

THE UN CONSTITUTIONAL

A Newsletter on United Nations
Constitutional Support



Issue 9
Winter 2019-20

FOREWORD

“The UN Constitutional” team is pleased to publish the ninth issue of its newsletter featuring articles by constitutional experts and reports from the field. In this issue, we interview Roberto Gargarella about the evolution of constitutionalism in Latin America. The issue also features an article on the rule of law dilemma presented by the judiciary in constitutional reforms; as well as an analysis of the Sudan and Philippines constitutional processes; in addition to updates on UN support to constitutional processes in three countries.

“The UN Constitutional” is a manifestation of the collective desire of 6 UN entities to raise awareness around the UN of constitutional issues and themes, share information, and strengthen the provision of constitutional assistance.

The UN Constitutional Team:

- Department of Political & Peacebuilding Affairs (DPPA)
- Department of Peace Operations (DPO)
- Office of the High Commissioner for Human Rights (OHCHR)
- UN Children's Fund (UNICEF)
- UN Development Programme (UNDP)
- UN Entity for Gender Equality & the Empowerment of Women (UN Women)

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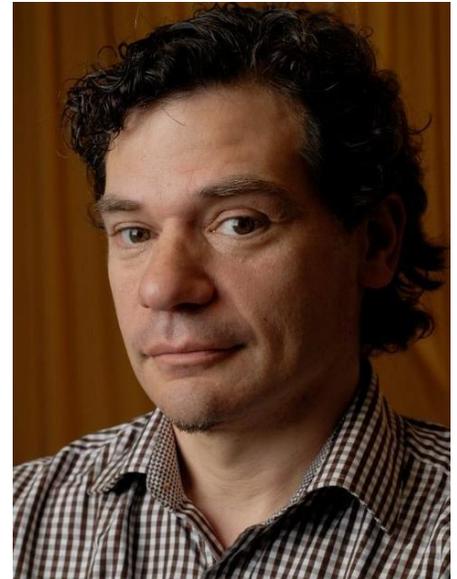
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Focus on constitutionalism in Latin America

Interview with Roberto Gargarella, Professor of Constitutional Theory and Political Philosophy at the Universidad de Buenos Aires and at the Universidad Torcuato Di Tella. He has authored and edited more than 25 books in English and Spanish on constitutional theory, political philosophy, and democratic law, The UN Constitutional thanks Professor Gargarella for this interview on trends in Latin American constitution making.



Q. To begin, can you tell us a bit about the evolution of constitutionalism in Latin America and some of what makes Latin American constitutionalism unique?

Latin American constitutionalism has gone through many different periods. I would mention the following as the most important: first, an “experimental” period (1810-1850), at the time following Latin American independence. Next, we find the “founding moment” (1850-1890), when most countries defined the basic constitutional structure that they still have. In particular, it was during this period when most countries defined the content of their “organization of powers” or system of government. This was done, in most cases, after an unexpected agreement between “liberals” and “conservatives” –the two main political forces, which had a long history of bloody confrontations. This agreement resulted in a system of “checks and balances” that followed the US model, which was the model that most liberals preferred, and a system of concentrated authority (where power mainly rests in the executive branch), which followed the

Spanish heritage, which was demanded by most conservatives. As a result of their compact, most Latin American Constitutions adopted a new model, which combined both demands; this is to say a system of checks and balances that was “unbalanced” towards the Executive. Finally, since the beginning of the 20th Century, and after the 1910 Mexican Revolution, most countries in the region began to re-shape the Constitutions’ “declaration of rights.” This period inaugurated what was called Latin America’s “social constitutionalism”. Following the model of the 1917 Mexican Constitution, most countries began to adopt long lists of social, economic and cultural rights. Both features are still present in most Latin American Constitutions: an organization of powers that it is still very much in line with what it was achieved by the mid-19th Century, and declarations of rights that still very much follow the model of a long list of social and economic rights that was defined at the beginning of the 20th century. By the end of the 20th century, we had a new wave of constitutional changes, which many people defined as the “New Latin American constitutionalism.” In my view, this “new model” is in a way “too old”: It only reinforced the kind of organization of

powers that was typical in the 19th century, and also extended the kind of declaration of rights that became typical in the 20th century.

Q. What are some challenges to constitutionalism in Latin America today?

In my view, what is necessary is to adjust the two main parts of the Constitution –declaration of rights, organization of powers- that began to work in different directions: as said, since the beginning of the 20th century we have been reforming once and again our Constitutions in a very peculiar way. As a result, most countries have social, progressive and democratic Constitutions, in what regards their declarations of rights, but at the same time very traditional, elitist and authoritarian organization of powers, which still follows the 19th Century non-democratic model. In sum, we have (what I call) Constitutions with “two souls.” To put it differently, in spite of all these reforms, we still preserved the old “engine room” of the Constitution intact and almost untouched. The challenge is to reform it for once, so as to adjust it and put it in line with the progressive and democratic

reforms introduced in the declaration of rights.

