

Area Studies and the Decolonisation of Comparative Law: Insights from Alternative Southeast Asian Constitutional Modernities

Eugénie Mérieau

Abstract

Like “philosophy”, constitutional law is a disguised form of area studies that should more adequately be called “Western” or “Euroamerican” constitutional law. In this field, as in many others, the international division of academic labour reveals hierarchical power-knowledge relations: the theoretical West produces knowledge about the empirical Rest, understood as a “reservoir of raw data”. Here, area studies reveals its counterhegemonic potentialities. By offering a safe space for non-Western-centric discussion, it opens the possibility of theorising from the South. For constitutional law, this means theorising alternatives to Western liberal constitutionalism in their own, normative, terms, so as to apprehend Islamic, Buddhist, communitarian or transformative constitutionalisms as equally “valid” types of modern constitutional ordering. This paper calls for a deeper engagement between area studies and comparative law scholars seeking to reflect on alternative modernities. It first sketches a brief overview of the history of comparative law as a discipline, then looks at the contribution of area studies to the deconstruction of “legal orientalism” and finally suggests three areas in which Southeast Asian modes of constitutional ordering might well offer images of the possible futures of Western constitutionalism.

Keywords: Constitutional law, area studies, Southeast Asia, orientalism, epistemic injustice

Compared to other disciplines, constitutional law’s critique of the Western telos of modernity is very much in its infancy. Non-Western public law is still often considered primitive, non-normative and a product of mere politics: in short, it is the very negation of law. As taught in Constitutional Law 101 at many Western law schools, law is quintessentially the empire of the universal, and constitutionalism that of liberal modernity; there is thus no possibility of non-liberal-democratic constitutionalism worthy of the name (Frohen 2011: 529). This assertion is itself based on the traditional claim that non-Western

Eugénie Mérieau, Centre for Asian Legal Studies (CALs), National University of Singapore, Singapore; laweam@nus.edu.sg.

law lacks “real” normativity, and in particular that non-Western constitutions are nothing but “façade”, “nominal” or even “sham” texts (Weber 1906:166, Loewenstein 1969: 213, Law / Versteeg 2013: 863). For many scholars, non-Western constitutionalism nevertheless proves itself a useful object of enquiry, as it constitutes an ideal laboratory for testing out various hypotheses within the paradigm of modernisation/Westernisation through “legal transplants”. Moreover, it opens lucrative opportunities for Western constitutional scholars in the business of technical legal assistance to help the South “catch up” with the North.

But what if Hegel – who famously claimed that “the history of the world travels from East to West, for Europe is absolutely the end of history, Asia the beginning” (Hegel 2001:121) – was wrong and history in fact moves the other way? Anthropologists Jean and John Comaroff have provocatively argued that indeed, it is the West that is evolving towards “Africa”, an imagined set of realities characterised by disorder, conflict and multiplicity (Comaroff 2011). If that hypothesis holds true, the evolving dynamics of constitutionalism – the prime state mechanism for legal and political regulation – should reflect that reality. An examination of the work of constitutional courts/supreme courts in the North reveals indeed that constitutional courts are increasingly grappling with disorderly and conflicting legal norms, a multiplicity of legal orders and competing notions of justice: a set of realities long established in the South. What if the wide variety of constitutionalisms espoused by non-Western countries were in fact emerging types of constitutional orderings that, perhaps, accurately mirror the plural futures of Western constitutionalism?

This article calls for the establishment of a research agenda characterised by multiple inversions of the past and the future, of the universal and the particular: regarding non-liberal forms of constitutionalism as new universals – or rather, multiversals – that as such belong to possible futures rather than obsolete pasts. Building on the contributions of legal anthropology, it aims to bring together area studies and comparative law within a non-Eurocentric frame that disrupts the common, Hegelian, sense of history.

The Self and the Other: A genealogy of comparative law

Throughout the nineteenth century, comparative law had a simple, straightforward and well-defined practical application: legal codification. During the first half of the century, legal codification meant the rationalisation of law and unification of local customs, as part of a project of nation-state building. The French Napoleonic Code was promulgated in 1804 and most of Europe followed suit. During the second half of the century, the same process was reproduced in the colonies. In those regions it meant codifying and reforming so-called

“primitive” law. The Indian Code was promulgated in 1860, blending together customary norms, Hindu rules and British laws. Legal codification became part of the project of colonisation, and comparative lawyers found in it their *raison d’être*: they embarked on the legal Westernisation (ad)venture, becoming active, enthusiastic participants in the European “civilising mission” through law. This process and the comparative law industry that it fed affected all non-European countries. Whether under colonial masters or not, all countries engaged in a legal codification process that borrowed Western forms and relied massively on European comparative law advisors – in 1882 the Japanese adopted a Criminal Code drafted by a French jurist, Gustave Boissonade. Chairs of Comparative Law were born in France and Germany, and with them periodicals, international congresses and the will to spread codification everywhere for the common good of humanity.

At the 1900 Congress of Paris, usually considered the first-ever comparative law conference, scholars shared their Kantian-like civilising dream: they would identify and build a common law for all, to bring all countries of the world on a path towards a shared civilisation that would in turn lead to perpetual peace (Fournier 2018). The League of Nations and later the United Nations enshrined these ideals in their respective charters and embodied them in their courts. Comparative law scholars engaged in the project of mapping the world’s laws. René David (1968) and Konrad Zweigert (1977) established taxonomies based on the Civil Law / Common Law distinction, making it the foundational dichotomy of the Western tradition, while identifying “other” systems, mostly religious, as not part of the Western tradition. They grouped these into families: Hindu, Islamic, Confucian and Other. The Legal Families approach was soon criticised for its Eurocentrism and essentialism, which resulted in an inability to account for legal change and circulation (Pargendler 2012, Glenn 2014). This was challenged by the Legal Transplants approach, premised on the idea that most law everywhere was changing under the influences of transplants. This new approach took comparative law back to the idea of convergence – massive transplantation should in all likelihood result in legal homogenisation (Watson 1973). The Legal Transplants approach resonated with its contemporary, the Law-and-Development Approach, according to which comparative lawyers were to engage in legal reform in the Third World to bring about “development”. This reproduced the late nineteenth century approach to legal codification as the only path towards becoming “civilised”.

