

July to December 2019

# Autonomy and Peace Review

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INSTITUTE FOR  
AUTONOMY AND  
GOVERNANCE

## IGR & ENHANCED FISCAL AUTONOMY TOWARDS MEANINGFUL BANGSAMORO AUTONOMY



Established in 2001, the Institute for Autonomy and Governance seeks to provide research, training and technical assistance to promote meaningful autonomy and governance in the southern Philippines.

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## IGR & Enhanced Fiscal Autonomy Towards Meaningful Bangsamoro Autonomy

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KONRAD ADENAUER-STIFTUNG

# IGR & Enhanced Fiscal Autonomy Towards Meaningful Bangsamoro Autonomy

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IAG continues to provide platforms in our common search for genuine autonomy and governance. This Autonomy & Peace Review is published semiannually.

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## *EDITORIAL*



In the transition from ARMM to the new Bangsamoro regional government, IAG has flagged three critical areas that must work efficiently to enhance the prospects for a successful transition: Intergovernmental relations (IGR) between national and regional governments and the LGUs in the BARMM, operationalization of the block grant for meaningful fiscal autonomy and the establishment of a strong regional Parliament. Unless the boundaries of powers and competencies of these three levels of government are clear and effectively functioning, the interpretation and implementation of autonomy policies and programs will be incoherent and unsustainable. As well, while the BOL contains good provisions to promote fiscal autonomy such as the block grant and enhanced resource generation powers of the autonomous regions, these policies will remain on paper until the right fiscal infrastructures and processes are in place.

In this issue of APR, Member of Bangsamoro Parliament and Minority Leader Atty Laisa Alamia juxtaposes the sources of revenues of ARMM with that of the BARMM to show an enhanced fiscal autonomy under the new legal regime. Under the BOL, the BARMM now has the power to pass its annual appropriations law, departing from the previous approach of submitting it to Congress for review and approval. With this new arrangement, the needs of the Bangsamoro community will be addressed in a more immediate

manner with a wider resource. But MP Alamia asserts bigger resource also means bigger responsibility.

For her part, MP Baintan Adil Ampatuan crunches the numbers of the 2020 BARMM block grant against potential challenges. She argues that because of the block grant, fiscal autonomy now makes sense in BARMM—the region is now poised to truly becoming autonomous in character and substance. Aside from the block grant, the BOL also provides for a parliamentary system of regional government. This experimentation coincides with lingering calls for the country to change its charter and abandon the unitary system in favor of federalism.

A policy brief co-produced by IAG and International IDEA from a series of learning sessions on charter change we conducted in Congress looks at constitutional design choices and other factors to keep in mind when encouraging economic competitiveness as an objective of constitutional reform.

We also put the spotlight on IGR, a concept that is traditionally associated with federal systems, although we contend that IGR mechanisms can and do play a key function in unitary systems with embedded decentralization arrangement such as the Philippines.

This issue of APR starts the discussion of IGR by looking at how distribution of powers is a key consideration in federal system design. Another IAG and International IDEA policy brief from a series of learning sessions

in Congress is full of insights on how IGR can impact governance.

Then we go to Atty. Michael Henry Yusingco's argument on how to make IGR deliver results. For IGR to work in the Philippines, Atty. Yusingco says, it is a must that we start asking questions: what are the different levels of cooperation? Is it just sharing information? Is it just sharing data? Or is it about coordinating our efforts? Is it about making commitments to solve issues, to solve problems? Is it about working together in an actual development initiative?

Lastly, Atty. Ishak Mastura reminds us that the Philippines is still a unitary state. It remains to be seen whether or not the IGR body in the BOL, which is usually a feature in federal constitutions, will provide a suitable mechanism to balance the oversight power of the President over autonomous regions with his mandate as protector of the Constitution to see to it that the autonomy of autonomous regions is preserved.

**Benedicto R. Bacani**

Executive Director

Institute for Autonomy & Governance



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# The Promise of an Enhanced Fiscal Autonomy

Atty. Laisa Masuhud Alamia, CESE  
Minority Leader and Member of Parliament  
Bangsamoro Transition Authority

The enactment of the Bangsamoro Organic Law (RA 11054) promises a stronger regional autonomy for the Bangsamoro. At its core, the law provides a new fiscal arrangement that vests an increased degree of fiscal autonomy to the Bangsamoro Government. It has expanded the sources of revenues to be tapped by the Government primarily through the annual block grant. This allows an automatic transfer from the national government equivalent to five percent (5%) of the net national internal revenue tax collection of the Bureau of Internal Revenue and the net collection of the Bureau of Customs from the third fiscal year immediately preceding the current fiscal year.<sup>1</sup> As a result, it has given the Bangsamoro Government an expanded authority over its appropriations. This means that it now has the power to pass its annual appropriations law, departing from the previous approach of submitting it to Congress for review and approval. With this new arrangement, the needs of the Bangsamoro community will be addressed in a more immediate manner with a wider resource.

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<sup>1</sup> Section 16, Article XII, RA No. 11054

Table 1. Sources of Revenues of the Autonomous Region in Muslim Mindanao (ARMM) and the Bangsamoro Autonomous Region in Muslim Mindanao (BARMM)

ARMM (RA 9054)	BARMM (RA 11054)
<p>(a) Taxes, except income taxes, imposed by the Regional Government;</p> <p>(b) Fees and charges imposed by the Regional Government;</p> <p>(c) Taxes, fees, or charges for the registration of motor vehicles and for the issuances of all kinds of licenses or permits, except tricycles which shall be registered with the city or municipality within whose territorial boundaries they are operated;</p> <p>(d) Shares and revenue generated from the operations of public utilities within the autonomous region;</p> <p>(e) Appropriations, shares in the internal revenue taxes, block grants, and other budgetary allocations coming from the central government or national government; and</p> <p>(f) Block grants derived from economic agreements or conventions entered into or authorized by the Regional Assembly, donations, endowments, foreign assistance, and other forms of aid, subject to the pertinent provisions of the Constitution.</p>	<p>(a) Taxes, in accordance with the BOL;</p> <p>(b) Fees and charges;</p> <p>(c) Annual block grant from the National Government;</p> <p>(d) Shares in revenues from the exploration, development, and utilization of natural resources within its territorial jurisdiction;</p> <p>(e) Share in the National Government taxes, fees, and charges collected in its territorial jurisdiction;</p> <p>(f) Dividends from Bangsamoro government-owned or controlled corporations (GOCC) and other corporations, and share from the dividends of national GOCCs and their subsidiaries in the BARMM as may be determined by the Intergovernmental Fiscal Policy Board;</p> <p>(g) Grants from economic agreements or conventions;</p> <p>(g) Grants, endowments, donations, foreign assistance and other forms of aid;</p> <p>(h) Loans and official development assistance;</p> <p>(i) Shares and revenues generated for the operations of public utilities in its territorial jurisdiction;</p> <p>(j) Appropriations and other budgetary allocations from the National Government; and</p> <p>(k) Tax of not more than ten percent (10%) of the fair market value in the locality per cubic meter of ordinary stones, sand, gravel, earth, and other quarry resources extracted from public lands or from the beds of seas, lakes, rivers, streams, creeks, and other public waters within its territorial jurisdiction.</p>

These liberties all point towards the realization of an autonomous government that is closer and more in line to the cause of the Bangsamoro people. It is important to note, however, that the success of this institutional framework is contingent on how the government can deliver services and programs that respond to the true needs of its people and on how the Bangsamoro community, in turn, can synergize and take part in the development process. This collective commitment among the people involved will ameliorate the projected development of the community.

### **Bigger Resource, Bigger Responsibility**

In the FY2020 proposed national budget, the block grant of the BARMM amounts to PhP70.63B under the Allocations to Local Government Units (ALGU). This reflects a 56% increase, which is PhP39.52B more than the PhP31.11B appropriation for the region in 2019.<sup>2</sup> The effectiveness of this transfer, however, goes beyond its amount. Greater significance should be attached to the responsibility of the government to manage and ensure the sustainability of this fiscal space in the years to come, as well as to give attention to its cooperation with various sectors in the region.

Drawing from the lessons from the ARMM experience, the region's fiscal autonomy can be better asserted if we anchor it on the following:

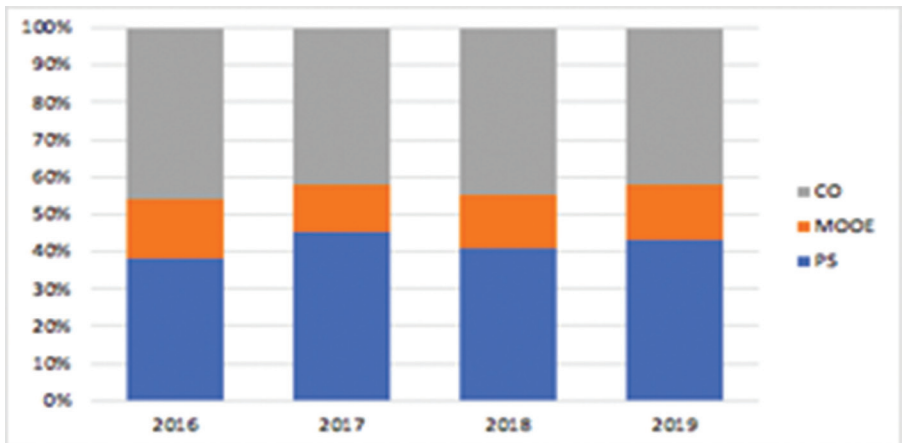
1. **Managing public funds.** The share of the

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<sup>2</sup> FY2020 National Expenditure Program, FY2019 General Appropriations Act (RA No. 11260), Department of Budget and Management

Autonomous Regional Government (ARG) in the national budget had been increasing over the years. In terms of expense class, the ARG appropriated an average of 44% for capital outlay (CO), 42% for personnel services (PS), and 14% for maintenance and other operating expenses (MOOE) in the past four years. This generally shows that expanding government assets had remained to be a priority of the ARG. The minimal appropriations for MOOE, however, demonstrate the need to reevaluate the operations of our offices as to derive relevant services and programs beneficial to the region. Correspondingly, the BOL prescribes an at least 45% appropriation cap for PS.<sup>3</sup> This then can come as a challenge for the Bangsamoro Government to be more innovative on its budgetary priorities.

Figure 1. 2016-2019 ARMM Appropriations by Expense Class



<sup>3</sup> Section 20, Article XII, RA No. 11054. Total appropriations for Personal Services for one fiscal year shall not exceed forty-five percent (45%) of the total revenue resources of the Bangsamoro Government.

In terms of operations, the ARG's allocation for its operations had progressed, too: from 44% of its total budget in 2016 to 85% in 2019. Dissecting this further, ARG prioritized social services comprising, on average, 68% of its total appropriations from 2016–2019, followed by economic services at 25% and general services at 7%.<sup>4</sup> Of all programs, education services got the highest appropriation with a total of PhP42.02B in four years, followed by health services with PhP5.28B. The gaps in the appropriation for agricultural services, which only amounts to PhP1.22B for years 2018 and 2019, can potentially be filled by the BARMM regime. This is especially needed because, even with our rich resources, growth rates of Agriculture, Hunting, Forestry, and Fishing (AHFF) sector in the region posed to slow down from 7.7 in 2017 to 5.8 in 2018.<sup>5</sup> It is crucial that we take a look

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4 For the purpose of this article, appropriations under ARMM operations are clustered as follows:

1. General: lawmaking; administration; and peace and order services
2. Social: employment promotion; health; education; environmental management and human settlement; and social welfare services
3. Economic: employment promotion; trade, industry, and investment; transportation and communication; and road and public infrastructure services

Sourced from GAA FY2016–2019, Department of Budget and Management

5 "ARMM Economy", Philippine Statistics Authority-BARMM.

into how government spending can contribute in elevating this sector in the following years.

