Constitution-building in states with territorially based societal conflict

Melbourne Forum on Constitution-Building in Asia and the Pacific
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Acknowledgements

Abbreviations

ABG   Autonomous Bougainville Government (Papua New Guinea)

AR   Autonomous Region (Philippines)

BBL   Bangsamoro Basic Law (Philippines)

BRA   Bougainville Revolutionary Army

CAB   Comprehensive Agreement on the Bangsamoro (Philippines)

CPA   Comprehensive Peace Accord (Nepal)

CPC   Constitutional Planning Committee (Papua New Guinea)

DPRP   Local council (West Papua, Papua New Guinea)

FPTP   First-past-the-post (electoral system)

GAM   Free Aceh Movement (Indonesia)

LGU   Local Government Unit (Philippines)

MOU   Memorandum of Understanding

MP   Member of Parliament

MRP   Papuan People's Assembly (West Papua, Papua New Guinea)

NLD   National League for Democracy (Myanmar)

OPM   Papua Liberation Organisation/Free Papua Movement (Indonesia)

Summary

In August 2016 the inaugural Melbourne Forum brought together leading academics and practitioners from across Asia and the Pacific to discuss constitution-building in contexts where there is a territorially defined societal conflict. While the diversity in contexts make it impossible to draw absolute or universal conclusions, discussions highlighted both the importance of exchanging knowledge and experiences, and the need for more opportunities for practitioner-focused discussions in Asia and the Pacific.

Some of tentative conclusions reached during the Forum include the following:

- Devolution of power alone is not a panacea for resolving societal conflict. Attention must also be paid to improving inclusive, fair and efficient governance as a whole, and to the complications brought about by devolution. These include, for example, managing and coordinating disputes between levels of government, how to encourage shared rule and self-rule, and increased opportunities for corruption.

- Literature on federalism often distinguishes between 'holding together' and 'coming together'. Instances of the former raise complexities such as the drawing of boundaries, the challenge of majority acceptance of minority demands, and willingness to surrender power on the part of centralized institutions and interests.

- Instances of 'coming together' in 21st-century constitution-building are rare. The discussion provided surprisingly little detail on how to forge 'common ties' in a process of devolution of power. This may well reflect the predominance of centrifugal forces in political discourse under such circumstances: political autonomy may be prioritized over inclusive national decision making.

- The process of constitution-building in cases of territorially defined societal conflict requires more attention. In particular, elite-driven peace processes can create challenges to inclusive constitution-building. Due consideration needs to be given to the role of courts or other bodies in resolving disputes during the process.

- Implementing devolution arrangements after a constitutional settlement may be as challenging as arriving at the settlement itself. Factors include the capacity and resources of substate governments to carry out their new mandates, and coordination between different levels of government. Constitutional arrangements are the initiating

mechanism for ongoing dialogue between the centre and substate units. The arrangements evolve over time, through judicial interpretation and changing political dynamics.

- Finally, while constitution-building necessarily relates to particular states and their peoples, and must be owned and driven by them, international actors have roles as well. International involvement may take a variety of forms, ranging from advice and assistance, to external political, economic and cultural influence. The nature and circumstances of this involvement warrants further investigation.

A more detailed set of conclusions can be found at the end of this report.

Introduction

Scope of the project

This report contains some of the key insights from the first Melbourne Forum on Constitution-Building in Asia and the Pacific held in Melbourne in August 2016. The focus of the Forum was constitution-building in polities in the region experiencing societal conflict that is territorially defined. This is a familiar context for constitution-building throughout the world, as shown by states as disparate as Iraq, Kenya, Libya and Spain. Many states that today appear relatively settled have constitutional arrangements that historically evolved as a response to societal conflicts of this kind. Canada, Italy and Switzerland are examples.

The Asia-Pacific region offers a particularly rich vein of global experience for this purpose. There is actual or potential societal conflict along territorial lines within many polities in the region, reflecting societal diversity in terms of language, religion, tribe, culture or ideology. Some states in the region have well-established constitutions that were designed with an eye to managing societal conflict. India is a significant example, in which some societal conflict is territorially defined but some, including distinctions based on religion and caste, is not.

Across the region as a whole there are states where constitution-building is either underway or pending, that need to take societal conflict into account. Their circumstances are very different, as the examples of Bougainville, Indonesia, Nepal, New Caledonia, the Philippines and Sri Lanka suggest. The solutions these states are working towards must necessarily vary as well. Nevertheless, there is considerable potential for countries in the region—and worldwide—to derive insights from each other's experiences as they grapple with these challenges. The Melbourne Forum was designed with this goal of mutual, shared learning in mind.

Constitutions accommodate territorially based societal conflict in a variety of ways. Often, the state is organized in ways that give a degree of autonomy to the people in territorially defined substate regions, complemented by institutional measures that give the latter a voice in decision-making at the centre. Federalism (itself a family of differing arrangements, operating according to different contexts) is one familiar structure that such arrangements take. Federalism comes in a variety of different forms to suit the context in which it must operate. Not all arrangements for constitutionally protected devolution of governing authority are designated as federal. They may lack some characteristics of local autonomy that federalism is deemed to offer, or there may be strategic reasons to adopt a different term. Where societal conflict engages only part of a state's territory, another option sometimes

pursued is regional autonomy for the area affected, within an otherwise unitary state. At the extreme, there may be calls for separation from the larger state. Each of these options presents challenges for the process and substance of constitution-building. Common challenges can include the extent to which boundaries follow ethnic lines, thus potentially entrenching divisions, and the principles that should apply to the treatment of those within each substate region who differ from the substate majority.

Local autonomy is not always adopted for states in which there is territorially based societal conflict. Even where it is adopted as a central element of constitutional design, local autonomy is unlikely to be sufficient to manage societal conflict on its own. A more comprehensive solution must address the need to give all peoples a sense of ownership of the state, rather than treating some as minorities—albeit tolerated and protected—in a state owned by others. This is a considerable challenge where much of a state's population is united (homogeneous) by language, religion or other socio-cultural characteristics. This challenge of ownership may be tackled through a range of measures, including the ways in which the state is conceived and defined within and beyond the constitutional text; the composition of central institutions; an inclusive language policy; and equality in the treatment of religious beliefs.

In this context, an examination of constitutional dynamics must extend beyond constitutional design to the process of constitution-building and implementation of new constitutional arrangements. Constitution-building processes can further the project of fostering a sense of collective ownership of the state. Societal conflict has implications throughout: from the design of a process, to the first moves towards new constitutional arrangements, to putting the new regime in place, and beyond, into implementation. Thus, societal conflict affects the negotiation and approval of any peace agreement; the framework for any referendum on future status; preliminary decisions about the parameters of constitutional change; and processes for deliberation and ratification. Once a new constitution is in place formally, effective implementation is essential to its operation in practice and to maximizing its potential for the management of societal conflict. The challenge of implementation is greater if changes introduce new institutional forms (e.g. devolution) or require cultural adaptation (e.g. greater inclusion) under conditions of societal conflict.

Methodology

Asia and the Pacific is a vast, diverse and complex region. The area covered by this project stretches from India in the west to New Caledonia in the east. The region comprises states that are vast, in terms of territory and population, as well as some of the smallest microstates in the world. Across the region there are tremendous variations, both within and between states, in terms of culture, history, language and religion. In a sense, the region is united by its diversity, which makes it particularly significant for present purposes, but also particularly challenging from the perspective of comparative method. Diversity makes both the selection of cases and the design of the project particularly important, to ensure that a broad range of experience is captured and that the insights gained are accurate and relevant.

To these ends, the Melbourne Forum, and therefore this report, focus on a wide range of polities across the region, including India, Indonesia (with particular reference to Aceh and West Papua), Myanmar, Nepal, New Caledonia, the Philippines, Papua New Guinea (in relation both to Bougainville and to PNG), Solomon Islands and Sri Lanka. The list is not comprehensive. It might also have included specific case studies on Bangladesh, China (with particular reference to Hong Kong, Macao and Taiwan), Thailand, Pakistan or Vietnam, for

example. The cases chosen are sufficiently representative, in terms both of geographical spread (being drawn from South Asia, South-East Asia and Melanesia) and different phases of constitution-building.

In some cases, new constitutional arrangements are settled, or relatively settled, enabling conclusions to be drawn from historical experience (e.g. India, Indonesia/Aceh). In others, constitution-building is currently underway, albeit at different points along a spectrum that range from pending referendums on status in Bougainville and New Caledonia, to implementation of a new constitution in Nepal. Others are on the threshold of constitutional change (Myanmar and the Philippines). Sri Lanka offers an unusual case where there is both negative historical experience in constitution-building in the face of societal conflict and a current, more inclusive constitution-building project. The case of the Philippines also offers insights into two interrelated, but relatively distinct constitutional processes: first, the special autonomy status provided to the Bangsamoro region; second, a current constitution-building process in contemplation of federal arrangements across the whole country. For these reasons, the Philippines and Sri Lanka are included in this report as case studies in relation to two themes.

The Melbourne Forum was greatly assisted by the participants' knowledge, their generous time commitment and their enthusiastic engagement with what became a common enterprise. Prior to attending the Forum, all the participants lived and worked in the jurisdiction on which they were asked to report. Many were practitioners, playing a leading role in the constitution-building process. Some were scholars, who had an opportunity to consider the experience of their jurisdiction over time and to place it in comparative perspective. All were able to examine the experience of their own jurisdiction in its local context, as a necessary prerequisite for identifying insights that might be more widely shared. A brief biography of each participant is included at the end of this report.

Structure of this report

For the purposes of the Forum, the cases were examined by reference to four principal themes, around which this report is also organized. The themes and the cases primarily assigned to each are as follows:

1. Constitutional design: federalism and devolution (India, Nepal, Papua New Guinea)

2. Constitutional design: special autonomy and other measures (Bougainville, New Caledonia, the Philippines)

3. Constitution-making processes (Myanmar, the Philippines, Solomon Islands, Sri Lanka)

4. Constitutional implementation (Indonesia, cross reference to Nepal, Sri Lanka)

Several other cases also were instructive to each theme and have been drawn on for the purposes of this report.

Each participant presenting a primary case study was assigned a series of questions and provided written responses in advance of the Forum as the basis for discussion. The written answers to the questions proved a valuable resource in their own right. They are made available in this report by grouping the questions and answers, within themes, in the sections that follow.

The purpose of the questions, which vary from theme to theme, was to seek contextualized information and insights, and with potential to inform constitution-building elsewhere, on the following matters:

- Where territorial devolution is involved, what form does it take? What are its principal design features? How effective is it, or is it likely to be?

- What are the societal divisions or other historical factors that the change is designed to address? How effective is it, or is it likely to be?

- What provision is made for 'shared rule' in central governing institutions? How effective is it?

- What additional provision, if any, is made for shared ownership of the state? How effective is it?

- Did the conceptual foundation or terms of any existing constitution present an obstacle to constitution-building? If so, what was, or might be, a solution?

- What challenges arise for constitutional implementation of any of these provisions? How significant are they, or likely to be?

A short analysis at the beginning of each theme explains its scope, the principal cases used to explore it, and other relevant cases. The concluding section identifies some of the key insights with cross-cutting relevance.

The information in this report was current at the date of the Melbourne Forum, 18–19 August 2016.

Theme 1. Constitutional design: Federalism and devolution

Introduction: Federalism and devolution

One way in which constitutions accommodate territorially based societal conflict is to devolve some services and functions of government and a degree of autonomy to the people in territorially defined substate regions. Constitution-building in such contexts is the focus of Theme 1.

Devolution may take a variety of different forms. One is federalism, in which governing authority is divided between the centre and substate regions in a way that gives each order of government autonomy. In contrast, devolution entails the conferral of some powers of government to substate regions, with the centre granting them some autonomy while retaining a greater measure of control over substate regions. Generally, the powers and status of each substate unit are broadly similar, in contrast to arrangements for regional autonomy (the focus of Theme 2). There is no clear line between federal and devolved forms of government, rather, a variety of arrangements that might differ in form, name and practice. The structure of federal systems is generally set out in a written constitution; devolved arrangements might also be constitutionally prescribed or left to an organic or ordinary law.

Federalism and devolution enable minority groups within the state to exercise a degree of self-governance and have a recognized political role within the state. As such,fcha-c they may be part of addressing territorially based societal conflict. Devolution can also serve to address some of the causes of conflict by sharing power among different groups, rather than concentrating it in the central government. Often, federal and devolved arrangements consolidate a position for substate units in the decision-making of the central government, using constitutional devices for shared rule such as representation of the substate units in the central parliament and other institutions, and procedures to foster cooperation between governments. A sense of shared ownership of the state may also be supported through non-discrimination, an inclusive language policy and symbols of the state that signify common ties across diverse social groups.

The three principal cases used to explore the significance of devolution in addressing territorially defined conflict are India, Nepal and Papua New Guinea. India is a well-established federation. It adopted a somewhat centralized federal system in its Constitution of 1949 following independence in 1947. The Constitution of India sets out the federal framework under which a few states have greater powers than others. India includes regions with special autonomy-type arrangements of a kind discussed under Theme 2. Nepal, on the other hand, is a very new federation. A new Constitution in 2015 marked the transition from

a unitary to a federal state, which is yet to be fully implemented. The third case, Papua New Guinea, is a unitary state, but with longstanding arrangements for devolution dating back to 1977. Like India, PNG also contains a region with special autonomy and the particular case of Bougainville is considered as part of Theme 2.

All three countries' populations display significant diversity. In some cases, social diversity is geographically distributed such that a substate unit's population consists predominantly of a particular ethnic, linguistic or cultural identity group. However, more often than not, cultural, linguistic and ethnic groups are more widely dispersed: diversity is found across and within each territory of the country. In the case of India, the deep societal divisions arising from caste groups are not territorially defined. Nepal and PNG both feature a high number of different ethnic and cultural groups with great linguistic diversity. This has resulted in each substate unit also comprising different ethnic groups. As such, the authors here consider a variety of ways in which federalism and devolution can address societal conflict through power sharing and non-discrimination rather than entrenching territorial differences.

Four further country cases presented at the Forum—Myanmar, the Philippines, Solomon Islands and Sri Lanka—are currently considering constitutional transitions to federal or devolved systems, in part to address the underlying causes of recent societal conflict. While some of these states are further down the path to federalism or devolution than others, their experiences of constitution-making and design are also relevant to this Theme.

Federalism and devolution in Nepal

Surya Dhungel

1. What are the main societal divisions that federalism is designed to address?

The main goal set out in the Interim Constitution of Nepal 2007, now replaced by a new Constitution (2015), was to design an inclusive, democratic and forward-looking (progressive) governance system in this post-conflict and ethnically divided state. The Comprehensive Peace Accord (CPA) signed by the then Nepal government and the Communist Party of Nepal on 21 November 2006 formalized the end of a decade-long Maoist insurgency that took the lives of over 13,000 Nepalese people and was the basis on which the peace process concluded.

Nowhere in the original text of the 2007 Interim Constitution, the CPA or several other agreements signed during their negotiation was federalism mentioned as a form of governance model envisaged for the country. In the former, the general commitments initially expressed by the leading political forces were 'progressive restructuring of the State, competitive multi-party democratic rule, local self-governance and inclusivity'. It was only in response to the political movement launched by some political parties based in Madhesh (southern plains) in early 2007 that federalism grew in acceptance as a prospective model—and this despite opposition from several political forces. The word 'federalism' then received space in the interim constitutional charter through the first constitutional amendment in the preamble and article 138(1) of the Interim Constitution. The new Constitution of Nepal is fully federal in principle.

Following the inception of democracy in 1951—ostensibly at least—and the social development opportunities afforded, a centuries-old social and economic order persisted and renewed itself. Centralized, authoritarian rule was either through absolute monarchy or dynastic oligarchy, with the result that democratic movements continued to be launched in opposition one after another by political parties. The transformation of absolute monarchy into a 'constitutional monarchy' via the 1990 Constitution was only a short-lived breakthrough.

The Maoist insurgency (1996–2005) took advantage of the failures of democratic political forces to effectively manage political changes or to resolve continued discrimination,

exploitation and poverty at the grassroots of society. The heavy toll on lives and property disturbed peace and escalated conflict that benefitted divisive forces and authoritarianism and eventually encouraged the king to dissolve parliament and centralize state power in his own hands. This impelled both radical Maoists and moderate democratic forces to reach a compromise on a new agenda for social reform in 2005. The basic framework for agreed reforms was radical social transformation under a democratic system: abolition of feudal monarchical rule (by ending the centralized system of governance); and the introduction of reforms to end all forms of social discrimination and economic exploitation. State restructure and devolution of power through federalization were the eventual outcomes agreed by existing political forces, including newly emerged Madhesi and Janajati parties, for constitutional design and democratic governance in the country.

Two main objectives of federal design were thus stated in the Interim Constitution: 'to bring an end to discrimination based on class, caste, language, gender, culture, religion and region'; and 'the restructuring of the state into an inclusive democratic federal system by eliminating the centralized, unitary form of the state.' Acceptance of aspirations to autonomy (self-governing provinces) on the part of indigenous ethnic groups, less-developed regions and others, including the people of Madhesh, was later explained through the fifth amendment of the Interim Constitution as the justification for federalization.

The same spirit and fundamental notions of 'cooperative and collaborative federalism' are reflected in the preamble, directive principles and state policy, and distribution of powers to the multiple orders of government under the new Constitution, which lays emphasis on the third tier of devolved village and municipal governments.

It is claimed that Federal structures have been drawn on by the Constituent Assembly in 2015 albeit in a very complex form. Five lists of exclusive and concurrent competencies empowering three levels of federal entities were included, with residuary power vested in the centre, creating scope for jurisdictional conflict rather than clarity or certainty. Few avenues were opened for fiscal arrangements and intergovernmental relations. Divided as they are, the political parties are likely to face challenges in the implementation of cooperative federalism and multiple orders of government in this ethnically, culturally, geographically and linguistically diverse society.

2. What are the principal features of the constitutional design for federalism in Nepal?

The new Constitution's design for federal governance is three orders of government (federal, provincial and local) under a parliamentary system, complemented by specially protected cultural and economic zones with all sources of power emanating directly from the Constitution itself (articles 56–60, 231–37, schedules 4–9). The basic federal concepts of 'self-rule' and 'shared-rule' are theoretically integrated in each level of government either through five lists of competencies or by innovating blended features of mixed electoral processes and institutional devices created for social inclusion, local participation and maintaining intergovernmental relations.

Overall legislative and executive primacy is given to the central authorities and institutions. At first sight, each level of government entities retains exclusive powers as specified in the competency lists. However, residuary power remains with the centre (article 58), which has the power to issue obligatory directives and dissolve provincial legislatures and governments on somewhat arbitrary grounds. This may dilute the self-rule aspect of federalism. The power to make final and interpretive decisions regarding dispute resolution vested in the powerful Constitutional Bench of the Supreme Court may help redress the

balance, although overlapping of the jurisdictions across the five different lists appears pervasive and quite confusing. The arrangement of two separate concurrent lists for sharing powers between different levels of government is unique in the Nepalese federal design. Structurally speaking, it is not clear whether the judiciary is unified or in line with the respective federally designed (separate) institutions.

