



### 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.

# Bill of Rights and Justice System Reform Under a Federal Transition

Charter Change Issues Brief No. 3 provides an overview of the third Learning Session, entitled *Bill of Rights and Justice System Reform Under a Federal Transition*, conducted on 18 June 2018 at the Philippines House of Representatives and on 19 June 2018 at the Senate of the Philippines. The resource persons were: Professor Miriam Ferrer-Coronel, Political Science Department, University of the Philippines; Professor Gwen Grecia-De Vera, College of Law, University of the Philippines; Roan Libarios, an attorney and member of the Consultative Committee to Review the 1987 Constitution; Angelo Francisco Piedra, Underbar attorney, who presented on behalf of Roan Libarios at the Senate. This brief is based on technical insights shared by these experts during the Learning Session. Since no international expert was present at the session, an international framework on human rights in constitutions was developed by International IDEA for this brief.

## Learning Session No. 3 overview

Human rights, the rule of law and the justice system cannot be set aside when talking about Charter Change and federalism in the Philippines. Human right defenders and citizens from different walks of life are understandably concerned about the implications of Charter Change and federalism on the Filipino people, particularly on their civil and political rights. Due to the centrality of this issue, Learning Session No. 3 focused on issues around the Bill of Rights and the justice system. The Learning Session provided a space for discussing the relevance and context of the Bill of Rights in the Philippines, and the emerging proposals to restructure the constitutional provisions on rights and the justice system under a federal setup.

As debates on Charter Change move forward, discussions on the Bill of Rights and the justice system have again renewed the call for the protection of human rights and the retention of the Bill of Rights in the Constitution. While initial proposals show that there will be modifications to the current Bill of Rights and the Philippine

**Human rights are at the heart of the constitutional order of a modern State, not only determining relationships between the individual, groups and the State, but also permeating State structures, and decision-making and oversight processes. (OHCHR, Human Rights and Constitution Making, 2018, 3)**

judicial system, these are generally meant to expand the coverage of constitutional rights, and to improve the efficiency and independence of the judiciary through institutional reforms.

## Conceptual framework

### Human rights in constitutions

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

While a delineated bill of human rights is not common to all constitutions, the inclusion of rights is increasingly understood as integral to the constitutional order of modern states and particularly important in democracies. This is true for several reasons:

1. The inclusion of human rights in a way that determines and balances the rights of an individual with those of the state and society as a whole represents an important limit on the exercise of state power. In conjunction with an independent judiciary, it can enhance respect for the rule of law through related mechanisms and procedures for justice and accountability.
2. Certain fundamental rights are critical to the effective functioning of democracy, for example the rights to freedom of expression and freedom of association and the right to political participation.
3. Democratic values can also be embodied by human rights provisions, for example through the rights to equality, equity, justice and dignity.
4. The inclusion of rights can support the domestic legalization of international human rights obligations that a state has undertaken through its ratification of international human rights instruments.

Furthermore, recognizing human rights in constitutions can be an important part of conflict mitigation, where constitutional change might be expected to serve conflict management and peace-building purposes. This may be particularly relevant where fundamental rights have been systemically curtailed in the past, or where economic and social reforms require rights-related considerations of vital interest to individuals, such as the right to health.

If rights are included in a constitution, there are critical questions to consider. For example: where in the document will rights be delineated; whose rights and which rights should be included and who bears the duty to protect and enforce rights; what is the scope and content of rights and how they are framed; and how should the institutions and systems of the state be organized to respect, protect and fulfil the rights mentioned? (International IDEA 2011).

### Where to include rights in constitutions?

Human rights can be included in a bill of rights or in a chapter or by specific provision in the constitution. A bill of rights—whether labelled as such or not—is considered legally binding, so this is often the strongest way to protect certain human rights. Rights, or commitments to human rights or international principles more broadly, are also often included in the constitutional preamble as part of a national vision

or statement of values. Sometimes, rights are referenced in a directive principles section of a constitution. Generally, preambles and directive principles are not legally binding, so decisions about where rights are included will have an impact on their enforceability (International IDEA 2011). Decisions about where rights are included in the constitution can also signify how important they are considered to be in the framework of the nation. For example, in Myanmar, fundamental rights are not recognized until Article 354 of the Constitution. Many constitutions include both specific rights provisions as well as reference to rights within preambles and/or directive principles to underscore their role in defining the overall vision and operation of the state so rights can be mentioned throughout a constitution.

