

ON AMENDING THE CONSTITUTION*

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A pervasive theme in constitutional law is continuity and change. What has been said of law in general applies with greater reason to constitutional law in particular: it must be stable but it cannot stand still. No one has articulated the basic dilemma with greater force and cogency than Alfred North Whitehead who, in his study of symbolism, said:

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 a free society consists first in the maintenance of the symbolic code; and secondly in 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 slow atrophy of a life stifled by useless shadows.¹

FORMAL AND INFORMAL WAYS OF CHANGING THE CONSTITUTION

Actually, there are two ways by which the Constitution may be changed: **formally**, as provided in its Article XVII, and **informally**, through judicial interpretation of its provisions. The latter takes place whenever the Supreme Court interprets the broad and open-ended provisions of the Constitution in the decision of specific cases and controversies.

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¹ Alfred North Whitehead, *SYMBOLISM, ITS MEANING AND EFFECT* at 88 (1927), *quoted in* Paul A. Freund, *THE SUPREME COURT OF THE UNITED STATES* at 176 (1961).

I would like to discuss this point briefly before going to the formal ways of amending and revising the Constitution to which I will devote the rest of this lecture.

By its very nature as the fundamental law, the Constitution, in contrast to ordinary statute, cannot be too detailed without running the risk of becoming obsolete. Of necessity, as Marshall said in the famous case of *McCulloch v. Maryland*,² "its nature . . . requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." The agency for "deducing the important objects" - for filling the interstices with details and adjusting the Constitution to the concerns of modern society -- is the Supreme Court. Its decisions applying and interpreting the laws or the Constitution, by virtue of Article 8 of the Civil Code, "form part of the legal system of the Philippines." Indeed, as Chief Justice Hughes once said, "[we] live under the constitution, but the constitution is what the judges say it is."

Unlike its interpretations of the provisions of statutes, which may be changed or overridden by Congress, the Court's interpretations of the Constitution cannot be superseded by Congress.³ For example, in *Perfecto v. Meer*,⁴ the Supreme Court construed Article VIII, section 9 of the 1935 Constitution, which provided that the salaries of judges "shall not be diminished during their continuance in office," as exempting their salaries from taxation. A law subsequently passed by Congress, declaring that "no salary whenever received by any public officer . . . shall be considered exempt from taxation" and that "payment of income tax shall not be considered a diminution of his compensation," was struck down by the Court in *Endencia v. David*⁵ on the ground that in the exposition of the Constitution, the Supreme Court is paramount. The final resolution of the question came when the ruling in these cases was abrogated by the 1973 Constitution which provided that "No salary or any form of emolument of any public officer or employee, including constitutional officers, shall be exempt from the payment of income tax."⁶ The present Constitution does not contain a similar provision, but neither does it reenact the provision of

² 4 Wheat (17 U.S.) 316, 4 L.Ed. 579, (1819).

³ *Dickerson v. United States*, 530 U.S. 428, 147 L.Ed.2d 405, (2000).

⁴ G.R. No. 2348, 85 Phil. 552, Feb. 27, 1950.

⁵ G.R. Nos. 6355-56, 93 Phil. 696, Aug. 31, 1953.

⁶ CONST. (1973), art. XV, § 6.

the 1935 Constitution that members of the judiciary "shall receive such compensation as may be fixed by law, which shall not be diminished during their continuance in office."⁷ What its Article VIII, section 10 says is that the salaries of members of the judiciary "shall not be decreased." In *Nitafan v. Commissioner of Internal Revenue*,⁸ it was held that by changing the word "diminished" to "decreased," the present Constitution clearly intended to overrule the doctrine of *Perfecto and Endencia*.

In contrast, a ruling of the Court that a teacher was neither a "person in authority" nor an "agent of a person in authority" within the meaning of Article 148 of the Revised Penal Code⁹ was subsequently superseded by a legislative amendment declaring teachers to be "persons in authority," and the Court, doing the legislative will, later applied the amended law by holding a school superintendent to be a person in authority.¹⁰

Thus, only if the Supreme Court reconsiders its decision, or its membership is changed, or its ruling is overruled by constitutional amendment can the gloss placed by it on the Constitution be changed. Otherwise, because of its power of interpretation, the Supreme Court functions as a veritable continuous constitutional convention, informally changing the Constitution without altering a single word of it. To be sure, contemporaneous interpretations of the provisions of the Constitution by the other departments of the government, particularly the Executive Department, constitute informal amendments of the fundamental law, but nothing is more decisive upon our understanding of what the Constitution is than judicial interpretations.

So much for the informal ways of changing the Constitution. I now turn to the formal methods by which it may be changed.

The amendment clause is an essential part of any written constitution for two reasons. One, is that the more definite and rigid the provisions of a constitution are -- thus precluding interpretation by the courts -- the greater is the need for such a clause. Two, is that the clause serves as a safety valve against violent change or even revolution by

⁷ CONST. (1935), art. VIII, § 9.

⁸ G.R. No. 78780, 152 SCRA 284, July 23, 1987.

⁹ *People v. Mendoza*, G.R. No. 39275, 59 Phil. 163, Dec. 20, 1933.

¹⁰ *People v. Benitez*, G.R. No. 48396, 73 Phil. 671, Sept. 11, 1942.

providing a procedure for orderly change. "The formal amendment process," as Professor Dellinger has written, "represents a domestication of the right to revolution."¹¹

Constitutional change may be formally made either by amendment or by revision.

