FROM BIG BANG TO INCREMENTALISM: CHOICES AND CHALLENGES IN CONSTITUTION BUILDING

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Session VI Conclusions

Insights on Key Questions

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The 2017 Melbourne Forum was designed to explore the dynamics of a series of choices between greater or lesser degrees of change in Constitution-making. Twenty cases were used for the purpose, all drawn from the Asia-Pacific region, defined to include Latin America. This region offers an extraordinarily diverse range of experiences, which are not necessarily peculiar to Asia and the Pacific but which contribute to an overall global picture.

The choices to which the Forum drew attention lay between a new or amended Constitution (sessions I and II), involved change to the form of government or the form of the state (sessions III and IV), or accepted deferral of immediate action on some matters (session V). This range of possibilities was captured in the title of the Forum as *From Big Bang to Incrementalism.* The title draws on the perception that, traditionally, a written Constitution derived from a revolutionary moment that ushered in radical change drawing its legitimacy from the people. Whatever the historical accuracy of that perception, it does not reflect the totality of global experience today. Political transition is always a major event, whatever its process and outcome, but in most cases, there is no stark dichotomy between a big bang on the one hand and incremental change on the other. In the world of the 21st century, constitutional transformation typically lies along a spectrum involving varying degrees of significant change, over varying periods of time.

Although the Forum necessarily examined questions of process and substantive change in separate panels, every constitution building project in fact is an integrated whole. Decisions about whether to seek a new or amended Constitution are interdependent with questions of substance and both almost invariably involve deferral of some questions in some way. While particular case studies were used as a focus in particular sessions, all threw light on several themes, in ways that emerged in discussion. These brief observations, by way of conclusion, seek to capture the principal insights gained across the entire Forum.

To make a new Constitution or to amend an existing one?

The first two sessions dealt, respectively, with constitution building projects that involve making a new Constitution and projects that involve amending a Constitution that already exists. Cases in the first

session comprised the Philippines in 1987, the Maldives in 2008, Thailand generally but with particular reference to 1997, and the current Constitution-making project in Chile. Cases in the second category were Indonesia from 1999-2002, Taiwan from 1991-2005, Pakistan in 2010 and Argentina in 1994.

Gabriel Negretto, writing about Argentina, noted that the border between making a new constitution and amendment is not necessarily clear-cut and is dependent on the criteria used. The case of Argentina makes the point. The Constitution of 1853 distinguishes between partial and total reform of the Constitution but provides the same procedures for both, culminating in an elected Convention (Article 30). A pact between the parties that led to the amendments of 1994 agreed on a wide range of changes but characterised the process as partial, to avoid a potential claim to sovereign or constituent power on the part of the Convention. A challenge to this mode of proceeding was dismissed by the Court, on procedural grounds. In these circumstances, while the changes took the form of amendments, they were so extensive in substance that in terms of Argentine constitutional tradition they could, and perhaps should, have been treated as a total revision.

Negretto's warning not to overdraw the distinction is salutary. The circumstances that prompted his observation do not prevail everywhere, however. Not all Constitutions provide a distinct procedure for total constitutional revision. Those that do generally make it more onerous than partial change. Equally, not all constitutional traditions accept or assume that a constitutional convention might seize sovereign authority. It may readily be accepted that the choice between a new constitution and amendment, where it is available, does not necessarily parallel a distinction between major and minor change. All new Constitutions are likely to include elements of earlier ones, as the examples of the Philippines and Thailand show; and constitutional amendment may make sweeping change, as the staggered series of changes in Indonesia graphically indicate.

