BOOK REVIEWS

Asian Laws through Australian Eyes by **Veronica Taylor** (editor) [1997, Law Book Company Ltd, North Ryde, New South Wales, xxvi + 471 pages, ISBN 0 455 214433]

The main substance of the book *Asian Laws through Australian Eyes,* edited by Veronica Taylor, is the contemporary status and strength of emerging legal systems within Asia regarding the rule of law. This is presented in seven Parts, consisting of 20 chapters. Some chapters are devoted to Asia as a whole while others concentrate on individual states. The Parts appear as: (1) Australian Perspectives,[1] (2) Relocating Asian Legal Systems,[2] (3) Constitutionalism in Asia,[3] (4) Public Law and Order,[4] (5) Monitoring Media Freedom,[5] (6) Civil Law in Transition,[6] and (7) Regulating Business in Asia.[7] The chapters are written by different authors and Taylor herself writes in Chapter 4, "Beyond Legal Orientalism".[8]

Generally speaking, in those states where the people operate largely outside the bounds of consumerism there are constitutions that struggle with the implementation of the rule of law. This may be due to traditional beliefs or lack of resources, or in states where the economy has not "taken off". On the other hand, in states with a successful economy, the prize is a growing acceptance of and protection obtained from the rule of law, in particular, a free press and judiciary.

Globalisation of world economies has resulted in great debate on the law. Central to this is the predictability of the law when there is a dispute concerning private rights. For a state to go beyond a knee-jerk reaction to the inevitability of globalisation and commercialism it requires the design and implementation of a reliable and predictable legal system.

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[1] At 3-62.
[2] At 65-110.
[3] At 113-182.
[4] At 185-236.
[5] At 239-277.
[6] At 281-364.
[7] At 267-439.
[8] At 47-62.

In essence, the book focuses on the debate on the rule of law and change within Asia. John Gillespie suggests that the debate on the Vietnamese notion of *Rechtsstaat*, or rule *of* law, versus *Nha Nuoc Phap Quyen*, the socialist legality of rule *by* law,[9] is conceptually alive and well understood by Asian legal planners.[10]

A state must have predictable laws and enforcement agencies to function effectively within a part of the world that boasts of trade which surpasses that in the northern European and North American triangle. Malcolm Smith presents Australians as tending to view Asian legal systems as inferior to their own legal institutions and constitution in Chapter 11.[11] Australia has the common law tradition that gives it the advantage in both mercantile law and contract law, laws that have become well-developed by the dominance of English trade and imperialism during the last two hundred years.

Is this dominance about to change given the economic strength and freshness of emerging Asian states? Is there a pattern of settled trade and laws that suit English traditions? Is there something more complex occurring within the Asia/Pacific basin, particularly the response of the Asian Civil Code to current needs? Should Asian states accept the British and European traditions, or can they bring about a new order based on inherited civil codes?

It is not only Asian states that are reacting to the dictates and tyranny of commercialism and trade. A careful read of this book makes one realise that Australian institutions are experiencing change also. This must happen to maintain current levels of economic development and trade patterns, in step with Asian states. Since 1987 Australia has identified and established a working group to consider issues arising from the needs of a globalised legal system.[12]

Taylor writes in Chapter 4:[13]

> Asia has emerged as an economic and political regional power. Global movements of people, capital and information have intensified. The

[9] At 371.
[10] See Chapter 18 on "Bureaucratic Control of Business Regulation in Vietnam".
[11] Entitled "Australian Perspectives on Asian Law: Directions for the Next Decade".
[12] At 23.
[13] At 53.

seeming importance of private law has been overshadowed by public regulation within the Welfare state. Global economic integration and free-market ideologies have impelled the growth of multiple layers of international regulation and harmonisation of state laws.

