Chaaban, Y. (2021). Comparative Law as a Critical Tool for Legal Research in Arab Countries: A Comparative Study on Contractual Balance. *Akkad Journal of Law and Public Policy*, *1*(3), 123-134.

COMPARATIVE LAW AS A CRITICAL TOOL FOR LEGAL RESEARCH IN ARAB COUNTRIES: A COMPARATIVE STUDY ON CONTRACTUAL BALANCE

Yousra Chaaban
University of Ain-Shams, Cairo, Egypt
E-mail:
y.chaaban@law.asu.edu.eg
ORCID: 0000-0001-8121-5692

Received: May 2021
1st Revision: June 2021
Accepted: August 2021

ABSTRACT. Montesquieu frequently used analogies from antiquity, the English political system, or the Chinese legal system in his classic work 'De l'esprit des lois.' However, it is insufficient to analyze a single system to conduct and convey legal research more effectively. Through real-world experiences, exposure to the legal environment enables the development of a particular cultural and sociological philosophy of the rule of law. We believe that comparative law is a challenging discipline to situate. It takes a social science and a legal perspective. According to Édouard Lambert, comparative law has two conceptions: it is viewed as social science, and it is considered a higher kind of legal art. He asserts that the first "social" approach places a premium on comparative history to distinguish between these two ideas. In contrast, the second "legal" approach focuses on relative legislation, specifically on the legal systems of distinct peoples.

JEL Classification: K12, K13, K20

Keywords: comparative law, legal research, contractual balance

Introduction

"In his famous work 'De l'esprit des lois,' Montesquieu often resorted to comparisons drawn from antiquity, the English political system or the Chinese legal system." It is not enough to study a single system to do better and present legal research. Openness to the legal world through real experiences would make it possible to build a particular cultural and sociological philosophy of law rules. 1

[1] HAGUENAU-MOIZARD Catherine, Introduction au droit comparé, Dalloz, 2018, p.1.

We find comparative law a complicated science for the position. It has a social science approach and a legal one. For Édouard Lambert, comparative law has two conceptions: one 2according to which he considers comparative law as social science, and another conception according to which comparative law is regarded as a superior form of legal art. And to differentiate between these two conceptions, according to him, the first "social" approach particularly emphasizes the side of comparative history. In contrast, the second "legal" approach concerns somewhat relative legislation, dealing with the different legal systems in given peoples. 34

Despite the difficulty of positioning comparative law, it has a significant interest in the science of law and legal research. We can distinguish two sets of claims in comparative law. First of all, it has practical interests since it can help unify rights, bring them into dialogue, and develop solutions in domestic law. Then, it knows theoretical interests since the comparison helps to understand the rights by bringing a particular light on the different rules adopted and to take, thus, a step back on the national law. This retreat makes it possible to criticize one's legal system for improving it.56

In this article, we emphasize the importance of comparative law for legal research by applying particularly to the comparative study on the notion of contractual balance, a concept little known by practitioners but stimulating for legal doctrine.

And to do this, we deal in one (I) with the understanding and knowledge of comparative law; to measure, then, in one (II), the presence of comparative law in the research of Arab countries throughout history, taking a determined and benevolent eye on the future of the notion of contractual balance.

[2] Is a professor at the Faculty of Law of Lyon, considered as one of the Fathers founders of comparative law. In 1921 he created the first Institute of Comparative Law in France. The Institute of Comparative Law (IDCEL) of the Faculty of Law of Lyon 3 currently bears his name. 1907-1908, Lambert created within the Faculty of Law of Lyon, a seminar of Studies of Muslim law thus attracting the Egyptian intellectual elite to the French universities.
[3] Introduction à l'étude du droit comparé: recueil d'études en l'honneur d'Édouard Lambert. Vol. 1, preface by Pierre Garraud, Paris, 1938, p. 39.
[4] In.Infrastructure, the different comparative legal systems, P. 3.
[5] HAGUENAU-MOIZARD Catherine, op.cit, p.4 et seed.
[6] Ibid, p.6 et se.

