



IMPLICATIONS OF CULTURE FOR CONSTITUTION BUILDING

The third Melbourne Forum on Constitution Building in Asia and the Pacific

**Jointly organised by International IDEA, the Constitution Transformation Network,
and the Centre for Policy Alternatives**

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Concept Note

Culture may play a role in constitution building in many ways:

- Culture is likely to be part of the context for constitution building, informing the substance and process of constitutional change.
- Culture may be a cause of division or conflict within a state. In this case, it may be both a catalyst for constitution building and an additional challenge to be taken into account.
- There is sometimes pressure for aspects of culture to be explicitly reflected in the terms of a Constitution, including in a preamble; in institutional design, in the framing of rights provisions and the relationship between religion and the state.
- Effective implementation of new constitutional arrangements might require cultural change on the part of constitutional actors (eg legislators, executives, the administration and courts at national and subnational levels) and in the wider community.
- In any of these cases, an appreciation of culture and the challenges and opportunities it presents may be critical to the outcome of a constitution building project.
- At the same time, however, culture can be an aspect of local context that is difficult for external observers and advisers to identify, understand and evaluate for constitution building purposes. There are many reasons for this. Aspects of culture are elusive; external advisers may be influenced by their own cultural assumptions; the significance of culture may be downplayed, where the provision of constitution building assistance is portrayed as 'technical'.

The Melbourne Forum 2018 is designed to explore the implications of culture for the making and implementation of constitutional change, in processes collectively conceived as 'constitution building'.

Culture affects constitutional arrangements in all parts of the world. The Melbourne Forum will explore these issues with primary reference to the countries of Asia and the Pacific, as a vast and diverse region of the world that represents a substantial component of global constitutional experience. The Asia-Pacific region offers a particularly useful context for this purpose. Asia and the Pacific are home to an extraordinary variety of cultures. In many cases, aspects of culture have deep historical roots; in at least some, culture is or has been implicated in conflict; everywhere, it is evolving. Constitution building has been a familiar phenomenon across the Asia-Pacific in recent decades. The Forum will deepen understanding of how culture interacts with constitution building

across Asia and the Pacific, in ways that throw light on the issues presented by culture in this important region and that inform global practice more generally. It will also throw light on the additional challenges presented by cultural considerations for the implementation of new constitutional arrangements, which almost invariably requires cultural change of some kind.

The idea of culture

Culture is a complex concept, on which there is a huge literature. To avoid unnecessary complication, four observations may be helpful about how the idea of culture is used for the purposes of the Forum.

What is culture? The idea of culture can cover a wide range of assumptions, influences and practices. Roger Cotterrell has identified four components of culture, which illustrate a possible range:¹

- Beliefs and ultimate values (deriving from, for example, religion or ideological commitment)
- Inherited traditions (including shared historical experience, legal system)
- Material factors (the impact of, for example, levels of economic development, geography)
- Emotional attachments or rejections (for example, strong feelings about identity).

While this definition is broad, it provides a useful starting point for consideration of the implications of culture for constitution building. It may be that the definition can be further refined, for the purposes of constitution building, through comparison of experiences in the Forum.

The nature of culture: Culture may be deeply influential, to the extent that it is engrained in the life of a community. Culture is neither static nor monolithic, however. It evolves naturally over time, in response to changing conditions. It may deliberately be shaped by, for example, new constitutional arrangements in ways and with results that the Forum will explore. In the current era of globalisation, cultural evolution may be more rapid than ever. What culture involves and whether or not change is required or has taken place may be contested within communities, presenting yet another dynamic for constitution building to take into account. Culture is not necessarily determinative of particular outcomes but is relevant in constitution building to the extent that it shapes the way in which people think about the issues and options at stake.

Some complications of culture: From the standpoint of constitution building, culture may be positive, negative or neutral. Many aspects of culture provide useful building blocks for a constitution building process or for the constitutional changes that are made. Where culture is the cause of deep division or violent conflict, however, this needs to be tackled in both the process and substance of constitution building, in order to build cohesive communities. Where culture is invoked to justify or excuse discriminatory or other practices inconsistent with international norms or sustainable peace, this needs to be tackled as well. These difficulties may be heightened if constitution building provides a catalyst for the revival of cultural claims, selectively drawing on history, religion or tradition. The Forum offers an opportunity to share experiences with how culture affects both the process and substance of constitution building, how benefits can be maximised and how challenges can be met.

¹ Roger Cotterrell, *Law, Culture and Society: Legal ideas in the Mirror of Social Theory* (Ashgate, 2006). Another important treatment is Larry Diamond (ed) *Political Culture and Democracy in Developing Countries* (Lynne Rienner, 1994).