Australia's reaction to this reality has been to promote a multicultural society and an economic gesture, the Asia-Pacific Economic Co-operation ("APEC"). This prompted Malcolm Smith[14] to warn that "the Australian theory of multiculturalism should be distinguished from the reality."[15] He suggests that an honest approach to multiculturalism would necessitate an independent and professional review of Australian-Asian-Pacific needs, and in particular legal needs, to allow the region to cope over the next 100 years. At the crux of orientating this need is the management of change, including legal education.[16]

Will Australia be at the forefront of this change? Will Australia have to surrender anything of itself to match the Asian reaction to globalisation?

The book gives an overall impression that it is examining these questions and attempting to gauge how important Montesquieu's *Philosophe* is on the separation of executive, legislative and judicial powers. Together with a free press, this doctrine forms the essence of a common law tradition, a condition for continued prosperity within the Australian-Asian region. Hence, the debate is about states and where they are placed along a continuum. And, as stated earlier, about distinguishing those ruled by law and those whose basic premise is the rule of law rather than rule by law.

The need for rule of law as a constitutional premise poses an important dilemma for education. A populace that remains ignorant on what law is, and thereby merely abides by the law, can never appreciate the intrinsic value of a good government's law. However, the protection of these people will always remain in constitutionalism, the judiciary's independence and the executive's ability to promote laws that make the transition to a global economy easier.

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[14] Refer Chapter 1.
[15] At 11.
[16] At 60.

India has long had a constitution and democratic processes, including a judiciary that is strong and independent. However, it is portrayed as declining in strength rather than gathering power, despite the rule of law being generally accepted as deeply inscribed in Indian society.[17] Corrupt officials, court systems that cannot react quickly enough and impotent government are seen as the elements of this decline. Consequently, despite being able to boast that its press is one of the freest and a populace that enjoys the benefit of freedom of speech, the rule of law is struggling and is at times transformed into rule by law.

Is the Indian experience a warning to Australians? Australia at the turn of this millennium is about to have its citizenry vote on whether to remain a constitutional monarchy, with a reigning British monarch as its Head of state.[18] Implicit in this referendum is whether the federal system of uniting states within the Australian Constitution is sufficient to cater for the next century. Australia became a federation in 1901 in response to defence, trade and regional pressures. In the months leading to the 1999 Australian constitutional referendum, Australian military forces were and are still in East Timor, supporting East Timor's desire to break from Indonesia and become independent.

At the same time, Australia's economic strength in Asia has been tested. This was particularly so during the recent Asian economic recession when the region witnessed Australia's growth and its neighbours' near economic collapse. Within this context, it may seem to the average media-influenced person that Australia does not need to adjust its direction or introduce major change to meet the next 100 years. Furthermore, it seems that even the proponents of republicanism in the forthcoming referendum view a mere change from an English monarch[19] to a President chosen by the Australian parliament as sufficient to meet the next 100 years. *Asian Laws through Australian Eyes* presents some enlightening chapters for those who hold this view, especially the four chapters in Part One on "Australian Perspectives".

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[17] Ibid.

[18] *Editor's note:* the referendum was held on 6 November 1999 when Australians voted to maintain the *status quo.*

[19] What appears anomalous is that Queen Elizabeth II is also Queen of Australia.

The book demonstrates a more comprehensive willingness and a practical acceptance of change by Asia to meet the growing needs of globalisation. It tests the theory on whether Australian common law is strong enough to satisfy regional demands and whether common law will prevail over the tradition of civil codes adopted by Asian states. It becomes apparent that the approach to globalisation adopted by states with civil coded law such as Taiwan, Korea and Japan is fresh and vibrant. Kate Laffer uses the Korean code on agency law as an example and states:[20]

> [L]ike the Common Law, the Korean Law aims to uphold the security of transactions and the utility of the institution of Agency by recognising apparent Agency... The Korean law appears to offer slightly more protection to the third party than the Common Law, this is just a difference of degree, not one of substance.

As the need arises, are states such as Korea able to take the best of both the common law and civil law and enshrine them in civil codes guaranteed by a new and modern order of constitutionalism?

