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Maartje DE VISSER

Singapore Management University, mdevisser@smu.edu.sg

Bui Ngoc SON

Chinese University of Hong Kong

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Glocalised constitution-making in the twenty-first century: Evidence from Asia

MAARTJE DE VISSER

School of Law, Singapore Management University, 55 Armenian Street, Singapore 179943

Email: mdevisser@smu.edu.sg

NGOC SON BUI

Faculty of Law, Chinese University of Hong Kong, 6/F, Lee Shau Kee Building, Sha Tin, NT, Hong Kong

Email: ngocsonbui@cuhk.edu.hk

Abstract: How have Asian nations conducted, or how are they conducting, constitution-making in the face of pressures associated with globalisation, and how do they balance those forces with domestic interests and realities? This article aims to develop an analytical framework that can capture this global–local interplay. It introduces the concept of ‘glocalised constitution-making’ to denote the co-existence and relationship between the two governance levels as manifested in the forces, actors and norms pertaining to the process of drafting a new constitution as well as its substance. Glocalisation permeates the entirety of a constitution-making episode, from the impetus to initiate the process, to its design and inclusiveness of interests featured, and the scope of topics considered. The effects of glocalised constitution-making for domestic drafters are arranged along a continuum with approbation and aversion as the polar opposites. The precise location on the continuum will depend on the value preferences of the domestic stakeholders and the matters under consideration. The application of this analytical framework is illustrated with reference to recent constitution-making exercises in Bhutan, Nepal, Thailand, East Timor and Sri Lanka.

Keywords: Asia; glocalised; constitution-making; human rights; international involvement; public participation

I. Introduction

The Grand Masters of comparative law that sought to classify the world's legal systems in the belief that the resulting taxonomies would be useful heuristic devices always gave pride of place to Western jurisdictions.¹ These were often subdivided into smaller categories like English (or common) law, Romanesque, Germanic and Nordic law, thereby revealing an implied belief that Western law had reached a degree of sophistication that allowed for such further nuances. A later categorisation attempt makes this clearer still, by recognising the rule of professional law, the rule of political law and the rule of traditional law, and including Europe and North America in the first of these categories.² While Asia was never absent from the taxonomies, this vast region was typically compressed into the single category of 'Far Eastern', 'East Asian' or 'Confucian' law. China and to a lesser extent Japan were the exemplars; no other jurisdictions were deemed to be of much academic significance. What is more, the Asian category was said to be justifiably on the periphery since law was less important in the Orient, as societies there 'are primarily based on personal relations and networks'.³

While newer generations of comparatists accept the intellectual loss attendant on using a West–East binary as a matter of principle, scholarship has so far remained strongly focused on the design and functioning of European and North American legal orders. Perhaps unsurprisingly, this is also evident in the constitutional branch of the discipline of comparative law. Hirschl has poignantly remarked on the preference exhibited within comparative constitutional studies to focus on 'a small set of "usual suspect" settings – all prosperous, stable constitutional democracies of the "global north"'.⁴ This unduly limits the evolution of the field: such small familiar settings cannot represent constitutional orthodoxy or be used as meaningful yardsticks to evaluate constitutional choices. Indeed, despite

¹ JH Wigmore, *A Panorama of the World's Legal Systems* (Thomson/West, St Paul, MN, 1928); P Arminjon, B Nolde and M Wolff, *Traité de Droit Comparé* (Librairie Générale, Paris, 1951); R David, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (3rd edn, Stevens, London, 1985); K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (3rd edn, Mohr Siebeck, Tübingen, 1996). Also J Esquirol, 'René David: At the Head of the Legal Family' in A Riles (ed), *Rethinking the Masters of Comparative Law* (Hart, Oxford, 2001).

² U Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 44 *American Journal of Comparative Law* 5.

³ M Siems, *Comparative Law* (Cambridge University Press, Cambridge, 2014) 81.

⁴ R Hirschl, *Comparative Matters – The Renaissance of Comparative Constitutional Law* (Oxford University Press, Oxford, 2014) 192.

a welcome increase in recent years in the number of publications that are Asia-centric or otherwise feature a discussion of Asian constitutional regimes,⁵ the region remains comparatively underexplored. This is particularly concerning as far as the making of new constitutions are concerned, since constitutional texts determine or otherwise shape the organisation of the state, the exercise of powers and the development of inter-institutional and interpersonal relationships.

Writing generally on constitution-building initiatives, Choudhry and Ginsburg note that these are 'poorly understood in part because of the sheer diversity of environments in which constitutions are produced'.⁶ While it is true that the full set of circumstances surrounding particular constitution-making episodes will vary from one country to the next, common influences and constraints can be identified as well. In Asia, the first wave of modern constitution-making occurred during the period of decolonisation and reconstruction after World War II. Notably for the former British colonies, this process typically involved the same series of steps, strictly controlled by the outgoing colonial administration and Westminster.⁷ Several countries in the region also keenly felt the impact of the end of the Cold War, and the resultant need to reconstruct their constitutions in a manner to promote democracy and social inclusiveness.⁸ With the onset of the new millennium, Asia seems to have entered yet

⁵ Leaving aside journal articles, recent book-length treatments of Asian constitutional arrangements include A Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press, Cambridge, 2014); W-C Chan, L-A Thio, K Tan and J-R Yeh, *Constitutionalism in Asia – Cases and Materials* (Hart Publishing, Oxford, 2014); R Dixon and T Ginsburg (eds), *Comparative Constitutional Law in Asia* (Edward Elgar, Cheltenham, 2014); J Neo (ed), *Constitutional Interpretation in Singapore – Theory and Practice* (Routledge, Abingdon, 2016); PJ Yap, *Courts and Democracies in Asia* (Cambridge University Press, Cambridge, 2017); DS Law, H Lau and A Schwartz (eds), *Oxford Handbook of Constitutional Law in Asia* (Oxford University Press, Oxford, 2019, forthcoming) as well as, albeit not comparative in outlook, the volumes on Thailand, Indonesia, Myanmar, Pakistan, India, Taiwan, Singapore, China, Malaysia, Japan and Vietnam in the *Constitutional Systems of the World Series* (Hart Publishing, Oxford).

⁶ S Choudhry and T Ginsburg, 'Introduction' in S Choudhry and T Ginsburg (eds), *Constitution-Making* (Edward Elgar, Cheltenham, 2017).

⁷ On which, e.g. W Dale, 'The Making and Remaking of Commonwealth Constitutions' (1993) 42 *International and Comparative Law Quarterly* 67; B Lapping, *End of Empire* (St Martin's Press, New York, NY, 1985). Arguably unsurprisingly, this also produced constitutions that (strongly) resembled that of the European colonial powers, see e.g. KYL Tan, 'The Making and Remaking of Constitutions in Southeast Asia: An Overview' (2002) 6 *Singapore Journal of International and Comparative Law* 1; H Kumarasingham (ed), *Constitution-making in Asia: Decolonisation and State-building in the Aftermath of the British Empire* (Routledge, Abingdon, 2016).

⁸ See e.g. WC Chang, 'East Asian Foundations for Constitutionalism: Three Models Reconstructed' (2008) 3 *National Taiwan University Law Review* 111.

another phase of constitution-making. East Timor adopted the nation's first constitution in 2002, with Bhutan following suit in 2008. While the Communist Party in Vietnam and its counterpart in Laos initially planned to amend their country's constitutions, new documents were enacted in the end (2013 and 2015 respectively). Myanmar (2008), Nepal (2015) and Thailand (2017) have replaced their existing constitutional texts in the last decade, while Sri Lanka is currently in the throes of a constitution-making exercise.

As compared to the earlier stages, a significant common feature of the current stage is the ubiquitous presence of globalisation. Countries today are more interconnected than ever before as a result of economic imperatives, migration and technology. There is a keen interest, amongst others on the part of third states and international organisations, in how countries design their constitutional systems and regulate internal legal relations. The resultant globalised pressures will rub up against domestic imperatives, interests and realities. The interplay thus generated is at the heart of this article, in which we examine how a sample of Asian nations have conducted, or are conducting, constitution-making in the face of the non-local forces bearing down on them, while seeking to remain responsive to the inevitable municipal dimensions of the process. Our aim in doing so is to flesh out a framework that can capture this global–local interplay and that, we hope, can be profitably become part of the toolkit for studying contemporary processes of constitution-making elsewhere in Asia and beyond. In Section II, we introduce the concept of ‘glocalised constitution-making’ to denote the co-existence and relationship between the two governance levels as manifested in the forces, actors and norms pertaining to the drafting of a new constitution as well as its substance. We show how glocalisation permeates the entirety of a constitution-making episode, from the impetus to initiate the process, to its design and inclusiveness of interests featured, and the scope of topics considered. Section III considers the effects of glocalised constitution-making for domestic drafters. It is suggested that these are arranged along a continuum with approbation and aversion as the polar opposites. The precise location on the continuum will depend on the value preferences of the domestic stakeholders, the extent to which international pressures enable them to act on these preferences, and the matter under consideration.

Before unfolding our argument, two limitations should be acknowledged. The first is methodological. The descriptive accounts below should not be taken as providing a comprehensive narrative of the constitution-making episodes in the selected Asian states. This is not the purpose of this article; it would moreover be presumptuous to attempt to convey the richness and complexity of several constitution-making processes in the course of a

single article. Rather, the recent Asian experiences will be referenced to illustrate how and when glocalisation can manifest itself in the contemporary drafting of a new constitution. This ought to give readers a good sense of how a glocalised framework can be applied and how this helps expose encounters between governance levels that could have remained hidden if a purely domestic or purely international lens were applied instead.

