

THE ART OF FREE SOCIETY*

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The title of my talk is derived from the work on symbolism of the English mathematician and philosopher Alfred North Whitehead. Whitehead wrote:

It is the first step in sociological wisdom to recognize that the major advances in civilization are processes which all but wreck the societies in which they occur—like unto an arrow in the hand of a child. The art of free society consists first in the maintenance of the symbolic code; and secondly in the fearlessness of revision, to secure that the code serves those purposes which satisfy an enlightened reason. Those societies which cannot combine reverence to their symbols with freedom of revision, must ultimately decay either from anarchy, or from the slow atrophy of a life stifled by useless shadows.¹

Today, several proposals are pending in Congress for the amendment or revision of the Constitution. Some relate to its economic provisions, others to such matters as the form of government and, as almost always, whenever there is a call for charter change or “cha-cha”, to the removal of term limits or the extension of terms of office of elective officials.

The reaction of two key members of Congress to these proposals presents interesting studies of attitudes toward change of the Constitution as the symbolic code. When told that the Senate was cool to proposals to amend the Constitution’s economic provisions and advised to seek the support of the president, Senator Robinhood Padilla said, “I will never do that. If I ask for the president’s blessings, that means we are a subordinate of the

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¹ ALFRED NORTH WHITEHEAD, *SYMBOLISM: ITS MEANING AND EFFECT* 88 (1927).

executive.”² That is the art of free society—a person’s determination, regardless of political consequences, to seek the amendment of the Constitution because of what he perceives is a necessity for change.

Representative Richard Gomez is also for charter change, but his reason is different. The Constitution, he said, is already old. Like an old car, it must be changed. (“*Parang lumang kotse iyan, eh. Ang lumang kotse kailangan inaayos na.*”)³ That is not the art of free society. The change must be for “purposes which satisfy an enlightened reason.”⁴ For that matter, there are people who think that because the Constitution has lasted, it is good and must not be amended. I remember a member of the Constitutional Commission, which framed the present Constitution, saying this during a Senate committee hearing on charter change.

Taking the Constitution seriously and changing it whenever necessary without changing its essential nature is what the art of free society is about.

The Constitution is our symbolic code. The ideals and principles stated in its preamble, the basic rights and duties enshrined in its Bill of Rights, and the system of government established by it must be taught to the people at an early age—in the primary schools and the high schools—so that the Constitution will live in their action and their being. The Constitution is also our social contract, as the Supreme Court said.⁵ It is similar to what two or more persons make when they enter into a contract of partnership. It is similar to what two persons make when they enter into a contract of marriage. It is binding on us the people and imposes on us certain obligations. If the Constitution has not worked out the way we expect it to work, perhaps it is because “[w]e, the sovereign Filipino people”⁶ have not lived up to our obligations under it.

However, reverence of the Constitution must not be allowed to degenerate into idolatry. Times change and with them the Constitution must change, consistent with its essential nature. As Chief Justice Marshall said, the

² Beatrice Pinlac, *Padilla won't ask for Palace support for cha-cha*, PHIL. DAILY INQUIRER, Mar. 14, 2023, at 4.

³ Vivienne Gulla, *Sandro Marcos, Richard Gomez attend House workshop for solons*, ABS-CBN News, July 4, 2022, available at <https://news.abs-cbn.com/news/07/04/22/sandro-marcos-richard-gomez-attend-house-workshop-for-solons>.

⁴ WHITEHEAD, *supra* note 1.

⁵ *Marcos v. Manglapus*, G.R. No. 88211, 177 SCRA 668, 693, Sept. 15, 1989.

⁶ CONST. preamble.

American Constitution was intended by its framers “to endure for ages to come and *consequently to be adapted to the various crises of human affairs.*”⁷

How well have we practiced the art of free society in our country?

At the threshold of independence, in 1947, we amended the Constitution, to grant equal rights for 28 years to Americans and their corporations in the exploration, exploitation, and development of our natural resources and the operation of public utilities.⁸ We did this so that our goods could continue to enjoy free trade in the American market after independence, what with our economy destroyed by the last war.⁹ The grant was for 28 years, or until 1975, but even before that year, we endeavored and succeeded in getting some adjustments which enabled us to maintain the Constitution as our symbolic code.

