CHARTER CHANGE: IS IT TIMELY AND IS IT NECESSARY?*

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There is a certain amount of skepticism suggested by this topic assigned to me, namely, whether Charter Change has not become a tiresome, boring subject, considering the length of time it has been on the national agenda without the debate on it having been concluded. The reason we have not settled this matter is simply the fear that if the table were declared open for consideration of constitutional amendments or revisions, partisan groups would take advantage of the situation to find a way for extension of the terms of office of elected officials, including the incumbent President. This is unfortunate, because it blinds us to the real need for change of our Constitution.

Both questions, I believe, call for an affirmative answer. I will begin with the last, whether charter change is necessary, and close with the first, namely, whether the changes such as I will propose are timely.

The Need to Change

There is a need for charter change, and the need arises from the need for a more responsive and a more responsible government. The various parts of the government are in constant contention, many a time the legislative and executive branches are deadlocked over issues, presidential elections are bitterly contested, and people power, backed by the military and the church, is at times employed in lieu of elections or impeachment, resort is often to the judicial process rather than the political process in the resolution of political questions, thus bringing the judiciary in confrontation with the political branches of the government.

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Delays in the approval of the budget are frequent. Time was when Congress failed to pass the budget due to a quarrel between President Quirino and the Senate. That is the why when the Constitution was revised in 1973, provision was made for automatic re-appropriation in the event Congress failed to pass the annual appropriation law.[1] However, since the amount re-appropriated is limited to the previous year's budget, the government often finds itself unable to meet urgent public need requiring bigger outlays.

Nor is this the only area of conflict between Congress and the Presidency. The two are frequently at loggerheads over appointments, the ratification of treaties, legislative investigations, and the exercise of the veto power. The judiciary, supposed to be apolitical, oftentimes finds itself dragged into the fray as the dueling branches of the government bring their conflicts to it for resolution. Judicial involvement in political affairs becomes inevitable as courts are charged with the duty of determining "whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the other departments or instrumentalities of the government."[2] While in theory courts are not to weigh in except when called upon to decide actual cases and controversies brought before them, in practice, the case and controversy requirement – a useful device to prevent courts from rendering ill-informed judgments – is often set aside for the sake of settling what courts consider questions of "transcendental importance," a broad and amorphous standard that can readily justify intervention in essentially political questions.

Conflicts: the Result of Internal Checks and Balances

Merely dividing governmental power for the purpose of allotting it among the three branches already is problematic. When power needed to deal with a problem is fragmented, its force is greatly reduced. When, in addition, each branch is given the power to check the exercise of power by the other branches, the problem becomes greater. Conflict becomes inevitable and the government becomes a house divided against itself.

Yet, that is exactly what the Constitution does. Under it, the President cannot make appointments even in his cabinet without the consent of the bicameral Commission on Appointments.[3] He cannot enter into treaties and international agreements unless with the concurrence of two-thirds of all the

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[1] 1973 CONST, art. VIII, §16 (6). This provision was carried over to the present Constitution, Art. VI, Sec. 25 (7).

[2] 1987 CONST., art. VIII, §1, para. 1.

[3] 1987 CONST., art. VII, §16.

members of the Senate.[4] As Commander in Chief of all the armed forces he can declare martial law or suspend the privilege of the writ habeas corpus in cases of invasion or rebellion when public safety demands it, but his proclamation is subject to the power of Congress to revoke.[5] On the other hand, a bill passed by Congress cannot become a law unless with the approval of the President and any such bill is subject to the President's veto power.[6] Of late, the legislative power of investigation is often stymied by the President's invocation of executive privilege.[7]

The system of government which we adopted from the United States gives each branch "partial agency in, or control over, the acts of the others,"[8] because, as Madison said, "unless these departments are so far connected and blended so as give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to free government, can never in practice be duly maintained."[9] The result, however, of giving "partial agency" to each branch is meddling by one department into the affairs of the other.

The truth is that, as Justice Holmes noted, the lines defining the powers of government cannot be drawn with precision. As he said, even the more specific provisions of the Constitution "terminate in a penumbra that gradually shades from one extreme to the other."[10] One is tempted to ask, why then do we try to divide power that, in its nature, is indivisible?

