

Developing into What? Constitutional Change, Legitimacy, and Economic Development in Asia

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Aside from internal or external political forces for change, the imperative for economic development often leads to pressure for constitutional and other law reform. Whether as part of meeting development loan conditions, or out of a desire to be attractive to investors in the global economy, etc., many countries are reforming their legal systems and constitutional make-up. This paper, in reflecting on the role of law in structuring development in Asia, considers some of the implications for constitutional legitimacy where the driving force of change is primarily economic.

1. Introduction

Even if we conceive of ‘development’ narrowly (as economic growth), legal institutions and frameworks are a significant part of any one countries’ development strategy, notwithstanding that it has proven difficult to draw conclusive links between a flourishing economy and regard for the rule of law. One source of pressure or incentive to reform the local legal order can be the external demands of donors, restructuring institutions, and investors, along with an internally-sourced perception that re-constituting the legal order will bring about conditions to enable the country to match the prosperity of various idealised other countries, or at least will attract the investing eye of those countries.

It is not surprising, therefore, that many Asian countries have undertaken constitutional reform in recent years. However, there are significant issues concerning the process or manner of economically-driven constitutional reform. Even if one is concerned only with stable conditions for economic growth and not with wider human development or participatory democracy, local empirical constitutional legitimacy is important. Even if the driving force of constitutional reform is primarily economic-development related, and not an internal political reordering, and even if foreign models and experience are drawn upon in constructing the document and institutions, the new constitution still needs to be embedded locally, and constructed and implemented in a way (that is by a process) that is inclusive, participatory and locally relevant.

The same sort of constitution-making process that would accompany a thorough political reordering might still be needed to be undertaken, so that the constitution is locally legitimate and credible, and the people identify with it. This will ensure that future national debate and progress takes place within and by reference to the constitutional framework and in a constitutional language. A new constitution adopted for economic-development purposes and not reflecting local participation (at

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many levels in society) is unlikely to stand the test of crisis, economic or otherwise, and thus will be ineffective for its stabilising, confidence-building purpose.

Reflecting on the role of constitutions and constitutional reform in development in Asia provides an opportunity to reflect on the paradox that while constitutionalisation is in some ways an inherently local and inward-looking notion (a nation constitutes itself according to its peculiar history and culture), many countries draw on external models when reforming institutions such as the constitution.

The result is a curious process: ‘constituting’ suggests taking foundational, defining actions that consolidate a country, while ‘developing’ suggests that the country being constituted is still defining itself. Meanwhile the process of constitutional reform – whatever the economic imperatives – is also development in itself, the development (evolving, self-conscious, self-reflective growth) of a society. Societies have always borrowed ideas from each other, and there is no reason not to model one’s experiment on the successful experiences of others. However, there are good reasons to emphasise that ultimately a reconstituting must be a localized process if it is to provide local stability in a globalised environment. Despite this, many accounts of constitutional reform not only assume a standardised process and outcome, but assume that ‘development’ is towards an idealised, often foreign model. Instead, and for legitimacy, constitutional reform should proceed on an assumption that the country is ‘growing into itself’. This may require original constitutions resulting from localised processes. We must pay attention to the identity and motivations of actors involved in both exporting and importing the ideology or institution being modelled. And attention must be given, in energising the development process, to what form of outcome is desired: what nature of country is it that the local entity is to be ‘developed into’, and who is to be involved in this process?

2. Modeling, Globalised Constitutionalism, and Drivers of Constitutional Change

It is revealing to place any constitutional reform in Asia in a wider context. Ours has been called ‘the age of constitutions’ (Fleiner 2003). Renewed faith has been placed in constitutions (and in particular in justiciable constitutions, bills of rights and democratic constitutionalism) as essential to peaceful and stable national development (Klug 2000; Fleiner; see also Hart 2003). Nearly 60 percent of UN members have made ‘major’ amendments to their constitutions in the decade 1989 – 1999, and 70 percent of these adopted entirely new constitutions (Klug, 2000, 12).

It is possible to identify waves of constitution-making, of which we are witnessing the latest. Currie *et al* record how after the European peace of 1848 a flurry of constitution making was witnessed in Europe in the second half of the 19th Century, which can be described as the ‘heyday of written constitutions’ (Strong 1963), as newly-defined countries codified their rules of government. After the First and Second World Wars, further waves followed, as the boundaries of Europe were redrawn. Decolonisation in Africa, Asia and Latin America led to new written constitutions, many modeled on the Westminster system (Currie *et al* 2003). Julian Go has described the decolonisation period as both novel and banal, illustrated by intense constitution-making for new political and geographical national entities, and yet marked by something more banal, a matter continuity rather than change, especially in the institutions emerging post-decolonisation, which often bore stark

resemblance to those of the mother country. This institutional modeling or isomorphism was the result of a combination or direct colonial imposition of institutions (such as constitutions), and of mother-country imitation by the colonised (typically, members of the local elite) (Go 2002).²

Then after the collapse of the Soviet Bloc, one witnessed a flurry of constitution-making in eastern Europe, which became in the 1990s ‘a major laboratory of constitutional works’ (Ludwikowski 1993). The phenomenon can be identified in the 1990s in some parts of South East Asia, and in UN-designed constitutions for Namibia, Bosnia-Herzegovina, East Timor and others. And today, federal constitutional structures are central to plans for peaceful, modern nations in Afghanistan and Iraq. A feature common to these waves of constitution-making is the combination of local and external influence on the process and the resulting document, and the degree to which foreign constitutional and institutional models are used in local contexts.

On one view, the idea of comparative constitutional modeling and of external influences on internal change, is surprising, indeed counter-intuitive. Since law is ‘very much a part and product of the political and institutional environment in which it functions’ (Silverstein 2003, 445), and what one is doing is constituting a nation within itself, constitutions are in a large respect inherently inward-looking (Opeskin 2003). They are not, and cannot be, ahistorical, since they constitute a particular history and politics. So, it is true that ‘the outcome of constitutional change is a reaction to the particular [local] realities – human rights violations, for example – that have dominated a particular society in the pre-constitutional era’ (Currie *et al*, 22).

However, external influences and patterns have greatly affected the timing and nature of internal constitutional reform, particularly where countries seek not so much to capture their history in constitutional form, but to model their new society entirely differently in order to escape past patterns or practices. So, a major factor in the internationalisation of constitutions post-1945 (looking outward for inspiration, models and content) was as a result of the experience of war, and enshrining references to international law in constitutions, it was hoped, would serve as a high level pledge and guarantee of peace, by reference to the past. However, it was also forward-looking issues that affected this trend as significantly: references to international law in constitutions were also an effect of globalization and integration, in particular economic interdependence and integration. Many of these references can be perceived as a manifestation of willingness to be a good international citizen, and as a kind of ‘confidence-building measure’ (Vereshchetin, 1996, 11).

