Pluralist Constitutions in Southeast Asia

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Pluralist Constitutions and the Southeast Asian Context

JACLYN L. NEO AND BUI NGOC SON

I. Introduction: Constitutions and Pluralities in Southeast Asia

Southeast Asia is a region of vast pluralities. An introductory text on Southeast Asia describes the region in these terms: 'No comparative area of the world has such a range of demographic, ethnic, linguistic, religious diversity as does Southeast Asia.'[1] This diversity has sometimes complicated attempts to properly define Southeast Asia, and indeed Asia in general, beyond a geographical concept. Indeed, the geographical boundaries where Southeast Asia begins and ends have been a fluid one. Nonetheless, regional groupings depend heavily on self-conscious definition. As Asia becomes 'Asianized' through a process of self-conscious coming together,[2] Southeast Asia has become increasingly defined through a voluntary regional grouping under the Association of Southeast Asian Nations (ASEAN). This book therefore adopts the ASEAN grouping as its starting point for defining Southeast Asia. In this regard, its focus is on the exploration of *how the constitutions respond to pluralities in this self-conscious grouping of ASEAN*.[3]

ASEAN consists of ten Member States, namely Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.[4] It is one of the most religiously diverse regions in the world, being home to the largest population of Muslims globally (Indonesia), the largest population of Roman Catholics outside of Latin America (the Philippines), a population with the largest percentage of Buddhists anywhere in the world (Thailand), and the most

[1] Clark D Neher, *Southeast Asia: Crossroads of The World* (Northern Illinois University Press 2010).

[2] Yoichi Funabashi, 'The Asianization of Asia' (1993) 72(5) Foreign Affairs 75.

[3] We are aware that such a position may be problematic as the region could extend beyond ASEAN. To be clear, we do not assert or adopt any political position concerning regionalism in Southeast Asia by adopting the ASEAN grouping.

[4] See the website of the ASEAN: 'Association of Southeast Asian Nations' <https://asean.org/> last accessed 18 September 2018.

religiously diverse country in the world (Singapore).[5] The spread of religions further follows an intra-regional pattern, where an overwhelming majority of Southeast Asian Muslims live in Indonesia, Malaysia, and Brunei, while Buddhism and Catholicism dominate the Myanmar-Indochina region and the Philippines respectively.

On top of its religious diversity, Southeast Asia is also ethnically diverse. Two types of ethnic diversity have been emphasised in the region: first, indigenous ethnic diversity arising from regional variations of cultural and linguistic groups; and second, diversity arising from immigration – primarily of people from the Chinese and the Indian races.[6]

Furthermore, another distinctive feature within Southeast Asia is that all Southeast Asian countries had been colonised by western countries with the sole exception of Thailand. Colonial history, while a seemingly common trait, actually reveals shades of difference among ASEAN countries as the colonial experience in the region is varied. The British empire ruled over Brunei, Malaysia (Malaya, Sabah, and Sarawak), Myanmar (or Burma), and Singapore; while the US controlled the Philippines. Indochina, comprising Cambodia, Laos, and Vietnam, was colonised primarily by France and Indonesia was colonised by the Dutch.[7] The legacies of colonialism varied across these countries, not just in reception of colonial legal, political, social and economic systems, but also in terms of their rejection. As Tan highlights, communism and nationalism fuelled opposition to colonial rule in Southeast Asia and revolution featured prominently as a theme among some post-colonial societies.[8] Thus in apparent attempts to 'restore' the mythical glorious pre-colonial past, several Southeast Asian states eventually jettisoned or at least modified colonially-imposed or influenced constitutional orders.

The impact of colonialism on the legal systems in Southeast Asia is obvious. English common law is adopted by Brunei, Malaysia, Myanmar, and Singapore; whereas civil law is practised in the rest of Southeast Asia. The Philippines, having both Spanish and US influence, practice a mixed legal system instead.[9] Even within each country, there is significant legal pluralism. Thus, systems such as those of Confucian, Islamic, Hindu, Buddhist, and various chthonic or indigenous laws continue to be practised in various Southeast Asian countries. In fact, there is increasing recognition that these underlying traditional legal systems continue to influence law and society.

[5] Pew Research Centre, 'Global Religious Diversity: Half of the Most Religiously Diverse Countries Are in Asia-Pacific Region' (*Pew Forum*, 4 April 2014) www.pewforum.org/2014/04/04/global-religious-diversity/ accessed 18 September 2018.

[6] Charles Hirschman, 'Ethnic Diversity and Change in Southeast Asia' in Calvin Goldscheider (ed), *Population, Ethnicity, and Nation Building* (Westview Press 1995) 22.

[7] See generally, Paul H Kratoska (ed), *South East Asia: Colonial History* (Routledge 2001).

[8] Kevin YL Tan, 'The Making and Remaking of Constitutions in Southeast Asia: An Overview' (2002) 6 Singapore Journal of International & Comparative Law 1, 3.

[9] For comprehensive survey of law in Southeast Asia, see M B Hooker, *Laws of South-East Asia, Volume I, The Pre-Modern Texts* (Butterworth 1986); M B Hooker, *Laws of South-East Asia, Volume II, European Laws in South-East Asia* (Butterworth 1988).

Consonant with its religious, ethnic and legal plurality and varied colonial histories, Southeast Asia is a kaleidoscopic collection of constitutional experiments. Constitutional dynamism and resistance to it is also driven significantly by state-building, economic development, and globalisation.[10] Thailand enacted 20 constitutions as of 2017 but retains fundamentally the same political structure: a constitutional monarch, a Westminster-style government, and a German-style constitutional court.[11] Indonesia's constitution was adopted in 1945 when it declared independence but substantively revised it in the 2000s to firmly establish a presidential system and introduce a constitutional court, among other things.[12] In the Philippines, the current Constitution, which provides the framework for a presidential system modelled after the American system, was enacted in 1987 without any subsequent amendment despite several attempts of constitutional reform.[13]

The constitutional epochs of the British colonists are varied. Brunei practises an absolute monarchy defined by the Constitution of 1959, which was retained even after the constitution was amended in 1984.[14] In Malaysia, the current constitution, enacted in 1957 and frequently amended afterward, establishes a constitutional monarch alongside its Westminster-style government.[15] Singapore is a constitutional republic with a Westminster-style government within the framework established by the Constitution of 1965 and subsequent amendments.[16] Myanmar enacted three constitutions in 1947, 1974, and 2008 – each of which created different types of government.[17]

The former countries of Indochina do not have a single constitutional path either. While Cambodia aspires to implement a liberal constitutional democracy within the 1993 Constitution drafted under the auspices of the United Nations and repeatedly amended afterward,[18] Laos and Vietnam follow a socialist constitutional model which remains in their newly-enacted constitutions of 2015 and 2013 respectively.[19]

[10] See generally, Kevin Tan, 'Making and Remaking of Constitutions' (n 8); Wen-chen Chang, Li-ann Thio, Kevin YL Tan and Jiunn-rong Yeh, *Constitutionalism in Asia: Cases and Materials* (Hart 2015).