Indeed, the operation of the system of checks and balances may tempt the exercise of unconstitutional power, as in 1949 when President Quirino, finding himself without a budget because of a hostile Senate, resorted to his old emergency powers despite the fact that the war had been over and Congress was already able to meet, by appropriating public funds for the operation of the government. His attempt was checked by the Supreme Court which declared that his emergency powers had lapsed after the war, when Congress was able to meet.[11]

We applaud the decision of the Supreme Court as yet another triumph of the Rule of Law. But little do we realize that the incident which occasioned the decision was the normal operation of the separation of powers principle whose function was precisely to cause a friction between departments of the government, and that the incident would not have happened had it been a parliamentary system

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[4] 1987 CONST, art. VII, §21.
[5] 1987 CONST, art. VII, §18.
[6] 1987 CONST, art. VI, §27 (1).
[7] 1987 CONST, art. VI, §21.
[8] THE FEDERALIST NO. 47, THE FEDERALIST PAPERS 299 (C. Rossiter ed. 2003).
[9] THE FEDERALIST NO. 48, at 305, , THE FEDERALIST PAPERS 299 (C. Rossiter ed. 2003).
[10] Springer v. Government of the Philippine Islands, 277 U.S. 189, 210 (1928) (Holmes, J., *dissenting*).
[11] Araneta v. Dinglasan, 84 Phil. 368 (1949).

we had. Indeed, right now, the executive and legislative departments of the U.S. government are reported deadlocked over budget cuts that threaten to shut down part of the government.[12]

Nevertheless, the separation of powers is defended on the ground that the conflict it engenders is necessary to prevent the abuse of power. Justice Brandeis said: "The doctrine of separation of powers was adopted not to promote efficiency but to preclude the arbitrary exercise of power. The purpose is not to avoid friction, but by means of the friction incident to the distribution of powers among three departments, to save the people from autocracy."[13]

Alas, in our case, the friction, instead of being a safeguard of liberty against tyranny, more often than not is the cause of inefficiency if not paralysis in government. Whatever theoretical merits this political maxim may have are clearly outweighed by the problems brought about by its observance. As an astute student of the present political system, Vicente G. Sinco, wrote in advocating a shift to the parliamentary system:

> [The] principle of separation of powers prevents neither tyranny nor dictatorship or halts official extravagance under the so-called departmental courtesy. . . . [It] tends to make deadlocks a political asset. It does not encourage the spirit of cooperation. It stresses freedom and minimizes responsibility. It overvalues friction and undervalues cooperation. It magnifies the possibility of the rise of tyranny and despotism and ignores the human tendency and preference for peace, order, and harmony. It preaches suspicion and fear and considers with incredulity man's capacity for unity and fraternity. . . .[14]

Whole Powers Needed to Govern Effectively

A parliamentary system of government concentrates political power at the highest level of authority through the Prime Minister and his cabinet and is thus able to achieve its goal, while preventing the abuse of power by making the government dependent on popular support for its existence. The Prime Minister and his cabinet, are constituted leaders of legislation and responsible heads of administration and what otherwise are independent departments are brought together in an "intimate but open cooperation," as Woodrow Wilson described their relationship.

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[12] N. Y. TIMES, p. 1, April 7, 2011.
[13] Myers v. United States, 272 US. 52 (1926) (*dissent*).
[14] PARLIAMENTARY GOVERNMENT FOR THE PHILIPPINES 34-35 (1971).

There is a fusion of legislative and executive powers and consequently unity of planning and execution. Under such a system, not only is the success of the program of the government assured, responsibility for its failure is easy to determine. There is no finger pointing nor passing of the buck among the several branches of the government. There is instead an efficient machine of centralized decision-making that is able to set its goals clearly, accomplish them smoothly and prevents bickering concerning ends or means. Indeed, such a government will have a strong incentive to govern well. Even though separated by the nature of their functions, the government and Parliament remain united in pursuit of a common program of government, as both are held jointly responsible to the people.

