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Constitutional Judges as Agents for Development

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Abstract: This Article explores how constitutional judges can become agents for development and how they may wish to go about performing this role. Due to the high politico-economic stakes involved and the inevitability of trade-offs between competing interests, judicial review of developmental questions is liable to expose judges to negative fall-outs. At the same time, it is fairly common for Asian constitutions to expressly set out the parameters or objectives for economic development that the State is expected to realize, while simultaneously recognizing a suite of (socio-)economic rights, thereby providing textual ammunition to query the validity of a government's chosen implementation in court. Against this reality, the Article suggests a range of coping mechanisms that can mitigate risks to judicial legitimacy. At its broadest, the decentralized model of judicial review offers judges opportunities to side-step controversial constitutional questions that are unavailable to the same extent, or at all, to distinct constitutional courts. When deciding on the merits of developmental claims, courts should combine a strong presumption of constitutionality as far as the substance of the law is concerned with robust scrutiny of compliance with procedural guarantees. Additionally, courts should be better equipped with knowledge about the methodologies used by and insights from other social sciences to enable them to better evaluate extra-legal evidence submitted. This will also make it possible to better anticipate the likely economic consequences of particular judicial findings, possibly with a view to tailoring their remedies accordingly.

Keywords: constitutional review, polycentricity, economic question doctrine, institutional design, access to extra-legal information

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1 Introduction

In 1987 Richard Posner, then a judge at the US Court of Appeals for the Seventh Circuit, wrote an essay entitled 'The Constitution as an Economic Document'.[1] In it, he expounded on eight possible points of contact between economics and constitutional law. Several of those have a developmental dimension: the interpretation of constitutional guarantees based on an underlying economic logic such as the US commerce and takings clauses; the study of "[p]roposals to refashion constitutional law to make it a comprehensive protection of free markets"; and, in particular, the question of whether there exists a link between the constitution and economic growth and if so, the nature and strength of such a connection. New institutional economics suggests an affirmative answer to this last inquiry, assuming as it does that rule-of-law institutions are relevant to generating higher levels of welfare.[2] Its prescriptions have been embraced by leading international organizations. The World Bank has made building accessible, efficient and fair justice institutions a central plank of its work to reduce poverty[3] and the United Nations has identified "peace, justice and strong institutions" as one of the sustainable development goals that its members should implement to promote sustainable, inclusive and equitable economic growth.[4]

This Article explores how one type of justice institutions, namely constitutional judges, can become agents for development and how they may wish to go about performing this role. The focus will be on courts that have the power to carry out constitutional review, that is to say, evaluate State measures for their conformity with what the constitution says and allows. For present purposes, this will typically involve scrutiny of legislation and subsidiary rules with a general character; it may also entail adjudicating claims filed by individuals alleging that their fundamental rights have been infringed by a public authority. In countries that subscribe to the so-called centralized system of review,

1 R.A. Posner, *The Constitution as an Economic Document*, 56 George Washington Law Review, no. 1 (1987), 4–38.

2 Among an abundant literature see e. g. C. Ménard and M.M. Shirley (eds.), *Handbook of New Institutional Economics* (Heidelberg: Springer-Verlag, 2008); S. Haggard, A. MacIntyre, and L. Tiede, *The Rule of Law and Economic Development*, 11 Annual Review of Political Science (2008), 205–234; D. North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990); L. Alston, T. Eggersson, and D. North, *Empirical Studies in Institutional Change* (Cambridge: Cambridge University Press, 1996).

3 World Bank, *Justice and Development*, available at: <http://www.worldbank.org/en/topic/governance/brief/justice-rights-and-public-safety>, accessed March 4, 2019.

4 United Nations, *Sustainable Development Goals – Goal 16*, available at: <https://www.un.org/sustainabledevelopment/peace-justice/>, accessed March 4, 2019.

whereby deciding constitutional matters is the preserve of a special constitutional court or tribunal that is distinct from the ordinary judiciary, the analysis will be confined to these institutions.[5] Reference will regularly be made to specific national approaches or experiences to illustrate general points, though there is no attempt to provide a comprehensive narrative of judicial engagement with developmental claims in a single or small range of jurisdictions. The examples will be taken mainly from South-East Asia. Comprised primarily of developing countries, this region has been rapidly increasing its global footprint in economic terms through eager domestic and concerted efforts to devise policies to pursue sustainable growth.[6] Many of the constitutions in force address the national economy and at times do so quite elaborately. While the vast majority of countries have adopted judicial review, several have done so relatively recently as part of new constitution-making exercises or significant amendments in the post-1989 era.[7] The wider domestic setting for constitutional adjudication in much of South East Asia is characterized by political volatility and societies that are divided along ethnic, religious or socio-economic lines.[8] The region, then, offers a good backdrop against which to explore how constitutional judges might engage with questions pertaining to the promotion of economic growth.

This Article submits that it is increasingly prone to happen that courts will be placed in a position where they can shape the direction of and set preconditions for fostering economic prosperity. At the same time, due to the high stakes involved and the inevitability of trade-offs between competing interests,

5 This article will accordingly not address the role of administrative courts, while acknowledging that in countries where they exist, such courts too may play a relevant role in vindicating rights and keeping the executive in check. For more details on administrative courts in Asia, see e. g. A. Harding and P. Nicholson (eds.), *New Courts in Asia* (Hoboken: Taylor & Francis, 2009).

6 See e. g. H. Hill (ed.), *The Economic Development of Southeast Asia* (Cheltenham: Edward Elgar, 2002).

7 On which e. g. A. Croissant, "Ways of Constitution-Making in Southeast Asia: Actors, Interests, Dynamics," in M. Bünte and B. Dressel (eds.), *Politics and Constitutions in Southeast Asia* (Abingdon: Routledge, 2017); M. De Visser and N.S. Bui, *Glocalized Constitution-Making in the Twenty-First Century: Evidence from Asia*, 8 Global Constitutionalism (2019), 297–331.

8 On which e. g. D.S. Law, "Constitutional Inertia and Regime Pluralism in Asia," in M. Graber, S. Levinson, and M. Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018); B. Dressel and M. Bünte, "Contesting Constitutionalism: Constitutional Politics in Southeast Asia," in Bünte and Dressel (2017), *supra* note 7; C. Formichi (ed.), *Religious Pluralism, State and Society in Asia* (Abingdon: Routledge, 2013); J. Neo and N.S. Bui (eds.), *Pluralist Constitutions in Southeast Asia* (Oxford: Hart Publishing, 2019).

constitutional adjudication of developmental questions could expose judges to negative fall-outs. This risk is particularly acute for special constitutional tribunals as their portfolio is entirely made up of tasks that implicate the political branches. This suggests that it is important to craft institutional and procedural measures that enable judges to negotiate their involvement in the implementation of the national economic agenda.

This Article is divided into five parts. Part II explains the principal limitations attendant on adjudication of such claims and the kind of criticisms vis-à-vis constitutional judges that these can be translated into. Part III continues the diagnosis by exploring why constitutional judges will nevertheless be faced with petitioners seeking to use the judicial process to vindicate economic interests and entitlements. Part V considers how, given the seeming unavoidability of judicial review of developmental claims, courts can be harnessed against the worst of such charges. Part V offers a brief conclusion.

2 Suitability of Courts as Drivers of Development?

The principal misgivings about having constitutional judges adjudicate developmental claims relate, first, to their perceived inability to do so competently and, secondly, to possible negative implications for their legitimacy, which could inhibit the performance of their role in other domains. These will be discussed in turn.

