

CONSTITUTION BUILDING IN STATES WITH TERRITORIALY BASED SOCIETAL CONFLICT

Melbourne Forum on Constitution Building in Asia and the Pacific

Jointly organised by International IDEA and the Centre for Comparative Constitutional Studies

Melbourne Law School, 18 and 19 August 2016

Concept note

The subject-matter of this Forum is the substance and process of constitution building in societies in which there is societal conflict that is territorially defined. This is a familiar context for constitution building throughout the world, as states as disparate as Kenya, Libya, Spain and Iraq show. Nor is it new. Many states that today appear relatively settled have constitutional arrangements that historically evolved as a response to societal conflicts of this kind. Switzerland, Italy and Canada are examples.

The particular focus of this Forum is on constitution building in conditions of societal conflict in the vast and diverse region of Asia and the Pacific. The Asia-Pacific offers a particularly rich vein of global experience for this purpose. There is actual or potential societal conflict along territorial lines within many states in the region, reflecting societal diversity in terms of language, religion, tribe, culture or ideology. There are examples in the region, of which India is an example, of states with well-established constitutions that were made and designed with an eye to managing societal conflict. Across the Asia-Pacific region there are many states in which constitution building is or has recently been underway or is pending and which face the need to take societal conflict into account. Their circumstances are very different, as the examples of New Caledonia, Bougainville, Nepal, the Philippines and Indonesia suggest. The solutions towards which they are working necessarily vary as well. Nevertheless, there is potential for countries in the region to derive insights from the experience of each other as they grapple with the challenges they face. Equally, constitution building elsewhere in the world can derive insights from constitution building in Asia and the Pacific; and the converse also is true.

Constitutions accommodate territorially based societal conflict in a variety of ways. Often, accommodation is built around organisation of the state in ways that give a degree of autonomy to the people in territorially defined sub-state regions, often complemented by institutional measure that give sub-state orders a voice in decision-making at the centre. Federalism is one familiar form that such arrangements take. Federalism comes in a variety of different forms, however, to suit the context in which it must operate. Nor are all arrangements for constitutionally protected devolution of governing authority designated as federal, either because they lack some of the characteristics of local autonomy that federalism is deemed to offer or because there are strategic reasons to adopt a

different term. Where societal conflict engages only part of the state, another option sometimes pursued is regional autonomy for the area affected, within an otherwise unitary state. In extreme cases, there may be calls for separation from the larger state. Each of these options presents challenges of its own, in terms of both constitutional building process and substance. Problems that may be held in common include the extent to which boundaries follow ethnic lines, thus potentially entrenching divisions and the principles that should apply to the treatment of those within each sub-state region who differ from the sub-state majority.

Local autonomy is usually, but not always adopted for states in which there is societal conflict, territorially defined. Even where it is adopted, in some form, as a necessary dimension of constitutional design, it is unlikely to be sufficient to manage societal conflict on its own. A more comprehensive solution engages with the need to give all peoples a sense of ownership of the state, rather than treating some as minorities in a state owned by others, whose presence is tolerated and protected. This challenge is considerable in states in which the majority population is united by language, religion or other cultural characteristics. It may be tackled through a range of measures, which include the ways in which the state is conceived and defined within and beyond the constitutional text, the composition of central institutions, an inclusive language policy and equality in the treatment of religious belief.

An examination of constitution building in conditions of societal conflict is not confined to constitutional design but extends also to the process of constitution building and to implementation of new constitutional arrangements. The project of fostering a sense of collective ownership of the state can be furthered by the processes of constitution building. Societal conflict in any event has implications for the design of a constitution building process from the first moves towards new constitutional arrangements until the new regime is in place. Thus, societal conflict affects the negotiation and approval of any peace agreement; the framework for any referendum on future status; preliminary decisions about the parameters of constitutional change; and processes for deliberation and ratification. Once a new constitution formally is in place, effective implementation is essential to its operation in practice and to maximising its potential for the management of societal conflict. The challenge of implementation is greater to the extent that the changes made introduce new institutional forms or require cultural adaptation. This is likely to be the case where a new constitution requires devolution and/or inclusion in conditions of societal conflict.

Cases

Many cases might be chosen from the Asia-Pacific region to explore these complex and important issues. This Melbourne Forum will focus in particular on the following: India, Nepal, Indonesia (with particular reference to Aceh and West Papua), the Philippines, Sri Lanka, Papua New Guinea (with particular reference to Bougainville), Myanmar, the Solomon Islands and New Caledonia.

Consideration also may be given to Bangladesh, Thailand, Vietnam and China (with particular reference to Hong Kong, Macao and Taiwan). The principal cases for examination fall into different categories in terms of the stage that constitution building has reached. In some, new constitutional arrangements are settled, or relatively settled, enabling conclusions to be drawn from historical experience (India, Indonesia/Aceh). In others, constitution building is currently underway, albeit at different points along the spectrum that range from pending referendums on status in Bougainville and New Caledonia to implementation of a new constitution in Nepal. Sri Lanka offers an unusual case, in relation to which there is both negative historical experience in constitution building in the face of societal conflict and a current, more inclusive constitution building project that presently is under way.

Format and logistics

The Forum is organised under the auspices of the Constitution Building Program of International IDEA in collaboration with the Constitutional Transformation Network of the Centre for Comparative Constitutional Studies at Melbourne Law School. It will take place over two days, on 18 and 19 August 2016.

The format is designed to encourage the interchange of ideas, collegiality and openness to learning from the experiences of others. To this end, we will ask presenters to address a particular set of questions, which we hope will encourage in-depth discussion and meaningful comparison between the cases. Our aim is to develop conclusions about how constitution building can most effectively contribute to the management of societal conflict.