In 1969, we revised the Constitution in response to urgent social and economic changes.¹⁰ Unfortunately, lawless elements took advantage of the occasion, justifying the establishment of an authoritarian regime. Thanks to the resilience of our country, however, our society eventually redeemed itself and in no time, the constitutional order was restored with the present Constitution.

We have been able to do this because we have the means, formal and informal, for adapting the Constitution to change without changing its essential nature. The formal means for doing this are to be found in Article XVII,¹¹ the provisions of which are intended to act as safety valves to prevent violent expressions of popular will or revolutions.¹² Unfortunately, Section 1 of this Article¹³ fails to provide whether, when acting as a constituent assembly, the two houses of Congress must sit jointly or separately, and, if they sit jointly, whether they must vote as one assembly or in two divisions as in the 1935 Constitution.¹⁴ This problem has arisen, because the provision in question was originally intended for a unicameral National Assembly.¹⁵ But

⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819). (Emphasis added.)

⁸ CONST. (1935, amend.), ord. This is the parity amendment to the 1935 Constitution, ratified on March 11, 1947.

⁹ *Republic v. Quasha*, G.R. No. 30299, 46 SCRA 160, 174–75, Aug. 17, 1972.

¹⁰ On March 16, 1967, Congress passed Resolution No. 2, later amended by Resolution No. 4, adopted on June 17, 1969, calling a Convention to propose amendments to the Constitution. *Planas v. COMELEC*, G.R. No. 35925, 49 SCRA 105, 105, Jan. 22, 1973.

¹¹ CONST. art. XVII.

¹² 4 RECORD CONST. COMM’N 377 (Sept. 17, 1986).

¹³ CONST. art. XVII, § 1.

¹⁴ CONST. (1935), art. XIV, § 1.

¹⁵ 2 RECORD CONST. COMM’N 35 (July 21, 1986).

the Constitutional Commission later decided to have a bicameral Congress.¹⁶ Several provisions of the draft constitution were revised to reflect this decision, but the correction of Article XVII, Section 1 was overlooked.

Thus, in the following cases, it was provided that the two houses of Congress must meet jointly but vote separately:

- To declare the existence of a state of war;¹⁷
- To canvass the votes for President and Vice President and proclaim the winners, and, in case of tie, to break the tie;¹⁸
- To revoke the President's proclamation of martial law or suspension of the privilege of habeas corpus, or to extend the period of proclamation;¹⁹
- To confirm the President's nomination of a Vice President whenever a vacancy occurs in the office during the term of the Vice President;²⁰ and
- To decide a dispute between the President and his cabinet, if, after declaring himself unable to discharge the duties of his

¹⁶ *Id.*

¹⁷ CONST. art. VI, § 23(1). "The Congress, by a *vote of two-thirds of both Houses in joint session assembled, voting separately*, shall have the sole power to declare the existence of a state of war." (Emphasis added.)

¹⁸ Art. VII, § 4, ¶¶ 4–5. "Upon receipt of the certificates of canvass, the President of the Senate shall, not later than thirty days after the day of the election, open all certificates in the presence of the Senate and the House of Representatives *in joint public session, and the Congress*, upon determination of the authenticity and due execution thereof in the manner provided by law, [shall] canvass the votes."

"The person having the highest number of votes shall be proclaimed elected, but in case two or more shall have an equal and highest number of votes, one of them shall forthwith be chosen by the *vote of a majority of all the Members of both Houses of the Congress, voting separately.*" (Emphasis added.)

¹⁹ Art. VII, § 18. "The Congress, *voting jointly, by a vote of at least a majority of all its Members in regular or special session*, may revoke such proclamation or suspension, which revocation shall not be set aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it." (Emphasis added.)

²⁰ Art. VII, § 9. "Whenever there is a vacancy in the Office of the Vice-President during the term for which he was elected, the President shall nominate a Vice-President from among the Members of the Senate and the House of Representatives who shall assume office upon confirmation *by a majority vote of all the Members of both Houses of the Congress, voting separately.*" (Emphasis added.)

office, he subsequently claims to be fit to resume his office, but a majority of his cabinet disagrees.²¹

If the two houses of Congress are required to meet in joint session but to vote separately in performing these non-legislative functions, with more reason must they be required to do the same in performing their function under the Amendment Clause. To read the Amendment Clause as simply requiring Congress, when acting as a constituent assembly, to require one house to propose amendments or revisions and then to send its proposals to the other house for concurrence and, if they have some disagreements, to thresh them out in a conference committee, is to recognize no distinction between lawmaking and amending or revising the fundamental law.

