

POSITION PAPER OF FACULTY MEMBERS OF THE U.P. DEPARTMENT OF POLITICAL SCIENCE ON THE CONGRESSIONAL INITIATIVE TO UNDERTAKE CONSTITUTIONAL REVISION

(Presented before the Senate of the Philippines' Committee on Constitutional Amendments and Revision of Codes and Committee on Electoral Reforms and Peoples' Participation, 17 January 2018)

INTRODUCTION

The faculty members of the Department of Political Science (whose names appear below) thank the Committee on Constitutional Amendments and Revision of Codes and the Committee on Electoral Reforms and Peoples' Participation of the Senate of the Philippines for the invitation to be one of the resource persons and institutions in the committee hearing as part of the congressional initiatives to revise or amend the 1987 Philippine Constitution.

Constitutional revision is a daunting task with both long-lasting and unintended consequences for all. In making this presentation, it is not the Department's intention to collectively advocate a particular position. Our aim is to flag issues of concern that we hope the two Senate Committees, Congress as a whole, and the Executive Branch will duly consider as they contemplate charter change.

Our position paper responds to the series of questions posed by the two Senate Committees in their invitation. Major parts of the position paper were also presented to the House of Representatives' Committee on Constitutional Amendments during its public hearing on 16 November 2016, and the same Senate Committees during its public hearing on 8 December 2016.

By addressing the points of concern on both the process and substance of constitutional change that we will raise in this position paper, we believe that the Senate would be able to better inform the people of its intentions, plans, and vision with a degree of cohesion and foresight that would help generate confidence in the process.

PART 1: ON THE NEED TO AMEND OR REVISE THE CONSTITUTION

Issue of Scope of Changes

How grand are the changes being contemplated? If the objective is to shift to a federal system, this would partake of an all-encompassing break from the past and introduces a new set of institutions that would constitute another political system altogether.

What is the past that the effort to change the constitution now wishes to break from and the future where it wants the country to go?

Historically, Philippine constitution-writing took place to break from the immediate past and usher in a new political order.

- The 1935 Constitution provided the transition and vision of a post-American colonial regime in the Philippines.
- The 1973 Constitution institutionalized one-man rule.
- The 1987 Constitution dismantled the dictatorship, and offered solutions the heightened social injustices that authoritarian rule had engendered.

The overarching change envisioned in the current constitutional reform process must articulate the nature of the break that it wishes to achieve. What problems does charter revision wish to address that cannot be addressed through constitutional amendment, regular legislation, and/or executive action?

The people need to hear from the political leadership answers that are based on grounded and evidence-based claims. Our people deserve no less.

Issue of Timing

While constitutional amendments may not require any special historical moments, revisions in practice were usually undertaken after some major upheavals like revolutions, coups, postcolonial wars, democratic uprisings, post-peace agreement managed transitions, or after a regime change such as when left-leaning governments were elected into power in several Latin American countries.

Since 2016, several proposed resolutions in both chambers of Congress either favoring the federal shift or a charter change claim that there is a “public clamor” for the shift or change. But a July 2016 survey done by Pulse Asia does not necessarily indicate so. Around 61% are either opposed to or undecided on a shift from a unitary to a federal system, while 44% oppose any proposal to amend the 1987 Constitution. The same survey shows that 73% of Filipinos have little or no knowledge of the country’s constitution. In Pulse Asia’s quarterly surveys on most urgent national concerns, top responses usually include controlling inflation, improving / increasing workers’ pay, fighting criminality, creating more jobs, and fighting graft and corruption in government. Since 2016, no higher than 2-4% of respondents consider changing the Constitution as urgent. In the Publicus Asia / Vox Opinion Research’s survey last August 2017, only 33% of respondents have read, heard or watched anything about the proposal to change the present form to federal; among those aware, 22% said they understand the discussions about federalism, 51% said their knowledge or understanding of the concept of federalism is not full, and 27% said that they have no understanding about it.

What is in the current political, economic and social dispensation that would warrant a major constitutional overhaul now?

Deliberative and Dialogical Process

Constitution-making should be a national endeavor. We ask Congress to reflect on the following process questions in order to ensure a democratic process with democratic outcomes.

