Pluralism And Territorial Governance: A View from Southeast Asia

Andrew Harding*

Let me say first how much I admire Professor Roberto Toniatti and how much I have benefited from his deep comparative knowledge, insight, and sheer breadth of mind. Not only is talking with him a great experience – even talking with those who have talked with him is a great experience. As an indication of his ubiquity, I have had the pleasure to meet him in far too many different places to mention, not just in Trento and Singapore. It is indeed an honour to call him a friend and wish him the very best retirement a scholar could have.

This comment brings together several of Roberto Toniatti's interests: comparative constitutional law, pluralism, territorial governance, and Asia. Readers will be familiar with the first two, but may associate his illustrious career with Europe and the Americas rather than Asia. However, Roberto has visited different parts of Asia on several occasions, and has been a regular participant at the annual Asian Law institute's (ASLI) conferences. He also brought Asian law topics into the law teaching programme at Trento, developing a solid relationship with scholars at the Faculty of Law, National University of Singapore and other Asian schools. As with other regions, Asia has been grist to Roberto's intellectual mill, indicating the breadth of his mind and his interests. Inspired by Roberto's work and discussion with him, I offer here a few thoughts about pluralism and territorial governance in Southeast Asia; and I wish to focus on special autonomy – yet another of his interests.

****

Southeast Asia offers several interesting and contrasting cases of special autonomy. I discuss these in comparative perspective, with some brief concluding thoughts.

Special Autonomy in Aceh[1]

Aceh is a strongly Islamic province at the Northern tip of Sumatra that periodically waged war against Dutch rule for around 300 years prior to Indonesian independence, and continued to resent inclusion within Indonesia in 1945, which, although agreed by Aceh at the time, led to exploitation of its abundant natural

* Centre for Asian Legal Studies, National University of Singapore.

1 S Butt and T Lindsey, The Constitution of Indonesia: A Contextual Analysis (Oxford: Hart Publishing, 2012), 182 ff.

resources and oppression by the central government in Jakarta. A rebel group, Gerakan Aceh Merdeka (GAM) mounted an insurgency against Indonesian forces, especially between 1989 and 1999, resulting in extensive violence on both sides. Eventually there were moves towards establishing peace, and an Aceh Autonomy Law was passed in 2001,[2] but failed to resolve the conflict. Ultimately, following the devastating tsunami that hit Aceh in December 2004 and killed more than 120,000 people in the province's coastal areas, a permanent peace was concluded in 2005 and given effect in the Law on the Government of Aceh 2006,[3] which involved the granting of asymmetric powers to the province over a number of subjects, especially religion, customary law, education, and natural resources.[4] The 2006 Law is a comprehensive piece of legislation that acts as a special constitution for Aceh embracing both provincial government and central-local relations.

The process dealing with the Aceh insurgency was Indonesia's first item on the decentralization agenda, which also started in 1999, and is properly seen in that context.[5] However, Aceh autonomy goes much further than the general decentralization, which gives power to local governments rather than provinces. Of Indonesia's provinces only Aceh has powers over religion, and only Aceh has the right to veto national legislation in its application to the province. It has power to implement Islamic law via qanun (local regulations), distinguishing the province from the whole of the rest of Indonesia, where religion is a central government matter. In religion also, Aceh's shari'a court jurisdiction goes beyond the rest of Indonesia and the Southeast Asian region, embracing both criminal and commercial law as well as the more obvious subjects of family law and succession. The Islamic jurisdiction has notably been exercised through qanun outlawing, for example, gambling, alcohol and sexual immorality. Most significant is the qanun jinayat or Islamic criminal code, which has been controversial.[6] This law involves hudud and ta'zir punishments, and applies to Muslims in Aceh as well as non-Muslims who commit offences with Muslims or who violate the qanun in terms of offences not provided in the Criminal Code. For Muslims the qanun jinayat takes precedence, according to its own terms.[7] There are many objections to this qanun, and its validity has been challenged, albeit unsuccessfully, in the Supreme Court, on the grounds that it violates the hierarchy of

---

[2] Law No.18/ 2001.

[3] Law No.11/ 2006.