On the hand, the informal means of changing the Constitution are to be found in the power of judicial review of the Supreme Court²² and in the power of executive officials to execute the Constitution and the laws.²³ The Supreme Court functions as a “continuing constitutional convention,” treating the Constitution as a “living organism,”²⁴ capable of adaptation and change. Its interpretation of what the Constitution means constitutes part of the law of the land.²⁵

To a lesser degree, other agencies of government, which are charged with administering or executing the Constitution and the laws, also contribute to the clarification of the meaning of the Constitution. Their contemporaneous constructions of its provisions are given great weight by the courts. For example, in the early case of *Krivenko v. Register of Deeds*,²⁶ which also involved an interpretation of the economic provisions of the 1935 Constitution, reliance was likewise placed on the contemporaneous construction of land laws in the Court’s ruling that an alien cannot own a piece of residential land. Under that Constitution, public lands were classified into “agricultural, timber and mineral.”²⁷ Those classified as “agricultural” can be conveyed to Filipinos and to corporations 60 per cent of the capital of which

²¹ Art. VII, § 11. “If the Congress, within ten days after receipt of the last written declaration, or, if not in session, within twelve days after it is required to assemble, *determines by a two-thirds vote of both Houses, voting separately*, that the President is unable to discharge the powers and duties of his office, the Vice-President shall act as the President; otherwise, the President shall continue exercising the powers and duties of his office.” (Emphasis added.)

²² Art. VIII, § 1.

²³ Art. VII, § 17.

²⁴ *Javellana v. Exec. Sec’y*, G.R. No. 36142, 50 SCRA 31, 275, Mar. 31, 1973.

²⁵ CIVIL CODE, art. 8.

²⁶ G.R. No. 630, 79 SCRA 461, Nov. 15, 1947.

²⁷ CONST. (1935), art. XII, § 1.

is owned by them.²⁸ With respect to private agricultural lands, the Constitution provided that they could be conveyed only to those qualified to own public lands. The only exception from the ban are foreigners claiming rights by hereditary succession.²⁹

Relying on the construction by the executive and legislative departments of the government of the term “agricultural land” as meaning land that is susceptible of cultivation for agricultural production and that is neither a “mineral” nor a “timber” land, the Supreme Court held that a piece of private residential land is an agricultural land and therefore cannot be conveyed to aliens.³⁰

Mention may also be made of two recent efforts to liberalize the restrictions on foreign investments in the country. They illustrate the informal ways by which contemporaneous construction of the provisions of the Constitution by agencies of government contribute to our understanding of these provisions.

First is the initiative of the Department of Energy in allowing the exploration, development and utilization of renewable energy to foreign citizens and foreign-owned corporations.³¹ The move followed the issuance of an opinion by the Secretary of Justice³² that Article XII, Section 2 of the Constitution, which declares all “natural resources” of the country as exclusively belonging to citizens of the Philippines, refers to those which are capable of being depleted. Sources of renewable energy are inexhaustible and therefore are not off limits to foreigners. While the Constitution also mentions “forces of potential energy” as part of our natural resources, neither is renewable energy inalienable “potential energy” or “energy at rest.” Renewable energy is “kinetic energy” or “energy in motion,” derived from the sun, wind, and hydro and tidal currents. The Secretary of Justice explained: “If a ball is held up at head height, it has potential energy relative to floor due to gravity. But when the ball is released, its potential energy decreases and such is transformed into increasing kinetic energy until it hits the floor and

²⁸ Art. XII, § 1.

²⁹ Art. XII, § 5.

³⁰ *Krivenko v. Register of Deeds*, G.R. No. 630, 79 SCRA 461, 469-70, Nov. 15, 1947.

³¹ Rep. Act No. 9513 Rules & Regs. (2022), Rule 6, § 19. “All forces of potential energy and other natural resources are owned by the State and shall not be alienated. These include potential energy sources such as kinetic energy from water, marine current, and wind; thermal energy from solar, ocean, geothermal and biomass. [...] Foreign RE Developers may also be allowed to undertake RE development through an RE Service/Operating Contract with the government, subject to Article XII, Section 2 of the Constitution.”

