

Rule of Law in East and Southeast Asia?

Review >
General

In the wake of the Asian financial meltdown, numerous analysts focused on the lack of regulation and transparency as factors precipitating the 1997 crisis. Partly as a result of pressure from international financial institutions, countries have started to improve the legal frameworks in which businesses operate. Christoph Antons' *Rule of Law in East and Southeast Asia* brings together a variety of perspectives from legal scholars on the reforms now underway. Traditional Asian understandings of law as an instrument of state power notwithstanding, do we see signs of a greater regional importance attached to the rule of law?

By Willem Visser 't Hooft

This highly readable collection of 14 different papers is the result of an IIAS workshop held in January 1998. In examining prospects for legal reform in Asia, the book addresses diverse fields of commercial law: intellectual property law, competition law, and financial market regulation, among others. The book is divided into five parts. In the first theoretical section, the authors focus on perceptions of the role of law in economic development. Of particular note are the articles by Bernard Bishop and John Ohnesorge. Bishop points to economic deregulation in many East Asian countries and the resulting separation of business from government. Governments increasingly focus on policies promoting competition, such as increased enforcement of laws on cartel formation; this will inevitably lead to a stronger emphasis on the rule of law. Ohnesorge, however, questions the necessity for a strong rule of law in all areas of the economy. It is important to develop an understanding of the rule of law, he argues, that can effectively be distinguished from the simple legalization of society or the suppression of government

discretion in economic governance.

Part two focuses on Japan as a model for law and development in East Asia and specifically treats the influence of administrative decision-making on Japanese commercial law. Harald Baum, critical of the simple 'West vs. Asia' mental framework, explores important forces of change at work in Japan. In particular, strong bureaucratic interference is regarded as an impediment to economic growth. He cites the example of the Japanese financial industry and the challenges of globalization, and concludes that courts and lawyers will become more important in ex post monitoring instead of the traditional ex ante monitoring manifested through administrative guidance.

Richard Boyd stresses that, when looking at the significance of law in the management of economic change in Japan, the rule of law and safeguarding of competition appear less significant than legal instrumentality and informality. He points, however, to the increasing influence of the Fair Trade Commission (FTC) which implements the Anti-Monopoly Law, an important institution anticipated by rule of law rhetoric. Boyd is right to focus on

strong bureaucratic sectionalism in Japan, such as the continuous rivalry between the FTC and the Ministry of Economy, Trade and Industry (METI) in issuing laws and guidelines relating to competition policy. Christopher Heath likewise focuses on the rivalry between the FTC and METI in his chapter on industrial property legislation.

Christoph Antons points to a fundamental characteristic which Japan shares with other countries in East Asia. This is the primacy of public over private law. Many countries instrumentalized their imported commercial laws for development purposes, yet never encouraged litigation for individual goals. The classical distinction between private and public law has usually been blurred. The relative shortage of attorneys and judges and a lack of specialized courts in East Asian countries may therefore be no coincidence.

The book could have been improved by placing more emphasis on the question whether the current (commercial) legal reforms will lead to a more autonomous private realm where private citizens can more easily go to court. To what extent will the inevitable increase in private trade disputes lead

to a greater emphasis on the rule of law? The book leaves the question unanswered. The article by Robert Lutz on resolving trade disputes and on Asian dispute resolution fora, however, is interesting. He retains an optimistic outlook on the emerging international dispute resolution culture, although he draws attention to remaining enforcement problems in some countries.

Part three of the book deals with the role of law in China. Chen Jianfu concludes that although in China 'rule by law' is still strong, the strengthening of legal discourse and the involvement of legal experts in lawmaking are important steps in the right direction towards a greater emphasis on the rule of law. Part four deals with Southeast Asia and discusses industrial relations and technology transfer, two issues that have been central to the debate on economic development in Southeast Asia. Concluding the volume, Roman Tomasic discusses some recent examples of socio-legal scholarship on Asian commercial law, and encourages further empirical research in the field.

To sum up, this book is a useful guide for understanding law and development in East Asia and the place of the rule of

law in various East Asian countries. Differences and similarities between countries are examined, as are practices and understandings that can be expected to resist pressures to reform. For example, government bureaucracies responsible for implementing new commercial laws will be hesitant to give up their power to courts and lawyers.

The book's main merit lies in its diversity and its emphasis on factors other than cultural ones. Although cultural factors are not to be neglected, recent socio-legal research points to the fact that institutional and procedural aspects of national legal systems matter and may be resistant to transnational harmonization. ◀

- Antons, Christoph (ed.), *Law and Development in East and Southeast Asia* (IIAS Asian Studies Series), London: RoutledgeCurzon (2003), pp. 387, ISBN 0-7007-1321-2

Dr Willem Visser 't Hooft is an attorney at Law at Raadgever Advocaten in Vleuten, the Netherlands. He completed a PhD thesis on Japanese Contract and Anti-Trust Law. He also lectures at Dutch universities on Japanese Law.

visserthooft@raadgever.nl

Madrigals, Mandarins, and Budgetary Politics

For a long time in the United Kingdom the Treasury was 'off limits' to scholars. Strange, because there was little doubt that this was the hard core of government, the central citadel of Whitehall where the Treasury men not only taxed the public, but defended the national purse 'like inverted Micawbers, waiting for something to turn down' (Winston Churchill). Since few acts of government have no financial repercussions, and since public finance is the purlieu of the Treasury, how could it escape the attention of political and other social scientists? There was no ban, but serious study of the Treasury seemed or was deemed impossible and best left to journalists. How could this be?