The proposition of seven High Courts, one in each province with additional High Court benches spread around, and the subsequent District Courts falling within provincial entities, creates confusion and requires further clarification. Moreover, the High Courts and the Supreme Court are at risk of politicization due to the complex nature of their responsibilities and certain features of the appointment process, including the power of dispute resolution related to federal elections and public interest litigation cases. This threatens the independence of the judiciary and rule of law principles. Serious controversy may ensue under a new federal republic unless the judiciary handles the situation cautiously. The handling of public interest litigation cases, already filed in the Supreme Court, has started attracting critical comments in the media. Such cases could multiply in seven High Courts and their extended Benches in the near future, thereby dragging High Courts into political controversy.

One untested feature of the Nepalese federal design is the inclusive and mixed nature of electoral processes prescribed for the lower house of the central legislature (House of Representatives), the unicameral provincial legislatures and the third tier of single chambered local legislatures (i.e. Village and Municipal Assemblies). The National Assembly, which is the upper chamber of the federal Parliament designed after German and South African models, is considered to be for representing local voices and ethnic interests (a 'House of Provinces') as a part of shared responsibility in law and policy making.

The 275-member Federal House of Representatives is constituted by 165 directly elected members from respective constituencies on a first-past-the-post (FPTP) basis. The remaining 110 seats are filled from closed proportional lists submitted to the autonomous National Election Commission based on the proportion of overall votes received by each party in the FPTP elections. A 33 per cent quota is set aside for women and the list of candidates must be prepared by each party based on the inclusive quota allotted for marginalized groups as specified in the Constitution and electoral laws.

The most important aspect of devolution is reflected in the representation devices created at the lowest 'ward level' of federal units at Villages and Municipalities through direct elections inclusive of women, Dalits and marginalized groups. Wards function as the fourth tier of the federation that represents people at their doorsteps. Compared to Provinces, the Local Governance Units are stronger in terms of stability and representation, as the Constitution does not permit the central government (through the President) to dismiss local governments or dissolve assemblies as it does for the provincial governments. And the District Assembly coordinates relations between local units and resolving political disputes. This strengthens the autonomy of local government bodies. As the local government is not placed directly under the provincial government, the role and importance of provinces may erode over time. The comparative experiences of provincial governance under different federations may be interesting for Nepal and other emerging federal countries to study.

3. What arrangements does the constitution make for shared ownership of the state by different societal groups at the national level?

Shared ownership has been envisaged by the Constitution in five different ways. First, the National Assembly, one of the two chambers of the federal legislature consisting of 59 members, has been developed as the representative house of the seven provinces. The National Assembly is comparable to the upper houses of Germany, South Africa and to a certain extent Ethiopia. A quota system operates such that the eight members, including three women, one Dalit and one from disadvantaged or marginalized groups, are to be elected by an electoral college of provincial assembly members, the Village Council Chief and Deputy Chief, and the Mayor and Deputy Mayor of Municipalities of each of the seven provinces. Three additional members, including one woman, are to be nominated by the President. Hence, the 59 membered National Assembly is constituted inclusively by a minimum of 22 women, seven Dalits and seven from disadvantaged or marginalized groups. Further, the electoral college involves elected officials from each of the seven provinces.

Second, the 275-member Federal Lower House, i.e. the House of Representatives, also has entrenched a mechanism of shared ownership under the mixed electoral system. A total of 165 members are elected directly by qualified voters (adults over 18), while the remaining 110 members are elected from the closed inclusive lists (these are identity, minority and gender based) on a proportional representation basis. Amongst the 275 MPs of the Lower House, at least 33 per cent must be women, and the 110 members of the proportional list are mainly identity-based.

Third, shared ownership is guaranteed in the elections of the President and the Vice-President. One of them must be a woman and both should represent different political parties. The President and Vice-President are elected by members of the National Assembly (the representative chamber of the seven provinces), the House of Representatives (elected under a mixed electoral system) and the seven Provincial Assemblies (which have overwhelming representation of women and identity/marginalized groups).

Fourth, even the Speaker and Deputy Speaker of the lower house, and the Chairperson and Deputy Chair of the upper house require a gender and party balance. Each of the two Houses must have a woman as alternative Chairperson from different political parties. The same principle has also been applied to the Provincial Assemblies.

Fifth, the structure of the registered political parties, eligible for participating in elections at various levels of the federation, must be democratic, inclusive, and comply with conditions laid down by the Constitution and federal laws (articles 269–72). Article 269 (4)(c) clearly states: 'there must be a provision of . . . inclusive representation in [the party's] executive committee at various levels as may reflect the diversity of Nepal'.

4. What obstacles or challenges to federalism and constitution-building exist, and how might these be overcome?

Although there are numerous obstacles to devolution and challenges to constitution-building efforts under the newly promulgated Constitution (presented here as 'gaps'), three are particularly critical:

The legitimacy gap

Some political parties, especially those representing the Madhesi, Janajati and marginalized identity groups, have refused to take part in the ownership of the new Constitution despite the fact that it was adopted by over 90 per cent of Constituent Assembly members. More than 15 political parties boycotted the adoption process and refused to sign the draft constitutional charter on the grounds that their (minority) voice was not heard; that due constitutional process (the Assembly's rules of procedure) was not followed in the name of fast-tracking; that a few leading political parties imposed their political will (through 'whip') arbitrarily, in violation of the established Constituent Assembly norms; and that sufficient time was not given to read and make comments on the Draft Constitution. The agitation of the protesting political parties, especially in the Terai plains close to the Indian border, resulted in the deaths of over 40 people (including children and senior police personnel), as well as serious economic and social crises due to the unofficial imposition of blockades across the southern border for more than four months. At the time of writing, life in the southern plains has not returned to normal.

Accommodating dissenting voices and ensuring full acceptability of the new Constitution by all sectors of society and the agitating parties is a big challenge. Many political parties and some members of the international community have also expressed concerns about the procedural deficiencies and inadequacies of the new Constitution. The new Constitution continues to face implementation challenges during the federalization process. Implementation is yet to take place as the electoral laws for creating the federal entities have not been adopted by the transitional legislature. Political parties and the government are working, albeit slowly, towards constitutional reforms to respond to the demands and grievances of dissenting parties and groups.

The knowledge gap

The new Constitution is a radical departure from the past. On the one hand the document was conceived as introducing major societal transformations through democratic republicanism, identity-based parliamentary federalism, principles of inclusivity and secularism, and a mixed electoral system for representation. On the other hand, ensuring that multiple orders of federal governance will secure 'unity in diversity' would not be an easy task for any country—still less an economically under-developed country with 126 identity/ethnic groups, speaking nearly 100 languages and dialects, divided into about ten religious faiths and living in diverse geographical locations between two global powers. Nepal, despite being a country rich in natural resources with huge economic potential, is inhabited by very poor people led by extremely divided and ideologically opposed political parties who lack sufficient knowledge about the complex nature of the new federal governance system in a pluralistic, identity-based, traditional society. Neither the political nor the administrative leadership and other personnel, including the judiciary, have adequate conceptual or practical knowledge or experience of federal systems. The human resources and administrative machineries currently involved are the product of the previous feudal and centralized system and mindset. The lack of knowledge and experiential gaps in managing such a radical transformation within the existing socio-political and legal set up will be challenging.

Political actors and the Constituent Assembly have been reluctant to hold sufficient, even minimal, dialogue amongst decision makers, academics and experts during the constitution-building exercise. A massive education drive at all levels of decision-making, including throughout the public in general, is thus needed to overcome these deficiencies and gaps. In order to create the right environment to meet these challenges effectively, serious political

commitment, open-mindedness and a desire to learn from others' experiences on the part of political actors is urgently required.

The institutional gap

Nepal is a federal country in theory, but functionally it is still a unitary state governed under transitional provisions of the new Constitution and through institutions (legislature, executive, judiciary and laws) which have been temporarily modified or transformed from the old system. Hence, all governance institutions display continuity, including constitutional bodies and (with the exception of the reconstituted High Courts) the judiciary. Implementing laws for elections (for all three layers of federal governments) are yet to be framed. New institutions envisaged by the new Constitution are accordingly yet to be created through democratic means. Without experience of duly constituting and operationalizing federal devices, Nepali political actors are simultaneously dismantling and transforming an unstable, divided (and divisive) feudal society into a complex, egalitarian, democratic society under sophisticated federal constitutionalism.

The institutional gap is insurmountable. Province names have not been assigned; the delimitation of constituencies at all three levels of federal units has still to be determined. Implementing legislation on a priority basis is to be produced by the existing unitary legislature. Unless top priority is given to preparing for elections for all levels as early as possible before the deadline of 21 January 2018, then in the absence of the real governing institutions, federalism and the full implementation of the new Constitution will remain a dream. Hence, the state must free itself at the outset from the clutches of ad hoc transitional provisions that prevent the country moving from a unitary to a federal system. Without intense political negotiations amongst major political parties, especially dissenting Madhesi and Janajati groups, institutional gaps cannot be filled. Operationalizing federalism is a bigger challenge in reality than politicians think, and we have a long way to go before realizing this in Nepal.

5. What insights can be drawn for constitution-building in conditions of territorially based societal conflict elsewhere?

In view of the experiences of established federations like Canada, India, Switzerland and even that of the emerging South African federation, managing territorially based societal conflicts through federalism can be achieved through peaceful means by resolving conflicts which do not extend to the extreme measure of secession. Some countries, such as Sri Lanka, will not take the risk of federalizing the ethnically (in this case Tamil) dominated minority area in apprehension of secession, while Ethiopia appears to manage ethnic tensions with the formation of territorially based ethnic entities despite the Constitution permitting secession options. The absence of democratic elements may have posed questions limiting the flexibility of ensuring territorial cohesion and ethnic harmony in that case. The right to self-determination, as interpreted by some ethnic and Madhesh based leaders in Nepal, creates apprehension in the minds of hill people. Loss of trust amongst the Maharshi and Janajati communities, who are demanding territorially based federal provinces, has led to protests and growing threats of violence that may cause loss of life, as happened prior to and during the blockade period in the aftermath of the promulgation of the new Constitution.

The Madhesi issue has even dragged the international community into diplomatic controversy due to mishandling of the situation by political parties and government. The vaguely articulated problems of the Madhesi and Janajati involve demographic adjustments, redrawing provincial borders, and delimitation of constituencies are still unresolved and may

pose a serious obstacle in negotiations for implementing the Constitution. No comparative lessons have assisted to date, because of hardened attitudes and entrenched positions on various sides.

Accommodating the grievances of dissenting forces through intensive dialogue and progressive constitutional amendments could be a legitimate way to address the problems by peaceful means. But certain technicalities, involving changes of provincial boundaries, are more complicated because the provinces that must give their endorsement (as required by the prescribed constitution amendment procedure) do not yet exist. Further delays in the reform process may complicate the situation and further divide the more tractable political actors. Nepal also risks being plunged into crisis with potential involvement of foreign forces to constructively use their good offices to mitigate problems that may have cross-border implications. The recent political developments appear quite encouraging and are indicative of the political forces nearing close to the common ground. Hopefully, the political parties will again work together, as they did in the past, to safeguard the new federal republican Constitution, and move towards fulfilling promises made to the people for their own empowerment.

Federalism and devolution in India

Madhav Khosla

1. What are the main societal divisions that federalism is designed to address?

Unlike several other cases discussed in this report, societal divisions in India have not, for the most part, been articulated through territorial claims. The reason for this is partly historical, namely the division of British India into the two independent sovereign states, India and Pakistan, in 1947. That dramatic event has shaped Indian democratic and constitutional practice in profound ways, and has made it extremely hard to make claims for territorial autonomy. In addition, caste groups—which arguably involve the deepest forms of societal divisions in India—are territorially dispersed throughout India, rather than lending themselves to a territorially based solution such as federal power-sharing. In the case of caste groups, whose recognition and management have been the subject of intense constitutional treatment, the primary debate has been on reservations: compulsory quotas in legislatures, public employment, and education. Thus, even though India is a country with considerable social divisions and social heterogeneity, there has been limited attention devoted to 'territorially based societal conflict' in constitutional discussions.

There are two major exceptions to the above. The first is special treatment of tribes outlined in Schedules V and VI of the Indian Constitution. While the former gives the Governor (an appointee of the Federal Government) extensive powers in tribal districts outside the North-East States of India, the latter vests autonomous district councils in those states (Assam, Meghalaya, Mizoram, and Tripura) with considerable powers of self-governance. These two schedules are to be read alongside a range of provisions in article 371 that relate to ethnic conflict resolution in India's north-eastern states.

The second exception—and a notable feature of Indian federalism—is the creation of new states along linguistic lines. As per article 3 of the Constitution, India's Union (central) government can alter state boundaries, and create new states, without the consent of the states themselves. Although attempts at creating new states have often invited judicial challenge, courts have demonstrated a striking degree of non-interference and have endorsed Parliament's absolute power in this regard. In this sense, India represents a somewhat weak federal model, for states themselves do not have any territorial integrity. At different points in independent India's history, both in the decades immediately following independence and

more recently, this provision has been used to create new states along linguistic lines and is generally viewed as having helped diffuse political tensions arising out of linguistic diversity.

2. What are the principal features of the constitutional design for federalism in India?

India is a federal country, although it is heavily centralized. Power tilts to a considerable degree in favour of the centre, including residuary powers of legislation. Legislative powers are divided between the centre and the states by way of lists outlined in Schedule VII of the Constitution: the Centre List, the State List, and the Concurrent List. The 73rd and 74th Amendments to the Constitution (1993) established local government in India and made elaborate provisions for decentralization, although as scholars have recognized, such provisions have failed to be realized in any meaningful way.

3. What arrangements, if any, does the constitution make for shared ownership of the state by different societal groups at the national level?

This question does not exactly apply to India, given that group-based claims and tensions have not really been addressed through federal power sharing mechanisms. All states are represented in the Upper House, and this naturally includes states created on linguistic lines. There are reservations (compulsory quotas) for caste groups and tribal groups in public employment, education, and legislatures, and these apply at the national (as well as state) level.

4. What obstacles or challenges exist to devolution and constitution building and how might these be overcome?

The principal challenges to devolution in India are political and legal. Any attempt at devolution will take power away from the state governments, and such governments are reluctant to allow this. The ambiguous drafting of the 73rd and 74th Amendments to the Indian Constitution that provide for local government has led to divergent interpretations, but courts have generally held that states have the discretion to choose the precise nature of devolution and determine whether certain powers must be devolved at all. It has been held that the relevant provisions are merely discretionary and enabling, and that devolution is therefore not required under the Indian Constitution. It is unlikely that any real change can take place in this regard without further constitutional amendments, which in turn is unlikely in the absence of political will.

5. What insights can be drawn for constitution-building in conditions of territorially based societal conflict elsewhere?

The division of states along linguistic lines has been an important device through which India has managed to diffuse constitutional tensions. It has also, as one would expect, led to political mobilization along the lines of language at different points of time in the history of independent India. It is a remarkable feature of Indian politics and constitutionalism that despite being a multi-lingual nation, language has not been a source of social conflict and tension in the same way as religion or caste.

The treatment of tribal groups presents a more interesting example. It is difficult to draw a definitive insight here but it does seem that while the north-eastern states were afforded special treatment to preserve their culture and tradition, such treatment has only led to their exclusion from mainstream politics and development. The constitutional hope of preservation has brought only marginalization as the political and social reality. In this sense, the important question for constitutional designers globally is whether territorially based autonomy risks becoming a new form of exclusion.

Federalism and devolution in Papua New Guinea

Stephen Pokawin

1. What are the main societal divisions that federalism is designed to address?

The PNG Independence Constitution was enacted by the Constituent Assembly about a month before the declaration of Independence on 16 September 1975. It was passed without the provision on devolution of powers as recommended by the Constitutional Planning Committee (CPC), triggering political reactions within the House of Assembly by members of the CPC and more so from Bougainville. As part of a compromise with Bougainville, a commitment was made by the Government to amend the Constitution after independence to insert provisions on devolution. The Constitution was amended in 1977 with the insertion of Part VIA, Sections 187A–187J. Through Part VIA, the system of provincial government was written into the Constitution.

Impact of European expansionism and colonialism

The island of New Guinea was divided into three parts: Dutch New Guinea to the west, and British New Guinea and German New Guinea to the east. British New Guinea under Great Britain became Papua under Australia, and German New Guinea went to Australia under the auspices of the League of Nations after World War I (and subsequently the United Nations after World War II). Australia took charge of Papua in 1902 and New Guinea from the start of World War I. It administered the two Territories together as Territory of Papua and New Guinea from 1949. West Papua was sanctioned by the United Nations as part of Indonesia in 1969. Dutch New Guinea became part of Indonesia when the Netherlands vacated its authority in the region.

Linguistic and cultural divide

Prior to Europeanization, there existed vast linguistic and cultural divides in PNG. Over 800 different linguistic groups exist in PNG. The harshness of the terrain reinforced their separate identities and character. Colonialism stitched together these diverse societies into a single nation state.

Administrative and political divide

The legacies of the colonial administration formed the legal nature of the independent state. The districts set up during the colonial period for administrative purposes took on great political significance. Today we have a country comprising: (a) a National Government; (b) 20 Provincial Governments, one Commission and one Autonomous Government; (c) 89 District Development Authorities; (d) 314 Local-level Governments; and (e) 6,114 Wards.

Purposes of devolution

Devolution in PNG is designed to:

1. empower the people to participate in determining their own destiny amidst the backdrop of a highly centralized administrative system;

2. unite the diverse people as part of a single nation; and

3. allow political power to be shared and exercised by many instead of being concentrated in the hands of a few.

The inclusion of the system of provincial governments in the Constitution in 1977 and the grant of autonomous powers to Bougainville in 2001 were deliberate policy decisions to accommodate demands largely from Bougainville. The grant of provincial government to Bougainville in 1977 led to other provinces requesting to be granted such powers as well. Given that experience, the grant of autonomous powers in 2001 was specifically stated in the Constitution to be available only to Bougainville.

2. What are the principal features of the constitutional design for devolution in PNG?

The Constitution creates three levels of government within a unitary, parliamentary system of government. The levels of governments are: (a) the national government; (b) the provincial and regional governments; and (c) the local-level governments.

Part VIA Sections 187A–187J and Part XIV entrenched the principles of devolution in the Constitution. Part VIA provides for the establishment of provincial governments and local-level governments throughout the country except for the National Capital District and Bougainville through the Organic Law on Provincial Governments and Local-level Governments. The Organic Law among other things allocates powers to the provincial governments and local-level governments. The powers not mentioned remain with the National Government. Several features need mentioning:

1. The higher level of government(s) may exercise the powers of the lower level of government with the consent of the lower level of government that is affected.

2. The national government may exercise the power or powers of the provincial governments and local-level governments where it is in the national interest.

3. The national government has powers to suspend provincial governments and local-level governments.

4. The national government provides much of the funding.

5. National members of parliament are governors of the provinces, members of the provincial assemblies and chairman of district development authorities.

Part XIV of the Constitution was inserted in 2001 resulting in restoration of peace in Bougainville after 10 years of violent conflict. Part XIV applies only to Bougainville and provides for Bougainville to have its own Constitution. It created an Autonomous Regional Government and provides for a referendum by the people of Bougainville to determine the political future of Bougainville within five years after year 15 from the establishment of the first elected Autonomous Bougainville Government. Its key features are:

1. Part XIV of the Constitution applies only to Bougainville.

2. Where there is inconsistency between provisions of Part XIV and the rest of the PNG Constitution, Part XIV prevails.

3. Bougainville has its own Constitution.

4. Under the principle of double entrenchment, powers devolved to Bougainville cannot be returned to the National Government without the approval of Bougainville.

