



About this series

The International Institute for Democracy and Electoral Assistance (International IDEA) and the Institute for Autonomy and Governance (IAG), in partnership with the Philippines Congressional Policy and Budget Research Department (CPBRD) and the Senate Economic Planning Office (SEPO), held a series of Learning Sessions on Constitutional Change and Federalism from May 2018 to April 2019.

As the Charter Change debate persists in the Philippines, questions around the substance, process and scope of constitutional reform remain. Regardless of the outcome of these debates, Congress has a substantial role to play in voting on draft texts and amendments, and even possibly drafting constitutional language itself. As such, the Learning Sessions were designed to target members of the House of Representatives and the Senate, providing a safe space for technical discussions on relevant and pressing issues. Each Session focused on a specific issue, including a conceptual framework based on international experience and expertise, and a contextualized consideration of the issue as it pertains to the Philippines, presented by national experts. The Charter Change Issues Briefs series consolidates and memorializes these inputs for future reference and further reach.

Principles and Processes of Constitution Building

Charter Change Issues Brief No. 1 provides an overview of the first Learning Session, entitled *Principles and Processes of Constitution Building*, conducted on 16 May 2018 at the Philippines House of Representatives and on 17 May 2018 at the Senate of the Philippines, with the following resource persons: Amanda Cats-Baril, Constitution-Building Advisor for Asia and the Pacific, International IDEA; Sedfrey Candelaria, former Dean of the Ateneo Law School; Michael Mastura, former Representative and Member of the 1971 Constitutional Convention; and Ponciano Bennagen, former Constitutional Commissioner in the 1986 Commission. This brief is based on technical insights shared by these experts during the Learning Session, as well as input from Romulo Emmanuel Miral, Jr, Director General of the Congressional Policy and Budget Research Department (CPBRD), Lutgardo Barbo, Senate Secretary, and Benedicto Bacani, Executive Director of the Institute for Autonomy and Governance (IAG).

Learning Session No. 1 overview

Learning Session No. 1 laid the foundation for the Series, covering the basic definitions and functions of a constitution, the circumstances that often surround constitutional change, and key decisions and factors involved in designing constitutional change processes. The four speakers presented the principles of constitutional design and related these to the present Philippine context and the ongoing debates on federalism and constitutional change.

When a Pulse Asia survey in March 2018 asked Filipinos about their most urgent concerns, the top responses were wages, inflation, poverty, jobs, criminality, corruption, peace and taxes; at the bottom of the list were population growth, national defence, terrorism and Charter Change. The survey revealed that, almost midway into the presidency of Rodrigo Duterte, people felt that there were many issues more urgent than constitutional change. That said, constitutional change can help with some of the concerns identified by Filipinos in the survey, such as promoting peace-building, combating corruption and encouraging economic growth. Institutions can shape socio-economic conditions

and political cultures and realities. Wages, the availability of jobs, levels of poverty and peace-building efforts are all influenced by institutions. Since one function of a constitution is to establish and give structure to government institutions, constitutional change is an important element to consider alongside other planned policy changes. In this way, Charter Change is related to the country's capacity to address the issues that Filipinos care about, which suggests that a better understanding of how constitutions can have an impact on economic growth and peace-building, for example, might help people to see the connections between Charter Change and their lives.

If the primary challenges facing a nation do require—or would be facilitated by—constitutional change, another range of questions is then to be considered. These include: what should the scope of constitutional change be? How should the process be structured and designed to balance elite inputs and public participation? Should Congress be convened as a Constituent Assembly? Learning Session No. 1 aimed to provide a framework for discussing answers to these questions.

Conceptual framework

Assessing a constitution's purpose and performance

Amanda Cats-Baril, Constitution-Building Advisor for Asia and the Pacific, International IDEA

Functions and characteristics of a constitution

In order to ensure that a government and its citizens are prepared for decisions and debates around constitutional change, familiarization with the basic functions of a constitution and the principles and processes of constitution design and implementation are key.

