CAN THE MUSLIM WORLD BORROW FROM INDONESIAN CONSTITUTIONAL REFORM?
A Comparative Constitutional Approach

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Abstract: This paper attempts to analytically examine the possibility of constitutional borrowing for the Muslim world regardless the differences in history, system, culture, language, and characteristics. It discusses this issue by looking at the arguments put forth by the opponents of comparative constitutional interpretation and their counter arguments. It will consider materials from Canada, USA, South Africa, Singapore, Malaysia, and Hungary, taking the position that constitutional borrowing can be justified. The paper argues that the 1999-2002 Indonesian constitutional reform should be taken into account by other Muslim countries in undertaking their constitutional reform. The substantive approach of the *Shari'ah* that has been used in Indonesia has shown that Muslim world can reform its constitutions without the "assistance" of Western foreign policy. Indonesian constitutional reform has demonstrated that Islamic constitutionalism comes from within Islamic teaching and the Islamic community itself; it is a home grown product.

Keywords: Constitutional reform, constitutional borrowing comparative law, *Shari'ah*.

Introduction

Comparative constitutional law is "part of a larger phenomenon: the globalization of the practice of modern constitutionalism."[1] The trend of this discipline is to learn from constitutional experience

[1]See Sujit Choudhry, *'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation,' 74 Ind. L.J. 819 (1999).*

elsewhere. Several countries such as South Africa and Canada go further. Not only do they learn from others but also interpret their own constitutions by analysing other constitutions.[2] In other words, comparing constitutional experiences elsewhere might contribute to the interpretation of their own constitutions.

Other countries however, such as Singapore and Malaysia, suggest that a constitution must be interpreted "within its own four walls." In the words of Justice Scalia (United States of America), "We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."[3] It seems to this group that learning from others does not mean that one may borrow others' constitutional interpretations to understand one's own constitution.[4] The question is: can constitutional borrowing be justified while every country has its own history, system, culture, language, and characteristics?

Firstly, this paper would discuss this issue by looking at the arguments put forth by opponents of comparative constitutional interpretation and their counter arguments. It will consider materials from Canada, USA, South Africa, Singapore, Malaysia, and Hungary, taking the position that constitutional borrowing can be justified. The main argument might be summarised in the following quotation, "I never completely understood the French law before coming to the United States and studying another system (Pierre Lepaulle)."[5]

Secondly, the theoretical debate above will be applied in the context of the Muslim world. Whilst constitutionalism in the West is mostly identified with secular thought,[6] Islamic constitutionalism has attracted growing interest in recent years. For instance, the Bush Administration's response to the events of 11 September 2001 radically transformed the situation in Iraq and Afghanistan. Both countries are

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[2] See Section 39 of the Constitution of the Republic of South Africa; and USA v. Burns *195 D.L.R (4th) 1 S.C.C. (2001) (excerpts).*

[3] Printz v. United States, *521 U.S. 898, 921 n.11 (1997)* at 935, footnote 11.

[4] See Vernon Valentine Palmer, 'Insularity and Leadership in American Comparative Law: The Past One Hundred Years,' *75 Tul. L. Rev. 1093 (2001).*

[5] As quoted by Kai Schadbach, 'The Benefits of Comparative Law: A Continental European View,' *16 B.U. Int'l L.J. 331 (1998).*

[6] Graham Hassal and Cheryl Saunders, *Asia-Pacific Constitutional Systems* (Cambridge: Cambridge University Press, 2002), p. 42. See also C Perry Patterson, 'The Evolution of Constitutionalism' (1948) 32 *Minnesota Law Review* pp. 427-457.

rewriting their constitutions.[7] As Ann Elizabeth Mayer points out, Islamic constitutionalism is "constitutionalism which is in some form based on Islamic principles".[8]

Behind all this lies a basic question: can a state be at once truly democratic and in some sense Islamic in character? In other Muslim countries, the alternative to trying democracy has been autocracy, whether secular dictatorship or religious monarchy. Indonesia before 1998 era shared similar experiences. It is worth considering that the original 1945 Constitution was an inappropriate foundation on which to erect the superstructure of a democracy. Since its re-instatement by President Soekarno, on 5 July 1959, the 1945 Constitution has facilitated the establishment of two authoritarian regimes, "Guided Democracy," under Soekarno and the "New Order," under President Soeharto, which together lasted for almost four decades.[9]

In addition, for more than half a century Indonesia has been unable to conduct an un-interrupted dialogue, concerning the position of *Shari'ah* in the Constitution. In 1945 and 1955, efforts were hampered by the pressure of time and political maneuverings by Soekarno and the military. Under Soeharto, debate was forbidden, since his government was afraid of its disruptive potential. The moment for free dialogue and debate, through constitutional

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[7] For a full account, see International Crisis Group (ICG), 'Iraq's Constitutional Challenge', (Baghdad and Brussels, ICG Middle East Report No. 19, 13 November 2003); International Crisis Group (ICG), 'Afghan's Flawed Constitutional Process', (Kabul and Brussels, ICG Asia Report No. 56, 12 June 2003).

[8] See Ann Elizabeth Mayer, 'Conundrums in Constitutionalism: Islamic Monarchies in an Era of Transition' *1 UCLA Journal of Islamic and Near Eastern Law,* 2002, 183.

