Introduction

Among the immense challenges facing states at the beginning of this new century is that of establishing a global order in which the legitimate rights of peoples and nations are balanced with the inevitable adjustments required by globalisation. The Declaration of Human Rights, adopted and acclaimed by the General Assembly of the United Nations on 10 December 1948, must surely have had more impact on thinking about law, constitutionalism and governance than any other document produced in the last century. In the twentieth century, government was based on the philosophical presuppositions of modernity: sovereignty resided in the people, and the legitimacy of states rested on adherence to the rule of law, the holding of periodic elections, and the maintenance of democratic values that maximised the freedom of the individual. While these presuppositions continue to inform the thinking of many occupants of public office, new ideas about governance are emerging from reflection on the successes and failures of statecraft in the last century.

This book provides an opportunity to reflect on the constitutional experience of the states of Asia and the Pacific during this period of transition. It consults history so as to face the future. It focuses on a unique sub-region of the world system, one with immense diversity in cultural, religious, political and social–economic traditions. Curiously, however, the constitutional arrangements of Southeast Asia and the Pacific Island countries have received relatively little attention in Western literature.[1] There are few studies of constitutionalism within anthropological literature,[2] and somewhat surprisingly, much political science literature avoids consideration of the constitutional framework. Legal literature, in turn, can tend to ignore the vital evidence supplied by social science literature.

This silence is open to a number of possible explanations. Discrepancies between what governments do and what constitutions promise may have raised questions about the nature of constitutionalism in the region and its usefulness as a subject for study by constitutionalists, as opposed to scholars in other disciplines. Yet this divergence between

positive law and 'underlying legal postulates' is the very source of motivation for further inquiry.[3]

A process of constitutional development is under way, worthy of study in its own right, as nations and their peoples evaluate and refashion the colonial constitutional heritage. States in which formal constitutional change has taken place in recent years include Hong Kong, Singapore, Malaysia, Vietnam, Thailand, Taiwan, China, Nepal, Fiji, Papua New Guinea and Kiribati. Constitutional discussions continue in some of those states, as well as in others, notably the Cook Islands, Indonesia and Sri Lanka. Discussions between the leaders of North and South Korea herald the closure of hostilities that have split that nation for more than a generation. A 'civil coup' in Fiji and a 'copy-cat' coup in the Solomon Islands, on the other hand, and concern at the viability of some smaller states, point to the fragility of constitutionalism in the small states of Melanesia, and highlight the need for close study and evaluation of effective state-formation in the post-colonial Pacific.

This study also coincides with a period of constitutional reflection elsewhere (in Eastern Europe, in South Africa, and in the former Soviet Republics), since it has become increasingly evident that the established institutions and principles of government in the new democracies also need adjustment to meet the challenges of the emerging era of globalism. The method calls for both generalisations that are sufficiently explanatory and instances that bring specificity to the broader view.

This book is a contribution to the understanding of constitutional arrangements in Asia and the Pacific, as they currently operate. Its principal focus is the ASEAN group of countries and selected islands of the Pacific, including Papua New Guinea, the Solomon Islands, Vanuatu, Fiji and Tonga. Where appropriate, it also draws on countries outside that range to illustrate particular trends, approaches or challenges. Even confined in this way, the scope of the project is vast. It is not our intention, however, to deal with countries and systems in detail. Rather, the aim is to identify and explain constitutional arrangements in the region more broadly, using particular countries to illustrate their operation. For those with an interest in particular countries or systems, the book also offers a broad bibliography of the literature in the field.

By the latter part of the twentieth century, almost every independent state had a written constitution, entrenched in some way. The Asia–Pacific countries are no exception. The ostensible purpose of such instruments is to provide a framework for the allocation and exercise of state power. In the Western constitutional tradition, at least, constitutions ideally prescribe institutions and rules considered the most important for the state concerned and impose substantive or procedural restraints on state power.[4] Typically, they identify the state and create a position

of head of state; specify the rights of individuals and groups which are to receive constitutional protection and, sometimes, prescribe responsibilities and duties; allocate a hierarchy to sources of law; describe the principal structures through which government is delivered; and outline the most important processes to be followed. The institutions invariably include a law-making body, an executive, and a judiciary. Other significant institutions, such as the military, the public service and an ombudsman, may be included as well. In some states the constitution also may allocate power between central and regional governments.