2.1 Relative Institutional Incompetence: Polycentricity and Enforcement Difficulties

To appreciate the competence-related concern, it should be recalled that courts are fashioned as legal institutions: they are expected to decide matters presented to them with reference to formal legal arguments and apply legal methodologies to give meaning and effect to the rules that make up the official legal system. While extra-legal considerations may be taken into account, these will not be decisive, or least, should not explicitly be presented as such. The composition of the bench reflects these assumptions: a law degree is a typical prerequisite for a judicial career. Even separate constitutional tribunals, generally more accepting of diversity in backgrounds among its justices than ordinary courts, usually demand that candidates for appointment are legally trained and have worked for a substantial period as a legal professional in the regular judiciary, as a

prosecutor, lawyer or law professor.[9] The upshot is that judges are accordingly less well-versed, and often less comfortable, with using data from economics, history, sociology or political science.

At the risk of stating the obvious, developmental policies and the questions they give rise to are however not only or even predominantly legal in nature. Arguments derived from finance, business management or macroeconomics have major currency when strategies for economic growth are plotted. Excising these from the analysis when problems arise that are presented for judicial review is difficult and, some might say, artificial. This is however precisely what courts are likely to attempt – at least in their judgments. As Jakab, Dyevre and Izcovich have noted in a global comparative study of constitutional reasoning, judges "know that the public looks at them through the normative lens of formalism, and this gives them a strong incentive to justify their decisions in terms that are consonant with the formalist model of adjudication [according to which judges are neutral and objective servants of the law]".[10]

Developmental claims have several other characteristics that do not neatly fit the classic type of question considered intrinsically well-suited to judicial determination. Development is a multifaceted phenomenon, involving many stakeholders and many interests. A classic example is the situation where companies, sometimes backed by foreign investors, wish to exploit the natural resources of a developing country. The government is incentivized to allow such activities as these will boost the country's GDP and might simultaneously result in improvements to the national infrastructure. Conversely, local communities may be up in arms, sometimes literally: they stand to lose access to these resources, may be evicted from their land and if they attribute cultural or religious value to natural resources – like land or rivers – their ability to practice their beliefs may be impaired.

Lon Fuller has developed the idea that polycentric disputes, defined as those that tend to involve several affected parties and a fluid range of cause-and-effect relationships, are unsuited to judicial resolution.[11] While acknowledging that polycentricity is arguably a feature of all litigation, Fuller asserted that the key question is knowing "when the degree of polycentric elements have become so significant

9 See e. g. Venice Commission, *The Composition of Constitutional Courts* (CDL-STD(1997)020); AACC SRD, Jurisdictions and Organization of Association of Asian Constitutional Courts and Equivalent Institutions Members (Seoul, December 31, 2018), available at: <http://www.aaccsrd.org/en/pubsDtl.do>; M. De Visser, *Constitutional Review in Europe – A Comparative Analysis* (Oxford: Hart Publishing, 2015), pp. 211–218.

10 A. Jakab, A. Dyevre, and G. Itzcovich (eds.), *Comparative Constitutional Reasoning* (Cambridge: Cambridge University Press, 2017), p. 21.

11 L. Fuller, *The Forms and Limits of Adjudication*, 92 Harvard Law Review (1978), 353–409.

and predominant that the proper limits of adjudication have been reached".[12] He identified problems related to the allocation of economic resources as a paradigm example of a polycentric problem ill-suited for adjudication.[13] These are exactly the kind of issues likely to be implicated in developmental policies and decisions. Polycentric problems would be better left to the politics or the market. These arenas allow for the concurrent participation of all interested actors – unlike courts and the judicial process, which in principle conceive of disputes as bilateral in nature. This creates space for a comparatively superior vindication of voice (representation of the various 'wills' involved) and expertise (knowledge and institutional capacity) when making decisions.[14]

A related though distinct reason for interrogating the suitability of constitutional adjudication relations to Hamilton's conception of courts as the weakest branch. As he noted in the Federalist Papers, the judiciary lacks influence "over either the sword or the purse".[15] The courts are dependent on the legislature for the allocation of their budget and mainly need to rely on the executive to ensure that their rulings are respected. Now, part of the challenge in addressing polycentric situations is that they tend to exhibit a certain degree of temporal fluidity. Many developmental projects have a medium- to long-term horizon, increasing the likelihood of changes in the circumstances of one or multiple parties and thereby make it difficult for courts to render rulings that are self-executing. That is to say, resolving a developmental claim may call for the imposition of an ongoing supervisory remedy. This, however, is something that many courts are reluctant to order, reasoning that their finite resources are better spent on adjudication rather than monitoring. To the extent that the bureaucracy would be able to assist with enforcement or follow-up, it should be borne in mind that the State often has a stake in the matter, which could compromise the effectiveness of any such executive assistance.

The use of land in Indonesia show how the points in the preceding paragraphs can play out in practice. The Indonesian central government has long been in the

12 *Ibid*., p. 398.

13 *Ibid*., p. 400.

14 This is an adaption of the proposal by Daniel Halberstam, who has suggested that voice, expertise and rights protection are the three primary values of constitutionalism that should be used to settle constitutional conflicts in heterarchical systems, i. e. those in which questions of final authority remain essentially unsettled: D. Halberstam, "Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States," in J. Dunoff and J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge: Cambridge University Press, 2009).

15 A. Hamilton, "Federalist: No. 78," in G. Carey and J. McClellan (eds.), *The Federalist, Edited with an Introduction, Reader's Guide, Constitutional Cross-Reference, Index, and Glossary* (Indianapolis: Liberty Fund, 2001).

habit of granting concessions to commercial enterprises – local as well as foreign – to exploit sizeable forestry areas, including for industrial logging and the expansion of the agricultural sector. These activities account for a sizeable portion of the GDP and have helped the country sustain high levels of economic growth: Indonesia is one of the world's leading exporters of palm oil, rubber, rice and cocoa. At the same time exploitation has also resulted in massive deforestation and degradation of forest areas, while the attendant emissions (for instance in the form of peat fires) have been estimated to account for 85 % of Indonesia's greenhouse gas emissions.[16] In addition, social tensions about land are rife: it was reported in 2013 that then-president Yudhoyono's office "had heard of 8,495 agrarian conflicts in 2012 alone, of which 2,002 were likely to erupt into violence."[17]

The legal basis for concessions is provided by the 1999 Forestry Law, which classified large swathes of land as State Forest Area and awarded the central government the authority to decide on the function and utilization of such areas. In 2013, the Indigenous People's Alliance for the Archipelago (AMAN) challenged the validity of this Law in the Indonesian Constitutional Court, arguing that the government's ability to grant concessions without being required to seek the consent of indigenous communities was unconstitutional. The Court upheld the claim, ruling that several of the territories should not have been categorized as State Forest Areas and opening the way for a return of those lands to indigenous peoples.[18] One of its justices explained that "[i]ndigenous Indonesians have the right to log their forests and cultivate the land *for their personal needs, and the needs of their families*" (emphasis added).[19] In the years that followed, the government has remained mostly passive however. While Indonesian President Joko Widodo returned some 20,000 hectares of land from late 2016 onwards, NGOs have estimated that there are more than 10 million hectares that similarly should be recognized as belonging to indigenous communities.[20] Further, the Agrarian Reform Consortium, which

16 National Council on Climate Change, 2010, reported by REDD, available at: <http://theredddesk.org/countries/indonesia>.

17 "South Sumatra Shooting Puts Government in Cross Hairs," Jakarta Globe, July 30, 2012.

18 Decision number 35/PUU-X/2012. For commentary, see S. Butt, *Traditional Land Rights before the Indonesian Constitutional Court*, 10 Law, Environment and Developmental Journal, no. 1 (2014), 57; H. Hidayat *et al., Forests, Law and Customary Rights in Indonesia: Implications of a Decision of the Indonesian Constitutional Court in 2012*, 59 Asia Pacific Viewpoint (2018), 293.