[9] On Indonesian constitutional reform see Todung Mulya Lubis, 'Constitutional Reforms' in Hadi Susatro (et.al.), *Governance in Indonesia: Challenges Facing the Megawati Presidency* (Singapore: ISEAS, 2003). See also Harun Alrasid, *Naskah UUD 1945 Sesudah Tiga Kali Diubah oleh MPR* (Jakarta: UI Press, 2002); Didit Hariadi Estiko (ed.), *Amandemen UUD 1945 dan Implikasinya terhadap Pembangunan Sistem Hukum Nasional* (Jakarta: Tim Hukum Pusat Pengkajian dan Pelayanan Informasi Sekretariat Jenderal DPR-RI, 2001); Suwarno Adiwijoyo, *Amandemen UUD 1945* (Jakarta: Intermasa, 2000); The Habibie Centre, *Naskah Akademis dan Draf Rancangan Naskah Undang-Undang Dasar Republik Indonesia* (Jakarta: The Habibie Centre, 2001); Anhar Gonggong, *Amandemen Konstitusi, Otonomi Daerah dan Federalisme: Solusi untuk Masa Depan* (Yogyakarta: Media Presindo, 2001); Hendarmin Ramadireksa, *Visi Politik Amandemen UUD 1945 Menuju Konstitusi yang Berkedaulatan Rakyat* (Jakarta: Yayasan Pancur Siwah, 2002); Jimly Asshiddiqie, 'Telaah Akademis atas Perubahan UUD 1945' (2001) 1 (4) *Jurnal Demokrasi & HAM*, 17.

mechanisms, came after Soeharto's resignation on May 1998. The challenge, as the transition to democracy began in 1998, was what to do about the Constitution.

In this sense, the paper would argue that the 1999-2002 Indonesian constitutional reform should be taken into account by other Muslim countries. Under this approach, the flexibility of Islamic law is secured, and citizen's constitutional rights are guaranteed.

The substantive approach of the *Shari'ah* that has been used in Indonesia has shown that Muslim world can, and should, reform its constitutions without "assistance" or "direction" from Western or U.S. foreign policy. Indonesian constitutional reform has demonstrated that Islamic constitutionalism comes from within Islamic teaching and the Islamic community itself; it is a home grown product. In the Muslim world, this model is important since the Indonesian experience has demonstrated that the *Shari'ah* does provide a basis for constitutionalism. This suggests that it is possible to reconcile between Islam and democratic constitutionalism.

Arguments Put Forth by Opponents

There are, at least, four strong arguments not to use comparative constitutional interpretation. Firstly, the term "comparative law" does not explain adequately what the comparative method is or should be. There are some basic questions here: Is the comparative method anything more than mere comparison? What purposes are served by legal comparisons? What exactly is chosen for comparison, and from which perspective? With which techniques are comparisons of specific variables differentiated? Why choose a particular variable or standard of differentiation? How might comparisons be evaluated and on what basis or rationale? How do these questions and the responses they generate relate to one another, and will these inquiries yield satisfactory answers? These questions lead to the suspicion that comparative jurisprudence opens the door to the problems of conceptual and cultural relativism —which cannot easily be resolved.

Secondly, in *Printz v. United States*, the US Court held that Congress lacked the power to require state law-enforcement officials to conduct background checks on prospective firearms purchasers. Such a requirement, the Court held, was inconsistent with the principles of dual sovereignty embodied in the US constitutional system. Justice Breyer, dissenting, argued that experience in other federal systems demonstrated that the Court's notion of sovereignty was not an

essential part of federalism, and suggested that the Court should weigh and consider the experience of the European Union. According to Justice Breyer, when interpreting the Constitution, judges could appropriately draw on constitutional experiences elsewhere, which could serve to 'cast an empirical light on the consequences of different solutions to a common legal problem.'[10]

This was summarily dismissed by Justice Scalia's majority opinion, as has been noted earlier, that experience in other systems might properly bear on designing a constitution, but not on *interpreting* the one already in place. Justice Scalia's statement, 'The fact is that our federalism is not Europe's,'[11] suggests that the law of a particular country is deeply rooted in that country's history and traditions. That law gives voice to aspirations, fears, and priorities specific to that country's culture. Although the rhetoric and terminology used by different jurisdictions may sound and even feel similar, the same words and phrases can, and often do, convey different meanings.[12]

Thirdly, a 'four walls' approach focuses judicial attention on the constitutional context and local culture (assuming this is static and identifiable). In Singapore, the High Court in *Colin Chan v PP* [13] affirmed the approach adopted by Thomson CJ in the Malaysian case of *Government of the State of Kelantan v Government of the Federation of Malaya*, 'the Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia.'[14]

In *Colin Chan v PP*, How QC pointed to the international dimension in the balancing of rights and competing interests. The added importance of a particular right was the fact that it was also a universally accepted human right and hence this ought to be factored into the balancing process. He pointed out that religious liberty was enshrined in Article 18 of the Universal Declaration of Human Rights.

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[10] Printz v. United States, at 970-971.

[11] Ibid.

[12] See Christopher Osakwe, 'Rethinking the Communion Between the Common Laws of England and the United States,' *82 Nw. U. L. Rev. 855 (1988)* (reviewing P.S. Atiyah & R.S. Summers, Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory and Legal Institutions (1987).

