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Contemporary Constitution Making in Asia-Pacific

Maartje De Visser* and Ngoc Son Bui†

Abstract

This issue features a curated set of contextualized case studies that interrogate how six Asian countries have calibrated global imperatives with domestic desires and concerns during the drafting of their latest constitution. Read together, the accounts demonstrate that the impact of globalization on what has long been thought of as a quintessential exercise of national sovereignty is ubiquitous, yet that the precise combination of the global and the local is unique to each country, determined as it is by the strength of domestic interests and factions. Taking contextualized functionalism as its premise, this introduction sketches the contours of an analytical framework to study constitution-making processes in a globalized environment. By implication, this framework is conceived in a neutral fashion and cast in functional terminology that extrapolates from the circumstances of the countries featured in this issue. This, we hope, will make it a helpful toolbox to make sense of the global-local interplay in constitution-making in any country, whether located in Asia or further afield.

While this issue recounts the actual drafting of new constitutions in the Asia-Pacific, it is axiomatic that the globalization of constitution making is not particular to the countries featured or their immediate neighbours. We therefore suggest that the validity and currency of the framework elaborated later should similarly not be confined to the geographic boundaries of that region. Indeed, the articles that follow this introduction should be seen as illustrations of the use of contextualized functionalism to study constitution-making processes in a globalized environment that, we hope, will spur on others to do the same for other jurisdictions.

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Constitutional design between local and global imperatives

Comparative constitutional studies have truly come into their own in the last three decades.¹ For much of this period, and, arguably, in line with the common law heritage of the jurisdictions typically studied, the focus has been on courts as guardians of the constitution and the manner in which judges have understood and enforced constitutional rules.² More recently, leading academics in the field as well as those operating in policy circles have shifted attention to constitution making:³ the creation of big 'C' constitutions by means of formal processes. This is hardly surprising; from the late 20th century onwards, numerous countries around the world have engaged in constitution building or reform exercises as part of larger processes of decolonization,⁴ post-communist democratization,⁵ State building,⁶ post-conflict peace building,⁷ and political construction after radical revolutions.⁸ There is thus ample empirical material that can inform scholarly works on constitution making, which, in turn, hold out the tantalizing prospect for their authors that the conclusions reached will be of real practical interest to future constitution writers and their cast of (international) supporting actors.

The Asia-Pacific region has gone through several stages of constitution making since the late 19th century, with decolonization, in particular, spurring a flurry of activity in this regard.⁹ In more recent years, a new wave of constitution making has been taking place: East Timor, for example, adopted the

¹ See eg Theunis Roux, 'Comparative Constitutional Studies: Two Fields or One?' (2017) 13 *Ann Rev L & Social Science* 123; Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014).

² Constitutional cases, therefore, have dominated major textbooks on comparative constitutional law. See eg Norman Dorsen et al (eds), *Comparative Constitutionalism: Cases and Materials* (2nd edn, West 2010); Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law* (3rd edn, Foundation Press 2014).

³ See generally Hanna Lerner and David Landau (eds), *Comparative Constitution-Making* (Edward Elgar 2019); Sujit Choudhry and Tom Ginsburg (eds), *Constitution Making* (Edward Elgar 2017); Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (OUP 2016); International Institute for Democracy and Electoral Assistance (International IDEA), *Constitution-building* <<https://www.idea.int/our-work/what-we-do/constitution-building>>; Constitution-making for Peace Programme and Online Resource Center, *Supporting Constitution-Making for Peace Globally* <<http://constitutionmakingforpeace.org/>>.

⁴ Dietmar Rothermund, 'Constitution Making and Decolonization' (2006) 53 *Diogenes* 9.

⁵ Ruti Teitel, *Transitional Justice* (OUP 2000).

⁶ Laurel E Miller and Louis Aucoin (eds), *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace 2010)

⁷ Kirsti Samuels, 'Post-Conflict Peace-Building and Constitution-Making' (2006) 6 *Chicago J Intl L* 663.

⁸ Rainer Grote and Tilmann J Röder (eds), *Constitutionalism, Human Rights, and Islam after the Arab Spring* (OUP 2016).