I. Understanding and knowledge of comparative law

To better understand and know comparative law, we find it useful, even essential, to return to its creation, its origins, and its development (A). But, first, to show in a (B) its different methods that can serve as concrete tools in legal research service.

A. Comparative law, advent, and concept

To delimit the notion of comparative law, it is necessary to begin by tracing its history.

According to some authors, comparative law is a relatively recent science that appeared during the nineteenth century, thanks to German, French, and English jurists who showed an interest in studying foreign rights. On the one hand, during the development of international trade at that time, thinkers tried to find legal solutions common to different legal systems. On the other hand, thinkers 78 criticize the rigor of the law, finding that it must be more adapted to social needs. This is the case of Rudolf Von Jhering (German) and Raymond Salleiles, Édouard Lambert, and François Gény (French). They adopted a more liberal interpretation of the Civil Code and criticized the fixed vision of the law. The French school in this regard is known as the"school of exegesis" in law. In addition, thinkers such as Carl Mittermaier (German) and Jean-Jacques Foelix (French) find that comparative law and the study of different foreign systems help broaden legal knowledge by sometimes observing solutions otherwise adopted by other laws, which helps to improve domestic national law.9, 10

The most significant event in the history of creating comparative law is the International Congress of Comparative Law in Paris from July 31 to August 4, 1900. It is considered a birth certificate of comparative law as an academic discipline. It brought together thinkers and academics from all continents to discuss current topics in comparative law. In 1926, thanks to the individual efforts of German and Italian academics, the International Institute for the Unification of Private Law was established.11

Comparative studies have subsequently found space and value, thanks to the construction of European organizations such as the European Communities and the Council of Europe. 12

[7] Ibid, p.1.
[8] Ibid., p.2.
[9] Ibid.
[10] Ibid.
[11]Ibid.
[12] Ibid, p.3.

After recalling the history of comparative law, we will list the different legal systems known in the world. It should be noted that there is already controversy over how to classify these other legal systems compared.

Classification of legal systems

René David, the father of classifications in comparative law, proposed to group legal systems by "family of law." This logic makes it possible to classify legal procedures according to their common or similar traits, facilitating their studies.13, 14

Two possible criteria for identifying the legal family: on the one hand, it is a technical legal criterion where we are mainly interested in the different sources of law (legislative or jurisprudential) and the methods of legal reasoning; and on the other hand, it is an ideological criterion where the different political ideas or religion are particularly emphasized.15

Other great comparatists, successors of René David, favor one criterion over the other; there, the doctrinal controversy asserts itself. For example, Konrad Zweigert and Hein Kötz affirm the legal criterion by identifying five more criteria: "history, mode of reasoning, the existence of distinctive institutions, sources of law and modes of interpretation, ideological factors." Ugo Mattei, on the other hand, only emphasizes cultural criteria. So, Thierry Rambaud holds to the thought of René David, who identifies the three sides: legal (technical), ideological and cultural, emphasizing the relationship of the judge to the written rule. 1617

The prominent legal families, the best known, are the family of the Common Law, the Romano-Germanic family, and the family of Islamic law.18

Anglo-Saxon law is of jurisprudential origin, and it began to create rules only in the nineteenth century. While French and German law gives a central place to codification but in no way prevents the creative power of the judge.1920

As far as the family of Islamic law is concerned, it is identified concerning philosophical and religious conceptions. Except that, for some states such as Egypt, and unlike Saudi Arabia or Pakistan, religion is only a source of inspiration. Law and religious rules are not confusing.

[13] Ibid, p. 8.
[14] Ibid.
[15] Ibid.
[16] Ibid, p. 9.
[17] Ibid.
[18] Ibid, p. 8.
[19] Ibid, p. 9.
[20]Ibid.