The second limit is jurisdictional. Even when using national experiences only for illustrative purposes, it would not be possible to cover all recently completed or ongoing constitution-making exercises in Asia.⁹ Those that will be featured below are Sri Lanka, Nepal, Thailand, East Timor and Bhutan.¹⁰ This selection is made pursuant to what Hirschl calls the ‘prototypical cases’ principle.¹¹ As he explains, ‘a prototypical case serves as a representative exemplar of other cases exhibiting similar pertinent characteristics’, allowing for ‘reasoning by analogy’.¹² A core common characteristic across the five cases is the temporal dimension: the five countries all embarked upon constitution-making projects in the new millennium, meaning that all were doing so against the backdrop of similar developments and trends at the global level. Beyond that similarity, the cases can be arranged on a spectrum ranging from that where international actors actively inserted themselves into the constitution-writing exercise to the counterfactual example of a process in which international constitution-hawkers were virtually absent. East Timor is the prototype of a country whose new constitution was drafted under the auspices of an international organisation, the United Nations, which could – and did – actively shape the design of the process to be followed. Nepal and Sri Lanka exemplify countries that embarked upon constitution-writing to realise national unity by overcoming ethnic conflict, while simultaneously facing considerable international pressure to do so in a manner that would ensure that the

⁹ Mirroring the (still) dominant trend within the comparative constitutional discourse, most recent Asian scholarship studies the judicial application of constitutional rules as opposed to the creation thereof, a process during which non-judicial actors take centre stage. In addition to the books cited in (n 5), see also A Chen and A Harding (eds), *Constitutional Courts in Asia – A Comparative Perspective* (Cambridge University Press, Cambridge, 2018); J-R Yeh and W-C Chang (eds), *Asian Courts in Context* (Cambridge University Press, Cambridge, 2015); PJ Yap, *Constitutional Dialogue in Common Law Asia* (Oxford University Press, Oxford, 2015).

¹⁰ For Vietnam, see NS Bui, ‘Contextualizing the Global Constitution-Making Process: The Case of Vietnam’ (2016) 64 *American Journal of Comparative Law* 931.

¹¹ R Hirschl, ‘The Question of Case Selection in Comparative Constitutional Law’ (2005) 53 *American Journal of Comparative Law* 125, 142–4.

¹² Ibid 142.

resultant constitutions would contribute to reducing instability in what had hitherto been a volatile part of the region, including for the international community's own benefit. These international pressures were further buttressed by powerful economic and trade incentives that indirectly circumscribed the room for manoeuvre on the part of the local framers, in view of the real need for external financial support to enable Nepal and Sri Lanka to transition toward upper-middle income countries. Bhutan is an example of a very different kind of country: while the decision to pursue regime change to a democratic constitutional monarchy was autochthonous in nature, an important motivating factor for the elites was the intention to thereby enhance the country's international credibility. Finally, Thailand is a prototype of country where the initiation and design of the constitution-making process were essentially animated by local concerns and interests – establishing stable rule after a long history of coups and sharply polarised politics – although the framers were mindful of the fact that a successful drafting exercise could also have welcome second-order effects on the country's ability to attract more foreign direct investment (FDI). As we explain in detail below, while the strength and nature of global factors varies across the five case studies, none is entirely immune from global influences: it is clear that contemporary framers – notably those discharging their role in developing economies – will not be able to keep foreign actors and ideas entirely at bay.

II. Bridging the global and the local: Towards the glocalisation of constitution-making

Constitutions between the global and the local

'Constitutions,' Jackson has observed, 'are bearers of particular conceptions of national identity.'¹³ The view that constitutions are autochthonous, and ought to be so, has a rich pedigree and can be traced back to the writings of Montesquieu and Hegel, amongst others.¹⁴ The autochthonous character of a constitution can be linked to ideas of sovereignty: a nation's constitution, it might be said, is the ultimate form of internal self-expression and arguably necessary for participation in the international community of states. On this view, it is natural to assume that the making of a new

¹³ V Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, Oxford, 2009) 3.

¹⁴ Montesquieu, *The Spirit of the Laws* (AM Cohler *et al.* eds and trans, Cambridge University Press, Cambridge 1989); G Hegel, *Outlines of the Philosophy of Right* (TM Know trans, Oxford University Press, Oxford, 2008).

constitution would be a localised affair; the *pouvoir constituant* is found within the community for which that fundamental charter is intended, or in its chosen or self-appointed representatives.¹⁵ The understanding of constitutions as locally produced and situated may find expression in the preambles of such documents: think of the famous invocation of ‘We the People’ by the US Constitution.¹⁶

At the same time, constitutions reflect the setting in which they are made. That setting is no longer exclusively national in nature (if ever it was). In 1994, Friedman theorised that ‘In a world bound together by television, satellites, and jetports, there is a certain melting together of world cultures; and legal cultures can hardly stay immune.’¹⁷ His expectation that the advent of globalisation would produce a growing convergence in law has been echoed in the comparative constitutional discourse. In a classic piece, Tushnet has posited that the globalisation of constitutional law, understood as the ‘convergence among national constitutional systems in their structures and in their protections of fundamental human rights’, is inevitable.¹⁸ Various theories have been fashioned to account for (the expectation of) constitutional convergence.¹⁹ Some have suggested that States and their constitution-writers will learn from each other,²⁰ either as doing so would be efficient, because it holds out the promise of emulating foreign success in the domestic setting or because of the belief that there are a finite number of general constitutional ideas and mechanisms.²¹ Others point to the existence of a ‘law market’, where nations are spurred to adopt similar or superior constitutional guarantees of personal and economic freedom to attract investment and skilled labour. Yet others

¹⁵ For constituent power, see A Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (Cambridge University Press, Cambridge, 2017).

¹⁶ T Ginsburg, D Rockmore and N Foti, ‘We the Peoples: The Global Origins of Constitutional Preambles’ (2014) 46 *George Washington International Law Review* 305.

¹⁷ L Friedman, ‘Is There a Modern Legal Culture?’ (1994) 7 *Ratio Juris* 117, 125.

¹⁸ M Tushnet, ‘The Inevitable Globalization of Constitutional Law’ (2009) 49 *Virginia Journal of International Law* 985, 987–95. See also J-R Yeh and W-C Chang, ‘The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions’ (2008) 27 *Pennsylvania State International Law Review* 89, 97, positing that ‘In all directions of the globe, there are now similar constitutions.’

¹⁹ See in particular DS Law and M Versteeg, ‘The Evolution and Ideology of Global Constitutionalism’ (2011) 99 *California Law Review* 1172; R Dixon and E Posner, ‘The Limits of Constitutional Convergence’ (2010) 11 *Chicago Journal of International Law* 399.

²⁰ This has been aided by the development of a knowledge society, with vast opportunities for the circulation of information, such as through constitutional databases like the *Constitute Project*.

²¹ So e.g. W Osiatynski, ‘Paradoxes of Constitutional Borrowing’ (2004) 1 *International Journal of Constitutional Law* 244, 244.

argue that convergence is due to the wish to gain acceptance and support from domestic and, crucially, international audiences and reap attendant benefits. China's modification of its constitution with a view to joining the WTO or the influence that the prospect of joining the EU and Council of Europe has on the former communist states in Central and Eastern Europe can be mentioned as examples here.²² It should be noted that these theories as well as empirical studies tracing the impact of the forces of globalisation have been principally geared towards the content and judicial application of constitutions,²³ but not the actual making thereof. Moreover, as Tushnet's definition reveals, the focus has very much been on detecting the presence of similarities in the make-up and interpretation of bills of rights and models of governance.²⁴

The underlying assumption of this article is that the phenomenon of globalisation is also relevant and already present during the logically prior stage of constitution-building. It would be difficult to imagine how some measure of substantive constitutional convergence can come about in the absence of globalising tendencies during the process stage. Understanding why a particular constitution bears resemblance to, or deviates from, other constitutional texts requires an examination of the extent to and manner in which external elements were present during its writing and adoption. This is all the more so for those invested in the promotion of universal minimum standards.²⁵ This dovetails with the greater emphasis placed on process in contemporary constitution-making as compared to the beginning of the twentieth century. To be fair, traditional constitution-builders and thinkers already accepted that process mattered, in the sense that the constitution's status as higher law meant the need for a different set of steps and requirements than those governing the drafting of ordinary legislation. The significance of process has, however, intensified markedly in the recent past due to the extension of exacting 'norms of democratic procedure, transparency and accountability' from the sphere of quotidian political decision-making to constitution-drafting.²⁶ This makes it both

²² Cf e.g. arts 49 and 2 TEU.

²³ Z Elkins, T Ginsburg and B Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) 54 *Harvard International Law Journal* 64; Law and Versteeg (n 19); Dixon and Posner (n 19); DS Law, 'Globalization and the Future of Constitutional Rights' (2008) 102 *Northwestern University Law Review* 1277.

²⁴ E.g. C McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 *Oxford Journal of Legal Studies* 499.

²⁵ E.g. M Sunder, 'Enlightened Constitutionalism' (2005) 37 *Connecticut Law Review* 891, arguing that the court of world opinion should initiate a transnational dialogue in response to envisaged deviations from liberal constitutional values by constitution-makers.

²⁶ V Hart, 'Democratic Constitution Making' (2003) *Special Report 107 of the United States Institute of Peace*.

more feasible and relevant to uncover the complex mix of ingredients and blending thereof that has produced a given country's *Grundnorm*. Bismarck's assertion that like sausages, one should not wish to see laws being made, is no longer defensible in the twenty-first century.

Glocalised constitution-making

Against this backdrop, what is needed is a framework that combines a bottom-up perspective buttressed by local empirical findings with an appreciation of the presence of the global level. To capture this interplay, we will refer to the 'glocalisation' of constitution-making. The origins of this neologism have been traced to Asia, with glocalisation making an appearance in discussions about Japanese marketing practices in the 1980s. The concept has, however, found more general theoretical favour. The writings of Roland Robertson,²⁷ Eric Swyngedouw²⁸ and George Ritzer²⁹ in particular have been instrumental in extending glocalisation beyond the domain of business and economic factors to culture and sociological aspects. While the term has made an occasional appearance in constitutional legal writings,³⁰ it has yet to be substantively theorised and mainstreamed in the language of constitutional law. We suggest that there would be good reasons for such to happen. Globalisation is associated with cultural homogenisation or even cultural imperialism, with tastes, beliefs and attitudes overcoming spatial constraints ('McDonaldisation'). The corollary of this employment of the concept is the flat juxtaposition of the global (or universal) and the local (or particular): unstoppable economic forces will compress the world and in the process reduce if not eliminate heterogeneity in local value systems. For those concerned about this advent of globalisation, this can give rise to a siege mentality: the local is 'under threat', should be 'defended' and show itself resilient in the face of a 'clash', even if it may not be ultimately victorious in the battle for supremacy.