There is no simple definition of a constitutional document, but there are some shared characteristics and functions that can help shape people's understanding of what a constitution is and does. For example, the 'vast majority of contemporary constitutions describe the basic principles of the state, the structures and processes of government and the fundamental rights of citizens in a higher law that cannot be unilaterally changed by an ordinary legislative act' (International IDEA 2014). For example, a country's constitution establishes the government by defining the organs of public power, how they are composed and how they exercise power. It may also give life to people's aspirations and express their vision of society, for example by setting out fundamental values and principles. It can also enshrine fundamental rights—a list of freedoms that people enjoy and that government must uphold. In this sense, a constitution organizes and constrains the exercise of power by the government.

Data analysed by the Comparative Constitutions Project has shown that there is a definitive trend in countries adopting a written constitution, such that as of 2016 almost every country in the world has a written constitution. This trend suggests that, overall, peoples and nations seek out constitutions, considering them an important tool for organizing government and society.

It is common to seek to determine whether a particular constitution is 'good' or not but this can be a relatively fruitless question. For one,

what would the measure of a good constitution be? Would it be the durability of the constitution? While there is some correlation between constitutional durability on the one hand and democratic consolidation, political stability and economic growth on the other, the relationship is one of correlation and not causation. One potential measure is whether a constitution continues to meet the demands of the people it governs. This suggests, however, that constitutions must be flexible or at least open to revision and change to maintain their relevance and effectiveness over time; this partly explains the fact that the average lifespan of a constitution is 19 years (Elkins et. al. 2009: 2).

Questioning whether a constitution is good or not could therefore mean looking at what the intended functions of a constitution are and then seeing whether the constitution is fulfilling these functions or not. This can require looking at: the text of the constitution; the intent of the drafters; and the implementation of the constitution along multiple dimensions, including technical, interpretive and cultural. A constitution's durability depends on more than the institutional design measures it puts in place; the culture that accompanies constitutional implementation is key to whether these measures will allow for resilience and flexibility in the face of external shocks.

Constitutions can have many functions; sometimes these are even competing, for example balancing the retrospective and prospective concerns of a nation. While there are certain general and global functions that constitutions can be said to perform, the functions of individual constitutions also vary significantly according to the context in which they operate. Constitutional expert Yash Pal Ghai (2010) has identified 10 ways in which constitutions can contribute to democracy and rule of law, which can be seen as globally accepted constitutional functions: (a) affirming common values and identities without which there cannot be a political community; (b) prescribing rules to determine membership of that community; (c) promising physical and emotional security by state monopolization, for legitimate purposes, of the use of force; (d) agreeing on the ways in which and the institutions through which state power is to be exercised; (e) providing for the participation of citizens in affairs of the state, particularly through elections, and other forms of social action; (f) protecting rights (which empower citizens as well as limit state action); (g) establishing rules for peaceful changes in government; (h) ensuring predictability of state action and security of private transactions through the legal system; (i) establishing procedures for dispute settlement; and (j) providing clear and consensual procedures for change of these fundamental arrangements.

Importantly, a constitution is a product of human engineering. The 'human' in that phrase suggests that people make choices and have agency over the constitutional and institutional designs, while 'engineering' implies building for purpose (Elkins et al. 2009). So, a nation decides the functions and purposes of its constitution, and these should be regularly reviewed to see whether the constitution is succeeding or failing in fulfilling them. If it is failing, then a question may arise as to the need to amend or repeal and replace the constitution.

Decision to amend or make a new constitution?

Questions of constitutional change arise in many circumstances. One common context is after major conflict or regime change, but sometimes debate over reform can arise as the result of a more gradual breakdown in the constitutional order or from emerging social movements. The pace and scope of change will have to be defined and will depend on the circumstances under which debates around constitutional change arise. In the Philippines, for example, there is a sense that constitutional change could be the answer to several challenges the nation is facing, including inequitable service delivery and development and demands for increased autonomy in Bangsamoro. But there are also questions about whether an entirely new constitution would be needed to meet these challenges, or if the challenges could be addressed through specific amendments or even through legislative change.

