

Systematic Comparative Study of Asian Legal Systems

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ABSTRACT

This article explores what makes the study of comparative legal systems in Asia distinctive and important. It explores why a comparative study of the legal systems in Asia contributes to the growth of a strong comparative law tradition and legal research. The article suggests that the seven concepts and methods stated by [Siems \(2019\)](#) can be applied to systematically undertake comparative legal research with regards to the legal systems in Asia. The specific features that shape the context of Southeast Asia and Asia in general must be clearly defined and addressed. Finally, this paper discusses how the Southeast Asian example may be instructive because it can help highlight the importance of teaching comparative law in other parts of the world.

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Contribution/Originality: This study contributes to the existing literature on comparative law by examining the expanding scope and diversity within the field. While traditionally focused on comparing legal rules between different countries, the paper explores the potential for comparative law to encompass historical legal systems, sub-national laws, and broader comparisons across domains.

1. Introduction

[Shuaib \(2018\)](#), in his article positing the need for an “intra-Asia intensification” with regards to the learning of Comparative Law in Asia, describes how the study of other legal systems and laws “forces us to shift our gaze to the outside world, to embrace the world that exists outside our cocoon” and this exercise is only made possible if we believe that other legal systems are “worth looking at, pondered upon and examined”.

This exercise of “shifting our gaze to the world and to embrace the world that exists outside our cocoon” fulfils one important objective of Comparative Law, which is to enhance one’s appreciation of the legal systems of other nations. In studying Comparative Law, one becomes better aware of the constitutional development and the history of our surrounding Asian nations, and possibly apply the lessons learnt in an attempt to improve one’s own legal system.

In the same article, [Shuaib \(2018\)](#) also emphasizes the importance of increasing comparative legal studies among Asian countries or 'intra-Asia', as opposed to a comparative "undertaking between Asia and other non-Asian" parts of the world. The entity with the closest proximity to Malaysia is, of course, the Association of Southeast Asian Nations (ASEAN). With a specific focus on countries within the Southeast Asia region, such a comparative legal endeavor would surely go a long way in achieving integration of the Asian community with regards to its collective economy. [Shuaib \(2018\)](#) also points out that armed with the advantage of such close proximity and an association through ASEAN, academics in Asia shall have the benefit of ease of time, shared space and cultural affinity to embark upon such comparative studies.

[Örücü \(2007\)](#), emphasizes the significance of understanding various legal frameworks. She highlights the necessity of recognizing that law is dynamic and evolving, with contemporary legal systems undergoing significant transitions. Increasingly, these systems are becoming hybrid and interwoven. Exploring this hybridity is crucial for grasping the interplay between legal principles and cultural contexts. Such study sheds light on how different legal traditions influence and shape each other in our globalized world.

Further, [Shuaib \(2018\)](#) argues for a stronger focus on comparative legal research within Asia. He acknowledges that such efforts have already been made but emphasizes the need for prioritizing and accelerating this research area. He also clarifies that this does not mean excluding comparisons with non-Asian countries or devaluing their importance. Rather, he advocates for a concentrated effort on intra-Asian studies. Observing from a distance can sometimes yield more insightful analyses, he notes. However, his suggestion centres on prioritizing regional comparisons without implying exclusivity. This approach aims to enhance understanding and integration of legal systems within Asia.

In setting the backdrop for this article, one naturally has to restate the definition and purpose of Comparative Law as understood in contemporary terms. Comparative Law involves examining and contrasting different legal systems from various countries, and comparative lawyers, according to [Zweigert and Kötz \(1998\)](#), "compare the legal systems of different nations." [Zweigert and Kötz \(1998\)](#) also draw a distinction between 'macrocomparison' and 'microcomparison'. 'Macrocomparison' examines broad legal questions across entire legal systems, whereas 'microcomparison' addresses specific institutions or particular issues.

