



**FROM BIG BANG TO  
INCREMENTALISM:  
CHOICES AND CHALLENGES IN  
CONSTITUTION BUILDING**

**The second Melbourne Forum on Constitution Building  
in Asia and the Pacific**

**Manila, the Philippines**

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*Jointly organised by International IDEA and the  
Constitution Transformation Network*

*Hosted by Political Science Department, University of  
the Philippines Diliman*

## Concept

Any constitutional change is significant. At the very least, it is designed to alter an existing pattern of behaviour. It may affect established institutions. Insofar as the Constitution represents fundamental law, change may require negotiation of a political and societal consensus. There will almost invariably be an implementation phase, while the new arrangements are bedded down. In some cases, the stakes are particularly high. Constitutional change may be needed to make and sustain peace, to provide a framework for transition from authoritarianism to democracy and the rule of law, build effective government, and/or to protect human rights. Designing a Constitution building process and negotiating an acceptable constitutional settlement are significant challenges in cases of this kind.

The subject matter of this Forum is the relative magnitude of constitutional change and the ways in which it is handled, in responding to a constitutional moment. It deals with issues that may arise in the course of transition to democracy or in an established democracy contemplating constitutional change. Magnitude for this purpose can be measured by reference to process or substance or both.

Process involves the question of whether change is effected by a new Constitution, with or without legal rupture; by alteration of an existing one; or by limiting or avoiding formal constitutional change altogether in favour of changes to legislation or political practice. Where change occurs through alteration rather than replacement, there is an additional question of whether to make all changes at once or to seek a series of amendments over time. In any of these cases, there also is a question of when to seek formal constitutional change and when to leave issues to ordinary politics.

Substance refers to major institutional change irrespective of the process followed. Examples for present purposes include change to the form of government, in a move between parliamentarism and presidentialism, or to the form of the state, in a move between unitary and federal or substantially devolved arrangements. In context, other changes may be major as well: a major shift in the electoral system, in relations between religion and the state or in the status of international in domestic law are possible examples.

Sometimes the degree of magnitude is a matter of choice by stakeholders at the outset of a Constitution building exercise; in other cases circumstances effectively determine whether or not a new Constitution is needed or a major institutional change made. In either case, however, Constitution building will be enhanced by an understanding of the issues that are likely to arise from taking particular paths and the options for dealing with them.

The Forum will explore the issues associated with the relative magnitude of constitutional change by reference to experience in the vast and diverse region of Asia and the Pacific in particular, although cases may be drawn from Latin America as well. The Asia-Pacific region is a fertile field for this purpose, offering cases that span the entire spectrum from what might be described as big bang Constitution making to more incremental approaches, with a rich array of variations in between. In this as in other contexts, Constitution building in the Asia Pacific makes a substantial and important contribution to global experience.

In some cases the Constitution building projects on which the Forum draws are historic, allowing outcomes to be assessed from the vantage point of hindsight. In others, including the Philippines, where the Forum is likely to be held, a Constitution building process is ongoing although, in the

particular case of the Philippines, the experience of making the 1987 Constitution offers relevant insights as well. In yet another group of states, of which Myanmar is a possible example, there are grounds on which to expect that questions about the magnitude of change and how it is achieved will need to be answered in due course. The mix of different phases of Constitution building is valuable, generating different kinds of insights and offering opportunities to apply the understanding gained from comparative knowledge.

For the most part, properly, decisions about the magnitude and pace of constitutional change are driven by the state concerned and its people, responding to local conditions and underpinning local ownership. In most cases, nevertheless, international models will be taken into account. In addition, international institutions, including the United Nations and other international actors may play supporting roles of various kinds in constitution building processes. In order to adequately understand Constitution building, the nature and impact of external forces of this kind must be taken into account as well.

The aim of the Forum is to enhance understanding of decisions around the magnitude of constitutional change so as to better understand Constitution building generally and to inform decisions made by others in the future. To this end, the Forum is organised around five principal themes, each of which will be explored through selected case studies. As always, in drawing insights from each of the themes, other relevant aspects of local context should be taken into account. A final session is designed to draw the themes together, generally and for their relevance to the current debates on Constitution building across the region, including in the Philippines. This final session provides an opportunity to reflect on the purposes of international assistance, ways in which it is most usefully delivered and the role of international institutions in this regard.

