



MELBOURNE FORUM

on Constitution-Building



CONSTITUTION
TRANSFORMATION
NETWORK

“Reflections on the 2018 Melbourne Forum on Culture and Constitution Building”

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The focus of this report, and of the 2018 Melbourne Forum on Culture and Constitution Building on which it was based, is the intersection of culture and constitution building. Examination of this important issue, and the opportunities and challenges to which it gives rise, has the potential to be particularly productive in the vast region of Asia and the Pacific. This is a region in which there is a rich range of cultures between, among, and within states. It is also a region in which constitution building has been a common occurrence over the past thirty years, offering experiences and insights that contribute significantly to global constitutional knowledge.

Culture is a complex phenomenon. It was defined broadly for the purposes of the Forum, to encompass historical, geophysical, social and other contextual factors that affect assumptions, practices, behaviour and beliefs. It may be elusive and is often contested. Different manifestations of culture – such as language, religion, history and traditions – may overlap. Culture is not static, but evolves over time in response to changing circumstances, of which the current phase of globalisation is one.

In relation to constitution building, further complications arise. Culture is unlikely to be homogenous within state borders and is not necessarily confined by state borders. Cultural claims may be exaggerated or otherwise manipulated in the heady context of constitution building where so much apparently is at stake, by any or all the stakeholders. Culture may become stultified and cultural divisions magnified, if it is incorporated in a written constitution or other law. Some cultural practices are discriminatory, against women, children or other disadvantaged groups, or are otherwise inconsistent with international human rights. In the context of constitution building, a sub-set of culture may become particularly relevant, where there are practices, assumptions and beliefs that affect the making, design and operation of constitutions themselves. For the purposes of the Forum, these are described as constitutional culture.

Whatever the difficulties of the subject-matter, a clear conclusion of the Forum is that culture is a reality that constitution building must take into account. This is reflected in the responses of all the participants, in states ranging from India to Tuvalu and from Afghanistan to Papua New Guinea. From the standpoint of constitution building, culture may be a positive, negative or neutral force. Constitutional responses to culture may differ accordingly: reinforcing the positive, to strengthen the effectiveness of the constitution, in ways that may also be expressivist; managing or mitigating the negative, to the extent that a constitution can; or informing successive phases of a constitution building project, whether explicitly or not. Culture is likely to affect the design of a process that will enhance the legitimacy and thus the people’s acceptance of the constitution resulting from it; a particularly complex task in communities that are deeply culturally divided. Culture may be reflected in the substance of constitutions in myriad ways, which include but are by no means limited to such

surface features as preambles, directive principles and cultural rights. In addition, or instead, culture may affect the structure of government, the organisation of the state and the articulation of rights. Alternatively, culture may simply inform constitutional understanding, transforming the operation in practice of constitutions that on the face of it look much like many others. Culture undoubtedly is a dimension of the implementation of a new or amended constitution, particularly following major constitutional change, of which a move from a unitary to a more decentralized system is an example. The influence of culture on constitution building presents yet another set of challenges for effective external assistance at any stage of the process. These challenges might include the intricacies of translating not only constitutional text but constitutional understandings; gathering knowledge of the constitutional culture as well as diverse cultures and different understandings within the state; and reconciling the goals of external and international actors with the aspirations of the people of the country concerned.

The proceedings of the Forum identified several other issues for constitution building that are not necessarily captured under the rubric of culture. One is the importance and relevance of time, in enabling complex constitutional negotiations to occur and enabling significant substantive change to be introduced incrementally, where that assists the process of transition. Another is the influence of leadership on effective constitutional change. Neither of these issues is novel, but both are reinforced by the participant's responses in this report.

In addition, the responses and the discussion that accompanied them suggest a series of questions about constitution building and culture that require further reflection. Two of the most important are the following. One is the design of constitution building processes in states with deep cultural divisions. Cultural division typifies the condition of many states, often fueling conflict and in any event complicating inclusive constitution building processes and affecting the legitimacy of the resulting constitution. How this can best be accommodated in the design of constitution building processes has long been recognised as a problem, which so far has no clear answers. A second question, also highlighted by the proceedings of the Forum, is the relationship between culture and international standards. In the context of constitution building, this relationship can present itself as a binary divide: a choice between local ownership and international approval. The proceedings of the Forum suggested that the relationship might be more complex. There are unexplored questions about whether, to what extent and with what effects globalisation generally and international human rights standards in particular are reflected in local culture as it evolves. Conversely, there is an urgent need to consider more carefully how international standards reflect and can be seen to reflect the cultures of the peoples of the world, in their shared humanity.

This report is designed to make the proceedings of the Forum available as quickly as possible to those interested in constitution building in all regions of the world. A series of Constitutional *Insights*, drawing on the themes of the Forum, also will be published in due course. One of the purposes of the Forum is to promote the interchange of ideas between those who are grappling with questions of this kind, and any comments about the conclusions of the Forum and the issues to which they give rise are welcome.