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Legal Cultures Dialogue: Benefits and Obstacles of Comparative Law Studies

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Legal Cultures Dialogue: Benefits and Obstacles of Comparative Law Studies

Cover Page Footnote

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**Legal Cultures Dialogue:
Benefits and Obstacles of Comparative Law
Studies**

Dr. Zaid Muhmoud Al-Aqaileh⁽¹⁾

Abstract:

Comparative law is not a body of rules or principles, but a method of study and research by which it becomes possible to make valuable observations, or comments that would not come to one, who confines his study to the law of a single legal system or the law of a single country.

Comparative law studies may not only furnish information about the various legal systems, or the laws in question, but also may provide, through the process of borrowing, popular solutions for many problems, or may help to avoid possible problems. They can make one aware of the fact that there is much to learn from the experience of other legal systems or legal cultures. In undertaking comparative law studies, however, the comparatist may encounter some problems.

This article investigates an important legal issue; the legal cultures dialogue. It seeks to shed light on the importance of comparative law in a globalizing and diverse world, and to show that it is currently possible for one legal system or one legal culture to be enriched by another legal system or another legal culture, and that legal cultural exchange may help to enhance mutual understanding between nations and provide solutions to many issues of common concern.

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Introduction

This article throws light on the legal cultures dialogue. It aims to contribute to the growing literature on the methodology and philosophy of comparative law, and to show that borrowing from other legal systems and modernization of Arab laws is currently possible, and it can provide solutions to some social and legal problems.

There is scarcity of written materials on this subject in Arabic libraries, whether in English or in Arabic⁽²⁾. The shortage in the studies that explain the idea of comparative law, its dimensions, and its uses and misuses, is exactly what makes this study of great importance at the present time. Also, it constitutes the motive for us to write about this topic.

This article is divided into three main parts: part one discusses the general concept of comparative law, part two considers the mechanism of undertaking comparative law studies, and part three discusses the process of borrowing from one legal system. The main conclusions and recommendations are stated at the end of the article.

1. The general concept of comparative law

Under this heading, we will define comparative law, evolution of legal systems, and modernization of Islamic legal systems: the case of Jordan.

1.1 Definition and importance

In its most simple sense, comparative law is an academic study that defines differences and similarities between two laws, or more, belonging to different legal systems⁽³⁾. It is a method of study and research that is concerned with the description and analysis of the contents of different legal systems in their

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- (2) See Al-Termanini Abdulsalam, 1982, *Comparative Law and Modern Legal Curriculums*, Second Edition, Kuwait: Kuwait University Press Publications, pp.23-24. In this book, the author referred to the difficulties he faced and, in particular, the general lack of references in comparative law.
- (3) Sacco R, 1991, 'Legal Formants: A Dynamic Approach to Comparative Law', *The American Journal of Comparative Law*, Vol.39, p.6; Kamba W.J, 1974, 'Comparative Law: A Theoretical Framework', *International and Comparative Law Quarterly*, July, Vol.23, p.486.

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answer to the solution of various legal problems. More precisely, it is a technique by which certain ends can be achieved by looking at the laws of various nations in comparison with one's own laws⁽⁴⁾.

Thus, one can argue that comparative law is a very important discipline in communication between legal systems and legal cultures. It can provide a platform for intellectual exchange in terms of law and can cultivate a culture of understanding in a diverse and globalizing world. Specifically, comparative law can help in broadening horizons for law reformers and legislators around the world, and can provide the basis for the production of bilingual dictionaries that include the information necessary to make legal communication across borders successful.

According to Levy Ullman, "comparative law is a branch of legal science, whose object it is to bring about systematically the establishment of closer relations between the legal institutions of different countries"⁽⁵⁾. Sir Henry Maine has expressed this idea as "the chief function of comparative jurisprudence is to facilitate legislation and the practical improvement of law"⁽⁶⁾.

It should be indicated that several disciplines are currently developed as separate branches of comparative law, including comparative constitutional law, comparative administrative law, comparative property law, comparative contract law, comparative commercial law, etc.

1.2 Evolution of legal systems

The legal system of a state is constituted by its laws, beliefs, legal convictions, traditions and customs and is closely connected to the social and

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- (4) Al-Termanini Abdulsalam, Op. Cit, p.18.
 - (5) As quoted by Gutteridge H.C, 1971, Comparative Law - An Introduction to the Comparative Legal Study and Research, Second Edition, London: Wildy & Sons Ltd, p.165.
 - (6) Sir Henry Maine, Ancient Law, Reprinted in 2006, London: John Murray Ltd, p.3. Also, see Al-Termanini Abdulsalam, Op. Cit, p.18.

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economic environment prevailing in the state⁽⁷⁾. The major legal systems in the world of today are the civil, common-law, socialist and Islamic legal system⁽⁸⁾.

The civil legal system is the oldest system in the world and the most influential on the other law systems⁽⁹⁾. It is the most widespread system of law around the world. It finds its roots in the Roman Law⁽¹⁰⁾, which was the product of a brilliant civilization extending from the Mediterranean to the North Sea and from Byzantium to Britannia⁽¹¹⁾. The civil legal system is characterized by the compilation of legal principles into scientifically arranged documents called codes⁽¹²⁾. In such a system, the role of the court is limited, theoretically at least, to apply the law as embodied in the codes whenever it is presented with a case by the opposing parties⁽¹³⁾.

The common-law system originated in England. It is largely case law or, more precisely, a judge-made law⁽¹⁴⁾. That is, the bulk of the common law and equity has not been enacted by the Parliament, but has it been developed

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- (7) Kamba W.J, 1974, Op. Cit, p.493; René D & Brierley J.E.C, 1990, Major Legal Systems in the World Today, Third Edition, London: Stevens & Sons, p.4.
 - (8) See René D & Brierley J.E.C, Op. Cit, p.27. We do not say the Arab legal system because there is no specific Arab legal system in the form of the civil, common or communist legal system. Until the Ottoman Empire era, Arab countries falling under the ottoman rule applied the ottoman civil law, which is derived from Islamic law, particularly from the Hanafi Doctrine (Mansour A, 2001, The General Theory of Obligations, First Edition, Amman: Dar Al-Thaqafah for Publishing and Distribution, p.11). Concerning other branches of law, these countries started at the beginning of the twentieth century to apply rules and principles imported from the West. In other words, Islamic legal system was partially replaced by foreign rules borrowed from the West.
 - (9) Merryman J.H, 1969, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America, California: Stanford University Press, p.1.
 - (10) See Dawoodi Gh, 2004, Introduction to the Science of Law, Seventh Edition, Amman: Dar Wael, p.96.
 - (11) René D & Brierley J.E.C, Op. Cit, p.42.
 - (12) Bermann G.A & Picard E, 2008, Introduction to French Law, Bedfordshire: Wolters Kluwer International, p.1 & p.36.
 - (13) Khateeb N, 1986, Terminology of Law, First Edition, Mu'tah: Mu'tah University Publications, p.2; Al-Termanini Abdulsalam, Op. Cit, pp.129-130.
 - (14) Dawoodi Gh, Op. Cit, p.143; Brown J, 1995, A Casebook on Landlord and Tenant Law, First Edition, London: Sweet & Maxwell, p.241.

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through the centuries by the judges applying established or customary rules of law to new situations and cases as they arise⁽¹⁵⁾. In this system, when a court has laid down a principle of law applicable to a certain state of facts, the inferior courts must adhere to that principle and apply it to future cases where the facts are substantially the same⁽¹⁶⁾. From the British Isles, where it originated, the common law system was transferred by British settlers to their settlements in the United States of America, Australia, Canada, India, Sri Lanka, Nigeria, South Africa, New Zealand, Hong Kong and Pakistan⁽¹⁷⁾.

A socialist system is exclusively based on the communist ideology, which affects its structure and organization and makes it totally different from the above systems⁽¹⁸⁾. This ideology is based on the theories of Karl Marx, who expressed this idea as:

“My investigation led to the result that legal relations as well as forms of the state are to be grasped neither from themselves nor from the so-called general development of the human mind, but rather have their roots in the material conditions of life ...”⁽¹⁹⁾.

An Islamic legal system derives its principles from the Quran⁽²⁰⁾ and Sunna⁽²¹⁾. It is not only a system of religious beliefs and practices, but also a system of law⁽²²⁾. Even though it is only binding for Muslims to its full extent in

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- (15) Khateeb N, Op. Cit, p.4; Al-Termanini Abdulsalam, Op. Cit, p.167.
 (16) René D, 1971, ‘The International Unification of Private Law’, International Encyclopedia of Comparative Law, Vol.2, Chapter 5, p.68; Khateeb N, Op. Cit, p.4.
 (17) Dawoodi Gh, Op. Cit, p.181; Kahn-Freund O, 1974, ‘On Uses and Misuses of Comparative Law’, Modern Law Review, January, 37(1), p.14; René & Brierley, Op. Cit, p.8.
 (18) The socialist system has been adopted by some countries of the world, particularly those of the former Soviet Union and those of Eastern Europe (Merryman J.H, Op. Cit, p.1).
 (19) Quoted by Knapp V, 1974, ‘Socialist Countries’, International Encyclopedia of Comparative Law, Vol.6, p.35.
 (20) Quran (the Noble Book) is the word of Allah. It was transmitted to Prophet Muhammad (peace be upon him) through the Angel Gubrai’l (peace be upon him).
 (21) Sunna is the narratives and reports of the deeds, sayings, and approvals of the Prophet Muhammad (peace be upon him).
 (22) Starr J, 1992, Law as Metaphor: from Islamic Courts to the Palace of Justice, New York: State University of New York Press, p.90.