As the 1960s–1970s saw postmodern thought develop as the internal critique of the Enlightenment myths on which the Westernisation narrative was built, the Law-and-Development Approach suffered a massive existential crisis and lost momentum (Trubek / Galanter 1974). At the same time, taking its cues from Marxism and to a certain extent from postmodernism, the move-

ment for Critical Legal Studies developed in the United States. It conceived of law as of a problematic institution eager to entrench inequalities, but instead of taking aim at the Law-and-Development paradigm through a world-systems approach, it kept a rather domestic, practical focus – notably, to reform legal education in the United States (Kennedy 1983, Unger 1983) and to engage in a daily critique of the gender and race hierarchies enshrined in (American) domestic laws, mainly through critical race theory and critical feminist theory. Meanwhile, the discipline of comparative law remained informed, in its aims, outlooks and strategies, by its colonialist origins (Baxi 2003) and maintained its firm commitment to a taxonomic enterprise of categorising the world’s various legal systems to identify processes of convergence (or, marginally, divergence) (Mattei 1997).

It was only in the mid-1980s that critical thought eventually came, timidly, to comparative law (Frankenberg 1985). In 1997, under the title “New Approaches to Comparative Law”, critical comparative scholars gathered at a workshop in Utah to spark a paradigm shift based on the contributions of Marxism, postmodernism and postcolonialism. They sought to challenge the very idea of legal families and legal transplants, inviting scholars to focus instead on processes of resistance, hybridity, mimicry, subversion and the like at play in legal change (Carozza 1997, Legrand 1997, Legrand / Munday 2003). In a similar move, by the mid-1990s, critical legal theory had made its way in the discipline of international law, giving birth to the Third World Approaches to International Law, nicknamed the TWAIL movement (Anghie 1996, 1999). However, if TWAIL flourished, the encounter between critical legal studies and comparative law that could have given birth to critical comparative legal studies somehow failed to materialise (Mattei 2019, Seidman 2006), and the awakening of comparative law to non-Eurocentric modes of thinking remains, as of today, quite marginal. It is even more marginal in the field of constitutional law, which suffers from being doubly peripheral: it is situated at the margins of the discipline of comparative law, itself at the margins of the discipline of law (Frankenberg 2006).

As a result, constitutional law remains largely unaffected by both postmodernism and postcolonialism despite renewed calls to “decentre” the discipline and open it up to transdisciplinarity (Hirschl 2013, 2014; Frankenberg 2018). Ignoring the insights from critical legal studies, comparative constitutional law remains widely dominated by Eurocentric formalism. As a consequence, non-Western constitutionalism tends to be assessed based on its degree of conformity with its Western counterpart (Law / Versteeg 2013). Yet the shift towards a more inclusive model of scholarship has already begun and owes much to area studies, where legal scholars can safely leave legal formalism behind to enter in conversations with scholars from other disciplines.

Debunking the myth of “lawless Asia”: Area studies versus legal orientalism

Montesquieu is often identified as the first Comparative Law scholar. In his 1748 opus, the *Spirit of the Laws*, he reflected on the Self through considerations of the Other (Montesquieu 1989). Although he did remark that law was tied to society, his focus and aim was not to advocate for or against legal transplants, even less for the Westernisation of the Orient, and not even to create knowledge about the “Orient”. Contrary to what many comparative lawyers have read in him, Montesquieu’s aim was to engage in a domestic critique of the despotism of the French absolute monarchy. Due to fear of censorship, such criticism was expressed by implicitly showing how the French King’s rule was no different from the rule of imagined oriental monarchs. For the sake of his argument, he created an Asian, naturally despotic, stereotype, which he contrasted with the idea of separation of powers, which he had observed in Britain (see Sullivan 2017). Unfortunately, comparative law scholars misread Montesquieu and took his tactical, instrumental considerations about oriental despotism as knowledge about Asia: the myth of lawless Asia has informed scholars ever since. For instance, in the early twentieth century, legal orientalist Robert Lingat argued that Hindu traditional conceptions of law, based on *dharma*, prevented traditional rulers from engaging in lawmaking. According to Lingat, Hindu-based conceptions of law were not normative but descriptive, falling short of the modern/Western definition of law (Lingat 1941; see also Lingat 1973).

The two world wars and the advent of the Cold War displaced the centre of orientalist studies to the United States under the name “Area Studies”. In the US, area studies was designed as the study of China, Japan, the Soviet Empire and Latin America, in accordance with the foreign policy interests of the United States (Wallerstein 1997). In the 1970s, the field came under intense criticism, not least because of the Vietnam War that divided the community of Asianists. A few years later, area studies suffered yet another near-fatal injury with the publication of Edward Said’s *Orientalism: Western Conceptions of the Orient* in 1978. In this influential book, Said offered a relentless attack against area studies as being the prime site of orientalism as opposed to more valuable modes of enquiry structured around intellectually rigorous academic disciplines. In the words of Said, “[i]nteresting work is most likely to be produced by scholars whose allegiance is to a discipline defined intellectually and not to a ‘field’ like Orientalism defined either canonically, imperially, or geographically. An excellent recent instance is the anthropology of Clifford Geertz, whose interest in Islam is discrete and concrete enough to be animated by the specific societies and problems he studies and not by the rituals, preconceptions, and

doctrines of Orientalism” (Said 2003: 326). Clifford Geertz was indeed not an area studies scholar but a cultural anthropologist with no clear specific regional interest. Nonetheless, he did much to advance the study of Islam as well as the study of law in non-Western contexts. In one of his most influential works, he analysed law as a cultural system to be both deciphered and deconstructed like a text (Geertz 1973), à la Derrida, and as a form of imagining the real, à la Lévi-Strauss (Geertz 1983). Moreover, using the example of Indonesia, he contended that law was no less dogmatic in the so-called “primitive” societies than in the West (*ibid.*: 182). Although Geertz was not an area studies scholar *per se*, his extensive field-work experience in Indonesia proved essential to his willingness and ability to challenge the myth of the lawless non-West.