This challenge of executive dominance, or “hyper-presidentialism,” has provoked systematic tendencies of “democratic erosion” from within. It has favored the “gradual colonization” of the entire structure of checks and balances. As a result, in many countries we still have very weak institutions of control. So, in general terms, I would say that we have had problems in preventing undemocratic constitutional changes (although this is a topic that requires further discussion). There are some exceptions, however. The most salient is the one offered by the Colombian Constitutional Court, which was created in 1991, which on some occasions at least has limited the executive’s ability to reform the Constitution in order to extend a presidential mandate.

Q. Latin American constitutions have a lot to offer to other countries undergoing constitutional reform. What would you say are some of the salient “successes” of Latin American constitutions?

Well, it is true that countries like Mexico and Argentina have been pioneers in the creation of judicial tools for the preservation of rights: the “amparo”, in particular, is always mentioned in this respect (in Argentina we have interesting developments regarding the use of the habeas corpus). [Editors: The writ of amparo, like the habeas corpus, may be invoked by any person who believes that any of his/her rights, is being violated. It enables citizens to invoke the action for the violation of any right protected either explicitly or implicitly by the Constitution.] In any case, I think that the other good “lessons” offered by the region are the following: i) the introduction of social

rights (“social constitutionalism” in general). This was a novelty that was created in Mexico 1917 (the first country in the world to include a long list of social economic and cultural rights). The list of rights has expanded further in recent years. They now include multi-cultural rights and human rights (which have been incorporated in many constitutions). The reference that Constitutions such as those of Ecuador and Bolivia made to the Sumak Kausay or “rights of nature” needs also to be considered and discussed ii) I will also mention the advances introduced in many Latin American constitutions in terms of access to justice. Countries such as Costa Rica and Colombia have been exemplary in this respect, with extremely low requirements for accessing the Courts, through amparos, acciones populares and the like, and very low “standing” requirements. iii) Finally, I will also mention the 169 ILO Convention, and the requirements of “consulta previa” [prior consultation] for cases of economic initiatives that may put in danger the environment or the rights of indigenous communities.

Q. It is said that some of the most inclusive and participatory constitution making processes have taken place in Latin America. Can you talk a little bit about the experience of constitution making in Latin America?

Yes, it is said that many of the processes of constitution-making in Latin America were open and participatory, including those of Venezuela, Ecuador and Bolivia. I want to make two claims in this regard, one more descriptive, one more normative. The descriptive one is this: I wish those processes had been really open and participatory. I absolutely agree that constitutions need to be written in such a way (through an inclusive and deliberative process). However, they could have been substantially more open. The Bolivian process, which initially was the most interesting of all of them, ended up convening in a military barrack, given the level of conflicts and disputes that characterized the process. Worse still, in most cases, even today nobody knows who wrote



the final version of some of the articles -which contradicted some of what was agreed to during the debates. In Ecuador, the process was very inclusive, at the beginning, but immediately we had the then President of the Convention, Alberto Acosta, and some of his followers, resign because they found severe disagreements with those who gained control of the debates. Acosta led, at that time, what was in my view the most interesting group taking part of the debates (an ecological and pro-aborigin group, which was situated in the left of the ideological spectrum. They were for instance responsible of writing one of the most challenging and interesting aspects of this Constitution, which has to do with the "derechos de la naturaleza," namely *sumak kausay*).

My normative point is the following: We need Constitutions to be written through popular, inclusive, pluralist, transparent, deliberative, constituent assemblies. But, in most occasions, the most important aspects of the Constitution became developed through legal and interpretative debates, which begin when the constitution-making process has finished. And what we have been seen in Latin America is that legal processes of the kind end up being controlled by the Executive authority. In other words, those who become charged with interpreting the Constitution are allies of the President (say, members of the Constitutional Court or the supreme court, etc.). In this way, we end up having decisions like the one we got in Ecuador, where the most revolutionary clause included in the constitution, namely the one referred to the *sumak kawsay*, was interpreted by Correa's Court as if it were compatible with the most brutal forms of natural-resource-exploitation. I mean: the one and only purpose of the clause was to make those initiatives unconstitutional. Shortly after, the

Court, by interpreting the Constitution, said just the opposite.

Q. Do you have anything to say on the "right to peace" and how it's impacted conflict and conflict resolution in the region? Article 22 of the Colombian constitution provides that "peace is a right and a duty of which compliance is mandatory." A lot of our readers will be interested in knowing how constitutions – in particular this right to peace – have impacted conflict resolution.