⁹ See eg Kevin YL Tan, 'The Making and Remaking of Constitutions in Southeast Asia: An Overview' (2002) 6 *Singapore J Intl & Comp L* 1; Wen-Chen Chang et al, *Constitutionalism in Asia: Cases and Materials* (Hart 2014) 17–37.

nation's first Constitution in 2002.¹⁰ More recently, Thailand and Nepal have adopted new constitutions in 2016 and 2015 respectively,¹¹ while Sri Lanka and Myanmar are currently in the throes of constitution-making processes.¹² In the Pacific region too, many countries have recently engaged in constitution-building activities: Bougainville, Fiji, the Marshall Islands, New Caledonia, Solomon Islands, Tonga, and Tuvalu.¹³

As compared to the earlier epochs, a significant feature of the current stage is that constitutional drafters must complete the task at hand in a heavily globalized setting. In 1994, Laurence Friedman perceptively observed that '[t]here are no longer any hermit kingdoms'¹⁴ and theorized that '[w]hen societies have similar experiences, and are exposed to a single world of transport and communication, their legal systems too necessarily come closer together.'¹⁵ His views have been borne out, at least in part, in the constitutional domain: in 2008, renowned Asian scholars Jiunn-Rong Yeh and Wen-Chen Chang could confidently posit that 'most nations, in all directions of the globe, now have similar constitutions.'¹⁶ In his acclaimed article published a year later, Mark Tushnet went even further, claiming that the globalization of constitutional law is, in fact, 'inevitable.'¹⁷ While this assertion was articulated with reference to what is included in the constitution, we can say the same about how this text is fashioned.

Political leaders today look to constitution-making processes as opportunities to communicate not only with the citizenry but also with the world. As David Law and Mila Versteeg put it, constitutions are written for audiences 'ranging from domestic constituencies whose support is needed to ensure regime stability, to foreign investors who seek assurance that their investments are safe from expropriation, to other countries whose approbation is crucial to securing diplomatic recognition and national security.'¹⁸ Since a written,

¹⁰ Hilary Charlesworth, 'The Constitution of East Timor, May 20, 2002' (2003) 1 *Intl J Const L* 325

¹¹ Khemthong Tonsakulrungruang, 'Thailand: The State of Liberal Democracy' (2018) 16 *Intl J Const L* 643; Abrak Saati, 'Participatory Constitution-building in Nepal: A Comparison of the 2008–2012 and the 2013–2015 Process' (2017) 10 *Journal of Politics & Law* 29.

¹² Dinesha Samararatne, 'Public Consultation in Constitution Making – The Sri Lankan Experiment' *IACL-AIDC Blog* (6 June 2018) <<https://blog-iacl-aidc.org/blog/2018/6/5/public-consultation-in-constitution-making-the-sri-lankan-experiment>>; Nyi Nyi Kyaw, 'Myanmar's Constitutional Reform Process: A Pragmatic Prioritization of Process over Substantive Reform?' *Constitutionnet* (15 June 2018) <<http://constitutionnet.org/news/myanmars-constitutional-reform-process-pragmatic-prioritization-process-over-substantive>>.

¹³ Anna Dzedzic and Cheryl Saunders, 'Constitution-building in the Pacific in 2015' in Sumit Bisarya (ed), *Annual Review of Constitution-Building Processes 2015* (International IDEA 2016) 31.

¹⁴ Laurence M Friedman, 'Is There a Modern Legal Culture?' (1994) 7 *Ratio Juris* 117, 125.

¹⁵ *Ibid.*

¹⁶ Jiunn-Rong Yeh and Wen-Chen Chang, 'The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions' (2008) 27 *Penn St Intl L Rev* 89, 97.

¹⁷ Mark Tushnet, 'The Inevitable Globalization of Constitutional Law' (2009) 49 *Virginia J Intl L* 985, 987–95.

