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BOOK REVIEW

Constitutional Statecraft in Asian Courts

by Yvonne Tew. Oxford: Oxford University Press, 2020. 272 pp. Hardcover: £80.00.

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Yvonne Tew's *Constitutional Statecraft in Asian Courts* is a careful and detailed study of constitutionalism in Malaysia and Singapore. The book combines history, theory, and practice to offer a nuanced account of how judicial power has evolved in both countries and provides a framework for how it can be harnessed further in the service of constitutional democracy.

The book begins with a theoretical section that overviews the major literature in this area.[1] Tew is critical – rightly so – of categorical statements about the nature of judicial power and of constitutional rights. She helpfully deconstructs and critiques several dichotomies including the universal versus relativist conceptions of human rights, which was prominent in the 'Asian values' debate of the 1980s and 1990s, and still has resonances today.[2] This is the idea, advanced by Lee Kuan Yew and Mahathir Mohammad, among others, that Asian cultures place higher value on community and social order than on 'Western' notions of individual liberty.[3] In addition to essentialising the values of a large and diverse continent, Tew points out that 'Asian values' is susceptible to ideological capture, particularly in the context of justifying the policies of authoritarian regimes.[4]

Tew is also skeptical of the dichotomy she observes in the existing literature between 'herculean' and 'Sisyphean' conceptions of the judicial role.[5] Judges, as Tew shows, are neither all-knowing heroic figures who consistently reach the 'correct' result, nor are they doomed to perpetual failure. Indeed, by presenting a contextual analysis of judicial strategy in the enterprise of state building in these two postcolonial states, the book charts a middle path for judges that is informed by the political environment. National-level politics in both countries have been dominated by a single party – the Barisan National (BN) coalition in Malaysia and the People's Action Party (PAP) in Singapore. While the PAP has never lost an election, the BN suffered a shock loss in the 2018 election, though the new government only lasted until 2020.[6]

In these 'dominant party democracies', courts have limited room to maneuver.[7] As Tew charts the history of the judiciaries of Malaysia and Singapore, she shows that courts in both countries have evolved from being extremely deferential to the government on matters of constitutional law, to becoming more assertive. Tew argues that pliant courts can become more activist through a

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[1]Yvonne Tew, *Constitutional Statecraft in Asian Courts* (Oxford University Press 2020) ch 1.
[2]ibid 22–23.
[3]ibid 24–28.
[4]ibid 22–24.
[5]ibid 4–5.
[6]ibid 5–6.
[7]ibid 5; Po Jen Yap, *Courts and Democracies in Asia* (Cambridge University Press 2017) pt I.

strategic, incremental process in which judges must navigate complex political dynamics, wait for the right case to enter their dockets, and then seize the opportunity to assert or expand their jurisdiction.[8]

Tew describes in rich detail how this process unfolded in both countries. In Singapore, the judiciary has adopted a textualist – and in recent years originalist[9] – approach in which they have never struck down a duly enacted piece of legislation for inconsistency with the Constitution. While Singaporean courts are averse to judicial review of legislation, they have expanded their administrative review jurisdiction.[10] In *Chng Suan Tze v Minister of Home Affairs* (1988), the Singapore Court of Appeal ruled that the executive must have an objective basis to hold detainees without trial under the *Internal Security Act* (ISA).[11] The Court stressed the principle of legality and that 'all power has legal limits … the rule of law demands that the courts should be able to examine the exercise of discretionary power.'[12] The Singaporean government responded by amending the ISA and the Constitution to limit the scope of judicial review. But in *Tan Seet Eng v Attorney General* (2016), the Court of Appeal once again asserted the power to examine executive detention policy – here, the Home Minister's authority to order preventative detention under the *Criminal Law (Temporary Provisions) Act*.[13] As Tew writes, the objective standard of review adopted by the Court in this case 'was similar to the one it had articulated in its earlier decision of *Chng Suan Tze*.'[14]

Meanwhile, in Malaysia, Tew focuses on three landmark cases in the Federal Court. The first, *Sivarasa Rasiah v Badan Peguam Malaysia & Another* (2010), represented a fundamental shift in the Court's approach to rights adjudication.[15] While the Federal Court had previously, much like Singapore, adopted a 'traditional and narrow' approach to these cases, it adopted a 'prismatic approach' in *Sivarasa Rasiah* through which rights would be interpreted generously.[16] The Federal Court in this case also laid the foundation for two key doctrines in Tew's account of constitutional statecraft: it endorsed proportionality analysis for the adjudication of fundamental rights and declared that Parliament cannot enact laws that violate the Constitution's basic structure. Malaysia's political transition – in which the ruling BN coalition lost an election for the first time in 2018 – appears to have opened the door for the strategic assertion of judicial power. The other two Federal Court cases on which Tew focuses,[17] *Semenyih Jaya v Pentadbir v Tanah Daerah Hulu Langat* (2017)[18] and *Indira Gandhi* (2018),[19] invoke the basic structure doctrine more explicitly. While neither judgment strikes down a constitutional amendment, they powerfully asserted that judicial power resides only in the civil courts, and not with land assessors or in *syariah* courts, respectively. These judgments further declared that judicial independence and the separation of powers constitute part of the Constitution's basic structure and are, therefore, unamendable.[20]