[4] H Heintze, 'The autonomy of Aceh', ch.10 of R Toniatti and J Woelk (eds), Regional autonomy, cultural diversity and Differentiated Territorial Government: The Case of Tibet – Chinese and Comparative Perspectives (Abingdon: Routledge, 2017).

[5] D Horowitz, Constitutional Change and Democracy in Indonesia (Cambridge: Cambridge University Press, 2013), 71 ff.

[6] Qanun Aceh No.6/ 2014; see further Butt and Lindsey, above n.1; S Butt and T Lindsey, Indonesian Law (Oxford: Oxford University Press, 2018), at 205-8.

[7] Qanun Aceh No.6/ 2014, Art.72.

laws and the Law on Law-making.[8] The Constitutional Court has power, not yet exercised, to rule qanun as contrary to the Constitution.[9]

There is of course a cost to such arrangements. The qanun jinayat is a legal irritant[10] in a number of respects. Such laws may not be in conformity with human rights as expressed in the Indonesian Constitution, in terms of being oppressive to women or sexual minorities, or involving cruel or unusual punishments; and their applicability to non-Muslims is highly unusual in the region. As Butt and Lindsey have stated, '[t]he result is the most ambitious attempt to formally apply Islamic law in modern Southeast Asia'.[11] The tension with national criminal law is palpable. There has also been controversy over an Aceh ban on independent candidates in elections, where the Constitutional Court struck down a provision of the Aceh Government Law itself.[12]

Special autonomy in Papua[13]

The province now known as Papua forms most of the Western part of the island of Papua and its population is mainly indigenous Melanesian, similar to that of Papua New Guinea. An insurgent group, Organisasi Papua Merdeka, has the agenda of complete independence from Indonesia and claims that Papua never really agreed to be part of the Republic, but was coerced into joining. As with Aceh, there are issues of local culture and natural resource exploitation, allied with the province's under-development. As with Aceh, Papua's autonomy was part of the decentralization plan, and is provided by the Law on Special Autonomy for Papua Province 2001.[14]

The most significant features of the 2001 Law are, first, its provision for return of 70% of oil and gas revenues to the province for 25 years (the proportion then reduces to 50%); and second, as distinct from the Aceh law providing for religious powers, the creation of a Papuan People's Assembly (Majelis Rakyat Papua, MRP). The MRP's main purpose is to advise the Papuan government on the protection of the rights of the indigenous people. Under the 2001 Law[15] the MRP is to comprise equal numbers of representatives of traditional adat (customary) communities,

---

[8] Supreme Court Decision 60/P/HUM/2015.

[9] Above, n.6, Art.235.

[10] G Teubner, 'Legal irritants: Good faith in British law or how unifying law ends up in new divergencies' (1998) 61 Modern Law Review 15.

[11] Butt and Lindsey, above n.1, 183.

[12] Above n.6, Art 256.

[13] Butt and Lindsey, above n.1, 192.

[14] Law 21/ 2001.

[15] Art. 19(1).

women, and religious figures, selected by their respective constituencies. The provincial government is under a duty, further, to protect customary law and indigenous land rights.[16]

The main problem with the 2001 Law is its provision for MRP membership, which involves appointment of 25% of its members. This provision has been challenged in the Constitutional Court on grounds of lack of equality of access to opportunity and benefit[17] and breach of provincial powers to regulate and administer matters of government.[18] The decision recognizes the legitimacy of making appointments to the MRP as part of affirmative action to enable adat community representatives to participate in decision-making and protect the environment and Papuan customs. In another decision, the Constitutional Court allowed a cultural exception to ordinary voting rules in a case involving the customary 'noken' system, which is used in parts of Papua. Under this system the village chief determines the distribution of votes by implicit consent of the villagers, described by the Court as 'community agreement' or 'acclamation'. This was justified by reference to the obligation under Art.18B(2) of the Indonesian Constitution to respect adat communities and their traditional rights, and the need maintain harmony in traditional communities with their own norms concerning elections.[19]

Asymmetric federalism: Sabah and Sarawak

Malaysia offers a useful comparison in that it has a constitution that implicates asymmetric federalism in respect of the two Borneo (East Malaysian) states of Sabah and Sarawak, whose special position was negotiated at the iteration of Malaysia,[20] rather than conceded by a unitary state as with Aceh and Papua. This was not part of a decentralization process, but rather the opposite, that is, the integration of the two territories with an existing federation (the Federation of Malaya) to form a new, two-tiered, and therefore asymmetric, federation. This was effected by the Malaysia Agreement 1963 and amendments to the Constitution of the Federation of Malaya 1957 to create the new entity of Malaysia.[21]

---

[16] Ibid.

