



Constitution
Transformation
Network

MELBOURNE FORUM

for Constitution-Building 



Sixth Melbourne Forum on Constitution Building in Asia and the Pacific
Jointly organised by International IDEA and the Constitution Transformation Network

2, 4 November, 1-5 pm, AEST

DEMOCRACY, CONSTITUTIONS & DEALING WITH THE WORLD

CONCEPT NOTE

Constitutions deal primarily with the organisation of public power within states. In democracies, Constitutions provide for institutions that draw their authority from the people, directly or indirectly, and are accountable to the people, not only through elections, but through processes that involve transparency and interaction. Constitutions specify the individual and, sometimes, collective rights that must be respected by the institutions of the state. Increasingly, constitutions provide for the devolution of power within the state, to one or more levels of sub-national government, exercising public power in a way that is closer to the people.

All constitutions also have what might be described as an external face, vis-à-vis the rest of the world. This manifests itself in all sorts of ways. Most obviously, constitutions typically provide the means for identifying the citizens of the state and sometimes also the territory of the state, distinguishing them from the citizens and territories of other states elsewhere. Some constitutions commit the state to particular international policy positions, such as peace or multilateralism. All constitutions, expressly or by implication, identify the national institutions that have primary responsibility for conducting international relations on behalf of the state. Many constitutions specifically provide for the status of international in domestic law.

The external face of national constitutions has always been important, but its significance is greater than ever in the current age of globalisation. International organisations and norms have proliferated across most areas of human activity. International trade, investment and development assistance have been catalysts for deep and sustained economic interdependence. There is a growing list of urgent and, in some cases, existential problems that require collective and effective global action.

Globalisation in these forms and on this scale has implications for democracy. States are the principal sites in which democracy is practised. Democracy in the form in which we presently understand it developed in the context of states and finds its primary expression there. As state power erodes in the face of globalisation, democratic decision-making, and the opportunity for democratic engagement, potentially erode too. This reality has prompted speculation about the possibility of greater democratisation of international institutions, as a form of compensation. Initiatives to enhance the legitimacy and effectiveness of collective action have merit in their own right, although there are obvious limits to the extent to which international institutions can democratise, in the common understanding of the term. A more direct response to the impact of globalisation on democracy is to consider ways to ensure that democratic practice within states

applies adequately to dealings by government institutions with the outside world. For historical as well as practical reasons, in many states these aspects of democracy are underdeveloped, generally and within the framework of the constitution. Questions that might be asked include, for example, whether procedures for conducting international dealings on behalf of a state, in the name of its people, meet democratic standards for transparency, inclusion and accountability. A different but related question is whether constitutions can do more to protect the domestic public interest from forces of globalisation that are inimical to it, while at the same time taking advantage of opportunities that globalisation offers and contributing to international collaboration in dealing with global problems.

The Melbourne Forum 2021 tackles a series of current issues involving the outward-looking, or external face of democratic constitutions. It cannot cover the whole field, which is vast. It focuses instead on four themes, chosen for their immediate relevance, as a way of starting the broader conversation. These themes are elaborated more fully below. In summary, however, they deal with:

- the relevance and significance of international approval of new constitutions;
- constitutional procedures for entering into treaties and other international commitments;
- constitutional frameworks for international investment approvals; and
- international engagement with sub-national jurisdictions.

In 2021, as in other years, the Melbourne Forum will examine these themes through the experiences of states across Asia and the Pacific. This vast and diverse region of the world represents a substantial component of global constitutional experience and offers many insights into the external face of national Constitutions.

Goals of the Forum

The goals of the Forum are to examine current practice, emerging trends, and pressures for change in the interface between Constitutions and the rest of the world. Specifically, the Forum will seek to:

- Understand the circumstances in which international approval is relevant for new Constitutions, its effects and significance, and its implications (if any) over time.
- Examine the ways in which Constitutions authorise entry into treaties and other forms of international agreement and consider whether and, if so, how they allow adequately for the transparency and democratic accountability on which democratic systems rely.
- Examine differences in the status of international law in domestic law, the implications of different approaches for democratic law-making, the extent to which Constitutions provide for the status of international law and the link (if any) with treaty-making procedures.
- Explore whether and, if so, how Constitutions provide specific procedures for approval or protection of international investment in the state, to examine the rationales for such procedures, and to consider their relevance and adequacy in democratic states in contemporary global conditions.
- Understand when, how and under what conditions sub-national jurisdictions engage directly in international arrangements and evaluate the advantages and disadvantages of increasing involvement, generally and in relation to climate change.
- Better understand how democratic principle and practice within states applies or should apply in dealings between states and the outside world, consistently with the public interest.

- Consider whether enhanced democratic practice by states in dealings with the outside world is relevant to the legitimacy and effectiveness of international action.

