

## BOOK REVIEWS

*Constitutionalism and Legal Change in Myanmar* BY ANDREW **HARDING** AND **KHIN KHIN OO**, eds [Oxford and Portland, Oregon: Hart Publishing, 2017. xl + 266 pp. Hardcover: £75]

On 29 January 2017, one of Myanmar's most noted constitutional lawyers and legal adviser to Aung San Suu Kyi's ruling National League for Democracy ("NLD") was shot dead in broad daylight at Yangon International Airport. Coming only three days after the publication of *Constitutionalism and Legal Change in Myanmar* (2017), U Ko Ni's shocking assassination graphically highlighted the ongoing fragility of the transition to democracy and the perils continuing to face those who speak out for constitutional reform, human rights and the rule of law in one of South East Asia's most complex countries. The cautious optimism advocated by Daw Suu in the wake of the NLD's election victory in November 2015 has in the intervening two years been increasingly tested. The political power still evidently wielded by the military, continuing sporadic armed conflict in the ethnic states despite the nationwide ceasefire agreement, and international condemnation of widely reported allegations of government-perpetrated mass human rights violations in Rakhine State have all strained Myanmar's nascent democratic credentials.

As Professors Andrew Harding and Khin Khin Oo's timely edited collection reminds us, central to every democracy is a robust and rights-respecting constitution. Their book focuses on the *Constitution of the Republic of the Union of Myanmar* (2008) [*2008 Constitution*], and its suitability (or otherwise) as a foundation for the necessary break from the entrenched attitudes and fears accrued over the previous near half-century of military and quasi-military rule. The editorial preface sets out the aims of the book. Rather than provide a comprehensive commentary on the *2008 Constitution* or simply a reference resource on Myanmar constitutionalism, Harding sets out his hope that the collected scholarship will also "inform the process of constitutional change" itself through contributing to the discussion, engagement and research on the subject in Myanmar's legal education sector and elsewhere (at p vii). The editors have sought to achieve these aims by inviting contributing authors to examine the *2008 Constitution* from a range of viewpoints.

The book commences with a historical perspective on Myanmar constitutionalism, examines the disparities between the text of the *2008 Constitution* and the actual enjoyment of constitutional rights, and goes on to analyse some of the major contemporary legal and political themes. These include federalism and its centrality to both reform of the existing constitution and the peace process, the difficulties

of constitutional amendment and oversight, separation of powers and the impact of the continuing overbearing influence of the military, the problems of human rights protection and the role of lawyers in advocating reform.

The 12 contributing authors to the book—nine academics (two from Myanmar, seven from other countries), one former United States diplomat, one former Australian politician, and one Austrian development expert—originally assembled for a workshop on constitutionalism and legal change in Myanmar at the Centre for Asian Legal Studies at the National University of Singapore in February 2014. The majority of their papers prepared for this workshop were updated to take account of developments up to April 2016, but the reality of the rapidly changing political context makes it difficult for published scholarship written even only a few months previously to keep pace with events, as Harding recognises (at pp vi, vii). As several of the authors point out, however, much of the change in Myanmar remains superficial and cosmetic, with the primary structures of authoritarianism still intact. For this reason, the clamour for rapid constitutional reform must be tempered with a realistic understanding of political power as well as the state architecture.

Some of the contributors are more optimistic about the possibilities for change than others. At one end of the spectrum is Harding himself. Whilst admitting the imperfections of the *2008 Constitution*, particularly in relation to the provisions on constitutional change, he urges us to consider it as but one step in the gradual iterative process of constitutionalism in Myanmar. Given the delicate political balance and the relatively undeveloped democratic discourse within the country, for Harding the *2008 Constitution* is still a useful normative reference point. He even views its much-criticised rigidity as insurance for ethnic and religious minorities seeking confidence in a constitutional structure that will not be dismantled to their detriment; in other words, constitutional certainty increases the chances of national unity (at pp 79-81).

Priscilla Clapp adopts a similar approach: at first the *2008 Constitution* might have been viewed as a “democratic veneer for a lightly ‘civilianised’” polity, but given the emergence of reform-minded former generals since 2010, she argues that it has been a remarkably effective instrument for radical political and economic change (at p 83). Clapp’s chapter focuses on power structures and the ‘evolution’ of leadership within Myanmar. She reminds us that it was not a foregone conclusion that the military would accept the general election result at all, crediting them in the event with an “unexpected degree of sincerity” (at p 103). Clapp also notes that power relationships are key to the country’s future stability—whether between past and present leaders or between the legislature and the executive and other branches of government as they adapt to the new administration (at pp 98, 99, 102).

Myint Zan takes a considerably more pessimistic view of the status quo. He analyses the principal problems facing those who seek to rely on the *2008 Constitution* in order to assert their fundamental rights, whether to resist arbitrary detention or torture, to seek timely and effective remedy before competent, independent and impartial courts, or to make use of the so-called “constitutional writs”. These problems are compounded by the practical realities, such that even where there are provisions written into the Constitution, poor access to justice, impunity and corruption prevent the pursuit and enjoyment of rights (at pp 31-38). Myint Zan concludes that in these circumstances it is not realistic to hope for significant improvements in the rule of law under the current Constitution.

