

Singapore Management University

## Institutional Knowledge at Singapore Management University

---

Research Collection Yong Pung How School Of  
Law

Yong Pung How School of Law

---

10-2019

### The constitutionalisation of development

Maartje DE VISSER

Singapore Management University, [mdevisser@smu.edu.sg](mailto:mdevisser@smu.edu.sg)

Follow this and additional works at: [https://ink.library.smu.edu.sg/sol\\_research](https://ink.library.smu.edu.sg/sol_research)



Part of the [Constitutional Law Commons](#)

---

#### Citation

DE VISSER, Maartje. The constitutionalisation of development. (2019). *Law and Development Review*. 12, (3), 637-646.

Available at: [https://ink.library.smu.edu.sg/sol\\_research/3024](https://ink.library.smu.edu.sg/sol_research/3024)

This Journal Article is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection Yong Pung How School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email [cherylds@smu.edu.sg](mailto:cherylds@smu.edu.sg).

## Editorial

Maartje De Visser\*

# The Constitutionalization of Development

<https://doi.org/10.1515/ldr-2019-0040>

## 1 Introduction

There is a steadily growing interest among academics and policymakers alike in the role of constitutional law in fostering socio-economic development. This attention ties in, at a practical level, with the latest wave of law and development thinking, which conceives of rule-of-law institutions and democracy as existing in a symbiotic relationship with economic growth that together will propel countries to achieve higher levels of foreign investment and overall prosperity.<sup>1</sup> The idea that public law, and the constitution more specifically, has potential in spurring development has for instance found expression across a range of the Sustainable Development Goals formulated under the auspices of the United Nations in 2016.<sup>2</sup> By way of example, a concern with human rights protection – a classic function associated with constitutions – is evident in goals 3, 5 and 6, dedicated to, respectively, protection of individuals' health, ensuring gender equality and access to clean water, including for sanitary purposes. Goals 11 (safe, inclusive and liveable cities) and 16 (strong justice institutions) create expectations for institutional refinement or innovation on the part of States, which are similarly likely to implicate the constitution, for instance in improving the constitutional guarantees for judicial independence or through the grant of greater constitutional autonomy to cities.

---

<sup>1</sup> On which, e. g. M. Trebilcock and M. Moto Prada (eds.), *Advanced Introduction to Law and Development* (Cheltenham: Edward Elgar, 2014); D. Trubek and A. Santos (eds.), *The New Law and Economic Development – A Critical Appraisal* (Cambridge: Cambridge University Press, 2010); Y.S. Lee, *General Theory of Law and Development*, 50 *Cornell International Law Journal*, no. 3 (2017), 415–471; T. Ginsburg, *The Future of Law and Development*, 104 *Northwestern University Law Review Colloquy* (2009), 164–173.

<sup>2</sup> United Nations Development Programme, *Sustainable Development Goals* (adopted in 2016), available at: <<https://www.undp.org/content/undp/en/home/sustainable-development-goals.html>>, accessed April 26, 2019.

---

**\*Corresponding author: Maartje De Visser**, Singapore Management University School of Law, Singapore, Singapore, E-mail: [mdevisser@smu.edu.sg](mailto:mdevisser@smu.edu.sg)

For its part, the constitutional legal discourse has progressively broadened its vista to feature aspects of socio-economic development more prominently than has been the case in the past. This is in large part due to the explicit embedding of socio-economic rights or developmental prescriptions in constitutional texts during the postcolonial and post-communist waves of constitution-making. As the authors of a renowned comprehensive empirical study of constitutional design have observed: the “menu of ‘required’ rights has expanded dramatically since the days when the negative rights enshrined by the U.S. founders seemed complete”, with “[s]econd and third generation rights ... now included in international covenants as well as most national constitutions.”<sup>3</sup> The underlying logic is that the fulfillment of individual self-determination (and the related notion of human dignity) as well as the realization of social stability and harmonious coexistence among individuals presupposes that the basic existential needs of all those resident in a given territory are met.