As Currie *et al* note (at 22-3), the timing of constitutional change in general has a significant impact on the tone and content of the resulting instrument and constitutional structure, as the prevailing global political culture will affect constitutional change. In South Africa, the timing of constitutional re-ordering coincided with a pattern of constitution-making post-Cold War. There, the Constitution was a deliberate attempt to move away from past practices (cf Davis 2004, 148) and unfettered parliamentary sovereignty, and so the constitution-makers

² Dr. Go has challenged the prevailing view that newly independent countries merely imitated the constitutional form of the mother country; instead, the mimicry was neither universal nor whole scale.

drew on aspects of North American constitutionalism and on the international wave of constitutional developments during the latter part of the twentieth century.

As a function of the wider political dynamic, part of those constitutional developments is a changing conception of what constitutionalism entails, and what 'counts' as a constitution. As we will note again in concluding, constitution-making of itself does not signify the successful advance of constitutionalism (Currie et al 22; Okoth-Ogendo 1993). Historically, the 'frenetic' constitution-making in Europe and elsewhere did not prevent dictatorships, coups and a general pervasive disregard for constitutionalism. It is thus possible to observe how the term 'fell into disrepute' and lost its normative significance as drastic, often oppressive actions were taken purportedly to safeguard the constitutional system. If a 'constitution' is simply a document or unwritten tradition or convention and practice that prescribes the governance of a society, it is arguable that all societies already have a constitution, written or not. However, an interesting question arises whether there are now (as a result of the failure of neutrally-defined constitutionalism in the past) threshold and internationally-determined necessary conditions for a constitution (and for its adoption processes). If all regimes have a 'constitution' (defined broadly), it is not evident that all have a constitutionalism that suffices for those who would attribute normative content to the term.

The most recent wave of constitution-making has placed an emphasis on democracy and human rights. Joseph Raz has spoken of the 'thick sense' of the term 'constitution' in its contemporary use, with seven features including justiciability (Raz 1998).³ For Currie et al the word 'constitution' has acquired an additional substantive normative sense beyond simply describing the legal foundational document that structures systems and relationships of governance in society. This substantive content includes many features of liberal market democracies, in particular conceptions of the rule of law, democratic participation, and human rights. Many newly-drafted constitutions contain elements of this culture.⁴ There has also, as indicated, been a wave of introducing references to international law in national constitutions and a clear tendency towards *de jure* recognition of the primacy of international law in new constitutions (Vereshchetin).⁵

Thus constitutional reform is often outward-looking, (or at least outwardly-sourced ideas are sought for local application) even if locally-triggered. Currie *et al* note that the availability of constitutional models is more important to the outcome of the processes of political reconstruction than internal factors. They acknowledge the influence, on the eventual outcome, of the way in which a society is structured before the constitution-making process, but state that the timing of this change is significant, and dependent on the prevailing international political culture (see Klug 2000, 8-9). They argue that the ideologically-inspired diversity of constitutional alternatives of

³ The seven features are: it is constitutive of the legal system, stable, written, superior law, justiciable, entrenched, and expressing a common ideology.

⁴ The inclusion of multiple references to human rights protections does not necessarily guarantee their protection, without a strong culture of judicial independence and a culture of constitutionalism.

⁵ For example, the post war constitutions of the Federal Republic of Germany, Italy, and Japan: Article 25 of the Basic Law of the Federal Republic of Germany 1949; Article 10(1) of the Italian Constitution 1947; Preamble and Article 98 of the Japanese Constitution 1947 (Vereshchetin, 2 n 4). Of course, these were constitutions imposed, in effect, by the Allied occupiers of these three countries.

the Cold War has given way to increasing uniformity modeled on liberal constitutional principles incorporating judicial review as a prerequisite for 'international constitutional respectability' (Currie *et al*, 24). It is thus possible, says Klug, to identify 'a thin, yet significant, international political culture, which is shaping the outer parameters of feasible modes of government' (Klug 2000, 6). This particular hegemonic form of international political culture has resulted from political struggles for rights-based democracy and market economics, and (it is argued) that is the broad context and framework within which one should now view local actors on constitutional reform situations, as they 'confront and accommodate their own histories and divisions (Klug, 2000, 11).

Whether or not this 'thicker' concept of a constitution has received global acceptance, it is the case that there is a perception that countries need a written constitution or, even if one exists already, require a re-worked written constitution. One distinguished scholar has said, in the Asian context, that there is a 'rare level of worldwide agreement...that a modern nation state needs a single document setting forth constitutional arrangements' (Beer 1992, although 'national priorities regarding citizens' rights and duties may vary...both in documentary language and in operative policy'). I comment on this need below. The point made by Klug and others is that the prevailing international political culture (liberal market democracy?) shapes, and determines the timing and manner of, constitutional change. This is partly a result of pressure for change from countries already incorporating such systems, and partly as a result of modeling brought about by a local perception of the ideal constitutional framework (based on what is seen as a successful constitutional experience). However, not all aspects of the idealised external model will necessarily be adopted, a point we return to below. Klug has demonstrated how the construction of new rules, including new constitutions, is nowadays 'both unique and ubiquitous', since these processes involve attempts both to address particular localized problems, and to reflect comparative experiences in a globalised world (and respond to the perceived demands of these). Thus local agents and agencies accept and deploy, in their struggles and process, various global forms, and are reshaped in the process (although in doing so they in turn contribute to the 'global text' and the continuing reformulation of global / local alternatives among the available options, viewed as norms or as stories of success or failure) (Klug 2002).

Thus, external climate and influences usually will affect the timing, structure and outcome of local constitutional change. There are a number of forces that might drive constitutional change. Change might result from evolutions, imposition after military occupation, and amalgamations of imposition and local creation, including via transitional arrangements, such as is proposed in Iraq. A desire to be included in global communities may drive constitution-making or change. When Vanuatu applied for membership of the United Nations, it was required to submit a written constitution in order to obtain admission (Fleiner), something that illustrates the perceived significance of having a strong constitutional framework. Constitutional reform, particularly where it promises a limitation of State power to correct past abuses, can be undertaken out of a desire for international legitimacy and respectability in a world increasingly conscious of standards of State treatment of its nationals. We are concerned with economic development imperatives (external and local) and the way in which these might initiate and affect constitutional reform.