Methodology and logistics

The Forum is organised under the auspices of the Asia and the Pacific and Constitution Building Programs of International IDEA in collaboration with the Constitutional Transformation Network at Melbourne Law School.

This year's Forum will take place virtually, using zoom or another platform. It will comprise two 4 hour sessions, held on Tuesday 2 and Thursday 4 November. Each session will begin at 1 pm AEST and finish by 5 pm and will cover two themes. Each of the four themes will be explored through up case studies from across the Asia-Pacific region, by experts from selected case study countries. The experts will speak briefly to the experiences of their own country, after which discussion will take place, moderated by a chair from the International IDEA/ConTransNet team. Brief written materials providing background on each of the cases will be prepared by the presenters, responding to questions set by the organisers, and distributed to participants in advance.

Each theme will address a distinct aspect of the topic, enabling it to stand alone. The themes also are linked conceptually, however, so that collectively they can offer a broad understanding of issues raised for democratic states by the interface between Constitutions and the rest of the world. We hope that all the invited experts will join and participate actively in both sessions, together with the teams from ConTransNet and International IDEA. The Melbourne Forum Alumni and interested members of the public also are encouraged to join and to add to the insights from the discussion.

The themes to be examined are:

1. Relevance of international approval for new Constitutions: November 2
2. Entry into treaties and other forms of international arrangements in democratic practice: November 2.
3. Constitutional procedures for the approval or protection of international investment: November 4
4. Sub-national engagement in international arrangements: November 4

Session 1 also will briefly introduce the Forum as a whole; session 4 will end with reflections on the collective outcomes

Melbourne Forum Themes

1. The relevance of international approval of new constitutions

International actors often play supporting roles when new constitutions are being made. This can place additional normative pressures on constitution makers that, in some cases, may be considerable. This now familiar process raises questions about the appropriate limits and modalities of international assistance for constitution making. The theme to be explored in this session, however, is somewhat different. It considers the circumstances in which international approval of a new Constitution is, at least implicitly, sought and the issues that arise. This is not a new development and it may occur for several reasons. Historically, some constitutions were adopted to

ward off colonisation or other forms of international intervention, as in Thailand or Tonga. In current times, polities seeking statehood may draft constitutions with an eye to international recognition. Timor-Leste and potentially, in the future, Bougainville, are examples. The unusual situation of Taiwan, which retains the 1947 Constitution of the Republic of China at least in part for geopolitical reasons, demonstrates that sensitivity to international reaction to constitutional change may arise in a variety of ways.

This session will explore the ways in which international approval is relevant for new constitutions, its effects and significance, and its implications (if any) over time. Questions to be considered in relation to each case (with appropriate contextual adaptations) are:

- To what extent was a positive international reaction a factor in making the designated constitution? Why? How was sensitivity to international opinion manifested? How was international reaction conveyed?
- Did this have an effect on the process by which a Constitution was made or on the substance of the constitution? If so, in what ways? Was the result positive, negative, or neutral, in your view?
- What was the international reaction?
- Did the felt need to attract international approval/acceptance/recognition affect the workability of the constitution in the local context and/or its implementation?
- Did the felt need to attract international approval/acceptance/recognition affect the attitudes of state institutions or the people of the state to the concept of a constitution, immediately and/or over time?
- Are there any other aspects of the experience with constitution making and change in your country that might have a bearing on these issues?

2. Treaty-making and implementation

All states enter into treaties and other forms of international agreements including, in some cases, agreements about development aid. Some of these agreements require continuing international activity on the part of the state: to nominate people for positions or to participate in meetings, for example. Many, perhaps most, of these agreements need to be implemented within the state. In some states, at least some aspects of international law that is applicable to the state takes direct effect in domestic law. In other states, domestic implementation of international commitments requires further action by domestic institutions.

How international agreements are made and given effect within states are matters on which practice differs. As a generalisation, nevertheless, the executive branch bears primary responsibility for international relations, including treaty making and, sometimes, ratification. In an age in which international arrangements are pervasive, affecting many aspects of the lives of communities, it is timely to consider the extent to which current practices adequately meet democratic norms for transparency, inclusion, and accountability, without jeopardising international engagement, in the public interest. Given the significance of these issues a related issue, for present purposes, is whether and, if so, how, procedures for domestic participation in international law-making have a framework in the Constitution itself.