[11] See generally, Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Hart 2011).

[12] See generally, Timothy Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Hart 2011).

[13] See generally, Rufus B Rodriguez, *Constitutionalism in the Philippines* (Rex Book Store 1997).

[14] See generally, Hussainmiya, *The Brunei Constitution of 1959: An inside History* (Brunei Press 2000).

[15] See generally, Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart 2012).

[16] See generally, Kevin YL Tan, *The Constitution of Singapore: A Contextual Analysis* (Hart 2014).

[17] See generally, Andrew Harding, *Constitutionalism and Legal Change in Myanmar* (Hart 2017).

[18] See generally, Hor Peng, Kong Phallack and Jörg Menzel (eds), *Cambodian Constitutional Law* (Konrad-Adenauer-Stiftung 2017).

[19] See generally, Gerald Leather, 'Laos: A Constitution in Search of Constitutionalism,' in Clauspeter Hill and Jőrg Menzel (eds), *Constitutionalism in Southeast Asia, Vol 2* (Konrad-Adenauer-Stiftung 2008) 125; Mark Sidel, *The Constitution of Vietnam: A Contextual Analysis* (Hart 2009); Bui Ngoc Son, 'Vietnamese Constitutional Debate in Comparative Perspective' (2017) 11(2) Asian Journal of Comparative Law 189, and the rest of the articles in the special issue on Vietnamese and Comparative Constitutional Law.

These varied constitutional histories and developments make Southeast Asia a particularly rich region for empirical and theoretical examination. Much can be said about the common themes and divergences within the region, the international, regional, and local influences on constitution-making, and how constitutional histories and developments in different countries affect others in the region.[20] As mentioned, the focus for this book is the presence of pluralities and how the various constitutions respond to the extant range of these within each constitution's respective jurisdictions. We propose to conceptualise this phenomenon as one of 'pluralist constitutions' – *a constitution that recognises internal pluralities within society and makes arrangements to accommodate rather than eliminate these pluralities*.

This chapter critically reviews relevant scholarship in Part II, and discusses institutional design in these pluralist constitutions in Part III. Part IV contains our proposed conceptual framework of pluralist constitutions, which we then apply to analysing Southeast Asian constitutions in Part V. We conclude with further reflections in Part VI.

II. Constitutions in Pluralist Societies in Southeast Asia: A Gap in Comparative Constitutional Law Scholarship

While comparative and country-based studies on constitutional law in Southeast Asia abound, this is the first study to approach the issue from a pluralist perspective. This study contributes to existing scholarship on the matter in three ways. First, it offers a constitutional framework to analyse constitutional practices in Southeast Asia where societies are marked by significant pluralities. Secondly, it pluralises the field of comparative constitutional law by identifying internal pluralities as a significant site of constitutional practice and meaning. Thirdly and critically, the study bridges the gap between constitutional theory and scholarship on legal pluralism.

A. Constitutional Law in Pluralistic Southeast Asia

Constitutions in Southeast Asia, in general, and their relationship with internal pluralities, in particular, are understudied in existing constitutional law scholarship.[21] Existing scholarship of Southeast Asian constitutions can be broadly divided into two forms: textualist and contextualist. Textualist approaches focus

[20] See further, Kevin YL Tan and Bui Ngoc Son (eds), *Constitutional Foundings in Southeast Asia* (Hart Publishing forthcoming).

[21] For example, there are no substantive accounts on the relations of constitutions to pluralities in two recent leading books on Asian constitutional law. See Chang (n 10); Rosalind Dixon and Tom Ginsburg, *Comparative Constitutional Law in Asia* (Edward Elgar 2015).

on the texts of the Southeast Asian constitutions, usually providing doctrinal analysis or cross-text comparisons.[22] Textualist accounts do not usually substantively address the questions of how the constitutional texts in Southeast Asia are informed by the realities of plurality.

Contextualist accounts on the other hand do better in accounting for the realities of plurality do not always draw a sufficient connection between these pluralities to constitution-making or design. Furthermore, there is a tendency for some contextualist accounts to focus on single-country study or on a small handful of countries for comparative study. All of these approaches underestimate the relations of the constitution to internal pluralities.

Contextualist accounts can be further divided into macro-historical, political, and social approaches. On the first, macro-historical contextualism situates the Southeast Asian constitutions within their historical surroundings and identify a variety of constitutional models in the regions. Chen, for example, identifies:

1. Marxist-Leninist constitutional systems in Vietnam and Laos;
2. stable hybrid constitutional systems in Singapore and Malaysia which combine both liberal and authoritarian elements;
3. unstable liberal constitutional systems in Philippines, Thailand, and Indonesia;
4. liberal constitutional systems with international intervention in Cambodia and East Timor; and
5. authoritarian constitutional systems in Myanmar and Brunei.[23]

Similarly, Neo presents a typology of three models of state-religion relationships in Southeast Asia. These are, namely:

1. formal prioritisation of religion (Brunei, Cambodia, Indonesia, Malaysia, Myanmar, Thailand);
2. statist or communitarian states that tend to regard religion as an aspect of state control (Laos, Vietnam, Singapore); and
3. formalised separation of state and religion (the Philippines).[24]

These typologies focus the plurality of constitutional experiences *among* Southeast Asian nations. Our study, however, is instead concerned with pluralist constitutional experiences *within* individual Southeast Asian nations.