Parliament is not likely to tolerate an ineffective government. It will not hesitate to change the government if it is necessary to do so in order to survive. It can withdraw its confidence from the Prime Minister by simply electing his successor. Though in theory the Prime Minister can in turn seek the dissolution of the Parliament and the holding of general elections, he will weigh the risks and his chances of winning in the election. He will exercise his prerogative only if there is a fundamental issue between him and Parliament and he is convinced of prevailing in the elections.

Thus, what keeps the government constantly on its toes is the instinct of self-preservation. There is command responsibility running, as it were, directly from the electorate to the Parliament and from the Parliament to the Prime Minister and his cabinet and other agencies under them. In the presidential system of government, while the Chief Executive is elected directly by the people, popular support for him tends to dwindle after the elections as he becomes isolated and meaningful contacts with the people become less and less. In contrast, while the Prime Minister is elected by Parliament, he knows he can remain in office only if he retains the people's confidence. For this purpose, he keeps his ears close to the ground and strives to serve the interest of the public.

Direct election is not necessarily a virtue. It tends to become a big circus and does not necessarily ensure better selection of candidates. In contrast, the parliamentary system somewhat resembles a corporation in which the board of directors are elected by the stockholders, and it is the one which takes care of forming the management of the firm, thus ensuring the selection of those who are competent to manage its affairs. The theory is that the board of directors knows best what is good for the company.

The present system encourages sloth on the part of the people, who leave everything to government in between elections. They tend to leave everything to

their representatives and seldom, if ever, hold them accountable for their actions. Only when their representatives misbehave in a very gross manner do they get aroused but then they have to wait for the next election before they can sanction their representatives. By then, the event will only have been half a memory. The result is that often the people end up looking to the unelected judiciary to administer the spanking for them.

Unlike in the presidential system, where government performance is audited only at periodic intervals, in the parliamentary system the review is constant. People will not have to wait for the elections before they can change public officials through the ballot. Political responsibility is demandable at the opportune time.

For their part, the people will thus become more engaged. The declaration[15] that sovereignty resides in the people and all government authority emanates from them will become a living reality and not merely a parchment principle.

The Altered Role of the Judiciary

Under a parliamentary system, the judiciary will continue to be independent of the political branches. It will continue to be the bulwark of civil liberties. Nevertheless, the rearrangement of power resulting from the shift to the parliamentary system is bound to redefine its role in government. For one, the judiciary will not be called upon anymore to determine the constitutional boundaries of power. Recall what the Court said in *Angara v. Electoral Commission*,[16] that in case of conflict, -- and we have seen that the presidential system precisely relies on conflicts incident to the distribution of powers among independent departments for the preservation of liberties -- the judiciary is "the only constitutional organ which can be called upon to determine the proper allocation of powers between the several departments and among the integral and constituent units thereof." That is not likely to happen in a parliamentary system as there will no longer be a separation of the legislative and executive powers to enforce. The preservation of liberties will be primarily the function of the people as they will become more involved in self-government.

In cautioning the American people against frequent resort to judicial review, James Bradley Thayer said:

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[15] 1987 CONST., art. II, §1.
[16] 63 Phil. 139, 156 (1936).

> [The exercise of [this power], even when unavoidable, is always attended with serious evil, namely, that the correction of legislative mistakes comes from the outside and the people thus lose the political experience and the moral education and stimulus that comes from fighting the question out in the ordinary way and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people and to deaden its sense of moral responsibility. It is no light thing to do that.[17]

Indeed, the judiciary in the parliamentary system of government will be less interventionist than we know it today. More than the vague notion that there "there is grave abuse of discretion amounting to lack or excess of jurisdiction on the part of [the other branches of the government age]" necessary to justify the exercise of its power of judicial review. And the people, now truly the possessors of sovereign power, will fight their problems out in the ordinary way, as more and more, they will be asked to decide for themselves questions of good government.

The judicial department should really be independent of, and separate from, the government and the Parliament. Its function is different and its members have no business exercising non-judicial function. The adjudication of cases and the protection of civil liberties properly constitute its business.