[17] Constitution, Art.28H(2).

[18] Ibid., Art.18(2).

[19] S Butt, 'Indonesia's Constitutional Court and Indonesia's electoral systems', ch.9 of A Harding and A Chen (eds), Constitutional Courts in Asia: A Comparative Study (Cambridge: Cambridge University Press, 2018), 236-8.

[20] Tan Tai Yong, Creating 'Greater Malaysia': Decolonization and the Politics of Merger (Singapore: ISEAS, 2008).

[21] A Harding and J Chin, 'Fifty years of Malaysia: Reflections and unanswered questions', in A Harding and J Chin, 50 Years of Malaysia: Federalism Revisited (Singapore: Marshall Cavendish, 2014).

Sabah and Sarawak, have exactly the same position as each other constitutionally, and enjoy special powers going beyond those of the West (or Peninsular) Malaysian states, over immigration, family and customary law, and constitutional amendments.[22] As with the other states their powers include powers over local government, land and natural resources.[23] Their legal systems are also separate from that governing West Malaysia, and in addition to the civil courts and shari'a courts that administer justice across all of Malaysia, there are native courts administering their adat (customary law) for the indigenous people.[24] The main objective of the Malaysia Agreement was to ensure protection of the indigenous people, who form a majority of the more than two million population in each of the two states. While there has been no insurgency or secession movement, the period of membership of the federation (1963 to date) has been punctuated by federal interference in the operation of these states' politics, and back-sliding on the commitments of 1963, which offered a partnership rather than a takeover.[25] Rather than guaranteeing a large degree of autonomy, the constitutional arrangements have failed to prevent creeping centralization and gradual approximation of the two states' special position to that of the other eleven states, in what is already a highly centralized federal system. Resentment has meanwhile been mounting in Sarawak in particular over cultural and religious issues, and natural resource royalties, which have been fixed at only 5% for many years, but are now raised to 20% (contrast the position in Aceh and Papua discussed above). As with the two Indonesian cases the abundance of natural resources is contrasted with indicators of underdevelopment. Development clashes extensively with indigenous customary land rights across both states, giving rise to constant litigation.[26]

Currently, the demand for autonomy, variously expressed as being aimed at 'sovereignty', 'devolution', and 'recognition of special status', is very strong. The Pakatan Harapan federal government that took office in May 2018, before being undermined and replaced by the new Perikatan Nasional government in March 2020, promised to address the desire for autonomy, but went only so far as to propose a somewhat symbolic constitutional amendment in 2019 that failed to achieve the requisite two thirds' majorities in both houses of parliament.[27] The new government

---

[22] Federal Constitution of Malaysia, Schedule 9.

[23] Ibid.

[24] Native Courts (Criminal Jurisdiction) Act 471/ 1991; Native Courts Enactment (Sabah) 1992; Native Courts Ordinance 1992 (Sarawak).

[25] A Harding, '"A measure of autonomy": Federalism as protection for Malaysia's indigenous peoples' 46 Federal Law Review 587 (2018).

[26] S Yogeswaran, 'Legal pluralism in Malaysia: The case of Iban native customary rights in Sarawak;, ch.6 of A Harding and Dian AH Shah (eds), Law and Society in Malaysia: Pluralism, Religion, and Ethnicity (Abingdon: Routledge, 2017).