Generally speaking, the book demonstrates the willingness by Asian states to take on change, to be challenged by globalisation and to modify their legal institutions accordingly. They have the luxury of being able to change their institutions and laws because they have not been blessed with affluence and settled law that satisfy private and public interests. Constitutional barriers in the Western sense do not restrain them and their constitutions are able to meet growing needs when they arise. What is emerging is that growth and stability in law occur when regulated patterns of consumerism settle.

Although Australia has a settled pattern of the rule of law, it is not resistant to change. It has a willingness to trade and the defence of its position is paramount. However, change for Australia may be labelled as more subtle and covert. APEC and the adoption of international treaties like the 1980 Vienna Convention of Contracts for the International Sale of Goods[21] represent global economic reality for Australia in its statutory law.

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[20] See Chapter 17 on "The Law of Agency in Korea" at 360.

[21] More commonly known as the "Vienna Sales Convention", 1988 Australian Treaty Series No 32. The Convention is applicable in the Australian states by way of uniform legislation. For example see 1986 Sale of Goods (Vienna Convention) Act (NSW).

The book explores the changes that are occurring in Asia and demonstrates that it is a process that instigates the servicing of the needs of Asian states and the region by establishing civil codes. The rewards for a successful change are a free press and an independent judiciary. At large, Australia has these institutions in place. However, is Australia willing to trade off its common law tradition for new regional civil codes shared in common with the rest of Asia? Can an independent judiciary exist across jurisdictional boundaries to enforce common civil codes that respond to the dictates of trade and the realities of multiculturalism within the region? Will the change protect ethnic and minority groups? Without the protection of human rights within the region, and a common-ground approach, constitutionalism within the Asian-Australian-Pacific region will remain compromised. The degree to which this compromise affects economic prosperity and stability will depend upon the impact that the restraint of human rights abuse has on consumerism.

The examples of Asian jurisdictional reaction and adoption of change illustrated by the book[22] almost convince the reader that over the next century the region, perhaps the world, will adopt a Bill of Rights that is common to all states. The essential ingredients will be the rule of law, a free press and an independent judiciary. It becomes apparent that common law traditions will become less persuasive and subordinate to common civil codes. There will be an independent judiciary to enforce those codes, with mediation as the preferred position for dispute resolution.

Law within the region is portrayed as on the move,[23] and while the global economy is developing, law cannot remain static or be used to serve the past. An analysis of regional Asian laws embroils Australia in the need for constitutional change from within and across jurisdictional boundaries.[24]

Australians expect Asian states to change and adopt constitutions to meet modern-day realities of commerce. However, the first question is whether Australians have identified similar needs for Australian legal institutions. When answering this question, the reader is left with other questions such as the following. If a general population within a state cannot comprehend the economic and legal requirements of change, does change have to be

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[22] See Parts 3 and 6.
[23] Ibid Part 6.
[24] At 360.

executive-driven? To what degree do the traditional safeguards of a free press and independent judiciary matter in an executive-driven model?

To answer the first question, a difficult one, Taylor reviews the various aspects of Asian states as they relate to constitutionalism, public law and order, freedom of speech and the media, civil law and business law.[25]

In Chapters 8 and 9 respectively, South Korea and Taiwan are presented as prosperous and stable economic "miracles". In particular, South Korea's Constitution maintains a Confucian tradition and has adapted the German Civil Code to meet its needs. The role of judicial review along the American model has been important to Korean constitutionalism in recent years. Peter Holland reports in Chapter 8, which is entitled "Towards Constitutionalism: The First Term of the Constitutional Court of South Korea", that the Korean Supreme Court has preferred to protect citizens' rights through a constitutional construction of legislation.[26] In 1987 Korean Law was enshrined in the start of Chapter 2 of the Constitution, which provided an array of rights and guaranteed freedoms to its citizenry including:[27]

- freedom of occupation (Article 15);
- freedom of instruction in place of residence (Article 16);
- privacy (Articles 17 and 18);
- freedom of conscience (Article 19);
- freedom of religion (Article 20)
- freedom of speech and freedom of assembly and association (Article 21);
- freedom of learning and the arts (Article 22);
- property rights (Article 23); and
- the right to vote and hold public office (Article 24).