Speakers will address specific questions relevant to their case and the theme of the session. In general, however, each case study will consider:

- The magnitude of the constitutional change;
- How and why decisions were made about both the process and the substance of constitutional change;
- The consequences of particular choices for the wider constitution building project;
- The insights that can be gained from particular case studies and their potential application in other contexts.

In considering the themes, cases and questions it is important not to overstate the significance of the distinction between particular options. A new Constitution may incorporate familiar institutions from the past; an amended Constitution may make radical substantive change. The process followed to make a new Constitution may be prescribed by the old one; the processes for amendment of an existing Constitution may be augmented to enhance the legitimacy of the changes that are made. There are gradations of unitary and federal systems that shade into each other and the same is true of the distinctions between presidential and parliamentary systems. Points of this kind may emerge from careful consideration of particular cases. Even in these cases the distinctions have some consequences that, in many instances, are highly significant.

## Sessions

### 1. Making a new Constitution

Constitution building in any state with an existing Constitution involves a decision whether to amend that Constitution (or, sometimes, an older one) or to make a new Constitution.

Obviously this is not a choice that needs to be made where no Constitution existed before as, for example, in Timor Leste. In some other circumstances a new Constitution may effectively be necessary because, for example, the previous one has lapsed and cannot practically be reinstated; or is considered illegitimate as foundation for transition (arguably, the Philippines in 1987); or is necessitated by terms of a peace agreement. In other cases, however, the decision may be more open. In these cases, the choice may be governed by a wide range of legal, political, symbolic, or pragmatic factors.

Whether the choice to make a new Constitution is deliberate or not, it is relevant to the questions of how and why particular Constitution making procedures were used and how the expectations and tensions generated by a major constitutional moment were managed. Depending on the circumstances, a decision to make a new constitution may also have implications for the perceived legitimacy of the Constitution and the challenges of constitutional implementation. Potentially, in these circumstances, all existing institutions are subject to renegotiation and change. The process also may be time consuming, raising questions about how the country is governed in the interim.

This session will discuss what can be learned from four case study countries in relation to:

- The factors that influenced the decision to make a new Constitution rather than amend an existing or former Constitution;
- The point in the process at which it was decided to make a new Constitution, and how this decision was made;
- The process for making the new Constitution and how it was managed;
- Ways in which legal continuity was or was not maintained;
- How much, if any of the old Constitution was retained in the new Constitution;
- The sources of comparative experience and other international influences brought to bear on constitution making; and
- What might have been done differently in hindsight and insights for other countries dealing with similar issues.

Case studies and speakers

- Philippines 1987: Benedicto Bacani
- Maldives 2008: Mariyam Zulfa
- Thailand 1997: Borwornsak Uwanno
- Argentina 1994: Gabriel Negretto

## 2. Amending an existing Constitution

This theme explores the experiences of states that choose to amend an existing Constitution rather than make a new one.

As with theme 1, in some cases a decision to amend rather than replace is effectively dictated by circumstances, ranging from the scope of the changes envisaged to the politics of constitutional change. In other cases, the decision is more open, although there always will be factors that influence the choice that is made. In a few cases, of which the Philippines is an example, the existing Constitution provides for choice between amending procedures, raising further questions about a preference for one or another. And in some cases, there may be an option for returning to and amending an earlier Constitution, rather than the one that is presently in place.

Whatever the motivation, the decision to proceed by way of amending an existing or previous Constitution has consequences, for the processes that are followed and, perhaps, the outcomes achieved. On balance, constitutional amendment is more likely to retain the pre-existing legal and institutional framework than formal constitutional replacement. And in some constitutional systems, constitutional amendments also are subject to review by a court.