### Which rights? Whose rights? Who bears the duty to respect and protect?

While the inclusion of civil and political rights can be seen in early constitutions like that of the United States (1791), which added its Bill of Rights as the first 10 amendments, there is an increasing trend to also include economic and social rights in constitutions, like that of India (1949) and Japan (1946). Today, cultural rights are also increasingly constitutionally recognized, sometimes to ensure protection for minority groups, for example in South Africa's Constitution. Many states have also ratified international human rights instruments that create obligations on the state. These may require legal domestication in a dualist system or be directly applied in monist systems. Either way, international human rights instruments can help define whose rights and which rights should be included in a constitution (OHCHR 2018).

When considering inclusion of social, economic and cultural rights, such as rights to housing or a clean environment, it is important to consider the state's capacity to effectively protect and enforce in the immediate, middle and long term. Public expectations about the state's ability to uphold rights which may, for example, require infrastructure development to realize, may not align with reality. If rights are included in the constitution but not effectively implemented, then the whole legitimacy of the constitutional order can be put at risk (International IDEA 2017b).

In defining whose rights are recognized in the constitution, there are a few considerations. For one, rights can be held by an individual or a collective. For example, a 'people' within a state may have a right to internal self-determination; or a particular ethnic group may have linguistic rights, which can be layered with an individual right to freedom of expression. Another consideration is whether rights are stated to belong to all people within a territory or if they are restricted to citizens only. Similarly, how will individual and collective rights be balanced? Determination of whose rights and which rights to include in a constitution is rarely straightforward and often requires negotiation and bargaining among different groups and interests (International IDEA 2011).

In terms of who bears a duty to protect, respect and fulfil rights, the duty-bearer is traditionally explicitly or implicitly understood as the state

**The rights in the bill of rights may be limited only in terms of laws of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-**

- a. the nature of the right**
- b. the importance of the purpose of the limitation**
- c. the nature and extent of the limitation**
- d. the relation between the limitation and its purpose; and**
- e. less restrictive means to achieve the purpose.**

**(Constitution of South Africa, Article 36)**

itself. Duties may extend, however, to non-state actors particularly when performing functions traditionally associated with the state or when it comes to protecting fundamental rights in the private sphere (OHCHR 2018). For example, private education institutions are prohibited from discriminating in the South African Constitution (Section 29), and the Constitution of Angola prohibits private employers from restricting the rights of their workers based on membership in trade unions (Article 33(3)).

### How are rights framed? What is their scope and content?

After deciding which rights will be included for whom in a constitution, there is a need to consider how rights are framed and phrased. Rights can be positive—as in a right to a resource, opportunity or power (e.g. a right to education or a right to access adequate healthcare); or rights can be negative—as in a right to be free from interference (e.g. the rights to free speech or religious belief). In both categories, both the content of the rights and the scope of their application may be contentious. How state interests and duties and the rights of citizens and human beings are balanced has implications for the underlying values of the state and the people and for the important interpretive role that government actors have to play in applying the constitution legislatively, judicially and executively.

### Rights limitations and derogation in states of emergency

One critical consideration regarding the scope of human rights is whether rights may be limited, and if so, in what way and to what degree. Often, the exercise of one right must be balanced against the exercise of another, such as balancing rights to privacy with rights for children in the context of abuse in the home. Or the interests of the state can be pitted against rights. While some constitutions recognize a small number of absolute rights, which can never be limited or restricted even in a state of emergency—such as the right to freedom from torture, slavery and servitude, protection against retroactivity of criminal laws, and the right to recognition before the law (see the Constitution of Uganda, Article 44, in the sidebar)—many constitutions include explicit limitations on human rights, for example in the name of security or public order.