19 Reported in M. Walden, *Indonesia's Land Rights Decision a Major Victory for Indigenous Peo*ples, available at: <https://asiancorrespondent.com/2017/01/indonesias-land-rights-decision-major-victory-indigenous-peoples/>, accessed March 4, 2019.

20 Including the Rainforest Action Network, as reported by one of its senior campaigners: see B. Morgan, "Indigenous Land Rights Recognised for Pandumaan-Sipituhuta in Indonesia," The Understory, January 5, 2017.

records the occurrence of agrarian conflict on a yearly basis, noted in late 2017 that although the government had committed to a moratorium on new permits for oil palm plantations, this policy 'has not yet reduced or settled agrarian conflict, since it has not yet reviewed the permits issued in the past'.[21] In the meantime, commercial exploitation can continue unabated and indigenous communities continue to be denied access to and enjoyment of these resources, despite the 2013 constitutional judgment insisting otherwise.

2.2 Jeopardizing Judicial Legitimacy

Let us assume, even if only for the sake of argument, that the judicial competence objection can be overcome. A second concern that can be voiced against courts dealing with developmental claims is that it would be unwise for them accept such claims or handle these assertively, for legitimacy reasons.

For constitutional adjudication to be valid, it must be legitimate in the 'narrow' sense of having a legal basis for its existence. This threshold test is easily met, especially in countries that have a constitutional court, which is typically explicitly empowered by the constitution to perform judicial review. The court's audiences (think of politicians, civil servants, other judges, civil society, marginalized groups, the media, the general public) tend to be more interested in legitimacy in its wider sense: a social perception according to which the court is *seen* to act with authority, and its audiences deem its existence and behaviour to be persuasive, proper and entitled to respect. As members of a rationally-ordered society, these audiences would thus cooperate with the court and acquiesce to its findings, even when these are unpopular or adverse to their particular interests. Legitimacy in the wider sense further accentuates the ability of the court to achieve its mandated objectives, which should enhance the authority of the document that is at the heart of judicial review cases: the constitution itself. Conversely, criticism about individual rulings could eventually impugn the authority and acceptability of the court *qua* institution. This is notably salient for courts with a relatively young genesis or more mature ones that have been performing judicial review for a relatively short period of time only, as these will not have had much time to cultivate institutional loyalty on the part of the political branches and public. Several courts in (South-East) Asia find themselves in such a position: the countries that subscribe to the centralized

21 Reported in "Cases of Agrarian Conflict Increase in 2017: Consortium," The Jakarta Post, December 28, 2017.

system of review almost all established their constitutional tribunals in the 1990s (Cambodia, Indonesia, Mongolia, Thailand)[22] or 2000s (Myanmar).[23]

The adjudication of developmental issues is particularly prone to raise performance-legitimacy reservations, notably on the part of the political branches. One reason is the polycentric and extra-legal character of development, as mentioned above. Fuller argued that when courts rule on polycentric problems, the probability of judicial error is likely to increase as their decisions cannot help but generate unexpected consequences. Courts could accordingly be criticized for failing to truly grasp the issue before it, including assessing the persuasiveness of the pro-development justifications canvassed by the government or corporations. In early 2018, for instance, India's Finance Minister appealed to the courts to deliver economically responsible justice, which he considered especially important when the Supreme Court's decisions were likely to have a negative impact on employment and India's GDP.[24] Alternatively, courts could betray judicial decorum by engaging in practices such as consulting parties not represented at the hearing or "guess[ing] at facts not proved"[25] in an attempt to try to obtain as holistic as possible an understanding of the matter before them.

The wider political environment in which courts operate must also be considered. The period in the 1960s and 1970s of the Asian Developmental State during which "capitalist economic development or socialist collectivism was deliberately privileged over democracy and constitutional forms"[26] has

22 Although the Taiwanese Constitutional Court was set up under the country's 1946 Constitution, it led a dormant existence until the democratic transition in the 1990s. For discussion, see e. g. J.R. Yeh and W.C. Chang, "A Decade of Changing Constitutionalism in Taiwan: Transitional and Transnational Perspectives," in A. Chen (ed.), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge: Cambridge University Press, 2014); T. Ginsburg, *Judicial Review in New Democracies – Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), pp. 106–157.

23 For general account of this institution see A. Harding, "The Short But Turbulent History of Myanmar's Constitutional Tribunal," in A. Chen and A. Harding (eds.), *Constitutional Courts in Asia* (Cambridge: Cambridge University Press, 2018), pp. 270–288; M. Crouch, *Dictators, Democrats, and Constitutional Dialogue: Myanmar's Constitutional Tribunal*, 16 International Journal of Constitutional Law, no. 2 (2018), pp. 421–446.

24 Cf. K. Gautam and A. Bharadwaj, "Justice Cannot be Blind to the Economy," The Hindu Business Times, March 27, 2018.

25 Fuller (1978), *supra* note 11, p. 401.

26 A. Harding, "Asian Law, Public Law, Comparative Law Stir Fry: Theory and Methods Considered," in T. Groppi, V. Piergigli, and A. Rinella (eds.), *Asian Constitutionalism in Transition: A Comparative Perspective* (Rome: Giuffre Editore, 2009), p. 31.

produced strong path-dependencies. It is still widely accepted that the state can, and should, interfere in the operation of the economy: indeed, as we shall see, this idea finds expression in several Asian constitutions. Many Asian nations also continue to enforce strict controls on the exercise of civil and political rights to ensure stability, with the hope of thereby enticing international investments and loans. Constitutional judges who are minded to vindicate such rights in the face of government-led economic developments run the risk of sacrificing valuable political capital and hurting their institutional standing. What is more, strong central states, including of the authoritarian or dominant-party variety, are a common feature in Asia. For courts, this can make it advisable to tread gingerly on issues that the government has a keen economic interest in.[27] The salience of development for many Asian countries means that the organization of the national economy will constitute what Ran Hirschl has termed 'mega-politics': "contentious issues of an outright political nature and significance".[28] If a court were to consistently and forcefully rule against the government on such issues for constitutional reasons, there would be a substantial likelihood of withering criticism or attempts to reign in the court,[29] and given the typical political climate in many Asian countries there would be few, if any countervailing forces with sufficient political clout to prevent this from happening.[30]

27 For general reflections from a comparative perspective, see the contributions in T. Ginsburg and T. Moustafa (eds.), *Rule By Law – The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008). A contemporary account of challenges to the independence and integrity of the judiciary at large in Asia is provided in H.P. Lee and M. Pittard (eds.), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge: Cambridge University Press, 2018).

28 R. Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 Annual Review of Political Science (2008), 93–118.

29 Outside the developmental setting, there have been strong backlashes against the constitutional courts in Hungary, Poland and Turkey, in the wake of a single party acquiring power to dictate national policy, with the court having been perceived as erecting unwelcome obstacles in the execution of this desired agenda. For a succinct overview, see S. Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 Columbia Journal of Transnational Law (2015), 285–320, at 294–303.

30 This is particularly likely in dominant party democracies, of which there are several in Asia. See generally, L.F. Lye and W. Hofmeister (eds.), *Political Parties, Party Systems and Democratization in East Asia* (Singapore: World Scientific, 2011).

3 The Inevitability of Judicial Review of Development Claims

The normative concerns about the relative unsuitability of courts as a forum to decide developmental questions set out above are not, however, conclusive. This section explains why courts may not be able to escape adjudicating claims attendant on economic growth strategies as a matter of daily reality.