Similarly, both Melissa Crouch and Catherine Renshaw highlight aspects of the particular brand of military-driven authoritarianism that led to the erosion of civil liberties and human rights that continues to this day. Crouch's powerfully argued chapter urges scholars not to omit an appreciation of the continuing "broader colonial legal legacy" and how this has been interpreted by the State when considering constitutionalism and the *2008 Constitution*. She cites section 144 of the 1898 *Criminal Procedure Code* (Burma Code, Vol VIII) (still in force today) used by authorities to create what she describes as the normalisation of extreme reaction to ordinary civic life (at pp 160-164). Crouch explains how section 144 was originally conceived of as an emergency power designed to permit the judiciary to respond to threats to public order in colonial times. However, she demonstrates how the military regime corrupted this exceptional power, and how it continues to be regularly used to stifle any form of individual or public expression. She also highlights the extensive contemporary use of section 144 to suppress the Rohingya Muslim population in Rakhine State, legitimising a "perpetual state of emergency" (at p 172). The broader issue here is how such tools of social control operate outside of any constitutional safeguard, which, as Crouch says, points to the importance not of what legal texts say but how they are "understood and acted upon" (at p 161).

Renshaw's analysis of the problematic state of human rights in recent Myanmar history focuses on some of the underlying causes of the democratic deficit, including the lack of a basic rights-protecting infrastructure, the difficulties of an entrenched culture of abuse, the fragility of the peace process, and the "regime-initiated" nature of the transition (at p 117). She also discusses structural limits on the scope of human rights protection, both within the *2008 Constitution* (limiting rights only to 'citizens', thereby excluding groups such as the 800,000 Rohingya living in the country (at pp 224, 225)) as well as in the Myanmar National Human Rights Commission (whose weak funding and lack of effective independence she argues contribute to its failure to speak out against oppressive laws and state violence (at pp 226-229)).

No book on Myanmar constitutionalism would be complete without examining the issue of federalism and the demands of ethnic nationalities for greater autonomy. Both David Williams in chapter three and Marcus Brand in chapter seven discuss the importance of federalism to the ongoing peace process and to national unity. Williams revisits the 1947 Panglong Agreement in which then-Burmese leader Aung San met representatives of some of the ethnic minorities and promised them autonomy within the Union of Burma if they joined the newly independent country. Williams cautions against an overly romanticised or incomplete understanding of what he notes was supposed to be a temporary solution at Panglong and what has in fact been the subject of great resentment for the ethnic states—even if the original *Constitution of the Union of Burma* (1947) granted more rights of self-determination than the *2008 Constitution* (at pp 56-61). Williams observes that many people see a "Second Panglong" as the cure for the ongoing enmity between the central government and the armed ethnic leaders, but outlines the different challenges facing modern-day Myanmar as well as the uncertainties within the current constitutional framework. Brand approaches the issue of federalism from a somewhat different perspective, arguing that the *2008 Constitution* has already set a precedent for moderate administrative and fiscal decentralisation to the ethnic states (at p 145). He

is encouraged by the ongoing national dialogue, and suggests that even without re-writing the *2008 Constitution* there are “opportunities for strengthening its federal pattern”, providing what he describes as the best opportunity in generations for final settlement and peace (at pp 149-151). Nevertheless, even Brand concedes that there must be a complete shift to a more respectful, tolerant, compromise-based political culture for genuine and workable federalism to prevail (at pp 152, 155).

Several authors make the point that constitutionalism in Myanmar is still in its infancy. Dominic Nardi in chapter nine and Khin Khin Oo in chapter ten discuss the faltering progress of the Constitutional Tribunal, the constitutional review mechanism created by the *2008 Constitution*. Both authors deal with the crisis precipitated by a controversial Tribunal ruling in 2012, which led to calls for impeachment and then the mass resignation of its members. The subsequent watering-down of the mechanism’s powers, and greater control over its composition, speaks to a lack of understanding of constitutional review and a lack of confidence in the political system—unsurprising in Khin Khin Oo’s view given that there was no such oversight during the decades of military rule, and therefore no familiarity amongst judges and lawyers with the concept of such review (at p 213). Janelle Saffin and Nathan Willis’s chapter on the rule of law touches on similar issues from the perspective of the legal profession, but an interesting additional perspective might have been to consider the role of Myanmar’s judicial institutions, such as the Union Attorney-General’s Office and the Office of the Supreme Court of the Union, or indeed whether a ministry of justice should be created to coordinate legal change. A viewpoint from Myanmar’s thriving civil society organisations would also perhaps have added further depth to the book.

In summary, the principal strength of this edited collection is that the Myanmar Constitution is a very useful unifying theme when examining the country’s transition to democracy. The authors have demonstrated that focusing exclusively on the evident flaws in the 2008 text (and even greater problems in its implementation) risks masking the complex historical and social context of the trajectory of change, an appreciation of which is vital to peaceful coexistence and development. Nevertheless, as many of the authors point out, there are substantial problems with the current foundations for the rule of law, prolonging the oppression of and misery for many within the country’s borders who should be able to rely on the constitution for effective protection of their fundamental rights.

As the tragic murder of U Ko Ni reminds us, Myanmar needs to create and sustain a political culture of respect, open honest debate and sensitivity to the needs of its diverse population, whilst recognising the history and ongoing reality of military power. This book is an excellent contribution to both the scholarly and practical conversations on the transition to democracy in Myanmar, at the heart of which must be a discussion on the nature of the Constitution itself. That Myanmar cannot yet be described as a liberal democratic state is not wholly the fault of the 2008 text, but undoubtedly its many deficits are clear obstacles to progress.

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