



# Indigenous Peoples Rights and Charter Change: Possibilities and Uncertainties

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Legal Rights and Natural Resources Center  
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## **Indigenous Peoples Rights and Charter Change: Possibilities and Uncertainties**

### **Introduction**

The perceived impending shift to a federal system through amendments to the Constitution of the Philippines has engendered concerns among the general public, but more particularly among indigenous peoples (IPs) because of the possible impact on their right to self-determination and self-governance.

Foremost among such concerns is the extent to which a federal system with autonomous subnational (i.e. region/state) and sub-subnational units (i.e. province, municipality, city and barangay) will exercise control over or give more room for indigenous cultural communities to exercise the right to self-determination and self-governance. Are these concerns of indigenous peoples, grounded in the present political dynamics and among various actors in the political landscape, adequately considered? What are the roots of these concerns? What are the possible scenarios? How can indigenous peoples prepare for such scenarios?

We may not have the answers to all these questions right now but this paper will attempt to outline how and why the shift to a federal system is happening, explore the implications of the changes to the Constitution, and identify what can be undertaken with or without constitutional amendments. After all, opening the Constitution to amendments means that any part of the Constitution may be revised or the entire Constitution may be overhauled.

This paper does not aim to discuss in-depth the proposed amendments to the 1987 Constitution. Rather, it intends to catalyze discussion on the implications of amending the 1987 Constitution and how this may affect indigenous peoples rights.

### **Recent Historical Background on Constitutional Amendments**

Amendments to the Constitution have been attempted during the previous administrations from the time of President Fidel Ramos to President Joseph Estrada and President Gloria Macapagal Arroyo.

More recently, the key proponent of the shift from the present Unitary-Presidential System to a Federal-Parliamentary System has been the Partido Demokratiko Pilipino-Lakas ng Bayan (PDP-Laban) Party. Former Senator Aquilino Pimentel, Jr. has been the key personality advocating the shift to federalism and whose ideas have been adopted in the proposed constitution of the Federal Republic of the Philippines of the PDP-Laban.

During the May 2016 election, then Mayor Rodrigo Duterte stated that a plebiscite on the proposed dismantling of the present unitary system and replacing it with a federal system will be held in two years.<sup>1</sup>

After winning, Duterte revived his campaign promise and supported the proposed federal form of government by former Senator Aquilino Pimentel, Jr. On December 7, 2016, President Duterte signed Executive Order No. 10 creating a Consultative Committee (Con-Com) under the Office of the President to review the 1987 Constitution.<sup>2</sup>

The Consultative Committee was tasked with the mandate to “study, conduct consultations and review the provisions of the 1987 Constitution including, but not limited to, the provisions on the structure and powers of government, local governance and economic policies.”

The Consultative Committee is to be composed of not more than 25 members appointed or designated by the President.

More than a year passed before the President appointed 19 members<sup>3</sup> of the Consultative Committee on January 25, 2018.<sup>4</sup> The Consultative Committee was required to submit its report within six months after convening.

On August 2, 2016, Representatives Aurelio “Dong” D. Gonzales, Jr. and Eugene Michael B. de Vera filed Resolution of Both Houses No. 08 “Constituting the Senate and the House of Representatives, Seventeenth Congress, into a Constituent Assembly to propose revisions of the 1987 Constitution by adopting a Federal Form of Government and for other purposes.” A working draft of the “Proposed Constitution of the Federal Republic of the Philippines” was attached to the Resolution.<sup>5</sup> On February 15, 2017, House Concurrent Resolution No. 09 was filed “To Constitute the Congress of the Philippines as a Constituent Assembly for the Purpose of Proposing Amendments to, or Revision of, the 1987 Constitution.”<sup>6</sup> The resolution was sponsored by Representatives Roger G. Mercado, Rodolfo Farinas, Gwendolyn F. Garcia, Vicente “Ching” S.E. Veloso, Edward Vera Perez Maceda, and Fredenil “Fred” H. Castro.

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<sup>1</sup>“Duterte: Polls on federalism in 2 yrs.” (May 20, 2016). *Inquirer.net*. <http://newsinfo.inquirer.net/786631/duterte-polls-on-federalism-in-2-yrs>.

<sup>2</sup>See <http://www.officialgazette.gov.ph/downloads/2016/12dec/20161207-EO-10-RRD.pdf>

<sup>3</sup>As of April 2018, the members of the Consultative Committee are: Reynato Puno as chairman, Aquilino “Nene” Pimentel, Jr., Randolph Climaco Parcasio, Antonio Arellano, Susan Ubalde-Ordinario, Arthur Aguilar, Reuben Canoy, Roan Libarios, Laurence Wacnang, Ali Pangalian Balindong, Edmund Soriano Tayao, Eddie Mapag Alih, Bienvenido Reyes, Julio Cabral Teehankee, Antonio Nachura, Rodolfo Dia Robles, Virgilio Bautista, Ranhilio Aquino, Victor de la Serna, Ferdinand Bocobo, Rex Robles, and Jose Martin Loon.

<sup>4</sup>Ranada, P. (January 25, 2018). “Duterte appoints 19 members of Charter Change consultative committee.” *Rappler*. <https://www.rappler.com/nation/194518-duterte-appoints-members-consultative-committee>

<sup>5</sup>See copy of Resolution of Both Houses No. 08. [http://lpp.gov.ph/wp-content/uploads/2017/08/RBH0008-Resolution-of-Both-Houses-8\\_FEDERALISM.pdf](http://lpp.gov.ph/wp-content/uploads/2017/08/RBH0008-Resolution-of-Both-Houses-8_FEDERALISM.pdf)

<sup>6</sup>See copy of House Concurrent Resolution No. 09, [http://www.congress.gov.ph/legisdocs/first\\_17/CR00110.pdf](http://www.congress.gov.ph/legisdocs/first_17/CR00110.pdf)

In September 2017, the PDP-Laban submitted its draft constitution to the Office of the President and to Congress proposing a Federal-Parliamentary form of government.<sup>7</sup> And on July 9, 2018, the Consultative Committee submitted their draft to Malacañang.<sup>8</sup> After the submission, Duterte is expected to study the document and possibly propose revisions. If and when the draft is acceptable to him, he will then endorse it to Congress, which has the sole mandate to propose amendments to the 1987 Constitution.

The timetable of the Office of the President consists of the following:<sup>9</sup>

- a. The Consultative Committee submits its report by July 2018;
- b. Deliberation of amendments will end by February 2019;
- c. A plebiscite to ratify the new constitution will be held in 2019;
- d. The first parliamentary elections under the new federal constitution will be held in 2020;
- e. President Duterte's term will end in 2022;
- f. For the transition period from the present unitary system to a federal system, incumbent President Duterte may assume dual role as head of state and head of government presiding over the new unicameral parliament. He has the option to step down from his post or if the people desire, there may be transitory provisions in the new constitution for him to extend his term;
- g. Term of the first unicameral parliament under the newly ratified constitution will end by 2025;
- h. The second regular parliamentary elections under the new constitution will be held by 2025;
- i. The parliament will elect a new president and a new prime minister by 2025;
- j. Autonomous territories may already operate like federal states by 2028.

Congress is apparently targeting the holding of the first election of members of Congress, regional legislators, regional governors, regional vice governors, and local elective officials under the federal republic a year earlier in 2019.<sup>10</sup>

Should this proposal prosper, it will be the fifth constitution for the Philippine Republic and the second to institute a substantial change in the form of government. The Malolos Constitution is

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<sup>7</sup> Yap, DJ. (September 28, 2017). "PDP-Laban submits draft Charter adopting federalism." *Philippine Daily Inquirer*. <http://newsinfo.inquirer.net/933930/pdp-laban-submits-draft-charter-adopting-federalism>.

<sup>8</sup>See <https://www.rappler.com/newsbreak/84-documents/207513-consultative-committee-draft-constitution-final-version-document>.

<sup>9</sup> See "Cha-Cha Express Gathering Steam." (October 1, 2017). *Philippine Daily Inquirer*, p. A18.

<sup>10</sup> Ibid.

the first constitution of the Philippines and is considered the first republican constitution in Asia (Tucker 2009). It is followed by the 1935 Commonwealth Constitution then the 1973 Constitution, promulgated after Marcos' declaration of Martial Law, and the present 1987 Constitution (shortly preceded by the provisional 1986 Freedom Constitution). Except for Marcos' 1973 Constitution, the constitutions prior and after followed a similar unitary and presidential form of government. The 1973 Constitution saw the change of government from presidential to parliamentary and allowed Marcos to stay in power beyond 1973. This constitution was approved by 95% of the voters in what was considered to be a highly irregular plebiscite and was amended a couple of times in the course of the Marcos dictatorship.