Constitutional culture: Finally, while what might be described as general societal culture is relevant to constitution building, a more particular concept, of constitutional culture, including the manner in which it is formed and changed, demands consideration as well. Constitutional culture can be disaggregated into the same four components described earlier in relation to culture more generally. Thus, constitutional culture encompasses beliefs and fundamental values (eg unity, liberty, solidarity, harmony); inherited traditions (eg a particular understanding of constituent power or the manner in which a new constitution achieves legitimacy); material factors (eg population size, poverty, inequality, difficulties of communication); and emotional concerns (eg a fear of secession). As with any other understanding of culture, constitutional culture may be internally contested and is subject to change. Developing or adapting constitutional culture becomes particularly important for the implementation and maintenance of significant constitutional change, such as a transition from authoritarian to more democratic and pluralist regimes; from a unitary to a more devolved system of government; movement between presidential and forms of parliamentary systems; from a religious to a secular state, or vice versa; or from winner-take-all government to more consociational arrangements.

Goals of the Forum

The goals of the Forum are to explore the implications of culture for constitution building across Asia and the Pacific in order to:

- Better understand how culture affects the process and substance of constitution building generally and in transition to democracy in particular;
- Consider and compare experiences of how culture can enhance or impede democratic constitution building processes and outcomes;
- Explore how disagreements over culture within communities can affect constitution building; understand by whom and why cultural issues are raised; and identify options for resolving the resulting problems;
- Examine the challenges of culture for constitution building in multicultural states and identify options for dealing with them;
- Better understand the role of culture in the implementation of democratic constitutions, both generally and for the purposes of specific types of change (eg transition to a federal form of state or a secular state).
- Examine the implications of culture as a component of a constitution building context for informed and effective external assistance and advice.

To achieve these goals, the Forum is organised around five principal themes, each of which will be explored through selected case studies. 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 Sri Lanka.

Session Themes

The sessions, themes and cases are:

1. Societal culture and constitutions: Tuvalu, Vietnam, Thailand
2. Constitution building in culturally diverse states: India, Indonesia, Sri Lanka
3. Implications of constitutional culture for constitution making: Philippines, Myanmar, Japan

4. Constitutional culture in the context of implementation: Papua New Guinea, Bhutan, Malaysia, Nepal
5. External assistance and culture: Timor Leste, Afghanistan, ASEAN
6. Conclusions: International IDEA, ConTransNet, CPA

Speakers will address specific questions relevant to their case and the theme of the session. In general, however, based on our understanding of culture as a concept that shapes (but does not determine) understandings of constitutions, speakers will explore three kinds of questions:

1. Description:
 - What aspects of culture are/have been relevant to constitution building?
 - What are the sources of culture; the extent of internal agreement or disagreement on relevant aspects of culture; actual or potential evolution of culture over time?
2. Implications for constitution building
 - How has culture impacted on constitution building, in substance and process?
 - What has been the experience of explicitly reflecting culture in the constitutional text? Does it help or hinder agreed and effective democratic constitutional change?
 - How is culture, including cultural difference, accommodated in a constitutional settlement?
 - How is a constitutional culture developed or adapted so that a constitutional settlement is implemented and maintained? What implications do these insights have for, for example, civic education programs, public sector training programs, and actions taken by key institutions in the immediate aftermath of constitutional change?
 - To what extent and how do new constitutional arrangements shape culture over time?
3. Insights from country experience for global understandings of the intersection of culture and constitution building.

1. Societal culture and constitutions

This session will examine what can be learned from four country case studies in relation to how societal culture is (or is not) reflected in the written text of a constitution and in constitutional practice. Questions to guide discussion include:

- How does culture (values, tradition, material factors and emotional attachments) affect choices about constitution making process and the substance of constitutional change?
- Who makes claims to culture? How is culture used to further a constitution building project? Can the concept of culture be misused or abused in this context?
- How do concepts of culture intersect with other more specific identity issues such as religion, gender and socio-economic status?
- Do aspects of culture provide points of constitutional continuity? If so, how?
- What impact does constitution building have on the evolution of culture within communities?
- In what ways is culture reflected in the substance of a Constitution, including constitutional text? What are the implications (both positive and negative) of this, for example for local ownership, national identity, constitutional interpretation? Where culture is not reflected in the substance of a Constitution, how do the two co-exist?
- What are the implications of culture for (i) inclusive constitution building processes and (ii) the effectiveness of external assistance?

Case studies

- Tuvalu
- Vietnam
- Thailand

2. Constitution building in culturally diverse states

This session examines additional questions about the intersection of culture and constitution building that arise in states that are culturally diverse. If culture has implications for the process and substance of constitution building, any significant cultural diversity may need to be factored into both. Where cultural diversity has been implicated in divisions of the kind that lead to violent conflict, constitution building may offer a partial solution, which in turn needs to take account of the realities of cultural difference in the way in which settlement is reached and the constitutional arrangements that are put in place.