²⁷ R Robertson, *Globalization: Social Theory and Global Cultures* (Sage, London 1992); R Robertson, 'Glocalization: Time-Space and Homogeneity-Heterogeneity' in M Featherstone, S Lash and R Robertson (eds), *Global Modernities* (Sage, London, 1995); R Robertson, 'Globalization Theory 2000+: Major Problematics' in G Ritzer and B Smart (eds), *Handbook of Social Theory* (Sage, London, 2003).

²⁸ E Swyngedouw, 'Neither Global nor Local: "Glocalization" and the Politics of Scale' in K Cox (ed), (Guilford, New York, NY, 1997); E Swyngedouw, 'Globalisation or 'Glocalisation'? Networks, Territories and Rescaling' (2004) 17 *Cambridge Review of International Affairs* 25.

²⁹ G Ritzer, *The Globalization of Nothing* (Sage, London, 2003); G Ritzer, *Globalization: A Basic Text* (Wiley-Blackwell, London, 2010).

³⁰ E.g. T Fleiner and L Basta Fleiner, *Constitutional Democracy in a Multicultural and Globalised World* (Springer, New York, NY, 2009) 9; R Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, Oxford, 2014) 282.

Glocalisation holds out the promise of overcoming such a mindset and opens up analytical space. It 'should be a concept analytically distinct from globalization'.³¹ Rather than privileging the global, it signals that local actors, relationships and settings too matter, and do so from the outset; and it accepts that ideas or concepts that are distributed globally should be customised to local considerations. The outcome is neither purely local nor purely global, but hybrid in nature: a fusion of the two that has its own authenticity. The very terminology used signals that the global and local are interlaced and should not be viewed as distinct spheres. Put simply, the global is shaped by the local and vice versa. As Robertson posits: 'Much of what appears at first experience to be local is the local expressed in terms of a generalised recipe of locality. Even in cases where there is no concrete recipe – as in the case of some forms of contemporary nationalism – there is, or so I would claim, a translocal factor at work; the basic idea here being that the assertion of ethnicity and/or nationality is at least made within contemporary *global terms* of identity and particularity.'³²

When analysing the process of making a national constitution, a glocalised perspective invites reflection on the identification, origins and meaning of supposed global norms pertaining to constitution-making. It also directs attention to the attitude towards such norms on the part of local framers and their capacity to interact with the global arena, its inhabitants and interests. These dual considerations entail the possible conceptualisation of contemporary constitution-making situations as a 'glocalised enterprises', in which global (or transnational) and municipal forces, norms and actors pertaining to the drafting and design of constitutions co-exist, interact or shape one another. We suggest that a glocalised examination of constitution-building can take place along three dimensions: the decision to embark upon the writing of a new constitution; the design and inclusiveness of the process; and the range of topics canvassed for possible constitutional regulation.

Glocalised Impetus. At the most general level, the decision to draft a new constitution stems from the perceived need or desire for reform and as such, there is a decidedly instrumental quality to constitution-making processes. While the triggers for constitution-making exist in the political, economic and social realm, their study ought not to be left to political

³¹ V Roudometof, *Glocalisation: A Critical Introduction* (Routledge, Abingdon, 2016) 1.

³² R Robertson, 'Globalisation or glocalisation?' (2012) 18 *Journal of International Communication* 191, 192 (original emphasis). Here he *inter alia* refers to the work by Greenfield on nationalism, who shows that the emergence of national identities in the US, Germany and Russia developed as part of an 'essentially international process'.

scientists, historians or anthropologists. These are the meta-factors that have an indelible influence on how the process will unfold as well as on the content of the resulting document. Whether a new constitution is made due to the creation of a new state, out of fear of regime collapse, with the hope of putting to rest ethnic or social conflict or to attract more riches will yield variations in the sense of urgency felt on the part of the drafters and the time frame available to complete the process, the choice of the parties around the negotiating table and the issues at the forefront of the deliberations. At the same time, and despite the supposedly exclusive national character of some of these imperatives, the global dimension is unavoidably present as well, as the vignettes of recent Asian experiences with constitution-making below will show. These further show that the salience of the global arena for any given constitution-making exercise is not predetermined or fixed, but rather varies across jurisdictions and time.

In East Timor, the origins for a new constitution can be traced to 1999, when the population of this island nation expressed itself against incorporation within the Republic of Indonesia on the heels of the departure of the Portuguese colonial administration. The unrest brought about by the vote in favour of full independence led the international arena, acting through the UN Security Council, to establish an International Force for East Timor (INTERFET) to restore peace and security. INTERFET led a short-lived existence and was succeeded by the United Nations Transitional Administration in East Timor (UNTAET), whose mandate extended to ‘support capacity-building for self-government’. For East Timor, as other newly independent States, there was a need for a constitution to make self-government a reality. Institutions had to be set up, or provided with a new legal basis, to exercise sovereign powers alongside spelling out the conditions for and limits of those powers to the benefit of the local population.³³ At the same time, the necessity of crafting a constitution in these scenarios extends to the international level. While the Montevideo Convention on the Rights and Duties of States does not explicitly demand a constitution as a prerequisite for a State’s legal existence, it is difficult to conceive how a political organisation can demonstrate that it meets the criteria that are listed – a permanent population, a defined territory, government, and the capacity to enter into relations with other states³⁴ – and

³³ LE Miller and L Aucoin, ‘East Timor’s Constitutional Passage to Independence’ in LE Miller and L Aucoin (eds), *Framing the State in Times of Transition: Case Studies in Constitution-Making* (US Institute of Peace Press, Washington, DC, 2010).

³⁴ Montevideo Convention on the Rights and Duties of States, 165 LNTS 19; 49 Stat 3097, art 1.

hence claim its place within the international community of states in the absence of a basic constitutive document.³⁵

Bhutan offers an interesting variant on the theme of drafting a new constitution where none existed before. The country has been ruled as an absolute monarchy for most of its history, which *inter alia* meant that there was no document with the attributes normally associated with a constitution.³⁶ In 2001, King Jigme Singye Wangchuck agreed to surrender the monarchy's powers and privileges, paving the way for the creation of an elected assembly to draw up a new constitution for 'an inclusive democratic republic nation'. The king's decision has been explained as a testament to his belief in the intrinsic value of democracy as a 'system of government best suited for the future well-being of the nation'. A closer look shows that wider geopolitical factors brought influence to bear as well, particularly the global appeal of the model of constitutional democracy and its embrace by neighbouring Nepal, where the demise of the centuries-old monarchy was accomplished resolutely and swiftly. A democratic constitutional framework was arguably also required to keep the potential flaring of ethnic tensions between Lhotsampas migrating from Nepal and indigenous Drupka at bay.³⁷ As a commentator noted: '[The King] knew that in a rapidly globalising world, Bhutan could not sustain its isolationist path; he also knew, looking at developments in neighbouring Nepal, that sooner or later there would be a democratic challenge to an absolute monarchy. In view of this, he chose to anticipate the inevitable by initiating change himself.'³⁸ A final exogenous factor that exerted peripheral pressure were the gains to be obtained from India once a constitution would be in place. Upon the initiation of the drafting process, the aid it received from India increased by five per cent and following the implementation of the new constitution in 2008, India ended its prorogation of Bhutan's competences over the country's external affairs.³⁹

³⁵ See also N Walker, 'Sovereignty and Beyond: The Double Edge of External Constitutionalism' (2018) 58 *Virginia Journal of International Law* 799.

³⁶ See e.g. Y Hasebe and C Pinelli, 'Constitutions' in M Tushnet, T Fleiner and C Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge, Abingdon, 2013); D Grimm, 'Types of Constitutions' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012).

³⁷ V Iyer, 'Constitution-making in Bhutan: A Complex and *Sui Generis* Experience', paper presented at the Workshop 'Constitution-Making in 21st Century Asia' (Singapore, 13–14 November 2017) (copy on file with the authors).

³⁸ PK Varma, 'How Democracy Took Roots in Bhutan' (*The Hindu*, 1 April 2015) <<https://www.thehindu.com/opinion/columns/How-democracy-took-roots-in-Bhutan/article10752146.ece>>.

³⁹ W Bothe, 'The Monarch's Gift: Critical Notes on the Constitutional Process in Bhutan' (2012) 40 *European Bulletin of Himalayan Research* 27, 37.

The recent constitution-making in Sri Lanka and Nepal was induced by rather different domestic conditions. Both countries were motivated to conclusively resolve the long period of social turmoil that had damaged political stability and led to economic stagnation. Sri Lanka has suffered almost three decades of bloody separatist fighting by the Liberation Tigers of Tamil Eelam against national security forces to secure autonomy for the Tamils, who are the country's largest minority group. This played out against the wider backdrop of 'the national question': how much and what kind of decentralisation of powers should be pursued to accommodate Sri Lanka's many religious and ethnic minorities.⁴⁰ Nepalese society is, if anything, even more diverse in its make-up, with more than 100 languages beyond spoken and its 29 million people grouped into a myriad of castes and corresponding hierarchies. The dominant cause for its new constitution-writing project was the need to give effect to the 2006 peace accord between the country's traditional parties and the Maoists that saw the latter end their decade-long civil war and agree to continue the fight for their beliefs without violence within conventional political forums. Yet, despite the overt domestic character of the forces that induced constitution-making in Sri Lanka and Nepal, international elements augmented the need for these processes and helped keep the momentum going. There was a general expectation within the international community that both countries ought to seize the opportunity for peace-building, as this would contribute to regional stability and improve cross-trading prospects. A specific contributory factor in the case of Nepal was the 25 April 2015 earthquake. By then, negotiations about a new constitution had been ongoing for years and the realisation that much-needed international financial aid could be jeopardised if the process would drag on for much longer, put pressure on the government to wrap up the process.⁴¹

At first blush, the Thai story varies markedly from those recounted above. The by now familiar pattern in which coups, military-dominated governments and new constitutions have alternated since the late 1990s suggests an exclusively domesticated approach to constitution-drafting

⁴⁰ On which, e.g. NS Cooray and S Abeyratne (eds), *Decentralization and Development of Sri Lanka within a Unitary State* (Springer, Singapore, 2017); M Yusoff *et al.*, 'Decentralized Administration and Minority Accommodation in Sri Lanka' (2015) 6 *Mediterranean Journal of Social Sciences* 1; R Oberst, 'Decentralization and Local Government in Sri Lanka' in D Vajpeyi (ed), *Local Democracy and Politics in South Asia* (Springer, Wiesbaden, 2003).

