CHAPTER 1

Methodology and General Difficulties

1 Comparative Legal Methodology

The main purpose of this book is to compare aspects of English trusts law and Islamic Waqf law. This section will be devoted to the discussion of comparative legal methodology, which will be the legal research methodology adopted in this book.

Contact between nations, such as ‘economic and commercial contacts’, generates interest in comparative law. Grubb notes that there is an ‘increasing necessity of comparative law in a world where physical and legal barriers are breaking down’. Some have even described comparative law as ‘fashionable’. Comparative law has even been equated with ‘traveling’, where one breaks away from routines and meets the ‘unexpected’ and ‘unknown’. Whereas with traveling, one must actually travel to see the foreignness; in law, sometimes, one does not have to look beyond one’s own legal system to see foreign influences.

All legal systems are open to ‘foreign influences’, British legislation and English law are no exception, and, therefore, comparative law can always

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5 Interestingly, for our purposes, some have even argued that the English trust was inspired by the Islamic Waqf. See Monica Gaudiosi, ‘The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College’ (1988) 136 University of Pennsylvania Law Review 1231. However, note Gamal Moursi Badr, ‘Islamic Law: Its Relation to Other Legal Systems’ (1978) 26 American Journal of Comparative Law 187, 193, ‘when venturing into the field of historical comparison between legal systems we should avoid jumping to the conclusion that of the two legal systems under study the later in date has necessarily borrowed from the earlier’; see also Paul Matthews, ‘From Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust’ in D.J. Hayton (ed), *Extending the Boundaries of Trust and Similar Ring-fenced Funds* (Kluwer Law International 2002), 2, ‘although similar pressures in different places (and times) may lead to legal solutions which resemble one another, that does not inevitably mean that the first of them to appear must be
shed light into how these foreign influences played their role in shaping the law as we know it. Moreover, one does not have to look beyond one’s indigenous legal system to see comparative workings. Comparison is in the nature of all legal work, and, even more importantly, it is an important constituent of ‘human thought.’ Comparison is inevitable; it ‘is a fundamental principle of legal research.’ All claims legal researchers or lawyers make are ‘implicitly or explicitly... set against another situation.’

Yet, comparative law, as a separate legal discipline, is distinctive because it entails reconstructing the meaning of foreign rules. What also makes comparative law distinctive is that it is not only the study of ‘foreign’ laws; rather, it is the study of ‘foreign’ law within a ‘conceptual framework’ that has been constructed for the simultaneous study of a multiplicity of systems where each system does not necessarily share the same ‘epistemic’ view of law. By looking at laws outside of their indigenous setting, one immediately takes them out of the context in which they normally operate. Not only that, but one would also look at a particular law with his own prejudices and personal legal background. For example, a common lawyer might view a conventional family Waqf as a legally repugnant wealth-planning structure as it offends the rule against perpetuities. A true comparatist must at first rise above this and seek to understand ‘foreign’ laws within their context, suspending judgments based on personal experience and heritage. Only after such an understanding is achieved may one begin the process of reconstructing the ‘foreign’ law, drawing on his own legal system. It is at this point where we, as comparatists, learn most.

the parent of (or even related to) the other or others’. With regards to the issue of trust being influenced by the laws of Waqf, Badr holds, ‘it is safer here also to ascribe the similarities between waqf and trust to an independent similar treatment of a very similar problem.’

6 Kahn-Freund 2.
7 A. Kh. Saidov, Comparative Law (William Elliott Butler tr, Wildy, Simmonds and Hill Publishing Ltd 2003), 33.
9 Ibid.
10 Ibid. 239.