The core themes in modern Comparative Law were identified by [Michaels \(2011\)](#) as constituting three themes. The first theme involves comparing different legal systems to uncover, explain, and evaluate their similarities and differences. The second theme focuses on the interaction and influence between legal systems, particularly regarding the adoption of laws from one system to another. The third theme is the creation of a comprehensive theory of law, aiming to understand different legal systems in their entirety and their interconnections. This approach was significant in the early 20th century and is regaining prominence today. Comparative Law thus serves as a field that explores the relationships and distinctions among global legal systems.

Juxtaposing [Michaels's \(2011\)](#) themes to the study of comparative legal systems in Asia, one can state that these three themes would be greatly beneficial if they are embedded in the curriculum of legal studies in Asian institutions.

With regard to Asia and ASEAN, one learns about the influence of legal systems vis-à-vis the reception of law, if any. This may include, for example, the influence of neighbouring Malaysia and Indonesia public laws on each other even though Malaysia is a common law country whilst Indonesia is a civil law country. Studies can also be done on whether there are influences or transmission from common law countries to civil law countries within Asia, and vice versa.

Furthermore, the study of Comparative Law serves multiple purposes. According to [Michaels \(2011\)](#), the study of Comparative Law serves to inform the process of national law-making, aids judges in resolving complex issues, forms a foundation for legal unification or harmonisation, and expands knowledge and awareness, particularly within legal education. Seen in this light, Comparative Law emerges as a distinct branch of legal science, in that, it incorporates comparative analysis of different foreign laws. This comparative element is essential for its application in these various contexts. Thus, Comparative Law not only enhances understanding but also plays a crucial role in informing legal practice and education.

Going further, [Demleitner \(2019\)](#) in her chapter on “Why and how to teach Comparative Law”, describes some of the perennial discussions surrounding the topic of the study of comparative legal systems. According to her, Comparative Law as an academic subject has remained somewhat singular when compared to the other bodies of law. In contrast to the established doctrinal parts of the legal curriculum, such as common law or civil law obligations, Comparative Law as a separate subject “lacks an obvious core and has no delineated subject matter.” This is because legal scholars have not come to any agreement on the methodological approach to be taken, or on the legal systems to be studied, and neither is there any agreed case studies to understand the subject matter. Furthermore, she says, the syllabus and textbooks on Comparative Law reflects the highest manifestation of academic freedom since it is all up to the teacher who is teaching Comparative Law. For an outsider, it may be confusing to see the subject of Comparative Law, although it shares the same name, but the content is totally different depending on where it is studied.

In this article, the study of comparative legal systems in Asia will be explored together with other related concepts, methods and specific features which emerge when discussing this important topic.

2. Theoretical Background of Comparative Law

This article delves into the study of comparative legal systems within the Asian context, emphasizing the region's unique and multifaceted legal landscapes. Asia's legal systems are characterized by a rich tapestry of traditions, including common law, civil law, religious law, and customary law. The article highlights how these diverse legal traditions contribute significantly to the broader field of comparative law.

The study of these systems is essential not only for understanding the unique legal cultures and practices within Asia but also for appreciating their interactions and influences on global legal norms and practices. By examining these varied legal landscapes, the article aims to foster a deeper comprehension of legal diversity and provide a more nuanced analysis of how legal principles are applied in different sociocultural and political contexts. It also explores the specific features relating to

history, religious, society and culture which have shaped the context of Asia (as opposed to Europe and other regions in the world).

In addition to that, this article also focuses on the methodological approaches required to analyse the similarities and differences among Asian legal systems. Utilizing [Siems's \(2019\)](#) seven concepts and methods for comparative legal research, the article proposes a systematic framework for examining the complexities of legal systems in Asia.

More significantly, this article also looks into some of the historical, religious, societal, and cultural factors that have shaped the legal context of Asia, setting it apart from other regions such as Europe. The article argues that the study of Asian legal systems provides valuable insights into the dynamic interplay between law and culture, enhancing the comparative legal scholarship and expanding the scope of legal research to include diverse perspectives and experiences.

3. Unit of Comparison and the Functional Approach: A Two-Step Method in Comparative Law

There seems to be two distinct steps in the study of comparative legal systems: through the unit of comparison and the functional approach.