⁴¹ For more detail, see S Bisarya, 'Forces and Mechanisms in Plurinational Constitution-Building in South Asia' in IDEA (ed), *Annual Review of Constitution-Building Processes: 2015* (International IDEA, Stockholm, 2016).

that unfolds in a manner that reflects the relative strength of competing Thai economic and political interests. The desire to break that vicious cycle by institutionalising military government was the impetus for the latest bout of constitution-making in 2017.⁴² A closer look, however, reveals that even in the apparently self-referential Thai story, evidence of global pressures can be detected. It was hoped that the pursuit of political stability through a new constitution will also yield a boost in FDI, since the coups and military grip on government have significantly reduced investment in the country on the part of the US, China and the EU.⁴³ This would not be unprecedented: after acceding to the WTO, Thailand amended its then-constitution to ensure a 'fairer investment environment', a sensible move for a country seeking to climb the developmental ladder.

Glocalised Design and Inclusiveness of the Process. The second dimension of a glocalised study of constitution-making pertains to the design and inclusiveness of the drafting process. This refers to the series of steps that must be completed before the entry into force of the text and are likely to encompass all or most of the following: deciding on the identity of the institutional body with principal responsibility for preparing a draft text, selecting its members and determining the parameters within which it should complete that task; fashioning the modalities, if any, for consultation and feedback on the draft; completion of the text and its adoption; and finally, its official entry into force. In studying the inclusiveness of the process across its multiple stages, a distinction can be usefully drawn between participation of the local body politic and the involvement of transnational advisors and materials.

Taking the former first, international law today recognises that 'the people' should be involved in the making of their new constitution. Article 25 of the International Covenant on Civil and Political Rights (ICCPR) declares that every citizen shall have the right 'to take part in the conduct of public affairs'. In its 1991 *Marshall and ors v Canada*⁴⁴ ruling, the United Nations Committee on Human Rights (UNCHR) already clarified that 'public affairs' encompasses constitution-making. It reiterated this conclusion in its 1996 commentary on Article 25, declaring that

⁴² M Crouch and T Ginsburg, 'Between Endurance and Change in South-east Asia: The Military and Constitutional Reform in Myanmar and Thailand' in IDEA (ed), *Annual Review of Constitution-Building Processes: 2015* (International IDEA, Stockholm, 2016) 68, 75–6.

⁴³ Cf Yeh and Chang (n 18); A Harding and P Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Hart, Oxford, 2011).

⁴⁴ Human Rights Committee, Comm No 205/1986 (Appl No) UN Doc CCPR/C/43/D/205/1986, Oxford Reports on International Law 1735 (UNHCR 1991).

‘Citizens also participate directly in the conduct of public affairs when they choose or change their constitution.’⁴⁵

Ratification by means of a popular referendum became a favoured approach over the course of the previous century, with the rise of public consultation and feedback sessions on the rise since the new millennium. Indeed, as Saunders remarks, ‘People now expect actually to be involved in the constitution-making process and not just symbolically associated with it.’⁴⁶ This ties in with the usual justification for public participation, namely that it enhances the legitimacy and thereby the effectiveness and durability of the resulting constitution.⁴⁷ Empirical data further suggests that involving the population in constitution-making has an impact on the substance of the text, more particularly the presence of rights and certain democratic institutions.⁴⁸

At the same time, the manner in which the people can partake in the constitution-building process varies and with Hart it can be said that ‘there is no model appropriate to all nations’.⁴⁹ Participation, then, is paradigmatic illustration of glocalisation: originally practised locally, it has been elevated into a global norm, or generalised recipe as Robertson put it, that is in turn realised using local ingredients. It is worth pointing out that the global norm only requires *that* the public should be involved, but is silent on *when* and *how* such involvement should take place. The leeway thus granted for local adaptation can result in markedly different trajectories, as in the recent Asian constitution-making exercises. Across the states that embarked on constitution-building, there was a keen awareness among the drafters that the public should be involved in part to gain (or retain) international legitimacy. The precise format chosen, and the degree to which this exemplified the spirit behind the expectation of popular involvement, was, however, contingent on the prevailing political context. The convergence began and ended with the local acceptance of the global norm.

⁴⁵ UN Human Rights Committee, CCPR General Comment No. 25: Article 25 (12 July 1996, CCPR/C/21/Rev.1/Add.7).

⁴⁶ C Saunders, ‘Constitution-Making in the 21st Century’ (2014) 4 *International Review of Law* 1, 2.

⁴⁷ See e.g. V Hart, ‘Constitution-Making and the Transformation of Conflict’ (2001) 26 *Peace & Change* 153; S Voigt, ‘The Consequences of Popular Participation in Constitutional Choice – Towards a Comparative Analysis’ in A van Aaken, C List and C Lütge (eds), *Deliberation and Decision: Economics, Constitutional Theory and Deliberative Democracy* (Ashgate, Aldershot, 2004).

⁴⁸ T Ginsburg, Z Elkins and J Blount, ‘Does the Process of Constitution-Making Matter?’ (2009) 5 *Annual Review of Law and Social Science* 1.

⁴⁹ Hart (n 26) 11.

The population of East Timor had relatively wide opportunities to be involved in constitutional design from the outset, mainly due to the fact that the process was largely conducted under the auspices of UNTAET (on which more below). Its international origins and mandate meant that UNTAET could be expected to pay heed to the then-emerging norm of an inclusive, transparent and participatory constitution-making exercise.⁵⁰ Additionally, the years of UN-led governance made it particularly important to cultivate a sense of national ownership and give the Timorese a solid foundation for their new State's constitutional identity. UNTAET established constitutional commissions to solicit grass-roots input, with almost 10 per cent of the electorate attending the hearings organised for this purpose.⁵¹ It also provided civil education to familiarise the Timorese with voting, which was important as the delegates to the Constituent Assembly charged with drafting, debating and adopting the constitution would be directly elected. Timorese leadership, however, appeared less enamoured of efforts to engage the local population. Many of those in the upper echelons of the dominant political association FRETILIN (Revolutionary Front for an Independent East Timor) had spent years in exile in Portugal and Mozambique and their intention was to simply model the new Timorese text after the constitutions of those two states. This meant that public participation would be superfluous at best, and even dangerous as the local citizenry could put forward suggestions at odds with the desired templates. The legacy of the 1975 civil war further hampered a strong local endorsement of participation: it would be better 'to keep the lid on debate, to get things moving quickly'⁵² rather than risk polarisation at the time when achieving social unity for the new State should be the main goal. At the insistence of some local elites, the Constituent Assembly did organise public consultations that again solicited high levels of interest, but perhaps unsurprisingly, these made little difference to the eventual text of the constitution.

The constitution-making exercise in Sri Lanka formally commenced with the conversion of its Parliament into a Constitutional Assembly.

⁵⁰ See now UN Secretary General, 'Guidance Note of the Secretary General: United Nations Assistance to Constitution-making Processes' (April 2009), <<https://www.un.org/ruleoflaw/blog/document/guidance-note-of-the-secretary-general-united-nations-assistance-to-constitution-making-processes/>> 4.

⁵¹ Constitutional Affairs Branch, Department of Political Affairs, UNTAET, 'A Report of the National Constitutional Consultation in East Timor, June–July 2001' (UNTAET, Dili, 2001).

⁵² A Regan, 'Constitution-making in East Timor: Missed Opportunities?' in D da Costa Babo Soares *et al.* (eds), *Elections and Constitution Making in East Timor* (Australian National University, Canberra, 2003) 40.

The Resolution doing so envisages a strong participatory and public quality to the entire process. The Assembly was charged with ‘seeking the view and advice of the People’⁵³ and to this end appointed a Public Representations Committee for Constitutional Reform that visited each of the country’s 25 districts and amassed more than 4,000 submissions that led it to suggest a host of dramatic reforms.⁵⁴ The Assembly further maintains a free website with a repository of all committee reports as well as public representations it has received.⁵⁵ The final draft, once ready, is to be approved in a nationwide referendum. Whether it will come to that is far from certain, however. There is strong resistance among sections of Sri Lankan society, including influential Buddhist leaders, to the devolution of powers proposed to resolve the discrimination and oppression felt by the Tamil minority. Additionally, a March 2017 opinion poll found that more than two-thirds of Sri Lankans are of the view that instead of pursuing constitutional reform and transitional justice the government should devote itself to more pressing economic and developmental issues, in particular ‘cost of living, infrastructure development, economy of the country and unemployment’.⁵⁶ Such sentiments suggest that despite the existence of a framework that put in place multiple avenues for the public to partake in or learn about the constitution-making process, these are unlikely to produce the legitimacy-conferring benefits typically associated with participation due to the absence of a constitutional moment in Sri Lanka at this point in time (and that is even assuming that there would be sufficient grass-roots support for the contentious changes envisaged to the existing constitutional settlement).

In Thailand, the drafters’ apparent concern to (be seen to) pay homage to the global norm of participation found its way into the text of the Constitution itself. The preamble to the 2017 recounts how

The Constitution Drafting Committee ... has provided the people opportunities to widely access to the Draft Constitution and its meaning through different media, and has involved the people in the development of the essence of the Draft Constitution through receiving recommendations

⁵³ Sri Lanka Parliament, ‘Resolution for the Appointment of the Constitutional Assembly’ (9 March 2016) point 1.

⁵⁴ See Public Representations Committee on Constitutional Reform, ‘Report on Public Representations on Constitutional Reform’ (May 2016) <http://english.constitutionalassembly.lk/images/pdf/PRC_1.pdf>.

⁵⁵ <<https://english.constitutionalassembly.lk>>. Cf Resolution for the appointment of the Constitutional Assembly (n 53) points 4(b), 11 and 12.