AMENDMENT DISTINGUISHED FROM REVISION

Article XVII of the Constitution provides:

AMENDMENT OR REVISION

Sec. 1. Any amendment to, or revision of, this Constitution may be proposed by:

(1) The Congress, upon the vote of three-fourths of all its Members; or

(2) A constitutional convention.

Sec. 2. Amendments to this Constitution may likewise be directly proposed by the people through initiative upon a petition of at least twelve per centum of the total number of registered voters, of which every legislative district must be represented by at least three per centum of the registered voters therein. No amendment under this section shall be authorized within five years following the ratification of this Constitution nor oftener than once every five years thereafter.

The Congress shall provide for the implementation of the exercise of this right.

Sec. 3. The Congress may, by a vote of two-thirds of all its Members, call a constitutional convention, or by a majority vote of all its Members, submit to the electorate the question of calling such a convention.

¹¹ Walter Dellinger, *Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV.L. REV. 386, 431 (1983).

Sec. 4. Any amendment to, or revision of, this Constitution under Section 1 hereof shall be valid when ratified by a majority of the votes cast in a plebiscite which shall be held not earlier than sixty days nor later than ninety days after the approval of such amendment or revision.

Any amendment under Section 2 hereof shall be valid when ratified by a majority of the votes cast in a plebiscite which shall be held not earlier than sixty days nor later than ninety days after the certification by the Commission on Elections of the sufficiency of the petition.

By providing both for its amendment and for its revision, the Constitution renders moot the long standing debate whether it may radically be altered or whether it may only be changed so long as its basic design is retained. What then is an amendment and what is a revision?

The Constitution's framers adopted¹² the distinction between amendment and revision in the concurring opinion of Justice Antonio in the Ratification Cases (*Javellana v. Executive Secretary*)¹³ in which he stated:

... Revision may involve the rewriting of the *whole* constitution. The act of *amending* a constitution on the other hand, envisages a change of only specific provisions. The intention of an act to amend is not the change of the entire constitution but only the *improvement* of specific parts of the existing constitution or the addition of provisions deemed essential as a consequence of changed conditions or the elimination of parts already considered obsolete or unresponsive to the needs of the times.

But, while a constituent assembly and a constitutional convention are vested with the power to propose amendments and/or revisions to the Constitution, the people can only propose amendments by means of initiative. In sponsoring what is now Article XVII of the Constitution, Commissioner Suarez explained that, in giving the people the power to propose changes in the Constitution, the Committee on Amendments and

¹² I RECORD OF THE CONSTITUTIONAL COMMISSION 372 (1986) (hereinafter cited as RECORD).

¹³ G.R. No. 36142, 50 SCRA 30, 361, 367, Mar. 31, 1973.

Transitory Provisions, of which he was the chair, deliberately limited the grant to amendments.¹⁴

The distinction between amendment and revision owes much to Dean Sinco's book on Political Law in which he wrote:

Strictly speaking, the act of revising a constitution involves alterations of different portions of the entire document. It may result in the rewriting either of the whole constitution, or the greater portion of it, or perhaps only some of its important provisions. But whatever may be the results the revision may produce, the factor that characterizes it as an act of revision is the original intention and plan authorized to be carried out. That intention and plan must contemplate a consideration of all the provisions of the constitution to determine which should be altered or suppressed or whether the whole document should be replaced with an entirely new one.

The act of amending a constitution, on the other hand, envisages a change of only a few specific provisions. The intention of an act to amend is not to consider the advisability of changing the entire constitution or of considering that possibility. The intention is to improve specific parts of the existing constitution or to add to it provisions deemed essential on account of changed conditions or to suppress portions of it that seem obsolete, or dangerous, or misleading in their effect.¹⁵

AMENDMENTS AND REVISION OF PREVIOUS CONSTITUTIONS

The 1935 Constitution was twice amended: in 1940 and again in 1947. The 1940 amendments wrought three changes in the fundamental document: (1) changing the term of office of the President and the Vice President from six years, with no reelection in the case of the President, to four years with allowance, in the case of the President, for reelection provided the total number of years he served in office did not exceed eight consecutive years;¹⁶ (2) replacing the unicameral National Assembly with a bicameral Congress composed of a Senate and a House of

¹⁴ I RECORD 372 (1986); *Santiago v. Comelec*, G.R. No. 127325, 270 SCRA 106, Mar. 19, 1997.

¹⁵ Vicente Sinco, *PHILIPPINE POLITICAL LAW, PRINCIPLES AND CONCEPTS* 46 (11th ed. 1962).

¹⁶ CONST. art. VII, § 4-5.

Representatives;¹⁷ (3) and creating an independent Commission on Elections.¹⁸ The 1935 Constitution was amended a second time in 1947 to grant American citizens and corporations owned by them equal rights with Filipinos in the disposition, exploitation, development and utilization of the natural resources, as well as the operation of public utilities in the Philippines.

In 1960 worsening economic conditions reinforced a strong sentiment that the 1935 Constitution was not responsive to the demands of the nation and led to its revision. Indeed, Philippine society was in ferment and martial law had to be declared on September 21, 1972. Amidst violent demonstrations, the Constitutional Convention called by Congress met in inaugural session on June 1, 1971 and continued working until November 30, 1972 when it approved the draft of a revised constitution. The proposed constitution was then submitted to the people and approved by them in citizens assemblies held throughout the country. This became the 1973 Constitution.