How and at what stages can broader participation take place in the drafting process? Should (and how might) the following mechanisms be put in place:

- a national dialogue process managed independently by a commissioned or designated body;
- surveys to inform the dialogue process and drafting;
- online sites and other modes to receive proposals and submissions; or
- a Constitutional Convention of elected and, possibly, appointed delegates, the design for which would guarantee the election and selection of qualified citizens other than members of traditional political clans.

How would the authorities that will be put in-charge of the whole endeavor, process and synthesize the inputs from these participatory mechanisms? How would these processes be funded?

We urge the Senate Committees to fully lay down its plans before the people so that the people may know and be encouraged to participate from the beginning.

Constitutional reform and the Moro peace process

As per the Comprehensive Agreement on the Bangsamoro, there is urgency to legislate a Bangsamoro basic law (BBL) that will establish a more meaningful autonomy in Muslim Mindanao and enable the completion of the normalization process, including the decommissioning of the weapons and combatants of the Moro Islamic Liberation Front (MILF). The BBL is also deemed urgent by President Duterte.

Stakeholders in these peace tracks need to be shown how the substance and time frame of the constitutional reform initiative taken on by the administration and Congress will support, not supplant, the political settlements arrived at through negotiations. Otherwise, the administration may be held in breach of these settlements, leading to breakdown in the talks or the implementation of the agreements, a corresponding escalation of violence, and the perpetuation—instead of resolution—of the armed conflicts. Hence, it is important for Congress to consider the draft BBL.

Reiteration

In closing Part 1 of our intervention, we reiterate the need, on the part of the proponents, for articulation on the following process concerns:

- The need for the political leadership to fully articulate the objectives and the vision for initiating constitutional revision.
- The need to fully conceptualize the process and time frame.
- The need to define responsibilities and leadership of the process.
- The need for broader participatory mechanisms and effective consolidation, synthesis and integration of inputs.
- The need to have a clearer direction and time frame as to how the constitutional reform process would jibe with the peace process with the Moro fronts.
- The need to come up with safeguards against misinformation and undemocratic practices.

PART 2: ON THE PARTS OF THE CONSTITUTION TO BE AMENDED OR REVISED

In the first part, we posed the question: What is in the current political, economic and social dispensation that would warrant a major constitutional overhaul?

Now we reverse this question and pose fundamental counter-questions.

The questions are:

- Could we instead envision an evolutionary transformation of our institutions?
- Specifically, could the perceived problems of our current national milieu be addressed instead through several constitutional amendments, regular legislation, and/or executive action?
- Should we tread the path of constitutional reform in careful measured ways, instead of fast tracking a constitutional overhaul?

Though we acknowledge that federalism has been used to address societal problems with varying degrees of success in other countries, Congress should also consider the following constitutional amendments.

We draw your attention to Article X of the 1987 Constitution that deals with the political and territorial subdivisions of our country. The first sets of provisions focuses on local governments of provinces, cities, municipalities and barangays. The second set provides for the creation and powers of two autonomous regions, as well as other intergovernmental bodies like metropolitan political subdivisions and regional development councils.

- Could the underdevelopment and relative deprivation of peripheral areas, and the lack of governance and fiscal powers of subnational entities be addressed by amending Article X of the 1987 Constitution and legislating a new Local Government Code as well as organic acts for autonomous regions as may be deemed necessary?

Moreover:

- Can the option to constitute themselves into autonomous regions be given to other provinces, municipalities, cities and geographic areas other than those in Muslim Mindanao and the Cordillera?
- Can regional development councils and metropolitan political subdivisions be vested with more devolved powers?

Asymmetrical arrangements, wherein clusters of local governments band together and enjoy more powers, may be sufficient to address the demands for self-government or need for greater coordination and collaboration, in places where there is readiness and unanimity.

Short of an overhaul, a number of smaller amendments to the constitution may also be considered to improve popular representation and efficiency.