This theme will explore the ways in which states enter into treaties and other forms of international arrangements, together with the related issue of the status of international law in domestic law. Questions to be considered in relation to each case (with appropriate contextual adaptations) are:

- How are treaties entered into in your country? Where relevant, use the Paris Agreement on Climate Change as an example.
- Is it relevant to distinguish treaties from other forms of international agreements for this purpose, or to distinguish between different types of treaties?
- How are these procedures reflected in the Constitution?
- Is there any debate in your country on the adequacy of the procedures entering into treaty commitments and other forms of international agreements from the standpoint of transparency and accountability? Is there any pressure for change?
- What is the status of international law in domestic law in your country? Is it relevant to distinguish between different forms of international law for this purpose?
- Does the Constitution specify the status of international law in domestic law?
- Does the implementation of international law in domestic law create any theoretical or practical problems?
- Is there any debate in your country about the ways in which international law is absorbed into domestic law?
- Are there any other aspects of the experience of your country with the entry into international arrangements and their implementation and activation, which might throw light on the issues raised by this theme?

3. Approval and protection of international investment

International investment may bring significant benefits to a state, in terms of economic development and the provision of infrastructure and other public goods. Whatever its benefits, however, particular investment projects may have a significant impact on the operations of government and the lives of communities, in ways that include land use and the environment and may have implications for law-making and tax-raising. Investment programs and projects take many forms for present purposes. Some are primarily commercial ventures; others may be linked to development assistance as well. Some international investment programs are intertwined with global geopolitical positioning. The Belt and Road Initiative of the PRC is one example. The Build Back Better World (B3W), agreed at the G7 in 2021, is another.

Constitutions do not necessarily provide a framework for agreement to proposals for international investment by state institutions, although some do so. Given the pace of international investment activity, however, and the high significance of the approval of many such projects for the state in which the investment would occur, it is timely to examine how such decisions presently are made, to consider the consistency of current arrangements with the norms and practices of democratic government and to explore options for future directions.

This theme will explore whether and, if so, how Constitutions provide specific procedures for approval or protection of international investment in the state, to examine the rationales for such procedures, and to consider their relevance and adequacy in democratic states in contemporary

global conditions. Questions to be considered in relation to each case (with appropriate contextual adaptations) are:

- What kinds of major international investment projects are there in your country? How do they affect community life and governance? Are any of them controversial, or the subject of public debate?
- Are investment projects subject to the ordinary law?
- Which institutions have authority to approve such projects? How are these decisions made?
- To what extent is there transparency and public accountability for such decisions?
- Does the Constitution provide a framework for making decisions about international investment? If so, since when? What does it provide? Does the framework operate in practice?
- Are there any changes to current procedures and to the constitutional framework that applies to them that might retain the beneficial aspects of international investment while enhancing transparency, deliberation and accountability?
- Are there any other aspects of the experience with international investment and assistance in your country that might throw light on the issues for this theme?

4. Sub-national engagement in international relations

International engagement usually involves institutions at the national level of government. Typically, the national level of government exercises the external sovereignty of the state on the part of the country as a whole. Typically, also, the national level of government controls the external borders of the state. As a result, central authority is required for the flow of people, capital, and commodities across those borders. International law professes a lack of interest in the internal constitutional arrangements of countries as long as the country as a whole fulfils its international obligations.

Nevertheless, there is a significant degree of internal devolution of power in many countries. This may take place through all or any of the following: a general intermediate level of government (federated units, regions); a general local level of government; major cities or urban centres; territories with special autonomy. Most sub-national levels of government are democratically elected, have significant authority to act in the public interest and have considerable autonomy in doing so. In conditions of globalisation some, including constituent units in federal systems, territories with special autonomy and major cities in fact engage in international relations of some kind, entering into international agreements with less than treaty status, participating in international commercial arrangements, collaborating across international borders, and generally taking action in response to global concerns. The many contexts in which this may occur include environment protection, generally and with an eye to the dangers of climate change. Action in relation to problems of this kind often fall, at least in part, within sub-national authority, formally or informally.

This theme will explore when, how and under what conditions sub-national jurisdictions engage directly in international arrangements and evaluate the advantages and disadvantages of increasing involvement, generally and in relation to climate change. Questions to be considered in relation to each case (with appropriate contextual adaptations) are:

- What forms of sub-national government exist in your country? Are they symmetrically organised or is there an element of asymmetry?
- Do any of them engage in international arrangements? If so, with what partners and in what areas? What procedures are followed within the sub-national jurisdiction?
- What is the governance framework for such arrangements within the country? Are sub-national governments recognised as having any international legal personality? Is the approval of national institutions required, positively or negatively? Is there any debate about these arrangements?
- How is the position of sub-national governments in international relations and other arrangements reflected in the Constitution?
- Have sub-national governments in your country adopted policies in relation to climate change? If so, please elaborate. Have these steps been taken unilaterally, in collaboration with other governments in your country, or in response to external representations or pressures?
- Are there other aspects of the experience of your country with the engagement of sub-national governments in international activity that might throw light on the matters for consideration in this theme?