At the heart of the charter change proposal is the changing of the form of government from unitary-presidential into a federal one. Among the rationales advanced for the federalist model are fiscal autonomy and greater independence in governance, and administration by federated regions.

Similar to other federalist jurisdictions, the proposed constitution retains powers to the national or the federal government, namely: over defense, national security, foreign policy, currency, banking and monetary policy, customs and national taxation, and international trade. The regional governments or federated regions, on the other hand, are given mandate over the development of their respective regions and to provide basic services to their constituents. The central and regional governments have concurrent power over particular sectors such as in law and order, energy, sustainable use and management of natural resources, and social welfare and development, among others.

The Con-Com proposal provides for 18 federated regions—16 symmetrical federated regions, which include the proposed Negrosanon region, and the asymmetrical federated regions of Bangsamoro and Cordillera (Art. XI, Sec. 1). It should be noted that precise delineation of territorial boundaries and names of territories under the proposed draft will be subject to debate by the Constituent Assembly.

Parallel to the discussion towards a federalist system is the Bangsamoro Organic Law (BOL), recently approved by Congress and signed into law by President Duterte. Of particular concern is the case of the Teduray Lambangian community of Maguindanao whose ancestral domains lie within the contemplated territory covered by the Bangsamoro Basic Law (BBL). Timuay Alim Bandara, Teduray leader, noted the various interests and reactions from various stakeholders both in and outside of the Bangsamoro areas, including his own community, on the proposal for the then BBL: “the Moro Islamic Liberation Front or MILF wanted to see a BBL that is compliant with the Framework Agreement on the Bangsamoro or FAB and the Comprehensive Agreement on the Bangsamoro or CAB and other signed agreements. Legislators from both Houses of Congress, on the other hand, want a BBL that is compliant to the 1987 Philippine Constitution, while other sectors want a BBL that is compliant to a Federal Philippines. In the case of the Non-Moro Indigenous Peoples, what they want is a BBL with provisions on indigenous peoples that are compliant to IPRA.”<sup>11</sup> The BOL articulates the protection and respect of indigenous peoples rights based on IPRA. Advocates for the approval of the BBL (BOL) ahead of the shift

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<sup>11</sup>Alim Bandara. (July 5, 2018). “Mindanao (Philippines): The Bangsamoro Basic Law and the Non-Moro IP Provisions in Senate and House Bills.” *Europe Solidaire San Frontieres*. <http://www.europe-solidaire.org/spip.php?article45114>.

to federalism propose to consider the Bangsamoro government as a “model” and an “experiment” for a federal form of Government.<sup>12</sup> Others imply that it may be subsumed under a federal model as “an exemption rather than the rule.”<sup>13</sup>

The proposal has certainly sparked debate and concern. Indigenous peoples and various sectors have raised the lack of consultation and information, and even misinformation, on the Administration’s proposal to change the Constitution. A survey showed more Filipinos not being in favor of amending the Constitution, with the majority against the charter change.<sup>14</sup> Members of the Duterte cabinet have raised concern on the fiscal implications of a possible charter change.<sup>15,16</sup> Despite ongoing debates on whether or not to change the Constitution and on the voting mechanism for amendments by the Constituent Assembly, it appears that the Administration is keen on pushing charter change towards the shift to a Federal-Parliamentary System of Government.

### Basic Legal Framework for Self-Determination and Self-Governance of IPs

How does the right of indigenous peoples to self-determination and self-governance relate to the present situation? Let us first examine the basis of this right.

The right of indigenous peoples to self-determination is recognized by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP):

*Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

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<sup>12</sup>Ager, M. (February 5, 2018). “Legal experts back approval of BBL ahead of Cha-cha.” *Inquirer.net*. <http://newsinfo.inquirer.net/966218/legal-experts-back-approval-of-bbl-ahead-of-cha-cha-federalism#ixzz5KkepGbz>.

<sup>13</sup>Arguillas, C.O. (January 18, 2018). “Bangsamoro in federal system: not template but more of exception.” *Mindanews*. <http://www.mindanews.com/peace-process/2018/01/bangsamoro-in-federal-system-not-template-but-more-of-exception/>.

<sup>14</sup>Based on a Pulse Asia survey. See Helen Flores. (July 17, 2018). “Poll: Filipinos oppose charter change, federalism.” *The Philippine Star*. <https://www.philstar.com/headlines/2018/07/17/1834204/poll-filipinos-oppose-charter-change-federalism#0s9bFI5kdV4jL8S6.99>.

<sup>15</sup>Rivas, R. (July 17, 2018). “Federalism will ‘wreak havoc’ on Philippine economy - Pernia.” *Rappler*. <https://www.rappler.com/business/207521-federalism-bad-for-economy-ernesto-pernia>.

<sup>16</sup>Corrales, N. (August 14, 2018). “Diokno wants ‘more rigorous’ study of draft federal charter.” *Inquirer.net*. <http://newsinfo.inquirer.net/1021171/diokno-wants-more-rigorous-study-of-draft-federal-charter#ixzz5ODxOn4gm>.

*Bearing in mind* that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law

*Article 3*

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The right to self-governance is also recognized by the UNDRIP:

*Article 4*

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

*Article 5*

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

The right of indigenous peoples to their ancestral land is recognized by the 1987 Constitution under Article XIII, Section 6:

Section 6. The State shall apply the principles of agrarian reform or stewardship, whenever applicable in accordance with law, in the disposition or utilization of other natural resources, including lands of the public domain under lease or concession suitable to agriculture, subject to prior rights, homestead rights of small settlers, and the rights of indigenous communities to their ancestral lands.

The right of indigenous peoples to preserve and develop their cultures, traditions, and institutions is recognized by the 1987 Constitution under Article XIV, Section 17:

Section 17. The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.

The right of indigenous peoples to self-determination and self-governance under the IPRA are provided under the Indigenous Peoples Rights Act (IPRA) and its Implementing Rules and Regulations (IRR).

Under Section 1: Recognition of Authentic Leadership, Part I: Self-Governance and Political Leadership Systems, RULE IV: RIGHT TO SELF-GOVERNANCE AND EMPOWERMENT, the IRR provides:

In pursuance of the right to self-governance and self-determination, the ICCs/IPs, in coordination with the Department of the Interior and Local Government, through the NCIP, shall formulate measures to ensure that:

- a) The socio-political structures, systems and institutions of ICCs/IPs are strengthened;
- b) The indigenous structures, systems, and institutions are not supplanted by other forms of non-indigenous governance; and/or
- c) Mechanisms that allow the interfacing of indigenous systems of governance with the national systems are established.

Under Section 7: Right to Determine and Decide Own Development and Right to Develop as Peoples, Part I: Self-Governance and Political Leadership Systems, RULE IV: RIGHT TO SELF-GOVERNANCE AND EMPOWERMENT, the IRR provides:

The ancestral domains of the ICCs/IPs [are] the foundation of their right to self-determination. As such the ICCs/IPs shall have the right to decide their own priorities for development affecting their lives, beliefs, institutions, spiritual well-being and the lands they own, occupy and use. Towards these ends, the ICCs/IPs shall participate in the formulation, implementation and evaluation of plans, policies and programs for national, regional and local development which may affect them.

The NCIP shall take special measures to guarantee the right of ICCs/IPs to pursue their economic, social and cultural development at their own choice and pace and to ensure that economic opportunities created by the government are [extended] to them based on freedom of initiative and self-reliance.

Under Section 1: Right to Manage and Develop Ancestral Domains, Part II. Ancestral Domain Development and Protection, RULE VIII. DELINEATION AND RECOGNITION OF ANCESTRAL DOMAINS, the IRR provides:

The ICCs/IPs shall have the right to freely pursue their economic, social, political and cultural development. In the exercise of this right, the ICCs/IPs shall formulate and pursue their own plans for the sustainable management and development of the land and natural resources as well as human resources within their ancestral domains based on their indigenous knowledge systems and practices and on the principle of self-determination. Such plans may be consolidated into an Ancestral Domain Sustainable Development and Protection Plan (ADSPPP) which shall be the basis of the Five Year Master Plan defined under these Rules and Regulations.

Based on all the above, international law and national laws provide support for IPs to pursue, uphold and realize their right to self-determination and self-governance.

Considering the provisions in the 1987 Constitution that articulate rights for IPs, are we ready to confront a scenario where amendments will be introduced?



It should be emphasized that the shift to a federal system requires not only amendments to the 1987 Constitution but also the crafting of a constitution for each subnational unit (federated regions) that should be aligned with the Federal Constitution.