In lieu of the presidential system, the 1973 Constitution established a parliamentary form of government. In 1976 it was amended principally to give then President Marcos lawmaking powers that he could exercise "whenever in his judgment there was a grave emergency or threat or imminence thereof, or whenever the . . . National Assembly fails or is unable to act adequately on any matter for any reason that in his judgment requires immediate action." This is the well known Amendment 6.

STAGES IN THE AMENDMENT PROCESS

The amendment and revision of the Constitution comprehend two distinct, but related, stages: one, the **making of proposals**, and two, the **ratification** of the proposals. Proposals may be made by Congress, sitting as a constituent assembly, by a constitutional convention, or by 12 percent of the registered voters in the preceding election. On the other hand, in order that proposals for amendments or revisions may be valid, they must be ratified by the people in a plebiscite.

¹⁷ CONST. art. VI, § 1.

¹⁸ CONST. art. X.

The Constitution thus follows the general pattern of constitution making around the world of having separate agencies for proposing amendments or revisions and for ratifying the proposals. The Constitution of the United States, for example, provides for (1) the making of proposals either by two thirds vote of both houses of Congress or by a constitutional convention called by Congress upon petition of two-thirds of the states, and (2) the ratification of the proposed amendments either by the legislatures of three-fourths of the states or by conventions in three-fourths of the states.

On the other hand, the French Constitution of 1946 provides for its revision by resolution of the National Assembly and for approval of the revision by a three-fifth vote of the Parliament. If the majority vote is less than three-fifth, the proposed revisions must be submitted to the people for approval in a referendum.

Similarly, the 1946 Japanese Constitution provides that amendments must be proposed by the votes of at least two-thirds of each house of the Diet and then submitted to the people for ratification by a majority of the votes cast in the election.

Is ratification by the people of proposed amendments or revisions essential to their validity or coming into force? Noting that only seventeen out of forty eight state constitutions in the United States require popular ratification, Dean Sinco observes that "unless popular ratification is expressly provided in the constitution itself, the practice of submitting to the people for ratification has not become part of the unwritten law of the United States." He adds, however, that in those cases where a constitution has been put into effect without popular ratification, "the approval of the people was inferred from acts of acquiescence to the constitution manifested by the organization of the government and the observance of its provisions by the public officials elected or appointed under it."¹⁹ In other words, formal ratification is required only if expressly provided for in the existing constitution. Otherwise, ratification may be implied from the acquiescence of the people to the constitution.

¹⁹ Sinco, *supra* note 15, at 49-50.

In the Ratification Cases (*Javellana v. Executive Secretary*),²⁰ petitions for prohibition were filed to stop executive officials from enforcing the 1973 Constitution on the ground that it had not been validly ratified in accordance with the 1935 Constitution. The Constitution had been submitted to the people through citizens assemblies in which they were asked whether they "approve[d] of the new Constitution." Six Justices,²¹ representing a majority, held that the Constitution had not been validly ratified, because Article XV, section 1 of the 1935 Constitution required that constitutional amendments should be submitted to the people "at an election." On the other hand, four Justices²² contended that whether the Constitution had come into force and effect was a political question, that Article XV applied only to the amendment of the Constitution and not its revision, and that in any event there was substantial compliance with the amendment procedure of the 1935 Constitution. However, on the question whether the petitions brought to enjoin executive officials from enforcing the Constitution should be granted, two²³ of the six Justices, who held that the Constitution had not been validly ratified, joined the four who held that it had been, and the new majority then voted to dismiss the petitions for prohibition. The two argued that whether the Constitution had come into force and effect despite the fact that it had not been validly ratified was a political question which required consideration of other factors "not judicial [but] beyond the competence of this Court [to resolve]." The Court then declared: "This being the vote of the majority, there is no further judicial obstacle to the new Constitution being considered in force and effect."²⁴

WHO MAY PROPOSE AMENDMENTS OR REVISIONS?

Under the Constitution, amendments or revisions may be proposed by (1) Congress acting as a constituent assembly, (2) a constitutional convention called for the purpose, or (3) the people by means of initiative.

²⁰ G.R. No. 36142, 50 SCRA 30, Mar. 31, 1973.

²¹ Concepcion, C.J., Makalintal, Zaldivar, Castro, Fernando, and Teehankee, JJ.

²² Barredo, Makasiar, Antonio, and Esguerra, JJ.

²³ Makalintal and Castro, JJ.

²⁴ For an analysis of the voting in these cases, see Vicente V. Mendoza, *Annotation, Judicial Review of the Effectivity of the New Constitution and the Political Question Doctrine*, 50 SCRA 393 (1973).

1. CONGRESS AS A CONSTITUENT ASSEMBLY

Article XVII, section 1(1) provides that constitutional amendments or revisions may be proposed by "Congress, upon the vote of three-fourths of all its Members." But it is silent on how the vote of three-fourths "of all its Members" shall be determined. The question is, how may Congress, sitting as a constituent assembly, propose amendments or revisions to the Constitution? The question arises because Congress is composed of two houses. Can it do so in the same way it enacts ordinary legislation, with its two houses sitting and voting separately? Or, should the two houses meet in joint session and, if so, should they vote jointly or separately?

One interpretation of the amendment clause is that put forth by the Speaker of the House of Representatives, and it is to the effect that "three-fourths of all its Members" means three-fourths of all the members of the House and of the Senate taken together, so that, as there are at present 236 Representatives and 23 Senators, or a total of 259 members, the vote required is three-fourths of 259 or 194. Under this view, it does not matter if all the 194 votes cast in favor of a proposed amendment or revision come from the House nor if all the members of the Senate object. However, the constitutional provision in question speaks of the vote of "three-fourths of all [the] Members [of Congress]." As Congress is composed of two houses, it is obvious that the House of Representatives alone cannot act as a constituent assembly.