[27] 'No two-thirds majority support to amend Constitution', The Star, 9 April 2019: <https://www.nst.com.my/news/nation/2019/04/477868/no-two-thirds-majority-support-amend-constitution> (accessed 1 May 2020).

has also undertaken to deal with this issue. It seems clear that Sabah and Sarawak need a new deal involving a commitment to fully observe and implement the letter and spirit of the 1963 Agreement, as well as devolution of powers that are not mentioned in that Agreement but which nonetheless make sense in terms of subsidiarity and decentralization.[28]

Special autonomy of Bangsamoro[29]

In the Philippines, attempts have been made to find a similar solution to those in Aceh and Papua for the region formerly known as Muslim Mindanao, but now known as Bangsamoro. As with Aceh there is a long history behind the claim for autonomy, based on the Muslim identity of the region. Insurgent groups, notably the Moro Islamic Liberation Front (MILF) have mounted a campaign of violence intermittently since 1945, aimed at autonomy or independence. Regional autonomy, extensive in its potential breadth, is clearly entrenched in Article 10 of the 1987 Constitution, which requires the enactment of a special autonomy law for the region.[30] Pursuant to this provision the Organic Act for the Autonomous Region in Muslim Mindanao Law was passed in 1989.[31] However, successive attempts to make autonomy work proved unsuccessful, being rejected by some groups as creating too little autonomy for the region.

Peace talks continued over several years between groups advocating autonomy, including MILF, with the national government. A comprehensive agreement had been reached in 2014, but the region was destabilized by Islamic extremism, a notable example of which was the seizure of the regional capital Marawi by Abu Sayyaf in 2017, which led to extensive military action, a siege, and widespread destruction of the city.

As a result of further talks the Bangsamoro Organic Law was passed in 2018. The peace process led to a double referendum in early 2019 and the consequential creation under the organic law of the new Bangsamoro Autonomous Region in Muslim Mindanao (BARMM) and a Bangsamoro Transitional Authority to oversee the implementation of regional autonomy. The referenda established the acceptability of the principle of autonomy and also which municipalities and barangay would join the new region; 63 barangays in Cotabato province did so. Under the organic law the BARMM is currently in transition to full autonomy with the election of a local parliament in 2022. As with the special autonomy laws for Aceh and Papua, the

[28] See, further, Harding and Chin, above n.21.

[29] L Robis, 'The sun rises anew in Mindanao: Towards recognizing the Bangsamoro nation within the context of the Philippine Republic', 59 Ateneo Law Journal 1117 (2015).

[30] Article X, ss.15-21.

[31] Republic Act 6734.

Bangsamoro law acts as a constitution for the new region, covering all aspects including central-local relations.[32]

The implementation of asymmetrical autonomy, the ultimate outcome of which remains to be seen, is not without problems as a solution. The organic law provides for a Westminster-type parliamentary system of government with a Chief Minister and a regional head of state, that sits uneasily (another legal irritant) with the Philippines' presidential system, and is considered by some to be unconstitutional. Partly for this reason and partly because of the extent of autonomy, the BARMM has spawned a debate around the creation of a federal system and wider constitutional reform, for which the BARMM may be seen as a pilot scheme. Yet it does not appear that federalism proposals are likely to yield fruit in terms of actual reform.[33] Thus asymmetrical regional autonomy has become a general problem for the Philippines. The current debates concerning federalism proposals owe much to the fact that other regions resent the special concessions to Bangsamoro, and federalism would offer those regions a similar degree of autonomy. Already in 2018 a new demand emerged for recognition of autonomy for Bangsa Sug, a region comprising other Mindanao provinces that distinguish themselves from the Bangsamoro.

As a result of the referenda the BARMM region is geographically odd (for example, Isabela City is not part of it but the rest of the province of which Isabela is part is included) comprises three major cities, 116 municipalities and 2,590 barangays.

The issue of pluralism lies of course at the root of the problem and as with Aceh a central issue is the justice system under which shari'a courts exist at lower and appeal levels, applying Islamic law, while indigenous people are dealt with separately under their own adat, providing another layer of legal pluralism.

Myanmar's ethnic states and special administrative zones

Under its 2008 Constitution Myanmar is in theory a decentralized state, but much of what the constitution demands is yet to be realized, and it displays in practice a great degree of centralism. However, the main division into seven states and seven regions is already recognized historically. The difference between the regions and the states is not primarily a legal one. States are ethnically based, whereas regions denote areas where Burmans are in the majority, but, as Melissa Crouch puts it, '[t]he seven ethnic-based States are primarily highland, border areas that occupy a different place in the political imagination compared with the seven Regions in the lowlands'.[34] Some of the ethnic states have been in conflict with the Burmese/ Myanmar army since the end of World War II, and the future of Myanmar depends

[32] Republic Act No. 11054.

