# COMPARING COMPARATIVE LAW: PERSPECTIVES FROM THAILAND

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**Abstract** This article conducts an analytical review of the works of three prominent Thai comparative law professors: Professor Preedee Kasemsup, Professor Phijaisakdi Horayangkura and Professor Sanunkorn Sotthibandhu. Although influential in Thailand, their works are mostly in Thai and therefore have received little academic attention outside the kingdom. The authors argue that the works of these scholars have the potential to shine new light on comparative law theory and bring voices from the Global South to add fresh perspectives and contexts to a discipline dominated by scholars from the Global North. Moreover, this examination highlights the challenges that comparative law faces in freeing itself from this hegemony when using internally developed concepts and modes of questioning.

**Keywords**: comparative law, Thailand, Thai law, Asian law, Global South.

## I. INTRODUCTION

The dichotomy of the Global North and the Global South is familiar to comparatists. Indeed, it has been pointed out that the academic field of comparative law is structured and dominated by the Global North, with mainstream theories frequently using Global North legal systems as the starting point or benchmark for comparison, while the Global South remains marginal to the discipline.[1] It is thus unsurprising that comparative law runs the risk of being seen as conservative, with a tendency to reinforce ideals from the Global North.[2] Although such dichotomous thinking engenders sharp divisions between Western and Eastern, convergence and divergence,

[1] See, eg, L Salaymeh and R Michaels, 'Decolonial Comparative Law: A Conceptual Beginning' (2022) 86(1) RabelsZ 166, 167–8.

[2] TV Warikandwa and SK Amoo, 'African Law in Comparative Law: A Case of Undermining African Jurisprudence and Promoting a New World Order Agenda?' in A Nhemachena, TV Warikandwa and SK Amoo (eds), *Social and Legal Theory in the Age of Decoloniality: (Re-) Envisioning Pan-African Jurisprudence in the 21st Century* (Langaa RPCIG 2018). See also JJ

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universalism and localism, universalism and pluralism, to name a few, the usefulness of epistemological bifurcation is not here doubted, at least as a heuristic device. Indeed, it is arguably necessary as semantics for the purpose of framing intellectual debate for legal comparison. Comparative lawyers are no strangers to the discussion of 'otherness'.[3] Complying with the necessary devils that are the dichotomous terminologies, this article seeks to examine some comparative law perspectives from Thailand, hopefully to enrich and expand existing debates by making an inroad into the largely unbridged gap between English-language and Thai-language literature on comparative law. In so doing, the authors resist a tendency to adopt the 'classical' Western legal logic as the theoretical foundation and to use non-Western legal diversities as so-called 'exotic' illustrations.[4]

From the perspective of comparative law, Thailand's experiences of legal development in the past two centuries have been nothing short of extraordinary. From the extensive reforms of the laws and the legal system in the nineteenth and twentieth centuries, in a wider context of 'modernisation' efforts in almost every aspect of the nation,[5] to 2020s contemporary developments in cutting-edge legal frontiers in law and technology,[6] the country stands as a valuable comparator in a global comparative law conversation. Nonetheless, very little has been written in the English language on comparative law discourse through the lens of prominent Thai academics, well known to and widely respected by Thai lawyers, but yet to receive significant international attention.

This article seeks to review and analyse comparative private law works of three prominent Thai law professors—Professor Preedee Kasemsup, Professor Phijaisakdi Horayangkura and Professor Sanunkorn Sotthibandhu—for the benefit of an English-reading audience, as a very small step towards filling the

Kroncke, *The Futility of Law and Development: China and the Dangers of Exporting American Law* (OUP 2016).

[3] For further discussion of 'otherness' and comparative law, see, eg, E Orücü, 'Comparatists and Extraordinary Places' in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003); W Menski, 'Beyond Europe' in E Örücü and D Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007).

[4] E Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Brill 2004) 155; see also WF Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (CUP 2006) 80.

[5] The topic of Siam's modernisation has been extensively examined. See, eg, FB Sayre, 'The Passing of Extraterritoriality in Siam' (1928) 22(1) AJIL 70; T Loos, *Subject Siam: Family, Law, and Colonial Modernity in Thailand* (Silkworm Books 2002); and R Syamananda, *A History of Thailand* (Kurusapha Ladprao Press 1971) 124–72.

[6] For instance, in the field of data privacy law (see the Personal Data Protection Act B.E. 2562 (2019)), cryptocurrency regulation (see the Emergency Decree on Digital Asset Businesses B.E. 2561 (2018)) and the introduction of a special civil court division for consumer cases involving online transactions, which also establishes a new online system for filing claims (see 'Announcement of the Judicial Administration Commission on the Establishment of the Online Transactions Division in the Civil Courts', *Government Gazette* vol 138 pt 87 gor 37 (20 December 2021) (Thai language)).

void in comparative law voices from the Global South. Naturally, Thai academia has a number of scholars operating in this intellectual space who might equally have been selected for analysis. The authors have chosen these three individuals partly due to the significant influence that they have had on legal thought and education in Thailand in their respective generations, but also in part because each presents a fundamentally different perspective on comparative law.

However, a few important considerations must be noted at the outset. First, this article focuses on Thai scholarship that presents a perspective on comparative law theory, rather than legal literature about Thai law that may offer insightful comparative material for a comparative law project about, say, contract law. Second, this article does not seek to present these perspectives as representing 'Thai comparative law' as a whole; nor does it suggest that comparative law in Thailand has an identifiable, authoritative and unified 'Thai perspective', or one that could be placed in a dichotomous oppositional relationship to comparative law from the Global North. Rather, the authors believe that these scholars are worthy of including in global comparative law dialogue, given their influence on legal study in Thailand and the knowledge gained from the comparative legal studies and theoretical discussion produced over their careers. However, their works have, to date, been virtually inaccessible to audiences who do not read Thai. Accordingly, the article shines a dimmer light on the already celebrated English-language comparative law literature about Thailand so that sufficient room on the centre stage is given to these Thai-language pieces.

The article is divided into three parts. In the first part, the authors create a framework for understanding Thai comparative law in its context, looking at the emergence of the use and study of comparative law in the kingdom. The second part, comprising the majority of the article, contains discussion and analysis of the theories of the three scholars. The third part offers some concluding remarks, highlighting what may be learned from the theories of the three scholars and from the enquiry itself. Overall, the authors argue that the diverse approaches employed by the three scholars stem from their distinct objectives in engaging with comparative law. These objectives, in turn, are moulded by the diverse contexts within which each scholar wrote, differing both from one another and from Global North scholarship generally. However, this enquiry also illuminates the formidable challenges that the discipline of comparative law confronts in using writings on comparative law theory from the Global South in an attempt to free itself from the hegemony of the Global North.

## II. FRAMING THE DEBATE: THE EMERGENCE OF THAI COMPARATIVE LAW IN CONTEXT

As Andrew Harding observed:

> It is appropriate to think of law in South East Asia geologically, as a series of layers each of which overlays the previous layers without actually replacing

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> them, so that in places, due to tectonic shifts, the lower layers are still visible, although not perfectly distinguishable from each other.[7]

This description of a region rich in the reception and adaptation of legal ideas, resulting in pluralistic and diverse legal landscapes developing from a variety of legal sources, certainly appears apt from the perspective of Thailand. It is unnecessary here to give a complete history of Thailand's experiences and interactions with laws of other jurisdictions, which would probably require a complete history of the country's legal development. Indeed, some recent publications have significantly expanded the English-language scholarship on Thai legal history, in particular focusing on its extraordinary period of legal reformation during the late nineteenth and early twentieth centuries.[8] Briefly put, during this period, interaction with active colonising empires—specifically Great Britain and France—provoked widespread legal change.[9] Treaties with these colonial powers (and a wide array of other Western nations and Japan) removed Siam's[10] legal jurisdiction from their subjects, such 'extraterritoriality' to be revoked only on the completion of legal reforms satisfactory to the treaty partners.[11] At the same time, swiftly increasing trade, particularly with Great Britain, during the second half of the nineteenth century led to English law being used in commercial matters where Siamese law was silent or obsolete.[12] Many Siamese were sent to the West for education, to return and assist with legal and judicial reforms, and foreign advisors were employed to draft continental European-style law codes, and to sit on the Supreme Court in some cases, and Acts were passed on specific issues, such as bankruptcy, based on English law models.[13]

Given this context for the adoption of many of the laws that are still in place in Thailand, it is perhaps natural that comparative law would be of interest to Siamese scholars for the first time in this period. Foreigners had been interested in writing accounts of the laws and customs of the Siamese by

[7] A Harding, 'Comparative Law and Legal Transplantation in South East Asia' in D Nelken and J Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 205.

[8] See eg the contributions in Part II: Foreign Influence and the Reform Period in A Harding and M Pongsapan (eds), *Thai Legal History: From Traditional to Modern Law* (CUP 2021).

[9] For further discussion of Siam's legal reforms during this period of modernisation, see, eg, PW Thornely, *The History of a Transition* (Siam Observer Press 1923); Sayre (n 5); MB Hooker, 'The "Europeanization" of Siam's Law 1855–1908' in MB Hooker (ed), *Laws of South-East Asia* (Butterworth 1988) 531; and G Padoux, 'Law Reform in Siam' (1917) 2(2) ChineseSocPolSciRev 1, 3.

[10] Before 1939, Thailand was known as Siam, and the Thai people as Siamese.

[11] Hooker (n 9) 548; Sayre (n 5) 80–1.

[12] P Kasemsup, 'Reception of Law in Thailand – A Buddhist Society' in Masaji Chiba (ed), *Asian Indigenous Law: In Interaction with Received Law* (KIP Limited 1986) 267, 292–3; and Thornely (n 9) 220.

