


RESEARCH ARTICLE

Constitution transformation

Cheryl Saunders 

Melbourne Law School, University of Melbourne
Email: c.saunders@unimelb.edu.au

Abstract

This article explores the extent to which (if at all) the concept of a constitution is undergoing change in the conditions of globalization that characterize the early decades of the twenty-first century, to an extent that might be described as transformation. The question is prompted both by familiar manifestations of the interdependence of domestic constitutional and international law and practice, and by the interpretation placed on them by some of the literature on global constitutionalism. Some – although by no means all – of the literature and the experience on which it draws relate to the extent of transnational influence on the way in which constitutions now are made or changed: constitution transformation in the narrow, or more particular, sense. The article seeks to answer this question with reference to global constitutional experience, including – critically – experience in Asia, as one of the largest and most diverse regions of the world, too often omitted from studies of this kind. To this end, the article considers whether the concept of a constitution can be regarded as having been globally shared in any event; examines the phenomena associated with globalization that might suggest a paradigm change; and considers the arguments that mitigate against change, at least on a global scale. In exploring these factors, it necessarily considers the extent to which states in different regions of the world diverge in their experiences of the internationalization of constitutional law. The article concludes that, on balance, it is not plausible to argue that the generic concept of a constitution has changed, with global effect. It does, however, acknowledge that current conditions of globalization present a series of challenges for national constitutions. Responding to them might itself be regarded as an exercise in global constitutionalism.

Keywords: Asian constitutionalism; constitution transformation; globalization; national constitutionalism; transnational influence

I. Introduction

The central question for this article is whether the very concept of a national constitution is changing in conditions of globalization. In order to capture the significance of such a shift if, indeed, it is underway, the essay uses the terminology of transformation. I acknowledge, but try to avoid, the potential for confusion with another usage of transformation, also in connection with constitutions and constitutionalism, to describe the extent of the change that a constitution seeks to make to society, the precise nature of

which may vary with context.¹ Transformation in this sense assumes the underlying concept of a constitution but contributes to a categorization of constitutions based on purpose. I distinguish this usage of transformation further, in developing and explaining the present theme.

If transformation in the sense in which I use the term is occurring, it is prompted by a range of practical developments associated with globalization, on which theories of global constitutionalism draw.² I canvass these developments in due course, but they include both the expansion of the legal and political (and, perhaps, moral) authority of spheres of government above the level of the state and the practical opportunities to introduce global standards into national constitutions that have been offered by the extraordinary spate of constitution-making around the world since the end of the Cold War.³ Constitutional transformation might also be analysed by reference to theories of transnational legal ordering. For our present purposes, however, the distinction between theories of global constitutionalism with a bearing on national constitutions and transnational legal ordering in its application to constitutions is not sufficiently significant to be pursued further.⁴

Ultimately, the article concludes that the concept of a constitution has not been transformed in the ways that the myriad forces of globalization might suggest. To reach this point, the article necessarily engages with the idea of a constitution, in order to assess the extent to which there is or has been a conception that is sufficiently shared to justify examination of the possibility of transformation. This is the subject of the rest of this part. The commonality of the conception of a constitution is explored in Part II. Parts III and IV examine the evidence for and against constitutional transformation, in the sense in which the term is used here. A brief conclusion pushes back against claims of a paradigm change. It nevertheless shows that there are still isolated constitutional phenomena, which might be attributed to globalization, for which the common conception of a constitution cannot fully account. The article also argues that the dynamics of globalization highlight the significance of those aspects of constitutions that relate to the manner in which states deal with the rest of the world, and that these deserve more attention than they generally receive.

The concept of a constitution on which the article draws involves a close link with the state for which a constitution is devised and on which its efficacy depends. To head off a straw man sometimes introduced, however, no constitution is made or designed in a vacuum.⁵ External influence is inevitable, even though its nature and extent may vary. The link with the state nevertheless has primacy for theoretical, symbolic and functional purposes, in ways explored in the later parts of this article.

¹P Langa, 'Transformative Constitutionalism' (2006) 17(3) *Stellenbosch Law Review* 351.

²A recent, particularly relevant, addition to a voluminous literature is T Suami, A Peters, D Vanoverbeke and M Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, Cambridge, 2018).

³At least 110 new constitutions have been made over this 30-year period; others have been substantially amended: Central Intelligence Agency, *The World Factbook*, available at <<https://www.cia.gov/library/publications/the-world-factbook/fields/307.html>>.

⁴G Shaffer, T Ginsburg and TC Halliday (eds), *Constitution-Making and Transnational Legal Order* (Cambridge University Press, Cambridge, 2019).

⁵For example, T Ginsburg, TC Halliday and G Shaffer, 'Constitution-Making as Transnational Legal Ordering' in G Shaffer, T Ginsburg and TC Halliday (eds), *Constitution-Making and Transnational Legal Order* (Cambridge University Press, Cambridge, 2019) 1, 2, 9.

A constitution may take a variety of forms. The now typical core features of what Martin Loughlin has characterized as a 'modern' constitution, however, began to take shape towards the end of the eighteenth century, following the revolutions in the United States and France.⁶ It now frames understandings of the concept of a constitution across the world. I make this claim with diffidence because, as Part II of the essay shows, not all of these core features are globally shared. At a level of generalization, however, it is nevertheless accurate enough. On this basis, a constitution generally is a written instrument, through which a deliberate attempt is made to set out a framework for the government of a state for the foreseeable future, which is distinguishable from other law and superior to it. Such an instrument requires legitimacy in the eyes of those subject to it. Legitimacy may derive from several factors, including the effectiveness of a constitution over time. Critically, however, factors contributing to legitimacy include the authority for the constitution, which has come to be accepted as the people of the state, in some sense and on some basis, whether assumed in theory, demonstrated in practice or both. The concept of a constitution, understood in this generic way, can be distinguished from at least three other ways of thinking about constitutions, by reference to content, purpose or effect.

First, the concept of a constitution does not prescribe particular content,⁷ perhaps unlike the associated concept of constitutionalism.⁸ It follows that trends in the typical subject-matter of constitutions do not, without more, amount to transformation. It may be accepted that, after 1989, constitutions around the world increasingly adopted features of liberal democracies, in terms of elected institutions, separation of powers, guarantees of rights and institutional protection for courts exercising functions of judicial review.⁹ It may even be that the content of many constitutions has converged further, around common forms of recognized rights and a smallish range of models for government, in consequence of a process evocatively captured by Günter Frankenberg as the 'IKEA approach' to constitutional transplants.¹⁰ The significance and effect of these developments are complex questions that deserve analysis, using the tools of comparative constitutional law. They are not directly relevant for our present purposes, however, and are not considered further here.

Second, the concept of a constitution is not directly engaged by the purposes or goals of constitutions. Depending on context, constitutions may vary by reference to purpose. Cobbling together taxonomies, purpose can be used, for example, to distinguish between constitutions that are traditional, transitional or transformational; this last in the alternative sense to which reference was made earlier.¹¹ A traditional constitution typically is

⁶M Loughlin, *Foundations of Public Law* (Oxford University Press, Oxford, 2010) 276.