5. Bougainville under the Constitution is effectively an independent region within PNG without formally recognizing it as a separate, independent nation.

6. Bougainville's political future will be determined at a referendum set to be held after year 15 but before the end of year 20 of the existence of the Autonomous Bougainville Government.

3. What arrangements does the constitution make for shared ownership of the state by different societal groups at the national level?

The Constitution distinguishes two categories of citizens—those who are indigenes to Papua New Guinea and members of any of the many tribal nations which make up the nation of PNG, and those who acquire citizenship through naturalization. Recent constitutional amendments created dual citizenship and permanent residencies. The Constitution recognizes the basic or fundamental rights of all human beings regardless of citizenship, and qualified rights which only citizens have. With the rights go basic social obligations and responsibilities.

The power of the people is exercised by representatives who are elected every five years at the national and local government levels based on constituencies. At the national level there are 22 political divisions comprising 20 Provinces, the National Capital District and the Autonomous Region of Bougainville. Each of the divisions is categorized into the provincial electorates and within the provincial electorates there exist open electorates. There are 22 provincial electorates and 89 open electorates. The National Parliament is therefore made up of 111 elected representatives who exercise the legislative power of the people.

At the provincial level, the 20 provincial governments are composed of the respective members of parliament, heads of local level governments and appointed members with the provincial member as Governor. There are no direct elections to the provincial assembly.

Each of the open electorates is a district for the purposes of administration of service delivery. There are a total of 89 districts, each with a District Development Authority. The open member of the National Parliament is Chairman of the District Development

Authority while heads of local-level governments within the district and appointed members are members of the Authority.

The Organic Law allows for one urban local-level government for each open electorate or district and a maximum of three rural local level governments. Where there exist special circumstances, more local level governments may be established. There are 314 local level governments throughout the country. Each local level government is further subdivided into wards which elect their representatives to the Local-level Government Assemblies. There are a total of 6,114 wards.

Land throughout Papua New Guinea is originally owned by the indigenous customary land owners. The colonial administration over time had alienated land from the customary land owners for public purposes. The Constitution provides for land owners, whose lands were alienated land, to be justly compensated. However, all resources found below the surface of the land and under the sea are owned by the state. The application of the relevant provisions of the Constitution has required the state and the developers to pay royalties and negotiated benefits to the land owners where the natural resource is located, as well as those who are affected by the development of the natural resource depending on the regime established in the respective resources legislation.

The Constitution allows the state to compulsorily acquire land from land owners for fair and just compensation. Except for Bougainville, the powers of the national government prevail over other parts of the country. Bougainville alone has its own elected autonomous government while at the same time has representatives in the National Parliament.

4. What obstacles or challenges to federalism and constitution-building exist, and how might these be overcome?

Papua New Guinea has existed as an independent country for just over 41 years. However, the people are connected to the past for thousands of years. It is a nation state comprising many nations whose independence was taken away and given to the foreign central creation called the state. Devolution involves the state creating sub-national political institutions with which to share some of that power. The obstacles or challenges to devolution appear in the following forms:

Threat of disintegration

The threat of secession hangs over the country. Prior to independence, Bougainville and Papua unilaterally declared independence. The deliberate choice of a unitary system of government was considered best in fostering a nation out of many nations. The Constitutional Planning Committee (CPC) recommended decentralization to be entrenched in the Constitution. The Constituent Assembly excluded it from the Constitution. Bougainville declared Independence. The Parties agreed to amend the Constitution to include provisions for the establishment of the system of provincial governments. A 10-year conflict erupted in the 1990s and this resulted in the Constitution being amended again to avail autonomy to Bougainville by referendum between the 15th and 20th year after the establishment of the Autonomous Bougainville Government.

Reluctance to part with power and authority

From the very beginning, effective implementation of political decentralization was opposed by those reluctant to part with power and authority. The idea that the centre would get smaller and smaller and the outer would become bigger and bigger did not eventuate. Attempts were made to devolve powers but the centre continued to expand and entrench

itself. Eventually the 1995 reform was effected which provided for control by the members of the National Parliament. And 20 years later in 2015, the process was enhanced further by the amendment to the Constitution and the Organic Law to establish the District Development Authority as the vehicle for open members of Parliament in the districts.

Deficiencies in performances of state institutions

Politicization of state institutions and increasing activism by elected representatives in administration and delivery of service mechanisms have weakened and marginalized state institutions.

Need for sustained capacity

Combined efforts of provincial governments, the national government and external aid donors to build capacity at the national, provincial and local-level government levels have yet to yield a sustained positive outcome.

Impacts of globalization

Rapid changes occurring globally create instability, and as they depend on external funding, state institutions and programmes with scarcity of resources are left unimplemented. Unsustainable funding then creates urgency to complete programmes.

5. What insights can be drawn for constitution-building in conditions of territorially based societal conflict elsewhere?

Papua New Guinea is a nation of many indigenous nations. Four main insights can be drawn from PNG's experience. First, the PNG Constitution is autochthonous. It has emerged as the glue that holds the nation of nations together. The approach taken to designing the Constitution became a form of contract that the emerging nation made with its component parts to form an independent state.

Second, political compromise results in constitutional amendments to accommodate devolution of powers. The first ever amendment to the Constitution soon after independence incorporated provisions for the devolution of powers. The system was abolished in 1995 and replaced by a new system. And to restore peace in Bougainville, the 2001 amendment to the Constitution created the Autonomous Government of Bougainville and charted the way for the political future of Bougainville. The negotiated peace agreement was enacted as part of the Constitution by the National Parliament.

Third, the politicization of state institutions and processes weakens governance which in turn fuels conditions that draw attention to existing divides.

Fourth, the double entrenchment of devolved powers in the Constitution accompanied by funding and professionalism increases opportunities for effective devolution.

Theme 2. Constitutional design: Special autonomy

Introduction: Special autonomy

Special autonomy arrangements are a form of devolution in which one or more regions have a greater degree of authority to self-govern than is conferred on other sub-national parts of the state. It differs from the kinds of federalism and devolution that were the focus of the first Theme, in which the devolution of power is broadly equal across all substate units.

Special autonomy arrangements are often a response to territorially defined conflict, particularly where the conflict is between the peoples of the region and the central state. In the three principal cases discussed here, the constitutional arrangements for special autonomy were preceded by peace agreements and were the result of a compromise between those seeking the region's independence and those who wish the region to remain part of the parent state.

The process and substance of special autonomy arrangements have implications for constitution-building, at both the regional and national levels. At the national level, the constitution of the parent state may need to be formally amended or flexibly interpreted to accommodate the kind of special autonomy agreed as part of the peace-making. The terms of special autonomy might be set out in the constitution or, alternatively or in addition, left to ordinary law, leading to different degrees of entrenchment and autonomy. The constitution of the parent state might also expressly confine special autonomy arrangements to a particular part of the state, in an effort to prevent claims for devolved powers and status from other regions. A region's capacity to implement self-government, once granted, requires constitution-building processes at the local level, as the newly autonomous region develops its own laws, institutions and systems of government.

The three principal case studies presented under this Theme have recent experience of establishing regional autonomy within the parent state in the context of territorially defined societal conflict. Bougainville was established as an autonomous region within Papua New Guinea after civil conflict over a period of 10 years. New Caledonia is a sui generis territory of France that has had special autonomy since 1988, an arrangement that was also made after a period of conflict between groups supporting independence and those resisting it. The arrangements in Bougainville and New Caledonia are distinctive in that, as well as creating special autonomy, the constitutional arrangements also provide for a referendum on independence within a certain period of time. Mindanao is a predominantly Muslim region of the Philippines which has also seen decades of armed conflict between those seeking and resisting independence. The Philippines Constitution of 1987 provided for the Autonomous Region of Muslim Mindanao, but continuing conflict has resulted in the negotiation of a

new peace process and constitutional arrangements to establish the Bangsamoro Autonomous Region in its place.

The cases of Indonesia (which is set out under Theme 4, implementation) and India (set out under Theme 1) are also relevant to this Theme. In Indonesia, two special autonomous regions have been established for Aceh and West Papua in response to internal conflict in those areas. Djohermansyah Djohan reports on some of the challenges in making and implementing laws for special autonomy there. In India, special autonomy-type arrangements exist for the tribal districts in the North-Eastern states in an effort to preserve their distinctive culture and traditions, but Madhav Khosla suggests that such arrangements might have come at the cost of marginalizing the region from the politics of the parent state.

All five cases demonstrate the importance of the continuing relationship and dynamics between the government of the parent state and the autonomous region, for constitution-building at both levels.

Special autonomy and Bougainville

Kearnneth Nanei

1. What are the main societal divisions that special autonomy is designed to address?

Bougainville is an autonomous region of Papua New Guinea (PNG), located 1,000 kilometres to the east of the national capital of Port Moresby. It consists of two large islands, Bougainville and Buka, separated by a narrow passage, as well as many smaller islands and atolls. The region's total land area of 9,438 square kilometres accounts for about 2 per cent of PNG's land mass. Geographically, culturally, and linguistically, Bougainville is properly part of the Solomon Islands chain, but it became part of German New Guinea, rather than the British Solomon Islands, as a consequence of the colonizing powers' carving-up of the Pacific in the late-19th century.

Bougainville became a province of the new Independent State of Papua New Guinea in September 1975; however, Bougainvilleans were not content to be part of PNG. They had always been very conscious of their differences—historically, culturally and geographically and perhaps, most notably, their distinctive dark skin colour. Even before PNG gained its independence, the Bougainville secession movement had considerable support.

As early as the 1960s there had been various movements and groups on Bougainville advocating for Bougainvilleans to be given the right to manage their own political affairs. The leaders of these movements were unhappy with the perceived neglect and other aspects of colonial rule and called for separation from the rest of PNG. Establishment of an enormous copper and gold mine in central Bougainville, against the wishes of landowners, together with the beginnings of the debate about PNG's decolonization, contributed to intensified feelings of resentment, as well as heightened interest in charting an independent path for Bougainville. A unilateral declaration of independence of the Republic of North Solomons pre-dated PNG's independence by two weeks. Unable to secure international recognition, the push for Bougainvillean independence faltered.

Since the start of the Panguna mining operations in Bougainville, landowners and adjacent communities witnessed a major influx of workers from other parts of PNG, as well as significant environmental damage. Combined with resentment over inequitable distribution

of the proceeds of mining, most Bougainvilleans felt marginalized and intimidated by the new arrivals.

Matters came to a head in late 1988, with the formation of the Bougainville Revolutionary Army (BRA) by Francis Ona, a leader of the local landowner group. The BRA's guerrilla tactics led to the closure of the mine the following year and violent conflict with the PNG Defence Force, which came to the aid of the mining company. The BRA attracted Bougainvilleans from other areas of Bougainville to join the fight for political independence from PNG.

In 1990 the PNG Defence Force withdrew from Bougainville and imposed a blockade on the islands. Francis Ona issued another unilateral declaration of independence, which again received no international support. The blockade led to critical shortages of food and medicine in Bougainville, causing many deaths. However, Bougainville was not united behind Ona and the BRA. Many opposed the often brutal means adopted by the BRA— Bougainville split into several factions, mostly along clan lines, and descended into civil war. The civil war, known locally as 'the Crisis', lasted until 1997 when a peace was brokered by New Zealand, with support from Australia and other Pacific nations.

From June 1999 to August 2001, Bougainville's leaders engaged in protracted negotiations with each other and with the PNG Government, seeking a political settlement to the conflict by taking a 'peace by peaceful means' approach. Even though Francis Ona refused to participate in the negotiations, many of the BRA leadership came to the table. On 30 August 2001, Bougainville's factional leaders (without Ona) and the PNG Government signed the Bougainville Peace Agreement. It was witnessed by representatives from New Zealand, Australia, Solomon Islands, Vanuatu, Fiji and the United Nations.

The Bougainville Peace Agreement

The Peace Agreement provided the basis for a new kind of relationship between PNG and Bougainville, and for the cooperation and unification of once-divided Bougainvilleans. The Peace Agreement contains three main pillars, providing for:

1. a constitutionally guaranteed high level of autonomy for Bougainville;

2. a constitutionally guaranteed referendum for Bougainville on the region's future political status, to be held within 10 to 15 years from the establishment of the new autonomous government; and

3. the demilitarization of Bougainville through withdrawal of PNG security forces and a three-stage agreed process for weapons disposal in Bougainville.

Implementation of the Agreement began in March 2002, when the PNG Parliament passed constitutional laws to give effect to the Agreement. The constitutional laws dealt with the referendum issue and provided for the autonomy arrangements. The laws were to come into operation once the United Nations had verified the completion of the second stage of weapons disposal, which occurred in August 2003.

The first step to establish the proposed Autonomous Bougainville Government (ABG) was through elections. Therefore an election was held when the new Bougainville Constitution was passed which defined the composition of the ABG, including the membership of the mainly elected law-making body.

2(i). and (ii). What form does local autonomy take and how and why did independence become part of the options on offer?

Delaying the referendum on independence for Bougainville was a significant compromise for many Bougainvilleans involved in the peace talks. In accepting this compromise, the leaders of Bougainville were in clear agreement that they wanted Bougainville to have the highest possible level of autonomy in the meantime. They saw such autonomy arrangements as providing one approach to the goal of self-determination that the people of Bougainville had pursued for several decades. The leaders wanted autonomy to better enable Bougainvilleans to express and develop their own identity, and empower them to solve their own problems, including tackling aspects of aftermath of the Crisis.

During the peace negotiations the PNG representatives were steadfast in their opposition to the concept of Bougainvillean independence. PNG could not accept its own fragmentation after only 20-some years of nationhood. Even on Bougainville there were differing views about the islands' political future. Those pushing for autonomy hoped that it would achieve reconciliation and facilitate the development of a new relationship between Bougainville and the rest of PNG.

Autonomy for Bougainville was intended to give Bougainvilleans an opportunity to reconcile and reunite, rebuild the economy and the infrastructure that had been destroyed during the Crisis, and rebuild the capacity of their government. Ultimately, it was agreed that the political future for Bougainville would be a combination of a deferred referendum on independence with, in the meantime, the highest possible autonomy guaranteed under the PNG Constitution. The ABG is constitutionally empowered to seek transfer of several powers and functions, except for those related to the national sovereignty of PNG. The PNG government retains powers relating to: defence; foreign relations; immigration; pelagic fisheries; central banking; currency; international aviation and shipping; international trade; and posts and telecommunications.

2(iii). What processes are involved on the road to referendum, including collaboration with other governments and planning for a post-referendum future?

The holding of a referendum on the future political status of Bougainville is guaranteed under Part XIV of the PNG Constitution. The arrangements for the conduct of the referendum are laid out in an organic law.

The negotiating position of many of the Bougainville representatives to the peace negotiations was immediate independence for Bougainville. However, PNG would not allow or accept such an outcome. There was also a view held by some from Bougainville that the time was not yet right for independence. They felt that a deferred referendum could give time for Bougainvilleans to reconcile and reunite, rebuild the economy and infrastructure, to be better placed to prosecute the case for independence later.

Ultimately it was agreed that the Bougainville referendum would be held during a 5-year window, commencing 10 years after the establishment of the first Autonomous Bougainville Government. The Referendum window therefore opened in June 2015, with the Referendum to be held no later than June 2020. In a move that remains contentious, the outcome of the deferred referendum will not be binding, but subject to ratification by the National Parliament. Acceptance of this compromise by the Bougainville negotiators

removed one of the last (and most trenchant) sticking points to finalizing the Peace Agreement.

In setting the referendum date, the PNG and ABG governments are required to consult and agree on the criteria for enrolment of non-resident Bougainvilleans who will be eligible to vote. The two governments must consider whether (a) weapons have been disposed in accordance with the Peace Agreement; and (b) the ABG has been conducted in accordance with 'internationally accepted standards of good governance' as applicable and implemented in the circumstances of Bougainville and PNG as a whole. These matters are not pre-requisites for the holding of the Referendum; they are only matters to be considered in setting the date.

Bougainville is now within the Referendum window. In June 2016 both governments agreed to 15 June 2019 as an indicative target date for the Referendum. A work plan has been approved by both governments, including planning for Bougainville's post-referendum future, of which the current legislative framework makes no mention.

3. What arrangements does the constitution make for shared ownership of the state by different societal groups at the national level?

The fact that Bougainville was emerging from a conflict that had fragmented communities, creating distrust, resentment and suspicion amongst Bougainvilleans, meant that putting the pieces together would not be easy. Accordingly, during the consultations of the Bougainville Constitutional Commission, the people of Bougainville made it clear that they wanted the region's new constitution to contribute to reconciliation, unification, the rebuilding of Bougainville, and the development of a truly Bougainvillean government.

It was agreed there should be reserved seats made available for women and former combatants in the new Bougainville legislature. Consideration had been given to inclusion of seats for other special interest groups, such as youth and churches, but these did not eventuate. There are three reserved seats for women and three seats for former combatants in the Bougainville House of Representatives, with one representing each of the three regions of Bougainville¬—North, Central and South.

4. What obstacles or challenges to special autonomy and constitution-building exist, and how might these be overcome?

In the case of Bougainville, the post-conflict autonomy and constitution-making was an enormous challenge, because (as alluded to above), the Bougainville Constitution needed to be a significant platform for maintenance of the peace process. It was meant to pave the way for reconciliation, unification, the rebuilding of Bougainville and development of a truly Bougainvillean form of government. The challenge was amplified by the refusal of a number of key groups to participate in the constitution-making process. Indeed, it has only been in recent years that a major faction, the Me'ekamui, has agreed to join the process.

The other challenge is getting the Bougainville economy back on track, in the hope of sustaining an autonomous government. There is significant potential for small-scale alluvial mining, fisheries, tourism, and agricultural cash crops such as cocoa and copra. However, facilitating the re-emergence of these sectors in a post-conflict environment has been an enormous challenge for the Government. Collection of the ABG's internal revenue remains poor, and the government relies heavily on financial support from the National Government and international donors.

Within the ABG there are very serious capacity constraints that present a significant impediment to the effective transfer of the powers and functions available to the ABG. The Bougainville Public Service was only formally established two years ago, and recruitment is ongoing in the hope of attracting experienced and qualified people to work for the government in Bougainville. The current constitutional provisions to devolve the various powers and functions from the National government to Bougainville are complex and require significant financial and human resources to implement.

5. What insights can be drawn for constitution-building in conditions of territorially based societal conflict elsewhere?

For Bougainville, it was important that the experience of developing a new constitution post-Crisis was driven by local factors. While some insight could be drawn from experiences of constitution-building abroad, and legal experts with experience elsewhere in post-conflict constitution-making were engaged to work with Bougainvilleans in the development of its constitution, the people of Bougainville were adamant that they wanted something truly home-grown.

Bougainvilleans were clear that they wanted their government to be built firmly on the basis of customary identity. The people wanted to see customary authority recognized within the formal government structures. Bougainvilleans expressed the view that their constitution must give due recognition to their customary values and that it should foster and develop the Bougainville identity. We have always been proud of our identity, built as it is upon concepts of fairness, equality, respect for individuals, recognition of community obligations, self-sufficiency and self-reliance, and respect for land and environment.