[22] See the three volumes by Clauspeter Hill and Jörg Menzel (eds), *Constitutionalism in Southeast Asia* (Konrad-Adenauer-Stiftung 2008).

[23] Albert H Y Chen, 'Western Constitutionalism in Southeast Asia: Historical and Comparative Observations' in Dirk Ehlers, Henning Glaser and Kittisak Prokati (eds), *Constitutionalism and Good Governance: Eastern and Western Perspectives* (Nomos Publishers 2014) 6.

[24] Jaclyn L Neo, 'Realizing the Right to Freedom of Thought, Conscience, and Religion: The Limited Normative Force of the ASEAN Human Rights Declaration' (2017) 17(4) Human Rights Law Review 729.

Secondly, political contextualism locates the constitutions and constitutional practice in Southeast Asia within political contestation.[25] Domestic pluralities however tend to be viewed as a source of constitutional contestations rather than as a source of constitutional dynamism.

Finally, social contextualism locates the constitutions in South East Asia (and other Asian parts) based on various types of social difference, including religion, ethnicity/race, urban/rural divisions, language, gender, and sexual orientation.[26] Social contextualists tend to focus on the functional question of how the constitutions deal with difference but do not substantively address this ontological question: what is the nature (not only function) of a constitution when it engages with plurality?

Pluralist constitutionalism recognises – indeed even celebrates – contextualism. However, it is also methodologically pluralistic on two levels. First, it adopts contextualism broadly, including macro-historical, political, and social contextualism. Secondly, it is methodologically pluralistic in that the embrace of contextualism does not exclude the formal text and law. Since constitutional texts are embodiments of domestic pluralities, textualist accounts are still important. Pluralist constitutionalism emphasises that there is connection between text and context, as formal texts must be located within the historical, political and social contexts. Consequently, pluralist constitutionalism adopts an integrated approach towards text and context whereby contextualism must be integrated with textualist considerations. Such methodological pluralism is also directed to a range of ontological, functional, and consequential questions related to constitutional engagement with plurality. These include inquiries into the nature of the constitution, its functions, as well as the results of any constitutional engagement with plurality.

B. Comparative Constitutional Law

Following from constitutional theory's limited engagement with pluralities within constitutional systems in Asia, studies in comparative constitutional law have also tended to overlook the significance of internal plurality within Southeast Asian constitutions. This partly stems from the epistemological foundations of comparative constitutional inquiry. First, comparative constitutional inquiry is dominated by institutionalism, especially juricentrism. While it is important to explore judicial review, constitutional cases, and more recently the making and amendment of constitutions, this does not sufficiently account for the plural social contexts of constitutional design and practice.[27] Second, the prevalent use

[25] Marco Bünte and Björn Dressel, *Politics and Constitutions in Southeast Asia* (Routledge 2017). See also, Victor V Ramraj, 'Constitutional Tipping Points*:* Sustainable Constitutionalism in Theory and Practice' (2010) 1(2) Transnational Legal Theory 191.

[26] Susan H Williams (ed), *Social Difference and Constitutionalism in Pan-Asia* (CUP 2014).

[27] For some recent works in these lines, Conrado Hübner Mendes, *Constitutional Courts And Deliberative Democracy* (OUP 2014); Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of*

of functionalism and universalism[28] in comparative constitutional inquiry tends to focus on global constitutional convergence.[29] This results in these inquiries underestimating factors that induce internal constitutional divergence.[30] Third, eurocentrism dominates comparative constitutional inquiry, which makes the field focus mainly on a limited set of constitutional systems sharing similar features such as the separation of power, the bill of rights, and judicial review. This unfortunately marginalises constitutional experience of the global south.[31] While there is a growing body of Asian comparative constitutional scholarship,[32] this literature has also been dominated by the institutional approach and has yet to fully accounted for the pluralist foundations of constitutional institutions save for a few exceptional studies.[33]

C. Legal Pluralism and Constitutional Theory

Thirdly, this book hopes to bridge the gap between two scholarships on constitutional theory and legal pluralism. There are extensive studies of legal pluralism in Southeast Asia,[34] but this body of scholarship focuses on the existence of two or more legal systems within a Southeast Asian country – particularly the coexistence of colonial law with traditional or indigenous law. Literature on legal pluralism does not always address the influence of, and its impact on, constitutional arrangements and practices across different countries. Theories of legal pluralism

Constitutional Courts (OUP 2014); Sujit Choudhry and Tom Ginsburg, *Constitution Making* (Edward Elgar Publishing 2016); Richard Albert, Xenophon Contiades and Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Hart 2017).

[28] On these two constitutional epistemologies, see Vicki Jackson, 'Comparative Constitutional Law: Methodologies' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 54.

[29] For reviews and discussions of several theories of constitutional convergence, see Rosalind Dixon & Eric Posner, 'The Limits of Constitutional Convergence' (2011) 11 Chicago Journal of International Law 399.

[30] Jaakko Husa, 'Global Constitutionalism – Some Critical Remarks,' (2017) 47 Hong Kong Law Journal 13; David Law, 'Alternatives to Liberal Constitutional Democracy' (2017) 77 Maryland Law Review 223.

[31] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014).

[32] For a review of this scholarship, see Andrew Harding and Bui Ngoc Son, 'Recent Work in Asian Constitutional Studies: A Review Essay' (2016) 11(1) Asian Journal of Comparative Law 163–183.

[33] Such exceptions include: Benjamin Schonthal, 'Formations of Buddhist constitutionalism in South and Southeast Asia' (2017) 15(3) International Journal of Constitutional Law 705–733; Pranoto Iskandar, 'Indigenizing Constitutionalism: A Critical Reading of Asian Constitutionalism' (2017) Oxford Unversity Comparative L Forum 2 https://ouclf.iuscomp.org/indigenizing-constitutionalism-a-critical-reading-of-asian-constitutionalism/ accessed 18 September 2018.