From the standpoint of constitutional building process, the distinction between renewal and amendment may be significant, nevertheless. Most obviously, the distinction may affect how change is made. A constitution building project involving a new Constitution may not necessarily follow the procedures laid down in an existing Constitution. Whether it does so or not in practice depends on whether there are such procedures and whether maintenance of legal continuity is viewed as important by key stakeholders. Of the four case studies in the first session, the Philippines (1987) and, in the case of most of its many Constitutions, Thailand, devised procedures anew to make new Constitutions. The Thai Constitution of 1997 was an exception to the usual pattern in Thailand, insofar as the earlier Constitution was first amended to prescribe a manner for making a new Constitution, which then was followed. In contrast, the new Constitution in the Maldives was made through procedures already laid down in the previous Constitution. It is proposed that existing procedures will be followed in Chile as well, although these may first be altered, to provide for a Constitutional Convention. In some cases, of which Chile is an example, a decision to make a new Constitution in a way that complies with pre-existing requirements reflects a cultural attachment to legality, which may be less of a factor in other cases.

By contrast, a decision to amend an existing Constitution generally requires compliance with the procedures that it prescribes. To this extent, flexibility in designing the process is significantly limited, unless the amendment procedures can themselves be altered, as occurred in Indonesia and, after a time, in Taiwan and is under consideration in Chile. Flexibility in the changes that can be made may also be limited, where local jurisprudence accepts judicial review of constitutional amendments on substantive grounds, as in Taiwan. By definition, in any event, in cases of this kind, some parts of the existing Constitution are retained in their existing form.

Where changes are made by way of constitutional amendment, there is a risk that the that procedures that commonly accompany making a new Constitution, including a significant degree of public participation, are overlooked. As a result, the procedures prescribed in the existing Constitution may be augmented, formally or informally, in recognition of the significance of the changes being made. Thus, in Indonesia, changes were agreed by consensus, notwithstanding the formal voting requirements in the People's Consultative Assembly (MPR); in Pakistan, special advisors were appointed from civil society organisations to contribute to the deliberations of a Special Committee on Constitutional Reforms appointed by the Parliament; and in Taiwan a national consultative conference in 1990 preceded the successive constitutional changes that began in 1991.

Decisions about whether to make a new Constitution or amend an existing Constitution, including the steps to be followed, typically are made at the outset of a constitution building project, often with little public exposure.

The eight cases discussed at the Forum show that such decisions are likely to be driven by local circumstances. Sometimes, most obviously, the choice is shaped by consideration of the magnitude of the proposed change, in the sense that extensive change is pursued through a new Constitution and important but more confined change is achieved through constitutional amendment. The contrast between the Maldives and Pakistan is instructive here. Occasionally, a new Constitution is unavoidable, because there is no existing Constitution to amend. Bougainville is an admittedly unusual example, in which a new Constitution was made for an autonomous region, in accordance with the terms of the Bougainville Peace Agreement. A new Constitution also may be indicated where an existing Constitution is deemed to be discredited by association with an earlier authoritarian regime. Of these eight cases, the Philippines, Chile and, for many of its Constitutions, Thailand are examples. This is not always the case where constitution building is associated with transition from authoritarianism, however, as the example of Indonesia shows.

Significantly, these cases show that, all else being equal, the choice between a new or amended Constitution often depends on political agreement. To put the point differently, this becomes one of a number of factors that may be used in a political bargaining process on the threshold of a constitution building project. Thus, in Indonesia, political realities resulted in an agreement on constitutional amendment on bases that retained both certain substantive aspects of the existing Constitution and its original form, by framing amendments by way of an ‘addendum’. In Argentina, constitutional change was secured by an agreement between the government and opposition parties that both determined the range of amendments and sought to avoid characterisation of the process as total change. In Taiwan, similarly, the mode of proceeding by amendment was the consequence of a compromise between the leading parties, powerfully reinforced by international pressure from China and the United States.