The Colombian Peace Process has extraordinary political and legal importance. I would say two things, one about the law, and the other about democratic politics. The first is that the peace process included negotiating peace, partial amnesties, pardons, restitution of land, etc. Now, what has been done there (particularly in regard to the decision not to punish certain perpetrators of crimes in certain occasions) has generated numerous controversies. And the concerns that were raised about the use of amnesty in Colombia is particularly understandable in a region where historically dictators have absolved themselves of any legal liability before leaving power. But it is important to distinguish between amnesty granted to one's self (or one's regime) without any procedural or democratic legitimacy versus amnesties that are decided by and through democratic institutions and processes, including through popular consultations – as was the case in Colombia. The other issue that I wanted to mention is even more centrally related to democracy and has to do with the referendum that was used by Santos' government at the end of the Peace Process. This was a new instance of a polemic use of a seemingly democratic tool, namely a popular consultation. For me, as a democrat, it is important to

make clear that democratic decisions gain legitimacy only according to the level of discussion and inclusion that characterize them. In other words: a decision that is preceded by a debate where only a few participated is an elitist decision, and a decision where everybody participates (like a referendum) but is not preceded by a robust and ample debate also lacks democratic legitimacy.

Constitutional reform and the judiciary: a rule of law dilemma

By Jan van Zyl Smit, Bingham Centre for the Rule of Law

One of the legacies of conflict and authoritarian rule is that citizens may have little confidence in the ability of their judiciary to uphold the rule of law. It is widely accepted that constitutional reform offers an opportunity to address this problem by strengthening judicial tenure and providing other safeguards for judicial independence. However, the issue of incumbent judges can nonetheless present a rule of law dilemma. As truth commission reports have shown, many societies want to engage with the role of the judiciary during the past and ensure that those judges who remain in office have the qualities required for building a future that is based on the rule of law. In this lies the dilemma: without a qualified, effective and legitimate judiciary, the rule of law is unlikely to thrive but, at the same time, removing or officially reassessing judges by any process other than one that is intended to apply under all circumstances, and respects the usual safeguards for judicial independence, may itself undermine the rule of law.

Responses to this dilemma have varied widely. In some countries new constitutions retained the judges who were in office, as Spain and Portugal did in the 1970s, and South Africa after the end of apartheid. Other countries combined constitutional change with a wholesale renewal of the judiciary. After East Germany joined the Federal Republic of Germany in 1990, its courts were reorganised and restaffed, with judges from the communist era

having to compete with new applicants. In some East German regions, this resulted in most of the judges being replaced by West German lawyers. A similar exercise of court restructuring and fresh appointment of judges was carried out in Bosnia and Herzegovina in the early 2000s, but there a relative shortage of applicants led to the majority of judges being reappointed. An earlier example of judges being reappointed after screening occurred in Argentina's federal courts following the end of military rule in 1983, but this process was justified as a remedy for an illegal period of governance and preceded full-scale constitutional reform.

Intermediate options exist between retention and wholesale renewal. For example, the 2010 Constitution of

Kenya required a judicial vetting process. Vetting generally involves the scrutiny of individual office holders for qualities of integrity and competence. In Kenya, where the legal profession and some civil society groups claimed judicial corruption was widespread and public trust in the judiciary was low, a specialist board with one-third international members vetted every judge. It investigated complaints against judges and assessed their judicial skills and commitment to constitutional values. Those judges who were found unsuitable for office were removed.

As a precedent for vetting, the drafters of the Kenyan constitution referred to lustration programmes undertaken by post-communist states in Central and Eastern Europe, where



judges were screened for their links to the secret police, the communist party or complicity in human rights abuses. Such screening could take place either as part of an open competition for appointment to new courts (as in the East German and Bosnian cases that have already been mentioned), or through the individual assessment of judges alongside other state employees, of which the Czech Republic provided a leading example.

Notwithstanding the global spread of ideas for processes such as judicial reappointment, vetting or lustration, caution is still needed when constitution-making bodies consider the position of incumbent judges. Personnel reforms – that is, screening and possibly replacing judges – are not the only way in which a constitution can strengthen the ability of courts to uphold the rule of law and many argue that they are seldom, if ever, the best. Alternative or additional measures include structural reforms such as the establishment of a new constitutional or apex court, the creation or reform of judicial selection and discipline bodies, and improving the financing and operational autonomy of the judicial branch of government. These measures do not target incumbent judges but can reduce their involvement in the most politically sensitive cases, improve their accountability and dilute their influence on the composition and functioning of the courts over time.

If a country in transition to democracy decides to take some action specifically with regard to incumbent judges, then it would do well to reflect on comparative experiences that can provide lessons about risks to the rule of law, and how they may be avoided. First, the constitution should provide clear legal authority for any special process in relation to incumbent judges, and distinguish that process from the

permanent mechanisms by which judges are appointed, assessed or disciplined. Failure to do so may result in uncertainty about the scope and justification for such a special process, as well as the safeguards that are required. For example, in Serbia, the 2006 Constitution changed the process for the selection of judges. Two years later the Serbian parliament passed legislation that required all incumbent judges to compete afresh for judicial posts on the grounds that their previous appointment was invalid. The Serbian Constitutional Court initially accepted this premise. A fresh appointment competition was undertaken, but afterwards found to be unconstitutional because the process was not sufficiently individualised and failed to produce specific reasons for removing each judge who was not reappointed.