[34] Hooker M B, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Oxford: Clarendon Press 1975); Gary Bell (ed), *Pluralism, Transnationalism and Culture in Asian Law: A Book in Honour of M.B. Hooker* (ISEAS Yusof Ishak Institute 2017); Poh-Ling Tan (ed), *Asian Legal Systems: Law, Society, and Pluralism in East Asia* (Butterworths 1997). See also, Adam Possamai, James T Richardson and Bryan S Turner (eds), *Legal Pluralism and Shari'a Law* (Routledge 2016), with particular regard to ch 5.

problematised the idea of law as a closed system, and saw 'societies, states and "tribes" as self-contained, decontextualized units.'[35] Legal pluralists propose a conception of law that recognises and emphasises its plurality (beyond state-made law), fluidity (between different legal systems and sub-systems), the importance of private law-making (presence of social norms and conventions), and the presence and influence of unwritten norms (whether in the form of natural law, social norms or religious norms).[36] Legally, pluralist arrangements involving the state also tend to be given less focus, as unfortunately reflected by the term 'weak' legal pluralism.[37] Our account seeks to provide a link between legal pluralism and constitutionalism.

III. Institutional Design and Pluralist Constitutions

In comparison, the political scientists do a better job in addressing the impact of pluralities on constitutions. Specifically, scholars working on ethnic plurality have long advocated various forms of constitutional engineering to promote stable democracy in deeply divided societies.[38]

Arend Lijphart's consociationalism proposes grand coalitions among political elites to ensure inter-ethnic power sharing,[39] whereas Donald Horowitz's work examines, inter alia, electoral systems and the role of race-based parties in exacerbating existing ethnic division.[40] Lijphart's consociational approach relies on elite cooperation between leaders of different communities.[41] This entails grand coalition cabinets, elections with proportional representation, minority veto powers, and communal autonomy – all of which are meant to maximise the independence and influence of each main ethnic community.[42]

[35] William Twining, *Globalisation and Legal Theory* (Butterworths 2000) 7. See also, Gad Barzilai, 'Beyond Relativism: Where is Political Power in Legal Pluralism?' (2008) 9 Theoretical Inquiries in Law 395, 396.

[36] Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, (CUP 2006) 34.

[37] For a description of the types of legally pluralistic orders (and more), see William Twining, 'Normative and Legal Pluralism: A Global Perspective' (2010) 20 Duke Journal of Comparative & International Law 473.

[38] Donald L Horowitz, Ethnic Groups in Conflict (University of California Press 1991).

[39] For Arend Lijphart's work, see *Democracy in Plural Societies: A Comparative Exploration* (Yale University Press 1977).

[40] For Donald Horowitz's work, see *A Democratic South Africa? Constitutional Engineering in a Divided Society* (University of California Press 1991); 'Constitutional Design: An Oxymoron?' in Stephen Macedo and Ian Shapiro (eds), *Designing Democratic Institutions* (Nomos XLII 2000) 253–284 and (2000) 3 Democratic Culture 117–147; 'Constitutional Design: Proposals Versus Processes' in Andrew Reynolds (ed), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (OUP 2002) l, 15–36; 'Conciliatory Institutions and Constitutional Process in Post-Conflict States' (2008) 49 William and Mary Law Review 1213–1248; 'Encouraging Electorial Accommodation in Divided Societies' in Brij Lal & Peter Larmour (eds), *Electoral Systems in Divided Societies: The Fiji Constitution* (ANU Press 2012).

[41] Lijphart (n 39).

[42] ibid.

In contrast to consociational approaches, centripetalism denotes institutional designs that encourage inter-communal moderation and cooperation. This is achieved by promoting multi-ethnic political parties, cross-cutting electoral incentives and inter-group accommodation.[43] Benjamin Reilly's exposition of centripetalism focuses on putting in place institutional incentives for cross-ethnic behaviour in order to encourage cooperation between rival groups.[44] A third approach identified, communalism, is explained by Reilly as encompassing the use of explicit ethnic criteria of representation.[45] Quotas, for instance, would be a form of communal approach.

Theorists of constitutional designs for pluralist societies have further identified two competing models: accommodation and integration.[46] While integrationists promote a single public identity, accommodationists advocate for dual or multiple public identities.[47]

Inspired by these developments in political science, several scholars of comparative constitutional and other fields of law have turned to questions of constitutional design in pluralist or divided societies in recent times.[48] This literature in both political science and comparative constitutional studies has provided important normative theories and detailed institutional recommendations.

That said, the term 'design' suggests a technocratic and systematic approach to constitution-making.[49] However, scholars have identified difficulties with a design-oriented approach to constitutions, including the fact that institutional designs are often based on speculative predictions of how institutions will actually function, and thus be distorted by bias and self-interest.[50] We will identify and address some limitations among the wider range of criticisms below.

First, the existing scholarship is concerned with ameliorating pluralities since its focus is on divided societies. This results in an over-emphasis on internal plurality as a source of social division, and fails to see plurality as engendering a host of

[43] Benjamin Reilly, 'Institutional Designs for Diverse Democracies: Consociationalism, centripetalism and Communalism Compared' (2012) 11 European Political Science 259.

[44] ibid. See also, Benjamin Reilly, 'Centripetalism: Cooperation, Accommodation, and Integration', in Stefan Wolff & Christalla Yakinthou (eds), *Conflict Management in Divided Societies: Theories and Practice* (Routledge 2012).

[45] ibid 260.

[46] See John McGarry, Brendan O'Leary and Richard Simeon, 'Integration or Accommodation? The Enduring Debate in Conflict Regulation,' in Sujit Choudhry (ed) *Constitutional Design for Divided Societies: Integration or Accommodation?* (OUP 2008) 42.

[47] ibid.

[48] See generally, Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (OUP 2008); Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press, 2011); Jaime Lluch, *Constitutionalism and The Politics of Accommodation In Multinational Democracies* (Palgrave Macmillan 2014); Michel Rosenfeld, *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press 1994); Aslı Ü Bâli and Hanna Lerner, *Constitution Writing, Religion and Democracy* (CUP 2017).

[49] Tom Ginsburg (ed), *Constitutional Design* (CUP 2012).