After charting this gradual, non-linear evolution in both courts, Tew advances a normative claim: that courts in Malaysia and Singapore should take on a greater role in both protecting and constructing constitutional democracy.[21] The 'protective role' refers to situations in which courts intervene to

[8]Tew (n 1) 8–12.
[9]ibid 86; *Yong Vui Wong v Public Prosecutor* [2010] 3 SLR 489 (CA).
[10]Tew (n 1) 64–65.
[11][1988] 2 SLR(R) 525.
[12]Tew (n 1) 60.
[13][2016] 1 SLR 779.
[14]Tew (n 1) 64.
[15][2010] MLJ 333.
[16]ibid paras 3, 19; Tew (n 1) 62.
[17]Tew (n 1) 62–64.
[18][2017] 3 MLJ 561.
[19]*Indira Gandhi* [2018] 1 MLJ 545 (FC).
[20]ibid para 42; *Semenyih Jaya* (n 18) para 76; Yaniv Roznai, 'Constitutional Amendability and Unamendability in South-East Asia' (2019) 14 The Journal of Comparative Law 188.
[21]Tew (n 1) 131.

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protect against 'abusive constitutionalism',[22] such as when constitutional amendments enacted threaten fundamental principles like the separation of powers or judicial independence.[23] A major protective tool, especially in the dominant-party democracy context of Malaysia and Singapore where constitutional amendments can be passed relatively easily, is the basic structure doctrine. While the Malaysian Federal Court recently entrenched the doctrine, its Singaporean counterpart (the Court of Appeal) has been reluctant to do so, despite both judicial and scholarly interest in the topic there.[24]

Tew argues that the 'scope and limits of a basic structure doctrine are ultimately connected to democratic legitimacy.'[25] Thus, with respect to Malaysia's *Semenyih Jaya* judgment, she is sympathetic to the Federal Court's 'strategy in self-empowerment.'[26] Noting that the Court 'refrained from invalidating the constitutional amendment outright', she praises the Court for establishing 'the groundwork for a robust tool that empowers the judiciary to assert authority against the political branches.'[27]

Tew's strategic account is plausible, but I am less sanguine about the Court's motivations and its propensity to deploy the basic structure doctrine to uphold democratic principles *per se*. Elsewhere, Po Jen Yap and I have characterised the use of basic structure doctrine to uphold judicial prerogatives as 'judicial self-dealing' – a mechanism through which the judiciary gains an institutional advantage vis-à-vis the political branches that is not necessarily in the service of democratic principles.[28] The 2016 Indian Supreme Court judgment in *Supreme Court Advocates-on-Record Association v Union of India*, which struck down the constitutional amendment and legislation creating a National Judicial Appointments Commission (NJAC), is a case in point.[29] It remains to be seen, therefore, whether the Malaysian Federal Court will deploy the basic structure doctrine when judicial power is not at stake. Based on the evidence thus far, the Court appears to be engaged in turf protection, using the doctrine only when its own prerogatives are clearly threatened as they were in *Semenyih Jaya* and *Indira Gandhi*. On this account, the Court may, in some cases, uphold core principles like judicial independence and the separation of powers through its basic structure jurisprudence, but such democracy-enhancing outcomes would be a by-product of its institutional self-interest, rather than strategic, statecraft-oriented ends in themselves.

Malaysian and Singaporean courts, according to Tew, should also play a constructive or transformative role in developing a rights-based constitutional culture.[30] Specifically, judges should adopt a broad, purposive interpretive approach to fundamental rights claims and use the proportionality test to adjudicate individual rights claims against the government. Proportionality has become the global standard for rights review, as it has been adopted in much of the common law world, in continental Europe, in newer democracies like Israel, South Africa, and Brazil, and increasingly across Asia too.[31] Even in the United States, there is growing scholarly attention paid to, and advocacy for, proportionality-based approaches to constitutional rights adjudication.[32]

[22]David Landau, 'Abusive Constitutionalism' (2013) 47 University of California Davis Law Review 189.

[23]Tew (n 1) 132.

[24]See eg, Chan Sek Keong, 'The Courts and the "Rule of Law" in Singapore' [2012] Singapore Journal of Legal Studies 209, 223–224; Jaclyn Neo, 'Towards a "Thin" Basic Structure Doctrine in Singapore' (ICONnect Blog, 17 Jan 2018) <http://www.iconnectblog.com/2018/01/towards-a-thin-basic-structure-doctrine-in-singapore-i-connect-column/> accessed 8 Sep 2021.

[25]Tew (n 1) 215.

[26]Tew (n 1) 136.

[27]ibid.

[28]Po Jen Yap & Rehan Abeyratne, 'Judicial Self-Dealing and Unconstitutional Constitutional Amendments in South Asia (2021) 19 International Journal of Constitutional Law 127.

[29](2016) 4 SCC 1. See also Rehan Abeyratne, 'Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective' (2017) 49 George Washington International Law Review 569.