⁷D Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010) 3, 9–10.

⁸Although cf. D Feldman, "'Which in Your Case You Have Not Got": Constitutionalism at Home and Abroad' (2011) 64 *Current Legal Problems* 117.

⁹R Hirschl, 'The Strategic Foundations of Constitutions' in DJ Galligan and M Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press, Cambridge, 2013) 157.

¹⁰G Frankenberg, 'Constitutional Transfer: the IKEA Theory Revisited' (2010) 8 *I-CON: International Journal of Constitutional Law* 563.

¹¹J-R Yeh and W-C Chang, 'The Changing Landscape of Modern Constitutionalism: Transitional Perspective' (2009) 4 *National Taiwan University Law Review* 145; Langa (n 1). Yeh and Chang have also developed a taxonomy that includes 'transnational' constitutions: J-R Yeh and W-C Chang, 'The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions' (2008) 27 *Penn State International Law Review* 89. Insofar as they apply this category to national constitutions in ways that raise the

concerned with state-building in a form that provides for the best possible framework for government, including rights protection against state institutions, on which the framers of the constitution can agree.¹² A transitional constitution, on one understanding of the term, may be put in place for instrumental purposes with a view to its progressive evolution over time.¹³ A transformational constitution, by contrast, is directed to broader changes, in society and the economy, as well as in the governance of the state, and may place particular responsibilities on the performance of courts.¹⁴ The cohesion within these categories and the distinctions between them are not as marked as a taxonomy implies, although they can be useful for comparative purposes. They may even have an indirect bearing on concepts of a constitution, as Part II of this article shows. Purpose alone, however – at least within this range – does not affect the concept of a constitution.

Third, for the purposes of this article, the concept of a constitution should be distinguished from ways of thinking about constitutions by reference to compliance, and therefore effect. This is an old approach to the categorization of constitutions. In an earlier phase, in 1957, Karl Loewenstein classified constitutions by reference to compliance as ‘normative’, ‘nominal’ or ‘semantic’, where a normative constitution is ‘faithfully observed’ and a semantic constitution effectively is a constitution in name only.¹⁵ More recently, Albert Chen has adapted the taxonomies of Loewenstein and Sartori¹⁶ to contemporary purposes, overlaying degrees of constitutional compliance with measurements of liberal democratic norms and applying the results to an analysis of constitutional systems in East Asia.¹⁷ Chen developed four categories, ranging from category I, in which liberal democracy and a normative constitution align, to category IV, in which authoritarian systems are associated with semantic or nominal constitutions.¹⁸ While there is considerable variation in the operation of constitutions at the two ends of the spectrum, Chen’s applied analysis shows movement between categories over time and a degree of effectiveness even of constitutional arrangements that fall within his category IV. Again, therefore, while both the democratic character of constitutions and their effectiveness in practice may be critical points of distinction in comparative work, they do not necessarily bear directly on the concept of a constitution, except perhaps in the most extreme cases.

The question of whether the very concept of a constitution is changing is one of many puzzles associated with globalization. The Asia-Pacific region offers a particularly appropriate context in which to look for answers. These are large and significant regions, home

possibility of an external source of legitimacy, the concept of a constitution is potentially engaged. I consider transnational constitutions further in Part III.

¹²Yeh and Chang, ‘The Changing Landscape of Modern Constitutionalism’ (n 11).

¹³Ibid. A transitional constitution might also, in some contexts, refer to a constitution intended to last for only for an interim period, with obvious implications for durability and potentially also for legitimacy: K Zulueta-Fülscher, ‘Interim Constitutions: Peacekeeping and Democracy-Building Tools’ (*International IDEA*, Policy Paper 2015).

¹⁴Langa (n 1); M Hailbronner, ‘Transformative Constitutionalism: Not Only in the Global South’ (2017) 65(3) *American Journal of Comparative Law* 527.

¹⁵K Loewenstein, *Political Power and the Governmental Process* (University of Chicago Press, Chicago, 1957) 148–49.

¹⁶G Sartori, ‘Constitutionalism: A Preliminary Discussion’ (1962) 56(4) *American Political Science Review* 853.

¹⁷AHY Chen, ‘Constitutions, Constitutional Practice and Constitutionalism in East Asia’ in C Antons (ed), *Routledge Handbook of Asian Law* (Routledge, London, 2016) 75.

¹⁸Ibid 79, 88.

to more than a quarter of the member states of the United Nations and of many other largely autonomous polities. They are sites of extraordinary diversity, in language, religion, culture, historical experience and governance. Asia and the Pacific have experienced the current phase of globalization somewhat differently to many other parts of the world, including in the range and depth of regional integration. Asia and the Pacific nevertheless are regularly omitted from analyses on which generalizations about global constitutionalism are based. If claims about globalization do not hold true in the Asia-Pacific region, they do not reflect genuinely global phenomena at all, significant though they may be in particular parts of the world.

II. Has there ever been a common concept of a constitution?

Logically, a critical examination of whether there is a sufficiently common global concept of a constitution precedes consideration of whether the concept has changed. It is also an important issue in its own right. Different understandings that underlie many terms in frequent use in constitutional law bedevil comparative research if they are not recognized and taken into account.¹⁹ If the term ‘constitution’ is one of these, it has implications for many comparative projects, of which this is only one. In what follows, I ultimately conclude that, at an appropriate level of generality, the concept of a constitution is sufficiently widely shared for the broader inquiry into transformation to be sustainable. I accept, nevertheless, that there are important differences, which qualify the findings and are potentially relevant to other problems of comparative constitutional law.

The concept of a constitution that is currently assumed emerged from revolutionary contexts in the United States and France at the end of the eighteenth century. It spread to much of the rest of the world in a complex variety of ways, both voluntary and less voluntary, over the following two centuries. Such a process of diffusion, over time and space, suggests plenty of opportunity for difference to emerge. It is not necessary to trace the history of the idea to establish this point, instructive though such a project would be. Even the two early prototypes differed from each other in significant ways. Like most constitutional phenomena, the idea of a constitution with which the revolutionaries worked built on earlier ideas with a long history, many of which were shared, although emphases differed.²⁰ The revolutionary context was another common feature of the two events, providing a catalyst for both constitutions. There were also key contextual differences between them, however, which fed into the concepts of a constitution that emerged. For example, the distinction between popular sovereignty in the US tradition and national sovereignty in the French tradition are variations on the way of conceiving the role of the people and goes to the source of authority for a constitution.²¹ In a similar vein, the understanding of the constitution as fundamental law in the United States, which proved ultimately to be enforceable through ordinary courts, was not shared in France

¹⁹‘Separation of powers’ is one example, which I have previously explored: C Saunders, ‘Theoretical Underpinnings of Separations of Powers’ in G Jacobsohn and M Schor (eds), *Comparative Constitutional Theory* (Edward Elgar, Cheltenham, 2018) 66.