¹⁸ David S Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *Cal L Rev* 1172.

large-C constitution is practically regarded as a universal requirement of statehood, newly independent States will embark on constitution-making processes to secure recognition of their status as sovereign nations. In a similar vein, established States may decide to overhaul their existing constitution to augment their international legitimacy or better integrate themselves in the global community. Once the decision is taken to draft a new constitution, framers need to flesh out the process in which such work will be done. In doing so, they will be confronted, amongst others, with the emerging global norm of ensuring public participation in the making of a new constitution,¹⁹ in the wake of the resurgence of the notion of constituent power.²⁰ In answering the question what kind of mode of participation to adopt²¹ and, moving from procedure to substance, what kind of topics to feature in the deliberations, drafters can tap into a growing number of international constitutional networks and programs. In the past, foreign States were the leading peddlers of foreign ideas, and, in most instances, these States moreover had a pre-existing relationship with the country embarking on a constitutional-drafting exercise. Contemporary emissaries of foreign constitutional ideas include international organizations, non-governmental organizations (NGOs), and consultancy groups and academics.²² Importantly, taken together, these non-governmental actors vastly outnumber States *qua* constitutional advisors and include entities whose very mission is to provide guidance,²³ which means that they may do so even if the framers are not looking for, or even welcome, foreign input.²⁴

At the same time, the influx of global constitution-making ideas is constrained by, and filtered through, local political culture, the composition and power held by political elites, ideologies, and other factors that speak to the polity's identity. As a textbook on Asian constitutionalism puts it, 'the constitution is a site for mediating universal values and local particularities.'²⁵ This is

¹⁹ Vivien Hart, *Democratic Constitution-Making* (United States Institute of Peace 2003) 31; Thomas M Frank and Arun K Thiruvengadam, 'Norms of International Law Relating to the Constitution-Making Process' in Miller and Aucoin (n 6); John Morison, 'Citizen Participation: A Critical Look at the Democratic Adequacy of Government Consultations' (2017) 37 *Oxford J Leg Stud* 636, 637; Arak Saati, 'Participatory Constitution-Making as a Transnational Legal Norm: Why Does It "Stick" in Some Contexts and Not in Others?' (2017) 2 *UC Irvine J Intl Transtl & Comp L* 113.

²⁰ See eg Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2008); Martin Loughlin, 'The Concept of Constituent Power' (2014) 13 *Eur J Pol Theory* 218.

²¹ To be clear, that framers heed the norm of public participation to acculturate and socialize into the international community should not be taken, in and of itself, as evidence that they subscribe to its intrinsic merit.

²² For a historically contextualized discussion, see Tom Ginsburg, 'Constitutional Advice and Transnational Legal Order' (2017) 2 *UC Irvine J Intl Transtl & Comp L* 5.

²³ Such as the Venice Commission, on which, see Maartje de Visser, 'A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform' (2015) 63 *Am J Comp L* 701; Paul Craig, 'Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy' (2017) 2 *UC Irvine J Intl Transtl & Comp L* 57.

²⁴ Eg Wiktor Osiatynski, 'Paradoxes of Constitutional Borrowing' (2004) 1 *Intl J Const L* 244, 256.

²⁵ Chang et al (n 9) 69.

salutary; to buttress its legitimacy and enhance its longevity, a constitution 'must respond to local needs and...be "owned" by the people of the state concerned'.²⁶ Equally significant, there are operational questions that can only be answered with reference to the particular national context. To return to the quasi-general norm of public participation, what constitutes 'the people' is locally understood and practised. Do 'the people' include all individuals residing in a given territory, or are certain groups excluded? Do the views of those recognized as having a voice count equally, or are those of some communities accorded more weight? Can the diaspora participate in the constitution-making process? If the choice is made to use a constitutional convention or national assembly as the drafting body, these cannot include people as a whole; rather, their composition should be 'at most representative of the people'.²⁷ This begs the question of who these representatives should be, a question that takes on particular significance in deeply divided, or otherwise pluralistic, societies.²⁸ As the above discussion shows, the global inevitably becomes localized in its concrete manifestation.

It is against this backdrop that this issue explores how Asia-Pacific nations have conducted, or are conducting, constitution making in the face of pressures associated with globalization and how they balance those forces with domestic interests and realities. More precisely, what is the nature and origin of those global and local factors respectively? How do they interact: are they mutually constitutive of specific procedural choices; do they point in opposite directions and inject (more) tension in what often is a complex and sensitive process. And what are the consequences, both in terms of procedural choices and the eventual text of the constitution, that can be attributed to the interplay between global and domestic drivers and concerns?