It was much later that the Saidian analysis of orientalism was applied to Asian legal studies. The first recorded denunciation of legal orientalism is the work of Chinese Law scholar Teemu Ruskola, who coined the term in an article published in 2002 (Ruskola 2002). He defined it as “a set of interlocking narratives about what is and is not law [...] and who has law” (Ruskola 2013: 5). From the mid-nineteenth century, the British had argued that China had no law, thus enabling the United Kingdom to force extraterritorial treaties, claim ports and colonise parts of the Kingdom of China. In the early twentieth century, orientalist scholars argued that the specificity of the West resided in its use of law and courts as opposed to customs, rituals and mediation as practiced in the non-West, in particular in China. In a process spanning about a century, orientalist scholars invented legal primitivism, characterised by status as opposed to contract, by hierarchies as opposed to individualism (*cf.* Maine 2002, Dumont 1986, Tuori 2014). But unlike orientalism in literary studies, “legal orientalism” did not give rise to a boom of legal literature, the creation of a lively school of thought or the endowment of chairs in prestigious law schools – mostly, it remained confined to Chinese legal studies, where it is still today a dynamic discussion (*cf.* Li 2014, Coendet 2019).

The myth of “lawless” Asia was debunked in Chinese area studies, but very much maintained in the thinking of Western law schools. Anthropologists noted the fetishisation of law in the non-West, but legal scholars were quick to point out that this was not “really” law, being inefficient at solving disorder in the postcolony (Comaroff / Comaroff 2007). In a similar fashion, legal scholars take notice of the fetishisation of constitutional law, but are quick to point out that this is not “really” constitutionalism and these courts are not “really” constitutional courts, being unable to fully uphold liberal-democratic values – in fact, the use of constitutionalism and judicial review by such courts is conceptualised as the “abuse” of constitutionalism and judicial review (Landau 2013, Landau / Dixon 2019). Even the type of judicial review operated by the Supreme Court of one of the most established Asian democracies, Japan, is described as having “failed” (Law 2011: 192).

The first denunciation of constitutional orientalism is yet to come. “Real” constitutionalism is still often associated with the type of constitutionalism practiced in the West while “sham” or incomplete versions of constitutionalism are the preserve of the East. The canon of constitutional law scholarship still tends to establish liberal-democratic forms of constitutionalism as the only genuine type and sees “authoritarian”, “Islamic” or “Confucian” constitutionalism as oxymorons (Dowdle / Wilkinson 2017). Studies of constitutional design still aim to transfer constitutionalism-as-development to developing countries, especially the most underdeveloped, divided, disorderly ones (Choudhry 2008, Lijphart 2004). In constitutional studies more than comparative legal studies, legal transplants are seen to migrate primarily from the North to the South (Choudhry 2006, Perju 2012). Even if the spread of constitutions and constitutional courts has been acknowledged, the South is still seen as “constitutionalism-deprived”. In the discipline, the most quoted article by the African scholar H.W.O. Okoth-Ogendo (1988) is precisely that which establishes this argument: the non-West has “constitutions without constitutionalism”. Most of the studies on constitutionalism outside the West refrain from using the word “constitutionalism” – as the common assumption remains that non-Western constitutional practices are not deserving of the label (Ginsburg / Moustafa 2008, Ginsburg / Simpser 2013, Grimm 2016).

By contrast, scholars working in/on Asia have repeatedly made use of the prestigious label to refer to Asian forms of constitutional ordering (Chen 2014, Chang et al. 2014). There is much evidence that, like legal orientalism, the denunciation of constitutional orientalism will come from scholars of Asian law. For decades now, they have pointed to alternatives to Western constitutionalism as equally valid forms of constitutionalism (Thio 2012, Neo / Son 2019). In fact, constitutional orientalism has already been alluded to in specific works on Southeast Asian constitutionalism, and Andrew Harding and Bui Ngoc Son gave a first, simple and efficient definition in 2016: “Constitutional orientalism can be referred to as the western imagination of constitutional law in Asia” (Harding / Son 2016: 168). Scholars have also attempted to establish Asian experiences as having universal appeal. There is a growing literature on Asian constitutionalisms in the plural form, with the elaboration of concepts, theories, models and methodologies for constitutional law out of Asia and Southeast Asia. In the realm of concepts alone, “illiberal constitutionalism” (Thio 2012, Mérieau 2016b), “authoritarian rule of law” (Rajah 2012) and “authoritarian constitutionalism” (Tushnet 2015) were all crafted from and for Southeast Asia. An exponential volume of literature is investigating Asian discourses of the rule of law (Peerenboom 2003), Asian forms of legalities (Chen / Fu 2020) and the Asian judicialisation of politics (Dressel 2012).

The judicialisation of politics is a telling example of the type of historical inversion referred to in this piece. The judicialisation of politics was believed

never to occur in a place where law was as marginal as in Asia. In 1997, Tate Vallinder proclaimed that Southeast Asia was an unlikely candidate for the judicialisation of politics (Tate / Vallinder 1997). Yet since the late 1990s, centralised constitutional review has spread in the region (Thailand 1997, Cambodia 1998, Indonesia 2003, Myanmar 2011), while supreme courts have also embarked, to various degrees, on a constitutional review of legislation (Philippines, Singapore, Malaysia and Timor-Leste). Even Vietnam has discussed the option of adopting an organ of constitutional review (Bui 2018). In fact, in Southeast Asia, in the early twenty-first century, constitutional courts are engaged daily in dealing with a wide range of issues and core political controversies. Examining judicial behaviour in Southeast Asia in 2020, one is puzzled by the elaborate rulings issued by courts, from Myanmar to Indonesia, and by the expanding role of the judiciary in the region. Today, Southeast Asia is experiencing one of the most intense phenomena of judicialisation of politics carried out by numerous constitutional courts – with courts sending politicians to jail for lengthy sentences, dissolving political parties and invalidating constitutional amendments (Dressel 2012). Constitutionalism in fact is as intense and dynamic in Asia than in Europe, if not more so, but, more importantly, it is much more diverse.