But, as David Sciulli suggests, successful constitutionalism does not reside in 'forms of government in and of themselves', or in the division of powers, or relations between the economy and the state, or even in the 'natural rights' and subjective interests of individuals. Success requires, rather, the emergence and growth of a *collegial form* in society, without which government will ultimately be reduced to forms of social control. In other words, without a collegial form of society – some form of bonding or networking or system of mutual interrelations – constitutionalism and the operation of government powers will do no more than prevent the pursuit of heterogeneous interests from fragmenting the body politic.[5]

Hence, 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. Indeed, constitutional studies cannot be confined to a single discipline, whether law, history or political science. What is required, rather, is inquiry that includes, in addition to the constitution and its associated arrangements, the operation of the system of government in practice; its historical evolution; the traditions on which it rests; and its social, political and economic context. Inevitably, these wider considerations will cast parts of the constitution in a new light and augment its bare terms significantly and substantially. They may, indeed, show that the constitution itself has limited or no effect, because it is not conceived as a binding instrument, because real power lies with people or institutions beyond the confines of the constitution, or for some other reason. Whereas the People's Republic of China has had new constitutions in 1954, 1975, 1978 and 1982, other post-war constitutions, including those of Japan and Indonesia, remain unchanged. Clearly, then, the nature and scope of constitutional change differ markedly between peoples and nations, and practices of constitutional revision are closely linked to other political and social forces.

Notwithstanding the multidisciplinary nature of the subject, the single disciplinary approach adopted by much modern scholarship tends to strip constitutional studies of its inherent complexity. If it is

true, as Loughlin has recently argued, that public law in England 'is simply a sophisticated form of political discourse; that controversies within the subject are simply extended political disputes',[6] then a similar relationship exists between law and politics in the Asia Pacific.

One of the central concerns of this book is examination of the relationship between the legitimacy of the constitutional framework and its effectiveness in the delivery of good governance. In the context of Western social theory, Jurgen Habermas has suggested the inadequacies of both liberal democracy and welfare models of government, on the grounds that the former protects rights at the expense of fair distribution of wealth, while the latter delivers welfare while creating dependency and reducing individual choice. His 'third paradigm' of constitutionalism develops, instead, an approach to government which is based on the fullest exchange of the views of the people concerned. It assumes that the decisions thus reached will be the best in the circumstances, so long as the communication which takes place is not distorted. The present study is interested in how such a concept applies in the Asia Pacific. For Habermas, it 'reproduces itself only in the forms of a constitutionally regulated circulation of power, which should be nourished by the communications of an unsubverted public sphere that in turn is rooted in the associational network of a liberal civil society and gains support from the core private spheres of an undisturbed lifeworld'.[7]

It is easily conceded that no system reaches an ideal state of communication; to suggest that it be sought in the contested societies of the Asia Pacific may require even deeper apologetics. Apart from the logistical difficulties, now dwindling in the face of information technology, there are also immense practical impediments to the removal of distortions to communication which favour the more articulate, the more persuasive, the better situated, the more interested and the more affluent.[8] Yet while Habermas' views were developed principally in the context of Western, and specifically European, constitutional debate, they nevertheless suggest at a more general level an approach to constitutionalism which has universal application.

Given the incompatibility of significant Western constitutional concepts with Asian legal traditions, it is not surprising that constitutionalism has a reputation as a legal gloss for authoritarian rule.[9] This was particularly so during the period of martial law in the Philippines under President Marcos, 1972–84.[10] Marcos spoke of a 'New Society', but his manipulation of the constitution and public power came to be known as 'Constitutional Authoritarianism'.[11] Ideals of constitutional rule and the spread of democracy have at times also given in to the exercise of centralised authority elsewhere in the region. In Indonesia, Soekarno established 'Guided Democracy', in Cambodia King Sihanouk pro-

moted 'Buddhist Socialism', and in South Vietnam Ngo Nhu Diem cultivated 'Personalism'. Recently, the 'Singapore School', led by retired prime minister Lee Kuan Yew, has advocated a state philosophy based on 'New Confucianism'.[12] Doctrines of authoritarian rule have also been established in Burma, China, Taiwan, North Korea and Brunei.

A contextual approach is particularly appropriate for the comparative study of constitutional systems which includes, for present purposes, generalisations about constitutional arrangements across a number of different states in the same region. There is little insight to be gained from the mere juxtaposition of legal principles and institutions without taking into account the historical, philosophical and human circumstances to which they respond and which affect their operation and significance. Arguably, a contextual approach is even more important, albeit more difficult, for those who seek to understand the constitutional arrangements of states with a history and culture very different from their own.[13] A useful starting-point, variously identified in legal comparative literature, is the manner in which different legal systems perform common functions or meet common problems.[14] In comparing constitutional arrangements, functions necessarily performed everywhere include community decision-making of all kinds, ranging from general rules to their day-to-day application; dispute resolution and prevention; the provision and financing of public goods; and defence against internal and external threats, however conceived. A common issue, or problem, is the basis on which these arrangements are accepted by the communities to which they apply.