In summary, therefore, a decision to make a new Constitution always is a major event, whether characterised as a ‘big bang’ or not. Potentially, it opens the entire constitutional framework to change and, although that opportunity is not always taken, a positive decision is needed about what is to be retained. In addition, where legal continuity with the previous Constitution is impossible, or not sought, decisions must be made about how to make the new Constitution in a way that secures its legitimacy. The contribution from Thailand attributes the requirement for a referendum associated with the new Constitutions of 2007 and 2017 to this consideration. A decision to proceed by amendment, on the other hand, always requires compliance with pre-existing procedures. Further decisions are required, at the outset of a constitution building project, if these procedures are to be amended or augmented in other ways. By definition, proceeding by amendment involves retention of

at least part of the original Constitution, although as the examples of Indonesia and Taiwan show, what is retained may prove to be minimal, in terms of substance. The Indonesian case draws attention to another issue associated with amendment; whether to incorporate the changes into the original text or not. Constitution building through constitutional amendment also may be more vulnerable to judicial review than proceeding by way of a new Constitution.

Changes to the form of government

In the third session, the Forum explored the dynamics of the relative magnitude of constitutional change from the standpoint of constitutional substance beginning, first, with changes to the form of government or, in other words, to the design of the executive branch and its relationship to the legislature. Four cases were specifically examined: Kyrgyzstan (2010), Mongolia and Sri Lanka in processes that currently are underway, and South Korea, where change is under consideration. In each case, the movement was, or would be, towards a more parliamentary form of government while, probably, retaining an elected President. In Kyrgyzstan, the form of government sought was described as 'premier-presidential'; in South Korea, as 'decentralised presidential'. In only one of these four cases, Sri Lanka, were the proposals for change linked to other changes to the form of the state, in order to deepen devolution. This combination of proposals for change is under consideration in the Philippines, however, making Sri Lanka a particularly interesting comparator from that perspective.

These cases prompt several reflections on the challenges of changes to the system of government, in Asia and the Pacific and elsewhere. The effective operation of the legislature and executive are critical to the operation of any constitutional system. The performance of these two branches, individually and collectively, is immediately relevant to the performance of the bureaucracy and significant for independent agencies, including courts, through control of appointments and funding channels. Deficiencies in the operation of the legislature and executive and the relationship between them, may be manifested in authoritarianism, instability and/or corruption, in addition to the problems that accompany poor governance. Attempts to counter these tendencies often lead to some combination of a presidential and parliamentary form of government, as in the proposals for change examined here.

Three institutions are key, in such a system of government: a (usually) directly elected President; a legislature; and a Prime Minister and cabinet connected in some way with the legislature. The relationship between these three institutions determines, for example, the composition of the government from time to time, the manner of the formulation of policy and legislation and the lines of democratic accountability. The relationship is shaped both by important details of institutional design and by the dynamics of the local political context. The difficulty of predicting the impact of the latter, on the operation of the system in practice, may cause continued constitutional experimentation over time, as has occurred in each of these four cases.

The evidence of these cases suggests that it is often difficult to change from a directly elected presidency, which appears to give voters a greater say and offers the possibility of strong and decisive leadership. On the other hand, a directly elected president can risk authoritarianism when the office dominates the legislature and government, as the examples of Sri Lanka and Kyrgyzstan show. The challenge, then, is to limit the power of an elected presidency by shoring up the authority of the Prime Minister and/or the legislature. A complementary goal, as in South Korea, may be to provide for a more collaborative style of government than a strong presidency allows.

As these cases show, however, rearranging public power between institutions is not easy. Almost any shift is significant and may encounter resistance for this reason, not only during the process of change

but in the course of implementation. Moves from a strong presidency towards a greater measure of parliamentarism is complicated by another factor as well. The institutions of President, Prime Minister and legislature are interdependent. Change involves altering not only the power of one but the behaviour of the others. A more parliamentary style of government not only requires limitation of the powers of the President but a different mode of operation by the legislature, which now must hold the government to account, with the aid of an identifiable opposition. Changes of this kind depend on political culture as well as institutional design, which should be anticipated in a constitution building project.