3.1 A Strategic Asset in the International Race for Valuable Resources

At a general level, inter-jurisdictional competition among countries for economic resources can be said as having created the 'original link' between development and judicial review. The very decision to entrust courts with responsibility to enforce constitutional supremacy could be explained with reference to a 'law-and-development' logic. Scholars such as Law and Farber have suggested that countries may adopt particular constitutional arrangements with a view to attracting investment or skilled professionals (or deterring their own nationals from investing or moving elsewhere).[31] The argument put forward is that would-be investors or migrants will be particularly mindful of the extent to which the country ensures constitutional protection for property and due process rights: weak protection for such rights increases exposure to expropriation and the risk that no redress will be available if assets or other fundamental liberties are interfered with. Similar assumptions are a staple of the new institutional economic framework that has been accepted by major international economic organizations like the World Bank, the International Monetary Fund and the Asian Development Bank.[32] As a General Counsel for the World Bank put it, "serious investors look for a legal system where property rights, contractual arrangements, and other lawful activities are safeguarded and respected, free from arbitrary governmental action."[33]

31 D. Law, *Globalization and the Future of Constitutional Rights*, 102 Northwestern University Law Review (2008), 1277–13; D. Farber, *Rights as Signals*, 31 Journal of Legal Studies (2002), 83–98.

32 In addition to the sources cited in notes 2 to 4 *supra*, see Asian Development Bank, *Potential Growth, Misallocation, and Institutional Obstacles: Firm-Level Evidence*, ADB Economics Working Paper Series No. 480 (Manila, 2016).

33 I. Shihata, "Judicial Reform in Developing Countries and the Role of the World Bank," in F. Tschofen and A. Parra (eds.), *The World Bank in a Changing World – Selected Essays* (London: Martinus Nijhoff, 1995), p. 149.

Crucially, putting in place a sufficiently strong rights regime is not only a matter of enshrining property and due process guarantees in the constitution: their effective enforcement must be ensured as well. This is where courts come in. Granting judges the power to uphold rights signals to prospective investors and migrants that the State is serious in its commitment to rights protection. This will matter especially for foreign target audiences from Europe or North America as many will expect – either based on arrangements that they are familiar with in their own jurisdiction or for reasons of corporate social responsibility – that rights can ultimately be vindicated in a judicial forum. 'Competition theories'[34] of judicial review thus suggest that there is a causal link between the establishment of this practice and a country's quest to attract foreign capital or skill injections.

3.2 Conducive Constitutional Texts

It is surely true that notably developing countries will be mindful of financial benefits that can be reaped by tailoring their institutional design to match the real or perceived expectations of potential investors or migrants. But given the multiple stakeholders involved in questions of constitutional design, the decision to adopt judicial review typically comes about a complex amalgamation of domestic and foreign interests.[35] Competition theory logic may be one variable in this mix, but it is unlikely to be the dominant, let alone the only variable. Perhaps this does not matter too greatly. After all, the impetus to embrace constitutional adjudication does not predetermine exactly how courts will exercise their review powers and the type of cases that make up its docket. However, once they are up and running, there are good reasons to believe that courts will be asked to decide questions with a developmental dimension. Put differently, the actual operation of judicial review ensures another, and enduring, connection between courts and the national development agenda. The stakes in realizing the latter are high, the number of potential

34 R. Dixon and E. Posner, *The Limits of Constitutional Convergence*, 11 Chicago Journal of International Law, no. 2 (2010), 399–422, at 403, 418.

35 Possible driving forces include the need for independent arbiters to allocate competence disputes between branches or echelons of government (e. g. M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1986); the symbolism of judicial review as a hallmark of the country's Rule of Law credentials in the wake of democratization; or the desire of self-interested political elites to put in place 'insurance' mechanisms to contest policy changes in the wake of uncertainties in the electoral market (e. g. R. Hirschl, *Towards Juristocracy – The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004); T. Ginsburg and M. Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 The Journal of Law, Economics, and Organization (2014), 587–622.

stakeholders is large and their interests are misaligned, a point that we will return to below. Corporations, investors and the government stand to realize – or loose – significant financial gains. For civil society, local (indigenous) communities and private citizens, the quest for development may imperil their personal liberties or livelihood. Disagreements among stakeholders will be inevitable and as a corollary, so too is the need for a dispute resolver. Courts are the obvious candidates in this regard: they are (or at least should be) neutral and their independence and need for reasoned decisions promises a fairer and more intelligible outcome than if the matter were left to the political branches for final resolution.

Importantly, the ability for stakeholders to translate their grievances into constitutional language to make these susceptible to adjudication is aided by the manner in which modern constitutions are framed. That is to say, constitutions increasingly include multiple textual anchors that make it possible to mount developmental claims. These may include, first, the preamble. That of the Timor Leste Constitution for instance expresses "determination to ... [build] a just and prosperous nation". In a similar vein, several Asian constitutions incorporate provisions setting out the desired attributes of the national economy. The Constitution of Bhutan directs the state to "encourage and foster private sector development through market competition and prevent commercial monopolies"[36] and that of the Philippines mandates that the state "recognises the indispensable role of the private sector, encourages private enterprise and provides incentives to needed investments".[37] To that end, the president can conclude agreements with foreign-owned corporations to assist with the exploitation of the country's natural resources, with the proviso that the state undertakes to "promote the development and use of local scientific and technical resources" in such agreements.[38] Constitutional provisions with an economic dimension sometimes have a strong normative flavour. For example, Article 6 of the Timor Leste Constitution insists that the state must "promote ... the fair distribution of the national product" and that of Singapore mandates that 50 % of the net investment income generated during the financial year is paid into the country's reserves,[39] which is said to ensure "intergenerational equity".[40] Other Asian constitutions include articles with nationalist or protectionist overtones. That of Indonesia stipulates that 'the economy shall be organized as a common

36 Constitution of Bhutan, Art. 9(10).

37 Constitution of the Philippines, Art. II, Section 20.

38 *Ibid*., Art. XII, Section 2.

39 Constitution of Singapore, Art. 142(2)(b).

40 W.C. Chang *et al., Constitutionalism in Asia – Cases and Materials* (Oxford: Hart Publishing, 2014), p. 82.

endeavor based upon the principles of the family system'[41] and the Philippines Constitution proclaims that the national economy must 'effectively be controlled by Filipinos',[42] with the state being obliged amongst others to encourage the establishment of businesses whose capital is entirely in the hands of Filipinos[43] that must further be protected against "unfair competition and trade practices".[44]

It could be objected that preambles and provisions of the type just mentioned are merely aspirational or programmatic in nature, and as such, directed to the political branches of government – not to the courts. Indeed, their language often suggests non-justiciability and this may have been what the drafters sought to achieve. Having said that, the example of India shows that the framers' original intention need not be decisive: its Supreme Court has famously held that the Directive Principles of State Policy included in the Indian Constitution are in fact amenable to judicial application.[45]

But even if courts were to decide against the direct effect of the preamble or programmatic articles, they can nevertheless use these to extract overarching (economic) constitutional values with a view to using these as a guide for the interpretation of other, justiciable, articles. The most obvious example of such provisions are those protecting economic rights. Examples include the rights to own and transfer property[46] as well as protection from expropriation,[47] the right to establish a business[48] and operate it in a competitive marketplace,[49] and

41 Constitution of Indonesia, Art 33(1), on which S. Butt and T. Lindsey, *Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33 of the Constitution*, Sydney Law School Legal Studies Research Paper No. 09/29, (2009).

42 Constitution of the Philippines, Article II, Section 19.

43 *Ibid*., Art. XII, Section 10.

44 *Ibid*., Art. XII, Section 1.

45 For an overview, see G. Bhatia, "Directive Principles of State Policy," in S. Choudhry, M. Khosla and P. Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016).

46 E. g. Constitution of Bhutan, Art. 7; Constitution of Cambodia, Art. 44; Constitution of Indonesia, Art. 28H(4); Constitution of South Korea, Art. 23; Constitution of Malaysia, Art. 13; Constitution of Myanmar, Art. 37; Constitution of the Philippines, Art. II, sec. 5; Constitution of Sri Lanka, Art. 157A(12); Constitution of Thailand, sec. 37; Constitution of Timor Leste, Art. 54; Constitution of Vietnam, Art. 32.