In order to ensure that these limitations are not abused by the state or used as a pretence to abrogate rights, many countries develop tests for the justification and scope of rights limitations (International IDEA 2017a). These tests can be included explicitly in the constitution as a general limitation clause, as with South Africa's Constitution, Article 36 (see sidebar), or through limitations on specific rights, such as Article 19 of the Indian Constitution, which sets out the limitations applicable to freedom of speech, expression and assembly. In common law states, limitations and tests for their constitutionality can also be developed through jurisprudence, like the strict scrutiny test in the United States, which the Supreme Court instituted in the case of the United States vs Carolene Products (1938).

In addition to specific limitations, constitutions sometimes also permit the government, often the executive, to declare a state of emergency,

**Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms—**

- a. freedom from torture, cruel, inhuman or degrading treatment or punishment;**
- b. freedom from slavery or servitude;**
- c. the right to fair hearing;**
- d. the right to an order of habeas corpus.**

**(Constitution of Uganda, Article 44, Prohibition of Derogation from Particular Human Rights and Freedoms)**

during which certain processes and principles might be truncated or otherwise modified in the name of security or state interests. Derogation is the partial or total suspension of a right. Of course, the declaration of a state of emergency poses certain risks not only for rights but also for broader governance and democracy considerations that can be mitigated in a constitution. In some cases, constitutions distinguish between non-derogable or absolute rights and those that may be curtailed, as in Uganda's Constitution (see sidebar).

A constitution can also subject the declaration of a state of emergency to substantive and procedural rules—for example, requiring parliamentary approval by a specified majority in a specified timeframe, and/or limitations to the duration of the state of emergency. In Colombia, for example, the state of emergency period is limited to 30 days renewable but may not exceed 90 days in any calendar year (Article 215); in South Africa, a state of emergency may only be declared by an Act of Parliament and can be reviewed by any competent court (Article 37).

### Enforcement of rights

The way constitutions set up processes, procedures and institutions are critical—although not sufficient alone—for ensuring that human rights are effectively realized. Some constitutions empower the judiciary with judicial review, which is the power given to courts to review laws and specific actions to determine their constitutionality. If judicial review is granted, other considerations and issues follow: who has standing to raise a claim that a law is unconstitutional? Can a claim be brought before a law is passed or only after it has been promulgated and applied? Which courts will have the power of constitutional judicial review?

As important as the above questions are determinations about the judicial appointment and selection process, security of tenure for judges, judicial remuneration and removal of judges (International IDEA 2018). The role and autonomy of a judicial council and the level of autonomy of public prosecutors are also important for the effective realization of rights. In a federal system, it is critical to think how the voices of the subnational units (provinces, states or regions) will be represented at least in the selection process for judges.

Besides structuring courts and judicial institutions, constitutions increasingly also establish independent institutions to support rights enforcement and monitoring. The Global Alliance of National Human Rights Institutions (GANHRI) has accredited 120 national human rights institutions as of February 2018, with accreditation status linked to the status of financial, administrative, functional and political independence under the United Nations Principles relating to the Status of National Institutions (Paris Principles) of 1993. Other special bodies, such as commissions on gender equality, minority rights and indigenous rights, can look after the rights and interests of marginalized groups. Relatedly, anti-corruption bodies can help to curb systemic abuses, including in the realm of rights. Finally, the organization of security forces—including diversity and representation, training on rights and related due process, and the establishment of effective accountability mechanisms—can strengthen the realization of rights and respect for rule of law.

### **FAST FACTS: Katipunan**

The Katipunan (also known as Kataas-taasan, Kagalang-galangang, Katipunan ng mga Anak ng Bayan, and translating as Supreme and Venerable Society of the Children of the Nation) was founded in 1892 in Manila. As a Philippine revolutionary movement set against Spanish colonialism, it aimed to gain independence from Spain through revolution.

## **Expert insights**

### **Evolution of a human rights regime in the Philippine constitutions**

*Professor Miriam Ferrer-Coronel, Political Science Department, University of the Philippines*

In understanding the Bill of Rights and the justice system in the Philippines, one first has to appreciate their historical evolution. Each of the past constitutions of the Philippines is a chapter of the nation's developing history—each coincided with the typical periodization used by mainstream historians and political scientists, namely: Spanish Colonial Rule; American Colonial Rule; Philippine Revolution; Japanese Occupation; Martial Law; and Post-Martial Law. These political developments shaped the Philippine Constitution and the rule of law as it is now.