²⁰Among many works that make the point, see the complex origins of popular sovereignty and the ideas associated with it in D Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford University Press, Oxford, 2016) 1–20.

²¹D Grimm, *Sovereignty* (Columbia University Press, New York, 2015) 39–40. Flow-on implications of the difference include understanding of the relations between people and representatives, both generally and in the context of constitutional change.

where, even now, constitutional control takes a distinctive form.²² These and other differences in the original concept of a constitution have since tended to converge to a degree. At the outset, however, they were a source of variation in the concept as it spread, founding somewhat different constitutional traditions, of which significant traces remain.

Even this brief, impressionistic history of the global spread of the concept of a constitution suggests the potential for differences to emerge. Three catalysts for difference deserve particular attention.

First, the 'modern' concept of a constitution did not spread everywhere. Most obviously, the United Kingdom still has an uncodified constitution in conditions that might be argued to affect the very concept. The constitution is not fundamental law, and substantial parts of it are not law at all. The constitution is not a deliberate prescription of arrangements for government, but rather a consequence of the evolution of arrangements that have been used over time. The legitimacy of the British Constitution historically depends on its organic character rather than the authority of a sovereign author – virtual or otherwise. There is a resulting ambiguity in the identity of the constituent power, which is not entirely resolved by identifying parliament as the legal sovereign and the people as the political sovereign, a faultline recently exposed by the dilemma of Brexit.²³ These differences in the concept of a constitution in the United Kingdom once led David Feldman to equate 'constitutionalism' as 'a commitment to using distinctively constitutional modes of argument ... and constitutional processes to mediate disagreements ... between institutions with different visions or interpretations of the Constitution'.²⁴ While this prescription may have some resonance in understandings of constitutionalism elsewhere, it is underpinned by an assumption that the constitution is not fundamental law. Such differences of definition and emphasis in the British understanding of a constitution have left their mark in other states with constitutions that more closely fit the modern concept of a constitution.²⁵

Second, variations in the concept of a constitution may develop as a response to the context in which a constitution is adopted and evolves. There are myriad ways in which this might be so. Continental Europe offers an example. As a generalization, the context that led to the adoption of constitutions in broadly contemporary form in many western European states, including Germany, involved the fragmentation of public authority in feudal Europe as the contemporary state emerged; the chaos caused by religious wars; attempts by monarchs to head-off revolution by offering instruments termed constitutions in which they limited their own power; and the eventual adoption of constitutional instruments for which other sources of legitimacy needed to be found.²⁶ This context helps to explain the emphases in understandings of a constitution in states in this tradition. Thus, the five characteristics of constitutionalism identified by Dieter Grimm include the need for regulation of public power by the Constitution to be 'comprehensive in the sense that no extra-constitutional bearers of public power ... are recognized'.²⁷ The

²²*Marbury v Madison* 5 U.S. 137 (1803); E Zoller, *Introduction to Public Law: A Comparative Study* (Martinus Nijhoff, Leiden, 2008) 220–21; *Constitution of the French Republic 1958* Art 61-1.

²³*R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61.

²⁴Feldman (n 8) 123.

²⁵Most obviously New Zealand, which also has no overriding constitutional instrument. Many of the other states in the former British Commonwealth share some similar attitudes, however, affecting the scope of the fundamental law, modes of interpretation and understandings of sources of authority.

²⁶Grimm (n 7) 6–8.

²⁷*Ibid* 9.

point is acceptable enough, but the priority accorded to it in this account of the concept of a constitution arguably reflects the European past as well, perhaps, as present debates about the impact of the European Union. Similarly, while the distinction on which Grimm insists, between *'pouvoir constituant* and *pouvoir constitué*', is familiar in constitutional discourse, it receives much less emphasis in constitutional traditions that have not been confronted by the contrast between granted Constitutions and those derived from an exercise of popular sovereignty or those that have handled the contrast in a different way.²⁸

Third, in a related point, the concept of a constitution may vary with the conditions in which the idea is adapted for use. This possibility is heightened where a constitution is adopted for instrumental purposes in polities with long-established approaches to governance that differ significantly from those in the states from which the concept of a constitution originated. Thus Jiunn-rong Yeh and Wen-Chen Chang argue that East Asian states initially adopted constitutions with a view to the 'modernization' of 'ancient states', to emulate the path to economic development that they saw elsewhere.²⁹ In an example of another kind, other states – including Thailand and Tonga – initially adopted constitutions for the even more basic instrumental purposes of deterring Western intrusion.³⁰ Of course, over time the concept of constitutions adopted for such instrumental reasons may evolve to become closer to what appears to be the global norm, as Yeh and Chang argue in relation to East Asia.³¹ It is nevertheless plausible that in some states constitutions continue to vie with other norms and practices in ways that affect the concept of a constitution itself. Thailand is an example where, it has been argued, successive written constitutions have 'no real meaning in Thai culture', leaving them vulnerable to repeated abrogation.³² In these circumstances, a written constitution does not embody the most fundamental law or set of norms and is not complete in its coverage of the sources of public power. Rather, there is an underlying 'cultural constitution', which derives its legitimacy from 'the long-term experience of the society over centuries'.³³

These variations reinforce the need for care in making claims about a global concept of a constitution. At a sufficient level of generality, however, the concept is sufficiently widely shared for the claim to be safe enough. If anything, in conditions of globalization, variations in the concept of a constitution, originally attributable to historical factors, are converging, although the possibility remains that convergence is by no means complete. Some evidence for convergence comes from the astonishing diffusion of the doctrine of unconstitutional constitutional amendment, despite its original dependence on theories about constituent power that are not universally shared.³⁴ In any event, I note in passing a point that becomes relevant below: whatever the differences in emphasis in

²⁸L Lacchè, 'Granted Constitutions. The Theory of *octroi* and Constitutional Experiments in Europe in the Aftermath of the French Revolution' (2013) 9(2) *European Constitutional Law Review* 285.

²⁹J-R Yeh and W-C Chang, 'The Emergence of East Asian Constitutionalism: Features in Comparison' (2011) 59(3) *American Journal of Comparative Law* 805, 819.

³⁰N Eeoseewong, 'The Thai Cultural Constitution' (2003) 3 *Kyoto Review of South East Asia*, available at <<https://kyotoreview.org/issue-3-nations-and-stories/the-thai-cultural-constitution>>; G Powles, 'Testing Tradition in Tonga: Approaches to Constitutional Change' (2007) 13 *Revue Juridique Polynésienne* 111.

³¹Yeh and Chang (n 29).

³²Eeoseewong (n 30).

³³*Ibid.*

³⁴Y Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, Oxford, 2017).

understandings of a constitution, all assume that the legitimacy of constitutions relies on authority within the state and, usually, authority derived from the people of the state.