Secondly, the more a special process interferes with traditional safeguards for judicial independence, the stronger the justification that is required. The UN Special Rapporteur on the Independence of Judges and Lawyers argues that competitive reappointment should be resorted to only 'where the situation is so serious that [it] is the only course of action left'.¹

Thirdly, the procedures by which incumbent judges are assessed must be fair. This requires at a minimum that the process should be conducted by an independent and impartial body, that the assessment criteria should be transparent, and that decisions should be made on the basis of evidence which judges have been given an opportunity to challenge, for example through cross-examination if witnesses are relied

upon. If the decision is made that a judge should be removed from office, then that decision should be subject to appeal or review. The Kenyan Constitution denied ordinary courts jurisdiction to rule on the judicial vetting process, presumably to avoid conflicts of interest and because it did not have confidence in those courts. Instead, the Kenyan legislative framework gave the vetting body sole responsibility for reviewing its own decisions. A better solution may be to establish a dedicated body to deal with appeals against vetting decisions. In the judicial vetting process that is currently taking place in Albania, this has been done by entrusting vetting appeals to a pre-vetted chamber of the Constitutional Court.

In summary, great care is needed to ensure that any special process for screening incumbent judges from a previous era enhances the rule of law rather than imperilling it.

The present author is leading a [research project](#) at the Bingham Centre for the Rule of Law, in which experts from 12 countries in Africa, Asia, Europe and Latin America are examining how incumbent judges were dealt with during transitions in their jurisdictions. The research is funded by the UK Arts and Humanities Research Council through Grant No AH/R005494/1 and a full set of findings will be published in early 2020.

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¹ Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 23 January 2006 (UN Doc E/CN.4/2006/52), para 54.

Sudan's Constitutional Charter 2019: Highlights on Sudan's Step Towards Constitutional Democracy and Rule of Law

By Rule of Law Unit, UNAMID

Following the overthrow of President Omar Al Bashir of Sudan on 11 April 2019, the Forces of Freedom and Change (FFC) that championed the revolutionary protests engaged in negotiations with the Transitional Military Council (TMC) for a peaceful transition from military rule to civilian government in Sudan. The negotiations led to the signing of a Constitutional Charter between the TMC and the FFC on 17 August 2019 on the establishment of a new civilian-led transitional government and transitional institutions. This article highlights key provisions of the Constitutional Charter (Charter) especially as they relate to the rule of law, constitutional democracy and governance.

Is the Constitutional Charter of Sudan a Constitution *Stricto Senso*?

A Constitution can be described as a body of fundamental and supreme rules, institutions, and principles according to which a State and its people have accepted to be governed. Ordinarily, the constitution making process reflects the aspirations and visions of a people through participatory, representative and deliberative processes, including sometimes a referendum. The Charter of Sudan did not strictly follow this process as it was an agreement negotiated between the TMC and FFC. However, the Charter fits a prototypical transitional constitution, which are often elite negotiated instruments. In a nutshell, the Charter abrogates the 2005 Constitution of Sudan and declares Sudan a democratic and sovereign state with commitments to implement the rule of law through accountability for crimes committed during the previous regime and to restore fundamental human rights.

Unlike previous Constitutions, it does not declare Sharia Law as the basis of all laws in Sudan.

Major Features of the Transitional Government Established by the Charter (Relating to Rule of Law)

Established Transitional Period of 39 Months

Chapter 2 of the Charter establishes a transitional period of 39 months with timelines for the attainment of specific milestones, including the completion of the peace process in Sudan. During the transitional period, key governance, rule of law, human rights and legal reforms will be undertaken. These include inter alia the repealing of outdated or discriminatory laws, the holding of a constitutional conference, the drafting of a permanent constitution, the establishment of transitional justice mechanisms, including accountability for crimes committed by members of the former regime against the Sudanese people including Darfuris,

as well as investigations of violations committed on 03 June 2019 during the revolutionary protests.

Sovereign Council, Transitional Cabinet and the Prime Minister and Legislative Council

The Charter establishes three key governance structures. Chapter four creates a joint military and civilian Sovereign Council, consisting of members of the TMC and FFC, with overall authority over the administration of the country. A military leader will head the Council for the first 21 months, followed by a civilian leader for the next 18 months. Chapter five establishes a Transitional Cabinet of ministers headed by a civilian Prime Minister with authority over the day-to-day business of government. Chapter seven establishes a 300-member Transitional Legislative Council conferred with powers to enact laws, oversee the performance of the Cabinet, approve budgets and ratify treaties to which Sudan is a signatory. While the first two organs have been established and are functional, the establishment of the legislative assembly has been delayed pending peace negotiations.

Supreme Judicial Council and the Supreme Council of the Public Prosecution

The Charter guarantees the establishment of an independent judiciary and public prosecutor. It further confers judicial and financial independence on the judiciary while it stipulates that the Public Prosecution office shall operate as an independent agency in accordance with its enabling laws. Chapter eight establishes the Supreme Judicial Council charged with the powers to select the Chief Justice and members of the Judiciary for appointment by the Sovereign Council. Chapter nine establishes the Supreme Council of the Public Prosecution as an

independent body which shall nominate the Prosecutor-General and assistants for appointment by the Sovereign Council. If fully implemented, these provisions will create a much more independent and effective judiciary than under the 2005 Constitution and have a positive impact on the rule of law and human rights in Sudan, as well as instill in the politics and governance of Sudan a strong principle of separation of powers. It further would allow the Judiciary to assert its independent authority over any oppressive actions of the executive or the enactment of oppressive laws by the legislature.

