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Newsletter Issue 2 | February 2018

This is the second newsletter from the Constitution Transformation Network (ConTransNet) based at Melbourne Law School. We are a network of expert scholars sharing our latest research and exposure to the development of constitution-making processes, content and implementation.

On the Radar

Constitutional implications of the Chinese Belt and Road Initiative?

The Belt and Road Initiative (BRI), first mooted by the People's Republic of China in 2013, is a global development project of truly enormous proportions in its conception. At its heart are two corridors to be developed between China and Europe. The Silk Road Economic Belt runs through Central Asia and Russia and draws on historical memories of the ancient Eurasian Silk Road. The Maritime Silk Road runs through South-East Asia, South Asia, West Africa, the Persian Gulf and the Mediterranean. Offshoots extend to the Pacific and potentially further afield: across the Arctic, with a Polar Silk Road and to Latin America.

Well over 60 countries will be directly affected by the BRI, many of them in economically depressed regions of the world. The numbers seem certain to grow. They have been estimated to comprise half the world's population and almost one-third of the global economy. The immediate focus of the BRI is economic, but inevitably, but the BRI may have constitutional implications as well, for all the countries along its paths. This CTN blog identifies some of the initial constitutional issues that the BRI raises.

[More info >](#)

News

Presentation: "Tuvalu Comparative Constitutional Design Workshop"

In late February 2018, our Co-Convenors Cheryl Saunders and Anna Dziejcz presented at a workshop with the Tuvalu Constitutional Review

Presentation: "Post-Soviet Super-Presidentialism"

In February 2018, Associate Professor and Co-Convenor of ConTransNet, Will Partlett traveled to Moscow to deliver a paper entitled "Post-

Committee held in Sydney, Australia. Cheryl canvassed options for strengthening the parliamentary systems and improving executive and legislative relations. Anna identified constitutional reform options relating to the judicial sector. The workshop was organized by UNDP, Gilbert & Tobin Centre of Public Law and UNSW Institute for Global Development

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Workshop: "Regional and Constitutional Structures in Tension Network"

In January 2018, Tom Daly, one of the Co-Convenors of the ConTransNet, attended a week of workshops for the Regional and Constitutional Structures in Tension Network. The Network is an international research collaboration aimed at examining how regional organizations are transforming the constitutional space of their member states.

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Workshop: "Understanding how elections & constitutions interact in conflict -affected contexts"

In December 2017, Tom Daly attended the Fourth Workshop of the 'Post-Conflict Constitution Building' Series, hosted by the

Soviet Super-Presidentialism." Will's paper examines an undertheorized, fourth type of formal constitutional design found in many of the former Soviet states: Super-presidentialism. It describes how many post-Soviet super-presidential constitutions are analytically distinct from presidential and semi-presidential ones.

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Roundtable: "Recovering from Authoritarian Backsliding"

In December 2017, Tom Daly attended a Roundtable bringing together European and US experts with constitutional lawyers from Hungary and Poland, to discuss the current state of affairs in both countries and the possible constitutional and legal responses to the current democratic challenges they are facing.

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Berlin Social Science Center



Presentation: "An African Judicial Network - Building Community, Delivering Justice"

In November 2017, Tom Daly presented at the Third African Judicial Dialogue convened by the African Court on Human and Peoples' Rights (ACHPR) in Arusha, Tanzania. Tom was engaged

Edinburgh Centre for Constitutional Law and International IDEA. This 'Fourth Edinburgh Dialogue' focused on the interactions between elections and constitutions after conflict, in particular, the type and timing of elections.

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by the ACPHR to propose a design for an African Judicial Network, to create a platform for formal collaboration between courts and other judicial bodies on the African continent. which he presented to participants, including regional and domestic judges from across the African Union.

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Update

CTN hosting two workshops at World Congress of Constitutional Law (June 2018)

The next World Congress of Constitutional Law will be held in Seoul from 18-22 June 2018. The theme of the Congress is "Violent Conflicts, Peace-Building and Constitutional Law". The Congress is held every four years and brings together scholars and jurists with interests in constitutional law from all parts of the world. This year's Congress is particularly relevant to constitution making and change in the most difficult of circumstances.

In addition to four plenary sessions, the Congress program offers a wide range of workshops, some directed to the general theme and some dealing with other issues of immediate importance. The full list is here: <http://wccl2018-seoul.org/workshops.html>. Two workshops will be led by ConTransNet members:

- Post-Soviet Constitutionalism and Peace Building (#21) seeks to evaluate the continuing legacy of Soviet constitutionalism for the post-Soviet region and more generally. The workshop leaders are Sergey A. Belov and Will Partlett (w.partlett@unimelb.edu.au).
- External Influences on Constitution-Building Processes (#24) is designed to explore a wide range of experiences with foreign involvement in Constitution-making to consider whether and how a new theoretical framework can better capture its relevance and effects. The workshop leaders are Hahm Chaihark and Cheryl Saunders (c.saunders@unimelb.edu.au).

A full description of both workshops, together with information about how to participate in the Congress and other details, are available on the Congress website here: <http://wccl2018-seoul.org/>.