It has been said that, 'in implementing autonomy for Bougainville there is no road, you build the road as you walk'. In building this road, we still have far to go, with many challenges ahead, but it is a road that we are building together. We are endeavouring to put the trauma of the Crisis behind us and build a resilient Bougainville to face the future together.

Special autonomy and New Caledonia

Carine David

1. What are the main societal divisions that special autonomy is designed to address?
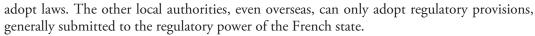
The main societal division that special autonomy is designed to address in New Caledonia is an ethnic division. Indeed, New Caledonia is what the doctrine of political science calls a 'divided society' on an ethnic basis. It became a French colony in 1853 and is now a French overseas territory, which benefits from an important autonomy that goes further than what is usually tolerated within a unitary state. As New Caledonia is a settlement colony, there are several communities living in the territory. The results of the last census (2014) reveal that 40 per cent of the population is Kanak (i.e. the indigenous population) and about 30 per cent is European. The remaining population self-identifies as Wallisian or Futunian (Wallis and Futuna being another French overseas territory in the Pacific), Metis, Polynesian (from French Polynesia) or from diverse Asian countries.

The ethnic division corresponds with socio-economic and political divisions. The indigenous population suffers deep social and economic inequalities in terms of education, access to employment and housing. The question of independence for New Caledonia is deepening these divisions: the Kanak people predominantly argue for independence whereas the other communities (mainly the European population) wish to stay within the French state. In such a context, the ethnic conflict is also a political conflict. As a consequence, the political debates tend to systematically focus on this opposition to the detriment of any other issue.

2(i). What form does local autonomy take in New Caledonia?

New Caledonia is a sui generis territory of the French Republic that enjoys a very large degree of autonomy, in particular since 1988. The local autonomy takes diverse forms that are not usually encountered within a unitary state like France.

First, there is normative autonomy. The local Parliament, the Congress of New Caledonia, is provided with a legislative power. New Caledonia is the only French territory which can

adopt laws. The other local authorities, even overseas, can only adopt regulatory provisions, generally submitted to the regulatory power of the French state.

Second, autonomy is granted by an important transfer of powers in various fields either to New Caledonia or to its three provinces. Powers such as tax law, labour law, civil law and commercial law have been progressively transferred to New Caledonia. The provinces have jurisdiction in all matters that are not devolved to the French state or to New Caledonia and they have powers in environmental law, economic development (tourism for example), and can also regulate social protection and primary education among other matters. Power sharing between New Caledonia and its provinces is of primary concern in order to maintain balance among the political movements.

The French state is therefore reduced to the role of mediator and retains sovereign powers such as those relating to defence, money and public order. Even powers such as those relating to international relations and criminal law are shared with the local entities.

The autonomy is also economic. Important financial transfers from France, as well as autonomy in tax law are some tools allowing the local authorities to decide their own economic strategies. A policy of economic rebalancing has been established since 1988 to enable the development of those parts of the territory that were underdeveloped and suffering from a lack of infrastructure; two provinces benefit from a larger budgetary allocation than the third province, which is home to the territory's capital and is the more developed.

2(ii). How and why did independence become part of the options on offer?

Kanak people were deprived of any citizenship from 1853 when New Caledonia was annexed. They gained access to citizenship and then were entitled to vote from 1946. By 1957, all Kanak people were French citizens. From then, Kanak representatives have claimed autonomy. In 1957, the French Parliament voted for a status of wide autonomy which satisfied, in great part, the Kanak demands. This explains why, in 1958, the inhabitants of New Caledonia voted in favour of the new French Constitution by 98 per cent, even though General de Gaulle stated that colonies which voted against the Constitution project would become independent.

Nevertheless, during the 1960s France progressively reneged on the promise of autonomy with several laws. This shift in the situation caused a toughening of the Kanak demand, which gradually but quickly moved from a demand for autonomy to a claim for independence. At the beginning of the 1970s, the first claims for independence were formulated by some political parties. By the mid-1970s, the shift was clear and marked a bipolarization of the political spectrum that still exists today.

The option of independence has been on offer since the 1980s, when the political situation radicalized as a result of civil conflicts that occurred from the beginning of the decade. But discord about the electoral college for a referendum on self-determination, i.e. who should be allowed to vote, prevented the organization of a referendum (consultation), as the separatist parties refused or boycotted the consultations.

Finally, in 1988, after the civil war reached its peak, it was decided to proceed with a consultation regarding the question of the accession of New Caledonia to independence, scheduled to take place in 1998. Nevertheless, the political leaders of both camps decided to postpone the referendum within the Noumea Agreement of 1998. The referendum should take place at the latest in November 2018.

2(iii). What processes are involved on the road to referendum, including collaboration with other governments and planning for a post-referendum future?

The Noumea Agreement states that the consultation should take place between 2014 and 2018. Until May 2018, it is up to two thirds of the members of the Congress of New Caledonia to decide the date of the consultation. If the Congress has still not decided by that time, then it is the French government that will set the date, at the latest in November 2018. Today, the date is still not decided and the consultation will most probably take place in November 2018.

The electoral college is composed of persons who have lived in New Caledonia since 1994 at the latest. In 2015, the French government began an information campaign for registration on the electoral list for the self-determination referendum. At this stage, it appears that 20,000 Kanak are still not registered on this list. This is very important because it could affect the outcome of the consultation. Recently, a United Nations delegation called upon the French authorities to organize a localized registration process of proximity. This is an important issue because it could lead to a boycott of the referendum by separatist parties if it is not resolved.

Discussions about the post-referendum future, which I call 'the day after', are not really in progress because political leaders are focusing either on the issue of independence or maintaining the territory within France. At the moment, there is still no public participation to determine the post-referendum future. Nevertheless, local political leaders have asked France to assist them with the discussions regarding post-referendum institutions and governance. Since 2014, French experts have regularly come to New Caledonia to assist political leaders on different issues. This work is still in progress. The next issue to be examined is citizenship and nationality.

3. What arrangements does the constitution make for shared ownership of the state by different societal groups at the national level?

There is no arrangement at the national level to share the ownership of the state, the tools for autonomy being employed exclusively at the local level.

Nevertheless, the implementation of the Noumea Agreement of 1998 required the review of the French Constitution to allow certain exceptions to the constitutional provisions and principles to provide legislative power to the local parliament, create local citizenship, restrict the right to vote in local elections to persons settled after 1998 in New Caledonia, and implement priority access to local employment for persons permanently settled in New Caledonia. New Caledonia's status is subject to specific provisions within the French Constitution.

4. What obstacles or challenges to special autonomy and constitution-building exist, and how might these be overcome?

In regard to special autonomy, there exist several challenges. First, economic and social inequalities between communities are still very much present in New Caledonia. For example, the policy of affirmative action in higher education has not yet been effective

enough to train the local executives needed. It does not enable real empowerment of New Caledonians.

A second issue concerns the remaining transfers of power that should take place before 2018. As a matter of fact, the Noumea Agreement, and then the statutory law, provide for progressive transfers of powers. There are still three powers that may be transferred to New Caledonia: (a) audiovisual communication; (b) higher education; and (c) rules for the administration of local governments, review of the legality of acts adopted by infra-territorial public entities, and the accounting and financial regime of infra-territorial public entities.

Unlike the other powers that were gradually transferred to New Caledonia since 1999, the Congress of New Caledonia must express its will to see these transfers happen. At the moment, there is no agreement between separatist and loyalist parties on these transfers. Nevertheless, they are not compulsory and are not a condition for holding the self-determination consultation.

In regard to constitution-building, the main obstacle is the inability of political leaders to look to the post-referendum future irrespective of the result. Yet it appears that the conceivable options in either situation (whether or not New Caledonia is independent) are very similar in terms of institutional engineering. For example, New Caledonia cannot take responsibility for its own defence, which will most likely become the responsibility of France, whatever the result of the self-determination consultation. In addition, the alternatives available regarding the exercise of judicial power are quite similar in either situation. Indeed, in either situation, these powers can be entirely or partly assumed by New Caledonia.

The other main challenge in order to build a constitution is the inability of local political leaders as well as the representatives of France, to organize a constitution-making process that meets international standards. Good practices require that the process respects several principles such as inclusiveness, participation of the public, transparency, consensus-based decision making and national ownership. None of these are being considered by political leaders at the moment. In this context, it seems that the process has to be questioned. It seems urgent that the population claims ownership of the debate.

5. What insights can be drawn for constitution-building in conditions of territorially based societal conflict elsewhere?

In divided societies, participation is often considered to be counter-productive because there is a high risk that each group will seek their own interests and will not be prepared to work with other groups to seriously discuss the future and to resolve conflicts. Moreover, discussions can become narrower and revolve around particular issues, and the process is slower. That is why it is often suggested that in divided societies, decisions should be made by a small group of influential elites and the constitution-making process is often not transparent and not participatory.

The ongoing situation in New Caledonia and the demand for more participation expressed by the population tend to contradict this analysis. Moreover, any negotiated autonomy status which unfolds as a palliative response to a demand for independence, as is the case in New Caledonia, must not annihilate any prospect of later evolution. It is also essential that the population as a whole appropriates the agreement. An important issue is to consider whether the solution is definitive and permanent, or open to potential future revision. Indeed, from the Caledonian viewpoint, affirming a negotiated solution as final appears problematic because it excludes any expectation of further evolution.

The progressive evolution of its autonomy has allowed New Caledonia to experiment with different degrees of autonomy, allowing each camp to assess the advantages and

disadvantages. It has also had the advantage of allowing a rebalancing of territories and populations to enable them to assume autonomy and prepare for a possible exercise of sovereignty. Indeed, institutional arrangements have been systematically accompanied by measures to meet Melanesian claims in relation to land reform, the promotion of Kanak culture, the economic and social development plan and re-balancing in favour of rural territories and islands. Measures taken include setting up infrastructure for the benefit of areas predominantly inhabited by Melanesians, introduction of a management training programme primarily for Melanesians, and power sharing with the provinces that have skills and significant financial resources.

In addition, it seems essential in view of the Caledonian experience that the conclusion of the Agreement must be part of a population-wide reconciliation process for considering, in the Caledonian jargon, a 'common destiny'. There is a need to build a common identity while accepting the differences between the constituent groups.

Special autonomy and the Philippines

Miriam Coronel-Ferrer

Although the Philippines is once more on the verge of crafting a new constitution that would significantly alter the political system from an 'impure' form of unitary state to a decisively federal form of government, this chapter focuses on the existing 1987 Constitution and how it framed past and current efforts to legislate autonomy laws. [Editors' note: Benedicto Bacani examines the current amendment process under Theme 3, Constitution-making processes, in this report.]

1. What are the main societal divisions that special autonomy is designed to address?

The current Philippine Constitution was a product of the upheaval against the Marcos dictatorship. Among other social and political goals, it sought to provide answers to the erstwhile separatist agenda of the Moros in southern Philippines and the social injustice on which a large-scale, communist-led (Maoist) insurgency grew across the country, including the Cordillera in the north. The Cordillera movement notably assumed the nature of an identity struggle that demanded special territorial devolution arrangements for the region, particularly in the form of a federal state.

The 1987 Constitution introduced major measures to provide more checks on the presidency/executive branch, as well as to decentralize and democratize power to local governments. It acknowledged the aspirations of the indigenous Moro and Cordillera populations though the specific provisions that are discussed below. It enshrined the rights of all indigenous peoples including those in other provinces and regions, and upheld popular participation and representation of people's organizations in various levels of government. It provided for the first form of proportional representation in the national Congress through a party-list system that has made possible the entry of sectoral and non-traditional constituents in the legislature. Party-list seats comprise 20 per cent of the total seats in the House of Representatives. Among such party lists is a regional group representing the diverse peoples in Mindanao, as well as a Bangsamoro party-list group.

Thus, the context of constitution-making in 1986–87 was the democratic upheaval against dictatorship and the onset of the democratization process. Among other goals, it provided the

impetus for peaceful, democratic reforms that would address the underlying causes of the different armed conflicts while protecting the territorial integrity of the Philippine state. However, the 1987 Constitution kept the presidential, unitary system generally intact.

The current push for constitutional change (or, as it is referred to in the Philippines, charter change, or 'cha-cha'), envisions a shift to federalism and draws on the felt resentment of the outlying provinces (against so-called Manila imperialism). It is led by the first-ever elected president from Mindanao, Rodrigo Roa Duterte, who is flanked by a pro-federalism Senate President and House Speaker—both fellow-Mindanaoans. It offers a comprehensive package of territorial devolution not only for 'special regions' but for all parts of the country.

2. What form does territorial devolution take in the Philippines? How effective has it been?

Article X of the 1987 Philippine Constitution explicitly provides for territorial devolution in the form of two—and only two—Autonomous Regions (ARs) in the country: in Muslim Mindanao in the south and the Cordillera in the north.

The ARs are distinct from 'political and territorial subdivisions' of the country, which are enumerated as provinces, cities, municipalities and barangays (clusters of villages). These subdivisions are more commonly referred to as local government units (LGUs). However, it is argued that ARs are also local governments since the provisions on ARs fall under Article X (Local Government).

The Constitution provides for devolution of powers to the aforementioned LGUs. Legislation for the devolution of powers to LGUs was passed in 1991 in the form of the Local Government Code. In contrast, ARs shall be created through their respective organic acts that define their powers.

The following are some of the principal design features of the ARs that the 1987 Constitution provides:

1. Foremost, such ARs to be established shall be 'within the Framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines'.

2. These ARs shall respectively consist of provinces, cities, municipalities and geographic areas that share 'common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics'.

3. The President shall exercise general supervision over the ARs 'to ensure that the laws are faithfully executed.' This is consistent with the higher autonomy envisioned for ARs against other local governments. Presidential supervision over other local governments can be deemed more encompassing as it is unqualified as to the extent of the general supervision ('The President of the Philippines shall exercise general supervision over local governments.').

4. The organic act for each of the ARs shall define the basic structure of government for the region. This implies that the two ARs may have different structures of government from each other and the other LGUs. The only qualification regarding the structure of government is that the government shall consist of the executive department and legislative assembly, both of which shall be elective and representative of the constituent political units.

5. The organic acts shall provide for special courts with personal, family, and property law jurisdiction consistent with the provisions of the Constitution and national laws.

6. Inclusion in the AR shall be based on the democratic principle of consent of the governed. Inclusion shall be determined through a plebiscite in all local governments and geographic areas considered for inclusion.

3. What arrangements does the constitution make for shared ownership of the state by different societal groups at the national level?

Article X (section 20) of the 1987 Constitution reads:

> Within its territorial jurisdiction and subject to the provisions of this Constitution and national laws, the organic act of autonomous regions shall provide for legislative powers over:
>
> - Administrative organization;
>
> - Creation of sources of revenues;
>
> - Ancestral domain and natural resources;
>
> - Personal, family, and property relations;
>
> - Regional urban and rural planning development;
>
> - Economic, social, and tourism development;
>
> - Educational policies;
>
> - Preservation and development of the cultural heritage; and
>
> - Such other matters as may be authorized by law for the promotion of the general welfare of the people of the region.

To a significant extent, these powers are given to the ARs along the lines of fiscal and political autonomy, preservation and advancement of identity and indigenous ways of life, and jurisdiction over natural resources. Effectively exercised, they can engender meaningful autonomous governance, culture-sensitive administrative systems, and appropriate development programmes in the region.

However, these powers are not absolute and must be read alongside other provisions of the constitution. In particular and unlike in most federal systems, residual powers belong to the national government. Furthermore, without sufficient financial resources the AR remains dependent on the national government and at the mercy of its budgetary system. Muslim Mindanao's limited revenue base has required massive infusions of funds into the AR from the national government in order to address basic human development issues. In this regard, the Comprehensive Agreement on the Bangsamoro (the peace agreement made in 2014) devolved more sources of revenue and provided for a system of annual automatic block grants. This replaced the annually appropriated budget from Congress based on submissions of the national Department of Budget.

'Shared ownership of the state' is reflected in major provisions in various articles of the 1987 Constitution that mandate the distribution of wealth and power across the social, geographic and political divides. Examples of such provisions are:

1. Article XII (National Economy and Patrimony), section 1: 'The goals of the national economy are a more equitable distribution of opportunities, income, and wealth . . .'

2. Article XIII (Social Justice and Human Rights), section 1: 'The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.'

3. Article X (Local Governments), section 7: 'Local governments shall be entitled to an equitable share in the proceeds of the utilization and development of the national wealth within their respective areas, in the manner provided by law, including sharing the same with the inhabitants by way of direct benefits.'

Since the passage of the Constitution, major laws have been passed in this regard, including the Comprehensive Agrarian Reform Program, the Indigenous Peoples' Rights Act, the Magna Carta for Women, the Local Government Code, the Omnibus Election Code, the Reproductive Health Act, and the Generics Drug Act. Implementation has been gradual and variegated; some benefits have accrued to intended beneficiaries but major challenges remain.

While the Constitution bans political dynasties, no law has been passed to put this into effect given the majority of elected representatives come from elite political families. As such, certain powerful families (clans) dominate elections at the local and national levels for decades on end. The prevailing plurality system in elections has served to sustain this capture for most elective positions, including some of the party list seats.

4. What obstacles or challenges to special autonomy and constitution-building exist, and how might these be overcome?

As noted, the framers of the 1987 Constitution adhered to the status quo in the sense of sustaining the pre-martial law regime's presidential and unitary form of government. On this count, it confined the 'right to self-determination' demands of the Moro and Cordillera identity movements within a presidential, non-federal set-up. Peace negotiations and agreements forged with Moro national liberation fronts and Cordillera autonomy advocates operated within these constitutional parameters, as did the laws that have been legislated or attempted to be legislated. Consequently, negotiations and legislations were contentious as to the deemed allowable extent of operationalizing the right to self-determination.

Such legal-constitutional constraints relate to aspects of jurisdiction over land and natural resources (for example only the President has to right to declare public lands alienable, and under the regalian doctrine, all public lands are owned by the state); possible deviations in the AR's electoral system; and the power to legislate the creation of new provinces and cities.

Given this fundamental constraint compounded by prevailing fears of dismemberment, distrust of the Moro fronts, and bias and prejudices toward the Muslim minority, legislated outcomes have been conservative (that is, even less than what may deemed allowable within the constitutional framework) and unsatisfactory for the identity advocates, and have thus been unable to provide full closure to the conflicts.

Beyond constitutional parameters, however, there are other challenges that have confounded the law-making process. Among these are the multiplicity of actors and stakeholders that have legitimate claims to both identity and resources that are under contestation. In other words, concerns of inclusivity and guarantees of rights for other segments of the population required modulation of identity demands in order to protect the welfare and interests of other stakeholders over and beyond constitutional parameters for power devolution from the centre.

In the 2014 Comprehensive Agreement providing for a new Bangsamoro political entity that would replace the existing AR in Muslim Mindanao (through congressional fiat, not constitutional change), these constraints were overcome through some sharing of powers such as giving to the prospective Bangsamoro sole recommendatory powers, for instance, over the alienation of land from the public domain for agricultural and other uses. As agreed, the Bangsamoro may legislate its own election code (but still within the framework of the constitution); and have greater oversight over the Bangsamoro police force (which shall remain part and parcel of the national police, since the Constitution provides for a single national police force). Lastly, realizing that other envisioned changes would be possible only through constitutional amendment or cha-cha, the Bangsamoro Transition Commission that was created as part of the Comprehensive Agreement was tasked with drafting the new legislation as well as recommending proposals for future constitutional reform.