The opposite interpretation of Article XVII, section 1(1) is that advanced by the Senate. According to this view, Congress can propose amendments or revisions to the Constitution in the same manner it enacts ordinary legislation. This means that a resolution proposing an amendment or revision of the Constitution may be passed by the vote of at least three-fourths of one house and, if concurred in by the vote of at least three-fourths of all the members of the other house, the proposal is deemed approved and may then be submitted for ratification in a plebiscite.

This interpretation calls for two observations. First, it reduces the amendment process to the category of ordinary legislative process. "Legislated Cha-Cha," as *The Philippine Star* appropriately called the Senate position.²⁵ This interpretation blithely ignores the fact that ours is intended

²⁵ *Legislated Cha-cha Eyed*, PHIL. STAR, May 18, 2006 at 1.

to be a rigid constitution, which means that it cannot be amended by the ordinary process of legislation. Second, the Senate interpretation is inconsistent with the pattern of other provisions of the Constitution, an analysis of which suggests that, when performing non-legislative functions, the two houses of Congress must meet in joint session. Thus, in the following cases, the two houses are required to meet in joint session and, with the exception of the third case, to vote separately:

(1) When Congress declares the existence of a state of war.²⁶

(2) When it confirms the President's nomination of a member of the Senate or of the House to be Vice President of the Philippines in the event of a vacancy in that office.²⁷

(3) When it decides whether to revoke the President's proclamation of martial law or suspension of the privilege of the writ of habeas corpus.²⁸

(4) When it sits as a board to canvass the votes for President and Vice President and declare the winners, or to break a tie between candidates receiving the highest number of votes for the same position.²⁹

(5) In determining whether the President, who has declared himself unable to discharge the duties of his

²⁶ 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."

²⁷ 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 or of 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."

²⁸ 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."

²⁹ 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 election, open all the 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, 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 the Congress voting separately."

office and later desires to resume office but his cabinet objects, is now fit to discharge the powers and functions of his office.³⁰

There is no reason why the same requirement should not be observed in determining the manner of sitting and voting of the two houses when Congress acts as a constituent assembly. Indeed, in such a case, it has been held that "Senators and members of the House of Representatives act, *not as members of Congress*, but component elements of a constituent assembly."³¹ At the same time, by requiring that the two houses vote separately, the Senate is protected against being outvoted due to its small size compared to the House of Representatives. Moreover, there is an advantage to be gained by requiring Senators and Representatives to meet in joint session, for then they can discuss together and argue face to face.

On the other hand, where Congress is legislating, the two houses are required to sit and vote separately. This is clear even in the case of Article VI, section 28(4), which provides that "No law granting any tax exemption shall be passed without the concurrence of a majority of all the Members of the Congress." That this provision refers to lawmaking is inferable from the use of the phrase "with the concurrence of" instead of the phrase "by the vote of." "With the concurrence of" implies that, as in other cases of lawmaking, the two houses must sit separately and after one house has passed the tax measure, it must pass it on to the other house for concurrence. In contrast, it is reasonable to construe the language of Article XVII, section 1(1) that Congress may propose any amendment or revision of the Constitution "upon the vote of three-fourths of all its members" to mean that the two houses of Congress must meet in joint session.

Additional light on what procedure the Constitutional Commission would have adopted had its attention been called to the problem is thrown by the history of the amendment clause. The amendment clause of the present Constitution was copied from the corresponding provision of the

³⁰ 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."

³¹ *Gonzales v. Comelec*, G.R. No. 28196, 21 SCRA 774, 785, Nov. 9, 1967; *Tolentino v. Comelec*, G.R. No. 34150, 41 SCRA 702, 714, Oct. 16, 1971 (emphasis added).

1973 Constitution, which provided for a unicameral legislative body. This provision read:

ARTICLE XVI

AMENDMENT

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

(2) The Batasang Pambansa may, by a vote of two thirds of all its Members, call a constitutional convention or, by a majority vote of all its Members, submit the question of calling such a convention to the electorate in an election.

Sec. 2. Any amendment to, or revision of this Constitution shall be valid when ratified by a majority of the votes cast in a plebiscite which shall be held not later than three months after the approval of such amendment or revision.

The assumption was that the legislative body to be adopted would also be unicameral. In fact the Committee on the Legislative Department unanimously voted to adopt a unicameral National Assembly.³² However, when the question of a unicameral National Assembly or a bicameral Congress was put to a vote before the plenary session of the Commission, the proponents of bicameralism won by a narrow vote of 23 to 22.³³ Accordingly, the draft articles on the Legislative and on the Executive departments were amended to reflect this fact by requiring that when performing non-legislative functions, the two houses of Congress must sit in joint session but vote separately. Undoubtedly, they were patterned after Article XV of the 1935 Constitution which read:

³² II RECORD 41-43 (1986).

³³ *Id.* at 69.

Article XV. – Amendments

Sec.1. 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. Such amendments shall be valid as part of this Constitution when approved by a majority of the votes cast at an election at which the amendments are submitted to the people for their ratification.

Somehow, however, the draft amendment clause, which had earlier been adopted on July 9, 1986,³⁴ was forgotten with the result that it was not adjusted to the bicameral character of Congress.