The next part considers whether this complex concept of a national constitution is presently undergoing substantial change in ways suggested by some of the literature on global constitutionalism.

III. The case for (a degree of) transformation

Impact of globalization

The principal case for transformation stems from developments at the international, rather than domestic, level, which are given theoretical shape by observers seeking to make sense of contemporary conditions of global interdependence and transnational collaboration.

If change is occurring, it affects the touchstones for legitimacy by adding a requirement for international approval. To the extent that international approval is required from the outset, moreover, it affects the identity of the constituent power. If, in these circumstances, a constitution is less responsive to national conditions, or is perceived to be less responsive, it plays less of a symbolic role and may have a more precarious claim to observance as fundamental law. As a *quid pro quo*, however, the role of a constitution may be reimagined as comprising a network of instruments of a distinctive legal kind, providing an intermediary between ordinary domestic and international law, in which international norms are enshrined and through which they become at least formally binding on domestic legal orders.

The struggle to interpret the impact of globalization on the concept of a constitution is mirrored in comparable questions about the impact of globalization on the institution of the state. With hindsight, these questions have been live throughout most of the twentieth century and into the twenty-first, driven by factors that include the erosion of the significance of territorial borders by, for example, religion and political ideologies; the need for transnational collaboration on a growing range of shared problems; the establishment and evolution of international law and institutions; and the failure of many states to provide basic needs for their people in terms of security and welfare. Over the course of this period, questions about the future of the state peaked at key moments: between the wars; in 1945; in 1989.³⁵ Despite the intervening troughs, the questions have remained relevant, shaped by increasing interdependence. De facto, at least, the sovereignty of states has been eroded to a degree, which varies significantly between states, by international law and practice. New forms of regional integration, through which states pool sovereignty for mutual advantage, make further inroads still, not least because, as Brexit shows, they are hard to unwind.

On the other hand, predictions of the significant decline or even disappearance of the institution of the state,³⁶ many of which were prompted by economic and other responses to the end of the Cold War, also are implausible, at least as matters presently stand. Whatever their faults, states currently are the largest territorial form with which

³⁵The post-1989 phenomenon is well known. For the earlier periods, see O Rosenboim, *The Emergence of Globalism: Visions of World Order in Britain and the United States, 1939–1950* (Princeton University Press, Princeton, NJ, 2017).

³⁶For example, K Omae, *The End of the Nation State: The Rise of Regional Economies* (Simon and Schuster, New York, 1995).

communities, grouped as citizens, identify. They are the principal form of polity through which democracy as presently understood is practicable, with all that it potentially offers in terms of identifying and serving a common good. States are a critical precondition for the operation of international law and international relations. If there were to be change, research on drivers of the size of states and the incidence of secession movements around the world suggests that a move to smaller, rather than larger, polities is at least as likely, notwithstanding its challenges for regional and international arrangements.³⁷ In the shortish term at least, the most likely scenario is the continuation of states with a degree of authority that can reasonably be described in terms of sovereignty, coexisting with other levels of government in relationships that require careful nurturing and considerable nuance.³⁸

Questions about state sovereignty may affect the concept of a constitution as well. But the implications of globalization for the concept of a constitution are also an issue. The issue is not new: as the brief discussion in the earlier part showed, the initial spread of the concept of a constitution is attributable to earlier phases of globalization, including processes of conquest and colonization. Neither any longer is permissible at international law.³⁹ In its place is a new, at least equally deep phase of globalization, in which some states still are much more influential than others, despite formal equality.

Critical to the current phase of globalization, from the standpoint of constitutions, is the growth of international law and institutions, buttressed by at least two other phenomena: the horizontal interdependence of states in terms of economy, environment, health and security; and the rapidity of global communication through ever-improving technology. At the heart of the international system is the United Nations, established in the wake of World War II, with an overriding authority in the face of threats to global peace and security that has been expansively understood, if inconsistently exercised.⁴⁰ In turn, the creation of the United Nations was the institutional catalyst for the international recognition of a wide and deep range of international norms, including international human rights norms.⁴¹ The vast majority of states became parties to these instruments,⁴² many of which also have implications for constitutional institutional design, as exemplified by, for example, protection for independent courts and free and fair elections.⁴³ Domestic application of international norms is by no means necessarily guaranteed.⁴⁴ This familiar weakness of international law has been tempered, however, by the practices of monism in parts of the world;⁴⁵ the use of Security Council resolutions in ways that

³⁷A Alesina and E Spolaore, *The Size of Nations* (MIT Press, Cambridge, MA, 2003).

³⁸Joseph Raz, 'The Future of State Sovereignty' (Kings College London Dickson Poon School of Law Legal Studies Research Paper No 2017-42).

³⁹OA Hathaway and SJ Shapiro, *The Internationalists: How A Radical Plan to Outlaw War Remade the World* (Simon and Schuster, New York, 2017).

⁴⁰M Mazower, *Governing the World: The History of an Idea* (Penguin, New York, 2012); *Charter of the United Nations 1945* Ch VII.

⁴¹Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press, Cambridge, MA, 2010) Ch 5.

⁴²On motivation, see OA Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (2007) 51(4) *Journal of Conflict Resolution* 588.

⁴³See, for example, GH Fox, 'International Law and the Entitlement to Democracy after War' (2003) 9 (2) *Global Governance* 179.

⁴⁴Hathaway (n 42).

⁴⁵Both de jure and functional monism may be relevant: on the latter, see MA Waters, 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007) 107(3) *Columbia Law Review* 628.

sometimes have implications for domestic law and constitutions;⁴⁶ the continual refinement of international monitoring mechanisms;⁴⁷ and pressure for domestic compliance from the Bretton Woods institutions and other transnational financial bodies through the use of sanctions by individual states and/or through conditions attached to development aid.

In some parts of the world, the impact of international forces on national constitutions has been deepened further by regional arrangements, some of which circumvent problems of enforcement that plague the international sphere by making supra-national norms and values conditions of membership. The European Union is the obvious case in point, the impact of which is further reinforced by its symbiotic relationship with the Council of Europe and the European Convention on Human Rights, including the monitoring role of the Venice Commission.⁴⁸ Thus the Treaty on European Union prescribes the values on which it is based and on which its accession criteria draw, and provides a mechanism for dealing with breach by a member state, difficult though that has proved to apply.⁴⁹ Other arrangements for regional integration and regional human rights protection in other parts of the world, including Africa and Latin America, are different in ambition, and perhaps levels of compliance, but have broadly similar implications for the constitutional systems of their member states for present purposes.⁵⁰ This is not so with the quite different sub-regional arrangements that presently exist in Asia and the Pacific, a point to which I return in the next part.⁵¹

Constitution-making

The earlier section shows how international actors and international norms affect the substance and operation of national constitutions in current conditions of globalization. This section considers constitution-making as the point at which national constitutions are most susceptible to international influence. The conditions in which a constitution is made lay important foundations for its ongoing acceptance as fundamental law. Constitution-making is not a final determinant of legitimacy, as the success of the constitutions made during post-war occupation in Germany and Japan shows. For the purposes of this article, however, understanding of the impact of globalization on constitution-making is integral to an assessment of whether the concept of a constitution is undergoing transformation.