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the territories of Islamic states, it is valid to govern the whole universe⁽²³⁾. Islamic law is called 'Shari'a', which is a derivative of an Arabic root word 'track', 'road' or 'path'⁽²⁴⁾ and means that this law constitutes a divinely ordained path of conduct that guides the Muslim towards the fulfilment of his, or her, religious conviction in the life and reward from his, or her, Creator in the life hereafter⁽²⁵⁾. The rules of Shari'a not only cover religious rhetoric worships and practices, e.g. prayer and fasting, and matters of family law, e.g. marriage, divorce, inheritance, etc., but also they cover legal transactions and areas of civil law, e.g. the validity of contracts, the principles of property law, etc⁽²⁶⁾. In some Islamic states, such as Saudi Arabia and Iran, Shari'a actually makes up mostly the whole part of the legal system of the state⁽²⁷⁾.

These systems have, in some measure, influenced each other. The civil law system has considerable influence on the countries of Continental Europe, Latin America and the Middle East, such as Jordan, Egypt and Tunisia⁽²⁸⁾. The common law system has influenced legal systems in all of the English-speaking countries, such as New Zealand, Canada, India, Australia, and United States⁽²⁹⁾. The Islamic law system has major influence on the legal systems of the majority of Islamic and Arab countries, such as Saudi Arabia, Sudan and Iran⁽³⁰⁾. The

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- (23) Edge I, 1996, 'Introduction: Material Available on Islamic Legal Theory in English', in Edge I (ed.), *Islamic Law and Legal Theory*, Aldershot: Dartmouth, p.1; Shalabi M.M, 1983, *Introduction to the Islamic Doctrine: Rules of Property and Contracts*, Beirut: Dar Al-Nahdah, p.3.
- (24) Jordan Media Group, 1995, *Jordan: Keys to the Kingdom*, Amman: the Ministry of Information Press, p.58.
- (25) See Abdul Azeez M, 1413 H, *Researches in Credence*, London: The Islamic Centre, pp.3-4.
- (26) See Mahfoodh A & Khateeb N, 1987, *Principles of Political Systems*, Amman: Dar Al-Furqan, pp.60-61.
- (27) Anderson J.N, 1971, 'Modern Trends in Islam: Legal Reform and Modernization in the Middle East', *International and Comparative Law Quarterly*, January, Vol.20, p.15; Ayubi N, 1994, *Political Islam: Religion and Politics in the Arab World*, London: Routledge, p.99; Amin S.H, 1987, 'Classification of Legal Systems in the Muslim Countries', *Islamic and Comparative Law Quarterly*, June, 7(2), p.93.
- (28) Koopmans T, 1996, 'Comparative Law and the Courts', *International and Comparative Law Quarterly*, July, Vol.45, Part 3, p.545; Kahn-Freund O, 1974, *Op. Cit.*, p.16.
- (29) Khateeb N, *Op. Cit.*, p.5.
- (30) Amin S.H, 1987, *Op. Cit.*, p.93, p.93; Ayubi N, *Op. Cit.*, p.99.

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socialist system has influenced the legal systems of many European, Central American and Arab countries, such as Romania, Poland, Cuba, Libya and Yemen⁽³¹⁾.

It should be kept in mind, here, that the inclination of many socialist countries in the world of today is to adopt other legal systems, e.g. civil or common-law systems, and to get rid of their archaic systems. This has happened in many European countries as well as in some Arab countries, particularly after the Arab Spring and the peoples' revolutions against their regimes. Libya is a clear example in this respect. After the collapse of the Al-Qadhafi regime, the chief of the Libyan Transitional Council declared that "the rules of Shari'a (Islamic law) will be the main source of all legislations in the country.."⁽³²⁾. This means that Libyan legislation, which is derived from the socialist legal culture and which is modeled after the socialist legislation, will be phased out shortly.

Legal systems evolve from time to time according to the social and economic needs and universal developments⁽³³⁾. Zagday points out "it would be better to allow the law to evolve and inevitably find its solutions, as it must do, if it is to remain a living system worthy of respect"⁽³⁴⁾. Today, the most striking example of the evolution of legal systems is found in the socialist countries, which have replaced socialist law either by civil or common law. The former Soviet Union countries and Yemen are suitable examples here⁽³⁵⁾. Also, striking is the evolution of the Islamic legal systems in the majority of Islamic countries. An example is Turkey, which, in the belief that Islamic law is rigid and no longer able to adapt to the needs of a modern state, has abolished all laws of Islamic origin and Europeanised society in all its aspects⁽³⁶⁾. The same happened in

(31) Merryman J.H, Op. Cit, p.13.

(32) See Alraed Newspaper: Libyan Daily Newspaper, 2011, Sunday, 23 October, Part 1, p.1.

(33) Mark V & Mark W, 1998, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', International and Comparative Law Quarterly, July, 47(3), p.512.

(34) Zagday M.I, 1948, 'Modern Trends in Islamic Law in the Near, Middle and Far East', Current Legal Problems, Vol.1, p.221.

(35) Sacco R, 1991, Op. Cit, p.3; Mark V & Mark W, Op. Cit, p.495.

(36) Edge I, 1990, 'A Comparative Approach to the Treatment of non-Muslim Minorities in the Middle East, with Special Reference to Egypt', in Mallat C & Connors J (eds.), Islamic Family Law, London: Graham & Trotman, p.34.

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Malaysia and in Iran during the Redha Shah regime⁽³⁷⁾.

In this respect, comparative legal studies can be of great importance and can provide the basis for borrowing and reform⁽³⁸⁾. Hill remarks that “society is like a train, with law as the engine. The comparatist is a mechanic, who has the job of finding the parts which will make the engine run more smoothly”⁽³⁹⁾.

René & Brierley⁽⁴⁰⁾ and Geoffrey⁽⁴¹⁾ indicate that comparative legal studies may aid the legislator to reform the existing law, or the judge to more accurately interpret the provisions of law. Collins⁽⁴²⁾, on the other hand, points out that comparative legal studies can identify better legal solutions in foreign legal systems and then recommend their incorporation into domestic law. In the words of Markesinis: “foreign law can bring a deeper understanding of problems - perhaps even unexpected ideas for solving them”⁽⁴³⁾.

Given that, comparative legal studies may be said to bring a great benefit to the country involved and to enable it to benefit from a new legislation enacted by a foreign country⁽⁴⁴⁾. More precisely, comparative studies may not only furnish information about the legal systems, or the laws in question, but also may provide, through the process of borrowing and modernization, popular

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- (37) Zagday M.I, Op. Cit, p.209; Horowitz L.D, 1994, ‘The Quran and the Common Law: Islamic Law Reform and the Theory of Legal Change’, *The American Journal of Comparative Law*, Vol.42, p.562.
- (38) Kahn-Freund O, 1966, ‘Comparative Law as an Academic Subject’, *The Law Quarterly Review*, January, 82(325), p.41; Neville B.L, 1971, ‘A Century of Comparative Law in England: 1869-1969’, *The American Journal of Comparative Law*, Vol.19, p.233; Hill J, 1989, ‘Comparative Law, Law Reform and Legal Theory’, *Oxford Journal of Legal Studies*, 9(1), p.102.
- (39) Hill J, Op. Cit, p.106.
- (40) René D & Brierley J.E.C, Op. Cit, pp.6-7.
- (41) Geoffrey S, 1998, ‘Comparative Law and Jurisprudence’, *International and Comparative Law Quarterly*, October, Vol.47, Part 4, p.820.
- (42) Collins H, 1991, ‘Methods and Aims of Comparative Contract Law’, *Oxford Journal of Legal Studies*, Autumn, 11(3), p.397.
- (43) Markesinis B, 1990, ‘Comparative law - A Subject in Search of an Audience’, *Modern Law Review*, January, 53(1), p.21.
- (44) See Montesquieu C, 1989, *The Spirit of the Law*, Cambridge, Cambridge University Press, p.13.

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solutions for many problems, or may help to avoid possible problems. As observed by Schlesinger:

“Whoever seeks rational solution of perplexing social problems sooner or later will recognize that there is much to be gained, not only by learning from the successes and failures of other systems, but also by a broader perspective which a comparative approach provides”⁽⁴⁵⁾.

The extent to which foreign law may be used as a model ranges from the study and occasional adoption of foreign legal institutions and ideas to the wholesale reception of foreign legal institutions and ideas. In modern times, many countries of the ‘Third World’ provide striking examples of the utilization of foreign legal experience. In grappling with the problems of modernizing their systems of law to meet the needs of a modern state, they have relied heavily on foreign materials and experience⁽⁴⁶⁾.

In undertaking this process, however, there is a danger that foreign legal institutions and ideas may be adopted without adjustment to local circumstances. Where this has happened it has often led to disastrous effects. This is exactly what happened in Turkey and Afghanistan⁽⁴⁷⁾. In this regard, Kahn-Freund points out that, “one must ask what chances there are that the new law will be adjusted to the home environment and what are the risks that it will be rejected. The chance and, conversely, the risk, may be smaller or larger, and the magnitude of this chance and of this risk determine the point on the scale at which we have to place the foreign law”⁽⁴⁸⁾.

1.3 Modernization of Islamic legal systems with particular emphasis on Jordan

In general, legal systems in the Muslim world vary as a logical result of the existence of different schools (*madhahib*) of Islamic law prevailing with the given geographical and political boundaries of Muslim nation-states. The

(45) Schlesinger R.B, 1971, ‘The Role of the ‘Basic Course’ in the Teaching of Foreign and Comparative Law’, *The American Journal of Comparative Law*, Vol.19, p.618.

(46) René D & Brierley J.E.C, *Op. Cit*, p.17.

(47) See part 3.2.

(48) Kahn-Freund O, 1974, *Op. Cit*, p.6.

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principal Sunni schools are Hanafi, Maliki, Shafi'i and Hanbali⁽⁴⁹⁾. These Schools effectively participated in the development of the Islamic legal system, and do not differ in fundamentals, but disagree about several points of detail, yet mutually recognize each other's orthodoxy. The first school is the one that is adopted in Jordan⁽⁵⁰⁾.