The most enduring values running through the Philippine experience of constitution-building are liberal democracy and republicanism, with their emphasis on rights and freedom. In the recent Social Weather Survey (Social Weather Stations 2018) in the Philippines, the majority of respondents favoured democracy, with 60 per cent always preferring democratic government over any other kind.

The historical propaganda movement Katipunan (see sidebar) was founded on the principles of popular sovereignty, basic freedoms and limitations on the state when it comes to individual and collective rights. These values were captured in the first three articles of the 1899 Malolos Constitution:

- Article 1. The political association of all Filipinos constitutes a nation, whose state shall be known as the Philippine Republic.
- Article 2. The Philippine Republic is free and independent.
- Article 3. Sovereignty resides exclusively in the people.

The original template of the Philippines' Bill of Rights can be seen in the Malolos Constitution, with Title IV, 'On the Filipinos and their National and Individual Rights'. It contains 27 provisions on individual rights, and citizenship was addressed by putting in place the label 'Filipino' to apply to the people of the Philippines. This first Bill of Rights was mostly focused on civil and political rights including the rights to freedom of expression and association.

The 1935 Constitution came under the Philippine Independence Act or the Tydings–McDuffie Act, which was passed by the United States Congress and established the process for the Philippines to become an independent country after a 10-year transition period. The Constitution, which was drafted through the 1934 Constitutional Convention, the first convention in the country, met three conditions: (a) have a Bill of Rights; (b) guarantee freedom of religion; and (c) have a republican government, where power emanates from the people. Despite the elitist nature of the 1934 Constitutional Convention, delegates picked and chose provisions from the US Bill of Rights to draft the 1935 Philippine Bill of Rights. The 1943 Philippine Constitution, passed under Japanese occupation, contained most of the civil and political rights included in the 1935

**The presence of a Bill of Rights even under colonial rule or dictatorship precisely proves or shows its indispensability in Philippine constitutional discourse. (Soliman Santos, Jr 2000)**

Constitution, even though this Bill of Rights had only 11 provisions, making it the shortest in Philippines constitutional history.

In 1973, a new Constitution was passed after President Ferdinand Marcos' declaration of martial law, which is incredibly was allegedly an improvement on the Bill of Rights in the 1935 Philippine Constitution. The new Constitution added the right against self-incrimination, and the right of the people to information on matters of public concern. However, the fact that the country was under martial law and the transitory provisions that suspended the legislature and enabled President Marcos to rule by decree severely restricted those rights and resulted in a dictatorship. This speaks to the importance of derogable and non-derogable rights as mentioned in the conceptual framework above. The constitutional authoritarianism of the 1973 transitory provisions effected the monopoly of powers of the President even as he sought to regularize institutions. President Marcos exercised the powers granted to the president in both the 1935 and 1973 Philippine constitutions and he continued to exercise legislative powers even when the National Assembly (Batasang Pambansa) was eventually constituted in 1984. All laws and decrees were continued to be in effect until they were repealed mostly only after 1986.

The 1973 Bill of Rights was among the provisions adopted in toto by the 1986 Provisional Freedom Constitution. In less than a year, the 1987 Constitution was drafted by the appointed 48-member Constitutional Commission. Under this Constitution, the right to form unions was included. It also provided for the non-imposition of the death penalty unless there were compelling reasons involving heinous crimes as provided by law. Civil and penal sanctions for violations were stipulated and there was provision for the rehabilitation of torture victims.

The 1987 Constitution enhanced the rights-based foundation of the country's constitutional order when it introduced a separate article on social justice, which emphasized social, economic and cultural rights in contrast with the usual emphasis on political and civil rights in a typical bill of rights. It spelled out indigenous peoples' rights and innovative categories of sectoral rights for rights-holders, including those of labour, peasants, the urban poor, indigenous cultural communities and women. Further, it banned foreign military bases, troops or facilities and gave Congress a role in foreign policy. It also banned private armed groups, private armies and paramilitaries. More than 100 years after the Philippine Revolution against Spain, the country's rights-based constitutionalism was entrenched in its national discourse. The belief in constitutional supremacy as the framework in which people's sovereignty operates and people's rights are protected has been maintained, with an accompanying sense that rulers and laws cannot be above the Constitution to the detriment of the rights and welfare of the people.