Rewriting Article XVII

There is an urgent need to change the Constitution, but the process by which such change may be brought about is itself in need of rewriting to clear it of ambiguity. Originally written for a unicameral legislative department, the framers of the Constitution overlooked to specify how Congress may propose amendments or revisions or how it may call a constitutional convention. Consequently, they failed to specify how the two Houses of Congress, when acting as a constituent assembly, should sit–whether jointly or separately–and how they should vote--whether jointly or separately. Article XVII, Section 1 simply provides:

> Any amendment to, or revision of, this Constitution may be proposed by: (1) The Congress, upon a vote of three fourths of all its Members; or (2) A constitutional convention.

As a result of the Constitution's failure to provide such details, several theories have been advanced. One interpretation is that made by the House of

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[17] James Bradley Thayer, *John Marshall* 106-107 (1920), *quoted* in ARCHIBALD COX, THE ROLE OF THESUPREME COURT IN AMERICAN GOVERNMENT 116-117 (1976).

Representatives of the Fourteenth Congress[18] and it is to the effect that Congress may propose amendments to, or revisions of, the Constitution, by the vote of three-fourths of all the members of the two Houses taken as a whole, without regard to the number of Senators and Representatives casting their votes. The House Resolution cited Article XV of the 1935 Constitution which provided that –

> The Congress, **in joint session assembled**, by a vote of three-fourths of all the Members of the Senate and of the House of Representatives **voting separately**, may propose amendments to this Constitution or call a convention for that purpose.[19]

It was pointed out that the phrases "in joint session assembled" and "the Senate and the House of Representatives voting separately" do not appear in the present Constitution. Hence, the House concluded, the vote required is not "three fourth of all the Members of the Senate and of the House of Representatives voting separately," as in the 1935 document, but "three-fourths of all [the] Members of [Congress]" without regard to whether they are Senators or Representatives.

This interpretation is unacceptable. Under this interpretation, it is entirely possible for the three fourths vote to come from the House of Representatives only, with the result that the proposed amendment or revision is not that of Congress but only of the House. It was error for the House to compare Article XVII, Section 1 with the provision (Article XV, Section 1) of the 1935 Constitution as if the present provision was taken from the 1935 document and conclude that "the intention of the amendments of the 1935 Constitution by deletions of certain words and phrases thereon by the 1987 Constitution are clear and manifest as underscored in the preceding WHEREAS Clauses and by such deletions the meaning and application of the corresponding provisions of the 1987 Constitution on Amendments and Revisions have been changed."[20]

As already stated, at the start of their work, the framers of the present Constitution assumed that the legislative department would be a unicameral National Assembly. Consequently, it is more probable that they took for their model the provisions of the 1973 Constitution for a unicameral Batasan Pambansa. Art. XVI, Section 1 of that Constitution provided:

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[18] *See* House Resolution No. 1109, April 22, 2009.

[19] Emphasis added.

[20] *See* House Resolution No. 1109, 7th Whereas Clause.

> Sec. 1(1)Any amendment to, or revision of, this Constitution may be proposed by the Batasan Pambansa upon a vote of three-fourths of all its Members or by a constitutional convention.

The 1973 Constitution - not the 1935 document - appears to be the source of Article XVII, Section 7. The latter in fact appears to be a word-by-word copy of the former.

However, there was a last minute switch to a bicameral Congress toward the closing days of the Constitutional Commission. The framers failed to make the necessary changes in the present provision with the result that the suit did not fit wearer. Nonetheless there are several relevant provisions in the Constitution which give an insight into what the framers would have wrought in the present provision had they not overlooked it in the rush toward adjournment. These provisions are significant for the procedure they provide when Congress performs non-legislative functions. With but one exception, and that is when Congress considers the President's decision to declare martial law or suspend the privilege of the writ of habeas corpus, these provisions require the two Houses of Congress to meet in joint session but to vote separately. The reason for the separate voting is to prevent the larger House from outvoting the smaller Senate. This procedure applies whenever Congress acts to do any of the following:

1. To declare the existence of a state of war."[21]
2. To confirm the nomination of a Vice-President by the President.[22]
3. To consider the President's proclamation of martial law or suspension of the privilege of the writ of habeas corpus.[23]
4. To canvass the votes for President and Vice-President and, in case of tie between candidates receiving an equal and highest number of votes, to break the tie.[24]

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[21] 1987 CONST., art.VI, §23(1): "(a). 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 supplied)

