Law *and* Legal Institutions *of* Asia

Traditions, adaptations and innovations

Edited by
E. Ann Black & Gary F. Bell

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To the memory of my mother and to my father, who together opened the world to me. Mille fois merci.

Gary F Bell

To the memory of my father and to my mother, both of whom first introduced me to Asia and have always inspired me.

E Ann Black (nee Hart)

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Bandar Seri Begawan
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East Timor
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Introduction

In 2006, in the Great Hall of the People in Beijing, Chinese Premier Wen Jiabao foreshadowed that the 21st century could become the 'Asian century'.[1] He was voicing a belief that the world's economic centre of gravity is shifting to Asia, away from the United States of America and Europe,[2] and that with this will come greater political, strategic and cultural influence for the nations of the region. Whether one endorses or dismisses such simplifications or generalisations,[3] the notion of the Asian century has, at its core, an acceptance both within and outside the region that what happens in Asia does matter in the world and that collectively, and individually, the countries of this region have become, or are becoming, significant global players. This book shares the view that the nations of Asia can no longer be seen as operating at the periphery of global power, with their significance confined to economic and commercial matters.[4] The importance of Asia means that Asian law and the role of law in Asia have also become important.

We lawyers, especially Western lawyers, tend to overemphasise the role that law plays in development. The early proponents of the 'law and development' movement and their predecessors who decades, or even centuries, earlier forced or convinced Asians to 'modernise', that is, to Westernise their legal systems, did so with the belief that this would lead to the economic development of Asia. Even though intuitively we know there can indeed be a link between the rule of law and some economic developments, the causal link is hard to prove empirically. Indonesia, which is now more regulated by law than it was under Suharto, has developed less rapidly under the rule of law than it did under Suharto. India, the world's largest democracy, where the rule of law often prevails, has been developing less rapidly than China where the rule of law is a new and only a developing phenomenon. Obviously, law is not the only factor in development, nor is it necessarily always the most important factor.

1 Wen Jiabao, 'Strong China–India Relations to Usher in True Asian Century' (14 March 2006), <http://news.xinhuanet.com/english/2006-03/14/content_4302492.htm>.
2 The corollary is that the 19th century was the European or British century, with the American century the label for the 20th century.
3 M Abramowitz and S Bosworth, 'America Confronts the Asian Century', *Current History*, vol. 105, no. 690, p. 147.
4 In political terms, the parity of Asian nations with Western nations was evident in the debate at the Copenhagen Conference on climate change.

There is also the fact that the transplantation of Western laws to Asian countries often created a different law altogether – the legal culture in place often reacted quite differently to the Western law than the Western culture did; in other words the local body reacted to the transplant. The lessons from the past have not always been learnt and the recent imposition of Western-style legal reforms by the International Monetary Fund (IMF) following the 1997 Asian financial crisis often simply made matters worse. Transplants work better when the patient requests, fully consents to and then takes care of their transplant. For example, in Indonesia, the importation of a Western-style bill of rights in the *Constitution* was the result of vast pressures by the people of Indonesia who did not want a return to the autocratic past. So this transplant has been much more successful than others.

Notwithstanding the fact that the law has its limits and cannot single-handedly transform societies, nowadays, in all the jurisdictions covered in this book, the governments and the people are convinced that law should be taken seriously and that law and respect for the law do play a role in facilitating progress, whether economical, human or societal, and in ensuring justice and respect for the citizens. And law is indeed taken increasingly seriously by both the citizens and the governments of the jurisdictions under study. There is everywhere debate about what role the law should play, what sources of law should be recognised (indigenous versus foreign laws, secular versus religious laws, local versus national laws) and how law should be implemented and interpreted. This book wants to account for this rising Asian debate about the law and its role in Asian societies.

1 Asia: what's in a name?

The 11 countries and territories selected for this edited volume are on the eastern side of Asia, with borders that meet the Pacific Ocean, in an arc extending from Japan in the north to Indonesia in the south. There is indeed another arc of Asian nations whose shores are on and rivers flow into the Indian Ocean which, together with the nations of the Indochina peninsula (which as the name indicates relate to both Asian spheres), awaits coverage in a later volume.[5] While there is considerable licence in using the term 'Asia' to cover just 11 countries on the Asian continent, the authors contend that these nations are representative of the diversity, pluralism and reforming spirit that pervades much of Asia and as such are good case studies through which insight into the functioning of law and legal institutions in much of the region could be attained. After all, Asia is both a geographical term and also a construed entity; as McCormack has written, Asia is an 'imposed identity: a fantastic ideological