The same shift will also require that almost all national government agencies will have to be replicated at the subnational unit level in order to ensure the provision of basic and other services to constituents. The cost of operating and sustaining the programs of executive agencies, the legislature, and the judiciary at the level of the subnational unit will also have to be determined during the transition period to a federal system.<sup>17</sup>

### Amending the 1987 Constitution: Possibilities and Uncertainties

The “recognition and promotion” of rights of indigenous cultural communities articulated in the 1987 Constitution are present in the proposed versions for a federalist government. How will this translate in the mechanisms provided in the transition towards federalism?

<b>1987 Constitution</b>	<b>2018 Con-Com Charter Charge Proposal</b>
<p><b>ARTICLE II DECLARATION OF PRINCIPLES AND STATE POLICIES</b>  <b>Section 22.</b> The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development.</p>	<p><b>ARTICLE II DECLARATION OF PRINCIPLES AND STATE POLICIES</b>  <b>Section 24.</b> The Federal Republic recognizes, promotes, and protects the rights of indigenous peoples within the framework of national unity and development.</p>
<p><b>ARTICLE XIII SOCIAL JUSTICE AND HUMAN RIGHTS</b>  <b>AGRARIAN AND NATURAL RESOURCES REFORM</b>  <b>Section 6.</b> The State shall apply the principles of agrarian reform or stewardship, whenever applicable in accordance with law, in the disposition or utilization of other natural resources, including lands of the public domain under lease or concession suitable to agriculture, subject to prior rights, homestead rights of small settlers, and the rights of indigenous communities to their ancestral lands...</p>	<p><b>ARTICLE XVI SOCIAL JUSTICE</b>  <b>Section 6.</b> The Federal Republic shall apply the principles of agrarian reform or stewardship, whenever applicable in accordance with law, in the disposition or utilization of other natural resources, including lands of the public domain under lease or concession suitable to agriculture, subject to prior rights, homestead rights of small settlers, and the rights of indigenous peoples to their ancestral lands...</p>

<sup>17</sup> Experts suggest that shifting to federalism, including increasing the number of senators, could cost P44 billion to P72 billion a year. See Manasan, R.G. (December 2017). “Designing the Fiscal Features of a Federal Form of Government: Autonomy, Accountability, and Equity Considerations.” *Philippine Institute for Development Studies*. [https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsdps1756\\_rev.pdf](https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsdps1756_rev.pdf).

<p><b>ARTICLE XIV EDUCATION, SCIENCE AND TECHNOLOGY, ARTS, CULTURE AND SPORTS ARTS AND CULTURE</b></p> <p><b>Section 2.</b> (4) Encourage non-formal, informal, and indigenous learning systems, as well as self-learning, independent, and out-of-school study programs particularly those that respond to community needs;</p> <p><b>Section 17.</b> The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.</p>	<p><b>ARTICLE XVII EDUCATION, SCIENCE AND TECHNOLOGY, ARTS, CULTURE, AND SPORTS ARTS and CULTURE</b></p> <p><b>Section 2.</b> (d) Encourage non-formal, informal, and indigenous learning systems, as well as self-learning, independent, and out-of-school study programs, particularly those that respond to community needs;</p> <p><b>Section 17.</b> The Federal Republic shall recognize, respect, and protect the rights of indigenous peoples to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of federal and regional plans and policies.</p>
<p><b>ARTICLE XII NATIONAL ECONOMY AND PATRIMONY</b></p> <p><b>Section 5.</b> The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.</p> <p>The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.</p>	<p><b>ARTICLE XV NATIONAL ECONOMY AND PATRIMONY</b></p> <p><b>Section 9.</b> The Federal Republic shall, subject to the provisions of the Constitution and national development policies and programs, respect the primacy of customary laws of indigenous peoples to their ancestral domains and lands, and all resources found therein to ensure their economic, social, and cultural well-being.</p> <p>Ancestral domains which are communal properties cannot be alienated.</p>
<p><b>ARTICLE XVI GENERAL PROVISIONS</b></p> <p><b>Section 12.</b> The Congress may create a consultative body to advise the President on policies affecting indigenous cultural communities, the majority of the members of which shall come from such communities.</p>	<p><b>ARTICLE XX GENERAL PROVISIONS</b></p> <p><b>Section 9.</b> The Congress may create a consultative body to advise the President on policies affecting indigenous peoples, the majority of the members of which shall come from such communities.</p>
	<p><b>ARTICLE XXI TRANSITORY PROVISIONS</b></p> <p><b>Section 4.</b> The Federal Transition Commission shall ensure people’s participation by involving faith-based, civil society, indigenous peoples, sectoral, non-government and other community based organizations in the transition, especially in the selection and screening of appointees to the new government.</p>

### **Governance-sharing**

The idea of federated regions gives import to the notion of “autonomy” and the imagination of self-governance and self-determination. This “nearness” of governance supposes greater participation from its constituency and even greater accountability from its elected representatives. The governments of federated regions are thought to know best what is best for its own. The touted result of this sovereignty-sharing scheme is having distinct administrative, legal, and judicial systems among regions. Each regional legislative assembly is theoretically enjoined to enact laws that would be (more) responsive to the needs of and culturally appropriate to its constituents. In the proposed PDP-Laban Institute model, precursor

to the draft proposal, the idea of “regional autonomy” (SJR No. 10 Revisions 1, 5, 10) is expounded as:

Regional Autonomy. Section 5. Principles:

(1) Autonomy: the State shall allow the people of the regions to determine what is best for their welfare and development...

(7) Development of regional culture and civic virtues: the State shall foster the preservation and development of regional culture and civic virtues for greater understanding, tolerance, and unity towards nation-building.

Deeming to address historical conflicts, PDP-Laban Institute cites achieving peace in Mindanao and the preservation of culture of the various ethnolinguistic groups as their drumbeat for the transition to a federal system.<sup>18</sup> Then House Speaker Alvarez, himself a member of the PDP-Laban, “promised leaders of indigenous peoples (IPs) he would push for a ‘separate states’ for them in the Cordilleras and Mindanao, as he called on them to support the shift to a federal system of government.”<sup>19</sup>

With the exception of the Bangsamoro and (proposed) Cordillera regions, which assumes the notion of “separate states” for Moros and Cordillera IPs, little else can be gleaned in the proposed charter towards creating mechanism that would enable indigenous peoples in other regions to be autonomous, self-determining, and self-governing. For IPs who are often the minorities in their regions, representation and the creation of structures that will encourage and ensure their governance systems present a greater challenge. Unless their secured mandate (sovereignty) is translated into local legislation in the federated regions, the right of indigenous peoples to their ancestral domains, governance, and self-determination will only remain as guiding principles devoid of apparatus for implementation.

The tension and uncertainty remain notwithstanding the creation of the Bangsamoro. Without the support of local legislation for the respect and protection of indigenous peoples within its jurisdiction, i.e. protecting and ensuring the ancestral domains and governance structure implemented by the Teduray Lambangian in their ancestral domains within the Bangsamoro territory, indigenous peoples rights within the Bangsamoro will remain insecure. Pushing the rhetoric forward, the question is what are the chances that a separate Teduray Lambangian region could solicit approval from a majority Bangsamoro plebiscite? In the case of the Cordillera, the presumption that all indigenous groups are amenable and follow the same governance and political trajectory is inaccurate. On the other hand, the creation of “separate states” for indigenous peoples elsewhere would require a revision of the constitution, not a simple matter of course requiring no less than a plebiscite or referendum to reflect “majority” sentiments.

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<sup>18</sup> Placido, D. (January 18, 2018). “Duterte warns of war in Mindanao if BBL, federalism not pursued.” *ABS-CBN News*. <http://news.abs-cbn.com/news/01/18/18/duterte-warns-of-war-in-mindanao-if-bbl-federalism-not-pursued>.

<sup>19</sup> Cupin, B. (February 07, 2018). “Federal PH: Alvarez wants separate states for indigenous peoples.” *Rappler*. <https://www.rappler.com/nation/195499-alvarez-federalism-separate-states-indigenous-peoples>.

Moreover, while the recognition and promotion of the rights of indigenous peoples is retained as part of State Policies (Art. II, Sec. 22) and the “primacy of customary laws of indigenous peoples to their ancestral domains” (Art. XV, Sec. 9) as part of national patrimony, these remain subject to national development policies and programs.

The Con-Com draft operationalizes autonomy by granting federated regions exclusive power within their territories over socio-economic development planning, creation of sources of revenue, financial administration and management, municipal waters, economic zones, culture and language development, justice system, land use and housing, and indigenous peoples’ rights and welfare, among others (see Art. VII, Sec. 2).