Implementation challenges

There will always be individuals and blocs who will reject the new rules of the game or find ways and means to get around them: hence the need for checking that provisions are explicit and implementable. For example, the 1987 Constitution provided term limits in order to arrest the capture by any one politician of a post. But political families circumvented this through a game of 'musical chairs' whereby one family member after another warmed the post which the matriarch/patriarch easily reassumed in a later election.

The lack of further checks or of 'implementability' in the constitution itself on this matter as well as other key issues did not fully address the problems that the constitution sought to address. The constitution could have already been more explicit in certain provisions (for example in qualifications of candidates in elective posts) to effectively put checks on dynasties.

In the case of the territorial-based conflicts in the Moro and Cordillera regions, Congress's 'lack of generosity' in drafting the organic acts for the Moro region and failure to appreciate the 'locality' of the Cordillera region led to the unsatisfactory outcomes discussed earlier.

Actually, in the case of the Cordillera, no autonomous region has been established despite two laws being passed (in both instances, only one province of six voted for inclusion in the plebiscite and the Supreme Court ruled that one province cannot make a region). The ideological disunity among the autonomy advocates and internal dynamics among the elites and tribes have in fact dissipated the momentum for Cordillera autonomy.

Coming from the irregular transfer of power from Ferdinand Marcos to Corazon Aquino in 1986, a transitory Freedom Constitution was promulgated. This gave the president authority to constitute a Constitutional Commission by appointment of various advocates, academics, and other professionals of probity and competence, alongside traditional politicians. Thus, progressive provisions were incorporated in the draft, based on international norms prevailing in the late 1980s. The draft, finished in a six-month period and widely covered by the media, was passed with more than 70 per cent of voters in approval.

President Duterte has indicated that a Constituent Assembly—or the Senate and the House of Representatives jointly convened—is his preferred cha-cha mode. Given his hold over the legislature, the possibility of a broader-based Constitutional Convention has become remote, even though this was what he advocated in the beginning of his term. The Constituent Assembly would be an extremely narrow base for what should be a more democratic process of constitution-making given that Congress remains dominated by traditional political elites. Although public consultations are expected to be conducted in consonance with established legislative procedures, the whole exercise is premised on the necessity of a shift to a federal system, alongside instituting a strong presidency whether under a presidential or a parliamentary form of government.

There was no direct international participation in the drafting of the 1987 Constitution, other than external influence that might have been exercised on individual commissioners, notably on the provisions relating to the foreign military bases and certain economic matters.

5. What insights can be drawn for constitution-building in conditions of territorially based societal conflict elsewhere?

As in any human endeavour, there is no perfect process nor perfect human agents or parties that will guarantee a fool-proof process and outcome. Constitution-building is necessarily framed within the issues of the day (no matter how transient) and the dominant domestic and international norms. In any case, the writing of a new constitution provides a valuable opportunity to address with a freer hand longstanding historical issues, such as the societal conflicts and civil wars that have dragged for decades.

In a strong and personality-driven presidential system like the Philippines, the influence of a new, popular incumbent president over other political elites and the populace can be a decisive factor. The expressed desire of the president to shift to a federal system was an election platform and his 'supermajority' hold over Congress is precisely what is driving this 'cha-cha' train.

However, even the president's popularity will be tried and tested at the bar of public opinion, that more often than not, is conservative and short of imagination and patience as to possibilities and the study of alternatives (e.g., options for a proportional representation system in Congress as well as local government assemblies that may be too complicated to the ordinary citizen). Civil society organizations and public intellectuals must thus engage in the process to raise the standard of the discourse. Social media in this age and time will continue to be both a boon and bane in this discourse. It must be tapped well to ensure a more enlightened process and outcome.

As mentioned, among the challenges in the current endeavour to change the Philippine Constitution is how to ensure broader-based public discourse and participation that would put to task some of the premises of the shift, notably, that it would lead to fiscal autonomy and economic development of the relatively lower-income areas, so that these may be duly addressed in the draft provisions, or alternately, through specific constitutional amendments and/or new legislation rather than a complete overhaul of the country's basic law.

The other major challenge is how to reconcile the stalled implementation of the Comprehensive Agreement on the Bangsamoro which provides for the immediate passage of a Bangsamoro Basic Law (BBL), with the bigger cha-cha project. The road map issued by the new administration, with its cha-cha priority, still envisions a BBL passage but not until July 2017 during which time a Constitutional Convention should already be in place. [Editors' note: as of August 2017 the BBL had not yet passed, and the President has changed his mind about the Constitutional Convention] It remains unclear how the BBL track will be given

significant play side-by-side the 'cha-cha' track. There is also the question of how 'unique' a Bangsamoro federal state would be in relation to the other envisioned federal states or whether in fact the federal system to be adopted would be asymmetrical or not. As such, from the perspective of Bangsamoro advocates, passing the BBL first would entrench the features of the autonomy arrangements agreed on in the peace negotiations and fast-track the other components of the Comprehensive Agreement such as the decommissioning of the weapons and combatants of the Moro Islamic Liberation Front and the transformation of their camps into productive, civilian communities. Implementing the agreement would stabilize the situation on the ground and deter the movement of disenchanted constituents toward the extremist jihadist groups.

On a more theoretical plane, it would be helpful to keep in mind various options not only along the lines of 'power-sharing' (as in consociational arrangements) which run the risk of making permanent existing societal cleavages, and 'power-dividing' (that is, creating multiple, diverse authorities) which distribute power across different bodies. A combination of such power-dividing and power-sharing modalities would avoid some of the inherent risks associated with the pure types.

Theme 3. Constitution-making processes

Introduction: Constitution-making processes

Federalism, devolution and special autonomy are important elements of constitution-building in circumstances of territorially defined societal conflict and are explored in some depth in the thematic discussions above. The process of constitution-making is also relevant to constitution-building in such circumstances, and this is the subject of Theme 3.

Specific challenges may arise from the need to align constitution-making with peace processes. The context of conflict might serve to include or exclude certain parties from constitution-making. The process of peace-making might involve other states and members of the international community in constitution-building, while internally, provision may be made to include previously excluded rebel groups or ex-combatants in the constitution-making process. Processes for drafting, reviewing and ratifying the constitution that recognize and include different territorially defined groups can foster a sense of collective ownership of the state. Constitution-making processes can open the way for consultation, deliberation and debate on critical issues of national, personal and group identity, potentially reigniting tensions but also opening the way to their peaceful resolution.

The specific cases selected to examine this Theme are Solomon Islands, Sri Lanka, the Philippines and Myanmar. These cases were chosen on the basis that these states are either currently engaged in constitution-making processes or appear to be contemplating constitutional change in the near future. In Sri Lanka and Solomon Islands, the constitution-making processes are in progress, with drafting and consultations currently under way. The Philippines and Myanmar are at an earlier stage of the process. Although leaders have committed to or suggested constitutional change, it is uncertain what such changes will entail or how they will occur.

Each country studied in this Theme has adopted, or is likely to adopt, different procedural paths for constitution-making. The process in Solomon Islands has been described as a 'people's process', in that it is administered by the executive and has involved extended consultations with both international experts and the people, and to date, Parliament has had a limited role. In contrast, the process in Sri Lanka is dominated by Parliament, which has transformed itself into a Constitutional Assembly and established committees to prepare proposals for different aspects of the new constitution. In the Philippines, the choice is open between a process dominated by Parliament or a more widely representative assembly, and Benedicto Bacani outlines advantages and disadvantages of each option. Finally, any constitution-making process in Myanmar will be heavily constrained by the current

Constitution, which was written by the military junta. Constitutional change in Myanmar effectively requires the consent of the military. This constraint gives weight to a more radical process in which a new constitution is made outside of the constraints of the existing constitution. More radical constitution-making processes in Myanmar face the significant challenge of ensuring buy in from those with power and entrenched and vested interests in continuing the current constitution.

The relevance of constitution-making processes to constitution-building is not limited to the national level. The examples of the Bangsamoro Basic Law, the Bougainville Constitution and the Special Autonomy Laws for the Indonesian regions of Aceh and Papua show that the processes and timing of sub-national constitution-making can assume importance in both peace-building and constitution-building.

Constitution-making in Solomon Islands

Warren Paia

1. What are the main societal divisions in Solomon Islands that devolution is designed to address?

Solomon Islands is an archipelagic state with wide open seas separating its nine provinces. The provinces are highly diverse from each other in terms of culture, language (more than 80 in the whole country), ethnicity, foreign contact experiences, geopolitical realities and traditional leadership structures. The country is also divided into more developed and less developed provinces in as far as commercialization, physical infrastructures, transportation, telecommunication and social and economic indicators are concerned. Moreover, each Province is very much aware of its own distinctiveness and socio-cultural integrity and context, and is therefore often quite vocal about protecting them. This situation has made common national policies and or implementation programmes difficult to carry out evenly.

2. What form of devolution was adopted or is likely to be adopted in Solomon Islands? What are the principal impediments to devolution?

The classic form of devolution often practised in a unitary system of government is currently in place. This means that a central government typically controls, and hands down, powers, legal competencies, administrative functions and limited authority to local level governments. Distance from the centre of power, dissimilar socio-cultural contexts, language barriers, intra-ethnic rivalries, conflict between traditional and modern leadership structures and the contradictions between the adversarial and traditional (mediation) systems of justice are among many impediments that make devolution less suitable as a governance device. In Solomon Islands, the alternative to the idea of devolution has been identified as autonomy and sovereignty at the regional/local level. This implies not more devolution, but rather an adoption of a federal system of government, with its emphases on the sharing of powers, revenues, responsibilities and legal competencies through a constitution.

3. How have the interests of different territorially concentrated groups been represented in the constitution-making process?

The interests of different clans, tribes, ethnic groups, civil societies and stakeholders in the country have been taken on board through public consultations, visitations to different localities for meetings; and through their leaders (elected leaders, chiefs and duly appointed representatives). Print and electronic media have been used to publicize information about the federal reform. Written submissions have also been received and considered. The consultations have covered the whole country since 2003. Most points of view or positions on the proposed constitution have been solicited in the said manner and been mutually agreed upon.

4. What are the principal features of the process for constitutional change?

In essence, Solomon Islands has been using a process whereby successive working drafts of a federal constitution are incrementally improved. This means that after every major consultation has taken place, a new improved version of the draft is produced. It is then taken back to the people for further vetting and inputs. As a result, a total of nine drafts will have been formulated by 2017 when the final draft is handed over to the Government. Since 2014, external advisers (two constitutional lawyers and a drafter) have been involved in the project. They will continue to advise the Government on the matter until 2017. The preferred method for ratifying the Draft has yet to be decided upon. It will be up to the Government of the day to make the choice. Three options are available: amendment of section 61 of the Solomon Islands Independence Order 1978; a referendum; or a 'clean break' approach.

5. What problems arose during the process for constitutional change? How did negotiation positions change over time?

In the beginning, very few teething problems arose. The decision to adopt a federal government system was taken as a matter of course. Other 'push factors' in society had existed before the ethnic tensions erupted. Therefore, the conflict experienced from 1999 to 2003 was merely an additional catalyst to an already existing aspiration. But to actually come up with a mechanism to harness the idea of a federal constitution, to crystallize it, has posed existential challenges. Although people in all provinces had no reservations about going forward with the reform, especially after the ethnic conflict, the aspiration could not be constructively pursued until the 2003 military intervention, to save the country from anarchy. Consequently, not until 2005 was the Government of the day (Kemakeza Government: 2001–06) able to pass a White Paper in Parliament on federal reform. And not until 2007 was the mechanism to properly formulate a Federal Constitution put in place by the second Sogavare Government (2006–07). Since then, the formulation of a federal constitution has become a national pre-occupation. Insurmountable barriers to the reform are not expected to arise in the near future, as the matter continues to enjoy bipartisan political support. However, resistance to the exercise has come mainly from certain development partners.

6. What role did international actors play in the constitution-building process?

Work on the formulation of a federal constitution for Solomon Islands has been carried out mainly by the people and their Government(s). No international actors were involved until 2014 when outside auditors started to be engaged. The mandate of the people is for Solomon Islands to have an autochthonous federal constitution. However, the country understands that in order for the constitution to be acceptable internationally, outside experts have to be involved. Hence the engagement of the three international constitutional lawyers.

7. What insights can be drawn for constitution-building in conditions of territorially based societal conflict elsewhere?

1. A whole-of-society, as well as specific target groups, approach in consultations is essential.

2. Securing the political support and will of 'the powers that be' to pursue a fundamental governance reform is absolutely necessary.

3. A constitution should, where possible, be autochthonous in all aspects, except in regard to the internationally accepted requirements, values and practices.

4. In post-conflict societies, peacebuilding and reconciliation efforts, as well as the strengthening and/or remaking of democratic institutions must go hand in hand with any reform. In constitution-making, such initiatives must be recognised as foundations on which to rebuild a conflict-affected society.

5. The process used must be legitimate and acceptable to the people. In Solomon Islands, the Constitutional Congress and the Eminent Persons' Advisory Council, the two legal bodies that are currently handling the drafting of a federal constitution, will have directed and perfected the process after 10 years of work.

6. Autochthonous constitution-making cannot be rushed; it must first stand the test of political scrutiny and the melding of territorially based interests, viewpoints and positions. When all views have been considered and positions mutually adopted, then the next step can be taken. Solomon Islands has reached this stage with the Draft Federal Constitution, and so the next milestone would be to ratify it. After that, a new constitution, of 'The Federal Democratic Republic of Solomon Islands' would be publicly launched, hopefully on 'Federation Day'.

Constitution-making in Sri Lanka

Assanga Welikala

1. What are the main societal divisions in Sri Lanka that devolution is designed to address?

The main challenge that devolution is directed at is the long-standing demand of Sri Lankan Tamils for federal-type territorial autonomy in the north and east of the island which they claim as a traditional homeland. The island polity and the constitutional structures of the state are dominated by the Sinhala-Buddhist majority, who have traditionally insisted that the Sri Lankan state must be unitary in form. There is also now an increasing demand from the (Tamil-speaking) Muslims of the east for a unit of devolution for themselves. This creates an internal cleavage within the Tamil-speaking north and east. Other minorities such as the Tamils of recent Indian origin do not make territorial claims, but demand less fundamental forms of accommodation such as through electoral reforms and vote-bloc clientelism in exchange for executive office.

2. What form of devolution was adopted or is likely to be adopted? What are the principal impediments to devolution?

The current reform process will use the existing framework of devolution under the Thirteenth Amendment to the Constitution (1987) as the starting point. The multiparty negotiations within the Constitutional Assembly process have been looking at ways in which well-identified defects in this framework can be remedied. These include: reducing certain excessively intrusive powers of the provincial governor (the centre's agent within the province) in favour of the elected provincial executive and legislature; abolishing the concurrent list of powers and moving to a two-list system of reserved and provincial competences; changes to administrative procedures and decentralising the structure of the civil service; similar changes to the fiscal and financial framework including to reformulate the fiscal equalization body to include provincial representation; removing the centre's parallel administration within the province through its control of local government authorities; and establishing subsidiarity as a constitutional principle (to guide the process of negotiations as well as the future implementation of devolution). More specific and

controversial matters such as devolving powers over police and law and order and state land are also being dealt with.

The biggest difficulties relate paradoxically—although entirely characteristically in Sri Lanka—not to issues of substance but to matters of symbolic significance. Thus what to call the state (whether unitary, as the Sinhalese insist or federal, as the Tamil desire) is a central bone of contention. The emerging middle path is to use neither term, but to use other words to stress both pluralism and unity. While this will allow the Tamil parties to 'sell' the deal— not quite federalism, but no reference to the unitary state—to their constituency, it is far from certain if the government could actually win a referendum on a constitution bill that does not expressly contain the term 'unitary state'. This may therefore come back into the constitutional text at a future stage of the process.

In all these respects, ironically, Sri Lanka's profusion of past failed attempts are proving useful in offering a wide range of options and ideas for reform, options which may require only some tweaking in order to be applied to the current process.

3. How have the interests of different territorially concentrated groups been represented in the constitution-making process?

All politically salient groups are organized and mobilized through long-established political parties, which are all part of the current process within the Constitutional Assembly, and some even within the reformist government.

4. What are the principal features of the process for constitutional change?

Parliament has converted itself into a Constitutional Assembly, which functions through thematic sub-committees and a steering committee. The sub-committees will report imminently, after which the steering committee will prepare a consolidated report and a draft constitutional bill. This will be debated clause by clause and amendments made until there is political consensus amounting a two-thirds majority around the bill. This bill will then be certified by the Cabinet as being a bill for the repeal and replacement of the constitution, before going to Parliament for formal enactment by two-thirds majority. After this, the bill must be submitted by the President to referendum, and will be deemed passed if it obtains 50 per cent + 1 of the vote. Under this procedure set out in the existing constitution, the courts have no role in considering the bill (although the referendum may be challenged on procedural grounds). A Public Representation Commission sought and processed public submissions earlier in the process. It has reported back to the Constitutional Assembly. Other than this, and the referendum, the constitution-making process is undertaken very much as an exercise in representative, rather than participatory, democracy.

5. What problems arose during the process for constitutional change? How did negotiation positions change over time?

The previous regime was defeated in the 2015 election by an extremely broad coalition of political and civil society forces. All of them are either driving or supporting the current constitution-making process. The only parties and politicians that opposed the process are those who have chosen to associate themselves with the former President for various reasons, including Sinhala-Buddhist nationalist ideological affinities or for making common purpose against corruption investigations. They have formed a de facto opposition group within the

President's party, which is otherwise formally part of a unitary government together with the Prime Minister's party. They have the potential to scupper reform, but despite loud and frequent political interventions decrying the direction of constitutional reform, and especially devolution and human rights as a sell-out of their war victory against Tamil secessionism, they have not so far demonstrated strength of numbers within Parliament or on the streets sufficient to successfully block reforms. However, this could change.

6. What role did international actors play in the constitution-building process?

International actors played no role as facilitators, mediators, or even as major donors. There was some minimal international technical or advisory support through local civil society. Overall, there is extreme sensitivity—even among liberals—to any visible international presence or involvement in what is seen as a national process: a legacy of the failed, Norwegian-facilitated peace process. Its internationalized nature is widely seen as reason for its failure and the consequent association of reform with foreign interests and agendas.

7. What insights can be drawn for constitution-building in conditions of territorially based societal conflict elsewhere?

Sri Lanka is somewhat unusual among cases of this kind, in that the war ended with one side —the state—comprehensively defeating the armed secessionist challenge militarily. This has changed the dynamics of the political and constitutional problem in a number of ways. To simplify, for the majority Sinhala-Buddhists, the military victory is the end of the matter: the (unitary) state defeated terrorism. For Tamils, however, their political aspiration to autonomy continues, and many would say this was always distinguishable from the way in which the Liberation Tigers of Tamil Eelam conducted its war against the state. There is no doubt, however, that the absence of both this group as an active terrorist force as well as the ultra Sinhala-Buddhist nationalist regime that defeated it, provides a much more conducive space to address these matters in a constructive way among moderates of all ethnic and political parties. The current process, based on a broad coalition of political and civil society forces, is projected as a self-consciously national and local effort, one that unifies plural communities around a shared project of democratic state-building. It is also an incremental process based on the pragmatic and possible rather than the idealist and transformative. For all its governance problems, Sri Lanka benefits from a long and unbroken tradition of procedural democracy that makes regime change frequently possible, and in turn quite radical constitutional change within a narrative of continuity.

