



MELBOURNE FORUM

on Constitution-Building



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‘Implications of Culture(s) for Constitution Building: Insights for Sri Lanka’

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The third Melbourne Forum on Constitution Building in Asia and the Pacific was a unique opportunity for constitutional law scholars, lawyers and activists with a comparative bent to wrestle together with the epistemological challenges that cultures pose to this field. The Melbourne Forum is to be commended for opening up the space for this critical and engaging exercise. In examining the relevance and implications of cultures to constitution building it was evident that taking account of cultures is in fact a call to re-examine some of the foundational assumptions in the field of constitutional law.

The Melbourne Forum engaged with this task of unpacking and understanding the place of cultures in constitution-building with an attitude of openness and sensitivity. The discussions at the Forum established in clear ways that the examination of the implications of culture for constitution building was long overdue. The Forum discussions on this theme were highly illuminating. The discussions were humbling from a methodological point of view as well as from a substantive point of view. The Forum challenged its participants – comparative constitutionalists – to take on the epistemological and methodological challenges that cultures pose to the field of ‘comparative constitutional law’. The Third Melbourne Forum paved the way for further questions that we can and indeed we must pose in advancing the impact and reach of comparative constitutional law. In what ways should culture be explained? Should a constitution describe, regulate or reflect cultures in its scheme? What tools can be used to discern the impact of cultures in constitution building? These questions (and many others) foreground unexplored and understudied aspects of constitution building and paves the way to new areas of study.

A critical appreciation for cultures in constitution building creates new possibilities. One is that it provides us with analytical tools with which we can ground, in specific cultural contexts, the abstract concepts of constitutional law. Cultures are primarily experiential and more regularly explained through critical forms such as deconstruction or discourse analysis. Concepts in constitutional law are generally abstract in nature and explained, primarily, if not entirely, by positivist methods. Positivist methods often involve forms and concepts that are assumed to be ‘discrete’. According to dominant constitutional scholarship these forms and concepts exist, are interpreted, enforced and internalized without any significant influence from other factors. Culture(s), at the most, is acknowledged as only having a secondary place in this scheme.

The discussions at the Third Melbourne Forum have attempted to question some of these assumptions in constitutional law – its scholarship and its practice. Cultures are not merely a factor that one has to take account of, or only an aspect of life that constitutions manage in different ways such as through a preamble or a Bill of Rights. Rather, cultures are the very medium whereby we think about, experience and practice constitutional ‘norms, rules’ etc. It is the medium in which we engage

in constitution building. Paying attention to cultures makes constitutional lawyers more attentive to 'ground realities' and therefore probably more effective in their work.

Turning to the study of cultures, it is useful to note that Anthropology emerged as a field of study with the colonial encounter of 'the other' in colonized territories. More recently cultural studies emerged as a field of study heavily influenced by emerging interests in studying the position of the working class under conditions of affluence. Colonial encounters and economics therefore are critical sites that one should pay attention to in seeking to understand the implications of cultures in constitution building. Law is perhaps one of, if not the most, enduring features of the colonial project. The conversations at the Third Melbourne Forum about constitutions in the Asia-Pacific have affirmed that view. If law is an enduring feature of the colonial project, one could argue that constitutions and constitutional law is at the core of it. Today Anthropology has shed much of its colonial trappings and has been appropriated by its 'subjects' – the colonized. Similarly, law too has been appropriated for social engineering in newly formed independent states to promote the different ideologies of such states. Constitutions have been the most obvious forms of the law that have been appropriated in this way. However, unlike Anthropologists or students of Cultural Studies, constitutional lawyers are less self-aware of the ways in which constitutions are being appropriated as a form.

The discussions at the Third Melbourne Forum inspired two specific reflections on Sri Lanka, the geographical location of the Forum. The first is regarding constitutional identity. A constitutional identity is a cultural identity irrespective of whether it is thought of in that way or not. In Sri Lanka the failure of the political elite, or its sub-group that drives the process of constitution-making, to acknowledge this reality arguably explains the lack of progress made in the current cycle of constitution-making. Where a constitution-making exercise does not actively promote a constitutional identity, it can be argued that the process creates a vacuum. This vacuum is then organically occupied by existing cultural identities of a society. It could be said that constitutional governance in Sri Lanka (under four written constitutions) is an example of how this organic capture of a constitutional identity can take place. The same occurred in its two constitution-making exercises. Sri Lanka's existing cultural identities are organized around ethnicity, nationalisms, majoritarianism and patriarchy. It is these very same cultural identities that are entrenched in Sri Lanka's constitutions. It follows as a matter of logic therefore that the process for constitution-making must take up the question of cultural identity not as a secondary concern but as a central one. The need to do so is even greater given the fact that the existing cultural identities have given way to sustained violence in Sri Lanka. Constitution-making therefore needs to actively focus on designing a process that will enable the forging of a constitutional identity that is also a cultural identity. Depending on the context this can be a thick or thin identity, a fixed identity or an evolving one.

This leads to the second Sri Lanka specific reflection, which is to do with public participation in constitution-making. One of the most obvious ways of taking on the project of forging a cultural identity is through public participation in constitution-making. In Sri Lanka, the public consultation process undertaken early 2016 was not only inadequate but even counter-productive. It arguably led to disenchantment with the constitution-making exercise. One explanation for these outcomes is the lack of attention to cultures in these processes. Sri Lanka has had an entrenched constitution-making culture in which hand-picked elite lawyers engage in political bargaining behind closed doors. That entrenched sub-culture encountered, perhaps for the first time, public expectations of direct involvement, participation and engagement in the constitution-making process. Perhaps little thought was given to how the public participation process would impact on this sub-culture of constitution-

making through elite political bargaining. The incremental transformation of Sri Lanka's political culture that is currently underway through, for instance, the effective implementation of the Right to Information Act, cannot be ignored by the political elite anymore.

If cultures are given their due place of significance in constitution-making it demands that public participation be revisited – in substance and in process. Such an approach would include the following. 1) Strategizing on either affirming cultural identities or forging of new identities. Public participation must be based on identifiable positions on cultural identities. 2) Public participation must mainstream conversations on culture and acknowledge its centrality in shaping experiences, expectations and outcomes of public participation/consultation. 3) These strategies must be accompanied by education, awareness and engagement on how cultures should inform constitution-making. 4) Strategies for public participation in constitution-making should include plans for continued public engagement after the constitution is adopted. The public consultation process was carried out in Sri Lanka within three months with no preparation and with no clear pathways for continued engagement. That process created structures that have been captured by existing cultural/political contestations and perhaps even amplified them. Much therefore remains to be learnt from the disregard for cultures in public participation/consultation and culture in Sri Lanka.

PostScript

On 26 October 2019 the President of Sri Lanka purportedly appointed a new Prime Minister. This was followed by the prorogation of Parliament and subsequently its dissolution. These actions of the President set in motion a constitutional crisis which was also described by some as 'a constitutional coup'. The dissolution of Parliament was challenged before the Supreme Court of Sri Lanka by several individuals on the basis that it violated the right to equality. On 13 December a seven-member bench of the Supreme Court issued a unanimous decision and held that the dissolution of Parliament was unconstitutional. The constitutional crisis of Sri Lanka and the way in which it was resolved validate the focus of the Third Melbourne Forum. At a time when the written constitution was sought to be undermined and openly flouted several institutions performed their functions independently. The push back eventually resolved the crisis. These events suggest that Sri Lanka's institutions and democracy are perhaps healthier than they were presumed to be. This experience raises new questions about constitutional identity and constitutional culture in Sri Lanka.

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