

South- Asian Economic Constitutionalism and the (Re) Building of Constitutional Order in South Asia

*Prof. (Dr.) Dilip Ukey¹
Adithya Anil Variath²*

Abstract

The appellation 'South Asia' represents a vibrant set of post-colonial geographies that are witnessing transformative constitutional churning in their socio-economic and political structures. Constitutional law studies about South Asian societies have generated interest in South Asian constitutionalism and how the region is tackling unstable democratic patterns. In this context, South Asian States have changed, amended and replaced their existing constitutional structures and forms of governance. In the recent past, the deeply divided region has witnessed two important crises, the 2021 Taliban offensive in Afghanistan and the 2022 Sri Lankan political crisis. Both crises despite their structural dissimilarities trace some parallelism in the factors that incited the democratic and non-democratic responses, i.e., lack of political consensus on economic governance and economic mismanagement by democratically elected governments. Besides its economic impact, the lack of constitutional order in managing the economy has also trickled down political repercussions. The crisis reflects the role that an accountable government should play in the market. Despite constitutional structures for economic governance and the establishment of government institutions, South Asian states are witnessing the withering of institutional mechanisms and delegitimization of rule of law.

The paper argues for a need for the South Asian States to develop formative practices that focus on accountable constitutional governance of the economy and strengthening financial institutions. While South Asian constitutions have kept economic actions by the states outside the purview of judicial and public scrutiny, the lack of accountability and cynical manipulation of independence of economic institutions by the authoritarian leaders raises questions on the constitutional

¹ Professor of Law and Vice Chancellor, Maharashtra National Law University Mumbai, India.

² Assistant Professor of Law, Maharashtra National Law University Mumbai, India.

limits of the unbridled power and domination by the elected leaders. In this context, the paper explores how strengthening the pillars of Economic Constitutionalism can lead to the creation of a stable constitutional order in South Asia.

Keywords: South Asia, Economic Constitutionalism, Constitutional Order, Democracy, Constitutional Crisis

I. Introduction

The discourse of comparative constitutional law is an academic discipline that focuses on the patterns and institutions of democracy. To a great extent scholars who are developing this project in their geographies and contextualizing their historiographies are “transforming comparative constitutional law by analyzing the way constitutional courts have engaged with issues concerning the very structure of democratic institutions and processes.”¹ The politics and pedagogy of comparative constitutional law in South Asia are not limited to analyzing the patterns of interpretations and decisions by courts. It is more about studying societies, public institutions, the content and context of rule of law and people-

¹ Richard H Pildes, *Courts and Democracies in Asia*, 16 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 682–685 (2018). Sujit Choudhry, *How to Do Constitutional Law and Politics in South Asia*, in *UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA* 18–42 (Mark Tushnet & Madhav Khosla eds., 2015); Mitra Sharafi, in *LAW AND IDENTITY IN COLONIAL SOUTH ASIA: PARSİ LEGAL CULTURE, 1772–1947* (2014); Dian A H SHAH, *The Law and Politics of Religion and Constitutional Practices in Asia*, 13 *ASIAN JOURNAL OF COMPARATIVE LAW* 207–218 (2018); Joya Chatterji, *Secularization and Constitutive Moments: Insights from Partition Diplomacy in South Asia*, in *TOLERANCE, SECULARIZATION AND DEMOCRATIC POLITICS IN SOUTH ASIA* 108–133 (Humeira Iqtidar & Tanika Sarkar eds., 2018); Mara Malagodi, *The Oriental Jennings’: An Archival Investigation into Sir Ivor Jennings’ Constitutional Legacy in South Asia*, 14 *LEGAL INFORMATION MANAGEMENT* 33–37 (2014); Diane A. Desierto, *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia*, 36 *INTERNATIONAL JOURNAL OF LEGAL INFORMATION* 387–431 (2008); Javaid Rehman, *Institutions of International Law and the Development of Regional Forum for Peaceful Dialogue in South Asia*, 1 *ASIAN JOURNAL OF COMPARATIVE LAW* 1–18 (2006).

government relations and a lot more. However, the role of the courts has been pivotal in this discourse.²

The constitutional courts have played a very important role in protecting and developing the foundations of democratic politics and institutions in the South Asian region. Scholars also argue that constitutional courts have a social responsibility “to invalidate legislative acts that seek to undermine the structural foundations of meaningful democratic self-governance and political competition.”³ The role of courts and public institutions have been crucial

² See Albert H. Y. Chen, *Constitutional Courts in Asia: Western Origins and Asian Practice*, in CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE PERSPECTIVE 1–31 (Albert H. Y. Chen & Andrew Harding eds., 2018); PO JEN YAP, COURTS AND DEMOCRACIES IN ASIA (2017); Cheryl Saunders, *Constitutional Review in Asia: A Comparative Perspective*, in CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE PERSPECTIVE 32–59 (Albert H. Y. Chen & Andrew Harding eds., 2018); Helen Irving, *The Constitutional Court*, in GENDER AND THE CONSTITUTION: EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN 134–161 (2008); See also Theunis Roux, *The Constitutional Court: A Levian Take on Its Place in the Reformasi*, in THE POLITICS OF COURT REFORM: JUDICIAL CHANGE AND LEGAL CULTURE IN INDONESIA 245–264 (Melissa Crouch ed., 2019); DIAN A. H. SHAH, CONSTITUTIONS, RELIGION AND POLITICS IN ASIA: INDONESIA, MALAYSIA AND SRI LANKA (2017); K. J. Keith, *The Courts and the Conventions of the Constitution*, 16 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 542–549 (1967); Samuel Issacharoff, *The Era of Constitutional Courts*, in FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 189–213 (2015); Po Jen Yap, *Democracy, courts and proportionality analysis in Asia*, 9 GLOBAL CONSTITUTIONALISM 531–542 (2020); Mattias Kumm, *On the Representativeness of Constitutional Courts: How to Strengthen the Legitimacy of Rights Adjudicating Courts without Undermining Their Independence*, in JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS 281–291 (Christine Landfried ed., 2019); Cheryl Saunders, *Courts with Constitutional Jurisdiction*, in THE CAMBRIDGE COMPANION TO COMPARATIVE CONSTITUTIONAL LAW 414–440 (Roger Masterman & Robert Schütze eds., 2019); Sidharth Luthra & Nivedita Mukhija, *The Need for Reinventing the Supreme Court as a Constitutional Court*, in JUDICIAL REVIEW: PROCESS, POWERS, AND PROBLEMS (ESSAYS IN HONOUR OF UPENDRA BAXI) 225–235 (Salman Khurshid et al. eds., 2020); Björn Dressel, *The Informal Dimension of Constitutional Politics in Asia: Insights from the Philippines and Indonesia*, in CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE PERSPECTIVE 60–86 (Albert H. Y. Chen & Andrew Harding eds., 2018).