It is well known how states now formulate their constitutions in order to attract international investors, be accepted into international institutions, and satisfy rule of law-focused development and loan bodies. Constitutionally-ordered government, (or outward-looking constitutional reform to achieve this) is perceived by external and local actors as a kind of ‘confidence-building measure’ (Vereshchetin, 11). This perception is familiar to this Asian audience. Lee Kuan Yew told Parliament in 1995 that Singapore’s reputation for the rule of law ‘is a valuable economic asset, part of our capital, although an intangible one’ (Silverstein, 437). On the other hand, there may be a link between economic crises in Latin America, and the ‘drastic yet familiar’ step of frequently reforming the Constitution: one reason for the instability of these economies might be the tendency to identify constitutions with the government in power at a particular time, and the tendency to reengineer institutions frequently (in Peru’s case, an average of once every 14 years), eroding the whole idea of constitutionalism and any investor confidence in a stable political framework for economic engagement (e.g. Lozada 2002).

3. Constitutional Reform and Economic Development

Not only are constitutions mostly inward-looking, they are they most obviously political of legal institutions and forms, and one assumes that the primary driving force of constitutional change is the desire for essentially political reform. Klug’s assumption, sketched above, is that while these issues may have been taken up by local actors for their own causes, the new constitutionalism and democratic transition is driven by social and political movements, primarily those articulating rights-claims (Klug, 5). However, economic drivers of constitutional change are also important. Thus Klug himself notes that common features of post-Cold War constitutions are ‘broad guarantees for the creation and protection of market economies, independence of national banks controlling the value of a State’s currency, independent oversight of State expenditures’ along with an overall recognition of international and global norms. This economic driver of change is interesting since it is some distance away from accounts of the idea or rhetoric of constitution-making or reform as State reformation centered on the nationalist assertion of local identity (cf. Klug, 12).⁶ This is related to an understanding that recognizes the significance of markets and private economic forces, and not officials and government planning, as drivers of economic and social change.

Sachs *et al* (2000) have noted the neglect by transition economists of the relationship between economic reforms and constitutional transition. They argue that ‘economic reforms are just a small part of large scale constitutional transition’ and that the driving force for constitutional transition is political rivalry between inter and intra-national forces. This is perhaps rather naïve and assumes too simplistic a division between ‘economic’ and ‘political’ forces, motivations and processes. I would have thought it obvious that a large part of the motivation for the use of political mechanisms for constitutional change is to control or set the structures to control economic growth and wealth. It cannot be assumed that the purpose of constitutional change is political (‘the core of transition is a large-scale shift of constitutional rules’) and that economic transition is merely a by-product of that. One driver of

⁶ Of course, it is artificial to divide forces into ‘political’ and ‘economic’, since of course the desire for control of economic forces is, at least on some theories of politics, what drives all political action.

constitutional change can be reactive – including in the aftermath of economic crisis. Davis (2004: 149) illustrates how pressure for constitutional reform can come from an internal (economic) angle as people seek to ‘renegotiate the fundamental state-society bargain of their political economy’. The desire to reorder the economy may drive external or internal pressure for political transformation. In a way Sachs *et al* acknowledge this by tying the emergence of more capable governments and the adoption of competitive institutions, to intensive competition between roughly equal smaller countries dependent for their very survival on international trade.⁷

This paper reflects on the significance of the change-driver to the nature of the process and outcome: how, if the primary driver of constitutional reform is that it is tied to (or seen as essential for) economic development, does this affect the kind and quality and local legitimacy of constitutional framework that results? The premise of the paper is that constitutional change not resulting from political forces must still be worked in and embedded through the gamut of local political processes (as if resulting from internal political pressure) in order to ensure the new constitution becomes the forum for national political contestation (constraining non-constitutional conduct), and achieves local legitimacy, so anchoring political and economic development thereafter. There are however at least two dangers: first, that the urge to re-constitutionalise will (although it is intended to produce a stable framework for political discourse), provoke previously dormant local antagonisms and so become a site for national disharmony; secondly, that the reform will be undertaken by local elites to capture or consolidate powerful economic positions while presenting the reform as inclusive.⁸

A conference focused on ‘development’ inevitably draws responses about ‘what counts as ‘development’?’ As we will note, ‘development’ is more than simply GDP growth (UNDP 2002). At least when more than economic growth is considered, participatory institutions (such as legitimate constitutions resulting from an inclusive process) contribute to development. Political freedom and participation are part of human development, and so important irrespective of their link to the narrower concept of economic development. With this in mind, we turn to efforts that are made to tie law reform to economic development. Democracy and the Rule of Law have been tied to economic growth, although there is a large body of literature on the contested question of whether democracy is an explanatory factor in economic growth (UNDP, Ch 2.4). Nevertheless there has been a strong movement to link political reform and governance issues to economic development and in particular international investment, as reflected in the ‘Monterrey Consensus’ of the March 2002 UN Conference on Financing for Development, New York. Drawing on theory and study of institutional role and change, and particularly those studies positing a relationship between weak institution and poor growth (eg North 1990), many macro-studies of development explicitly tie institution building to development, both economic and

⁷ Of course for a lawyer, the danger of viewing through economists eyes is that an efficient institution is not necessarily a just or inclusive one.

⁸ Sachs *et al* look at Russia as an example of economic reforms associated with constitutional transition, and China as an example of economic reform unaccompanied by constitutional change. Market-oriented reforms without constitutional reforms mean that economic development is still hostage to vested interests and state opportunism. This problem does not completely go away with constitutional reform, since this may simple capture (now in a more credible format) that same power dynamic.

market development (World Bank 2002) and wider human development (UNDP 2002). This reflects a recognition that ‘promoting human development is not just a social, economic and technological challenge: it is also an institutional and political challenge’, and good governance is ‘perhaps the single most important factor in promoting development’ (UNDP, ch 2). Constitutions themselves can be considered institutions. Political (and so economic) uncertainty or unpredictability is clearly a major deterrent to investment, and effective constitutions are seen as an antidote to instability. Davis (2004) has noted two broad thematic approaches linking democracy⁹ and development: the first notes the statistical correlation between democracy and growth (survivability, role in encouraging development, ability to deal with crises), while the second looks at the causal mechanisms in development contexts that lead to increased demands for democratic representation, rights and legality.