People often assume that having a new constitution suggests more robust change than merely amending an existing constitution, but this is not true. For example, even though the Philippines Constitution of 1987 was completely new, many of the institutional aspects of the 1973 Constitution were carried over, for example the presidential system. Similarly, while Thailand has had many new constitutions, they resemble one another in many aspects, including the position of the monarchy, the form of the government and the structure of the state (Melbourne Forum 2018). The Comparative Constitutions Project (2016) has found that entirely new constitutions are highly likely to resemble ones that came before due to the phenomenon of ‘sticky institutions’; even after monumental shifts between authoritarian and democratic rule, for example, institutions within a country’s constitutions endure over time. As such, sometimes a surgical amendment or series of amendments to fundamental parts of a constitution can more deeply change the constitutional order than an entirely new constitution. For example, from 1999 to 2002 in the name of *reformasi* [reform], the Indonesian Government pursued democratization through a series of constitutional amendments that altered the constitutional order in Indonesia significantly. Approximately 80 per cent of the Constitution of Indonesia was changed through a series of amendments (Melbourne Forum 2018).

Constitutional repeal and replacement has benefits insofar as a new constitution can serve as a symbolic break with the past, even if it is not radically different from the constitutions preceding it. However, opening up an entire constitutional order to potential revision entails risks as well. For example, one concern in the Philippines is that promulgating a new constitution for federalism might be used simultaneously as an opportunity to weaken the Human Rights Commission and other accountability mechanisms.

Expert insight

Motivations for changing the 1987 Constitution: Is constitutional change needed in the Philippines?

Sedfrey Candelaria, former Dean of Ateneo Law School, and Michael Mastura, former Representative and Member of the 1971 Constitutional Convention

Applying the framework of constitutional function and design to the Philippines raises questions about whether the country needs and is ready for constitutional change. Although there is an appetite for constitutional change, such change requires monumental political efforts and has profound consequences. In accordance with the conceptual framework outlined above, it is necessary first to think about what challenges the Philippines is facing, and then whether these challenges are related to or can be addressed through constitutional design. If they can, it is important to identify the elements of the 1987 Constitution where the design is faulty, and assess whether proposed amendments are likely to repair this design flaw and improve on constitutional performance. In the context of the Philippines, assessing the need for constitutional change requires looking at the country's development and economic growth and considering whether the decentralization envisioned by the 1987 Constitution has served to remedy inequality across the territory. In addition, there are the ongoing challenges related to political oligarchies and what constitutional change could do to address these.

Federalism for equitable economic growth

In the Philippines, the expectation is that constitutional amendments will serve several key purposes. There is the call for more equitable development among regions, particularly through further decentralization and maybe, necessarily, federalism. Factors animating this call include the wish to promote economic competitiveness and fight oligarchic democracy (*Candelaria*), as well as the desire for peace and conflict resolution in Mindanao (*Mastura*). Some salient questions include: is federalizing and moving away from a unitary setup a necessary condition for the Philippines to address challenges around economic growth and peace-building? How will constitutional change address the challenges the country is facing? How will a new constitution embody the response required by the constitutional moment and if it does not, what will be the mechanism for accountability?

Becoming federal in structure would require a constitutional amendment or the replacement of the 1987 Constitution, since it preserves a unitary structure for the Philippines. One expectation of federalism in the Philippines is that it will bring more equitable service delivery and development across all regions. To date, development in the Philippines is uneven, even with the efforts to decentralize power and resources under the 1987 Constitution. However, federalism is not a panacea and there are risks that come with greater regional autonomy and devolution. In particular, it is important to consider unintended consequences. For example, the ruling elite and how their interests might be affected by constitutional change remains a significant consideration. There is a

question over whether the regional strongmen in the Philippines might be further empowered under a federal system, if constitutional amendments for federalism are not accompanied by other reforms to fight oligarchies and strengthen party systems.