In the decades since the end of the Cold War, whether by happenstance or design, there has been extensive external engagement with national constitution-making processes. The entry point for external actors is most obvious when constitution-making is linked to the resolution of conflict even where, as now is the case more often than not, the conflict is

⁴⁶M Wiechers, 'Namibia: The 1982 Constitutional Principles and Their Legal Significance' (1989–90) 15 *South African Yearbook of International Law* 1.

⁴⁷Moyn (n 41).

⁴⁸P Craig, 'Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy' in G Shaffer, T Ginsburg and TC Halliday (eds), *Constitution-Making and Transnational Legal Order* (Cambridge University Press, Cambridge, 2019) 156.

⁴⁹Arts 2, 7.

⁵⁰M Wiebusch, 'The Role of Regional Organizations in the Protection of Constitutionalism' (*International IDEA*, Discussion Paper 17, 2016).

⁵¹T Hsien-Li, 'Regional Organizations' in S Chesterman, H Owada and B Saul (eds), *The Oxford Handbook of International Law in Asia and the Pacific* (Oxford University Press, Oxford, 2019) 37.

intra-, rather than inter-state in nature. Intra-state conflicts may have spillover effects, actually or virtually, engaging neighbouring states and others. Threats to international peace and security attract the authority of UN institutions under the UN Charter.

UN involvement is by no means confined to cases that can be explained in these ways, however. From shortly after its inception, but with gathering momentum after 1989, a range of UN agencies have offered assistance and support to states in the global south on democracy-building, including the conduct of elections and on compliance with international human rights standards. While constitutional assistance was initially encompassed by broader UN programs such as rule of law, by 2009 at the latest the United Nations engaged in it explicitly,⁵² as an adjunct to peace-building,⁵³ human rights advocacy⁵⁴ or development generally.⁵⁵ The United Nations is only one external actor engaged in these activities, moreover. Among myriad others are regional organizations such as the European Union or the African Union; intergovernmental organizations of which the Commonwealth or International IDEA are examples; international NGOs such as Interpeace; and individual states, as neighbours, donors of aid or in some other capacity.⁵⁶

These diverse and far-reaching forms of constitutional engagement are a means by which international norms and standards – a category with somewhat imprecise boundaries – may be incorporated into domestic law at the level of the constitution and thus as supreme law. More significantly for present purposes, they also raise questions about sources of constitutional authority. In fact it is rare, even now, for external forces overtly to prescribe a constitution. The annexation of a Constitution for Bosnia-Herzegovina to the Dayton Peace Agreement remains an exception in this respect.⁵⁷ External involvement in some other constitution building comes close to prescription, however, or at least exceeds mere influence. US involvement in determining the substance of the Constitution of Iraq during and after the occupation is one example.⁵⁸ The effect of the rules of accession to the European Union on aspiring member states is another, albeit of a different kind. Security Council resolutions that prescribe process or substance for constitution-making in a state emerging from conflict also fall into this category.⁵⁹

The vast bulk of external involvement is officially consensual, however, described in terms of ‘assistance’ or ‘support’. Its de facto authority comes from uneven power relations and the financial resources that often accompany constitution-making advice. Its effect is

⁵²UN Secretary-General, ‘Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes’ (United Nations April 2009) available at <https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf>.

⁵³UN Peacemaker, ‘Seventh Issue: December 2017’ (United Nations December 2017) available at <<https://peacemaker.un.org/Constitutions/Newsletter>>, describing constitutional change as ‘pivotal to ensuring peace and stability’.

⁵⁴UN Human Rights, ‘Human Rights and Constitution Making’ (United Nations 2018) available at <https://www.ohchr.org/Documents/Publications/ConstitutionMaking_EN.pdf>.

⁵⁵UN Development Programme, ‘UNDP Guidance Note on Constitution-Making Support’ (United Nations 20 September 2016) available at <<https://www.undp.org/content/dam/undp/library/Democratic%20Governance/Parliamentary%20Development/Constitution-Making-Support-Guidance-Note.pdf>>.

⁵⁶C Saunders, ‘International Involvement in Constitution Making’ in D Landau and H Lerner (eds), *Comparative Constitution Making* (Edward Elgar, Cheltenham, 2019) 69.

⁵⁷*General Framework Agreement for Peace in Bosnia and Herzegovina* 1995, Annex 4.

⁵⁸Z Al-Ali, *The Struggle for Iraq’s Future: How Corruption, Incompetence and Sectarianism Have Undermined Democracy* (Yale University Press, New Haven, CT, 2014).

⁵⁹For example, UNSC Resolution 2254 (2015) in relation to Syria.

also underpinned by recourse to claims of international standards and support from international actors by advocates inside a state during a constitution-making process. On one view, this is no more than the give and take that might be expected, and indeed needed, in a process of this kind. On the other hand, this dynamic contributes to the overall picture of the impact of globalization on national constitutions.

Interpretation of the significance of external involvement in national constitution-making also needs to take account of the limits that external actors themselves identify. These are most explicit in the case of the United Nations, where key documents consistently describe constitution-making as a 'sovereign process' and stress the need for 'national ownership and leadership'.⁶⁰ These disclaimers are sometimes hard to reconcile with the circumstances in which they are invoked, however. In relation to the Syrian constitutional process, for example, the intense involvement of both the United Nations and other interested states, including Turkey, Russia and Iran, presents challenges for an outcome that is 'nationally owned'.⁶¹

Analysis is further complicated by the ambiguity of the idea of national ownership and leadership. In the context of guidance about the nature and extent of external involvement in constitution-making, particularly when juxtaposed with references to the 'sovereign' nature of the process, 'national' ownership might be understood in contradistinction to 'foreign' ownership. The emphasis on public participation, which also appears in the guidance notes, suggests another possibility: that national ownership mandates an inclusive constitution-making process, involving the 'nation' practically as well as virtually. While the concept of a constitution ideally calls for a more inclusive constitution-making process, determination of its nature and extent, from the top down, makes it another internationally derived standard.

Global constitutionalism

In summary, therefore, the case for transformation of the concept of a constitution depends on the following observations. First, there has been a degree of convergence in national constitutions both through transnational borrowing and the incorporation of international norms, each facilitated in a variety of ways connected with globalization. Second, there has been extensive engagement of external actors in national constitution-making projects, affecting both the processes followed and the substance of the new constitutional arrangements adopted. In most cases external involvement is not formally determinative, but in many it is influential nevertheless. Third, while external influence is significantly less once a constitution takes effect, there are mechanisms at both the regional and international levels through which some of the more egregious aspects of constitutions in operation can be monitored, although with variable effect.