<b>Table 2. 2018 Con-Com Proposal ARTICLE XII DISTRIBUTION OF POWERS OF THE GOVERNMENT</b>	
<p><b>Section 1.</b> The Federal Government shall have exclusive power over:</p> <ul style="list-style-type: none"> <li>• Defense, security of land, sea, and air territory;</li> <li>• Foreign affairs;</li> <li>• International trade;</li> <li>• Customs and tariffs;</li> <li>• Citizenship, immigration and naturalization;</li> <li>• National socio-economic planning;</li> <li>• Monetary policy and federal fiscal policy, banking, currency;</li> <li>• Competition and competition regulation bodies;</li> <li>• Inter-regional infrastructure and public utilities, including telecommunications and broadband networks;</li> <li>• Postal service;</li> <li>• Time regulation, standards of weights and measures;</li> <li>• Promotion and protection of human rights;</li> <li>• Basic education;</li> <li>• Science and technology;</li> <li>• Regulation and licensing of professions;</li> <li>• Social security benefits;</li> <li>• Federal crimes and justice system;</li> <li>• Law and order;</li> <li>• Civil, family, property, and commercial laws, except as may be otherwise provided for in the Constitution;</li> <li>• Prosecution of graft and corruption cases;</li> <li>• Intellectual property; and</li> <li>• Elections.</li> </ul>	<p><b>Section 2.</b> Within their regional territory, the Federated Region shall have exclusive power over:</p> <ul style="list-style-type: none"> <li>• Socio-economic development planning;</li> <li>• Creation of sources of revenue;</li> <li>• Financial administration and management;</li> <li>• Tourism, investment, and trade development;</li> <li>• Infrastructure, public utilities and public works;</li> <li>• Economic zones;</li> <li>• Land use and housing;</li> <li>• Justice system;</li> <li>• Local government units;</li> <li>• Business permits and licenses;</li> <li>• Municipal waters;</li> <li>• Indigenous peoples’ rights and welfare;</li> <li>• Culture and language development;</li> <li>• Sports development; and</li> <li>• Parks and recreation.</li> </ul>

A review of existing legislation clarifies that such powers are not absent.<sup>20</sup> The powers granted to federated regions echo relevant provisions of the Local Government Code (LGC, Republic Act No. 7160). In the LGC, the fundamental principles of “genuine and meaningful local autonomy” and “accountability of local government units” are declared as policy guidelines (Sec. 2 a, b). Among the devolved powers to local governments include the provision of basic services and facilities (Sec. 17) such as in health, environmental management (which includes the implementation of community-based forestry projects, including integrated social forestry programs and similar projects; and the management and control of communal forests), agriculture, infrastructure and tourism, and the corresponding power to develop their own organizational structure and staffing to achieve and deliver such services. Characterized as municipal corporations, local government units have both governmental and corporate personalities to enter into joint ventures and other co-operative instruments with the private sector for the delivery of basic services and livelihood projects, and the development of local enterprises. These, in essence, already grant power to the local governments to determine their socio-economic development plan, trade and investment, and, to some degree, the use and management of natural resources.

The expanded powers present either opportunity or threat to indigenous peoples rights—federated regions could expand or limit indigenous peoples’ rights and welfare by complementing or putting in place opposing or contradicting instruments and mechanisms, i.e. land use plan that may or may not consider IP rights over their territories and economic zones that may encroach on IP territories, among others. The creation of economic zones, for instance, has not been without controversy. The Aurora Pacific Economic Zone and Freeport (APECO)<sup>21</sup> sponsored by then Senator Edgardo Angara in the Senate and by his son, then Representative, now Senator, Juan Edgardo Angara, in the House of Representatives, continues to be protested by indigenous communities and farmers for usurping their rights and encroaching on their lands.<sup>22,23</sup>

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<sup>20</sup>New provisions in the proposed charter find these as already existing legislation, e.g. the non-discrimination against people with disability in Article XVI, Sec. 3(f), is comprehended in RA 7277 - Magna Carta for Disabled Persons; the protection from and compensation for damages to the environment brought by “illegal and unsustainable exploitation of natural resources” in Article II, Sec. 28(b) are available in the National Integrated Protected Areas System Act (RA 7586) and various DENR Administrative Orders.

<sup>21</sup>Created by virtue of Republic Act No. 9490 and signed into law by then President Gloria Macapagal Arroyo.

<sup>22</sup>Environmental Justice Atlas. APECO Special Economic Zone on ancestral lands and fishing grounds, Aurora, Philippines. <https://ejatlas.org/conflict/apeco-special-economic-zone-on-ancestral-lands-and-fishing-grounds-aurora-island-philippines>.

<sup>23</sup>Salaverria, L.B. (February 20, 2012). “Aurora economic zone a threat to people’s livelihood, say farmers, fishers.” *Inquirer.net*. <http://newsinfo.inquirer.net/149053/aurora-economic-zone-threatens-livelihood-say-farmers-fishers>.

Under the proposal, indigenous peoples' rights and welfare will be under the mandate of the federated regions.<sup>24</sup> At present, the IPRA sets the mechanisms and bounds for indigenous communities' rights. It sets about to ensure the security of ancestral domains through the application and grant of Certificate of the Ancestral Domains Title and Certificate (CADT and CADC). At both the national and regional levels, the office of the National Commission for Indigenous Peoples (NCIP) is tasked to implement this mandate. The expansion of exclusive power to federated regions has implications on the subsequent implementation of IPRA and of the powers presently held by the NCIP.<sup>25</sup> How will indigenous peoples' rights and welfare be appreciated at the level of federated regions? How will the NCIP exercise its mandate within this layering of bureaucracy? Will it retain its mandate?

In terms of representation in the legislative department, the Constitution provides for the party-list system where sectors may garner seats in Congress through election. The same provision finds similar wording in the Con-Com proposal. The idea of sectoral representation was initially thought to be an avenue to address indigenous peoples' issues through legislation. Intended in spirit to allow political participation by marginalized sectors who lack the resources and political machinery to enter popular elections, the party-list system has evolved to become another conduit for political parties to garner seats in Congress (Tangkia and Habarabas 2004).<sup>26</sup> Unless articulated categorically that the introduction of "the party-list system has for its objective the equalization of political power" and "...[t]he basic premise for this is that by these sectors, we mean the underprivileged..." (Bernas in Tangkia and Habarabas 2004), the party-list system will remain mostly an extension of traditional politics while the sectors remain at the margins in whatever form of government.

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<sup>24</sup>Previous proposals submit the creation of courts "according to the customs and traditions of the indigenous populations of the States concerned." Senate Joint Resolution (SJR) No. 10 (Revision No. 11) filed in the Fourteenth Congress grants State Legislatures (regional legislatures) the exclusive jurisdiction to enact laws, among others, particularly with respect to Indigenous Peoples and Moro governance;

New Section. Article X. State Legislatures - Powers and Duties.

15. Courts for the governance according to the customs and traditions of the indigenous populations of the States concerned including but not limited to the indigenous populations of the Cordilleras in the State of Northern Luzon and the Autonomous Region in the State of the BangsaMoro.

RBH No. 8 translates this in Section 21 where Regional Councils have authority to legislate;

(o) Courts for the governance according to the customs and traditions of the indigenous populations of the regions. The regional legislation creating said courts shall take precedence over laws passed by the federal congress covering the same subject matter. The courts, however, shall apply the provisions of this constitution, particularly the applicable provisions under the bill of rights, to ensure that no cruel or unusual punishment is imposed;

These proposals are absent in the Con-Com draft.

<sup>25</sup>In the case of the Teduray Justice Governance (TJG, the organization of Teduray Lambangian in Maguindanao), whose ancestral domain lies within the jurisdiction of the Autonomous Region of Muslim Mindanao, their recourse has been a long struggle to petition the NCIP at the national level and the Office of the President for the application of their CADT, there being no NCIP in the region.

<sup>26</sup>At present only ANAC-IP was elected in Congress with one seat.

1987 Constitution	2018 Con-Com Charter Proposal
<p><b>ARTICLE VI THE LEGISLATIVE DEPARTMENT</b>  <b>Section 5.</b> (2) The party-list representatives shall constitute twenty per centum of the total number of representatives including those under the party list. For three consecutive terms after the ratification of this Constitution, one-half of the seats allocated to party-list representatives shall be filled, as provided by law, by selection or election from the labor, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector.</p>	<p><b>ARTICLE VII LEGISLATIVE DEPARTMENT</b>  <b>Section 5.</b> (b) For three (3) consecutive terms following the ratification of this Constitution, one half of the seats set aside for parties voted under the proportional representation system shall be reserved for labor, peasant, urban poor, indigenous peoples, and fisherfolk groups, provided that they organize themselves as parties or coalitions of parties. The other half of the total seats allocated for proportional representation shall be open to all other political parties or coalitions thereof.</p>

In the face of complexities and tensions that may be brought about by the shift to federalism—bureaucratic layering, discrete legal and administrative policies—will IPs be compelled to reassert and renegotiate their rights within their respective federated regions? How will indigenous communities fare among “majority” interest in a federal system, or in any system? Lacking a definitive regional legislative agenda towards ensuring IP communities’ right to self-determination and their right to delineate territories, there is yet no assurance that such aspirations will be supported and safeguarded in federated regions. It remains to be seen how indigenous peoples’ interests and rights, often in tension with various commercial and development interests, will be resolved and ensured.

