Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S., EDITED BY RANDALL PEERENBOOM [London/N.Y.: Routledge, 2004. xxiii + 479 pp. Paperback £29.99]

AS the Editor explains (pp. x-xi), the aim of this collection of essays is to provide "what has been lacking to date in the discussion about values in Asia"; namely, with "systematic empirical studies to back up the strong theoretical (and in some cases polemical) claims being made on both sides about the differences or lack thereof in fundamental values". The empirical evidence in this case would comprise "concrete legal cases and socio-political events" and the book will "explore the reasons for such differences". Aside from the Editor's chapter on the "varieties of rule of law", and two chapters on the United States and France (written by Brian Z. Tamanaha and Laurent Pech, respectively), the Asian legal systems surveyed are those of Singapore (Thio Li-ann), Malaysia (H.P. Lee), Indonesia (Tim Lindsey), Thailand (Vitit Muntarbhorn), the Philippines (Raul C. Pangalangan) and Vietnam (John Gillespie) in Southeast Asia, India (Upendra Baxi) in South Asia, and Taiwan (Sean Cooney), Hong Kong (Albert Chen and Anne Cheung), China (Randall Peerenboom), Japan (John O. Haley and Veronica Taylor) and South Korea (Hahm Chaihark) in East Asia.

There are several well-respected Asian scholars amongst these. I mention that because it is a part of our everyday reality still that the study of "Asian law" has retained the predominant influence of a group of largely white scholars (I mean this descriptively) who publish learned papers in which, if I might borrow Richard Delgado's phrase, they "comment on, take polite issue with, extol, criticize, and expand on each other's ideas". More often than not these scholars write for a non-Asian audience, establish centres for the study of this-or-that aspect of Asian law, and generally dominate their respective sub-fields within those self-confined parameters. It may be that this is simply because the Asians do not see themselves as doing "Asian law". But it is a measure of the truth of this observation that the present book while consciously seeking to avoid the charge of Orientalism cannot do so entirely. Professor Peerenboom says: "Asian legal systems have historically been given short shrift in studies of comparative law" (p. xiv). Whose study of comparative law are we talking about? Professor Peerenboom has in mind the likes of Weber,

who "considered the legal system of many Asian countries to be nothing more than a kind of arbitrary or irrational *kadi* justice" (p. xiv). He also points to Rene David's "other law" and Ugo Mattei's "Oriental view of the law", and notes the defects there (pp. xiv-xv). But can any self-conscious focus on "Asian Law" escape the charge of Orientalism entirely? Why, for example, would "Asian values" be no more than an authoritarian fraud, according to some, but "Asian law" a worthy subject instead? Is it because our conception of law is formal, bureaucratic and institutionalized, but that our conception of political-morality is liberal and constitutionalist?

To be fair to Weber, he was probably right, except for the fact that there is no reason to suppose that *kadi* justice is not law nonetheless. Legal anthropologists criticize the late H.L.A. Hart's "descriptive sociology" of "law" for a similar transgression. "Armchair sociology" they said because Hart, while he may have succeeded in providing a descriptive-explanatory account of Anglo-American law from an Anglo-American viewpoint (with formal rules of recognition, change and so on), had not set out only to do that. He had set out instead to describe the *concept* of law itself. Even E.E. Evans-Pritchard had once concluded famously that, in a strict sense, the Nuer "have no law" for they simply lacked "legal procedures and legal institutions". Having said that, Hart at least did not try to prescribe the values for which *any* concept of law should promote.