Since a constitutional culture has developed around having a Bill of Rights and a commitment to social justice, these are issues that must be accounted for in any discussion of Charter Change. That said, it is important to note that the Bill of Rights has been in place for a long time and human rights challenges still exist in the Philippines. Most Filipinos do not blame the Constitution for the problems of the country. Surveys point to other concerns and a common complaint is

not that the Constitution or the laws are the problem but rather the people who implement the Constitution. It is true, however, that there are serious reasons to rethink the kind of institutions and systems that were entrenched or restored in 1987 for perpetuating predatory politics and representative institutions, a weak political party system and social inequities.

## **Human rights and justice system under the 1987 Philippine Constitution**

***Professor Gwen Grecia-De Vera, College of Law,  
University of the Philippines***

### **Constitutional change and human rights protection: the ‘Interregnum’ experience**

An in-depth analysis of the post-Marcos period in the Philippines and the country’s experience with the 1987 Constitution highlights the importance of respect for the protection of human rights. After President Corazon Aquino was catapulted into power by the People Power Revolution of 1986, she declared that the revolution had been conducted in defiance of the 1973 (Marcos) Constitution. During the transitory period, or interregnum, which was described as a period when the old Constitution was not operative and a new one was not yet adopted, the revolutionary government took over the operations of the bureaucracy until the approval of a new constitution and the election of new officials. However, one of the controversies during this period pertained to abuse of government power over private individuals. Law enforcement agents abused their positions by capitalizing on the absence of a working constitution. As such, the constitutional vacuum also created challenges for the enforcement and realization of human rights, showing how moments of constitutional change are times for vigilance over human rights.

The main issues that came about during this period were: (a) whether the then revolutionary government was bound by the Bill of Rights and the 1973 Constitution; and (b) whether the protection accorded to individuals under the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights remained in effect during the interregnum. Fortunately, the Supreme Court held in 2003 that even though the 1973 Constitution and the Bill of Rights were not in effect, the Philippines, as a signatory to international conventions and treaties, was bound by its international obligations to protect and promote the rights of its people (*Republic vs Sandiganbayan*, G.R. No. 104768, 2003). Nevertheless, the absence of a functioning constitution during this period emphasized the challenges for and importance of protecting individual rights and preventing law enforcement agents and institutions from taking advantage of ambiguous constitutional application to enjoy impunity for rights violations.

Given the experience during the interregnum, the significance of a written constitution as a tool to assert and defend rights cannot be understated. The existence of a written constitution, apart from literally laying out a country’s general principles and policies, emphasizes a nation’s regard for the rule of law (see Charter Change Issues Brief

**This bundle of rights guarantees the preservation of natural rights which include personal liberty and security against invasion by the government or any of its branches or instrumentalities. Certainly, the hierarchy of rights, the Bill of Rights takes precedence over the right of the State to prosecute, and when weighed against each other, the scales of justice tilt towards the former. Thus, relief may be availed of to stop the purported enforcement of criminal law where it is necessary to provide for an orderly administration of justice, to prevent the use of the strong arm of the law in an oppressive and vindictive manner, and to afford adequate protection to constitutional rights.**

**(Allado vs Diokno, G.R. No. 113630, 1994)**

No. 1). Even in small organizations, private associations and other similar groups, a constitution provides for a mechanism on how such organizations should be governed by their duly recognized and authorized state officers.

### **Rights under the 1987 Constitution**

The 1987 Constitution can be seen to contain three main parts: the constitution of government, the constitution of sovereignty, and the constitution of liberty. In the constitution of government, it presents the extent of bureaucracy, the separation of powers among the branches of the government, and the checks and balances that should come with such arrangements. The constitution provides a preview on how the government should be organized and how it should exercise its inherent powers. On the other hand, as the constitution of sovereignty, it refers to suffrage and constituent power (or the power to change a constitution). As a constitution of liberty, it enumerates the rights of the people, mainly in the Bill of Rights.