3.1. Unit of Comparison

[Siems \(2019\)](#) states that the unit of comparison in Comparative Law refers to the subjects which are compared, whereas the normative method to discern the different legal rules between different legal systems is by using the functional approach. While 'microcomparison' focuses on smaller units, 'macrocomparison' focuses on the study of legal families or engagement in grand systems discussion. The dividing line between the two is flexible, wherein "one must often do both at the same time" to understand why a foreign system solves a particular problem in a certain way.

The idea of the method of 'macrocomparison' was first introduced by [Zweigert and Kötz \(1998\)](#). According to them, 'macrocomparison' looks into "different ways of resolving conflicts adopted by different legal systems" and "the various people engaged in the life of law, asking what they do, how and why". Further, the functional approach may be used to identify a common ground between two or more legal systems, and then to explore how these differences function in the different legal systems across Asia.

3.2. The Functional Approach

The functional approach is also defined by [Zweigert and Kötz \(1998\)](#), who state that "the basic methodological principle of all comparative law is that of functionality" whereby the intellectual activity is its objects and comparison is its process. They state further that "functionalism typically applies at the level of micro-comparison and macro-comparison".

In brief, the functional approach as defined by [Zweigert and Kötz \(1998\)](#) starts by identifying common social issues in each jurisdiction without relying on the legal terminology applied in the jurisdictions. It proceeds to examine and describe the responses that these legal systems provide to these identified problems. Through this comparative analysis, it aims to uncover both similarities and differences in how these

solutions are approached across different systems. It then goes on to develop a “language” that can effectively discuss and compare these cases across diverse legal contexts and languages. Further on, any similarities and differences are contextualised within broader societal and cultural contexts. Ultimately, the findings are evaluated critically and normatively to assess their implications for legal theory and practice. Further according to [Zweigert and Kötz \(1998\)](#), this approach will lead us to understand how legal systems address societal issues and offers insights into potential avenues for legal harmonization and development.

Thus, within the study of legal systems in Asia, the organizational structures of each country's legal system are integral components of Comparative Law. This approach facilitates understanding how different legal systems respond to similar challenges or issues. It also highlights the adaptability and universality of legal principles across diverse cultural and jurisdictional contexts.

3.3. Siems's Seven Methods in Comparative Law

[Siems \(2019\)](#) outlines seven primary methods for comparative legal studies. First, the functional approach identifies common social problems across legal systems and compares how each system addresses these issues. This method emphasizes functional equivalence, where different legal doctrines can be compared based on their similar functions. Second, the concept of legal families, which are groups of legal systems with shared characteristics, aiding in the comparison and explanation of similarities and differences among countries. Despite criticisms, this taxonomic method remains prevalent. Third, the concept of legal transplants examines how laws from one jurisdiction influence another, a method particularly relevant in post-colonial contexts. Fourth, understanding foreign legal cultures involves a deep immersion into the legal and cultural contexts of other countries, enhancing cross-cultural legal comprehension. Fifth, examining sociolegal relations explores how law interacts with and shapes society, often through comparative studies of constitutional interpretations. Sixth, law reforms by transplant advocate for the adoption of foreign legal models to improve domestic laws, provided these transplants are well integrated into the local context. Finally, the seventh method involves the harmonization and unification of laws, where comparative studies lead to the creation of unified legal standards. These methodologies collectively expand the scope and depth of comparative legal studies, especially in the context of Asia.

The seven methods and concepts of Comparative Law were outlined by [Siems \(2019\)](#) in order to discuss whether these concepts should become new units and part of Comparative Law. He argues that if these concepts are made into new units in Comparative Law, it will broaden the methods under Comparative Law. Based on the explanations and supporting examples outlined above, these methods can become part of the curriculum in the study of comparative legal systems in Asia.