Chapter 2 of the South Korean Constitution commences as follows:[28]

> All citizens shall be assured dignity in the value of human beings and have the right to pursue happiness. It shall be the duty of the state to

[25] See Parts 6-7.
[26] At 140.
[27] At 141.
[28] Ibid.

affirm and guarantee the fundamental and inviolate rights of individuals.

Holland observes that in 1988 judicial review of legislation occurred for the first time in Korea's legal history. Review is vested in a Constitutional Court, a specialist tribunal established in accordance with the civil law heritage within the Korean legal system.[29]

Sean Cooney discusses Taiwan in Chapter 9 entitled "Emerging Liberal Democracy and the Constitutional Review". Following an emerging liberal democracy and new constitutional era Taiwan elected a president for the first time in 1996. Emphasis during the last decade had been on the education of the populace in the rule of law. Up until this period, the Taiwanese had been largely subject to rule by law.

Cooney discusses the Council of Grand Justices as an important but fragile player in the building and maintenance of democracy in Taiwan in this chapter.[30] The Grand Justices' role during the martial law era was one of defending legitimised authoritarian rule but in recent times there has been a positive shift in the Council. It is now determined to support democracy and assert its autonomy. Further, it will intervene decisively against the branches of governments whose actions transgress judicial powers and violate the institutions of freedom.[31]

The discussion on freedoms continues in Part 5 on media freedom. John Middleton presents the discussion on Japan, which appears as Chapter 13, entitled "Reporting Fiction as Fact – The Problem of Misrepresentation and Invention by the Japanese Media". He introduces the very useful concepts of *hodo higaisha* (victims of media reports), *Goho* (misreporting, misinformation) and *Ryoho* (false reporting, misrepresentation, fabrication, invention, disinformation). The concepts are presented as weaknesses in free press, resulting in bias and dysfunction.[32]

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[29] At 158.
[30] At 163-182.
[31] For the discussion on Taiwan see Sean Cooney, Chapter 9 "Taiwan's Emerging Liberal Democracy and the Constitutional Review".
[32] At 262-268.

Japan has developed and recognises distinct and clear concepts of false reporting. The first example of misreporting provided by Middleton is the false manufacturing of news. An American example of the manufacturing of news occurred in the Washington Post in 1981. It presented "Jimmy's World Affair", a story about an eight year old heroin user who received the Pulitzer Prize for feature writing. The story happened to be fictitious and a total misrepresentation of an identifiable person.[33] Therefore, to what degree does the globalisation of laws require the press to be unbiased and free from misleading (whether negative or positive), deceptive and false reporting?

The second example of false reporting is to work and benefit from something by converting conjecture into fact. In this respect, there is the benefit of selling additional copies of publications because of the "scoop". This benefit is seen to outweigh the risk of publishing inaccurate information.[34]

The third area recognised by the Japanese press as false reporting is the presenting of an article to simulate a staged event as a real event in order to persuade somebody to do something. Middleton reports:[35]

> In Japan several cases of distortion and invention have been exposed in popular magazines and major dailies.

As an example, Middleton cites a lawsuit brought by Kazayoshi Miura, a businessman who was wrongly convicted of murdering his wife and portrayed incorrectly by the media, which resulted in a journalist being sued for irresponsible reporting.[36]

There is a turning of the tide in Japan against poor and inaccurate press. The role of the judiciary has been identified to assure that the press is unbiased and not manipulative.[37] Generally, there is a fear and feeling of shock now amongst journalists because of the judicial treatment of the media.[38] The reader is left contemplating whether the Australian media

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[33] At 266.
[34] At 267.
[35] At 266.
[36] At 277.
[37] At 268-269.
[38] Generally see Chapter 13.

would survive public and judicial scrutiny if there were similar laws on misleading and deceptive reporting.