These include:

- Creating regional rather than national constituencies for the Senate to improve regional representation and to make Senators directly accountable to a smaller constituency. Such a mechanism also lowers electoral campaign costs for individual candidates to the Senate.
- Holding a run-off election for when no presidential candidate garners a majority of votes cast so as to strengthen the president's electoral mandate.
- Reviewing the terms of elective positions and term limits so as to enable continuity in governance reforms but also to provide checks against the monopolization and abuse of power.
- Reserving certain legislative powers for the Lower House so as to give more attention to pressing issues of local concern.
- Instituting a constitutional court that would hear cases pertaining to constitutionality so as to relieve an overburdened Supreme Court. (see Arugay 2016)
- Reviewing the party-list system provisions and considering introducing a more progressive proportional representation system.

Moreover, even prior to amending the Constitution, the following can immediately be undertaken by Congress:

- Amend the Local Government Code in order increase the local governments' share in the internal revenue allotment (see Atienza 2004), and allow local health boards and similar bodies to operate independently from the local chief executives in order to improve the delivery of social services, among others (see Go 2016).
- Pass a Bangsamoro basic law that provides for a more expanded autonomy for the Bangsamoro in order to complete the normalization process at the shortest possible time while the ceasefire between the government and the MILF continues to hold (see Rivera 2016).
- Overhaul the electoral and party system laws to support the development of strong political parties, instill party discipline and prevent turncoatism, public financing of political parties to reduce the advantage of well-financed parties, and make the process more competitive and participatory., e.g., limiting political dynasties.

Our recommendations are very preliminary and not exhaustive. Our intent is to stimulate alternative thinking and generate more solutions other than the one on the table, without discounting federalism's viability for the country and the noble aspirations behind it.

PART 3 ON THE MODE OF AMENDING OR REVISING THE CONSTITUTION

Who is in charge?

It is notable that the post-Marcos constitutional revision agenda was always executive-driven – the shift to a parliamentary system under the Ramos and Arroyo administrations; and now the shift to federalism under the Duterte administration.

In this regard, it is essential that the executive leadership define the process and identify the responsible authorities who will oversee it.

Meanwhile, in constituting itself as a Constituent Assembly, Congress has to ensure that it will complete the process without taking time and resources away from other legislative priorities.

On the Appropriate Drafting Body

Congress constituting itself into a Constituent Assembly is indeed less costly. However, studies of the International Institute for Democracy and Electoral Assistance (IDEA) raise the following dangerous drawbacks to such a body:

- The assembly may seek to advance its institutional interests at the disadvantage of other institutional actors.
- The political parties that dominate the assembly may lack internal democratic structures.
- The parties may tend to favor electoral systems that distort the distribution of representation and power.
- Excluded parties may resort to violence or not own the process.

What measures can be undertaken to guard against these dangers?

At the same time, being executive-directed, the revisions may unduly favor the executive as far as the allocation of powers is concerned and the institutional design in general. Indeed, we have heard President Duterte favoring the French model which is a strong-presidency type.

A new constitution exhibiting the traits of a global trend known as hyper presidentialism will be the direct opposite of one of the strongest impetuses that drove the constitutional rewriting in 1986, which was to cut back on the discretionary powers of the presidency.

Another alternative to a Constituent Assembly is a Constitutional Convention. According to the Institute for Political and Electoral Reform (IPER), members of a Constitutional Convention are more focused on their job of revising the charter having been elected for that specific purpose. Likewise, the process through a Constitutional Convention can be more democratic, transparent, and deliberative (IPER 2004). However, a Constitutional Convention may not necessarily be more inclusive than a Constituent Assembly.

Delegates elected solely for the purpose of constitution rewriting are not necessarily better than appointed ones. A case in point is the 1986 Constitutional Commission which produced a Constitution that will now enter its 31st year, only seven years short of the longevity of the 1935 Constitution. While the 1987 Constitution has been described by some critics as superfluous, it undoubtedly has very strong democratic credentials.

In sum, the Constituent Assembly and Constitutional Convention both have advantages and disadvantages. A Constituent Assembly has the following advantages: (1) less costly and inexpensive; (2) consists of skilled, experienced lawmakers; and (3) likely lead to speedy and swift period of constitutional amendments. However, its disadvantages are: (1) limited participation of other sectors; (2) lawmakers' vulnerability to self-interest; and (3) popular legitimacy may be found wanting and lacking. On the other hand, the Constitutional Convention has the following advantages: (1) encourages more participation of other actors; (2) likely promotes diversity and pluralistic views and

opinions; and (3) delegates selected through popular elections. Its disadvantages include: (1) much larger expenses entailed by electing delegates and separate deliberations; (2) possibly more time-consuming process of preparation, deliberation and finalization of proposed amendments or revisions; and (3) possible lack of accountability mechanism unlike representatives in Congress.

