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Newsletter Issue 1 | November 2017

This is the inaugural newsletter of the Constitution Transformation Network (ConTransNet), based at Melbourne Law School. ConTransNet is a network of expert scholars and practitioners of constitutional transformation. ConTransNet can reliably deliver quality, evidence-based advice, research and expertise on the development of constitution-making processes, content and implementation. Our Associates include practitioners, scholars and representatives from partner institutions..

On the Radar

"Federalism and Secession" by Cheryl Saunders

Secession is presently in the news again, with separation mooted in Catalonia, Bougainville, Iraqi Kurdistan, and the Southern Cameroons, and with Scotland and the Eastern Ukraine possible additions to the list. These movements make it timely to reflect again on whether secession and federalism are linked and, if so, how. One link might be negative. Apprehension that federalism encourages secession is familiar. It causes states to eschew federalism, as in Sri Lanka, or to forbid secession, as some would like in Myanmar. In Canada, it led to development of a procedure to manage secession, should an attempt occur again.

Apprehension regarding federalism can be attributed to several factors. One is conceptual: some state traditions (although by no means all) deny the possibility of divided sovereignty that federalism entails. Another is historical, drawing on past examples of failed federations: the separation of Bangladesh from Pakistan, the disintegration of Yugoslavia, the division of Czechoslovakia. A third is pragmatic, pointing to the possibility that the identity and self-governing institutions of a constituent unit of a federated state could be used as a springboard to independence. In some conditions, these factors may have salience.

Typically, however, the concerns over federalism are overstated. They tend to give little weight to the difficulty of secession, both internally, given the need to negotiate with other state actors and externally, in the face of the need for support from other parts of the international community. Most importantly of all, the focus on negative factors overlooks the positive contribution of federalism to holding together diverse communities, discouraging secession by giving all parts of the country a sense of ownership of the state. None of the secession movements currently under way involve federalised states. On the contrary, it is possible to argue in each case that a genuinely federal form of

government, with appropriate mechanisms for both self-rule and shared rule, would have avoided the present impasse. Such a federation works by making continued membership of the state desirable and attractive.

Legal prohibition of secession is unnecessary and may be counterproductive. The idea of a 'holding together' federation was originally used to describe federations that are formed by devolution within a hitherto unitary state. In the 21st century, it deserves closer attention as a means of designing and operating a federation, however formed, which comprises diverse communities. This is one of many aspects of the transformation of cConstitutions and constitutional ideas that ConTransNet has under review.

Events

Melbourne Forum 2017: From big bang to incrementalism: Choices and challenges in Constitution Building

The second Melbourne Forum was held in Manila, the Philippines, from 3-4 October 2017. The theme for this Forum explored how, why and with what consequences a range of states in the region have chosen different forms of greater or lesser constitutional change. The Forum provided an opportunity to examine both questions of process (eg. the choice of a new or amended Constitution and the issue of deferral) and questions of substance (eg. changes to the form of government and/or the state).

All sessions of the Forum were relevant to the debate on constitutional change currently taking place in the Philippines, but the issues are topical and significant elsewhere as well. To take adequate account of regional experience, the Forum brought together contributors from more than 16 polities and the United Nations in addition to the IDEA and ConTransNet teams.

Over the coming weeks, the responses of the various participants to the questions put to them about the relevant constitution building experiences of their polities will be put on line, pending more specific analysis of the issues raised by each session.

Download the [Concept Note](#) and [Forum Program](#) →

Melbourne Forum 2016: Territorially based societal conflict

The Melbourne Forum is a joint initiative of ConTransNet, based in Melbourne Law School, and the Constitution Building Program of International IDEA. The Forum is designed to ensure that the rich and diverse experience of Constitution making, development and change across the Asia-Pacific region forms an integral part of the stock of global comparative knowledge on Constitution-Building. Each Forum brings together practitioners and scholars from states across the region to compare experience on an aspect of Constitution-Building with global significance. The series was inaugurated in Melbourne in 2016, on the theme of Constitution-Building in States with Territorially Based Societal Conflict.

The first Melbourne Forum examined substantive approaches to such conflicts, in terms of

constitutional design, along a range that included regional devolution, varieties of federalism and forms of special autonomy. It also considered the particular challenges of constitution making process and implementation in the face of territorially based societal conflict. Contributors came from 10 polities: India, Nepal, Papua New Guinea/ Bougainville, New Caledonia, the Philippines, Myanmar, Solomon Islands, Sri Lanka and Indonesia. Other participants contributed insights from Colombia, Somalia and Vietnam.

The report now on line provides an introduction to the issues raised in the course of the Forum and identifies some tentative conclusions. It also includes the written responses of each of the contributors to the questions posed about the relevant experiences of the states from which they come. Further analyses, developing more specific insights from the Forum, will be published in due course.

