

East Asia—Human Rights, Nation-Building, Trade, edited by Alice Tay (Nomos Publications, Baden-Baden, Germany, 1999) 598pp. Price approx \$100 (softcover). ISBN 3 7890 3853 X.

THEO CHRISTMANN*

This book is edited by Alice Tay and comprises three sections, which add up to 13 essays by 11 authors in total. The sections are divided into former British Colonies dealing with Singapore, Malaysia and Burma, former Indo-Chinese States dealing with Vietnam, Cambodia and Laos and finally Indonesia and Thailand forming the third and final section.

Based on the title, and a first glance, a reader might wonder why countries such as China and North and South Korea are not included, since many would associate discussions on human rights mainly with China, it being the dominant East Asian nation and last stronghold of conservative communism. This gives rise to the first criticism. The title could have been more specific or less confusing since the book does not cover East Asian countries but Southeast Asian countries only.

In addition, the map on page seven reveals some geographic inaccuracies: although the book was edited in the late 1990s Russia and parts of the Commonwealth of Independent States is described as the Soviet Union and Mongolia as the Mongolian People's Republic.

The index seems to indicate that the essays deal with specific commercial and business legal issues, human rights and also with legal culture in general. This raises the question to which target group the book is meant to be addressed. I will discuss this issue at the end.

The first section dealing with former British Colonies contains six essays of which three are about Malaysia, two on Burma and one on Singapore. However, out of the total 330 pages of this section, the essays about Burma amount to 150 pages with Myint Zan's contribution of 102 pages 'Law and Legal Culture, Constitution and Constitutionalism in Burma' forming not only the most voluminous essay of section I but of the whole book.

The first essay is a contribution about Singapore by Tan Yock Lin, entitled 'Legal Change and Commercial Law in Singapore'. The essay itself delivers what the heading promises: after a short sketch of the economy and the political system, Tan provides in the first part an outline of changes in the original common law-based legal system of Singapore. In the second part he focuses on commercial law in particular, such as taxation law, employment law, intellectual property and product liability and also on the commercial law's sources and its transformation.

* Graduate Student, School of Law, Deakin University.

Tan ably describes the dichotomy between what an observer of changes in the legal system might see and what changes might have actually happened. At first sight, most observers would see all the trappings and features of a common law system. Still, there have been important changes, although they are quite subtle and not easy to detect. Tan does not refer to the rather trivial changes to methodology, sensitivity to adaptation and modification of the Singaporean legal system within the milieu of the common law. These sorts of changes are evident in countries which have adopted the common law system. He refers to unique Singaporean responses to the common law, such as public housing law, which creates a new concept of real estate and whose uniqueness results from the confined area of the state. Another specific Singaporean law and closely related to the public housing law is the Central Provident Fund Law which requires employers and employees to contribute into a fund which is then used for construction of housing. The fund also plays a significant role in capital development.

Certainly the most famous and unique Singaporean law is the whole conglomerate of criminal law and procedure. The Police Force Act, the separation of the prosecutorial function and the tough fine and sentencing policies are explained. In this regard one notices that Tan could not resist discussing the caning of American tourist Michael Fay for vandalism, which drew worldwide attention in 1994.

In describing developments in the commercial area, Tan manages, not without some critical sub-tone, to point out the dichotomy regarding modernisation and acceptance of western ideas on the one hand, and rejection of current liberal ideas within the criminal justice system and with regard to the role of discretion, on the other hand. For the Australian reader it might be interesting that as for copyrights, Singapore rejected the UK version in favour of the Australian *Copyright Act*.

The essays of Khoo Boo Teong, 'Law and Legal Culture in Malaysia from the Perspective of Public Law' and Poh-Ling Tan 'Apostates, Deviants and Visions of Modernity: Contradictory Trends in Religious Freedom in Malaysia' provide a good outline of the sources of law, the structure of the court system and the difficult balance between English common law, Islamic law and ethnic customary law in Malaysia's multiethnic society.

Khoo Boo Teong describes the different sets of law applicable to the different ethnic groups and thus shows in an impressive way that the notion of equality before the law has a completely different meaning from what we are used to in western countries. The Constitution and the unique spirit of it—the so-called 'Rukunegara'—are described well, including the restriction of fundamental rights with regard to the four 'sensitive issues'. These are citizenship, Malay language as the national language, special position of the Malays and legitimate position of other communities and the sovereignty of the Malay Rulers.

My view is that on these issues, public discussion and therefore the freedom of speech has been virtually removed. Khoo describes this deficit with a good deal of cynical criticism as 'democracy a' la Malaysia'.