[13] See S Reekie and A Reekie, 'British Judges in the Supreme Court of Siam' in Harding and Pongsapan (n 8); S Ratthanapaijitr et al, 'Research Report Concerning Project to Improve the Enforcement of Bankruptcy Cases in accordance with International Standards offered to the Legal Enforcement Department' (Faculty of Law, Thammasat University 2016) (Thai language).

comparison to their own since the seventeenth century,[14] and the foreign advisors made much use of comparative methodology in drafting Siam's major codes.[15] However, comparative law, at least in an academic style recognisable to Western eyes, began with legal education in Thailand's first law school, established in 1897 by the newly appointed, English-educated, Minister of Justice, Prince Rabi Badhanasakti, also known as the Prince of Ratchaburi.[16] Parallel to the early development of the academic discipline of comparative law in the West during the same period,[17] Siamese lecturers and students actively engaged in comparative law discussion. It has been noted that the Prince's teaching materials were highly international: Siamese law, English law for his contract and tort classes, and India's penal code for his criminal law classes.[18] Another example can be seen from 'Lectures of the Prince of Ratchaburi', a compilation of notes taken from the Prince's lectures in late nineteenth century.[19] In a lecture given in September 1899, a discussion of the law of succession and inheritance in Siam, drew from traditional law (*Laksana Moradok* in the Three Seals Code), judgments of the Supreme Court, and English trusts law.[20]

Early law textbooks also routinely discussed promulgated laws alongside traditional laws, foreign and Thai judgments, and legal principles from a wide array of jurisdictions, including Roman, English, French, Swiss, Italian, Portuguese, German and Japanese laws.[21] Arguably, English law received

[14] See, eg, Van Vliet's major works—*Historiael verhael* (1663), *Beschrijving van het koningrijk Siam* (1692), *Cort verhaal van't naturel sijnde der volbrachter tijt en de successive der coningen van Siam* (1640)—are compiled, re-translated and edited in C Bakeret al (eds), *Van Vliet's Siam* (Silkworm Books 2005). Another account, contemporary to Van Vliet's works, was that of Simon de La Loubère, a French diplomat to Siam; see S de La Loubère, *Du royaum de Siam* (A. Wolfgang 1691).

[15] R Guyon, *L'Oeuvre de Codification au Siam* (Imprimerie Nationale 1919).

[16] N Tassaro, *HRH Prince Rabi Badhanasakti, the Prince of Ratchaburi: Father of Thai Law* (พระเจ้าบรมวงศ์เธอ พระองค์เจ้ารพีพัฒนศักดิ์ กรมหลวงราชบุรีดิเรกฤทธิ์ พระบิดาแห่งกฎหมายไทย) (NanmeeBooks 2006) (Thai language) 108; W Mahakhun, *Legal History and Legal Language of Thailand* (ประวัติศาสตร์กฎหมายและภาษากฎหมายไทย) (3rd edn, Faculty of Law, Chulalongkorn University 1980) (Thai language) 50; D Leelamien, 'Legal Education in Thailand since the Modernisation of Thai Law during the Reign of King Chulalongkorn' (การศึกษากฎหมายในประเทศไทย ตั้งแต่การปฏิรูปกฎหมายและการศาล ในรัชสมัยพระบาทสมเด็จฯพระจุลจอมเกล้าเจ้าอยู่หัว) in Institute of Legal Education of The Thai Bar, *100 Years of the Thai Law School (100 pi rongriangotmai)* (The Thai Bar 1997) 76–7 (Thai language).

[17] As evidenced in the first International Congress for Comparative Law in Paris in 1900. See K Zweigert and H Kötz, *An Introduction to Comparative Law* (T Weir trans, 3rd edn, OUP 1998) 2–3.

[18] Tassaro (n 16) 109.

[19] *Lectures of the Prince of Ratchburi (*เล็ก เซอ ร์ ของ พระเจ้า พี่ ยา เธอ กรม หลวง ราชบุรี ดิเรก ฤทธิ์*)* (Krungthepbannakarn 1925) (Thai language).

[20] ibid 127–31.

[21] See Luang Praditpijaranakarn, *Explanation of Contract Law (คำอธิบายกฎหมายมูลคดีสัญญา)* (Kong Lahutosa 1911) (Thai language), which includes discussion of promulgated codes, Thai Supreme Court judgments and English law principles; หลวงดุลยธรรมกิรมย์, *Explanation of Law on Pledges, which is different from the Law on Contracts (*คำ อธิบาย กฎ หมา ยลักษณ จำนำ ของ ซึ่ง ต่าง กับ มูล คดี สัญญา*)* (Sophonpipatthanakorn 1920) (Thai language), which includes many comparisons with Roman, French and English laws; Phraya Dhebvithoon, *Explanation of the Civil and Commercial Code Book 1 Sections 1–193 (*คำ อธิบาย ประมวล กฎหมาย แห่ง และ พาณิชย์ บรรพ *1* มาตรา *1* ถึง *193)* (1933) (Thai language), which contains numerous comparisons with English, French, Swiss, Italian, Portuguese, Japanese and German law. Another interesting example is a textbook in the Thai

greater emphasis during this early period of legal education, as a number of textbooks used English law as the main comparator to Thai law or simply pointed to English legal principles.[22] These early Thai-language textbooks engaged in intellectual discussion of laws in different societies or of different times, not unlike comparative law textbooks from the West from the same period of the late nineteenth–early twentieth century.[23] It may be said, therefore, that at the turn of the twentieth century, Siam was at the sharp edge of comparative law development, given its widespread engagement in legal education.

Outside academia, legal comparison and the importation or internalisation of foreign legal norms became a daily legal reality of Siam in this reform period, through drafting laws and codes based on foreign models, the use of English law in commercial cases, the use of foreign laws in Siam's International Courts, and the reorganisation of the judicial system on foreign models, to name but a few avenues of influence.[24] However, comparative practice from that time does not seem to have directly engaged in theoretical, methodological or typological discussion, but was highly practical in nature, with the aim of searching for appropriate legal principles to serve the needs of the political moment and of a society swiftly increasing in economic growth and complexity.

After the reform period, with the introduction of major codes of law and a thoroughly reorganised legal and judicial system, comparative law took a step forward in its engagement with theoretical discourse. Academic interest in the subject became increasingly characterised by attempts to find the identity of Thai law following the major reforms. Many scholars were educated in the West and brought back with them Western views of law and its belonging to a system or family. In spite of the English law influence described above, King Chulalongkorn set the policy direction to adopt legal

language which discusses English cases on contract law, with comparison with laws from Continental European countries. See Luang Dulayathampirom, *The Law on Contractual Disputes Volumes 1–2 (กฎหมายเรื่องคดีสัญญา เล่ม 1–2)* (Sophonpipatthanakorn Publishing House 1922). Later textbooks, written after the promulgation of various Codes, continued to discuss Thai law and judgments alongside foreign sources. See, eg, J Tingsabhat, *Civil and Commercial Law on Persons (กฎหมายแพ่งและพาณิชย์ว่าด้วยบุคคล)* (Thammasat University Press 1973) (Thai language), which refers to foreign textbooks (such as JE de Becker's *Annotated Civil Code of Japan* and *Halsbury's Law of England*) and legal principles. Another interesting type of early textbook came in the form of a Thai summary and explanation of a body of foreign law. See, eg, S Pramoj, *English Law on Contract and Tort (กฎหมายอังกฤษว่าด้วยลักษณะสัญญาและละเมิด)* (Suansri 1936).

[22] For instance, the foreword of a contract law textbook explained that the book was written in a manner that follows English legal principles, but adapted so that they may best fit with Thai law, and examples were drawn from judgments of the Supreme Court or of English courts (Luang Praditpicharanakarn, *Explanation of Law on Contract (คำอธิบายกฎหมายมูลคดีสัญญา)* (Kong Lahutos Publishing House 1911) (Thai language), Foreword); see also Dulayathampirom (n 21) which draws heavily from English law, but with some comparison with French law.

[23] See, eg, HS Maine, *Lectures on the Early History of Institutions* (Henry Holt and Company 1875).

[24] For English-language discussion of these and other foreign law influences in the reform period, see in particular the contributions in Part II: Foreign Influence and the Reform Period in Harding and Pongsapan (n 8).

codes after returning from a visit to Europe in 1897 and following the conclusion of the first treaty with Japan in 1898.[25] The first codification committee, made up of Siamese jurists, and Belgian and Japanese legal advisors, generally adopted civil law models for the 1908 Penal Code, but also considered the Indian Penal Code of 1860, on the basis that this incorporated legal principles from common law systems.[26] In the field of private law, the first two books of a civil and commercial code were painstakingly prepared during the first two decades of the twentieth century, predominantly by French legal advisors, using the method of gathering Siamese legal concepts into categories, 'modernising' and adding concepts, drawing on European models for inspiration.[27] However, the long-awaited 1923 drafts of Books I–II on General Principles and Obligations were not well received, considered unsystematic and unsuitable by many, among others, the English-educated secretary of the Codification Commission, Phraya Manavarajasevi.[28] The new 1925 draft, which became the first two books of the current Thai Civil and Commercial Code, was more swiftly completed, apparently by a practice of transposing many sections of the Japanese civil code and the German *Bürgerliches Gesetzbuch*.[29] The currently-in-force six books of the Civil and Commercial Code were adopted between 1925 and 1936.

