

## THE NEED TO CHANGE THE CONSTITUTION\*

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In the last few decades, we have witnessed the birth of many “democratic states.” Statistics tell us that in 1914 with the disintegration of the Ottoman and the Austro-Hungarian Empires, there were only 55 honest-to-goodness States. Their number jumped to 59 in 1919, to 69 in 1950 and to 90 in 1960. When the Cold War ended with the fall of the Soviet Union, the number of the so-called democratic nations skyrocketed to unprecedented heights. After the independence of East Timor in 2007, their total number is now 192. Whether these new states deserve the description “democratic” is a highly contentious issue. Freedom House considers most of these democratic states as only “partly free.” In the case of the Philippines, some scholars have already cast a doubting eye on our capacity to meet the essential requirements of democracy as early as 2004. They noted our basic democratic deficits and warned that we are facing what they call as the “incubus of failure.”

The warning is far from flattering considering our checkered history of fighting for freedom and long experience as a democratic nation. If you look at Asia’s pantheon of political thinkers who made a difference, you will find Jose Rizal, Marcelo del Pilar, and other Filipino leaders espousing the ideals of democracy well ahead of their cerebral counterparts, Mahatma Ghandi included. Indeed, social scientists consider pre-Spanish Philippines as one of the hatching grounds in Asia where the embryo of natural rights was nurtured even by its indigenous people.

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It is thus no historical wonder that, in Asia, we were among the first to put in parchment the basic rights of man. In November 1897, Aguinaldo declared our independence from Spain at Biak-na-Bato and adopted a Constitution whose essential principles were copied from Cuba. In a month's time however, the Pact of Biak-na-Bato was signed with the Spanish authorities where Aguinaldo, et al., agreed to surrender, to get exiled to Hong Kong in exchange for amnesty, an indemnity of 1.7 million and the promise of reforms. Thus, our first written Constitution came to an end before we can savor our self-proclaimed independence thereunder.

Then entered the United States in our struggle for independence. The United States and Spain came to war and Aguinaldo and company were caught in the middle. With a good sense, Aguinaldo and company fought Spain side by side with the Americans. With the defeat of Spain looming as a certainty but uncertain about their relationship with the Americans, Aguinaldo and company went to Kawit, Cavite, on June 12, 1898 and boldly read the "Act of the Proclamation of Independence of the Filipino People," which severed every political tie between the Philippines and Spain. At its foot, the Proclamation read: witnessed by the "Supreme Judge of the Universe" and protected by "the Mighty and Humane North American Nation." The new Philippine flag was unfurled and the new national anthem was played.

Aguinaldo's dream that the "Mighty and Humane North American Nation" would recognize our independence turned out to be a mirage. The United States defeated Spain with little help from the forces of Aguinaldo. In due time, the United States declared its sovereignty over the Philippines, and all efforts of Aguinaldo to preserve the Philippine Republic established in Kawit, Cavite, proved to be futile. Even then, Aguinaldo did one great act of significance to our history of constitutionalism. He convened the Malolos Congress that drafted a new Constitution patterned after the Constitutions of Costa Rica, Guatemala, Mexico, Belgium, France, and Brazil. Its draft was principally prepared by delegate Felipe Calderon with the advice of Cayetano Arellano. The Malolos Constitution was promulgated by Aguinaldo on January 21 1899. According to historian Teodoro Agoncillo, the Malolos Constitution "was a great monument to the capacity of the Filipino people to rule themselves in a democratic way." I quote him:

“[T]he Malolos Constitution was the first important state document that the Filipino people, speaking thru their representatives, ever produced. Democratically oriented, the Congress worked hard to have a Constitution for the people, which was democratic in its aspects. According to this Constitution, the government established was “popular, representative and responsible.” It was divided into three branches: the executive, the legislative, and the judicial. The Constitution also provided for national and individual rights not only of Filipinos but also of foreigners. xxx The Assembly had only one House... it was unicameral. The President was elected by the Assembly xxx. The department secretaries were responsible not to the President but to the Assembly.”