The report prepared by the Sub-Committee on Fundamental Rights for the ongoing Sri Lankan Constitutional Assembly exemplifies the contemporary approach, which as the Committee duly underscores has particular resonance in the Global South:

[I]n the last two decades, ... it has become clear that the intrinsic link between political rights and freedoms and access to economic resources and a better quality of life can no longer be overlooked. This is particularly so in a country such as ours where deprivation of such resources has led to violent conflicts in the past. The global trend is to recognize [socio-economic] rights as evidenced by the constitutions of South Africa, East Timor, Kenya, Nepal and Latin American countries.<sup>4</sup>

Interestingly, the report also confirms the intimate link between the global developmental agenda and constitutional reform efforts alluded to earlier: “Sri Lanka has also committed to the Sustainable Development Goals and it is appropriate that these commitments be given expression in the new constitution.”<sup>5</sup>

For constitutional scholars, the growing acceptance of socio-economic rights and explicit visions of the type of economy that ought to be realized for the polity’s welfare have provided rich new material for study beyond classical ever-

---

<sup>3</sup> Z. Elkins, T. Ginsburg, and J. Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009), p. 28. See also C. Jung, R. Hirschl, and E. Rosevear, *Economic and Social Rights in National Constitutions*, 62 *American Journal of Comparative Law*, no. 4 (2014), 1043–1093.

<sup>4</sup> The Sri Lanka Constitutional Assembly, *Report of the Sub-Committee on Fundamental Rights* (Colombo, November 19, 2016), p. 7.

<sup>5</sup> *Ibid.*

greens such as the vertical organization of State competences or the meaning to be given to equality or due process clauses.

A pertinent question is this regard concerns the justiciability of constitutional clauses that give expression to socio-economic commitments.<sup>6</sup> Distinct from so-called first-generation political rights and civil liberties, which are commonly viewed as creating negative duties for States, socio-economic rights are dependent on positive State action for their realization. This in turn implicates polemical decisions on the allocation of scarce State resources, the optimal design of taxation regimes (for instance to encourage the expansion of home-grown enterprises beyond national borders) and the propriety of welfarist policies.

For constitutionalists and law-and-development scholars alike, two related sets of issues accordingly present themselves for consideration. The first concerns the language in which socio-economic commitments are couched, which ought to be sufficiently capacious to accommodate changes in societal needs and available resources, but not so indeterminate that a very minimal level of State intervention would satisfy these constitutional requirements. The second relates to the choice of State institutions that ought to be entrusted with ensuring that socio-economic commitments do not remain a parchment promise. Here the greater democratic credentials of parliaments are typically weighted against the longer-term thinking and closer attention to the needs of marginalized and vulnerable groups associated with courts judicial review.

It is against this background that this Special Issue explores the interplay between constitutions, constitutionalism and development.

## 2 The Konrad Adenauer Stiftung (KAS) Rule of Law Programme

This Special Issue has its origins in a late April 2018 meeting of the KAS Research Group on Constitutionalism in Asia. As its name indicates, this

---

<sup>6</sup> See, amongst others, V. Gauri and D. Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008); F. Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerp: Intersentia, 2006); J. King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012); E. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 *Columbia Human Rights Law Review*, no. 2 (2007), 321–386; M.J. Dennis and D.P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?* 98 *American Journal of International Law*, no. 3 (2004), 462–515.

Group, which meets annually, seeks to provide a forum for senior members of the legal fraternity from the Asian region to exchange experiences, best practices and ideas related to current and emerging issues associated with constitutionalism. During its third Workshop, which took place in Singapore, the participants debated the diverse range of connections between constitutional law and socio-economic development as well as attendant challenges. This Special Issue offers a curated collection of the proceedings of that event.