The trend to replace the existing legal systems, or at least to replace some of the present laws, in some Muslim world countries, by codes of law largely of European origin, is driven by four main reasons. First, some governments embraced the belief that the material in shari'a is still inadequate to provide solutions to the legal problems of a modern society⁽⁵¹⁾. Second, shari'a tended to evolve according to a logic quite different from that of the rulers, who are no longer feel satisfied with what shari'a prepares to give them⁽⁵²⁾. Third, there is also a desire for emulation and secularism⁽⁵³⁾. Fourth, the new political and commercial relations which connect Islamic countries to the West require new legal systems able to cope with the legal development in Western countries⁽⁵⁴⁾.

Shari'a was not entirely abandoned, but it was restricted to matters of personal status and to areas where it could be clearly and easily codified. What the reformers sought, then, was a system consistent with and occasionally even derived from principles of shari'a rather than a wholly shari'a-based system. In some Islamic countries, however, shari'a has been completely excluded. The most striking example can be seen in Morocco, where the Berber tribes follow their own customary law, to the exclusion of shari'a even in matters of the personal status law⁽⁵⁵⁾.

Modernist legislative interference with shari'a started modestly with the Ottoman Law of Family Rights of 1917, which was later repealed in Turkey, but

(49) Edge I, 1990, Op. Cit, p.34.

(50) Dwyer D, 1990, 'Law and Islam in the Middle East: An Introduction', in Dwyer D (ed.), Law and Islam in the Middle East, New York: Bergin & Garvey, p.12.

(51) Edge I, 1990, Op. Cit, p.35.

(52) Starr J, 1992, Op. Cit, p.14.

(53) Ayubi N, Op. Cit, p.5.

(54) René D, Op, Cit, p.22.

(55) Weiss B, 1978, 'Interpretation in Islamic Law: the Theory of Ijtihad', The American Journal of Comparative Law, Vol.26, p.212; Dwyer D, Op. Cit, p.3.

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remained valid in Syria, Lebanon and Transjordan. After the First World War, Turkey carried out a revolution against its Islamic laws and sought to throw away all the Islamic laws still in operation in the state, so as to become a European country in every way. Ultimately, it abrogated all laws of an Islamic flavour replacing them by codes imported from the West, such as the Swiss civil code, the Italian penal code and the French commercial code⁽⁵⁶⁾.

The same thing happened in the 1930's in Iran during the regime of the Redha Shah, who abolished many laws of an Islamic origin substituting them with laws borrowed from Europe. The importation of these foreign laws, however, was not total and was only limited to commercial and criminal law, but the civil law, which includes the family law as well as the law of civil transactions, was European in form only and not in content. It was still essentially Islamic being related to the Shi'a School⁽⁵⁷⁾.

The reshaping of Islamic law by modernist legislative reform, has evoked much interest and inspired similar movements in many countries of the Middle East, such as Jordan, Syria, Egypt and Lebanon, and the influence of this modernization has extended even to the Far East countries, such as Malaysia and Pakistan. The Gulf States were not immune from this influence. An example is the State of Bahrain, where the first attempt at a systematic codification, based on Western codes, started in 1955. Between this date and 1977, many British-based laws, such as the labour law and the law of foreigners, were promulgated in order to replace those of an Islamic nature⁽⁵⁸⁾.

As for Jordan, it is worthwhile to note that although Jordan is recognized as a civil law country, its legal system is mixed, in that it represents an amalgamation of rules and principles borrowed from different legal systems. In

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- (56) Starr J, 1989, 'The Role of Turkish Secular Law in Changing the Lives of Rural Muslim Women', *Law & Society Review*, 3 November, 23(3), pp.498; Zagday M.I, Op. Cit, p.209.
- (57) Zagday M.I, Op. Cit, p.209.
- (58) Al-Baharna H.M, 1972, 'Bahrain', *International Encyclopedia of Comparative Law*, Vol.1, National Reports, p.3; Edge I, 1985-86, 'Comparative Commercial Law of Egypt and the Arabian Gulf', *Cleveland State Law Review*, 34(1), p.134. There is virtually no Islamic country, with the exception of Saudi Arabia, which has not received the principles of European law in some measure (Anderson J.N, 1971, Op. Cit, p.15; Ayubi, Op. Cit, p.99).

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other words, it is a synthesis of Islamic, civil and common-law systems⁽⁵⁹⁾. Like the law-making bodies in the majority of Islamic countries, the Jordanian legislator has sought to modernize the laws of the Kingdom, by importing some secular laws based primarily on French and English law, and by restricting the sphere of shari'a and modifying it according to its own requirements.

The most striking example, in this respect, is the promulgation of many laws approving *riba*, which is prohibited under the rules of shari'a. Examples of these laws are the Commercial Law No.12 of 1966 and the Central Bank of Jordan Act No.23 of 1971. These laws, which admit of *riba* under the name of 'legal interest', and provide that this interest should not exceed 9%, are derived from Western laws. Other examples are:

(i)- The Civil Code No.43 of 1976⁽⁶⁰⁾ which is the main legislation in the areas of private law in general and the law of obligations in particular. The rules and provisions of this code are entirely derived from Islamic law principles, the Syrian Civil Code of 1949 and the Egyptian Civil Code of 1948, which are, to a significant extent, derived from the French Code of 1804⁽⁶¹⁾. By following this method, the Jordanian legislator created some problems: The Civil Code of 1976 deals with some legal institutions twice, with conflicting rules sometimes. A good example of this is the option to designate (sections 189-192) and the option in the subject-matter (sections 407-410) where sections 189 and 407/1 sound to conflict each other regarding the number of things to which the option belongs. Another example is where the Code mentions the voidable contract in sections 134 and 467 even though it does not recognize this type of contract⁽⁶²⁾.

(ii)- The Ownership of Floors and Flats Law No.25 of 1968 and its amendments has been borrowed from the Lebanese Ownership of Floors and

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- (59) Al-Far A, 2007, *Rules of Obligations in Jordanian Civil Law*, Amman: Dar Al-Thaqafah for Publishing and Distribution, p.71.
- (60) This Code was enacted as a provisional law in 1976 and became a permanent law in 1996.
- (61) Jordan Media Group, *Op. Cit.*, pp.38-39; Amin S.H, 1984, *Islamic Law*, Glasgow: Royston Ltd, p.13; Siwar M, 2006, *Explanation of the Jordanian Civil Law: Original Property Rights*, Volume 2, Amman: Dar Al-Thaqafah for Publishing and Distribution, p.4.
- (62) Jordanian Civil Code No.43 of 1976 recognizes there types of contract; namely: valid, *fasid* and void.

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Flats Law of 24 December 1962, which in great part has been borrowed from the French Ownership of Floors Law of 18 June 1938⁽⁶³⁾.

(iii)- The Penal Code No.16 of 1960, which is mainly modeled as the Syrian Penal Code with some variations, and based on French articles⁽⁶⁴⁾.

(iv)- The Commercial Law No.12 of 1966, which is partly derived from European laws.

The modernization movement of Jordanian laws, however, has not affected the law of personal status, which is concerned with succession, legacy, marriage, divorce, child custody, etc. The Jordanian Personal Status Law No.36 of 2010 is based mainly on Shari'a rules and governs personal matters for Muslims, but personal matters for non-Muslims are governed by the law of their particular religious community and questions of personal status for foreigners are determined by the law of their nationality.

In addition, when modern secular codes, mainly derived from French and English laws, were introduced to Jordanian law, certain institutions and doctrines of Shari'a, such as the right of preemption (*shufa'a*), the transfer of debts (*hawwalah*), the stipulated right of cancellation (*khiyar al-shart*), and the contract for delivery with prepayment (*salam*), were retained in the civil code.

Thus, unlike the position in some Islamic countries, where the process of the modernization of Islamic laws was resisted and resulted in legal and political problems, the process of modernization in Jordan ran smoothly with no such problems. The borrowing of many foreign rules and the introduction of many foreign doctrines give new evidence of the capacity of Jordanian law to receive and assimilate new foreign doctrines and principles. This means that the ground of Jordanian law is ready for further modernization, providing this modernization takes into account the social and economic circumstances prevailing in Jordan as well as the rules of other laws in force.

Having discussed the general concept of comparative law, it seems appropriate to discuss the mechanism of undertaking comparative law studies;

(63) See Al-Mumani A.S, 1983, Arbitration in Jordanian and Comparative Law, Amman: Al-Tawfeeg Press, p.15.

(64) Amin S.H, 1984, Op. Cit, p.260.

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thereafter to discuss the process of borrowing from one legal system to another.

2. The mechanism of undertaking comparative law studies

Under this heading, it is necessary to discuss the following subheadings:

2.1 The benefits of undertaking comparative law studies

Sacco⁽⁶⁵⁾ and Kamba⁽⁶⁶⁾ argue that comparative law is not a body of rules or principles, but a method of study and research by which it becomes possible to make valuable observations, or comments that would not come to one, who confines his study to the law of a single system or a single country. This argument is supported by Siwar⁽⁶⁷⁾ who points out that the comparative study of property law, for example, does not mean that the comparatist has devised a new set of rules, or principles, to govern the relations between a person and a thing. It merely indicates - Siwar remarks - that the laws of property in several legal systems, or in several countries of the world, have been subjected to a process of comparison in order to ascertain how far and in what aspects they may differ from one another.

Since no system of law is so complete as to be without any gaps, (which may occur in cases which are not plainly covered by legislation, or binding precedents, or where there are no code provisions directly in point), it becomes the function of legal jurists and courts to fill up gaps. In so doing, comparative legal studies can be of great importance and can provide the basis for borrowing and reform⁽⁶⁸⁾. René & Brierley⁽⁶⁹⁾ and Geoffrey⁽⁷⁰⁾ indicate that comparative legal studies may aid the legislator to reform the existing law, or the judge to more accurately interpret the provisions of law. Collins⁽⁷¹⁾, on the other hand, points out that comparative legal studies can identify better legal solutions in foreign legal systems and then recommend their incorporation into domestic

(65) Sacco R, Op. Cit, p.6.

(66) Kamba W.J, 1974, Op. Cit, p.486.