[13] Chan Hiang Leng Colin v. P.P., *3 S.L.R. 662 (1994).*

[14] State of Kelantan v. Government of the Federation of Malaysia, *M.L.J., 355 (1963).*

Yong CJ brushed aside this consideration by declaring: 'I think the issues here are best resolved by a consideration of the provisions of the Constitution, the Societies Act and the UPA alone.'[15]

Fourthly, there is a danger of borrowing from other constitutional experiences. The quotation below provides a good example on this matter:

> ....the Hungarian Constitutional Court —by adopting the German view without critical analysis and without investigating the whole legal and socio-economic environment in which the German decisions were made— protected many parts of the *status quo* inherited from the communist period without taking into consideration the completely distinct legal nature of the right to property and to social rights.
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> The qualification of social claims by the Hungarian Constitutional Court, mechanically following the German view, might have resulted in an unreformable social system. The Hungarian Constitutional Court's practice was revised after some months and the constitutionality of social claims legislation was later qualified as belonging under the framework of the Constitution's social rights provisions.[16]

All arguments discussed above lead to the rejection of comparative constitutional interpretation. It is time to move to the next section. The paper will raise five counter-arguments concerning the comparative constitutional law, and at the same time, provide evidence that constitutional borrowing can be justified.

Counter Argument

The paper argues that there are, at least, five strong arguments to justify constitutional borrowing. Firstly, although there is a debate as to whether comparative law is a method, a discipline or a science,[17] it can be stated that several scholars have asserted that comparative law has method of comparison. Schlesinger, Baade, Herzog, and Wise dedicate

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[15] Chan Hiang Leng Colin v. P.P., op. cit.

[16] More information can be obtained from Imre Vörös, 'Contextuality and Universality: Constitutional Borrowings on the Global Stage - The Hungarian View,' *University of Pennsylvania Journal of Constitutional Law,* Vol 1, No. 3, (Spring 1999).

[17] See, for instance, Francois Venter, *Constitutional Comparaison: Japan, Germany, Canada, and South Africa as Constitutional States* (Cape Town: Juta & Co., 2000), pp. 15-19.

the introduction of their popular casebook to the topic of comparative methods.[18] These authors define comparative law as a 'method, a way of looking at legal problems, legal institutions, and entire legal systems, ... [which can be used for] a wide variety of practical or scholarly purposes.'[19] Most of this discussion attempts to illustrate, through cases and extensive notes, the many uses of comparative methods. It explains that valuable use of comparisons may be made in the application of a foreign solution as a model in a rule or decision, or a piece of legislation, to demonstrate perspective by way of a contrast in the resolution of cross-border disputes through unification or harmonization, or in legal science; including empirical social science and jurisprudence.

In addition, Zweigert and Kötz state some basic points about legal comparisons. For example, they claim that because explanations of legal systems are often stated in terms internally unique to each system, one must 'free' these explanations 'from the context of [each] system.'[20] Arguably, they support creating an abstract heuristic conceptual framework within which contrasts of chosen variables can be understood. As a second step, Zweigert and Kötz stress that function is 'the start-point and basis of all comparative law...[because] different legal systems can be compared only if they solve the same factual problem.'[21] It would be misleading to compare only parts of a

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[18] See Rudolf B. Schlesinger (et.al), *Comparative Law: cases, text, materials,* 6th edition (Mineola, N.Y.: Foundation Press, 1998), pp. 1-43.

[19] Ibid*,* p. 2.

[20] See K. Zweigert & H. Kötz, *An Introduction to Comparative Law,* 3rd edition, 1998, p. 36.

[21] Ibid. As a comparison, Watson argues that 'political, moral, social and economic values which exist between any two societies make it hard to believe that many legal problems are the same for both except on a technical level. He draws a bright line between a comparison of these factors and more technical legal comparisons when he writes: 'when the starting point is the problem the weight of investigation will always be primarily on the comparability of the problem, only secondarily on the comparability of the law; and any discipline founded on such a starting point will be sociology rather than law.' See. Alan Watson, *Legal Transplant: an approach to comparative law,* 2nd edition, (Athens, Ga., 1993), pp. 4-5. Pierre Legrand criticises this book in, 'The Impossibility of "Legal Transplants," 4 *Maastricht Journal of European and Comparative Law*, 1997]. However, it should be noted that Watson describes the absence of discussion on the topic of what the comparative method is: 'What is this method or technique? The student will find that the question tends to remain unanswered.' In contrast, I believe that the answer is still there but there is no single

solution. Instead, one must 'build a system...[with a] special syntax and vocabulary.'[22] Here Zweigert and Kötz recognize the importance of shifting back and forth between micro and macro analysis. As a third step, a comparative system must be flexible enough to grasp a wide variety of 'heterogeneous institutions which are functionally comparable.[23] Finally, the comparison ought to produce an evaluation; otherwise comparative legal studies amount to little more than 'piling up blocks of stone that no one will build with.' [24]

This paper would acknowledge that the issue of method discussed here is a complex issue and there would be no single answer, even in principle, to the basic questions, 'what is law?'; [25] 'what is comparative law';[26] and 'what is the limit of constitutional interpretation?'.[27] However, this does not mean that there is no method of comparative law.