[33] 'Proposed charter for federal PH weakens senate, eyes Prime Minister' (CNN, 9 January 2018): <http://cnnphilippines.com/news/2018/01/09/draft-proposal-federalism-PDP-Laban-senate-prime-minister.html> (accessed 1 May 2020).

[34] M Crouch, The Constitution of Myanmar: A Contextual Analysis (Oxford: Hart/ Bloomsbury, 2019), xx.

on the real integration of these states into the Union. The constitutional status of the states is exactly the same as that of the regions, so that their autonomy, insofar as it exists, is symmetrical, not asymmetrical as we have seen with the Indonesian and Philippines cases. Nonetheless, these states do offer the ethnic groups a constitutionally guaranteed homeland, and the possibility in future to exercise their powers so as to protect their religions, languages and cultures. Nonetheless, the Chief Ministers of states and regions are centrally appointed, the Chief Minister selects the other ministers, and the administration of both states and regions comes under the central General Administration Department within the interior ministry. The executive in states and regions is responsible to the President, not to the state/ region legislature.

The powers of the states/ regions are quite extensive, embracing finance, town and housing development, the economy, agriculture, municipalities, the local economy, industry, agriculture, energy, electricity, mining, forestry, transport, communication, construction, social welfare, fire and disaster response, and heritage and cultural preservation.[35]

Despite this, Myanmar also has a degree of local decentralization, and also the designation of Self-administered Zones and Divisions, which are special ethnic enclaves recognized by the 2008 Constitution, which guarantees them a degree of self-governance. These SAZs/ SADs were established in 2010 under a process that was part of the drafting process for the 2008 Constitution itself. They are the Naga, Kokang, Danu, Palaung, Pa-O and Wa Areas.[36] They are defined by their common ethnicity, which had to be established according to fixed criteria, and comprise between two and six townships. They enjoy legislative, executive and judicial powers that include local development and the operation of the local economy, public services, the environment.

In addition to this, Myanmar has an unusual system of 'national races' representatives at both state/ region and national level.[37]

Currently there are intermittent meetings of the Second Panglong conference designed to resolve conflicts that have troubled Burma/ Myanmar for almost 80 years.

****

One overall conclusion we can draw from this brief survey is that regional autonomy is revealed not as an ideal but as a least damaging solution to the problem of pluralism that seems confined mainly to instances of continuing violence and/ or

[35] 2008 Constitution, s.188, Sch.2.

[36] 2008 Constitution, s 56.

[37] Crouch, above n.35, ch.7 (II).

potential separatism. It has proved very difficult, however, to negotiate these cases to a state of finality, even though the issue shave been apparent for several decades. In the cases of Aceh, Papua, and Bangsamoro the process has been punctuated by violence and has been uncertain in its implementation. In the cases of Sabah and Sarawak, there has not been any violent insurgency, and the injustice of a barely acknowledged form of asymmetry is only now, after six decades being raised. Even though special autonomy might seem to have succeeded in some instances, in the limited sense of avoiding secession and offering hope of integration, it would be an exaggeration to say that regional autonomy has become entrenched, accepted, and certain in its parameters. It remains for the most part stuck at the level of experimentation. Regional autonomy addresses the issue of bare adherence to the nation-state, but fails to address the issue of real-time nation-building.

In all of the cases discussed here asymmetry raises problems for other regions, which resent the special consideration given to regions having groups prone to violent overthrow of the state. Perhaps more promising answers lie in dealing with problems of uneven development. Ideas are always, as philosopher Simon Blackburn has put it, the whistle on the train, and it is noticeable that in all of these cases the regions in question, while on the face of it deeply concerned with issues of ethnic and religious identity, also suffer from underdevelopment despite having an abundance of natural resources.

I offer the tentative conclusion that attempts to constitutionalise these problems need to be supported by socio-economic programmes if they are to provide a future of security and prosperity.