This session will discuss what can be learned from four case study countries in relation to:

- The factors that influenced the decision to amend the existing Constitution rather than make a new Constitution;
- The point in the process at which it was decided to amend the Constitution and how this decision was made;
- Ways in which legal continuity was or was not maintained;
- The choice of formal procedures for constitutional amendment and other supplementary procedures;
- The effect of the possibility of judicial review on the scope of the amendments;
- The sources of comparative experience and other international influences brought to bear on constitution making; and
- What might have been done differently in hindsight and insights for other countries dealing with similar issues.

Case studies and speakers

- Indonesia: Jimly Asshidiqie
- Pakistan: Sadaf Aziz
- Taiwan: Wen Chen Chang
- Chile: Javier Couso

### 3. Moving between a presidential and parliamentary system

This theme deals with alteration of the form of government, as an example of one kind of major substantive shift sometimes undertaken in the course of Constitution building. The magnitude of change is greatest with a move between the extremes of a parliamentary and a presidential system. There are variations in between, however, which can involve significant change as well. Variations between parliamentary government on the one hand and presidential systems on the other typically involve arrangements in which there is both a leader of the government (Prime Minister) chosen by reference to the composition of the Parliament, and a President with significant power who normally is directly elected. Depending on the respective powers assigned to the Prime Minister and the President, arrangements of this kind may be ranged at different places along the parliamentary/presidential spectrum of possibilities. Not all aspects of the form of government are set out in the text of the Constitution and much important detail inevitably is left to legislation or political practice, typically during the implementation stage. A change of this kind is so central to the system of government, however, that a framework for it, at least, is always constitutionally provided.

A decision to change the form of government in a substantial way may be influenced by a variety of considerations including dissatisfaction with current arrangements and a perception that restructuring could lead to improvement in stability, effectiveness or representation. Any such change requires care in design and implementation, however, and may have consequences for the structure and operation of politics that are difficult to predict. Where a change of this kind is combined with devolution, as sometimes is the case, it is necessary to consider how the two intermesh as well, in terms of both practice and design.

This session will discuss what can be learned from four case study countries in relation to:

- The factors that influenced the decision to make a significant change to the form of government;
- The reasons why it was decided to make a substantive change to the form of government rather than reform the existing presidential or parliamentary system;
- The most difficult questions that arose when designing the changes;
- Challenges for implementation;
- The sources of comparative models and other international influences brought to bear; and
- What might have been done differently in hindsight and insights for other countries dealing with similar issues.

Case studies and speakers

- Kyrgyzstan (presidential to parliamentary): Sanila R. Toktogazieva
- Mongolia (movement within semi-presidentialism): Gunbileg Boldbaatar
- South Korea (presidential to semi-presidential): Chaihark Hahm
- Sri Lanka (parliamentary to semi-presidential): Paikiasothy Saravanamuttu

#### 4. Moving between a federal/devolved and unitary state

Devolution of some kind often is undertaken in the course of Constitution building. There are degrees of devolution, however, which can be ranged along a spectrum from forms of decentralisation at one end to arrangements that offer more substantial local autonomy at the other. The latter include federalism or provision for special autonomy for particular parts of the state. Federalism affects the character of the state, in the sense that it is no longer unitary (if it was before). Special autonomy can be achieved within a framework that otherwise is unitary (although tensions may arise, between competing principles or competing practices). The two also may be combined, in a federation that is asymmetric, in the sense that some parts of the state enjoy deeper federal autonomy. Malaysia is an example, in relation to Sabah and Sarawak.

Movement from a unitary system to create either special autonomy or, more particularly, federalism, involves major, substantive constitutional change, although the extent of the change depends on the detail of the arrangements planned or adopted. These decisions may be influenced by a variety of considerations. Some form of devolution often is suggested by considerations of efficiency or the need for local responsiveness. Deeper forms of devolution may be pursued in response to regional inequality, to accommodate diversity, as a form of check and balance or as part of a package of measure to resolve conflict, or to provide a means for peaceful co-existence.

The purpose of this theme is to examine why and how deeper forms of devolution are undertaken through constitution building and the challenges that result, both during the making of the Constitution and in its implementation.