Table 2. 2016–2019 ARMM Appropriations for Operations, by Programs (in thousand pesos)<sup>6</sup>

Operations	2016		2017		2018		2019	
	Amount	%	Amount	%	Amount	%	Amount	%
General (Lawmaking; administration; and peace and order services)	1,108,722	9%	1,234,329	7%	1,518,969	6%	1,554,950	6%
Social (Employment promotion; health; education; environmental management and human settlement; and social welfare services)	10,630,872	85%	14,501,626	88%	12,423,412	48%	13,264,303	50%
Economic. (Agriculture and land reform; trade, industry and investment; transportation and communication; road and public infrastructure services)	790,824	6%	826,222	5%	11,713,877	46%	11,623,30	44%
Total (Operations)	12,509,418	44%	16,562,177	51%	25,656,258	78%	26,442,556	85%
<b>Total ARMM Appropriations</b>	<b>28,492,010</b>		<b>32,261,846</b>		<b>33,056,999</b>		<b>31,117,016</b>	

<sup>6</sup> General Appropriations Act FYs 2016-2019, Department of Budget and Management.

More than the budget, of course, it is equally crucial that we ensure the efficient utilization of these resources. Now with a bigger fund, we take the responsibility of managing this within the principles of efficiency, accountability, and transparency. This is hinged primarily on how our government can set up a financial management system that will sharpen our obligation and disbursement performance.

Lastly, we at the BARMM should also take the responsibility to ensure that our efforts at the regional level is well-coordinated with national priorities and directions. As such, there is a need to balance fiscal autonomy and accountability by maintaining checks-and-balances and the region's contribution to the overall development of our country.

**2. Establishing sustainable finance.** It is also crucial that the BARMM builds on its revenue collection capacity. This self-reliance can benefit both the Bangsamoro Government in terms of sustaining its public funds with limited dependency on central transfers and the community at large by having access to greater programs and projects in aid of human development.

From 2015 to 2018, the ARG was able to mobilize locally sourced revenues with a total budget of PhP6.89B.<sup>7</sup> The local fund (LF) constituted the “collections of local taxes by the Office of the Regional Treasury (ARMM-ORT), as well as the ARG’s

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<sup>7</sup> Book VII, Part 15, ARG Transition Report 2019. Access at <https://drive.google.com/file/d/1NZZPIVnRAePGoa-jlOYvKd2L8wQsL9Nv/view>

share in nationally collected taxes”.<sup>8</sup> Through this collection, it was able to fund fifteen (15) agencies including those that are specific and significant in protecting the Bangsamoro culture and basic sectors like the Bureau of Madaris Education, Regional Commission on Bangsamoro Women, Regional Darul Ifta, and Regional Reconciliation and Unification Commission, among others.

The use of the block grant, within and beyond our transition, should also be geared towards placing sustainable mechanisms that will particularly enhance our capacity to generate more revenue at the regional level. Some ways to do this, within the bounds of the BOL, include strengthening our industries, leveraging technology for economic growth, promoting tourism, and easing business agreements.

**3. Strengthening civic space and multi-stakeholder cooperation.** The BOL promotes democratic and active citizenship. In fact, it enjoins the civil society and basic sectors to participate in various political processes and recognizes the private sector as a prime mover of trade, commerce, and industry.<sup>9</sup> This provision highlights the crucial need for multi-stakeholder collaborations among the government, civil society, the private sector, and the public at large to make our new fiscal arrangement, or ultimately, the BARMM work.

The civil society can contribute by: (a) being a

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<sup>8</sup> Ibid.

<sup>9</sup> Section 3, Article IV and Section 17, Article XIII, RA 11054.

partner of the government in regional policy making processes such as in budgeting and planning activities and public consultations; (b) developing monitoring and evaluation measures to check the Bangsamoro Government's performance; and (c) contributing to the advancement of civic education. The private sector, on the other hand, can help the government through partnerships on revenue mobilization and service delivery.

The BARMM's regional autonomy comes from the common aspirations of the Bangsamoro people to establish peace and assert its freedom to pursue its development in accordance to its own particular needs. The government must keep in mind the roots of this demand in order to serve its people properly. It is also crucial that this autonomy is supported by a functional fiscal arrangement that will not only allow us our right to self-governance, but also strengthen our integrity.

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# Annual Block Grant Advantages and Potential Challenges

Hon. Engr. Baintan Adil Ampatuan

It may be said that the budgetary process that the Autonomous Region in Muslim Mindanao (ARMM) had to go through annually was contrary to the idea of autonomy. For indeed, it is incredible how an entity can achieve the essence of self-rule when its exercise of fiscal power is subject to certain procedures requiring close coordination with, if not the approval of the national government. Fortunately, this issue has been addressed in the passage of Republic Act No. 11054 or the Bangsamoro Organic Law (BOL).

One of the important provisions of the BOL is the Block Grant. This provision is the best argument that the BOL is much stronger and viable than the ARMM Organic Law and can make the Bangsamoro Autonomous Region work. The Block Grant allows the Bangsamoro Government more flexibility on how to use the funds to address Bangsamoro Government development goals and objectives, including lasting peace and sustainable development. It allows the Bangsamoro Government to determine specifically how to allocate and spend the funding in accordance with the rules and guidelines for implementation by the Department of Budget and Management (DBM), unlike the past ARMM where the national government predetermined the allocation of funds.

It is in this Block Grant where fiscal autonomy makes sense in Bangsamoro Autonomous Region in Muslim Mindanao (BARMM) and makes the Bangsamoro Autonomous Region meaningfully autonomous in character and substance. The old ARMM never enjoyed fiscal autonomy or had no fiscal autonomy at all.

Under the National Expenditure Program (NEP) for 2020, a total of **P70.6** billion will be allocated for BARMM, with the following breakdown: a) P63.6 billion as annual Block Grant; b) P5.0 billion as Special Development Fund for the rebuilding, rehabilitation, and development of its conflict-affected communities as part of its normalization process; and, c) P2.0 billion as the BARMM's share in the taxes, fees and charges collected in the region.

The total BARMM allocation is more than twofold higher compared to the **P31.117** billion ARMM budget. This P70.6 billion is equivalent to an estimated P16,529.75 per capita allocation and twice the ARMM's P8,299.00<sup>1</sup>. This certainly is a huge resources and a great potential to expand services in the Bangsamoro areas.

Of the P31.117 billion 2019 ARMM budget, more than P15.0 billion pesos was earmarked for construction of roads, bridges, seaports, shore protection, water system, drainage system, housing, livelihood, and basic services among others. With BARMM's almost P39.0 billion or 55.0 percent of Block Grant by 2020, substantial areas and poor families will benefit from socio-economic initiatives.

As provided in the BOL, the following are the conditions to unlock the Block Grant: 1) passage of annual appropriations law by the Parliament that gives priority to education, health, and social services; b) exclusion of procurements of firearms, ammunitions, armaments, and explosives; c) Bangsamoro Development Plan (BDP) to be furnished to the Department of Interior and Local Government (DILG); d) observance of national laws and

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<sup>1</sup> Based on 2015 Census on Population, ARMM population is 3,781,387 and 4,273,149 including the new areas of BARMM.

the budgeting rules and regulations implemented by the DBM and DILG applicable to local government units; and e) setting of performance standards and targets for each sector in the annual appropriations law.

The BOL also provides general limitations for the use of funds including among others, the requirement that the total appropriations, whether annual or supplemental, for Personal Services (PS) of the Bangsamoro Government for one fiscal year shall not exceed 45 percent of the total revenue sources of the Bangsamoro Government. This figure is slightly higher than the actual allocation for PS of ARMM. Under the 2019 General Appropriations Act, out of P31.1 billion allocation of the ARMM, P13.3 billion or 43 percent thereof is allocated for PS.

Aside from the conditions above, the Parliament needs to consider the following: a) approved agency organizational structure, staffing, and position classification; b) agency priority PAPs based on BDP targets; and c) Bangsamoro Economic and Development Council (BEDC) that will adopt the BDP and deliberate on the annual priority programs and projects (PAPs). All of these must be complied with as requisites for responsive planning, investment programming, and budgeting.

The next step is for the Bangsamoro Parliament to pass an annual appropriations law allocating the Block Grant to various agencies and programs according to the powers and functions of the Bangsamoro Government.

The challenge now before the Parliament is the timing of the passage of the appropriations law along with the priority legislations and the reorganization of the

bureaucracy as provided in Article XVI of the BOL.

The budget implication of the additional areas such as Cotabato City and the 63 barangays in North Cotabato is another challenge. Will the budget of the national government agencies (NGAs) like Department of Education, stationed therein be charged against the Block Grant? Or will the officials and employees of said NGAs remain as such, such that the Bangsamoro Government shall not appropriate funds to provide for their salaries, wages or any form of emoluments in accordance with Section 20 (c), Article XII of the BOL?

Will the Block Grant be able to respond to long-term problems of poverty, neglect and slow socio-economic growth? What will be the geographic spread of the fund allocation for mainland and island provinces? What will be the share of devastated areas like Marawi City? These are some of the challenges the annual Block Grant is expected to answer.

While the Bangsamoro Government is grateful for the recognition of its autonomy through the annual Block Grant and its appropriation, it recognizes the fact that the struggle does not end here. Spending and utilization of the huge annual Block Grant is another question. Will the transition government be able to translate these funds into tangible programs and projects given its new form of government, work force, and systems and processes?

It is reminded that public office is a public trust. As the 1987 Constitution requires, public officers and employees must, at all times, be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and

efficiency; act with patriotism and justice, and lead modest lives.

May the Bangsamoro Government overcome these challenges and deliver to the Bangsamoro people the services they deserve.

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*Hon. Engr. Baintan Adil Ampatuan is a member of the Bangsamoro Transition Authority.*

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# Constitutional Design and the Promotion of Economic Growth and Competitiveness

This policy brief provides an overview of the Learning Session, entitled Constitutional Design and the Promotion of Economic Growth and Competitiveness, conducted by IAG and International IDEA, in partnership with the Senate Economic Planning Office (SEPO) and the Congressional Policy and Budget Research Department (CPBRD), on 28 June 2018 at the Philippines House of Representatives and on 26 July 2018 at the Senate of the Philippines. The resource persons were: Dr Tom Ginsburg, Leo Spitz Professor of International Law and Professor of Political Science at the University of Chicago Law School and Senior Advisor to International IDEA's Constitution-Building Programme; Dr Ronald U. Mendoza, Dean of the Ateneo School of Government; Dr Romulo Miral Jr, Director General of the Congressional Policy and Budget Research Department (CPBRD) of the Philippines House of Representatives; Dr Alvin P. Ang, Professor, Department of Economics and Director of Ateneo Center for Economic Research and Development; and Professor Edmund Tayao, member of the Consultative Committee to Review the 1987 Constitution. This brief is based on technical insights shared by these experts during the Learning Session.

## **Introduction**

The important role of political institutions in advancing economic development cannot be overemphasized. Constitutional design, which includes the form of government and choice of institutions, as well as often defining the relationship between the state and the economy, has an impact on economic performance and competitiveness. Sociopolitical theorist Jon Elster (1994) posited that 'constitutions matter for economic

performance to the extent that they promote stability, accountability, and credibility'. On accountability, the constitution must ensure that politicians are held responsible for their actions and that there is a mechanism for voting them out of office. Accountability affects both economic efficiency and security. On stability, the constitution must provide a framework that is relatively stable and immune to strategic manipulation. By ensuring stability of the basic framework, the constitution discourages wasteful rent-seeking. And on predictability, constitutions should facilitate and encourage long-term planning by citizens by protecting them against retroactive legislation and taxation and against expropriation without full compensation.

While these studies suggest that constitutional rules appear to shape economic policy, the contrasting results indicate that designing or redesigning constitutions, or what is termed as 'constitutional engineering', may prove to be a difficult task requiring trade-offs and compromise. This session discussed several of the constitutional design choices and other factors to keep in mind when encouraging economic competitiveness as an objective of constitutional reform.