Poh-Ling Tan's article focuses on the resurgence of the Islamic religion in Malaysia and its impact on politics and society in general. The article considers the dichotomy between religious freedom and growing bureaucratic and executive intolerance notwithstanding constitutional guarantees. The constitutional safeguards for freedom of religion are discussed together with specific Islamic socio-political structures. Conversion to and from Islam, the difference between Sufis and Shiites, and the subject of religious freedom within the non-homogeneous Muslim community itself and prohibition against proselytising are discussed extensively.

Tan's conclusion illustrates well the latent potential for future ethnic tensions. Although there is a constitutional protection of freedom of religion, the complex binding of the Malay identity with Islam, the communal nature of Malaysian politics and finally the official policy of affirmative action for Malays compared to non-Muslims have created an Islamic based class system which operates on a subconscious level. Tan's view, however, that Islam and Christianity have one major thing in common, since both claim exclusive truth, arguably represents the medieval version of Christianity rather than the now prevailing pietistic belief and might therefore cause some objection from certain groups of Christian readers.

The third article by Cheong May Fong, 'Commercial Law and Legal Culture in Malaysia', unlike the previous two articles, is, from an academic point of view, of no educative value, as it is almost wholly political propaganda. Cheong tries to convince the reader of all the recent achievements and the 'Malaysia 2020' vision in a manner that only a loyal pro-government journalist could have written. This article is almost an insult to any serious reader and is therefore misplaced in this book. It should have been published in certain Malaysian periodicals or newspapers.

With regard to all the three essays, readers will find that the issue of the problematic leadership of Prime Minister Datuk Seri Dr. Mahathir Mohamad has been omitted completely, although the editor's referral to that 'show trial' in the introduction (page 23) gives reason to expect a discussion. In power since 1981, Mahathir has been the impressive force behind Malaysia's economic growth and development. Mahathir is also at the same time a proponent of a strong Asia standing firm against western pressures and influences. Neither of the articles mentions the dismissal and jailing of former Deputy Prime Minister Anwar Ibrahim by Mahathir in September 1998. It may have been that, although according to the introduction the book was completed in November 1998, the political events overtook the authors' finalised contributions by some weeks. The editor should have explained this more clearly in the introduction, however, instead of giving the impression that the issue would be discussed in the articles. To some this might be disappointing since this recent event might have a negative effect on the country's political stability in the near future and a discussion might have been of great interest.

Myint Zan's contribution 'Law and Legal Culture, Constitutions and Constitutionalism in Burma' is without any doubt of high value for any human-rights or constitutional lawyer. It is not only the quantity of the essay that impresses but also the quality.

The article contains two parts. Part one deals with Burmese customary law, the influence of Buddhism and the role of the '*Dhammathats*' a collection of Buddhist customary rules as source of law and in what way those traditional features of Burmese Legal Culture have been influencing later epochs.

Introduced initially are aspects of customary law concerning the general status of women, rights of women in marriage (whose modernity might surprise the reader), divorce and partition of property in divorce. Zan proves how liberal from today's point of view Burmese customary law was. He probably also intends to reject a general tendency to classify customary law as being too strict or of being an anachronism. Zan then moves on to more general topics of customary law, such as political and legal culture. He also discusses the Ten Duties of Kings in Burmese Buddhist political thought.

The second part deals mainly with public law in the colonial and post-colonial Burma after the British had brought constitutionalism and the rule of law to Burma. He does so by analysing the two defunct constitutions of 1947 and 1974. Part Two also elaborately describes the recent attempts of drafting a new constitution and discusses the relationship between some principles of the drafted constitution and the principles of the two former constitutions and traditional legal culture. Especially interesting is Zan's examination of the reason for the termination of the 1947 Constitution by military coup'd etat and the de facto collapse of the 1974 constitution through a people's uprising. Zan appears to posit that the 1988 uprising can be seen as a departure from conservative traditional Burmese political culture.

The two parts are not meant to be read or understood separately. Part Two is a continuation of Part One; indeed it is almost the logical consequence of it since it builds on the premises developed earlier. By choosing this structure Zan manages not only to cover a very wide field but also illustrates how the topics are interrelated and how they interact.

The second contribution about Burma, completing Section I, is Laksiri Fernando's 'The Burmese Road to Development and Human Rights'. There is no doubt that the article is well-written. It is also always captivating. Readers will find themselves almost carried away by Fernando's article. However, the essay hardly deals with any legal problems in an elaborate or thorough way. The essay is partly a historical summary interspersed with geographical or sociological or demographic issues such as history of settlement and migration, the leading class in medieval times, today's urbanisation, density of population, education, ethnic variety, minorities and their origin and also religious pluralism. Part of the essay repeats or summarises Myint Zan's article, since Fernando looks at familiar topics such as the state formation, traditions, colonial state development, the postcolonial period, the constitutions of 1947 and 1974, Burmese socialism and the current military regime.

