

Asia-Pacific Constitutional Systems

By Graham Hassall and Cheryl Saunders

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Reviewed by Myint Zan^[*]

The authors of the book state in their introduction that ‘the subject-matter of this book is not confined to constitutional law or theory, or to the formal institutions and other legal rules which derive their authority from constitutions’. They also reiterated the truism that ‘[i]ndeed, constitutional studies cannot be confined to a single discipline, whether law, history or political science’ (page 3). As the reviewer reads the subsequent (quoted) statement that even the ‘public law in England “is simply a sophisticated form of political discourse [and] that controversies within the subject are simply extended political disputes”’ (page 4)^[1] I am reminded of the statement made by the late Sir Owen Dixon on the occasion of his inauguration as Chief Justice of Australia in the year 1951. Sir Owen Dixon stated that ‘[t]here is no other safeguard in judicial decisions in great conflicts than a strict and complete legalism’.^[2] But the year was 1951 and Sir Owen was describing the ‘scene’ in Australian ‘constitutionalism’ and constitutional law of more than half a century ago. It is not only a credit to the authors but a reflection of the changing times that a ‘strict and complete legalism’ is (almost) completely eschewed in this book. Nevertheless one of the book’s, if not a substantial part of the book’s focus and orientation is legal in the broad sense of the word.

Each age or epoch probably has its ‘catchwords’ and one such word or phrase that appears twice in the Contents page is ‘modernity’. Part I of the book has the title ‘Modernity and Nation-States at the Dawn of the Global Era’ and Part II ‘The Constitution of Modernity’ followed by the final Part III on ‘Democracy and the Rule of law’. Part II and Part III are more ‘legalistic’ than the preceding Part I. Matters specifically concerning the Asia-Pacific region are also dealt in those two Parts.

A map of the Asia-Pacific region is reproduced in pages x to xi of the book with the names of the countries or regions whose constitutional systems are discussed – in varying lengths and emphasis- being ‘named’ in the map. The maps of Australia and New Zealand are reproduced but are not named and hence Australian and New Zealand constitutional systems are not discussed in the book.

In the Chapter on ‘The modern constitution’ (Chapter 2) three ‘forms’ of State are briefly discussed ‘The liberal-democratic state’ (pages 34-5), ‘The socialist-democratic state’ (pages 35-9) and ‘The ethno-nationalist state’ (pages 39- 42). The mention of Pacific Island states are made mostly in the section about ‘ethno-nationalist states’ with Malaysia and Fiji being (naturally) mentioned at the outset of this section.

It would come as no surprise that the Pacific region is again the main focus in the section dealing with ‘The common law and customary law’ in the Chapter on ‘Courts and the judiciary’ (Chapter 8). A major

bulk of the discussion in the section make references to the Island states of the Pacific region including, briefly, the (very) small ‘Pacific territory of Tokelau’ (page 173). ‘Adat law’ as practised in Indonesia (rather than Malaysia) is also briefly discussed in a paragraph with the pertinent but somewhat unsurprising reminder that *adat* is ‘not necessarily the same as Islamic law’ (page 172).

The authors further state that since both Islamic law and *adat* ‘concern “the totality of life” rather than merely legal relationships, the two can come into conflict’ (page 172) How the conflict was or could be resolved say in particular cases – whether the cases are, to use a fashionable term, paradigmatic or not – could have been beneficially and briefly discussed perhaps in a foot note. It also bears mentioning that Indonesia –in contrast to Malaysia - does not have as part of its legal system a common law system^[3] but a civil law one. Put it another way, though Islamic law plays a part in the legal and indeed the constitutional systems of both Malaysia and Indonesia (mainly though not exclusively in the areas of family law) the ‘other’ (devolved)^[4] legal system of these two Muslim-majority countries are that of the common law in Malaysia and the Dutch-based civil law system in Indonesia. Hence a brief discussion of the *adat* law situation vis-à-vis both Islamic law and common law in Malaysia (in addition to that of Indonesia) would have been appropriate in this particular section whose sub-title was ‘common law and customary law’.