47 E. g. Constitution of Cambodia, Art. 44; Constitution of Malaysia, Art. 13; Constitution of the Philippines, Art. III, sec. 9.

48 E. g. Constitution of Myanmar, Art. 370; Constitution of the Philippines, Art. XII, sec. 6; Constitution of Sri Lanka, Art. 14; Constitution of Thailand, sec. 75; Constitution of Vietnam, Arts. 33 and 51.

49 E. g. Constitution of Cambodia, Art. 56; Constitution of South Korea, Art. 119(2); Constitution of Myanmar, Art. 36; Constitution of Thailand, secs. 40 and 75.

protection of IP rights and the right to reap the attendant economic benefits.[50] Also relevant in this regard are constitutional commitments to protect the environment or to preserve indigenous communities and physical manifestations of local culture. The explicit constitutionalization of economic and conservationist rights provides individuals and, depending on their formulation, legal entities too, with an obvious set of tools to judicially challenge alleged encroachment thereof by the State or enterprises authorized by it in the name of development.

3.3 Multi-Layered Nature of Development

A final point about the amenability of developmental questions to judicial review concerns the notion of development itself. In line with common usage in the law and development discourse, the discussion so far has taken that term to denote economic growth. This is however but one understanding. In works on constitutional law and the role of courts development has been ascribed several other meanings.

Some take it as referring to the need to protect the self-worth of human beings so as to enable them to autonomously decide how they wish to live their lives. On this version, development is related to human dignity and how respect for personal liberties enables personal growth and self-realization.[51] Courts have a privileged position among State institutions in the process of identifying the parameters for the realization of this type of human development by virtue of what is commonly seen as a natural link between independent judges and fundamental rights protection.

Others understand development in institutional terms: the effective distribution of State powers across branches and echelons and the fashioning of well-

50 See e. g. Constitution of Bhutan, Art 7(13); Constitution of South Korea, Art. 22(2); Constitution of Malaysia, Ninth Schedule (List 1, sec. 8(e)); Constitution of Myanmar, Ch. I, Part 2, s. 37 and Ch. VII, s. 372; Constitution of the Philippines, Art. XIV, s. 13; Constitution of Timor-Leste, Art. 60; Constitution of Vietnam, Art. 62.

51 See e. g. M. Mahlmann, "Human Dignity and Autonomy in Modern Constitutional Orders," in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012); R. Uitz and O. Salát, "Individual Autonomy as a Constitutional Value: Fundamental Assumptions Revisited," in A. Sajó and R. Uitz (eds.), *Constitutional Topography: Values and Constitutions* (The Hague: Eleven Publishers, 2010); M. Mahlmann, *The Basic Law at 60 – Human Dignity and the Culture of Republicanism*, 11 German Law Journal (2010), 9–31.

functioning governmental arrangements for the exercise thereof.[52] A stable set of State institutions is vital for the delivery of fundamental governmental services and the creation of a comprehensive and internally coherent legal system. On this account, courts can play a key role in fostering a capable State and development of the law by ensuring that the other branches and echelons respect each other's competences and exercise their own powers in line with basic principles of fairness, consistency and transparency.[53]

Yet another approach is to emphasize on the underlying 'big ticket' constitutional values like the rule of law, democracy and constitutionalism and how these can be realized, in particular for countries experiencing processes of regime change.[54] Again, courts are often looked to by others and similarly conceive themselves as the logical forum to concretize and disseminate such constitutional values.[55]

These various understandings of development are not mutually exclusive; on the contrary, they clearly shade into one another. The attendant difficulty of neatly untangling 'economic' developmental questions from those with a legal-constitutional angle means that courts may find it similarly difficult to confine their involvement to the latter type. As an aside, we should also bear in mind that most courts cannot fully control their docket in terms of when, by whom and what they are asked to exercise their review powers.

4 Designing for Responsible Judicial Involvement

Given the prospect of constitutional judges finding themselves in a position where they can review developmental policies, what tools are available that

52 Cf. B. Ackerman, *The New Separation of Powers*, 113 Harvard Law Review (2000), 633–729; A. Chen and M.P. Maduro, "The Judiciary and Constitutional Review," in M. Tushnet, T. Fleiner, and C. Saunders (eds.), *Routledge Handbook of Constitutional Law* (Abingdon: Routledge, 2013).

53 The intellectual father of the separate constitutional court, Hans Kelsen, envisaged this institution as a check on the other State organs, ensuring that these would not encroach upon each other's powers, but explicitly not as a guardian of the constitutional bill of rights: *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 3 Journal of Politics (1942), 183–200.

54 Cf. M. Krygier, "Rule of Law," in Rosenfeld and Sajó (2012), *supra* note 51, p. 248.

55 A good illustration is the establishment of the Association of Asian Constitutional Courts and Equivalent Institutions, which seeks to promote the triumvirate of the rule of law, democracy and fundamental rights. For more details, see M. de Visser, *We All Stand Together: The Role of the AACC in Promoting Constitutionalism*, 3 Asian Journal of Law and Society, no. 1 (2016), 105–134.

could help mitigate the concerns identified earlier? This section sets out three possible coping strategies that could bring about judicial involvement that is responsible, in the sense of boosting courts' capacity to hand down sound decisions while limiting their exposure to legitimacy-eroding behaviour, notably by political institutions. The strategies are formulated against the backdrop of the particular Asian setting, as elaborated above, although some could be of more general relevance.

4.1 Attractiveness of Decentralized Judicial Review

There exist two dominant institutional configurations for the exercise of judicial review: the decentralized and the centralized model.[56] Under the former, adjudicating constitutional issues, including claims that a particular statute does not pass muster, is within the purview of the regular judiciary. Under the latter, a special institution – a constitutional court or tribunal that is conceived as a separate column within the judicial branch – enjoys the power to authoritatively settle questions of constitutional interpretation and review laws for their validity. Generally speaking, civil law countries tend to create constitutional courts, while the decentralized model is typically embraced by common law countries, although there is no necessary connection between a country's legal tradition and the system for review.[57]

While it is unlikely that a country will change its original choice for a particular model exclusively with reference to the adjudication of developmental issues, the attractiveness of decentralization respectively centralization vis-à-vis such issues can be a factor when countries are otherwise minded to reconsider their system of review. This is potentially relevant in Asia. Some Asian countries presently do not envisage a role for the courts in constitutional enforcement, while others are contemplating a possible change in their design of judicial review. In Vietnam, Laos and China, the national assembly or a committee thereof is entrusted with upholding the constitution.[58] The need, direction and

56 These are also referred to as the American and the European model respectively, to denote their ancestries.

57 For example, Japan, which is a member of the civil law family, has adopted decentralized review, whereas Myanmar, which has a common law system, has set up a constitutional tribunal.