4. Appreciating legal systems outside the Western Paradigm

In his book, [Menski \(2006\)](#) outlines several key factors that influence the understanding of legal systems outside of Western contexts. He argues for a global perspective, challenging the common Western-centric viewpoint in legal studies. He also emphasizes the hybrid nature of these legal systems, which are shaped by their specific localities and cultures, referred to as 'locality coloured'. Additionally, he highlights the normative

challenge these systems pose to Western legal paradigms, critiquing what he calls the 'lego-centricity' of the West. [Menski \(2006\)](#) also notes the universal presence of plurality and porosity in legal systems worldwide, not just in Asia and Africa. He points out that the boundaries within these legal frameworks are often ambiguous, with the lines between law and non-law being indistinct. Finally, he observes that law is deeply intertwined with society and culture, evolving over time in response to societal changes, making it 'encultured' and a 'lived tradition'. [Menski's \(2006\)](#) framework offers a comprehensive approach to analysing non-Western legal systems, providing valuable insights into their complexity and adaptive nature within global legal scholarship. Additionally, [Shuaib \(2018\)](#) reiterates on the importance of understanding the legal culture of Asian countries because, especially in this region, the law could not be separated from the culture of the society.

In recognising this importance, [Menski \(2006\)](#) proposes that a valid understanding of the law at a global level must be cognizant of the written and unwritten, as well formal and informal. In other words, [Menski \(2006\)](#) pointed that one must consider the socio-cultural environment in order to grasp the law as it is being applied correctly so that a balance is struck between international and local.

When it comes to a comparative study of the legal systems in Asia, according to [Jamal \(2019\)](#), it is essential to unpack the context of Asia and to show the perspective of Asia which can benefit Comparative Law. [Jamal \(2019\)](#) recognises that this endeavour is not easy given the sheer scale, scope and vastness of Asia. Nevertheless, once the Asian context and experience is understood, the study of the Asian legal systems will "offer the inspiring possibility of a deep and rich understanding of the content and context of different legal regimes within Asia."

Thus, in other words, although Comparative Law in Asia appear overwhelming and complex, considering Asia's enormous size and scope, however, one must acknowledge that the study provides an excellent opportunity to gain a thorough and comprehensive grasp of the substance and context of Asia's many legal systems. [Jamal \(2019\)](#) and [Shuaib \(2018\)](#) therefore agree and support the importance of prioritising the study of Comparative Law amongst the different legal systems and regimes within Asia.

5. The current Asian scenario

In the study of comparative legal systems in Asia thus, the method of researching legal transplants is significant in understanding the current Asian scenario. Such exercise, for example, is found in the study by [Mahy and Ramsay \(2014\)](#) which traces the development of company law in Malaysia to understand "whether the law is more a product of legal transplants than of legal family". Their research explored the use of the limited liability company entity of the British company laws which became widespread in Malaya.

[Mahy and Ramsay \(2014\)](#) find that while the British used this type of limited liability company form to assist British capital to move globally and exploit resources and opportunities in Malaya, there was resistance to this by the Malay population. They find that the local company law in Malaysia during the times of British colonialism in Malaya was not a successful tool of imperialism – in other words, it was not a successful *legal transplant* of company laws in Malaya at that time from British powers because there were relatively small number of local companies. [Mahy and Ramsay \(2014\)](#) also found

that although traditional Malay rulers were able to accumulate wealth through taxes and probably made small investments in trading opportunities with the British-registered companies, the Malay rulers never became commercial capitalists. This is an example of significant comparative legal research concerning Malaya of the past which provides current comparative lawyers a glimpse into the development of company laws from the days of colonialism until present times.

In the case of Malaysia, for example, given its geography, economic activities and maritime laws which are currently increasingly tested in South China Sea due China's political manoeuvres, the study of comparative legal system intra-Asia is extremely important. China has no common law and uses a civil law system instead. The law here means statutes and excludes case laws. In other words, court cases are not law; only rules codified by the legislature, the executive, and the judiciary are laws.