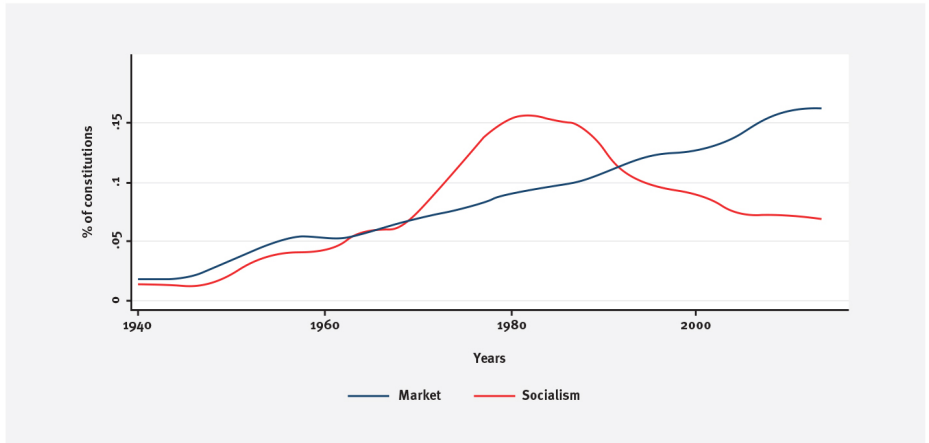
## *Conceptual framework*

# **Constitutional design and the Promotion of Economic Growth**

*Dr Tom Ginsburg, Leo Spitz Professor of International Law and Professor of Political Science at the University of Chicago Law School and Senior Advisor to International IDEA's Constitution-Building Programme*

Since 1789, about 900 constitutions and nearly 2,500 amendments have been written (Elkins et al. 2009). Over the years, the number of countries has risen but so has the percentage of those countries that have written constitutions, such that now almost every independent country in the world has a written constitution. Trend analysis also shows that constitution-making tends to come in waves and often follows conflict (Comparative Constitutions Project 2016). There is also a good deal of borrowing among constitutions and constitution-makers, which raises questions about how domestic the exercise of constitution-building is. The contents of constitutions reflect how ideas have emerged and spread through time. For example, in the past many constitutions referred to socialism, whereas today more constitutions refer to the market (see Figure 1). Constitutions affect the economy in many ways, mostly in an indirect manner.

Figure 1. Economic ideas reflected in constitutions over time



Source: Comparative Constitutions Project, Database, 2016

## Providing a framework for market activity 'empowering the market'

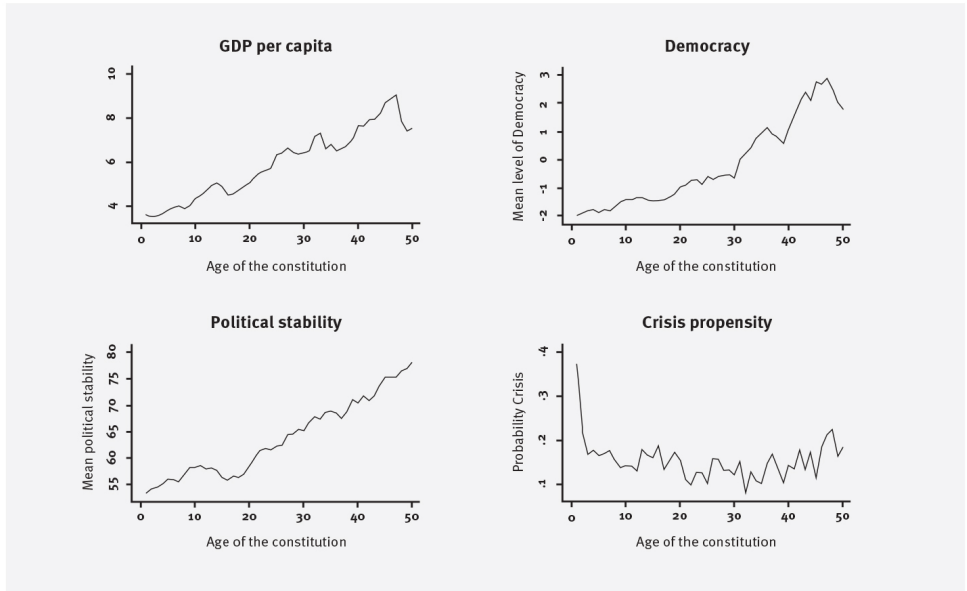
Constitutions serve as frameworks for governments to make policies and decisions, and this affects the economy. Some constitutions require governments to make detailed economic plans, set up the framework for the national budgeting process, or demand the establishment of an independent central bank, among other requirements that shape economic policies and institutions. As such, in turn, constitutions provide a framework for market activity. Constitutions do not generate wealth themselves but structure political outcomes, which, in turn, affect market growth and competitiveness.

Constitutions should be able to place limits on government action. They do this by reducing the stakes of politics; for example, by making it so that every new government cannot change the religion of the country. This is an important concept in relation to property rights; if every government could come in and change the rules of the game, no one would invest, and economic activity would be insecure. As such, basic stability of property rights is fundamental to a market economy. Constitutions also incentivize investment through the protection of people's other core interests; for example, ensuring non-discrimination in transactions, and noninterference of the government in enforcing contracts. These are some general principles that limit government power in a way that permits a market economy. The challenge, then, is to design, establish and operate good institutions to apply the principles. A constitution can also play an important role here.

Overall, when thinking about the role of a constitution in providing a framework for government action with regard to empowering markets, stability is very important. Rather than considering which particular rules are in place (for example, high or low rates of taxation), investors tend to look for places that do not exhibit frequent, fundamental changes in the governmental framework, which indicate instability. Indeed, data suggests that constitutional stability (durability) is good for growth and investment in the economy. Figure 2 shows the average levels of various characteristics, correlated with the age of a constitution, and demonstrates that where older constitutional orders persist, higher wealth, greater stability and deeper democracy are also present. This demonstrates that a stable framework manifested in a

durable constitutional order can bode well for economic growth.

Figure 2. Correlates of constitutional duration



Source: Comparative Constitutions Project, Database, 2016

## Creating and allocating public goods

Constitutions should also provide frameworks for the provision and allocation of public goods. Public goods are things that the market cannot be counted on to provide. A classic example is national defence: this cannot be produced by the market, and if left to the market, probably would not be provided for sufficiently. Public goods also include parks, environmental protection, and basic services and utilities. These goods can be produced at different levels of government and the question

becomes what is the right level at which to produce and provide for public goods. As such, the provision of public goods relates to decisions about how governmental powers are allocated, both between the centre and other levels of government, and in terms of different forms of government (see Charter Change Issues Briefs No. 1 and No. 5). Separation of government powers can occur along different dimensions, namely vertically (between levels of government) and horizontally (between branches). These are substantive constitutional design questions, that require the consideration of pathways of power, fiscal resources and information, as well as an understanding of associated risks and externalities. Regardless of the design choices made, how powers are distributed will inevitably have an impact on the provision of public goods, which in turn affects the economy and prospects for economic growth.

### **Choice of form of government**

There is an open debate in political science on what form of government is most likely to promote economic growth and competitiveness. Some literature suggests that parliamentary governments are better at fiscal redistribution than presidential systems; conversely, presidential systems allow for more checks and balances in the budget process, which can lead to more efficient spending (Akee et al. 2012).

The central fact that drove the literature on this issue was the observation that presidential democracies seem to collapse more frequently than parliamentary democracies, and when they collapse, they are often replaced by dictatorial regimes. Later research has established that this is because these countries were already prone to dictatorship, not because there is a causal relationship between presidential systems and weak democracies. There is also a large and contested

literature on whether democracy is itself good for growth. There does not seem to be firm evidence on this point, but it does seem clear that dictatorships have more variable outcomes, with some performing very badly economically. Venezuela is a good contemporary example.

Some literature suggests that presidential systems result in more efficient and limited government spending. The study by Persson and Tabellini (2003), which used econometrics to investigate the 'missing link' between constitutional systems and economic policy in 75 democracies, showed that presidential/parliamentary and majoritarian/proportional dichotomies influence several economic variables. The study showed that presidential regimes tend to have smaller public sectors, and proportional elections lead to greater and less targeted government spending and larger budget deficits. Moreover, the details of the electoral system (such as district magnitude and ballot structure) influence corruption and structural policies, and can thereby inadvertently promote economic growth.

Another study by Knutsen (2009), which re-estimated the effects of constitutions on economic growth on a much larger sample of data, showed that the distinction between presidential and parliamentary democracies does not have any robust effect on economic growth. Electoral systems, however, seemed to matter systematically for economic growth. Plural-majoritarian systems tend to produce lower economic growth than proportional representation (PR) and semi-PR systems.

All of these studies are meant to be informative, and representative of statistical results, but are not determinative of outcomes in any particular country. That is, just because a country selects one form of

government does not guarantee a certain economic or political outcome.

As a corollary and noteworthy point, if local government autonomy is constitutionally protected, local governments can also be sites of innovation and learning by allowing for experimentation in choice of form of government at the local level. Diversity in the forms of local governments can be beneficial. For example, studies have shown that mayor-oriented (more presidential) municipalities have less spending and less redistribution than municipalities with city councils (more parliamentary style) (Coate and Knight 2011).

### **Constitutional federalism for economic growth**

Besides the horizontal division of powers between executive and legislative branches, the vertical division of powers, through a federal, decentralized or devolved system, also has an impact on economic policy and growth. There are many definitions of federalism, and in some places, it is a very sensitive concept, but since it is being openly considered in the Philippines, it is worth discussing here as a constitutional change reform related to encouraging economic growth, equitably, across a nation. There are, of course, many motivations for countries considering the transition to federalism, but economic performance is one of them.

The key condition to keep in mind when considering whether a country is 'federal' is whether or not subnational jurisdictions have the power or authority to make final decisions on any area of authority/competency, independent from the central authority. This authority should be explicitly provided for in a federal constitution, and it is important to consider which authorities pertain to economic growth and development. For one, the powers and authorities devolved in a federal system can allow

for and encourage policy experimentation and diversity in approaches to market, allowing ultimately for better alignment between policies and local preferences and interests.

Moreover—and this is critical from an economic growth perspective—federalism can encourage policy competition. If a federal constitution allows state/provincial governments to collect local taxes, for example, this gives constituent units incentives to increase their tax bases, often by competing against each other for more businesses and residents. For example, a state could provide tax breaks for corporations so they register in the state and ultimately increase their overall tax break. This environment for competition leads, in theory, to the optimal level of policies and regulations for economic growth.

### **Limiting corruption and agency costs**

Increasingly, constitutions also monitor economic activity by limiting corruption or providing mechanisms for government oversight to ensure that the government is acting in the public interest (as opposed to officials acting out of self-interest). There is a trend in constitutional design to establish special institutions whose mandate is to combat corruption (Comparative Constitutions Project 2016); approximately 10 per cent of constitutions currently include anti-corruption institutions. The act of expressly providing for, and specifying the powers of, these institutions in the constitution gives them a higher status in government and theoretically protects them from political capture.

### **Redistribution**

It is important to remember that almost all governments play some role in economic redistribution;

there is no truly free market in the world. As such, another aspect of constitutions that can have an impact on economic growth and competitiveness is how they perform their redistributive function.

Federal systems often include a formula by which the national/federal government collects and redistributes tax revenue across states/provinces, often in the name of equalization.

This is very important in places like the Philippines where there are stark differences in GDP between regions (see the section titled Economic competitiveness of the Philippines and its regions). Grafting a federal system onto a state that has such a high level of internal inequity in economic development and potential can be problematic. If the system allowed provinces to issue their own taxes, the existing disparities would be likely to grow. As such, federal systems often provide for redistribution of revenue through formulas. There are a number of ways to accomplish this. One is a block grant system, like the one currently used in the Philippines, where revenue proceeds will be sent to the central authority, and it will redistribute the monies back to the state governments. These arrangements of revenue redistribution should be clearly established between levels of government to avoid conflicts. Another way is to establish an independent (and expert) commission to develop special rules and formulas for fiscal redistribution and equalization; often these commissions are depoliticized through constitutional protection like in Nepal and South Africa.

Redistribution is a particularly acute issue in places where some regions might have natural resources, while other regions are resource poor. An example of this can be found in Nigeria, where in response to repeated conflict, a policy was put in place to allow oil-

producing state governments to keep 13 per cent of the total oil revenues, while the rest goes to the centre to be redistributed and shared among non-oil-producing states. Revenue allocation arrangements can be decided by the parliament through legislation, often by giving the upper house a special role. For example, in Germany, the upper house has an absolute veto over bills related to the apportionment of tax revenues between the Federation and the states.

Besides the redistribution of tax revenues, constitutions can—and increasingly do—provide for redistribution through the embodiment of social and economic rights. This is a trend in contemporary constitutions; for example, there is a rise in the recognition of the right to healthcare in national constitutions over time, such that over 50 per cent of constitutions included this by the year 2000 (Comparative Constitutions Project 2016).