The decision to adopt civil law-style codes based on Continental European and Japanese models invited scholars to categorise conceptually the emerging system accordingly and relate it to its adopted civil law 'parent' systems. These tasks were first approached notably in Western languages in a clear attempt to bridge the understanding of Thai law in the global comparative law landscape, mostly written by foreign lawyers who were instrumental in, or contemporary to, the reform efforts by the Siamese government.[30] Leading Thai lawyers of that time, it seemed, were occupied by writing a wealth of textbooks in the Thai language, mentioned above, which were necessary for legal education and development of the legal system. However, it was not until the next generation of Thai scholars, such as Preedee Kasemsup, born two years after the first books of the Thai Civil and Commercial Code came into force, that

[25] K Chanhom, 'The Modernisation of Thai Criminal Law: From the 1908 Penal Code to the 1956 Criminal Code' in Harding and Pongsapan (n 8) 142.

[26] ibid.

[27] See Office of the Juridical Council, *Archives of the History of Thai Codification*, Vol 014, Roll 03-3, Doc 14/89 (1919) 90; Guyon (n 15).

[28] Phraya Manavarajasevi, *Transcript of the Interviews with Phraya Manavarajasevi (บันทึกคำสัมภาษณ์พระยามานวราชเสวี)* (Thammasat University 1982) (Thai language) 4, 29–30.

[29] ibid. However, the authors have argued elsewhere that the predominance of English-educated Siamese members of the drafting committee may have led to unacknowledged English law influence in some of the provisions. See A Reekie and S Reekie, 'The Long Reach of English Law: A Case of Incidental Transplantation of the English Law Concept of Vicarious Liability into Thailand's Civil and Commercial Code' (2018) 6(2) CLH 207.

[30] Padoux (n 9) 3; T Masao, 'New Penal Code of Siam' (1908–1909) 18 YaleLJ 85; Guyon (n 15); Thornely (n 9).

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significant, direct and extensive engagement with comparative law theory in the style of academia of the Global North occurred.

## III. SOME PERSPECTIVES FROM THAI COMPARATIVE LAW

Discussion now turns to the body of work that is the focus of this article—Thai academic literature that directly engages with, and provides a valuable addition to, comparative law theories, themes and dialogues. The following discussion offers a synoptic examination of major comparative law perspectives from Thailand in the past century, discussed through the works of three legal comparatists who, in the authors' view, define their generation of comparative legal discourse.

### *A. Professor Preedee Kasemsup: Refocusing on Traditional Law, its Interaction with Foreign Law, and Pork Belly*

A number of Thai academics belonging, broadly speaking, to the first generation born after the promulgation of the major law codes and the release of extraterritoriality in the 1920s–1930s, took an approach to comparative law that was distinctly Western-centric in their attempt to explain Thai legal features by using Western terminology and worldviews. This is exemplified by explanation of ancient laws in Western terminology.[31] Whilst a Western-centric approach to comparative law has been subject to criticism for some decades,[32] it is understandable why many early scholars chose this academic method. In the period when Thai law was still described as *terra incognita*,[33] arguably the main utility of comparative law literature from Thailand was to facilitate bridging the knowledge gap in global comparative law discourse. An alternative perspective, however, was taken by Professor Preedee Kasemsup's Thai- and English-language works on Thai law's development and identity, formulated and written in the 1970s–1980s, which remain highly influential in the domestic sphere today.[34]

The late Professor Preedee Kasemsup (1927–2019) may be credited as the first Thai scholar who discussed Thai law as a result of the reception of

[31] See, eg, T Kraivixien, who discusses ancient Thai law texts of the *Dhammasat* and *Rajasat* as 'Code Law' and 'Precedents', respectively: T Kraivixien, 'Thai Legal History' (1963) 49 WomenLawyersJ 6.

[32] See, eg, M Reimann, 'Comparative Law—An Overview of the Discipline' in K Zweigert and U Drobnig (eds), *International Encyclopedia of Comparative Law* (2020) vol II, Ch 4, 225; U Baxi, The Colonialist Heritage' in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003); and Salaymeh and Michaels (n 1) 170–4.

[33] MB Hooker, *A Concise Legal History of South-East Asia* (Clarendon Press 1978) 32.

[34] It should be noted that there are some English-language works from the same period that also take a non-Western-centric approach to Thai law. See, eg, DM Engel, *Law and Kingship in Thailand During the Reign of King Chulalongkorn* (Center for South and Southeast Asian Studies, University of Michigan 1975).

Western law during the law reform period without recourse to 'deeply ingrained concepts and categories of Western jurisprudence'.[35] Having grown up during Siam's ongoing major legal reforms, and been educated in Thailand and abroad,[36] Professor Preedee's legal thinking seems to have been shaped by the following factors: Siam's experience, his higher education in Germany and his interest in legal history during this pivotal moment of Thailand's legal development.[37] Indeed, the influence of Carl von Savigny in particular can be observed in his work, in relation to the 'People's Law' and 'Lawyers' Law' layers of his Three-Layer Theory of Law, as discussed below.[38] His major contribution to comparative law is his works on legal reception and law-making, which comprise two intertwined strands of argument: his Three-Layer Theory of legal development and the importance of the culturally specific setting of the law. Professor Preedee's theory of legal development will be introduced first, to provide a basis for the ensuing discussion.

### *1. The Three-Layer Theory of Law and the Thammasat school of legal thought*

The 'Three-Layer Theory of Law', a widely regarded paradigm of legal development and cornerstone of Thai jurisprudence, was Professor Preedee's *magnum opus*, although the name of the theory was originally coined by another academic.[39] Preedee spent the 1970s–1980s developing the theory which became one of the hallmarks of the Thammasat school of legal thought,[40] together with a strong adherence to the distinct Thai juristic methods as discussed below. He applied his Three-Layer Theory of Law to understand the process of legal change in Thailand, from which legal comparatists may draw implications for comparative law and legal reception.

At the risk of oversimplification, Preedee's Three-Layer Theory of Law seeks to identify and explain foundational concepts of law through describing its evolution across three stages. In the first stage, termed 'People's Law', the

[35] ibid 267.

[36] He completed his undergraduate degree in law from the Faculty of Law, Thammasat University, and later received his postgraduate degrees of Master of Civil Law from Tulane University, and Dr iur from the University of Bonn, Germany. See P Kasemsup, *Philosophy of Law* (K Prokati ed, 15th edn, Faculty of Law, Thammasat University 2017) 399.

[37] As a lecturer at Thammasat Law School, he spearheaded a legal history project comprising a series of interviews about the law reform processes with a major Siamese law drafter, Phraya Manavarajasevi, and a collection of documents relating to the reform of the Civil and Commercial Code. The result of the project is published by the Faculty of Law, Thammasat University; see Phraya Manavarajasevi (n 28). In Thai legal scholarship professors and other public figures are referred to by their first names, and thus that convention will be followed in this article.

[38] In particular, FC von Savigny, *Of the Vocation of our Age for Legislation and Jurisprudence* (Abraham Hayward trans, Arno Press 1975).

[39] See S Chuathai, 'Dr. Preedee's Three-Layer Theory of Law' in S Chuathai (ed), *Essays in Honour of Preedee Kasemsup* (Faculty of Law, Thammasat University 1988) (Thai language) 31. For an English translation, see S Chuathai, 'Dr. Preedee's Three-Layer Theory of Law' (Adam Reekie trans) (2022) 2(1) ThaiLegStud 117.

[40] Chuathai (1988) ibid 31.

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law originates from customs, morals and reasons which already exist in a particular community. As such the foundation of law is any 'simple, natural reason'[41] of that community, developed into law through the expediency of repeated and widespread use by its members.[42] This type of law, Preedee opined, does not require a sovereign in the sense of legal positivism, but reflects the Latin motto: *ubi societas ibi ius*.[43]

The second stage of legal development, termed 'Lawyers' Law', is marked by the emergence of dogmatic legal principles, which represent laws developed by the legal world of judges and lawyers through judgments and legal reasoning.[44] The rationale of this type of law is 'Artificial Perfection of Reason'[45] or 'Artificial Juristic Reason'[46] which is demonstrated through legal precedents, as in common law jurisdictions, and legal doctrines developed by legal scholars.[47] The People's Law is refined, conceptualised and systematised for application to the demands of more complex communities. The law therefore no longer aligns with simple, natural truth in the community, but represents the legal methods and legal reasoning of lawyers, based on legal principles which have been developed and accepted by them.

Legislated 'Technical Law' represents the final stage of legal development, whereby the legislative process, claiming authority from the concept of sovereignty, produces legislation without concern for limitations from, or purposes deriving from, the customs of the community; it is 'devised by the deliberation of human will and design',[48] and each law has a particular objective which its enforcement is intended to fulfil. This third type of law, representing Preedee's conceptual extension of the ideas of others such as von Savigny, does not need to align itself with long-standing customary practices or the gradual development of legal doctrines, but can simply emerge through a legislative process. As Professor Preedee explained, this type of legislated Technical Law has become the dominant form of law in European legal systems,[49] and certainly also in the Thai legal system, with its numerous codes, decrees, acts and regulations.