The Bill of Rights, which comes right after the Declaration of Principles and State Policies in the 1987 Constitution, is a significant part of the framework for the protection of human rights in the Philippines. Primarily, this set of rights serves to establish a relationship between an individual and the state through the protection of rights against the arbitrary and discriminatory use of state power. The Supreme Court of the Philippines, in *Allado vs Diokno* (G.R. No. 113630, 1994), highlighted and further explained the importance of protecting these rights, and the role of government agents in doing this (see sidebar).

The 1987 Constitution's Bill of Rights has also effectively provided a limitation on the state's law-making power. For instance, the government is prohibited from introducing policies and authorizing laws that may diminish the full exercise of certain rights, including but not limited to freedom of speech and expression, freedom of assembly, freedom of religion and freedom to contract. This is to ensure that the government will sincerely acknowledge and respect these particular rights and freedoms of its citizens. Based on its experience during the Marcos martial law period, the 1987 Constitution reflects recognition of the importance of these rights and freedoms. As per protection and enforcement of rights, the provisions of the Constitution on the Judicial Department (Article VIII), Social Justice and Human Rights (Article XIII), the Commission on Human Rights (Article XIII), and the Executive Department and Police Force (Article XVI) provide for the establishment of responsible institutions and mechanisms. The role of government institutions in building a fair and just society will be crucial not only in ensuring that checks and balances are in place, but also in preserving the human rights of the people all the time.

## **FAST FACTS: Amparo, Habeas Data and Kalikasan**

**Amparo:** The petition for a writ of amparo is a remedy available to any person whose right to life, liberty and security is ated or threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity. The writ shall cover extralegal killings and enforced disappearances or threats thereof. (Philippines Supreme Court, A.M. No. 07-9-12-SC, 25 September 2007, Section 1)

**Habeas Data:** The writ of habeas data is a remedy available to any person whose right to privacy in life, liberty or security is violated or threatened by an unlawful act or omission of a public official or employee, or of a private individual or entity engaged in the gathering, collecting or storing of data or information regarding the person, family, home and correspondence of the aggrieved party. (Philippines Supreme Court, A.M. No. 08-1-16-SC, 22 January 2008, Section 1)

**Kalikasan:** The writ is a remedy available to a natural or juridical person, entity authorized by law, people's organization, non-governmental organization, or any public interest group accredited by or registered with any government agency, on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission of a public official or employee, or private individual or entity, involving environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces. (Philippines Supreme Court, A.M. No. 09-6-8-SC, 13 April 2010, Part III Special Civil Actions, Rule 7, Section 1)

## **Charter Change Proposals**

### **Emerging Charter Change and federalism proposals and issues**

#### ***Roan Libarios, an attorney and member of the Consultative Committee***

There are several key reform questions that relate to the Bill of Rights and the justice system, which should be highlighted in relation to the ongoing Charter Change debates. First, retention of the Bill of Rights is of primary concern. Based on the initial deliberations of the Consultative Committee to Review the 1987 Constitution (ConCom), established by President Duterte, human rights proponents have also considered adding several provisions to the 1987 Bill of Rights, including: (a) inclusion of non-state agents as violators of human rights; (b) expansion of rights against unreasonable searches; (c) enhancement of the right to privacy; (d) strengthening of economic rights; and (e) the constitutionalization of the writs of amparo, habeas data and kalikasan (see sidebar).

However, members of the legal community are concerned that the Bill of Rights could be removed from the Constitution as part of the reform process. This is one of the risks of developing a new constitution, as also discussed in Charter Change Issues Brief No. 1. Although there are no proposals yet that seek to exclude the Bill of Rights from the proposed federal constitution, there are still those who are wary about how rights would be recognized, protected and enforced under a federal setup. For example, there is no consensus yet among Committee members as to whether the proposed subnational units will have the right to their own subnational constitutions and individual bills of rights. In some federal countries, there are subnational constitutions developed at the province/state level; under these circumstances, provinces in the Philippines could theoretically have their own constitutions that provide for their own principles and policies, but where the scope would still be determined by the national constitution. As such, a national bill of rights would provide an important overall framework for human rights, even in a federal setup.