Changes to the form of the state

A substantive change of a different kind occurs in a move from a unitary state to one in which power is constitutionally devolved to regions organised along territorial lines. The four cases around which this theme was built offer insights into what is or may be involved in a change of this kind. They represent different degrees of decentralisation, at different phases of development. The new Constitution of Nepal of 2015 provides, for the first time, for a form of federalism although the federalism provisions are not yet fully in effect. In Myanmar, the principles agreed in the Panglong peace process almost certainly will require federalism as a basis for peace, probably through amendments to the Constitution of 2008. In Solomon Islands, a new draft federal Constitution has now been finalised but not enacted. And in Papua New Guinea, the system of provincial government, put in place in 1977, may be about to undergo a third round of changes, this time to deepen devolution.

Each of the four cases involves a state with a deeply diverse population in which conflict has been a catalyst for devolution. In terms of process, Nepal and Solomon Islands have adopted or propose to adopt a new Constitution; Myanmar is likely to seek to establish a more federal form of government through constitutional amendment; and PNG also regionalised through constitutional amendment, supported by Organic Law.

Individually and collectively, the cases illustrate some of the challenges of moving from a unitary state to a constitutionally devolved form of government. In some states, federalism may meet opposition in principle, for reasons that range from theoretical conceptions of the nature of a state to political concerns about the consequences of federalisation for unity, in the sense of the territorial integrity of the state. There is some evidence of the latter in the case of Myanmar, at least, where federalism was described as 'initially taboo', before it emerged as an essential component of the peace process. Hostility to the concept of federalism is even more marked in Sri Lanka. Whatever the cause, a similar reluctance to devolve power is suggested by the histories of constitution building in Nepal and Papua New Guinea, where requirements for federalism in the case of the former and regionalism in the case of the latter were additions to the principles on which the constitutional systems ultimately were based, through pressures from particular groups within the state.

Myanmar also demonstrates some of the complications of terminology in this context. Federalism may occur either by aggregation or disaggregation and encompasses a range of different design options, providing for different degrees of sub-national autonomy. There may be different perspectives between key actors within a single state, however, about the point at which a federation shades into a confederation, with assumed implications for state unity or, at the other end of the scale, the point at which the degree of central control precludes description of a state as a federation at all and becomes unacceptable for that reason. There is some indication of these differences in Myanmar, attributable to different perspectives of the federation to be formed as one that historically brought the component parts of the state together in 1947, in arrangements that have not since been

honoured, or as one that is to be created by devolution of a state that has been governed as a union for 70 years. These differences suggest the need to move beyond labels in negotiation in order to try to identify workable arrangements on which all participants can agree.

The dynamics of devolution of a unitary state are likely to play out in the design of the new arrangements. All else being equal, it is likely that the centre will be unwilling to surrender much significant legislative power. Devolution of administrative power or power over cultural goods such as education is more likely although the centre may well seek to retain significant step-in authority. Most, if not all, tax powers are likely to remain at the centre, subject to procedures for revenue redistribution over which the centre may have considerable control. Provision may be made for shared rule, often through a federal second chamber and also, sometimes, in other ways. Significant cultural change in the way in which the centre operates is necessary, however, for this to lead to a genuinely collaborative, regionally informed exercise of central authority. As a generalisation, the arrangements for devolution in Nepal, Papua New Guinea and the draft Constitution of Solomon Islands exhibit these characteristics, although they are very different in design. In particular, in the Pacific island states, there are no second chambers but shared rule is sought in other ways, such as representation of the provincial governors in the parliament (PNG) or rotation of the presidency amongst the provinces (Solomon Islands). While the outcome in Myanmar remains to be seen, federalisation through amendment of the existing Union Constitution makes it more, rather than less likely that the federal units will be relatively weak. Of course, it is possible to resist these trends in the course of negotiating the future form of the state or once the new arrangements are in place, but the hurdles to doing so are substantial.