How the West is evolving towards the East: Southeast Asian examples

The first phenomenon that puts Southeast Asia at the forefront of global legal development is its long-lasting, multifaceted experience with legal pluralism, a distinctive feature of Southeast Asian systems. In Southeast Asia, the principle that the law should be the same for all was never the rule (Hooker 1975, Hussain 2011, Bell 2017). Instead, various indigenous, religious and ethnic communities have been governed by their own normative orders within the State constitutional order (or outside of the State). In much of Southeast Asia, indigenous systems of conflict resolution coexist with sharia courts, which coexist with the national courts. On top of this, legacies of successive waves of colonialism have layered colonial over indigenous laws, often recodified as modified versions of customary laws, on top of mixed systems of civil and common law. In the region, the various apex courts including constitutional courts police the relationship between the competing legal orders and the intermingling of norms from various origins and systems as well as the coexisting means of conflict resolution (Harding 2015). For instance, the religious condemnation of blasphemy clashes with constitutional secularism in Indonesia, a clash that must be entertained by the Indonesian Constitutional Court. Indigenous voting sys-

tems in West Papua clash with the one person–one vote principle, a clash also entertained by the Indonesian Constitutional Court.

Southeast Asia is also a region that has one of the richest experiences of mechanisms of transitional justice: the Extraordinary Chambers of Cambodia put members of the Khmer Rouge on trial for more than a decade (2006–2018); Timor-Leste organised many initiatives to deal with Indonesian massacres in 1999 and in the 2000s, while Indonesia, the Philippines and Thailand have engaged in deep reflections about transitional justice and attempted to set up truth and reconciliation mechanisms. In this area as well, high courts are tasked with policing the conflict between competing notions of justice and law. In Cambodia, the Philippines, and Indonesia, they have ruled transitional justice mechanisms as unconstitutional, often involving the key principle of non-retroactivity of criminal law.

So, why would such mechanisms – legal pluralism and transitional justice – designed for a perceived dysfunctional and disorderly South, increasingly appear as legal solutions to social problems of the West? The year 2020 provides a great snapshot of evidence. In the United States, 2020 has been marked by intense ethnic-based violence, a deadly epidemic, economic inequalities and crises, as well as an attempted coup, political corruption and incompetence. The foundational myth of equality before the law and the impartiality of the justice system has crumbled under the evidence brought to light by social movements such as Black Lives Matter. Protesters have called for the replacement of mass incarceration of Blacks by mechanisms of transitional justice. Meanwhile, in the United Kingdom, following the set-up of the Muslim Arbitration Tribunal in 2007, there are calls to allow sharia courts to operate in parallel to the secular courts; in Canada, there are calls to allow indigenous populations to rule themselves according to their customary norms and to give them reparations through transitional justice mechanisms. With events of violence, terrorism, ethnic riots and awareness of lingering colonial legacies, legal pluralism and transitional justice no longer appear as the Other to Western legality and justice but increasingly as potential solutions to universal issues.

Additionally, another area where Southeast Asia might be seen as a repository of legal solutions to (re)emerging problems in the West is that of authoritarian legality to respond to epidemic diseases. In Southeast Asia, as in the Western model, emergency legislation has been deployed heavily against terrorism, but it has also been used more recently to deal with epidemics, implementing quarantine and curfews – Southeast Asia was one of the first regions to adopt a “national security” or, rather “human security” approach to epidemics (Caballero-Anthony 2008). Southeast Asia has a legacy of normalising states of emergency into ordinary legislation (Ramraj 2008, Ramraj / Thiruvengadam 2009), and this has been replicated in its handling of epidemics. These legal devices are also spreading to the West, as governments grapple with the Covid epidemic

against the backdrop of continuous mass protests fuelled by an unprecedented level of income inequality and the exploding legitimacy crisis of liberal democracy. In 2020, the normalised State of Emergency as applied to epidemics travelled from China to Europe through Southeast Asia. Mass quarantines and lockdowns were quickly implemented, turning liberal societies like France into Orwellian dystopias where drones patrol the air reminding the public that anyone walking the streets or gathering in groups will face immediate sanctions. As some have argued, Europe emulated China: massive surveillance by drones, phones and tracing apps, as well as the prohibition against assembly, became the norm (Tréguer 2020 /Rocca 2020).

Finally, there is lawfare, or legal warfare – the use of courts to silence critical voices in the name of democracy. Southeast Asia has been at the forefront of this development at least since the 1990s: courts including Constitutional Courts dissolve political parties, remove prime ministers and presidents, veto constitutional amendments and pieces of legislation, support institutions such as the Church or the Military, and are used to bankrupt political opponents on a regular basis. The most telling example is that of Thailand, whose Constitutional Court has dismissed every single elected prime minister, one after the other, since its creation in 1997 and has dissolved the most popular political parties on several occasions (Mérieau 2016a).

This very brief overview aims to show how legal transfers, long assumed to move unilaterally from the North to the South, are now increasingly embedded within an opposite trajectory. If the benefits of authoritarian legality in the handling of epidemics are not self-evident, mechanisms of transitional justice and legal pluralism might appear as useful processes for dealing with current challenges in Western societies. This “inversion” of the sense of history is due to a generalisation of disorder in Western states, characterised by ethnic tensions, epidemics and inequalities, all conducive to further violence.

Towards an epistemology of the South in Comparative Constitutional Law: A set of three proposals mediated by Area Studies

Yet at the level of social theory, Eurocentric modernisation theory turned upside-down has all the same defaults as the original, substituting one imperialistic modernity (say, the Euroamerican Empire) with another imperialistic modernity (say, the rising Chinese Empire). By contrast, the aim here is to acknowledge the possibility of multiple coexisting modernities, and to recognise that Southern modernity is not a derivative of Northern modernity, nor does the South lag behind the North. Instead, the centre might mimic the periphery and

the periphery be the centre's avant-garde. In order for scholars to work towards undoing the colonality of (constitutional/legal) knowledge by accounting for alternative constitutional modernities without hierarchising them, here is a set of three proposals.

