LECTURE HANDOUT # 18

Excerpts from:

Post-Construction Liabilities for Latent Defects in Building and Construction Contracts:
The Theoretical Foundations and the Allocation of Risk
(A Comparative Study in Kuwaiti, French, and English Law)

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1.1 Research Methodology

This section sketches the methodology followed throughout the present thesis (the term ‘methodology’ denotes a body of practices, procedures, or rules used to engage in an enquiry). It is thought that comparative methodology conducted between conceptually divergent legal systems; being the Kuwaiti, French, and English law, is the most suitable for the nature of the research.

Within this context, an attempt is made to combine the two paths that Rubin ascribes to legal scholarship; being the ‘descriptive’ and the ‘prescriptive’ approaches. Accordingly, while comparative law is necessarily descriptive, because it derives much of its value from the accurate presentation of contrasting legal rules, the ultimate purpose of the current study is not to describe the existing state of the law, but rather to frame workable recommendations for the law’s improvement, based upon specific norms.

1.1.1 Systems under Review

Attention is drawn at the outset that the axis of this investigation is Kuwaiti law. The overall comparative treatment is therefore conducted with the Kuwaiti law being the focal legal system against which other systems were considered. No apology is therefore required for the basically civiliste orientation of this thesis.

The fact that this study is conducted by a Kuwaiti researcher investigating her own legal system might, to a certain extent, be an advantageous point of departure for a comparative research. According to Schutz, this ‘internal perspective’ allows the observer to actively participate in the social practice being studied, thus providing a separate mode of understanding that cannot be duplicated by external observation.

Given that the CCF and the Egyptian Civil Code (the “ECC”) represent the KCC’s historical source, these systems will be examined with view to highlight shortcomings of their Kuwaiti counterpart in the domain of risk and liability associated with post-construction defects.

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English law’s position is introduced in this study as an attempt to investigate a conceptually different treatment to this problem. The manner in which civil law and common law are compared is through selecting certain issues and comparing their treatment in the systems under review.

It is submitted that these systems are different in terms of both philosophy and application. Therefore, as no attempt could have been successfully made to adopt a uniform pattern that was to be rigidly preserved throughout the work. Predominance had to be given to the Kuwaiti system in which this study expresses a greater interest.

1.1.2 Principal Methodological Hypothesis

The relation between legal transplant and comparative law cannot be overemphasised. This is particularly true in Kuwait’s case, where the legal mind was set on finding a single foreign institution that could easily be copied as a general whole. Thus, the KCC’s forerunner was transplanted in 1960 after its Egyptian counterpart, which, in its turn, was copied en masse after the Code Civil Français. This French-based law now operates, in addition to Sharia law, under the denomination Kuwaiti Civil Code. This code is therefore conceived as a ‘melting pot’.

Kuwait is not unique in adopting such a hybrid legal system; this is also the position of many Arab civil codes. Mallat correctly notices that “[i]n the contemporary civil law of obligations, a ‘Middle Eastern style’ could perhaps be identified as a patchwork of European and local traditions with a language and a terminology sometimes derived from classical Islamic law, Fiqh”.

Indeed, codes of most Arab states are based upon a synthesis of Islamic and modern European legal principles.

Kuwait provides an excellent example of the intersection of the reception of foreign laws by way of legal transplant with the construction of new legal systems and the transformation of societies. Hence, the central hypothesis that this study adheres to in terms of methodology is that examination of French and English law (and, on a limited scale, Egyptian law) will reveal many of the concepts that underlie the approach adopted in the KCC with respect to post-construction liability and risk. Accordingly, there will be

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instances in which each legal system, or a pair of them, may be separately treated and/or compared, and other instances where all of them are concurrently stated and compared.

1.1.3 The Comparative Method

1.1.3.1 What is Comparative Law?

Comparative law is defined as the field of study devoted to the systematic comparison of legal systems, through the delineation of a fund of ideas common to them.\(^4\) Empirical usages of comparative law are evident in most, if not all, legal systems when lacunae occur in cases that are not plainly covered by legislation or binding judicial precedents. However, despite the vast corpus of writings on comparative law, this discipline still lacks a clearly formulated theoretical framework. It is widely accepted now that comparative law, while promoting greater insight into the national legal system through juxtaposition of different systems; allows for the evaluation of the relative efficiency of legal institutions within the national system, and contributes to the better understanding of other foreign systems of law embraced in the research.

1.1.3.2 Kamba’s Technique of Legal Comparison

Unlike conventional legal research, which is normally distinguished with defined methodologies, very little systematic writings are dedicated to comparative law methods. To overcome these methodological difficulties, Kamba suggests an objective practical comparative technique. He advocates that there are three main stages involved in comparative research,\(^5\) these being:

(1) The ‘descriptive phase’ which involves a description of the norms, concepts and institutions of the system under comparison, in addition to an examination of the socio-economic problems and the different available legal solutions;

(2) The ‘identification phase’ which is concerned with the identification of aspects of differences and similarities between the systems under comparison; and

(3) The ‘explanatory phase’ in which all divergences and resemblances are accounted for.


\(^5\) Kamba, ibid, 512-518.
Kamba clearly states, however, that these stages overlap by their nature and that distinct separation between them is not always attainable, nor are they always dealt with in the sequential order. He also conceives that proper execution of these stages is greatly influenced by the comparatist’s jurisprudential outlook; the social context of the legal systems under comparison; and the legal context of the legal topics being compared. These stages are followed throughout the present thesis.