⁵⁶ Centre for Policy Alternatives, ‘Opinion Poll on Constitutional Reform’ (CPA, Colombo, 2017) <http://www.cpalanka.org/wp-content/uploads/2017/04/Rapid-survey_final-report_March-2017.pdf> 2.

on possible revisions. Once the preparation of the Draft Constitution was complete, copies of the Draft Constitution and a brief primer were disseminated in a way which allowed the people to easily and generally understand the main provisions of the Draft Constitution, and a referendum was arranged to approve the entire Draft Constitution.⁵⁷

In actual fact, though, the referendum and the campaign that preceded it were tightly controlled by the Thai military. They did not allow any campaigning against the draft and more than 100 politicians, journalists and civil society members who were critical of the proposed text or had issued calls to reject the constitution in the referendum were reportedly arrested.⁵⁸ Put differently, the Thai military elites carefully delimited the scope for participation of the local population in keeping with their preferences regarding the content of the 2017 Constitution and the corresponding need for its swift and smooth adoption.

Since the impetus for constitutional transformation in Bhutan came from the King, the drafting process was very much 'top-down' in approach, with the monarchy firmly in the driver's seat.⁵⁹ The preparation of the text of the new constitution was entrusted to a committee chaired by the chief justice and comprising government officials alongside a small number of clergymen. It was only after the draft was completed that the public was engaged, as the purpose of participation was in large part educational, to wit, instruct Bhutanese citizens in democratic thinking to enable the transition from an absolute to a constitutional monarchy. Every household received a copy of the proposed text and numerous road shows were held throughout the country, several of which were attended by the King and the then-crown prince.⁶⁰ The engagement of the public was also deemed necessary to imbue the constitution with legitimacy⁶¹ and lend credence to the narrative that the King bestowed it as a 'gift'⁶² on his subjects, who could simultaneously be heralded in the preamble as the constituent power of Bhutan's new constitutional arrangements.

The Nepalese story shows how the opportunity for and type of popular participation does not remain constant even within the same jurisdiction and

⁵⁷ Thailand Constitution (2017), preamble.

⁵⁸ Human Rights Watch, 'Thailand: Events of 2016' <<https://www.hrw.org/world-report/2017/country-chapters/thailand>>.

⁵⁹ See e.g. SD Muni, 'Bhutan: Marching towards Democracy' (Institute of Southeast Asian Studies, Singapore, 2008); Iyer (n 37).

⁶⁰ LS Tobgye, *The Constitution of Bhutan: Principles and Philosophies* (Thimphu, no publisher stated, 2015) 20.

⁶¹ Ibid 10.

⁶² Bothe (n 39).

over the course of a single constitution-building enterprise.⁶³ A Constituent Assembly was first created in 2008, comprising 575 popularly elected members and 21 members nominated by the Council of Ministers.⁶⁴ The Assembly in turn set up a Committee on Citizens and a Committee on the Collection and Coordination of Public Opinion to foster mass participation through *inter alia* raising awareness about participation opportunity, collating input and organising public hearings.⁶⁵ The process was designed to be as inclusive as possible, in that no individual or entity was prevented from making their voice heard, and yielded result: more than half a million contributions were submitted to the Assembly.⁶⁶ The Assembly was, however, unable to produce a constitution and it was succeeded by an identically constituted second Constituent Assembly in 2015.⁶⁷ Different from the previous cycle, the scope for public input was circumscribed: there was an exceedingly brief period of public consultation – a mere two days – held *after* the draft text of the constitution had been agreed and no public hearings were organised.⁶⁸ The decision to keep the citizenry at bay has been attributed to the realisation on the part of the Nepalese elites that the successful conclusion of the constitution-making process required ‘negotiated compromises’.⁶⁹ In a comparable vein, others have pointed to the existence of ‘disputes and conspiracies’ between political leaders and Constituent Assembly members⁷⁰ that required the kind of delicate management that can only happen away from the public eye.

The involvement of the international community in national constitution-making processes similarly evinces and calls for a globalised perspective, even more so than the design of avenues to engage the local population. Such international involvement can take the form of foreign agencies (experts, organisations, other States) actively injecting themselves in the constitutional process as well as the proactive consideration of international and foreign materials by domestic drafters. Non-national involvement in

⁶³ See generally B Karki and R Edrisinha (eds), *Participatory Constitution-Making in Nepal: Issue of Process and Substance* (United Nations Development Programme, Kathmandu, 2014).

⁶⁴ A Saati, ‘Participatory Constitution-Building in Nepal – A Comparison of the 2008–2012 and the 2013–2015 Process’ (2017) 10 *Journal of Politics and Law* 33.

⁶⁵ Ibid 33–4.

⁶⁶ K Hachhethu, ‘Legislating Inclusion: Post-war Constitution Making in Nepal’ (2017) 26 *Accord* 60.

⁶⁷ Saati (n 64) 35.

⁶⁸ Hachhethu (n 66).

⁶⁹ R Edrisinha, ‘Challenges of Post Peace Agreement Constitution Making: Some Lessons from Nepal’ (2017) 9 *Journal of Human Rights Practice* 436.

⁷⁰ D Jha, *Federal Nepal: Trials and Tribulations* (Aakar, New Delhi, 2018) preface.

constitution-making has a long and rich pedigree. When Japan's Meiji government embarked on the drafting of what would become its 1889 constitution, it solicited the assistance of two German experts.⁷¹ External involvement became progressively more systematic over the course of the twentieth century. The post-war constitutional reform efforts in the aggressor states of Japan and Germany were conducted under the auspices of the Allied Forces⁷² and the transfer of sovereignty and drafting of the constitutional settlements of soon-to-be-former colonies in Africa, Latin America and Africa were typically tightly guided, and guarded, by the outgoing colonial powers.⁷³ During the democratic transition in Central and Eastern Europe after the fall of communism in the 1990s, international advisory groups comprising scholars, diplomats and legal professionals made themselves available to the local drafters as did organisations such as the Venice Commission, whose very establishment was borne out of the wish of mainly Western European states to have an institution devoted to help the CEE countries with restructuring their constitutional arrangements.⁷⁴

Today, it is rare for domestic constitution-making processes to take place without any form of external involvement, solicited or otherwise. This is unlike the experiences in earlier times: interventions by non-local actors are no longer reserved for new countries or transitioning regimes, but also routinely offered to mature democracies. In a related vein, the identity and number of contemporary constitution mongers extend beyond States to international organizations, NGOs, consultancy groups and individuals, and include entities whose very mission is to provide constitutional guidance.⁷⁵ This, together with the realisation that no aspect of the constitution seems immune from susceptibility to external guidance,⁷⁶ means that the role played by external actors and the

⁷¹ See further G Akita, *Foundations of Constitutional Government in Modern Japan 1868–1900* (Harvard University Press, Cambridge, MA, 1967).

⁷² For Germany, see e.g. US Department of State, *Germany 1947–1949: The Story in Documents* (US Department of State Publishing, Washington, DC, 1950); E Spevack, 'American Pressures on the German Constitutional Tradition: Basic Rights in the West German Constitution of 1949' (1997) 10 *International Journal of Politics, Culture, and Society* 411. Questioning whether Japan's constitution lacks an autochthonous character as a result: D Law, 'The Myth of the Imposed Constitution' in D Galligan and M Versteeg (eds), *The Social and Political Foundations of Constitutions* (Cambridge University Press, Cambridge, 2013).

⁷³ See e.g. Kumarasingham (n 7); Lapping (n 7).

⁷⁴ On which e.g. M de Visser, 'A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform' (2015) 63 *American Journal of Comparative Law* 701.

⁷⁵ For a recent discussion, see T Ginsburg, 'Constitutional Advice and Transnational Legal Order' (2017) 2 *UC Irvine Journal of International, Transnational and Comparative Law* 5.

⁷⁶ L Backer, 'From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power System' (2009) 113 *Penn State Law Review* 671.

ramifications thereof must be systematically featured in case studies of national constitution-making processes.

A first important step is identifying the range of entities involved and tracing the source of their funding, which is not always easy as conventional actors like the United Nations are increasingly flanked by associations purposely set up for a particular constitution-making process. In the case of Nepal, for instance, assistance was amongst others rendered by the Supporting Constitution Building Process in Nepal project supported by the Embassy of Norway in Nepal (from 2006 to 2015 and by the Embassy of Finland (from 2009 to 2013); the United Nations Development Programme (UNDP) Supporting Participatory Constitution Building in Nepal; the United States Agency for International Development; the Department for International Development's Enabling State Programme; and the Swiss Agency for Development and Cooperation.⁷⁷ Not only the size of the international delegation can be substantial, so too can the resources invested. Foreign constitutional assistance has become big business: the total expenditure for Nepal has been estimated to be approximately 600 million USD.⁷⁸

There is, of course, no such thing as a blank canvas for international input. In his account of the making of the Bhutanese constitution, the chairman of the Drafting Committee identified 12 'basic sources of the Constitution', several of which had non-local origins: 20 foreign constitutions, '[v]arious international conventions and political philosophies' and observations made by international organisations and individuals. These were positioned alongside and contextualised by Bhutanese sources, including Buddhist philosophies, royal decrees, indigenous customs and traditions and 'historical documents and laws codified by our ancestors'.⁷⁹ Indeed, as Tushnet correctly observes, 'What primarily determines the content of constitutions are the intensely local political considerations "on the ground" when the constitution is drafted.'⁸⁰ This is so even in the case of newly formed States, like East Timor. The entire Timorese process took place while the country was still governed under a UN transitional administration and the strong presence of the UN encouraged foreign NGOs, activists and experts to similarly flock to the incipient nation to

⁷⁷ International Institute for Democracy and Electoral Assistance, *Nepal's Constitution Building Process: 2006–2015: Progress, Challenges, and Contributions of International Community* (Publications Office International IDEA, Stockholm, 2015) 33–5.

⁷⁸ Ibid 29.

⁷⁹ Tobgye (n 60) 14.