Secondly, the paper takes the view that what comparative law should aim for is an understanding of conscious ideas at work in the foreign legal system; that is, the principles, concepts, beliefs, and reasoning that underlie the foreign legal rules and institutions. It might be true that one should study rules, and ideas, and philosophy, and economics, and sociology—in short, that one should study everything, to understand other constitutions. However, in terms of comparative jurisprudence, in contrast, one would seek to understand ideas: as it is indeed interested in economic and social relations, but only to the extent that they play a role in the thought of jurists. Unlike others who portray an immediate relationship between the background economic structure and the functioning of the legal system, comparative

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answer or method and no set of criteria which would be useful for all purposes, or acceptable to all scholars.

[22] Zweigert & Kötz, Loc. Cit.

[23] Ibid.

[24] Ibid, p. 41.

[25] Zweigert & Kötz wrote, 'According to Gustav Radbruch, 'sciences which have to busy themselves with their own methodology are 'sick sciences'. In the next paragraph, they wrote, 'If there is a 'sick science' in Radbruch's sense today it is not comparative law but rather legal science as a whole.' (Ibid*,* p. 33).

[26] See. John C. Reitz, 'How to Do Comparative Law,' *46 Am. J. Comp. L. 617 (1998)* .

[27] See. for instance, David M. Beatty, 'The Forms and Limits of Constitutional Interpretation,' *49 Am. J. Comp. L. 79 (2001);* and also Michael C. Dorf and Barry Friedman , 'Shared Constitutional Interpretation,' *2000 Sup. Ct. Rev. 61 (2000).*

jurisprudence sees the relationship as crucially mediated through the realm of jurisprudential thought.[28]

This means that the unique characteristic of foreign countries is recognized, but it does not mean that constitutional borrowing cannot be justified. In fact, legal transplantation has been practiced widely. For example, the American Bar Association's Central and East European Law Initiative (CEELI) has, with the support of the Federal government, dispatched scholars, practitioners, and judges into former Soviet countries to review constitutional drafts and help formulate laws, especially in the economic sphere. A vast array of scholarly writings and statutory models pertaining to the organization of the legal profession, legal education, and commercial, environmental, and criminal law has been proffered to post-Communist legislators, judges, lawyers, and legal educators.

In addition, under the auspices of the State Department, the American Bar Association, the Ford Foundation, and others, delegations of American judges and lawyers have visited Eastern Europe and Asia to explain how America's independent judiciary protects citizens' basic legal rights against state action, and, in Cambodia, American lawyers and judges have teamed up with their counterparts from Australia and India to help Cambodian lawyers and judges develop a legal system.[29]

While other countries are willing to gain benefit from American experience, American lawyers and judges seem to pay little or no attention to the law of other countries when focusing on the domestic issues they litigate and adjudicate at home. It is interesting to mention Judge Guido Calabresi's opinion when he looked to the constitutional courts of Germany and Italy in discussing what courts should do when a law, rational when enacted, becomes increasingly dubious over time. He wrote:

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[28] This argument is based on William Ewald, 'The Jurisprudential Approach to Comparative Law: A Field Guide to 'Rats', *46 Am. J. Comp. L. 701 (1998)* and, also by the same author, 'Comparative Jurisprudence (1): What Was It Like to Try a Rat?,' *143 Penn. L. Rev. 1889 (1995)* and, again, William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants,' *43 Am. J. Comp. L. 489 (1995).*

[29] Shirley S. Abrahamson and Michael J. Fischer, 'All the World's a Courtroom: Judging in the new millennium,' *26 Hofstra L. Rev. 273 (1997);* See also Bruce Ackerman, 'The Rise of World Constitutionalism,' *83 Va. L. Rev. 771 (1997).*

> At one time, America had a virtual monopoly on constitutional judicial review....drawing origin and inspiration from American constitutional theory and practice....These countries are our "constitutional offspring" and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.[30]

However, the danger of looking at others without understanding still remains. In other words, many wise parents cannot understand their children well, even though they do not hesitate to learn from them. The quotation below explains this matter:

> I may misrepresent the legal traditions from which these cases come or fail to discern nuances in the opinions…but the risks inherent in exploring different legal systems are risks that American lawyers and state court judges take every day. We are already comparatists. We just don't think of ourselves that way…The American federal system has made seasoned comparatists of all of us. Every American law school class and casebook uses the comparative law method, drawing upon examples and opinions from numerous states and state courts. Every American lawyer and judge must pay attention to the law developing in other state jurisdictions….Why shouldn't our experiences as American comparatists embolden more American lawyers and judges to explore the law of non-American jurisdictions in the same spirit? Why shouldn't we take advantage of the comparatist instincts learned in our law schools and practiced in our courts by venturing farther a field? … Indeed, we can cross the divide separating us from other jurisdictions around the world. And if we do so with the modest intent to borrow ideas on classifying, discussing, and solving a particular problem, we should not be deterred by unfamiliarity with foreign legal systems.[31]

The quotation concludes that, 'We may fail to understand a particular system of law or even misinterpret some foreign decisions. Nevertheless, we may also find unexpected answers or new challenges

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[30] United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring).

[31] Shirley S. Abrahamson and Michael J. Fischer, op. cit., p. 286.

to domestic legal issues.'[32] This is the third argument for justifying constitutional borrowing: that one has not only the danger of comparative constitutional interpretation, but also the benefit and the advantages of using it.

Therefore, the next issue is that: if the danger of misinterpreting foreign constitutions still exists, then, is there any approach which can be used to minimise the danger in order to obtain more benefits and advantages? The answer is "yes", and this becomes my fourth argument.