It is worth noting that under the Malolos Constitution, the Assembly was superior to both the Executive and the Judiciary. Calderon well explained the reason for this superiority. He said that he was afraid that if the Executive branch became powerful, then the soldiers who were for Aguinaldo would dominate the government.

Next, we orbited around the sun of sovereignty of the United States. President McKinley formed the first Philippine Commission to study how a civil government would be established in our war-ravaged country. In its Report, the Commission stated that the Filipino people wanted above all “a guarantee of those fundamental human rights which Americans hold to be natural and inalienable birthright of the individual but which under Spanish domination in the Philippines had been shamefully invaded and ruthlessly trampled upon.” Obviously impressed, President McKinley issued on April 7, 1900 his Instruction to the Commission that the civil government to be established in the Philippines must be based on certain “inviolable rules,” by which he meant the Bill of Rights of the United States Constitution. Hence, the Philippine Bill of 1902 which temporarily established a civil government in the Philippines carried these “inviolable rules” or Bill of Rights. Likewise, the Philippine Autonomy Act of 1916, or the Jones Law, which called, among others, for an autonomous government for the Philippines contained those “inviolable rules” or the guarantees of the United States Bill of Rights. In 1934, The Philippine Independence Law or the Tydings-McDuffie Law was enacted. It guaranteed independence to the Philippines and authorized the drafting of a new Constitution for the Philippines.

Two sine qua non conditions were imposed by the United States for the approval of the said Constitution--- first, the government to be established must be republican in character, and second, it should contain a Bill of Rights. The delegates to the 1935 Constitutional Convention elected and chose the eminent Claro Recto to be its president. They drafted a Constitution that heavily borrowed principles from the United States Constitution. The resulting Constitution was signed on February 19, 1935, approved by United States President Roosevelt on March 23, 1935, and ratified by the majority of the Filipino people on May 14, 1935. This Constitution served as our fundamental law even after the United States granted our independence on July 4, 1946 and beyond. It was later amended which granted American citizens equal rights with the Filipinos in the disposition, exploitation, development and utilization of our natural resources. This imposition was to last until July 1974. Despite the economic imposition, the 1935 Constitution served us in good stead in rebuilding our country from the devastation of World War II. We were among the leader countries in Asia in the decades of the 50's and the 60's.

In the 1970's, our constitutional journey took an undemocratic detour. Then President Ferdinand E. Marcos suspended the privilege of the writ of habeas corpus and shortly thereafter, proclaimed martial law, allegedly to quell a communist rebellion and restore peace and order in the country. President Marcos used his extraordinary commander-in-chief powers even while a Constitutional Convention under the leadership of former President Diosdado Macapagal was in progress revising our 1935 Constitution. President Marcos' exercise of emergency powers was upheld by the Supreme Court and thereafter, the 1973 Constitution was ratified under contentious circumstances. The 1973 Constitution completely reorganized government, validated all the martial law decrees of President Marcos, and allowed him to govern with unprecedented powers, including legislative power.

It took years for the people to bring down the authoritarian regime of President Marcos. One explanation for its long life was the Cold War between the US and the USSR. Both superpowers unblushingly patronized client-countries even if they were ruled by dictators who showed no compunction butchering the rights of their own people. The Cold War enabled all types and stripes of dictators to reign all over the world--- in Europe, the Americas, Africa, and Asia, including the Philippines.

In 1986, the regime of President Marcos' government came to an end. As is the usual case, it was ended by a revolution of the people: by miracle, a peaceful one in the case of the Philippines. Regardless whether it is democratic or anti-democratic, revolution has long been considered a right reserved to the people which they directly exercise to change a government that is both irresponsible and irresponsible. The 1986 People Power Revolution catapulted Corazon C. Aquino to the Presidency. During a short transition, she ruled the country by means of decrees under the Freedom Constitution which superseded our 1973 Constitution. A Constitutional Commission was formed by President Aquino and was headed by Cecilia Munoz Palma, a retired Justice of the Supreme Court, to draft a new Constitution. The draft Constitution was approved by the Commission on October 1986 and was ratified by the Filipino people in the plebiscite held on February 2, 1987.