[50] See Horowitz, 'Constitutional Design: Proposals Versus Processes' (n 40). See also Horowitz's article in 'How to Study Constitution-Making: Hirschl, Elster and the Seventh Inning Problem' (2016) 96 Boston University Law Review 1347.

social and political relationships of differing intensities. Furthermore, by focusing on divided societies, societies that are less divided are given less attention although they are no less pluralistic. This is especially problematic as these less divided societies may provide more insight into constitutional arrangements that have been successful in managing plurality. Thus, a primary concern with divided societies may result in an under-appreciation of crucial functions that constitutions play in such pluralistic societies, such as an instrument to mitigate social polarisation while permitting expressions of plural public identities.

Secondly, the design options are created for *deeply* divided societies. Their applicability therefore depends on there being deep division within societies. Many societies, including those within Asia, may not themselves be deeply divided or have started out as such. It would be difficult to determine if applying institutions designed to address deep division in turn reinforces and deepens those divisions, since it requires an exercise in the counterfactual. Nonetheless, it would be an important question to ask if these institutional options are suited for societies that are less deeply divided.

Thirdly, where existing scholarship focuses mainly on ethnic pluralities, it may to overlook other forms of pluralities, such as those of religion, values, ideas, and even systems. Ethnic identity may be distinguished from religious identity since religion may often be considered as more fluid – particularly where the state does not restrict religious choice or conversion. In most instances where the state does impose such restrictions, religious identity is arguably seen as a form of ethnic identity and/or as intertwined with ethnic identity, which often results in greater politicisation of racial/religious identity.[51] Ideational differences are also distinct from ethnic differences since they are based on ideological commitments, which are not necessarily intertwined with identity. While there is little difference in the level of difficulty in overcoming ideological commitments, religious identity politics or ethnic identity politics, we suggest that constitutional designs specifically for ethnic identity politics may not always be suitable where different forms of plurality are involved.

Consequently, we have not adopted the lens of deeply divided societies nor their common framework of choices. Instead, this book investigates options that may not neatly fall within these options and considers ways in which various forms of plurality have been addressed within the region.

IV. Pluralism-in-fact and the Pluralist Constitution

The question of plurality and pluralism has increasingly become a crucial focus of constitutional scholarship in recent times. Michel Rosenfeld's work in this area

[51] See Jaclyn Neo, 'What's in a name? Malaysia's "Allah" controversy and the judicial intertwining of Islam with ethnic identity' (2014) 12(3) International Journal of Constitutional Law 751–768.

is of particular importance. He distinguishes 'pluralism-in-fact' from 'pluralism-as-a-norm', where the former denotes 'societies marked by the coexistence of a number of competing and often antagonistic conceptions of the good.'[52] This may be the result of diversities between and within groups and individuals.[53] However, as Rosenfeld rightly points out, 'the fact of pluralism … does not tell us anything about how we ought to deal with conflicts arising within pluralistic societies'.[54] There are many possible approaches to addressing plurality within society. One such approach is liberal constitutionalism which emphasises the neutral State and equality; but it is not necessarily the only one.

'Pluralism-as-a-norm', or normative pluralism, posits that pluralism in fact is good.[55] Conflicts in a pluralistic society thus 'ought to be handled in a way that is designed to preserve and enhance pluralism'.[56] In other words, pluralism-as-a-norm entails 'the pursuit of pluralism on normative grounds.'[57] It is a conception of the good, and does not assume a position of genuine neutrality as regards to other competing conceptions.[58] Nonetheless, normative or comprehensive pluralism does seek to be inclusive of these other conceptions of the good. It is thus distinguishable from monism where it does not take the view that there is a single conception of the good that is preferable.[59] Even more boldly, Rosenfeld distinguishes normative pluralism from relativism, thus rejecting the view that all value preferences are ultimately purely subjective and contingent.[60] His pluralism-as-a-norm is therefore propounded as 'a critical counterfactual ideal [that] yields the best possible normative criterion for the reconciliation of self and other within a pluralistic in fact society, in a way that maximizes the potential for justice while minimizing that for violence.'[61] It is premised upon a dual emphasis on equalising all conceptions of the good and including them, rather than relying on hierarchy and exclusion.[62] Pluralist constitutional ordering as such involves 'multiple sets of norms that intersect, overlap, divide the field, or relate to one another horizontally rather than vertically.'[63]

While it remains to be seen if Rosenfeld's proposal for normative pluralism is the preferred way of addressing 'pluralism-in-fact', we agree that it is necessary

[52] Michel Rosenfeld, *Just Interpretations: Law between Ethics and Politics* (University California Press 1998) 200–201.
[53] ibid 201–3.
[54] ibid 200.
[55] ibid 206.
[56] ibid 201.
[57] ibid.
[58] ibid.
[59] ibid 206.
[60] ibid.
[61] ibid 207.
[62] ibid 208. There are of course important criticisms to Rosenfeld's attempt to straddle the middle ground between monism and relativism, though it is not necessary to go into these criticisms for this book.
[63] Michel Rosenfeld, 'Rethinking constitutional ordering in an era of legal and ideological pluralism' (2008) 6(3–4) International Journal of Constitutional Law 415, 417.

to distinguish between factual and normative pluralisms to resist constitutional monism. Our proposal of a pluralist constitution is more modest. Ontologically, we see the pluralist constitution as *a constitution that recognises and accommodates (and not eliminate) internal pluralities within a given society*. It does not go as far as Rosenfeld's normative pluralism to prescribe a comprehensive doctrine to equalise and include a plurality of conceptions of the good. Pluralist constitutions are therefore minimalist: they abjure attempts to eradicate pluralities, but may at times provide incentives for individuals and groups to abandon pluralities. Thus, for instance, a proposal for ideas of national citizenship transcending inter-group differences may persuade groups to shift their loyalties to the nation.

What the pluralist constitution clearly rejects is any attempt to ignore or *coercively* eliminate individual and group identity that is not in line with the predominant identity. This conception of pluralist constitutions can accommodate a more flexible range of constitutional choices between inclusion and exclusion, and between equality and non-equality. It is minimalist in terms of the degree of inclusion and equality. Within the pluralist constitution is a combination of hierarchical and heterarchical legal relationships. Multiple sets of norms in such constitutions may interact sometimes vertically, and other times horizontally. The consequence of this interaction may be what we call 'state constitutional pluralism': a concept that denotes competing claims to constitutional meanings by different institutional and social actors within a state.[64] Thus, what is distinctive about the pluralist constitution is the dynamism with which it develops in response to a society's range of pluralities.