In so doing, this issue is connected to recent scholarship in comparative constitutional law, which considers the transnational or global dimension of constitution making and the constitutions. For example, the important volume *Constitution-Making and Transnational Legal Order*, edited by Gregory Shaffer, Tom Ginsburg, and Terence C. Halliday, investigates constitution making as a transnational process and constitutions as transnational charters.²⁹ Yet this collection only includes one Asian case: Pakistan.³⁰ Apart from that, the *Virginia Journal of International Law* has recently published a collection of essays on the external dimensions of constitutions.³¹ Asian cases are not

²⁶ Cheryl Saunders, 'Constitution-Making in the 21st Century' (2012) 1 Intl Rev L 1, 9–10.

²⁷ Mark Tushnet, 'Constitution-Making: An Introduction' (2013) 91 Texas L Rev 1987.

²⁸ For an example, see Nicole Töpferwien, 'Participation and Representativeness in Constitution-making Processes' in Bisarya (n 13) 6 (reporting the use of quotas for different ethnic and other groups in Nepal's Constituent Assembly, decided by political parties).

²⁹ Gregory Shaffer, Tom Ginsburg and Terence C Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019).

³⁰ Harshan Kumarasingham, 'A Transnational Actor on a Dramatic Stage: Sir Ivor Jennings and the Manipulation of Westminster Style Democracy: The Case of Pakistan' in Shaffer, Ginsburg and Halliday (n 29) 55.

³¹ See papers in (2018) 57(3) Virginia J Intl L 493.

substantively incorporated in this volume though. This issue seeks to fill in the gap in comparative scholarship on the transnational dimensions of constitution making with a focus on Asia.

In addition, this issue builds on existing scholarship that chronicles historical antecedents in the region. Harshan Kumarasingham has compiled a fascinating collection of articles detailing the drafting of the constitutions of the British colonies in Asia on the cusp of independence—India, Pakistan, Sri Lanka, Malaysia, and Nepal—and pays tribute to the leading role played by Sir Ivor Jennings in these processes.³² In a similar vein, a recent book by Chaihark Hahm and Sung Ho Kim explores and theorizes the historical and political constitutive foundations of the constituent power during the democratic transitions in post-war Japan and South Korea.³³ At the same time, this issue is envisaged as a complement to several compilations that provide thick bottom-up, endogenous accounts of constitution making in the Asia-Pacific region.³⁴ These books introduce the reader to the intricate web of domestic socio-economic and political factors and factions that have shaped the manner in which formal constitutional change has taken place across a range of States in the region. Given their aim of presenting genuinely endogenous descriptions, the presence of ‘the global’ is not systematically considered in the case studies that are included; neither do these volumes explicitly seek to situate the local experiences in the Asia-Pacific region within the wider global story of comparative constitution making. In contrast, and as will be clear from the foregoing, the interplay between global constitutional norms and domestic conditions is at the heart of the articles that make up this issue to offer a more complete account of the constitution-making processes in the various countries.

Approach and methodology

From a methodological standpoint, the globalization of constitutional law calls for an approach that straddles functionalism in its strongest, Zweigert-and-Kötz sense with its presumption that both needs and chosen solutions are similar, if not the same, across different legal systems³⁵ and deep-level comparative law that sees virtually inseverable linkages between a society’s cultural,

³² Harshan Kumarasingham (ed), *Constitution-making in Asia: Decolonisation and State-Building in the Aftermath of the British Empire* (Routledge 2016).

³³ Chaihark Hahm and Sung Ho Kim, *Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea* (CUP 2015).

³⁴ Graham Hassall and Cheryl Saunders, *Asia-Pacific Constitutional Systems* (CUP 2002); Albert HY Chen (ed), *Constitutionalism in Asia in the Early Twenty-first Century* (CUP 2014); Marco Bünte and Björn Dressel (eds), *Politics and Constitutions in Southeast Asia* (Routledge 2016).

³⁵ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, translated by Tony Weir (3rd edn, OUP 1998) 39–40.

political, epistemic, and moral framework and its legal order.³⁶ Writing more generally on the respective merits of functionalism and contextualism for students of constitutional institutions and ideas, Vicki Jackson convincingly argues that it would be misguided to conceive of these as alternatives that one must choose between.³⁷ Rather, she proposes a reconciliation in the form of 'contextualised functionalism'. Such a methodology subscribes to the functionalist starting point of taking a common problem of constitutional life as the starting point of analysis—such as organizing constitutional change, safeguarding constitutional supremacy, structuring government, protecting rights—while being carefully attuned to local specificity and emphasizing the role of political attitudes, culture, and jurisprudential principles in examining how different legal systems tackle the problem.³⁸ To date, constitutional scholars have mainly applied contextualized functionalism to study constitutional texts and their interpretation, notably in the context of adjudication.³⁹ We suggest that its usefulness can be extended to understand the logically prior process of drafting new constitutions. This has informed the analytical framework that the contributors who prepared country-specific case studies were asked to apply.

