

Book Review

Asian Comparative Constitutional Law Volume I: Constitution-Making

Ngoc Son Bui and Mara Malagodi
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Reviewed by *Patharanist Wannapoglang**

Asian constitutional law continues to be under-explored. Scholars therefore attempt to integrate an Asian aspect to the comparative study of constitutions. The *Asian Comparative Constitutional Law* series explores and expands the knowledge about constitutions of a variety of Asian jurisdictions. The series is divided into four volumes, each dedicated to a specific context of constitutional study: *Constitution-Making*, *Constitutional Amendment*, *Constitutional Structures*, and *Constitutional Rights*. This is a review of the first volume, *Constitution-Making*.

Several Asian jurisdictions are explored in this volume. Familiar topics, such as revolution, constituent power, public participation, and international involvement are discussed. Addressing geographical, political and, most importantly, historical aspects, the authors each deal with unique questions and, hence, unique frameworks. The chapters share similar features, while also exhibiting distinct elements. The cases of Japan (Chapter 1), India (Chapter 16), Indonesia (Chapter 8), and South Korea (Chapter 2) concern the making of constitutions after colonization. Other chapters manifest the transition of the state into a new economic regime, such as in the case of Vietnam (Chapter 13), or into a new political regime, such as in Mongolia (Chapter 7). Many concern the deterioration of political stability, as epitomized in Thailand (Chapter 15), Sri Lanka (Chapter 18), Bangladesh (Chapter 17), the Philippines (Chapter 11), and Myanmar (Chapter 14), under a military regime. The Nepalese experience (Chapter 19) reflects the attempt to bring ethnic peace into constitution-making, which has, however, proven to be a failure. Constitution-making is also categorized into time-consuming cases, i.e., the Republic of China (Chapter 3) and China (Chapter 4), or cases taking only limited time, i.e., Singapore (Chapter 10).

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Other chapters challenge stereotypical thoughts towards constitution-making, namely the cases of Malaya 1957 (Chapter 9) and North Korea (Chapter 6), and explore less examined jurisdictions, such as Hong Kong (Chapter 5). The editors ultimately propose six models which describe constitution-making in Asia, differentiated by the core elements they each preserve: nationalist, democratic, imperial, ethnic, military, and socialist constitution-making (436–44).

Several authors frame their analysis in a binary way with respect to certain qualities of the constitutions. For instance, Abdurrachman Satrio in Chapter 8 questions the existence of a colonial element in the anti-colonial 1945 Indonesian Constitution. Akiko Ejima in Chapter 1 discusses the imposed and the hybrid types of the Japanese Constitution. Andrew Harding in Chapter 9 examines the autochthonous and the non-autochthonous elements of the Federation of Malaya's 1957 Constitution, while Jeong-In Yun in Chapter 2 investigates the founding or re-founding of South Korea's 1948 Constitution. Many chapters do not confine themselves to either of these choices, though. Satrio's chapter on Indonesia considers the process and substance of constitution-making to elucidate that Indonesia also adopted colonial values in its so-called anti-colonial 1945 Constitution (166, 169). But the implementation of this Constitution shows how adopted colonial values promoted Indonesia's independence by "resolving the disagreements in the new state" (168–69, 173). In this respect, parallels with Ejima's chapter on Japan and Harding's chapter on Malaysia can be drawn: despite no public participation, the implementation of these constitutions shows that a constitution can be a "hybrid" compromise between global and local stakeholders (28–30) or of "autochthonous" nature (195–56).