A study by [Shuaib and Tumay \(2019\)](#) provides insights into sociolegal relations through a comparative analysis of constitutional interpretations in Turkey and Malaysia. Their research primarily examines how both countries' constitutions can be seen through secular or religious lenses. Although the main focus is on constitutional construction, the paper also sheds light on sociolegal dynamics. [Sufian & Tumay \(2019\)](#) also discuss how the Turkish Constitutional Court views secularism as a project aimed at secularizing society. They argue that when a secular state implements policies to secularize its population, it risks losing its neutrality. This study, while centred on constitutional interpretation, inadvertently informs us about the broader sociolegal relationships within these countries. Therefore, in-depth research such as [Shuaib and Tumay \(2019\)](#) helps make clear that, when juxtaposed with lessons from Turkey, Malaysian courts had adopted the principle of harmonious construction which gives a prominent place in Islam, based on article 3(1) of the Malaysian Federal Constitution which declares Islam to be the religion of Malaysia.

5.1. Influences which shaped the Asian context

5.1.1. History, religion, society and cultural

[Menski \(2006\)](#) had emphasised the importance of taking a global perspective in the study of Comparative Law, and in doing so, reiterated the need to unpack the context of Asia. This includes unpacking the legal history of Asian countries because the historical, political, social and cultural development of each Asian country has had a profound effect on its legal system.

5.1.2. Local particularity

Malaysian common law is not the same as Singapore or Hong Kong common law, and in the civil law tradition, Indonesian civil law is surely not the same as Thailand civil law. This is because, when influences have moved from one country to another, what will develop is local particularity and adjustment to the differing contexts based on the reception of different systems. Thus, it comes as no surprise that the common law or civil law expressions in Southeast Asia are distinctive from each other.

5.1.3. Contextualisation

In the study of comparative legal systems in Asia, even though several countries inter-Asia may share the same legal family, contextualisation based on the existing local environment must be accounted for.

One such example for the need for contextualisation can be found in [Shuaib \(2018\)](#) when accounting for the differences in Malaysia's and Indonesia's legal systems. According to him, even though, at first glance, both countries share similar Islamic history and supremacy, but each country has a different approach depending on the individual country's context. In the same article, he also compared Malaysia and Indonesia based on each country's legal pluralism inherited from colonialism (although by different colonial powers) and existing indigenous laws. Further, according to [Shuaib \(2018\)](#), on the surface, it appears that both Malaysia and Indonesia have a parallel court system, i.e. in the form of the court of general jurisdiction. This court of general jurisdiction is known as *peradilan negeri* or state court in Indonesia, and as civil courts in Malaysia. When it comes to the court of Islamic jurisdiction governing religious observances of Muslims, the court system is known as *peradilan agama* in Indonesia, and *mahkamah syariah* in Malaysia.

[Shuaib \(2018\)](#) observes that, while the apparent external feature of legal pluralism is similar in both Malaysia and Indonesia, a deeper examination of Indonesia's *peradilan agama* led to the finding that the system is actually very different to Malaysia's Syariah court system. In Indonesia, the *peradilan agama* court system operates under a single and central level, unlike Malaysia where the *mahkamah syariah* operates separately in each state (there are fourteen distinct Syariah courts in Malaysia). The result is, in Indonesia, all appeals of the Islamic legal cases dealt in the *peradilan agama* courts will rise upward to the Supreme Court (Mahkamah Agung), i.e. the apex court in Indonesia. In other words, the Supreme Court judges who hear appeals on general jurisdictions in Indonesia will also hear appeals on Islamic matters. This is a stark contrast to Malaysia where the civil courts have no jurisdiction to hear appeals or interfere in Syariah court matters. In other words, in Malaysia, the courts of general jurisdiction and Syariah courts have exclusive jurisdiction, and one is not superior to the other.

6. Conclusion

This article argues that the study of comparative legal systems in Asia is essential not only to build richer and deeper understanding of the local laws rooted in each Asian neighbour for the greater goal of harmony within the region, but it is also expedient in terms of geographical and cultural proximities. While most legal systems in Asia share colonial legacies of the past from amongst different colonialists, the systems have each evolved into separate and distinct globalised systems of law, sharing legal families rooted in common law, civil law or socialist law. Each legal family has its own well-tested set of legal system and laws worth researching under the umbrella of Comparative Law.