The 1987 Constitution, as expected, established a more democratic government by, among others, expanding the human rights of our people, rebalancing the three great powers of government, and recognizing the power of the people to rule directly, through referendum, recall, and initiative. In rebalancing the powers of government, the 1987 Constitution curtailed the commander-in-chief powers of the President and expanded the judicial power of the Supreme Court to annul acts of government done in grave abuse or discretion.

Concededly, the 1987 Constitution restored our democracy but whether it has continuously given us a government of the people, by the people, and for the people, is another matter. Outside the Philippines, the world has changed. The Cold War has left out but in came the War on Terror and its resultant reconfiguration of the contours of some civil and political rights. Communism collapsed and the visible hand that guided the economy was replaced by the invisible hand behind free market and again the transnational movement of money has to be adjusted. Globalization gained a cultic following and left on its trail was the shrinking sovereignty of nation-states. This was accompanied by the rise of a supra-regional arrangement of States like the European Union and the formation of tribunals with powers that traverse the jurisdiction of States over crimes committed against humanity.

Within the Philippines, we witnessed the attempts at coup d'état led by the military, its role in regime changes, its pampering by leaders of government; we saw the gridlocks between the Executive and the Legislative in the many instances when the latter exercised its power to investigate in aid of legislation; we saw the growing use or misuse of the power of impeachment by Congress; we heard complaints of the overarching exercise of the power of judicial review on political questions; we saw the multiplication of political dynasties despite their constitutional ban; we saw the continuation of the stranglehold of power of economic monopolies and oligopolies; we saw the continuing rule of a hyper-powered elite, a marginalized middle class, and a manipulated masses. In short, our democracy has not given us a government that is responsive to the will of the people, a government that has promoted the greater interest of the many. The sovereignty of our people has remained lifeless in some vague hieroglyphics in a hardly remembered piece of paper called the Constitution.

Unfortunately, all attempts to amend or revise the Constitution to enable our government to meet these internal and external problems have been unsuccessful. It is too late in the day to dissect the overt and covert reasons for these failures, but it is never too late to restart thinking the need to revise our Constitution to meet the felt necessities of our time. Democracy is always a work of progress. I like to believe that now is the perfect time to rekindle this thought for we have just inaugurated a new government.

There is hardly any doubt about the pristine intention of the new President to bring the boons of democracy to our people. But just after six months in office, we hear already him complaining about the obstacles to his objective. I respectfully submit that the most effective way to clear these obstacles is to revise our Constitution. And given the high trust rating of the President and the non-existence of any distrust that he would be perpetuating himself to power, I have no doubt he can succeed in this endeavor and drive us back to the fast lane of progress we used to traverse. I have been in government in all its branches for the last four decades and I can say that with no exception, our elected officials, early on their term, want to succeed in office, serve the people well, and leave a lasting legacy. Unfortunately, a lot of them failed, for their good intentions were devoured by a government system that has been overtaken by time and, worse, captured and corrupted by evil men.

My task is merely to provoke debate on the need to change some of the precepts and systems of our Constitution, strengthen its institutional mechanisms with the end in view of reinvigorating our democracy and constitutionalism. If I learned anything of value in life, it is the knowledge that we must not be diminished by dogmas nor hobbled by orthodoxies, for the first rule in the search for truth is to be uncertain of the certain. Let me therefore propound some propositions for marketplace discussion.