³ See Jamal Greene & Madhav Khosla, *Constitutional rights in South Asia: Introduction*, 16(2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 470 (2018); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91(2) THE AMERICAN POLITICAL SCIENCE REVIEW 245–263 (1997)

considering how political actors, often democratically elected, have regularly attempted to outgrow beyond the boundaries of constitutions. Democratically elected leaders in the region have time and again mismanaged the economic structures and financial institutions which also reflects a lack of an effective constitutional design for strengthening constitutional designs.

The overpowering of constitutional structures by political actors is not something peculiar to South Asia. Political actors have abused constitutional structures and public institutions across the world. While constitutions often represent an aspiration of the society to protect the constitutional order, this trend of the rise of authoritarianism also means the rise of abusive constitutionalism.⁴ As David Landau writes about ‘abusive constitutionalism’ as “the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before.”⁵ In referring to manoeuvres that “make a regime significantly less democratic”, he conceptualized the norms of democracy on a spectrum that “there are various kinds of hybrid or competitive authoritarian regimes between full authoritarianism and full democracy.”⁶ This also calls for constitutionally fragile states to bring in substantive limitations on the constitutional amendment power. While the larger issue is to strengthen the nature and quality of politics and political actors, however, these are beyond the capacity of legal regulations.

⁴ See also Frank Pasquale, *Authoritarianism*, in TIPPING POINTS IN INTERNATIONAL LAW: COMMITMENT AND CRITIQUE 37–51 (Jean d’Aspremont & John Haskell eds., 2021); AUTHORITARIAN LEGALITY IN ASIA: FORMATION, DEVELOPMENT AND TRANSITION, (Weitseng Chen & Hualing Fu eds., 2020); AUTHORITARIAN LEGALITY IN ASIA: FORMATION, DEVELOPMENT AND TRANSITION, (Weitseng Chen & Hualing Fu eds., 2020); LEE MORGENBESSER, THE RISE OF SOPHISTICATED AUTHORITARIANISM IN SOUTHEAST ASIA (2020); Maya Tudor & Dan Slater, *Nationalism, Authoritarianism, and Democracy: Historical Lessons from South and Southeast Asia*, 19 PERSPECTIVES ON POLITICS 706–722 (2021); William Case et al., *Low-Quality Democracy and Varied Authoritarianism: Elites and Regimes in Southeast Asia Today*, in THE 3RD ASEAN READER 107–111 (2015); Thomas B. Pepinsky, *Capital Mobility and Coalitional Politics: Authoritarian Regimes and Economic Adjustment in Southeast Asia*, 60 WORLD POLITICS 438–474 (2008); Jeffrey C. Isaac, *Contesting Authoritarianism*, 12 PERSPECTIVES ON POLITICS 305–309 (2014); Jeffrey C. Isaac, *Authoritarianism, Elections, Democracy?*, 10 PERSPECTIVES ON POLITICS 863–866 (2012); Yonatan L. Morse, *The Era of Electoral Authoritarianism*, 64 WORLD POLITICS 161–198 (2012); Tom Ginsburg, *Authoritarian International Law?*, 114 AMERICAN JOURNAL OF INTERNATIONAL LAW 221–260 (2020).

⁵ David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013)

⁶ *Id.*

II. Contextualizing the Role of India's Constitutionalism

The story of Asian constitutionalism in its true sense is the story of constitutionalizing democratic politics. India has an important role in the region with respect to it influencing constitutional understanding across the region. Indian constitutionalism can influence other South Asian states to bring in changes within the constitutional structure to control political authority. Although India is struggling to deal with rampant government corruption, religious tensions and low levels of development, Indian constitutional ideas of building substructures within the constitution like the 'basic structure' or 'constitutional morality' have been successful experiments.⁷ The role that constitutional courts play in striking down unconstitutional amendments and strengthening the implied limits on constitutional change has been crucial for the success of constitutional accountability. However, courts do not possess the same powers to in different constitutional systems within South Asia.

The most fundamental of this is the use of the "unconstitutional constitutional amendments doctrine" that can help in limiting the authoritarian powers and the evolution of democracy and constitutional order.⁸ In India, the courts started

⁷ See Andreas Buss, *Dual Legal systems and the Basic Structure Doctrine or Constitutions: The Case of India*, 19 CANADIAN JOURNAL OF LAW AND SOCIETY 23–49 (2004); Claire B. Wofford, *The Structure of Legal Doctrine in a Judicial Hierarchy*, 7 JOURNAL OF LAW AND COURTS 263–280 (2019); Salman Khurshid, *Constitutional Morality and Judges of the Supreme Court*, in JUDICIAL REVIEW: PROCESS, POWERS, AND PROBLEMS (ESSAYS IN HONOUR OF UPENDRA BAXI) 384–410 (Salman Khurshid et al. eds., 2020); Sotirios Barber, *The Role of Moral Philosophy in Constitutional Law*, 19 PS 858–860 (1986); Achyut Chetan, *Writing the Rights: Inscribing Constitutional Morality*, in FOUNDING MOTHERS OF THE INDIAN REPUBLIC: GENDER POLITICS OF THE FRAMING OF THE CONSTITUTION 167–212 (2023); MICHAEL J. PERRY, CONSTITUTIONAL RIGHTS, MORAL CONTROVERSY, AND THE SUPREME COURT (2008); Howard Schweber, *The Question of Substance: Morality, Law, and Constitutional Legitimacy*, in THE LANGUAGE OF LIBERAL CONSTITUTIONALISM 260–318 (2007); Michael J. Perry, *Human Rights: From Morality to Constitutional Law*, in CONSTITUTIONAL RIGHTS, MORAL CONTROVERSY, AND THE SUPREME COURT 9–34 (2008); Larry Alexander, *Constitutions, Judicial Review, Moral Rights, and Democracy: Disentangling the Issues*, in EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 119–137 (Grant Huscroft ed., 2008).