Constitution-making in the Philippines

Benedicto Bacani

1. What are the main societal divisions in the Philippines that devolution is designed to address?

The delineation of political power and division of national wealth means that regions outside the national capital region—especially Mindanao—feel that 'Imperial Manila' under the current unitary system dominates the country's politics and receives the lion's share of national taxes, to the detriment of regional development. Further, there are divisions around identity and self-determination, particularly involving the Cordillera and Moro regions.

2. What form of devolution was adopted or is likely to be adopted? What are the principal impediments to devolution?

The present system of devolution involves decentralization of administration to local government units composed of provinces, cities/municipalities and the barangays (clusters of villages). Two autonomous regions are called to be established by the 1987 Philippine Constitution in Muslim Mindanao and the Cordilleras, subject to the ratification of their organic laws in a plebiscite called for that purpose. Currently, only Muslim Mindanao has an Organic Law in place that governs the Autonomous Region in Muslim Mindanao. The Cordillera region has twice rejected, in a plebiscite, the establishment of an autonomous region. Since the passage of the National Local Government Code in 1991, the national government has transferred to local government units (LGUs) basic governmental functions such as agriculture, health, social services, maintenance of public works and highways and environmental management and protection. The share of national revenue taxes that LGUs receive has increased by 40 per cent even as they were given authority to collect local taxes such as real property taxes.

Impediments to devolution to LGUs include patronage politics, dependency on the national government particularly on funds sources, and weak local bureaucracies.

As to the Autonomous Region in Muslim Mindanao, the extent of its autonomy has been unclear because in practice, the region does not enjoy real political and fiscal autonomy. It is totally dependent on the budgetary transfers from the national government via the yearly

appropriation from Congress. Absent real fiscal autonomy, the political leadership of the region is always beholden to the national leadership.

The peace agreements with the Moro revolutionary groups seek to address these impediments to autonomy for the Moro people. A Basic Law for the Bangsamoro is pending passage in Congress over concerns that some of its provisions are unconstitutional. The current government is pushing for a shift from the current unitary system to a federal system of government. This requires a change in the country's constitution. Advocates of federalism consider it to be the key to countryside development and to a sustainable political solution to the conflict in Mindanao.

3. How have the interests of different territorially concentrated groups been represented in the constitution-making process?

The shift to a federal system requires total revision of the Philippine Constitution, which can be effected by either Congress revising the Constitution as a constituent assembly or Congress calling for a constitutional convention that will propose changes. Both processes require ratification of the proposed changes by the people in a plebiscite.

During the campaign the President publicly expressed his preference for change via constitutional convention (which is largely perceived by the public as more representative and independent than a constituent assembly of Congressional members). However, with the supermajority of Congress now supportive of the President's agenda, his lieutenants in Congress have indicated that the President now prefers a constituent assembly to a constitutional convention as the faster and more economical mode to change the country's Constitution.

4. What are the principal features of the process for constitutional change?

1. *Constituent Assembly.* The Congress shall constitute itself into a constituent assembly and upon a vote three-fourths may amend or revise the constitution. Proposed changes will be ratified in a plebiscite.

2. *Constitutional Convention.* The Congress, by a vote of two-thirds of all its members, shall call a constitutional convention or, by a majority vote of all its members, shall submit to the electorate the question of calling such a convention. The Constitutional Convention will submit the new constitution for ratification by the people in a plebiscite.

5. What problems arose, or are anticipated, during the process for constitutional change?

A national survey conducted on 16 July 2016 reveals that 73 per cent of respondents said that they have little to no knowledge of the country's constitution. The same survey shows that 44 per cent of respondents are opposed to amending the 1987 Constitution, compared to 37 per cent who agree with doing so. The remaining 19 per cent of respondents were ambivalent on the matter. The low level of awareness concerning the country's current constitution, in place for almost 30 years, raises concerns about inclusiveness and citizens' ownership of the process. The high number of those opposed to changing the Constitution indicates the deep fissures in Philippine society on this issue.

The mode of change is potentially a contentious issue. As mentioned, Congress amending or revising the Constitution is seen as economical and faster. However, this is resisted by many as a process susceptible to 'elite capture'. The current administration proposes an 'express train' to constitutional change and federalism: amendment or revision process in 2016 to 2017; plebiscite during the mid-term elections in 2019; and transition to a federal-parliamentary system up to 2022 when the President ends his term. The short timeline raises concerns about whether citizens can really make informed decisions on the issue.

6. What role did international actors play in the constitution-building process?

The international community, especially embassies of countries with federal systems of government, is currently helping to provide the needed information on federalism. International non-governmental organizations (NGOs), the United Nations and the United Nations Development Programme are providing technical assistance especially in positioning the Bangsamoro autonomy agenda in the national debate on federalism.

7. What insights can be drawn for constitution-building in conditions of territorially based societal conflict elsewhere?

Constitution-building is both a political and social process that can bring about national unity and healing. How transitional justice can be weaved in the constitution-building process is a challenge in the Philippines.

The ways in which asymmetric federalism can address territorially based conflict, such as that in Mindanao, is a question for further comparative learning. Autonomy within a greater federalism arrangement is a relevant issue in cases where state boundaries are drawn based on reasons of viability and economics than identity or demand for self-determination.

Constitution-making in Myanmar

U Ko Ni

1. What are the main societal divisions that devolution is designed to address?

During the 70 years since Myanmar became independent from the United Kingdom in 1948, the country has written three constitutions.

The first constitution was enacted in 1947 and came into effect on 4 January 1948. It was abolished by military coup of March 1962. That constitution was truly democratic in nature and it also garnered people's consent. For the period of thirteen years when that constitution was in effect, Myanmar stood as the most well developing and richest country in South-East Asia.

The second constitution was based on a single-party system enacted in April 1974—12 years after the coup—by the military junta. It did not reflect the desire of people nor did it have any support from the people. That constitution came to a halt by a second military coup in 1988. While that constitution was in effect, Myanmar became recognized as one of the Least Developed Countries by the United Nations in 1987.

The third constitution was drafted over a period of 15 years from 1993 to 2008 by the military junta to ensure that the military remain dominant and pivotal in Myanmar politics. It came into effect on 31 January 2011. The majority of the people of Myanmar do not endorse the current Constitution. In fact, five million people signed the petition to call for amendments, which was turned down by parliament in May 2015.

The current parliament, elected in November 2015, is dominated by the National League for Democracy (NLD) MPs who were genuinely elected by people and truly represent them. Although they are the majority in the parliament, article 436 of the Constitution means that it is not possible to amend the current constitution without consent from the military. Hence, amendments may not be a solution to the problem.

The issue Myanmar is facing right now is not necessarily about writing a new constitution. It is mostly about a conflict between the people—who demand a true democracy—and the army, which neglects what the people want. That introduces a very difficult situation. It may be more straightforward to write a new constitution while there is none in effect. When there is an undemocratic constitution authored by a military which only serves its own interest, it

may not be possible to replace it or make it democratic in an easy way. Such a situation merits advice and help from experts in the matter.

2. What form of devolution was adopted or is likely to be adopted? What are the principal impediments to devolution?

There are two key points to consider when we discuss how the state will be structured from the union level to local or regional administration, and how devolution could address main societal divisions of Myanmar.

According to the current constitution, the country is structured as follows: (a) Union; (b) State or Region; (c) Self-Administered Area and District; (d) Township; (e) Ward or Village. There are seven states. Each state represents one of seven major ethnic groups of Myanmar while all seven regions are largely occupied by the main Bamar (Burmese) ethnic group.

According to the first constitution of Myanmar (1947–48), there were only eight states/regions in total representing Bamar and seven major ethnic groups. After 1974, it was broken down into seven states and seven regions. This structure was disapproved of by some ethnic groups but Bamar people did not raise any objection to that structure. This structure needs to be assessed and discussed in depth.

Under the current 2008 constitution, the union (central) administration retains sweeping authority while local and regional administrations have rather limited autonomy. It is not a true federal system with a proper delegation of power. It is more of a quasi-federal system in which local and regional administrations want to expand their authority. This point shall also be put on the table for detailed discussions.

Only when the structure (described above) has been discussed among all stakeholders can we discuss how devolution could be designed, together with potential impediments. One issue with the current system is that the majority of districts have governors appointed by the Minister of Home Affairs while self-administered areas (that have the same rank as districts) are governed by elected individuals.

Moreover, state and region chief ministers are appointed by the President. Hence, it cannot be guaranteed that there is any autonomous authority in those states and regions. In addition, the legislative power of the state and regional parliaments is also very limited (compared to the union parliament). Jurisdiction in the states and regions constitutes merely sub-elements of the jurisdiction system of the country as a whole. Hence, there is much to discuss about separation of powers.

3. What are the principal features of the process for constitutional change?

There are two main criteria for a constitution to guarantee democratic governance for a country:

1. Sovereignty belongs to the people of the country. This means that any authorities and/or institutions that exercise the power derived from sovereignty are merely holding such power as a proxy of the people, for a limited period, with consent of the people. It must be clearly stated in the constitution that those authorities and/or institutions are by no means the original owners of sovereignty.

2. The constitution is written and enacted according to majority vote. This means that the terms of the constitution—how the state will be structured, how powers will be separated, how offices will be defined, how individuals will be granted authority, and

what will be the basic principles of the country—must be written according to the consent of people. By no means should it be written based on the desire of those who will govern the country.

Although it seems conceivable for a country to write a constitution by either adopting constitutions of successfully established democracies or by referring to the technical bibles authored by constitutional experts around the world, it is, in practice, a challenging task for a country to tailor a constitution to its own needs and multiple, variable factors. Prevailing circumstances will merit dialogues and negotiations to overcome major challenges and impediments.

In other words, it is a strenuous endeavour with challenging obstacles to write a constitution that a majority of stakeholders can agree on. No matter how insurmountable the task seems, a country will be successful only if a constitution meets the above two criteria.

4. What problems arose, or are anticipated, during the process for constitutional change? How did negotiation positions change over time?

The first obstacle is that the military has been the controlling power since 1962 (five decades) and it has expressed its desire to continue the status quo. That much is evident in the 2008 constitution drafted by the military. Two main features are relevant: (a) 25 per cent of parliaments are controlled by military officers appointed by the military chief while amendment of constitution requires more than 75 per cent of parliament (effectively blocking any potential constitution amendment efforts without military consent); and (b) the Minister of Defence, Minister of Home Affairs and Minister of Border Affairs are appointed by the military chief.

The second obstacle is the difficulty in reaching an agreement between the Bamar and other ethnic groups. The latter demand that there is only one region to represent the Bamar, while the Bamar people prefer the current seven regions to represent them.

Discussions regarding the political interests and representation of ethnic groups are essential, too. According to studies, ethnic groups tend to focus on the geographic boundaries, language and culture. There are more than 100 currently recognized groups in total. If each (those with enough population) were to demand its own state, this would lead to many small states in the country, which would become a major issue. The underlying reason is that groups in Myanmar hold on to their ethnic identity more than they do to Myanmar citizenship. This presents a problem for nation building.

There are two main principal features of constitutional amendment in Myanmar. The first point is that military involvement in political affairs should be limited without further delay. In order to protect its political and economic interest, the military wants to hold on to power for as long as possible with the help of the 2008 Constitution. Currently, the military is clearly above civilian administration. That is one main issue that needs to be addressed immediately.

The second point relates to the challenge of building a truly federal nation. Although it seems that there is certain agreement between NLD, ethnic groups and the military, there are many practical challenges—in terms of structure and power separation, as discussed above. One decision that probably needs to be made is whether states will be formed based on ethnic or geographic lines (i.e. without any representation for any particular ethnic group). A national dialogue session between government and all ethnic groups will be held soon. It is hoped that this dialogue reaches a feasible conclusion agreed by all parties involved.

Problems to be expected during the process of constitution amendments can be related to technical aspects of constitutions such as autonomy, budget sharing, resource sharing, and tax systems. At the dialogue session, there will be a need for discussions on various issues between (a) the NLD and the military; (b) the NLD and ethnic parties; (c) the NLD and ethnic armed forces; and (d) the military and ethnic armed forces.

A major task for all stakeholders will be to determine whether to build a federal system with an ethnic basis or a geographical basis. There will be much discussion, and many negotiations and compromises at the national dialogue session.

5. What roles do, or might, international actors play in the constitution-building process?

Myanmar needs help and assistance from international actors with regards to its constitution. Even though three constitutions were enacted within 70 years in Myanmar, the people of the country, which was under 50 years of military dictatorship, have very limited knowledge about constitutions. Therefore, support from international experts will be very helpful in terms of knowledge dissemination. This includes educating on basic principles of constitutions and on the importance of the constitution; knowledge sharing with parties involved in constitution drafting processes; providing advice; arranging overseas study visits for knowledge enrichment; holding local and overseas seminars, and coordination meetings and lectures by international constitutional specialists.

The intermediary role of international actors is also crucial during the discussions and negotiations, especially when disagreements arise. Experienced experts can offer the best possible solutions to resolve such disagreements.

6. What insights can be drawn for constitution-building in conditions of territorially based societal conflict elsewhere?

Due to the demographic nature of Myanmar, we may need to consider three different approaches to issues that could arise with regards to geographical divisions by taking into account cosmopolitan areas with racial diversity, areas of indigenous peoples, and border areas. With regards to the above conditions, India shares similarities with Myanmar in terms of demographics and Myanmar could also study the Indian constitution.

The current political context of Myanmar is quite unique and it may not be practical to adopt a constitution of another country since it will not address all the issues Myanmar is facing. We need to carry out several negotiations to come up with a constitution agreed upon by all major stakeholders. It will be more practical to introduce amendments later to address other issues rather than perfecting it in the first instance.

Theme 4. Implementation

Introduction: Implementation

Implementation is an important but under-examined dimension of constitution-building. By implementation we mean the process through which the institutions, rights and aspirations contained in the constitutional text are put into practice and become part of the lived reality of the state, the government and the people. Implementation is important for securing the legitimacy of new constitutional arrangements. Particularly in contexts in which there has been civil conflict, successful constitutional implementation enables citizens to look to the constitution—to politics, institutions and the courts—to resolve societal conflict.

Constitutional implementation comes to the fore once a new constitution, or substantial amendments to an existing constitution, come into force. It includes the formal implementation of constitutional requirements, such as passing necessary laws, making regulations and establishing institutions. It also includes processes of interpreting the constitution—by courts and other constitutional authorities. Implementation requires capacities of different kinds: political will, technical competence, and financial and human resources. Even when all of this is present, implementation may be hindered if there is a lack of ownership and understanding of the new constitutional framework on the part of stakeholders. Where changes represent a significant departure from the former constitutional order—including where there is significant devolution or decentralization—constitutional implementation may also require cultural changes in the ways government officials and institutions conduct themselves and in their relationships with each other. An important issue to be considered here is how features of constitutional design can support, or alternatively, hinder, implementation.

The principal case study countries for this Theme are Sri Lanka, Indonesia (both set out below) and Nepal (Surya Dhungel's analysis of implementation of the new federal Constitution of Nepal is included under Theme 1).

The three countries are at different stages of implementation. Djohermansyah Djohan reflects on over a decade of experience in implementing the special autonomy arrangements established for the Indonesian regions of Aceh and West Papua. Asanga Welikala draws out some lessons from implementation of the Thirteenth Amendment to the Sri Lankan Constitution (1987) which sought to devolve some powers to the provincial level to address demands from Tamil minority groups. These lessons in implementation and design have implications for the current constitution-making process underway in the country. Nepal is currently facing the prospect of implementing a new constitution that makes significant and fundamental changes to the nature of the state. This new constitution not only moves from a

centralized to a federal structure, but also from a monarchy to a republic and from a Hindu to a secular state.

Together with the other examples of territorially defined societal conflict included in this report, these cases show that particular pressures on constitutional implementation in such circumstances include addressing the practicalities of devolution and the attendant demands of co-operation and power sharing, the potential benefits of an incremental approach to constitutional change and implementation, and the challenges of embedding constitutional values into political practice.

Implementation by Indonesia

Djohermansyah Djohan

1. What are the main societal divisions that constitutional change was designed to address?

The Unitary State of the Republic of Indonesia today consists of 34 provinces. Two of these provinces, Aceh and West Papua, have experienced internal conflict for more than 30 years. In both provinces, armed conflict took place between the national military and separatist organizations: in Aceh, the GAM (the Free Aceh Movement) and in West Papua, the OPM (the Papua Liberation Organisation, or Free Papua Movement). The resulting security situation affected the proper functioning of government and public services, and led to thousands of lives being taken, including women and children. In addition, the state budget was used to fund costly military operations rather than economic development, further exacerbating the conflict.

Eventually, the way of peace through negotiation and constitution-building was taken. As an Acehnese proverb goes: 'there is no heavy rain that will not end, and so does societal conflict end'. Today, Aceh and West Papua continue to implement new constitutional provisions, negotiated with the central Indonesian government, written to encourage peace and socio-economic development.

2. What form did devolution take?

Special autonomy involved the devolution of powers from a highly centralized system to the provincial level in Aceh and West Papua. Eventually the second amendment of the 1945 Constitution of the Republic of Indonesia paved the way as it stated clearly in article 18B(1): 'the state recognizes and respects units of regional authorities that are special and distinct, which shall be regulated by law'. This was re-interpreted to allow for special autonomy.

In Aceh, the agreement with Jakarta and resulting constitutional change created a 'special autonomy of Aceh'. Among other things, the special region status has allowed the Acehnese to establish a local political party; in the remainder of Indonesia only national-level parties may exist (there are no other local parties). As a result the separatist organization, GAM, was able to transform from a civilian and military force into a local political party. Named the Aceh Party, this has participated in local elections and has successfully led the provincial and

district governments. As a result of this change, the conflict moved from the dark of the forest to the transparent political process of open deliberation and contestation.

Aceh's special region status also allowed independent candidates to compete for office for the first time in Indonesia's history—but only for one local election in 2007. Indonesia has since allowed independent candidates elsewhere, but Aceh was the first province to have the experience. The ability to have independent candidates was important for GAM as a first vehicle for its members to participate in the 2007 local elections, which took place before they could establish the Aceh Party; after 2007, the local Aceh Party would field candidates. Regarding power sharing, almost all sectors of public affairs were transferred to Aceh except the national powers of foreign affairs, defence, national security, monetary and fiscal policy, justice and religious affairs: these sectors still belong to the central government.

Under the special autonomy law (11/2006), the Indonesian Government has transferred extraordinary powers to Aceh. For example, Aceh can establish a local political party and has the right to use regional symbols including a flag, a crest and a hymn; historically, only national symbols could be used. As mentioned previously, the administration of Aceh has the authority to govern all sectors of public affairs except for the absolute authorities, such as foreign and defence policy. In terms of fiscal decentralization, Aceh has the right to retain 70 per cent of the revenues from all current and future hydrocarbon deposits and other natural resources in the territory of Aceh, as well as in the territorial sea surrounding Aceh; in other areas of Indonesia, natural resources are a national government prerogative. Aceh also has the right to receive a special autonomy fund from the state budget, equal to two per cent of the national general allocation budget.

