

The State of Comparative Law and its Teaching in Asia – An Introduction

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I. A CONFERENCE AND A SPECIAL ISSUE ON COMPARATIVE LAW IN ASIA

This Special Issue on the *State of Comparative Law and its Teaching in Asia* is the result of a two-day conference organized and financed by the Centre for Asian Legal Studies (CALs), National University of Singapore (NUS), and the Asian Law Institute (ALI), with the support of the International Academy of Comparative Law (IACL). Both ALI and CALs have as their main objective the promotion of Asian comparative law. ALI was established in 2003 at the initiative of NUS by leading Asian law schools to foster Asian legal scholarship and to facilitate greater interaction amongst legal scholars in Asia. ALI now has more than 100 member schools. It publishes this Journal. CALs was established in 2012 to facilitate research on Asian law at NUS, again in collaboration with scholars from the whole region and beyond. The IACL, headquartered in Paris, was founded in The Hague in 1924. It has extensive membership in Europe and North America and wants to expand its membership in Asia. Sponsoring this event was part of current efforts by IACL to reach out to Asia.

The conference which led to this Special Issue was held at the NUS Faculty of Law on 27 and 28 September 2017. The first day of the conference, sponsored by CALs, was on *The State of Comparative Law in Asia*; and the second day of the conference, sponsored by ALI, was on *Teaching Comparative Law in Asia*. Hence, the two parts in this Special Issue.

The conference saw twenty-seven colleagues present their papers. Some of the papers have been or will be published elsewhere, but we were able to assemble eleven of the papers presented at the conference in this special issue.

A collective reflection on comparative law and its teaching in Asia was long overdue. Of course, there have been comparisons and even competition between the different legal traditions of Asia long before Western legal traditions were imposed or

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adopted. Buddhism disturbed some assumptions of Hindu law; the Legalists and Confucianists in China had different views of the role of law; and when Islam came to Southeast Asia, it encountered *adat* (customary) laws that at least partially, and sometimes in large part, survive Islamization. The most recent developments in comparative law as an academic endeavour, however, came from the Westernization of the law in Asia. Mainly through colonization, but sometimes through a so-called ‘modernization’, Western law – the common law or the civil law – was adopted almost everywhere in Asia. In some jurisdictions in Asia, parts of local laws were retained, mainly as personal laws in the form of state-enforced legal pluralism. However, most of the laws were Westernized.

This led to a comparative law focused mainly on the relationship between the law now transplanted in Asia, and the law of the colonizing country or the law of the jurisdiction from which the transplanted law was borrowed. For example, Singapore, Malaysia, and India look mainly at English law and sometimes other common law jurisdictions; Japan and Korea look at German law; Thailand at French law (for administrative law); and Indonesia at Dutch law. Comparisons, until recently, were almost exclusively (and are still to a large extent) with the West, not with other Asian countries. More recently, Asian civil law colleagues started comparing their law to the common law, and they often do this by pursuing graduate studies in English mainly in the West (primarily in the United States and the United Kingdom, ie, mainly outside Asia). Common law colleagues, due to the lack of mastery in a civil law language such as French, German, or Japanese, do not study the civil law.

What we have started to see much more of, but only recently, is comparative law between Asian countries done without reference to Europe or the US. Yet, on the other hand, the influence of US law seems to be growing in Asia, in part because of its promotion by international organizations like the International Monetary Fund (IMF) and the World Bank.

We therefore wanted to evaluate the state of comparative law in Asia. Is the dominant comparison still with the former colonizer (eg, Singapore looking at England) or the main country that served as a model of the modernization of the law (eg, Japan looking at Germany), or is it the case that comparisons are increasingly made with the US or with other Asian countries? This constituted the first part of this Special Issue.

The second part of this Special Issue focuses on the teaching of comparative law in Asia. We are conscious that comparative law is probably taught to large numbers of students only in a few law schools in Asia. This part focuses on how, and to what extent, comparative law should be taught in Asian law schools.

II. THE ARTICLES ON THE STATE OF COMPARATIVE LAW IN ASIA

The two first articles discuss the extent to which Western law, from the US and from other common law countries, has become influential in Asia.

The first article is by Margit Cohn from Hebrew University of Jerusalem, Israel being part of Asia. The article, entitled *Comparative Public Law Research in Israel: A Gaze Westwards*, shows how, in Israeli public law, the object of comparison is Western law rather than the law of Asian countries (not even the law of Asian countries that share a similar colonial history), and that materials from the US outweigh all other sources. She attributes this to an Americanization of Israeli culture, and the fact that academics are encouraged to publish in American journals and other Western publishing outlets.

The second article is by this author and is entitled *The Civil Law, the Common Law, and the English Language – Challenges and Opportunities in Asia*. It wonders what will be the effect on the civil law in Asia of academics adopting English, the language of the common law, as a second language; and of civil law jurists pursuing their graduate studies not only in English but also in common law jurisdictions, rather than in civil law jurisdictions and returning home to become academics or practising lawyers in civil law jurisdictions. Will we have enough jurists trained in the civil law at the graduate level to keep the civil law tradition alive? The article also enquires how the English language can be adapted to the civil law so as to make English one of our civil law languages.