[22] 1987 CONST., art. VII, § 9: "Whenever there is a vacancy in the Office of the Vice-President during the term for which he was elected, the Preside shall nominate a Vice-President from among the Members of the Senate and the House of Representatives who shall assume office upon confirmation of a majority vote of all the Members of both Houses of Congress, voting separately." (emphasis supplied)

[23] 1987 CONST., 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 b y the President." (emphasis supplied)

[24] 1987 CONST., art. VII, §4: "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 the certificates in the presence o the Senate and the House of Representatives in joint session, and the Congress, upon determination of the authenticity and due execution thereof in the manner provided by law, shall canvass the votes. (emphasis supplied)

5. To decide whether the President, who has once declared himself unable to discharge the duties of his office but later claims he can resume office, is now fit for office, in the event the cabinet disagrees with the President.[25]

From these provisions it may be deduced that whenever Congress acts as a constituent assembly either to amend or revise the Constitution or to call a constitutional convention for this purpose, the two Houses must meet in joint session but vote separately.

Still, there is a need for an official and authoritative interpretation of the Constitution. As a ruling is not likely to come from the Supreme Court for want of an actual case in which to raise this question, it behooves the people to propose amendments through initiative to rewrite Article XVII, particularly its Sections 1 and 3. Any doubt as to the adequacy of the implementing legislation (Republic Act No. 6735 or the Initiative and Referendum Act) has been settled in its favor.[26] The amendment of Article XVII through initiative remains to be the only way urgent constitutional reforms may be effected.

Timeliness of Proposals for Charter Change

The proposals contained in this paper are both urgent and timely. Without clear rules as to how the two Houses of Congress should sit and how they should vote to propose amendments to, or revisions of, the Constitution and how it may call a constitutional convention, no substantive proposals for the amendment or revision of the Constitution can be proposed. As former Justice Azcuna recently noted, the present Constitution is "the longest running Constitution" which has not stood any amendment or revision "not because none was desired or proposed [but] because the procedure for amendment or revision is open to different and conflicting interpretations."[27] Fears that partisan groups

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"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 the Congress voting separately." (emphasis supplied)

[25] 1987 CONST., 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 President, otherwise the President shall continue exercising the powers and duties of his office." (emphasis supplied)

[26] See Lambino v. Commission on Elections, G.R. Nos. 174340, 174318, and 174177, Oct. 25, 2006, overruling sub silencio Santiago v. Commission on Elections, 270 SCRA 106 (1997).

[27] Adolfo S. Azcuna, The Necessity for Charter Change (Or Why it Has not Happened so Far), paper delivered at the Hearing on Charter Change held by the Senate Committee on Constitutional Amendments, Revision of Codes and Laws on February 17, 2011.

might take advantage of charter change to extend the terms of office of elected officials, including that of the President, have led other people to oppose calls for charter change, but surely the lack of an authoritative interpretation of Article XVII likewise explains why specific proposals for amendments or revisions cannot be proposed by Congress or why the latter cannot call a constitutional convention to propose such changes.

The substantive proposal for a change to the parliamentary system is also urgent. The merits of the parliamentary system have been discussed for so long since the adoption of the 1935 Constitution, it is time we put a closure to the national debate. For my part, I firmly believe it is what we need to have a responsive and responsible government. Responsible leaders have advocated its adoption. Claro M. Recto, president of the 1934 convention that wrote the 1935 Constitution, Jose P. Laurel, chairman of the Bill of Rights Committee, Manuel C. Briones, former Senator, Vicente G. Sinco, former President of the University of the Philippines and delegate to the 1971 Constitutional Convention, to name only a few, urged adoption of this system. The 1971 Convention adopted it in the document that they wrote, but because of martial law, a truly parliamentary system of government was never established in this country. When the Constitutional Commission, which wrote the present Constitution, first met in 1986, the members preliminarily discussed the merits of the presidential and parliamentary systems, but for some reason, without taking a formal vote on the question, the idea of a parliamentary government was dropped. Then at the Senate hearings on constitutional change in 2003 there was overwhelming endorsement of this system.

There are times when we should let our minds be bold. I believe this is such a time.

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