Review >
Japan

By Richard Boyd

The root of the problem was the cult, the culture, the mystique of the Treasury itself. These were mandarins among mandarins, an intellectual elite, the pick of the civil service, the cream of recruits, members of a chosen race, a race apart. A musical race at that! There was always a Treasury choir and even, at one time, a quartet of madrigal-singing Treasury knights (the UK's equivalent to Japan's administrative vice-ministers). In the Treasury, as Sampson famously observed, the literary, Oxbridge character of Whitehall had its quintessence. This was all a bit too much for the unchosen, the poor cousins of the mandarin, cloistered in their university departments, and so the Treasury remained substantially off limits until about 1970. At which time two American academics presented themselves, unabashed and unashamed, made appointments, prepared their questions, switched on their tape recorders, and asked their questions as the tapes rolled. The academics were Hugh Hecló and Aaron Wildavsky, their questions were answered in full, and the result was the classic 1974 study, *The Private Government of Public Money*.

The parallels with Japan and its Ministry of Finance (MOF) and, no less, between Maurice Wright and these distinguished Americans, are irresistible. The MOF is the centre of Japan's government (say what you will about the importance of the ministry formerly known as the Ministry of International Trade and Industry or (MITI), its initiatives, if and when they have financial repercussions, intrude the MOF's bailiwick and trigger its prerogatives), and its officials are no

less the crème de la crème, the pick of the bureaucratic crop, than their Treasury counterparts. The response of the poor cousins has not been so different either: Japanese scholarship has been at arm's length, to put it mildly. Budgeting is treated not so much as a substantial political process (with the exception of Campbell's pioneering study, *Contemporary Japanese Budgeting*, 1977) but rather in formal, constitutional, legal, and institutional terms. Journalists in Japan, as in England, are made of sterner stuff and are left to deal with the facts of the matter. Wright himself has co-authored a highly regarded study of the UK Treasury. His work on the MOF draws upon techniques and insights derived from that study, and consciously echoes a broad theoretical stance that refers back to Wildavsky. His 'tape recorder' was no less active than that of Hecló and Wildavsky – the book is fed on a rich diet of more than 150 interviews with senior officials and politicians.

There is another parallel at once intriguing and provocative. Hecló and Wildavsky were 'outsiders', removed at the outset from the inhibition and self-censorship that marked local observers. That distance facilitated enquiry, while expertise and experience derived elsewhere enabled research. This is troubling stuff for at least one group of professional students of Japan, for whom (to play on the colonial idiom) 'learning to dance like the natives' is a virtue not a vice, and is even an indispensable means to knowledge. The dance demands (Japanese) linguistic competence and a depth of cultural knowledge. We students of the dance see no disadvantage in this. Wright, perhaps, does, and he might be right – in this case at least. Certainly there has been no adequate account of budgeting in Japan in Japanese or English for decades. The pussyfooting around the MOF rivals that around the Treasury. Wright's interviews were conducted in English and he is unapologetic: 'most senior officials have acquired proficiency in the language from time abroad in academic study as part of their earlier formal training, and through career postings to Japanese embassies or international organizations such as the IMF and the World Bank'. Was this a disadvantage? No. Not a bit of it. In fact, 'interviewing in English had the advantage that it was normally unconstrained by those social conventions and contexts cus-

tomarily observed in Japanese discourse'. Is this music to the ears of a Japan scholar? About as much as fingernails scraping on a blackboard are. As for the literature used, Wright knows and draws upon the major literatures in both languages. This is conventional enough: indeed, careers have been made out of synthesizing the best of published Japanese sources. This is emphatically not the case here. Wright depends little on Japanese literature, the limitations of which he understands. As for the results, Wright has written the only major text on the MOF and the Japanese budgetary process to have appeared in the last 25 years; it is a substantial, comprehensive, theoretically informed, analytically acute, and empirically rich, culturally sensitive, historico-institutional account of one of the key agencies in Japanese government and of one of the key processes in Japanese politics. Its importance is considerable. Not least for area studies. Read it. ◀

- Wright, Maurice, *Japan's Fiscal Crisis, The Ministry of Finance and the Politics of Public Spending, 1975-2000*, Oxford: Oxford University Press, (2002), pp.631, ISBN 0-1992-5053-7.

Bibliography

- Hecló, H. and A. Wildavsky, *The Private Government of Public Money*, London: Macmillan (1974).
- Sampson, A., *Anatomy of Britain*, London: Hodder and Stoughton (1962).
- Thain, C. and M. Wright, *The Treasury and Whitehall: The Planning and Control of Public Expenditure, 1976-1993*, Oxford: Oxford University Press (1995).

Dr Richard Boyd is Reader in Japanese Politics at the Department of Japanese and Korean Studies, Leiden University. His recent work and publication have been on the politics of rents and on the politics of economic development in Latin America and East Asia. He is currently joint responsible for an international research project on the state in Asia

r.a.boyd@let.leidenuniv.nl
raboyd@hetnet.nl