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**Newsletter Issue 3 | May 2018**

*This is the third 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

### Foreign judges on constitutional courts

In present conditions of globalisation, there is much discussion about the transnational movement of constitutional texts, ideas and concepts. Often overlooked, however, is the movement of judges themselves across national borders. This may be because it is generally assumed that the judges sitting on a state's courts - especially courts of constitutional jurisdiction - will be citizens of that state. This assumption is reinforced by a review of national laws, which in over 100 countries require judges to be citizens. However, in a small but significant number of countries, foreign judges regularly sit on a state's highest courts and determine constitutional matters.

Reasons for the use of foreign judges on constitutional courts vary. In some circumstances, foreign judges are appointed to a constitutional court to counterbalance entrenched divisions within the national polity. The appointment of foreign judges to the Constitutional Courts of Bosnia Herzegovina and Kosovo is an example. Another reason for the use of foreign judges arises where there are insufficient numbers of qualified local people who are able and willing to accept appointment as judges. This is the case in many small states and territories in the Pacific and Caribbean. Foreign judges might also be appointed to enhance the expertise and prestige of the courts, and the inclusion of foreign judges on the Hong Kong Court of Final Appeal might be understood in this sense. This range of rationales mean that the practice of foreign judging features in a variety of constitutional contexts.

Does the nationality of a judge matter? If so, how does the position of a foreign judge differ to that of a local judge? The answers are likely to depend on how the role of the judge is conceived, drawing on different theoretical understandings and legal traditions. One point of difference relates to the kinds of knowledge about both the law and the wider community that judges are expected to have, and the extent to which constitutional law is understood to be distinctively local, or converging in the wake of various historical and contemporary global influences. Another relates to conceptions of the judiciary as part of state or wholly separate to it, such that the ties of allegiance and membership that are understood to accompany nationality are understood to be more or less significant to the position of

judges.

The use of foreign judges is just one manifestation of the interface between domestic constitutions and regional and international legal orders explored in the work of the Constitution Transformation Network. It deserves attention in its own right, as a feature of the constitutional systems across the globe, but also provides a new lens for examining widespread but often unarticulated assumptions about the significance of nationality to the functions and qualities of constitutional judges.

## News

### Seminar: "Notes from the Coalface - Working on Constitutional Reform in Myanmar"

On 8 May, Cheryl Saunders lead a seminar at Melbourne Law School discussing the insights into constitution-building that she has gleaned engaging with policy-makers in Myanmar, under the auspices of International IDEA. Cheryl described the current context in Myanmar, the nature of the work she has been doing and some of the lessons she has learned regarding comparative constitutional law.

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### Presentation: "Foreign judging and international judging"

Anna Dzedzic, ConTransNet Co-Convenor and PhD Candidate at Melbourne Law School, was a recent visitor to [iCourts](#), the Danish National Research Foundation's Centre of Excellence for International Courts and the University of Copenhagen. On 11 April, Anna presented a seminar on '[Foreign judging and international judging](#)', drawing on her doctoral research project on the use of foreign judges on the courts in independent Pacific island states.

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### Presentation: "An Australian Republic - Future Prospects"

The challenges of constitution building are real in Australia, as well as in the rest of the world. As elsewhere, they require careful thought to be given to process, as well as to the substance of constitutional change. On 7 May 2018, Cheryl Saunders stressed the former when speaking to a [recent forum](#) hosted by Monash Clayton Republic Club, Melbourne University Republic Club and the Progressive Law Network.

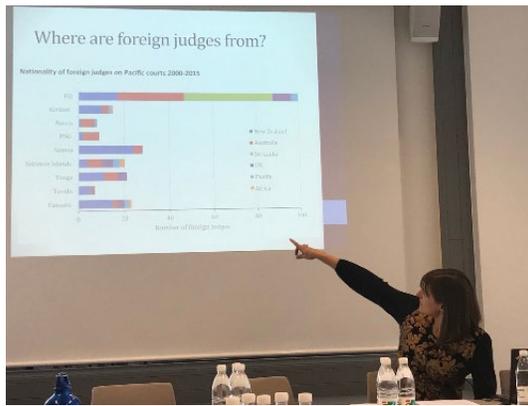
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### Presentation: "Using Comparative regional Law to Provide Direction to the Central American Integration System"

Carlos Arturo Villagrán Sandoval, a Member of ConTransNet, presented his thesis' findings at the Central American Integration System General Secretariat in San Salvador, El Salvador on 9 April. Carlos Arturo discussed the challenges of how Central American academics and legal practitioners engage with other integration enterprises, arguing that there is a pattern of Eurocentric bias and decontextualized transplant of European doctrines in Central American legal scholarship.