This session will discuss what can be learned from four case study countries in relation to:

- The factors that prompted the decision to make significant changes to the form of the state through devolution or federalism;
- The approach taken by constitution makers to negotiating and designing a new federal or devolved system;
- The kinds of issues that arose negotiating and designing a new federal or devolved system and how they were resolved;
- Challenges for implementation;
- The sources of comparative models and other international influences brought to bear; and
- What might have been done differently in hindsight and insights for other countries dealing with similar issues.

Case studies and speakers

- Nepal (unitary to federal): Dipendra Jha
- Myanmar (potentially, unitary to federal): Min Zaw Oo and Lian Sakhong
- Solomon Islands (unitary to federal): Warren Paia
- Papua New Guinea (different degrees of devolution): Eric Kwa

## 5. Deferring or postponing controversial issues

One technique that can be employed in managing significant constitutional change is to defer or postpone certain decisions. In a sense, all Constitution building exercises defer some decisions by selecting matters to be included in a written Constitution while leaving others to be handled by legislation, judicial interpretation or political practice. Some constitutional traditions leave far more to later implementation than others. Deferral has particular potential, however, for decisions that are controversial and threaten the sustainability of peace or the Constitution building process itself. In especially fraught conditions, deferral might involve postponing Constitution making altogether, to a more propitious time, making do in the short term with legislative change or interim arrangements of some kind.

This theme concentrates on more specific examples of deferral, in which particularly difficult issues are taken out of the immediate Constitution building process with a view to dealing with them at some later stage through constitutional change, organic or ordinary law, judicial interpretation or in some other way. This will not be an option for issues that, for one reason or another, need to be dealt with from the outset. There may also be a risk that an issue that has been postponed may never be revisited at all.

Deferral of this kind may be reflected in the constitutional text in different ways. Where a particularly difficult issue is not resolved in the course of constitution making, deferral may be accompanied by a facilitating provision in the Constitution to assist resolution in the future when the opportunity arises. A relatively uncontroversial position may be preserved in the Constitution, but with mechanisms to enable reconsideration and change, such as low thresholds for constitutional amendment (as was the case with state boundaries in India); provision for a periodic review of the provision or indeed the entire constitution; a sunset clause which provides that the provision expires after a certain period of time; or simply a power to vary the constitutional provision by legislation. In some cases, a provision might be drafted in terms that are deliberately vague, leaving future resolution to judicial decision or political practice. In the unusual case of Bougainville, postponement of a referendum on independence for a fixed period of years was based on a peace agreement between the parties, witnessed by representatives of neighbouring countries and the UN Nations.

This session will discuss what can be learned from four case study countries in relation to:

- The kinds of issues that were deferred and why;
- The drafting or other techniques used to defer the issues;
- How the decision to defer was made, and by whom;
- The ways in which deferral assisted the general peace making or Constitution building process; and
- The insights that can be from past experience with deferral, in relation to the kinds of issues that can effectively be deferred and the conditions in which deferral occurs.

Case studies and speakers

- India: Gautam Bhatia
- Fiji: Vijay Naidu
- Bougainville: Kearnneth Nanei
- Iraq: Zaid Al Ali



## 6. Conclusions

The final session is designed to draw together insights into choices about the magnitude of constitutional change to inform future initiatives in Constitution building, generally and with particular reference to the Philippines, and other states represented at the Forum where significant change is currently under consideration.

This session will also provide an opportunity to reflect on the international assistance to in constitution building, as an overarching issue across all themes.

## 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 3-4 October 2017 in Manila, the Philippines.

The format is designed to encourage the interchange of ideas, leading to shared insights on how and why choices are made between major and incremental constitutional change and some of the issues that might be anticipated in each case. The format follows that of the first Melbourne Forum on Constitution Building in the Asia Pacific, held in August 2016. Presenters from each case study country will be asked to provide brief written responses to questions which will be circulated to them in advance of the Forum, based on the theme of each session. These written responses will be circulated to participants in advance of the Forum. Presenters will give a short oral presentation on the key insights offered by their case at the beginning of each session, so that the majority of time in each session is devoted to questions and discussion.