The three layers are not envisaged as existing separately; rather, today's laws often have rules from all three layers within them. For example, a fundamental principle in Thai contract law is that people must keep their promises; this is a principle from People's Law.[50] Legal rules and concepts governing when a contract is made, when an offer or an acceptance is effective, etc, are Lawyers' Law, developed from People's Law by jurists. However, rules such as those in Thailand's Civil and Commercial Code that state that some contracts must be in a particular form, whilst some are merely required to be evidenced in

[41] P Kasemsup, *Civil Law: General Principles* (5th edn, Faculty of Law, Thammasat University 1982) (Thai language) 11.
[42] Chuathai (1988) (n 39) 32; and Kasemsup (n 36) 304.
[43] Kasemsup ibid 304.
[44] Kasemsup (n 41) 11–12; Kasemsup (n 36) 304–5.
[45] Kasemsup (n 41) 11.
[46] Chuathai (1988) (n 39) 33–4.
[47] Kasemsup (n 41) 11; Kasemsup (n 36) 305.
[48] Kasemsup (n 12) 270.
[49] ibid.
[50] Chuathai (1988) (n 39) 36.

writing are examples of Technical Law, representing nothing more than the result of the legislative process, and are not based on any more profound rationale.[51] Thus today's Thai contract law, similar to other areas of law, has all three layers within it, just like, to use Preedee's colourful metaphor, a cut of pork belly.[52]

### *2. On interactions of traditional and foreign laws*

For domestic lawyers, Preedee's theory serves as an aid to interpretation and a caution to legislators when conducting a comparative legal exercise in the legislative process. First, when interpreting a provision of written law, it is essential to understand its derivation; for provisions which originated even in part as People's Law, or evolved as Lawyers' Law, a focus on identifying the intention of the legislator is not useful, for example. Second, when drafting a new piece of Technical Law, regard should be made to pre-existing People's Law and Lawyers' Law and the general practice in society. Where Technical Law conflicts significantly with other types of law or societal practices, evasion is likely and therefore enforcement will be problematic.

For legal comparatists, Preedee's work highlights the distinct importance of local considerations and their interactions with imported legal norms. He noted the difficulties relating to the reception of Western-inspired Technical Law during the time that Siam was using traditional law, a combination of People's Law and Lawyers' Law, which was explicable through the difference of People's Law across communities, resulting in different sets of considerations for appropriate legal development and reception. Accordingly, Preedee's legal thinking aligns, in part, with Legrand's,[53] that law is a cultural phenomenon, and thus a recipient country's lawmakers disengage from societal and cultural settings at their own risk. However, it was also difficult for the lawmakers to resist the Western-dominated legal tides of their time:

> [Thais] inadvertently abandoned their age-old traditional conviction in the immutable law of justice and equity over which no human law could prevail. It was unfortunate that the reception occurred in the nineteenth century when the spirit of *jus strictum* was dominating the age, with only a little of the spirit of *jus aequum* supplemented in later codifications as in the German Civil Code. The Western positivistic jurisprudence was hurriedly imparted to the East. The spirit of *jus strictum* was fortified by an over-confidence in the omnipotence of law and the fallacy of modern constructivism. It was not possible for the new-born legal profession, trained under such a jurisprudential spirit, to develop a fruitful organic connection between the received Western law and the indigenous cultural milieu.[54]

[51] ibid.
[52] ibid 35.
[53] P Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4(2) MJ 111.
[54] Kasemsup (n 12) 294–5 (reference omitted).

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The notion that law is a cultural phenomenon is clearly reflected in Preedee's general characterisation of Thai law as positive law firmly rooted in a strongly Buddhist society. In his view, the country's customary law can be found partly in those legal rules received from the *Dharmasastra*, rooted in the Code of Manu, an ancient treatise of secular and Hindu religious law from India, influential in Buddhist countries of Southeast Asia.[55] The *Dharmasasta*, which he called the *corpus juris* of the traditional Thai legal system, provided the foundation for the domain of written law that is unique and distinct from Western written law in the sense that the traditional written law, generally known collectively as the Three Seals Code, was recorded in an allegoric manner.[56] This leads to an important question that has been revisited by later legal historians,[57] whether the traditional law should be considered law by reference to currently employed concepts:

> [W]e have to admit that it was not a code in the modern sense, in spite of its juristic character. It was not a comprehensive statement of law to govern the all-inclusive area of human relations. It is inaccurate to say that 'the entire field of ordinary civil and criminal justice was covered by written law.' Moreover, in trying to understand the Thai traditional legal system, we must guard against the preconceived ideas of modern jurisprudence, for the Thai traditional concept of law is different from it …[58]

Having recognised the unique characteristics of the Thai traditional legal system, distinctive from Western laws,[59] Preedee mused: 'The process of legal modernization of non-Western countries by Western law is truly a serious problem to us.'[60] Western law, dominated by Technical Law as a result of the emergence of nation States with the concept of sovereignty, had become rational and systematic, and therefore easy to export to other countries.[61] However, when independent countries in the East, under pressure to reform, selected Western models for pragmatic purposes or out of necessity, many problems ensued, such as how to select the body of law to adopt? How best to proceed with the task?

Considering Siam's experience, Preedee contended that one of the main problems was due to the unsystematic adoption of Western legal rules. For instance, the reception of English law was piecemeal, used as a gap-filling

[55] ibid 276. On the Code of Manu and its reception, see P Olivelle (ed), *Manu's Code of Law: A Critical Edition and Translation of the Mānava-Dharmásāstra* (OUP 2005); and R Lingat, *The Classical Law of India* (University of California Press 1973). [56] Kasemsup ibid 278.
[57] See, eg, C Baker and P Phongpaichit, 'The Child is the Betel Tray: Making Law and Love in Ayutthaya Siam' (2021) 1(1) ThaiLegStud 1. [58] Kasemsup (n 12) 277 (reference omitted).
[59] Other distinct characteristics of the traditional legal system included the autonomous legal domains which were family law and laws of the *Sangha* (Brotherhood of the Buddhist Monks or Ecclesiastical Order) and the considerable body of unwritten law, covering much of civil law, which was the product of usages, customs and morals of the community. See ibid 277–9. For further discussion of the relationship between Thai law and religious law, see S Sucharitkul, 'Thai Law and Buddhist Law' (1998) 46 AmJCompL 69. [60] Kasemsup ibid 289.
[61] ibid 290.

mechanism for when traditional Thai law was silent or obsolete; on the other hand, French and German civil laws were received more or less wholesale, through the codification process.[62] Another difficulty, he implied, was that the French and German Civil Codes were products of their time, with different contexts and different guiding spirits.[63] Lawmakers from a potential recipient country must therefore be cautious of the uncritical adoption of foreign norms without sufficient recognition of strengths of domestic legal traditions. Thus, he warned that '[t]he modern fallacy of the omnipotence of law must be overcome, and the limitation of law as an instrument of social control must be recognized'.[64]

On Thailand's experience, he concluded that whilst the reception process was on the whole 'successful' in spite of its difficulties,[65] it was an involuntary product of the prevailing legal thinking of that time, bowing to the dominance of positive law and strict law. Therefore, to Preedee, a recipient society would significantly benefit from a bridging process between the received law and the local milieu, and it would also be astute to employ the existing strengths of the domestic laws fully. This means that an autonomous legal domain such as family law, which was strongly characterised by long-standing usages and cultures, and informed by morality, should be preserved such that 'the old wisdom may be put into its rightful niche with refreshed energies'.[66]

### 3. *On juristic methods as the spirit of a legal system*

Professor Preedee may be credited with propounding the academic focus on juristic methods which became an integral part of Thai legal education as well as offering a distinct perspective to comparative law. Juristic methods concern the way of thinking and attitudes of lawyers towards their own legal system, including their attitude to how various types of sources of law—written, traditional, judgments—are treated and interpreted, the manner of legal education, and how legal thinking may change and evolve through time.[67] These elements are not always written, but are inherent and specific to a legal system. As such, comparison of legal systems is not complete merely through comparison of legal content but requires comparison of juristic methods. Preedee warned that two societies may share the same legislative wording on a certain matter, but this does not necessarily mean that they

[62] ibid 291, 292–3. [63] ibid 293. [64] ibid 295.

[65] As acknowledged by Preedee, the first draft of the Civil and Commercial Code, representing a shift from the dominance of English law to French law, was promulgated after many years of hard work, 'to test the reaction of the legal profession', but it was quickly repealed two years later and replaced by a new code, modelled after the Japanese and German Civil Codes. See ibid 293.

[66] ibid 295.

[67] P Kasemsup, *Civil Law: General Principles* (Pabpim Limited Partnership 1983) (Thai language) 119.

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have the same 'law'.[68] Differences in the unspoken juristic methods may dictate completely different law on the ground.

Intrinsic to this perspective to comparative law is Preedee's consistent culture-focused approach. Emphasis was given to a deeper understanding of the operations of the law, situated in the proper context of historical and social development, to the unspoken and unwritten rules which are apparent to domestic lawyers but much less so to foreign lawyers, and to lawyers' attitudes to various sources of law and the changing cultural and moral landscape.[69] Therefore, if a legal system were a person, he explained, the juristic method would be the spirit of a legal system, the written laws the body.[70]

### 4. *Analysis of Preedee's comparative law works*

Some aspects of Preedee's application of the Three-Layer Theory of Law to the concept of comparative law are worthy of closer analysis. First, although attempting to create a paradigm of legal development that is unencumbered by concepts of Western jurisprudence, in explaining his theory Preedee drew on a deep well of cosmopolitan learning, focusing heavily on Western legal concepts. There are numerous references to Western legal theorists and concepts such as *ius strictum*, *ius aequum*, positivism and constructivism. Indeed, in advancing a model of legal change that can be applied outside of the ingrained concepts and categories of Western legal thought, there is an unstated assumption of universality in terms of the progression of stages of legal development. However, at the same time, there is recognition of heterogeneity in terms of culture: People's Law differs across communities, resulting in the difficult choice of which Western laws independent Eastern countries should adopt. A further question of homogeneity/heterogeneity is in the assumption that there is an identifiable People's Law which adheres to an ethnic or national group. Furthermore, perhaps implicit in Preedee's conclusion is an atavistic call to seek old wisdom, unaffected by the influence of Technical Law and the law of other jurisdictions, in finding more appropriate legal solutions for today's Thai society. Moreover, evident in the Three-Layer Theory of Law is a reaction against a pure focus on legislative intention, and an attempt to justify a renewed focus on elements of traditional law and the link between law and society. Indeed, according to the Three-Layer Theory of Law, People's Law imposes limits on the permissible scope of the legislature; attempts to create Technical Law that directly conflicts with principles of People's Law are likely to end in legal evasion and failure.

