

ROUTLEDGE LAW IN ASIA

# Law and Development in Asia

Edited by  
Gerald Paul McAlinn  
and Caslav Pejovic



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First published 2012

by Routledge

2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada

by Routledge

711 Third Avenue, New York, NY 10017

*Routledge is an imprint of the Taylor & Francis Group, an informa business*

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*British Library Cataloguing in Publication Data*

A catalogue record for this book is available from the British Library

*Library of Congress Cataloging-in-Publication Data*

A catalog record has been requested for this book

ISBN: 978-0-415-57603-1 (hbk)

ISBN: 978-0-203-15112-9 (ebk)

Typeset in Times

by Wearset Ltd, Boldon, Tyne and Wear



Printed and bound in Great Britain by  
TJI Digital, Padstow, Cornwall

# Law and Development in Asia

This book fills a gap in the literature by presenting a comprehensive overview of the key issues relating to law and development in Asia. Over recent decades, experts in law and development have produced multiple theories on law and development, none of which were derived from close study of Asian countries, and none of which fit very well with the existing evidence of how law actually functioned in these countries during periods of rapid economic development. The book discusses the different models of law and development, including both the developmental state model of the 1960s and the neo-liberal model of the 1980s, and shows how development has worked out in practice in relation to these models in a range of Asian countries, including Japan, Korea, China, Thailand, Singapore, India and Mongolia. Particular themes examined include constitutionalism, judicial and legal reform; labour law; the growing importance of private rights; foreign investment and the international law of development. Reflecting the complexity of Asian law and society, both those who believe in an “Asian Way” which is radically different from law and development in other parts of the world, as well as those who believe the arc of law and development is essentially universal, will find support in this book.

**Gerald Paul McAlinn** is Professor of Law at Keio University Law School in Tokyo, Japan. His books include *Japanese Business Law*; *Comparative Law: Law and the Legal Process in Japan*; *Introduction to American Law*; and *The Business Guide to Japan*.

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# Preface

This book grows out of a conference held at Kyushu University in 2008, entitled “Law and Development at a Crossroads: Asian Alternatives to Universal Schemes?” As the title suggests, the central theme of the conference was whether it can be said there is an Asian alternative to universal approaches to law and development. The materials contained in this book strongly suggest that Asia writ large presents examples of both convergence and divergence with universal approaches. Those who believe there is an “Asian Way” and that it is radically different from law and development in other parts of the world will find support in the chapters of this book. Likewise, those who believe that the arc of law and development is essentially universal will find material to point in that direction as well. The book may not answer this ultimate question, but this only serves to reflect the rich complexity of Asian law and society.

The Rule of Law, as well as the degree to which law per se has played a key role in Asian development, is a central theme of the chapters in this book. Various theories of law and development ranging from neo-liberalism to legal transfer are discussed and analysed in context. The chapters of this book also represent wide geographical coverage dealing with issues of law and development in Japan, Korea, Taiwan, China, Thailand, India, Mongolia, and Singapore.

This book is divided into two major sections: “Law and development orthodoxy: Asian challenges”; and “Special topics: institutions and areas of law”. Setting the stage for the debate that forms the core of this book is a short introductory chapter written by David Trubek. He begins by reminding readers of the role legal reform has historically played in both the economic and social development of nations. It was not until the twentieth century, however, that systematic legal reform projects began to take shape as central vehicles for driving development. Trubek identifies three major themes springing up in the second half of the twentieth century. First, law as an instrument to foster economic and social change in developing states. Second, law as a barrier to economic development insofar as “bad” law could impede development. Third, law as a framework for private decision-making, emphasizing the recognition of the critical role to be played by private actors as contrasted with state-led initiatives.

Trubek observes that a specialized academic field of law and development has failed to materialize, notwithstanding strong academic interest. This he

attributes to the mixed record of legal reform in the context of development as well as to the tension between the use of law by developing states and the growing belief that deregulation (and privatization) possibly held the answers to rapid development. He concludes by advancing four basic propositions to guide law and development studies into the twenty-first century, namely, that (1) Law should facilitate experimentation and innovation; (2) Law is increasingly affected by global forces; (3) Law itself is part of development; and (4) Law and development policy should be evidence-based. As Trubek rightly argues, these four propositions have already gained traction in the field and are being adopted by academics, law and policy makers, and judges alike.