⁸ Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISRAEL LAW REVIEW 321–341 (2011); Po Jen Yap, *The conundrum of unconstitutional constitutional amendments*, 4 GLOBAL CONSTITUTIONALISM 114–136 (2015); David E Landau,

active engagement with the political institutions and political processes, especially after the imposition of the emergency. It is safe to assume that this change was seen after the decisions like *ADM Jabalpur v. Shivkant Shukla*,⁹ the Court wanted to regain the trust of the Indian society. The Supreme Court of India also witnessed the collapse of public institutions to abusive power politics. This vulnerability to be a victim of manipulation of democratic processes sent a strong signal to the courts that it has to play a larger role in the Indian political context. Over the last few years, South Asia has been the centre of this discussion with respect to the undemocratic control of public institutions. This has also resulted in some advancements in the way South Asia is studied from a lens of comparative constitutional law. In South Asia, the narrative of constitutional law is the narrative of crisis. For example, in the case of India, it could be how constitutional systems are responding to the protection of civil liberties or democratic values. In Pakistan, the focus could be the judicialization of politics and the militarization of governance.¹⁰ In Nepal, the sub-continent witnessed the politics behind constitution-making.¹¹

This article discusses two important events that marked a fundamental shift in reading constitutional law and democracy in South Asia: the 2021 Taliban offensive in Afghanistan and the 2022 Sri Lankan political crisis. This article also explores three important themes, first, how political actors use democracy as a mechanism to enforce their undemocratic objectives. Second, the idea of economic constitutionalism and third, the role of courts in strengthening the constitutional order in South Asia.

Rosalind Dixon & Yaniv Roznai, *From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras*, 8 GLOBAL CONSTITUTIONALISM 40–70 (2019); Joel Colón-Ríos, *Deliberative Democracy and the Doctrine of Unconstitutional Constitutional Amendments*, in THE CAMBRIDGE HANDBOOK OF DELIBERATIVE CONSTITUTIONALISM 271–281 (Ron Levy et al. eds., 2018); Po Jen Yap, *Democratic Values and the Conundrum of Unconstitutional Constitutional Amendments*, in COURTS AND DEMOCRACIES IN ASIA 181–200 (2017).

⁹ Additional District Magistrate, Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207 (1976)

¹⁰ See Osama Siddique, *The Judicialization of Politics in Pakistan: The Supreme Court after the Lawyers' Movement*, in UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA 159–191 (Mark Tushnet & Madhav Khosla eds., 2015).

¹¹ See Mara Malagodi, *Constitutional History and Constitutional Migration: Nepal*, in CONSTITUTIONALISM IN CONTEXT 113–135 (David S. Law ed., 2022);

III. South -Asian Economic Constitutionalism and Constitutional Order

Constitutional economics emerged as an academic sub-discipline from the public choice theory. While the history of constitutionalism can be traced back to the *Federalist Papers*, it has been noted that “the Federalist Papers have increasingly been recognized not only as a political manifesto but also as a theory of the constitution whose central assumption is almost identical with that made in economics”.¹² It is clear that political changes can have economic ramifications and political changes often have a close link with constitutional designs.

Since political decisions and constitutional changes are closely read in economic constitutionalism, the idea of reading the constitution as a social contract becomes very important.¹³ In this respect, commenting on the work of James M. Buchanan, one of the prominent scholars of the field, Stefan Voigt writes:

“Buchanan has not reinvented social philosophy but has made extensive use of Hobbes and others. The situation out of which the social contract emerges is the ‘equilibrium of anarchy’ in which marginal costs and returns for producing, stealing and protecting goods are equally high. The individuals realize that they could all be better off if they could agree on a disarmament contract which would allow them to reduce the resources used for protecting and stealing goods. Since the

¹² Stefan Voigt, *Positive Constitutional Economics: A Survey*, 90 (1) PUBLIC CHOICE (1997). See Brian Z. Tamanaha, *Locke, Montesquieu, the Federalist Papers*, in ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 47–59 (2004); Colleen A. Sheehan, *The Federalist Agenda*, in JAMES MADISON AND THE SPIRIT OF REPUBLICAN SELF-GOVERNMENT 31–56 (2009); THE CAMBRIDGE COMPANION TO THE FEDERALIST, (Jack N. Rakove & Colleen A. Sheehan eds., 2020); Martin Diamond, *Democracy and The Federalist: A Reconsideration of the Framers' Intent*, 53 AMERICAN POLITICAL SCIENCE REVIEW 52–68 (1959).