These various phenomena have fuelled that part of the literature on global constitutionalism that pertains to the nature and function of national constitutions. Much of this is complementary to the primary focus of global constitutionalism, which is on the constitutionalization of levels of government above the state. From the standpoint of national constitutions, speculation revolves around two poles. One questions whether

⁶⁰See UN Secretary-General (n 52) and UN Development Programme (n 55).

⁶¹But see the statement by the Secretary-General on the launch of the Syrian Constitutional Committee, describing it as 'Syrian-owned and Syrian-led': 'UN Chief Announces Progress on Committee to Shape Syria's Political Future' (*UN News*, 23 September 2019), available at <<https://news.un.org/en/story/2019/09/1047092>>.

national constitutions have now become components of a 'compound constitutional system', supplemented by international law.⁶² The other asks whether, in the circumstances, the constituent power is now located in, or at least shared with, the international sphere.⁶³

If either or both were correct, it would be arguable that transformation of the concept of a constitution was in train. There would also be work to be done on the consequences that might follow from such a significant theoretical and practical change. Before drawing such conclusions, however, it is necessary to consider indicators that the concept of a constitution remains broadly as it was, albeit operating within a globalizing environment.

IV. Contraindications

The arguments against constitutional transformation, despite the implications of globalization, rest on three bases. These can be characterized in terms of evidence, belief and effectiveness.

Evidence

As the earlier part of this article showed, the case for transformation can be traced to a series of developments over the past 30 or so years. One is the expansion in the strength and depth of international law – particularly international human rights law, but also international economic law, reinforced by internationalized dispute-resolution processes.⁶⁴ A more specific development is the spate of constitution-making and constitutional change, particularly in post-conflict states, which is influenced by international actors in a variety of ways. Finally, and by no means least, the deepening of regional integration, particularly in Europe, has had effects that potentially bear on the concept of a constitution.⁶⁵

However significant these factors are in relation to many states, they do not apply everywhere in the ways that can found claims of global transformation. Not all states are parties to the same range of international treaties. International legal norms are not incorporated directly in or even through the constitutions of many states or the decisions of national courts. Not all states have participated in the spate of constitution-making that has characterized the early twenty-first century. Of those that have done so, not all have been exposed to or accepted external involvement. Regional integration takes very different forms in different parts of the world, and has little impact on constitutions in some areas – if integration exists at all. In these and other respects, the evidence on which global constitutionalism is based is patchy across the world and manifests itself least obviously in the broad Asian region.⁶⁶ Any persuasive global theory about the changing

⁶²A Peters, 'The Globalization of State Constitutions' in JE Nijman and A Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press, Oxford, 2007) 251, 257.

⁶³A Kemmerer, 'The *Pouvoir Constituant* in Times of Transition: A Comment on Andrew Arato and Philipp Dann' (2008) available at <<https://ssrn.com/abstract=1147018>>.

⁶⁴D Schneiderman, 'Global Constitutionalism and International Economic Law: The Case of International Investment Law' in M Bungenberg, C Herrmann, M Krajewski and J Terhechte (eds), *European Yearbook of International Economic Law 2016* (Springer, Heidelberg, 2016) 23.

⁶⁵Grimm (n 7) 16.

⁶⁶Hence the more cautious claims for global constitutionalism in East Asia in Suami et al. (n 2) 6–15.

concept of a constitution in conditions of globalization must take the experiences of these states and their constitutions into account as well.

In any event, with gathering speed in the aftermath of the global financial crisis, the second decade of the twenty-first century has seen pushback from many sources against aspects of globalization that potentially have a bearing on the concept of a constitution. Some of this has been all too obvious, as leaders have harnessed populist fervour through forms of unproductive nationalism to deal with or to distract attention from pressing national and global problems. The potential for this to happen, however, underscores the limits of globalization as a constraint on national constitutional systems.

The pushback has had tangible effects, moreover – at least in the short term – as the following, non-exhaustive, examples show. There has been a spate of withdrawals or threatened withdrawals from international or regional institutions: the United Kingdom from the European Union; Burundi and the Philippines from the International Criminal Court. There are significant instances of non-cooperation with the requirements of international and regional institutions, further exposing the legal and political challenges of enforcement above the level of the state.⁶⁷ There is ambiguity about whether and when many regional and international arrangements prevail over national constitutions, encapsulated (and to some extent masked) by theories of constitutional pluralism.⁶⁸ Some states, of which Bhutan, Sri Lanka and arguably Myanmar are examples, resist or at least manage external involvement in their constitution-making processes; anecdotally, the trend is increasing.

Even where not in retreat, globalization in forms that have implications for national constitutions is not moving forward, either. To take one example: a proposal for an international constitutional court has effectively stalled, despite spirited Tunisian advocacy.⁶⁹ An example of another kind is the growing resistance to investor-state dispute-settlement mechanisms, in the forms in which they have been used, which is prompting discussion about change, at least some of which would favour state authority to a greater degree.⁷⁰

It may be that these and other examples of resistance to aspects of globalization are temporary, and that the earlier trajectory will return. The Brexit saga of the move by the United Kingdom to leave the European Union points to reasons why this might be so: a substantial proportion of the population favours continued membership of the Union and disentangling the now deep economic, social, legal and political ties has proved remarkably difficult. The emerging challenges of climate change and population movement, both of which require global action, are likely to make new initiatives for close

⁶⁷For example, ‘Commission Takes Hungary to Court for Criminalizing Activities in Support of Asylum Seekers and Opens New Infringement for Non-provision of Food in Transit Zones’ (*European Commission* 25 July 2019) available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4260>; Directorate of Communications, ‘Implementing ECHR judgments: Latest Decisions from the Council of Europe’s Committee of Ministers’ (*Council of Europe*, 15 March 2019), available at <https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=09000016809385cc>.

⁶⁸L Pierdominici, ‘The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?’ (2017) 9(2) *Perspectives on Federalism* 119, available at <http://www.on-federalism.eu/attachments/262_download.pdf>.

⁶⁹LK Naswarin, ‘Towards the Establishment of an International Constitutional Court’ (2016) 10(4) *Vienna Journal on International Constitutional Law* 386.

⁷⁰J Kelsey, ‘UNCITRAL Working Group III: Promoting Alternatives to Investor-State Arbitration as ISDS reform’ (*Investment Treaty News*, 2 October 2019), available at <<http://rspace.iisd.org/itm/2019/10/02/uncitral-working-group-iii-promoting-alternatives-to-investor-state-arbitration-as-isds-reform-jane-kel-sey>>.

collaboration irresistible. The practices of globalization may not return in the same form, however. The current hiatus has provided an opportunity to take stock of the relations between states and supra-state levels of government in order to harness the potential strengths and minimize the weaknesses of both.⁷¹

In any event, the geopolitical context for globalization has changed. The recalibration of the role of the United States under President Trump is unlikely to be reversed in a way that restores the status quo ante, originally built on the assumptions of the ‘end of history’.⁷² The enhanced global role of the People’s Republic of China suggests the re-emergence of a multi-polar world, with inevitable impact on the operation of UN institutions. Potentially significant in this regard too is the Chinese position in relation to the constitutional systems of others that, ostensibly at least, eschews ‘political’ interference.⁷³

Belief

A second factor suggesting caution about claims of constitutional transformation is the beliefs of the principal actors: political and legal elites within and beyond the state and, with qualifications, the people at large.