First, it is crucial to engage in a locally-informed genealogy of the processes of marginalisation and othering at the foundation of disciplinary knowledge. In particular, in constitutional law, the mainstream approaches share a common embeddedness in an orientalist agenda founded upon the Westernisation narrative: there is only one modernity, and it is Western (Hall 1992, Wolf / Eriksen 2010). Andrew Harding wrote, in his seminal article on "Southeast Asian Lessons for Public Law", that the legal scholars who attended the 1900 Paris Congress of Comparative Law had not only ignored the region but in fact went as far as to "plan the exclusion of Southeast Asian Law" (Harding 2002: 266). Against this background, Harding calls their comparative law project "misconceived". Yet rather than misconceived, I would like to suggest that the project was very much well-conceived for its aim of epistemic imperialism, a process at the core of disciplinary knowledge. The absence of Southeast Asian Law was actively produced and reproduced with much effort and coordinated action within the discipline of comparative law. This exclusion has been achieved through an active process of policing the canon of what law is and who has it, the declinations of which have evolved over time. Therefore, engaging in a genealogy of marginalisation includes a thorough examination of how various scholars have exerted their agency to iteratively exclude Southeast Asian law over time, a method sometimes referred to as a "sociology of absence" or continued epistemic violence (Santos 2001, 2008).

Second, it is equally crucial to both provincialise the canon, by resituating it as a specific form of Euroamerican area studies and to theorise from Southeast Asia. In constitutional law as in other disciplines, it has been proven time and again that the lived experiences of the South challenge the established theories produced in the North, demonstrating the latter's particularism rather than universalism. Area studies, with its deep commitment to language training, fieldwork and interdisciplinarity, offers opportunities to revise these theories and derive new ones from non-Western grounded empirical study. So, for instance, based on the examples used in this article, legal monism must be revised, retributive justice must be revised, the binary opposition between authoritarian and liberal forms of constitutional ordering must be revised, and the faith in constitutional courts as democracy-enhancers must be revised. Revised theories from the South will be embraced by the North as it increasingly grapples with religious and ethnic diversity, conflict, epidemics and environmental disasters, and the end of the liberal consensus.

Third, it is urgent to refuse to submit to the international division of labour that assigns empirical work to the South (as the non-West is a place of "un-

processed data”, Comaroff / Comaroff 2012: 114) in order to leave theory to Western scholars. In comparative constitutional law, this international division of labour knows an additional layer: scholars from the South are encouraged not only to focus on empirical work, but also to focus their empirical work on their own jurisdiction. As a result, the outcome might fall short of the label “comparative” and see its contribution reduced to that of data collection, whose value added is greatly diminished compared to comparative and theoretical work (Hirschl 2005). Due to the elite status of theory as opposed to empirics, and to comparative work as opposed to single-country expertise, there is a tendency among Southern scholars to reject area studies altogether in order to associate themselves with disciplinary work usually dominated by the North, with the risk, also present in area studies, of becoming perpetual subcontractors to more established scholars (Alatas 2000). Although this strategy might be understandable at the individual level, this paper calls for using area studies as a platform to theorise alternative modernities, aiming for an “area” type of theorising, which emancipates itself from the traditional dependencies on Western elite institutions – for instance by engaging in critical, comparative, South-South area studies.

Against the predictions of the “death” or “end” of area studies (Miyoshi et al. 2002, Walker / Sakai 2019), I contend that area studies has increasing relevance today, when the zeitgeist calls for “provincialising” the social science canon and theorising from the South. Against this background, as pointed out by legal scholars, area studies specialists and comparative lawyers have a lot to gain from entering into a mutual conversation (Nicholson 2008:72) – historically, law has, after all, been used as the quintessential sign of modernity as well as the first device to both colonise and resist colonisation. Like the discourse on Asian lawlessness, the “constitutions without constitutionalism” narrative (re)produces the Western discourse of the West versus the Rest: its survival depends on a struggle between competing interpretations of the term “constitutionalism” as being inclusive or exclusive of non-liberal-democratic forms of ordering.

Conceptual formation and diffusion, a highly valued form of knowledge production, is a function of power (Foucault 1980). For instance, the authorship of the notion of orientalism, a widely used concept in the social sciences, is attributed to Edward Said, a Palestinian scholar from Columbia University. The concept could as well have been partly credited to Syed Hussein Alatas, a Malaysian scholar from the National University of Malaysia from whom Said got much inspiration (Alatas 1977; Graf 2010). Successful theories, however historically, geographically and subjectively situated, are the ones that manage to “erase” their particularistic characteristics or “situatedness” to speak in universal terms (Said 1983: 226, Haraway 1988). Yet they often claim their point of origin as some sort of branding mechanism: postmodern critical theory

with France and Germany, subaltern studies with India, decolonial thought with Latin America, and perhaps, or so is the ambition of this paper, alternative/pluralist constitutional theory with Southeast Asia.

Concluding remarks

Comaroff and Comaroff argued that the (imagined) South (“Africa”) might well represent the future of the North – mired in violence, ethnic conflicts, epidemics, inequalities and religious fundamentalism. Against ideas of convergence towards a Western telos, disordered pluralities appear on the horizon. Is it possible, then, that Southeast Asian constitutional law, in its extreme diversity, offers images of the future of Western constitutional law? Can constitutional design principles and jurisprudence travel from East to West? This article has shown not only that they can, but that they already have. Yet, this shift has not yet been captured as legitimate knowledge in the field of constitutional law, which, still blinded by the narrative of Westernisation, remains in a general state of denial of changes that have *already happened*. Twenty years ago, Andrew Harding already referred to Southeast Asian law as “post-Western”: it had digested Western modes of legality, and moved beyond them (Harding 2001: 219).

If some elements of Southeast Asian constitutionalism have begun to gain increased scholarly attention, their universality is contested as they challenge the end-of-history narrative of liberal-democratic constitutionalism with a rule of law rooted in the idea of legal monism and notions of retributive justice. More precisely, the types of normativity experienced in Southeast Asia directly challenge three fundamental tenets of Western constitutional ordering: legal pluralism challenges legal monism, transitional justice challenges retributive justice, and authoritarian modes of legality – including lawfare – challenge liberal constitutionalism. It is possible to maintain a discourse of differences (here, of alternative constitutional modernities) while refusing to convert these differences into values and hierarchies in line with the current geopolitics of knowledge that maintains Western dominance through academic imperialism and dependency (see Mignolo 2002; Alatas 1993, 2016a, 2016b; Zeiny 2019). As long as theory remains an elite practice guarded by gate-keepers located in elite Western institutions, non-Western area disciplinary studies, with their journals and associations, provide an ideal site of resistance.