¹³ See also Pamela A. Mason, *Rhetorics of “the People”: The Supreme Court, the Social Contract, and the Constitution*, 61 THE REVIEW OF POLITICS 275–302 (1999); B. Dan Wood & Soren Jordan, *Establishing the Founders' Social Contract from the Constitutional Convention through George Washington*, in PARTY POLARIZATION IN AMERICA: THE WAR OVER TWO SOCIAL CONTRACTS 17–47 (2017); Dennis C. Mueller, *The constitution as a utilitarian contract*, in PUBLIC CHOICE III 615–642 (3 ed. 2003); Jean-Jacques Rousseau, *Of the Social Contract*, in ROUSSEAU: THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 39–155 (Victor Gourevitch ed., 2 ed. 2018);

individuals find themselves in a prisoner's dilemma situation, they all have the incentive to sign a disarmament contract and to break it subsequently. As they all foresee this, they create a protective state to protect the individuals' private spheres. Additionally, they create the productive state which is to provide society with those (collective) goods whose private production would not be profitable. The idea that individuals create a state by way of a contract is not meant to be a historically correct description but simply a heuristic means.”¹⁴

“The liberty to organize national life at will” shapes constitutional democracies. The constitutional crisis in South Asia also reflects a larger issue of the trembling of the social contract. The non-accountability of political actors that are hijacked

¹⁴ Stefan Voigt, *Positive Constitutional Economics: A Survey*, 90 (1) PUBLIC CHOICE (1997): “It has been argued that the ‘lived’ constitution will not only be determined by the written document but also by judicial interpretation as well as the ‘constitutional system’ which comprises values, norms, attitudes and the like of elites as well as the populace at large. If the constitutional system is indeed a crucial factor for the ‘real’ constitution under which a society lives, it should also be relevant for the formal procedure as well as the substantive rules a group of persons chooses when agreeing on a constitution.” See John Considine, *James M. Buchanan and Edmund Burke: Opposite Sides of the Same Fiscal Constitution Coin*, 28 JOURNAL OF THE HISTORY OF ECONOMIC THOUGHT 243–257 (2006); David M. Levy & Sandra J. Peart, *James Buchanan and the Return to an Economics of Natural Equals*, in TOWARDS AN ECONOMICS OF NATURAL EQUALS: A DOCUMENTARY HISTORY OF THE EARLY VIRGINIA SCHOOL 22–40 (2020); See also T.E. Flanagan, *James M. Buchanan, The Limits of Liberty: Between Anarchy And Leviathan*. Chicago: The University of Chicago Press, 1975, Pp. xi, 210, 9 CANADIAN JOURNAL OF POLITICAL SCIENCE 508–509 (1976); STEFAN VOIGT, CONSTITUTIONAL ECONOMICS: A PRIMER (2020); Stefan Voigt, *Positive Constitutional Economics*, in CONSTITUTIONAL ECONOMICS: A PRIMER 43–88 (2020); John M. Carey, *The Economic Effects of Constitutions*, 3 PERSPECTIVES ON POLITICS 193–194 (2005); Knut Wolfgang Nörr, “*Economic Constitution*”: *On the Roots of a Legal Concept*, 11 JOURNAL OF LAW AND RELIGION 343–354 (1983); Gabriel L. Negretto, *Economic Crises, Political Fragmentation, and Constitutional Choice: The Agenda-Setting Power of Presidents in Latin America*, in CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS 285–304 (Tom Ginsburg, Mark D. Rosen, & Georg Vanberg eds., 2019); Pamela A. Mason, *Rhetorics of “the People”*: *The Supreme Court, the Social Contract, and the Constitution*, 61 THE REVIEW OF POLITICS 275–302 (1999); Tom Ginsburg, *Constitutions as Contract, Constitutions as Charters*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 182–204 (Denis J. Galligan & Mila Versteeg eds., 2013).

by political actors through the political process has created a sense of distrust among the people towards the institutions. Popular mandates are not sufficient to call a political system democracy. The ‘mandate’ of elections in itself has been/will be manipulated. The idea of constitutionalism is about creating a political framework for a rule-oriented society. However, elections can create undemocratic power structures in society.¹⁵ Political actors have misused the process of ‘mandate’ to legitimize several undemocratic decisions. South Asia has seen several similar phases in its post-colonial history. The success of any society in this respect will be based on how effective the constitutional designs are shaped to manage these extra-constitutional powers.

A. Militant Democracy and Taliban Unwritten Constitution

The takeover of Afghanistan by the Taliban was an event that witnessed the breakdown of the legal and political order of a society developed under the Constitution of Afghanistan in 2004.¹⁶ The legal order was replaced by an alternative legal order based on the *Hanafi* school of law. The new unwritten constitutional order can be termed as ‘Taliban constitutionalism’ or a form of ‘militant democracy’.¹⁷ Jan-Werner Müller in his work the ‘Militant Democracy’

¹⁵ See Garrett Wallace Brown, *The constitutionalization of what?*, 1 GLOBAL CONSTITUTIONALISM 201–228 (2012); Thio Li-ann, *Varieties of Constitutionalism in Asia*, 16 ASIAN JOURNAL OF COMPARATIVE LAW 285–310 (2021). See also Adam Czarnota, *Sources of Constitutional Populism – Democracy, Identity and Economic Exclusion*, in ANTI-CONSTITUTIONAL POPULISM 495–505 (Martin Krygier, Adam Czarnota, & Wojciech Sadurski eds., 2022); Andrew R. Rutten, *The Supreme Court and the Search for an Economic Constitution, 1870–1990*, 53 THE JOURNAL OF ECONOMIC HISTORY 391–393 (1993).

¹⁶ See Clark B. Lombardi & Shamsad Pasarlay, *Constitution-Making for Divided Societies: Afghanistan*, in CONSTITUTIONALISM IN CONTEXT 89–112 (David S. Law ed., 2022).