Despite the burgeoning scholarship on global constitutionalism, there are few if any signs that the political elite within states assume or accept that the concept of a constitution is changing in ways that would affect the sources of its legitimacy or the authority for it.⁷⁴ Consideration of two extreme cases makes the point. Even in the European Union, where conditions have provided the greatest intellectual impetus for theories of global constitutionalism, the actions of decision-makers in member states tend to belie the claims of scholars, whether manifested in abandonment of the project of a European Constitution, the protection of national identity in Article 4 of the *Treaty on European Union*, the utility of the ambiguity introduced by doctrines associated with constitutional pluralism or instances of reassertion of authority by particular member states.⁷⁵ Even in states in the Global South that are most exposed to the conditionality of external assistance, the emphasis on, for example, the ‘centrality of state–society relations’ as the path to peace and development in statements such as the Dili Declaration makes assumptions about the constitutional framework within which those relations occur.⁷⁶

⁷¹For example, R Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge University Press, Cambridge, 2019); Suami et al. (n 2) 4.

⁷²Francis Fukuyama, *The End of History and the Last Man* (The Free Press, New York, 1992).

⁷³Information Office, ‘China and the World in the New Era’ (State Council, People’s Republic of China, September 2019) available at <http://english.www.gov.cn/archive/whitepaper/201909/27/content_WS5d8d80f9c6d0bcf8c4c142ef.html>.

⁷⁴Suami et al. (n 2) 8.

⁷⁵The first three of these points could also be reformulated as cautious evidence of paradigm change, however, reflecting the delicate balance of these issues in the European Union. See, for example, E Cloots ‘National Identity, Constitutional Identity and Sovereignty in the EU’ (2016) 45(2) *Netherlands Journal of Legal Philosophy* 82.

⁷⁶The G7+, ‘Dili Declaration; A New Vision for Peacebuilding and Statebuilding’ (*International Dialogue of Peacebuilding and Statebuilding*, 10 April 2010), available at <<http://www.oecd.org/dac/gender-development/45250308.pdf>>.

Equally, there are few signs that the people of states accept that the concept of a constitution is changing. In weighing the strength of this observation, however, two caveats are needed. One is that that most people neither think nor even, necessarily, know about the constitution unless at least the issues at stake are drawn to their attention. The other is that the attitudes of many who are constitutionally aware are likely to have been shaped to a degree by the internationalization of civil society and the spread of global knowledge about constitutional possibilities. These realities make it likely that there will be pressure for incorporation of what are perceived as global norms in the course of contestation within the state over a constitutional project. Insofar as this pressure is accompanied by claims about the requirements of constitutional legitimacy, it has implications for the concept of a constitution that are still too amorphous to ground concrete conclusions. It is equally likely that proponents of the incorporation of global standards accept the concept of a constitution, but seek only to influence its content. Indeed, the considerations of effectiveness discussed in the next section make this the most rational course to pursue.

Finally, under the rubric of belief, international actors also largely continue to accept the state-centred concept of a constitution. A constitution that complies with international expectations is not a general requirement either for statehood or for membership of the United Nations, although it may occasionally be one of a number of factors in recognition of a new state. United Nations spokespersons continue to describe constitution-making as a ‘sovereign national process’, despite the ambiguity over the meaning of it being ‘nationally owned and led’.⁷⁷ Even in relation to Syria, where pressure from outside sources seems almost palpable, both UN spokespersons and representatives of foreign states stress the need for a process that is ‘Syrian-owned and Syrian-led’.⁷⁸ Whatever the reality on the ground, the need to formulate the goals of the process in this way says something about the assumptions made by the speakers.

Effectiveness

One final set of considerations that weigh against change to the concept of a constitution concerns the effectiveness of constitutions, both in the early phases of implementation and over time. It is trite that a constitution is merely an empty symbol unless it has effect in the state to which it pertains. Ironically, even the incorporation of international norms and standards in national constitutions depends on the effectiveness of the constitutions on the ground.

The challenge of effectiveness depends on purpose and substance – on what the constitution is designed to do. On any view, constitutions seek to perform the highly delicate task of empowering and constraining powerful state institutions. Many constitutions are more ambitious still. Some are associated with democratic transition after authoritarian or military rule. Constitutions deemed ‘transformative’ seek also to change society. Constitutions made in the wake of conflict usually are designed with an eye to securing and building peace. New or substantially amended constitutions may provide

⁷⁷UN Secretary-General (n 52).

⁷⁸UN Security Council, ‘Special Envoy Hails Formation of Constitutional Committee as “Sign of Hope for Long-Suffering Syrians” in briefing to Security Council’ (*United Nations*, 30 September 2019), available at <<https://www.un.org/press/en/2019/sc13967.doc.htm>>.

major changes from past practice, in terms of democracy, federalization, power-sharing or in myriad other ways.⁷⁹

Making a constitution effective is a long-term project. Ultimately, in a democracy, it depends on local actors operating state and sub-state institutions responding to expectations of the population at large. To this end, local actors need an understanding of constitutional requirements, a sense of ownership of them and a commitment to making them work. To some extent, these can be secured through practice, including the process of constitution-making and constitutional design. They are also linked to the symbolism of a constitution, however, which in the right conditions gives it a hold on the collective imagination.

The generalized but essentially state-centred concept of a constitution offers both a set of practices that are likely to lay the groundwork for implementation and a justification on which the status of the constitution can be built. Both practice and theory assist to embed constitutions in national experience and actively involve both political elites and people on those heady occasions that may be described as ‘constitutional moments’.⁸⁰ Sometimes the founding constitutional story is a myth, but it can be a constructive myth.⁸¹ It assumes that constitutions derive their legitimacy and authority from sources within the state, even if those sources choose to adopt transnational ideas. It enables constitutions to respond to more localized conditions, both actual and experiential.

External actors can assist national constitution-builders in various ways, including by offering insight into comparative options and experiences. International aid may assist further with the early phases of implementation of new constitutional arrangements; however, sooner or later these forms of aid end. Regional and international constitutional monitoring and enforcement mechanisms have evolved with the processes and practices of globalization, and may have some effect over time on constitutional compliance with selected issues. More domestic courts have become more willing to take international law or comparative experience into account.⁸² Factors such as these contribute to the possibility of constitutional transformation over time. As matters presently stand, however, they fall a long way short of substituting for processes of domestic implementation, which draw on the will and capacity of state institutions given impetus, in democracies, by the population at large.