Moreover, the approach adopted in this volume includes constitutional exceptionalism, the concept according to which, as Carl Schmitt phrased it, "sovereign is he who decides on the exception."¹ This power, as Mithi Mukherjee contends, can be examined from "conceptual networks and institutional practices that evolve historically." In India (Chapter 16), Mukherjee points to "justice as equity" as the principle frequently espoused by the state when exercising its control over material resources. Justice as equity is used to justify control of this type, calling it "justice as fair distribution" and "justice as compensatory discrimination" (348–49). Constitutional exceptionalism is indeed a useful concept to grasp the basis on which the post-colonial Indian legislature operated (348). Transcending from the British imperial model (343), justice as equity is a colonial legacy whose influence survives in the present Indian constitution. Mukherjee, on the one hand, reaches the same conclusion as Satrio in Chapter 8 as they both see an adoption of colonial values in so-called revolutionary or anti-colonial constitutions. On the other hand, Satrio adopts a distinct approach, showing another facet in this book by examining the underlying concept of the constitution through the state practice of making exceptions.

However, the volume's six models of constitution-making may not grasp all the dynamics of constitution-making in Asia. This becomes clear when appreciating the

¹ Carl Schmitt, *Political Theology* (University of Chicago Press 2005) 5.

intricate details addressed in each chapter. For instance, despite being classified as following a military model, the making of Thailand's 2017 Constitution was, as Rawin Leelapatana contends in Chapter 15, actually driven by two forces: the "Liberal Democratic Power" (LDCP) and the "Royal Constituent Power" (RCP), rivalling each other to gain political superiority (311). In addition, Rawin describes the relationship between these forces as a "binary star" type, meaning that the exploitation of one side also has deteriorating effects on the imposing side (311–12). To some extent, this may explain contemporary Thailand's political instability and the possibility of a new round of constitution-making (335–36).

The categorization by models, however, may disguise some intersections between different paths of constitution-making. Myanmar's 2008 Constitution, for instance, is usually categorized as following a military model (429), while Nepal's 2015 Constitution arguably pursues an "ethnic model" (444). Both constitutions, however, are similar in terms of land demarcation and ethnic minorities' entitlements to rights against the state. In Chapter 14, Jonathan Liljeblad shows that Myanmar's 2008 Constitution laid down a structure to deal with ethnic-minority problems to secure the power of the junta (306, 309). In the Nepalese context, however, despite the constitutional assembly's role in promoting peace between ethnic groups, its dysfunction led to land divisions, with one demographic group dominating others (422). It could therefore be said that, to some extent, Myanmar's 2008 Constitution consists of ethnic elements, but instead of peace for ethnic minorities, the result actually turns into the suppression and subjection by the military regime. By contrast, Nepal's 2015 Constitution, though being categorized as ethnic, accounts for the dominance of a certain ethnicity, which possibly makes the country susceptible to authoritarian governance as well.

The categorization of constitutional models has led some authors to narrow their perspectives in constitution-making down to specific models. This, again, becomes apparent in the Myanmar chapter, where the strong focus on military aspects, according to the model pursued, excludes other aspects of Myanmar's constitution-making. Liljeblad describes the state as being "largely free to exercise its law-making powers over environmental governance (306)." Such power is described as a "core element in the struggles between the military and ethnic minorities" and important for the preservation of military power (310). This perspective evokes intersections between the environment and politics. However, regarding environmental governance, another important aspect could be resource nationalism. Under this concept, a government plays a major or monopolized role in controlling natural resources.² In the context of formerly colonized countries, such control may be viewed as resistance against the colonizers who had previously exploited the natural resources.³ Governments may therefore justify their monopoly on environmental

² Luo Shengrong, "Myanmar's Resource Nationalism and Its Influence" in Chaw Chaw Sein, Chenyang Li, and Xianghui Zhu (eds), *Myanmar: Reintegrating Into the International Community* (World Scientific 2016) 369–70.

³ *ibid* 369.

governance under this aspect. In Myanmar's historical context, it should be mentioned that the country's colonization by the British Empire, to some extent, contributed to the way of environmental governance that Liljeblad proposes.

To conclude, with their diverse approaches and methods, the authors of this volume grasp the specific contexts of each jurisdiction and reach conclusions without being overly constrained by the narrow analytical framework. Several chapters contain in-depth information on specific contexts of each jurisdiction. However, possible intersections between the chapters are partly neglected, which raises some questions as to the analytical framework of the study.