In a way that echoes Currie *et al*’s description of a narrowing of options for constitutional reform that ‘qualify’ as internationally valid, Harvard-based economists Sachs *et al* have argued that constitutional democracy is essential to long-term economic growth. Concentrating on transitional societies, they have noted how economists debate about the relative merits of ‘gradual v. shock therapy’ approaches to transition, examining the short and long term economic benefits of sudden and of gradual constitutional change. A common study is to contrast the gradual constitutional change in Britain (and its related economic growth in the Industrial Revolution) with the sudden revolutionary change in France (see e.g. Roland 2000). From an economist’s point of view, inefficient institutions require shock change in order to realize economic progress. Sachs *et al* note that the short term economic effect of changes in constitutional rules is likely to be negative as participants adjust to the new environment. However, they plumb for the role of constitutional reform in economic development since overall their argument is that credible commitment to constitutional order is essential for long-term economic development. The core of their argument is the now familiar one that economic liberalisation is not sufficient to realise substantial and ongoing economic growth. So, imitating the industrialisation pattern of the capitalist developed economy can generate impressive short term growth (even in the absence of capitalist institutional infrastructure); however, these sorts of systems do not have an institutional infrastructure that can ‘create its own capacity for development and innovation’ (Sachs *et al*, 8). They reject the idea that ‘particular cultural and historical traditions of developing countries may lead to different institutional transition paths’ (15), saying that the development experience in various countries shows this.

Sachs *et al* endeavour to show how Taiwanese and South Korean attempts to mimic capitalist structures (but without a democratic political system) did not work (ie did not deliver the expected economic transition and growth), hence the transition to constitutional democracy in the late 1980s. The latecomer to economic development, they posit, tries to follow a reverse pattern of institutional development (from Western European systems): they mimic the industrial pattern, the economic system, the legal system and finally the political system (and so may finally adopt some constitutional checks and balances and constitutional behaviour from developed countries).

⁹ Of course, it is not obvious that ‘constitutionalism’ and ‘democracy’ are inter-changeable or necessarily co-dependent. In following Davis’ argument, one must assume, as he does, that one cannot speak of constitutionalism without some substantive notion of participation.

However, the process of development in Western Europe, it is said, occurred the other way around: ideology and moral code determined the shape of political and constitutional structures, which determined the political and legal system, which then generated a certain economic performance (North & Weingast 1989). While not an economist, it seems to me that this debate of chicken and egg perhaps oversimplifies the matter. Capitalist economic thinking partly shaped the political evolution of Britain, the two forces complemented each other. I think it true, though, that economic performance differences between countries will lead to pressure for changes in ideology and constitutional rules and in this sense will be a driver of change (Sachs *et al* 9). And it may be that economic reform without accompanying reform to political structures will not deliver, ultimately, a sustainable and confidence-inspiring local market economy. Sachs *et al* conclude that ‘all this experience suggests that there is a universal institutional core that is essential for long-term successful economic development’ so that effective transition must consist in ‘harmonisation of the institutions of ex-socialist countries with global capitalist institutions, rather than a process to create institutional innovations that are substantially different from the capitalist institutions’ (15). These required features include constitutional rule of law and checks on power and an absence of political monopoly (see also Pistor & Wellons 1999). (Other papers in this Conference look more directly at the relationship between economic liberalization and domestic political and social reform. While there may well be, as illustrated in Europe, a ‘powerful spillover effect...from rulings designed to secure economic liberalization to rulings in the social and political arenas’, it is certainly open to question whether the Rule of Law is a ‘machine that runs of itself’, a ‘conveyor belt’ necessarily translating economic incentives into political reform (Silverstein). That is, experience in some Asian countries is that political liberalisation accompanying economic liberalisation can be curtailed with no necessary economic sanction or penalty or cost in the eyes of the global investment community.)

Michael Davis has recently argued, in the context of Asia’s post-1990’s economic crisis, that constitutionalism, if properly conceived, may provide the institutional basis to confront socio-economic challenges. That is, it provides the reliability and accountability upon which sustainable development depends (Davis 2004). His argument is that Asian countries with a system of ‘authoritarian developmentalism’ (a model of market liberalisation without political liberalisation) fared the worst in the economic crisis, despite arguments that democratization was irrelevant or even harmful (inefficient, undisciplined, divisive) to economic development. His argument challenges the assumption that it was democratization (and broader ‘globalisation’ forces) that led to the economic crisis. Instead, he argues, while China (that had not reformed constitutionally) and mature constitutionalised democracies withstood the crisis, it was in those countries that had not matched market liberalisation with sufficient institutional and constitutional reform, that adverse effects were most keenly felt. Thus ‘blame’ cannot be laid at the feet of constitutionalisation as such. Instead the crisis partly resulted from (or had particularly adverse effects because of), a weak and excessively formal concept of constitutionalism that failed to capture and engage the national political dynamic. Any political reform accompanying economic liberalisation was insufficient, and the State fell between two stools.

Davis notes that a constitutional system affording a degree of order, reliability, transparency and participation inspire confidence and thus entrepreneurial activity and

investment. Thus he argues that constitutionalism may provide ‘the formal institutional components that allow the state to perform its functions [in the] development process in the best manner.’ In the intermediate period between authoritarianism and ‘free-flowing democracy’, where partial constitutionalisation has created a climate of both openness and constraint, constitutionalism may ‘afford the transparency, accountability and reliability that citizens and investors rely on’ (at 138).

Davis observes that we mostly focus on the ‘constraining aspects’ and vocabulary of constitutionalism (limiting public power, checking political misbehaviour). He sees instead for constitutionalism a significant empowerment and enabling role in the political economy of development, a role where it is appreciated that commitment to constitutionalism generates possibilities, it ‘empowers diverse forces’ in society, by affording transparency and reliability and a framework for orderly predictable processes of decision-making, and from the perspective of the investor, it ‘insures consent’. It is thus ‘crucial to the maintenance of stability and economic prosperity in a complex free-market society’ (Davis 2004, 139-140; see Scully 1992: 11).

It is not necessary, finally, to comment on the strength of the links (related above) between institutional reform (directed towards the model of Western liberal constitutional democracies) and economic growth, although it would be difficult to refute Davis’ argument that a flourishing constitutionalism engenders the local public and investor confidence so necessary in societies facing economic restructuring. It is sufficient to note that, whatever the internal and external pressures for political change *per se*, there is likely to be further considerable economics-sourced pressure for constitutional reform in some Asian countries. This pressure might be external and premised on the need to move in this direction (pressure of the World Bank variety), or internal as a form of mimicry attempting to achieve similar stable patterns of economic growth to existing constitutional democracies.

What this paper is concerned with is the manner in which the economic nature of the pressure might affect the process and outcome of any constitutional change, in a way that differs from notional politically-driven change.