Fernando does not provide the reader with many new aspects since he mainly repeats information, but on a much less juridical level. Some may find the overlap quite disappointing, wondering why there was no editorial coordination in this regard.

The second section of the book deals with the former Indo-Chinese States. It contains five articles of which three are about the dominant Vietnamese state and one each to Cambodia and Laos. Two of the three articles about Vietnam are contributed by John Gillespie, who can be considered as an authority in the field given his vast contributions to the literature.

His first article 'The Emergence of a Law-based State' introduces Section Two of the book. It comprises a bit of everything for readers without any previous knowledge and who want to get a first impression about the country. The historical background from 1000 BC to the introduction of economic and constitutional changes in the 1980s and 90s is roughly sketched. A general outline of the political structure, the almighty Communist Party, the Constitution and state organs follows. From the middle of the essay on, under the heading 'The Role of Law in Vietnam', Gillespie turns to explaining recent developments in legislation, legal institutions and dispute resolution since the introduction of the '*doi moi*' (literally, 'new change') in 1986 and also the status of the legal profession.

His second article 'Legal Framework for Foreign Investment and Trade' is a more detailed description and continuation of the second half of the first article. It provides an excellent illustration of the legal environment for doing business in Vietnam. Nearly all the relevant issues any potential foreign investor or international commercial or trade lawyer could possibly be interested in, such as investment vehicles, repatriation of profits, taxation, protection of intellectual property and import/export regulations are thoroughly discussed.

It describes changes in the country's most important Foreign Investment Law and the introduction of other relevant legal structures that have been made to attract foreign investment since the policy of *doi moi* was adopted. Also, the development towards the rule of law following the government's commitment for further reforms is adequately discussed. Though much more precise and detailed, the second essay overlaps occasionally with the second part of the first.

Gillespie also makes critical remarks regarding the role of corruption in the licensing system, which itself is quite cumbersome. The impractical land law, with its obscure mortgages and security and other current obstacles and impediments which will have to be removed if Vietnam wants to be economically successful in the next millennium are presented on a quite sophisticated legal level.

Unlike the first essay, given the detailed and intricate discussion of foreign investment related matters, the second essay seems clearly to have been written for readers with a good deal of previous knowledge if not of Vietnam, then at least of foreign investment issues. Those readers are recommended to skip the first article. Both articles have, by the way, been used as the main source of the chapters dealing with Vietnam in the Deakin Law School's Study Guide on 'Asian Trade and Investment Law'.

Gillespie's articles act as frames of reference for Benedict J Tria Kerkvliet's contribution: 'Dialogical Law Making and Implementation in Vietnam'. Kerkvliet wants

to prove that regulations and rules are not entirely imposed from above but influenced from below.

Despite the interesting title, which seems to announce a discussion about how Vietnamese citizens may influence laws and policy, Kerkvliet narrows the relevant discussion to two episodes involving changes in rules and regulations regarding only agricultural cooperatives and collectivised farming. Readers might find this disappointing since the two episodes date back to the mid 60s and 1981. These episodes arguably indicate that even before the introduction of *doi moi* in 1986 there had been a small process of deemphasising the collective state plan in favor of some individual entrepreneurship. Kerkvliet's contention is not very strong though since he confines and illustrates his argument only in reference to the agricultural sector.

The time frame (before the official introduction of reforms) is also not a very appropriate choice since (unlike China) in the early days of the communist party in Vietnam there was no sophisticated communication system throughout the slender but long country. As a result, local party officials in remote areas had a good deal of independent authority to act on their own and to exert their own commands to the local peasants.

Laksiri Fernando's second contribution, 'Khmer Socialism, Human Rights and the UN Intervention' is again an historical outline from the early precolonial period to the UN-departure in 1993, rather than a juridical discussion. By comparing Cambodia mainly with Burma but also with Vietnam and Thailand Fernando illustrates some of its unique features. Its most unusual feature is its monolithic society—consisting of over 90 per cent ethnic Khmers. The extreme exploitation of slaves and the role of slavery in the state structure, and the legal system that is derived from the Indian legal texts of Manu with its adopted caste classification such as inequality of birth, are well discussed. Also discussed is the French neglect of Cambodia—their main interest was simply to create a buffer zone between their interests in Thailand and Vietnam while competing with the British. This is set out convincingly. Fernando argues that a direct consequence of that indifference was the non-development of human rights, the absence of political reforms and the failure of an administration of justice which all contributed to the postwar decline of democracy and contributed to the military takeover, the civil war and the Pol Pot regime. The unique and complex UN Intervention of May 1993 (after the Vietnamese invasion of Cambodia in 1979) with all its achievements and difficulties involving regional and international partners is presented accurately and in good detail. The goal was not just to observe a free and fair election but to conduct it together with direct involvement in the local administration and in the process of democratisation.