³² Sec’y of Justice Op. No. 21 (Sept. 29, 2022).

stops.”³³ We can share with foreigners the exploration, development, and utilization of renewable resources without fear of being left with nothing else afterward because these resources are inexhaustible.

The second initiative to liberalize the restrictions on foreign investments is the opening of public services to foreigners and foreign owned corporations. This has been accomplished by the amendment of the Public Service Act by defining what “public utilities” are and considering other public conveniences “public services.”³⁴ *Public utilities* are public conveniences which operate, manage, or control for public use any of the following: (1) distribution of electricity; (2) transmission of electricity; (3) petroleum and petroleum products pipeline transmission systems; (4) water pipeline distribution systems and waste water pipeline systems, including sewerage pipeline systems; (5) seaports; and (6) public utility vehicles.³⁵ On the other hand, *public services* are those which render (1) transport services for carrying passengers and goods by air, road or water; (2) postal services; (3) telephone services; (4) power facilities; (5) lighting facilities; (6) water facilities; and (7) insurance services.³⁶ Consequently, as the constitutional restriction refers only to the operation of public utilities, the operation of public services can be opened to foreigners and foreign corporations.³⁷

Thus, the Constitution is brought up to date not only by Congress as the principal department of the government for amending and revising the Constitution, but also by the Supreme Court and by other agencies of the government which are charged with administering or executing its provisions.

It is not a denigration of a document intended to endure for ages to say that its meaning changes over time. That is precisely how and why it endures. In a sense, the Constitution does not change. Indeed, as the French writer Jean-Baptiste Alphonse Karr put it, “the more things change, the more they stay the same.”³⁸ Consider how technological advances have changed the meaning of the phrase “land and naval forces” in the provision of the Constitution of the United States enumerating the powers of the US Congress.³⁹ Strictly construed, the phrase would exclude the maintenance of

³³ *Id.* at 5–6.

³⁴ Com. Act No. 146 (1936), § 13(d), *amended by* Rep. Act No. 11659 (2022). Public Service Act.

³⁵ *Id.* § 13(d).

³⁶ *Id.* § 13(b).

³⁷ *Id.* § 13(e).

³⁸ Jean-Baptiste Alphonse Karr, *LES GUÉPES* (1849). This quotation is translated from the French “*plus ça change, plus c’est la même chose.*”

³⁹ U.S. CONST. art. I, § 8.

an air force. Would anyone argue today that the organization of the US Air Force is unconstitutional, because the US Constitution provides only for the organization of “land and naval forces”?

It is the duty of every generation to keep the Constitution up to date. This task requires the utmost dedication of mind and spirit of those who would undertake this solemn and sacred duty. “He who would bring home the wealth of the Indies, must carry the wealth of the Indies with him,” as the Spanish proverb says. Not to him whose outlook is limited by parish or class, or whose motive is solely to prolong the stay in power of those in public office or to seek material gain or political advantage, should the task be entrusted.

We are not likely to see a reduction of tension and other concerns in the future. We should be grateful we have decent, civilized procedures provided by our Constitution for adapting to change, as we strive to elevate to an art form our efforts to preserve our free way of life.

After witnessing the constitutional crisis of 1959, which was brought about by the refusal of then President Elpidio Quirino to give up the exercise of his emergency powers despite the fact that Congress had been able to meet in session after the war, Claro M. Recto, the president of the 1935 Constitutional Convention, spoke grimly of the future of the constitution. “Perhaps,” he said, “we believe in the Constitution only because it is the thing to do, because we have learned its provisions by rote in school like arithmetic and spelling and the Lord’s prayer, and not because we sincerely and conscientiously believe it to be the best and surest guaranty of the way of life which we regard as the sole foundation of our present and future welfare.”⁴⁰ He concluded with the story of the Moorish king of Granada who was upbraided by his mother with these words: “Weep not like a woman for the loss of a kingdom you cannot defend like a man.”⁴¹

May the moral of that story not be lost on us. May it guide us in our efforts to establish in our land a government of the people, for the people, and by the people in our day and in the days we may not see.

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⁴⁰ Claro M. Recto, *The Future of the Constitution*, MANILA CHRON., Feb. 9, 1953, at 8.

⁴¹ *Id.*