5 Vietnam is covered in this volume but Myanmar (Burma), Thailand, Cambodia, and Laos are not.

construct without racial or cultural meaning . . . paradoxically, the notion of Asia strengthened the farther one moved away from it and receded as one entered into it'.[6]

Given that the legal systems covered in this book are all in jurisdictions on the eastern side of the continent of Asia, there was some exploration of recent terms used in the literature that may better describe these 11 jurisdictions: terms such as East Asia and Asia Pacific or the Asia-Pacific basin or rim. These formulations, however, remain recent constructs, each with its own ideological parameters. In many ways they are the descendants of the old 'Far East', 'Eurasia' and 'Orient', which dominated 19th- and early 20th-century discourses on Asia. The new formulations still come with dimensions of pejorativeness, and the collective groupings may not necessarily coincide with how people do identify. East Asia is a case in point. East Asia was never a geographical expression but is one that developed in the 1970s. It first arose in the organisational thinking of Western foreign ministries[7] and then was applied more generally to encompass nations that primarily shared a legacy of China's cultural influence and European imperialism. Therein lies the problem. Malays and Indonesians (and other 'Southeast Asians') do not self-identify as East Asians and regard that categorisation to be the preserve of nations to their north where Chinese values and traditions hold greater sway. Again, this would be a contested notion in the North. People in Japan would not necessarily identify with Chinese cultural dominance, which further highlights the limitation and paradoxes inherent in any such constructions. There are similar difficulties with Asia Pacific (hyphenated or not) which is preferred by some writers such as Kaup[8] who uses it in the narrower sense to mean the 'Eurasian' nations on the Asian side of the Pacific. Others, especially writers and academics in Australia, use the term more broadly to also include the Melanesian and Polynesian nation states of the South Pacific.[9] Used at its broadest, with an implied 'and' (Asia [and the] Pacific), and seen often in American political and economic discourse, Asia Pacific encompasses all nations that border the Pacific Ocean, including not only Asian countries but also Australia, New Zealand and the nations of North and Latin America.[10] Some formulations also include Russia. Beeson cautions that boundaries and constituent parts of the Asia Pacific are uncertain and unsettled[11] and remain open to challenge. So, given this identification minefield, the editors felt comfortable using the simpler term, Asia, while acknowledging that not all possible

6 G McCormack, *The Emptiness of Japanese Affluence*, M E Sharpe, New York, 1996, p. 161.

7 See also T Terada, 'Constructing an "East Asian" Concept and Growing Regional Identity: From EAEC to ASEAN+3', *The Pacific Review*, vol. 16, no. 2, p. 251.

8 K Kaup (ed), *Understanding Contemporary Asia Pacific*, Lynne Rienner, Boulder, 2007.

9 C Saunders and G Hassall, *Asia-Pacific Constitutional Systems*, Cambridge University Press, Cambridge, 2002.

10 As are represented by the 21 member states of the Asia Pacific Economic Cooperation; see M Beeson, *Institutions of the Asia Pacific: ASEAN, APEC and Beyond*, Routledge, New York, 2009. See also D McDougall, *Asia Pacific in World Politics*, Lynne Rienner, Boulder, 2007.

11 ibid., p. 4.

Asian nations were covered in this book but that those selected would provide a valid and valuable cross-section of the laws and legal institutions in parts of this region.

2 The approach

This book traverses the broad spectrum of legal systems found in Asia as seen through the eyes of each author derived from his or her own experiences, research and reflective analysis. Although the same eight core topics are covered, the individual perspectives shine through, making each chapter authentic, distinctive and vibrant. The authors were not constrained to give equal weight to each section or to traverse the same issues but were to focus their analysis around these key features of the legal system under study. In this way, the eight core components form the skeleton on which each author can describe and evaluate that nation's laws and legal institutions. These core components also provide the foundation for comparative analysis between these nations and also for comparison with other countries outside the region. Each chapter commences with an introduction to set the scene and to highlight key aspects of that nation, before moving to a discussion of the historical development and context of the country's legal system; the sources of law and legal traditions; the key legal institutions including law-making, adjudication and other processes; the legal culture that underpins those institutions and the prevailing attitudes to law and institutions; the key actors in the legal system – the legal professionals; and new directions, initiatives or key themes that have emerged.