⁸⁰ M Tushnet, 'Some Skepticism about Normative Constitutional Advice' (2008) 49(4) *William & Mary Law Review* 1473.

offer their services. At the outset, UNTAET mainly made the necessary financial and logistical resources available to the local drafters to reduce the risk that the constitution would be characterised as foreign or imposed. As the process unfolded, the UN officials assigned to observe the meetings of the Constituent Assembly also began to provide substantive suggestions, in particular to ensure adherence to international human rights standards.⁸¹ While some have lauded UNTAET's approach to generally place itself at arm's length of the constitution-making process, other observers have been more critical. Its concern for a locally led process, they argue, made for an unbalanced approach to empower local elites, with UNTAET winding up privileging the largest and savviest of the parties (FRETILIN), which was accordingly able to manipulate the work of the Constituent Assembly to serve its own interests and influence the eventual text of the constitution considerably. The East Timor story serves as a stark reminder that local stakeholders are not a homogenous group with a single, shared set of objectives; and international agents should accordingly not only be concerned with preserving domestic ownership, but simultaneously avoid capture by certain elites that seek international assistance to better entrench their views in the new constitutional settlement.

The Timorese experience allows for two further observations about international involvement. The first is the duration of the entire process of constitution-building. In the case of East Timor, the preparatory works, the establishment of the Constituent Assembly and the actual drafting were due to be completed within a year, a time frame that reflected the availability of donor budgets and the Security Council's patience. While international assistance may be instrumental in equipping national actors with the tools to acquit themselves of their task as best as they can, time constraints dictated by foreign financial concerns can hamper achieving agreement about the new legal and political structures. This is especially concerning in nations with a pluralist character and carries with it potentially dramatic consequences for the endurability of the constitution. In a related vein, while Nepalese elites generally welcomed foreign constitutional aid efforts, there was also criticism that some international projects that focused on the empowerment of disadvantaged communities exacerbated frictions among indigenous groups.⁸² When we recall the highly diverse character of Nepalese society, it becomes apparent that good intentions on the part of international actors – like combating

⁸¹ J Wallis, 'Cut and Paste' Constitution-making in Timor Leste', paper presented at the Workshop 'Constitution-Making in 21st Century Asia' (Singapore, 13–14 November 2017) (copy on file with the authors).

⁸² IDEA (n 77) 36.

disenfranchisement – may play out completely differently depending on prevailing local conditions.

The second observation concerns the characterisation of members of the diaspora. Many of the delegates in the Timorese Constituent Assembly that determined critical aspects of the new constitutional system had returned to the country after a lengthy stay overseas. The presence of such individuals blurs the global–local participation distinction: while they arguably cannot be analogised as ‘pure’ locals as their views will have been coloured by their experiences abroad, neither are they foreigners: their investment in a successful constitutional settlement will be stronger and more personal than that of foreign agents. Such individuals are perhaps best conceived as the personification of glocalisation.

Alongside providing logistical support geared to capacity-building or civic education, international actors aim to draw the drafters’ attention to foreign or international sources that they believe ought to be reflected in the new constitution. Local constitution-makers should not be thought of as merely passive recipients of such materials, however. On the contrary, they commonly decide to investigate foreign systems and rules of their own volition, as the Bhutanese experience already revealed. Looking at the choices made in this regard is critical, as this tells us which foreign constitutional regimes the drafters themselves consider to be instructive and possibly worthy of emulation, and in relation to which areas. Consider, by way of example, the report by the sub-committee on fundamental rights to the Sri Lankan Constitutional Assembly, which remarks in its opening sentence that ‘recognition of and respect for human rights is a ... universal concept’ thereby setting the tone for its chosen approach and methodology.⁸³ Committee members took note of a wide range of international covenants as well as the contemporary trend among countries in the Global South to recognise justiciable socio-economic rights, including those that have drafted new constitutions in the wake of periods of internal turmoil – much like Sri Lanka. South Africa was identified as the jurisdiction with a particularly ‘progressive and innovative’ Bill of Rights that moreover has the longest genesis in the Global South. This made it the ideal jurisdiction for members of the sub-committee to visit for a constitutional fact-finding mission to learn about ‘the implementation of social and economic rights and judicial review of State action’.⁸⁴

⁸³ The Constitutional Assembly of Sri Lanka, ‘Report of the Sub-Committee on Fundamental Rights’ <<https://english.constitutionalassembly.lk/images/pdf/reports-2018/Fundamental%20rights%20report%20English%20final.pdf>> 3.

⁸⁴ Ibid 6.

Glocalised range of topics for constitutional regulation. The third and final dimension of a glocalised exploration of constitution-building is concerned with the range and type of governance questions that a new constitution ought to tackle. Several of these have and are featured in each and every constitution-making process, simply because ‘there are a limited number of general constitutional ideas and mechanisms [that] have been in the air for some time’.⁸⁵ These include the identity of the State and the framework for governance as well as the protection of fundamental rights and liberties. These universal evergreens also come with universal expectations as to the implementation thereof, at least as far as the broad strokes are concerned. All (quasi-)democratic systems follow the principle of political morality that demands that State powers are not concentrated in the hands of a single institution. The implementation thereof has traditionally taken place along the lines of the classic Montesquieuan tripartite approach.⁸⁶ Similarly, framers of twenty-first century constitutions are expected to ensure that their bill of rights complies with international treaties guaranteeing such rights, notably those with/of a civil and political character.⁸⁷

The influence of international actors and materials on the specific selection of governance questions that constitution-makers should deliberate is undeniable and growing. This is notably the case for the design of the section of rights, as this is a favoured item for guidance among foreign experts and entities. In the case of Nepal, the Peace Accord – which, it will

⁸⁵ Osiatynski (n 21) 244.

⁸⁶ Montesquieu envisaged a functionalist separation of government powers into legislative, executive and judicial power in his *The Spirit of Laws* (vol I, 1750). Discussions of its historical origins and present-day application can, amongst others, be found in S Krause, ‘The Spirit of Separate Powers in Montesquieu’ (2000) 62 *Review of Politics* 231; P Resnick, ‘Montesquieu Revisited, or the Mixed Constitution and the Separation of Powers in Canada’ (1987) 20 *Canadian Journal of Political Science* 97; JH Merryman, ‘The French Deviation’ (1996) 44 *American Journal of Comparative Law* 109. In contrast Taiwan’s constitution divides government powers among five branches or *yuans*: the legislative, executive, judicial, examination and control branch, on which e.g. E Ip, ‘Building Constitutional Democracy on Oriental Foundations: An Anatomy of San Yat-Sen’s Constitutionalism’ (2008) 9 *Historia Constitucional* 373. Notably the idea of distinct control institutions alongside the regular judiciary has begun to find traction more generally, see B Ackerman, ‘The New Separation of Powers’ (2000) 113 *Harvard Law Review* 633 and M Tushnet, ‘Fifth-Branch Institutions: South Africa’ in DS Law (ed), *Constitutionalism in Context* (Cambridge University Press, Cambridge, 2019, forthcoming).

⁸⁷ See generally, Z Elkins, T Ginsburg and B Simmons, ‘Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice’ (2013) 54 *Harvard International Law Journal* 61.

be recalled, was the principal reason to trigger the constitution-making exercise – contained an explicit commitment to ‘the Universal Declaration of Human Rights, 1948, and international humanitarian laws and fundamental principles and values related to human rights’.⁸⁸ The insistence by the international community that this Peace Accord be given effect to, coupled with the population’s desire for a democratic regime in which their interests would be duly safeguarded, meant that both constitutional assemblies devoted considerable time to debates on how international human rights norms should be reflected in the new constitution. The strong involvement of the UN in East Timor similarly meant that compliance with the rights established under international law, many under the auspices of the UN, ranked high on the agenda. One particular question concerned the scope *ratione personae* of the section on rights. The initial draft contemplated citizens as the principal addressees, which induced the UN High Commissioner for Human Rights and the Transitional Administrator to write to the Speaker of the Assembly respectively the leaders of the political parties represented therein to signal their disquiet about this move. Their intervention solicited some effect: the final text guarantees many fundamental liberties to all, although the drafters left the limitation in place for certain rights.⁸⁹

Irrespective of any explicit suggestion to this effect by external experts and organisations, drafters of new constitutions may themselves decide to place rights protection questions on the agenda to ensure that the new constitution is in step with perceived global tendencies. The report by the Sri Lankan sub-committee mentioned earlier offers a good illustration. It notes that the absence of justiciable socio-economic rights in the country’s 1978 constitution was consistent with the general approach to such rights at the time that text was drafted. However, ‘in light of global developments in human rights it has become clear that the intrinsic link between political rights and freedoms and access to economic resources and a better quality of life can no longer be overlooked ... particularly so in a country such as ours where deprivation of such resources has led to violent conflicts in the past’.⁹⁰ The sub-committee accordingly recommended that it was ‘of paramount importance’ that the new constitution include justiciable

⁸⁸ Comprehensive Peace Accord between the Nepal Government and the Communist Party of Nepal (Maoist) (22 November 2006) preamble and see also points 3.4–3.9.

⁸⁹ Including the right to equality (East Timor Constitution, section 16); special protection for seniors (section 20); access to the Ombudsman (section 27) and access to personal data (section 38).

⁹⁰ Report of the Sub-Committee on Fundamental Rights (n 83) 7.

socio-economic rights and went on to proffer suggestions on the desired formulation of such rights for consideration by the Constitutional Assembly.

While confirming the role played by the global level in setting the agenda of constitutional framers, the Asian experiences also attest to the enduring relevance of the local context. The examples just given already hint at this, but this is worth explicating further. Consider Bhutan, whose society is animated by Buddhism, something that is celebrated in the constitution as a defining aspect of that State's identity.⁹¹ According to Buddhist thought, each person must perform moral duties so that all can enjoy the rights conferred upon them.⁹² This made the question of identifying these duties and deciding which ought to be given constitutional recognition an important topic for the drafting committee. The result can be found in Article 8 of the Bhutanese constitution, which enumerates 11 duties owed towards the self, the environment, society at large and the Nation. Several of these have an obvious Buddhist flair, such as the duty not to tolerate or partake in inflicting harm on other human beings (subsection 5) or the duty to uphold justice (subsection 9). Turning back to East Timor, the large number of exiles who had had to live abroad made the treatment of the diaspora a salient question to consider. This resulted in section 22, which extends the State's protection for the exercise of fundamental rights to citizens while they are overseas. In a related vein, the oppression experienced during the years of Indonesian occupation explains why the question whether citizens must always abide by legislation regardless of its compliance with core rights was placed on the constitutional agenda. This produced section 28, which enshrines a constitutional right to civil disobedience.

