formation

Al-Sanhūrī argues that the creditor's consent is necessary for the transfer of rights. According to Article 362 of the Iraqi civil law, "The creditor may assign whatever right is owing to him from his debtor." In consensual subrogation, the transfer is completed with the creditor's consent if they agree with the payer, as stated in Article 380/1: "For the creditor who has received his right from someone other than the debtor, an agreement with such a third party subrogates him." Still, it may also be done without the creditor's consent if the payer agrees with the debtor, according to Article 380/2 of the Iraqi civil law, which states: "The debtor who has borrowed money by which he discharged the debt may subrogate the lender into the rights of the creditor who has received his right even without the consent of said creditor...".

In Article 380/2, it is explained why the creditor's consent is unnecessary when an agreement is made between the payer and the debtor. This article asserts that the debtor himself paid the debt to the creditor, not the lender. Therefore, we have a natural obligation from a debtor to his creditor, so the creditor has no right to object to this obligation. The creditor is not harmed by the replacement of the payer with another individual in the debt guarantees to facilitate obtaining the loan. The creditor does not have the right to accept the

fulfillment and then object to giving his place to the lender because this replacement is interconnected with his acceptance of the fulfillment.

Even if the creditor refuses to fulfill their obligation for any reason, the lender and the debtor have legal recourse to compel the creditor to do so by presenting a valid offer and making a deposit. Hence, what the creditor refused to do has been accomplished. If the creditor accepts the offer, the subrogation is complete; if he rejects the offer, the money will be deposited into his account. It is determined that the deposit is valid, so the subrogation is also complete.

There is a historical origin for not needing the creditor's consent, dating back to 1609 when the interest rate was high due to the unrest in France caused by the religious wars at that time. When the situation calmed down, the interest rate fell. The debtors wanted to pay off their debts and borrow at a low interest rate, but the old creditors preferred to maintain their debts to generate high interest. Therefore, they refused to fulfill it. Henry IV issued a decree stating that subrogation could be obtained through an agreement between the debtor and the payer without the creditor's consent (Al Kassir, 2021). The real reason for distinguishing between the right's transfer and consensual subrogation is the necessity to transfer the creditor's rights to the payer, even in the face of the creditor's opposition. Consensual subrogation has emerged as a valuable and flexible system for achieving this goal.

This historical event is not a genuine reason for the invention of a new legal system but rather an application of the general rules, as the creditor does not have the right to refuse fulfillment. If he refuses, we have the offer, and a deposit is an alternative to his refusal.

C. Differences in the Conditions of Effectiveness

The effectiveness of transferring rights to the debtor and third parties is achieved through the debtor's consent or notification of the assignment. The absence of any need for any action for the effects of consensual subrogation is genuine in Egyptian civil law. Article 327 states: “The creditor who receives his right from a non-debtor may agree with this third party to replace him, even if the debtor did not accept that, and it is not valid for this agreement to be delayed from the time of payment.” However, in Iraqi civil law, Article 380 stipulates that the agreement must be documented on an official paper, whether the deal is between the creditor and the payer or between the debtor and the lender. The Egyptian civil law draft also requires an official document, but the audit committee removed this requirement. Indeed, this official document will inform the debtor and others, similar to a rights transfer, whether the subrogation agreement is between the creditor and the payer. Thus, the distinction between the right transfer system and subrogation does not exist in Iraqi civil law.

D. The Differences in Terms of Effects

Al-Sanhūrī mentions that the transfer of rights involves one claim: the subrogation lawsuit, which is the lawsuit for the right being transferred. In consensual subrogation, the payee faces two lawsuits: one related to subrogation rights transfer and another stemming from the fulfillment of the agreement. The source of the latter can be traced back to agency (Negotiorum gestio) or unjust enrichment.

This discrepancy is inaccurate, as the consensual substitution does not involve any personal legal action. There is only one claim, the subrogation lawsuit, regarding the transfer of rights. Although this conclusion contradicts the views of civil law jurists in Iraq and Egypt regarding the existence of a personal lawsuit in consensual subrogation (Khubyari & Tabatabae, 2021), it is supported by legal evidence.

If the fulfillment is by someone other than the debtor, we ask about the reason that prompted him to do so. If he were an agent on the debtor's behalf, he would revert to him according to the agency contract terms between them. If the characteristics of curious fulfillment were fulfilled, he would return to him with the content of the interested agreement. For example, if he erred in fulfillment, he would return to him by enrichment without cause, i.e., under the terms of tort liability and not the contractual liability. These are the most prominent parts of the personal lawsuit.

On the other hand, suppose the payer is an agent of the debtor in fulfillment. In that case, the payer is not entitled to refer to him according to the curious contract (Negotiorum gestio) or tort responsibility. Also, if the conditions of tort liability are met, he is not entitled to return through contractual liability.

Now, we come to the consensual subrogation. We know the fulfillment is definite, as there is no consensual solution without the actual fulfillment. This is what Article 380/1 stipulates: (the creditor who has received his right...), and Article 380/2: (the debtor who has borrowed money by which he discharged the debt...) whether this fulfillment is a separate incident or a transplantation of the consensual subrogation.