The next four articles make actual comparisons. The third article by Ngoc Son Bui is entitled *Social Movements and Constitutionalism in Japan, South Korea, and Taiwan*. It focuses on comparative constitutionalism in Japan, South Korea, and Taiwan and asks whether this field of study may be further developed by considering the relevance of social movements. ‘Integrating social movement theories into comparative constitutional law, this article argues that a more nuanced positive account of the creation and consolidation of constitutionalism in these East Asian polities must be situated within the engagement of social movements in discursive venues for formal and informal constitutional change.’¹

The fourth article by Jae-Hyup Lee and Jisuk Woo is entitled *Assessment of the Jury Systems in Asia: A Comparison of Korea and Japan*. Korea experimented with both the German and the US models of jury trials, whereas Japan based its jury system mainly on the US system. This is an interesting comparison of the adoption of different Western models in two Asian jurisdictions.

The fifth article by Qiao Liu – *Chinese ‘Case Law’ in Comparative Studies: Illusions and Complexities* – explains the increased importance of court cases in China, but tells us that it would be a mistake to liken Chinese Guiding Cases to precedents in common law jurisdictions and to even speak of ‘precedents’ in the Chinese context. The reality is far more complex and is explained in detail.

The sixth article by Eriko Taoka explores the *Shaping and Re-shaping of the Duty of Loyalty in Japanese Law*. She explains that this duty has remained vague and complex in Japan in part because, in developing this duty, Japanese law has borrowed notions and theories from both civil law (mainly German law) and common law (mostly American and English laws), in a variety of contexts such as corporate,

1. From the abstract of the article.

trust, and agency laws. The article explains how, through the adoption of foreign concepts, Japan has developed its own concept of the duty of loyalty.

III. THE ARTICLES ON THE TEACHING OF COMPARATIVE LAW IN ASIA

The second part of this Special Issue comprises articles on the teaching of comparative law in Asia.

In Maartje de Visser and Andrew Harding's article on *Mainstreaming Foreign Law in the Asian Law School Curriculum*, the authors argue that even though a separate course on comparative law should continue to be offered to teach the method and theory of comparative law, foreign law should be mainstreamed in all law courses or at least in as many law courses as possible. This means, for example, that in a common law school, rather than teach only the common law of contract of one's own jurisdiction, one should also teach the civil law of contract of at least one other Asian jurisdiction, as well as the international instruments relating to the topic.

In the same vein, in my contribution on *Teaching More Civil Law at the National University of Singapore: A Necessity for Singapore as a Legal Hub for Asia*, I argue that the Law School at NUS has not done enough to teach the civil law, especially considering that Singapore aims to be a legal hub for the region, which is mainly governed by the civil law. Much more should have been done and should be done, but there has been a long resistance to the compulsory introduction of the civil law in the core curriculum at NUS. In that respect, the NUS Law School is not a leader in Asia and is not as global as its slogan, 'Asia's Global Law School', suggests. The article makes some proposals on how Singapore could train some of its lawyers to be familiar with the civil law, and therefore better able to serve the region.

The ninth article by Arif A Jamal is entitled *Comparing the Teaching of Comparative Law: A View from Singapore*. The article argues that in teaching comparative law in Southeast Asia, one must balance both familiarity and distinctiveness. One can draw on materials from the legal traditions originating in Europe which have settled in Southeast Asia. However, one must also address specific features that shape the context of Southeast Asia: the historical and cultural context of Singapore and Southeast Asia (colonialism, religious demographics, presence of chthonic traditions, and Asian values) and the forces of cultural and political change (changing economic and geopolitical realities).

The last two articles focus on the teaching of comparative law in Indonesia. The tenth article by Topo Santoso is entitled *Comparative Law in the Faculty of Law, University of Indonesia: Course Content and Teaching Methods*. Drawing from the experience of teaching comparative criminal law in the Master's Programme in Law at the Faculty of Law, Universitas Indonesia, this article considers how the teaching of comparative law must move away from the passive learning of distributed course materials by making sure that students are able to conduct research and write about comparative law independently. This requires students to actively participate in their

learning, which implies learning to conduct library and database research in comparative law and improving their ability to function in English and in other languages.

The eleventh and last article by Herlambang P Wiratraman is entitled *The Challenges of Teaching Comparative Law and Socio-Legal Studies at Indonesia's Law Schools*. It 'argues that a socio-legal approach is critical for the continued development of comparative law in Indonesia. Failure to harmonize the theories and methods from both socio-legal studies and comparative law would be a missed opportunity to explore the social complexities and nuances of people's expectations when dealing with institutions, including the informal justice system, which is a significant part of Indonesia's legal pluralism.'²

IV. CONCLUSION

This Special Issue is only the start of an academic discussion about the direction that comparative law and its teaching should take in Asia in the years to come. It is hoped that the articles will lead to more discussions on comparative law as the state and the teaching of comparative law continue to evolve everywhere in Asia.

2. Herlambang P Wiratraman, 'The Challenges of Teaching Comparative Law and Socio-Legal Studies at Indonesia's Law Schools', this Special Issue, S229.