**Wealth-sharing**

Wealth-sharing scheme is one of the key features of federalism.<sup>27</sup> Fiscal independence is meant to spread the wealth of the nation and to allow federated regions to develop revenue sources directly and independently.<sup>28</sup>

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<sup>27</sup>Deemed to enhance both local and national development by shifting the financial planning locally to federated regions in order to enhance their delivery of services, which has mostly been financed nationally. The Local Government Code increased the share for local governments of the Internal Revenue Allotment (IRA) to 40 percent from 20 percent (Sec. 284, Title III, Ch. 1, LGC). The proposed charter intends to increase this further with a provision on its automatic release (Art. XIII, Sec. 4). The automatic release of shares is not new and is a key feature of the LGC (Sec. 284).

An en banc decision of the Supreme Court (July 3, 2018) ruled that the IRAs of local governments should be based on “national taxes” and not only on “national internal revenue taxes.” The Court ruled that the basis for the ‘just share’ of local government units under Art. X, Sec. 6 of the 1987 Constitution as based on all national taxes and not only national internal revenue taxes, as provided in Section 284 of the Local Government Code, effectively raising the share of local government units (Mandanas, et al. v. Ochoa, et al., G.R. No. 199802 and Garcia Jr. v. Paquito Ochoa, et al., G.R. No. 208488, July 3, 2018).

Natural resources, including those owned by indigenous peoples, are a major source of national income and wealth. It is also a major source of dispute because of conflicting claims on the ownership, control and sharing of the wealth derived from such resources. Conflicts have arisen and will arise when the one who owns the resource is unable to control that resource. This is clearly relevant to IP communities who own vast resources within their ancestral domains.

<b>Table 4. Share of local governments from the exploitation of natural resources within their territory</b>	
<b>1991 Local Government Code</b>	<b>2018 Con-Com Charter Proposal</b>
<p><b>CHAPTER 2 - SHARE OF LOCAL GOVERNMENT UNITS IN THE NATIONAL WEALTH</b></p> <p><b>Section 290. Amount of Share of Local Government Units.</b></p> <p>- Local government units shall, in addition to the internal revenue allotment, have a share of forty percent (40%) of the gross collection derived by the national government from the preceding fiscal year from mining taxes, royalties, forestry and fishery charges, and such other taxes, fees, or charges, including related surcharges, interests, or fines, and from its share in any co-production, joint venture or production sharing agreement in the utilization and development of the national wealth within their jurisdiction.</p> <p><b>Section 291. Share of the Local Governments from any Government Agency or -Owned and -Controlled Corporation.</b></p> <p>- Local government units shall have a share based on the preceding fiscal year from the proceeds derived by any government agency or government-owned or -controlled corporation engaged in the utilization and development of the national wealth based on the following formula whichever will produce a higher share for the local government unit:</p> <p>(a) One percent (1%) of the gross sales or receipts of the preceding calendar year; or</p> <p>(b) Forty percent (40%) of the mining taxes, royalties, forestry and fishery charges and such other taxes, fees or charges, including related surcharges, interests, or fines the government agency or government -owned or -controlled corporation would have paid if it were not otherwise exempt.</p>	<p><b>ARTICLE XIII FISCAL POWERS AND FINANCIAL ADMINISTRATION</b></p> <p><b>Section 7.</b> The Federated Regions shall be entitled to fifty percent (50%) of all net revenues derived from the exploration, development, and utilization of all natural resources within their territory.</p>

<sup>28</sup>While the draft proposes a 3 percent Equalization Fund from the national budget to be distributed according to each region’s needs (Art. XII, Sec. 5), experts argue this may not be enough to equalize the needs of the regions given population, resources, and other disparities. They caution that the income disparity among the regions, i.e. with three regions accounting for 62 percent of the economy (Metro Manila, Central Luzon, and Calabarzon) and the rest with smaller contribution to the GDP, could even result in greater disparity. See ABS-CBN (Feb 15, 2018), “Revamped bureaucracy under federal gov’t may add up to P72B in costs.” *ABS-CBN.com*. <http://news.abs-cbn.com/business/02/15/18/revamped-bureaucracy-under-federal-govt-may-add-up-to-p72b-in-costs>.



In the Con-Com proposal, the share of federated regions from revenues derived from the exploitation, development, and utilization of all natural resources within their territory is pegged at 50 percent. Presently, the rate of share and distribution to local governments is mandated under the LGC at approximately 40 percent from all gross collection from mining taxes, royalties, forestry and fishery charges, and such other taxes, fees, or charges, including related surcharges, interests, or fines, and from its share in any co-production, joint venture or production sharing agreement in the utilization and development of the national wealth within their jurisdiction.

<b>Table 5: Comparing provisions on National Patrimony</b>	
<b>1987 Constitution</b>	<b>2018 Con-Com Charter Proposal</b>
<p><b>ARTICLE XII NATIONAL ECONOMY AND PATRIMONY</b>  <b>Section 2.</b> All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.</p> <p>The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens. The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fish-workers in rivers, lakes, bays, and lagoons.</p> <p>The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources. The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.</p>	<p><b>ARTICLE XV NATIONAL ECONOMY AND PATRIMONY</b>  <b>Section 2.</b> All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State and shall not be alienated except lands of public domain provided herein as alienable.</p> <p><b>Section 4.</b> (a) The exploration, development, and utilization of natural resources shall be a shared power of the Federal and Regional Governments. Within their respective competencies, they may determine the manner and extent of their exploration, development, and utilization. They may directly undertake such activities, or they may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or entities at least sixty percent (60%) of whose voting capital is owned by Filipino citizens. Such agreements may be for a period not exceeding twenty-five (25) years, renewable for another twenty-five (25) years.</p> <p>(b) They may also enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils. They shall notify their respective legislatures of every contract entered into within thirty (30) days from its execution.</p> <p>(c) The small-scale utilization of natural resources by Filipinos, especially the marginalized, shall be allowed and protected.</p> <p>(d) Congress may, by law, change the voting capital requirement under this section considering the federal and regional interest of the people.</p>

A reading of the proposal's section on national economy echoes the scheme that the exploitation and utilization of natural resources will be a viable source of income and revenue for the government, federal and regional. Corollarily, the exploitation of natural resources in partnership with investors (local and foreign) also remains as a key development strategy for the Philippine administration, past and present.<sup>29</sup>

When taken in consideration with the record of mining and other resource exploiting companies in the country, the opening to more investments in extraction and natural resources is a prospect that will continue to leave communities at greater risk. Often operating within ancestral domains, these ventures have undermined communities' right to free, prior, and informed consent, and caused the erosion of IPs' customary laws and sustainable resource management practices.<sup>30,31</sup> Moreover, they have a track for unsustainable resource extraction practices that cause hazard to communities.<sup>32</sup>

The increase in the share of federated regions from utilizing natural resources presents an incentive. As it is, indigenous peoples' assertion of their rights to their ancestral domains under IPRA continues to be a challenge and a source of tension, often putting IPs in direct conflict and harm. At the core of these conflicts is the contest to exploit the resources within their ancestral domains. Will federated regions be willing to respect IP communities' right to self-determination when it can potentially divest them of potential sources of revenue?

### **Possibilities-uncertainties, more uncertainties**

A comparative review of studies on federalism<sup>33</sup> concluded that "it is in fact deeply divided along national lines, where different country-specific preoccupations determine the issues to be investigated" (Erk 2006). Federalism is found to mean different things in various applications: "In some federal systems the term federalism represents the dispersal of political power to

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<sup>29</sup>In February 2018, President Duterte declared that he wanted ancestral domains open to investors. He wanted IPs in Mindanao to relocate from their ancestral domain, hinting "that the government's counter-insurgency efforts are linked to his plan to relocate IP communities to temporary shelters." These statements were subsequently clarified by Malacañang that the President would consult the *lumads* on the use of their ancestral domains. See Basa, M. (February 1, 2018). "Duterte tells Lumad leaders to prepare for relocation." *Rappler*. <https://www.rappler.com/nation/195046-duterte-tells-lumad-leaders-prepare-relocation>; and Ranada, P. (February 5, 2018). "Duterte to consult with Lumad on use of ancestral lands." *Rappler*. <https://www.rappler.com/nation/195294-duterte-consult-lumad-ancestral-lands>.