Following Anderson's suggestion that nations are 'imagined communities',[15] the constitution plays an essential role in defining the nation in legal form. Where such nations bring together numerous ethnic traditions, there will be a reduction of diversity in such things as language and culture. To the nationalist movements that emerged in opposition to the colonial powers, the 'constitution' was a statement of and framework for independence. The nationalist idea was spread by the communists under Ho Chi Minh in Vietnam, by Sun Yat Sen in China, by Soekarno in Indonesia, and by Bonifacio and Rizal in the Philippines. Sun Yat Sen's constitutional framework was adopted by the Republic of China (Taiwan), which had been under Japanese occupation (1895–1945) and which established its constitution in 1947. Since such national constitutions invariably break with the received constitutional traditions, they are often guided by a manifesto or statement of guiding principles.

Despite its multidisciplinary approach, however, this study only considers developments in politics and public life to the extent that they inform a study of the constitutional framework itself. This means that the book discusses only the framework, rather than each and every

subsequent development having constitutional significance. For such detail, the reader must refer to more country-specific studies.

Description and understanding is one thing: evaluation is another. It cannot entirely be avoided in constitutional study. Constitutions, whether formal or informal, exist to structure the exercise of power in accordance with particular standards. Compliance with these, both in substance and operation, is the essence of constitutionalism, which is far more important from the standpoint of the communities concerned, than the constitutions themselves. In a comparative constitutional project, there is an obvious danger of applying too narrow a framework of analysis to different systems, derived from more familiar, or dominant, constitutional cultures. Equally, however, danger lies in having no analytical framework at all and thus no standards, accepting every regime as constitutional and undermining the purpose of the distinction: constitutional scholars must steer a course between uncritical adherence to their own view of constitutionalism on the one hand and unbounded relativism on the other.

The principal characteristics we adopt for this purpose are the emphasis on procedure rather than fixed, substantive standards; the requirement for shared and structured as opposed to arbitrary exercise of public power; the need for wide involvement in public decisions, both to secure quality and as a source of legitimacy; and the underlying assumptions of human worth, which must be reflected in any constitutional arrangement. Accordingly, this study adopts four broad themes for the purpose of constitutional analysis: legitimacy, democracy, justice, and prosperity.

Legitimacy refers to the acceptance of the principles on which a state is founded and of the means for their revision. Legitimacy in this sense confers a sense of constitutional unity—or, at least, coherence—without which the state is in danger of serious internal conflict, or even collapse. The most obvious and direct means of establishing legitimacy is through the consent of the people at the time of the formation of the state. Legitimacy also can be established over time, however, if the needs of the people are met and a sense of unity of purpose develops. The source of a constitution has great bearing on its legitimacy, and the legitimacy of a constitution has bearing on its effectiveness. In numerous non-Western countries, the constitutional state is an alien creature, so there must be effort to boost constitutional legitimacy. A constitution must come from a body higher than that which subsequently enacts ordinary laws. The law of the constitution is not the source but the consequence of the rights of the individuals. This insight led to the increased significance of courts as protectors of people's rights and as determiners of the law.

Legitimacy requires effort both to establish and to maintain. In states

that have multiple centres of coherence that interact, compete and clash, there is often competition from other sources of power, offering methods of social ordering which rely on control and which are not necessarily sympathetic to a return to constitutional government. Even in normal times, the ability of a state to build and maintain legitimacy is affected by the quality of its dialogue with the people. In this way, the legitimacy of a state provides a foundation for the operation of democracy.

Democracy, broadly defined, is a corollary of legitimacy. Its content is not fixed in detail but may vary within states and over time. As a minimum, however, it requires a regular choice of leaders by the people, on a basis which is fair, to make decisions which cannot or will not be made by the people themselves. Regular elections confer a degree of popular control both over the leaders and over the decisions they make. They imply that the power of government is held by the leaders on trust for the people. Necessarily, as trustees, they are accountable for its exercise. This concept of government, coupled with the right to participate, provides people in turn with an incentive to take an interest in public and community life and to be informed.

Whether the incentives on either side are sufficient is a question for the twenty-first century, recently joined in the debate on deliberative democracy. The simple majoritarian model of electoral democracy has been modified already, however, in other respects. In the second half of the last century, the experience of global war and the atrocities associated with it prompted international and national recognition of civil, political, social and economic rights on a wider scale than ever before. The protection of rights affects electoral democracy by limiting the decisions which communities may make, by identifying circumstances in which the interests of minorities or individuals are entitled to prevail, and by providing new, qualitative criteria to evaluate the decisions that are made. There has been a continuing dispute between regions of the world, not yet resolved, over the extent to which particular rights are culturally specific, and concerning the priorities which should apply between them. All constitutional states, however, accept the underlying imperative of a social and political community in which individuals are valued and are free to pursue goals of their own choosing, to fully develop their personalities, abilities and talents, and to contribute the fruits of their efforts back to society.