Rights are powerful and the increasing inclusion of social and economic rights signifies that many countries around the world believe people have the right to live with a certain level of welfare or dignity. There are some important considerations related to the recognition of social and economic rights, however. For one, they should not necessarily be promised if the state does not have the capacity to deliver on the rights, as this can create conflict. Another consideration is that including social and economic rights in a constitution allows courts to be involved in making redistributive decisions. Latin America provides a number of lessons that can be learned on this point, especially relating to the implementation of the right to healthcare in Brazil, Colombia and Mexico. In fact, the people who can actually hire a lawyer and bring a claim to court for enforcing the right to healthcare are middle class, so the right has not had an impact on access to healthcare for the very poorest, as it was meant to.

This point unites many of the above issues: government is costly. The more branches of government a country has, the more civil servants, houses and legislatures. The more rights included, especially to basic services like health, education and housing, and the more levels of government, the higher the fixed cost to government overall. This doesn't mean that more government or more rights is not good but in considering constitutional reform to empower economic growth, it is important to look at the costs of the reforms planned in relation to the expected economic benefits.

### *Expert insights*

## **Economic competitiveness of the Philippines and its regions**

*Dr Ronald U. Mendoza, Dean, Ateneo School of Government*

The growth trajectories of the Philippines and its ASEAN neighbours; Indonesia and Malaysia, are similar but significantly differ in terms of how they recovered from the 1997 Asian financial crisis. In the 1960s, the Philippines saw real GDP per capita of about PHP1,000, which was higher than Indonesia's GDP but lower than Malaysia's. However, following the financial crisis, both Indonesia and Malaysia were able to quickly return to their development trajectories following a V-shaped recovery, characterized by a sharp decline financially then a sharp rise back up again to recovery. On the other hand, the Philippines suffered a prolonged period of economic underperformance following the crisis, arguably due to political unrest and weak institutions.

In recovering from economic crises, it is critical to get quickly back on a relatively normal development trajectory, and strong institutions play a key role in

steering the economy as mentioned in the expert framework above. The government must be able to convey to investors and trade partners that the country's strong institutions—a trustworthy central bank and department of finance, well-managed public debt—will quickly bring the economy back on track in the event of a crisis. Without this, economic competitiveness will suffer.

The Philippines is currently considered to be a potential East Asian tiger. However, the country is facing important challenges that may jeopardize its growth trajectory towards inclusive development. This is shown, particularly, in how the Philippines underperformed in the latest World Competitiveness Yearbook by the International Institute of Management Development. After experiencing significant gains in the past, the country's overall competitiveness reverted back to where it was in 2004. In 2018, the Philippines dropped to be ranked 50th (out of 63 countries) from 41st in World Competitiveness in 2017, the biggest year-to-year decline over the last decade, and the sharpest drop among peers in the Asia-Pacific region.

In recent months, the inflation rate, which is an important barometer of how inclusive a growth pattern is, is actually on an uptick, partly as a result of the government's implementation of the Tax Reform for Acceleration and Inclusion Act (TRAIN) Package 1 at the beginning of 2018. Food prices are on the rise, especially for basic commodities consumed by ordinary Filipinos. Indeed, Filipinos are experiencing less and less purchasing power as a result of inflation. Worse, the inflation pressures could well persist in the medium term, especially with the government's plan to ramp up infrastructure spending under the 'Build, Build, Build' programme. The challenge is to find structural solutions to inflation, for instance the urgent passage of the proposed Rice Tariffication Law that has long been languishing in Congress.

Industrial growth in the Philippines is not necessarily inclusive, meaning that many are excluded from the market; there is a lack of the high-value-added and employment-generating export industries, which were critical to the growth of South Korea, for example. This is partially because the Philippines has been a 'hard sell' to foreign investors in recent years due to perceived disregard for the rule of law, as well as institutional weaknesses. In today's interconnected world, it matters how you produce things. It matters what your 'brand' is linked to from a principled standpoint, for example how you treat women, children and poor communities; and the environment. Foreign direct investment depends on appraisals of these sorts of principles and values. Many investors will not work in or with countries that backtrack on fundamental values and human rights; for example, Prime Minister Mahathir of Malaysia commented that the extra judicial killings occurring in the Philippines would scare off foreign investors (Mendoza and Banaag 2018).

The Philippines, like all countries, is part of what is known as the 'global value chain', greatly vulnerable to the continued increase in interest rates of the major economies of the world, the significant drop in the global stock market performance, the end of free money, as well as the trade war between the China and US. The trade deficit problem the country is facing is caused by the higher amount of dollars going out than coming in, and the poor ratio of exports to imports. Constitutional amendments proposed should seek to address these economic challenges, perhaps by relaxing the foreign equity restrictions in key industries. Foreign direct investment is needed to facilitate the transfer of knowledge and technology to make the Philippines' industries and workers competitive in the face of globalization.

Therefore, there are several points to consider if the Philippines were to proceed with constitutional change. The first is the timing of this endeavour with regard to the global environment; if the country undertakes constitutional reform, will that help it to meet the needs of the global economy and the challenges that represents? The second, related issue is the question of whether constitutional change will address the particular issues that slow economic growth in the Philippines, such as infrastructure and inefficient bureaucracy? Lastly, will federalism make Filipinos take advantage of what wealth they do have and will it help to distribute economic growth across regions? How will these benefits be related to the costs of federalization?

### *Charter Change Proposals*

## **How Bayanihan Federalism could promote economic competitiveness: Proposals by the Consultative Committee to Review the 1987 Constitution**

*Professor Ed Tayao, Chairman of the Consultative Committee's (2018) Subcommittee on the Formation and Structure of Federated Regions*

The federal system proposed by the Consultative Committee to Review the 1987 Constitution (ConCom) aims at addressing the current challenges, many related to local governance, that have an impact on economic growth in the Philippines. Namely, the proposed federal system seeks to address issues with the fragmentation and limited jurisdiction of LGUs, which render them ineffective at service delivery and prone to rent-seeking politics. The proposed federal reforms are meant to make public administration more effective and to strengthen local political institutions by empowering local and regional governments.

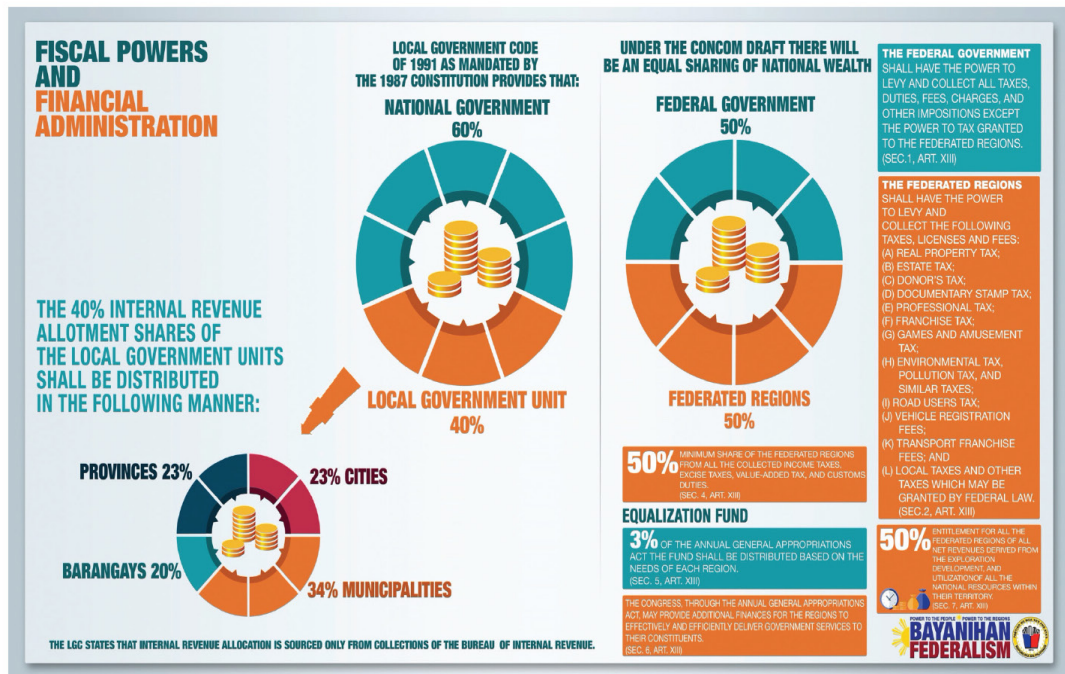
Figure 3. The ConCom’s proposal for economic reforms



Source: Consultative Committee to Review the 1987 Constitution (ConCom 2018)

There are three main roles that federalism could play in the economic development in the Philippines (see Figure 3). The first is ensuring integrated economies and placing greater value on creating a business-friendly environment. The ConCom draft constitution envisages an integrated approach to economic development with powers being shared rather than devolved or delegated by the central government. Federated regions are to be partners of the national government. Policies or programmes that the federal government comes up with will have to have been developed with the participation of federated regions and to have their approval.

Figure 4. The ConCom’s proposal for fiscal powers and financial administration



Source: Consultative Committee to Review the 1987 Constitution (ConCom 2018)

Second, the ConCom federalism aims to increase the economic viability of the regions by enhancing their own revenue-generating powers. Federated regions will be given taxing powers for them to raise their own revenues, aside from the Internal Revenue Allotment, which may then increase their economic viability, for example road users' tax would be at the federated region level. By giving them taxing powers, federated regions could not only collect fees in their region, but they would also have the incentive to find sensible solutions to traffic management, security and road management or maintenance, so as to attract residents, as noted in the expert framework. They would also be able to address

the accountability challenges under which the regional and local governments are currently accountable to and dependent on the central government for resources. Additionally, the proposed federal system in the ConCom draft calls for redistributive revenue-sharing within the national budget, with 50 per cent allocated to the federal government to support broader functions and to ensure macroeconomic stability, and 50 per cent allocated to the federated regions (see Figure 4 for more details).

Thirdly, federated regions are designed to be more responsive to local development needs, both for LGUs and communities. According to the ConCom draft, decisions, plans and actions by the regional assembly have to be agreed upon by the local governments, in order to make political decision-making more collective, responsive and flexible to the needs of the different units. In theory, this should make units more empowered and stable, as well as more accountable, in turn promoting economic growth.

One often-cited criticism of Charter Change is that it is unnecessary for reconfiguring local governments, and simply revising the local government code would suffice. Legislative reform, however, could be problematic with the current 'piecemeal' approach to policymaking in the Philippines. This approach has meant that policies are sometimes inconsistent, if not in direct conflict, with one another; the outcome is haphazard policy reform with a great risk of unintended consequences. Furthermore, without the constitutional guarantee of the division of powers provided by federalism, decentralization of powers can be as easily constricted as expanded through legislative change.

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# Federal Systems, Intergovernmental Relations and Federated Regions

This policy brief provides an overview of the Learning Session entitled *Federal Systems, Intergovernmental Relations and Federated Regions* conducted by IAG and International IDEA, in partnership with the Senate Economic Planning Office (SEPO) and the Congressional Policy and Budget Research Department (CPBRD), on 15 August 2018 at the Philippines House of Representatives and on 16 August 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; Dr Julio Teehankee, member of the Consultative Committee to Review the 1987 Constitution; Professor Edmund Tayao, member of the Consultative Committee; Wendell Tamayo, support staff for the Consultative Committee; and Michael Henry Yusingco, attorney and Senior Fellow at the Ateneo Policy Center. This brief is based on technical insights shared by these experts during the Learning Session.

## **INTRODUCTION**

Demands for a federal transition in the Philippines focus on the ways in which federalism might be able to address persistent governance challenges that the country is facing. These include but are not limited to: demands for greater autonomy from Mindanao and, to a lesser extent, Cordillera regions; more efficient and effective service delivery at the subnational level; promotion of economic growth; and equitable development throughout the nation. At present, the three regions of Metro Manila, Calabarazon (Cavite, Laguna, Batangas, Rizal and Quezon) and Central Luzon account for 62.9 per cent of gross domestic product (GDP) in the Philippines, while 14 out of the 17 regions account for only

37.1 per cent combined. Economic distribution across the Philippines has remained consistently disproportionate for the past four decades, with the poor regions of Western Mindanao left behind due to protracted conflict. The current system of government has been in existence since Spanish colonial rule and the logic behind it then was to facilitate the extraction of goods from the colony (the Philippines) to the colonizing country (Spain). Colonial rule has now been replaced by what is referred to as 'Imperial Manila'.