Elite buy-in or participation, as discussed more below in the section on process considerations, is an important component of constitutional change, with consequences for the overall success of the initiative, as well as the stability of a new or significantly amended constitution. Caution must be taken in this regard, since the country's experience suggests the dangers of one group dominating any attempt towards reform. For instance, despite attempts to fight political dynasties in the 1987 Constitution, oligarchic rule remains entrenched in the Philippines. So, while the constitution-making process should account for elite interests, there should also be mechanisms to ensure that it does not become a 'distribution of spoils' (*Candeleria*). Thus, the question of who gets to draft the new constitution, and how these people are chosen, is key.

Foreign ownership and economic competitiveness

Reforming the 1987 Constitution has also been discussed in relation to improving the Philippines' economic competitiveness internationally. The restrictions on foreign ownership in the 1987 Constitution have been criticized for limiting business development and competitiveness, and constitutional reform of these provisions has been proposed. Proponents of lifting economic restrictions through constitutional amendment assert the necessity of allowing foreigners to fully own enterprises to pursue competitiveness.

Addressing autonomy claims and historic grievances for peace-building

Another expectation for constitutional change in the Philippines is for it to address two concurrent movements for autonomy—the Bangsamoro and Cordillera. The two are premised on the need for greater autonomy among particular groups and in certain areas, citing history and cultural diversity as justifications. The Bangsamoro initiative specifically is grounded on bringing about peace in Muslim Mindanao by recognizing the desire for regional self-rule. This pushes to the fore the function of a constitution as a potential tool for peace-building, and also the question of whether constitutional change could have peace dividends in the Philippines.

Increasing regional autonomy in the Bangsamoro through constitutional amendment could be a solution to the Mindanao problem (Mastura). Currently, proposals for greater autonomy in Bangsamoro have been interpreted to amount to the creation of a sub-state, which according to some would be unconstitutional under the 1987 Constitution. Interpreted in this way, meeting the demands for autonomy in Bangsamoro, for the purpose of conflict mitigation, would require constitutional change. Amendments, or a new federal constitution, would pave the way for regional self-rule, thereby giving the Bangsamoro the opportunity to govern in accordance with their ways and in recognition of their history.

While others claim that the Bangsamoro can thrive under the present setup and without changing the Constitution, some believe that a unitary setup will always inhibit Bangsamoro autonomy. The philosophy that guided the Commonwealth Government under the 1935 Constitution pushed for stronger control from the centre, at the expense of the autonomy of and representation for the special provinces, including the Moro Province, and represents the risks inherent in a devolved versus a federal system (see Charter Change Issues Brief No. 5). Only with a constitutional amendment promising a federal setup can the Bangsamoro regain, if not extend, the status that it once enjoyed. Under a federal setup, the Bangsamoro authorities would be considered ‘constituents of a constitutionally protected shared rule’ (Mastura).

Discussions pointed to very real motivations for constitutional change in the Philippines. Assuming that this is accepted politically as a path forward—as opposed to, for example, legislative or policy change—then a number of questions arise as to how to design the process for constitutional change.

Conceptual framework

Constitution-building processes

Amanda Cats-Baril, Constitution-Building Advisor for Asia and the Pacific, International IDEA

How to change a constitution?

As mentioned above, a threshold question when considering the process of constitutional change is whether to pursue promulgation of a new constitution or to push for constitutional amendments based on an assessment of the constitution’s intended functions, text and implementation. All constitutions contain procedures for amendment within the text so, if amendment is considered to be the way forward, many questions of process will already be answered. However, even in these instances, it is possible to build upon the mandated procedures—for example, by adding extensive public consultation mechanisms. In the case of the Philippines, there is a clear procedure for amendment included in the 1987 Constitution, in Article 17 on Amendments and Revisions.

Few constitutions provide procedures for their own replacement, however, and so, when countries decide to promulgate a new constitution, a range of choices have to be made as to how the new constitution will be written and promulgated. Even if there is a mechanism for constitutional replacement in the constitution, a country may decide not to use it, as the example from Sri Lanka in the sidebar illustrates. Either way, with constitutional repeal and replacement, especially when there is no constitutional provision to guide the process, decision-makers may have greater flexibility to outline the rules for change. Procedures should be chosen and communicated in a way that will ultimately enhance the legitimacy of the final constitutional product, accounting for mechanisms of inclusion and participation, as well as mechanisms to ensure elite buy-in (Melbourne Forum 2018).