As mentioned above, Preedee's conception of the People's Law seems to echo von Savigny's claims, drawing on ideas from Romanticism,[71] that law

[68] ibid. [69] ibid 120–3. [70] ibid 119.

[71] HS Reiss, The Political Thought of the German Romantics' in HS Reiss (ed), *The Political Thought of the German Romantics 1793–1815* (Macmillan 1955); see also R Berkowitz, *The Gift of Science: Leibniz and The Modern Legal Tradition* (Harvard University Press 2005).

is the expression of the 'common consciousness of the people' and grows organically over time driven by 'internal, silently operating powers'.[72] Preedee modified and extended these concepts, and recalibrated them in the particular context of the wide-scale imposition of foreign law. Moreover, whilst von Savigny argued against codification—that it should be postponed until Germany could develop a proper consideration of these factors[73]—Preedee presented something akin to what might now be called postcolonial resistance: a criticism of the imposition of Western positive law, while simultaneously borrowing the ideological, linguistic and textual forms of the colonial power, presenting the complex relationship of debt and defiance to a colonial power characteristic of postcolonial nationalism.[74] Of course, Thailand was never colonised, but the legal reform period is presented as a hastily implemented, only partially voluntary, adoption of foreign law, thus putting it into a similar conceptual space. Furthermore, his comments on Technical Law represent a significant extension of von Savigny and are particularly noteworthy in the context in which Preedee writes: the legal reform period was both successful and problematic; Technical Law is useful but has its limitations.

Overall, Preedee's comparative law disposition serves to challenge any assumptions of superiority of 'modern' Western-inspired law over traditional Thai law and to expose fallacies concerning legal positivism and constructivism; or, at the very least, it can be seen as a call to localise foreign legal transfers in a manner that would best mitigate their 'harsh edges' in the local landscape. Ultimately, Preedee should be read within the context of his era: he adopts and extends theories and terminology of Western law academia to criticise the adoption of that law in Thailand and argues for a renewed focus on culture for the interpretation and development of the law, in a departure from previous comparative law writings in Thailand. He also sets the path for a focus on the concept of juristic methods, taken up by successors such as Professor Sanunkorn, as discussed below, arguably to establish and defend a manner of legal understanding that is particular to Thai lawyers, perhaps subtly challenging assumptions of the superiority of the Global North.

### *B. Professor Phijaisakdi Horayangkura: Economic-led Approach to Comparative Law*

The next phase of comparative law studies extends from the 1980s to 1997—the year of the Asian Financial Crisis. The direction of Thailand's development in

[72] von Savigny (n 38) 30.

[73] These arguments were employed elsewhere later. See, eg, M Reimann, 'The Historical School against Codification: Savigny, Carter, and the Defeat of the New York Civil Code' (1989) 37 AmJCompL 95, 97.

[74] L Gandhi, *Postcolonial Theory: A Critical Introduction* (2nd edn, Columbia University Press 2019) 148–9.

pursuit of the aspiration to become 'the fifth Asian Tiger' aligned with comparative law discourse during this time, which focused on the role played by comparative legal exercises in serving the practical needs of a growing economy. Emblematic of the approach to comparative law in this era is the work of Professor Phijaisakdi Horayangkura.

### *1. Legal pragmatism, utility and happy plagiarism*

To give an overview of his approach,[75] Phijaisakdi's mastery of comparative law was rooted firmly in legal pragmatism and utility of law, seeing comparative law as an effective tool to serve domestic socio-economic needs. Two connected purposes, or utilities, of comparative law projects were encompassed within this overarching goal. In his first published work on comparative law in 1994, Phijaisakdi argued that the two most important objectives of comparative law were knowledge of different laws as they exist in different legal systems, and understanding the strengths and weaknesses of those laws.[76] This led to the primary utility for the exercise of legal comparison which, he inferred, was to enable one to select an appropriate legal approach to adopt or apply to the comparatist's own legal system. He later referred to this approach as 'happy plagiarism'.[77] The 'plagiarism' was necessary if the end goal of a comparative project was to achieve new and efficient legal solutions or to improve existing law. The secondary utility was for 'epistemological happiness'—by which he meant that even if the knowledge acquired from the exercise does not lead to any direct practical utility, its usefulness remains in equipping oneself with knowledge, and in the contentment that one possesses such knowledge.[78]

It can be seen that Phijaisakdi's dual purposes of comparative law as a pragmatic and academic tool were influenced by his wealth of experience in legislative drafting, as well as a distinguished academic career.[79] He was a

[75] In his long and distinguished career in law, despite his keen interest in comparative law, Phijaisakdi wrote relatively few academic works directly on comparative law in comparison to Western legal scholars with similar stature. His works on comparative law are: P Horayangkura, 'Introductory Issues on Comparative Law' in W Mahakul et al, *84 Years of Professor Jitti Tingsabhatiya* (Faculty of Law, Chulalongkorn University 1994) 155 (Thai language); P Horayangkura, *Comparative Private Law I* (Teaching Materials) (Faculty of Law, Chulalongkorn University 1983); and a posthumous compilation of his lectures, P Horayangkura, *Phijaisakdi Horayangkura on Comparative Law* (S Reekie ed, Winyuchon 2021) (Thai language). Instead, he devoted much of his time to teaching and discussing with his students—the first author is privileged to be one of them. Therefore, in the following discussion of Phijaisakdi's approach to comparative law, the first author's understanding of his legal direction and philosophy may be at times employed as a gap-filling mechanism in order to provide a richer understanding of his works.

[76] Horayangkura, 'Introductory Issues on Comparative Law', ibid 155.

[77] Horayangkura, *Comparative Private Law I* (n 75) 29.

[78] ibid.

[79] After receiving his undergraduate law degree from the Faculty of Law, Chulalongkorn University and LLM from Harvard Law School, he joined the Faculty as a full-time professor, as well as occupying numerous prestigious positions including as a member on many law drafting committees and a committee member of the Office of the Council of State of Thailand, the legal

champion of comparative legal studies in law schools, maintaining that 'a good legal education may only be achieved through legal comparison',[80] and also a firm believer that law drafters and legal practitioners alike may find appropriate legal solutions only through the deep understanding of their own law and the knowledge of the available pool of legal solutions in other countries.[81] Good law and a good economy thus go hand in hand, and good law may only be achieved through a good dose of legal comparison.

Given this conceptual framework, Phijaisakdi developed his own distinct methodology of selecting comparators for a comparative project which might be summarised as follows: identifying potential donor countries with legal solutions that would most suit the economic and social settings of the recipient country; and choosing the most appropriate legal solution based on its efficiency in terms of its ease of reception and application in the recipient country.[82] These two considerations should not be thought of as consecutive steps, but instead as two strains of analysis that should be conducted in harmony in order to serve the primary utility of comparative law, that is the efficient development of the country's laws.

On the first consideration, Phijaisakdi placed strong emphasis on selecting either comparators with a similar state of socio-economic development, so that efficiency of reception may be enhanced, or comparators which are at least one step more advanced in the that particular area of law, so that the recipient country may aspire to achieve the same.[83] A deeper understanding comes from: an interdisciplinary investigation into the foreign laws, including their historical development and surrounding context; the social, cultural, political and economic context; as well as an extensive correct linguistic understanding of the comparator jurisdictions.[84] The last consideration merits its own discussion and will be addressed further below.

The second consideration for choosing the most appropriate law for a given society places an emphasis on the differences between the 'law in action' and the 'law on the books'—Phijaisakdi understood that the application of the laws within the actual socio-economic context of the country, and hence their actual societal impact, differs from the textual reading of the law.[85] His approach in this respect is in alignment with many legal comparatists who highlight the wide spectrum of transferability of law.[86] However, his distinct

advisor to the government. See *Memorial Book for the Occasion of the Funeral of Professor Pichaisakdi Horayangkura* (Starboom Interprint 2018).

[80] Horayangkura, *Comparative Private Law I* (n 75) 16.

[81] ibid 16–17, 156.

[82] ibid 29–30.

[83] ibid 11–12, 27–8.

[84] ibid 32–7; Horayangkura, 'Introductory Issues' (n 75) 157.

[85] Horayangkura, *Comparative Private Law I*, ibid 29, 30–1.

[86] Such as 'horticultural thought exercise' of legal transplants (I Markovits, 'Exporting Law Reform – But Will It Travel?' (2004) 37(1) CornellIntlLJ 95) and 'legal irritants' (G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61(1) ModLRev 11). See also the genealogy of legal transfers discussed in S Vogenauer, 'Interpretation of Contracts and Control of Unfair Terms in Asia: A Comparison' in

contribution to comparative law discourse in this area lies in its distinctly non-Western-centric nature.