While there have been attempts to address this problem, such as decentralization, most of the interventions have failed since all have been confined within the current unitary form of government. This means that the attempts have largely taken the form of legislative and policy change; many observers have noted problems with this approach. For one, it leads to fragmentation and piecemeal policy development; for another, it fails to guarantee that levels of government have meaningful autonomy and resources to exercise functions. These critiques have fuelled the suggestion that constitutional reform is necessary to truly address the challenges that the Philippines is facing.

Federalism, however, is a complicated and technical subject, and it should be considered carefully and designed with an understanding of the context in which it will operate. The inputs of Learning Session No. 5 were intended to help further discussions and consideration of the potential benefits of federalism in the Philippines.

## **CONCEPTUAL FRAMEWORK**

# **Federalism: Key Features, Issues and Design Considerations**

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

Depending on how federalism is defined, close to 40 per cent of the world's population live in 'federal' countries and there are approximately 33 federal countries around the world, although this number varies over time. Importantly, there are as many models of federalism as there are federal countries—showing that there is no 'one size fits all' solution in federal arrangements. The principles, features and practices laid out in this Brief are therefore meant as guidance in considering the design of a federal system but not as prescriptive advice. Context-specific adaptations to federal principles and processes are necessary and desirable. Overall, it is important to note that while federalism is often looked to as a means of addressing certain challenges and/or conflicts in society (ranging from secessionist movements to unequal development), federalism is not a panacea cure for these challenges. Transitions to federalism are difficult to implement, require patience and institutional and behavioural change, and often give rise to as much conflict and as many challenges as they are meant to resolve. This should not discourage desires for federalism but rather inform them, cautioning the need for expectation management and attention to detail in the design and undertaking of federal transitions.

## **In comparison with other systems**

Federalism can be understood when looked at in comparison with alternative systems for structuring a state:

1. A unitary state under which political power is allocated to and exercised by a single/central government that has final authority in all matters, even if some powers are unilaterally decentralized or devolved to subnational units. Examples of unitary states in Asia the Pacific include Sri Lanka and Thailand. While power may be devolved and decentralized by the central government in these systems, the decentralization remains vulnerable because the central government can unilaterally take power back as the division of powers is not constitutionally guaranteed and protected from unilateral change, as it is in a federal state.

2. Devolution or regionalism offers varying degrees of decentralization within an otherwise unitary state, with some subnational or regional areas having more space to develop their own representative institutions to a degree limited by the central government. Examples of devolved systems include the Spain and the United Kingdom.

3. Special autonomy arrangements exist where certain parts of the country are given autonomy (final authority and/or power to set up own institutions and exercise certain power) even though otherwise the state operates as a unitary system. Indonesia provides one example in the Asia and the Pacific region, and the Philippines itself calls for special autonomy arrangements

in the 1987 Constitution (Article 10).

4. Confederations are a union of otherwise sovereign states, where the centre is typically weak and subunits retain high degrees of sovereignty. In these systems, the central government rarely interacts directly with the populations in the subunits. This was the original model in the United States under the Articles of Confederation (1781), and is the current structure of the European Union.




### **Key considerations in federal system design**

There are some critical variables and variations in context that influence how federal systems emerge. Some of the classic distinctions are between the types of federalism that embody 'coming together' or 'holding together' experiences. 'Coming together' federalism brings together formerly independent states (e.g. United States), whereas 'holding together' federalism tends to involve the delineation and establishment of subnational units within a formerly unitary state (e.g. Ethiopia and Nepal) (International IDEA 2017). There are also important differences in the sociopolitical contexts in which federalism emerges, in particular whether the population of a territory is plurinational, like Nepal and Switzerland, or more homogenous like Argentina or Germany. These contextual features should be accounted for in designing the details of a federal system and can sometimes even be considered in the delineation of subnational units, as was the case in India where language was used as a criterion in delineating state boundaries.

Although different political realities and balances of power between and amongst constituent units of

the state will have an impact on the design of federal systems, in essence federalism is often about striking a balance between ‘a desire for unity and communality on certain issues with a desire for diversity and autonomy on others’ (International IDEA 2017: 5; see Figure 1). The design of federal systems can therefore be used to address and accommodate the contextual variations (and tensions) identified above promoting self and shared rule simultaneously, or ‘unity in diversity’.

Figure 1. Federalism as unity in diversity

Separate states	A unitary state	A federation
		
<p>Diversity and autonomy without unity or communality</p>	<p>Unity and communality without diversity or autonomy</p>	<p>Diversity and autonomy within unity and communality</p>

Source: International IDEA, Federalism, International IDEA Constitution-Building Primer No. 12 (Stockholm: International IDEA, 2017), <<http://constitutionnet.org/sites/default/files/2017-10/federalism-primer.pdf>>, accessed 13 August 2019

## **Core features of federal systems**

Given the great diversity in the design of federal systems, it is difficult to fix a set definition, but there are several core features of federalism that can be used to identify federal countries, as defined by George Anderson of the Forum of Federations (Anderson 2008). Perhaps the primary feature of a federal system is at least two levels of government, each with their own institutions, which have the autonomy to exercise powers assigned to them by the constitution and the authority to deal directly with the people (or a subset of the people) on those matters. Therefore, there also needs to be a written constitution which establishes these levels of government for a federal system to exist and operate. The constitution will assign responsibility and accountability to each levels of government for managing and delivering certain competencies, which means that the assignment of powers should be clear to avoid accountability deficits and power struggles, as much as possible. Regardless of clarity, there should be provisions for resolving any disputes that arise from implementation of a federal system (i.e. between levels of government) through an independent body. In many countries, the judiciary will be arbitrators of federal disputes; for example, in the United States the Supreme Court has made critical decisions about the scope and limits of state and federal governments' powers. In other countries, however, disputes may first be managed by other forms of intergovernmental relations mechanisms (see below).

In a federal system, the constitution—or at least those aspects of a constitution that affect the federal system of government—typically cannot be changed unilaterally by one level of government. A federal constitution should provide for the division of legislative, fiscal, executive and sometimes judicial power between the constitutionally

recognized levels of government, giving this division constitutional protection. As such, the constitution guarantees separation of powers between levels of government and prevents the central government from pulling or limiting the power of the subnational governments unless there is consent from both levels to change its provisions. In this way, federalism is not a delegation of power from the center to the provinces as is the case in devolved systems; rather, each level of government is imbued with its own powers by the constitution. This makes the levels of government co-equal in their sources of authority and origin. It should be noted, however, that this does not mean federal systems promise more autonomy than decentralized systems; in fact, some unitary countries exhibit greater degrees of decentralization in practice than federal systems (Anderson 2008).

Critically, federal systems should provide a mechanism for the participation of subnational units in central decision-making. This typically occurs through a second chamber of the federal legislature but there are other ways as well (discussed below). In this way, federalism combines self-rule and shared rule. The division of powers and exercise of authority in certain core competency by the subnational government represents the self-rule aspect, often talked about in reference to autonomy. The aspect of shared rule is equally critical to making federalism work as, if well-designed, it ensures that subnational units have a sense of ownership, investment and belonging to the state as a whole. The shared rule aspect of federalism, and associated mechanisms and processes, can also be a means of ensuring positive intergovernmental relations in a federal system, which is critical since cooperative intergovernmental relationships between levels of government help to build a spirit of partnership that is central to make federalism work.

Beyond these core features, several other considerations, common across most federal countries, should be mentioned. Often, federal systems will provide for some sort of revenue redistribution or other equalization measures to ensure (at a minimum) that basic services are provided across all federated states. Another key issue, is freedom of movement within a federation, such that citizens may choose where to work and live. Federal systems should also ensure the protection of minorities and human rights within states/regions. Different federal systems will do this in different ways but is important that some assurances are provided to minority-within-minority groups, that they will not be disempowered or worse under a federal system (Ginsburg 2018).

### ***Division of powers***

#### **Division of legislative powers**

The division of legislative powers refers to the constitutional assignment of the power to pass laws in different subject areas (competencies) to different levels of government. These can be divided among two, or three, levels of government, if local government also has legislative power, as it does in Nepal under the 2015 Constitution. Most federal constitutions have a unique division of legislative power but three general categories of powers exist: exclusive, residual and concurrent. Exclusive powers are powers of legislation that can only be enacted by the level of government to which the power is assigned. There can be an exclusive list for each level of government. Concurrent powers are powers of legislation that multiple levels of government hold. Residual powers are those powers that are not specifically mentioned in the constitution but may arise later over the course of its implementation.

In some countries, for example Argentina, Australia, Pakistan and the United States, there is one list of powers that outlines what falls within the authority of the central government, with everything else not explicitly mentioned—residual powers—preserved for the subnational units (see sidebar). Other countries, such as Canada, have two lists, which explicitly assign exclusive powers to both the provincial and central governments. Even in systems with two lists, some provision should be made for how residual powers that are not explicitly divided will be assigned; in Canada, for example, residual powers are held to lie with the centre. Some federal constitutions, for example in India, Nigeria and South Africa, also include a list of concurrent powers, over which both the federal and the subnational governments are given authority. In this type of situation, clear rules and mechanisms for dispute resolution in the event of conflicts in the exercise of powers becomes even more important (International IDEA 2017).

Under a federal system, cooperation between the two levels of government is essential to making division of powers operational and ensuring federalism has the desired impacts on effective governance. Often, the principle of subsidiarity, holding that power should be granted to the lowest level of government (closest to the people) that can most effectively implement it, is applied when dividing legislative powers. Factors that influence assignment of powers to subnational governments include whether the government will be able to effectively and efficiently exercise the powers within its boundaries; and if the subnational government will be more responsive to the issue, for example if it relates to issues specific to local contexts. Factors that influence the assignment of powers to the centre, on the other hand, include whether the power can be characterized as 'national' (e.g. treaty ratification, defence); if its

exercise has cross-border effects or affects other states (i.e. environmental regulations or immigration); and, if there is a need for uniformity, such as standard-setting, to ensure that services are delivered at a basic minimum quality across the country.

One issue worth extra consideration in the division of powers debate is that of local government. Some constitutions establish local government as a third level of government, with its own legislative and other powers. Others vest local government as a competency of either the national or subnational governments—representing another critical choice in federal systems. In Nigeria, the states possess the competency to oversee local governments, and it has created some problems as the state governments have in the past refused to appropriate monies to local governments and also—for example—failed to conduct elections at the local level citing resource constraints. In response, a movement has developed to reform the constitution to establish a special/dedicated funding account for local government directly from the central government, instead of the joint account shared by the state and local governments. Local governments want direct access to allocations from the central government.

On the other hand, local government as a central government competency may also create problems, as shown in Nepal under its 2015 Constitution Schedule 5 which gives the central/federal government general power over 'local affairs', with no mention of the same in the powers of provincial governments. Since the local and central governments have a direct link with each other, and are also the levels of government which the longest historic track record (pre-existing the new constitution) and therefore legitimacy, the new provinces have struggled to develop relationships with and incentivize cooperation from local governments.

## **Division of executive powers**

Executive powers can also be distributed between national and state governments. Federal laws can be executed by the federal government, as is the case in Canada and the United States, but sometimes states and regions will be responsible for administering or executing federal laws within their boundaries. This is the case to varying degrees in Germany, India and South Africa. Cooperation between the central and state governments in the implementation of federal laws is critical to the functioning of a federal system. If executive power is to be divided, and if some authority to 'execute' national laws is to be given to subnational units, a decision must be made as to which legislation should be administered by these units. This requires several correlated decisions, including: what kinds of and how much central legislation is administered by the subnational units; how trust and cooperation, as opposed to coercion, will be encouraged between the levels of government (see South Africa example of constitutional encouragement of cooperative federalism in sidebar); what say subnational unit governments will have in the development of federal legislation that they will be co-responsible for implementing; the extent and means of control of the central government over the administration of its legislation.

## ***Symmetric and asymmetric federalism***

Federal systems can be symmetrical or asymmetrical in nature. Federal systems are symmetrical when all subnational units have the same degrees of autonomy as one another, represented by the same competencies and the same relationship with the central government. It is worth noting that even non-federal, decentralized systems can also be symmetrical or asymmetrical. For

example, Indonesia is a non-federal country but Aceh and other regions enjoy enhanced autonomy under the Constitution, making it an example of an asymmetrical arrangement (Ginsburg 2018). De jure asymmetry is where one unit is given more or less autonomy than other units in the federal constitution. This is in contrast to de facto asymmetry, in which—regardless of what is written in the constitution—different regions will exercise more or less power than others depending on a number of factors, including economic strength of the region and population size, among other issues. De facto asymmetry—where in fact differing levels of power are exercised— can exist in a de jure symmetrical systems, when powers are formally equally assigned amongst subnational units.