¹⁷ See Ulrich Wagrandl, *Transnational militant democracy*, 7 GLOBAL CONSTITUTIONALISM 143–172 (2018); THE MILITANT FACE OF DEMOCRACY: LIBERAL FORCES FOR GOOD, (Anna Geis, Harald Müller, & Niklas Schörnig eds., 2013); Paulien de Morree, *The Concept of Militant Democracy*, in RIGHTS AND WRONGS UNDER THE ECHR: THE PROHIBITION OF ABUSE OF RIGHTS IN ARTICLE 17 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 147–184 (2016); Samuel Issacharoff, *Judging Militant Democracy*, in FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 100–124 (2015); Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AMERICAN POLITICAL SCIENCE REVIEW 417–432 (1937); Anna

defines “‘Militant democracy’ or ‘defensive democracy’ or ‘fighting democracy’” as an idea of “a democratic regime which is willing to adopt pre-emptive, *prima facie* illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime.”¹⁸ In September 2021, the militant group said that “they would implement the 1964 Constitution of Afghanistan as an interim charter.”¹⁹ The interim charter and the presence of a religion-centered constitutional order create a socially complex legal order. In the context of the legal perplexity that the Taliban is facing, Shamshad Pasarlay writes:

“To make matters even more confusing, the Taliban have in many places suggested that they reject the values and rules that are enshrined in both the 1964 and the 2004 constitutions. Taliban official conduct is also obviously and unapologetically inconsistent with the democratic and liberal values enshrined in both the 1964 and the 2004 basic laws. In public statements the Taliban have made no secret of their hatred and animus towards the 2004 Constitution, decrying the document as a foreign imposition. The Taliban have re-

Geis, Harald Müller & Niklas Schörnig, *Liberal democracies as militant ‘forces for good’:: a comparative perspective*, in *THE MILITANT FACE OF DEMOCRACY: LIBERAL FORCES FOR GOOD* 307–344 (Anna Geis, Harald Müller, & Niklas Schörnig eds., 2013); Angela K. Bourne & Bastiaan Rijkema, *Militant Democracy, Populism, Illiberalism: New Challengers and New Challenges*, 18 *EUROPEAN CONSTITUTIONAL LAW REVIEW* 375–384 (2022); Tom van der Meer & Bastiaan Rijkema, *Militant Democracy and the Minority to Majority Effect: on the Importance of Electoral System Design*, 18 *EUROPEAN CONSTITUTIONAL LAW REVIEW* 511–532 (2022); Malthe Hilal-Harvald, *Islam as a Civilizational Threat: Constitutional Identity, Militant Democracy, and Judicial Review in Western Europe*, 21 *GERMAN LAW JOURNAL* 1228–1256 (2020); Michael Tomz, Jessica L.P. Weeks & Keren Yarhi-Milo, *Public Opinion and Decisions About Military Force in Democracies*, 74 *INTERNATIONAL ORGANIZATION* 119–143 (2020); Aurel Croissant & David Kuehn, *Patterns of Civilian Control of the Military in East Asia’s New Democracies*, 9 *JOURNAL OF EAST ASIAN STUDIES* 187–217 (2009).

¹⁸ Jan-Werner Müller, *Militant Democracy*, in Michel Rosenfeld & Andrés Sajó (eds), *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* (2012)

¹⁹ Mira Patel, *Explained: The Taliban plan to ‘temporarily’ adopt parts of the 1964 constitution; what it could mean*, *INDIAN EXPRESS* (Jan. 12, 2022, 6:15 PM), <https://www.scconline.com/blog/wp-content/uploads/2020/07/20th-Harvard-bluebook.pdf>

established the unitary, highly centralized, autocratic “Islamic Emirate” (1998 charter) and have revived a number of laws they adopted in the mid-1990s.”²⁰

Taliban has consistently vouched for creating “law” that is based on the Taliban ‘Islamic Emirate’. For example, the “Law of the General Principles of the Organization and Jurisdiction of the Ministries of the Islamic Emirate”, defines “the structure of the Taliban’s executive branch which includes a prime minister, deputy prime ministers and several other ministries.”²¹ This law empowers the ministry with extensive power to enforce public morals. The new unwritten constitutional order is based on *Hanafi fiqh*. Shamsad Pasarlay writes that “this change marks, one must stress, a significant departure from the Afghan constitutional tradition, as previous Afghan constitutions adopted provisions requiring that state law must not be repugnant to the ‘basics of Islam’ and none required that state law must be consistent with the rulings of the *Hanafi fiqh*.”²²

One of the most important reasons that facilitated the takeover of the constitutional government was the fact that the public institutions failed to create a stable society. The constitutional institutions have played along with the uprising and acted as a support system to facilitate a smooth takeover by militant groups. The Afghanistan crisis also showed the world that if constitutional bodies fail to work towards progressive development, then the society can show collective support even to militant government provided they offer an alternative form of governance.

²⁰ Shamsad Pasarlay, Afghanistan’s Unwritten Constitution under the Taliban, Int’l J. Const. L. Blog, May 17, 2022, at: <http://www.iconnectblog.com/2022/05/afghanistans-unwritten-constitution-under-the-taliban/>; See also Shamsad Pasarlay, *Constitutional Incrementalism in a Religiously Divided Society: A Case Study of Afghanistan*, 13 ASIAN JOURNAL OF COMPARATIVE LAW 255–281 (2018).

²¹ Official Gazette No. 797: 1996

²² Shamsad Pasarlay, Afghanistan’s Unwritten Constitution under the Taliban, Int’l J. Const. L. Blog, May 17, 2022, at: <http://www.iconnectblog.com/2022/05/afghanistans-unwritten-constitution-under-the-taliban/>

B. The 2022 Sri Lankan Constitutional Crisis and Economic Breakdown

Protests in Sri Lanka and changes in the political order are not unprecedented.²³ On 31 March 2022, the demonstrators stormed the President's private residence in the State's capital which ultimately led to mass resignations. While the government tried to quell the protesters, the people's movement was uncontrollable. The appeasement steps by the government that included resignations by Central Bank Governor and Treasury Secretary also failed. While this led to the fall of the elected government, the underlying reason was the mismanagement of the economy. The Government failed to meet the demands and aspirations of the people who elected them. The collapse of the Government also marked some changes in the constitutional order of Sri Lanka.²⁴

In the case of Afghanistan and Sri Lanka, one dealing with a militant coup and the other dealing with a democratic people's coup, there are some commonalities. Both states had an unlimited government with unlimited sovereignty. Both events had the failure of elected governments to hold public institutions accountable and political actors accountable. A lack of strong constitutional order focused on structures defining the limits of, government power or authority led to the breakdown of the state machinery. These events mark the beginning of a new phase of constitutional governance that South Asia aspires for. There is a need to build strong independent financial institutions and hold the political actors who manage them within constitutional limits.