Before proceeding to introduce the individual contributions that make up this Issue, a brief introduction to the work of KAS generally and that of its Rule of Law Programme specifically is warranted. KAS is a German foundation which aims to promote of democracy and international cooperation<sup>7</sup> and has been doing so, with considerable success, for more than 50 years.<sup>8</sup> In a 2018 lecture, Robin Niblett noted that think tanks will remain relevant as instruments that shape public policy only if (i) they infuse fact-based political debate; (ii) offer comprehensive ideas to promote more inclusive, equitable and sustainable growth; (iii) continue to build and strengthen rule-based governance systems; (iv) reinforce positive change to keep the world alive to the opportunities that advances in science and technology can offer and (v) invest more time to innovatively engage with substate and non-state actors to drive positive change and even become partners in promoting a new, more distributed international order.<sup>9</sup> The goals set out by Niblett align closely with how the manner in which KAS views its role and operates.

One of its core pillars is the KAS Rule of Law Programme, which has a truly global dimension, with dedicated regional offices in Asia, Europe, Latin America, Sub-Saharan Africa and Middle East/Northern Africa. The Asia regional office for the Rule of Law Programme Asia is located in Singapore, though its activities involve and take place across the full panoply of the countries that make up this region. By way of example, in 2018, the Rule of Law Programme Asia organized events in Singapore, Vietnam, Philippines, Thailand, Sri Lanka, Hong Kong and Nepal on topics as varied as rule of law and religion, environmental law, migration and refugee rights, and the impact of constitutionalism on digitalization on societies.

---

<sup>7</sup> KAS, *About Us*, available at: <<https://www.kas.de/about-us>>, accessed April 26, 2019.

<sup>8</sup> It was ranked 11th out of 145 top non-US think-tanks by the University of Pennsylvania's Lauder Institute in 2018: J.G. McGann, *2018 Global Go to Think Tank Index Report*, Think Thanks and Civil Societies Programme, available at: <<https://www.gotothinktank.com/global-goto-think-tank-index>>, accessed April 26, 2019.

<sup>9</sup> R. Niblett, *The Future of Think-Tanks*, Martin Wight Memorial Lecture given at Chatham House (London, November 21, 2018).

Promoting cooperation among national institutions that secure and defend the constitution has been a key focus of the KAS Rule of Law Programme Asia. To that end, it has actively supported regular meetings of constitutional judges in Asia, to provide them with a platform to discuss matters of common concern. More specifically, KAS has been instrumental in the formation of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC)<sup>10</sup> in 2010, founded by the highest judicial institutions of Indonesia, Korea, Malaysia, Mongolia, the Philippines, Thailand and Uzbekistan. While KAS is not a formal member of the AACC, it advised the organising committee that set up the Association and in 2012, during its inaugural congress, then president of the Korean Constitutional Court Kang-Kook Lee awarded a token of appreciation to former directors of the Rule of Law Programme Asia, Clauspeter Hill and Marc Spitzkatz, in appreciation and acknowledgement of KAS' contributions to constitutional justice in Asia.

As a political foundation involved in the promotion of democracy, KAS strives to ensure that the rule of law as an overarching norm is sustainably imbedded in the social reality in the countries that it works in. To foster social acceptance of human rights protection, independence of the judiciary, constitutional supremacy and separation of powers as part of good governance norms, KAS proactively supports the establishment and flourishing of epistemic communities around these core constitutional values through various modalities. These range from public events targeted at university students, civil servants and members of the national bar to information-sharing session with policy-makers to high-level workshops that allow senior scholars and judges to reflect on the driving forces that animate contemporary practices and consider whether particular constitutional solutions or approaches are preferable to others and might be suitable for emulation elsewhere.

On that note, this Special Issue is designed to be of interest to a wide range of audiences, from scholars with a theoretical bend to their research to strategists to (graduate) students, in keeping with the manner in which KAS has sought to give effect to its mandate.