3 Introductions

The Introduction to each chapter is predicated on the basis that the reader may not be familiar with the nation discussed, and for those who are, reading the author's synopsis of the key aspects may be quite instructive of his or her viewpoint. A survey of the introductory sections reveals a mosaic of geographical, economic, political, religious, ethnic, linguistic, demographic, and historical difference. From this, one cannot fail to appreciate Asia's diversity, making plurality perhaps the most defining feature of the region. We have two of the world's most populous nations, China (1.34 billion) and Indonesia (240 million) alongside two of the smallest, Brunei Darussalam (Brunei) (400 000) and Singapore (4.8 million). In geographical terms there are island states or jurisdictions such as Brunei (on part of a larger island), Singapore and Taiwan; states comprising three of the world's largest archipelagos, Indonesia, Japan and the Philippines; the peninsula state of Korea; and, of course, the vast diverse geographical entity of China. In terms of governance, there are two socialist republics, China and Vietnam, albeit with their 'own characteristics', with Hong Kong as a special

administrative region of China; five non-socialist republics, Indonesia, Korea, the Philippines, Singapore and Taiwan, all of which are functioning democracies; and three monarchies. Each of the latter are quite distinctive – Japan is a constitutional monarchy, with the Emperor's role largely ceremonial; Malaysia's King (*Yang di Pertuan Agong*) is one of the Sultans who holds the position on a rotating five-year basis but with limited law-making powers; while Brunei is one of the world's few remaining absolute monarchies, with its Sultan enjoying unfettered law-making power. Apart from Malaysia, which is a federation, all other nations are unitary states, although some have decentralised some key powers. There are two countries – Japan and Korea – which are relatively homogenous in terms of ethnicity and language but ethnic, linguistic and cultural diversity is a feature of the other nine nations. Religion too is marked by divergence. In Brunei, Indonesia and Malaysia (Sunni) Islam is the religion of the majority and as such informs the local culture and national identity, while in the Philippines and Singapore Islam is the religion of a significant minority but is accorded formal recognition in each of those legal systems. In the Philippines, Christianity in the form of Roman Catholicism is the faith of the majority and the Roman Catholic Church has for many centuries been a significant force in that country. Japan has its unique indigenous Shinto religion and with its neighbour Korea shares Buddhism and a legacy of Confucian philosophy. In China's and Vietnam's past, Confucianism philosophy dominated but today a secular ideology, socialism, rather than a religion guides those nations. As socialist states, religious adherence is tolerated and monitored rather than encouraged, but in sheer numerical terms religious belief – Buddhism, Christianity, Islam and Taoism – is still significant. In economic terms, China is the world's second largest economy closely followed by Japan, with Indonesia, the Philippines and Vietnam still developing economies.

Although each of the nations can be slotted into the traditional comparative law 'family' classifications – common law, civil (Roman-Germanic) law, religious law, socialist law and Far Eastern law[12] – the limitations in doing this have been widely acknowledged in the literature.[13] These classifications can be misleading, especially so in Asia, where the plurality of influences has led to systems that are better described as hybrids. So where a comparative family categorisation is used in the book, it is as a form of shorthand, a general guide to the common traits typically identified in such classifications, in the way Friedman acknowledged classifications as helpful 'in many ways' while emphasising the inherent flaws in such classifications.[14] He highlights the vital role of legal culture in any equation, as without it, institutions and laws risk being mere 'lifeless artefacts'.[15]

12 R David and J E C Brierley, *Legal Systems in the World Today*, 3rd ed, Steven and Sons, 1985. Also K Zweigert and H Kotz (T Weir trans), *An Introduction to Comparative Law*, Claredon Press, Oxford, 1998.
13 L Friedman, *Law and Society: An Introduction*, Prentice-Hall, Englewood Cliffs, 1977, p. 76.
14 ibid. The example given by Freidman is that Haiti and France in the standard classification system are family members, whereas France and England are unrelated.
15 ibid.

4 Historical contexts

To understand the present, one must first understand the past.
–Chinese proverb

In the section reflecting on the historical context underpinning the contemporary legal system, it becomes apparent that traditions from distinct centuries have persisted despite the transformative effects of colonisation and adoption of Western form and process. This includes remnants of ancient practices and attitudes to law that can be glimpsed in today's legal systems. The legacy of two millenniums of China's rich imperial past, where the role for law and for morality was aligned with Confucian philosophy (also intersecting with legalism), can be seen in today's preference for law as a supplementary or secondary means for social control. As a consequence, law continues to function as a political and administrative tool, whereby substantive justice prevails over procedural justice.[16] China's neighbour Korea has an equally ancient history, with its written laws dating back to 2333 BCE, but today's legacy can be traced especially to the period of the Joseon Dynasty when Korean Confucianism became embedded in the society. It continues to inspire many aspects of current Korean law, in particular family law. Japan too was influenced by China but this influence was adapted and 'indigenised' and debate continues today as to the degree to which traditional notions inform today's legal system.