(67) Siwar M, 1993, Property Rights in the Jordanian Civil Law, Volume 1, Amman: Dar Al-Thaqafah for Publishing and Distribution, p.27.

(68) Kahn-Freund O, 1966, Op. Cit, p.41; Neville B.L, Op. Cit, p.233; Hill J, Op. Cit, p.102.

(69) René D & Brierley J.E.C, Op. Cit, pp.6-7.

(70) Geoffrey S, Op. Cit, p.820.

(71) Collins H, Op. Cit, p.397.

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law. In the words of Markesinis: “foreign law can bring a deeper understanding of problems - perhaps even unexpected ideas for solving them”⁽⁷²⁾.

Given that, comparative legal studies may be said to bring a great benefit to the country involved and to enable it to benefit from a new legislation enacted by a foreign country. More precisely, comparative law studies may not only furnish information about the legal systems, or the laws in question, but also may provide, through the process of borrowing, popular solutions for many problems, or may help to avoid possible problems. As observed by Tallon:

“... Its aim is not to find a foreign institution which could be easily copied, but to acquire ideas from a careful survey of similar foreign institutions and to make a reasonable transportation of those which may be retained, according to local conditions”⁽⁷³⁾.

This means that comparative legal studies play an important role in the evolution of legal systems⁽⁷⁴⁾. In this regards, Rayar remarks that, “without comparing legal systems, we would have no idea of the conceptual differences between systems and could not assess the usefulness of foreign terms”⁽⁷⁵⁾.

Comparative legal studies allow the comparatist to learn from the experience of other legal systems and thus promote the cross-fertilisation of ideas and experience⁽⁷⁶⁾. As Hill observes: “legislators all over the world have found that on many matters good law cannot be produced without the assistance of comparative law”⁽⁷⁷⁾.

It follows that comparative law, as described by Schlesinger, makes one aware of the fact that there is much to learn from the experience of other legal systems:

(72) Markesinis B, Op. Cit, p.21.

(73) Tallon D, 1969, ‘Comparative Law: Expanding Horizons’, Journal of the Society of Public Teachers of Law, Vol.1, p.266.

(74) Kamba W.J, 1974, Op. Cit, p.497.

(75) Rayar L, 1990 ‘Translating Legal Texts: A Methodology’, Conference Paper: Euro-forum, 13 April, p.2.

(76) Kamba W.J, 1974, Op. Cit, p.493.

(77) Hill J, Op. Cit, p.102.

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“Whoever seeks rational solution of perplexing social problems sooner or later will recognize that there is much to be gained, not only by learning from the successes and failures of other systems, but also by a broader perspective which a comparative approach provides”⁽⁷⁸⁾.

It is of great importance, however, to indicate that there are many ethical issues⁽⁷⁹⁾ that should be taken into account by a comparatist who undertakes a comparative law study. One of these ethical issues is ‘distortion and cheating’ which means that faking and dishonesty should be avoided and the researcher should report methods and data as completely and accurately as is possible. As Baker states: “the researcher is responsible for carrying out the research truthfully, without distortion, tampering with result, plagiarism, or suppression of relevant materials”⁽⁸⁰⁾. This is important because the researcher bears an important social and moral responsibility since his recommendations or suggestions might alter the lives of others and the legislator or government may adopt his findings to the matter which finally affects the whole society.

It is proposed here to focus on the comparison as a methodological technique that is used in undertaking comparative law studies and then to discuss some of the comparison problems and how a comparatist can tackle such problems.

2.2 Comparison as the main methodological technique employed in conducting comparative law studies

Having described research as a formal, systematic, intensive process used in the investigation of a problem, Turney and Robb point out that research provides answers for important and fundamental questions through sound and acceptable methods:

“Research is directed towards seeking answers to worthwhile, fairly important and fundamental questions through the

(78) Schlesinger R.B, Op. Cit, p.618.

(79) Ethics refer to rules of conduct or to set of principles by which particular group or society decides to regulate its behaviour (Goodale. J.G, 1982, The Fine Art of Interviewing, Englewood Cliffs, N.J: Prentice-Hall, Inc Robinson, p.29).

(80) Baker T.L, 1994, Doing Social Research, Second Edition, New York: McGraw-Hill, Inc., p.75.

application of sound and acceptable methods”⁽⁸¹⁾.

Patton⁽⁸²⁾ and Hakim⁽⁸³⁾ argue that reviewing previous studies on a topic can provide a synthesis of existing knowledge of a specific question, based on an assessment of all relevant researches that can be found. They maintain that the researcher needs to know about the contributions others have made to the knowledge pool relevant to the topic, because it is the ideas and work of others that provide the researcher with the framework for his own work. Similarly, Cooper⁽⁸⁴⁾ and Yin⁽⁸⁵⁾ have established that review of previous studies is the best way to determine the research questions that are most significant for the topic.

In any work, however, the choice of research strategy is primarily determined by the topic under investigation. As Clark and Causer remark, this strategy has much relevance to the nature of problem, data sources and research objectives:

“The crucial point is to choose methods according to how far they enable you to achieve your research objectives and to implement your particular research design”⁽⁸⁶⁾.

Phillips and Pugh⁽⁸⁷⁾ argue that academic research should add in some way, no matter how small, to the further understanding of the relevant matter under investigation. They argue that this can be achieved through: (i)- using already

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- (81) Turney B and Robb G, 1971, *Research in Education: An Introduction*, Hinsdal: Dryden Press, p.18.
- (82) Patton Q.M, 1990, *Qualitative Evaluation and Research Methods*, Second Edition, California: SAGE Publications, pp.5-6.
- (83) Hakim B.S, 1999, ‘Urban Form in Traditional Islamic Cultures: Further Studies Needed for Formulating Theory’, *Cities: The International Journal of Urban Policy and Planning*, February, 16(1), p.53.
- (84) Cooper H.M, 1989, *Integrating Research: A Guide for Literature Reviews*, Second Edition, California: SAGE Publications, pp.13-14.
- (85) Yin K.R, 1994, *Case Study Research: Design and Methods*, Second Edition, California: SAGE Publications, p.14.
- (86) Clark J and Causer G, 1991, ‘Introduction: Research Strategies and Decisions’, in Allan G and Skinner C (eds.), *Handbook for Research Students in the Social Sciences*, London: The Falmer Press, p.172.
- (87) Phillips E.M & Pugh D, 2000, *How to Get a PhD: A Handbook for Students and Their Supervisors*, Third Edition, Buckingham: Open University Press, pp.24-25.

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known ideas, practices or approaches but with a new interpretation; (ii)- creating a new synthesis that has not been done before; (iii)- applying something done in another country to one's own country; (iv)- looking at areas that people in the discipline have not looked at before; and (v)- adding to knowledge in a way that has not previously been done before.

In this respect, methodology refers to the research techniques used, and procedures employed in order to achieve the research objectives. It explains how the research is conducted and the data is analyzed⁽⁸⁸⁾. It is defined as:

“a system of methods and rules to facilitate the collection and analysis of data and to provide the starting point for choosing an approach made up of theories, ideas, concepts and definitions of the topic”⁽⁸⁹⁾.

This means that methodology is a way to explain how one's research is going to be conducted and the procedures which are going to be employed in order to gain valid knowledge.

Following the work of such authors as Kamba⁽⁹⁰⁾, Legrand⁽⁹¹⁾ and Koopmans⁽⁹²⁾ it was decided that the best research strategy for the work containing multiple legal systems, is the comparative method, which allows focusing on other countries' legal systems, and seeing the suitable norms that may be borrowed⁽⁹³⁾. In other words, comparison is the technique by which comparative law studies are carried out; it constitutes the essence of any scientific research involving different legal cultures. Their argument is supported by the jurist James Coleman who points out that comparison is the

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- (88) Wenger G.C, 1987, *The Research Relationship*, London: Allen & Unwin, p.3; Salmon P, 1992, *Achieving a PhD: Ten Students' Experience*, Staffordshire: Trentham Books Limited, p.77; Patton Q.M, Op. Cit, p.13.
- (89) Chris H, 1998, *Doing a Literature Review*, First Edition, London: SAGE Publications, p.28.
- (90) Kamba W.J, 1974, Op. Cit, p.486.
- (91) Legrand P, 1995, 'Review Article: Comparative Legal Studies and Commitment to Theory', *Modern Law Review*, March, 58(1), p.269.
- (92) Koopmans T, Op. Cit, p.454.
- (93) Adams M, 1999, 'The Rhetoric of Precedent and Comparative Legal Research', *Modern Law Review*, May, 62(3), p.464.

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key for understanding deeply the matter that has shared roots in different cultures. He has expressed his idea as “you can’t be scientific if you are not comparing”⁽⁹⁴⁾.

Having pointed out that description is the first step in the carrying out of comparative law studies, Mark & Mark stated that “description is a key ambition of comparative law”⁽⁹⁵⁾. This is supported by Kingsley & Colin⁽⁹⁶⁾ who, in turn, point out that through comparison, access to a range of different solutions to a common problem, is provided.

Geoffrey⁽⁹⁷⁾ and Adams⁽⁹⁸⁾ point out that in order to achieve valid results from any study that involves two legal systems or more, the mechanism of comparison must be carried out as a second step.

Based on this, one can say that comparison is an important source of knowledge and understanding as well as a technique or a discipline by which the values of human life, relations and activities are known and evaluated. In clear words, comparison is a means that gives the comparative study its original flavour, and provides a better knowledge, and a deep understanding of the national, as well as foreign legal systems⁽⁹⁹⁾. Thus, while throwing fresh light on different legal systems, comparison may facilitate the prediction of the effects of introducing particular changes into a country’s legal system.