To answer that, we find that the subrogation agreement has three times: either it is before the fulfillment, contemporary to the fulfillment, or after it. If the subrogation agreement is before the fulfillment, there is no objection that the subrogation agreement is before the fulfillment. In that case, the fulfillment is in implementing the subrogation agreement. With it, the payer returns the claim of substitution only. As mentioned above, it is not valid for him to refer back to the personal lawsuit from the agent's invalidity to return through enrichment without reason. If the subrogation agreement is contemporary with the fulfillment, both take place simultaneously; then the fulfillment shall be implemented in the substitution agreement, too. The payer shall return under

the substitution lawsuit only. But, yes, if the substitution agreement is after the fulfillment, i.e., the fulfillment is an independent event, and the substitution agreement comes after, the payer has the right to return according to the personal lawsuit. He also has the right to recourse to the subrogation lawsuit because of the subsequent agreement on subrogation.

Now, we come to consensual subrogation. We know the fulfillment is definite, as there is no consensual solution without the actual fulfillment. This is what Article 380/1 stipulates: (the creditor who has received his right...), and Article 380/2: (the debtor who has borrowed money by which he discharged the debt...), whether this fulfillment is a separate incident or a transplantation of the consensual subrogation.

To answer that, we find that the subrogation agreement has three times: either it is before the fulfillment, contemporary to the fulfillment, or after it. If the subrogation agreement is before fulfillment, there is no objection that the subrogation agreement is before fulfillment. In that case, the fulfillment is in implementing the subrogation agreement. With it, the payer returns the claim of substitution only. As mentioned above, it is not valid for him to refer back to the personal lawsuit from the agent's invalidity to return through enrichment without reason. If the subrogation agreement is contemporary with the fulfillment, both take place simultaneously; then the fulfillment shall be implemented in the substitution agreement, too. The payer shall return under the substitution lawsuit only. But, yes, if the substitution agreement is after the fulfillment, i.e., the fulfillment is an independent event, and the substitution agreement comes after, the payer has the right to return according to the person.

So, in the third case only, the payer in the consensual subrogation has two personal and subrogation lawsuits. Still, this case is prohibited by the text of the article 380/1 from the Iraqi civil law, which states: (... The agreement must be by a formal paper the date of which must not be later than the time of the discharge," and article 327 from the Egyptian civil law, in which it is stated: (... and it is not valid for this agreement to be later than the time for fulfillment), so there is no personal lawsuit in the agreement solution. Therefore, we conclude that there is no difference between the consensual subrogation and the right's transfer regarding the lawsuit against the debtor.

Now that it has become clear that the fundamental differences did not stand the test of analysis and discussion, it is unnecessary to discuss the secondary differences in terms of the effects mentioned by Al-Sanhūrī, such as the guarantee and partial fulfillment.

4.2.3. The Future of the Consensual Subrogation System in Iraq

Through our work in Iraqi civil law for nearly two decades, we have not encountered a single practical contract in the consensual subrogation system,

and we have not heard of anyone dealing with this legal frame. Therefore, we confirm that consensual subrogation in Iraqi civil law is just ink on paper. It has nothing to do with practicality. Also, Islamic jurisprudence was satisfied with organizing the transfer system, which includes the consensual subrogation system (Joppke & Torpey, 2013), so Islamic jurisprudence did not know the consensual subrogation system. Therefore, the theory of fulfillment with subrogation has no basis in Islamic jurisprudence. Also, most of the jurists of the eighteenth century in Europe did not differentiate between the transfer and subrogation systems. They see a single legal system in them. The Swiss legislator, for example, did not know the consensual subrogation between the creditor and the payer. Instead, he refers to the right's transfer because it serves the same purpose. As for the fact that the transferee is a speculator and that the payer provides a service to the debtor, there is no objection to the transferor performing the service to the payer in the proper transfer. The Jordanian legislator did not regulate the consensual subrogation system at all.

From all of the preceding, we recommend that the Iraqi legislator delete the articles related to consensual solutions, Articles (380, 381, and 382). Thus, this will reduce the inflation of legal texts or their negative exacerbation (Al-Hadeethi, 2021), which is a defect that Iraqi civil law suffers significantly from.

Conclusion

1. The anti-transplantation doctrine of comparative law concerning legal transplantation is divided into two currents: that of the culturalists, who argue that one cannot or must not detach the rule from its cultural context, and that of the rationalists, who argue that one cannot incorporate a foreign rule into a legal system without upsetting the internal balance of the latter.
2. Iraqi Civil Law No. 40 of 1951 suffers from the flaw of unsuccessful legal transplantation. We reviewed two models to prove this: the foundation system and the consensual subrogation system.
3. The main reason for the lack of success of legal transplantation in Iraqi civil laws is the originality and comprehensiveness of Islamic jurisprudence. This can be sufficient in developing a new Iraqi civil law through the codification of Islamic jurisprudence. Thus, we will return to our original legal status.

Recommendations

1. We recommend that the Iraqi legislature revise Iraqi civil law, specifically addressing the issue of unsuccessful legal transplantation. This can be achieved by thoroughly examining all its applications and subsequently removing the articles associated with them.
2. Amending the curricula of law faculties in Iraq by introducing Islamic jurisprudence and not being limited to curricula imported from the West to

prepare a new legal generation aware of the importance of its legal heritage that was born and developed on its land.

Finally, praise be to ALLAH, the Lord of the worlds.

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