Federalisation of a state that was previously unitary, de jure or de facto, is likely to face further challenges at the implementation stage, when the federal provisions of a new constitutional order are put into effect. The case of Nepal confirms what might logically be expected: that such challenges may be exacerbated where significant actors are opposed to federalism in principle in the first place. In Nepal, these pressures played out initially in the difficulty of negotiations over the number and configuration of provinces in the text of the Constitution, which never was satisfactorily resolved. They seem to have played a role in the failure of the first Constituent Assembly and it required intervention from the Supreme Court to ensure that federalism was included in the Constitution finally concluded by the second Constituent Assembly. Thereafter it took two years even to hold elections for the provincial assemblies on which federalism in Nepal depends. The account of Nepal in this report also draws attention to the reluctance to implement federalism in practice on the part of central politicians, bureaucrats and courts. Nepal is a useful case to continue to monitor on this score, to better understand the dynamics of transition to devolved government.

These difficulties are further exacerbated when, as often is the case, there are problems of capacity at the sub-state level of government. This was an issue in Papua New Guinea and it can be anticipated in Nepal and Solomon Islands as the provincial order of government begins operation. In theory, the problem can be relieved by the movement of at least some central politicians, bureaucrats and other government actors to the regions. In practice, they may be reluctant to move from the capital, historically associated with power, control over resources and relative comfort. The rationale for federation or regionalisation, however, demands effective sub-state government. The problem of ensuring capacity raises a question about whether implementation can be staged, so that greater degrees of autonomy are exercisable by individual regions as capacity grows. While this seems sensible in theory, the reluctance of central institutions to cede power may mean that, in practice, if phased implementation were deliberately prescribed, significant devolution might never occur.

In summary, therefore, devolution from a unitary to a federal or regionalised state always involves major change. Difficulties are likely to be experienced throughout the Constitution building process, from initial decisions about the principles on which devolution should be based; to the design of the new arrangements; to their implementation in practice. The experiences of states such as those considered here illustrate the kinds of challenges to be anticipated. To overcome them requires a clear view of issues and options. The case of Nepal shows that courts may sometimes be helpful for this purpose, even during the deliberative phase of Constitution making. Equally, however, courts also can be an impediment unless they, too, undergo the cultural change necessary to perform an appropriate role under a federal Constitution. Ultimately, support for devolution needs to come from the people as a means of ensuring government that is more responsive and effective. How to gauge and harness popular support for federalisation in the course of Constitution building is another work in progress, too often overshadowed by the complexities of negotiating constitutional settlements in the aftermath of conflict, to secure at least negative peace, to end the worst of the hostilities.

Deferral

Strategic use of deferral may affect both the process and substance of constitutional change. Deferral postpones final decision on a contentious matter or matters that merit constitutional treatment but that, at least in the short term, have the potential to derail constitutional negotiations or even to threaten implementation of the new Constitution. Deferral thus can be distinguished from the many decisions, taken for other reasons, to avoid constitutionalising particular issues that can adequately be handled by ordinary or organic legislation or left to political practice.

Deferral may take a variety of forms. The four case studies for this session illustrate the range but do not exhaust the possibilities. In India, in 1947, some substantive issues were effectively deferred, including cow slaughter, the uniform civil code and labour rights. In Fiji, in 1990, a final constitutional settlement was deferred and, with it, resolution of the vexed issue of the use of communal voting rolls. In Bougainville, a referendum on independence was deferred, in accordance with the Peace Agreement of 2001. Deferral of the referendum also deferred adjustment of the constitutional arrangements of Papua New Guinea and Bougainville, which would seem necessary, whatever the referendum outcome. And more than 60 issues of a constitutional kind were deferred during the constitution making phase in Iraq in 2005. Most of these were substantive: the composition and role of the second chamber of the legislature and relations between religion and the state are examples. Others were more procedural, including a referendum to determine the status of Kirkuk.