<sup>30</sup>"Stop mining operations hurting IPs in Nueva Vizcaya." (June 28, 2016). *Inquirer.net*. <http://opinion.inquirer.net/95396/stop-mining-operations-hurting-ips-nueva-vizcaya#ixzz5DmsDI3Wm>

<sup>31</sup>Rural Missionaries of the Philippines. (Sep 21, 2013). "Only nixing mining will end Tampakan horrors - IP group." <http://www.rmp-nmr.org/articles/2013/09/21/only-nixing-mining-will-end-tampakan-horrors-ip-group>

<sup>32</sup>Santos, T.G. (March 27, 2017). "Marcopper dam leaks threaten townsfolk." *Inquirer.net*. <http://newsinfo.inquirer.net/884047/marcopper-dam-leaks-threaten-townsfolk#ixzz5DmrM9PyL>

<sup>33</sup>Erk, J. (2006). "Does Federalism Really Matter?" *Comparative Politics*, Vol. 39. No.1, pp. 103-120.

strengthen democracy and bring politics closer to citizens; in others it represents a system that allows the diverse ethnolinguistic groups a form of self-rule. In some federal systems the term is synonymous with costly inefficiency resulting from divided authority; in others it is seen as a system that encourages experimentation and policy variation” (2006:116).

The experiences of the United States on federalism in relation to indigenous nation homelands present important learning. While different in historical context, they share some analogous conditions with the Philippine IP struggle. In their review, Corntassel and Witmer<sup>34</sup> (2008) argue that as state governments received more jurisdictional powers from the federal government, including the “institutionalization of an indigenous-state compact system,” the “once exclusive federal trust relationship,” “direct consultation with Congress,” and “direct indigenous government-to-federal government relations” are now challenged by state governments; “consequently, state governors and officials are asserting more dominance over indigenous nations within their state boundaries.”

Since 1988, the federal government has compelled or coerced indigenous nations to negotiate away their powers of governance and jurisdiction of their homelands relating to taxation, gaming, hunting and fishing rights, homeland security, and so on vis-a vis indigenous-state compacts with state governments that have historically shown animosity towards them. This contemporary devolution process, which transfers federal powers to state and local governments, has been labeled “new federalism” but is just the latest attempt by the federal government to off-load their trust responsibilities to indigenous peoples onto state and governments (2008:17).

Corntassel and Witmer (2008:18-20) enumerates areas where federal states in the case of the US have begun to assert jurisdictional claims over indigenous territories:

1. Criminal Jurisdiction and Policing – Disputes regarding law enforcements and punishments for indigenous and non-indigenous persons committing crimes on indigenous homelands;
2. Hunting and Fishing Rights – Despite guarantee of hunting and fishing rights, indigenous peoples are being challenged by states in the name of conservation and environmental protection. In the Philippine context this may also expand to cover indigenous farming practices that may run counter to conservation programs;
3. Self-Governance – State legislators and members of state executive branches increasingly claim jurisdictional control over issues of indigenous governance, such as water rights and policy decisions (e.g. ban on alcohol in some states, state intrusion into areas once reserved exclusively for indigenous governments);
4. Taxation and Economic Development – State and local governments raising revenue by taxing transactions on indigenous land, state assertion to tax indigenous-owned businesses;
5. Child-protection and Welfare – Imposition of state governmental standards by proposing to adopt “objective” measures of cultural ties;
6. Gaming – In the US context, state governments limit and tax indigenous casino profits; in the Philippine context, this may be applied to other enterprises entered into by indigenous communities such as tourism;

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<sup>34</sup>Corntassel, J. and R.C. Witmer. (2008). *Forced Federalism: Contemporary Challenges to Indigenous Nationhood*. University of Oklahoma Press.

## 7. Homeland Security – The US context pertains mostly to funding priorities.

In the Americas, a comparative study found that the federal systems of Argentina, Brazil, Mexico and Venezuela in reality have political power heavily centralized in the national government, particularly in the executive, so that provinces or states exercise limited autonomy.<sup>35</sup> On the other hand, the powers of the federal or central governments do not always reach the interior of the countries where they are traditionally ruled by local large landholders (Rosenn 1994:43). Federalism in these countries has not deterred dictatorships. In the US, “federal government, not the state governments, has frequently been far more vigilant in protecting the rights of minorities” (1994:49).

The Philippines is not without any instrument that presents a way towards governance characterized by local independence. The devolution envisioned by the LGC has this for its end. It is, of course, not without faults; challenged mainly because of a persisting political culture that has hampered its implementation,<sup>36</sup> not the least of which is the “system of bossism and cronyism that insulate elites from real accountability and public pressures.... The political interests of key actors at the national and sub-national levels contribute to the inconsistency in delivery of public goods and services and economic development” (Shair-Rosenfield 2016:158).

A review of fiscal distribution found that

the issue here is not so much that the NCR and its periphery (i.e., Regions III and IVA) receive a disproportionate share of national government spending relative to their contribution to the economy or to their need for public services (as measured by their share in population, for example) because, in fact, this is not necessarily the case especially in recent years.... Rather, the issue is that, by providing the venue for legislators and local government officials to access additional budgetary resources in the common pool via transactional politics... [it] adds an additional layer of distortions on the incentives for more accountable governance at the local level (Manasan, 2017: 36).

Finding a way forward towards national development might not be a case of determining the appropriate government system but more about finding a way to address the effects of a detrimental political culture.

Closer scrutiny of the proposed charter exposes other issues. The proposal, while positing the change to a federal system as its central objective, insinuates substantive changes in the constitution that will affect the security and liberty of the people.

In its Declaration of Principles and State Policies (Article II), “human rights”<sup>37</sup> is no longer mentioned (see Sec. 13)—a principle enshrined in the 1987 Constitution after the atrocities and violations suffered under the Marcos dictatorship (see 1987 Constitution, Art. II, Sec. 11). In light

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<sup>35</sup>Rosenn, K.S. (1994). “Federalism in the Americas in Comparative Perspective.” *Miami Inter-Am. L. Rev.* 1 26 U.

<sup>36</sup>Shair-Rosenfield, S. (2016). “The Causes and Effects of the Local Government Code in the Philippines Locked in a Status Quo of Weakly Decentralized Authority?” *Journal of Southeast Asian Economies* Vol. 33, No. 2, pp. 157-71.

<sup>37</sup>While it maintains the Commission of Human Rights (Article X).

of the many challenges faced by indigenous communities, this is a serious concern. In asserting their rights and accessing justice, human rights instruments and bodies have been their recourse when state actors provide no support or even connive with perpetrators. The lack of categorical mention of human rights implies the state's diminution of its obligations to ensure, protect, and observe human rights. Taken in the context of the present Administration's pronouncements against human rights and the mandated bodies tasked to observe and ensure the same, both local and international,<sup>38,39,40</sup> this change in the proposed charter reveals a particular bias regarding human rights.

In the proposed Bill of Rights, Sec. 1 declares the rights are demandable against state and non-state actors. While this presents the possibility for communities to proceed against corporations/entities violating their rights, the same could also be demanded, under false charges, against organizations, entities or individuals supporting communities. A Supreme Court decision<sup>41</sup> clarified the obligations and responsibilities of the State<sup>42</sup> as the essence of the Bill of Rights,

That the Bill of Rights embodied in the Constitution is not meant to be invoked against acts of private individuals finds support in the deliberations of the Constitutional Commission. True, the liberties guaranteed by the fundamental law of the land must always be subject to protection. But protection against whom? Commissioner Bernas in his sponsorship speech in the Bill of Rights answers the query, which he himself posed, as follows:

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<sup>38</sup>Berlinger, J. (March 2, 2018). "Duterte tells rights investigators 'don't f\*\*\* with me' in speech." CNN.com. <https://edition.cnn.com/2018/03/02/asia/duterte-philippines-un-probe-intl/index.html>.

<sup>39</sup>Reuters. (March 10, 2018). "Philippines slams U.N. rights chief for 'disrespectful' remarks about Duterte." <https://www.reuters.com/article/us-philippines-un/philippines-slams-un-rights-chief-for-disrespectful-remarks-about-duterte-idUSKCN1GM04I>.

<sup>40</sup>"Duterte slams UN rights High Commissioner: 'You have a big head but it's empty'." (April 6, 2018). CNN.com. <http://cnnphilippines.com/news/2018/04/04/President-Duterte-UNHRC-Chief.html>.