Mark Tushnet[33] has tried to provide a more systematic approach to the possibility of learning from constitutional experience elsewhere. He offers three approaches: functionalism, expressivism, and bricolage. Functionalism claims that particular constitutional provisions create arrangements which serve particular functions in a system of governance. Comparative constitutional study can help identify those functions and show how different constitutional provisions serve the same function in different constitutional systems. According to the expressivist view, constitutions help constitute the nation, to varying degrees in different nations, offering to each nation's people a way of understanding themselves as political beings.

Contemporary reference to comparative constitutional materials may be a form of bricolage. Functionalists and expressivists worry about whether appropriating selected portions of other constitutional traditions is sensible, or whether the appropriation will 'work' in some sense. The bricoleur does not have these concerns about maintaining proper borders among systems. Tushnet explains more:

> Comparative constitutional analysis can use the idea of bricolage in several ways. In contrast to functionalism and expressivism, which offer ways of interpreting particular constitutional provisions, bricolage cautions against adopting interpretive strategies that impute a high degree of constructive rationality to a constitution's drafters. Further, the idea of bricolage can displace our sense of the taken-for-granted in the constitutional system with which we are

[32] Ibid; See also Kathryn A. Perales, 'Note, It Works Fine in Europe, So Why Not Here?: Comparative Law and Constitutional Federalism, *23 Vt. L. Rev. 885, 897-905 (1999).*

[33] Mark Tushnet, 'The Possibilities of Comparative Constitutional Law,' *108 Yale L.J. 1225 (1999).*

> most familiar, without suggesting, as the functionalist would, that we can replace some parts of what we take for granted with elements appropriated from other systems. Finally, bricolage brings the historical contingency of all human action to the fore. It may therefore help us think about the recent interest in comparative constitutional law in the Supreme Court and the legal academy. [34]

Meanwhile, Sujit Choudhry claims that comparative jurisprudence is used in three different approaches in constitutional adjudication. He explains in his own words:[35]

> The first interpretive mode, universalist interpretation, holds that constitutional guarantees are cut from a universal cloth, and, hence, that all constitutional courts are engaged in the identification, interpretation, and application of the same set of norms. Those norms are comprehended as transcendent legal principles that are logically prior to positive rules of law and legal doctrines.
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> The second mode, genealogical interpretation, holds that constitutions are often tied together by complicated relationships of descent and history, and that those relationships are sufficient justification to import and apply entire areas of constitutional doctrine. In stark contrast to universalist interpretation, genealogical argument is positivist in structure, because genealogical relationships confer sufficient authority and validity on comparative sources to make them legally binding.
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> In the third mode, dialogical interpretation, courts identify the normative and factual assumptions underlying their own constitutional jurisprudence by engaging with comparable jurisprudence of other jurisdictions. Through a process of interpretive self-reflection, courts may conclude that domestic and foreign assumptions are sufficiently similar to one another to warrant the use of comparative law. Conversely, courts may conclude that comparative jurisprudence has emerged from a fundamentally different constitutional order; this realization may sharpen an awareness of constitutional difference or distinctiveness.

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[34] Ibid., p. 1229; see also Mark Tushnet, 'Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law,' *1 U. Pa. J. Const. L. 324 (1998)*

[35] Sujit Choudhry, op. cit., pp. 825-826.

In addition, David Fontana[36] introduces the idea of 'refined comparativism,' a type of rulebook about when American courts adjudicating constitutional cases should use comparative constitutional law and how they should structure the process of legal borrowing within the context of a trial or an appeal. He gives explanation that:

> A judge should consider using comparative constitutional law when the American sources do not provide a clear answer to a question the judge must answer (whether factual or legal). The judge should use the comparative legal materials only if the contextual differences are relatively minimal –if the problems faced by importing a solution or fact from another country are relatively insignificant. The judge should then consider whether the comparative materials have any comparative advantages, the paradigmatic case of when comparativism would be appropriate, or simply provide another "data point" (factual or legal). Within the framework of a trial or appeal, a judge should encourage litigants to argue comparative constitutional law to courts (when appropriate), sometimes even using expert witnesses on foreign law who can help the judge determine the relevant comparative constitutional law and its transferability. Judges who use comparative constitutional law and solicit expert witnesses to help them do so will encourage litigants to argue and brief foreign law, thereby making the judicial use of comparative constitutional law more accurate, because it will be based on a number of different sources.[37]

This paper has shown above some approaches, developed by Tushnet, Choudry and Fontana, which can be used to justify comparative constitutional interpretation and also to minimise the negative effect of using this kind of interpretation. All lead to the suggestion that the danger of constitutional borrowing could be managed and/or prevented.

It is time to move to the last argument. Concerning the four walls argument used in Singapore (and Malaysia), the paper could not agree more when Thio Li-ann argues that comparative constitutional interpretation is not rejected because it does not comply with

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[36] David Fontana, 'Refined Comparativism in Constitutional Law', *49 UCLA L. Rev. 539 (2001).*

[37] Ibid., pp. 556-557.

Singaporean local culture or 'the four walls', but because it does not support the judge's opinion. In fact, foreign cases are cited where they support judicial conclusions.[38]

Both pieces of evidence come from the court in *Colin Chan*. It rejected considering several US Supreme Court cases on religious liberty and the Universal Declaration of Human Rights, as has been mentioned earlier, but, at the same time, approvingly cited the Australian High Court case of *Adelaide Company of Jehovah's Witnesses v. Commonwealth of Australia (67 CLR 116 (1943))* where legislation outlawing organisations which opposed the war effort was challenged as being unconstitutional.