His two-pronged considerations focus on finding legal solutions that offer the most ready-for-application legal rules for Thailand and countries of similar developmental status, with an emphasis that the solutions should take the path of least resistance. Inherent in Phijaisakdi's approach are pragmatism and efficiency. He suggested that Thailand should look for solutions from donor countries that share the most similarities in socio-economic setting, but perhaps enjoying a degree of further advancement in an aspect that Thailand would like to emulate. Accordingly, his comparative net was cast much wider than the Western-centric choice of classic comparators in Thai comparative law literature, such as the United Kingdom, the United States, Germany, France or Japan. Instead, he suggested that Thailand would benefit from a comparison with, for instance, South Korea if the relevant field of law that the country is looking to develop is industrial law; with Singapore if the relevant field is commercial law; and with Israel if the relevant field is agricultural law.[87] This is because he believed that those countries had achieved greater advancement in terms of industrial development, commerce and agriculture, respectively. At the same time, these countries would present more appropriate comparators than Western countries because they share more similarities with Thailand—in a broad sense which takes into account a combination of various factors such as geographical location, population size, income and the general state of the country's economy and social considerations. In contrast to Watson's early work,[88] Phijaisakdi did not seem to believe in the relative ease of legal transplants: that the level of success of legal transfer is independent from the surrounding factors. Implicit in the body of his comparative law works is a call for identifying the readiness and ease of transfer, in terms of practicality and time frame of application. Thus, it may be surmised that Phijaisakdi's approach would prefer a re-potting of legal institutions that are self-contained and may be imported with relative ease into a new environment. This would better serve the needs of a recipient country in providing a legal solution for a problem that cannot wait for internal legal evolution through irritants, cross-fertilisation or other more time-consuming processes.

Overall, Phijaisakdi's economic-led contextualised approach takes into account a variety of other factors—social, cultural, historical and linguistic. Comparative law is seen as a vital tool for economic prosperity; at the same time knowledge of law is an important tool to improve Thailand's economy

M Chen-Wishart and S Vogenauer (eds), *Studies in the Contract Laws of Asia III: Contents of Contracts and Unfair Terms* (OUP 2020) 552–4.

[87] Horayangkura, *Comparative Private Law I* (n 75) 29.

[88] A Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1974).

and legal structure.[89] To his mind, outdated laws create obstacles for economic activities; obstacles to economic growth provide a pressing reason for legal change; and good legal change requires comparative law.[90]

### 2. *Translation and legal transfer*

Professor Phijaisakdi belonged to a rare breed of legal comparatists who are ingenious polyglots. He published a number of law dictionaries,[91] including a pentalingual law dictionary of legal terminology in Thai, English, French, German and Spanish.[92] Language and translation are thus an integral part of his comparative law outlook and offer another distinct perspective from Thai comparative law.

In his Thai-language article, 'Translation of Legal Documents',[93] he considered a link between translation and comparative law. He argued that a good legal translator should not only possess the linguistic mastery of all relevant languages, but should also be a competent legal comparatist; conversely, a legal comparatist should possess legal knowledge of all relevant jurisdictions and also a mastery of the relevant languages.[94] Sufficient language skills would alleviate a few of comparative law's obstacles from a lack of true legal understanding and encourage legal immersion.[95] Phijaisakdi examined the importance of the preliminary examination of the source text for translation, which is equally applicable to the preparatory stage of legal comparison, and argued that it involves an enquiry into various considerations, including its origin and development (purely domestic or borrowed from or influenced by a foreign system), its links to other facets of domestic society or external elements, and the people behind the text or the law.[96] He emphasised that, when and if possible, analysis should extend to this group of people in order to understand their linguistic, educational and professional background, and to appreciate the surrounding context in which the particular use of language was adopted.[97]

It can be seen that Phijaisakdi was highly conscious of what Rodolfo Sacco called 'legal formants'—the unique components that inform and formulate a

[89] P Horayangkura, 'Sixty Outlooks on the Development of Thai Laws' (August 2000) 19(2) AdminLJ 85 (Thai language).

[90] See Horayangkura, *Comparative Private Law I* (n 75) 16–17, 28, 156.

[91] P Horayangkura, *Dictionary of Arbitration with Index* (Arbitration Department, Ministry of Justice 1993); P Horayangkura, *Latin–Thai Law Dictionary* (Faculty of Law, Chulalongkorn University 1994); P Horayangkura, *Dictionary of Arbitration* (Chulalongkorn University Press 2002).

[92] P Horayangkura, *Pentalingual Law Dictionary* (Nititham 1993).

[93] P Horayangkura, 'Translation of Legal Documents' (1999) 1 ChulaLJ 197 (Thai language).

[94] ibid 198–9.

[95] See V Grossfeld Curran, 'Cultural Immersion, Difference, and Categories in U.S. Comparative Law' (1998) 46 AmJCompL 43.

[96] Horayangkura (n 93) 199–203.

[97] ibid 202.

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legal system.[98] Phijaisakdi clearly understood the complexity of the permutation of these components and their influences on the law, especially how the law as understood by lawyers may differ from the law on the ground. Legal translators and comparatists alike would greatly benefit from this deep contextual and legal cultural understanding of country comparators. However, it would seem that Phijaisakdi's approach stopped short of advocating the impossibility of legal transplant, as per Pierre Legrand.[99] Phijaisakdi's approach is, to some extent, sympathetic to Legrand's, drawing on semiotics, sociology and anthropology, and he might have agreed with Sacco that 'some expressions are untranslatable'.[100] However, it must be assumed that Phijaisakdi's consistent emphasis on pragmatism and economic-based utility of comparative law precludes the contention that legal transfer is impossible. This would not be because Legrand's theoretical stance is rejected, but more likely because, due to Phijaisakdi's vast experience in law drafting and the legislative process, he would most likely have directed attention away from theoretical and metaphorical discussion and towards pragmatism. When legal terminology is 'untranslatable' or 'impossible to be transplanted' due to its surrounding legal cultural baggage, Phijaisakdi suggested two solutions.

The first is to coin a new term in the target language.[101] This is an example of his highly pragmatic outlook, as coining a new term offers a few benefits. The translator, comparatist or legislator is free to fashion new terminology, a concept or institution that fits with the particular combination of legal formants or the legal landscape of the recipient country. By so doing, the translator or comparatist is able to internalise the foreign norms in a manner that is free from the linguistic and institutional shackles of the donor system. Thus, previously untranslatable terms would be more likely to be 'successfully embedded into their surroundings'[102] by being more relatable to the new system.

The second solution is to use an existing term that the translator, comparatist or legislator considers similar to the foreign term.[103] Whilst this approach might be criticised for being the exact example of Legrand's impossibility of legal transplant, or for being deliberately blind to cross-cultural differences in the transfer of legal norms,[104] it offers an interesting take on legal comparison. By using an existing local term to denote a foreign norm or an institution that is untranslatable, the translators, comparatists or legislators are at liberty to mould a creation that is both new and old, as it imports new foreign elements and may simultaneously remain uniquely informed by local cultural inputs.

[98] R Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39(1) AmJCompL 1, 22. [99] Legrand (n 53). [100] Sacco (n 98) 11. [101] Horayangkura (n 93) 207. [102] Markovits (n 86) 101. [103] Horayangkura (n 93) 207.

[104] See L Foljanty, 'Legal Transfers as Processes of Cultural Translation: On the Consequences of a Metaphor' (2015) Max Planck Institute for Legal History and Legal Theory Research Paper Series No 2015-09.

A good example from Thailand was the import of the concept of 'liberty' by using the existing Thai term *issaraphap* that came with a unique internal meaning, in order to, as Tamara Loos argued, serve a particular policy objective of legislators.[105] This approach to legal transfer can potentially be problematic. For example, as Loos concluded, the Thai term was inherently linked to limits of liberty; hence when chosen to denote an imported legal concept, it came to occupy a narrower, and discordant, conceptual scope in comparison with the original English term.[106] Nonetheless, the phenomenon represents a valuable lesson for comparative law, which can learn from the mutation process of local terminology that is injected with foreign genes and later develops a life of its own in the domestic legal landscape. Such outcome may be unpalatable to some, but as Andrew Harding astutely put, '[t]he evidence of successful legal transplants of almost every conceivable kind is powerful'.[107]

### 3. *Analysis of Professor Phijaisakdi Horayangkura*

Professor Phijaisakdi's emphasis on the comprehensive understanding of the law within its domestic environment is in tune with the weight attached to contextualisation by other comparative law academics, especially in the Southeast Asian context.[108] However, there are some notable contours to Phijaisakdi's view of comparative law. First, the contextual factors which carry the heaviest weight are economic, with factors such as similarity in terms of the legal framework of the recipient country seen as secondary. Second, there is an interesting granularity in the search for economic similarity between Thailand and potential legal comparator countries, which is to select countries for similarity based on a particular economic sector—agricultural, commercial, industrial—with an assumed link between the law and the state of economic development in the relevant sector. Underlying this approach are some not unproblematic assumptions of identifiable relativity of similarities and differences: Asian countries are assumed to be more culturally similar to Thailand than countries from other continents; there is a 'pecking order' of countries in terms of economic development, whereby countries lower in the order should look to countries somewhat higher in the order to inspire incremental progress in their law.

There is also an interesting apparent paradox between Phijaisakdi's publication of multilingual legal dictionaries and the detailed focus on understanding the linguistic and cultural nuances of different systems. At first glance, the production of multilingual legal dictionaries may imply an easy

[105] T Loos, 'ISSARAPHAP: Limits of Individual Liberty in Thai Jurisprudence' (1998) 12(1) Crossroads 35. [106] ibid 71. [107] Harding (n 7) 218–19.

[108] See, eg, A Harding, 'Comparative Public Law: Some Lessons from South East Asia' in A Harding and E Örücü (eds), *Comparative Law in the 21st Century* (Kluwer Law International 2002) 249.

equivalence between legal systems and laws, and a universality of legal concepts that is masked by linguistic differences, both of which are generally anathema to mainstream comparative law theories.[109] However, it is submitted that this interpretation is very far from Phijaisakdi's intention, as evidenced by his discussions on coining new legal terms, or finding existing analogous terms, resulting in an impact from prior interpretations and nuances. In the authors' view, the dictionaries should not be seen as an attempt to ignore differences, but rather to flag or signpost the existence of similar or analogous concepts across languages for further investigation by a comparatist into the detail of the similarities and differences; they should act as a guide to a starting point for comparative enquiry, not as an end point eliminating the need for further study.

