

BOOK REVIEWS

The Constitution of Malaysia: A Contextual Analysis BY ANDREW HARDING [Oxford: Hart Publishing, 2012, xxii + 266 pp. Softcover: US\$36]

I first encountered Andrew Harding's work as a young law student when I became fascinated with Malaysian constitutional law. Harding's exegeses on public law and Islam (e.g., Andrew Harding, "Islam and Public Law in Malaysia: Some Reflections in the Aftermath of Susie Teoh's Case" (1991) 1 M.L.J. xci, and Andrew Harding, "The *Keris*, the Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia" (2002) 6 Singapore Journal of International and Comparative Law 154) shaped my early understanding of Malaysian constitutional law, state and religion. His Geertzian approach to law draws out the complexity and anomalies of the pluralistic, post-colonial, and democratising Malaysian state. This perceptive local knowledge pervades his latest book, *The Constitution of Malaysia: A Contextual Analysis*, where he surveys the past, scrutinises the present, and meditates on the future of Malaysian constitutional law. It is part of the *Constitutional Systems of the World* series, which provides a comprehensive range of introductory texts on the various constitutions in the world.

In his book, Harding evocatively prefaces each section with local sayings, poems (*pantun*), and proverbs (*peribahasa*). This is a nod to the indigenous, and connects local traditions to universal ideas. The first chapter, "Historical Background" is a whirlwind ride through Malaysia's rich history, penetrating pre-colonial politics to early post-colonial birth pains. Harding identifies the May 13 Incident as the starting point of Malaysia's authoritarian turn to power. The constructed narrative of racial conflict became the main rhetorical tool for justifying abridging and abrogating freedom of speech and association in Malaysia. According to Harding, the resulting *Rukunegara* amendments "redefined ethnic relations and the political economy of Malaysia", effectively converting "a liberal democracy observing basic rights into an authoritarian semi-democratic police state with large exceptions to basic rights" (at 48).

This observation sets the theme for the rest of the book. In Chapter 2, "Executive Power and the Developmental State", Harding examines how this racialised political economy justified the developmental state and the consolidation of executive power in the office of the Prime Minister. The next chapter, "Parliamentary Democracy in a Plural Society", on the other hand, highlights Parliament's deputised role in Malaysian politics and political discourse. This deviates from the Westminster-style of parliamentary government that Malaysia consciously adopted at independence,

in which Parliament is conventionally designated as the most important branch of government.

A landmark in Malaysia's road to independence was the spectacular failure of the British plan for the Malayan Union and the preservation of the Malay monarchy under the *1948 Federation of Malaya Agreement* because of nationalist mobilisation to preserve the monarchy as symbols of Malay sovereignty. Harding traces the resulting dynamics between the Malay monarchy and Malay political leaders in Chapter 4, "Territorial Governance: Monarchy and the State Constitutions". Here, Harding astutely observes that the seminal 1993 constitutional amendment removing sovereign immunity for civil and criminal actions was an apparent "defeat for the Rulers" (at 121). However, it could nonetheless be seen as a turning point in their public reputation in having motivated the Rulers to behave lawfully and more exemplarily in order not to be subject to legal action and public criticism.

Chapter 5, "Territorial Governance: Federal, State and Local Government" observes that federalism in Malaysia served to preserve relative autonomy of the Malay states, as well as Sabah and Sarawak. The fact that there have been relatively few legal disputes on the division of federal and state rights and powers is attributed to Barisan Nasional's dominance in federal and the majority of the state governments. Harding thus shrewdly questions whether this lack of open conflict, especially over fiscal issues, would persist in a more plural party political climate.