There are some general remarks and comments by Fernando, however, with which readers might find it difficult to agree. He is very critical about French colonialism in the 19th century and in comparing the former British colony of Burma with the former French colony of Cambodia he clearly favors the British version. This is a generalisation derived from two examples. Cases could be easily found which prove

the opposite. By criticising the French rule in Cambodia Fernando is relying on the axiom that 'when a colony is established, the coloniser has to take the responsibility for the colony's development'.

The question raised is where does Fernando derive this 'commandment'. It is, of course, a decent ethical demand, but it might give the false impression that Cambodia has been the only colony that has been neglected, exploited and seized merely due to its geographical position as a buffer. Other examples can be found where colonialisation did not contribute to the colony's development and progress regardless of the identity of the colonial power. Under the heading 'Why did they happen?' Fernando describes the Pol Pot regime as an extreme form of Marxism. He further argues that there is a general tendency in Marxism to disregard human rights in subordinating the individual to collectivist objects. The disregard of human rights and the tendency to justify violations of individual rights for the sake of the 'Kollektiv' is not a specifically Marxist idea but a general totalitarian policy employed equally by Marxist, Maoist, Fascist or military regimes. One might wonder whether the Khmer Rouge followed a Marxist ideology or any ideology at all except their wish to reconstruct a society from the ground up.

Fernando contradicts himself later by admitting that none of the Khmer Rouge leaders ever contributed to Marxist discussions and none of the basic Marxist literature was ever translated into Khmer. This is as good an argument as any that the aim of the Khmer Rouge was the simple totalitarian and brutal exertion of power in order to achieve their goal of a new society shorn of any ideological belief. Finally, Fernando does not mention Thailand's support of the Khmer Rouge for much of the 1980s. The Thai government saw the guerillas as a counterweight to Vietnamese power in the region and allowed them to retreat to Thailand after Vietnamese forces had invaded Cambodia in 1979.

Tony Lamb's contribution about Laos, 'Outline of the Lao Legislative System' is, at 16 pages, the shortest article in the book. Lamb himself describes the article as a 'glimpse' of the legal system, which is unarguably true given its brevity. Though brief, his outlook addresses some very interesting and particularly unique points. After an introduction that highlights the unusual status of Laos' socialism as one of the few intact single-party systems at the end of the millenium, Lamb embarks on sketching the modern legislative history, which can be divided into three phases. The first phase in 1975 is the abolishing of the former monarchy and the proclamation of the rule of the communist Lao People's Democratic Party. The second phase (1975 - 1980) is one in which the Lao PDR denied the necessity of laws at all but promoted the regulation of actions by 'consensus' between the (disputing) parties, and finally the late 1980s phase which saw the introduction of reforms. The reformed and modernised legislative structure and the process of drafting legislation as well as the state organs are well explained. Similarities to neighbouring Vietnam are apparent. The hierarchy of legal instruments from the constitution over laws, decree laws, presidential decrees, simple decrees, and orders to Minister's instructions are briefly discussed.

It has to be said, however, that Lamb draws a too positive picture of Laos. In doing so he receives some support from the editor who describes Laos in the Introduction as a 'nation of quiet and gentle people too often forgotten because they are too small, too gentle and too quiet.' It remains unmentioned that, for instance, in the late 1970s and early 1980s and during the rule of the Lao People's Revolutionary Party, thousands of refugees left Laos due to the party's harsh political and economic policies. This migration became a mass exodus so that by the mid-1980s almost 10 per cent of the population had decided to leave the country, most of them seeking a better life in Thailand. Lamb also omits to mention that in the mid-1990s due to an increasing loosening of political controls, crime had become an issue of national concern just like in the post-communist states of the former eastern bloc. Both these facts should be considered in light of the editor's remark of a 'nation of quiet and gentle people'. Finally, he fails to discuss the almost routine border disputes between Laos and Thailand.