But by the 90s, the World Conference on Human Rights in Vienna had focused attention of "Asian law" comparativists on the (proper) values which *any* sort of "law" worthy of the name should promote. In the events leading up to and during that Conference, some governments in East and Southeast Asia had taken a cultural relativist stand. They advocated in the course of so doing, the virtues of "Asian-ness". The "outside" perception of this (perhaps unanticipated) "Asian" official initiative was nonetheless that the stand which these governments took was unnecessarily exclusionary in effect. Asian governments were criticized for talking about "Asian values" as if (as one scholar had put it) Asians learnt their values "with their mother's milk". The truth is that all this talk of "Asian values" is simply anathema to a growing ambition both in certain foreign policy and academic circles to extol, without compromise, the "universality of rights". It is therefore unavoidable that any work which seeks to deal with "Asian law" today should have to circumnavigate the "Asian values" bend. That is what Professor Peerenboom says his book tries to do. In addition, he also wants to do things differently from what has sometimes (even often) gone on before; he wishes to discover the social facts that matter. A cynic might nonetheless ask: Why? Is it not to lend a sort of empirical basis *to* more talk of Asia's (poor) rule of law record?

So far as the foreign relations dimension to "Asian values" is concerned, a former Director of Human Rights Watch has described this as simply a less disruptive manner by which to conduct American human rights diplomacy. It is less disruptive to American foreign relations for the U.S. State Department to *export* human rights than for it to take it upon itself to *enforce* human rights globally. The solution was to push for a "super-right"—the right to democratic government, with its overlapping and interlocking concerns of representative democracy, periodic elections, creating a proper rule of law culture, upholding the constitutional separation of powers, and generally creating a rights-based climate of freedom in East and Southeast Asia, especially in light of an emergent China. The anticipated result would be that the "Asians"

in these countries can learn these few basic truths themselves and amidst a culture of freedom of expression, assembly and association take their own governments to task, ultimately for their own benefit. Asian governments, and even the Human Rights Movement have reacted against this; arguing that it amounts to politicization of human rights. This is not to mention a further "economic" dimension—what the IMF, World Bank and western donors are doing today in Vietnam (pp. 15, 160).

Professor Peerenboom's project aims to take some of the politics which resides in the foreign policy dimension away from the academic front. We are entitled to ask—does it, and can it, achieve what it sets out to do? The answer is a qualified "yes". Yes, to the extent that there are notable Asian constitutional law experts amongst the various contributing authors. These scholars are out to measure "rule of law achievement" which in the case of Singapore, Malaysia, Hong Kong, the Philippines and Thailand for example, is justified by the formal terms of these constitutions. But the difference between these authors who champion the liberal elements in their constitutions, who do not have "the luxury of belittling rule of law" in their societies (p. 34), and others yet who serve as external critics is interesting. The latter are "external" critics not simply in the sense that they are not in any true sense participants in the societies which they seek to describe, but because they are using the "thick" Anglo-American conception of rule of law as an external yardstick. Taking Professor Lindsey, for example, his aim seems to be to measure the progress made in Indonesia by how far the original constitution drafted by Raden Soepomo (no more than "ambidextrous lawlessness" in truth, p. 289) has since been reformed in the post-Suharto era. The focus is on Lindsey's deduction that the "Anglo-American thick interpretation of rule of law" (p. 296) has proven itself not to be alien even to a legal system that has never truly experienced it—recent events "demonstrate that the implicit claim of the Bangkok Declaration that 'Asian values' in relation to human rights are inherent in Asian societies is, at least in Indonesia, no longer sustainable" (p. 296). We are not shown, however, how far this emphasis would resonate with local Indonesian scholars. Contrast an Indonesian colleague of mine who, during this year's ASEAN-ISIS Human Rights Colloquium, had this to say: "In the past, we were kicked in the head for being soft on civil and political rights, but with September 11 we are getting kicked in the head for being soft on terrorism and terrorists". Such a (real or potential) divide between the "foreign" and "local" viewpoints comes most clearly to the fore in the case of the chapter on Vietnam, where "foreign agencies and elite intellectuals are likely to invoke rule of law" while "local discourses often treat similar issues in different terms" (p. 16). Here too, authorial viewpoint remains important. According to John Gillespie: "Party leaders use invented values to tap into a visceral nationalism obsessed with 'protecting the fine cultural traditions and values of the country' from foreign enemies" (p. 155). The two ("external" versus "participatory") kinds of authorial perspective make strange bedfellows. What unites them is a commitment to the liberal agenda, but for somewhat different reasons. A third sort of perspective, which may be termed the "descriptive-explanatory" perspective may also be discerned, and involves the external scholar seeking to describe the view from the inside. Peerenboom, for example, argues that: "We need to theorize rule of law in ways that do not assume a liberal democratic framework, and explore alternative conceptions of rule of law that are consistent with China's own circumstances" (p. 113).