Independent Commissions

To carry out key functions during the transitional period, Chapter 12 of the Charter establishes a number of independent commissions. These include inter alia the Peace Commission; the Constitutional Drafting and the Constitutional Conference Commission; the Elections Commission; the Legal Reform Commission; the Human Rights Commission; the Land Commission; the Transitional Justice Commission; and the Women and Gender Equality Commission. It is envisaged that the Transitional Justice Commission will implement transitional justice and accountability of crimes committed by the previous regimes, including in Darfur. As their respective powers and functions shall be stipulated in separate legislation, and the legislative assembly is yet to be appointed, the timeline for the establishment of these commissions remains uncertain.

Human Rights Regimes

Chapter 14 of the Charter establishes a comprehensive human rights regime that makes all rights and freedoms contained in international human rights agreements, ratified by Sudan, an integral part of the constitution. It is important to note



the robust and progressive rights of women and children, as well as socio-economic rights – all of which are improvements on the 2005 Constitution. The fact that these rights are made obligatory in the Charter is a welcome development, provided they are replicated in the permanent constitution to be drafted and implemented after the interim period.

Conclusion

The provisions of the Charter represent the negotiated aspirations of various stakeholders in their pursuit to transition to a civilian led and elected government. While there is a risk that some forces in Sudan may continue to reject the document as not representative of all interests and aspirations of the Sudanese people, it nevertheless provides a framework and foundation for which a permanent and inclusive constitution could be drafted and adopted by the people of Sudan.

In this regard, the United Nations and its partners, including the Office of Rule of Law and Security Institutions, should stand ready to support the government and people of Sudan

with expertise and provision of comparative experiences and lessons learned in other jurisdictions, including advice and support to drafting committees, including on specialized issues such accountability and transitional justice, engagement of political actors and participation of local and marginalized communities. To advance inclusive and participatory constitutional reform processes, the United Nations should utilize existing joint mechanisms and platforms to help facilitate or enable consultative processes involving marginalized regions and communities, especially those most affected by conflict, such as those in Darfur, with a strong emphasis on women, youth and internally displaced persons.

Constitutional Reform in the Philippines: A Power Struggle, Peacebuilding, Charter Change, or Decentralization? Or All of the Above?

By Chetan Kumar, *Outcome Lead for Peace, UNDP Philippines*

A Political Process

In 2016, on assuming office, President Duterte promised an accelerated transition by the Philippines to a federal system. A constitutional review committee was formed and even submitted a new draft constitution to the President and the Congress; consultative exercises were held among different sectors to converge viewpoints; and key members of the political elite expressed support. By mid-2018, the President's supporters held sway over both houses of the national legislature, which also adopted procedural resolutions to launch deliberations over a new charter. Thereafter the process halted.

Devolution as Peacebuilding

Concurrently, the President and the government prioritized the passage of the Bangsamoro Organic Law in Congress and the subsequent plebiscite leading to the formation of the Bangsamoro Transition Authority in February 2019 as the interim government of the Bangsamoro Autonomous Region in Muslim Mindanao (BARMM).

Effectively, BARMM enjoys all the powers that are foreseen for state governments in a federal system, the most critical one being control over its own finances. As opposed to receiving its share of the national revenues based on a line-by-line budget, it receives an annual "block grant" equivalent to 5% of the

national revenue and then determines how these monies are used.

In prioritizing the formation of the BARMM, the president fulfilled a promise made to the Moro leadership that full autonomy for Bangsamoro would be implemented before the transition to a federal system. Moro leaders were concerned that should they only receive autonomy as part of a federal dispensation, the unique nature of their struggle and their cultural heritage as well as the special parameters of Bangsamoro autonomy—as reflected in the 2014 Comprehensive Agreement on the Bangsamoro (CAB) between the Government and the Moro Islamic Liberation Front (MILF)—would be blurred. Officially, the government and the MILF took the position that BARMM would offer an early and useful experiment on genuine local autonomy that could then provide both a milestone and a baseline for the country's eventual transition to a federal system.

A Power Struggle

For the national leadership, however, there may be a deeper consideration. Private interests that have dominated the heights of the Philippines' political economy from Manila need a lot more persuasion that letting go of at least some of their influence would benefit them in the longer term. In the short term, however, they are more comfortable with the implementation of the CAB given the unique history

and culture of Bangsamoro as compared to the rest of the country. In addition, the peace agreement opens the way for business to enter mineral-and-resource-rich southern Mindanao in a more comprehensive manner. It is entirely possible that the prevailing elite would be more comfortable with a wider federalism project once they have had a "practice run" with autonomy in Bangsamoro.