Since familiarity with the various local conditions cannot be presumed, each country study opens with a succinct overview of any prior endeavours to draft a constitution and other salient historical events. At their core, the articles present the reader with a detailed account of the latest—at times, still ongoing—constitution-making process, subdivided into the phases of agenda setting, procedural design, adoption, and implementation. In this regard, the contributors were asked to engage with the following contextualized questions:

- Pressures of constitution making:⁴⁰ why did the State decide to embark on the constitution making process; did non-domestic actors, such as international organizations, NGOs, or other States, exert pressure in this regard and, if so, how did local actors (both those in power and the population more generally) respond to these and what were the local factors (for example, the legal, political, economic, and social changes) that drove the need for making a new constitution?

³⁶ Mark Van Hoecke, 'Deep Level Comparative Law' in Mark van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004); a more general overview of the different versions of deep level comparative law can be found in Mathias Siems, *Comparative Law* (CUP 2018) ch 5 and the references cited there.

³⁷ Vicki Jackson, 'Methodological Challenges in Comparative Constitutional Law' (2010) 28 Penn St Intl L Rev 326.

³⁸ Ruti Teitel, 'Comparative Constitutional Law in a Global Age' (2004) 115 Harvard L Rev 2581.

³⁹ Zachary Elkins, Tom Ginsburg and Beth Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) 54 Harv Intl LJ 64; Law and Versteeg (n 18); Rosalind Dixon and Eric Posner, 'The Limits of Constitutional Convergence' (2010) 11 Chicago J Intl L 399; David S Law, 'Globalization and the Future of Constitutional Rights' (2008) 102 NW UL Rev 1277.

⁴⁰ For a classic overview, see Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 Duke LJ 364.

- Constituent power: who did the people and the political elites / the State conceptualize as being the author of the constitution during the constitution-making process?
- Constitutional questions: what were the intellectual sources and realities that informed the deliberation of constitutional questions and the substance of the constitution; was reference made to international or foreign legal documents or practices and, if so, by whom; and to what extent did the consideration of international or foreign sources shape the final text of the constitution?
- Social conflict: how has the constitution-making process dealt with pre-existing social conflict or pluralism (for example, in the religious or ethnic domain) and to what extent and in what way has the reality of pluralism and social conflict affected the text of the constitution as eventually adopted (for example, in the preamble, arrangements for vertical power sharing, the design and make-up of State institutions, or the inclusion of minority rights provisions)?
- Public participation: was public participation in the constitution-making process envisaged and, if so, what form did this take and what forces pushed for public participation and how did public participation influence the outcome of the constitution-making process?
- International involvement: were non-national actors involved in the actual constitution-making process; what was the identity of these actors: foreign States, international organizations, NGOs, academics; was their involvement at the request of domestic actors (political parties, State bodies, interests groups) or on their own initiative; how did the domestic drafters respond to the fact of international involvement; what was the nature of the involvement of non-national actors (for example, did they provide foreign or international documents for inspiration, conduct workshops or trainings, meet with local interest groups during country visits); and how do you assess the knowledge of domestic concerns and interests on the part of these non-national actors?
- Aftermath: has the new or amended constitution entered into force; is it perceived as legitimate by the people and political stakeholders, both local and foreign; have there been problems with the implementation of particular constitutional provisions and arrangements; and what caused these problems, and, in particular, are the provisions or arrangements in question ones that international forces pushed for or shaped in other ways?