What is the state of Asia then, as a whole? According to Peerenboom, in his editorial chapter, non-liberal legal systems such as those of China, Malaysia, Singapore and Hong Kong have the authorities and (in the case of Singapore at least) “mainstream” society too on the one hand, and liberals on the other each providing competing “thick” (i.e. normative—“a vision of what law should do”) conceptions of the rule of law (pp. 16, 20). In Vietnam, there are also competing “thick” conceptions of the rule of law (p. 26). In the “newly democratic” nations, however, such as the Philippines, South Korea, Taiwan, Thailand and Indonesia, these are grappling instead with “constitutional, balance of power and human rights issues” (p. 21). India is to be distinguished as a “longer standing democracy” (p. 21), whereas Japan, the United States and France are “mature democracies with mature legal systems” where “the basic constitutional issues have already been decided” (p. 31). There are other cross-cutting typological distinctions. In the case of India, Thailand, the Philippines and Indonesia, we see signs, according to Peerenboom, of a “*developmental, redistributive justice* model of rule of law” caused by crushing poverty (p. 29). In addition, India, Thailand, the Philippines, Indonesia, and to a lesser extent Taiwan and South Korea “are still dealing with many ‘thin’ rule of law problems such as access to justice, inefficient courts…and corruption” (p. 26). The overall result is that China, Malaysia, Singapore, Hong Kong, and Vietnam have been singled out from the other Asian countries surveyed here along what seems to be a liberal democratic/non-liberal democratic axis. It is only in China, Malaysia, Singapore and Hong Kong, for example, that we find government leaders, academics and citizens invoking and continuing to invoke “Asian values”, whereas “in Taiwan, South Korea and Japan senior government leaders have been critical of the notion” (p. 27). For convenience, we could state Peerenboom’s conclusions in a simplified table form.

<table>
<tr><th colspan="3">LIBERAL DEMOCRATIC</th><th colspan="2">NON-LIBERAL DEMOCRATIC</th></tr>
<tr><td>“THICK” INTERPRETATION OF RULE OF LAW</td><td colspan="2">STILL FACING “THIN” RULE OF LAW PROBLEMS (ACCESS TO JUSTICE ISSUES, INEFFICIENT COURTS, & C.)</td><td colspan="2">COMPETING “THICK” CONCEPTIONS OF THE RULE OF LAW DEBATED HEAVILY</td></tr>
<tr><td>MATURE DEMOCRATIC</td><td>“LONGER-STANDING” DEMOCRATIC</td><td>NEWLY DEMOCRATIC (CONSTITUTIONAL, BALANCE OF POWER AND HUMAN RIGHTS ISSUES)</td><td>ADVOCATES OF “ASIAN VALUES”</td><td></td></tr>
<tr><td>Japan,† United States, and France</td><td>India*</td><td>Philippines,* Thailand,* Indonesia,* South Korea,† Taiwan†</td><td>China (and Hong Kong), Malaysia, and Singapore</td><td>Vietnam</td></tr>
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*“Developmental, redistributive justice” conception of rule of law
†Leaders critical of “Asian values” talk