<sup>41</sup>See PP vs. Andre Marti, G.R. No. 81561, January 18, 1991. [https://www.lawphil.net/judjuris/juri1991/jan1991/gr\\_81561\\_1991.html](https://www.lawphil.net/judjuris/juri1991/jan1991/gr_81561_1991.html)

<sup>42</sup>Justice Tinga states, "Justice Puno characterizes the notion that constitutional due process limits government action alone as *pass*, and adverts to *nouvelle vague* theories which assert that private conduct may be restrained by constitutional due process. His dissent alludes to the American experience making references to the post-Civil War/pre-World War II era when the US Supreme Court seemed overly solicitous to the rights of big business over those of the workers... The differences between the State and employers are not merely literal, but extend to their very essences. Unlike the State, the *raison detre* of employers in business is to accumulate profits. Perhaps the State and the employer are similarly capacitated to inflict injury or discomfort on persons under their control, but the same power is also possessed by a school principal, hospital administrator, or a religious leader, among many others. Indeed, the scope and reach of authority of an employer pales in comparison with that of the State. There is no basis to conclude that an employer, or even the employer class, may be deemed a *de facto* state and on that premise, compelled to observe the Bill of Rights. There is simply no nexus in their functions, distaff as they are, that renders it necessary to accord the same jurisprudential treatment." See separate opinion J. Tinga, Agabon vs NLRC, G.R. No. 158693, November 17, 2004. [http://sc.judiciary.gov.ph/jurisprudence/2004/nov2004/158693\\_tinga.htm](http://sc.judiciary.gov.ph/jurisprudence/2004/nov2004/158693_tinga.htm).

First, the general reflections. The protection of fundamental liberties [is] the essence of constitutional democracy. Protection against whom? *Protection against the state. The Bill of Rights governs the relationship between the individual and the state. Its concern is not the relation between individuals, between a private individual and other individuals. What the Bill of Rights does is to declare some forbidden zones in the private sphere inaccessible to any power holder.* (Sponsorship Speech of Commissioner Bernas, Record of the Constitutional Commission, Vol. 1, p. 674; July 17, 1986; emphasis supplied). (PP vs. Andre Marti, G.R. No. 81561, January 18, 1991).

In another case (Agabon vs NLRC, G.R. No. 158693, J. Tinga separate opinion), the Court declared,

There are thousands of statutes, some penal or regulatory in nature, that are the source of actionable claims against private persons. There is even no stopping the State, through the legislative cauldron, from compelling private individuals, under pain of legal sanction, into observing the norms ordained in the Bill of Rights... [A]ppropriate remedies exist within our statutes, and so resort to the constitutional trump card is not necessary... [Private persons] plainly do not possess the awesome powers and the tremendous resources which the State has at its command.

Other provisions, contrary to the principle of governance sharing, concentrate police power to the executive department, e.g. the maintenance of one police force, which shall be federal in scope (Art. XIX, Sec. 4); the power of the president to intervene and take all measures necessary against any region when it is regarded as undermining the sovereignty, territorial integrity, economy, or unity of the federal republic (Art. XX, Sec. 4). These sections differentiate governance-sharing interpretation from the concept of sovereignty sharing espoused by other federalist models.<sup>43</sup>

Recent events show that there has been no abatement to the historical injustice against IPs and the usurpation of their ancestral domains. Various human rights abuses and violence continue to be perpetuated against indigenous communities, especially as they assert their rights. Among

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<sup>43</sup>Under the proposal, the federated regions are considered “permanent and indissoluble parts of the Federal Republic of the Philippines” with an accompanying prohibition “for anyone to advocate, demand for, or support the secession of any Region from the Federal Republic” (Art. XI, Sec. 2). An earlier proposal by Senators Pimentel, Jr., Angara, Biazon et. al. in the Fourteenth Congress (Senate Joint Resolution SJR No. 10, Art. 1, Rev. 4) included a provision that allowed for the dissolution, secession or separation of states.

Senate Joint Resolution (SJR) No. 10, Art. 1. Rev. 4. New Section. Article I. Dissolution, Secession or Separation of States:

No State may dissolve itself, secede or separate from the Federal Republic unless it first secures the approval of two-thirds of its qualified voters in a plebiscite called for that purpose. Thereafter, the Congress may, by a vote of two-thirds of all its members, voting separately, act on the proposed dissolution, secession or separation of the State concerned.

In other federal governments this is available to the people through a referendum.

countries, the Philippines ranked with the most number of environmental defenders killed in 2017 (Global Witness 2017<sup>44</sup>). Many of the violations are under the guise of legal actions<sup>45</sup> and with state intervention.<sup>46</sup>

The national development framework continues to operate under a resource exploitation track,<sup>47</sup> a policy that often collides with indigenous communities’ security and rights where development projects (dams, agro-industry, mining) overlap with ancestral territories.<sup>48</sup>

Table 6. Articulation of Human Rights	
1987 Constitution	2018 Con-Com Charter Proposal
<p><b>ARTICLE II DECLARATION OF PRINCIPLES AND STATE POLICIES</b>  <b>Section 11.</b> The State values the dignity of every human person and guarantees full respect for <u>human rights</u> [emphasis supplied].</p>	<p><b>ARTICLE II DECLARATION OF PRINCIPLES AND STATE POLICIES</b>  <b>Section 13.</b> The Federal Republic values the dignity of every human person and guarantees full respect for <u>the human person and the right of all citizens to participate in all government processes</u> [emphasis supplied].</p>

<sup>44</sup>See <https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost/>.

<sup>45</sup>In March 2018, the Department of Justice, citing the Human Security Act of 2007 (RA 9372), issued a list of 461 names and 188 aliases declared to be "terrorists." Included in the list are alleged leaders and members of the Communist Party of the Philippines (CPP) and its armed wing, the New People's Army (NPA). Among those listed are IP leaders and activists. See Alimondo, L. (April 4, 2018). "Cordillera leaders denounce DOJ 'terror' list." *Sunstar*. <http://www.sunstar.com.ph/article/426430/>.

<sup>46</sup>During her term, then president, now House Speaker, Gloria Macapagal Arroyo issued an executive order designating special army units to protect mines, plantations and power transmission lines. See "Manila's Arroyo sets up army unit to guard mines." (February 8, 2008). *Reuters*. <https://www.reuters.com/article/idUSMAN119101>

<sup>47</sup>Ison, L. (September 7, 2017). "Gov't wants mining industry more globally competitive." *Philippine News Agency*. <http://www.pna.gov.ph/articles/1008702>.

<sup>48</sup>In December 3, 2017, Datu Victor Danyan, his sons and other *lumads* were killed in a military encounter. They were reported by the military to be among the NPAs killed in the clash. Datu Victor and the T'boli-Manubo Sdaf Claimants Organization (TAMASCO) refused the renewal of the Industrial Forest Plantation Management Agreement 22 covering their ancestral domain that was awarded to David M. Consunji, Inc. (DMCI). See Espina-Varona, I. (December 15, 2017). "Killing of 8 Lumad followed visit of barangay captain: survivors." *ABS-CBN News*. <http://news.abs-cbn.com/news/12/15/17/killing-of-8-lumad-followed-visit-of-barangay-captain-survivors>.

In theory, the IPRA, and other statutes similarly protecting IP rights, would still be effective during constitutional change and even after ratification unless the IPRA is explicitly repealed by the new constitution or if it would include provisions contradictory to the IPRA. The Constitution, and the rule of law, does not lose power or effect at the time of amendment or revision, unless tyrannical moves are made to precisely dispense with this fundamental law of the land. If recognition of IP rights is thus affirmed in the new constitution for a federal Philippines and the IPRA is not expressly or implicitly repealed, the IPRA would be the minimum standard for protection of IP rights; the mechanism in operation is likewise that which is provided in the IPRA. The IPRA would be the starting point and may be amended to address conditions that were not foreseen at the time of its enactment. Under just conditions, federated regions could and would enact laws addressing indigenous peoples' issues and concerns and these laws could be the improvements and enhancements of the IPRA. On the other hand, a regional law that affords less protection may be challenged as unconstitutional for unequal protection or for diminution or derogation of rights. These are ideal scenarios.

There are some proposals related to the pursuit of reforms under the present Constitution without amending it:

- a. Amending the Local Government Code, particularly the provisions on wealth-sharing;
- b. Maximizing the initiative mechanisms in the Local Government Code;
- c. Ensuring the independence of and support for sectoral representatives in the local councils as mandated by the LGC;
- d. Amending the following laws, among others: NIPAS, IPRA, Fisheries Code, Forestry Code, Mining Law, and Strategic Environmental Plan for Palawan Act;
- e. Amending administrative issuances, rules, and regulations promulgated by national government agencies; and
- f. Amending ordinances or promulgating new ordinances and environmental codes at the level of local government units.