In West Papua, based on the special autonomy law Number 21/2001, the provincial government enjoys very special treatment, especially the native Papuans. For example, only indigenous Papuans have the right to run for provincial elected office. Besides that, in Indonesian local government only in West Papua province is a bicameral system found (DPRP and MRP). Similar to Aceh, West Papua also receives a special autonomy fund. However, more than Aceh, West Papua also receives infrastructure funds from the state budget to develop its public facilities.

In West Papua, the new special autonomy status guarantees that native Papuans retain the positions of governor and vice governor; the constitution thereby discriminates by ethnicity. The Javanese and other Indonesian ethnic groups are not allowed to become candidates. To protect the culture and the rights of native Papuans, in addition to the local council (DPRP), special autonomy also paved the way for the creation of a new body not existing elsewhere in Indonesia: the provincial level Papuan People's Assembly (MRP). Unlike other representative bodies in Indonesia, the MRP reserves a third of the seats for traditional or customary leaders, one third for women and one third from the religious establishment.

3. What provision was made during the constitution-making process for implementation?

In Aceh there were several important provisions for the implementation of the agreement, made during the process that led to the amendment of the constitution through the Helsinki MoU:

1. The decisions with regard to Aceh by the legislature of the Republic of Indonesia, will be taken in consultation with and with the consent of the legislature of Aceh.

2. Administrative measures undertaken by the government of Indonesia with regard to Aceh will be implemented in consultation with and with the consent of the head of the Aceh administration.

3. The border of Aceh must correspond to the border as of 1 July 1956.

4. Aceh has the right to use regional symbols including a flag, a crest and a hymn.

5. Aceh is entitled to retain 70 per cent of the revenues from all current and future hydrocarbon deposits and other natural resources in the territory of Aceh as well as in the territorial sea surrounding Aceh.

However, not all of the provisions could be fully accommodated in the 2006 law regarding Aceh's special status, due to the complicated political process in the national parliament. A particular issue relates to the regional flag, which had been the symbol of Aceh's separatism.

In West Papua, an important provision during the constitutional amendment was also about local political parties. As in Aceh, the West Papua special autonomy law (2001) stated that 'the Papua residents may establish a party which shall be regulated by law'. However, until today the law has not yet been issued by the central government to pave the way for local parties. So, unlike in Aceh, despite an agreed-upon provision, local parties remain absent in West Papua.

4. What issues arose in the course of implementation at the national level and at the sub-national level?

In Aceh two big issues arose in the course of the implementation of the 2006 Aceh special autonomy law. The first related to the candidacy of the Governor during local elections in 2012, while the second related to the issue of the Aceh regional flag in 2013.

Local elections in 2012

The story began after the constitutional court made a decision in 2012 to allow for independent candidates to run for office throughout the country. According to the Aceh special autonomy law (2006), independent candidates were only permitted for the first Aceh local elections (in 2007) so that former GAM leaders could compete for office in the election. This was due to the fact that the GAM did not have enough time to fulfil the requirements to establish a local party before the local elections were to take place; it was not because they supported independent candidates. In fact, GAM did not support independent candidates. The court's decision to allow for independent candidates has increased the Aceh Party's disappointment in Jakarta. It protested the decision by refusing to register its candidates and has threatened Jakarta that they will not recognize the election result.

Formally, the Aceh Party argue that Jakarta did not implement the law Number 11/2006 appropriately. This sounds like a reasonable argument because the special autonomy law states that 'the decision with regard to Aceh will be taken with the consideration of the legislature of Aceh'. However, since it was the constitutional court that allowed for independent candidates, then-President Yudhoyono could not make an intervention. Beyond the formal reasons, the substance of the issue was that the Aceh Party was worried that the incumbent governor, Irwandi, would run again as an independent, and thereby compete against the Aceh Party candidates in the local election. In the eyes of the elites in the Aceh Party, governor Irwandi was a traitor to GAM.

The political temperature in Aceh was rising. Some Javanese people living in Aceh were killed for no apparent reason. Nobody knew who or what was behind the killings, even the police. Finally, the Ministry of Home Affairs succeeded in persuading the Aceh party to register their candidates (Zaini Abdullah and Muzakir Manaf) after a long and hard negotiation with the Aceh Party Chairman and with support from the Constitutional Court and the Indonesian Commission for Elections through decisions to extend the registration timeline. The critical compromise was Jakarta's willingness to accommodate the Aceh Party's demands to re-arrange the schedule of local elections after the term of governor Irwandi was over, so that a free and fair election could be assured.

The regional flag

The second issue threatening the success of the agreement concerned the local flag. In order to implement the special autonomy law, the government of Aceh issued a provincial regulation (Qanun 3/2013) on 25 May 2013 regarding the flag and symbol of a crest for Aceh. After an evaluation, the Ministry of Home Affairs determined that the flag and crest of Aceh were exactly the same as the flag and crest of the separatist organization GAM. The Minister of Home Affairs ordered the Governor of Aceh to revise the symbols, because a 2007 government regulation states that no separatist flag can be a regional symbol. However, the Governor and the local legislature refused to revise their selected symbols. They argued that the 2007 regulation was illegal, because the central government did not consult with Aceh first during a law-making process which affected Aceh, as per the peace agreement.

Moreover, the government of Aceh challenged Jakarta to issue a Presidential regulation to abolish Qanun 3/2013. Until the end of his term on 20 October 2014, however, President Yudhoyono maintained the status quo and did nothing. As the top decision-maker in bringing a peaceful climate to Aceh, Yudhoyono, who had been nominated for a Nobel Peace Prize for his efforts, would not make a regulation that would threaten the peace. He may also have been concerned that if he made a presidential decision the government of Aceh would pursue a judicial review to the Supreme Court, and if he lost, Jakarta would lose face. To cope with the dilemma, Jakarta together with the Governor of Aceh team, conducted no less than 11 'cooling down' meetings. The case of the flag was not only cool but nearly frozen.

Finally, on 12 May 2016, President Jokowi's administration, through the Minister of Home Affairs, issued a decision regarding cancellation of several articles of Qanun 13/2013. There was no immediate response from Aceh; possibly because the political elite was busy preparing for the local election due on 15 February 2017.

In West Papua, a serious threat to the successful implementation of the agreement took place on 10 June 2010 when the Papuan People's Assembly (MRP) under the leadership of Agus Alua and Anna Hikoyabi sent back the special autonomy law to the central government in protest that it had failed to deliver a better economy and social welfare for Papuans as promised. The central government was very disappointed in the MRP. From Jakarta's perspective, if the implementation of the special autonomy law did not succeed, it was actually the problem of the competency and integrity of the actors—in this case the Papuan leaders—and not the law. Because every important aspect of local government, such as leadership, extraordinary authority, and a significant amount of money had been transferred to West Papua from Jakarta, Jakarta's role was simply supervision. However the Papuan stance was to defend the MRP, which was evidenced by their re-appointment of Agus and Anna for the next term (2011–16). Jakarta–West Papua relations have since deteriorated.

5. To what extent did the conceptual foundations and provisions of the terms of the original constitution present an obstacle to constitutional change to respond to societal conflict?

In Aceh, before the 2006 special autonomy law was issued, three local government laws governed the region. The first, issued in 1974 in the Soeharto new-order era, was very centralistic. The second, issued in 1999 during the B.J. Habibie reform era, emphasized that Aceh was a province governed by Sharia law. The third, issued in 2001 in the Megawati Soekarnoputri era, provided for a special autonomy law, but without GAM in the government. Those three laws presented no obstacle to the changes contained in the peace agreement. Perhaps this was because the form of the state of the Republic of Indonesia overall during the implementation of the three laws was still as a unitary state.

In contrast, before the 2001 special autonomy law was issued, only the 1974 law governed West Papua. There was no special autonomy in West Papua at the time, and almost no room for Papuan political rights. The Governor was selected by Jakarta through political engineering in the local parliament, which indirectly elected the Governor, and the local government did not share control over the revenues from hydrocarbon extraction. Everything was taken over by Jakarta. Moreover due to the security situation, violations of human rights often took place. Since achieving special autonomy in 2001, Papua has had the opportunity to build a good local government. However, extraordinary power, leadership by the indigenous people and a significant increase in money do not guarantee improved social welfare. The index of poverty is still high in Papua. Mismanagement in running the government is a leading factor.

6. How stable have the new constitutional arrangements been? Have they resolved the territorially based political differences which drove demands during the negotiation of the constitution?

In Aceh over the past ten years, even though the atmosphere of local politics was unstable (as indicated by the case of independent candidates and the flag issue), and sometimes Aceh–Jakarta relations were rocky, implementation of the 2006 special autonomy law has been relatively successful, especially since GAM has been in government. In the central government, only one judicial review of the 2006 law has seriously affected implementation (regarding candidacy of independents in the local election of 2012). Fortunately, all government regulations providing for the agreements have already been completed. There is no call from Aceh to reject the special law. But the Acehnese are asking Jakarta to first consult with Aceh before revising it. The most interesting and successful part of the implementation of this special law is the lack of intention by former GAM combatants (many of whom are now holding legitimate power in executive and legislative positions), to separate from the unitary state of Indonesia.

Unlike in Aceh, in Papua the implementation of the 2001 special law has been unstable. First, the MRP under the leadership of Agus Alua and Anna Hikoyabi on 10 June 2010 returned the special law to Jakarta because it failed to deliver welfare for the Papuan people.

Second, in 2008 the special law was amended to accommodate the aspirations of a new province (West Papua) to receive a special autonomy fund equal with the old province (Papua); since special autonomy was established, the province of Papua was divided and a new province, West Papua, was created. This amendment also allowed the local election

system to move from indirect to direct elections to be in line with the rest of the country, which has resulted in some social conflict and other challenges.

Third, in 2014 President Yudhoyono sent the draft of the new special autonomy law to the parliament (called 'special autonomy plus') based on the initiative of Papuan Governor Papua Lukas Enembe. In this draft the local election system was turned back, from direct to indirect: this widened the candidacy requirements of indigenous people, now not only the governor but also for mayors and regents, and increased the upper limit of allocation of the special autonomy fund. Unfortunately, this draft failed to pass due to the end of the parliamentary term. Today, the Papuans are still fighting to persuade President Jokowi to resend the draft to the parliament.

Fourth, the voices for free Papua still exist in the jungles, in the young people and in the political elites.

7. What insights can be drawn for constitution-building in conditions of territorially based societal conflict elsewhere?

From the Indonesian experience, specifically the case of Aceh and West Papua, several recommendations can be drawn for constitution-building and constitutional amendment:

In the constitution-making process in states with territorially based societal conflict, it is preferable to have articles in the constitution which regulate the possibility of the central government accommodating the demand for special autonomy. It is also preferable for the central government to allow the region preparing the draft of the special autonomy law to involve all of the stakeholders including the separatists. Then, the central government should negotiate until consensus is reached, even if the process takes longer. Finally, the central government should present and fight for the bill in the parliament with the involvement of the public.

In order to have a successful implementation of the special autonomy law, it is suggested that every actor at the national and subnational level should be concerned, pay full attention and make it a priority to complete every single government regulation that implements those provisions. Without those government regulations the special autonomy cannot be implemented. The work does not end when an agreement is reached. If there are serious complaints and strong demands from the region about the substance of the special autonomy law that will prevent successful implementation, it is suggested that the central government should negotiate, facilitate and finally be willing to amend the law. In this stage, the roles of leaders of the state and region to cope with the problem is really very important. If not, the special autonomy law will break down.

Implementation in Sri Lanka

Asanga Welikala

1. What are the main societal divisions that constitutional change was designed to address?

The 13th Amendment to the Sri Lankan Constitution was enacted in 1987 to address the Tamil demand for territorial autonomy in the north and east of the island. The Tamils had demanded federal autonomy in fulfilment of their substate nationality claim since 1949 (soon after independence) but in the face of rejection by the Sinhala-Buddhist dominated Sri Lankan state, Tamil leaders had also demanded independence since 1976. This led to a war between secessionist Tamil armed groups and the state, which assumed crisis proportions by the mid-1980s.

Indian efforts at mediation led to the Indo–Lanka Accord of 1987, by which the Sri Lankan government undertook to devolve power to Provincial Councils, and in exchange, the Tamil armed groups agreed to lay down arms. The government did pass the Thirteenth Amendment and establish Provincial Councils, but did not implement these provisions wholeheartedly. All except the Liberation Tigers of Tamil Eelam (LTTE) accepted the Accord and attempted participation in the devolved institutions. The LTTE engaged the Indian Peace Keeping Force in military combat. The Tamil-dominated North-Eastern Provincial Council (NEPC) was dissolved by the central government in 1991 following its passing of a resolution that was understood as a unilateral declaration of independence. This was itself preceded by the NEPC expressing frustration at the government's tardy and obstructionist attitude to meaningful implementation of devolution.

2. What form did devolution take?

Some legislative and executive powers were devolved to democratically elected Provincial Councils, however, within the overall framework of the unitary state. The unitary state provision was interpreted by the Supreme Court in its pre-enactment determination on the 13th Amendment Bill to mean that the centre retained supreme power and could unilaterally roll back devolution. However, the fact that the Thirteenth Amendment was based on the (quasi-federal) Indian constitution meant that it had, and has, the potential to be implemented in a far more devolutionary spirit that has actually ever been the case in Sri

Lanka. Hence Tamil nationalists as well as liberals are seeking stronger safeguards for devolution than what is provided under the Thirteenth Amendment.

3. What provision, if any, was made during the constitution-making process for implementation?

No provision for implementation was made in the constitution-making process, except that the Sri Lankan government was expected (in terms of an international agreement in the form of the Accord) to implement its own constitutional amendment.

4. What issues arose in the course of implementation at the national level and at the sub-national level?

All branches of the Sri Lankan state—the political executive, the central bureaucracy, Parliament, and the judiciary—have tried to claw back devolution from the day it was established. There was no national consensus about devolution; the Sri Lankan state did so under pressure from India. The power of Sinhala-Buddhist nationalism has forced both governments and oppositions to resist devolution. The parliamentary Tamil parties also deemed the 13th Amendment inadequate and as such joined the LTTE in rejecting it, leaving a motley conglomeration of small militant groups to implement it at the level of the NEPC. In other areas, with only a few exceptions, provincial administrations have been held back by severe lack of capacity and resources, and seen as a refuge for second rate political talent or as a temporary home for defeated parliamentary candidates.

5. To what extent did the conceptual foundations and provisions of the terms of the previous constitution present an obstacle to constitutional change to respond to societal conflict?

The unitary state principle, and the way it is given effect in substantive provisions of the constitution that centralize power, all survived the introduction of devolution. They have served to limit the fullest possible implementation of the framework.

6. How stable have the new constitutional arrangements been? Have they resolved the territorially based political differences which drove demands during the negotiation of the constitution?

The 13th Amendment was a constitutional orphan until the end of the war in 2009. The crushing defeat of the Tigers, and the then Sri Lankan government's ideological opposition to any devolution, made everyone realize that this was now the only show in town. Even after that government's ouster in 2015, the Sinhala-Buddhists would only contemplate devolution to the extent permitted by a commitment to the unitary state. This has made even Tamil nationalists and liberals who have long been critical, realize that only incremental changes are politically possible in the short to medium term and, as such, the only option is to try to make the best possible changes to it and then try and improve it in implementation.

7. What insights can be drawn for constitution-building in conditions of territorially based societal conflict elsewhere?

Constitutional structures of devolution are almost entirely meaningless until and unless the polity at large is ready to accept multilevel governance. Constitutional reform aimed at minority aspirations cannot be forced through. Until the oppressing majority accepts the justice and legitimacy of devolution, constitutional solutions will not work. As the Indian intervention demonstrated, unless the state in question is failing or is very weak—which was never the case in Sri Lanka—then there is very little that international efforts can do either.

Conclusions

Cheryl Saunders, Anna Dziedzic, Sumit Bisarya and Joella Marron

Pros and cons of devolution

Devolution, in the sense of authority to govern that is shared between two or more levels of government in some form, is a common feature of many contemporary constitutions. In all the cases covered by this report, devolution is used as a response to territorially based societal conflict. In India, the driver behind the original decision to create a federal constitution was not the management of major societal conflict. However, federalism has provided a framework for the management of ethnic conflict in tribal areas in the north-east of India, for the governance of the disputed region of Jammu and Kashmir, and for constitutional responses to settle claims for autonomy related to ethnic (primarily linguistic) differences.

Devolution is also used for other purposes. It can be used instead of, or in addition to, conflict management. In many states, of which the Philippines and Nepal are examples, devolution offers a systemic means to reduce the concentration of power and resources in one part of the state, generally the capital city. Devolution can hence be a tool for more equitable economic development. In discussion during the Forum, Bui Ngoc Son explained moves towards devolution in Vietnam on this basis. It can also offer the opportunity for productive political competition, as the evolution of Indian federalism shows. Effective devolution should lead to more responsive and inclusive government.

Devolution is not a panacea, however, for societal conflict or indeed for other goals. A number of potential challenges may arise as a result of devolution. Three particular challenges emerged in discussions at the Forum.

First, while territorial divisions may ease old conflicts by empowering new majorities, they may at the same time create new minorities and new sources of conflict. This was identified as a potential issue in several cases, including Nepal and the Philippines. The position of minorities needs to be borne in mind both in the process of constitution-building and in the resulting constitutions.

Second, substate government cannot deliver the benefits claimed for it unless institutions have capacity and are adequately resourced. Both are critical issues for constitutional implementation and should be anticipated during the constitution-building process. Some concern was also expressed at the Forum that substate government units may be more

susceptible to corruption unless measures to discourage and control the problem are put in place; the adequacy of resources may be relevant to this problem as well.

Third, devolution always raises questions about relations among substate units and between them and the central government: how to govern in the interests of both the whole and all its component parts? These questions relate in part to constitutional design, and are to be considered in the context of allocating powers and resources and providing co-operative mechanisms and procedures. Meeting this challenge also requires a constitutional culture that is conducive to the sharing of power within and between the levels of government.

Devolution within a (formerly) unitary state

The literature on federalism, as one type of multi-level government, contrasts federations that are formed by bringing together previously discrete polities, with those formed by disaggregation of a previously unitary state. In the 21st century, the latter is the norm. All cases canvassed in this report, with the possible exception of India, involve devolution in circumstances of societal conflict within a single state that is, or was, conceived as unitary. However, in at least some cases examined here, the state itself is an arbitrary construct, with boundaries drawn in colonial times enclosing groups that previously had distinct identities, which have persisted. Papua New Guinea, including the autonomous region of Bougainville, is an example in which the boundaries drawn by former colonial powers both encompass and divide culturally connected groups. The challenge of constitution-building in these circumstances is not unique to Asia and the Pacific, although the impact of colonial history in these regions makes the challenges of constitution-building pronounced. From this perspective, the distinction between devolution through aggregation and disaggregation is more complex than it first appears.

Whatever their previous history, however, devolution within states that self-identify as unitary (or did so until recently) creates a series of particular constitution-building challenges.

