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Review of Pluralist Constitutions in Southeast Asia by Jaclyn L Neo and Bui Ngoc Son (eds)

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Pluralist Constitutions in Southeast Asia BY JACLYN L NEO and BUI NGOC SON, eds [Oxford, UK and Portland, Oregon: Hart Publishing, 2019. xvi + 290 pp. Hardcover: S\$100.04]

The project which gave rise to this book was motivated by a dearth of existing scholarship on the role of plurality *within* (as opposed to *among*) Southeast Asian nations (at p 5); how plurality can serve as a “source of constitutional dynamism” rather than of “constitutional contestations” (at p 6); and the role of constitutional practice (as opposed to the features which institutions possess on paper) (at p 6). The book aims to address these gaps through a collection of essays, each of which focuses on the constitutional orders in one or two Southeast Asian countries. As the editors Jaclyn L Neo and Bui Ngoc Son recognise, the diversity of experiences and constitutional responses is such that “there is no single model of pluralist constitutions in Southeast Asia” (at p 15). After all, the nature and effects of pluralism depend on the extent of division of a society and the types of plurality (at p 10). Moreover, because pluralism itself is ‘dynamic’ in the sense that “a pluralist constitution should be able to reconsider new constitutional claims and modify its existing settlement to address them” (at pp 12-13), drawing comparisons is not straightforward because of changes within each country over time. Yet, the book does a good job of presenting the complexities of each country’s constitutional order; and, as the editors point out in their useful introduction, interesting patterns and contrasts emerge when the various essays are placed side by side (at pp 15-18). The result is a study that is more than the sum of its parts.

In Chapter 2, Dian AH Shah describes both “identity-based” and “institution-based” pluralities in Malaysia (at p 45). She traces them to Malaysia’s pre-constitutional tradition, revealing that the latter are themselves coloured by the former. After describing how ethno-religious pluralities have influenced Malaysia’s constitutional design, Shah goes on to discuss specific cases engaging questions of plurality (such as those involving the religious conversion of children and custody disputes and apostasy). She highlights that what are ostensibly simple disputes about

the separation of powers and courts' jurisdiction belie underlying tensions which stem from the fact that "[p]reservation of religious and ethnic interests has given rise to conflicting claims on the parameters of fundamental rights and the role of the dominant religion (Islam) in the constitutional order" (at p 45). While other disputes (such as those relating to government-monarchy relations) are less directly related to religious plurality, Shah notes that these are manifestations of larger forces: even a "constitutionally suspect" pronouncement by the monarchy may in practice trump constitutional rules and conventions because of a "traditional sense of attachment to the Malay monarchy" that informs political practice (at p 48). Shah neatly concludes that "[a] study of Malaysia's pluralist constitution... cannot be limited to an analysis of the text and practice (empirical evidence); it has to be evaluated in light of the unique historical, social, and political contexts of the country" (at p 48).

Eugene KB Tan, in Chapter 3, takes a similar contextual approach to Singapore's Constitution. But compared to Shah, he makes little reference to particular constitutional provisions and source documents: for example, as support for his assertion that race is the "[c]ore [o]rganising [p]rinciple" (at p 57), he points to sources such as a 2017 speech by the Prime Minister and various contemporary government initiatives. This approach is justified by his interesting observation that, while "[p]luralism is a feature found in Singapore's constitutional documents" (at p 59), the "aspiration of multiracialism and equal citizenship" is but "inchoately expressed in [Singapore's] founding moment" (at p 57). Therefore, on Tan's analysis, the effects of pluralism are to be seen not in the design of the constitution and resultant disputes arising from constitutional provisions or conventions, but instead from the design of political "institutions and norms" engendered by the constitution (at p 59). For example, Tan suggests that various provisions of the Constitution that recognise minority interests, while not justiciable, may explain the existence of ordinary legislation providing for Islamic personal law applicable to Muslims (at p 65) and a national policy which "seeks to enable students to maintain their cultural links" by requiring students to study their 'mother tongues' in school (at p 68). So, too, does he describe constitutional provisions on elections and representation as an "innovation at advancing pluralist constitutionalism in the political arena" (at p 69). What emerges is an illustration of Michel Rosenfeld's concept, highlighted by the editors in Chapter 1, of "pluralism-as-a-norm" (as opposed to pluralism as a mere social fact) (at p 11).