58 Constitution of China, Art. 62(1)-(2) and Art. 67(1); Constitution of Vietnam, Arts. 69 and 70 (2); Constitution of Lao, Art. 53(13). See further Y. Lin and T. Ginsburg, *Constitutional Interpretation in Lawmaking: China's Invisible Constitutional Enforcement Mechanism*, 63 American Journal of Comparative Law, no. 2 (2015), 467–492; M. Sidel, *The Constitution of Vietnam – A Contextual Analysis* (Oxford: Hart Publishing, 2009), 183–207.

prospects for the introduction of some form of judicial review are however subject to debate in academic circles and among political and legal elites, in which case developmental considerations could be included in the analysis. For instance, the idea to establish a centralized constitutional court was seriously considered in the process that culminated in the adoption of Vietnam's fifth constitution in 2013, although proposals along these lines ultimately failed.[59] Meanwhile, in Sri Lanka, which is currently in the throes of a constitutional replacement exercise, some have mooted taking this opportunity to replace the decentralized system of judicial review with a constitutional court.[60]

The suggestion that this Article would like to put forward is that, from a developmental angle, the decentralized model of judicial review is preferable to a system with a constitutional court. The latter is necessarily situated in one location, often in or close to the seat of government. To be sure, this is advantageous for the political branches and large commercial enterprises: they know where to file claims and can do so expediently. For individuals and local communities, however, the regular courts are more accessible from a geographic, financial and legal perspective. Several Asian countries are very large in size and a number also have natural features that inhibit easy travel over land (think of mountain ranges, rivers, and islands), especially when considering that their status as developing nations typically means weaker infrastructure networks. Regular courts are spread across the country and are hence physically closer to the people than a constitutional court would be. This means that under the decentralized model of review, going to court is easier, faster and cheaper. Importantly, geographic closeness can also generate 'mental closeness' among these constituencies: the sense that they are entitled to call upon courts to perform judicial review and that this practice is not reserved to elites. Moreover, private parties are not always accorded the competence to initiate litigation in the constitutional court or are only able to do so on limited

59 N.S. Bui, *The Discourse of Constitutional Review in Vietnam*, 9 Journal of Comparative Law (2014), 191–221. For China, see G. Zhu, *Constitutional Review in China: An Unaccomplished Project or a Mirage?*, 43 Suffolk University Law Review (2010), 650–679; K. Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 University of Pennsylvania East Asia Law Review (2011), 51–159.

60 For analysis, see N. Jayawickrama, *Establishing a Constitutional Court: The Impediments Ahead*, CPA Working Papers on Constitutional Reform, No. 13 (2017); T.G. Daly, *A Constitutional Court for Sri Lanka? Perceptions, Potential Pitfalls*, CTN Policy Paper, No. 1 (2017). Sri Lanka already experimented with a constitutional court between 1972 and 1978, but this institution was only able to perform pre-enactment scrutiny.

grounds.[61] As individuals and local communities are commonly conceived as the principal beneficiaries of development, their ability to ensure that constitutional safeguards are duly respected in the process should be prioritized over expediency for public institutions and large economic players. At the same time, using the regular courts to settle constitutional questions obviates the need for the State to dedicate some of its finite resources to setting up and maintaining a special institution (i. e. a constitutional court) for judicial review.

Another argument in favour of decentralized review is tied to the rise of the regulatory state. In a growing range of areas, mainly those perceived as susceptible to rapid change, statutes are increasingly couched in general terms. The authority to adopt the rules that flesh out and operationalize legislative policy objectives is delegated to the government or other bodies within the executive branch. The transfer of regulatory power from the legislature to the executive means that constitutional problems no longer only or even principally arise 'on the face of' the statute. Instead, questions about the meaning of or compliance with constitutional requirements will increasingly come to the fore when the executive enacts the implementing regulations. Most constitutional courts, in Asia and beyond, are however expected to assess the constitutionality of statutes – not of subsidiary legal norms.[62] This means that under the centralized model rules with general applicability that raise constitutional questions may not be checked by the institution that has been designated as the country's chief guardian of constitution. Conversely, under the decentralized model, such questions will be judicially addressed as the regular courts are typically competent to consider the constitutional validity of both statutes and lower-level rules.

Finally, regular courts will find it easier employ strategies of avoidance to shy away from politically charged constitutional issues – which, as mentioned earlier, should be understood as encompassing questions about economic growth policies in Asia's developing countries – than special constitutional

61 While a centralized regime can include decentralized elements in the form of preliminary questions – whereby ordinary judges unsure about the validity of the statute applicable to the case must refer this question to the constitutional court for decision – this is not always the case. In Southeast Asia, for instance, the Indonesian Constitutional Court lacks the competence to receive such questions. In addition, a preliminary reference procedure introduces systemic tension and conflict in the relationship between the constitutional court and the ordinary courts, notably the supreme court, which is problematic in developing countries seeking to cultivate the authority of the judiciary as a whole. On this tendency, see L. Garlicki, *Constitutional Courts versus Supreme Courts*, 5 International Journal of Constitutional Law, no. 1 (2007), 44–68.

62 See e. g. Law on the organization and functioning of the Cambodian Constitutional Council, Art. 15; Constitution of Indonesia, Art. 24C(1) and Art. 24A(1); Constitution of Thailand, sec. 210(1).

courts. Since they also interpret and apply statutes and subsidiary norms (these, in fact, are their bread-and-butter activities) regular courts can side-step delicate constitutional questions by resorting to ordinary legal arguments and using classic techniques of statutory interpretation. This allows them to present themselves to their audiences as behaving in line with the traditional view of courts as formal, apolitical institutions. In contrast, special constitutional courts cannot avoid addressing the constitution and its political-economic overtones in their decisions: their very raison d'être is to authoritatively establish the meaning of this document and ensure its supremacy.[63] Under the decentralized model, courts would further be able to practice "case-by-case minimalism … [s] ince [regular judges] can circumscribe their holdings concerning the validity of a statute to the particular circumstances of the various cases."[64]

4.2 Economic Question Doctrine and Procedurally-Minded Review

Continuing with the performance of judicial review, it could be attractive for constitutional judges in countries with developmentalist priorities to embrace doctrines that enable them to reduce their involvement in decisions on the allocation of resources. Three such doctrines will be surveyed below.[65]

First, a court could decide to embrace an 'economic question doctrine', mirroring the political question doctrine according to which questions with a high or pure political dimension are deemed to be outside the judicial remit. In its 1962 *Baker v Carr* judgment, the US Supreme Court set out six elements to identify non-justiciable political questions that are generally considered as useful indicators in this regard. These are:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding it without an initial policy determination of a kind clearly for non-judicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision

63 If they were to use techniques of statutory interpretation, constitutional courts moreover would encroach upon the domain of regular courts, who could decide to simply ignore the former's suggested statutory construction, thereby creating legal uncertainty.

64 V. Ferreres Comella, *Constitutional Courts & Democratic Values – A European Perspective* (New Haven: Yale University Press, 2009), p. 75.

65 There could be others, but the three selected for discussion here seem particularly promising and could be applied regardless of the institutional model for review.

> already made' or [6] the potential of embarrassment from multifarious pronouncements by various departments on one question.[66]

Classic examples of political questions are those related to the conduct of foreign or military policy; in Asia, this is exemplified by the attitude of the Japanese Supreme Court vis-à-vis the constitution's famous pacifist clause.[67] Notably indicators 2, 3 and 5 seem however easily adaptable to the economic arena. When seized of issues that are essentially economic in nature (think for instance of macroeconomic policy questions concerning infrastructure development, reform of domestic labour markets or the direction and pace of industrialization), courts in developing countries could apply these indicators mutatis mutandis to dismiss the case and avoid reaching the merits. An illustration of what this would look like is offered by a 2009 judgment of the Philippines Supreme Court in a case involving a challenge to the government's decision to deregulate the oil industry after years of strong centralized control. The Supreme Court dismissed the petition as non-justiciable and its reasoning is worth quoting at some length, including for its reference to *Baker v Carr*:

> Stripped to its core, what petitioner Garcia raises as an issue is the propriety of immediately and fully deregulating the oil industry. Such determination essentially dwells on the soundness or wisdom of the timing and manner of the deregulation Congress wants to implement through [the Oil Deregulation Law 1998]. Quite clearly, the issue is not for us to resolve; we cannot rule on when and to what extent deregulation should take place without passing upon the wisdom of the policy of deregulation that Congress has decided upon. To use the words of Baker v. Carr, the ruling that petitioner Garcia asks requires *"an initial policy determination of a kind clearly for non-judicial discretion";* the branch of government that was given by the people the full discretionary authority to formulate the policy is the legislative department.
> Directly supporting our conclusion that Garcia raises a political question is his proposal to adopt instead a system of partial deregulation – a system he presents as more consistent with the Constitutional "dictate." He avers that free market forces (in a fully deregulated environment) cannot prevail for as long as the market itself is dominated by an entrenched oligopoly. In such situation, he claims that prices are not determined by the free play of supply and demand, but instead by the entrenched and dominant oligopoly where overpricing and price-fixing are possible.
> ...