#### **Justice system under a federal setup**

With regard to the restructuring of the justice system in the country under a federal setup, the main proposal is to assign the various jurisdictions and powers of the present Supreme Court to the proposed highly specialized courts, such as the Federal Supreme Court, Federal Constitutional Court, Federal Administrative High Court and Federal Electoral Tribunal. The proponents saw the need to distribute the functions of the Supreme Court primarily to improve judicial efficiency, especially in terms of the disposition of cases at the subnational level. That being said, it is worth noting that having multiple venues available for hearing constitutional cases could allow for actors/litigants bringing cases to forum shop, or choose among these courts based on where they anticipate getting a more favourable outcome.

Interestingly, a notable additional power of the proposed Federal Constitutional Court is to be able to render advisory opinions (judicial preview). Under judicial preview, an advisory opinion may be provided by the proposed Federal Constitutional Court upon the request of the following persons: (a) the President, Senate President or the Speaker of the House of Representatives, regarding the constitutionality of any enrolled bills; (b) the Chairman of the Commission on Elections, regarding the constitutionality of laws relating to the conduct of an election, initiative, referendum, plebiscite, or recall; and (c) any Filipino, on a matter of paramount importance relative to the validity of any law which he claims to be unconstitutional as applied to him. This means that judicial 'review' would essentially be allowed before a proposed bill became law, should a government body with standing wish to challenge its constitutionality.

There is also a proposal to decentralize judicial appointments and reform the present Judicial and Bar Council as a solution to further enhance the independence of the judiciary. The rationale is to empower and expand the existing Judicial and Bar Council to include, as its ex-officio members, the Chairpersons of the Ombudsman, Civil Service Commission and the Commission on Audit. Basically, the proposed Judicial Appointments and Disciplinary Council will have the power to: (a) thoroughly screen qualified judges and justices for promotion or transfer; and (b) investigate disciplinary cases involving members and officers of the judiciary. Decentralizing judicial appointments to central courts is one way of accounting for representation of subnational units at the centre under a federal system; and giving subnational units the right to appoint their own judges can be an important measure of self-rule in a federal system (see Charter Change Issues Brief No. 5).

### Associated issues and challenges

One of the issues raised as regards the proposed federal constitution is on the treatment of the current constitutional provisions that have not been implemented through legislation. In the existing Constitution, although there are self-executing provisions (such as the right to health, right to information, right to balanced and healthful ecology) or constitutional provisions that do not require supplementary executing legislation, there are also those that are not self-executing, such as the anti-dynasty provision and the provision for allowing a people's initiative to enable constitutional amendment, which have affected the implementation of our national policies. For now, the challenge for actors involved in Charter Change is how they will act on these non-self-executing provisions and how they will treat the constitutional rights that are already considered to be self-executing.

With regard to the extent of the Bill of Rights and other constitutional provisions, another issue is whether the government should recognize socio-economic rights and other emerging human rights such as the right to food security and adequate housing. Although it is well meaning to fully recognize these rights in the Constitution, doing so will compel the government to immediately provide results, which may not be practical and feasible for the government (see conceptual framework

above). Therefore, it is a challenge to Charter Change proponents to weigh the implications of including social and economic rights, which usually require a financial and physical resources from the government to be implemented, in addition to the existing civil and political rights in the Bill of Rights.

Two other major issues that need to be thoroughly deliberated and resolved pertain first to the distribution of powers among the three branches of government (horizontal relationship), and second to the allocation of powers between federal and regional government (vertical relationship). The outcome of the discussions and the position of the framers on these key issues will definitely shape the administrative arrangements and the intergovernmental relationships between proposed federal and subnational governments, which will in turn have a significant impact on how human rights are protected and promoted in practice.

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<<http://cpbrd.congress.gov.ph>>

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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.

This publication has been supported by the Australian Department of Foreign Affairs and Trade through the Enhancing Political Dialogue for Inclusive Peace in the Bangsamoro (ENPOLD) program.



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