The introduction by Trubek leads nicely into the first six chapters of the book, beginning with a chapter entitled “Law and development orthodoxies and the Northeast Asian experience” by John Ohnesorge. He begins his analysis by recognizing that the many theories of law and development did not reflect the prevailing situation in Japan, South Korea, and Taiwan. For this reason, they were never tested empirically against the clear and apparent success of the Northeast Asian development story. Ohnesorge queries why the Northeast Asia experience was so neglected by law and development theorists and advances some possible reasons for this oversight. Ohnesorge addresses this imbalance by reviewing the major theories of law and development and then measuring them against the reality of Northeast Asia. He then argues persuasively for a new theory of law and development based on inductive reasoning, to wit, by studying examples of success and failure it is possible to draw reasonable inferences regarding the role and function of law in development.

The next chapter, entitled “The resurgence of the right to development,” by Muthucumaraswamy Sornarajah notes the decline of the right to development in the last decade of the twentieth century in the face of neo-liberal economics. Sornarajah points to the UN Millennium Goals, which seek to address the problems of dire poverty in many countries of the lesser-developed world. He contends that it is a resurgence of recognition for the right of development that is most likely to see developing countries actually achieve the Millennium Goals. He predicts that strong leadership by large emerging economies such as India, China, and Brazil can now tilt the balance of power into a better state of equilibrium with the developed economies of the world.

Tom Ginsburg follows with a chapter called “Japanese law and Asian development.” His basic contention is that Japanese legal influence was transferred to Korea and Taiwan, placing those countries on a path to high growth. Ginsburg identifies three main elements of what he refers to as the “Northeast Asian legal complex.” The first is a semi-autonomous judiciary, meaning a judicial system organized hierarchically with effective top-down control and a limited capacity such that litigation rates could be kept relatively low. The second factor is a small private bar that sought to protect its monopoly rents and had no incentive to challenge state control. Finally, the administrative law regime had the effect of insulating state management of the economy from judicial review. These three factors combined to promote stability and reliable bureaucratic governance.

Ginsburg then successfully demonstrates how Japan was able to transfer this recipe for development to its former colonies, Korea and Taiwan.

The next chapter, "The success of law and development in China: is China the latest Asian development state?" by Connie Carter, asserts that law has been an important factor in China's move to a market economy, even though China does not conform to Western notions of "rule of law" or democratic principles of governance. She poses some provocative questions based on the Chinese model, such as does China's success prove that development can occur without observing the rule of law, and if development is ultimately concerned with freedom to choose then what choices must China make to ensure stability and equity between the countryside and the cities? Carter tracks the role of law through a number of China's developmental periods before concluding that China has, in many respects, followed the Asian development state model. The country continues to face many problems but Carter seems confident that the commitment to building a harmonious society will address many of the inequalities.

Andrew Harding takes on the recent problems of Thailand in his chapter entitled "The politics of law and development in Thailand: seeking Rousseau, and finding Hobbes." His concern is with the emergence of the so-called "third moment" in the history of law and development, i.e., one where development is defined broadly to include not only economic, but also, political and social considerations. He presents a historical perspective on law and development in the context of an absolute monarchy. This is followed by an analysis of constitutionalism in Thailand and, to a degree, its undoing by corruption under the Thaksin regime. Still, Thailand enjoyed strong economic growth as well as being able to recover from the global financial crisis. This he attributes not so much to the rule of law as to the nature of the Asian developmental state that offers stability and predictability as its hallmarks.

The final chapter of the first section is "Law and development, FDI, and the rule of law in post-Soviet Central Asia: the case of Mongolia," by Sukhbatar Sumiya. He presents a case study of Mongolia as it emerged at the end of Soviet domination. His approach is to examine the relationship between law and foreign direct investment. Mongolia, as Sumiya notes, had no recent history of either a market economy or multi-party democracy on which to draw after having existed for over 70 years under a single-party, central planning system of government. He concludes his argument by contending that, while the rule of law has a definite role in development, the need for state involvement cannot be denied.

With the theoretical issues of law and development being explained and explored in the Asian context, the second section of the book turns to a number of specific topics and themes that were identified in the first section.

The second section leads off with a chapter by Arun Thiruvengadam and Michael Ewing-Chow entitled "Echoes of *Through the Looking Glass*: comparing judicial reforms in Singapore and India." The authors present the debates with respect to the success of judicial institutions within the fields of law and development and comparative constitutional law. The focus for Singapore is the Malik Report, which concluded that Singapore had "one of the most efficient,

effective judicial systems in Asia,” and its deficiencies in terms of measuring the overall effectiveness of the Singaporean judicial system. Contrasted with Singapore, the authors offer an analysis the state of the judiciary in India. While the Singapore system is duly praised for its efficiency, it is sometimes criticized for an apparent lack of independence from other state political institutions. Indian courts, on the other hand, have been praised for rendering bold judgments in support of individual rights at the same time they are plagued by gross delays and systemic inefficiencies. The authors use the two countries to present a thought-provoking treatment of the oft time conflicting values of efficiency and justice.