This meant that the Adelaide Company of Jehovah's Witnesses was outlawed and the government seized their premises. The court unanimously held that Parliament could make laws which barred the advocacy of doctrines which prejudiced the prosecution of a war in which the government was engaged. The constitutional guarantee of religious freedom is effectively curtailed. [39]

The paper has discussed whether a constitution can be interpreted beyond its 'four walls'. Having discussed the issue, analysed both sides of arguments and considered materials from the USA, Canada, South Africa, Malaysia, Hungary and Singapore, the paper takes the position that a constitution can be interpreted comparatively and beyond the 'four walls.' It is hoped that analysing other constitutions would contribute to the understanding of our own constitution.

In Patrick Glenn's work, comparative law goes beyond the legal problem-based approach. Glenn goes further by looking at legal traditions. Glenn takes the view that all traditions contain elements of the others. Western legal traditions may contain some of the Eastern legal traditions. "There are always common elements and common subjects of discussion."[40] Therefore, Glenn rejects the claim that a

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[38] Thio Li-ann, 'An 'i' for an 'I'? Singapore's Communitarian Model of Constitutional Adjudication,' *27 Hong Kong L.J. 152 (1997).*

[39] Thio Li-ann criticises this 'constitutional borrowing' on the grounds that the case "…was decided while Australia was engaged in World War Two and for this case to be cited approvingly in a Singapore court during peace-time is evidence of an identification with a 'siege mentality' which is understandable where the exigencies of war require the curtailment of individual liberties. But Singapore is not at war." Thio Li-ann, op. cit., pp. 176-177.

[40] H. Patrick Glenn, *Legal Traditions of the World* (New York: Oxford University Press, 2000), p. 35.

religious legal tradition is incompatible or incommensurable with a secular legal tradition. However, at the same time, Glenn does not suggest that in all traditions all is subject to negotiation. He concludes that traditions may absorb foreign elements and contain them, as they contain many internal elements of variance or dissidence. Tradition should be defined as information and information is not dominating.

According to Glenn, comparative legal tradition is also beyond technical things. One does not need to be free from the context of each system. One can compare different versions of law with criteria drawn from themselves, with internal criteria. There is no *tertio comparationis*; it is all internal debate, which is what gives it its sense. Glenn rejects the proposition that 'you can't have your cake and eat it too'.[41] He offers multivalent views that everything would be a matter of degree. It is possible to compare apples and oranges. In other words, according to Glenn, "you can have your cake and eat it too, if you eat only half of it."[42] Moreover, comparative reasoning allows and facilitates judgment. "Not only is contextual judgment possible, the judgment based on criteria of existing traditions, juxtaposed with other criteria, is the only judgment which can possibly exist."[43]

Borrowing from Indonesia

As I take the position that a country can learn and even borrow the constitutional provisions, interpretations and decisions from the other countries, I outline eight points from the 1999-2002 constitutional reform taken place in Indonesia that can be "borrowed" by the Muslim world. In other words, Indonesia could be seen as providing a model for other countries in the Muslim world in reconciling *Shari'ah* and democratic constitutionalism.[44]

Firstly, not a single Islamic political party proposed the idea of the *khilafah* as the form for Indonesian governance. The very fact that Indonesia is the largest Muslim country in the world does not lead them even to propose that Indonesia become an Islamic state, like Egypt, Iran or Saudi Arabia. According to the Amendments, Indonesia

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[41]Ibid, p. 325.

[42] H. Patrick Glenn, 'The Capture, Reconstruction and Marginalization of "Custom"' (1997) 45 *American Journal of Comparative Law* 613.

[43] Ibid, p. 44.

[44] The eight points I outline here are based on my forthcoming book: Nadirsyah Hosen, *Sharia and Constitutional Reform in Indonesia* (Singapore: ISEAS, 2007).

remains a republic, with a presidential system and three branches of government.

Secondly, Islamic political parties have accepted that sovereignty belongs to the people. Without necessarily ignoring the role of God, the *`Ummah* (the totality of the Muslim population of the state) becomes the collective agent of the Divine Sovereign, rather than an individual person (Caliph). As a consequence of rejecting the caliphate form, the Indonesian people (including all Islamic political parties) adopted popular sovereignty. In fact, the issue of sovereignty was never raised during constitutional debate at the MPR Session (1999-2002). It has been accepted without any controversy. It is safe to argue that Indonesian Muslims have modified the views of the formal *Shari`ah*, as in the cases of the form of government, sovereignty, and pre-conditions for becoming the head of state.[45]

Thirdly, no single word in the Amendments provides special rights for Muslims to become President or Vice-President. Therefore, it would be constitutional if a non-Muslim were elected to the top position in Indonesia. The Constitution does not forbid a woman becoming President. Whilst there is no limitation on the Caliph's period in office, the Indonesian Constitution limits the term to two 5-year terms for both President and Vice-President. The Amendements also adopt direct election for the Presidency, whilst the exercise of the flexibility of the *syƒr~*and *bay`ah* makes them compatible with any of the electoral systems. Moreover, the Amendment regulates the procedure to impeach the President. The adoption of this new provision is a clear departure from the formal *Shari`ah* tradition.

