

*Honorary Article*

# Comparative Law in Asia: The Case for Intra-Asia Intensification

FARID SUFIAN SHUAIB

AUTHOR CORRESPONDENCE:

Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia  
Jalan Gombak, 53100 Kuala Lumpur, Malaysia  
farid@iium.edu.my

I would like to thank the organiser for inviting me to participate in this important conference – the ASIAN Conference on Comparative Law 2018 – with the theme “Comparative law and Legal Culture in Asia”. This conference is certainly timely considering what is happening around us on the world stage. One inference that we could make from Brexit (namely the success of the referendum for United Kingdom to leave the European Union) and the support received by the far right populist political parties in Europe, (such as the National Front in France) is that nationalism is on the rise. Of course, nationalism helps the creation of states in the first place and thus is not neces-

sarily a terrible thing. Moreover, nationalism could be used to harness unity and cohesiveness in a nation in order to be a developed country, so that the agenda for development could be executed and achieved. However, the language of nationalism that one could hear from some parts of the world is about superiority and exclusion. Thus, a conference on Comparative Law is nothing but timely.

The timing of this conference is apt because comparative law – as a study of other legal systems and laws – forces us to shift our gaze to the outside world, to embrace the world that exist outside our cocoon. We would not be able to do this if we do not believe that the legal system of others - are worth to be looked at, pondered upon, and examined. In this regard, comparative law would be a tool in connecting the world, to rise above the xenophobic thinking. As one of the objectives of comparative law is to gain knowledge and to be intimate with the law in foreign lands, comparative law should enable the appreciation of the legal system of others, and perhaps to use the lesson learned from examining other legal system to improve one's own legal system.

Most of the time, the above observation about learning the legal

system of others is made with a western-centric standpoint; with the assumption that law students and academics from western countries have inadequate knowledge of the Asian legal systems. That may be true, although we could find numerous numbers of scholars from the West who are regarded as experts on the Asian legal systems and numerous numbers of research centres on Asian law. It is also a fact that we could find an abundant number of journals published by university and other institutions specifically targeting Asian legal system and law.

In discussing about the standing of comparative law in relation to Asia, I would venture to suggest that a more critical task is to increase comparative studies among Asian countries or intra-Asia, rather than comparative undertaking between Asia and other part of the world. As they say, you should know first your neighbours. It is pertinent at this juncture to consider the Association of Southeast Asian Nations (ASEAN) ASEAN Community 2015 project, which has the twin pillars of peace and security. This project includes the ASEAN economic integration measures with the establishment of the ASEAN Economic Community (AEC). It aims is to provide the people of ASEAN with an open and integrated market. It remains to be seen whether this economic imperative will spur academics and lawyers to undertake comparative law to assist in the integration of the legal framework and laws particularly laws relating to trade. Although Southeast Asia is but a small part of Asia, taking into account that we are hosting this conference in the Southeast Asia, I would not think it is ill-advised to give some focus to the Southeast Asia region.

Comparative law is important in achieving the goal of integration of Asian economic community. In order to arrive at the integration, a full understanding of the legal system and laws in each ASEAN countries is essential. Towards this aim, the understanding of culture, including legal culture is important since legal system and law could not be separated from the culture of the society. Although there are words of caution for instance from Lawrence Friedman, who describe legal culture as a "troublesome concept" since it is an abstraction and difficult to define, and a term with value-

impregnated connotation,<sup>1</sup> the value of appreciating culture in understanding legal system could not be denied. Nevertheless, I would agree that we should exercise caution from using culture as "a lazy short cut that obviates the need for genuine investigation or, at worst, a thinly disguised effort at preserving the status quo".<sup>2</sup> For instance, the non-litigious nature of East Asia should not be a reason for the state not to provide legal aid; and following this, the reason why a government in Asia would not provide a comprehensive legal aid should not to be simply put to legal culture.

A culture could be said as "an entire system of patterned behaviour, beliefs, values, speech, and general design for living that is learned and shared by members of a given society".<sup>3</sup> The understanding of a statute, a legal institution, a case law, a legal process or a legal system must consider the different cultural contexts in which those things operate.

At the risk of being guilty of over generalisation, and at the risk of sounding like saying Asian is a homogeneous society (which is certainly far from the truth), I would say that academics in Asian institutions, relatively speaking, would have less physical and intellectual hurdles in understanding and appreciating the legal culture of Asian. I admit that Asia is the largest and the most populous continent, with mostly dense settlement of 4.5 billion people which is 60% of the world population. In Asia we have more than 50 countries with geographically and culturally distinct nation such as the Kingdom of Saudi Arabia, Russia, India and Japan. In Asia, we have India and China – the main growth engine of the world, although the global financial architecture remains in control of the West. Thus, Asia is far from being homogeneous.

This statement – namely the earlier assertion that we should have more comparative law projects among Asian countries - is not made to exclude academic from institutions in far away land to come to Asia and to examine Asian legal system. They are more than welcome. This statement is made to highlight the relative advantage of academics in Asia with regard to time, space and cultural affinity to embark upon comparative law projects among countries in Asia.