Courses

Post-Conflict State-Building (LAWS70313)

Bruce Oswald and Cheryl Saunders will teach an intensive subject in the Melbourne Law Masters from 14-20 March 2018 on Post-Conflict State Building. This 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.

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Constitution Making (LAWS70269)

Christina Murray and Cheryl Saunders will teach this course which 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. This includes Fiji, Iraq, Kenya, Nepal, Timor L'Este and Yemen.

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Projects

Peace Agreements & Constitutional Implementation: A Bougainville case study

Much Constitution making and change in recent decades has been a response to intrastate conflict. Often, the terms on which a conflict is brought under some control include commitments of a constitutional kind. This is by no means ideal: peace making and constitution building take place in different conditions, may involve different actors and have different immediate goals. The nexus between the two is often inevitable, however. Peace making seeks agreement on conditions in which groups in conflict can live together, to which Constitutions are at least one key. When this occurs, constitutional implementation, in all its complexity, is likely to be a factor in securing sustainable peace.

Over the course of 2018, ConTransNet members will carry out an exploratory study on the dynamics of the implementation of constitutional commitments in a peace settlement, using the Bougainville Peace Agreement as a case study. Led by Pip Nicholson and Cheryl Saunders and funded by the Folke Bernadotte Academy, the study will examine the nature and role of the constitutional commitments in the BPA, the processes by which they were included, their implementation since and the implications of the findings of the study for peace in and between Bougainville and the rest of Papua New Guinea.

Use of this case study is timely, 16 years after the agreement came into effect and as the referendum on Bougainville autonomy approaches. This study is just the beginning of a much larger project, which must necessarily take into account the differences between contexts in which questions about the nexus between peace processes and constitutional implementation arise. The conceptual framework that this phase of the project will develop, however, will provide a foundation for the rest.

Book Launch: "The Alchemists" **by Tom Daly**

Can courts really build democracy in a state emerging from authoritarian rule? This book presents a searching critique of the contemporary global model of democracy-building for post-authoritarian states, arguing that it places excessive reliance on courts.

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Article: "The American Tradition of Constituent Power" **by William Partlett**

Will Partlett has published a new article in the International Journal of Constitutional Law, exploring how “the people” exercise their revolutionary right to replace the existing constitutional order. The conventional answer is that the people act through specially elected constitution-making bodies like constitutional conventions. But what powers must these specially elected institutions—as the representatives of the people—wield? Must they possess the inherent power to, for instance, unilaterally change the ratification requirements? Or, even if they must submit their drafts to a popular referendum, must they have inherent power to pass laws or displace existing government prior to a referendum? This article recovers American debates about the powers of constitution-making bodies, however, and demonstrates that these runaway bodies are not necessary to a revolutionary expression of constituent power. On the contrary, the American approach to constituent power presents strong reasons why a revolutionary exercise of constituent power requires an elected constitution-making body to be a proposing body with limited legal powers.

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Melbourne Forum

2017 Melbourne Forum Interim Report now online

The 2017 Melbourne Forum brought together participants from 20 states across Asia and the Pacific to discuss the experiences of their own countries in grappling with constitutional change, looking at both process and substance issues. Themes of the Forum included: the choice between a new Constitution or amendment of an existing one; movement between centralised and less centralised government, including federalism; movement between presidential or parliamentary forms of government; and the pros and cons of various mechanisms to defer constitutional change.

The [Melbourne Forum Interim Report](#) is now on-line, and includes final presentations from 12 countries, as well as concluding observations from Sumit Bisarya and Cheryl Saunders. Key insights from the report include:

New or amended constitution:

- Either may be a vehicle for major substantive change

- The choice usually involves different legal and political dynamics
- The decision between the two often is part of a larger political bargain and may be made without much public exposure
- It is likely also to be driven by other local conditions

Changes to the form of government

- Almost any change to the functions and powers of the executive branch is likely to be treated as significant
- The operations of the executive and legislature are interdependent
- Many changes to the executive suggest the need for changes to the legislature as well, in behaviour if not in form.

Devolution, including federalism

- Federalism may be sought, or opposed, on the basis of constitutional tradition
- Federalism has multiple meanings in application to the form of a state
- Federalism by disaggregation inevitably encounters resistance from central institutions and central players
- Resistance is likely to be carried through to the point of implementation
- Implementation of effective devolution will also be hindered by problems of local capacity, unless these are anticipated and met.

Deferral

- Deferral of decisions that are an impediment to agreement in a Constitution-building project may take a variety of forms.
- Opportunities for deferral vary with local context
- Typically, deferral overcomes the immediate impasse.
- In the longer term, outcomes of deferral are mixed. A decision to defer therefore requires the short-term benefit to be weighed against the possibility that the matter deferred may not be resolved in the foreseeable future.

The annual Melbourne Forum on Constitution-Building in Asia and the Pacific is jointly convened by International IDEA and ConTransNet. In 2017, the Forum was held in collaboration with the Department of Political Science, University of the Philippines, Diliman. The overall goal of the Forum is to examine an issue of global constitutional significance through the experiences of states in the Asia Pacific region.

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