The suggestion is that, with the benefit of this empirical study, only a few Asian governments actually uphold talk of “Asian values”. However, as Vitit Muntarbhorn

explains—"Thailand has not been at the forefront of advocating Asian values", but "the governmental sector is particularly malleable to such values, especially when it acts in concert with Asia-Pacific governments" (p. 354). Professor Muntarbhorn, Southeast Asia's most widely regarded human rights scholar and activist, finds such talk of "Asian values" both "presumptuous and misleading"—an *instrument d'état* (p. 355). Notably, he urges debate on "values in Asia" instead which are non-exclusive and could "enrich universal norms" (p. 356). But by far the most significant limitation in the present book is that, in putting together a collection of largely liberal scholars to carry out "empirical" work of this sort, the contextual dimensions of academic politics and *real-politik* to the "Asian values" debate may become obscured, just as alleged official intransigence in Asia is accused of obfuscation. In raw power-political terms, South Korea and Taiwan depend heavily on the United States for their survival, and are to that extent officially more open to the "thick" Anglo-American conception of the rule of law. Thailand, as we have seen, tends to maintain official solidarity with proponents of "Asian values". America arrived on Philippine shores in 1898, culminating in Congressional approval of the 1935 Philippine Constitution which unsurprisingly, as Dean Raul Pangalangan puts it, became a "faithful copy of the U.S. Constitution" and a "textbook example of liberal democracy" (p. 372). It is unsurprising that in the difficult years that followed, the Philippine people have "embraced constitutionalism with a passion" (p. 381). Allied "reform" of Japan's *Meiji* Constitution which entered into force in 1947 reflects the Philippine experience to some extent, but (externally) Japan today also faces a rising China at its own door-step (p. 453). In Indonesia, the country remains deeply in transition, and the jury is still out. Similarly, the transition which Vietnam is currently experiencing, in which foreign agencies and donors play a key role, makes it difficult to draw firm conclusions. Some readers may simply find these facts more telling in respect of "Asian discourses on rule of law" than a liberal pre-occupation with institutional and constitutional design, and institutional and procedural fact.

Professor Peerenboom's reaction even to critics of liberalism within the Anglo-American milieu tends, however, to be dismissive (p. 34). Feminists, Critical Legal Scholars, Critical Race Theorists and Critical Race Feminists are not exactly talking about the plight of privileged members of their societies. Global Critical Race Feminists such as Vasuki Nesiah have shown that well-meaning liberal talk about the exploitation of female factory workers in Sri Lanka ignores important local nuances—these jobs are only available to a privileged group and are prized. Saying to these scholars and Critical Race Theorists (American proponents of narrative jurisprudence) that their preoccupations are luxuries which Asian scholars do not have is unworthy (p. 34). Firstly, in the immediate post-war defeat of Nazi Germany and Imperial Japan, the "free world" could not perhaps have been expected to award much attention to the American Anthropological Association's 1947 Statement. The AAA had stressed that even in the pursuit of individual freedoms, we "must take into full account the individual as a member of the social group of which [s/]he is a part". Many "Asians" would feel the same today; that their societies are not *simply* to be viewed in formal liberal terms as (more-or-less defective) products of post-colonial or post-war constitutional arrangement that embody cosmopolitan liberal ideals. Secondly, the "Asian experience" could also be explained more fully in parts by what proponents of American narrative jurisprudence seek today—contextually mindful,

local "inter-subjective truths" which "real" law-stories will tell, as opposed to the formal law stories which liberal scholars *only* tell. In Asia, these would include stories of crushing material and educational poverty, poverty of opportunity, highly complex race and cultural circumstances, chronic inadequacy in public services delivery, of women and child trafficking, of child prostitution. Not all these stories are that easily relegated to a mere "developmental, redistributive justice" Asian variant of formal rule of law-talk. Instead, American critiques of colour- and gender-blind liberal constitutional discourse would resonate with many Asian scholars in a way that formal "rights" talk would not. As Upendra Baxi's chapter shows, Asians too value freedom, but they do not necessarily have in mind the formal "for export only" variety of liberal constitutional discourse for Asia. Thirdly, in global human rights scholarship today there exists concern (as David Kennedy has said) that "hegemonic perspectives" allocate scholarly resources selectively, crowd out the "local" with the "global" instead; "delegitimate" other emancipatory strategies, vocabularies and projects; and distort by requiring the expression of these other possibilities in terms of liberal rights only.

All this points to the urgent need today for a distinctly "Asian voice" mode of scholarship.

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