[30]Tew (n 1) 132.

[31]ibid 149–150; Alec Stone Sweet & Jud Mathews, 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 Colombia Journal of Transnational Law 72; Po Jen Yap (ed), *Proportionality in Asia* (Cambridge University Press 2020).

[32]See eg, Vicki Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 123 Yale Law Journal 3094; Jamal Greene, *How Rights Went Wrong: Why Our Obsession with Rights is Tearing America Apart* (Houghton Mifflin Harcourt 2021).

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Tew makes a strong case for proportionality and how it can be operationalised with respect to religious rights in Malaysia, as well as in the national security context in both countries.[33] She explains how the Malaysian Federal Court, following its initial endorsement of proportionality in *Sivarasa Rasiah*, finally applied the doctrine in the landmark 2019 decision of *Alma Nudo v Public Prosecutor*.[34] In that case, a full nine-judge bench of the Federal Court struck down a statutory provision relying on a three-part proportionality test, which asked (1) if there was a sufficiently important objective to justify the restriction on the fundamental right at issue; (2) whether a rational nexus existed between the restriction and the objective; and, (3) whether the restriction was proportionate to the importance of the right at stake.[35]

In Singapore, meanwhile, Tew notes that the 'courts have staunchly resisted any form of proportionality analysis' and have relied instead on deferential doctrines such as *Wednesbury* or manifest arbitrariness.[36] Singapore was, therefore, an outlier compared to similarly situated Asian jurisdictions such as South Korea, Taiwan, Hong Kong, and Malaysia, which all have adopted proportionality.[37] A recent judgment – published after this book was released – suggests, however, that Singapore is on its way to joining the crowd. In *Wham Kwok Han Jolovan v Public Prosecutor* (2020), the Court of Appeal adopted a three-part balancing test to determine whether a provision in the *Public Order Act* violated the right to free speech, assembly and association under Article 14(1) of the Constitution.[38] Though the Court did not use the term 'proportionality', the steps in its analysis – including a determination of whether a restriction is 'necessary or expedient' to advance one of the enumerated interests under Article 14(2)(b) and 'a nexus between the purpose of the legislation in question and one of the permitted purposes' – sound very much in the proportionality register.[39]

While the further entrenchment of proportionality analysis seems almost inevitable in both countries, the doctrine does not necessarily operate as a 'robust yet nuanced' and 'potent' tool for rights adjudication as Tew suggests.[40] In Hong Kong, for instance, proportionality has evolved to incorporate a 'margin of discretion', which allows judges to tailor the level of scrutiny based, *inter alia*, on the nature, importance, and degree of the infringement of the impugned rights, and the identity of the decision-maker.[41] Hong Kong judges have applied a very deferential 'manifestly without reasonable foundation' standard not just in areas that the government may have more expertise – such as in socioeconomic policy – but also in politically sensitive cases involving the right to stand for election and the right of free expression within the Legislative Council.[42] More broadly, as Mark Tushnet has argued, proportionality in Asia is less a coherent doctrine than a 'rhetorical device' deployed by courts in certain types of cases and calibrated in line with the relevant structural and political context.[43] In many cases, what is labeled 'proportionality' is more akin to ad-hoc balancing.[44] And even so-called structured proportionality often resembles a less searching reasonableness review and may be applied in certain domains but not in others.[45]

[33]Tew (n 1) chs 7–8.
[34]ibid 151; [2019] 5 CLJ 780.
[35]Tew (n 1) 151.
[36]ibid 152.
[37]ibid. See also Yap (n 31).
[38][2020] SGCA 111.
[39]ibid paras 30–32.
[40]Tew (n 1) 152.
[41]*Hysan Development Co Ltd v Town Planning Board* [2016] 19 HKCFAR 37.
[42]Rehan Abeyratne, 'More Structure, More Deference: Proportionality in Hong Kong', in Po Jen Yap (ed), *Proportionality in Asia* (Cambridge University Press 2020) 33–34, 57–59; Alec Stone Sweet, 'The Necessity of Balancing: Hong Kong's Flawed Approach to Proportionality, and Why It Matters' (2020) 50 Hong Kong Law Journal 541.
[43]Mark Tushnet, 'Is there a Doctrine of Proportionality in Asia (or Anywhere)?', in Po Jen Yap (ed), *Proportionality in Asia* (Cambridge University Press 2020) 271.
[44]ibid 271–274.
[45]ibid 274–275.

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All this is to say that we should be wary of courts – in Malaysia, Singapore, or anywhere – purporting to entrench doctrines like basic structure or proportionality, which suggest a commitment to the sort of liberal constitutionalism and judicial statecraft that Tew advocates, but might in fact serve as window dressing for other institutional ends, or may be used selectively to signal a more robust form of judicial review than exists in practice.

Overall, this book provides a rich account of the judicial role within the broader political and cultural context in these two countries. It will be of great interest to scholars of comparative constitutionalism in Asia and beyond. One can only hope that Tew's optimism for historically passive courts to become 'partners in the enterprise of statecraft' proves correct.[46]

[46]Tew (n 1) 219.

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