

ANDREW HARDING & PENELOPE (PIP) NICHOLSON (eds.),

New Courts in Asia

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New Courts in Asia is an ambitious work covering many geographical and subject matter jurisdictions, including: Brunei, Indonesia, Japan, Korea, Malaysia, People's Republic of China, Philippines, Thailand and Vietnam. The courts considered in the book include commercial, administrative, criminal, intellectual property and constitutional courts. The breadth of scholarship has been neatly divided into thematic parts by the editors, enabling cross-jurisdictional comparisons of similar courts and different courts within the same jurisdiction. The focus on so many countries from South East Asia, rather than the giants, for example, Japan and China, is refreshing. The book's origins are to be found in a conference held in Canada in 2007, which attracted scholars, practitioners, including commercial lawyers, and development specialists from Asia, Europe and North America. Accordingly, it also offers an impressively broad perspective of opinions and theoretical and methodological approaches. It is not surprising that it was chosen to be part of Routledge's law in Asia series which is edited by Randall Peerenboom.

The introduction, "Law, development and judicialization", by Harding and Nicholson brings the diverse chapters together and enhances the intellectual grunt of the project; even if you are interested in just one of the jurisdictions or courts covered by the book, I recommend reviewing the introduction. They set out some important parameters for the project, asking questions such as: what is a new court; what does success mean; does an increase in courts mean an increase in judicialization of disputes in Asia? The establishment and development of judicial frameworks in these disparate jurisdictions of varying economic development suggests that policy-makers from many different backgrounds perceive courts as desirable. As many of the authors illustrate, however, desirability does not ensure success. The book offers insights into ways that the so-called success of new courts might be measured, particularly given the different political, social, economic and legal contexts in which the courts are conceived and executed. The editors deliberately do not set benchmarks for success or failure, which may disappoint some black letter law practitioners and donor agencies, but it allows the authors to explore nuanced analyses.

There are many interesting potential research questions arising from this initial study, including what new courts mean for alternative dispute resolution (“ADR”). Less public and transparent areas such as ADR have been successful in part because they are generally private dispute resolution mechanisms. Unfortunately for researchers, however, they are typically more difficult to document and research than even courts in relatively closed legal systems. The editors argue that the book does not privilege courts as dispute resolution mechanisms, but when viewed pragmatically in this way it is easy to see why so much research exists on courts. The same tendency can be seen in the wealth of early research on Japanese law where competing theories were developed based on the study of the use (or not) of courts as a proxy for dispute resolution. Theoretical problems emerge when attempts are made to apply these theories outside of an analysis of courts and the judiciary to other areas of Japanese law; it stretches their logical limits. By limiting the scope of this book to establishment or innovation and courts, the book helps to develop our understanding of the role of courts in delivering on slippery concepts such as the “rule of law”, “legal certainty” and “good governance” (see on the drivers for new courts at p. 3).

Readers of this Journal would be interested to know that there are three chapters relating to Japan. Shigenori Matsui provides an overview of the Japanese Intellectual Property High Court and argues that despite its new status the court reflects traditional concerns about the Japanese judicial process: an over-reliance on judicial research officials and documentation; a lack of transparency (for example, where official reports are not disclosed); and a lack of dissenting opinions. He concludes that the establishment of the court was largely symbolic. There is also a chapter reflecting on the role of courts in the contexts of Japan’s new quasi-jury system (*saiban-in seido*) by Kent Anderson and David T. Johnson. Much has already been written on the new system and this chapter should be read in conjunction with recent literature, including by these authors, but Anderson and Johnson offer an interesting speculative section on the rationales, political origins, structure and significance of the courts. Veronica Taylor’s excellent exposition of Japanese courts’ new role as corporate regulator highlights the Japanese judiciary’s capacity for change, somewhat contradicting Matsui’s more traditional view of the Japanese judiciary. Taylor describes a new regulatory environment in Japan which, she argues, has forced higher courts to be more responsive in the context of corporate law decisions and, in particular, shareholder derivative suits involving directors’ duties. Japanese courts were similarly emboldened to take a judicial lead after the reforms to insolvency law in the late 1990s and early 21st century; no new court was established, but the judges in the existing system began to take a more commercial and open approach, suggesting that new specialist courts such as the Intellectual Property High Court are not always necessary to effect change.

The collection of chapters on Japan are interesting, but it is the capacity for comparison within one text and the inclusion of less well known jurisdictions that makes this book an important contribution to the English-language literature on courts and law in

Asia. The book may offer scholars of Japan new insights and ideas into their own research and help frame future research questions and collaborations. For teachers, the book offers many resources for courses on comparative and development law, institution building and the judiciary, in addition to the specific geographical and institutional case studies offered. The editors have certainly achieved their goal of sparking “debate about the desirability of [new courts]; the nature of the political processes and choices leading to their adoption; and techniques for enabling them to succeed as legal institutions” (p. xiv).

Stacey Steele