Thus, Professor Phijaisakdi's approach presents some fascinating concepts for comparative law, fitting to the era in which he was writing, and in many ways fundamentally different from Professor Preedee's approach discussed above. Phijaisakdi places great emphasis on the possibilities for the introduction of positive law as a tool for economic advancement. The lens through which he saw these possibilities was filled with a sense of pragmatic optimism, captured in the phrase 'happy plagiarism', of the ability of the law to act as an effective tool for economic advancement if properly selected. This, in the authors' opinion, differs from many of the academics associated with the legal transplants discourse in the West,[110] but may be thought of as characteristic of this era of rapid economic development in Thailand. Indeed, his pragmatic and economic approach—selecting systems for comparison based on economic factors rather than focusing on similarities of doctrine or juristic methods—stands also in contrast to the third comparatist, Sanunkorn Sotthibandhu, to whom this article now turns.

### *C. Professor Sanunkorn Sotthibandhu: Doctrines, Juristic Methods and Thai Law's Affinity*

Professor Sanunkorn Sotthibandhu is one of the leading contemporary law professors in Thailand, and one of very few female law professors with a highly distinguished legal academic career. She may be considered a part of the generation following Professor Phijaisakdi, although their years of active scholarship overlapped, as she wrote extensively about foreign laws, mainly Italian and Roman, in the early 1990s,[111] and she continues to write

[109] See, eg, R Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Routledge 2006); D Nelken, *Comparing Legal Cultures* (Routledge 2017); Legrand (n 53).

[110] eg Legrand, who uses these arguments as resistance to harmonisation of law in Europe. See, eg, Legrand (n 53); and P Legrand, 'What "Legal Transplants"?' in Nelken and Feest (n 7) 55.

[111] See the following articles, some of which were written under her former first name and maiden name, Jumpi Yokubol: J Yokubol, '"Culpa In Contrahendo" in Contract Law' (1991) 21(1) ThammasatLJ 119 (Thai language); J (Yokubol) Sotthibandhu, '"Pacta de Contrahendo" in

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extensively on Thai law, frequently from a comparative perspective, to this day.[112] Specialising in the civil law family, Sanunkorn's approach to comparative law is firmly rooted in doctrinal analysis, comparing Thai private law with Roman law, Italian law and other civil law jurisdictions. Her legal approach is hallmarked by complex critical analysis, founded on a strong theoretical framework.

### *1. Comparative law as an epistemological and historical pursuit*

An important aspect of Professor Sanunkorn's contribution to comparative law lies in the fact that her work builds explicitly on comparative law theory and its application to Thai law. Sanunkorn is one of relatively few Thai legal scholars who engage directly with the theoretical discussion of comparative private law.[113] In her article on the foundation of comparative law, she draws on leading Western comparative law scholars and Thai scholars.[114] In discussing what comparative law is, having addressed various scopes and definitions, Sanunkorn adopts Gorla's definition of comparative law, submitting that comparative law is an approach, or in another sense a tool for such an approach, of solving problems regarding the discipline and the operation of law.[115]

Given this definitional scope, Sanunkorn views comparative law from a historical perspective as a tool which lawyers and scholars from different time periods have adopted and applied for the purposes that suited that particular historical context. For instance, Sanunkorn argues that the

Italian Law' (1991) 21(3) ThammasatLJ 454 (Thai language); J Sotthibandhu, 'Constiglio Superiore della Magistratura of Italy' (1992) 22(3) ThammasatLJ 371 (Thai language); J Yokubol, 'The Constitutional Court of Italy' in Faculty of Law, Thammasat University, *Selection of Articles in the Celebration of the 80th Birthday of Professor Pairoj Chainam* (Thammasat University 1992) 17 (Thai language); J Sotthibandhu, 'Utile Per Inutile Non Vitiatur' (1992) 22(4) ThammasatLJ 559 (Thai language).

[112] See, eg, S Sotthibandhu, 'A Separation of Commercial Law from Civil Law' (2007) 36(4) ThammasatLJ 781 (Thai language); S Sotthibandhu, 'Legal Problems relating to Loan Contracts' in Faculty of Law, Thammasat University, *Memorial Book on the 60th Birthday of Professor Ngor* (Duan Tula 2013) (Thai language); and S Sotthibandhu, *Basic Principles of Private Law* (Winyuchon 2019) (Thai language).

[113] Other major academic works in this area are the works of Professor Preedee Kasemsup and Professor Phijaisakdi Horayangkura, as discussed above. For other important works in the area of comparative private law, see Y Saeng U-tai and S Vinitchaikul, *Comparative Private Law; Thai Laws and Codes of Foreign Nations* (Faculty of Law, Thammasat University 1973) (Thai language); T Krivixien, *Thai and Anglo-Saxon Comparative Law* (Faculty of Law, Chulalongkorn University 1975); P Punyabandhu, *Comparative Law of Thailand and Codes of Foreign Nations* (Faculty of Law, Thammasat University 1976); P Chomchai, *Introduction to Comparative Private Law: Roman and Anglo-Saxon Customary Laws* (Faculty of Law, Thammasat University 2015) (Thai language).

[114] Including Konrad Zweigert and Hein Kötz, Roscoe Pound, Günter Frankenberg; Italian scholars such as V Arangio-Ruiz, G Gorla and R Sacco; as well as renowned Thai scholars including Preedee Kasemsup, Yud Saeng U-tai and Serm Vinichaikul. See J (Sanunkorn) Sotthibandhu, 'Comparative Law: A Theoretical Foundation' (กฎหมายเปรียบเทียบ: พื้นฐานความคิด) (1995) 25(4) ThammasatLJ 664 (Thai language).

[115] ibid 666.

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comparative method in Ancient Greece was an observational tool for the comparison of legal rules, principles and institutions of various city states,[116] whereas the Classical Roman period saw a major development of comparative jurisprudence influenced by natural law rationales and the idea that the *ius gentium* of Rome might have become the law of the world[117]—as such it may be perceived as a tool that aligned with the aspirations of the Empire.

Sanunkorn asserts that comparative law should serve two main purposes, namely, theoretical advancement and practical application. For the goal of theoretical advancement, Sanunkorn argues that comparative law creates an understanding of the law which serves to further the understanding of the relevant society and culture from a wider anthropological perspective.[118] This understanding, together with a deep knowledge regarding legal development and knowledge drawn from past experiences, leads to the growth and prosperity of our wisdom.[119] Regarding the objective of practical application, Sanunkorn submits that comparative law is useful for legislative purposes—in the passing of new laws or revising existing laws so that they may best suit the ever-changing social, economic and political context.[120] From an economic perspective, Sanunkorn argues that the study of comparative law also serves to enrich the body of knowledge of the judiciary, leading to an increase in its credibility and the trust of foreign investors in the Thai judicial system, thus strengthening the country's economic stability.[121]

It is also clear that Sanunkorn views comparative law as an intellectual tool to create unity and peace, through a comparative approach which, whilst studying both similarities and differences, searches for common opinions (*communio opinio*) or majority opinions (*magis communis*) which will act as a link between various societies.[122] This should lead to an understanding of the law from the perspectives of others, and create a deeper understanding of one other at an international level, and hence make progress towards the goal of peaceful co-existence.[123] Sanunkorn's emphasis on the common factor means that she proposes that a study of comparative law should focus on the comparables (*similia dimilibus*).[124] However, this does not mean that she advocates for a search for similarities in separation from surrounding considerations; indeed in discussing micro-comparison, she stresses that the relevant legal principles for comparison must be appropriately placed in their context: legal history, advancement of relevant legal institutions, foundational philosophy, court judgments, as well as the overall legal structure in which the principles operate.[125] Turning to macro-comparison, Sanunkorn's emphasis on similarity is less prominent as she argues that macro-comparison concerns a comparison of the spirit and juristic methods of each legal system, with sufficient contextualisation similar to that in micro-comparison.[126]

[116] ibid. [117] ibid 667. [118] ibid 674. [119] ibid. [120] ibid 672. [121] ibid 673.
[122] ibid 673. [123] ibid 674. [124] ibid 675. [125] ibid 676. [126] ibid 676–7.

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*2. Macro-comparison and classification of the Thai legal system based on the juristic method*

Many of Professor Sanunkorn's works, especially from the year 2000 onwards, contribute to the discussion of micro-comparison legal development in Thailand. In these, she uses her knowledge of Roman and Italian laws, and of other civil law jurisdictions, to assess critically the development of Thai law with a distinct academic style of engaging in the theoretical discussion of the foundation of Thai private law, many aspects of which are rooted in civil law cultures which she traces back to Roman law.[127] Nonetheless, her macro-comparison of the Thai legal system is also noteworthy. Having researched this area extensively, Sanunkorn's latest work on the foundational principles of private law conducts a macro-comparison of legal systems that have influenced Thailand. Although having argued in the past that Thai law represents a mixed system, bearing influences of both civil law and common law, she submits in this work that the Thai legal system should be classified as a civil law system.[128]

In supporting this claim, her argument revolves around one key feature: juristic methods. Building on Professor Preedee's work, she explains that a juristic method is a process or a manner of application of the law which signifies a method applied in legal interpretation that is specific to a country.[129] As such, she states that 'a lawyer may only be able to correctly and justly apply and interpret the law if he or she truly and extensively understands his or her legal system'.[130] She then goes on to distinguish between a simple reception of legal principles into the domestic legal system and the adoption of juristic methods. The first, she argues, can be found in Thailand's early importation of common law rules,[131] which was a direct adoption of specific rules without a process of developing and applying legal precedents. This was a simple legal reception without developing a juristic method in the common law style.[132] By contrast, as over time the Thai legal system has developed distinct juristic methods, the major influence of civil law, especially Roman law, on the Thai legal system is evident.[133] This can be seen from various matters including lawyers' attitudes towards written law, customary law, judgments of the courts, the process of legal drafting and the teaching of law in law schools.[134] The adoption of juristic methods is, in her view, very significant for the classification of a legal system,[135] which leads to her conclusion that, as the legal system of Thailand aligns ever more closely in

[127] See, for instance, Sotthibandhu, 'Legal Problems relating to Loan Contracts' (n 112); and S Sotthibandhu, *An Explanation of Obligation Law: Effects of Obligations* (Winyuchon 2020) (Thai language) 34.