Thailand's latest constitution-making exercise shows local interests shaping the agenda regarding the kind of institutional arrangements that should be debated. The new king instructed the military government to consider his role and powers as well as the circumstances in which a regent must be appointed to perform royal duties. It has been suggested that the underlying reason is the king's penchant to spend time abroad without having to hand over the reins and publicly announce his absence from the country. The junta duly obliged and the 2017 Thai constitution stipulates that '[w]henever the King is absent from the Kingdom ... [he] may or may not appoint ... a Regent'.⁹³ The military government itself added the

⁹¹ Bhutan Constitution, art 3(1).

⁹² On which, see e.g. KN Jayatilleke, *Dhamma Man and Law* (Buddhist Research Society, Singapore, 1988).

⁹³ Thailand Constitution 2017, Section 16.

regulation of political parties, rules on conflict of interest for politicians and the protection of ‘Thai-ness’ (the trinity of nation, religion and monarchy) to the list of topics for possible constitutional recognition. Its intention in doing so is to circumscribe the room for a return to power of the Shinawatrass or their allies, as the pressure to hold elections and at least officially transition back from military to elected government is increasing. In Nepal too, local concerns have led the framers of its new constitution to move beyond the options generally available on the menu when thinking about governance arrangements. As the constitution is intended to address if not overcome antecedent ethnic divisions, it was important to think about the avenues to be created for members of minority groups to enhance their standing in society and take remedial action for encroachments upon their interests.⁹⁴ This has prompted the creation of dedicated commissions to promote the integration of different ethnic groups in mainstream Nepalese society – like the Dalit, Adibasi Janajati, Madheshi and Tharu⁹⁵ – that will operate alongside a general human rights commission of the sort that is by now a common feature in many constitutions.

The survey in this section has sought to demonstrate the value of adopting a glocalised perspective when studying (foreign) constitution-building exercises. It has already hinted at the manner in which local framers may respond to global templates and international guidance, and it is to this that we now turn.

III. The effects of glocalised constitution-making

As mentioned earlier, much of the discourse dealing with the pressures associated with globalisation and related foreign influences on domestic constitutional law has suggested that constitutional regimes will progressively come closer together.⁹⁶ This remains an attractive position among scholars and activists, many of whom believe that such convergence is desirable as it will – or so they suppose – mean more protection for more rights and more democracy-supporting institutions (think of constitutional courts, human rights commissions, electoral commissions, Ombudsmen and the like).

⁹⁴ H Phuyal, ‘Nepal’s New Constitution: 65 Years in the Making’ (*The Diplomat* 18 September 2015).

⁹⁵ Nepal Constitution, arts 255, 261–263.

⁹⁶ Law and Versteeg (n 19); N Dorsen *et al.* (eds), *Comparative Constitutionalism* (3rd edn, West, St Paul, MN, 2016); DS Law, ‘Generic Constitutional Law’ (2005) 89 *Minnesota Law Review* 652.

Some comparatists have, however, begun to push back against the convergence thesis, arguing that it is an oversimplified representation of reality.⁹⁷ Dixon and Posner have suggested that ‘quite special conditions’ must be met before global convergence can occur, such as similarity in social conditions and aspirations for future development across states or the ability on the part of foreign actors to actually nudge a country towards the former’s preferred position.⁹⁸

In a related vein, writing in the context of the consequences of globalisation for courts and constitutional adjudication, Jackson identifies a continuum of ‘postures’.⁹⁹ The opposing poles are convergence, reflecting full identification with and endorsement of transnational legal norms, and resistance, which entails an outright refusal to accept non-national sources. The middle ground, which seems particularly common in practice and which Jackson herself also prefers for normative reasons,¹⁰⁰ is called ‘engagement’: this entails judges using transnational law to heighten their ‘capacities for more informed and impartial deliberation about the content of their own constitutional norms’ and is accordingly ‘open to possibilities of either harmony or dissonance between national self-understandings and transnational norms’.¹⁰¹

⁹⁷ See e.g. R Hirschl, ‘Out of “Global Constitutionalism”’ (2018) 12 *Law & Ethics of Human Rights* 1; S Choudhry, ‘The *Lochner* Era and *Comparative Constitutionalism*’ (2004) 2 *International Journal of Constitutional Law* 1; C Saunders, ‘The Use and Misuse of Comparative Constitutional Law’ (The George P. Smith Lecture in International Law) (2006) 13 *Indiana Journal of Global Legal Studies* 37; K Lane Scheppele, ‘Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models’ (2003) 1 *International Journal of Constitutional Law* 296; Li-ann Thio, ‘Reception and Resistance: Globalisation, International Law and the Singapore Constitution’ (2009) 4 *National Taiwan University Law Review* 335.

⁹⁸ Dixon and Posner (n 19) 1.

⁹⁹ V Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, New York, NY, 2010). For an interesting extension of her framework that considers the impact of having non-national judges on the bench to adjudicate constitutional cases, see A Dziedzic, ‘Foreign Judges on Pacific Courts: Implications for a Reflective Judiciary’ (2018) *Federalismi* no 5.

¹⁰⁰ The debate on the desirability of the consideration of foreign decisions in the course of domestic constitutional adjudication has spawned a large literature, including a discussions of the manner and extent to which such actually happens and the justifications that can be advanced in support, or against, the practice. See e.g. T Groppi and M-C Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart, Oxford, 2014); Hirschl (n 4) Ch 1; N Dorsen, ‘The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer’ (2005) 3 *International Journal of Constitutional Law* 519; G Halmai, ‘The Use of Foreign Law in Constitutional Interpretation’ in Rosenfeld and Sajó (n 36); M Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press, Oxford, 2013) Chs 11 and 13.

¹⁰¹ Jackson (n 99) 71.

We submit that local constitutional framers too may exhibit a range of attitudes towards the global.¹⁰² More particularly, while *some* may adopt a stance of approbation and pursue convergence with (perceived) globalised norms for *some* issues, the vast majority do not embrace foreign influences unqualifiedly. While global norms and actors may inform the making of a new national constitution, these do not control that process; rather, they provide sites for reflective consideration. This validates Dixon and Posner's diagnosis that 'rigorous empirical work has so far not found any evidence' to corroborate the convergence thesis as far as the content of constitutions is concerned.¹⁰³ At the same time, we should realise that it is increasingly difficult for framers to completely withstand the injection of international actors and ideas in the (design of the) process. Let us explain why, before setting out the considerations that should be borne in mind in making sense of attitudes of engagement.

Where the constitution-building process is conducted under the auspices of an international organisation, framers are faced with a powerful exogenous constraint in deciding on their attitude vis-à-vis the global. In the case of East Timor, for instance, many of the local elites were opposed to involving the citizenry in the early stages of the process. They could thus be said to adopt a posture of aversion to the (emerging) global norm of mass participation. The UN transitional administration, however, insisted on public outreach and overrode the contrary preferences of the Timorese drafters in this regard. Such occurrences will arguably be few and far between: the UN (or other international organisations) do not often play the part of an international interim administration and its Secretary General has since indicated that the UN endeavours to empower, rather than constrain, constitutional framers.¹⁰⁴

Despite not being in a position to shape the design of a constitution-making process *de iure*, international organisations and third states can *de facto* wield such power that local drafters find it difficult to give them and their views short shrift. This is a common scenario: developing countries with immature legal systems often simply lack the resources to go it alone. As we have seen in the case of Nepal, these countries are

¹⁰² On occasion, membership of both groups may overlap, on which R Dixon, 'Constitutional Design Two Ways: Constitutional Drafters as Judges' (2017) 57 *Virginia Journal of International Law* 1.

¹⁰³ Dixon and Posner (n 19) 19.

¹⁰⁴ UN Secretary-General, Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes (April 2009) <https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf> notably at 4 ('Ensure national ownership').

reliant on support from the international community to organise mass participation or process the results thereof and will have to accept the partial loss of control over the constitution-making process attendant on international involvement.¹⁰⁵ In a related vein, the financial imperatives of raising loans or foreign investments can circumscribe resistance. For example, in Sri Lanka the EU principle of subsidiarity has been put forward as the guiding principle for centre–periphery relations to meet international political conditionalities for capital injections, despite concerns that this runs against the current tenet for organising the vertical allocation of power and could lead to acrimony between the different echelons.¹⁰⁶ We should thus realise that while local drafters may not like the involvement of external actors in the process or display indifference about shaping the process to conform to (quasi-)global norms and expectations, they can effectively be prevented from making their preferred internal posture count in the way that the constitution-writing exercise eventually unfolds. In other words, the ‘aversion’ end of the spectrum may be only a hypothetical option rather than a real choice for framers in countries lacking a well-developed antecedent constitutional system or economic prowess.

At the same time, it is unlikely for the pendulum to swing in the opposite direction, with constitutional drafters fully opening the process to the global arena. The Bhutan experience is instructive here. It will be recalled that in Bhutan, the process was initiated by the king’s and his outlook on his preferred type of constitution exerted a strong influence over the mindset and approach of those entrusted with the actual drafting of the constitution. Across the Asian countries discussed in this article, the Bhutanese king exhibited the strongest preference for ensuring that his country’s new constitution would be aligned with international and foreign law. This can be gleaned clearly from his prescription of the matters that ought to be regulated in the constitution, the vast majority of which are familiar and indeed expected to be covered in any modern-day constitution worthy of that epithet: a preamble, fundamental rights and duties, the role and responsibilities of the three branches of government, local government,

¹⁰⁵ Contrast M Versteeg and E Zackin, ‘American Constitutional Exceptionalism Revisited’ (2014) 81 *University of Chicago Law Review* 1641, arguing that the US’ economic standing allows it to pursue a policy of isolationism.