4. Local participation and relevance: legitimacy

It is well known, as we have seen, how (alongside other drivers for change), countries now often come to reformulate their constitutions in order to attract international investors, be accepted into international institutions, and satisfy rule of law-focussed development and loan bodies. While local modeling on other constitutions is not unusual, it is possible that, as a result of the economic driver (as opposed to an historic political pressure to reconstitute), constitutions today have as a result become ‘standardised documents’ (much like financial instruments) rather than ‘the product of national ingenuity’, so much so that it might be that as time passes it is not considered an asset for constitution-makers to produce local, original constitutions (Fleiner, 242-3). And yet for longer-term legitimacy of the constitution, this local process and content is vital.

From an economists’ viewpoint (ie quite aside from the democratic imperative for local input), local legitimacy leads to stability and the promise that any political

‘bumps’ will be catered for along constitutional, ordered lines, and thus allow smooth economic development. ‘Local variation is an essential feature of constitutionalism’ and constitutional indigenisation enables the phenomenon to reach and be reached by the grassroots level (Davis, 145). If the primary driver for change is economic (external), it might be thought that this sort of participation is unnecessary or a distraction. The main point of this paper is that even if constitutional change results from economic needs only, the lessons of politically-driven constitutional change need to be taken into account.

Constitutional legitimacy requires locally-relevant, inclusive processes whereby the wider population identify with the constitutional order, accept it as resulting from their input (however abstractly), and consent to carry out political debate within its confines. It is in the process of constitution-making, rather than in the resulting document *per se*, that the country becomes aware of and constitutes itself (see generally Hart). Currie *et al* observe that despite the wave of constitution-making post Cold War, it is too simplistic to speak of globalised constitutional uniformity. They note that while new constitutions borrow extensively (in practice) from other experiences, ‘specific incorporation into a particular nationally-based legal order will have a significant impact on the shape and development of the principle over time’. So they note (referring to ongoing interpretation rather than making of the constitution, but in terms apposite to the concerns of this paper) in the South African experience that (at 24):

‘While in South Africa we may look to the jurisprudence of Canada, Germany, India, the United States and other more recent constitutional democracies as a vast historical text from which to draw examples and arguments, the principles of constitutionalism adopted by our courts will achieve acceptance only if they address local problems. It is the shaping of these principles in the context of applying them to local issues – in effect their hybridization – which will give them a unique South African character and life. *Our new experiment with constitutionalism will only bear fruit to the extent that these principles become ingrained into the hopes, dreams and practices of our society.* From there, they will become part of the global text from which others may [in turn] draw examples and arguments while simultaneously shaping them to meet their own circumstances.’ [Emphasis added].

It is therefore perhaps true that it is not the mere fact that a constitutional model is ‘foreign’ that militates against its use as a template or undermines its relevance: a foreign model of institution might work well in the receiving country, provided that it is translated into and received in local terms by a wide enough section of the local public. This fact – that simplistic institutional transplant will not be successful – has received recognition at the highest levels of institutions that one might consider ‘drivers’ of economically-motivated legal change.

Overall in development studies there is a discernable trend away from ‘development’ as a top-down imposition and increasing emphasis on the importance of self-reliance and local ownership of process. The World Bank’s study on ‘Building Institutions for

Markets' notes that reforms and innovations to institutional (constitutional) design¹⁰ have been most effective, unsurprisingly, when they meet needs 'in ways compatible with country conditions' (World Bank 2002). The report noted that learning from other countries' experience in institutional design can provide valuable guidance, but cautioned against mere copying or an approach based on transplanting 'best practice' on the bald assumption that 'one size fits all'. 'Best practice' says the World Bank, 'is a flawed concept' in that sense, and 'there is no unique institutional structure guaranteed to lead to economic growth'. The study emphasized the importance of history and culture in determining what drives institutional change, but the same might be said of determining what ensures longer-term success in institutional transformation. Significantly, the study notes that 'supplying' institutions is not enough: demand for these needs to be created, 'people must want to use them too'. In the constitutional sense, this means ensuring that people identify with and accept as legitimate the new constitutional framework and desire that it endure and prevail. The World Bank's study's recommendations ('what can be done not what should be done') are apposite to the subject of constitutional design and development:

- Complement what already exists: The design of any single institution should take into account the nature of the supporting institutions, skills, technology and corruption. Costs of building and maintaining the institution must be commensurate with per capita income levels to ensure access and use.
- Innovate: Institutions are not immutable. Be prepared to experiment with new institutional arrangements and to modify or abandon those that fail.
- Connect: Connect communities through open information flows and open trade. In particular, the exchange of information through open debate creates demand for institutional change.
- Promote competition: Foster competition between jurisdiction, firms and individuals. Competition creates demand for new institutions, changes behavior, brings flexibility in markets and leads to new solutions.

There are some legal reforms that do not have carry with them quite the same legitimacy or local relevancy concerns as constitutional reform. With certain areas of law, such as codes of commercial law, the transplant concerns that accompany constitutional modeling are arguably less immediate (Posner 1998; cf Messick 1999). That is, while in general sustainable reform requires that institutional changes are locally appropriate, it may not be possible (eg resources may be limited) to 'reinvent the wheel': large, complex bodies of legal codes already exist from market economies, which could be adapted locally, although experience suggests that importation of foreign law should draw heavily on local content and expertise (Aron 2002).

Merely adopting a model or standard form constitutional document is not a recipe for economic success, much less is it sufficient for the political legitimacy and effectiveness of the institutions of government that is in turn vital for economic progress. The lesson of the Asian economic crisis, Michael Davis has recently said, is that constitutionalism is not an economic 'quick fix', but a complex process with a range of interrelated commitments (at 139). He argues that Asia must 'look beyond

¹⁰ By 'institutions' are meant 'rules, enforcement mechanisms and organizations supporting market transactions' (within the institution of the constitution; cf policy).

the mere structure of formal institutions to appreciate the dynamic processes of representation and empowerment'. In addition to the 'three core' institutional components of constitutionalism (multiparty elections, protection of human rights, and adherence to the rule of law), he says:

'Constitutionalism must take on indigenous institutional elements and practices that better attach it to local social conditions and concerns. It is not enough to simply copy liberal institutions. For a society to make constitutionalism work, the society must understand how these institutions work in the local conditions and how they may contribute to economic development and its consolidation' (Davis, 128).