In 1972, following a mandate given by the people at the 1970 general election, a Constituent Assembly comprising all members of the Sri Lankan House of Representatives drafted and adopted a new constitution in accordance with its own procedures, rather than following those set out in the 1946 Constitution that it replaced. In contrast, in 1978, a new Constitution was enacted by a super-majority of the Sri Lankan Parliament, following the procedure for constitutional replacement set out in the 1972 Constitution. (Melbourne Forum, Constitutional beginnings, 2018, 2)

Process considerations

Some of the issues for consideration in designing a constitution-building process are: (a) legal frameworks and rules of procedure; (b) the form of the constitution-making body and how it will be selected; (c) communication, public engagement and consultation strategies; and (d) cost and timing.

These choices have to be made with reference to the context in which they are unfolding but one guiding consideration is balancing the interests and engagement of champions of the status quo and champions of change. Often, constitution-building processes will set constraints on existing rule-makers or seek to redistribute power, so ensuring elite buy-in is key to the reforms being acceptable and implemented with political will. In other words, support from the elite is key to the sustainability and effectiveness of constitutional change. That said, constitutions should also have broad-based support and legitimacy in the eyes of the public. It is important to provide both quality bargaining opportunities for elites and avenues for public participation in the process (International IDEA 2014).

Sometimes, champions of the status quo and champions of change can be brought together at different stages in a process; for example, by sequencing in the negotiations of a peace agreement that might set the principles for constitution change. A more private and select forum can be provided for these negotiations, with the constitutional change process itself opened up to more public input with the inclusion of consultations and/or provisions for a referendum on adoption of the constitution. Particular attention should be paid to the question of whether or not a referendum for adoption is called for in the constitutional change process; while promising high degrees of democratic legitimacy, referendums can also be divisive and politically polarizing, with a push for binary questions on complicated socio-political issues.

Constitutional principles and parameters for constitution-building

The development of constitutions can be guided by a set of principles that depend on the country's context, especially the circumstances at the time the constitution is being written. Principles are usually agreed to before the constitution-writing phase and can either be enforceable or non-enforceable. Whether enforceable or not, principles can be used to guide and limit the scope of constitutional negotiations. For example, commitment to a particular principle, especially if it is enforceable, can take an issue off the bargaining table. Principles can also be critical in creating consensus on lowest common denominators, which can be used as the basis for further dialogues and negotiations (International IDEA 2011).

For example, South Africa agreed on 34 enforceable principles which included a condition on having a bill of rights in the new constitution. In the event that a bill of rights was not included, or any of the other principles were not complied with, the Constitutional Court could send back the draft constitution. On the other hand, India had non-enforceable principles passed by the Constituent Assembly at the outset of its work in an 'objectives resolution' that embodied the ideas of diversity and accountability to guide their constitution-building process. It should be noted that, while general principles can be agreed before the constitution-

writing phase, they can also be reflected in the constitution through the preamble or directive principles (International IDEA 2011).

Bargaining

Constitution-building is most often a process of bargaining and compromise and the design of the process must take this into consideration. Decisions made about the design of the constitution-building process will affect the way the process proceeds and the quality of the bargaining opportunities included (Elster 1995). This can be considered the first stage of the constitutional-change process, when the rules of the game are negotiated and set.

Once the parameters are set in the first stage, the second stage of constitution-building is mostly concerned with setting up the conditions for collective decision-making, of which there are basically two types: (a) cooperative; and (b) distributive. The first type, as the name suggests, deals with a cooperative setup where various stakeholders, including the elite, are on board and negotiate towards a system that works. In contrast, a distributive type of bargaining is interested in relative access to and division of power, seeing this as a zero-sum game. The second type is motivated by what each party can get from the process without considering the bigger picture. Bargaining will occur in all constitutional change processes, for example within a Constituent Assembly or in a Parliament empowered to promulgate the constitution. In designing a constitution-building process, therefore, it is important to consider what incentives and conditions can be put in place to encourage cooperative as opposed to distributive bargaining (Elster 1995).