Most obviously, an existing constitution may impose constraints on devolution unless constitutional change can be achieved. Where the conflict that has prompted devolution pits a minority against the majority, constitutional change may be problematic; institutions representing the majority may not yet be persuaded of the necessity for change. The difficulty can be seen clearly in relation to both Bougainville and the Bangsamoro region of the Philippines, where the constitutional changes deemed necessary were confined to devolution alone. The political dynamics of these cases would benefit from study by others in similar situations. The problem may be less acute where (as in India, Indonesia or Nepal) major constitutional change has been or is required in any event, so that devolution is only one aspect of wider constitutional reform. Even in these cases, however, questions can subsequently arise about whether the authority conferred by the central constitution permits the degree of devolution necessary for the resolution of the conflict. Thus in Indonesia, as Djohermansyah Djohan notes, the ambiguity of the provision on which special autonomy is based suggests that constitutional provisions should specifically authorize central institutions to meet the demands for special autonomy. Relevantly for present purposes, he also recommends that once the scope of special autonomy is settled, 'the central government should . . . fight for the bill in the parliament with the involvement of the public'.

Second, where devolution occurs within an existing state it is necessary to draw the boundaries of the new substate units. Sometimes these will be obvious because they are defined by geography: the islands of Solomon Islands are an example. In other cases, of which the semi-autonomous Indonesian province of Aceh is an example, boundaries will

effectively be determined by the need to resolve the conflict. Even in cases of this kind, however, precise boundaries may be a matter for negotiation. In the Philippines, for example, the territory finally included within the Bangsamoro is dependent on votes in favour of the Basic Law, in accordance with detailed requirements in article XV of the Basic Law itself and article III section 2 of the Constitution of the Philippines.

In other cases covered by this report, of which Myanmar and Nepal are examples, determination of the precise number of substate units and delineation of their boundaries is a more open question. One relevant consideration, in cases of this kind, is the number and configuration of substate regions that are viable as governing entities. This may be in tension, however, with two other factors, also in some tension with each other. The first is the need to draw boundaries in a way that eases the conflict. The second is to avoid drawing boundaries in ways that further entrench social divisions, if possible.

Both Myanmar and Nepal are grappling with the familiar but difficult question of whether and when internal boundaries should be drawn along ethnic lines. In both cases, the outcomes are uncertain at the time of writing and the need to resolve societal conflict seems to favour ethnically-based boundaries, while other factors, including the heterogeneity of the populations within substate territories, militate against them. In the case of Myanmar a further question arises about whether areas dominated by the majority population also should be divided for the purposes of devolution and whether devolution should be asymmetric as a result.

The examples of India and Papua New Guinea offer an instructive contrast. In India, substate boundaries are flexible; they can be changed by central institutions, without substate government consent. This facility was used several times, most dramatically through the States Reorganization Act of 1956, which redrew several boundaries along linguistic lines. As a generalization, this measure has been successful, both in defusing linguistic tensions and in drawing boundaries that allow for some commonality of interests within and between states. Whether this approach can be replicated elsewhere depends on conditions on the ground, including the nature of the conflict. In contrast, in Papua New Guinea, substate boundaries may only be redrawn if there is a consensus between the national government and the groups within the substate units. One large province has been divided into two in this way. There are advantages and disadvantages to flexibility in the procedures for boundary change. Typically, it comes at the expense of greater central authority and less governing autonomy for the substate units.

Third, devolution within an existing state requires the surrender of some power by central institutions. Diminution of central power is likely to be resisted, creating pressures for a more centralized devolutionary model. This has implications for a range of design features of the model for devolution, including the scope of the powers able or required to be exercised by substate units; the extent to which substate units are reliant on the centre for financial resources; the degree of central control over substate institutions; and the extent of any central 'step-in' powers, for use when a substate unit is deemed to be underperforming. Thus in India, to take one example, the centre retains extensive legislative and executive power through its exclusive and concurrent lists; the centre has unilateral authority to redraw boundaries; there are no separate substate constitutions; central institutions control appointments to key substate positions including that of governor; and the centre possesses extensive step-in powers, including through presidential rule.

The advantages and disadvantages of the degree of centralization need to be weighed in each case. Centralization may have advantages where there are concerns about substate capacity, particularly during a transition phase as the state adapts to new arrangements.

However, undue centralization diminishes the effectiveness of devolution, confuses lines of democratic accountability and has some potential to reignite social tensions.

Finally, not only does devolution require the surrender of power, it also requires cultural adaptation on the part of both central and newly established substate institutions. Institutions must be willing to share power and to govern in a manner that is consistent with the spirit, as well as the letter, of the devolved arrangements. Cultural norms may already be in place to support this: one example is the value placed on consensus decision-making in Papua New Guinea. In other contexts, radical cultural change might be required. The nature of the challenge can be gleaned from the effective failure of the Thirteenth Amendment in Sri Lanka in 1987, due in part to entrenched unitary tendencies within the institutions of government. A similar need to move from a centralized to federal mindset will certainly be an issue in Nepal if and when its new federal constitution comes into effect.

Forms of devolution

As the cases in this report demonstrate, devolution may take a rich variety of forms. For present purposes, these can be described in terms of either breadth or depth.

Breadth refers to the territorial coverage of devolution. In some instances, the same degree of devolution may apply across the whole of the state. Equally, however, devolution may apply in only part of the state or to different degrees in different parts. This is particularly likely where devolution is one response (among several) to territorially defined societal conflict. Thus, for example, in the case of Papua New Guinea, Bougainville presently has the status of an autonomous region whereas other parts of the state function as provinces with a lesser degree of devolution. In Indonesia, Aceh and West Papua each enjoy a form of special autonomy, with their own characteristics. In India, Jammu and Kashmir and the north-east tribal areas operate under autonomy arrangements that differ from those in the rest of the federation. New Caledonia now has sui generis autonomy status in relation to France.

In terms of depth, arrangements for devolution potentially range from a relatively limited and centrally-controlled delegation of power, through intermediate arrangements for regionalization of various kinds, to federalism: in which each order of government has significant autonomy, protected by a federal constitution. These categories are not water-tight but fade into each other, depending on the detail of the arrangements, and one can observe much variation of depth within each category. Even states that undoubtedly are federal in form exhibit a wide range of variations in relation to, for example, the manner of the division of public power for federal purposes; the format of the fiscal settlement; the status of local government; and the degree of control over substate constitutions that may be exercised by those at the centre.

As we have seen, details of the design of arrangements for devolution are likely to be driven by a range of relevant circumstances including the imperatives of conflict resolution. Asymmetrical devolution in favour of Aceh, the Bangsamoro region or Bougainville, for example, is a response to the societal conflict concentrated in those areas. In each case, all or most of the rest of the state is subject to a lesser degree of devolution. It may be noted in passing, nevertheless, that grant of autonomy to part of a state with which there has been societal conflict can lead to autonomy claims elsewhere. The history of the establishment of the provincial system in Papua New Guinea is a case in point.

The intensity and the distribution of societal conflict in Nepal and Solomon Islands led to demands for devolution that could be satisfied only by establishing a federation. This may prove to be the case in Myanmar as well. By way of contrast, in Sri Lanka, where the view of political representatives of the majority has been firmly opposed to claims for federalism, the

parties are searching for a solution that offers the necessary degree of autonomy in the north and east of the state but that is not, at least overtly, federal in form.

Antipathy to federalism of the kind presently encountered in Sri Lanka often is associated with concerns about secession. However, both of the cases covered by this report in which the possibility of secession is presently in contemplation (Bougainville and New Caledonia) are autonomous regions within unitary states, in which an eventual vote on independence has been planned for some time as a key component in a peace settlement.

Plans for secession are relatively rare in the 21st century and deserve particular attention for this reason. Some features of the process in Bougainville and New Caledonia are of particular interest. The lengthy delay before a referendum is held under the respective peace settlements offers, in principle, a useful opportunity for capacity building and adjustment to possible independence. As the date for the vote approaches, each polity is grappling with a host of predictable but important questions. These include the composition of the voting population; the nature of the question to be put; voter education; and the administration of the vote. Each polity is also beginning to confront difficult and critical questions about the immediate post-referendum future, whatever the outcome. If a vote against independence prevails, there are decisions to be made about the ongoing relationship between each region and the parent state. If there is a vote for independence, the parent state must act to give the vote legal effect. In both cases, the risk of potential for renewed conflict is a pressing concern. Again, if the vote favours independence, further decisions may be required about what that means in a region where a considerable number of small states rely on others for defence, external affairs and financial support.

Common ties

Devolution of power in some form is an obvious and familiar response to territorially defined societal conflict. Such conditions also have implications for governance of the central state which extend well beyond the empowerment of substate units. Responses to societal conflict at the centre might, for example, be designed to develop a sense of shared ownership of the state by all societal groups; to give substate units a voice in central institutions, reflecting their own experiences and preferences; and to encourage harmonious and productive working relations between the centre and substate units, including those with considerable autonomy.

Interestingly, relatively little attention was paid to these issues in responses to questions or discussion at the Forum, perhaps because they are taken for granted. Perhaps the creation and empowerment of substate institutions is viewed as more significant and more challenging in the context of devolution within an existing, centralized state. However, this aspect of the undertaking is important for effective devolution and for defusing the causes of conflict. Several specific measures, associated with particular case studies, may be mentioned. India, Indonesia, Myanmar and Nepal all have second chambers of the central legislature in which substate units are represented; in Nepal, a range of other, previously marginalized groups are represented in the second chamber as well. In Indonesia, the Helsinki Memorandum of Understanding (MOU) that preceded the settlement with Aceh requires consultation with and consent by Acehnese institutions before central decisions are taken in relation to the region. In Papua New Guinea, members elected to the national parliament from each provincial electorate also head the provincial government. These measures are relatively limited, however. This may be one aspect of the subjects under discussion which needs more sustained attention.

Constitution-building processes

Where societal conflict involves significant violence, a ceasefire may be achieved through a peace agreement that also envisages or includes constitutional change. This situation creates tension between processes that are necessary or desirable for peacemaking and those suitable for constitutional change. The latter, ideally, are more inclusive and may be prescribed by an existing constitution. How this tension is resolved may affect implementation of the peace agreement, the viability of the final constitution, or both.

This is a familiar problem for both peacemaking and constitution-building. Several very clear examples are worth noting. One is the Bangsamoro region, in relation to which parties to the Comprehensive Agreement on the Bangsamoro (CAB) were authorized to enter into an agreement to end the conflict but where a wider range of stakeholders is needed to bring the agreement into constitutional effect. Similarly, in relation to Bougainville, the Peace Agreement between the central government and Bougainville leaders brought the bitter conflict to an end, but implementation required another, different act of will on the part of the state to amend the PNG Constitution. While that step was indeed taken in the heady conditions that then prevailed, if the upcoming referendum supports independence then PNG institutions will have to act again to ratify the outcome. In another example, implementation of the Helsinki MOU in relation to Aceh, Indonesia, also required action by the Indonesian legislature, not all of which was forthcoming.

A second set of observations relates to the nature of the institution with authority to make the constitution. In Solomon Islands, the process of constitutional design has been drawn out and broadly consultative but the mechanism for ratification has not yet been decided. Possible options include the parliament, a referendum, or a people's assembly. It remains to be seen whether the choice of ratification process will prove a stumbling block as the process approaches finalization (in 2017). In Nepal and now Sri Lanka, parliament has also served as a constitutional assembly. In Nepal, the body was specifically elected for this purpose, while in Sri Lanka a body formed under the existing law for electing the legislature was converted into a constitutional assembly. These cases are somewhat of a cautionary tale in this regard: in Nepal the rarefied business of constitutional negotiation too often became subsumed by the day-to-day business of politics, while in Sri Lanka the constitutional negotiations have been similarly delayed and subsumed.

A third set of observations about constitution-building procedures relates to the vehicle through which change is secured. In Indonesia, Papua New Guinea and the Philippines, 'organic' or other forms of special law have been used to give aspects of conflict settlement superior legal status without entrenching them fully in the Constitution itself. This technique is possible only in states with constitutions that provide for laws of this kind. Where changes are to be entrenched in the written constitution, there is a question about whether to create a new constitution or amend the existing one. Faced with this choice, Indonesia chose the latter and Myanmar may too, further contributing to the reputation of this region as one in which 'transitional constitutionalism' is a familiar tool.

Finally, these cases offer insights into constitution-building processes where devolution is likely to be required. In Papua New Guinea for example, the constitution-making process began without devolution in mind. Constitutional amendments were made subsequently, under pressure from Bougainville, to provide for a form of regionalism. On balance, as this and other examples suggest, it is desirable for the need for devolution to be taken into account from the outset of a constitution-building exercise, in the interests of both process and substance.

Implementation

All cases in this report implicitly or explicitly emphasize the significance of implementation —both with regard to new constitutional provisions generally, and in the specific context of territorially defined societal conflict.

Courts are a significant actor in constitutional implementation. The experiences of Indonesia and Sri Lanka demonstrate the importance of courts' willingness to engage constructively with new constitutional arrangements designed to deal with conflict. In Indonesia, the courts did so. In Sri Lanka, the failure of the courts to come to grips with the significance of the Thirteenth Amendment ultimately resulted in further violent conflict, leading to another round of attempted constitutional change. The role of courts is likely to be an issue in Nepal as well, once the constitution comes into full effect, as courts are approached to give meaning to sometimes ambiguous constitutional provisions.

Several case studies in which devolution or wider constitutional changes are either new or pending suggest that cultural adjustment is required for effective implementation. As already mentioned, Nepal is an obvious case in point. Solomon Islands is likely to be another, given the lack of familiarity with a federal approach to government, despite apparent broad acceptance of the proposed constitution. If Myanmar and the Philippines ultimately move to establish arrangements of a federal kind, cultural adjustment is also likely to be an issue.

A federal constitution may be better characterized as the establishment of a set of mechanisms for ongoing dialogue between the centre and regions, rather than a final answer on intergovernmental relations. Evolving political landscapes bear this out: multiple electoral arenas provided by federal constitutions have contributed to both an increase in political competition through the rise of regional parties, and as a consequence, to more decentralization in the operation of those constitutions.

A particular issue for implementation arises in the two polities scheduled to vote on independence in the next few years, namely Bougainville and New Caledonia. There are obvious sensitivities about taking overt steps to prepare for independence, which can be construed as seeking to pre-empt the outcome of the vote. However, implementation of newly independent statehood is a major undertaking and advocates need to be able to explain the practical implications to voters. The use and conduct of referendums to determine critical national issues is a matter of global concern. Insights drawn from these cases over the next few years may usefully guide actors in other and future contexts.

International involvement

The cases illustrate the potential for myriad international influences on constitution-building processes of these kinds. They include, for example, international peacekeeping (Solomon Islands); facilitation of discussions (Malaysia's role in the Bangsamoro Peace Agreement); international observation of agreements (Bougainville Peace Agreement); and international support for democratization processes (Myanmar). For the most part, each form of involvement has been welcomed as a positive contribution to intrastate conflict resolution.

In many cases, international involvement in constitution-building has included assistance with both substance and process, for example in Nepal. This more extensive form of international assistance is more contentious, depending on how it is done and by whom. Forum participants emphasized that international actors, whether foreign nationals (individuals) or organizations, should play a limited role in constitution-building processes. Many took this view on the basis that constitutional arrangements should be responsive to

local needs and preferences and should be locally owned, both in reality and perception. Some pointed to the risk that international funding and involvement may undermine the legitimacy, commitment to, and stability of the constitution-making process. In addition, participants from Bougainville and Solomon Islands argued that the constitution should embody customary local norms and practices. Given these views, the processes of constitution- building in many of the cases included in this report have tended to allow for international involvement that is limited and controlled. It is recognized that the term 'local ownership' can encompass a whole range of concepts, as can 'international involvement'. It is intended, in future Forums, to explore these concepts further.

In societies divided along territorial-lines, devolution may raise specific issues with respect to international involvement. For example, central governments of neighbouring states may be suspicious and fear divided loyalties among communities situated along international borders. Generally, cross-border ethnic groups and economic ties increase the role of neighbouring powers in national devolution debates: for example in Nepal and Sri Lanka, with regard to India, and in Myanmar, with regard to China.

In short, constitution-building processes are rarely completely free of international involvement, and the very nature of territorially based societal conflict can often complicate and intensify these engagements.

Further research is required into the manner and effect of international involvement in constitution-building in Asia and the Pacific. These are interesting regions in this regard. Many states are aid dependent and, cognizant of their own long traditions of governance, raise questions about demand-driven versus supply-driven donor assistance. Significant conflict tends to attract international attention, particularly where it enlivens geopolitical concerns and the interests of larger states in the region, as is the case with Nepal. In some other cases, international involvement is less pronounced. Perhaps international involvement is inhibited by the protracted process and evolutionary nature of some constitution-building processes.

It is hoped that constitution-building practitioners and scholars may learn from the experiences of other states facing similar challenges and issues – in their contextual, procedural and substantive dimensions. The format and methodology of the Forum fostered international comparison for the purpose of shared learning and reflection, rather than to identify the 'best' or most 'successful' model for constitution-building where territorially based societal conflict is a feature.

About the participants

Case study authors

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U Ko Ni held a BA (law) and LLB from the Rangoon Arts and Science University. He was an advocate of the Supreme Court of Myanmar and chairperson of the Laurel Law Firm. U Ko Ni was also a legal adviser to the National League for Democracy.

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About the organizations

International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide. International IDEA's mission is to support sustainable democratic change by providing comparative knowledge, assisting in democratic reform, and influencing policies and politics. International IDEA undertakes its work in three activity areas: providing comparative knowledge derived from practical experience of democracy-building processes from diverse contexts around the world; assisting political actors in reforming democratic institutions and processes, and engaging in political processes when invited to do so; and influencing democracy-building policies through the provision of our comparative knowledge resources and assistance to political actors.

International IDEA works worldwide. Based in Stockholm, Sweden, the Institute has offices in Africa, the Asia-Pacific and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations.

<http://www.idea.int>

Constitution Transformation Network, Melbourne Law School

The Constitution Transformation Network (ConTransNet) at Melbourne Law School brings together researchers and practitioners to explore the phenomenon of constitutional transformation. Constitutional transformation encompasses both practical dimensions of constitutional change and conceptual changes to traditional ideas about national constitutions in conditions of globalisation. ConTransNet pools the expertise of practitioners and scholars in comparative constitutional law, international law, international development law, military and international humanitarian law, regional law, and Asian law to tackle some of the most difficult questions for constitutional transformation in theory and in practice.

<http://law.unimelb.edu.au/constitutional-transformations>

The inaugural Melbourne Forum brought together leading academics and practitioners from across Asia and the Pacific to discuss constitution-building in contexts where there is a territorially defined societal conflict. Discussions highlighted both the importance of exchanging knowledge and experiences, and the need for more opportunities for practitioner-focused discussions in Asia and the Pacific. There is actual or potential societal conflict along territorial lines within many polities in the region, reflecting societal diversity in terms of language, religion, tribe, culture or ideology.

Some states in the region have well-established constitutions that were designed with an eye to managing societal conflict. Across the region as a whole there are states where constitution-building is either underway or pending. Their circumstances are very different, and the solutions these states are working towards must necessarily vary as well. Nevertheless, there is considerable potential for countries in the region—and worldwide—to derive insights from each other's experiences as they grapple with these challenges. The Melbourne Forum was designed with this goal of mutual, shared learning in mind.