One realises though that such a ‘neat’ division or description of legal or constitutional systems even in the generic sense of the word cannot always be precisely (at times even imprecisely) delineated. In this context, reference can briefly be made again to the three types of States or constitutions that were described previously in relation to the Chapter on ‘The modern constitution’. In the section on ‘The socialist democratic state’ Burma is briefly mentioned and discussed with the important and pertinent observation that ‘[t]he constitutional frameworks of some states have shifted to accommodate a change from liberal-democratic to socialist orientations’ (page 37). For this reviewer it is especially significant that *only* Burma is mentioned as an example as the State ‘which .. shifted ..from liberal democratic to socialist orientations’. Indeed among the countries mainly discussed in this section which are China, Vietnam, Burma, Laos and North Korea only the Burmese state, in most of its first fourteen years of independence, from 1948 to 1962 can roughly be described as ‘liberal democratic’ in that it adopted the (British inspired) parliamentary form of government. With the military coup of March 1962 the parliamentary system was abolished by decree and the country became a de facto (1964 to 1974)^[5] and constitutionally-mandated one party State^[6] (1974 to 1988).^[7] Incidentally, it is not correct to state that ‘a ruling “State Council” [actually ‘Council of State’] of 29 members was elected by a 464 member People’s Assembly (Pithu Hluttaw) [actually *Pyithu Hluttaw*] in 1966-67’ (page 37). The *Pyithu Hluttaw* came to existence only on 2 March 1974.

It is understandable that in a book which attempts to cover – at times if only peripherally or in perspective or from a certain ‘slant’- of such a diverse region constituting countries and territories ranging from India to Samoa, from Fiji to Nepal and from Pakistan to the Cook Islands- there would be some errors. Competent though their knowledge of and research in the variegated constitutional systems, the authors cannot be specialists in all or even most of the systems in the region. Moreover it would have been quite a task to check and cross-reference all the details concerning legal and political developments of the region. For those who want to check the ‘Chronology of constitutional events in the Asia Pacific’ there is an Appendix with that title starting alphabetically with the country of Bangladesh and ending with Vietnam.

This appendix states in ‘time-line’ with years (some times with months and dates) in chronological order in 30 pages (from pages 250 to 279) the political events and legal developments which have had constitutional implications in the 39 countries and territories of the region. The book was published some time in the year 2002. Hence for certain countries the ‘constitutional events’ are covered as recently as mid-to late 2001. For example, for Nepal, the assassination of King Birendra (and I should add most of the Nepalese royal family) (probably in June) 2001 is stated in the Chronology. The impeachment and

removal of Indonesia's President Abdurrahman Wahid and installation of Megawati Sukarnoputri in July 2001 is stated (not completely correctly) as '2001 : Abdurrahman Wahid resigns as president and is replaced by Megawati Sukarnoputri' (page 260).

Yet for Fiji the most recent constitutional event that is stated is the '1999 General elections' and of 'Mahendra Chaudhury becom[ing] prime minister' (page 255) omitting the events of 19 May 2000 'Speight take over' of Parliament, the appointment by the Commander in Chief of the Fiji Armed Forces of the interim government a few weeks thereafter and the landmark ruling of the Court of Appeal of Fiji on 1 March 2001 that the interim government was unconstitutional as per the 1997 *Constitution of Fiji*.^[8]

These events happened in Fiji from about a year to several months before the assassination of King Birendra of Nepal in June 2001 and the impeachment and removal (rather than the resignation as stated in page 260) of Abdurrahman Wahid and the ascension to the presidency of Indonesia of Megawati Sukarno Putri in July 2001. Internally, for Fiji, the events and consequences of 19 May 2000 is as significant as – if not even more significant than- Megawati Sukarno Putri becoming the first female president of Indonesia is for Indonesians or the assassination of most of the Nepalese royal family is for the Nepalese. Hence one feels that there is a need for more consistency as regards the chronology of events in the various countries.

On the other hand, the death in Washington DC of President Ratu Sir Penaia Ganilau of Fiji on 16 December 1993 is mentioned (page 255) but the assassination of Prime Minister Indira Gandhi of India in late October 1984 is not stated in the time line for India: an event of more national and international significance than the death of Fiji's president in 1993.

The 'time line' for Laos also somewhat puzzles this reviewer when it states that on '2 December 1975 [a] 264-member People's Congress proclaim [the] People's Democratic Republic of Laos' and for '1989' it was stated that (there was a) 'Communist take-over'. The reviewer believes that the 'Communist take-over' occurred in late November and early December 1975 when Laos was declared to be a 'People's Democratic Republic' and not in 1989 when the '[f]irst assembly elections' were held (page 261).