It is unlikely that the Constitution's framers would have provided differently had they not overlooked the amendment clause. Significantly, when this clause was being discussed by them, the following exchange took place between Commissioner Suarez, the chair of the Committee on Amendments and Transitory Provisions, and Commissioner Regalado:

MR. REGALADO. I also notice that both Sections 1 and 2 are premised on the anticipation that the Commission, not only the Committee, will opt for a unicameral body. In the event that a bicameral legislative body will carry the day, has the Committee prepared contingency proposals or resolutions?

MR. SUAREZ. Yes, in that situation, we would provide to include the words IN JOINT SESSION ASSEMBLED.

MR. REGALADO. But still maintaining the same number of votes?

MR. SUAREZ. The Commissioner is right.

MR. REGALADO. Thank you.³⁵

The understanding then was that, in the event a bicameral legislative body was adopted, the draft amendment clause would be

³⁴ I RECORD 412 (1986).

³⁵ *Id* at 375.

adjusted by providing that when exercising its constituent power, Congress should do so "in joint session assembled." The event took place, but the draft amendment clause was not changed accordingly. It seems that for once Homer nodded!

I now come to the second method of amending or revising the Constitution.

2. CONSTITUTIONAL CONVENTION

Whether to amend or revise the Constitution directly, or to call a constitutional convention for this purpose, or to refer the question of calling a convention to the electorate is a matter which lies solely within the discretion of Congress. The courts will not interfere with the exercise of such discretion.³⁶ For that matter, Congress may call a constitutional convention and at the same time propose amendments to the Constitution in connection with the convention it is calling. For example, on March 16, 1967, Congress passed three resolutions. By Resolution No. 1, it proposed to amend the 1935 Constitution by increasing the number of seats in the House of Representatives from 160 to 180. This was to be used as the basis for the apportionment of the seats in the constitutional convention at twice the number of the seats thus increased. By Resolution No. 2, it called a constitutional convention to be held on the second Tuesday of November 1971. By Resolution No. 3, it proposed the amendment of the Constitution to enable its members to run for the constitutional convention without forfeiting their seats. Then Congress by law provided for the submission of Resolutions 1 and 2 to the people in the general elections of November 14, 1967. In *Gonzales v. Comelec*,³⁷ it was contended that, having called a constitutional convention, "[it was better] to let the whole thing be submitted to the convention." While conceding the force of the argument, the Court nonetheless abstained from judging on the ground that the matter involved "the *wisdom* of the action taken by Congress, not its *authority* to take it."³⁸

³⁶ Del Rosario v. Comelec, G.R. No. 32476, 35 SCRA 367, Oct. 20, 1970.

³⁷ G.R. No. 28196, 21 SCRA 774, 785, Nov. 9, 1967.

³⁸ *Id.* at 795 (emphasis in original).

a. Procedure for Calling a Constitutional Convention

In discussing the manner of sitting and voting of the two houses of Congress whenever it acts as a constituent assembly, structural and textual arguments were summoned in support of the view that the House of Representatives and the Senate are required to meet in joint session and to vote separately. The same observations³⁹ apply, *mutatis mutandis*, to the procedure for calling a constitutional convention. For like Article XVII, section 1(1), beyond stating that "The Congress may, by a vote of two-thirds of all its Members, call a constitutional convention or, by a majority of the vote of all its Members, submit to the electorate the question of calling such a convention,"⁴⁰ Article XVII, section 3 of the Constitution does not say anything else. It is submitted that, as in acting as a constituent assembly, the two houses of Congress must likewise sit together but vote separately in considering a resolution calling a convention or referring the question of calling one to the people for resolution.

b. Powers of a Constitutional Convention

In considering the powers of a constitutional convention, a distinction must be made between **what it can propose** by way of amendment or revision of the Constitution and **what it can do**. Can Congress specify the agenda of a constitutional convention? It is relevant to discuss the theories underlying the existence of constitutional conventions in relation to the legislatures which call them into being.

The first theory, known as the **theory of legislative control**, considers a constitutional convention as subordinate to the legislature. In *Wood's Appeal*,⁴¹ a Pennsylvania case, it was said that "law is the highest expression of a people's sovereignty. . . . The right of the people to restrain their delegates by law cannot be denied, unless the power to call a convention by law, and the right of self-protection be also denied." Very much the opposite of this view is the **theory of conventional sovereignty** which considers a constitutional convention as the alter ego of the people which cannot be limited by the legislature. In *Sproule v. Fredericks*,⁴² the Mississippi Supreme Court described a constitutional convention as "the highest legislative body known to freemen in a representative government. It is supreme in its sphere. It wields the powers of sovereignty, especially

³⁹ See *supra* at 5-9.

⁴⁰ CONST. art. XVII, § 4.

⁴¹ 75 Pa. 59 (1874).

⁴² 11 So. 472 (1892). See also *Dickson v. State* 20 So. 841 (1896).

delegated to it, for the purpose and the occasion, by the whole electoral body, for the good of the whole commonwealth. The sole limitation upon its powers is that no change in the form of government shall be done or attempted." The third theory, the **theory of coequality**, posits a middle view that a constitutional convention, when called into being, becomes a coordinate branch of government. Under this theory, a convention owes its existence to the legislature but it cannot be controlled nor interfered with in its work by the legislature.⁴³

Which theory should we follow in the Philippines? If the theory of legislative control is applied, it is obvious that Congress can set limits on the powers of a constitutional convention and its agenda. On the other hand, if it is the theory of conventional sovereignty, Congress would have no power to do so since under this theory the powers of a constitutional convention are considered sovereign in character.