1.1.3.3 The ‘Functionalist’ Comparison

It is essential that the topics selected for comparison be comparable per se, in that they must relate to equivalent institutions or functions. The tertium comparationis that is believed to permit comparison is ‘functionality’, so what is required is to look for the ‘functional equivalents’ of legal terms and concepts. This argument is strongly support by Zweigert and Kötz, who subscribe to the view that “[i]ncomparables cannot be compared, and in law the only things which are comparable are those which fulfil the same function”. Admittedly though, adhering to this approach often proves to be ‘enormously difficult’ in terms of finding the equivalent functions.

Adopting this functionalist approach, the present study attempts to identify legal institutions that perform similar functions in the systems under comparison (eg the civil law’s contract for the hire of work and skill and the English law’s contract for the supply of goods and services), and to isolate them from similar and overlapping institutions under the respective systems (eg the contract of sale and the contract for the provision of services). The ultimate goal is to analyse and evaluate the mechanism by which these functions are performed under the systems compared.

1.1.4 Other Combined Methods

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6 Ibid, pp. 512-518.

7 See: Marie-Laure Izorche, ‘Propositions Méthodologiques pour la Comparaison’, RIDC, no. 2 (April-June 2001), 292, where she posits that “L’adjectif comparable signifie ici qu’il faut que les deux objets soient suffisamment proches, mais suffisamment distincts pour que la comparaison soit utile”.

8 Zweigert and Kötz, Introduction, p. 34.

9 Kamba, ‘Comparative Law’, pp. 517.
According to Allison et al., “research projects are usually characterised by the principal research method used and it is accepted that other methods are employed as appropriate”. Thus, in addition to the comparative method which is the main form of inquiry, three areas will need slightly different methodological treatments:

(1) In expounding and analysing the existing legal principles under the laws of Kuwait, France and England, the research will be conducted according to the qualitative (contextual) principles of analytical methodology. Documentation -mainly statutes and case law, including computer databases, eg LEXIS/NEXIS, West Law, and Internet resources—will be accessed and contextually analysed to ascertain the main theoretical bases of the law in general, and construction contracts in particular.

(2) In extracting, formulating and representing the rules regulating the problem under investigation, the methodology will be deductive. Accordingly, first a thorough examination of these rules will be carried out. Secondly, their application will be inspected.

(3) To fill the information gap attributed to the lack of literature and documented material, interviews were used—with a degree of dexterity and care-as a secondary source of data, mainly to generate information about working practices in the Kuwaiti construction industry. The question format adopted for the purpose of this thesis was the ‘totally unstructured interview’. This approach to interviews allows the respondent freedom of expression, yet still produced data that the researcher considered essential. Information gathered from the interviewees was being checked.

1.1.5 Lingual and Etymological Perspectives

1.1.5.1 Translation

Legal translation is fraught with linguistic traps and is therefore a prolific source of confusion in comparative research. It is therefore a well-known rhetorical technique of

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11 For more, see: Amin, Research Methods in Law, pp. 112-113.

12 Attention is drawn, however to that websites on the internet as very volatile; both their contents and their existence may change at any given time.

modern jurisprudence to apologise for the inadequacy of any translation. For the purpose of the present thesis, the languages covered are necessarily Arabic, French and English. The French and English ways of analysing and framing a legal concept are significantly different, and the Arabic way is at variance totally with that of the English and partially with that of French. As a result, it is not sufficient to simply render a passage from Arabic or French into English to conduct a proper comparative study. Unfortunately though, no theory of translation is developed as yet to allow the comparatist to surmount the intricate entanglement of law and language.  

Amongst the very few attempts to introduce workable translation solutions was the two-stage technique presented by Schlesinger et al, where they suggest that accurate legal translation could be produced by following two steps (a) establishing the literal, non-technical meaning of each term; and then (b) showing a different technical meaning as evidenced by cases, commentaries, textbooks, or any other embodiments of foreign law. Indeed, a comparatist has to perform a very delicate balancing act when translating foreign legal material, especially in the delicate area of construction contracts, where the utmost of care should be exercised when translating terms of legal/technical character, eg 'handover'.

Some of the main linguistic traps that the present researcher has encountered during the preparation of this thesis were the following (1) Although apparently identical, certain terms in common law parlance may have different denotations from that in their civil law counterpart, eg the term ‘specific performance’. It suffices to emphasise here that the chosen English term will be used with regard to civil law in a functional sense, ie it will be applied to institutions that fulfil a similar function. (2) In certain cases, a concept found in one legal tradition may have no corresponding concept in the other, eg the English law’s collateral warranties. Generally speaking, the approach adopted in the present work has been to stand as close to original texts as possible, through using the closest functional analogue to the legal term employed.


1.1.5.2 Etymology

There are endless problems of vocabulary when one writes in one language about a legal system whose rules and practices are expressed in another. Moreover, Arab legal writings show some terminological anarchy as regards terms denoting parties and aspects of the construction industry. These terms are loosely defined, and are therefore commonly ascribed for more than one meaning, *eg* ‘architect’. Therefore, a list of definitions for selected key terms used throughout this thesis is appended *ante*,\(^{17}\) for which no special authority is claimed, but which is designed purely for the better understanding and interpretation of this thesis.

\(^{17}\) P. xxiv.