---

<sup>10</sup> AACC, available at: <<http://aacc-asia.org>>, accessed April 26, 2019. An account of the genesis of the AACC and its performance in its first years of operation can be found in M. De Visser, *We All Stand Together: The Role of the Association of Asian Constitutional Courts and Equivalent Institutions in Promoting Constitutionalism*, 3 Asian Journal of Law and Society, no. 1 (2016), 105–134.

### 3 Organization of the Special Issue

The Special Issue comprises seven articles that, taken together, provide a bird's-eye view of the multifarious and dynamic linkages between constitutionalism and development. Their internal ordering allows readers to first gain an appreciation of general constitutional design choices that frame a state's ability to achieve developmental objectives, before offering a range of case studies that showcase how and the extent to which particular socio-economic priorities have been realized in selected Asian countries, in keeping with the geographic focus on this region.<sup>11</sup>

The theoretical scene is set in two opening contributions by Andrew Harding and Bui Ngoc Son that provide a critical presentation of the disciplinary state of the art and suggest reorientations to enable a more holistic, and in their view therefore more accurate, appreciation of the role that constitutions may play in the economic life of developing countries.

In "Constitutionalism and Development: A Mismatch or a Dream-Team?", Harding puts forward an eloquent plea in favour of bridging the mutual aloofness that the developmental and constitutionalism communities currently practice vis-à-vis each other. He explains that each community in fact engages with concerns that are the centre of the other's discourse, but does not appear to be aware of doing so, let alone systematically acknowledge this. This, as Harding remarks, is in urgent need of change: constructive engagement across the constitutional and developmental discourse is mutually beneficial in assisting each community to better realize its objectives – and thereby indirectly contribute to the achievement of those of the other as well. To this end, he suggests the notion of "developmental operativity" as a useful bridging concept, which should in turn be infused with understandings of the rule of law, political stability and justice that are duly attentive to the relevant local setting.

Bui offers a complementary narrative in his "Economic Constitutions in the Developing World". His starting point is that the conventional theories devoted to the interplay between constitutions and economic outcomes consider the former in an indirect fashion only, looking at how the design of political institutions such as the existence of checks and balances or the degree of political freedom helps or hinders growth. While the presence of such constraints has explanatory power, Bui argues that a fuller account requires that attention be given to what he calls the "direct economic constitution". With this, he refers to the express inclusion of economic aspirations, principles, rights and dedicated institutions like central

---

<sup>11</sup> For a general discussion of this region, see e. g. G.P. McAlinn and C. Pejovic (eds.), *Law and Development in Asia* (London: Routledge, 2012).

banks, in a country's constitutional text and, relatedly, the prevalence of economic concerns during the making or amending of that constitution. Such text-based inquiries allow for the identification of regional or even global trends in the manner in which the economy is presently featured in the constitution. This in turn permits more informed discussions of the factors conducive respectively resistant to convergence in constitutional design and economic success.

The next pairing of articles engages with the institutional dimension of the development–constitutionalism relationship, with Maartje De Visser and Yong-Shik Lee placing the courts, respectively, the political branches of government at the centre of their analysis. In “Constitutional Judges as Agents for Development”, De Visser observes that South East Asian constitutions devote considerable attention to socio-economic matters in their text, in line with Bui's notion of the direct economic constitution. This, she suggests, makes it likely that courts will be asked to assess whether the government's chosen implementation passes muster or should be declared void. The pursuit of economic development and prosperity by governments and their appeal to the general population means that courts have to tread cautiously when faced with fundamental rights claims that affect the domestic economic agenda. Against that backdrop, De Visser identifies the embrace of an economic question doctrine, proceduralized review and judicial training in macroeconomics as particularly promising strategies to preserve the legitimacy of courts in South East Asia's developing States.