The Japanese media is contrasted with the Indian press in this Part. David Flint writes on the monitoring of media freedom in India and reports India as having strength in a free press. He observes the following:[39]

> India's record in protecting freedom of speech, and in establishing and maintaining a regime of regulation which does not excessively constrain the media, is outstanding. As India opens her economy to foreign investment, freer trade and deregulation, it is expected that she will join a group of Asian countries who are recording high levels of economic growth. If this can be achieved, with her freedoms intact, she will be an answer to the proposition that Asian economic growth is somehow incompatible with full liberal democracy.

In his conclusion, Flint writes:[40]

> Indian jurisprudence, even in the Emergency, demonstrates the Court's desire to protect freedom of speech and of the media, and to consider carefully the jurisprudence of other countries in finding solutions which are appropriate to India.

Thus, the Indian media shows undenied strength, although there is weak institutional performance elsewhere and the main body of Indians is served poorly by a legal profession and a court system that works less efficiently than it should.[41] The implicit suggestion therefore is that rule by law should be in place, including the doctrine of separation of powers, a free press and a constant monitoring and evaluation of the performance of the Constitution.

The concluding chapter[42] concerns "China and the World Trading System". Jeff Waincymer reviews China's negotiations to enter the GATT and concludes that Chinese authorities need to come to terms with the modern

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[39] At 260.
[40] At 261.
[41] At 260.
[42] Chapter 20.

notion of sovereignty and integrate China into an interdependent world.[43] The suggestion is that China needs to have laws that act internally and externally to establish common boundaries of trade and that these laws have a strong predictability.

In fact, two chapters are devoted to China, the other[44] appearing earlier in Part 4. Sarah Biddulph contributes this chapter on some of the preliminary issues that surround "The Legal Structure of Decision Making in Chinese Police Enforcement Powers". The issues raised and discussed here may be summarised by Qiao Shi in a speech closing the National People's Congress (the Standing Committee) in April 1995:[45]

> Only when the laws are implemented in practice will they have the effect of acting as a norm of conduct for members of society, preventing abuse of power by government officials, protecting the rational order of political, economic and social life and protecting the lawful interests of citizens.

Towards the conclusion of the book, one is left with the impression that those "miracle" Asian states at the apex of the economic prosperity have adopted the rule of law as a guiding principle. This adoption is a beneficial by-product of successful economic growth. The failure of the rule of law as a guiding principle is presented as problematic in the sustenance of prosperity and economic growth.[46] This impression is neither confirmed nor denied by the book in the absence of a concluding comment that draws together the various threads of argument and observations presented.

Asian Laws through Australian Eyes presents law within the Asian-Australian region as non-static. The region is portrayed as one with several converging jurisdictions and legal institutions, all bound by the demands of globalisation. The need to reform human rights and adjust economic thinking in the region is highlighted.[47] The reader is left with the thought that Australian and Asian laws are on the move constantly, and somewhere in the future, common civil codes will work together with a separate and

[43] At 439.
[44] Chapter 11.
[45] At 207.
[46] Refer to Oliver Mendelsohn in Chapter 15 "From Colonial to Post-Colonial Law in India" at 315.
[47] At 439.

independent judicial system to enforce the law effectively across national boundaries.[48]

While the practice of common law and the rule of law as experienced by Australia have apparent strengths, Asian states are continually reviewing their position and are open to change. They have the ability to take on the strengths of the common law and incorporate them into their civil codes. In many of the civil coded states of Asia, the trend is to respond with constitutional changes that encourage the rule of law, an independent judiciary and the maintenance of a free press. This is all happening in the wake of transition and increases in disposable income. And this is all unavoidable because it is fact that globalisation and consumerism dominate social and economic life.

David McIlwraith

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[48] For example see discussion at 105-109, 130-131.