In each of these cases, deferral in response to disagreement and enabled the Constitution building project to move on to the next phase. Some other factors also were in play, however, that assist to explain the decisions. In India, the deferred issues split the Constituent Assembly deeply, along several different fault lines, but it was assumed that they could be more readily resolved once the Constitution was in action. In Fiji, the 1990 Constitution was made in the immediate aftermath of a military coup and lacked the legitimacy needed for a Constitution that was designed to last. The postponement of the referendum in Bougainville not only represented a compromise but provided an opportunity for Bougainville to develop capacity for self-government and to rebuild after conflict. In Iraq, at least some of the deferrals were attributable to the haste of the Constitution making project, dictated by the occupying powers. There was an interesting question, raised in discussion, about the motivations of the stakeholders in agreeing to deferral in the first place: in particular, whether each assumed that their view ultimately would prevail or whether, in an atmosphere of genuine uncertainty, each was simply prepared to contest the issue at a later stage. This perspective can be helpful in understanding

the dynamics of deferral, although these cases suggest that in practice motivations may be more complex and diffuse.

The means by which deferral was achieved in each case also illustrate the diversity of the practice. In India, all three of the controversial questions canvassed in discussion at the Forum in fact were included in the Directive Principles of State Policy in Part IV of the Constitution. They were deferred in the sense that the directive principles were not intended to be justiciable. In the case of cow slaughter, moreover, the principle was framed in a way that emphasised its economic, rather than religious, significance. In Fiji, deferral was achieved by a specific provision in the 1990 Constitution requiring review of the Constitution within seven years. With hindsight, therefore, the 1990 Constitution could be characterised as an interim Constitution. Deferral of the Bougainville referendum was secured through the peace agreement and specific amendments to the Constitution of Papua New Guinea. In Iraq, at least two techniques were used. In many cases including, for example, establishment of the second parliamentary chamber, the issue was left to legislation to be enacted by the Parliament. In others, the drafters relied on 'constructive ambiguity'. The case study illustrates the use of this technique in relation to the status of religion, through the inclusion of two potentially contradictory clauses, to be reconciled over time through interpretation and practice.

Deferral was effective in each case insofar as it overcame an immediate impasse in the constitution making process and enabled politics as usual to begin. These are significant achievements, in any Constitution building context. These cases also offer the opportunity, however, to evaluate the outcome of deferral in the longer term, in ways that also offer insights into the mechanisms used. Thus, in India, Bhatia reports that each of the deferred issues remains contentious and in several cases, highly so. He attributes this at least in part to the manner in which incorporation in the Directive Principles kept controversy over them alive, in both the political process and the courts. In Fiji, the requirement for constitutional review led to the Constitution of 1997, which improved, without resolving, the problems of communal voting and the respective rights of the ethnic communities and removed the immunity granted by the 1990 Constitution for coup leaders. Compliance with the constitutional requirement for review was attributable, at least in part, to pressure from sections of the international community. On the other hand, as Naidu reports, the 1997 Constitution also proved transitory, because the cycle of coups continued, suggesting that underlying problems of division between Fijian communities have not been adequately resolved. In relation to Bougainville, the independence referendum is scheduled to take place in 2019, but there are accusations on both sides of non-compliance with the requirements of the peace agreement. Notably also, the results of the referendum are, by law, subject to consultation between the governments of PNG and Bougainville and consideration by the Parliament of PNG. In Iraq, Al-Ali reports mixed outcomes. There has been no action at all on many of the institutional issues matters that were left dependent on legislation and which arguably are needed, in the Iraqi context. This highlights the need to consider the usefulness of incentives for action, when issues are deferred in this way. On the other hand, the ambiguity over the status of religion have been effective in the sense that the relationship between religion and the state is no longer a controversial question.

Final reflection

The 2017 Melbourne Forum offered a rich source of insights into experiences across Asia and the Pacific that have a bearing on global constitutional challenges. This conclusion captures some of the most obvious. Many more can be drawn from the written analyses of participants and from the conclusions of others. They all reveal, however, the need for further work on a range of key issues. These include, but are not limited to, the impact of culture on Constitution-building processes; the

expectations of legislatures under different configurations of the executive branch; the demands of a 'holding together' federation; the impact of external forces on Constitution building, generally and in specific cases; and the use of incentives in cases of deferral. These and other questions, prompted by the Forum, will be explored in subsequent work.

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