Berry⁽¹⁰⁰⁾ and Legrand⁽¹⁰¹⁾ have established that in order for any comparative law study to be done properly it is essential that there are two laws, or more, to be involved in the comparison process. They maintain that there is no need for

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- (94) Quoted by Hague R, Harrop M & Breslin S, 1993, *Comparative Government and Policies*, Third Edition, London: Macmillan Press Ltd, p. 23.
- (95) Mark V & Mark W, Op. Cit, p.530.
- (96) Kingsley T.W & Colin R.B, 1999, ‘A Comparative Study of the Fundamental Elements of China and English Company Law’, *International and Comparative Law Quarterly*, January, Vol.48, Part 1, pp.88-89.
- (97) Geoffrey S, Op. Cit, p.832.
- (98) Adams M, Op. Cit, p.464.
- (99) See Al-Termanini Abdulsalam, Op. Cit, pp.55-56.
- (100) Berry W, 1980, ‘Introduction to Methodology’, in Triandis C & Berry W (eds.), *Handbook of Cross-Cultural Psychology: Methodology*, Vol.2, Boston: Allyn and Bacon, Inc, p.124.
- (101) Legrand P, 1995, Op. Cit, p.262.

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these two laws to be completely similar, or completely different. If they are completely similar, the benefit of the comparison may be useless, and vice versa, if they are completely different. Thus, they stress that there should be some similarities along with some differences. Legrand wonders “what is the point of comparison if all that comparatists see are similarities?”⁽¹⁰²⁾.

An example of this is where one compares the right of ownership in the socialist law to that in Islamic law. The comparison here may be useless because the socialist law does not recognize private ownership. Besides, under Islamic law property can be transferred to the heirs after the death of the property owner but this is not the case in the socialist law which abolished inheritance⁽¹⁰³⁾. However, one can compare the right of ownership in Islamic law to that in the common law as both laws recognize private ownership and allow the transfer of property by inheritance even though they differ regarding to the allocation of shares. This leads us to say that comparison between two laws, which are completely different or completely similar, is of no use.

Accordingly, comparative law studies should not be restricted to similar foreign patterns of legislation, but should include other forms of legislation providing some convergences exist between these forms⁽¹⁰⁴⁾. Taking this idea into consideration, Al-Far⁽¹⁰⁵⁾ and Siwar⁽¹⁰⁶⁾ argue that it is not a condition for any civil law country, such as Jordan, to borrow only from the law of another civil law country and to disregard the laws of other legal systems, which might offer solutions better than those offered by the civil law.

Similarly, it is not a condition that any common law country, such as England, should borrow only from the law of another common law country. This is envisaged by section 3(1) of the *English Law Commission Act 1965*, which imposes upon the Law Commission the obligation ‘to obtain such

(102) Legrand P, 1996, ‘How to Compare’, *Legal Studies*, July, 16(2), p.240.

(103) Al-Obaidi A.H, Op. Cit, 2000, *Real Property Rights in Jordanian Law*, Amman: Dar Al-Thaqafah for Publishing and Distribution, p.122-123; Knapp V, Op. Cit, p.38.

(104) Kahn-Freund O, 1974, Op. Cit, p.5.

(105) Al-Far A, Op. Cit, p.7.

(106) Siwar M, 2006, Op. Cit, p.2.

information as to the legal system of other countries as appears to the commissioners likely to facilitate the performance of any of their functions'⁽¹⁰⁷⁾.

2.3 Problems of comparison

There are two types of legal comparison: vertical comparison and horizontal comparison⁽¹⁰⁸⁾. Vertical comparison is divided into two types: (i)- vertical 'bottom-up' comparison which is used to transplant legal concepts or principles from national to international level; and (ii)- vertical 'top-down' comparison which is used to transplant legal concepts or principles from international level to national level. Likewise, horizontal comparison is divided into two types: (i)- horizontal comparison which is employed among laws that belong to the same legal system; and (ii)- horizontal comparison which is employed among laws that belong to different legal systems.

The choice of the suitable type of comparison depends on the purpose behind employing such a comparison. Hence, as this article aims to show that legal cultures dialogue can help to develop mutual legal cultural understanding and that comparative law can play a significant role in the harmonization and unification of the law in modern societies, it can be said that the suitable type of comparison is the horizontal comparison which is employed among laws that belong to different legal systems.

Undertaking comparative research is not a process that is free of problems⁽¹⁰⁹⁾. The involvement of more than one law gives rise to some methodological problems. Such problems, however, are not complicated or not without solution. The three major problems encountered in relation to comparison are:

(a)- The existence of different meanings for the same word or concept.

The meaning of some concepts may differ according to the legal system to

(107) Koopmans T, Op. Cit, p.545; Kahn-Freund O, 1974, Op. Cit, p.2.

(108) Momirov A & Fourie N, 'Vertical Comparative Law Methods: Tools for Conceptualizing the International Rule of Law', 2009, Erasmus Law Review, 2(3), pp.295-296.

(109) Collins H, Op. Cit, p.399; Legrand P, 1995, Op. Cit, p.262.

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which they belong⁽¹¹⁰⁾. A concept in the Jordanian legal system, for example, may be different from that in the English legal system, and vice versa. Examples of the concepts or words that have different meanings in these legal systems are 'law', 'act' and 'code'. In English law, the word 'law' refers to the law in general, e.g. property law, while the word 'act' refers to a certain act passed in a certain period of time, e.g. the *Housing Act 1996*, but the word 'code' is rarely used.

In Jordanian law, on the other hand, the word 'law' means either the law in general, e.g. property law, or any particular law, such as the Law of Execution of 2007. Moreover, the word 'code' or 'act' is used to denote the same meaning, e.g. the Civil Code of 1976 and the Landlord and Tenant Act of 1994⁽¹¹¹⁾. In terms of the Personal Status Law of 2010, however, the word 'law' is used only to mean Islamic law (shari'a).

Another example may clearly be seen in the concepts of waqf, shufa'a and usufruct, where these concepts have no alternatives in English law, and the concepts of charity, preemption and long lease, are not the exact relevant meanings⁽¹¹²⁾. Similarly, the English law concepts of trust, trespass and estoppel have no counterparts in Jordanian law, and the concepts of charity, intrusion and fulfillment of agreements do not exactly reflect their real meanings.

However, in order to overcome this problem, one can say that the researcher or the comparatist should resort to the process of the unification of any different concepts in an understandable way. This can be achieved by the employment of one definite concept, as existed in one legal system, and between brackets, the insertion of its nearest counterpart in the other legal system. In addition, the comparatist can provide a table of glossary in order to clarify the meanings of some vague concepts which he believes to have no specific alternatives.

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- (110) Kamba W.J, 1974, Op. Cit, p.517; Bell J, 1995, 'English Law and French Law - not so Different?', Current Legal Problems, p.67; Hoecke M.V, 1996, 'Hohfeld and Comparative Law', International Journal for the Semiotics of Law, 9(26), p.189.
- (111) Naddawi A, 1999, Explanation of the Jordanian Civil Law: Landlord and Tenant Act of 1994, Amman: Dar Al-Thaqafah for Publishing and Distribution, p.8.
- (112) See Hurndall D.A, 1998, 'Property in England and Wales', in Hurndall D (ed.), Property in Europe: Law and Practice, London: Butterworths, p.110; Al-Termanini Abdulsalam, Op. Cit, pp.101-102.

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It is essential here to recite the words of Berry, who remarks that the existence of variation, or differences in a phenomenon, is what makes comparison a worthwhile enterprise; if such differences were not found, then comparative study would soon cease to be worthwhile. Berry proceeds:

“To compare two phenomena, they must share some feature in common; and to compare them to some advantage, they should differ on some feature. That is, it must be possible to place two phenomena on a single dimension in order to judge them validly in relation to each other; and for the comparative judgment to be of value they should not be identical in all aspects”⁽¹¹³⁾.

(b)- The problem of translation from one language to another language based on different legal culture and the use of different expressions.

René & Brierley⁽¹¹⁴⁾; Sacco⁽¹¹⁵⁾ and Legrand⁽¹¹⁶⁾ have insisted that the process of translation is considered as one of the major problems that face the comparatist. It imposes a heavy burden on him to conserve the exact meaning, and the spirit of the translated legal text, such as law provisions, constitution articles and court judgments. Translation from one language to another and, particularly, from Arabic into English is a tough task, especially when the comparatist does not find in Arabic, words similar to those in English, to perfectly reflect meanings. As stated above, the words equity, trust and estoppel are the best examples thereof.

Khateeb⁽¹¹⁷⁾ argues that using alternative words reflecting satisfactorily the meaning of the legal concept in question, or providing a closer meaning, will never kill the spirit of the concept since this is the only way for clarifying and developing legal research.

(113) Berry W, Op. Cit, p.8.

(114) René D & Brierley J.E.C, Op. Cit, p.12.

(115) Sacco R, Op. Cit, p.12.

(116) Legrand P, 1995, Op. Cit, p.269.

(117) Khateeb N, Op. Cit, p.7.

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(c)- The existence of some doctrines and principles which are not recognized by the other system under comparison.

For example, English law does not recognize some Jordanian law principles and doctrines. Examples are the principle of the privilege of administration, waqf, preemption (*shufa'a*) and the notary system. Similarly, Jordanian law does not recognize some English law doctrines and systems. Examples are the doctrine of joint tenancy, trust, estoppel and the jury system⁽¹¹⁸⁾.

However, one can say that the existence of different doctrines, principles or terminologies between two legal systems, or two laws, does not jeopardize the comparative study of these laws nor does it create an interpretational dilemma. It is sufficient that some convergences exist as this can bridge any gaps between the two laws concerned.

Giving that, the problems of different concepts and translation can be dealt with by employing a careful and strict method of translation from Arabic into English and by avoiding the use of vague concepts, or of concepts, which bear different meanings. This has been recognized by Sacco who argues that, in order "to translate, the comparatist is required to establish the meaning of the phrase to be translated and find the right phrase to express this meaning in the language of the translation"⁽¹¹⁹⁾. Thus, where there is no Arabic counterpart for any English word, or vice versa, the technique of using an alternative equivalent that conveys adequately and clearly the meaning of the word in question, is recommended.

Having considered the mechanism of undertaking comparative law studies and other relevant matters, it seems necessary to consider some key issues relevant to the process of borrowing from one legal system to another.