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[45] The idea of substantive and formal approach of *Syar,`ah* that I used in this paper is inspired by Peter Beyer's work. Beyer has examined the terms '*religious function*' and '*religious performance*'. According to Beyer, religious function refers to "pure" religious action: the cure for souls, the search for enlightenment or salvation and so on. Religious performance is the strategy that uses religion to solve problems that are for example social, political or economical and not religious in the sense of "personal piety". According to Beyer there are two versions of religious performance, one "liberal" and one "conservative". Representatives for the "liberal" one are advocates of ecumenism, inclusivism and tolerance towards plurality regarding religious function, respecting the individual choice. They also view religion as a moral or ethical guideline able to solve social problems. Advocates for the "conservative" version accentuate the need of putting holism above pluralism and exclusion above inclusion. They stress the authority of one specific religious tradition over all other spheres of society. They also demand that religious norm should be enforced by law. See. Peter Beyer, *Religion and Globalization* (London: Sage Publication Ltd, 1994), pp. 70-71, 79-93.

As has been demonstrated, these cases justify the notion that the Indonesian people are not only willing to accept the substantive *Shari'ah* approach, but also to value the rule of law. More importantly, the Amendments have filled the gap left by the formal *Shari'ah*, as in the cases of presidential tenure, method of elections, and method of dethroning the head of state, by providing new regulations.

Fourthly, since popular sovereignty is adopted into the 1945 Constitution (and is accepted by all Islamic political parties), the legislative functions of the Indonesian parliament are asserted, along with other functions: budgetary and supervisory functions. These are to ensure that the checks and balances systems work. Once again, the Indonesian Constitution fills the void left by Islamic history, owing to the fact that *ahl al-hall wa al-'aqd* had only one main function: to elect the Caliph. The substantive *Shari'ah* approach taken by Indonesia encourages the extension of the functions and power of *ahl al-hall wa al-'aqd*.

Fifthly, in order to fulfil one of the requirements of *Negara Hukum,* the Indonesian Constitution establishes judicial independence. Although Islamic history reveals many different stories on whether or not caliphs respected and valued the judicial independence. It follows from the Amendments that all Islamic political parties in Indonesia take the position that judicial independence is a tool for establishing constitutional government, and there is no provision in the *Qur'an* which responds negatively to the independence of the judiciary.

Following the resignation of President Soeharto, the establishment of a *Negara Hukum*, through the Amendments to the 1945 Constitution, becomes significant. The 32 years of the Soeharto government proved that, without the rule of law, constitutional government will become an item on a wish list. The contributions of Islamic political parties to the process of the Amendments, by adopting a substantive *Shari'ah* approach, should be seen as their *ijtihad*. Not only does this suggest that the rule of law is compatible with the *Shari'ah*, it also reflects the ability to deal with a modern constitution without abandoning the principles and the objectives of *Shari'ah*.

Sixthly, whilst the tendency of other human rights documents in Islam, ranging from the Constitutions of Iran, Egypt and Basic Laws of Saudi Arabia to UIDHR and the Cairo Declaration, is to restrict human rights provision under the rules of the *Shari'ah,* such restriction does not exist in the Second Amendment to the 1945 Constitution. In

other words, *Shari'ah* is neither above nor outside the human rights provision in the 1945 Constitution. The principles of *Shari'ah* inspire human rights protection since they can walk together side by side.

All Islamic political parties in Indonesia refer to the situation in Soeharto era particularly when many Muslim activists were sent to jail without human rights protection. Therefore, it is in the interests of Islamic political parties to ensure that such abuse would not occur in the post-Soeharto era. This explains why they have given full support to the inclusion of human rights provisions in the Amendment to the 1945 Constitution. [46]

All Islamic political parties take the position that human rights are compatible with the substantive *Shari'ah* approach. To put it differently, they operate on the premise that Islam is in substance compatible with Western human rights legal norms if interpreted accordingly. To support this contention they refer, on the general level, to the elasticity of Islam and to its capability to accommodate various interpretations equally favourable or hostile to human rights. [47]

The acceptance of human rights provisions without any restriction to the formal understanding of the *Shari'ah* suggests that the Indonesian Islamic political parties which were involved in the process of constitutional reform during 1999-2002 differ in their position from other Muslim groups who openly reject the concept of human rights as based on alien Western notions or as a conspiracy against Islam and from those who take pains to establish a specifically Islamic human rights scheme within an ideological framework devoid of a legal reform in Islam.

Seventhly, although the Second Amendment to the 1945 Constitution accepts human rights in their full substance, this does not mean that religions do not have a role at all in Indonesia. Religious values along with justice, morality, security, public order, and democracy, should be taken into account in implementing human rights provisions of the 1945 Constitution. It is worth noting that the phrase 'religious values' does not refer only to Islam but to other religions as well. Moreover, the word 'values' connotes spiritual or

[46] Nadirsyah Hosen, 'Human Rights Provisions in the Second Amendment to the Indonesian Constitution from Shari'ah Perspective', *The Muslim World,* Vol. 97, No. 2., April 2007.

[47] Ibid.

ethical norms rather than law or regulation. In the context of Islam, religious values can be interpreted as *Shari'ah* in its original meaning as a 'path' or guide, rather than a detailed legal code.