Chapter 4, by Kerstin Steiner and Dominik M Müller, explains much of Brunei's constitutional order by the "primordialist logic of a centuries-old tradition of Malay monarchical governance" coupled with a "conflation of royal power with Islam" (at p 85). Unlike Singapore's and Malaysia's Constitutions, which were the product of a process of negotiation between various interests, Brunei's 1959 Constitution was drafted only because the Sultan unilaterally decided to promulgate one (at pp 93-94). The Sultan put down opposition (in the form of the People's Party of Brunei) by declaring a state of emergency; that state of emergency has continued until today, with the result that "later constitutional developments were not accompanied by any public or otherwise documented deliberation over competing modes of constitutional interpretations, or public constitutional politics of any kind" (at p 102). At first glance, the account in the Chapter may seem frustrating to read, for one gets the impression of a *non*-pluralist order. But this is the very point Steiner and Müller make. Because "the Sultan is the law or *Grundnorm* and at the same time above the law" (at p 91), and the Sultan instituted a vision of Brunei as a 'Malay Islamic Monarchy'

(“MIB”) (at pp 102-103), there is little room in an account of Brunei’s Constitution for any other racial or ethnic interests. In other words, because the Constitution “underline[s] the country’s character of being a Malay Islamic Monarchy”, “[t]he notion of public ‘constitutional politics’... has become a contradiction in terms” (at p 102). The account that emerges is one in which pluralism has given way altogether to a “paradigm ascribed to Malay monarchical tradition” involving a “patron-client relationship” in which, in return for various benefits, “the society is expected to be strictly loyal and never question the Sultan and his government’s policies” (at p 109). This makes the Chapter an interesting foil to the others, particularly those which describe pluralism as a democratic phenomenon.

In Chapter 5, Herlambang P Wiratraman and Dian AH Shah present an interesting case study of how a constitutional norm can both serve to foster pluralism and serve as a locus of conflict. They devote much attention to Indonesia’s state ideology, the Pancasila, and describe its various effects. The theme that emerges is one of flexibility: “the interpretation and implementation of the Pancasila vary across different regimes and different time periods” (at p 125). But this makes the Pancasila a “double-edged sword” (at p 126): “it can be (mis)used as a tool to buttress a regime’s political dominance and control over the society” (at p 126), and has been the impetus for both the protection and the restriction of constitutional rights (at pp 127, 129). The authors pose the interesting question of what costs this flexibility comes at. For example, while the Constitution demonstrates “recognition of the existence of a plurality of legal orders in the country, as well as recognition of Indonesia’s territorial and ethnic pluralities” (at p 132), all it says is that “[t]he State recognises and respects units of regional authorities” (at p 133). While this provides a warrant to the state to recognise legal pluralism as it sees fit, Wiratraman and Shah pose the question of whether the steps taken pursuant to this end have, in substance, resulted in a departure from Indonesia’s identity as a unitary state (at p 138). The authors conclude that “what the Pancasila means and how it should drive Indonesia’s constitutional order and consciousness have become a contested discourse” as “[t]he plurality of constitutional norms, values, and sources... raises the question of supreme and final authority... [which] is ultimately linked to political power-play within the constitutional order” (at p 139). The reader is thereby left with a reminder that even as, as the editors put it, “constitutional values need to be constantly defended and negotiated in order to preserve them” (at p 13), this may come at the cost of other constitutional values.

In contrast to the idea of an enduring constitutional ideology whose interpretation changes over time, Nyi Nyi Kyaw’s Chapter 6 begins with a caveat that Myanmar’s constitutional order itself has changed repeatedly: in a series of “constitutional cycles” (at p 144), the military repeatedly seized a “care-taker” role amid conflicts between various ethnic groups (at p 150-151), and struggled to lead the subsequent creation of a constitution. Kyaw mentions the complexities of ethnic plurality, such as the issue that the Constitution protects all “national races” but not everybody is a member of a “national race” (at p 157). But what presents the most interesting contrast with other chapters is Kyaw’s discussion of another plurality specific to Myanmar: “political pluralities” between the military and various civilian interests (at p 145). The role of the military is so significant that, according to Myanmar’s 2008 Constitution (which is presently in force), the military is to play a “role of political leadership” (at p 155; emphasis omitted). Here, an interesting parallel with Steiner and Müller’s Chapter emerges. Steiner and Müller say (and can say) little

about non-Malay players in “constitutional politics” (at p 102) because of the long-standing dominant MIB ideology. Kyaw says little about other political players, instead pointing out that the military’s “somewhat permanent political leadership role” (at p 160) may be explained by the “political realities of Myanmar at least from the late 1980s” (at p 161), and that the transition to an order in which non-military political groups play a role is very recent and has only “becom[e] more visible” after the victory of Aung San Suu Kyi’s National League for Democracy in 2015 (at p 162). Kyaw ends on a tentative note: “Myanmar’s plurality continues to evolve and demands further constitutionalisation, whether in the form of an amended constitution or a new one” (at p 165).