The countries featured in this issue are Nepal (by Bipin Adhikari), Thailand (by Andrew Harding and Rawin Lee), East Timor (by Joanne Wallis), Bhutan (by Venkat Iyer), Myanmar (by Nyi Nyi Kyaw), and Sri Lanka (by Austin Pullé and Suri Ratnapala). These countries are in the midst of, or have recently completed, either an overhaul or wide-ranging revision of their constitution, which means that a contemporary account can be provided. Their endeavours have attracted international attention, culminating, *inter alia*, in references to the desirability of ensuring that the process is inclusive and participatory,

thereby creating ideal conditions to observe the interaction between global constitutional norms and domestic conditions. Indeed, the sampling of the countries includes States seeking to establish or improve their governing frameworks and international standing (East Timor, Bhutan) as well as States that are looking to constitution making as a tool to realize national unity by overcoming ethnic and political conflict (Thailand, Nepal, and Sri Lanka) or decades-long domination by a military regime (Myanmar). These variations in national contexts cast in sharp relief any differences in the nature, strength, and municipal reception of international factors.

The six national narratives are complemented by this introduction and a thematic contribution by Cheryl Saunders that interrogate the global-local interplay from a conceptual-theoretical perspective. These are intended as a frame for the ethnographic case studies. At the same time, they serve as an agenda for further research, both from a methodological perspective (see our analytical framework elaborated above) and by pinpointing principal fault lines in the global-local interaction, with Cheryl Saunders asking what the growing presence of the global means for the conceptualization of the *pouvoir constituant* and related notions of ownership and accountability.

Reflections

The globalization of constitutional law challenges the conventional thinking of the large-C constitution as an autochthonous product that self-consciously articulates a nation's fundamental values, thereby differentiating it from others. Global sources and norms that inform the constitution-making process are manifold, from the physical presence of international organizations, NGOs, and other States to expectations that framers heed the quasi-universal norm of public participation to the heterogenization of the recipient society due to the migration of people as well as values and ideas. At the same time, it is clear that a constitution-making process remains embedded in, and conditioned by, the local ideational, political, institutional, socio-economic, and cultural environment. The resultant interplay of global and local factors creates continuing constitutional dynamics that are likely to continue long after the new constitution has entered into force and that will, amongst others, determine how the new formal rules are understood and operationalized by State institutions and the citizenry.

Crucially, the contributions in this issue show that, while the fact of the combined influence of domestic and foreign/global factors will be common to constitution-making processes around the Asia-Pacific region – and beyond – the precise way in which that combination plays out is determined by the force and nature of the domestic factors. There is, in other words, no single template or consistent set of variables that explains when and why the local wins out. In this sense, this issue pushes back against scholarship that celebrates constitutional convergence or the emergence of universal constitutional

ideals and functions⁴¹ as far as the design of constitution-making processes is concerned.⁴²

While this issue recounts the actual drafting of new constitutions in the Asia-Pacific region, it is axiomatic that the globalization of constitution making is not particular to the countries featured or their immediate neighbours. We therefore suggest that the validity and currency of the framework elaborated earlier should similarly not be confined to the geographic boundaries of that region. Indeed, the articles that follow this introduction should be seen as illustrations of the use of contextualized functionalism to study constitution-making processes in a globalized environment, which, we hope, will spur on others to do the same for other jurisdictions. This would help alleviate the present paucity of empirical material identified by Sujit Choudhry and Tom Ginsburg, who lament that constitution making 'is poorly understood because of the sheer diversity of environments in which constitutions are produced'.⁴³ Any development in that direction, in turn, would positively affect the evolution of constitutional theory pertaining to the design and operationalization of constitution-making processes.

⁴¹ Eg David Law, 'Generic Constitutional Law' (2005) 89 *Minnesota L Rev* 652; Dorsen et al (n 2).

⁴² Calls for a more balanced approach that covers both positive and negative responses to transnational constitutional influences as far as constitutional content and interpretation are concerned can, amongst others, be found in Dixon and Posner (n 39); Sujit Choudhry, 'The Lochner Era and Comparative Constitutionalism' (2004) 2 *Intl J Const L* 1; Vicki Jackson, *Constitutional Engagement in a Transnational Era* (OUP 2010); Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law (The George P. Smith Lecture in International Law)' (2006) 13 *Ind J Global L Stud* 37; Kim Lane Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models' (2003) 1 *Intl J Const L* 296; Li-ann Thio, 'Reception and Resistance: Globalisation, International Law and the Singapore Constitution' (2009) 4 *National Taiwan UL Rev* 335.

⁴³ Sujit Choudhry and Tom Ginsburg, 'Introduction' in Choudhry and Ginsburg (n 3) i.