There is no provincialising of the Western canon without proposals for non-Western additions to it, and this is precisely a contribution best made by area studies which, with its commitment to rigorous empirical and transdisciplinary work, is a place where the empirical and theoretical analysis of alternative constitutional modernities can be engaged with. In other terms, while the decon-

structionist work can be done by the abstract, internal disciplinary critique, the reconstructionist work relies on empiricists such as area studies scholars. In law, critical legal studies deconstructs, and area (constitutional) studies offers alternative solutions. In particular, among the legal devices for which the South including Southeast Asia has much experience, constitutional mechanisms for deeply pluralistic/divided societies appear more than ever relevant to the North. The constitutional regulation of pluralism in turn raises a set of novel issues for constitutional adjudication that will prompt a fair deal of theorisation – from Southeast Asia.

References

- Alatas, Syed Farid (2016a): The Study of the Social Sciences in Developing Societies: Towards an Adequate Conceptualization of Relevance. *Current Sociology* 49(2), pp. 1–19.
- Alatas, Syed Farid (2016b): Academic Dependency and the Global Division of Labour in the Social Sciences. *Current Sociology* 51(6), pp. 599–613.
- Alatas, Syed Farid (1993): On the Indigenization of Academic Discourse. *Alternatives: Global, Local, Political* 18(3), pp. 307–338.
- Alatas, Syed Hussein (2000): Intellectual Imperialism: Definition, Traits, and Problems. *Asian Journal of Social Science* 28(1), pp. 23–48.
- Alatas, Syed Hussein (1977): *The Myth of the Lazy Native: A Study of the Image of the Malays, Filipinos and Javanese from the 16th to the 20th Century and Its Function in the Ideology of Colonial Capitalism*. London: F. Cass.
- Anghie, Antony (1999): Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law. *Harvard International Law Journal* 40(1), pp. 1–80.
- Anghie, Antony (1996): Francisco De Vitoria and the Colonial Origins of International Law. *Social and Legal Studies* 5 (3), pp. 321–336.
- Baxi, Upendra (2003): The Colonialist Heritage. In: Pierre Legrand / Roderick Munday (eds): *Comparative Legal Studies: Traditions and Transitions*. Cambridge: Cambridge University Press.
- Bell, Gary F. (ed.) (2017): *Pluralism, Transnationalism, and Culture in Asian Law: A Book in Honour of M.B. Hooker*. Singapore: ISEAS Publishing.
- Bourdieu, Pierre (1988): *Homo Academicus*. Redwood City: Stanford University Press.
- Caballero-Anthony, Mely (2008): Non-Traditional Security and Infectious Diseases in ASEAN: Going beyond the Rhetoric of Securitization to Deeper Institutionalization. *The Pacific Review* 21(4), pp. 507–525.
- Carozza, Paolo G. (1997): Continuity and Rupture in “New Approaches to Comparative Law.” (Symposium: New Approaches to Comparative Law). *Utah Law Review* 2, pp. 657–663.
- Chang, Wen-Chen / Thio, Li-Ann / Tan, Kevin YL / Yeh, Jiunn-Rong (2014): *Constitutionalism in Asia: Cases and Materials*. Oxford: Hart Publishing.
- Chen, Albert H.Y. (2014): *Constitutionalism in Asia in the Early Twenty-First Century*. Cambridge: Cambridge University Press.
- Chen, Weitseng / Fu, Hualing (eds) (2020): *Authoritarian Legality in Asia: Formation, Development and Transition*. Cambridge: Cambridge University Press.
- Choudhry, Sujit (2008): *Constitutional Design for Divided Societies: Integration or Accommodation?* Oxford: Oxford University Press.

AREA STUDIES AND THE DECOLONISATION OF COMPARATIVE LAW

- Choudhry, Sujit (ed.) (2006): *The Migration of Constitutional Ideas*. Cambridge: Cambridge University Press.
- Chua, Lynette J. (2014): Charting Socio-Legal Scholarship on Southeast Asia: Key Themes and Future Directions. *Asian Journal of Comparative Law* 9(1), pp. 5–27.
- Chua, Lynette J. / Engel, David M. (2015): State and Personhood in Southeast Asia: The Promise and Potential for Law and Society Research. *Asian Journal of Law and Society* 2(2), pp. 211–228.
- Coendet, Thomas (2019): Critical Legal Orientalism: Rethinking the Comparative Discourse on Chinese Law. *The American Journal of Comparative Law* 67(4), pp. 775–824.
- Comaroff, Jean / Comaroff, John L. (2012): Theory from the South: Or, How Euro-America Is Evolving Toward Africa. *Anthropological Forum* 22(2), pp. 113–131.
- Comaroff, Jean / Comaroff, John L. (2007): Law and Disorder in the Postcolony. *Social Anthropology* 15(2), pp. 133–152.
- David, René (1968): *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*. London: The Free Press, Collier-Macmillan.
- Davies, Sara (2008): Securitizing Infectious Disease. *International Affairs* 84 (2), pp. 295–313.
- Dowdle, Michael W. / Wilkinson, Michael (2017): *Constitutionalism beyond Liberalism*. Cambridge: Cambridge University Press.
- Dressel, Björn (2012): *The Judicialization of Politics in Asia*. 1st edition. London: Routledge.
- Dumont, Louis (1986): *Essays on Individualism: Modern Ideology in Anthropological Perspective*. Chicago: University of Chicago Press.
- Foucault, Michel (1980): *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*. New York: Pantheon Books.
- Fournier, Mireille (2018): Comparative Law Gets Entitled: The 1900 Paris Congress in Contexts. University of Victoria, <https://dspace.library.uvic.ca/handle/1828/9984> (accessed 6 November 2020).
- Frankenberg, Günter (2018): *Comparative Constitutional Studies: Between Magic and Deceit*. Cheltenham: Edward Elgar Publishing.
- Frankenberg, Günter (2006): Comparing Constitutions: Ideas, Ideals, and Ideology: toward a Layered Narrative. *International Journal of Constitutional Law* 4(3), pp. 439–459.
- Frankenberg, Günter (1985): Critical Comparisons: Re-Thinking Comparative Law. *Harvard International Law Journal* 26 (2), pp. 411–455.
- Frohnen, Bruce P. (2011): Is Constitutionalism Liberal? *Campbell Law Review* 33(3), pp. 529–558.
- Geertz, Clifford (1983): *Local Knowledge: Further Essays in Interpretive Anthropology*. New York: Basic Books.
- Geertz, Clifford (1973): *The Interpretation of Cultures: Selected Essays*. New York: Basic Books.
- Ginsburg, Tom / Moustafa, Tamir (2008): *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge: Cambridge University Press.
- Ginsburg, Tom / Simpser, Alberto (2013): *Constitutions in Authoritarian Regimes*. Cambridge: Cambridge University Press.
- Glenn, H. Patrick (2014): *Legal Traditions of the World: Sustainable Diversity in Law*. Fifth edition. Oxford University Press.
- Graf, Arndt (2010): Electronic Orientalism? The Afterlife of Syed Hussein Alatas. The Myth of the Lazy Native in Online Databases. *New Media and Society* 12(5), pp. 835–854.
- Grimm, Dieter (2016): *Constitutionalism: Past, Present, and Future*. Oxford: Oxford University Press.
- Hall, Stuart (1992): The West and the Rest: Discourse and Power. In: Bram Gieben / Stuart Hall (eds): *Formations of Modernity*. Cambridge: Polity Press in association with the Open University, pp. 185–227.
- Haraway, Donna (1988): Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective. *Feminist Studies* 14(3), pp. 575–599.
- Harding, Andrew (2015): Legal Traditions of Southeast Asia. In: James D. Wright (ed.): *International Encyclopedia of the Social and Behavioral Sciences*. Oxford: Elsevier, pp. 813–818.