At the end of the day, choices on the appropriate mechanisms have to be made in favor of generating greater legitimacy for the constitutional reform process. The decision must be based on careful study and supplemented by empirical evidence, not on impressions and short-term objectives.

PART 4: ON VOTING JOINTLY OR SEPARATELY IN CASE OF A CONSTITUENT ASSEMBLY

Voting separately supports the current bicameral nature of the Philippine Congress and establishes checks and balances between two institutions representing two different constituencies: national and congressional district constituencies. Voting jointly renders bicameralism and the principle of checks and balances irrelevant and meaningless. In addition, allowing Congress to vote jointly would put the Senate in a disadvantaged position because they can easily be outnumbered and dwarfed by their counterparts in the House of Representatives who have the numbers in the context of constitutional change and amendments. On the other hand, voting together may be more efficient but it invites distrust and attempts to stifle minority or critical views.

PART 5: ON THE POWERS OF THE CONSTITUENT ASSEMBLY OR CONSTITUTIONAL CONVENTION

Can Congress pass a resolution limiting the power of the Constituent Assembly or Constitutional Convention, or are their powers plenary? A resolution should simply declare that it is convening as a Constituent Assembly or call for elections for members of a Constitutional Convention. The Constitutional Convention should be free to define what parts of the Constitution, once convened, should be changed in consultation with the people; a Congressional Resolution should not dictate what is the direction of the revisions or amendments. The plenary powers of Congress are different from the powers of the Constituent Assembly.

PART 6: ON SHIFTING TO A FEDERAL FORM

The various House resolutions expressing support for a shift to federalism claim that federalism would be most suitable to the Philippines as an archipelagic and multi-linguistic country. Moreover, federalism would enable regions to retain locally-generated income, plan on their own without national government interference, and manage their own affairs.

The House Resolutions argue that federalism will bring political stability, spur economic development, unshackle the localities, and bring government closer to the people.

Some resolution sponsors consequently decried the failure of the 1987 Constitution to bring about these desired changes.

President Rodrigo Roa Duterte, for his part, has stated several times that only federalism will accommodate the legitimate interests of Filipino Muslims in the South.

Without discounting the potential of a federal system to uplift the country as claimed by the House resolutions and by the President, we should not be blind to its possible negative consequences.

We urge the proponents of federalism to duly consider the following pitfalls of a federal setup as already experienced in several federal states.

Regional Discrepancies, Dependency and Resentment

Across federal states, resource endowment and levels of development would differ. Without an effective mechanism for revenue sharing across states whereby richer states or units subsidize poorer ones, federalism could increase inequality among sub-national units (IDEA 2015, 5). Subsequently, the poorer regions or states may become dependent on fiscal transfers, causing resentment on the part of the more economically productive states (Hague and Harrop 2007, 290).

Given this very real drawback in a country of uneven development across regions:

- What provisions in the envisioned constitution could be put in place in order to avoid the continued dependence of poorer states on development funds from the central or federal government?
- What performance-based incentives could be offered to states for them to develop and increase their revenues?
- Do we introduce sanctions for those that fail to develop despite assistance from the center over a significant period of time?
- How might we avoid the resentment of the subsidizers against those subsidized? Such resentment is very much felt in federal Germany as well as regionalized Italy.

Disparity in the Provision and Quality of Public Services

It is assumed that federalism will deliver the public goods more efficiently (IDEA 2015). This may be the case in high-income regions or states, but the opposite may be truer in the poorer ones.

Full devolution of public services across the board could lead to gross disparities in the provision and the quality of public services from one state to another, to the detriment of the affected public (IDEA 2015, 5).