It has been said that a new 'social contract', in the form of constitutional reform, is needed in the aftermath of the Asian economic crisis (Haggard 1990). Davis advocates, as the template for this new contract, liberal constitutionalism, which he sees as the preferred long-term strategy for economic development. This sort of constitutional framework, he argues, is an essential tool in economic growth (Davis 2004, 128).¹¹

In the analogous African context, Okoth-Ogendo has identified a paradox between what appears to be a clear commitment by African political elites to the idea of a constitution, and an equally emphatic rejection of at least the liberal democratic notion of constitutionalism (Okoth-Ogendo 1993). That rejection lies in the continued perception that the purpose of a constitution is to facilitate state power, rather than to delimit and control it. It is arguable that the lack of a developed culture of constitutionalism in these societies has a great deal to do with the lack of empirical legitimacy of the governing constitution. That is, the constitution is not seen as the forum for political debate, and a constitution resulting from a localised process might have engendered a stronger culture of constitutionalism. There are many studies of the relationship of constitutions and constitutionalism to Western liberalism and capitalism (see ACLS).

It may be that there is no one particular and ultimately triumphant form of constitutionalism, and 'the politics of constitution-making remains eclectic' (Klug 2000, 23), so that actors have a range of alternatives. On the other hand, it is not necessarily that the 'liberal democratic notion of constitutionalism' is untenable in African political culture, only that it has not been afforded an opportunity to take on indigenous form (while retaining sufficient characteristics namely the idea of limitation of State power). Deng has explored ways in which African constitutions can be 'better oriented to the indigenous cultural values and institutions of African societies'. Many inherited (colonial) constitutions do not have structures, institutions and processes that can comprehensively deal with the identity conflicts that now constitute a significant component of the African crisis: the desire for internal self-determination, which may only be an aspiration for building on cultural identity (Deng 2003). That is to say, while in nation-building the desire for unity might suggest that diversity is played down, in fact to locally fashion constitutional

¹¹ Davis is referring to constitutionalism as an instrument for economic development, although he notes that in emphasizing this instrumental role of constitutionalism he does not mean to detract from the significance of constitutional aims and values and ends in themselves: 128 n 8.

processes allowing and encouraging diversity ‘offers opportunities to create a national commonality essential to nation-building’.

For most countries in eastern Europe, political, legal, economic and cultural traditions meant that although there was a tendency to borrow from other States’ constitutional experiences, what happened was not simply copying from the experience of others (Vereshchetin). The result was the localisation of external models in a way that accommodated local peculiarities. The lesson of South Africa’s constitutional transformation is that the process by which a constitution is made is as significant to a strong and legitimate longer-term constitutionalism as the technical legal workability and quality of the resulting document. The hallmarks of the South African process were consultation, participation and compromise, whereby people identified with the whole project of constitution-making and so with the resulting system, even if their preferences did not appear in the document (Jagwanth 2003). Public understanding and engagement in the process of constitution-making offers hope of progress in constitutionalism under unique local forces and constraints (see Davis 2004, 151): the new constitution must become part of the shared history of the people in order for constitutionalism to become a tradition upon which to found and build a developing nation.

The 1980 Zimbabwe constitution was adopted as a result of a political compromise at high level in London, and not as a result of a transitional order including a constitution-making function in the transitional authority. It is not surprising that the while formally valid, once crisis hit Zimbabwe, national debate has not centered on or been conducted through constitutional channels and in constitutional vocabulary: like many constitutions, it operated as an unrealistic façade behind or aside from which the aggregate of political conduct took place. The local dynamic needs to be given special attention: the Bosnian experience is an example of how the concrete implications of the general principle can only be interpreted through a political process, and how an artificial sense of urgency was created more by international institutional imperatives than by local needs, but none of the reasons for urgency given by external actors were as important (to longer term stability) as genuine domestic agreement on constitutional reform.

The lesson of most comparative studies is that ‘constitutionalism is a dynamic, political process not a fixed mode of distributing power’, and constitutional legitimacy is more often validated by political and social realities than by formal legal criteria. The ‘omnipresence of externally driven change reinforces the idea of constitutionalism as a dynamic process’, and there is much room to consider the degree to which non-liberal forms of constitutionalism, arising from local historical experience, might be created (ACLS). Constitutionalism revolves around a political process, overlaps with democracy in that it is concerned with limits on state power and individuals’ place in society, must be viewed in historical and political context, and must contain elements of institution-building and public consciousness (ACLS). Not only are constitutions inward-looking, there is an intrinsic link between local culture and constitutionalism, which makes more stark the challenge of how to define constitutionalism in a ‘transculturally persuasive manner’, including in Asia (Beer). One problem is that the idea of law and the state’s relation to it and operating through law is not necessarily a secure one in the receiving national society, let alone the internationalized version of this. Dezalay and Garth (2002) confirm:

‘Internationally-generated imports succeed only where the local situation allows them to be nationalised – made part of the indigenous structures and practices. Local histories determine what can be assimilated into local settings and how what is assimilated will affect long-standing local practices...while we tend to think of the rule of law as an international concept, law must be produced at the national level to make national sense’ (326).

The challenge of constitutionalism is to gain sufficient weight in local politics (Davis 2004, 151), and coping with the reality of existing diversity (Fleiner, 240), both of which direct attention to inclusive processes leading to legitimacy. A considerable challenge (particularly in countries of diverse ethnic and other identities) is to engage people in constitutionalism without that process itself (by calling to the surface questions of identity and foundational value) being a source of division. That is partly a challenge of ensuring ‘constitutional patriotism’, identity with a particular legal order, rather than nationalist (divisive) patriotism (see eg Viroli 1997).

The crisis of constitutionalism in Asia is to reconcile the disparity between constitutional theory and promise, and constitutional practice. For one thing, asks Tiruchelvam (1999), how can constitutions be at the same time general, foundational instruments capturing a nation’s history, and yet serve as vehicles of progress and transformation, and so mediate progress? One answer may be that if the constitution is at least accepted as the arena in which transformation is conceived and conducted, it serves at least to structure the forces of change. Ideally, as Klug notes, the processes and institutions of constitution-making provide (as they did in South Africa) a means to civilise political conflicts, the constitutional debate structured the parameters of possible political action during the transformation, and provided a site to receive the ‘incompatible constitutional imaginations of local contestants’ (at 5).

