

ADVANCE DIRECTIVES ACROSS ASIA: A COMPARATIVE SOCIO-LEGAL ANALYSIS, EDITED BY DAISY CHEUNG AND MICHAEL DUNN (CAMBRIDGE UNIVERSITY PRESS, 2021)

ALEX RUCK KEENE*

It is always a joy when a book not only lives up to what it promises in its title, but goes substantially further. This book is just such a one. Daisy Cheung, Assistant Professor at the Centre for Medical Ethics and Law at the University of Hong Kong, and Michael Dunn, Associate Professor at the Centre for Biomedical Ethics, National University of Singapore, have gathered a wide range of contributors to analyse the very different places of advance directives in end of life decision-making in 14 jurisdictions across Asia.¹ Crucially, they have also done the necessary heavy-lifting behind the scenes and on the page to pull together the threads to pose fascinating and important questions both about advance directives specifically but also about the interaction between international consensuses and localised traditions and expectations.

Of particular interest, and importance, is that the editors deliberately sought to cast their net widely in terms of defining 'Asia,' the book taking in countries as diverse as Israel, Saudi Arabia and the Philippines. This has the huge advantage of making clear that it is just as reductionist to talk about an 'Asian' approach to issues around advance directives as it is to talk about a 'Western' approach: and one only needs to compare the chapters about Saudi Arabia and Pakistan to understand that it is equally reductionistic to talk about an Islamic approach to such issues. Further, as it is impossible to talk about advance directives without talking about the framework within which they sit, the book also serves as a fascinating tour d'horizon of end of life decision-making more broadly in each of the jurisdictions.

In the discussion that I did with the editors for my website,² they (rightly) squirmed when asked to highlight jurisdictions which they found particularly interesting; they also (and equally rightly) wanted to emphasise that they wanted the book to stand alone, rather than continually to refer back or across to jurisdictions such as England & Wales. So whilst knowing it is perhaps wrong, I cannot help resist highlighting some of the points that particularly struck me in different chapters and some of the reflections that this Anglo-author had in response):

- The discussion in Ilhak Lee's chapter on South Korea of the Boromae Hospital case (page 58), in which the Korean Supreme Court found surgeons guilty as accomplices to murder in a case where a wife obtained the discharge of her

* Alex Ruck Keene, Barrister, 39 Essex Chambers, London, Visiting Professor at the Dickson Poon School of Law, King's College London, Visiting Senior Lecturer, Institute of Psychiatry, Psychology & Neuroscience, King's College London, Research Affiliate, Essex Autonomy Project, University of Essex.

¹ With limited exceptions, most obviously the chapter in relation to India, the contributors do not address so-called psychiatric advance directives.

² Advance directives across Asia – in conversation with Daisy Cheung and Michael Dunn – Mental Capacity Law and Policy – available at <https://www.mentalcapacitylawandpolicy.org.uk/advance-directives-across-asia-in-conversation-with-daisy-cheung-and-michael-dunn/>.

husband from hospital because she could not continue to pay for his care,³ the Supreme Court considering that his wife's decision could not be regarded as an authoritative proxy decision, and that the surgeons had not taken proper measures to prevent an anticipated harm;

- Daniel Fu-Chang Tsai's discussion (in the chapter on Taiwan, pages 88-89) of the 2019 Taipei Declaration of Advance Care Planning, which expressly recognises that family members and other care givers have needs that should be attended to as part of the patient's care;
- The observation in Kelly Amal Dhru and Ravindra B Ghooi's chapter on India (pages 116-120) that the introduction of advance directives in the end of life context has been accompanied by far more controversy than their introduction in the psychiatric context by the Mental Healthcare Act 2017 (in complete contrast, it might be noted, to the situation in jurisdictions such as England & Wales). The same chapter also contains a fascinating discussion of the way in which the courts in India appear to view the family as part of the problem, rather than (potentially) as part of the solution, in decision-making;
- The detailed analysis of what Islamic law requires, or is considered to require in Saudi Arabia (by Z. Abbas Syed, E. Shamshi-Gookshi and A. Parsapoor) and Pakistan (by Mohammed Asim Beg, Erfan Hussain, Noshin Khan, Asma Hamid and Muhammad Atif Waqar), albeit that this is one area where it would have been very interesting had the authors of the respective chapters expressly commented on the interpretations advanced in the other, as this would have been a conversation I would very much liked to have been privy to;
- The relevance of resignation to uncertainty within Filipino culture analysed by L.D. de Castro, R.B. Manaloto, and A.A.L. Lopez (pages 192-5), a cultural phenomenon which it might be thought is more widely spread than just within the Philippines (and the Filipino diaspora), and might well be thought to play at least some part in the universally low uptake of advance decisions in every jurisdiction;
- The (tantalisingly brief) discussion in Bo Chen's chapter (at pages 240-1) of the role of voluntary guardianship amongst the LGBT community in mainland China as a way in which to seek to secure recognition of the place of a partner within decision-making;
- The emphasis placed in Japan (discussed by Reina Ozei-Hayashi, Futoshi Iwata, Satoshi Kodama and Miho Tanaka, at pages 248-249) on consensus in healthcare decision-making, including the family as part of the consensus group. Whilst this might be thought to sit at odds with the focus on the patient