In practice, asymmetrical arrangements have proven critical in conflict mitigation and meeting differing demands for decentralization, as well as taking account of the unique identity and capacities of different regions (Ginsburg 2018). Asymmetry may be beneficial in meeting historical and long-standing claims for regional autonomy, such as that in the Bangsamoro and Cordillera regions in the Philippines. Moreover, asymmetric arrangements can help mitigate secessionist claims. Contrary to the belief that giving more autonomy to subnational units will make them want greater separation from the centre, it is often the case that giving more autonomy to these units can strengthen national unity, making autonomy arrangements and the realization of the internal right to self-determination 'anti-secessionist' cures (Cats-Baril 2018). Importantly, in order for autonomy to be meaningful, it is necessary that the distribution of resources matches the distribution of powers and responsibilities; if a subnational unit has greater autonomy, and therefore corresponding increased responsibility to provide services for its population, fiscal arrangements should enable it to

garner sufficient resources to provide those services either through transfers from the central government or through devolving resource mobilization powers.

### ***Fiscal federalism***

The division of powers and responsibilities in a federal system requires an accompanying division of resources to enable the effective discharge of functions by different levels of government. The framework, mechanisms and processes related to this division of resources are broadly covered under the concept of fiscal federalism. Fiscal imbalances between the centre and the subnational units, as well as among subnational units, are inevitable in all countries; often, as is the case in the Philippines, countries with centralized systems will see a particular over-concentration of economic resources at the centre. As such, federal constitutions often call for revenue-sharing, meaning the distribution of funds to other levels of government for general and/or specific purposes.

Most federations, with the United States as a notable exception, also call for equalization mechanisms to create more equitable revenue-sharing between units, recognizing different subnational units' capacities and needs. This is in line with the principle of solidarity, which holds that subnational units across a federal territory should be able to maintain the same standards of basic service delivery. If constituent units have the same responsibilities and functions as one another under a symmetrical system, but differing capacities to raise and access resources, there will be variation in the quality of delivery of those responsibilities and functions (Anderson 2008).

Equalization is often managed and administered by an independent body but it can also be accomplished and integrated in normal budget processes. If an

intergovernmental fiscal commission is called for in a constitution, attention should be paid to its composition requirements and appointment procedures. In India, the Commission is appointed by the President; in South Africa, in an attempt to acknowledge the technical nature of equalization, the Financial and Fiscal Commission is to be composed of independent experts, some appointed by the President in consultation with heads of other levels of government (Section 221). Equalization is not a static exercise and the size and formulas for distribution can be reviewed regularly for appropriateness. This is the practice in Germany, India and South Africa, where the reviews are conducted by independent financial commissions. Importantly, consideration should be given as to whether or not decisions and statements issued by the commissions are binding or not. In some countries, like India and South Africa, the recommendations are advisory and must be approved by the legislature.

Fiscal federalism is also significant in terms of ensuring the shared and self-rule aspects of federalism itself. Beyond equalization formulas, it is important to think about how taxation powers are distributed, which is intimately linked to ensuring meaningful autonomy in decision-making and service delivery at the subnational level. If a federated unit cannot generate sufficient revenues, it will remain dependent on the central government for fiscal support, thereby affecting the dynamics of the entire federal system and opening the possibility of coercive (as opposed to cooperative) relationships between the central and subnational governments. One way to avoid this is to constitutionally devolve more taxing powers to subnational units.

The exact practice of dividing taxation powers varies between federations, but there are various issues to take into account. On the one hand, there are advantages to having each level of government accountable for raising

the monies they administer; however, varying capacity and tax bases must be taken into consideration, meaning that some support in resource generation and provision might be required from the central government. On the other hand, there are administrative advantages to centralizing revenue collection even if taxation power is itself decentralized (Anderson 2018). In the United States, both the federal and the state governments can impose and collect taxes for their own purposes. In Germany, the central government imposes taxes but most are collected through the state-level governments.

### ***Representation at the centre***

The shared-rule dimension of federalism is as important as the self-rule dimension, although it often receives less attention politically. Shared rule is the way in which the subnational units are given recognition and included in central institutions and decision-making processes; this can enhance a feeling of national unity and ownership over state affairs. Shared rule can be designed in a number of ways, through representation in different branches of government (executive, the judiciary and other institutions, such as independent commissions). Most often, it takes the form of representation in the legislature, often in a separate organ/ chamber in bicameral legislatures (e.g. the United States Senate). The representation in the legislature could be based on the principle of equality of subnational units (promising each unit equal representation), or be weighted according to population (e.g. Germany, India). The upper house in bicameral systems can be elected by the peoples of the subnational units directly, or indirectly elected and appointed by subnational unit, legislatures (International IDEA 2017).

Besides representation in legislatures, other mechanisms exist for shared rule. It should be noted that

these also contribute to, and in many circumstances qualify as, mechanisms for intergovernmental relations (discussed in more detail below). Shared rule can be accounted for in executive institutions; for example, in Nigeria Article 33 of the Constitution requires that a presidential candidate has to win not only a plurality of votes cast nationally but also a minimum of 25 per cent of the votes in two-thirds of Nigeria's states. This ensures that the states have a voice in determining the presidency and also encourages more moderate and inclusive politics by making it difficult for a divisive or non-inclusive candidate to be elected. Representation can also be ensured in the judiciary as a body, formally or informally. In Canada, for example, it has become convention that one-third of the members of the Supreme Court are appointed from Quebec to ensure that province is represented in the court as an arbitrator of federal affairs (International IDEA 2017).

Finally, commissions for intergovernmental relations can also ensure representation at the centre, such as the Financial and Fiscal Commission in South Africa, and therefore serve as mechanisms of shared rule.

### ***Intergovernmental relations***

Intergovernmental relations vary from country to country and evolve over time, playing out in formal and informal ways. In the federal context, intergovernmental relationships encompass both relationships between the centre and the federated units, and relationships among the federal units. Intergovernmental relations can be cooperative or conflictual. Cooperative relationships are characterized by co-decision, coordination and consultation, while conflictual relationships are characterized by collusion, competition, control and even coercion.

Intergovernmental relations can be facilitated and shaped by intergovernmental mechanisms, which can encourage more cooperation and ease conflictual dynamics. Federations often establish, principally through the constitution, intergovernmental coordination mechanisms, which can bring together the highest executive of the federal and regional governments, or serve as a platform for coordination among regions. India's Inter-State Council is good example of a formal mechanism; it was established in 1990 on the basis of Article 263 of the Indian Constitution. Informally, mechanisms can also evolve over time. For example, in Canada the First Ministers' conference serves as a forum for the prime minister and the premiers (heads) of each province and plays a critical role in intergovernmental relationships, even though it is informal in nature, having no basis in the written constitution. In addition to the executive branch, mechanisms may be established at the parliamentary, judicial and sectoral levels as discussed in the section on Representation at the centre above.

### ***EXPERT INSIGHTS***

## **The imperatives of federalism and the proposed draft charter**

*Dr Edmund Tayao, member of the Consultative Committee to Review the 1987 Constitution*

There are a number of motivations behind the Philippines' interest in moving towards federalism. The question of whether federalism will indeed be able to fulfil these motivations and imperatives is considered below.

### ***Redistribution of resources towards subnational units***

One of the primary motivations for federalism for the Philippines is to increase the regions' capacity to exercise authority over spending and service delivery in their territories. As such, in designing a potential federal system for the Philippines, consideration should be given to the principle of form (funds) follows function, in which substantial resources should also be secured for the regions, to support the functions they are assigned under a new constitution. This principle suggests that resources should be distributed according to the functions assigned to the respective levels of government (see expert framework above).

### ***Decentralization for democratization***

Decentralization is used globally to deepen democracy and compensate for perceived or real governance deficits; in the Asia Pacific region alone, Cambodia, Indonesia, the Philippines, Thailand, Nepal and Vietnam have all turned to decentralization for democratization purposes. Many of the Arab Uprisings also resulted in reforms to decentralize power, moving power away from central and towards local and subnational governments. The theory is that democracy will be strengthened by engaging all levels of government more effectively in public administration.

The size and area of political jurisdiction is significant in public administration. While Indonesia is not a federal country, government functions are decentralized to subnational levels of government. When comparing the political jurisdictions of Indonesia and the Philippines,

Indonesia has a larger political jurisdiction in terms of area and size. The Philippines has more provinces than Indonesia, but in terms of land area, Indonesia is bigger. These smaller political jurisdictions in the Philippines hinder the effective delivery of public services, such as traffic management and pollution control, because of limited area coverage and jurisdictional concerns. Amalgamation of smaller units into larger subnational units is proposed as a means to improve public service delivery by uniting or integrating local governments into a bigger political body. This will hopefully address the current fragmentation that is inhibiting the delivery of democracy in the Philippines.

Besides enhancing public administration, federalism and decentralization can also promote more responsive governance and infrastructure development. Currently, the Philippines suffers from fragmentation in responsibilities and resources related to infrastructure development and service delivery, which undermines government accountability and effectiveness. Under a federal system, regions can act as powerful hubs to undertake interregional infrastructure projects at the subnational level, such as road networks, irrigation, agro-industrial services, tertiary hospitals and medicine warehouses.

### ***Resolving issues in local governance***

In a unitary government, even if powers are devolved to the subnational government, there is always a risk that they will be recentralized under the national government. This phenomenon occurs across the globe, but it has been seen in the Philippines, under the 1987 Constitution.

Regarding the implementation of the 4Ps, some local governments do not have the capacity to carry out such a programme at the local level. As a result, the implementation of the programme is heavily dependent on assistance from the central government anyway, regardless of the original intention of empowering local governments to manage the program. The lack of capacity of the local governments, means in actuality that the central government continues to exercise allegedly devolved powers. Charter Change for federalism would potentially create an opportunity to strengthen local governance, but in restructuring it is important to consider the absorptive capacity of subnational units in terms of providing services at the local level.

### ***Economic growth and viability***

Federalism can create a favourable environment for business and economic growth. If local economies are better integrated through regional preparation, consolidation and enhancement of local socio-economic plans to meet region-specific demands and needs of local industries, more equitable economic growth would be facilitated throughout the Philippines. Federated regions are geared towards increased economic viability. In the current structure of revenue generation under the 1987 Constitution, local government units (LGUs) are given the power to collect and administer real property taxes including business taxes. Other revenue-generation mechanisms could be devolved to local and regional governments under a new federal system. Under the current system, revenue generation does not fully support the expenditures assigned to local government. In a federal structure of government,

LGUs and regional governments could retain tax powers under the current Local Government Code but also have enhanced resource mobilization capacity to meet newly devolved responsibilities.