Despite President Duterte's personal popularity, the wider federalism project has also not caught fire in the popular imagination, as several polls have either shown very lukewarm support or a lack of understanding of the issues involved. Again, a working BARMM could help generate stronger support.

To date, the strongest champions of federalism have been regional leaders like the President, the first ever from Mindanao, regionally-based political parties, and the leaders of the island provinces of southern Mindanao and the Visayas. Under the current Philippines post-Marcos constitution, the President in Manila—via the national revenue—directly allocates the budget of local governments at the city, municipality, and village levels against submissions from these entities. While this directly empowers local governments, it also leaves leaders at the regional and provincial levels without key decision-making powers (as opposed to the BARMM, where the regional head of government allocates resources).

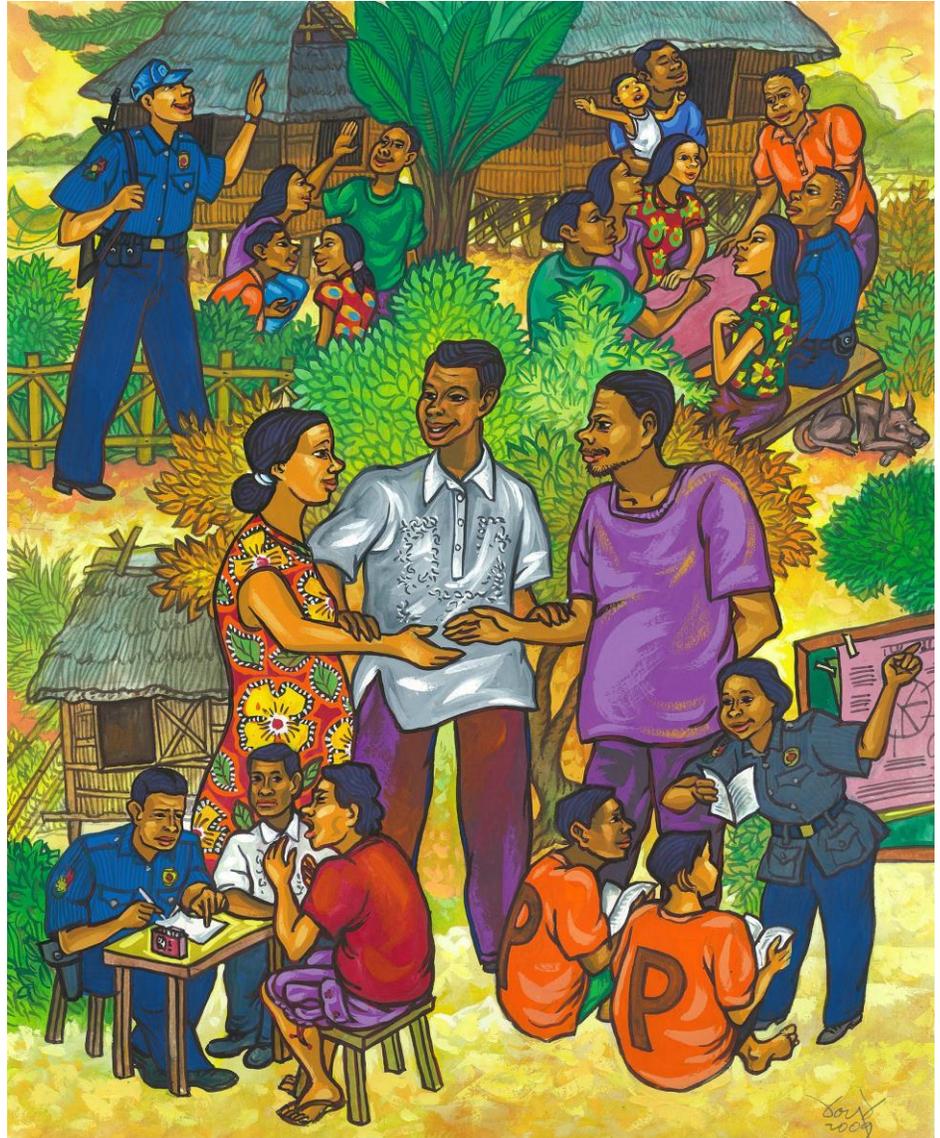
ANALYSIS: CONSTITUTIONAL REFORM IN THE PHILIPPINES

Champions of the federal model argue that this level of control from Manila is detrimental to the country's longer-term development as blockages or deadlocks in the capital can stall the entire country, and as local knowledge and priorities are curbed. A federal system could therefore advance both peace and development in the country.

Advocates of the current system argue that it has allowed progressive governments at the national level to set priorities that undercut the feudal local patronage networks that stymie development, and to push for issues such as gender equality and more effective service delivery.