66 *Baker v Carr*, 369 U.S. 186 (1962) at 217. For a contemporary discussion, see e. g. N. Mourtada-Sabbah and B.E. Cain (eds.), *The Political Question Doctrine and the Supreme Court of the United States* (Lanham: Lexington Books, 2007).

67 See e. g. P.L Chen and J.T. Wada, *Can the Japanese Supreme Court Overcome the Political Question Hurdle?*, 26 Washington International Law Journal, no. 2 (2017), 349–379.

> Petitioner Garcia's thesis readily reveals the political, hence, non-justiciable, nature of his petition; the choice of undertaking full or partial deregulation is not for this Court to make.[68]

While an economic question doctrine would allow a court to abstain from deciding issues with a very high or purely economic content, the multidimensional character of developmental questions means that there often will be a sufficiently clear legal angle to justify subjecting developmental matters to the exercise of judicial authority.[69] In those situations, courts could avail themselves of two alternative strategies to circumscribe the extent of their involvement: applying a strong presumption of constitutionality and proceduralized review.

As its nomenclature suggests, the former entails that court will commence its investigation of the statute or other State measure under review by initially assuming that these are compatible with the Constitution and that cogent reasons are hence required for the court to find otherwise. Depending on the strength of the presumption, the legislature and executive are accorded a wider or smaller margin of appreciation. It would be rational for courts to adopt a strong presumption of constitutionality when asked to review laws and other general acts with clear and dominant developmental features. Doing so signals judicial recognition of and respect for the superior institutional capacity of the political branches to make polycentric decisions that should not in principle be subject to judicial second-guessing. In addition, the presumption of constitutionality can also serve as a useful canon of construction. Using this presumption encourages the court to attempt to interpret the impugned rule in a way to make it compatible with the Constitution. Such conciliatory interpretation can take the form of incorporating, reading down or removing words or phrases from the act under review. It has been recognized that using the presumption of constitutionality as an interpretative maxim has its limits in the actual words deployed in the text, its objectives and, relatedly, the legislature's intentions.[70] Having said that, judicial practice shows that courts are often willing to go quite far and display considerable creativity to formulate an interpretation to avoid concluding that the act grates against constitutional requirements.[71] A strong

68 *Garcia v Executive Secretary, the Secretary of the Department of Energy, Caltex Philippines, Petron Corporation and Shell Corporation*, GR No. 157584, April 2, 2009 (emphasis in original).

69 Some courts might even decide that there is no question that is beyond their competence and reject an economic question doctrine altogether.

70 See e. g. *Attorney-General of the Gambia v Jobe* [1984] AC 689 (Privy Council); *Hector v Attorney-General of Antigua and Barbuda* [1990] 2 AC 312 (Privy Council).

71 See e. g. De Visser (2015), *supra* note 9, pp. 291–309; E.S. Fish, *Choosing Constitutional Remedies*, 63 UCLA Law Review (2016), 322–386; S. Butt, "Conditional Constitutionality and

presumption of constitutionality, then, can be a valuable tool for judges confronted with justiciable developmental claims.

The other strategy that this Article wishes to highlight is proceduralized review. This means that courts should place considerable emphasis on the availability and correct application of procedural guarantees in relation to developmental schemes. As explained earlier, developmental projects and policies often require balancing between competing substantive interests, such as facilitating private enterprises and investment versus protection from expropriation or the right of indigenous communities to enjoy natural resources. Under a procedural approach, courts would be primarily concerned with ensuring that these interests have been made known to and have been considered by the political authorities in the course of the relevant decision-making process. This could in particular entail the legislature being expected to statutorily prescribe that impact assessments must be conducted with respect to all economic decisions that have the potential to significantly affect a large and diverse range of stakeholders.[72] Relatedly, the legislature could also be mandated to lay down the basic requirements of such impact assessments to ensure that these are truly dialectic, for instance by stipulating the scope and modalities of public participation. This is important because, as a World Bank report on environmental impact assessments points out, "[p]ublic participation in decision-making processes for development helps meet public needs, enhances access to information, leads to better developmental decisions, results in fewer court challenges, and ultimately reduces conflict between developers and the affected public."[73] Under a procedural perspective, courts would also be expected to review whether the administration has indeed followed the impact assessment framework for the development projects, policies and plans that should be subjected thereto.

Conditional Unconstitutionality in Indonesia," in P.J. Yap (ed.), *Constitutional Remedies in Asia* (Abingdon: Routledge, 2019).

72 Extensive work has been done on the design of effective environmental and other regulatory impact assessments that could usefully be applied analogously. See e. g. C.J. Bastmeijer and T. Koivurova (eds.), *Theory and Practice of Transboundary Environmental Impact Assessment* (Leiden: Martinus Nijhoff, 2008); N. Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge: Cambridge University Press, 2008); A. Perdicoúlis, B. Durning, and L. Palframan (eds.), *Furthering Environmental Impact Assessment* (Cheltenham: Edward Elgar, 2012); R. Deighton-Smith, A. Erbacci, and C. Kauffmann, *Promoting Inclusive Growth Through Better Regulation: The Role of Regulatory Impact Assessment* (Paris: OECD Publishing, 2016).

73 M.A. Bekhechi and J-R. Merder, *The Legal and Regulatory Framework for Environmental Impact Assessments – A Study of Selected Countries in Sub-Saharan Africa* (Washington: The World Bank, 2002), p. 23.

Rather than reviewing the substantive balancing exercise itself, procedur-alized scrutiny thus sees courts giving effect to (often constitutionally-recog-nized) due process guarantees and rules of natural justice. Judges may have a natural predilection to do so, as this allows them to maintain the impression that they are concerned with enforcing legal technicalities rather than with value-laden substantive concepts. That air of neutrality and objectivity at the same time helps to make procedural review palatable for the political branches: this is judges doing the kind of 'legal' work that they are expected to do.

4.3 Enhancing Judicial Access to Relevant Extra-Legal Information

Courts faced with deciding developmental claims should have ample opportunities to obtain relevant extra-legal information. Access to such information implicates the quality and accuracy of their judgments and provides at least a partial answer to Fuller's concern that the probability of judicial error increases when courts must decide polycentric problems.

Various avenues are available to enable constitutional judges to collect extra-legal information. One possibility is to allow the submission of amicus curiae briefs by professional associations or advocacy groups that are well-versed in or have ready access to pertinent social science research. Whether a court can avail itself of this possibility is dependent on the governing procedural framework and its interpretation thereof. Amicus curiae briefs are typically associated with decentralized systems in which the supreme court ultimately settles constitutional disputes. In Southeast Asia, the supreme courts in Malaysia and the Philippines can for instance accept unsolicited submissions prepared by general interest groups and concerned citizens. Would-be amicus curiae are as a rule required to seek the court's consent to intervene. Whether such requests are granted is normally decided with reference to the expected content of the brief. The threshold criterion here is one of originality. For instance, the U.S. rules require that the submission 'brings to the attention of the Court relevant matters not already brought to its attention by the parties.'[74] It should be realized, however, that the range and type of extra-legal information received through amicus briefs, and hence their value in expanding the court's vista of the matter before it, is determined by the would-interveners – not by the court itself. Amici curiae are further not neutral in their approach; their objective is to convince the court to embrace a particular position and this guides their

74 U.S. Supreme Court, Rule 37(1).

selection and presentation of non-legal facts. A discriminating approach is accordingly called for in relying on the extra-legal information shared by amicus curiae. Thus, a study of law clerks at the U.S. Supreme Court found that, unsurprisingly, submissions by "[p]rofessional groups are considered to be more reliable than ideological groups."[75]

An alternative route is for the court to request information or opinions from experts, who should conduct themselves in a manner independent of the parties to the proceedings. Ideally, the relevant statutory framework or internal rules of court should explicitly authorize the appointment of such experts alongside specifications as to when and how their findings should be communicated to the judges. The power of courts to take evidence means that they are in the driving seat in deciding what kind of extra-legal information they wish to obtain and consider in the course of the judicial deliberations. This can be an advantage when compared to the dependence on the interests and incentives of third parties characteristic of amicus curiae regimes. However, much hinges on the judges' ability to appreciate that the information in the file before them must be supplemented or contains assertations that should be interrogated, thus triggering the use of their autonomous evidence-gathering powers.