Early text writers⁴⁴ expressed preference for the third theory of coequality. One of them, Professor Fernando, after becoming Justice Fernando, concurred in a ruling of the Court that whether a convention can submit partial amendments for ratification is a judicial question. For him, "the view that commends itself for acceptance is that the legislature and constitutional convention alike are coordinate, there being no superiority of one over the other."⁴⁵ Hence, as acts of Congress are subject to judicial review, so are those of a constitutional convention. He thus rejected the contention of the respondents that the 1971 Constitutional Convention was a body sovereign not subject to the jurisdiction of the Supreme Court.

But, while not a sovereign body, neither is a constitutional convention subordinate to the existing departments of the government. In the Plebiscite Cases (*Planas v. Comelec*),⁴⁶ Justice Fernando said in a separate opinion that the 1971 Constitutional Convention could even appropriate money for the holding of a plebiscite at which its proposals could be submitted to the people for ratification in the event Congress failed to do so. Otherwise, he said, "a legislative body, the appropriating arm of the government, could conceivably make use of such authority to compel the

⁴³ See *Tolentino v. Comelec*, 41 SCRA 702, 734, 735-737, Oct. 16, 1971 (Fernando J., *concurring*).

⁴⁴ E.g., Sinco, *supra* note 15, at 26; I Lorenzo M. Tanada & Enrique M. Fernando, *CONSTITUTION OF THE Philippines*, at 9-10 (4th ed., 1952).

⁴⁵ *Tolentino v. Comelec*, G.R. No. 34150, 41 SCRA 702, 737, Oct. 16, 1971.

⁴⁶ G.R. No. 35925, 49 SCRA 105, 156, Jan. 22, 1973 (*concurring and dissenting*).

Convention to submit to its wishes on pain of being rendered financially distraught."

Indeed, implicit in the rulings in the cases is the adoption by the Supreme Court of the theory of co-equality and the rejection of the theories of legislative control and conventional sovereignty. Consistent with this theory, the following have been held to be powers of a constitutional convention:

- (1) The power to adopt a different ideology. This view was expressed by the Court in *Del Rosario v. Comelec*,⁴⁷ in which it was stated:

Whether the Constitutional Convention will only propose amendments to the Constitution or entirely overhaul the present Constitution and propose an entirely new Constitution based on an ideology foreign to the democratic system, is of no moment; because the same will be submitted to the people for ratification. Once ratified by the sovereign people, there can be no debate about the validity of the new Constitution.

- (2) The power to provide for a transition government.

In *Benner v. Porter*⁴⁸ it was held:

The conventions being the fountain of all political power, from which flowed that which was embodied in the organic law, were of course competent to prescribe the laws and appoint the officers under the constitution by means whereof the government could be put into immediate operation and thus avoid an interregnum that must have intervened if left to an organization according to the provisions of that instrument. This was accomplished by a few lines, adopting the machinery of the territorial government for the time being and until superseded by the agency and authority of the constitution itself.

c. What the Convention Can Do and Cannot Do

A constitutional convention has the power to adopt rules for its own governance, the election of its officers, and the procedure for its deliberations and to determine the election, returns, and qualifications of its

⁴⁷ G.R. No. 32476, 35 SCRA 367, 369, Oct. 20, 1970.

⁴⁸ 9 How. 235, 13 L.Ed. 119 (1850).

members.⁴⁹ But, being the creation of the Constitution, it cannot act contrary to such constitution. For instance, it cannot deprive anyone of life, liberty or property or deny him due process or any constitutional right.⁵⁰ On the other hand, it can propose anything, including a different ideology for the country. After all, its proposals are subject to the approval of the people in a plebiscite.

I now come to the third method of amending the Constitution.

3. POPULAR INITIATIVE

Apparently as a bow to people power which brought about its adoption in 1987, the present Constitution provides for a system of initiative whereby the people (electorate) may directly propose amendments to the Constitution.⁵¹ This method was proposed in the Constitutional Commission by Commissioner Blas Ople. As something untried, however, the Constitutional Commission limited popular initiatives to amendments, in contrast to the power of a constituent assembly or a constitutional convention not only to amend but also to revise the fundamental law. In addition, the Constitutional Commission left the implementation of this right to Congress and limited its exercise by the people to once every five years.

Hence, in *Santiago v. Comelec*⁵² the Supreme Court held that without an enabling law to implement the provisions on popular initiative, the Commission on Elections cannot entertain any petition for initiative and that, if it does, it would be acting in excess of its jurisdiction. There was unanimity on this point. The Court split 8-6 on the question whether Republic Act No. 6735, which prescribed a system of initiative and referendum, applied to initiatives on constitutional amendments in view of the vagueness of some of its provisions regarding the conduct of initiatives and other details. While the Constitution is referred to in its statement of policy and requirements for petitions for initiative, its subtitles mention only "National Initiative and Referendum" and "Local Initiative and

⁴⁹ Sinco, *supra* note 15, at 57.

⁵⁰ Del Rosario v. Comelec, G.R. No. 32476, 35 SCRA 367, 369; Tolentino v. Comelec, G.R. No. 34150, 41 SCRA 702, 716, Oct. 16, 1971.

⁵¹ The Constitution likewise provides for initiative and for referendum on laws and local ordinances; *See*, art. VI, § 32 and art. X, § 3.

⁵² G.R. No. 127325, 270 SCRA 106, Mar. 19, 1997.