A pluralist constitution is likely to reflect a political compromise among constituents with divergent interests and ideologies. It signifies that proponents of divergent interests 'have agreed to set aside their political differences concerning the subject matter of the law and to converge, for the time being, around legislation.'[65] Thus, it is possible that constitutional settlements within the pluralist constitution are much less permanent since the dynamics of convergence and divergence remain in play within the constitutional order. Interpretation of the constitutional 'settlement' becomes a focal point in promoting and defending key constitutional values even after the constitution has been agreed upon. While courts may be an important forum for this contestation, constitutional interpretation outside courts, such as in the social and political arena, also reflects the dynamism of the pluralist constitution.

Another dynamic aspect of this pluralist constitution is that the class of legitimate participants of constitution-making and re-making is not closed. While certain forms of pluralities may be accounted for when the constitution was initially made, the 'people' is not a closed category. Therefore, a pluralist

[64] We explore this concept in a separate study in engagement with the European concepts of supranational constitutional pluralism.

[65] Rosenfeld (n 63), 421–2.

constitution should be able to reconsider new constitutional claims and modify its existing settlement to address them. While possibly disruptive, this dynamism would better reflect the practice of constitutional law in many pluralist countries.

One further advantage of conceptualising constitutions as pluralist is also to highlight that constitutional 'settlements' should not be taken for granted. Indeed, constitutional values need to be constantly defended and negotiated in order to preserve them. Where dominant groups assume the permanent superiority of their constitutional values, they may be less prepared to defend these values against objectors both old and new. This is analogous to Mill's argument for free speech as being important to the discovery of truth. The value of freedom of speech lies in its remit to challenge opinions, which enshrines them as 'living truth' rather than dead dogma.[66] Constitutions too need to be constantly negotiated and defended in order for them to remain relevant.

Consequently, pluralist constitutionalism, as a category of constitutionalism, does not merely draw our attention to pluralist sources and contentions within a constitutional system. A crucial dynamic that pluralist accounts can surface is the tussle between the appeal of unity and the reality of plurality. Constitutions, as a tool of state and nation-building, often aspire towards political and social unity. In other words, there is often a strong monist logic inherent to the idea of a constitution. Even where Robert Dahl speaks of pluralism, he speaks of 'the existence of plurality of relatively autonomous (independent) organizations (subsystems) within the domain of a state'.[67] In this regard, the State remains the dominant forum; relative autonomy remains mediated and controlled by the state. Dahl's attention to pluralism within democracies adopts the lens of organisations, which could be organised along ideology, religion, language, ethnicity and region. However, pluralist constitutionalism, as we propose here, is concerned with not just organisational autonomy and engagement with the state within a democratic entity. In fact, we take as a given that pluralist constitutions can take non-democratic forms; indeed, some of the constitutions examined in this book are socialist constitutions while one, Brunei, is an absolute monarchy.

This tussle between unity and plurality is also played out in contests along the lines of monism and pluralism or hierarchy and hetararchy. Indeed, pluralist constitutions emphasise that plurality can result in a relationship beyond just relative autonomy mediated through a hierarchical structure. It is one that could also give rise to a dynamic that could more or less be balanced and thereby less hierarchical but more hetararchical.[68] To be clear, hetararchical relations are not

[66] John S Mill, *On Liberty* (1st ed, John W. Parker and Son, London 1859).

[67] Robert A Dahl, *Dilemmas of Pluralist Democracy: Autonomy vs Control* (1st ed, YUP 1983) 5.

[68] Constitutional pluralism, which has been developed in the context of the national and supranational relations within the EU, is one such hetararchical arrangement. We have also identified a form

necessary features of the pluralist constitution. Our position is simply that relative autonomy can be conceptualised in more expansive manners.

V. Pluralist Constitutionalism in Southeast Asia

It bears mentioning here that this book is the culmination of a collaborative project. We gathered a group of scholars to examine constitutions and plurality in their respective countries in Southeast Asia at a workshop held in Singapore by the Centre for Asian Legal Studies at the Faculty of Law, National University of Singapore on 27 and 28 July 2017. For each country's paper, we asked scholars to: (1) provide a brief historical account of the nation's constitutional history and the context of domestic plurality; (2) address a range of questions related to the forms, substances, functions, and consequences of constitutional engagement with plurality; and (3) offer key observations on how the pluralistic sources shape/affect constitutional law and politics. The range of questions includes the following:

Constitutional ideas and values: What are the shared common goods the nation adopts? What are the fundamental ideas and values that inform the constitutional practices of the nation? What are the similarities and differences and the interactions of these constitutional ideas and values?

Constitutional rights: What are the principles of constitutional rights? Are rights considered universal or relative or both? Is there the principle of proportionality? What are specific rights included in the Constitution to address plurality?

Sources of constitutional norms: What are the sources of constitutional law in your country? What are some of the distinctive norms of these different sources of laws? Do the norms of these different systems conflict? What are the main points of conflict? How are conflicts to be resolved?

Constitutional structure: How is the overall constitutional structure arranged? How are constitutional ideas or values related to constitutional structure? How is the legislative election system designed to respond to plurality? Does plurality affect the choice of system of government (parliamentarism, presidentialism, or mixed)? What is distinctive about the organisation, operation, and relations of the three branches of the state (legislature, executive, and judiciary) in your country? How does this institutional arrangement respond to plurality? How is the head of state selected? Does plurality affect this selection? How do the branches of government claim their legitimacy? How do they understand constitutional meaning? Are there distinctive constitutional institutions beyond the usual branches of legislature, executive, and judiciary? If yes, how are they arranged and how are they

of pluralism, which we denote as state constitutional pluralism, which examines hetarchical arrangements within national boundaries. See Jaclyn L. Neo and Bui Ngoc Son, 'State Constitutional Pluralism' (forthcoming).

related to plurality? Is there judicial review or other adjudicatory or administrative mechanisms to adjudicate upon the constitutionality of State action? Which institutions have the primary function of interpreting the constitution? If your country has a specialist judicial review system, how do the constitutional review bodies and the ordinary courts and other political institutions interact? How is the vertical separation of power (federalism and decentralisation) designed to respond to plurality?