We can thus describe the Egyptian system as a "modernized" system of Muslim law or a Muslim state system built on a Western model, as presented by some authors, where Muslim law is only one source, among others, of modern Egyptian law.21

The different comparative methods

The methods of comparative law are diverse. They depend mainly on the objective sought by the author. Nevertheless, we will mention the two essential techniques 22and the most used. First, if it aims to standardize legal rules or create some reform, it will use a " functional method." Then, if the author seeks to compare remaining in the ranks of the doctrine, he will be called to use a method called "conceptual."

The first "functional" method compares the "elements that perform the same function to show that beyond the difference in the technical processes used, the solutions chosen are ultimately equivalent from one right to another." This method does not stop at the concept or the notion itself. It instead seeks the idea that can ensure the same function arrives at the same result. The comparatist in this method starts from the practical answer to arrive at the notion. This method is recommended if the researcher studies different legal systems (if each of these systems depends on another legal family).23

Whereas in the second "conceptual" method, the comparatist instead starts from institutions or notions to compare them to different rights. This method presupposes, in our view, that the other legal systems compared know the same concepts and have the same logic and legal reasoning. Therefore, this conceptual method is only recommended by comparing legal systems of the exact nature where the ideas sought are found. We find it interesting to emphasize further the comparative aspect that the Arab countries have experienced in history, thanks to the Egyptian comparative experience.

II. Comparative law in Arab countries, a history, and an illustration

In this part, we seek the thought of Al-Sanhoury, to trace the vision or the conception he made of comparative law (I), to follow, subsequently, with a real example of study highlighting the particularities of the notion of contractual balance in comparative law (II).

[21]In. RAMBAUD Thierry, *Introduction to Comparative Law : the great legal traditions in the world*, Paris, PUF, 2014, p. 189 et se seed

[22] In. JALUZOT Béatrice, Methodology of Comparative Law : balance sheet and prospective, *RIDC*, Vol. 57 N°1,2005. pp. 29-48., TWO : https://doi.org/10.3406/ridc.2005.19332.

[23] LAITHIER Yves-Marie, *Comparative law*, Cours Dalloz, Série de droit privé, Paris, 2009, p. 25.

A. Al-Sanhoury and the experience of comparative law

Al-Sanhoury, 24 thanks to his creative side, realized that comparative law is, on the one hand, a research tool and, on the other hand, a law reforming tool. This observation we can trace thanks to two moments of his professional and scientific life: first, through his studies and then when taking charge of the national mission to reform the law and the Egyptian legal and judicial system, starting with the Civil Code.

Through his studies, Professor Abdel-Razzak Al-Sanhoury had prepared his two doctoral theses in Lyon under the supervision of the great comparatist Édouard Lambert. We find the considerable influence of the comparative method learned by Professor Édouard Lambert in this work: his first doctoral paper dealt with 'contractual restrictions on individual freedom of work in English jurisprudence.' Despite the difficulties of this subject, Al-Sanhoury was able to study English law, formulate it, and present his paperwork in French, a language other than his own. His second25 paper dealt with the 'caliphate: its evolution towards an Eastern League of Nations, emphasizing this paper a purely oriental idea, studied in comparative view and also presented in French.

Then, when he was entrusted with reforming Egyptian law, Al-Sanhoury adopted the same methodology he studied. At the beginning of his task, he was even assisted by his former teacher, Édouard Lambert (26). When drafting the articles of the Code, Egyptian legislators had before them, as Professor Al-Sanhoury asserts, several international laws. First, ancient Latin legislation: French, Italian, Spanish, Portuguese and Dutch law; and the news: Tunisian, Moroccan and Lebanese law; and the Franco-Italian project. Secondly, Germanic legislation: German, Swiss and Austrian law. Thirdly, the legislation was formed by mixing the two previous trends: Polish, Brazilian, Chinese and Japanese law.27

Al-Sanhoury did not 'copy and paste' French law. On the contrary, Egyptian law has nevertheless retained its tradition or hue derived from Muslim law, mainly according to the

[24]Professor Abdel-Razzak Al-Sanhoury is the main reformer of Egyptian law, and a politician born in 1895 and died in 1971. He had been the main drafter of the Iraqi Civil Code as well as the Syrian Civil Code; he was the inspiration for the Jordanian and Libyan codes.