It is this framework role of constitutions that directs our attention, in the last part of the essay, to the identity of the actors involved in constitutional reform, for it is naïve to think of the constitution as providing a neutral arena for political interaction, when it may be that the framework has been established by particular political forces at a particular time with an discernable political preference. An idealist view of constitutions is that they are foundational and provide the basis for change, while a more realist view accepts that (new) constitutions may merely reflect the prevailing balance of political power (Klug, 6). It is simply not the case that globalization somehow results in pressure for constitutional reform. Nor is it sufficient, as we did above, to describe ‘economic’ drivers of change, as opposed to political, etc. Who drives this change, externally and internally, and what effect does their perspective and identity have on the legitimacy of the process and outcome? Is constitutional reform simply ‘neutral borrowing’ (Davis 2004, 147), external imposition or incentivisation / encouragement (or internal response to perceived fashions)? How do particular legal actors shape the reception of constitutionalism to achieve their own particular aims? Even if we take an ‘economic’ driver as the primary force, one can understand constitutional reform in transitional settings as a complex form of reception, where local actors draw on international models and resources to pursue essentially localized agendas (Klug 2000, 5).

It is also necessary, as we now turn to do in the final section, to question the wisdom of wholesale reform, or at least that which is not mediated through a (transparent and inclusive) local process. From an economists' perspective, Boyer has sought to qualify the enthusiasm for the new legal orthodoxy (of constitutionalism and the rule of law) by emphasizing the importance of 'resisting the importation of institutions that could clash with embedded approaches to that allow economies to prosper in particular settings', and not expecting local investment in foreign models to necessarily produce institutions that allow effective economic operation (Boyer, in Dezalay and Garth, 4). Moreover, attempting to transplant a common template of institutions and legal rules into developing countries without attention to indigenous contexts harms preexisting mechanisms for dealing with issues such as property ownership and conflict resolution.

5. Legalisation and the 'Urge to Constitutionalise'

Other papers at this conference dwell in more detail on how the rule of law has become, in the memorable accounts of Dezalay and Garth, a new legal orthodoxy and 'a new rallying cry for global missionaries'. What their study reminds us of, amongst other things, is to pay attention not simply to the observable phenomenon of renewed faith in law and legal institutions, but to the identity of the actors and agents involved in this process, and the content of the concepts spoken of.

Globalisation does not just happen to lawyers as a class of people, it happens also by and because of lawyers. Following the pattern of 'money doctors' selling competing economic expertise on the global plane, Dezalay and Garth have chronicled the growth in the 1990s of 'rule doctors' with 'competing prescriptions for legal reforms and new legal institutions' including constitution-writers. This pattern, observed above, was spurred by the new conventional wisdom informing international finance institutions such as the World Bank, and reflected a growing interest in the role of law in economic development assistance strategies, in particular the rule of law as an essential ingredient in economic growth.

As I have noted, it is not clear how effective this rule of law 'industry' has been in advancing development goals (see eg Carothers 1999), particularly where what is involved is the construction and exportation, and then importation and implementation, of standard form legal orthodoxies. However, the core institutions of law have always been closely implicated with the state and the elite, law is a vital resource for dominant groups to legitimate their power, and 'it is easier to generate new institutions outside state power than to refocus long-standing institutional structures with deeply embedded patterns of practice' (Dezalay and Garth, 5). This prompts one to think that if economic development is pursued partly through public law reform (constitutional reform), what may be occurring is the legitimization of the status quo without the broad participation and identification that accompanies nation-building. Even if one does not go so far as to suggest that rule of law reform is itself productive of instability and violence (Chua 2003), this realisation bodes ill for future crises, because there is no sense of ownership of the constitutional project. That is, local actors will be prepared to use international forms not out of any commitment to the ideals attending these, but to build, consolidate and legitimate their local positions. Klug has written, on the shaping of the South African constitution, that importing or incorporating international 'best practice' prescriptions will not necessarily lead of

itself to necessary social change and economic development, for it will depend on how the international ideas and expertises interact with local power structures (Klug 2002). In constitution-making or reform it is obvious that the future shape or model of economic development is being selected, and various interests will make their force and interests apparent. In emphasising the need for 'local processes', it must be acknowledged that the wider populace may well prefer the idea of an external model, since 'local process' often means process driven by and for local elites. This comment flirts with the debate about whether the thrust towards liberal constitutionalism is paternalist neo-imperialism, or whether 'universal' standards are welcomed by those on the ground. It also recalls the issue of whether it is possible to conceive of universal concepts outside culturally situated contexts. It is not necessary to pursue this – the point is that attention needs to be directed to the identity and motives of local and external players in constitutional reform situations. A new constitution is unlikely to be perceived as legitimate, and so cater for future crisis, if it is manifestly the legal capturing of an unpopular status quo rather than an attempt at reconstituting society.

If most analyses of political transition do not recognize the role of law in the reconstitution of the State (Klug 2000, 5), many economic transition accounts similarly sideline the role of law.¹² Many theories of global civil society (assumed to emerge from economic globalisation or information revolution) tend to ignore issues of agency and political opportunity, plural identity and motive, etc. So even those who see international society as the diffusion of universalist world culture simply describe the process, the fact that it is happening, but make no distinction between those actors that espouse norms reinforcing existing power relationships, and those that challenge these. Transnational actors are not like conveyor belts carrying western liberal norms elsewhere, the local is a site of cultural and political negotiation. Dezalay and Garth's work is thus valuable to us to the extent that it examines the general internationalisation of legal values, the claim of law for universal authority, and the role of lawyers in this, examining their authority and their new-found expertise to represent and implement 'universals' such as features of the rule of law concept.¹³

For example, one critique of the process views constitutionalisation as a form of patronizing missionary or civilization work or imperialism that reinforces Western influence and, at the same time, strengthens the position of cooperating local legal elites (see descriptions in Klug 2000, 3). Susan Marks has drawn attention to the chronologies that international legal renewalism, law and convention, impose, often imperceptibly, upon reconstructing states, in the form of models of market democracies. According to Marks, while political reconstructions appear to hold out the promise of catching up with the West, 'much of what passes for political and economic reconstruction offers little real prospect of change', or masks continuity as change (Marks 1999). We are thus reminded, in looking at the role of law in

¹² One comment is that this is now less the case, and law (in the form of the constitution) and lawyers figure strongly in accounts of transition, and indeed (as I remark), it is possible to focus too much on legal institutions and processes and documents, and not enough on the political and the real.

¹³ So, Dezalay and Garth note, lawyers might be conceived in many different ways: merchants of law as a commodity, global missionaries, Moral Entrepreneurs, consensus-builders, service-providers, moral guardians, knowledge-producers, power-seeking elites, purveyors of 'Empire', agents of political change etc.

developing Asia, that the concepts which might be exported or imported (democracy, rule of law, human rights) are not as universal, stable, immutable and uncontested, as they tend to be spoken about, nor are they exported or imported without the agency of politically-motivated actors.