In Chapter 7, Taing Ratana writes that Cambodia, too, has “experienced a long walk of change” (at p 169). He does not detail the events of the Cambodian Civil War, the Khmer Rouge dictatorship, and the war with Vietnam, instead emphasising the fact that there has generally been peace among various ethnic and religious groups in Cambodia (at pp 173-174). But Taing makes clear the impact of Cambodia’s tumultuous past on the present Constitution (which was promulgated in 1993). For instance, it is the past brutal Khmer Rouge regime which explains why the Constitution’s preamble counts “to guarantee human rights” and “to ensure respect for the law” among the “shared common goals of the nation” (at pp 179). Taing presents an account of Cambodia’s “inter-linked” (at p 182) and mutually supporting constitutional values; he places heavy emphasis on the maintenance of peace as a goal of constitutionalism in Cambodia. When seen in the light of the values and the reason for their adoption, it becomes clear that constitutional staples such as free and fair elections, the separation of powers, and bills of rights are not to be taken for granted in the face of plurality.

Taing concludes by emphasising that Cambodia’s constitutional journey will not necessarily be smooth-sailing. For example, he describes the 2003 deadlock in which, following the election, the party which won the most seats lacked the supermajority required to form a government and could not secure an agreement with the other parties. This is a product of political, not ethnic or religious, plurality. This sort of plurality is of the sort that features in any democracy, to be addressed by the fostering of a “culture of dialogue” (at p 188; emphasis omitted). Seen in this light, Taing’s Chapter presents an interesting foil to the chapters describing countries bedevilled by the “vast pluralities” of “demographic, ethnic, linguistic, religious diversity” (at p 1); it reminds us that an element of pluralism subsists in *any* democratic constitutional order.

In a similar manner to Taing’s account of Cambodia, Bui Ngoc Son describes Laos and Vietnam as ethnically “plural, but not divided” (at p 203). His focus is on constitutional provisions that seek “not to regulate social and political conflicts rooted in plurality but as an expression of the plurality” (at p 204). After providing a useful primer on constitutional expressivism, Bui explains the expressive significance of various aspects of the two countries’ Constitutions. For instance, both Constitutions implicitly assert that “despite ethnic plurality, power is not divided among ethnic groups but is practised by a single unified people” (at p 212). The Constitutions go on to express the pursuit of ethnic unity as a state aim; for Bui, the significance of this is they do so under the heading of “political regime”, which indicates that ethnic unity is “constituent to the nature of the polity” and “both define[s] and direct[s]

the regime's developmental path and state's specific policy" (at p 213). Besides these "constituent principles", there are also "directive principles" that "focus on guiding the state's specific actions rather [than] defining the state nature" (at p 214). Bui illustrates how these principles, too, are specifically directed toward plurality. It is Bui's description of rights provisions that most strikingly illustrates how the constitution may express values rather than enforce them: "The rights provisions are not meant to establish legal restraints on state power, but they are expressive of principles positively guiding the state's actions" (at p 215).

Bui goes on to illustrate the effects of the values expressed in the two countries' Constitutions: they inspire national policies and plans and form the locus of "political and scholarly discussions" (at p 218). One may discern a parallel with Tan's account of Singapore, in which the Constitution provides inspiration for minority-protecting state initiatives. Bui's conclusion is noteworthy: while "expressive constitutional provisions... are not judicially enforceable", they are not "meaningless" as "judicial constitutionalism is not the only way to conceptualise constitutionalism" (at p 219).