Mashood A. Baderin shares a similar observation "The scope of international human rights can be positively enhanced in the Muslim world through moderate, dynamic, and constructive interpretations of the *Shari'ah* rather than through hardline and static interpretations of it." [48]

The full acceptance of human rights provisions has shown that Indonesia has provided a model for other Islamic countries to acknowledge the compatibility of human rights and Islamic law. This position is closely related to the role of public religion in Indonesia, which differs from the position of Iran, Egypt and Saudi Arabia.[49]

Egypt is an interesting model of how the country put *Shari'ah* provisions in the constitution through amendment of the constitution.[50] In 1980 Egypt has amended Article 2 of the Constitution which states, "The principles of the Islamic *Shari'ah* are the principal source of legislation". Saudi Arabia could be seen as a model of a state which believes that *Shari'ah* is above the constitution.[51] Another differential fact is that a majority of Egyptians follow the Hanafi and Syafi'i schools, whereas Saudi Arabia follows the Hanbali school. n 1 March 1992, King Fahd ibn 'Abd al-'Aziz issued three major laws: the Basic Law of Government, the Consultative Council Law and the Law of Provinces. The first formalises several aspects of the constitutional framework of the country; the second replaces the existing council, established in 1926, with a new council to be appointed by the king; and the third aims at regulating the relationship between central government agencies and regional governors, replacing a 1963 law. These laws constitute significant steps toward codifying the largely

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[48] Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003), p. 219.

[49] Nadirsyah Hosen, 'Constitutionalism and Shari'a'. *Murdoch University Electronic Journal of Law, 11* (1), (2004).

[50] See, for example, Kevin Boyle and Adel Omar Sherif (eds.), *Human Rights and Democracy: the Role of the Supreme Constitutional Court of Egypt* (London: Kluwer Law International, 1996).

[51] More information on Saudi Arabia can be found in Frank Edward Vogel, 'Islamic Law and Legal System Studies of Saudi Arabia,' Ph,D Dissertation, Harvard University, 1993.

unwritten legal system of the country.[52] In addition, the Constitution of Iran should also be considered. Iran is a republic and it follows the *Syi`ah* school of thought.[53] The foundation for Islamic Republic of Iran is based on a new Constitution (after the Islamic revolution) which was established in 1979 and was amended in 1989. According to Article 4 of the Constitution, all laws and regulations in civil, criminal, political and other aspects shall be based on Islamic principles. The Iranian Constitution is based on the concept of *Wilayat al-Fiqh* (governance of the Islamic jurist introduced and coined by Ayatullah Khumayni).[54] In this context, the paper suggests that Iran, Egypt and Saudi Arabia should borrow from the Indonesian constitutional reform.

Eighthly, In Indonesia, the *Pancasila* (the five pillars that eventually became the state foundation: Belief in one God, Humanitarianism, National Unity, Representative Democracy, and Social Justice) in this regard basically compromises between secularism, where no single religion predominates in the state, and religiosity, where religion (especially Islam) became one of the important pillars of the state. An Islam-inspired agenda is welcome, to the extent that it corresponds with, and does not contradict, the *Pancasila.* In other words, it is a common belief that Indonesia is neither a secular nor an Islamic state. Both of the terms have negative images in Indonesian society, and therefore the use of the terms 'secular' and 'Islamic state' has been avoided in legal and political areas. Under the 1945 Constitution, Indonesia has been designed to stand in the middle position. The *Pancasila*-based state, which begins with the principle of 'One Godhead', not only allows, but also encourages, religion to inspire Indonesian public life in humanitarianism, national unity, representative democracy, and social justice.[55]

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[52] See James T. McHugh, *Comparative Constitutional Traditions* (New York: Peter Lang, 2002), pp. 193-211.

[53] More information can be found in Asghar Schirazi, *The Constitution of Iran: Politics and the State in the Islamic Republic* (London: I. B. Tauris, 1997).

[54] See Abdulaziz Abdulhussein Sachedina, *The Just Ruler (al-Sultan al-Adil) in Shiite Islam: the Comprehensive Authority of the Jurist in Imamite Jurisprudence* (New York: Oxford University Press , 1988).

[55] Nadirsyah Hosen, 'Religion and the Indonesian Constitution: A Recent Debate', *Journal of Southeast Asian Studies* 36(3): pp. 419-440, 2005.

Conclusion

It is worth considering that the outcome of the 1999-2002 constitutional reform serves as the common denominator *(kalimah al-sawa')* for the Indonesian people to support human rights, the rule of law and religious liberty. However, Gary Bell has correctly pointed out that "constitutions do not perform miracles".[56] This suggests that it would be misleading to assume that the Amendments to the 1945 Constitution would automatically bring Indonesian people out of economic, political and legal crisis. In other words, the first challenge faced by Indonesian people is to ensure that the Amendments will not turn out to have little more value than the wallpaper on the houses of the politicians and generals who have ignored them.

The recent 2004 elections in Indonesia is illustrative. Indonesian people have exercised their constitutional rights to rotate elites, to select leaders, to express grievances and desires, in free and fair elections. In the context of Muslim world, certainly, this rare experience is a significant way to show that the compatibility of *Shari'ah* and constitutionalism does not lead to a political chaos or to inflict harm (*mafsadah*) upon society. Instead, it protects public interest—as the main objective of *Shari'ah*. []

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[56] Gary F. Bell, 'Obstacles to Reform The 1945 Constitution - Constitutions do not Perform Miracles', *Van Zorge Report on Indonesia - Commentary and Analysis on Indonesian Politics and Economics*; Vol. III, No. 6. (2001).

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