EUGÉNIE MÉRIEAU

- Harding, Andrew (2002): Comparative Public Law: Some Lessons from Southeast Asia. In: Esin Örüçü / Andrew Harding (eds): *Comparative Law in the 21st Century*. London: Kluwer Law, pp. 249–266.
- Harding, Andrew (2001): Comparative Law and Legal Transplantation in South East Asia: Making Sense of the “Nomic Din”. In: David Nelken (ed.): *Adapting Legal Cultures*. Oxford: Hart Publishing, pp. 199–222.
- Harding, Andrew / Son, Bui Ngoc (2016): Recent Work in Asian Constitutional Studies: A Review Essay. *Asian Journal of Comparative Law* 11(1), pp. 163–183.
- Hegel, Friedrich (2001): *The Philosophy of History*. Kitchener: Batoche Books.
- Hirschl, Ran (2014): *Comparative Matters: The Renaissance of Comparative Constitutional Law*. Oxford: Oxford University Press.
- Hirschl, Ran (2013): From Comparative Constitutional Law to Comparative Constitutional Studies. *International Journal of Constitutional Law* 11(1), pp. 1–12.
- Hirschl, Ran (2005): The Question of Case Selection in Comparative Constitutional Law. *The American Journal of Comparative Law* 53(1), pp. 125–156.
- Hooker, M.B. (1975): *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*. Oxford: Clarendon Press.
- Hussain, Jamila (2011): More than One Law for All: Legal Pluralism in Southeast Asia. *Democracy and Security* 7(4), pp. 374–389.
- Kennedy, Duncan (1983): *Legal Education and the Reproduction of Hierarchy: A Polemic against the System*. 1st edition. Cambridge: Afar.
- Landau, David (2013): Abusive Constitutionalism. *U.C. Davis Law Review* 47(1), pp. 189–260.
- Landau, David / Dixon, Rosalind (2020): Abusive Judicial Review: Courts Against Democracy. *U.C. Davis Law Review* 53(3), pp. 1313–1387.
- Law, David (2011): Why Has Judicial Review Failed in Japan? *Washington University Law Review* 88(6), pp. 1425–1466.
- Law, David / Versteeg, Mila (2013): Sham Constitutions. *California Law Review* 101(4), pp. 863–952.
- Legrand, Pierre (1997): The Impossibility of “Legal Transplants”. *Maastricht Journal of European and Comparative Law* 4 (2), pp. 111–124.
- Legrand, Pierre / Munday, Roderick (2003): *Comparative Legal Studies: Traditions and Transitions*. Cambridge: Cambridge University Press.
- Li, Yang (2014): Legal Orientalism, or Legal Imperialism? *Rechtsgeschichte: Zeitschrift des Max-Planck-Instituts für Europäische Rechtsgeschichte* 22, pp. 316–321.
- Lijphart, Arend (2004): Constitutional Design for Divided Societies. *Journal of Democracy* 15(2), pp. 96–109.
- Lingat, Robert (1973): *The Classical Law of India*. Berkeley: University of California Press.
- Lingat, Robert (1941): Evolution of the Conception of Law in Burma and Siam. *Journal of Siamese Society* 38, pp. 9–31.
- Loewenstein, Karl (1969): Constitutions and Constitutional Law in the West and in the East. *The Indian Journal of Political Science* 30(3), pp. 203–48.
- Maine, Sir Henry Sumner (2002): *Ancient Law*. London: Routledge. Originally published in 1861.
- Mattei, Ugo (2019): Comparative Law and Critical Legal Studies. In: Reinhard Zimmermann / Mathias Reimann (eds): *Oxford Handbook of Comparative Law*. 2nd edition. Oxford: Oxford University Press, pp. 816–836.
- Mattei, Ugo (1997): Three Patterns of Law: Taxonomy and Change in the World’s Legal System. *American Journal of Comparative Law* 45, pp. 5–44.
- Mérieau, Eugénie (2016a): The Legal-military Alliance for Illiberal Constitutionalism in Thailand. In: Björn Dressel / Marco Bünte (eds): *Constitutional Politics in Southeast Asia*. London: Routledge, pp. 140–160.
- Mérieau, Eugénie (2016b): Thailand’s Deep State, Royal Power and the Constitutional Court (1997–2015). *Journal of Contemporary Asia* 46(3), pp. 445–466.