[Download the 2016 Melbourne Forum Report →](#)

Supporting constitutional dialogue in Myanmar

ConTransNet member Cheryl Saunders has just returned from Myanmar, where she held a series of constitutional discussions, with a range of different groups, in her capacity as Senior Technical Officer with the Constitution Building Program of International IDEA. Amongst other events, she delivered a series of seminars to the Union Attorney-General's Office, on Constitution Building and Federalism and another series of seminars to the Constitutional Tribunal on Constitutional and Statutory Interpretation in Federal Systems.

These discussions come at a time when Myanmar is actively considering a move to a federal form of government to implement the commitments likely to be made in a peace settlement. Amongst the many challenges that this process presents, one is the different understandings of history of the various stakeholders, for reasons that can be traced back to the events of 1947, which have continuing implications for the discussion of federalism now.

Courses

Courses: Post Conflict State Building will be taught by Bruce Oswald and Cheryl Saunders from 14-20 March 2018. The subject deals with the body of law and practice that applies to states as they emerge from conflict and try to build strong, prosperous and responsive communities. It lies at the intersection of several bodies of law including international law, humanitarian law, human rights law and domestic constitutional law. Many of the issues covered are at the cutting-edge of these fields: the extra-territorial effect of constitutional law; the possibility of a 'lex pacificatoria' to govern the ambiguous character of intra-state peace agreements; the legitimacy of constitutions developed with international assistance; the notion of transformative military occupation.

Courses: Constitution-Making will be taught by Christina Murray and Cheryl Saunders from 7-13 November 2018. Currently, constitution-making is actively underway in a range of states and pending in others. This concentrated burst of activity has given rise to a range of new ideas about the nature and purpose of constitutions, constitutional solutions to contemporary problems, the processes of constitution-making and the role of international actors.

The course explores the process of constitution making, by reference to a range of topical case studies with which one or both of the instructors have had direct experience, including Fiji, Iraq, Kenya, Nepal, Timor l'Este and Yemen.

Publication

Policy Paper on a Constitutional Court for Sri Lanka

In March 2017, Dr Tom Gerald Daly produced a policy paper for the Centre for Policy Alternatives in Sri Lanka, re-published as ConTransNet Policy Paper No.1, titled 'A Constitutional Court for Sri Lanka?: Perceptions, Potential and Pitfalls'.

The paper encourages reflection on three inter-related questions: What do we expect a constitutional court to do that an alternative could not achieve? What powers and jurisdiction would a constitutional court have? Considering experiences in other countries, what possible pitfalls need to be considered?

[Download the Paper](#) →

Updates

Comparative Constitutional Law Roundtable

ConTransNet member Will Partlett recently travelled to the United States to attend a comparative constitutional law roundtable hosted by Mila Versteeg (UVA) and Russ Miller (Washington and Lee) at the former residence of James Madison in Montpelier, Virginia.

Dr Partlett presented a paper entitled "Post-Soviet Super-Presidentialism" that describes the dominant model of constitutional design in Russia and other post-Soviet states. His article revises the dominant (and faulty) view that semi-presidentialism is the most important model of constitutional design in the region.

Designing an African Judicial Network

ConTransNet co-convenor Dr Tom Gerald Daly was recently awarded a contract by the African Court on Human and Peoples' Rights to propose a design for an African Judicial Network. The Network will link the African Court with the highest domestic courts across the African Union states that have accepted

the Court's jurisdiction, as well as courts of other regional organisations.

The Network aims to provide a forum for courts to work together to find solutions to challenges in upholding the rule of law and the promotion and protection of human and peoples' rights.

Welcome to Tarunabh Khaitan

We welcome Tarunabh Khaitan, who has joined our team after being awarded a Future Fellowship. His project aims to find out whether constitutional design can, and should, be used to make constitutional democracies more resilient. The project will investigate the role that the constitutional accommodation of salient ethnocultural and ideological groups, the autonomy of non-partisan constitutional watchdog institutions, and the adaptability of the constitution to changing circumstances could play in securing its resilience against serious threats. The project will look at case studies from India, Pakistan, Bangladesh, Nepal and Sri Lanka. It aims to produce a better understanding of constitutional resilience, and the features that promote it to allow constitution-makers and reformers to better protect democracy, human rights and rule of law.

Welcome to Charmaine Rodrigues

We welcome Charmaine Rodrigues, our new Coordinator, working with ConTransNet Team. Charmaine is an alumni of Melbourne University Law School, graduating with her BA/LLB (Hons) in 1998. She also has a Master of Social Sciences (International Development) and has worked in the field of international development for more than 17 years. Most recently, Charmaine was the Global Constitutional Specialist at the United Nations Development Programme from 2014-15 and an Inclusive Political Specialist before that. She also worked as the Pacific Regional Democratic Institutions and Accountability Specialist for UNDP from 2007-12, travelling across the region working on governance and democracy issues. Charmaine has also worked with AusAID in Canberra and the Commonwealth Human Rights Initiative in New Delhi.



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