Revolution and Evolution

But at the root of much of the debate lies an even more fundamental issue as to how wealth and power are eventually going to be organized in the country. The debate goes back to the founding of the Philippines in 1898, when the country's leaders clashed not just with Spanish and American colonizers but also among themselves on these issues. Central elites, who have argued that devolution will create an unstoppable centrifugal force in an archipelagic country, have been constantly challenged—including through violent insurgencies and recurring local violence—by regional leaders. Arguably, much of the proceeds from the country's natural wealth have accrued to Metro Manila and neighboring provinces, which now enjoy first world standards of living, while resource-rich provinces in southern Mindanao have some of the world's lowest human development indices. While the post-Marcos 1987 constitution changed this to some degree and set the Philippines on a high-growth trajectory, economic inequality across regions remains rampant.



Democratic governance paintings. Credit: UNDP Philippines.

Given their historical antecedents, it may be possible that these debates could not be resolved in the near term. A process of national dialogue around fundamental issues could generate wider public momentum and buy-in. The Constitutional Review Committee could have conducted a more systematic series of public consultations, and the Philippines' Congress may yet do so. Of course, it is equally likely that the President could carry the day based on his popularity and Congressional majorities. In either scenario, the

creation of the BARMM has already significantly advanced the agenda of decentralization and established a historical legacy for the incumbent administration.

What is the United Nations doing in the area of constitutional assistance? This section offers an overview of the latest developments, challenges and lessons in this key area of support sourced directly from our field missions, country offices and other UN entities.

COLOMBIA

“Promoting victim’s access to truth, justice and redress for gross human rights violations and their participation in the Comprehensive Transitional Justice System (SIVJRNJR)”

On 30 November 2016 the signing of a historic Peace Agreement between the Government and the FARC-EP, assured the end to Colombia’s more than five decades long internal conflict. It was hailed as a milestone, nationally and internationally. A constitutional reform was undertaken, to fast-track and adopt applicable norms for the implementation of the agreement. However, the implementation has been patchy. Two years later, the peace process in Colombia now stands at a critical juncture.

On 7 August 2018, President Ivan Duque of the Democratic Center party took up office. During his campaign, he had promised changes to what his party perceived as “structural errors” of the peace agreement. So far the most visible steps taken by the Government has been in the realm of victims’ rights and transitional justice.

At the national level contentious debates on issues of peace, justice, victims’ rights and historical truth have intensified in recent months. While the JEP is directly targeted the other mechanisms, such as the Truth Commission (CEV) and the Special

Unit for the Search of Missing Persons (UPBD) may also be impacted. Out of the three mechanisms, JEP has a specific oversight role – to verify that alleged perpetrators contribute comprehensively to truth-telling in line with the best interest of victims. Any special treatment, benefits, or waivers, provided to alleged perpetrators in this jurisdiction hinges upon the effective and proportional contribution to the other transitional justice mechanisms and measures.

In this context, and since the signing of the Peace Agreement, the Constitutional Court has played a pivotal role, underscoring the rights of victims as the foundation and overarching purpose of the

Comprehensive System of Truth, Justice, Reparation and Non-Repetition (SIVJRNJR). Thus demanding a victim-centered approach from the onset. In another ruling (C-674 of 2017) it stressed the need to ensure victims participation in criminal proceedings that affect them to ensure their rights to truth, justice, reparation and non-repetition. When analyzing the mandate of the Truth Commission (CEV) the Court emphasized the importance of applying an intersectional approach. Through the Decree Law 588 (article 11.3) it declared that “...the differentiated ways in which the conflict affected women, children, adolescents, young people and older adults, people with disabilities, indigenous peoples, peasant communities, Afro-Colombian, Roma, LGBTI individuals, to displaced persons and exiles, to human rights defenders, trade unionists, journalists, farmers, ranchers, traders and businessmen, among others” must be taken into account.

OHCHR-Colombia participated actively throughout this process by



providing advisory services to the magistrates of the Constitutional Court, and will continue to do so. It has advocated for the informed and active participation of victims in the Comprehensive TJ System and supported victims in their dealings with the various mechanisms. Many of the Court's rulings include international norms and standards, in line with OHCHR recommendations.

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The GAMBIA

The constitutional review process in The Gambia

As a key benchmark in the Gambia's democratic transition, the National Assembly of the Gambia established the Constitutional Review Commission (CRC) on 13th December 2017, which came into being by Presidential assent on 13th January 2018. The mandate of the CRC is to review the 1997 Constitution through a process of widespread public consultation while adhering to core principles, including respect for a republican system of government, democratic values, promotion of fundamental rights, separation of powers, and national unity and cohesion, among others.

In pursuant of its mandate, the CRC commenced its work by participating in an induction conference, co-hosted by UNDP and International IDEA in July 2018. Since that time, the CRC has conducted both internal and external consultations targeted at citizens, government institutions, political parties, civil society organizations as well as developed partnerships with international partners. Externally, the CRC conducted consultations with Gambians in the diaspora, including

in London, Paris, and New York. In August 2019, the CRC moved to the drafting phase of the constitutional review and delivered its first draft for public comment on 15 November 2019. Having received public feedback on the draft, the CRC is expected to make appropriate refinements and submit the draft to the President in early 2020. It is anticipated that the President will refer the draft to the National Assembly, which will then deliberate on the draft before seeking to adopt it by a vote of three-quarters of the National Assembly's 58 Members. If passed by the National Assembly, the draft will go to public referendum where it will require a turnout of 50% of eligible voters and a "yes" vote by 75% of those voting in order to be ratified. The referendum is expected to be conducted before the end of 2020.