Finally, it is useful to reflect on the overall urge to constitutionalise: there does seem to be an assumption that the first step towards the prosperous, peaceful future is to re-constitute the society and to capture its past and its future in a written document. While it may be true that strong and long-term growth is impossible without legitimate and effective governmental frameworks (such as constitutional reform might provide), we should at least be alert to the issues.

Firstly, should we draw anything from the idea that the urge to reduce things to written form and structure is particular only to some societies? Elazar has written about the covenant or oath-and-pact tradition in politics, which was essentially a Judeo-Christian tradition (Elazar 1998). Is it unquestionably necessary that the constitution be written? In the urge to constitutionalise, which perhaps reflects a trend of juridification or legalization, it should be borne in mind that (even if a new constitution does not seek to reflect the soul and entire being of a nation), not everything can be captured in legal forms, structures, legal vocabulary. Even if this does not militate against (re)written constitutions, which might be ultimately a sound governance idea, it does suggest we do not focus on the document at the expense of the idea behind it, or allow the political reality to stray so far from the written form that the document no longer tells us anything about a country's constitutional ordering.

While the constitution-making process can itself be a political arena, one must pause to question whether any debate about constitutions and constitutionalisation can assist in resolving very real political problems. Because of its foundational, relatively rigid nature, the imposition or hurried adoption of a constitution is itself likely to trigger crisis, since it declares itself the only arena for political dialogue, but has structured the arena in an exclusive way. In this sense constitutionalisation, if unconsidered, can itself lead to conflict. A single text written constitution (and its making) may in fact foster division rather than cohesion, conflict rather than harmony: written constitutions have a potential of serving as a source of 'fragmentation and disintegration' (Murphy 1993). (Of course, the tensions may be existing political ones and the document or constitution-making process may be merely a site for these to manifest.)

One commentator, reflecting on the EU constitution-making process and some of the limits of resolving political problems solely within legal argument and doctrine, has questioned the urge to categorise, name and predict the future in documentary form. She has asked (Shaw 2001):

'Do such debates not risk dangerously privileging law over politics, diverting constructive polity-building energies into blind alleys of discussion among technicians and experts about constitutional authority, sovereignty and legal rights which fail to illuminate...fundamental questions of political acceptance and legitimacy'.

Shaw adds that a constitution cannot provide answers to everything, and should be seen as a 'set of interlocking processes rather than a single one-off event or document' so that a constitution should be 'the subject of continuous critical reflection'.¹⁴ For Shaw the metaphor of constitutional 'architecture' suggests a singularly-directed, top-down model of constitution building. Effective mechanisms for participation in constitution-making need to be found, she says, arguing for a 'dialogic procedural, responsible and inclusive constitutionalism', a perspective that allows for 'the definition and redefinition of community as the process of constitutional settlement continues'. This reflects the idea of a political arena resembling a market, a constitutional tradition built on the outcome of ongoing bargaining, for which constitutionalism provides a space or forum (Poggi 1990). Law's relationship to politics, thus viewed, is that law has a capacity to set boundaries on the range of viable political options or responses, although within that sphere it may be that law is indeterminate. This general structure with indeterminacy implicit provides a 'vortex into which contending aspirations may be poured' and accommodated (Klug 2000, 8). Although these comments carry with them a spectre of indecisiveness (whatever the warm notions of inclusiveness), as a conception informing our view of constitutionalism, they offer valuable insights into ensuring a non-brittle, vibrant constitutionalism that can underlie future progress.

A South Asian observer has argued strongly that constitutionalism might have failed (in South Asia) because of the subordination of political accommodation to constitutional process and legalism (Samaddar 2001). So, we should question (at least) the continued legalisation of political conflict; and in debating development, we may have to look beyond legal institutions and reforms, and beyond lawyers: 'constitutional imagination and innovation is no longer the sole monopoly of law professionals or party leaders' (Tiruchelvam).

6. Conclusions

Law, lawyers and legal institutions have a significant role in Asia's development. The need for investment, global participation and economic development can be a driving force for constitutional reform. Constitutional reform, or a stronger culture of constitutionalism, may be an essential ingredient of longer-term political stability and so development and economic growth, in that effective constitutional frameworks allow orderly and predictable processes of decision-making, and a strong, inclusive and vibrant constitutionalism feeds the local public and foreign investor confidence necessary for economic development. If 'development' is conceived of as more than simply economic growth and poverty reduction, and includes the cultural and social enriching of the society, a deeper, more value-laden conception of constitutionalism might be necessary. This would include necessary elements of popular participation in politics against a background of respect for group and human rights, without which

¹⁴ Shaw picks up on James Tully's idea that 'a constitution should be seen as a form of activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary society negotiate agreements on their forms of association over time in accordance with three conventions of mutual recognition, consent and cultural continuity': J. Tully *Strange Multiplicity* (Cambridge UP, 1995, 30).

it cannot really be said that a people have the opportunities or capacity to develop themselves into their own ideal image.¹⁵

While constitutional reform may be driven by the external economic pressures (and / or internal perceptions or responses to these), and may draw on external models and experience, the outcome needs to be one that has local political relevance and legitimacy. This directs attention firstly to an inclusive, locally-situated and transparent constitution-making process, resulting in an effective but open and even playing field, and secondly to the identity, motivations and values of the players. Constitutional reform undertaken for primarily economic reasons still needs to be seen as locally legitimate, so that the quality of constitutionalism and political institutions underlies any economic development, national discourse takes place along constitutional lines, and the new system can manage crises, economic or otherwise.

Finally, exactly what is a country 'developing' into? Before one sits down to re-constitute any Asian nation, on the assumption that this is part of economic and wider development, it must be asked what ideal image or outcome directs or attracts the national gaze and movement. Nations have always borrowed ideas and institutions from each other, but for longer-term stability and self-regard, they, like teenagers, must be and develop into their own selves. While legal institutions and their actors are important to Asia's rise, it must not be overlooked (in an 'age of constitutions') that there are limits to the role of lawyers, rules and written instruments in the political economy of development. Not everything of national value and political importance can be represented in legal forms and vocabulary. Development is as much about people as it is about legal frameworks for their interaction. The urge to re-constitute must be considered conscious that within existing, unreformed constitutional frameworks there might be much room for improvement and for participation and political action: constitutionalism must not become a technical debate among elites, nor must legalisation result in the obscuring of political forces or the importance of rich national self-reflection and debate about what character of country one wishes to develop into.

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¹⁵ In relation to the conception of 'citizen' captured in the document, will constitutionalisation that is premised on economic development and not wider nation-building encourage or reflect only consumer-citizenship, rather than a more deep notion of belonging and contributing? (cf Fleiner 245).

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