For that reason, courts faced with developmental and other polycentric claims should have acceptable levels of in-house extra-legal expertise. As we have seen, the eligibility criteria for judicial appointment usually include legal training and may also include substantial legal work experience as far as elevation to superior national courts is concerned. The prospect of relaxing or abandoning the requirement of legal training as a general prerequisite seems unlikely. Judicial legitimacy derives, amongst others, from the fact that socio-economic or political issues are translated into and treated as legal problems, with its associated properties of neutrality and objectivity. The skills to effect such a translation and to justify decisions in a way that is accepted as 'legal' are best honed through legal training in universities and beyond. Against this reality, countries where law is a postgraduate degree may find themselves in a somewhat preferable position as far as access to extra-legal information is concerned. While judges in those countries may still be required to hold law degrees, they have been exposed to other disciplines, which may include sociology, history or economics during their undergraduate studies and should accordingly feel somewhat more comfortable interpreting data, methodologies and arguments derived from those fields than their counterparts who have been exclusively trained in the law.

75 K.J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 Journal of Law & Politics, no. 1 (2004), 33–75, at 51.

Improving the familiarity of exclusively legally-trained judges with basic economic, finance and other non-legal notions can at least in part be achieved through the design of judicial continuing education curricula. Countries in Southeast Asia and beyond increasingly demand that judges in service must partake in lifelong learning activities to continuously improve the quality of adjudication. Seminars on economics, accounting and the like could usefully be integrated in the judicial education curriculum alongside activities canvassing contemporary legal developments. By way of example, the training arm of the Singapore judiciary organized workshops on the mechanisms of carbon pricing and probability and statistics in 2018.[76] Mention should also be made of the work of the Asian Judges Network on Environment, the establishment of which was in part prompted by the realization that effective environmental protection is contingent on judicial capacity – and recall that such protection is likely to be implicated in developing countries whose governments may be incentivized to adopt an economic welfare maximization approach. To this end, the first provision of its 2014 Colombo Action Plan underscores the need to "emphasize the importance of environmental science as a component in judicial training".[77] In 2018, the Network organized a colloquium on the judicial use of constitutions to achieve climate justice. The resulting Lahore Action Plan reiterates the importance of well-designed capacity-building programs, notably calling for a concerted effort to do so for courts in "developing countries in the region".[78] As the content of interdisciplinary training is not jurisdiction-specific, good practices and well-curated training materials can be shared across judiciaries likely to face similar development issues. This makes investment in judicial training a particularly attractive strategy to pursue for those eager to enhance the quality and authority of judgments with a developmental angle, including international organizations and other foreign aid donors.

76 Singapore Judicial College, Annual Report 2018 (Singapore), available at: <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sjc/sjc_ar2018_31dec_flipbk_lr.pdf>, at 34.

77 I. Ahsan and G.R.P. Bueta, *Proceedings of the Third South Asia Judicial Roundtable on Environmental Justice for Sustainable Green Development* (Philippines: Asian Development Bank, 2015), point 1(i).

78 Asia Pacific Judicial Colloquium on Climate Change, *Using Constitutions to Advance Environmental Rights and Achieve Climate Justice – Meeting Reports and Materials* (Lahore, November 23, 2018), available at: <https://www.ajne.org/resource/asia-pacific-judicial-colloquium-climate-change-using-constitutions-advance-environmental>.

5 Conclusion

In this Article, I have identified the chief reasons that make it difficult for courts to decline expressing their views on developmental schemes and priorities, despite the risk that this may entail for their institutional authority and longer-term effectiveness. These reasons are particularly pronounced for judges in developmental States, of which there are many in South-East Asia. It is fairly common for Asian constitutions to expressly set out the parameters or objectives for economic development that the State is expected to realize, while simultaneously recognizing a suite of (socio-)economic rights, thereby providing textual ammunition to query the validity of a government's chosen implementation in court. At the same time, and as compared to much of North America and Europe, the roots of constitutionalism in many Asian countries are neither as deep nor as old, while the imperatives of economic growth are more acute.

Against this reality, I have suggested several coping mechanisms that could mitigate the risks to judicial legitimacy attendant on the adjudication of developmental claims. At its broadest, the decentralized model of review offers judges opportunities to side-step controversial constitutional questions that are unavailable to the same extent, or at all, to distinct constitutional courts. What is more, the decentralized exercise of review facilitates access to constitutional justice for affected individuals and communities in remote and rural areas, making this the preferred institutional design for constitutional adjudication in large developing countries.

Developmental claims typically require judges to navigate between upholding legally-binding constitutional rules and granting the government a sufficient margin of appreciation to set and deliver on economic growth policies. For quintessential policy determinations with a high prognostic character, using an economic question doctrine allows judges to decline to weigh in on matters that are more appropriately settled by the political branches. In the majority of cases, though, the developmental issues will be amenable to judicial resolution. The approach that I have advocated is for courts to combine a strong presumption of constitutionality as far as the substance of the law or regulation is concerned with robust scrutiny of compliance with procedural guarantees. For individuals and communities, this might even be more advantageous than having a judicial pronouncement on the outcome of the balancing of the interests at stake. Courts typically practice considerable deference for separation-of-powers reasons when reviewing the merits of polycentric decisions, making it difficult for individuals or communities challenging government plans on substantive grounds to succeed. In contrast, the logic of procedurally-minded review means that judges do not need

to maintain a fairly deferential stance. This should increase the likelihood of development measures that have come into being in defiance of prescribed procedural preparatory regimes, notably as far as public participation is concerned, being invalidated. Over time, proceduralized review can thus help safeguard the ability for individuals and local communities to shape the eventual content of developmental projects and activities *while these are being designed*. Put differently, this type of judicial review seeks to cultivate good governance as opposed to a conception of judicial review the main aim of which is to provide relief in the wake of occurrences of bad government.

To complement these approaches and ensure their successful judicial application, more attention should be devoted to equipping courts with knowledge about the methodologies used by and insights from other social sciences. To be clear, the argument is not that these will or should become leitmotivs in judicial decisions. Rather, familiarity with disciplines other than law will likely induce judges to reflect more critically on the persuasiveness of policy arguments and the evidence from social scientific research presented for consideration when they engage in their internal deliberations. A further welcome corollary is that judges will be better able to appreciate how particular judicial findings could result in significant adverse economic implications. In the event that the court deems the government action under review to be unconstitutional, awareness of the likely economic impact would allow it to tailor the remedial portion of its decision accordingly, for instance by suspending the effect of a declaration of invalidity to give the political branches the opportunity to enact remedial legislation.

The institutional and decisional approaches canvassed in this Article do not of course solve all the challenges raised by the adjudication of developmental claims. Nevertheless, these would allow courts to position themselves as ancillary agents for economic development while at the same time signalling to other stakeholders – notably the political branches – that the latter have prime responsibility in forging a developmental agenda in line with constitutional dictates.

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