[25] Al- Sanhūrī, ʿAbd al-Razzāq Aḥmad, *Contractual restrictions on individual freedom to work in English case law*, 1925 ; Al- Sanhūrī, ʿAbd al-Razzāq Aḥmad, *The Caliphate: Its Evolution towards an Eastern League of Nations*, Paris, 1926.

[26] v. Preparatory work for the Civil Code (collection), Government of Egypt, Ministry of Justice, Dar Al-Book Al-Arabi, (in Arabic) p. 6 et seed.

Preparatory Group for Civil Law, Egyptian Government, Ministry of Justice, Arab Book House Press.

[27] AL-SANHOURY Abdelrazzak, *The Referee*, on. cit. p. 50.

doctrine of fiqh of Al-Imam Al Hanafi in matters relating to family law, disabilities, as well as succession.28

Instead, Al-Sanhoury used comparative law as a "tool" of legal research, thus achieving one of the purposes of this law: to reform and modernize the law by providing adequate solutions to his society. As a result, he managed a cultural, legislative, and technical mix of law. He was thus able to present rich comparative works, duly in his legal research and in the national position to which he contributed. In our next point, we address the essential features of a doctoral paper dealing with the notion of contractual equilibrium as an example of a concrete case applying the methods of comparative law.

Contractual balance, an illustration of comparative research

The term "contractual balance" is often repeated without specifying its content. In the doctoral paper entitled "dependence and contractual balance, the study of comparative law," recently defended in Lyon, France, we tried to identify the content of this notion by studying its conception in the different systems studied (the Egyptian, French, and English legal systems). In the first place, the paper aims to reform Egyptian contract law, giving way to a principle of contractual balance. Since we believe that any legal reform or change begins with a broad and thorough study, legislating a normative regulation of contractual balance in Egyptian law or the different legal systems of Arab countries is to study the legal solutions adopted elsewhere fully.

Then, the paper aims, in the second place, to sensitize future researchers to the studies of comparative law by showing the possibility of having a dialogue between these different systems.

To date, the contractual balance in Egyptian law is reflected in a series of legal institutions which, in our opinion, are contested but which put in place a more solidaristic than individualistic side to the logic of contracts, such as the contract of adhesion and its regime (Article 100 of the Egyptian Civil Code), the theory of exploitation (as the fourth defect of consent, Article 129 C.c.e., functionally compared to the new form of exploited violence,

[28] GEMEI Hassan, Contractual Balance in Egyptian Law, *in Studies offered to Jacques Ghestin, the contract at the beginning of the twenty-first century*, Anthologie du droit, L.G.D.J., éditions 2015, p. 379 ; v. also JAHEL Sélim, Code civil et codification dans les pays du monde arabes, in Collectif, *The Civil Code: 1804-2004: a past, a present, a future*, Paris, Dalloz, 2004, p.833.

enshrined in French law), and the sanction of unfair terms and its regime (Article 149 of the C.c.e.).29

The contractual balance in French law is highlighted recently by the 2016 reform, thanks to articles 1170 and 1171 of the French Civil Code, where the legislator has generalized the control and sanction of contractual imbalance and unfair terms in membership contracts, 30formerly treated only under the aegis of special rights such as competition law or consumer law.

In addition, the contractual balance is ensured indirectly by Article 1143 of the C.c.f., which penalizes abuses that may result from the exploitation of a state of dependence.