Questions to guide discussions include:

- What aspects of culture affected the constitution-making process at the time? Who made cultural claims and why?
- How was cultural diversity accommodated as part of the constitution-making process, if at all?
- How was cultural diversity accommodated as part of the substance of the constitutional settlement? With what outcomes?
- Where and how was the balance struck between accommodating cultural diversity and social cohesion?
- What lessons might be learned from this experience, for other multicultural societies?

Case studies

- India
- Indonesia
- Sri Lanka

3. Implications of constitutional culture for constitution-making

The focus of this session is constitutional culture and its impact on the processes and substance of constitution making. Choices about the processes for constitution making and (legitimate) mechanisms for approving and promulgating a new constitution differ across the world, in part because of the different values and traditions of constitutional systems. Particular substantive choices may be affected as well, by considerations that can be described as cultural in character. Examples include an aversion to divided sovereignty; a particular understanding of secularism; or a preference for constitutional control by a specialist Constitutional Court rather than a general apex court.

Questions to guide discussion include:

- How did constitutional culture affect the processes chosen for constitution building? How were those choices made?
- How did constitutional culture affect choices about the substantive changes to be made?
- Where constitutional culture had implications for constitution building, what are the sources of origins of this culture? Was it simply assumed? Was it contested?

- What advantages or disadvantages followed from accommodating or not accommodating existing constitutional culture?
- What lessons might be learnt from these experiences by other states, embarking on a constitution building project?

Case studies

- Philippines
- Myanmar
- Japan

4. Developing constitutional culture in the context of constitutional implementation

The focus of this session is on the implications of constitutional culture for the implementation of new constitutional arrangements that represent significant change. The session assumes that constitutional culture encompasses the values, traditions, material factors and emotional attachments that shape how institutions, officials and the people themselves engage with the constitution. It follows that implementation of new constitutional arrangements requires more than technical change, but may involve changes in constitutional culture as well. The magnitude of this task varies, with the magnitude of the substantive changes made and the extent to which there already is an underlying culture of constitutionalism, in the sense of compliance with the constitution.

The questions to guide discussion include:

- What changes were introduced by the Constitution that required the development of a new constitutional culture or adaptation of an existing culture?
- What kind of changes need to occur in key sectors of society? Consider, for example, the public, civil society, the media, executive government, administrative agencies, legislatures, courts, constituent units, other?
- What proactive measures, if any, were taken to develop or adapt official and/or public culture to the needs of the new Constitution, during the constitution making process or in the implementation phase?
- How effective were any such measures, in the short-term and over time?
- What were the consequences of any failure to develop a constitutional culture to underpin implementation of the new arrangements?
- What lessons can be learnt from these experiences for other states that are implementing new constitutional arrangements?

Case studies:

- Papua New Guinea
- Bhutan
- Malaysia
- Nepal

5. External assistance and culture

This session will explore the implications of the conclusions from earlier sessions about the relevance of culture in constitution building for the roles of external actors in a constitution building process. External influence may come in a variety of different forms. One, which is common and on

which this session will focus is the provision of knowledge and advice by external actors on both the substance and process of constitutional change. External advisers come with their own understandings and assumptions about constitution building, informed by their own societal and constitutional cultures. Those with long experience in the field may have understandings and assumptions shaped by other constitution building projects as well. They may also be influenced by the international 'guidelines' or 'standards' that are beginning to shape action across the field as well. If culture is significant for effective constitution building, questions arise about how external actors engage with it, in order to grasp it and to evaluate it in providing advice and options on constitution building substance and process

The questions to guide discussion include:

- How necessary is it for external actors to understand local societal and constitutional culture as it impacts on the process and substance of constitution building? Does the answer depend on the role that external actors play?
- What methods or techniques have been used, or might be used, to assist external actors in this regard?
- To what extent do international guidelines and standards that have been developed for external assistance to constitution building projects and related activities by the United Nations and other actors leave sufficient room for culture to be taken appropriately into account?

Case studies

- Timor Leste
- Afghanistan
- ASEAN

6. Conclusions

The final session is designed to draw together insights into the interaction between culture and constitution building, generally and with particular reference to Sri Lanka, and to states represented at the Forum where significant change is currently under consideration.

Logistics

The Forum is organised under the auspices of the Asia and the Pacific and Constitution Building Programs of International IDEA in collaboration with the Constitutional Transformation Network at Melbourne Law School, in partnership with the Centre for Policy Alternatives. It will take place over two days on 15-16 October 2018 in Colombo, Sri Lanka.

The format is designed to encourage the interchange of ideas, leading to shared insights on how culture affects the making and implementation of constitutional change; the challenges that arise; and how they might be met. The format follows that of other Melbourne Forums on Constitution Building in the Asia Pacific. 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.