Justice is a response to the acceptance of equality, or equal worth. It encompasses the whole business of government: the rules which are made, their administration, the resolution of disputes, and the distribution of wealth. It requires wisdom and experience and impartiality in the governing institutions. It is both subjective and objective: decisions must not only be fair but be perceived to be fair, in the interests both of

harmony and of the legitimacy of the system. Justice is antithetical to corruption, which privileges some without reason or fairness.[16]

Prosperity has its usual connotations: economic development, enhanced growth rates, improved infrastructure, broader industrial opportunities, and the spread of material benefits. It is included here for its broader goal, however: its contribution to the well-being of people and to their ability to make best use of their potential through life. Important products of prosperity include health and education in both their technical and broader senses. In industrial communities, prosperity also may be a precondition for a clean and safe environment.

A central purpose of democratic constitutions has always been protection of the concept of a 'public sphere' in which all citizens are free to discuss issues of public concern. A 'civil society' built on the values of free speech and free association provides feedback about the performance of government and a forum for discussion of alternative policy options. The capacity of civil society to discuss the constitution has also been an important factor in choosing mechanisms of constitutional design and change. Societies lacking an educated and informed public have fewer resources available for such discussion. But civil society is only possible where the constitutional order is agreed. Civil societies, whatever their form, presuppose 'a juridical structure, a constitution, that articulates the principles underlying their internal organisation'.[17]

At times and places throughout the Asia Pacific, constitutional orders have been under grave threat of disruption and even dissolution. In some cases, the threat has been state-sponsored and, in others, based in the discontents of fragmented societies. Thus, it cannot be overlooked that at the beginning of the twenty-first century armed conflicts continue to thwart aspirations for democracy and prosperity in Sri Lanka, Nepal, India, Pakistan, China, Indonesia, the Philippines, Papua New Guinea and the Solomon Islands. The constitutional order has been disrupted in Fiji by no fewer than three military and civil 'coups'.

It seems evident that colonisation has left much of the Asia Pacific a paradoxical legacy of both a strong executive and a reliance on the Westminster model of parliamentary democracy. The result has been a failure of parliaments to function well, often having their role diminished by a president or prime minister, or even by the armed forces. The accountability that parliament is meant to provide in such matters as scrutiny of public accounts, and in controlling the use of power by the executive, is often lacking. Students of governance in this region must recognise, admit and respond to the harsh reality that a large number of constitutional systems currently in operation are not delivering the justice, legitimacy, democracy and prosperity they promise.

This book pursues these themes principally through examining the

functions which governments everywhere perform and the issues with which they must deal. First, however, it surveys the main underlying influences on constitutional systems in Asian and Pacific countries: the historical phases of constitutional development, each of which has left its mark, and the political and philosophical approaches derived both from history and from more recent circumstances.

Notes

1 The point is made solely for the purposes of comparison with the bodies of literature on constitutional systems elsewhere. It neither overlooks nor underestimates the important scholarship which in fact exists on the constitutional arrangements of countries in the region, individually and collectively. The scope of this literature may be gauged from the Bibliography: there is little extant literature describing the theory and practice. While there are few studies of constitutional processes in Asia, a notable contribution is that by Nasution, *The Aspiration for Constitutional Government in Indonesia*. There are gaps in the literature from the first round of constitution-making (1940s–1950s) into more recent times (e.g. Cambodia in 1993). In many constitutional studies, the processes of actual constitutional construction remain hidden, presumed, and form part of the context, rather than the rules in play (see Lane, *Constitutions and Political Theory*).
2 See Rodman, 'A Law unto Themselves'.
3 Chiba, 'Three Dichotomies of Law in Pluralism', 423.
4 Lane, *Constitutions and Political Theory*, 10.
5 Sciulli, *The Theory of Societal Constitutionalism*.
6 Loughlin, *Public Law and Political Theory*, 4.
7 Habermas, *Between Facts and Norms*, 408.
8 See, for example, the 'sceptical eye' which Stokes turns on 'deliberation and its effects': 'Pathologies of Deliberation', 123.
9 Beer, *Constitutional Systems in Late Twentieth Century Asia*.
10 Republic of the Philippines, Constitutional Commission of 1986, *The Constitution of the Republic of the Philippines*, National BookStore, 1986; Bernas, dismantling the Dictatorship.
11 Payayo, 'The rule of Law and the Decree-Making power of the President'.
12 Mahbubani, 'The Dangers of Decadence' and 'The Pacific Way'.
13 See, for example, Buxbaum, *Traditional and Modern Legal Institutions in Asia and Africa*.
14 See, for example, Zweigart and Kötz, *An Introduction to Comparative Law*.
15 Anderson, *Imagined Communities*.
16 Abas, 'Legal Perspective of the Third World'.
17 Arato and Cohen, 'Civil Society and Social Theory', 201.

Part I

Modernity and Nation-States at the Dawn of the Global Era