In “Political Governance, Law, and Economic Development”, Lee questions the conventional narrative of liberal democracy as the preferred system of governance in realizing economic development, which has amongst others been embraced by leading international organizations such as the United Nations (through its Sustainable Development Goals mentioned earlier) and the World Bank. Looking at the experiences of East Asian countries, including South Korea and China, in the twentieth century, and leading Western powerhouses in the nineteenth century, he posits that effective governance able to yield high levels of economic growth is not always or necessarily synonymous with good governance in its contemporary liberal-democratic guise. Lee suggests that political stability is a key condition precedent to achieving economic development and that the principal role for constitutions in this regard is inhibiting State conduct detrimental to social stability (such as unwarranted interferences with individual rights), while simultaneously authorizing the government to enact development-boosting legislation that is also able to positively influence the level of political stability in a country.

The institutional bifurcation between the judicial and political branches is reprised by Jürgen Bröhmer and Aishwarya Natarajan, who illustrate how being embedded in a multilevel governance structure constrains the ability of courts and executives at the national level to set and pursue a country's economic agenda.



Globalization has slowly and steadily eroded the traditional notion of State sovereignty, with supranational and subnational influences gaining force at the former's expense in view of the intermestic nature of development and developmental questions. While the creation of strong institutions is at the heart of the development discourse, demarcating the competences and functions of international, supranational and national institutions is fraught with difficulty, as both authors demonstrate through detailed case studies.

In "Economic Constitutionalism in the EU and Germany", Bröhmer explains the factors that have introduced tension in the relationship between Germany's Basic Law and the EU Treaties. In a careful analysis of leading judgments, he shows how the former's guardian – the German Federal Constitutional Court – has sought to preserve core tenets of German constitutionalism against the perceived overreach of the EU's version of economic constitutionalism. The German court has consecrated identity review as the yardstick in this regard, and has warned domestic political actors and the EU institutions alike that they ought to ensure that the further development of closer European integration, including in the economic sphere, does not fall foul of that concept. One ought to sympathize with the German court's effort to ensure that the national constitution remains relevant and respected in the face of transnational incentives for economic cooperation. At the same time, Bröhmer astutely notes that judicial institutions cannot, and should not, be the only line of defence: they ought to co-opt other institutions in establishing the meaning of "open" constitutional norms, such as those setting out the parameters for economic and monetary policy.

In a similar vein, Natarajan favours a more inclusive institutional approach to policymaking in federal systems that duly recognizes the interests and capabilities of subnational entities in "Democratization of Foreign Policy: India's Experience with Paradiplomacy". She explains that India's States are progressively asserting themselves in the foreign policy arena, partially to secure developmental opportunities for their inhabitants and partially prompted by differences in political configuration at the State versus the central level. And yet, there is presently no institutional or procedural framework that can accommodate the concerns and input of India's constituent states in foreign-policy formation and execution in a systematic fashion. This, as Natarajan explains, is a missed opportunity. The current ad hoc approach is liable to produce inconsistencies and confusion, not only for those directly involved in negotiations and the subsequent execution of policies but also for ordinary citizens who are seriously and deeply affected by foreign policy decisions with economic implications. She accordingly argues that mainstreaming the role of the states in foreign policymaking should be supported on democratic grounds, as it would literally bring matters of keen public interest closer to the citizenry.