At this point, permit me to share my experience in

one of my comparative law research. In year 2011, a number of my colleagues and I were embarking upon a research project on the plural court systems in Malaysia and Indonesia. Unfortunately, in the start of our project, we could not find any books or articles that specifically compare the Malaysian and the Indonesian legal systems or court systems. Even books on the Indonesian legal system in English could not be found. We could read law books in Bahasa Indonesia, but we do not want to risk misunderstanding the writings. Thus, we have to schedule earlier our field research portion of our project; to learn from the ground the Indonesian court system, rather than learning it first from the books. Here, I have to put on record the assistance rendered by colleagues at the law faculty of Universitas Muhammadiyah Yogyakarta in arranging interviews with the judges and academics for the week that we stayed in Yogyakarta.<sup>4</sup>

As I have mentioned earlier about the intra-Asia research, one of the advantages of comparing Malaysia and Indonesia is the similar features it shares, such as legal pluralism in the form of colonial and indigenous law which was cause in both countries by the colonial legacy albeit by different colonial actors. We discovered that both Malaysia and Indonesia have a parallel court system – in the form of the court of general jurisdiction – known as *peradilan negeri* or state court in Indonesia; and known as civil courts in Malaysia; and another court system for Muslims known as *peradilan agama* in Indonesia; and *mahkamah syariah* or Syariah courts in Malaysia. At first impression, this similarity should enable an apple to apple comparison.

However, a deeper examination of the *peradilan agama* system led to the finding that the system is very much different from the Syariah court system because of the different in the foundational structure of the country. Malaysia is a federation with the states having autonomous powers, particularly on matters relating to Islam; and Indonesia is a unitary state with much more concentration of powers at the centre. Thus in Malaysia there are fourteen distinct Syariah court systems, each state having its own Syariah court system.<sup>5</sup>

On the other hand, in contrast to Malaysia, as a union consisting of 17,508 islands, with diverse ethnic

groups and languages, Indonesian constitutional framework is a unitary government. Thus, the *peradilan agama*, or the religious courts is under one roof at the central level, not under each province. It is under the one roof of the Supreme Court of Indonesia. Thus, appeals from *peradilan agama* and *peradilan negeri* would rise upward to the same apex court, namely the Supreme Court.

However, a further study of the Indonesian legal system shows that there is an exception to this centralisation of judicial structure and power in the province of Aceh, where it enjoys a autonomous power including in setting up Shariah courts and Shariah legislation.<sup>6</sup> Curiously, rather than using the name *peradilan agama*, Aceh adopts the name Syariah courts for the new courts; a name similar to the Malaysian Syariah courts. In order to appreciate this aberration of the unitary structure of Indonesia, we have to know the religious, political and social history of Indonesia and its various provinces. In other words, we have to know the culture and the legal culture of Indonesia; and the culture and the legal culture of the former colonial master.

Thus, a simple method of juxtaposition between the court systems of Malaysia and Indonesia is inadequate. We have to appreciate the constitutional development and the history of the nation in order to fully understand the court system of Indonesia, and it would be true in the study of any country.

Considering the benefit from the full ASEAN Economic Community; the time, space and cultural affinity, I would again suggest that there is a case to be made for intensification of an intra-Asia comparative law. This is not to say that such effort has not been done or does not exist. Moreover, this is not to say that comparison with other countries should be totally excluded or of no value. What is proposed is that intra-Asian comparative study needs to be firmly prioritised and accelerated. It is indeed true that sometime sitting afar rather than near in making observation produce better analysis. However, the suggestion is not about exclusivity, but about priority. That is my simple message today so that we could see more collaboration among legal scholars in Asia in understanding our world, and in making this world a better place for us and for the generation to come.

## ENDNOTES

- <sup>1</sup> Friedman, Lawrence M. (2006) "The Place of Legal Culture in the Sociology of Law," in M. Freeman, ed., *Law and Sociology*, Oxford: Oxford University Press, 185-199.
- <sup>2</sup> David Nelken, "Thinking about Legal Culture" (2014) 1 *Asian JLS* 255.
- <sup>3</sup> Bodenheimer, "Book Review: HW Ehrmann, *Comparative Legal Cultures* (1976), (1977) 25 *Am. J. Comp. L* 416, 419-420.
- <sup>4</sup> Thanks to among others Mr. Yordan Gunawan, Dr. Iwan Satriawan, Mr. Nasrullah, Mr. Endrio and Mr. Ihsan.
- <sup>5</sup> For writings produced following this study, see Farid Sufian Shuaib, "Federalising Shariah Courts in Malaysia: Lessons from the Indonesian Peradilan Agama" [2015] 1 *Malayan Law Journal* lviii-xv; Farid Sufian Shuaib *et al*, "Towards an Apex Sharia Court in Malaysia" (2017) 25(S) *Pertanika Journal of Social Science & Humanities* 309-322.
- <sup>6</sup> See Undang-undang Nomor 18 Tahun 2001, Kepres Nomor 11 Tahun 2003 dan Qanun Provinsi Aceh Nomor 10 Tahun 2002. A reference could be made for instance to Undang Undang Nomor 11 Tahun 2006 on the system of government.