¹⁰⁶ The Constitutional Assembly of Sri Lanka, ‘Report of the Sub-Committee on Centre-Periphery Relations’ <<https://english.constitutionalassembly.lk/images/pdf/reports-2018/Subcommittee%20report%20on%20Centre-Periphery%20relations%20English%20final.pdf>> 246; D Weerasekera, ‘The Interim Report of the Constitutional Steering Committee of Sri Lanka: A Brief Analysis, Part 2’ (*Lankaweb*, 9 April 2018) <<https://www.lankaweb.com/news/items/2018/04/09/the-interim-report-of-the-constitutional-steering-committee-of-sri-lanka-a-brief-analysis-part-2/>>.

democracy-supporting institutions such as the creation of an anti-corruption commission, and amendment provisions.¹⁰⁷ In line with this command, the Constitution Drafting Committee accordingly studied around 100 foreign constitutions ‘to benefit from their wisdom and knowledge, avert the criticisms and to accede to universal values’.¹⁰⁸ At the same time, members of the committee were far more reticent in embracing direct foreign input. In the chairman’s account of the constitution-making process, we can read that the international community provided feedback on the draft text at various junctures and offered experts. None of these overtures, however, appears to have been accepted or even welcomed. As the chair explained: ‘Bhutan needed an acknowledged authority with positive disposition to Bhutan ... Further, over-representation by experts *would not have gained public receptivity* and would have compromised the provisions of the Constitution. *Experts from different legal backgrounds would not have produced a homogeneous Constitution.*’¹⁰⁹ In the end, the drafting committee invited a senior lawyer from neighbouring India to be the sole external contributor to its work. This example underscores that even in a context that was particularly conducive to the influence of the global, framers were acutely aware of the importance of grounding the constitution-making process in the local extra-legal environment to bolster its social legitimacy and effective operationalisation. When we consider that in most instances, leading local constituencies with the ability to influence the conduct of the actual drafters will be less enamoured of the global than was the case in Bhutan, the adoption of an uncritical stance of approbation seems as unlikely as unmitigated opposition.¹¹⁰

For these reasons, some degree of engagement with the global emerges as the typical, and arguably also most reasonable, attitude for drafters to adopt. This is in fact what actually happened in the Bhutanese example in the previous paragraph: the drafters practised measured deliberation on the merits of adopting global norms and inviting (certain) non-domestic actors to participate in aspects of the constitution-writing exercise.

Now, the discussion so far may have created the impression that a country’s constitution-making process *in toto* can be characterised as manifesting a particular stance vis-à-vis the global arena. To be clear,

¹⁰⁷ Royal audience by His Majesty Jigme Singye Wangchuck (22 September 2001), referenced in Tobgye (n 60) 6–7.

¹⁰⁸ Tobgye (n 60) 17.

¹⁰⁹ Ibid 16 (emphasis added).

¹¹⁰ It is probably also undesirable, given the risk of considerable dissonance between the constitutional text eventually adopted and preferred practice that in turn may negatively impact on the longevity of the new constitution.

that is not our argument: indeed, trying to place the entire drafting exercise in a single pigeon hole would be overly reductionist. The attitudes are better thought of as contingent and thematically determined, meaning that a whole range can be seen within a single constitution-making exercise and even within retail-level topics. Nepal offers a good example.

Consider first the ebb and flow of the debate about the creation and powers of a constitutional court in Nepal during its first Constituent Assembly. The Judicial System Committee (JSC) that conducted preparatory work for the Constituent Assembly had suggested parliamentary oversight over the judiciary, in line with the preferences of the Communist Party of Nepal (CPN). Given its political leanings, the CPN's view was that constitutional interpretation should be entrusted to a Special Judicial Committee of Parliament, using the arrangement in place in foreign (former) socialist countries as the template for its proposal.¹¹¹ The minority in the JSC was concerned that this would create tension with 'universally accepted values of independence, impartiality and accountability',¹¹² and counter-proposed a constitutional court. This idea was taken up by the Report Harmonization Committee, tasked with consolidating the work done by all the subcommittees. The CPN members on the Constituent Assembly eventually abandoned their resistance to a constitutional court, with some of them apparently having been swayed to do so following private meetings with a justice of the South African Constitutional Court who had socialist proclivities prior to his elevation to the bench.¹¹³ The critical reception of the idea of a constitutional court by the CPN had, however, paved the way for opposition from the Nepalese judiciary. While several sitting judges too had attended meetings with the South African constitutional justice and a German constitutional judge, they were unconvinced about the propriety of including a constitutional court in the country's new judicial architecture. They accepted that such an institution made sense in the particular historical contexts of constitution-making in South Africa and Germany. However, Nepal's judiciary had already championed fundamental rights and democratic principles in its case law, 'but adopting [a] constitutional court does not recognise its role and may even diminish ... the active role it played for the equal and democratic society'.¹¹⁴

¹¹¹ Committee on Judicial System, 'Preliminary report to the Constituent Assembly with Concept Paper' (Kathmandu, 2009).

¹¹² Quoted in H Phuyal, 'The Constitutional Court Debate in Nepal: Where Are We Heading?' in Karki and Edrisinha (n 63) 281.

¹¹³ Ibid 282–3.

¹¹⁴ Ibid 284 and see also AM Bhattarai, 'Designing the System of Justice for Federal Nepal: Possible Contributions of Comparative Constitutional Law' (2011) 5 *NJA Law Journal* 115.

Their preference was for constitutional review powers to be allocated to the Supreme Court instead. This opposition had effect: the various positions on the creation of a constitutional court resulted in the Constituent Assembly placing the matter on the list of ‘dissenting items’ that was referred for resolution to the High Level Political Mechanism, comprising the leaders of the main Nepali political parties. The Mechanism eventually settled on a compromise: a constitutional court would be established, but only for a five-year period to adjudicate centre–periphery disputes and helmed by the chief justice of the Supreme Court. The Constituent Assembly, however, collapsed before this recommendation could be implemented. Still, the design eventually agreed upon shows how the attitudes among the drafters towards the structure of the judiciary initially accepted a strong role for the global in answering this design query, with the embrace of two opposing global models by different factions within the Assembly.¹¹⁵ Over time, their attitudes evolved: foreign involvement initially helped to broker a consensus of sorts in favour of convergence if not full-fledged endorsement of the popular constitutional court option, but this was followed by backtracking to a decidedly *sui generis* design after local stakeholders inserted themselves in the constitution-drafting process.

Second, both Nepali Constituent Assemblies agreed that women’s rights were an important topic that the new constitution should regulate in some detail, with several of the sub-committees deliberating how emerging universal norms to protect women and promote gender parity could be incorporated. This was in large part due to the emphasis placed on women’s rights by the international community in its communications with the drafters. Yet, its provisions on passing citizenship to children differentiate between Nepali fathers and mothers in favour of the former,¹¹⁶ despite intense lobbying by women’s groups and repeated expressions of concern by the Committee on the Elimination of Discrimination Against Women that this is not in line with international non-discrimination rules.¹¹⁷ In an interesting twist, the Assembly’s chairman has indicated that the adoption of these provisions do not evince the drafters’ aversion

¹¹⁵ The tendency to ensure representation of the various social, religious and other factions often translates into a body of constitutional framers that is heterogeneous in its world views. This makes it difficult for a single, unified view to emerge on how to structure the constitution-writing process and which constitutional arrangements to adopt, and by implication, how to appreciate the input that the global can provide on these matters.

¹¹⁶ Nepal Constitution, art 11(5) and (7).

¹¹⁷ Cf Committee on Elimination of Discrimination against Women, 989th and 990th meetings (WOM/1873, July 2011).

to global norms, but rather demonstrate a posture of engagement. '[T]he new constitution is women-friendly ... [g]iven our geostrategic location, our citizenship provision is not discriminatory' (emphasis added).¹¹⁸ One might not have expected him to declare otherwise: drafters who have been actively involved in constitution-building may congratulate themselves on its successful completion and defend the outcome, warts and all, all the more so if the process has been long-drawn-out as in Nepal. Even so, his remark is important: it reveals that domestic elites and international actors may differ in their interpretation of the choices made in fashioning a glocalised constitution-making process. Those studying these issues should accordingly be careful when deciding where on the aversion–approbation spectrum to place a specific aspect of a national constitution-drafting exercise.

Finally, as Elster observed in his famous article on the forces and mechanisms that regulate constitution-making processes, constitutions ideally 'ought to be adopted in maximally calm and undisturbed conditions', yet in reality the process is frequently embarked upon only once 'a crisis is impending'.¹¹⁹ One corollary is that framers do not always come to the constitution-making table with a predetermined model of what the end product or road towards it should look like; and concomitantly, with clear views on the role envisaged for foreign constitutional norms or international entities. This is especially likely when it comes to questions of procedural design or topics for constitutional regulation introduced to the framers by foreign states or international entities, as opposed to having been raised by local elites or grass-roots movements. For such issues, there will be a large degree of happenstance as to how the global–local interplay plays out and which attitude is eventually adopted.

IV. Conclusion

The crafting of modern-day constitutions is not a purely domestic enterprise, if it ever was. The ubiquitous presence of the international community, a desire to secure more FDI or other commodities from third states and an expanding corpus of universal rules all combine to expose domestic constitution-writing processes to global influences. This calls for

¹¹⁸ 'Interview with Former Nepal Constituent Assembly Chair' (2016) 5 *The UN Constitutional* 3.

¹¹⁹ J Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364, 394.

micro-level studies that take seriously the inevitably interplay between the global forces and domestic realities. This article has put forward the concept of glocalised constitution-making as a useful prism in this respect. It not only emphasises the multitude of sites for the global and the local to encounter one another, from providing the catalyst to initiate a constitution-making exercise to the design of the process itself to the composition of the agenda. Crucially, the glocalisation prism also underscores that the global and the local are interlaced, with neither being privileged at the expense of the other and with both changing over the course of their interaction.

A challenging question that remains concerns the attractiveness of the status quo and how this can be retained or, conversely, adjusted. At least for now, crafting a new constitution remains a locally encultured process. As ideational, political, socio-economic and cultural settings differ, so too do the national trajectories followed and the attitudes exhibited towards glocalisation by drafters. Indeed, there is no single, common model for glocalised constitution-making across the Asian countries referenced in Sections II and III. In some countries and for some constitutional tropes, the global elements are more prominent; in other cases, local factors dominate. Yet there seems to be an evolutionary dynamic towards a growing involvement and corresponding greater impact of the global arena. Scholars and policymakers alike accordingly need to think about what this means for the idea of national ownership and perceptions of the legitimacy of the constitution. If we continue to subscribe to the popular 'We the People' fiction, this may require the formulation of guidelines or principles setting out how constitutional framers can best harness local values and translate or mute global pressures in addressing local concerns, especially as foreign actors pursue the implementation of universal norms with growing vigour and not infrequently for self-interested reasons.