The article has further shown how the seven concepts and methods stated by [Siems \(2019\)](#) can be applied to systematically undertake comparative legal research, and [Menski \(2006\)](#) tells us that the comparative study of Asian legal systems must clearly differ from the study of Western or European legal systems. [Menski \(2006\)](#) proposes that a valid understanding of the law in Asia must consider the difference between laws

which are written vs. unwritten, as well formal vs. informal. According to [Menski \(2006\)](#), one must consider the socio-cultural environment in order to grasp the law as it is being applied correctly. He suggests a cosmopolitan perspective that is neither Eurocentric nor Europhobic, but rather, one that strikes a balance between international and local.

This article also demonstrates the importance of unpacking the special features relating to the particular history, religious, society and culture which have shaped the context of Asia. An important example is a comparison between two neighbouring Asian countries – Australia and Indonesia. Each legal system in Asia is a product of distinct social circumstances and unique history and culture. Therefore, a lack of understanding or inadequate knowledge about the social, cultural, historical and other factors that influence the legal systems in Asia is a serious hurdle in the effort to bring about the understanding of the unique differences that exist.

In conclusion, the exploration of Asian legal systems through Comparative Law contributes significantly to legal scholarship by revealing the underlying similarities and differences in legal reasoning and application. By examining how various legal systems handle comparable issues, Comparative Law aids in identifying best practices and areas for legal reform. This comparative approach underscores the dynamic nature of legal systems and their responsiveness to societal and cultural changes. Moreover, it fosters a deeper appreciation for the cultural and historical influences shaping legal norms and institutions in Asian countries. Therefore, Comparative Law serves as a vital tool for both academic inquiry and practical legal analysis, offering insights into how legal systems evolve and adapt in an increasingly interconnected world.

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The author reported no conflicts of interest for this work and declare that there is no potential conflict of interest with respect to the research, authorship, or publication of this article.

References

- Demleitner, N. V. (2019). Comparative Law in Legal Education. In M. Reimann, & R. Zimmermann (Eds.), *The Oxford Handbook of Comparative Law* (pp. 320-344). Oxford University Press.
<https://doi.org/10.1093/oxfordhb/9780198810230.001.0001>

- Jamal, A. A. (2019). Comparing the Teaching of Comparative Law: A View from Singapore. *Asian Journal of Comparative Law*, 14(S1), S195-S211. <https://doi.org/10.1017/asjcl.2019.14>
- Michaels, R. (2011). Comparative Law. In J. Basedow, KJ. Hopt, & R. Zimmermann (Eds.), *Oxford Handbook of European Private Law*. https://www.researchgate.net/publication/294430907_Comparative_Law
- Mahy, P., & Ramsay, I. (2014). Legal transplants and adaptation in a colonial setting: company law in British Malaya. *Singapore Journal of Legal Studies*, 23–150. <http://www.jstor.org/stable/24872236>
- Menski, W. (2006). *Comparative Law in a Global Context – The Legal Systems of Asia and Africa* (2nd ed.) Cambridge University Press. <https://doi.org/10.1017/CBO9780511606687>
- Örücü, E. (2007). A General View of “Legal Families” and “Mixing Systems”. In D. Nelken & E. Örücü (Eds.), *Comparative Law: A Handbook* (pp. 169-187). Bloomsbury Publishing.
- Shuaib, F. (2018) Comparative Law in Asia: The case for intra-Asia intensification. *Indonesian Comparative Law Review*, 1(1). <https://doi.org/10.18196/iclr.1101>
- Shuaib, F. & Tumay, M. (2019). Lessons from a Secular State: Essence of the Constitution and Its Implication on Judicial Interpretation of Human Rights Provisions in Turkey and Malaysia. *Al-Shajarah*, 24(2), 167-183. <https://doi.org/10.31436/shajarah.v24i2.941>
- Siems, M. (2019). The Power of Comparative Law: What Types of Units Can Comparative Law Compare. *American Journal of Comparative Law*, 67(4), 861-888. <http://dx.doi.org/10.2139/ssrn.3557309>
- Zweigert, K., & Kötz, H., (1998). *An Introduction to Comparative Law*, Trans. Tony Weir (3rd ed.). Oxford University Press.