The final duo of articles showcases how the enforcement of discrete fundamental rights may positively influence the attainment of developmental objectives. The accounts provided by Won-Il Cha and Mario Gomez underscore that development, conceived from a constitutionalist perspective, is a multifaceted notion that goes beyond a country's GDP, attraction as a destination for FDI or greater access to material resources for its inhabitants. While fundamental rights have the ability to support such goals, they also – and perhaps even more importantly – can enable human development by making it possible for individuals to imagine and be able to realize better lives for themselves and future generations. In “The Judicial Enforcement of Socio-Economic Rights in South Korea”, Cha explains how the Korean constitutional court has sought to walk the tightrope between ensuring that socio-economic rights do not remain parchment promises, notably for vulnerable groups, and respecting the legislature's superior skill and discretion in allocating finite State resources. She highlights how the court has adopted an integrative approach, whereby socio-economic and classic civil-political rights are construed in tandem. This shows a judicial sensitivity towards the lived reality of ordinary citizens, who may be unable to make use of their libertarian rights if socio-economic prerequisites for their exercise are unfulfilled. At the same time, Cha argues that the court at times is overly cautious in the exercise of its review powers, with the corollary that those in economic need do not always receive the kind or level of assistance required. In countries that identify themselves as (budding) welfare states, it is imperative for the guardians of the constitution – often the courts – to strictly scrutinize statutes with a socio-economic dimension to ensure that the level of protection provided therein is sufficient to afford all citizens the dignity to live their lives. This would help to cultivate socio-economic homogeneity, which is an important ingredient in the recipe for social harmony and political stability. In his contribution, “The Right to Information and Transformative Development Outcomes”, Gomez argues that the most critical dimension of the right to information, which is typically celebrated for its potential to foster autonomy and protect dignity, should be found in its ability to reduce the asymmetry in knowledge between the government and ordinary citizens. This, he posits, enables the latter to claim their place as the ultimate beneficiaries and stakeholders of national developmental policies. The right to information as a constitutionally mandated right has the potential to change the social morality of the society from the bottom in a manner that brings to mind the idea of “people power”. Its latent potential to promote transparent governance and raise accountability standards demonstrates to the general population that constitutional norms matter in everyday life. In a war-torn country that is charting a new path to reconstruction and reconciliation, rights that enhance the quality of citizenship are instrumental for the development of a rule of law

culture that goes beyond the express commitment written in the formal constitution. The general lesson to be drawn is that empowered citizens and a sustainable rule of law culture gives the former a clearer stake in national development in all its guises and helps foster a better appreciation of the trade-offs made in the pursuit of economic prosperity.

## 4 In Fine

The interplay between development and constitutionalism is intriguing and warrants more attention than it has received to date. The frequency and specificity with which “the economy” is expressed in constitutional texts and the latest incarnation of the UN’s developmental goals suggest that the time is ripe to recognize constitutional-law-and-development as an integral, and important, component of the wider Law And Development (LAD) movement. This will require, amongst others, theory-testing scholarship that seeks to elucidate the strength and direction of the assumed causality between sustainable economic growth and constitutionalism.<sup>12</sup> We need more empirically grounded evidence to assess whether it is actually feasible to formulate meaningful constitutional policy prescriptions that LAD practitioners, developed States and policymakers in international institutions can heed when deciding on conditionalities for the disbursement of international loans or when advising developing countries contemplating constitutional reform in the pursuit of economic and social progress. Research along these lines needs to be informed by the lived experiences of countries in the Global South to avoid the spectre of misaligned legal transplants that are unworkable due to their agnosticism vis-à-vis the local context.<sup>13</sup> This is precisely what the contributions in this Special Issue offer. It is hoped that the ensuing accounts, particularly those of global south policies located in Asia, will be a valuable resource for those keen to understand or contribute to the fledging constitutional-law-and-development discourse.

---

<sup>12</sup> For an excellent example focusing on a non-conventional jurisdiction, see T. Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge: Cambridge University Press, 2007).

<sup>13</sup> Cf. D. Trubek and M. Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies*, 4 *Wisconsin Law Review* (1974), 1062–1104; D. Trubek, *Law and Development: Forty Years after ‘Scholars in Self-Estrangement’*, 66 *University of Toronto Law Journal* (2016), 301–329; B. Tamanaha, *The Knowledge and Policy Limits of New Institutional Economics on Development*, 49 *Journal of Economic Issues* (2015), 89–109; K. Davis and M. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 *American Journal of Comparative Law* (1995), 47–486.

Reproduced with permission of copyright owner.  
Further reproduction prohibited without permission.