While English law knows theundue influence and the economic hard as means of combating the abuse of dependency and achieving the contractual balance. The English court also exercises controls to assess unfair or unfair terms. These controls areincorporation, interpretation, and Fairness tests.31

We note that the three legal systems studied in this paper refuse a control of the contractual balance through the injury, implementing it by sanctioning the imbalance; more precisely, the sanction of the unfair terms causes the imbalance. This is the traditional way to achieve a certain balance in any contractual context, including in situations of dependency. 32

The contractual balance is thus implemented in these legal systems through the imbalance, that is to say, in a corrective way, since the intervention occurs only a posteriori, that is to say, in terms of correcting the imbalances that may result from the situation. However, the sanction of inequality is a second-line scenario, which comes only as an alternative to our main ambition, which is that of the contractual balance itself. This is why we believe that the current implementation **Error! Bookmark not defined.Error! Bookmark not defined.**(this corrective strategy in positive law) is insufficient. Instead, it is necessary to provide for contractual balance as a general principle of law as the case for freedom of contract, good faith, or binding force.

Finally, this paper shows us that a dialogue between the different legal systems could be established, highlighting divergences and convergences between them. Consequently,

[29] Hereafter C.c.e.
[30] Hereafter C.c.f.
[31] V. CARTWRIGHT John, *Contract law - An introduction to English Law of Contract for the civil lawyer*, Second Edition, Hart Publishing, Oxford and Portland, Oregon, UK, 2013 ,p. 211 et se seed
[32] We also find that Laurence Fin-Langer deals with this idea differently: she deals with the explanatory function of contractual balance. highlighting it in particular through imbalance, v. FIN-LANGER Laurence, on *Contractual Balance, Private Law Library*, T. 366, L.G.D.J, Paris, 2002, p. 134.

thanks to the technique of comparative law, a reform in contract law could be achieved, and a general principle of contractual balance could be put in place, thus changing, one day, the logic of contract law. This ensured an improvement in the national legal system, one of the ultimate aims of comparative law.33

Except that this ultimate goal could not take place in training our students, Egyptians, and Arabs in foreign languages, in the methods of comparative law, so that it is the tool and the main engine in their legal research and shaping laws. In the end, we must never forget that the law is not a closed field. On the contrary, the rules of law are explained through multiple cultural, social, political factors, etc., which have their origins in a particular legal system in the corner of the world, which we discover through comparative law.

Conclusions

The contractual balance is thus implemented in these legal systems through the imbalance, that is, in a corrective manner, because the intervention occurs only a posteriori, that is, in terms of correcting the imbalances that may arise as a result of the situation, and because the intervention occurs only in terms of fixing the imbalances that may occur as a result of the situation. On the other hand, the penalty of inequality is a second-line scenario that serves as an alternative to our primary goal, which is the achievement of contractual balance in and of itself. We feel that the existing implementation (this corrective technique in favorable legislation) does not address this issue enough. As with freedom of contract, good faith, and binding force, it is essential to provide for contractual balance as a fundamental principle of law in the same way that they are provided. Finally, this study demonstrates that it is possible to build a conversation between the various legal systems, exposing the differences and similarities between them. As a result, using comparative law techniques, a reform in contract law might be realized, and a general concept of contractual balance could be established, potentially altering the logic of contract law in the process. It was possible to do this since one of the ultimate goals of comparative law is to improve the quality of the national legal system. But this ultimate aim cannot be achieved without teaching our students, both Egyptians and Arabs, foreign languages and comparative law methodologies so that it becomes the primary instrument and engine for their legal study and the formulation of legislative proposals in their

[33] V. Supra the interests of comparative law p.1.

countries. Last but not least, we must constantly remember that the law is not a finite domain of knowledge. On the contrary, the principles of law are explained by various cultural, social, and political elements, among other things, all of which have their beginnings in a particular legal system in a specific part of the world, which we learn about via comparative law research.