²³ Sujit Choudhry, *Constitutional Politics and Crisis in Sri Lanka*, in MULTINATION STATES IN ASIA: ACCOMMODATION OR RESISTANCE 103–135 (Jacques Bertrand & Andre Laliberte eds., 2010); Asanga Welikala, *Constitutional Form and Reform in Postwar Sri Lanka: Towards a Plurinational Understanding*, in UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA 320–354 (Mark Tushnet & Madhav Khosla eds., 2015); Gehan Gunatilleke, *The Constitutional Practice of Ethno-Religious Violence in Sri Lanka*, 13 ASIAN JOURNAL OF COMPARATIVE LAW 359–387 (2018); Asanga Welikala, *Constitutional Form and Reform in Postwar Sri Lanka: Towards a Plurinational Understanding*, in UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA 320–354 (Mark Tushnet & Madhav Khosla eds., 2015).

²⁴ Uditha Jayasinghe, *Sri Lanka passes constitutional amendment aimed at trimming presidential powers*, REUTERS (Jan. 12, 2022, 6:15 PM), <https://www.reuters.com/world/asia-pacific/sri-lanka-passes-constitutional-amendment-trim-presidential-powers-2022-10-21/>

IV. Abusive Constitutionalism in South Asia and the Role of the Judiciary in Protecting Constitutional Rights

While democracy has been an interesting subject for constitutional scholars, the tensions in South Asia are distinct from western constitutional democracies. In South Asia, the fundamentals of democracy and constitutional institutions are declining.²⁵ Stability in the South Asian region requires ensuring constitutional compliance, ensuring human rights and safeguarding democracy. However, these four major issues plague the order of the region: ‘Dysfunctional politics’; ‘Lack of Constitutional order’; ‘Low levels of development’; and ‘Susceptibility to panics and populist pressures’.

The role of courts in dealing with these four major problems is crucial for the success of South Asian constitutions.²⁶ The most powerful weapon used by the judiciary in this respect is the power of judicial review. It is also interesting to note that this power is unwritten in the text of the South Asian constitutions. As Raeesa Vakil argues “Powers of judicial review are generally accepted as a *fait accompli*, and are sometimes understood to inhere in the constitution or, alternatively, as deriving from a reading of several constitutional provisions together.”²⁷ In India, article 13 prohibits the state from making “any law which takes away or abridges the rights conferred by part III” and any law made against this “to the extent of such contravention is void.” This gives the power to Indian Supreme Court to exercise judicial review. Such patterns are also visible in other

²⁵ See also AYESHA JALAL, *DEMOCRACY AND AUTHORITARIANISM IN SOUTH ASIA: A COMPARATIVE AND HISTORICAL PERSPECTIVE* (1995); Emmanuel Teitelbaum, *Response to Erik Kuhonta's review of Mobilizing Restraint: Democracy and Industrial Conflict in Post-Reform South Asia*, 10 *PERSPECTIVES ON POLITICS* 811–812 (2012); PO JEN YAP, *Democracy, courts and proportionality analysis in Asia*, 9 *GLOBAL CONSTITUTIONALISM* 531–542 (2020); Rosalind Dixon & Mark Tushnet, *Constitutional Democracy and Electoral Commissions: A Reflection from Asia*, 16 *ASIAN JOURNAL OF COMPARATIVE LAW* S1–S9 (2021); U.C. Jha, *The reform of military justice in South Asia*, in *MILITARY JUSTICE IN THE MODERN AGE* 178–195 (Alison Duxbury & Matthew Groves eds., 2016).

²⁶ Sujit Choudhry, *How to Do Constitutional Law and Politics in South Asia*, in *UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA* 18–42 (Mark Tushnet & Madhav Khosla eds., 2015).

²⁷ Raeesa Vakil, *Constitutionalizing administrative law in the Indian Supreme Court: Natural justice and fundamental rights*, 16(2) *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 475–502 (2018).

South Asian constitutions. Raeesa further argues that “When it comes to the judicial review over administrative action, on the other hand, the Indian Supreme Court has developed its jurisprudence by borrowing selectively from British common law to exercise two broad groups of control. The first group of controls consists of judicial, institutional, and private law remedies, such as appeals from Indian regulatory and administrative bodies to constitutional courts and injunctive relief in civil courts.”²⁸

The South Asian courts have used various common law doctrines to review administrative actions. Considering the kind of issues that South Asia faces, the role of constitutional courts becomes more crucial to deal with issues related to the review of constitutional amendments, adjudication of disputes relating to elections and dissolution of political parties. Constitutional Courts often succumb to the pressure of political actors who with popular support dictate extra-constitutional norms. In this context, the Indian Constitution and its unwritten elements have been an important model for constitutional development in the region. The success of Indian political structure is based on the values of social democracy.²⁹ In his closing speech to the Constituent Assembly, Dr. B.R. Ambedkar said:

“Political democracy cannot last unless there lies at the base of its social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality, and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of the trinity. Liberty cannot be

²⁸ Raeesa Vakil, *Constitutionalizing administrative law in the Indian Supreme Court: Natural justice and fundamental rights*, 16(2) *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 475–502 (2018).