Given the high disparity across Philippine regions in terms of income and other human development indicators:

- How would the new constitution ensure that mechanisms would be in place to achieve national and state targets on the delivery of services?
- How do we ensure that health services for specific sectors like women, children, and the elderly are amply provided in all states (see Bhatia and Haussmann 2014)?
- How do we ensure equity in the salaries and benefits of health and other government workers across the different states?
- How can we strengthen the civil service and bureaucracies at different levels to fulfill their mandates without political interference from local or state elites?

Lack of Coordination and Cooperation, Government Paralysis and Gridlock

One documented advantage of federalism is that it creates a system of checks and balances. On the other hand, contemporary societal concerns and key government functions are becoming more and more interconnected, requiring government operations to be more interdependent.

State governments may resent or fail to effectively coordinate emergency intervention from the central authority during urgent situations like disasters or failure of governance. Moreover, federal states may resist bold reforms emanating from the federal government (Heywood 2013, 385).

Federalism proponents must find good answers to the following questions:

- How do we create a federal system where there is greater coordination and sharing instead of just competition?
- Could or under what circumstances might the federal government intervene on fundamental matters like the protection of human rights, and perceived abuses of power or bad governance of federal state leaders?

In the area of disasters, we can learn from our own experience with Yolanda (Typhoon Hainan) as well as the experiences of federal systems like the United States and Mexico in their successes and failures dealing with disasters like hurricanes and earthquakes.

Budgetary Requirements

Obviously, creating a new territorial and political subdivision complete with its own bureaucracy and legislative body will entail additional operating costs, and require new infrastructure, personnel, etc. (IDEA 2015, 5).

A federal set-up also invests heavily in inter-governmental mechanisms that will effectively coordinate shared powers, manage shared revenues, and allocate budgetary support. All these mechanisms require highly technical human resources with complete staffing.

- How much would a federal system cost?

It is incumbent on proponents to undertake a serious study of the budgetary requirements of an added layer of government.

Alternately, proponents may consider instituting an entirely different set of territorial and political subdivisions or local governments that would constitute a federal state, other than the current provinces, municipalities, cities and barangays. Appropriation of legislative districts for the Philippine Congress would also have to be reconfigured.

- In constituting the regions and potentially reconfiguring the political and territorial subdivisions of the country, how do we guard against gerrymandering? How do we ensure that rationality prevails over vested parochial interests?

Judicialization of Politics

Federalism may result in an increased political role for the judiciary because disputes between the powers or competencies of national and federal institutions would be resolved in courts instead of in the elected legislatures. This enhanced role of the judiciary could consequently cause deadlock and paralysis in government action.

- What constitutional provisions can be put in place to guard against the overreaching hand of the judiciary in matters pertaining to the respective exercise of powers and functions of the federal government and the states?

Continuing Challenges to Nation-building and National Identity

Some countries like Canada, India and Switzerland have opted for a federal structure to bridge ethnic, linguistic and cultural diversity within a divided society. Even erstwhile non-federal Western European countries, under pressure from ethnic or regional nationalism, have shifted to federalism (e.g., Belgium) or instituted various modes of autonomous substates (e.g., in Spain, UK and Italy) (Bale 2013, 48; Opello and Opello 2009, 141).

The textbook distinction between federal states and unitary states has become more blurred. There is no longer a 'pure' form of a unitary state, just as there are different forms of federal governments.

In any case, federalism by itself simply cannot create unity in diversity or a sense of nationalism that transcends people's primary and subnational political identities. For instance, despite transforming into a full-fledged federal set-up in 1993, Belgium has yet to create a larger "Belgian" national identity that would overlay the divide between the Dutch-speaking and French-speaking populations.

A federal set-up, moreover, does not guarantee an end to secessionist aspirations (e.g. the Quebec case in Canada).

Moreover, minorities within federal states may continue to experience discrimination and marginalization, with the federal government unable to take direct action to address the oppression (IDEA 2015, 6).

It will take more than a shift to federalism to build a strong, united country with a cohesive national identity, especially in multicultural settings marked by politicized subnational identities, historical antagonisms, and even class divides.

We must not over-credit federalism with outcomes that it may not be able to deliver.

Monopoly and Abuse of Power

Will federalism prevent political elites from misusing state and other sub-national governments for private gain?

The challenge to the constitution drafters is how to avoid, not to perpetuate, in a new federal set-up the abuse and monopoly of power of a few political clans and elites.

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