## **CHARTER CHANGE PROPOSALS**

# **Overview of draft provisions on federalism by the Consultative Committee to Review the 1987 Constitution**

*Dr Julio Teehankee, member of the Consultative Committee to Review the 1987 Constitution*

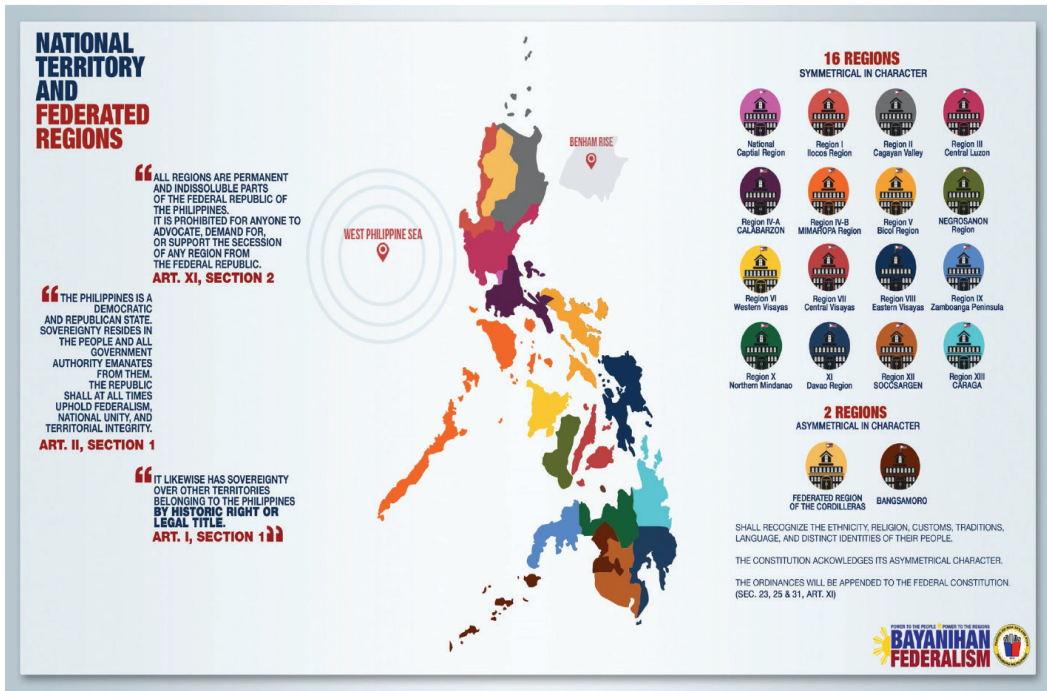
Federalism has been on the political agenda in the Philippines since President Duterte's election campaign, in which federalism featured as one of the major themes. Despite how prominently federalism is in political debates, discussions on federalism are reminiscent of the parable of the blind men and the elephant, where each blind man has his own interpretation of what that elephant is. Federalism can mean different things to different people. As discussed in the conceptual framework above, federalism is about constitutionally guaranteed multi-level and multi-order governance, and about shared and self-rule. The federalism debate in the Philippines is about location, concentration of sovereignty and the absolute power held by the state and among regions.

The style of federalism for the Philippines, if designed and implemented, would be more of the 'holding together' type (see expert framework above), examples of which show that one way for a country to overcome

internal conflict is for the central government or national government to give power to local constituent units. Bayanihan federalism, as envisioned by the draft constitution drawn up by the Consultative Committee to Review the 1987 Constitution (ConCom), has three defining characteristics: it is evolving, cooperative and bottom-up. The federal transition in the Philippines is not meant to be a single all-encompassing event, but rather to evolve over time. There will be a list of competencies for federated states; those that can be readily handled by the federated states will be devolved to them immediately, while those competencies that the regional governments lack the capacity to deliver will be supported by the federal government through block grants, at least transitionally. While the Philippines federal transition would represent a 'holding together' at the national level, at the regional level it will be a coming-together type of federalism, since the existing 81 provinces would be merged into 16 regions.

The design of the 2018 ConCom constitutional draft is Bayanihan federalism and emphasizes cooperative federalism. While some critics claim that federalism will only benefit two or three regions in the Philippines, the Filipino concept of Bayanihan symbolizes the idea that all regions can prosper and progress, with regions that are underdeveloped supported by others that have more resources.

Figure 2. ConCom federalism proposal



Source: Consultative Committee to Review the 1987 Constitution (ConCom 2018)

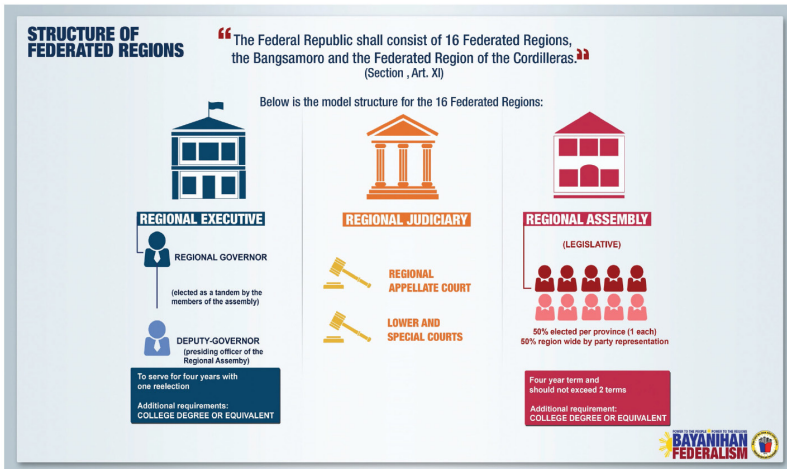
The ConCom design shows a preference for a strong federal government (see Figure 2). Thus, it is centralized federalism with empowered regions. The draft calls for the creation of 16 federated (symmetrical) regions, which will have the same powers in relation to each other and the central government; in addition, there are asymmetrical powers for Bangsamoro and Cordillera regions, which will have their own setup and their own organic law.

In the distribution of power, each level of the government

has its own exclusive powers. The powers essential for running the nation state—such as defence, immigration, foreign relations, monetary controls—are retained by the federal government. There are also reserved powers for the regions. Shared powers are identified as all those that are not specifically mentioned in the lists of exclusive and reserved powers. The principle is that these powers should be assigned based on relative capacity, and managed by federal law in cases of conflict.

Regional governments (see Figure 3) will include a regional executive consisting of a Regional Governor and a Regional Vice Governor. They will be elected but not directly elected. At the regional level, there will be a ministerial or parliamentary system, with a regional assembly, composed of two types of representative from different regions: one representative per province (or independent chartered city or highly urbanized city), and one representative based on proportional representation. The division of judicial power among levels of government will largely remain the same as under the 1987 Constitution, with the current regional trial courts becoming regional appellate courts, basically a change in nomenclature.

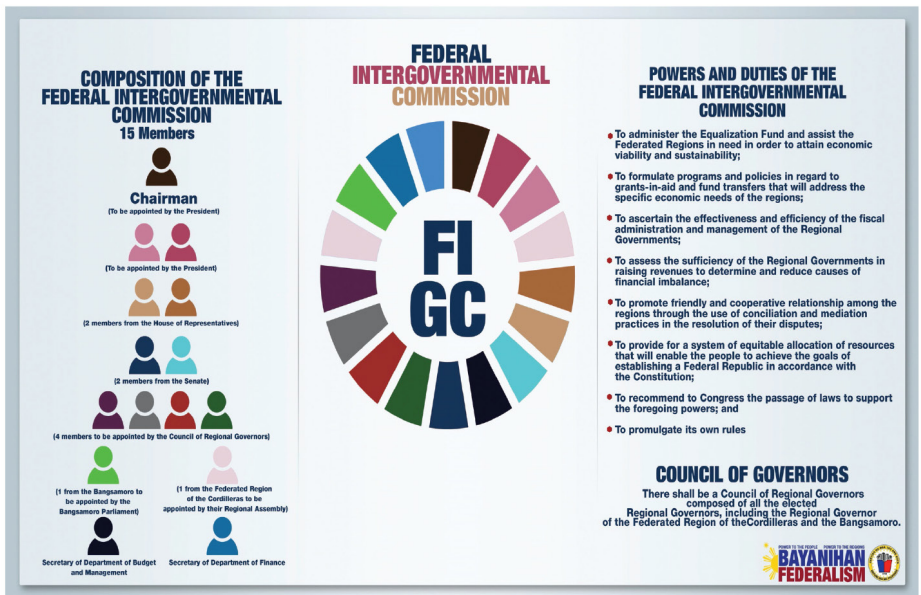
Figure 3. The structure of federated regions in the ConCom proposal



Source: Consultative Committee to Review the 1987 Constitution (ConCom 2018)

the draft charter provides for the creation of a Federal Inter-governmental Commission (FIGC) (see Figure 4). The draft also calls for a Council of Governors to facilitate horizontal inter-regional relationships, which could potentially influence regions' collective bargaining power with the central government.

Figure 4. ConCom's proposed Federal Intergovernmental Commission



Source: Consultative Committee to Review the 1987 Constitution (ConCom 2018)

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# Intergovernmental Relations In The Philippines



*The following is the full text of Ateneo Policy Center Fellow Atty. Michael Henry Yusingco's presentation at the National Conference on Intergovernmental Relations with the Bangsamoro held last 01 October 2019 in Makati City.*

A pleasant morning to everyone here! Lots of familiar faces, which makes me even more nervous to make this presentation. In any case, my presentation this morning is clearly about IGR in the Philippines, but I will only focus on two points:

1. Various institutionalized IGR mechanisms that we currently have and highlight particular features of these institutionalized IGR arrangements;
2. Propose suggestions on how to make IGR in the Philippines work.

But before that, just one shameless plug. Benny early on mentioned this joint project we have: Access Bangsamoro, the website that we launched recently. Access Bangsamoro is an online portal, which aims to facilitate free flow of information, analysis, and discussion on three broad areas which we think are crucial in ensuring the success of the BARMM:

1. Fiscal autonomy of the BARMM
2. Establishment of the Bangsamoro Parliament
3. IGR

Let me begin my presentation with just a brief review of what IGR means. I think the panel after this will delve deeper into what IGR means. This is just a broad overview and I'd just like to make three major observations or points about IGR:

IGR is broadly defined as the coming together of different orders of government through formal or informal processes, for the achievement of common goals. I would like to emphasize that IGR can also come

in informal processes, not just formal processes.

The essence of IGR is to facilitate cooperation and collaboration between the different orders of government. Now, it does that primarily to avoid confusion, duplication of delivery of services, duplication of policymaking, fragmentation, and others. Again, the collaboration and cooperation comes at the policy formulation stage and also at the implementation stage. Therefore, we have to see that IGR is a vital component of good governance. We have to appreciate that.

IGR is traditionally associated with federal systems. It is described as “the lifeblood of federal systems,” but scholars also believe, and I also believe, that IGR can be successfully applied to unitary systems with embedded decentralized arrangements, like the Philippines.

So our conversation this morning is not some pie in the sky conversation. It is a discussion that has practical value.

IGR is already present in the 1987 Constitution. In fact, this validates the observation of some scholars that our constitution has a quasi-federal ethos. Precisely because Article X already contains some federal features. Section 13, Article X demonstrates the “Horizontal IGR mechanism” – this is a mandate for all local government units to work together for the common good or for the greater good. This is a directive to implement the IGR mechanism at the sub-national level, which is the horizontal IGR. Again, I would like to highlight that the purpose of coordination and cooperation between the different levels of government is for the common good: mutual benefit to all involved. That is the purpose of the IGR.

Section 15, Article X is what we call “Vertical IGR.” This is the collaboration or cooperation of the different levels

of government at the vertical level: national government and local government. The engagement, the interaction is between these two levels. Interesting here, this is where we become unique because the constitution introduces here the participation of civil society in the IGR mechanism. Because here, the participation of non-government entities is mandated by the constitution itself. Many of you know that Section 14 actually describes the Regional Development Councils. This is the constitutional basis of the Regional Development Councils that we have now. More importantly, this introduces the idea that in that vertical IGR, the participation of CSOs must be considered, is mandated actually. You will notice the purpose of IGR: the purpose of IGR is also to strengthen local autonomy. Again, this is quite unique because in federal systems, where the autonomy of the sub-national government is already a given, this kind of articulation is not present. But in a unitary system, in our Constitution, the IGR mechanism is there specifically to strengthen local autonomy. That's quite unique.

Now to the local government code. IGR is present in our constitution, it is also present in our statutes, specifically the Local Government Code. In the local government code, it just emphasizes and repeats the point or the purpose of the IGR mechanism to strengthen local autonomy. The last slide specifically directs that local governments must be involved at the planning stage and at the implementation stage. IGR again, even in our statutes, emphasizes that its purpose is to strengthen local autonomy. The power of the president to supervise local governments must be exercised consistent with local autonomy — this is not found in our constitution, but in the local government code, the law qualifies how that power is exercised. Obviously, the author of this law was biased in favor of local governments. That's why probably this sentence was included there, but it's a peculiar way of understanding that power of the

president to supervise – that it has to be consistent with local autonomy. This is something that we should reflect on further because in a way, this is sort of inconsistent with existing jurisprudence. Our Supreme Court has always favored the exercise of supervisory power of the president that may not be consistent with the principle of local autonomy. But anyway, that’s something we can reflect on further.

I go now to the BOL. In the articulation of the IGR mechanism in the BOL, we have to understand it from the IGR perspective. Therefore, when you try to look at the provision, we have to put more attention on the collaboration and cooperation aspect of the provision. I like the last phrase that the “consultation and the negotiation must be conducted in a non-adversarial manner.” That is very, very particular and very, very attuned to the IGR ethos which is when the different orders of government come together to work together, there has to be a mutual recognition, mutual respect. There has to be that idea that we are here on this IGR table because we need each other. We are not here to fight each other, we are here to work together for that common goal, for that common benefit, for that greater good, and that we can only achieve that if we work together.