The draft submitted for public comment in November 2019 vastly changed the 1997 Constitution. Among the key amendments are ones that limit the President to two five-year terms (with the current president's term counting towards to

two-term limit); limit the number of Cabinet Ministers a President can appoint to fifteen, excluding the Attorney General and Minister of Justice; add 14 seats in the National Assembly for women and two for persons with disabilities while eliminating national assembly seats previously set aside for members nominated by the President; outline duties and obligations of citizens; and transform the Independent Electoral Commission (IEC) to the Independent Boundaries and Electoral Commission (IBEC) with additional power to delineate electoral boundaries. The draft also has a provision for a 5% Development Fund, first of its kind. And it retains a clause from that exempts personal status laws (marriage, divorce, child custody, inheritance and other similar matters) from the clause prohibiting discrimination against women.

UNDP has provided substantial technical and financial support to the constitutional review process. In addition to the induction for the CRC in 2018, UNDP has supported its installation and start up, providing capital goods for the CRC, funded the



nationwide consultations, funded technical experts from Kenya and Ghana, supported youth and women's groups to prepare position papers to the CRC on youth and women's rights and equality, and co-hosted with International IDEA and IRI a workshop for National Assembly members in October 2019 – the purpose of which was to help prepare the National Assembly members for their eventual role in deliberating on the draft once received from the President. UNDP, also with International IDEA and International Republican Institute (IRI), co-hosted a workshop for CSOs in October to support their continued engagement in the constitutional review process.

As the CRC nears completion of its mandate (which ends shortly after the CRC delivers its draft to the President), Gambians will turn to the deliberations in the National Assembly and then the referendum. The unusually high threshold requirements for turnout and approval will be an extreme challenge and underscores the need for truly national consensus and support for the draft. Nationwide voter education and mobilization of electorates in the run-up to the referendum will be crucial. UNDP will continue to support the CRC, National Assembly, the National Council for Civic Education (NCCE), the Independent Electoral Commission, CSOs, and other actors who will play a central role in this critical milestone for the Gambia's democratic transition.

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TUVALU

On May 21st, after more than two years, two rounds of public consultations, a national conference, and numerous iterations of drafts, the Parliament of Tuvalu scheduled a special session to table the Constitutional Reform Bill of 2019 for a First Reading in Parliament. Tuvalu's constitutional review has been led by the Constitutional Review Committee (CRC), and as previously reported by the UN Constitutional, is an endeavor to improve governance in Tuvalu, enhance fundamental rights (especially for women and disabled persons), and preserve and strengthen aspects of traditional Tuvaluan culture.

But above all, perhaps, the constitutional review has been an opportunity for Tuvaluans to scrutinize arrangements inherited at the time of Tuvalu's independence and make the constitution truly their own. At no time in Tuvalu's history – either at its inception or during any subsequent constitutional amendment process – have the Tuvaluan people ever been directly asked what they think their constitution should say or what principles and values it should espouse. Perhaps the greatest indicator of the gulf between Tuvalu's constitution and its people is that, to date, the Tuvaluan Constitution exists only in English; it has never been translated into the Tuvaluan language.

From the onset public input was a centerpiece of the constitutional review. The CRC conducted two rounds of public consultations and held a National Constitutional Conference (NCC). The NCC, which took place from 28 October to 10 November 2018, included a broad range of Tuvaluan stakeholders, including MPs, traditional high chiefs, representatives of Tuvaluan island



communities, women, youth, groups representing persons with disabilities, faith-based organizations, the private sector, civil servants, and CSOs. The NCC served as a validation exercise for the CRC to present its findings and elicit feedback on the key issues and amendments being proposed. Based on the feedback from the public consultations and the NCC, the CRC developed drafting instructions for the Secretariat to produce a Draft Bill. The Draft Bill was reviewed and discussed by the CRC in February 2019 in anticipation of the First Reading in May.

What happened next is a cautionary tale on the need to keep the politicians on board alongside other key societal stakeholders and the general public. For while the NCC confirmed broad public support for the amendment bill, certain issues generated enough vexation by the Cabinet that the Constitutional Reform Bill of 2019 was rejected at First Reading. With a very popular bill now on life support, the Cabinet reconstituted the CRC as the Constitutional Action Committee to propose a slightly modified bill later in May. This bill failed even to receive a vote and instead was rejected on parliamentary procedural grounds. The rejection of the two bills came in the run-up to parliamentary elections, which took place on September 9. The new parliament is expected to take up the issue of constitutional reform in 2020.

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This publication is a joint effort between the United Nations Department of Political and Peacebuilding Affairs (DPPA), the Department of Peace Operations (DPO), OHCHR, UNDP, UNICEF, and UN Women to strengthen system-wide information sharing, coordination, and partnership in the area of constitutional assistance.

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