AREA STUDIES AND THE DECOLONISATION OF COMPARATIVE LAW

- Mignolo, Walter (2002): The Geopolitics of Knowledge and the Colonial Difference. *The South Atlantic Quarterly* 101(1), pp. 57–96.
- Miyoshi, Masao / Harootunian, Harry / Chow, Rey (2002): *Learning Places: The Afterlives of Area Studies*. Durham: Duke University Press.
- Montesquieu, Charles de Secondat (1989): *The Spirit of the Laws*. Cambridge: Cambridge University Press.
- Neo, Jaclyn L. / Son, Bui Ngoc (2019): *Pluralist Constitutions in Southeast Asia*. Oxford: Hart Publishing.
- Nicholson, Penelope / Biddulph, Sarah (eds) (2008): *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*. Leiden: Brill.
- Okoth-Ogendo, H.W.O. (1988): *Constitutions without Constitutionalism: Reflections on an African Political Paradox*. New York: American Council of Learned Societies.
- Pargendler, Mariana (2012): The Rise and Decline of Legal Families. *The American Journal of Comparative Law* 60 (4), pp. 1043–1074.
- Peerenboom, Randall (2003): *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the U.S.* London: Routledge.
- Perju, Vlad (2012): *Constitutional Transplants, Borrowing, and Migrations*. Oxford: Oxford University Press.
- Rajah, Jothie (2012): *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore*. Cambridge: Cambridge University Press.
- Ramraj, Victor V. (2008): Constitutionalism and Emergency Powers. In: Clauspeter Hill / Jörg Menzel (eds): *Constitutionalism in Southeast Asia*. Berlin: Konrad Adenauer Stiftung, pp. 57–66.
- Ramraj, Victor V. / Thiruvengadam, K. (2009): *Emergency Powers in Asia*. Cambridge: Cambridge University Press.
- Rocca, Jean-Louis (2020): Coronavirus, Neoconservatism and Totalitarianism: The Case of China. Science Po, 7 April 2020, <http://sciencespo.fr/ceri/en/content/coronavirus-neoconservatism-and-totalitarianism-case-china> (accessed 5 September 2020).
- Ruskola, Teemu (2013): *Legal Orientalism: China, the United States, and Modern Law*. Cambridge: Harvard University Press.
- Ruskola, Teemu (2002): *Legal Orientalism*. Michigan Law Review 101(1), pp. 179–234.
- Said, Edward W. (2003): *Orientalism*. 25th anniversary edition. New York: Vintage Books.
- Said, Edward W. (1983): Travelling Theory. In: Edward W. Said: *The World, the Text, and the Critic*. Cambridge: Harvard University Press.
- Santos, Boaventura de Sousa (2018): *The End of the Cognitive Empire: The Coming of Age of Epistemologies of the South*. Durham: Duke University Press.
- Santos, Boaventura de Sousa (2008): *Another Knowledge Is Possible: Beyond Northern Epistemologies*. London: Verso.
- Santos, Boaventura de Sousa (2001): Nuestra America: Reinventing a Subaltern Paradigm of Recognition and Redistribution. *Theory, Culture and Society* 18(2-3), pp. 185–217.
- Seidman, Louis Michael (2006): Critical Constitutionalism Now. *Fordham Law Review* 75(2), pp. 575–592.
- Son, Bui Ngoc (2018): Why Do Countries Choose Not to Adopt Constitutional Review, the Case of Vietnam. In: Albert Chen (ed.): *Constitutional Courts in Asia*. Cambridge: Cambridge University Press, pp. 335–364.
- Sullivan, Vickie B. (2017): *Montesquieu and the Despotism Ideas of Europe: An Interpretation of "The Spirit of the Laws"*. Chicago: University of Chicago Press.
- Tate, Neal / Vallinder, Björn (1997): *The Global Expansion of Judicial Power*. New York: New York University Press.
- Thio, Li-Ann (2012): Constitutionalism in Illiberal Polities. In: Andras Sajó / Michel Rosenfeld: *Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press, pp. 133–148.
- Tréguer, Félix (2020): The State and Digital Surveillance in Times of the Covid-19 Pandemic. Science Po, 1 May 2020, <http://sciencespo.fr/ceri/en/content/state-and-digital-surveillance-times-covid-19-pandemic> (accessed 5 September 2020).

EUGÉNIE MÉRIEAU

- Trubek, David M. / Galanter, Marc (1974): Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States Law and Society. *Wisconsin Law Review* 4, pp. 1062–1103.
- Tuori, Kaius (2014): *Lawyers and Savages: Ancient History and Legal Realism in the Making of Legal Anthropology*. London: Routledge.
- Tushnet, Mark (2015): Authoritarian Constitutionalism. *Cornell Law Review* 100, pp. 391–462.
- Unger, Roberto Mangabeira (1983): The Critical Legal Studies Movement. *Harvard Law Review* 96(3), pp. 561–675.
- Walker, Gavin / Sakai, Naoki (2019): The End of Area (2019). *Positions: Asia Critique* 27(1), pp. 1–31.
- Wallerstein, Immanuel (1997): The Unintended Consequences of Cold War Area Studies. In: Noam Chomsky: *The Cold War and the University: Toward an Intellectual History of the Postwar Years*. New York: New Press, pp. 195–231.
- Watson, Alan (1973): *Legal Transplants: An Approach to Comparative Law*. Athens, GA: University of Georgia Press.
- Weber, Max (1906): Russlands Übergang zum Scheinkonstitutionalismus. *Archiv für Sozialwissenschaft und Sozialpolitik* 23(1), pp. 165–401.
- Wolf, Eric R. / Eriksen, Thomas Hylland (2010): *Europe and the People without History*. Berkeley: University of California Press.
- Zeiny, Esmail (2019): Academic Imperialism. *Asian Journal of Social Science* 47(1), pp. 88–109.
- Zweigert, Konrad (1977): *An Introduction to Comparative Law*. New York: Elsevier.