References

1. HAGUENAU-MOIZARD Catherine, Introduction au droit comparé, Dalloz, 2018, p.1.
2. Is a professor at the Faculty of Law of Lyon, considered one of the Fathers founders of comparative law. In 1921 he created the first Institute of Comparative Law in France. The Institute of Comparative Law (IDCEL) of the Faculty of Law of Lyon 3 currently bears his name. 1907-1908, Lambert created within the Faculty of Law of Lyon a seminar on Studies of Muslim law, thus attracting the Egyptian intellectual elite to the French universities.
3. Introduction à l'étude du droit comparé: recueil d'études en l'honneur d'Édouard Lambert. Vol. 1, preface by Pierre Garraud, Paris, 1938, p. 39.
4. In.Infrastructure, the different comparative legal systems, P. 3.
5. HAGUENAU-MOIZARD Catherine, op.cit, p.4 et seed.
6. Ibid, p.6 et se.
7. Ibid, p.1.
8. Ibid., p.2.
9. Ibid.
10. Ibid.
11. Ibid.
12. Ibid, p.3.
13. Ibid, p. 8.
14. Ibid.
15. Ibid.
16. Ibid, p. 9.
17. Ibid.
18. Ibid, p. 8.
19. Ibid, p. 9.
20. Ibid.

21. In. RAMBAUD Thierry, Introduction to Comparative Law : the tremendous legal traditions in the world, Paris, PUF, 2014, p. 189 et se seed
22. In. JALUZOT Béatrice, Methodology of Comparative Law : balance sheet and prospective, RIDC, Vol. 57 N°1,2005. pp. 29-48., TWO : https://doi.org/10.3406/ridc.2005.19332.
23. LAITHIER Yves-Marie, Comparative law, Cours Dalloz, Série de droit privé, Paris, 2009, p. 25.
24. Professor Abdel-Razzak Al-Sanhoury is the leading reformer of Egyptian law, and a politician born in 1895 and died in 1971. He had been the main drafter of the Iraqi Civil Code as well as the Syrian Civil Code; he was the inspiration for the Jordanian and Libyan codes.
25. Al- Sanhūrī, ʿAbd al-Razzāq Aḥmad, Contractual restrictions on individual freedom to work in English case law, 1925 ; Al- Sanhūrī, ʿAbd al-Razzāq Aḥmad, The Caliphate: Its Evolution towards an Eastern League of Nations, Paris, 1926.
26. v. Preparatory work for the Civil Code (collection), Government of Egypt, Ministry of Justice, Dar Al-Book Al-Arabi, (in Arabic) p. 6 et seed.
27. Preparatory Group for Civil Law, Egyptian Government, Ministry of Justice, Arab Book House Press.
28. AL-SANHOURY Abdelrazzak, The Referee, on. cit. p. 50.
29. GEMEI Hassan, Contractual Balance in Egyptian Law, in Studies offered to Jacques Ghestin, the contract at the beginning of the twenty-first century, Anthologie du droit, L.G.D.J., éditions 2015, p. 379 ; v. also JAHEL Sélim, Code civil et codification Dans Les pays du monde Arabes, in Collectif, The Civil Code: 1804-2004: a past, a present, a future, Paris, Dalloz, 2004, p.833.
30. http://theses.fr/2020LYSE3036
31. Hereafter C.c.e.
32. Hereafter C.c.f.
33. V. CARTWRIGHT John, Contract law - An introduction to English Law of Contract for the civil lawyer, Second Edition, Hart Publishing, Oxford and Portland, Oregon, UK, 2013,p. 211 et se seed
34. We also find that Laurence Fin-Langer deals with this idea differently: she deals with the explanatory function of contractual balance. Highlighting it in particular through

imbalance, v. FIN-LANGER Laurence, on Contractual Balance, Private Law Library, T. 366, L.G.D.J, Paris, 2002, p. 134.

35. V. Supra the interests of comparative law p.1.