One way to incentivize more cooperative bargaining is to lower the stakes of the game. This can be done through different techniques, but one is deferral. In this way, certain contentious decisions can be postponed to the future, sometimes through the adoption of vague constitutional language, or else specific text describing the issues to be left for legislative decision in the future (Dixon and Ginsburg 2011). One example of deferral in constitution-building was in India where the issue of cow slaughter was highly contentious from a religious perspective, and a decision was made to move the issue into the Directive Principles section of the Constitution (Article 48), which are non-enforceable provisions and also to frame the issue in accordance with economic animal 'husbandry' as opposed to religious freedom. Another technique for lowering the stakes of the game is regular review. For example, the now replaced 1990 Constitution of Fiji included Article 161: 'This Constitution shall be reviewed after a period of time but before the end of seven years after the promulgation of this Constitution. Thereafter, the Constitution shall be reviewed every 10 years.' This ensured that political actors would have another chance to revisit their decisions in the future and thereby lessened the pressure on the decisions taken during the constitution-building process. However, as the Fijian case proved, provisions for regular review can also be politically manipulated and should be accompanied by detailed rules of procedure.

Expert insight

Process considerations in the Philippines

Ponciano Bennagen, former Constitutional Commissioner

The present constitutional moment is somewhat different from that of 1986, when the restoration of democracy dominated the discussions. The People Power Revolution of the time had a major influence on the deliberations of the Constitutional Commission and even the very composition of the group itself. Presidential Proclamation No. 9, issued by former President Corazon Aquino in 1986, provided for a Commission with a diverse membership, including people with government experience from both the central and local governments, and sectoral representatives from different stakeholder groups, including, academics and indigenous peoples. When the Commission faced various questions on the form and structure of government, the members of the Commission agreed that, whatever decision was taken, it must represent the people's sentiments. A quote from 1986 Constitutional Commissioner Edmundo Garcia—'Let us write this Constitution with them [the people]'—reiterates this point. Thus, the 1986 Commission endeavoured to conduct numerous consultations across the country, with the Consultations Committee being the largest among all its committees. The need to ensure public input animated the design of the process.

The current debate around Charter Change is different; it does not come from a people's movement but from the Government itself. The Government is therefore considering what the body that will draft the new constitution will look like, without the same emphasis on including the people. Previous changes in the Philippine Constitution were done through a Constitutional Convention (1934 and 1971) with its members elected by voters, and a Constitutional Commission (1986) with its members appointed by the President. The current proposal touts a Constituent Assembly where sitting members of Congress draft the constitution, while President Duterte has also appointed through executive order the Consultative Committee to Review the 1987 Constitution. An underlying issue is whether the process will be more executive-initiated or legislature-led. There could be different power dynamics in the resulting constitution depending on how the process is designed.

Public consultations and civic education are two imperatives to ensure that the Charter Change process in the Philippines enjoys democratic legitimacy. Reaching out to citizens is a crucial element considering that the constitution is an aspirational document. The Filipino people need to listen, reflect and speak up on the actual needs of the country. The process of extensive consultations serves the coordinative and social compact functions of the constitution and promotes buy-in among different groups as mentioned in the conceptual framework.

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About International IDEA

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The Institute for Autonomy and Governance provides research, training and technical assistance to promote meaningful autonomy and governance in the southern Philippines.
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The Senate Economic Planning Office provides the Senate President and the Members of the Senate of the Philippines with proper research and in-depth policy analysis on economic and social issues as well as data and statistics which would assist various committees in the discharge of all matters within their jurisdiction, including information with respect to economic plans and programs, domestic and foreign indebtedness, and the promotion, regulation and diversification of economic sectors and sub sectors.

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