Harding's most passionate critique occurs in Chapters 6 and 7 where he discusses human rights and the judiciary. In Chapter 6, "Human Rights in an Authoritarian State", he uses the constitutional right to life and liberty (art. 5) as a focal point to emphasise the use and abuse of executive power to detain persons without trial under various security laws. The high number of preventive detentions in Malaysian history led Harding to opine that "[t]he temptation to see literally any social problem through the lens of the special legal regime, irrespective of individual human rights, seems to have proved irresistible" (at 176). The starting point in Chapter 7, "The Judiciary and the Defence of Judicial Power", is the familiar 1988 Judicial Crisis, which devastated judicial independence and the rule of law. Drawing, as he notes, from his excellent work with Amanda Whiting ("Custodian of Civil Liberties and Justice in Malaysia: The Malaysian Bar and Moderate State" in *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex*), Harding however shows how a galvanised legal profession under the leadership of the Bar Council had served as a wall of resistance against the complete destruction of the rule of law in the country. Highlighting recent measures such as the law fettering the Prime Minister's discretion over judicial appointments and an independent commission clearing judges sacked in the 1988 crisis of any wrongdoing, Harding sounds a hopeful note on the prospects of restoring public confidence in the judiciary and reinstating a robust rule of law in Malaysia.

Before concluding, Harding reviews Malaysia's complex and sometimes-contested relationship with Islam in Chapter 9, "Religion and the Constitution". The contestation over whether the Malaysian state is secular or Islamic reveals the risk of religious majoritarianism in the face of an ambivalent text, and with deleterious effect on individuals. Lina Joy, Kamariah Ali, Ayah Pin, the Catholic Herald, Shamala and Subashini are just some of the cases Harding discusses to demonstrate how the protection of religious freedom guaranteed under art. 11(1) of the *Federal*

Constitution has been weakened to cater to a conservative segment of the religious majority.

Reading Harding's masterful survey, one is struck by how legal constraints themselves have not been adequate to restrain authoritarian turns in Malaysia. Political constraints from an increasingly organised political opposition and a persistent civil society have however been important factors in democratising Malaysia. It is hard not to share Harding's cautious enthusiasm that Malaysia is on a rocky but sure path to liberalisation and democratisation. At various points, the book highlights the crucial significance of the 2008 General Elections, which has led to an expanding space for political dissent as well as concrete measures such as Parliament officially revoking past proclamations of emergency in 2011 and repealing detention laws (*i.e.* the *Restricted Residence Act 1933* (Act 377) and the *Banishment Act 1959* (Act 79)). After the book was published, Parliament also repealed the *Internal Security Act 1960* (Act 82). Harding also emphasises the importance of the populist *Bersih* movement in advocating electoral reform to ensure free and fair elections.

Harding's primer is extremely thoughtful and gives its readers a solid foundation on Malaysian constitutional law. One minor critique is that its approach tends to be conventional. For instance, Harding could probably have given greater emphasis to the role of new media in the changing political landscape. From the alternative online news (Malaysiakini and Malaysian Insider) to a variety of political blogs (*e.g.*, the now defunct Screenshots), to the use of forums, video-sharing platforms (YouTube), social networks (Facebook), and micro-blogs (Twitter), the social media explosion is widely credited for expanding the space for political discourse in Malaysia. By breaking the government's monopoly on channels of information dissemination, social media enabled civil society, the Bar Council and the opposition to break the climate of fear, disseminate information and more effectively mobilise support. Social media has been so pivotal that the Internet is now a major political arena in which both government critics and supporters engage in to shape public opinion. Another new trend that could have been tracked is the increasing use of polling data by the government and political parties to gauge voters' sentiment. The independent polling centre, Merdeka Center, conducts polling on a range of political issues, including the government's approval rate. Results are publicly available and have facilitated better understanding of the political sentiments of the *demos*.

That aside, Harding's text will prove to be an extremely important foundational text on Malaysian constitutional law. The book is a significant contribution to the field, brings order to the multitude of information and knowledge, and depth to familiar accounts. It is short but authoritative. The book will be easily comprehended by the newcomer to the subject matter. Yet it is sufficiently judicious to interest an established scholar of Malaysian constitutionalism. It should be compulsory reading for any student and scholar of Malaysian constitutional law and politics, as well as a necessary primer to anyone interested in Malaysian public law, society, and politics.

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