²⁹ See also Bryan Fanning, *The case for social democracy*, in *THREE ROADS TO THE WELFARE STATE: LIBERALISM, SOCIAL DEMOCRACY AND CHRISTIAN DEMOCRACY* 99–134 (2021); *THE FUTURE OF SOCIAL DEMOCRACY: ESSAYS TO MARK THE 40TH ANNIVERSARY OF THE LIMEHOUSE DECLARATION*, (Colin McDougall, George Kendall, & Wendy Chamberlain eds., 2021); Paul Wapner, *Democracy and Social Movements*, 97 *PROCEEDINGS OF THE ASIL ANNUAL MEETING* 305–308 (2003); Robert Page, *Social Democracy Then and Now*, 1 *SOCIAL POLICY AND SOCIETY* 77–80 (2002); David Miller, *Democracy and Social Justice*, 8 *BRITISH JOURNAL OF POLITICAL SCIENCE* 1–19 (1978).

divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become the natural course of things. It would require a constable to enforce them.”³⁰

In this context, Jamal Greene and Madhav Khosla argue “the reasons for India’s influence may partly be its political authority within South Asia, but it may also be a function of similar circumstances, namely, political corruption, widespread illiteracy, and low education levels coupled with the presence of civil society activism and non-governmental organizations.”³¹ A further reason according to Jamal Greene and Madhav Khosla for the influence of Indian constitutional ideas is the perception that “the Indian experiment has been successful and to the extent that India remains, in whatever imperfect form, a functioning constitutional democracy, the tools that it has developed may be seen as worthy of replication.”³² However, scholars have pointed out that “as established democracies such as Poland, Hungary, Turkey, Brazil, South Africa, and Israel witness democratic deconsolidation, the world’s largest democracy has sadly not been an exception.”³³ Indian constitutional interpretations and the ideas of basic structure

³⁰ SPEECH BY DR. B.R. AMBEDKAR ON 25 NOVEMBER 1949, CONSTITUENT ASSEMBLY DEBATES 979 (1949).

³¹ Jamal Greene & Madhav Khosla, *Constitutional rights in South Asia: Introduction*, 16(2) *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 470 (2018).

³² *Id.* See also HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION* (2000); *Democracy and Constitution Making*, in *RATIONALITY, DEMOCRACY, AND JUSTICE: THE LEGACY OF JON ELSTER* 143–188 (Claudio López-Guerra & Julia Maskivker eds., 2015); James S. Fishkin, *Deliberative Democracy and Constitutions*, in *WHAT SHOULD CONSTITUTIONS DO?* 242–260 (Ellen Frankel Paul, Fred D. Miller, Jr. & Jeffrey Paul eds., 2011); Samuel Issacharoff, *The Promise of Constitutional Democracy*, in *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* 137–165 (2015); Pasquale Pasquino, *Majority rules in constitutional democracies: Some remarks about theory and practice*, in *MAJORITY DECISIONS: PRINCIPLES AND PRACTICES* 219–235 (Stéphanie Novak & Jon Elster eds., 2014).

³³ T. Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, 14(1) *LAW & ETHICS OF HUMAN RIGHTS* 49-95 (2018).

doctrine can influence its neighbouring states to regulate their political actors through comparative constitutional engagement.

V. South Asian Regionalism and Constitutional Rights in South Asia

The South Asian subcontinent and its constitutional crisis often have repercussions on its neighbouring states. The geopolitical reading of the democratic deficit in the region also demands regional cooperation to find political solutions. Regionalism in constitutional studies is the process of building cooperative inter-state relations.³⁴ It includes building inter-governmental economic linkages and a common regional identity. The region has commonalities to strengthen common identities which are largely based on shared history, experience, norms and values. It would involve the process of creating institutions through collective action. However, the problem with South Asia is the presence of many South Asia(s) within the region.

While there is a growing need for interdependence, the region is deeply divided due to antagonism and mistrust. Due to this fragmentation, South Asia has historically failed to develop a sense of regional identity.³⁵ The economies of all South Asian states also face an internal crisis due to political problems. This calls for re-looking at how regionalism can play a role in bringing stability to the

See also CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

³⁴ BHUMITRA CHAKMA, SOUTH ASIAN REGIONALISM: THE LIMITS OF COOPERATION (2020); Kripa Sridharan, *SAARC and the Evolving Asian Regionalism*, in THE EMERGING DIMENSIONS OF SAARC 201–228 (S. D. Muni ed., 2010); Baogang He & Takashi Inoguchi, *Introduction to Ideas of Asian Regionalism*, 12 JAPANESE JOURNAL OF POLITICAL SCIENCE 165–177 (2011); Bhumitra Chakma, *International Relations Theory and South Asian Regionalism*, in SOUTH ASIAN REGIONALISM: THE LIMITS OF COOPERATION 155–168 (2020); PASHA L. HSIEH, NEW ASIAN REGIONALISM IN INTERNATIONAL ECONOMIC LAW (2021); Rajendra K. Jain, *From Idealism to Pragmatism: India and Asian Regional Integration*, 12 JAPANESE JOURNAL OF POLITICAL SCIENCE 213–231 (2011).

³⁵ Bryce Harland, *Regionalism in Asia*, in COLLISION COURSE: AMERICA AND EAST ASIA IN THE PAST AND THE FUTURE 182–193 (1986); Diana Panke, Sören Stapel & Anna Starkmann, *Regional Organizations in Asia*, in COMPARING REGIONAL ORGANIZATIONS: GLOBAL DYNAMICS AND REGIONAL PARTICULARITIES 83–100 (2020); Kym Anderson, *Asia and Other Emerging Regions*, in WINE GLOBALIZATION: A NEW COMPARATIVE HISTORY 466–490 (Kym Anderson & Vicente Pinilla eds., 2018).

region. Regionalism is “the role and interpretation of geography, identity, culture, institutionalization and the role of actors, including hegemony, major regional powers and other actors from within a region, both state and societal”.³⁶ Regionalism requires harmony, interdependence and identity. However, the region lacks harmony due to which common platforms like South Asian Association for Regional Cooperation (SAARC) have failed in case of constitutional breakdowns.³⁷ In 1987 before the creation of SAARC, then Indian Prime Minister Narasimha Rao stated the problems of regionalism at the 1981 United Nations General Assembly. Quoting him:

“There is an increasing tendency to tackle economic problems through political means. Obviously, this will not work in the new context of a world composed of states having sovereign equality but steeped in gaping economic inequalities, the pursuit of such strategy can at best be described as misguided and unfortunate and can lead to confusion and anarchy in economic relations.”³⁸

As the author has argued elsewhere, “Writings of early political philosophers indicate that the word ‘democracy’ was endorsed as an approach entrusted with the task stabilizing social order through people’s participation and creating structured mechanisms for social existence.”³⁹ Regionalism is constructed on the

³⁶ GLOBALISING THE REGIONAL, REGIONALISING THE GLOBAL, 35 (Rick Fawn ed., 2009).