As regards Malaysia, the 1990 and 1995 general elections (but not the 1999 general elections) are mentioned (page 263) but the 'constitutional crisis' of 1993^[9] whereby the full immunity from any civil or criminal prosecution accorded to the Sultan (Heads of the Malay states) in the pre-1993 *Federal Constitution of Malaysia* was removed through a major constitutional amendment is puzzlingly omitted from the Chronology.

Coming back to the Pacific region, in relation to the Solomon Islands, only events up to June 1999 are mentioned (page 273). The June 2000 coup as well the October 2000 Townsville Peace Agreement between the warring factions or ethnic groups which was brokered by Australia are not included.

South Korea's (Republic of Korea) '1997 Presidential election[]' (and just that) is mentioned without stating that Kim Dae Jung, after about 40 years in oppositional politics, was elected President in the 1997 election. This important development in South Korea politics should have been mentioned as it is stated a few lines earlier that in the 1987 Presidential election 'Roh Tae Woo beats Kim Dae Jung and Kim Young Sam' (page 273).

Coming back to Burma two 'anomalies' and one factual error in the Chronology should be pointed out. First, the anomalies: it was stated that in 1958 there was an 'Army take-over' (page 251). In fact it was not, at least in form, a 'take-over' as such. Parliament was convened at the request of the then Prime Minister U Nu to temporarily handover power to General Ne Win. This proposal of the Prime Minister was put to the vote in Parliament and was approved by a significant majority. And the handover of power to General Ne Win was done through constitutional means.

The ‘second-coming’ (to power) (so to speak) of the late General Ne Win- Ne Win’s caretaker government held general elections in February 1960 and handed over power to the late U Nu on 4 April 1960- on 2 March 1962 was the ‘real’ take-over and is rightly described in the Chronology as a ‘military coup by General Ne Win’. Secondly it is not quite correct to state that in ‘1971 [the] Ne Win government appoints [a] constituent assembly’. What happened was that a ‘Constitution-drafting Commission’ chaired by then Brigadier San Yu was formed by a decree of the Revolutionary Council on 25 September 1971. The Commission was not stated as a ‘Constituent Assembly’ in any of the official publications in English at that time. Hence it is not quite correct in terms of description and in terms of substance to describe this Commission as a ‘constituent assembly’.

The statement that in 1962 the deposed Prime Minister U Nu ‘goes into exile’ (page 251) is a clear factual error. On the day of the military coup of 2 March 1962 U Nu was taken into what was then (and still now!) euphemistically termed as ‘protective custody’ in a military camp outside Rangoon and he was released only on 27 October 1966. In February 1969 U Nu left the country on the pretext of taking medical treatment abroad and in a news conference held in London on 27 August 1969 declared himself to be ‘the legal Prime Minister of Burma’. On 23 July 1980 U Nu returned to Burma under an Amnesty granted by the then government whose President and undisputed leader was the person who overthrew him in 1962 : Ne Win. Hence U Nu’s ‘self-imposed exile’ of more than 11 years started in 1969 not 1962 as stated in the Chronology.

Before concluding one more (substantive) issue could be briefly mentioned not as a critique but based on the reviewer’s perhaps whimsical interest. Few scholars of the region would seriously dispute that among all the governments of the States and territories in the Asia-Pacific region perhaps the most isolated and repressive would probably be that of the ‘Democratic People’s Republic of Korea’ (North Korea). In addition as far as the possible threat to world peace and security are concerned the actions of North Korea and the possible reactions by certain countries against it could be said to constitute one of the greatest potential threat to the security of the region. Therefore the reviewer is a little disappointed that somewhat less than three pages (part of pages 35-6, 103) were devoted to discussing the North Korea constitutional ‘system’.^[10] This is considerably less than the pages devoted to discussions of Laos’ constitutional system and politics and perhaps briefly even its ‘legal culture’ (in parts of pages 37-8, 20-21, 79-80, 102-03, 120, 143, 186) . Laos might be a ‘fraternal’ Communist or one-party State like North Korea. Nevertheless in the scheme of things and taking international relations factors only partially into account one feels that the importance – for worse one should say rather than for the better- of North Korea is more than that of Laos or for that matter (say) Papua New Guinea whose constitutional system and political developments are given about seven to nine times more ‘space’ than that of North Korea.