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### Knowledge exchange with the Sri Lanka judiciary

From 23 to 27 April, Melbourne Law School hosted [ten judges from the Sri Lankan Supreme Court and Court of Appeal](#) as part of a knowledge exchange focused on sharing MLS scholars' expertise on key issues of interest to the visiting judges. ConTransNet hosted Day 2 of the knowledge exchange with the [agenda](#) focused on showcasing Australia's own constitutional history, institutions and practice, as well as canvassing global and regional constitutional developments relevant to Sri Lanka.

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### Seminar: "Brexit - Law, Constitution and Market"

In this important lecture, [Professor Richard Rawlings](#), Professor of Public Law, University College London, one of the UK's leading constitutional experts, addressed a central yet unexplored ramification of Brexit: the construction of 'a UK single market' to facilitate domestic commerce, pave the way for international trade deals and protect national



### Seminar: "Participation and process - the Sri Lankan experiment"

On 24 April, Ms Dinesha Samararatne, a Kathleen Fitzpatrick Visiting Fellow at Melbourne Law School, led a seminar that revisited the idea of public participation and consultation in constitution-making, using Sri Lanka as a case study. Public participation has been widely endorsed as a method of ensuring legitimacy of a constitution. However, in the context of states emerging from armed conflict, Dinesha argues that public consultations and/or participation in constitution making can be a double-edged sword.

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### Presentation: "Myanmar - federalism and the judiciary"

Cheryl Saunders, ConTransNet Co-Convenor, was in Myanmar for a week in March 2018, in her capacity as senior technical advisor to the Constitution Building Program of International IDEA. During that time, she held seminars and briefings with a series of groups, including judges and civil society, that will be involved in constitution implementation if and when constitutional changes were made to give effect

resources.

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to provisions of a peace agreement.

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## Publications



ConTransNet has published the next paper in our CTN Policy Series, "[Constitutional Design: Options for Decentralizing Power](#)". The paper is designed to guide the reader in understanding the key building blocks involved in building a decentralized state and identifying the most critical design issues involved. The paper illustrates these issues using 3 case studies.

In April 2018, Cheryl Saunders and Michael Henry Yusingco published an article on "[Complexities of Constitutional Change in the Philippines](#)". The article describes the current constitution-making process, highlighting a range of key constitutional and political issues that will need to be tackled as the process moves forward.

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**Complexities of Constitutional Change in the Philippines**

Cheryl Saunders, Michael Henry Yusingco  
14. April 2018

President Rodrigo Duterte assumed office in July 2016. His party, PDP Laban, had campaigned under the slogan: "No to Drugs, Yes to Federalism". Duterte thus is counted not as supporting the Philippines towards a federal form of government, an understanding that would require an extensive overhaul of the country's constitution.

Proposals for federalism are new to the Philippines. Federalism was considered in 1959, in connection with the first constitution of the Philippines and has been alternatively on the agenda again since 2001. Heretofore the idea of federalism was promoted by the geography of the country and the diversity of its people. More recently, it has been driven also by concerns about development, in a country where power and resources are heavily concentrated in the capital, Manila. From this perspective it sometimes is associated also with proposals to move from a presidential to a parliamentary form of government.

To complicate the matter further, the present debate on federalism overlaps with a separate process to create a new autonomous region in Mindanao, to finally resolve a long-standing, separatist conflict.

Should Duterte continue from Duterte and promote the process...

## Events

### 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](mailto: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 Chaihark Hahm and Cheryl Saunders ([c.saunders@unimelb.edu.au](mailto: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://wcccl2018-seoul.org/>.

## Courses

### Constitution Making (LAWS70269)

Christina Murray and Cheryl Saunders will teach this course from 7-11 November 2018. 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. This includes Fiji, Iraq, Kenya, Nepal, Timor l'Este and Yemen.

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