These questions are intended to be fairly comprehensive in order to ensure broad comparative consistency and a productive conversation. However, scholars are not asked to address all these questions, and could focus on particular questions that are most relevant to the prominent pluralist features of their respective constitutions. We focus below on the most prominent pluralist features of the constitutions from each country's chapter, and elucidate some insights from our overall study.

First, we found that there is no single model of pluralist constitutions in Southeast Asia. As a consequence of how the region is a plurality of pluralities, there is likewise a plurality of pluralist constitutions here. Although we found that all constitutions in the region have responded to the reality of pluralities, the presence, level, and consequence of pluralist constitutions are varied. Solutions proposed to address plurality range from formal equality, minority protections, affirmative action, and federalism, with many other approaches in between and beyond.

Secondly, while ethnicity is the major source of plurality influencing constitution-making and change in Brunei, Malaysia, Myanmar and Singapore, they feature much less in other Southeast Asian countries. In Malaysia, for instance, Dian Shah points out how inter-ethnic contestation and cooperation critically affected the constitutional negotiation over fundamental rights.[69] Specifically, the pull between fundamental liberties, equal rights for *all*, and special privileges for the disadvantaged Malay majority was a crucial flashpoint for Malaysia's constitution-drafting process.

Constitutional approaches towards ethnic plurality can also change over time, as shown in Eugene Tan's account of Singapore (Chapter 3). While ethnic plurality has always been a concern for Singapore's constitution-makers, this plurality has been addressed through a combination of commitments to formal equality and substantive equality. In particular, there has been a shift in policies and constitutional solutions adopted by the Singapore government towards a preference for specific mechanisms that address ethnic plurality, rather than to rely strictly on an ethnic-blind approach guaranteed under formal equality.

In contrast to such countries which directly grappled with the different interests and demands of ethnic groups, other countries in Southeast Asia did not address the question of ethnic plurality in their constitutions. This is especially

[69] See ch 2.

curious since ethnic pluralities do exist in these other countries as a matter of fact. For instance, as Bui Ngoc Son points out in Chapter 8, both Vietnamese and Lao societies are ethnically plural. He however observes that these societies are 'not divided' along ethnic lines and that there have not been serious ethnic conflicts translating to severe political crises. This leads into an interesting argument by Bui: that while both the Vietnamese and Lao PDR constitutions are not designed to regulate ethnic plurality, their constitutions are not necessarily silent about it. In this regard, ethnic plurality could be said to function in the background of a constitution that aspires towards ethnic unity.

Thirdly, religion is another common source of plural contests within countries in Southeast Asia – though again not in all of them. Perhaps unsurprisingly, religion is a flashpoint in constitution-making and change in religiously plural countries like Brunei, Indonesia, Malaysia, Myanmar, and Singapore. For instance, in Indonesia, as Dian Shah and Herlambang Wiratraman observe, the most contentious issue debated in 1945 while the constitution was being made was whether Islam should be the religious basis of the state in Indonesia. A proposal was initially made to include the *Jakarta Charter*'s statement that obliges the state to carry out Islamic *shari'a* for its adherents[70] in the 1945 Constitution. However, this was removed after Christian nationalists in eastern islands of Indonesia threatened to secede from the newly independent state. Thus, while Indonesia has a dominant religious majority with almost 90% being Muslim, religious plurality is still a major factor in constitution-making and change.

Fourthly, ideational plurality, while often overlooked, is also a source of significant value within the constitution. This is interestingly observed in the three constitutions in the Indo-China region of Southeast Asia. In Lao PDR, Vietnam, and Cambodia, as Bui Ngoc Son highlights, there is a strong tendency towards constitutional monism and the unitary orientation of the state. This is particularly the case in Vietnam and Lao PDR which have socialist constitutions. Political monism is implemented in these two countries with their national constitutions mandating the dominance of a communist party. At face value, Laos and Vietnam may thus be easily considered as constitutionally monist as well. The stories are, however, much more complex as these two societies are ethnically plural though not divided. Their constitutions are neither exclusively informed by communist values nor silent about ethnic plurality; instead, these constitutions are relatively pluralist as the consequence of their expression of ethnic values:

> From the preamble to constitutional provisions on fundamental principles of the regime, to the bill of rights, to the structural institutions, the constitutions seek to express the reality of ethnic plurality, the aspiration to continuing ethnic unity, the sovereignty of a unified people, and the state's commitments to promotion of socio-economic development of ethnic groups and protection of their rights.[71]

[70] Specifically, '… *dengan kewajiban menjalankan syariat Islam bagi pemeluknya*' (in Bahasa Indonesia).

[71] See ch 8.

In contrast, Cambodia was a former member of French colonial Indochina like Vietnam and Laos, but constitution-making in the country departed from a communist path due to the influence and involvement of the international community. Ratana Taing's account in Chapter 7 highlights that the 1993 Constitution of the Kingdom of Cambodia, is nonetheless, a pluralist constitution underpinned by variety of constitutional values.[72] The Cambodian constitution therefore engages with values from transnational, local, and religious origins. The Cambodian constitution is committed to recognising and respecting 'human rights as enshrined in the United Nations Charter, the Universal Declaration of Human rights and all the treaties and conventions related to human rights, women's rights and children's rights.'[73] It also adopts western liberal values, particularly Locke's idea of a social contract, Montesquieu's model of separation of powers, as well as liberal multi-party democracy. At the same time, the constitution is also informed by local traditional values, including monarchism as an unamenable feature, and the confirmation of Buddhism as the state religion.