Referendum." On the other hand, the dissenters, while acknowledging the poor draftsmanship of the law, thought that it was sufficiently clear that its provisions applied to constitutional amendments. Indeed, some provisions of the statute under the subtitle "National Initiative and Referendum" clearly refer to constitutional amendments.

As matters now stand, pending the amendment of Republic Act No. 6735 to make it applicable to constitutional amendments or pending the enactment of a new statute, popular initiative, as a mode of amending the Constitution, cannot be availed of.

RATIFICATION IN PLEBISCITES

Thus far, I have been discussing methods of amending or revising the Constitution, namely, by Congress as a constituent assembly, by a constitutional convention, and by the people by means of initiative. The proposed amendments or revisions become valid upon their ratification by the people in a plebiscite. In the case of amendments or revisions proposed by a constituent assembly or a constitutional convention, the plebiscite must be held not earlier than 60 nor later than 90 days from the date of approval of the amendments or revisions. In the case of amendments proposed by popular initiative, the plebiscite must be held within the same period counted from the time the Commission on Elections certifies the petition for initiative to be sufficient.

DOCTRINE OF PROPER SUBMISSION

In submitting proposed amendments or revisions for ratification, certain standards must be observed. In his separate opinion in *Gonzales v. Comelec*,⁵³ Justice Sanchez contented that constitutional amendments cannot be submitted to the people for ratification in a national election. Although the majority disagreed with him regarding this matter, they concurred with him that there must be "fair submission" to ensure the "intelligent consent or rejection" of proposed amendments or revision by the people. Thus was born what is now known as the "doctrine of fair submission."

⁵³G.R. No. 28196, 21 SCRA 774, 813, Nov. 9, 1967.

The following have been held to be required by the doctrine:

(1) Sufficient time must be given to the electorate to familiarize themselves with proposed amendments or revisions. In *Gonzales*, a period of eight months was considered by the Supreme Court to be sufficient. By now requiring that plebiscites for the ratification of proposed amendments and/or revisions must be held not earlier than 60 nor later than 90 days, the Constitution in effect sets a shorter period of from two to three months for voter information

(2) Proposals for amendments or revisions of the Constitution must all be submitted in a single plebiscite after the convention has finished its task and adjourned. Partial amendments of the Constitution are not allowed. Hence, in *Tolentino v. Comelec*⁵⁴ it was held that the 1971 Constitutional Convention could not submit, in advance of other proposals, an amendment to reduce the voting age from 21 to 18 and to drop the ability to read and write as qualifications to vote because, unless all proposed amendments were submitted, the electorate would have no "frame of reference."

PLEBISCITE

The present Constitution further requires that proposed amendments as well as revisions must be submitted for ratification in a "plebiscite." This means a special election held solely for the purpose of ratifying constitutional amendments and/or revisions. In contrast, the 1935 Constitution provided that "amendments shall be valid as part of this Constitution when approved by a majority of the votes cast at an *election* at which the amendments are submitted to the people for their ratification." Accordingly, it was held in *Gonzales v. Comelec*⁵⁵ that proposed amendments to the 1935 Constitution could be submitted in a regular election of public officials. By now requiring that proposed amendments and revisions must be submitted for approval of the people in a plebiscite, the present Constitution appears to have changed the ruling in *Gonzales* concerning this question

⁵⁴ G.R. No. 34150, 41 SCRA 702, Oct. 16, 1971.

⁵⁵ G.R. No. 28196, 21 SCRA 774, 785, Nov. 9, 1967.

EFFECTIVE DATE

Constitutional amendments and revisions take effect upon their ratification. This is understood to mean the date the plebiscite is held. For example, in *De Leon v. Esguerra*,⁵⁶ the issue was whether the present Constitution took effect on February 2, 1987, the date the plebiscite was held, or on February 11, 1987, the date when President Aquino proclaimed its ratification. It was held that the Constitution took effect on February 2, 1987, the date of the plebiscite, because the subsequent canvass of the votes by the Comelec on February 7, 1987 was merely a "mathematical confirmation of what was done during the date of the plebiscite," while the proclamation by the President on February 11, 1987 that the Constitution had been duly ratified and that it had thereby become effective was merely a confirmation of the adoption of the Constitution by the people "when they cast their votes on the date of the plebiscite."

Accordingly, in the case of the Commonwealth Constitution, the date of effectiveness of its main provisions is May 14, 1935. The 1940 amendments took effect on December 2, 1940. On the other hand, the 1973 Constitution, took effect on January 17, 1973, which was the date a majority of the votes were cast in citizens assemblies in favor of the Constitution.

The proclamation of the results of the plebiscite and the announcement of the date of effectiveness of the Constitution or of any amendment or revision thereof by the President complete the process of constitutional change. It remains to account for the agency supervising the process.

COMELEC SUPERVISION OF THE AMENDMENT PROCESS

The enforcement and administration of laws concerning "election, plebiscite, initiative, referendum, and recall" is vested by the Constitution in the Commission on Elections.⁵⁷ As already noted, proposed constitutional amendments and/or revisions have to be submitted to the people for ratification in a plebiscite and become effective only when approved by the

⁵⁶ G.R. No. 78059, 153 SCRA 602, 607, Aug. 31, 1987 (Techankee, J., concurring).