Brunei, Indonesia and Malaysia have histories that are perhaps among the oldest in the world. Here, the earliest people did develop a normative system for organising relationships with nature (and its spirits and gods), with one another and with outsiders, together with flexible processes for resolving disputes. Although based on oral, not written practices, these customary laws, or *adat*, evolved and devolved down through the centuries to the present and remain a recognised source of law in all three nations. During the centuries that followed, influences from India in the form of Hindu and Buddhist law infused the *adat* but it was the impact of the latest arrived 'foreign' religion, Islam, with its comprehensive law and jurisprudence, comprising the Sharia, which transformed the legal landscape of these nations, and also the southern islands of the Philippines. This was not done through colonialism, but through acceptance of Islam, first by the local rulers and in turn by their followers. The process was more gradual than a complete immediate transplantation of law, which meant that the existing customary law was not eliminated but syncretised or applied alongside Islam. Islam informed the notion of governance and sultanates flourished, extending from Sumatra and its Sultanate of Aceh up to the Philippines, across Borneo and Java and to the islands of the Moluccas. Their legal legacy lasts in the Sultanate of Brunei Darussalam and also in the nine Malaysian states, former independent sultanates, which continue under the governance of a sultan within the larger federal entity of Malaysia.

16 Chapter 1, section 2.1.

From a historical perspective, the second pervasive transformative feature common to all these nations of Asia is a legacy of Western imperialism. This occurred in two ways: either directly through colonisation by European nations or by Japan, or indirectly where the presence of Europeans was an impetus for a so-called 'modernisation' which included legal reform through the adoption of Western models. From the early 1500s Europeans arrived in Asia, with Spain, Holland and Portugal[17] making the first inroads in the region, followed by France, Britain and later America. Spain conquered the Philippines in the 16th century, bringing with it Roman Catholicism which remains significant in the lives and also in the laws of the nation at present. The Portuguese also brought Roman Catholicism to their colonies and its former colony of East Timor remains a devout Catholic nation today. In the early 17th century the Dutch colonised many other islands known then as the East Indies, now Indonesia, first through an incorporated company (VOC) and subsequently directly by Holland. Unlike the Spanish in the Philippines, the Dutch did not impose Christianity on the people, but did transplant Dutch law into these islands particularly for commercial and criminal matters. They did not oust *adat*, preferring instead to create different streams of law and legal avenues for different categories of people. This gave rise to the plurality of law that remains a hallmark of Indonesia's legal system today.

The British too left a legacy of formal legal pluralism. Although parts of the Malay peninsula were subject to inroads by the Dutch and Portuguese, it was Britain that imposed her colonial control (protectorates, residencies and full colonies) during the 19th century, which also extended to Singapore and to the island of Borneo, where today's Malaysian states of Sabah and Sarawak are situated, alongside the Sultanate of Brunei. A role for *adat* and Sharia (in Brunei written as 'Syariah') was maintained, albeit in limited form, but dissemination of English law, legal institutions and personnel along with British concepts of justice and processes introduced into these countries the common law foundation that has continued to the present. Also introduced was a secular system in which religion or morality was divided and separated from law. It was in the 19th century as well that France colonised Vietnam, bringing into play its foundation as a secular civil law nation.

Through wars with European nations, China did lose territory, including Hong Kong,[18] but neither China nor Japan were colonised. They were, however, cognisant of European commercial and military dominance in the region and aware of the colonisation risks. As well, they were sensitive to the extraterritoriality provisions that European traders in turn demanded. So at the turn of the century, both took the initiative to reform and 'modernise' their legal systems on their own terms, which to a large extent meant to voluntarily Westernise the law so as to avoid the threat of colonisation or compete with the more economically advanced West. The fall of the Tokugawa Shogunate in

17 The bastion of Portuguese colonisation was East Timor, *Timor-Leste*, which attained independence from Indonesia in 2002 and remains a predominantly Catholic nation.
18 First Opium War (1839–42)