The latter part of this review has devoted considerable space to critiquing and correcting a few inaccuracies and inconsistencies (mainly) in the Chronology since this reviewer believes that part of a reviewer’s task is to help improve the book for possible future edition or revision.

It needs to be emphatically stated that the reviewer believes that the book is a valuable one on the subject. The blurb states that ‘[t]he aim of this book is to ground the idea of constitutionalism in local and global practices, and, through examining these practices, to identify significant challenges to the workings of contemporary constitutional orders’. To a very large degree the authors have achieved this laudable aim.

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[1] Citing Massaji Chiba, 'Three Dichotomies of Law in Pluralism' in Peter Sack and Jonathan Alek (eds) *Law and Anthropology* (1992).

[2] (1952) 83 *Commonwealth Law Reports* xi, xiv.

[3] 'Common law' is used here in the sense of the 'English style' legal system and based on the 'adversarial system' and case law principles. It does not mean here the other meanings of common law which is 'law developed by courts on the basis of traditional principles created by parliamentary legislation or 'common law' as distinct from 'equity'. For these three types or definitions of common law see Clive Turner, *Australian Commercial Law* 18 (18th ed 1990).

As regards the application of (aspects of the common law) in Malaysia Khoo Boo Teong states that 'Malaysia has a common law system and the doctrine of binding precedent is applicable in Malaysia' Khoo Boo Teong 'Law and Legal Culture in Malaysia from the Perspective of Public Law' in Alice Tay (ed) *East Asia- Human Rights, Nation-Building, Trade* (1999) 70, 93.

[4] Under Part III 'Democracy and the Rule of Law' there is a Chapter (Chapter 10) in the book on 'Devolution'.

[5] The Revolutionary Council (RC) which took over power from the democratically-elected government in March 1962 issued a decree entitled *Law Protecting National Unity* on 23 March 1964 which banned all political parties except the Burma Socialist Programme Party which the RC had formed on 4 July 1962. Hence at the latest by 1964 Burma had become a defacto one-Party State.

[6] The 1974 *Constitution* which was in force from January 1974 to about mid-September 1988 in Article 11 states that 'The State shall adopt a single Party system. The Burma Socialist Programme Party is the sole political Party and it shall lead the State'.

[7] The reviewer has discussed the issue of Burma being the only country in Asia which was 'transformed' from a parliamentary system of government to that of a one-Party 'socialist' system in Myint Zan, 'Law and Legal Culture, Constitutions and Constitutionalism in Burma' in Alice Tay (ed) *East Asia- Human Rights Nation Building Trade* (1999) 180, 223-25, 277.

[8] *Republic of Fiji and Attorney-General of Fiji v Prasad* (Unreported Fiji Court of Appeal) Casey J, Presiding. The judgment can be accessed at http://www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_Q-R/Republic_v_Prasad.html (accessed 8 July 2003).

[9] At least according to one Malaysian law scholar see Andrew Harding 'Sovereigns Immune? The Malaysian Monarchy in Crisis' (1993) *The Round Table* 305.

[10] The reviewer believes that taken into account the Kelsenian definition of a 'legal system' the North Korean regime (or father-son dynasty of the late 'The Great Leader' Kim Il Sung and 'Dear Leader' Kim Jong Il) in power continuously since 1948 and the former Taliban regime of Afghanistan (in power in most parts of Afghanistan from October 1996 to November 2001) have 'laws' and 'a legal system'. Just as it is appropriate to study the laws and the legal system of the Taliban for academic and utilitarian purposes it should also be beneficial – taken North Korea's strategic importance and potential to affect the security of the region- to study in more detail than is provided in the book the orientation, structure and functions of the North Korea constitutional and legal system. Fortunately in this cyber and information age the

internet can provide a fertile ground for further research. When the reviewer typed the words 'North-Korean-Legal-System' in 'Google Search' (accessed 28 November 2003) 10 references to the phrase were found. The Google Search also turned up 34 references to the phrase 'North - Korea's – Constitution' (accessed 28 November 2003).

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