3. The process of borrowing from one legal system to another

The process of borrowing is the way by which foreign legal institutions are

(118) Kahn-Freund O, 1974, Op. Cit, p.19; Ahmed G, 1988, The Law of Revocation in Jordan, Amman: Al-Dustour Press, p.9.

(119) Sacco R, Op. Cit, p.14.

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transplanted from one legal system to another⁽¹²⁰⁾. It is one of the fruits of a comparative legal study, and one of its advantageous uses⁽¹²¹⁾. Before becoming involved in such a process, the first matter that should be observed is the deep investigation into the possibility of the successful application of the borrowed rules in the receiving legal system. The reason is that every nation or country has its own legal system, which is connected to its history, culture and social conditions and any attempt to borrow from it may fail if any of these components are not taken into account. In the words of Stone:

“We must study the history, the politics, the economics, the cultural background in literature and the arts, the religions, beliefs and practices, the philosophies, if we are to reach sound conclusions as to what is and what is not common”⁽¹²²⁾.

The idea that the law is the result of human wisdom for the benefit of mankind and that no one nation has a monopoly of such wisdom, provides the foundation of comparative law studies as well as of the borrowing process⁽¹²³⁾. Accordingly, borrowing from one law to another is not limited to certain systems of law⁽¹²⁴⁾, but it is open for all legal systems to search and learn from the experience of each other⁽¹²⁵⁾. In this regard, Prince Charles, the Prince of Wales, remarks:

“If the ways of thought found in Islam and other religions can help us, then there are things for us to learn from this system. I am utterly convinced that the Islamic and the Western worlds have much to learn from each other. Just as the oil engineer in the Gulf may be European, so the heart transplant surgeon in Britain may be Egyptian”⁽¹²⁶⁾.

(120) Horowitz L.D, Op. Cit, p.570.

(121) Kahn-Freund O, 1966, Op. Cit, p.46; Kahn-Freund O, 1974, Op. Cit, p.2.

(122) Stone F.F, 1951, ‘The End to be Served by Comparative Law’, Tulane Law Review, Vol.25, p.332.

(123) Kingsley T.W & Colin R.B, Op. Cit, p.88; Siwar M, 2006, Op. Cit, p.2.

(124) Kahn-Freund O, 1974, Op. Cit, p.5; Kingsley T.W & Colin R.B, Op. Cit, p.88.

(125) Sanyal B, 1990, ‘Knowledge Transfer from Poor to Rich Cities’, Cities, February, 7(1), p.31.

(126) The Prince of Wales, 1994, ‘Islam and the West’, Arab Law Quarterly, January-December,

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Below is a brief account of examples where borrowing achieved success, avoiding conflict with the legal culture and local circumstances of the receiving system, and other examples where it failed and created legal, social and political problems.

3.1 Examples of successful borrowing

There are many examples where borrowing from one legal system to another has achieved success:

(a)- Borrowing from civil law to Islamic law

Islamic law borrowed many contract law rules from Roman and civil law. Examples are the rule that says ‘contract is the law of contractors’ and the idea of ‘personal rights’⁽¹²⁷⁾. Also, the majority of Middle East Islamic countries⁽¹²⁸⁾ have resorted to borrowing from the civil law system despite their civil laws are, to a significant extent, based on shari’a. The bulk of the Lebanese Civil Code (Obligations and Contracts) of 11 April 1932, the Egyptian Civil Code No.131 of 1948, the Syrian Civil Code No.84 of 1949 and the Algerian Civil Code of 1975, are borrowed from the French Civil Code of 1804 (Napoléon Code)⁽¹²⁹⁾.

Most striking is the replacement of the Turkish Civil Code (*majallah*) of 1867, which is derived from Islamic law, by the Turkish Civil Code of 1926, which is taken from the Swiss Civil Code of 1907⁽¹³⁰⁾.

(b)- Borrowing from common law to Islamic law

Vol.9, pp.141-142.

- (127) Siwar M, 1993, Op. Cit, p.11; Official Gazette, 1994, House of Parliament Debates on the Landlord and Tenant Bill, 31(11), Amman: The Ministry of Finance, p.40; Fadel M & Fatalawi S, 1996, Explanation of the Named Contracts in Jordanian Civil Law: Landlord and Tenant Act of 1982, Revised Edition, Amman: Dar Al-Thaqafah for Publishing and Distribution, p.43; Mansour A, Op. Cit, p.14.
- (128) Law in these countries is described by Anderson as “hotchpotch, part Islamic and indigenous and part secular and Western” (Anderson J.N, 1975, Islamic Law in the Modern World, Westport: Greenwood Press, p.18).
- (129) Jordan Media Group, Op. Cit, p.39; Al-Termanini Abdulsalam, Op. Cit, p.60; Siwar M, 1993, Op. Cit, p.28; Al-Shamisi J, 2000a, Introduction to the Science of Law: The Theory of Law, Al-Ain: United Arab Emirates University Publications, pp.7-8.
- (130) Al-Termanini Abdulsalam, Op. Cit, p.137; Khateeb N, Op. Cit, p.77.

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A leading example is to be found today in the Malaysian law, where many institutions concerning procedure, evidence and marital property have been borrowed from English common law⁽¹³¹⁾. English common law is viewed by Malaysian reformers as an identical reference source that can be used so as to bridge the gaps in Islamic law and to adopt some secular principles, even if these are incompatible with those of Islam. Examples are the principle of constructive trust and the principle of the prohibition of hearsay, which in Malaysia meets with no principled Islamic objection⁽¹³²⁾.

(c)- Borrowing from socialist law to Islamic law

Many Islamic countries, such as Libya and South Yemen (before unification), have adopted the laws of the former Soviet Union. The laws in these countries represent the wholesale adoption of the Soviet laws⁽¹³³⁾.

(d)- Borrowing from civil law to civil law

The French Civil Code of 1804 is adopted in Belgium, Holland and Italy. The Spanish Civil Code has a great influence on the Argentinean Civil Code, which was adopted in Paraguay until 1987. The Jordanian Civil Code of 1976 is adopted in Sudan as well as in the United Arab Emirates under the name of the Civil Transactions Code No.5 of 1985⁽¹³⁴⁾.

Other striking examples may be found in the new Civil Code of the Netherlands which is based thoroughly on the literature of the German and Swiss Civil Codes, and the Japanese and Greek Civil Codes which have

(131) Horowitz L.D, Op. Cit, p.562.

(132) Ibid, 571.

(133) Merryman J.H, Op. Cit, p.103; Khateeb N, Op. Cit, p.6.

(134) Al-Termanini Abdulsalam, Op. Cit, p.59; Al-Shamisi J, 2000b, Introduction to the Science of Law: The Theory of Right, Al-Ain: United Arab Emirates University Publications, p.114; Al-Shamisi J, 2000a, Op. Cit, p.223; Jundi M, 1985, 'The Right of Pre-emption in the Civil Law of Jordan and the United Arab Emirates: A Comparative Study', The Law Journal, March, Vol.1, p.171; Koopmans T, Op. Cit, p.545; Siwar M, 1993, Op. Cit, p.85; Al-Far A, Op. Cit, p.6. Another striking example is the new Civil Code of Netherlands, which is based thoroughly on the literature of the German and Swiss Civil Codes (see Koopmans T, Op. Cit, p.545).

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borrowed most of their rules and principles from the German Civil Code 189⁽¹³⁵⁾.

(e)- Borrowing from common law to common law

Many rules and even details of the English divorce law (Divorce Reform Act 1969) have been borrowed from the laws of Australia and New Zealand⁽¹³⁶⁾. The English Commonhold and Leasehold Reform Bill 2002 is based on the legal experience of other countries, such as USA and Australia⁽¹³⁷⁾. Also, English case law has a very great influence upon the laws of the English-speaking countries, such as Canada, Australia and New Zealand. Judges in these countries are still resorting to and citing the decisions of English courts⁽¹³⁸⁾.

(f)- Borrowing from civil law to common law

Many English property and contract law rules are borrowed from civilian principles, which were seen to produce better results than contemporary English law⁽¹³⁹⁾. Examples are the principle of unjust enrichment and the doctrine of the communication of offer and acceptance⁽¹⁴⁰⁾.

(g)- Borrowing from common law to civil law

One remarkable example on the influence of English case law on civil law statutes is the case of *Rimmer v. Rimmer* (1953)⁽¹⁴¹⁾ where the English Court of Appeal held that in the event of a breakdown of the marriage with or without a divorce, family assets acquired partly with the husband's and partly with the

(135) See Koopmans T, Op. Cit, p.545.

(136) Kahn-Freund O, 1974, Op. Cit, p.14.

(137) Driscoll J, 2000, 'Residential Leasehold Reform', New Law Journal, 25 February, 150(6924), pp.285; Lock D & Zimmermann P, 2000, 'The Commonhold Proposals: An Outline', A Paper Prepared to the Commonhold and Leasehold Reform Conference, London South Bank University, 5 October, p.1.

(138) René D & Brierley J.E.C, Op. Cit, p.8.

(139) Collins H, Op. Cit, p.397.

(140) Simpson A.W, 1975, 'Innovation in Nineteenth Century Contract Law', The Law Quarterly Review, January, 91(361), p.260; Evans-Jones R, 1999, 'Roman Law in Scotland and England and the Development of One Law for Britain', The Law Quarterly Review, October, Vol.115, p.613.

(141) *Rimmer v. Rimmer* (1953) 1 QB 63 (CA).

wife's money are distributed according to the equitable principles, which mean normally half and half. After long parliamentary debates, the German legislator enacted in 1957 a statute, which embodies a rule similar to that which is extracted from this case⁽¹⁴²⁾.

(h)- Borrowing from ancient laws to Roman law

An ancient time influence by the laws of others can be noticed when some of Greek City States adopted the laws of other states, either as a whole or in part, and when Greek legal ideas exercised a considerable influence in the development of the Roman law, which was known as *jus gentium*⁽¹⁴³⁾.