Caslav Pejovic’s chapter on “Japanese long-term employment: between social norms and economic rationale” looks at law and development in Japan from the perspective of employment law. He points to the role of “life-time employment” as one of the essential elements of the Japanese economic model. The chapter traces the roots of the life-time employment system and demonstrates how the courts played a major role in its establishment. The system is supported by cultural, economic, and corporate control rationales that combined to provide the stability and work-force reliability needed for Japanese industry to regain its footing after the end of the war. Economic conditions, however, have changed in Japan and the model is under pressure in the face of the need for Japanese companies to maintain global competitiveness. Pejovic demonstrates that models, which may be highly effective at one point in a nation’s development, can have detrimental effects if they are not flexible enough to adapt to changing conditions.

The next chapter returns the reader to China and a discussion by Shin-ichi Ago of the “Non-economic criteria in the formulation of the world trade regime: from social clause to CSR.” He considers why developing nations wish to join the WTO regime at the same time as exploring some of the pitfalls of the global regime identified by protesters and developing nations alike. He warns that the universal application of trade rules can have a potentially devastating effect on economically weak developing countries. One of the more interesting aspects of the chapter is the author’s consideration of the role of corporate social responsibility (CSR) as a source of legal obligation. While CSR is not widely accepted as constituting a legal duty, it has clearly made its way into the various trade regimes and is now a part of international trade law.

Steven Van Uytsel contributes a chapter regarding “China’s antimonopoly law and recurrence to standards.” He uses competition law as a window into national policy and economic development. Van Uytsel warns that the provisions of the Chinese Antimonopoly Law allow for broad discretion, which he warns could give rise to market distortion as a result of lobbying aimed at protectionism. The focus of the chapter is on the provisions of the AML dealing with concentrations. He succeeds in linking the development of competition law and policy to economic liberalization, including the review of various economic development strategies such as infant industry protection, the advancement of “national champion” industries or companies, facilitation of R&D, and incentivizing foreign



investment as a means of enhancing capital infusion and intellectual property induction. The chapter concludes by confirming a widely held suspicion that China has demonstrated a willingness to use the discretion built into the AML to favor local industry over foreign investors.

The penultimate chapter by Gerald McAlinn entitled “The privatization of investor–state dispute resolution” approaches an important issue relating to FDI and development. It has been frequently said, but not conclusively proven, that foreign investors demand legal infrastructure in the form of dispute resolution institutions that is predictable and fair. Naturally, a foreign investor will be reluctant to submit an investment dispute to the national courts of the host country. Until relatively recently, this meant that foreign investors were forced to seek recourse through the channels of diplomatic protection. The inherently political nature of diplomatic protection, however, made this an unattractive alternative. Taking a page from the growth of alternative dispute resolution in the national law of developed states, the World Bank succeeded in having 144 nations sign on to the International Convention on the Settlement of Investment Disputes between States and Nationals of other States, or the Washington Convention as it is known. Many bilateral and multilateral investment treaties now embody ADR as the method of resolving foreign investment disputes thereby removing to a fair degree both the public and the political element.

Finally, Lawan Thanadsillapakul contributes a chapter entitled “Thailand and legal development.” Her work argues for ways in which Thailand can benefit from the global trend of trade liberalization by enhancing the interaction of institutions, law, economic policy, and market function. She emphasizes the criticality of being successful in this as all countries in Asia, including Thailand, are increasingly forced to deal with the issues of Asian regionalism and rapid economic integration. Lawan examines Thailand’s policy with respect to entering into free trade agreements and analyzes the nation’s negotiation strategy. She concludes by predicting that Thailand will have to strengthen its legal and institutional framework to meet the needs of a changing global and regional economy.

May 2011  
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Tokyo, Japan  
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# Acknowledgements

The editors would like to thank Kyushu University, Faculty of Law for organizing the conference under the title “Law and Development at a Crossroads: Asian Alternatives to Universal Schemes?” which represented the basis of this book. Particularly, we would like to express our gratitude to Professor Toshiyuki Kono, Director of International Graduate Programs, whose support in organizing the conference and in assisting with the publication of this book has been crucial. Special thanks are also owed to Sukhbaatar Sumiya, then LL.D. candidate at Kyushu University and presently assistant professor at the National University of Mongolia, who was most directly involved in organizing the conference.

The editors would also like to acknowledge, with gratitude, the following persons who have contributed to this book: Antonio Formacion, whose technical support was always prompt and efficient, Ronald De Vera and Sean McGuinty, both of whom took part in reviewing several chapters of the book.

Our special thanks go to Peter Sowden from Routledge and Professor Randy Peerenboom, who kindly accepted this book for publication, and then had patience and understanding about all delays throughout the editorial process.