If the shift to a federal-parliamentary system of government happens, the following questions may guide analysis, discussion, and decisions on engagement:

- a. How can IPs be represented in the national, subnational, and sub-subnational legislative bodies, whether unitary or bicameral? Should IPs form their own political parties and seek elective positions at all levels of governance?
- b. How can the right to self-determination and self-governance be ensured in terms of ownership, control, and wealth-sharing considerations?
- c. How can ancestral domains be recognized as subnational/sub-subnational units? What are the legal measures that have to be undertaken?

The realization of the right to self-determination and self-governance is a long road. The changes that indigenous peoples seek will require amending or revising national laws and the operational frameworks of government institutions. Some of those changes may be undertaken



under the present 1987 Constitution or may require amending it. Whatever the course of action, it is the right to self-determination and self-governance that should be the overarching theme for any undertaking by and for indigenous peoples.

## **Conclusion**

Amending the 1987 Constitution poses uncertainties for indigenous peoples' rights. Notwithstanding articulations of "recognition and promotion" of rights of indigenous peoples in the proposed models, amending the Constitution will mean opening up any and all provisions of the Constitution to changes. There will be the possibility that its protective features may not be retained or that possible revisions may hamper or contravene IPs' right to self-determination and self-governance.

The political rhetoric of granting IP communities "independence in governing themselves and the management of their own natural resources"<sup>49</sup> has long been the communities' desire. But, while it is a promise easily given, the lack of its fulfillment from past administrations hence has left communities in poverty and in peril. Largely dependent on the potential legislative agenda of the federated regions, which may have their own revenue and territorial projections, and measured against the political pronouncements of the current Administration, the promise is burdened with uncertainties.

The change to federalism must be considered in the light of political, economic, and social contexts—what are the real underpinnings that motivate the change? What are the political scenarios envisioned by the current Administration? What are its economic agenda and social biases? What are the political dynamics at play? What are the development agenda of the players? How do this Administration and the dominant political party in Congress regard natural resources—as capital and investment or as national patrimony that requires safeguards and protection? How are IPs regarded—keepers and defenders of territories or obstacles to a particular vision of development? Is the Philippine political culture ready for a change in political structure? Are the evils sought to be eradicated by a change to federalism—oligarchy, patronage, traditional and transactional politics, and so on—ripe for change, or will these practices simply find new avenues in the new system?

With varying political, cultural and religious circumstances among the regions, transitioning to a federalist system presents a crossroad between opportunity and greater risk fraught with socio-political challenges. It may pave the way for progressive pluralism or greater tension; what requires consideration are the differing mores and moralities within and among regions and, equally important, delineating territories—the right of IPs to their ancestral domains. If it happens, indigenous peoples must let their voices be heard and engage in debates on specific proposed amendments affecting their right to self-determination and self-governance.

The threats to the right to self-determination and self-governance are present and clear. Indigenous peoples and their support groups are tasked to undertake in-depth analysis and

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<sup>49</sup> "Alvarez vows he'll push for separate IP state under federal gov't." (February 7, 2018). *InterAksyon*. <http://www.interaksyon.com/alvarez-vows-hell-push-for-separate-ip-state-under-federal-govt/>

discussion of the various issues that imperil the rights of IPs, whether in the present unitary system or a possible federal system in the future. After all, whatever the form of government already assumes a statist resolution to the question of indigenous peoples' sovereignty over their lands. What remains constant is the need for vigilance and for IPs and their support groups to continue to assert their rights, consolidate, and organize so that in the political processes of the nation, their rights are not simply considered in platitudes but recognized, respected, and affirmed.

## Annexes

<b>Expanded Table 4. Share of local governments from the exploitation of natural resources within their territory</b>	
<b>1991 Local Government Code</b>	<b>2018 Con-Com Charter Proposal</b>
<p><b>CHAPTER 2 - SHARE OF LOCAL GOVERNMENT UNITS IN THE NATIONAL WEALTH</b></p> <p><b>Section 289. Share in the Proceeds from the Development and Utilization of the National Wealth.</b> - Local government units shall have an equitable share in the proceeds derived from the utilization and development of the national wealth within their respective areas, including sharing the same with</p>	<p><b>ARTICLE XIII FISCAL POWERS AND FINANCIAL ADMINISTRATION</b></p> <p><b>Section 7.</b> The Federated Regions shall be entitled to fifty percent (50%) of all net revenues derived from the exploration, development, and utilization of all natural resources within their territory.</p>

<p>the inhabitants by way of direct benefits.</p> <p><b>Section 290. Amount of Share of Local Government Units.</b> - Local government units shall, in addition to the internal revenue allotment, have a share of forty percent (40%) of the gross collection derived by the national government from the preceding fiscal year from mining taxes, royalties, forestry and fishery charges, and such other taxes, fees, or charges, including related surcharges, interests, or fines, and from its share in any co-production, joint venture or production sharing agreement in the utilization and development of the national wealth within their jurisdiction.</p> <p><b>Section 291. Share of the Local Governments from any Government Agency or -Owned and -Controlled Corporation.</b> - Local government units shall have a share based on the preceding fiscal year from the proceeds derived by any government agency or government-owned or -controlled corporation engaged in the utilization and development of the national wealth based on the following formula whichever will produce a higher share for the local government unit:                  (a) One percent (1%) of the gross sales or receipts of the preceding calendar year; or                  (b) Forty percent (40%) of the mining taxes, royalties, forestry and fishery charges and such other taxes, fees or charges, including related surcharges, interests, or fines the government agency or government -owned or -controlled corporation would have paid if it were not otherwise exempt.</p> <p><b>Section 292. Allocation of Shares.</b> - The share in the preceding Section shall be distributed in the following manner:                  (a) Where the natural resources are located in the province                  (1) Province - Twenty percent (20%);                  (2) Component city/municipality - Forty-five percent (45%);                  and                  (3) Barangay - Thirty-five percent (35%)                  Provided, however, [t]hat where the natural resources are located in two (2) or more provinces, or in two (2) or more component cities or municipalities or in two (2) or more Barangays, their respective shares shall be computed on the basis of:                  (1) Population - Seventy percent (70%); and                  (2) Land area - Thirty percent (30%).                  (b) Where the natural resources are located in a highly urbanized or independent component city:                  (1) City - Sixty-five percent (65%); and                  (2) Barangay - Thirty-five percent (35%)                  Provided, however, [t]hat where the natural resources are located in such two (2) or more cities, the allocation of shares shall be based on the formula on population and land area as specified in paragraph (a) of this Section.</p>	
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Expanded Table 5: Comparing provisions on National Patrimony	
1987 Constitution	2018 Con-Com Charter Proposal

<p><b>ARTICLE XII NATIONAL ECONOMY AND PATRIMONY</b></p> <p><b>Section 2.</b> All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.</p> <p>The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens. The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fish-workers in rivers, lakes, bays, and lagoons.</p> <p>The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources. The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.</p>	<p><b>ARTICLE XV NATIONAL ECONOMY AND PATRIMONY</b></p> <p><b>Section 2.</b> All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State and shall not be alienated except lands of public domain provided herein as alienable.</p> <p><b>Section 3.</b> (a) Lands of the public domain are classified into agricultural, forest or timber, mineral lands, and national parks. Agricultural and reclaimed lands of the public domain may be further classified by law according to the uses to which they may be devoted as residential, commercial, or industrial.</p> <p>(b) Private corporations or associations whose shares of stocks are owned or controlled at least sixty percent (60%) by Filipino citizens, may lease not more than one thousand hectares of alienable lands of the public domain for a period not exceeding twenty-five (25) years, renewable for another twenty-five (25) years.</p> <p>(c) Citizens of the Philippines may lease not more than five hundred hectares of alienable lands of the public domain or acquire not more than twelve (12) hectares thereof by purchase, homestead, or grant.</p> <p>(d) Congress may, by law, change the requirements for lease of alienable lands under this section, considering the general welfare of the people and the necessities of conservation, ecology, development, and agrarian reform.</p> <p><b>Section 4.</b> (a) The exploration, development, and utilization of natural resources shall be a shared power of the Federal and Regional Governments. Within their respective competencies, they may determine the manner and extent of their exploration, development, and utilization. They may directly undertake such activities, or they may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or entities at least sixty percent (60%) of whose voting capital is owned by Filipino citizens. Such agreements may be for a period not exceeding twenty-five (25) years, renewable for another twenty-five (25) years.</p> <p>(b) They may also enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils. They shall notify their respective legislatures of every contract entered into within thirty (30) days from its execution.</p> <p>(c) The small-scale utilization of natural resources by Filipinos, especially the marginalized, shall be allowed and protected.</p> <p>(d) Congress may, by law, change the voting capital requirement under this section considering the federal and regional interest of the people.</p>
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