**First Proposition.** Our elections are generally not free, fair, and honest; hence, they do not bring about the ideal of representative democracy. Proofs: (a) our elections are too expensive; (b) they are characterized by the use of force or fraud; (c) they are not issue-oriented; (d) they are more popularity contests and the uninformed masses hold the critical votes; (e) political inequality is evident especially in Congress which is the playground of the elites and dynasties, where the Muslims and our indigenous people are not represented in the Senate and underrepresented in the House of Representatives; and (f) in our elections, including presidential elections, winners are proclaimed though they merely garnered minority votes, a result that is anti-democracy for it violates the rule of the majority. Should we not then amend the Constitution to give more reality to the political equality of our people? Where the vote of each is of equal value with the vote of others? Where no significant sector of our society is underrepresented or unrepresented in Congress, and other branches of the government? Where our elected officials who will govern the people are chosen by the majority and not by the minority? These questions answer themselves.

**Second Proposition.** We are not only plagued by political inequality but also by social and economic inequality. Pervasive social and economic inequality is antidemocratic and anti-republicanism. Victims of social and economic inequality are not free to enjoy their civil and political rights. Democracy cannot succeed in a setting where poverty afflicts the many and prosperity is the lot of the few. Proof: eyeball evidence of the millions of Filipinos living below the poverty line; if you follow your nose, their stench will lead you to their hovels they call houses. Question: Should we not amend our Constitution in order to make our poor people's socio-economic rights such as the right to education and the right to basic health demandable from the state like our civil and political rights? In countries

like South Africa and India, their Constitutions have treated these socio-economic rights as not mere directional in character but demandable from government as requirements of democracy. We should do no less unless our democracy is no more than a pretension.

**Third Proposition.** The Presidential system of government has resulted in gridlock between Congress and the Executive especially when the leaderships of these two departments belong to different political parties. These gridlocks prejudice the common good, for they bring about bad governance. Proof is the refusals of our past Executive officials to obey the summons of Congress exercising its power of investigation in aid of legislation. These refusals frustrated Congress in enacting laws, especially laws to help our fight against corruption. These gridlocks will continue and will bring us the politics of compromise and in principled politics among our politicians. Again, should we not amend the Constitution to delineate more clearly the demarcation line between Executive privilege and the power of Congress to investigate in aid of legislation to avoid abuse in the use of the privilege and the power? Will a parliamentary form of government avoid these gridlocks? What are the other defects of a presidential form of government that can be remedied by a parliamentary system? Will a parliamentary government result in a more responsive government as the Parliament can be dissolved whenever the ruling party fails the people? Will it eliminate the specter of coup d'états and people power revolution which is destabilizing to democracy?

**Fourth Proposition.** There is a need to further strengthen the institutional independence of the Judiciary by bolstering its financial independence. A Judiciary with a bent back and a begging bowl is anathema to real democracy for it will have no backbone to check the other branches of government. A Judiciary independent in paper but a pauper in reality is inimical to constitutionalism for it makes easy for unscrupulous politicians to whip judges to join their hallelujah chorus. It is bad enough for the Judiciary to be begging Congress for a decent budget, but it is worse walking to the DBM on bended knees for the release of an indecent budget. This has resulted in the tragedy of the High Court citing the DBM for contempt and the greater tragedy of the Executive thumbing its nose to the High Court despite the citation for contempt. This, to my mind, is an



unmitigated tragedy to the rule of law. We compound the problem when poverty drives the Judiciary to rely on the benevolence of foreign funders. Again, let us consider the suggestion that the Constitution should allow a certain irreducible percentage point of the budget for the Judiciary and provide a mechanism for its automatic release.

**Fifth Proposition.** There is need to strengthen the Judiciary by further depoliticizing appointments to the bench. Unless we can remove this virus of partisan politics, molecule by molecule, to disinfect appointments to our Judiciary, our system of checks and balances will never fully work, again to the detriment of democracy. The Judicial and Bar Council can further diminish its vulnerability to partisan politics. Three of its members--the Secretary of Justice, the representative of the Senate, and the representative of the House--are carriers of the virus, yet they can be the swing votes on who to include in the short list of nominees to be submitted to the President for appointment to the Judiciary. Even the regular members of the JBC representing the nonpartisan stakeholders of our justice system are not totally invulnerable to the arrows of partisan politics. They have an Achilles' heel which is the desire to be reappointed as members of the JBC, and this desire can only be fulfilled by vowing to political pressure. Again, these political vulnerabilities can be plugged by amending the Constitution and reviewing the composition of the JBC and the manner of appointment of its members.