The final essay of the Third Section contains two fairly substantial articles about Indonesia and Thailand. Timothy Lindsey divides his contribution 'Indonesia: Reinventing a Legal System—Too Much, Too Little, Too Late?' into an outline of the current situation and a discussion of how actions, omissions and mistakes in the past led to today's deplorable situation. Lindsey uses the metaphorical expression 'sins of the fathers' to describe the mismanagement and maladministration of either Soekarno's Guided Democracy Movement and Soeharto's New Order, which both misused the state ideology of '*Pancasila*' (five principles) developed by Soekarno as the fundamental ideology only to legitimise executive policy. Lindsey blames the *Pancasila* as 'the legal cancer' responsible for the deterioration of the legal system to become nothing but a tool of the elite who comprised the government.

The long-lasting success of that ideology as well as its essential meaninglessness is very well explained. Lindsey concludes that the result of *Pancasila* was a society of extraordinary diversity of over 300 separately identifiable ethnic groups, forced to remain in an almost perverse way cohesive, and with a system of government that was exceptional for its structural simplicity but bewildering in the obscurity of its operation.

Lindsey's forecast for the country's future and a way out of the crisis are grim. He argues that Indonesia has to face a mission impossible. There is a huge social and political pressure for change, namely transparency and democratisation. The IMF and other donor organisations have demanded detailed timetables for implementing legislative reforms as the condition for support. Given that Indonesia's court system has been neglected over the past decades and enforcement was virtually non-existent, it seems impossible, for instance, to establish a new bankruptcy system and a commercial court within months. He therefore disagrees with the IMF rescue package that Indonesia has to comply with because it reflects the IMF's erroneous belief that if Indonesia offers a quick workable jurisdiction for debt recovery it will improve foreign investor confidence in order to recover economically in a reasonable time. Lindsey argues that there is no easy and fast solution. Tinkering with the legal system to attract foreign investment will not provide a solid solution but is

only a superficial improvement. It is a piecemeal reform condemned to fail since the persistence of the structural flaws in the legal system is likely. Instead he pleads for a full-scale reform plan as an alternative. Readers might find his discussion on this point somewhat convincing, though not thorough enough.

The only real criticism to be mentioned here is perhaps a factual mistake. Lindsey writes that the Rupiah had fallen to 80 per cent of its mid-1997 value after the currency crisis. Indeed the Rupiah had depreciated by that time not to 80 per cent but *by* 80 per cent of its mid-1997 value.

The last article by Same Varayudej, 'Thailand's Legal System and Business Law' reflects, in its discussion, the title of the book. The article is divided into three parts examining the historical development of the Thai legal system, the constitutional regime and the current legal framework for business and commercial activities.

Varayudej describes the unique historical situation of how the Thai kings and in particular King Mongkut Rama IV (1851 – 1868) managed to modernise the country according to western standards but at the same time keeping foreign rulers out of the country. From a legal point of view, he explains well what considerations were undertaken in the modernisation process to largely reject the common law system in favour of codified civil law assisted by French and Belgian legal advisers. He then turns to describe modern constitutionalism and the introduction of the constitutional monarchy in 1932. The following 16 constitutions are briefly outlined but with a thorough discussion of citizen's rights, state organs and political accountability for violation of human rights in the recent 1997 constitution. That discussion marks the end of Parts One and Two.

Varayudej seems to be very familiar not only with the legal history and the administrative system but also with the commercial system about which he also discusses. Legal transactions, the law governing the formation and rescission of contracts with its unique feature of not requiring consideration, introduce the outline of the current commercial and business legal framework. It follows a satisfying outline of legal forms of business organisations. Then he describes in great detail the intellectual property laws and their improvement in order to accelerate economic growth through technology transfer as well as to tackle piracy industries, whose size led to the threat of economic sanctions by the United States. Finally, the Foreign Investment Law and foreign participation in business activities under the 'Alien Business Law' with its recent developments, which allow investment vehicles and activities, complete the commercial subdivision.

The entire article is highly sophisticated and lofty in tone. Varayudej refrains even from mentioning that the famous King Mongkut Rama IV who successfully used diplomacy to maintain Thailand's independence, is the monarch in the famous 'The King and I' musical. He succeeds, however, in delivering a comprehensive contribution, which provides the reader with an enriching knowledge about the interaction of legal history, constitutionalism and business law in Thailand.

A final general conclusion is warranted. The structure of the book is very 'non-homogenous'. The contributions vary not only in size but also very much in depth. It remains unclear what target group was supposed to be addressed since some articles are very professional, obviously directed to readers with legal, sometimes even highly specialised, backgrounds; others are presented in a rather general manner simplifying or omitting facts. Readers will, therefore, find the essays to be a 'mixed bag'. The editor obviously anticipates this criticism and tries to justify it by stating 'Spontaneity in writing on what one knows about, rather than structured information provision, is the only guiding rule to contributors.'

If there were an understatement in the book, certainly it would be this one.