I also like to emphasize that BOL may enumerate specific IGR bodies, which makes it a formal IGR body. The needs of the BARMM right now also necessitates the organization of informal IGR mechanisms. Let me give you a clear example. For example, the matter of indigenous peoples rights. Right now, there is no provision in the BOL – and I could be correct, I could be wrong – there is no provision in the BOL that mandates the creation of an IGR mechanism for the rights of indigenous peoples. But think about it, the rights of indigenous peoples are drawn from the constitution, from a national law, and also from the

BOL. The fact that there are three levels of laws or three levels of authorities involved necessitates that when we try to resolve indigenous peoples rights within the BARMM, there has to be some kind of IGR mechanism. It cannot be that only one level of government will dictate on how these rights are implemented or resolved. Indigenous peoples' concerns in the BARMM has to come from the cooperation and collaboration of 1) national government represented by the national body, 2) regional government represented by the appointed ministry, and 3) local governments that have direct interaction with indigenous peoples communities. And by the way, the indigenous peoples themselves, if they are organized, will have to participate in that IGR mechanism.

The other example that I want to raise is the education framework that is mandated by the BOL, that the Bangsamoro Parliament has to create. Now if you think about it, when we talk about education – in fact this is stated in the BOL – we talk about national law that governs the CHED, the DepEd – these are national laws. CHED and DepEd are national government agencies, and yet the BOL also authorizes the Bangsamoro Parliament to enact laws that govern the education within the BARMM. Therefore, it's also clear that by statute, the regional government also has jurisdiction over education in the BARMM. If you think about it, because there are two jurisdictions now – two levels of governance that have jurisdiction over education – necessarily, there has to be an IGR mechanism for education. This could be a formal IGR mechanism, which maybe the Bangsamoro Parliament would pass later on, but right now because there is no IGR body for education – again, I could be corrected if I am wrong – there has to be an informal IGR mechanism now for education. The national agencies involved, the ministry involved must come together with the other stakeholders and really determine, at the very least from the start, from the initial stages, what this

education framework in the BARMM should look like. If this matter will be executed without any IGR mechanism, then potentially the different agencies would just go along their own ways. But down the road they can meet each other and potentially will come to a disagreement. To avoid that, the IGR mechanism could be applied for this particular government mandate.

Now that I have exhausted the IGR in our current structure, I go to my second point, which is suggestions that I propose to be considered in order to make IGR work, particularly IGR in the Bangsamoro Region.

### **We need a paradigm shift.**

I'm sure that you have noticed that in the past presentations, we are so focused on the hierarchical relationship of our governments, which is understandable because our governments are structured that way. We have a national government, we have the regional government, and then we have the local government. That is how the legal order is established. But in my view, we are too focused on the hierarchical relationship, which we cannot avoid – it's there, it's in the law, it's in our constitution. And we pay so little attention at the need for these different levels of government to coordinate, to cooperate, and to collaborate. We do not put any attention on that side. We are too preoccupied with how should the regional government supervise the local government, how should the president's power of supervision be limited, or how should it be exercised in the BARMM. Those are legitimate conversations – I do not say that they are not legitimate, but we rarely talk about how do we cooperate, how do we come together and work together.

I will give you an example. This is what is happening

now to traffic in Metro Manila. Because we are so preoccupied with the hierarchical relationship, we are always looking at the national government to solve the problem because that is their job and they have the authority. Even local governments think that way. Even local governments in Metro Manila say “We’ll just do our part in our own sphere and let the national government take care of the others.” Well, even civil society in Metro Manila is like that, “Let the national government solve this,” and rarely ask themselves what can we do to help solve the problem. The reason for that is that we are too attached to that hierarchical relationship of government. We do not put premium on the need to cooperate and collaborate.

That is what I mean by a paradigm shift. I do not mean we set aside that traditional view of regulation, supervision, and so on – we cannot set that aside. What I mean is, for IGR to work in the Philippines, we have to focus on the notion of cooperation and collaboration. We have to start asking ourselves: what are the different levels of cooperation? Is it just sharing information? Is it just sharing data? Or is it about coordinating our efforts? Is it about making commitments to solve issues, to solve problems? Is it about working together in an actual development initiative? Those are the questions that we need to be asking more than what is supervision or what is regulation and so forth. Those are important questions but as far as IGR is concerned, I think we should be more focused on that collaboration, coordination, cooperation side.

### **The participation of CSOs must be mandatory.**

I have shown that it is actually mandatory under the constitution, but in practice, I am not particularly confident that this is the case. When we think about organizing the IGR bodies in the BOL, we have to keep in

mind that for it to be successful, it's not just about the presence of the national government and the presence of the regional government or even just the presence of the local government. For it to be really successful and to deliver the results that we want, civil society must have a place in that table. Of course the challenge is when we go about civil society in the Bangsamoro, who are they? That is the challenge, and I won't be able to answer that this morning. That is a serious consideration, but the point I'm driving right here is that for IGR to be successful in the BARMM — for IGR to be successful in the Philippines, for that matter — the engagement of the CSOs must be mandatory. They must be there, have a clear and strong presence at the IGR table.

**There has to be a premium on deliberative process.**

I actually got this idea from Benny. When we were working at the House of Representatives, our theme there was: let's build consensus among the lawmakers and the staff of the lawmakers to understand what the BOL was. Benny was very insistent that the ethos has to be consensus-building. The deliberative process is the same. Parties to the IGR table must come with a clear position based on research and analysis. They must come to the table armed with what they want to achieve, but it does not end there. They must also come to the table willing to listen to the other parties, because they also come to the table prepared and therefore, are worth listening to. But more importantly — and this is the key — they come to the table open to the possibility that they will change their minds. They may be coming into that IGR table firmly convinced that they are right based on evidence and research, but ultimately they are open to the possibility that they could be wrong, the other party could be right, and they could come up with a mutually beneficial solution. Now that is the essence of deliberative process. The reason why I emphasized this is because we

do not want IGR to just be a talk fest, where the different representatives of government will come there and just make long speeches without any intention of listening to the others, or even not open to the possibility that they could be wrong. So for IGR to work, the mindset that deliberative process must be applied.

Just to summarize, for IGR to work in the Philippines and the Bangsamoro:

1. We have to change the way we think when it comes to governance, or at least the relationship of the different levels of government that we have. We have to focus on cooperation and collaboration.

2. CSOs must be on the table from planning to implementation.

3. When we talk about IGR, necessarily deliberative process has to be an integral component of that. Otherwise, IGR will not deliver the results that we all aspire to have.



# Oversight and Intergovernmental Relations in the Bangsamoro

Atty. Ishak V. Mastura, LL.M.



The Philippines is a Unitary State. There is no more potent expression of this state of affairs than the Constitutional provision that all executive authority lies with the President. The President is the head of state and the head of government, while under our republican system the Executive branch of government is his exclusive turf.

When the government and the Moro Islamic Liberation Front (MILF) were negotiating peace the supervision of the President over autonomous regions under the Constitution seemed to be a sticking point for the parties.

The supervision or oversight of the President over autonomous regions was viewed as curtailing the autonomous region from being fully autonomous, especially since the President was supervising or had oversight over the person of the head of the autonomous region.

This supervision could not be dispensed with as a logical end of the fact that the Constitutional provisions on “autonomous regions” are placed under the Executive department.

Upon examination of other Unitary States such as Britain, the impasse was resolved by proposing an Intergovernmental Relations (IGR) mechanism, which is now created by the Bangsamoro Organic Law (BOL) as the “IGR Body.”

The BOL did away with the personal supervision of the President of the head of the autonomous region, as in the case of the Regional Governor in the defunct Autonomous Region in Muslim Mindanao (ARMM). Instead the Constitutional provision that the President sees to it that the

laws be faithfully executed in the autonomous region was used in the BOL.

This oversight power of the President over autonomous regions is actually an extension if not expansion of the “Take Care Clause.”

As pointed out in one US article—the Constitution does not say that the President shall execute the laws, but that “he shall take Care that the Laws be faithfully executed,” i.e., by others, who are commonly, but not always with strict accuracy, termed his subordinates. (Powers derived from the “take care” duty, last checked August 3, 2019)

Interestingly enough the “Take Care Clause” became central to legal arguments on the investigations of Robert Mueller of US President Donald Trump very recently.

As argued the “Take Care Clause” plays a central role in Mueller’s constitutional argument. American legal scholars have studied the “protean” nature of the clause and the many contradictory interpretations that courts have adopted; here, Mueller’s analysis has some resemblance to the understanding set out by constitutional experts, who argue that the “Take Care Clause” imposes a “duty of fidelity” on the president. Mueller does adhere to well-established readings of the clause as empowering the president to exercise prosecutorial discretion and to remove officers. But he also reads it as constraining presidential action, writing that “the concept of ‘faithful execution’ connotes the use of power in the interest of the public, not in the office-holder’s personal interests.” Thus, the duty to “take care” can also be a limitation on discretion. (Jurecic, Q.,

“Robert Mueller’s Take Care Clause”, lawfareblog.com, April 29, 2019).

In the Philippines, we do not have similar jurisprudence interpreting the “take care clause”. But given its interpretation in US jurisprudence, it seems that the “take care clause” is an active duty and not a passive one of the President. Its implications are that the President has an active role in the affairs of autonomous regions such as the Bangsamoro Autonomous Region in Muslim Mindanao (BARMM).

Given that it is a new feature in the BOL, it remains to

be seen whether or not the IGR Body in the BOL, which is usually a feature in Federal Constitutions, will provide a suitable mechanism to balance the call for an active role of the President to supervise the BARMM as provided in the “take care clause”, with his mandate in accordance with his oath of office as protector of the Constitution to see to it that the autonomy of autonomous regions is preserved.

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## ABOUT THE INSTITUTE FOR AUTONOMY AND GOVERNANCE

The Institute for Autonomy and Governance (IAG) is a southern Philippines-based think tank at the forefront of capacity building, research, forums, training and technical assistance for advancing public policy for peace, security and good governance in the region. Our work for the past two decades has contributed in defining needed measures toward human security and meaningful self-governance in the Bangsamoro region.

IAG has engaged with regional and national executive authorities and policymakers, Moro revolutionary fronts, local government units, security sector and key leaders and thinkers toward building consensus on political, economic, and security issues.

As a homegrown public policy center with strong national and international linkages, IAG is able to help raise the bar of regional and local public policymaking to international standards even as we maintain sensitivity to the complexities and peculiarities of local settings, earning the trust and respect of a broad range of stakeholders.

We have regularly provided capacity-building programs to the Regional Legislative Assembly during the time of the ARMM, the Bangsamoro Transition Authority of the present BARMM, and constituent Local Government Units (LGUs).

IAG is committed to the development of public policies that promote and protect the rights and welfare of vulnerable groups. We championed and provided technical assistance in crafting local and regional policies, including the Bangsamoro Organic Law provisions on Indigenous Peoples, women, youth and children.

The pioneering researches we conducted on youth vulnerability, traditional madaris and the baseline studies on violent extremism in the Philippines are driving P/CVE policies and programs in the country.

Our facilitation of inter-religious and political dialogue is well recognized and we lead in promoting inclusivity and social cohesion in the Mindanao peace process. IAG convenes the annual Kusog Mindanaw conference that brings together Mindanao sectoral leaders in dialogue on issues of peace, security, governance and development.

IAG provided technical assistance in the establishment of the Iranun Development Council (IDC), an economic and development aggregation of five local government units in Maguindanao. We currently implement the same principle of interlocal cooperation, this time with five municipalities on the western seaboard of Basilan province that make up the Western Basilan Alliance.

IAG helped raised capacities of local government units, military and police in peacebuilding and security sector reforms. From a series of training-workshops we conducted for the uniformed men and women of the Armed Forces, we produced a security sector reform training manual, a vital resource from which Filipino soldiers can glean a broader understanding of their duties as peacekeepers.

IAG maintains a network of more than 100 civil society organizations in Mindanao that we assist in capacity building in peacebuilding, governance and politics.

We have published numerous policy papers and journals on political, economic, and security issues that define the needed measures to be undertaken for meaningful self-governance in the southern Philippines.



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