3.2 Examples of unsuccessful borrowing

In contrast to the successful examples above, there are many examples where the borrowing process resulted in political and legal problems and consequently failed:

(a)- Failure due to ethical, moral and religious differences

After the First World War, Turkey adopted the Swiss civil law and family law. The civil law achieved success and conformity with the Turkish legal system, but the family law failed and was, finally, rejected. The main reason behind its failure was its contradiction with the Islamic rules concerning divorce and other matters⁽¹⁴⁴⁾.

(b)- Failure due to the nature and structure of the legal system adopted and its inability to receive or absorb new foreign principles

During the nineteenth century, France and Germany attempted to adopt the English jury system. Due to the inflexibility of the civil law system adopted by both of these countries and its inability to cope with the jury system, that attempt failed⁽¹⁴⁵⁾. Likewise, when some African countries, who did not have characteristics similar to the English political or legal system, tried to import the

(142) Kahn-Freund O, 1966, Op. Cit, p.49.

(143) Al-Termanini Abdulsalam, Op. Cit, p.28; René D & Brierley J.E.C, Op. Cit, pp.1-2; Khateeb N, Op. Cit, p.34.

(144) Mark V & Mark W, Op. Cit, p.499; Kahn-Freund O, 1974, Op. Cit, p.17.

(145) Kahn-Freund O, 1974, Op. Cit, p.17.

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English parliamentary system, that too failed⁽¹⁴⁶⁾.

Another striking example can be seen when the legislature of the State of New York tried to adopt the notary system, which is workable in the civil law, the Law Commission, opposing such adoption, concluded that the state, like most common law jurisdictions, had no class of officials similar to the civil-law notary and that it would never have worked if it had been created⁽¹⁴⁷⁾.

(c)- Failure due to conflict between political and legal systems and the absence of suitable social grounds able to cope with new imported ideas

In the absence of suitable grounds, such as culture, customs, beliefs, convictions, and political life able to receive such new changes and to deal with new legal circumstances, the process of borrowing may result in legal and political problems⁽¹⁴⁸⁾. A good example, in this respect, is where Amanullah, the former King of Afghanistan, failed to see this fundamental fact, and in an attempt to transform his country into a European State on the Model of Turkey, failed pitifully and, consequently, lost his throne⁽¹⁴⁹⁾.

3.3 Examples of successful and unsuccessful borrowing from other laws to Jordanian law

As previously stated, the vast majority of the Middle East countries carried out a secular reform to their shari'a-based laws. Political, economic and legal developments, influenced by Western civilization, have led to the building up of distinct national systems of law in each country of the Middle East, such as Jordan, and made the principles of shari'a no longer supreme⁽¹⁵⁰⁾.

(146) Ibid, p.17.

(147) See Schlesinger R.B, Op. Cit, p.620.

(148) Stone F.F, 1951, Op. Cit, p.332.

(149) Zagday M.I, Op. Cit, p.211.

(150) Attalla F.B, 1971, 'Jordan', International Encyclopedia of Comparative Law, Vol.1, p.27; Kurian G, 1982, 'Jordan', Encyclopedia of the Third World, Vol.2, London: Mansell Publishing Limited, p.913; Anderson J.N, 1971, Op. Cit, p.1; Horowitz L.D, Op. Cit, p.555; Al-Termanini Abdulsalam, Op. Cit, p.61.

The Jordanian legal system is a blend of different legal systems; namely: Islamic, civil and common law⁽¹⁵¹⁾. In addition to being highly influenced by French law, the Jordanian legal system is also influenced by English law. This influence, which is attributed to the British mandate over Jordan in the first half of the twentieth century, is noticeable in several fields of law, such as constitutional, commercial, procedural and property law⁽¹⁵²⁾.

In the history of Jordan, there are some examples where the borrowed foreign provisions achieved success and worked effectively and, conversely, where they failed and were finally rejected.

3.3.1 Some examples of successful borrowing

(a)- The system of retrial or review of the conclusive judicial verdicts, which is adopted by sections 292-98 of the Jordanian Criminal Procedures Act No.9 of 1961 and by sections 213-22 of the Jordanian Civil Procedures Act No.24 of 1988 is borrowed from sections 622-26 of the French Criminal Procedures Act of 31 December 1957⁽¹⁵³⁾.

(b)- Many Jordanian property law rules and principles are borrowed from Egyptian property law rules and principles. The most recent notable example is the inclusion of the principle *al-wasiyyah al-wajibah*, which has its origins in Islamic law, and which has been borrowed from the Egyptian Law of Testamentary Dispositions of 1946 and has been transplanted into the Jordanian Personal Status Law of 1976, upon the recommendation of the Department of Islamic Chief Justice (*qadi al-qudhah*). Before amendment, the position was that living sons of a parent who dies will exclude from succession the grandchildren of that parent through a son or daughter who has predeceased the parent. If *al-wasiyyah* within the bequeathable third of the estate is not proposed, the orphan grandchildren will receive nothing from the grandparent's

(151) Welchman L, 1988, 'The Development of Islamic Family Law in the Legal System of Jordan', *International and Comparative Law Quarterly*, October, Vol.37, Part 4, p.869.

(152) Attalla F.B, Op. Cit, pp.27-28. An example is section 30 of the Jordanian Constitution of 1952, which states "the king is the head of the state and is immune from any liability and responsibility". (See Ghazwi M, 2005, *Constitutional and Political Organization in the Hashemite Kingdom of Jordan*, Fourth Edition, Amman: University of Jordan, p.105).

(153) Nammour M, 1993, 'The System of Retrial in the Jordanian Criminal Procedures Law', *Mu'tah Journal for Research and Studies*, November, 8(4), p.19.

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estate. Thus, *al-wasiyyah al-wajibah*, as introduced by Egyptians and applied in Jordanian law thereafter, made orphaned grandchildren entitled to take the amount their dead parent would have inherited had he or she been alive, provided that this does not exceed one third of the estate.

In addition, the doctrine of prescription, which is introduced by section 449 JCC 1976 and which is concerned with the acquisition of property or property rights by the passage of fifteen years, has been borrowed from section 374 of the Egyptian Civil Code of 1948⁽¹⁵⁴⁾.

(c)- This principle of the privilege of administration, which is adopted by Jordanian law and which means that the administration can be sued only in certain courts, i.e. administrative courts, has been borrowed from French Law⁽¹⁵⁵⁾.

(d)- Jordanian property law is influenced by English property law and this influence is particularly obvious in the field of intellectual (industrial) property law, which regulates and governs inventions, patents and trademarks. The Jordanian Industrial Property and Trademarks Act of 1952 is adopted from the English *Patent and Design Act* 1907, as amended in 1946⁽¹⁵⁶⁾. The Jordanian copyrights law (the Copyrights Ordinance of June 1924) was substantially a reproduction of the English *Copyright Act* 1911. The Jordanian Arbitration Act No.18 of 1953 as amended in 1962, is, in most part, based on the English *Arbitration Act* 1950⁽¹⁵⁷⁾.

It should be noted here that many Jordanian laws are borrowed and adopted by the legislators of many Arab countries. Examples are the Jordanian Civil Code of 1976, which is borrowed by the legislator of the United Arab Emirates and the Jordanian Criminal Procedures Act of 1961, which is borrowed, with some modifications, by the legislator of Oman⁽¹⁵⁸⁾.

(154) The Explanatory Memorandum of Jordanian Civil Code, 1992, Part I, Amman: Al-Tawfeeg Press, p.486.

(155) Ahmed G, 1993, Op. Cit, p.200.

(156) Attalla F.B, Op. Cit, p.30.

(157) Ibid, p.30.

(158) Jundi M, Op. Cit, p.171; Al-Dustour: Jordanian Daily Newspaper, 1999, Further Co-operation between Jordan and Oman, Tuesday, 9 November, Issue No.11583, Part 2, p.23.

3.3.2 Some examples of unsuccessful borrowing

(a)- The devolution of miri lands in Jordan was governed by the rule saying “the freehold estates are transferred by inheritance, with equal shares to males and females”. The application of this rule, which is borrowed from the Ottoman Transfer of Immovables Law of 1912, has continued in operation in the Kingdom for more than four decades. It is brought to an end by virtue of section 2 of the Jordanian Transfer of Immovables Act No.4 of 1991, which gives the male two shares and female one⁽¹⁵⁹⁾. The legislator’s point was that, since the Personal Status Law of 1976 is purely Islamic and according to Islamic law the proportion of shares is 2:1, i.e. two to the male and one to the female, the rule should be changed.

(b)- The rule saying “the king reigns but not governs”, which was borrowed from England, achieved failure in Jordan and was later rejected⁽¹⁶⁰⁾. This rule was borrowed during the regime of King Abdullah I during the 1920s. After the passage of the Constitution of 1928, the King, who was still Amir since Jordan had not yet been declared as a Kingdom, started to enjoy a wide range of rights. These rights, which were conferred on the Amir by sections 16-25 of the Constitution, included direction of the policies of state, drawing of social and economic plans, passage of laws, etc. Accordingly, the above rule was abandoned because it started to work against the constitution provisions and failed to adapt with the new constitutional developments.

3.4 The criteria for successful borrowing

Generally, there is no international standard, or specific criterion, for borrowing from one legal system to another, or from more to less developed legal systems⁽¹⁶¹⁾. However, it can be said that borrowing legal institutions, doctrines or provisions, from one legal system to another legal system requires the consideration of many factors. These factors, which may be argued to constitute the criteria for infallible borrowing, include:

(159) Al-Obaidi A.H, Op. Cit, p.122; Siwar M, 2006, Explanation of the Jordanian Civil Law: Real Property Rights, Volume 2, Amman: Dar Al-Thaqafah for Publishing and Distribution, p.62.

(160) Ghazwi M, Op. Cit, p.105.

(161) Kahn-Freund O, 1974, Op. Cit, p.20.