³ Linked, in some ways, to the observation in Thitanant Tengaumuay's chapter on Thailand (page 91) that the concept of wishing to refuse medical treatment was barely considered before 2002 and the introduction of Universal Health Coverage; before then, the primary concern was even access health care services at all, regarded as a matter of "luck."

in 'Western' systems, one might ask how often decisions to honour advance decisions to refuse treatment are honoured where (at the point that the decision is 'active') there is a mismatch between any indications that the patient may be able to give, the view of the family and the view of the medical team.

What is set out above are but a few of the points at which I found myself reaching for a Post-It note to put on the (curiously shiny) pages of the hardback, but hopefully serve to indicate just how many different directions it would be possible to jump from the springboard of the book's chapters.

Structurally, the editors have divided the jurisdictions that are covered into three categories: (1) well-regulated; (2) semi-regulated; and (3) non-regulated. However, as the editors make clear (page 13), "well-regulated" simply means that there is a clear set of rules, rather than that those rules actually work effectively. Miriam Ethel Bentwich (for instance) making a powerful case in relation to Israel (a supposedly "well-regulated" jurisdiction) that "the restrictive nature and supposed strict regulation of Israeli advance directives have actually led to their under-regulation" (page 19). As developed in the final chapter, the differences in approach represent different aspects of "generative accommodation" to "an emerging international consensus in healthcare practice and regulation regarding the value of an AD and its underlying ethical principle of respect for patient autonomy" (page 332). Cheung and Dunn's view, one which appears amply borne out on the evidence in the preceding pages, is that this a better way to explain the growing place of advance directives in different shapes in the jurisdictions they examine than indigenous development. The concept of generative accommodation, with its requirement for acute sensitivity to local traditions, is a helpful explanatory and descriptive tool for other areas where change is afoot: an obvious one being in relation to the Convention on the Rights of Persons with Disabilities. It is also one which is helpful in prompting reflection as to whether a failure to respond to the asserted consensus in the 'required' fashion simply because of wrong-headedness or bias, or is it because the accommodation reached actually represents the 'right' result for that particular jurisdiction at that point in time.

The only, minor, reservation that I have about this book is that, whilst the editors are at pains (page 14) to make clear that they did not seek to encourage their contributors to advance a case that advance directives are 'a good thing',⁴ the tenor of each of the chapters suggests that the contributors did, in fact, appear to consider this to be the case. It would have been interesting, if only to give shade to the light, to have had a chapter written by a contributor who appeared to have reservations about them, as it is clear that many people, in many of the jurisdictions covered, do indeed have reservations. However, I anticipate that it might well have proven challenging to find contributors with such views to take part in such a project, and even those contributors who are clearly most concerned to advance the cause of advance directives within

⁴ To be clear, I think that they are, although with caveats: see the advance planning discussion document I wrote for the Law Society of Scotland's 2022 report on Advance Choices and Medical Decision-Making in Intensive Care Situations, available at <https://www.lawscot.org.uk/news-and-events/law-society-news/advance-choices-and-medical-decision-making/>.

their own jurisdiction give more than enough material relating to that jurisdiction to enable the reader to gain what appears to be a rounded picture of the position.

Overall, therefore, this book comes highly recommended, and, as a real bonus, it is open access in its electronic form, thereby making its insights readily available to all.⁵

⁵ Full disclosure: I was involved in the conference in 2020 from which the book took its genesis.