³⁷ Faizal Yahya et al., *Pakistan, SAARC and ASEAN Relations*, in THE 3RD ASEAN READER 328–333 (2015); S. Narayan, *SAARC and South Asian Economic Integration*, in THE EMERGING DIMENSIONS OF SAARC 32–50 (S. D. Muni ed., 2010); Kripa Sridharan, *SAARC and the Evolving Asian Regionalism*, in THE EMERGING DIMENSIONS OF SAARC 201–228 (S. D. Muni ed., 2010); Bhumitra Chakma, *SAARC After 1992: Disagreements and Differences*, in SOUTH ASIAN REGIONALISM: THE LIMITS OF COOPERATION 99–120 (2020); Bhumitra Chakma, *SAARC and the Limits of Cooperation in South Asia*, in SOUTH ASIAN REGIONALISM: THE LIMITS OF COOPERATION 137–154 (2020); Bhumitra Chakma, *Beyond SAARC: Sub-Regional and Trans-Regional Cooperation*, in SOUTH ASIAN REGIONALISM: THE LIMITS OF COOPERATION 121–136 (2020); Javaid Rehman, *Institutions of International Law and the Development of Regional Forum for Peaceful Dialogue in South Asia*, 1 ASIAN JOURNAL OF COMPARATIVE LAW 1–18 (2006).

³⁸ See N. Rao, *15th Plenary Meeting*, General Debate, 28 September 1981.

³⁹ Adithya Variath, *Analysing the working of the Indian Democracy through the prism of Natural Law Philosophy: A Subaltern View*, ILI LAW REVIEW, 30-46 (2021); See also James M. Buchanan & Roger D. Congleton, *The political shape of constitutional*

idea of building a stabilizing social order in regions with commonalities. The discourse begins with the understanding that ‘regions’ are socially constructed. As Hettne put it “all regions are ‘socially constructed’ and hence ‘politically contested.’ Because regions are constructed, the most important aspect to understand region depends on ‘how political actors perceive and interpret the idea of a region and notions of ‘regionness’”.⁴⁰ Transnational economic relations in the region can be bolstered if constitutional designs are strengthened. States in the region have to cooperate and respond to institutional irregularities. Nation-building in South Asia will not happen unless political, social and economic conditions are stabilized. Issues related to dysfunctional politics and lack of constitutional order have to be prioritized in the region. The task begins with strengthening the institutions of democracy. Countries like India can play a proactive geopolitical role in regional constitutional dynamics in South Asia and beyond.

VI. Conclusion

South Asian region has faced systematic and ongoing violations of social order and rule of law. Countries like Afghanistan have not created transitional justice mechanisms that promote political stability. There is an imbalance of power between the branches of government and extra-constitutional actors. Sri Lanka

order, in POLITICS BY PRINCIPLE, NOT INTEREST: TOWARDS NONDISCRIMINATORY DEMOCRACY 147–154 (1998); Tom Ginsburg, Terence C. Halliday & Gregory Shaffer, *Constitution-Making as Transnational Legal Ordering, in* CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 1–25 (Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday eds., 2019); Robert W. Gordon, *The Constitution of Liberal Order at the Troubled Beginnings of the Modern State, in* TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 156–180 (2017); MOHAMED S HELAL, *Anarchy, ordering principles and the constitutive regime of the international system*, 8 GLOBAL CONSTITUTIONALISM 470–505 (2019); Ralph Ketcham, *Constitutional Democracy: Creating and Maintaining a Just Political Order*, 6 PERSPECTIVES ON POLITICS 164–165 (2008); Jaakko Heiskanen, *Found in translation: the global constitution of the modern international order*, 13 INTERNATIONAL THEORY 231–259 (2021); Jacco Bomhoff, *Constitutionalism and Mobility: Expulsion and Escape among Partial Constitutional Orders, in* THE DOUBLE-FACING CONSTITUTION 211–242 (Jacco Bomhoff, David Dyzenhaus, & Thomas Poole eds., 2020).

⁴⁰ Hettne Björn & Söderbaum Fredrik, *The New Regionalism Approach*, 17 (3) POLITEIA 6-21 (1998)

has to build strong financial institutions and it is crucial to maintaining rule of law, good governance and political order within a legal system. Strong constitutional designs can safeguard society from the arbitrary use of power by militant democratic forces. Democracy in the region has suffered due to military interference in the politicization of constitutional order and politics of intimidation. Most importantly, the region has witnessed political executives breaking the pillars of democratic constitutionalism. The fundamental challenge is to position economic constitutionalism to protect the independence of constitutional designs. The idea is to develop strong constitutional norms, empower judicial review and promote unwritten constitutional norms like basic structure to review arbitrary actions by administrative actors. Tarunabh Khaitan argues in his paper 'Killing a Constitution with a Thousand Cuts', "Liberal democratic constitutions typically adopt three ways of making accountability demands on the political executive: vertically, by demanding electoral accountability to the people; horizontally, by subjecting it to accountability demands of other state institutions like the judiciary and fourth branch institutions; and diagonally, by requiring discursive accountability by the media, the academy, and civil society."⁴¹ The idea of economic constitutionalism is an idea of accountability that political actors have in dealing with financial institutions. Judicial review, respect for rule of law, democratic accountability and economic justice form the pillars of South Asian economic constitutionalism. This would require the South Asian states to adopt fundamental changes in their constitutional designs. Courts have to engage in key litigation in constitutional courts by adopting principles like basic structure and constitutional morality.

⁴¹ T. Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, 14(1) LAW & ETHICS OF HUMAN RIGHTS 49-95 (2018)