**Sixth Proposition.** There is a need for the High Court to relieve its clogged docket and prevent its packing by the appointing authority. Justice to be of real value to democracy must not only be fair but must also be fast, for if democracy is boring to the people, it is because of Justice that travels in the slow lane. Justice must be, above all, credible. Given the unceasing influx of new cases, the High Court will continuously be burdened with a clogged docket, and constraint in time is the womb of decisions that are poor in insight and short in foresight. The possibility of an incumbent President appointing all the members of the High Court during his or her incumbency has come to pass. Rightly or wrongly, it has raised quizzical eyebrows on the independence of the Judiciary. But, however it may be, no democracy can succeed without a Judiciary enjoying the trust of the people. Ours is a task to produce a Judiciary without these burdens. One way to declog its docket is to amend the Constitution to delimit the

High Court's jurisdiction only to significant cases. We must also restrict its power so that it will not have the roving commission to review all acts of government on the ground of "grave abuse of discretion," a phrase with an amorphous content. There is no democracy in a world where the Judiciary has been empowered to be the policeman of government. Also, the Constitution should be amended to prevent its packing by any President and, thus, avoid the perception that the courts are mere extensions and instruments of partisan politics. Again, we cannot afford a Judiciary with a cracked confidence.

**Seventh Proposition.** When representative democracy is not fully functioning, as in our case today, then the means by which the people themselves can exercise direct democracy should be improved. More than any of our Constitutions, the 1987 Constitution placed greater stress on the democratic nature of our State more than the republican character of our government. The declaration of Principles and State Policies of both the 1935 and 1973 Constitutions simply state: "The Philippines is a republican state xxx." On the other hand, the 1987 Constitution went further as it states: "The Philippines is a democratic and republican State...." It is not hard to understand why the 1987 Constitution described our state, first as democratic, and then secondly, as republican. It is because our 1987 government was brought about by direct action of the people, thru what has become known as the peaceful People Power revolution of 1986. Consequently, the 1987 Constitution, as well as laws, introduced novel mechanisms by which the people can exercise their power of direct democracy, and govern the State, in case their elected representatives default in effectuating their will and protecting their interests. Thus, for the first time, under the 1987 Constitution, the people gave themselves direct power to propose amendments to the Constitution thru the process of initiative. Similarly, our laws now provide for the use of referendum by the people to resolve policy issues and the recall of some elected officials who perform below their expectations. Consistent with the democratic character of our State, the powers of the people to direct the government themselves should be further expanded. There ought to be more liberal use of the referendum, a bigger coverage of our elected officials who can be recalled, and greater liberalization of the process of initiative in amending our Constitution. To put too much stricture on the right of our people in the exercise of their right to direct our democracy nullifies the spirit of EDSA and will bring us back to the misrule of leaders who betray the interest of the people.

The constraints of time shackle me from fingering other areas of concern. These additional areas are the systemic changes that are needed to address the unabated violations of human rights, changes to uproot the deep-seated corruption in the bureaucracy, changes to make us globally competitive, and changes to provide a better constitutional framework to accommodate the legitimate demands of insurgents and separatist groups which have hounded us for years we can no longer count.

We elect our leaders, and it is our duty to provide them a constitutional framework of government which will make it difficult for them to fail the people. I reject the argument that there is no urgency to amend the Constitution to arrest the decline of our democracy. We do not need a democracy in a stretcher. We cannot wait for democracy to be in ICU before calling the doctors.

I started by saying I am only peddling proposals of change in the hope of provoking debates. If I have done anything correct this afternoon, it is to choose the University of the Philippines as the marketplace of discussion of these proposals. U.P. is one venue where the irrelevant is not treated as irreverent, where there is no idea that is considered inciting to sedition, where we are taught to doubt, and doubt, doubt itself.

*Mabuhay ang UP, Mabuhay ang UP College of Law.*