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(a)- Study of the history, legal culture, customs, traditions, habits, religions, beliefs, and even the economical, social and political construction of the society in both of the countries, which are going to be involved in the comparative study and thereafter in the borrowing process⁽¹⁶²⁾. This is because a transplant of legal rules may prove inappropriate as a result of the differences in the social and economic structures of the societies involved⁽¹⁶³⁾. A deep study and investigation of these factors, therefore, may have the benefit of revealing to what extent the transplanted rules are expected to achieve success in the receiving system.

(b)- The tendency and willingness of the receiving system to cope with the new imported ideas and thoughts. This is because the legal systems, in many aspects, are different from each other and for the process of borrowing of new institutions, or doctrines to succeed, conformity between the two legal systems (the giver and the receiver) must be achieved⁽¹⁶⁴⁾.

Where no investigation concerning the tendency of assimilation of new institutions has been carried out, the inevitable result will be the failure of the borrowed principles accompanying with occurrence of social, legal and political problems, as seen above in the case of Afghanistan⁽¹⁶⁵⁾. This is because some borrowed principles may suit some legal systems, but do not suit others. An example is the 'Council of State' system (Conseil d'Etat, *majils al-dawlah*) of which French law is the origin. This system had been imported by Egyptian law at the beginning of the last century and achieved success⁽¹⁶⁶⁾. But, it had been refused in many countries such as Jordan, England, etc⁽¹⁶⁷⁾.

(162) Stone F.F, 1951, Op. Cit, p.332; Gutteridge H.C, Op. Cit, p.75; Kamba W.J, 1974, Op. Cit, p.514; Hill J, Op. Cit, p.105; Ehrmann H.W, 1979, Comparative Legal Cultures, Englewood Cliffs, N.J: Prentice-Hall, Inc, p.78.

(163) Collins H, Op. Cit, p.397.

(164) Hill J, Op. Cit, p.92.

(165) See 3.2 - (c).

(166) Ahmed G, 1988, Op. Cit, p.92.

(167) Kahn-Freund O, 1974, Op. Cit, p.18; Ahmed G, 1988, Op. Cit, p.92. Jordan has substituted this system with a different system, which conforms better to its legal system and culture. This system is the High Court of Justice, which is established for the purpose of protecting citizens against illegal administrative acts, or decisions or, more generally, against

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(c)- Investigation of the possibility of the future continuity and practicability of any rules, or provisions, intended to be borrowed from foreign law. This is because some provisions may split their way to success only for a limited period of time and then cease to continue or cope with the legal, social or political changes and developments. A clear example is where Jordan borrowed some legal and constitutional rules both from Ottoman and English law and where these rules succeeded for a specific period of time, but thereafter failed and were rejected⁽¹⁶⁸⁾.

From the above discussion, we conclude that, in order for the borrowing process to succeed, certain conditions must be satisfied. First, there must be some ethical or moral co-ordination between the legal systems involved. Second, the legal system of the imported state must be flexible and able to absorb new foreign principles. Third, there must be suitable social, legal and political grounds able to deal with the new changes. This is because in the absence of such grounds the process of borrowing may not achieve its objectives and, as a result, it may fail. The most striking example, in this concern, can be seen when a Commission on European Contract Law was established in 1980 with the aim of drafting the general principles of contract law for all the EU countries. In 1989, the European Parliament passed a resolution on the preparation of a European Code of Private Law, the preamble of which stated "unification can be carried out in branches of civil law, which are highly important for the development of a single market, such as contract law"⁽¹⁶⁹⁾. However, this project has not been accomplished yet. This is because there are many difficulties relating to reconciling civil and common law traditions⁽¹⁷⁰⁾.

It is worthy mentioning here that the three parts of the European Principles

maladministration (Ahmed G, 1993, 'The High Court of Justice Act No.12 of 1992: A Comparative Study', Mut'ah Journal for Research and Studies, November, 8(4), p.201).

(168) See 3.3.3.

(169) McKendrick E, 2000, Contract Law, Fourth Edition, London: Macmillan, p.9.

(170) See Hill J, Op. Cit, p.114; Collins H, Op. Cit, p.397; McKendrick E, Op. Cit, p.9.

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on Contract Law are already published⁽¹⁷¹⁾. The approach adopted in drafting these principles is comparative in nature; that is to say the draftsmen have endeavoured to avoid concepts which carry doctrial connotations specifically related to a certain national legal system⁽¹⁷²⁾. It is to be added that the third edition of the Unidroit Principles of International Commercial Contracts 2010 is considered a successful example on the international arena. This edition embodies new provisions on restitution in case of failed contracts, illegality, conditions, and plurality of obligors and obliges. It embodies not only the black-letter rules but also detailed comments and illustrations on each article⁽¹⁷³⁾.

Summary and Conclusion

This article has discussed the legal culture dialogue; it has considered three main topics; namely: the general concept of comparative law, the mechanism of undertaking comparative laws studies, and the process of borrowing from one legal system to another.

Discussion of these topics has revealed that comparative law is a valuable tool for legal analysis of national legal systems. It can stimulate awareness of the cultural and social characters of the law in any given country and can provide a unique understanding of the way the law develops and works in different cultures.

Based on the above discussion, one can conclude that legal cultures dialogue can help to make legal cultures come closer and closer to each other in order to find solutions for some common legal problems the world currently witnesses. It can help to develop mutual legal cultural understanding and create co-cultural exchange. More specifically, comparative law can play a significant role in the harmonization and unification of the law in modern societies. The Unidroit Principles of International Commercial Contracts is an excellent example in this regard.

(171) these parts are published in 1995, 2000 and 2003 (Zimmermann R, 'Comparative Law and the Europeanization of Private Law', in Reimann M & Zimmermann R (eds.), *Comparative Law*, Oxford: Oxford University Press, p.560).

(172) Ibid, 565.

(173) See www.unidroit.org/english/principles/contracts/main.htm.

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The discussion shows that in order for the comparison to be fruitful, the comparatist must determine any similarities, and differences between the legal systems involved, and examine the practicability of any borrowed rules, or principles, having regard to the legal and social environment in which they are to function. This is because some of these rules, or principles, may not work if they are borrowed from one legal system to another without criterion, or in the absence of social, cultural or legal background, or in the nonexistence of conformity between the giving and the receiving legal system.

In light of the above discussion, and in light of the modernization movement in many Islamic countries and the recourse to borrowing from secular laws, it can be concluded that it is currently possible for Arab laws, such as Jordanian law, to be enriched by rules, or institutions, derived from the laws of other legal systems, providing these rules and institutions conform to the Arab legal culture, social environment, religious convictions and rules of morality.

In this regard, we invite the legislators and governments in the Arab countries not only to fund and encourage undertaking comparative law studies but also to get benefit from the recommendations these studies provide and to learn from the experience of other developed countries, especially in the field of contract law, commercial law, constitutional law and human rights. This will help in the unification and reform of the laws in the Arab world.

The Arab league is invited to play a vital role in this regard and to launch a special initiative for this purpose. It should revive its initiative towards drafting the Arab uniform civil law. This initiative was launched as per the resolution No.108 for the year 1987 according to which the Council of the Arab Ministers of Justice is charged with drafting this law.

It should be mentioned here that some Arab countries, such as Egypt, have participated in the preparation of some international legislative instruments and have partially transformed such instruments into their domestic legislation. For instance, the Egyptian Commercial Law No.17 of 1999 includes some provisions and concepts stipulated in the 1980 United Nations Convention on Contracts for the International Sale of Goods.

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To sum up, it can be concluded, as Legrand⁽¹⁷⁴⁾ points out, that the future belongs to comparative law, which may help to reshape and redevelop national legal systems as well as to provide solutions for some legal problems encountered. It is essential here to recite the words of Koopmans, who remarks that the twenty-first century will become the era of new comparative methods and new comparative legal studies:

“As we share so many difficult problems of society, and as we live closer and closer together on the planet, we seem bound to look at one another’s approaches and views. By doing so, we may find interesting things - but we may also find ways to cope with the tremendous legal challenges that seem to be in store for us”⁽¹⁷⁵⁾.

(174) Legrand P, 1995, Op. Cit, p.272.

(175) Koopmans T, Op. Cit, p.556.

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**حوار الثقافات القانونية:
الدراسات القانونية المقارنة -
المزايا والعقبات**

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ملخص البحث باللغة العربية

إنَّ القانونَ المقارنَ ليس مجموعة من القواعد أو المبادئ بل إنه وسيلة للدراسة والبحث يمكن من خلالها إبداء ملاحظاتٍ قيمة أو تعليقاتٍ لن يتسنى إدراكها من قبل الباحث الذي يحصر دراسته لموضوع ما في ضوء نظام قانوني واحد أو في ضوء قانون بلد واحد.

فالدراسات القانونية المقارنة لا تقدم فقط معلوماتٍ عن النظم القانونية المختلفة، أو عن القوانين ذات الصلة بموضوع الدراسة، ولكن قد تقدم أيضاً - ومن خلال عملية الاقتباس - حلولاً ملائمةً للكثير من المشاكل، كما قد تساعد على تجنب مشاكل محتملة. لذا فإنها تجعل الباحث على بينة من حقيقة أن هناك الكثير مما يمكن تعلُّمه من تجربة أو خبرة النظم القانونية أو الثقافات القانونية الأخرى. ومع ذلك فإن الباحث الذي يجري الدراسات القانونية المقارنة قد يواجه بعض العقبات.

يناقش هذا البحث مسألة قانونية هامة ألا وهي حوار الثقافات القانونية، ويهدف إلى تسليط الضوء على أهمية القانون المقارن في عصر العولمة وفي ظلِّ عالمٍ متنوع وبيان أنه من الممكن حالياً لنظام قانوني ما أو لثقافة قانونية ما أن تُخصَّب أو تستفيد من نظام قانوني آخر أو من ثقافة قانونية أخرى، وأن التبادل الثقافي القانوني قد يساعد في تعزيز التفاهم المتبادل بين الأمم ويقدم حلولاً للعديد من القضايا ذات الاهتمام المشترك.