In Chapter 9, Apinop Atipiboonsin describes constitutionalism in Thailand as "volcanic" in two senses. First, it reflects "the contest among – different layers of constitutional authorities of equal weight" (at p 226). Second, it is capable of eruption: "when conflicts cannot be contained in the constitution, society resorts to the extra-constitutional measures such as coup d'état and abrogation of the Constitution" (at p 226). Atipiboonsin's account of pluralism in Thailand is that "Thailand has long been pluralistic under its seemingly monistic façade. Such pluralism is further concealed under the legal and constitutional order" (at p 228). But according to Atipiboonsin, unlike many of the countries studied in the previous chapters, Thai law only *tolerates* plurality, subject to the proviso that "the core identity of Thainess is intact" (at p 235); this "just does not equate to acceptance and accommodation" (at p 235). Therefore, "the account of a positive constitutional pluralism, if any, can only be found in the dialogue existing in constitutional practice and conventions along with those unwritten or extraconstitutional powers" (at p 236). The result is a state of "constant contest within the constitutional system" (at p 243). Atipiboonsin concludes by asking whether the new 2017 Constitution might allow "democracy and constitutionalism to adapt themselves" (at p 246) to Thailand, but he declines to give a definite answer: while he outlines the positive potential of the new Constitution, one recalls his statement that aspects of that same Constitution are "worrying" (at p 241). What he makes clear is that, one way or another, the case study of Thailand will be instructive in the light of the "growing polarisation and hostility against constitutional democracy worldwide" (at p 227).

In Chapter 10, Bryan Dennis Gabito Tiojanco begins his study of the Philippines with a caveat: "[c]enturies of unreliable governments have taught Filipinos to depend upon informal, hierarchical webs instead of public institutions for their needs" (at p 252), leading to a system in which "[n]epotism and corruption are thus accepted as routine *realpolitik*" instead of "official rules and the public good" (at p 253). It is the plurality of this sort of informal network which is Tiojanco's focus. This makes for a fascinating study because such networks defy being addressed formally in the Constitution (save for the oblique statement that "[t]he State shall... prohibit political dynasties as may be defined by law" (at p 256)), yet they are powerful because of their political impact: "[l]ocal leaders" in informal networks "act as go-betweens

between their constituents and national leaders in the recurring exchange of votes for patronage” (at p 273).

Tiojanco describes the constitutional history of the Philippines against the backdrop of ‘kinship networks’. For instance, he describes the ‘People Power’ movement as being not only a movement against dictatorship, but more generally a “democratic entry of grassroots groups into a political stage historically dominated by elite patrons” (at p 258). What emerges is an account in which informal networks interact with formal constitutional structures: “[t]he People Power Revolution envisioned NGOs as ‘the vehicle by which political power would be democratised’” (at p 274), and while NGOs have limited direct political impact, they have influence on legislation (at p 275-276), and “mass public protest expressing popular will has... been a robust source of constitutional norms” recognised and applied by the courts (at p 276). Hence, Tiojanco suggests that ‘kinship’ is not in and of itself a force for good nor for evil, but simply a type of form taken by various political forces. But Tiojanco ends on a cautionary note: even as People Power aims to encourage “social cohesion” and “integrated diversity” through citizens’ membership in “overlapping associations” (at p 277), “weaker members and groups continually need the help of the state; otherwise, a creeping domination of the weak by the strong will unavoidably ensue” (at p 277) as informal social ties breed political patronage and populism.

Although the book’s subject-matter is complex, each chapter is written in an accessible manner. As a result, both specialists as well as readers unfamiliar with the methodology of comparative constitutional law, the nature of plurality in Southeast Asia, or the legal systems of the countries discussed will gain a deeper understanding of the multiple layers of plurality seen in Southeast Asian countries as well as the resulting responses (or non-responses) of constitutional systems. At the same time, each chapter colours one’s reading of the others by shedding light not only on what each country’s constitutional response to plurality is, but also what the response could (or could not) have been. The insights which arise as a result make this book a fascinating read.

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Carter’s Breach of Contract BY J W CARTER [Oxford: Hart Publishing, 2018; see also Australia: LexisNexis Butterworths, 2018. lxxvi + 738 pp. Hardcover: £180.00]

The author of this treatise holds the positions of Emeritus Professor of Law, University of Sydney, General Editor of the *Journal of Contract Law* and Consultant to Herbert Smith Freehills. Earlier versions of Emeritus Professor Carter’s treatise on breach of contract (previously published in 1984 and 1991, and substantially reworked and retitled as a 2012 first edition with Hart Publishing) have taken their place in the canon of leading works focusing primarily on this topic (other recent additions include John Stannard and David Capper, *Termination for Breach of Contract* (2014) and Neil Andrews, Malcolm Clarke, Andrew Tettenborn and Graham