This ideational plurality is present in Thailand in a different but no less fascinating manner. Like its neighbour Cambodia, Thailand's constitution is informed by monarchical and Buddhist values. It is pluralist where western ideas of constitutional law struggle against the idea of *Thainess* rooted in the monarchy and Buddhism. Apinop Atipiboonsin labels Thailand's constitution as a 'volcanic constitution' in the sense that it struggles between two competing sets of constitutional ideas:

> while constitutional democracy focuses on the will of the people and give rise to opportunities for plurality to express in the regime through empowering its citizen, the idea of *Thainess* and traditional ideas limit the range of plurality allowed under the regime.[74]

Fifthly, pluralist constitutionalism can be formalised as an ideological ideal. Where this is the case, contests between unity and plurality become constitutionalised as a site of constant negotiation. The key example here is Indonesia which constitutionalises the nation's philosophy, *Pancasila*. The Indonesian Constitution's preamble defines this philosophy as the 'source of all legal sources'. Pancasila, however, has been interpreted differently over time as a response to different constitutional ideas and values in each period. This is also because Pancasila is not a single monist set of values. Further, the institutional arrangement is responsive to religious plurality and legal pluralism, which is observed in the creation of the Sharia Court and numerous Customary courts (or *Adat* courts). The latter have even influenced the decisions of the Constitutional Court.[75]

Sixthly, plurality can be overlapping and mutually reinforcing. One example is in the coincidence of the Malay race and Islamic faith in Brunei, Malaysia,

[72] See ch 7.

[73] Art 31 of the Constitution of the Kingdom of Cambodia, 21 September 1993 www.refworld.org/docid/3ae6b5428.html accessed 18 September 2018.

[74] See ch 9.

[75] See ch 5.

and Singapore. Another form of mutually reinforcing plurality within Southeast Asia is between ethnicity and territory, and this specifically implicates territorial division as a way to accommodate differences. This is because where ethnicity and territory coincide, there tends to be scope for identifiable political mobilisation for regional autonomy. Such regional claims are present in Myanmar where ethnic plurality coincides with regional distribution. While the state has historically insisted on a unitary state and tried to accommodate ethnic pluralities, its attempts to do so by classifying certain groups as 'citizens' has not been entirely successful. As Nyi Nyi Kyaw explains, ethnic and territorial federalism are among demands that have been repeatedly asserted to ensure some power sharing among Myanmar's ethnic groups.[76]

Another example of regional autonomy as a means to accommodate plurality can be seen in the Philippines. As Bryan Dennis Tiojanco points out, the Philippines Constitution endorses the creation of autonomous regions in Muslim Mindanao and the Cordilleras.[77] This is done with the aim of accommodating the aspirations of groups who have been historically marginalised. Tiojanco also argues that the Philippine constitution promotes civic virtue and constitutional loyalty through a 'pluralist framework of integrated diversity'. The creation of autonomous regions can be seen as a strategic embrace of pluralism in an attempt to inoculate secessionist demands and keep these regions within the 'integrated' State of the Philippines.

Lastly, it cannot be gainsaid that all constitutions are ultimately pluralist and should be conceptualised and analysed as such. Plurality of all forms influence constitution-making and change in different ways and to different extents, but it is always present regardless. Tiojanco's chapter points to networks of kin as yet another source of plurality in the Philippines, and highlights the role of civil society in pluralising politics and unifying the country on various issues.[78] He contextualises this within the Philippine constitution's 'People Power Principle', which institutionalises the revolutionary spirit of people power by promoting the right of citizens to political participation.

Furthermore, even in countries that, on first blush, appear to be constitutionally monist *de jure*, constitutional practice in these countries may in fact be more pluralist than first expected. Brunei Darussalam is an excellent example of a country that strongly exhibits constitutional monism, albeit without a robust constitutionalism that limits absolute power. While it has a written constitution, Brunei is also an absolute monarchy. There is no separation of powers as the Sultan of Brunei wields executive, legislative, as well as religious powers without any alternative locus.[79] As Kerstin Steiner and Dominik Mueller observe in their chapter, the Sultan forms a 'Personaleinheit' – an amalgamation of roles and powers in one person.[80] The Sultan's authority is formally encompassed within the state

[76] See ch 6.
[77] See ch 10.
[78] ibid.
[79] Constitution of Brunei Darussalam 1959 (2011 Rev Ed).
[80] See ch 4.

ideology of 'Melayu Islam Beraja' (Malay Islamic Monarchy). The centrality of the Sultan and his monopoly on power indicates a highly singular constitutional order. Certain pluralist values however remain present, albeit suppressed by virtue of the state's strong control. For instance, value pluralism can be found in the state ideology of Melayu Islam Beraja. While it purports to draw three ideas of legitimacy together and locate them within the single person of the Sultan, these are in fact three distinctive and potentially competing claims of authority. For instance, the idea of Beraja or monarchy rests upon hereditary authority, but one that is premised upon familial heritage and not religious heritage. The relationship between Malay and Islam are also distinctive and potentially contrasting. Even in Brunei, being Malay is an ethnic association that does not necessarily coincide with Islam-ness. Islam itself can also transcend Malay-ness. Nonetheless, as long as the Sultan wields absolute power within Brunei, pluralism remains generally suppressed.

VI. Conclusion

While this study focuses mainly on the national context of Southeast-Asian countries, it may have implications for broader global and comparative constitutional discourse. We focus here on three potential themes, namely: constitutional pluralism, pluralist constitutionalism, and pluralist global constitutionalism.

To begin with, pluralist constitutions can potentially result in constitutional pluralism within a single state. The constitution as such would not provide an exhaustive framework for its legal order, and institutional authorities may also attach different values to claims of constitutional meaning. Several scholars in this book have discussed constitutional pluralism, but this remains an important question for future research and empirical verification.

The second theme is the relationship between the pluralist constitution and pluralist constitutionalism. A pluralist constitution is not necessarily implemented in the way that makes the regime accountable to general values. It can even be implemented under authoritarianism. However, authoritarian regimes may have to adopt some constitutionalist practices in response to plurality. A pluralist constitution may thus blur the distinction between authoritarianism and constitutionalism, and its implementation may result in pluralist constitutionalism: a type of constitutionalism in which the use of political power is constrained by and accountable to domestic pluralities.

Finally, a more nuanced approach to constitutionalism around the world requires attention to plurality in a global context. Pluralist global constitutionalism has two important dimensions. First, global constitutional ideas and institutions may be localised as the consequence of their interactions with local pluralist values. Second, pluralist global constitutionalism would acknowledge and explore the diversity of constitutional experiences in different corners of the globe. In

response to domestic plurality, people around the world may have a large variety of constitutional experiences and innovations.

These themes represent just some rich sites for future enquiry, and it is the aim of this collection to spark off further conversation about the impact of pluralities on constitution-making, constitutional change, and constitutional re-making.

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