There are famous examples of constitution-making where external pressure has been decisive for constitutional design. Those often referenced are the post-war constitutions of Germany, Japan and the Republic of Korea.⁸³ While these cases deserve consideration, they can be understood to substantiate the present point. In all three, local decision-makers struggled to preserve enough latitude for local conditions and preferences on

⁷⁹On a range of possibilities, see Melbourne Forum, *From Big Bang to Incrementalism: Choices and Challenges in Constitution Building* (Final Report 2017), available at <<https://law.unimelb.edu.au/constitutional-transformations/MF/melbourne-forum-2017/interim-report>>.

⁸⁰The phrase was most prominently coined by Bruce Ackerman, *We the People: Foundations* (Harvard University Press, Cambridge, 1993), providing a basis for an extensive subsequent literature.

⁸¹R Albert, M Guruswamy and N Basnyat (eds), *Founding Moments in Constitutionalism* (Hart, Oxford, 2019).

⁸²T Groppi and M-C Ponthoreau, *The Use of Foreign Precedents by Constitutional Judges* (Hart, Oxford, 2013); on experience in Asia, see C Saunders, ‘Judicial Engagement’ in R Dixon and T Ginsburg (eds), *Comparative Constitutional Law in Asia* (Edward Elgar, Cheltenham, 2014) 80.

⁸³C Hahm and SH Kim, *Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea* (Cambridge University Press, Cambridge, 2015).

which a future national constitutional story could build.⁸⁴ As those examples also show, the legitimacy of constitutions made in such conditions ultimately depends heavily on effective implementation drawing, however creatively, on the foundations thus laid. More recent cases in which external pressure was intense, of which Iraq is an example, have had a less positive outcome.⁸⁵ Even where external influence is more muted, recent emphases on formalized implementation through constitutional schedules or implementation authorities might be interpreted as attempts to compensate for a shortfall in the kind of local ownership that grounds a more natural progression from promulgation to implementation.⁸⁶

V. Conclusions

On balance, despite the extraordinary changes in the global context in which national constitutions operate, the concept of a constitution retains its defining characteristics as a set of institutions, principles and practices that serve the state and its people and draws its legitimacy from sources inside the state. This is not to deny that constitutions are affected by a host of influences from outside the state, which undoubtedly is a feature of contemporary practice. External influence is not new, however, even if it takes distinctive forms in contemporary conditions.

If the generic concept of a constitution remains essentially unchanged, retaining its state-oriented character, certain consequences follow. The concept of a constitution offers a useful touchstone to guide the appropriate nature and scope of international involvement. It also makes it clear that responsibility and accountability for the standards of governance for which the constitution provides a framework ultimately lie with the state, its institutions, its political actors and its people. External forces can expose problems and press for their resolution in a host of ways. There are limits to what they can achieve, however. Lasting solutions require internal assumption of responsibility.

It may be that, as globalization proceeds, transformation of the concept of a constitution will occur, perhaps in the directions that some theories of global constitutionalism suggest. This seems unlikely, however, without more dramatic changes in the quality, consistency and equity of governance at levels above the state. The degree of difficulty of reform of the international system suggests that any such dynamic will be likely to begin in processes of regional integration, which also would need revision for this purpose. Such a development would be significant but not unlikely to be able to be generalized across the world as the pattern of regional integration presently stands.

Two further sets of issues are raised by this inquiry into the concept of a constitution, which cannot be resolved here but deserve further reflection. One comprises a series of loose ends, linked by aspects of globalization but otherwise unconnected. The first concerns the meaning and application of the mantra of 'national ownership and leadership' in connection with constitution-making, generally and in particular cases.⁸⁷ The potential inconsistency between two possible meanings of these terms was described

⁸⁴Ibid, in relation to Japan and Korea.

⁸⁵Al-Ali (n 58).

⁸⁶M Böckenförde, 'From Words to Deeds: The Implementation of Constitutions' (*Democracy Reporting International*, Briefing Paper 81, May 2017), available at <http://democracy-reporting.org/wp-content/uploads/2017/05/DRI-Briefing-Paper_Implementation-of-Constitutions_May-2017.pdf>.

⁸⁷UN Secretary-General (n 52).

earlier. I have suggested elsewhere that they could be reconciled, by domestic acceptance of the need for an appropriately distinctive process for constitution-making, in recognition of the significance of the exercise.⁸⁸ Even so, there are unresolved questions about design of such a process that is both distinctive and effective to which, ultimately, there may be no generic answers. A second issue, indirectly raised but unresolved by reflection on the concept of a constitution, is the implications of a link between a peace agreement that resolves intrastate conflicts and a constitution designed to give the peace agreement effect. The arguments in favour of continuing to treat the latter as a constitution in the familiar sense remain. There is a risk, however, that in this case, as constitutional processes take over, the peace agreement is not given full effect. A solution might lie in accepting that such constitutions are in a genre of their own, at least for a transitional period, raising a host of further questions for both theory and practice that deserve more detailed examination.⁸⁹ A related issue concerns the characterization of national constitutions that undoubtedly are attributable solely to external authorship. Bosnia-Herzegovina is a prime – although still rare – example, and for that reason can, for the moment, be treated as an exceptional case.

Finally, the conditions of globalization in which constitutions presently operate point to the enhanced significance of the external face of constitutions, of the functions that constitutions perform looking outwards, rather than inwards. From an external perspective, a constitution performs various functions. It distinguishes the state, its people and its territory from others;⁹⁰ it structures the ways in which the state participates in the international realm by empowering state institutions and defining the scope of their authority; directly or indirectly, it controls or provides the means to control entry of others into the territory of the state, at least in normal circumstances.

Constitutions have always performed these functions. Typically, however, these aspects of a constitution have been taken for granted and have attracted relatively little attention. This may be because, in many states, the exercise of a still-substantial external sovereignty retained by states has been assumed to lie within the characteristically opaque purview of the executive branch.⁹¹ In a world in which so much that happens within a state is dependent on collaboration with those outside it, however, this arrangement is hard to justify and, in at least some states, has already changed to some degree.⁹² Inquiry into how constitutions might better structure the exercise of external as well as internal sovereignty might itself be described as a dimension of global constitutionalism. If and when this field develops, it could usefully extend to the exercise of private, as well as public, power to provide a framework for international borrowing and investment too, where these have substantial, including intergenerational, implications.

⁸⁸C Saunders, 'Global Constitutionalism: Myth and Reality' in JNE Varuhas and S Wilson Stark (eds), *The Frontiers of Public Law* (Hart, Oxford, 2020) 19.

⁸⁹A Dziedzic and C Saunders, 'Constitutional Implementation for Sustainable Peace' (*Folke Bernadotte Academy*, Research Report June 2019), available at <<https://ssrn.com/abstract=3442666>>.

⁹⁰Hahm and Kim (n 83).

⁹¹On external sovereignty see Grimm (n 21) 77–91.

⁹²Membership of regional organizations often is structured by the Constitutions of member states. Constitutions made in recent years typically provide explicitly for the treaty-making process and, increasingly, for the status of international law.