[128] Sotthibandhu, *Basic Principles of Private Law* (n 112) 125 (Thai language, translation by the first author). [129] ibid 148–9. [130] ibid 149. [131] ibid 152. [132] ibid 155. [133] ibid 151–2. [134] ibid 149–51. [135] ibid 160.

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its juristic method with civil law jurisdictions which are rooted in Roman law, Roman law may thus be considered a predecessor of Thai law.[136]

### 3. Analysis of Sanunkorn's comparative law works

Professor Sanunkorn, similarly to Professor Phijaisakdi, emphasises an approach to comparative law that is rooted in context, including economic, social and cultural factors. However, in many respects their approaches are fundamentally different. Sanunkorn's focus, in terms of the purpose of comparative law, appears to be aimed at finding similarities that can form links in understanding between different societies. Furthermore, there is an emphasis in her approach on the historical development of ideas, particularly, given her speciality, those with Roman origins. However, an interesting aspect to her comparative work is the focus on juristic methods, which can be seen as a contextual factor important for comparison. Different from Professor Preedee's comparison of juristic methods with the spirit of a legal system, Professor Sanunkorn's conception of the juristic method is found in the manner of application of the law, as developed and widely adopted within the legal community and informed by underlying attitudes towards the proper role played by legal institutions. Thus, the juristic method is considered a fundamentally important element of Thai legal culture. Therefore, although her focus on socio-economic context is similar to that of Phijaisakdi, her approach is more closely tied to the formal legal world.

Moreover, Sanunkorn's approach, once again, appears to present an identifiable, perhaps generational, shift in attitude. Distinct from Preedee's approach, of criticising or challenging assumptions of priority of law adopted from the West, and Phijaisakdi's approach of using foreign law as a tool for economic development, Sanunkorn's approach, the authors argue, represents 'affinity'.[137] Thai private law is painstakingly classified as belonging to the civil law system, the juristic methods identified and analysed in similar terms. Reflected in her discussions on the various and shifting purposes of comparative law across time, comparative law emerges in this era as a tool of mutual recognition. Through comparative law, Thai and foreign comparative law scholars may come to recognise and understand the Thai legal system as adopting an identifiable position in existing categories within a comparative law discourse that is implicitly global. Western law is no longer seen as presenting an oppositional 'other' to traditional Thai law, as for Preedee; foreign law is not presented as an opportunity for national development, as for Phijaisakdi; rather, Thai law is presented as a legal system standing shoulder to shoulder with others, with juristic methods and doctrines which

[136] ibid 152.
[137] See AA Jamal, 'Comparative Law, Anti-essentialism and Intersectionality: Reflections from Southeast Asia in Search of an Elusive Balance' (2014) 9(1) ASJCL 197.

are both unique and capable of being positioned in existing conceptual frameworks. Perhaps it can be concluded that Sanunkorn's perspectives could, in some ways, be characteristic of a generation of comparative lawyers deeply versed in the orthodoxy of comparative law of the Global North, for whom the development and application of such principles to Thai law, in the same way as to legal systems of the Global North, have become somewhat natural, and who might make no distinction between comparative law theory of the Global North and simply comparative law theory.

## IV. CONCLUDING REMARKS: LESSONS FROM THAI COMPARATIVE LAW

This article has offered perspectives from three prestigious Thai legal scholars on comparative law, for the benefit of an English-reading audience, as a small step to filling the void in comparative law voices from the Global South. The attempt has not been to offer a unique unitary 'Thai' voice, as an orientalising 'other' to stand in dichotomous opposition to Global North academia. Indeed, as can be seen from the analysis above, the three Thai scholars present divergent views and perspectives on fundamental aspects concerning comparative law. However, there are also interesting commonalities among the three professors. Mainstream comparative law is frequently associated with the potential to seek universals, de-emphasise differences between nations and legal cultures, in the pursuit of legal unification or harmonisation.[138] There are famously, of course, critics of this use of comparative law,[139] and comparative law has many identified alternative purposes, including in legal education, legal history and sociology of law.[140] However, as discussed above, common among the three professors is the implicit understanding that many important questions facing the nation—doctrinal or practical—may be answered by comparative law. Implicit or explicit in their works is the idea that comparative law is a national project that serves national objectives, primarily the improvement of the nation. Indeed, there is much to be gained from viewing comparative law through the prism of a legal system that is rarely considered to be an 'origin' or 'parent' system for the spread of legal ideas. The uses to which comparative law may be put are shown in a different light: refocusing on traditional law (Preedee), nuanced economic development

[138] G Dannemann, 'Comparative Law: Study of Similarities or Differences?' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 392.

[139] eg P Legrand, 'The Same and the Different' in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 240; G Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 HarvIntlLJ 411; R Hyland, 'Comparative Law' in D Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell 1996) 184.

[140] eg J Husa, *A New Introduction to Comparative Law* (2nd edn, Hart 2023); M Bogdan, *Concise Introduction to Comparative Law* (Europa 2013); G Samuel, *An Introduction to Comparative Law Theory and Method* (Hart 2014).

(Phijaisakdi) and affinity (Sanunkorn) do not appear prominently, if at all, in discussion of the uses of comparative law in Global North academia.

In addition, a notable feature arising from this analysis is that each scholar appears to be a product of their time, in the sense that many aspects of their views of comparative law appear tied to particular concerns of the moment, be they social, economic or relating to the education and development of the legal community. This perhaps is another manner in which comparative law looks simultaneously in two directions, reminiscent of the double-faced Roman god Janus. Comparative law is both a means of understanding a different legal system and simultaneously a means of better understanding the comparatist's 'home' system; thus, comparative legal scholarship may shine a light both on the object of a scholar's comparison and the context within which they were writing. Adding new contexts to the global discussion of comparative law is an exciting potential benefit of deeper investigation into comparative law in the Global South.

For a final lesson that may be drawn from the comparative law theories of the three Thai scholars, reference must be made back to the starting point of this enquiry, addressing the domination of the Global North over comparative law theory. As pointed out by comparative law scholars taking a postcolonial perspective, the usage of concepts perceived to have originated within Global North academia, and developed by reference to Global North legal systems, as the *tertium comparationis* creates the risk of perpetuating assumptions internal to a fundamentally conservative discipline. Criticisms include the discipline's resulting tendency towards enquiries focused narrowly on legal rules, methodologies focused on the unit of a nation, the assumed relative homogeneity between legal systems, and of cultures within a nation, and relative heterogeneity of cultures between nations, as well as an implied superiority of Global North systems that are frequently used as benchmarks.[141] Looking to comparative law writing of scholars in the Global South may thus appear to offer the potential for decolonising and radically decentring comparative law.

Indeed, many Western-resistant attempts can be observed from the three scholars; however, something else can also be discerned. Although all three offer important fresh perspectives on comparative law theory, their writings are fundamentally based on categories and modes of questioning from the Global North. This ought, perhaps, to be expected due to the very issue of the structural domination of the Global North over the discipline of comparative law itself: scholars from the Global South, operating in the existing structure of academia, out of necessity must study and engage with the canon of orthodox scholarship from the Global North to write and publish on comparative law. The discussion above highlights this particular challenge. However, it also points to the fact that that Global South comparative law

[141] Salaymeh and Michaels (n 1) 167–72.

scholars should not be thought of as standing outside of the discipline of comparative law. It is unhelpful, the present authors suggest, to turn to the works of scholars from the Global South in the assumption that a radically de-Westernised approach will necessarily emerge as an alternative, solving in its rejection the problems in comparative law from the Global North. An attempt to migrate comparative law discourse from the Global North landscape to an 'exotic' global South completely is not useful; for critique, perspectives and contexts offered by comparative law scholars, no matter where they are writing, are internal to the discipline, not external. Thus, although fresh perspectives, new uses, and incremental improvements or applications in different contexts may all be found—and indeed have been found in the three Thai scholars—fundamentally different approaches should not automatically be expected. To do so would be to orientalise and 'other' scholars of the Global South, and to claim implicitly mainstream comparative law theories as belonging to the Global North.

Perhaps the final lesson that may be taken from this analysis, therefore, is an awareness of the difficulties that comparative law scholarship faces in overcoming its much-discussed methodological challenges.[142] This article's examination of the three Thai scholars should perhaps be seen as a flattening of the peak of the Global North domination and an expansion of the comparative law discursive landscape, rather than an exodus to the Global South. Finally, the authors suggest that decolonising and decentring comparative law scholarship requires more radical approaches, perhaps drawn from outside of the existing discipline, which may be pursued and developed by all comparative law scholars, be they from the Global North or the Global South.

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[142] Reimann (n 32) 225 ff.