⁵⁷ CONST. art. IX-C, § 2(1).

majority of the votes cast in such plebiscite.⁵⁸ The conduct of the plebiscite and certification of the results thereof is the function of the Comelec. In addition, if a constitutional convention is called, the election of delegates is conducted and the proclamation of the winners is made by the Comelec. In the event of a dispute concerning the outcome of the plebiscite, the decision of the Comelec on this matter is subject to review on certiorari by the Supreme Court.⁵⁹

On the other hand, with respect to initiatives to amend the Constitution, the certification of the number of registered voters in the preceding election and the determination of the sufficiency of a petition for initiative, e.g., whether it is supported by the signatures of at least 12 percent of the total number of registered voters in the last election, of which three percent must be those of registered voters in each legislative district, are the functions of the Comelec.⁶⁰

JUDICIAL REVIEW AND THE AMENDMENT PROCESS

One of the chief merits of judicial review is its capacity to legitimate. In the following cases, the Supreme Court has served as a guarantor of the legitimacy of the amendment process and ultimately of the government formed under it.

In *Gonzales v. Comelec*,⁶¹ the Court passed upon (a) whether proposed amendments can be submitted for ratification in a general election of public officials, and (b) whether the submission of proposed amendments for ratification eight months after their adoption is sufficient for the purpose of informing the voters. In *Tolentino v. Comelec*,⁶² it passed upon the question of whether piecemeal amendments to the Constitution can be submitted for ratification by the people, while in *Santiago v. Comelec*,⁶³ it considered the question of whether a petition for initiative was adequate. On the other hand, in the Ratification Cases (*Javellana v. Executive Secretary*),⁶⁴ the Court held that whether a new constitution had been validly ratified was

⁵⁸ CONST. art. XVII, § 4.

⁵⁹ Cf. CONST. art. IX-C, § 2(2).

⁶⁰ CONST. art. XVII, § 2.

⁶¹ G.R. No. 28196, 21 SCRA 774, Nov. 9, 1967.

⁶² G.R. No. 34150, 41 SCRA 702, Oct. 16, 1971.

⁶³ G.R. No. 127325, 270 SCRA 106, Mar. 19, 1997.

⁶⁴ G.R. No. 36142, 50 SCRA 30, Mar. 31, 1973.

a judicial, not a political, question. But, though it ruled in *Javellana* that the ratification of the 1973 Constitution by the citizens assemblies was invalid, it nonetheless dismissed the suits brought to enjoin the enforcement of the new Constitution, holding that whether the new Constitution had come into force and effect as a result of popular acquiescence was a political question. It then declared that with its dismissal of the suits, there was no longer any "judicial obstacle to the new Constitution being considered in force and effect."

Javellana is similar in some respects to the case of *Mabanag v. Lopez Vito*,⁶⁵ in which the Court, 26 years earlier, had likewise been confronted with a claim of a co-equal branch of government that a proposed amendment to the 1935 Constitution had been validly adopted. The proposed amendment would grant parity rights to American citizens and to enterprises owned by them to explore and exploit the natural resources of this country and to operate public utilities. The Court refused to look into allegations that the votes in both houses of Congress were short of the required number, because some members of the opposition in both chambers had been illegally prevented from taking their seats and excluded from the computation. Indeed, it was shown that out of 24 Senators, only 16 voted in favor of the proposed amendment, because three Senators belonging to the opposition had been suspended after the opening session on account of alleged irregularities in their election. On the other hand, in the House the requisite three-fourths vote was not obtained either as only 68 representatives voted "yes," while 18 voted "no". Eight Representatives were not counted in the voting, having been suspended after the opening session of the House of Representatives, also because of alleged irregularities in their election. It was admitted that, if the three Senators and eight Representatives who had been suspended were counted, the votes in favor of the proposed amendment would be short of the necessary three-fourths vote of both houses of Congress. However, the Court ruled that a proposal to amend the Constitution was a "highly political function" committed to Congress by the Constitution and therefore not subject to judicial review.

In *Gonzales v. Comelec*,⁶⁶ the Court, through Chief Justice Concepcion, said that the force of *Mabanag* "had been weakened" by later

⁶⁵ G.R. No. 1123, 78 Phil.1, March 5, 1947.

⁶⁶ G.R. No. 28196, 21 SCRA 774, 786, Nov. 9, 1967.

cases in which it dismissed the claims of the parties that the issues were political and beyond the power of the courts to decide. The Court did not say that *Mabanag* was no longer controlling, but only that its force "had been weakened." For indeed none of the cases cited by the Court involved an aspect of the amendment process. In the first case cited, *Suanes v. Chief Accountant of the Senate*,⁶⁷ the Court held that employees of the Senate Electoral Tribunal were not subject to the supervision of the Senate President but of the Tribunal. In the second case, *Avelino v. Cuenco*,⁶⁸ the Court, after initially refusing to decide whether there was a quorum in the Senate during which the Senate President was removed, was later persuaded to take a hand because of the brewing constitutional crisis. In the third one, *Tanada v. Cuenco*,⁶⁹ the Court nullified the designation made by the majority party of two of its members to fill vacancies reserved for the minority party in the Senate Electoral Tribunal because of the failure of the latter party to name its representatives. And in the fourth case, *Macias v. Comelec*,⁷⁰ the Court invalidated a legislative malapportionment of seats in the House of Representatives.

Javellana is a reminder that the ghost of *Mabanag* has not been completely laid to rest. Hence, should a case arise in the future similar to *Javellana v. Executive Secretary*, in which the President had proclaimed that a new constitution had come into force and effect by reason of popular acquiescence, a claim which is disputed by parties in a case because of irregularities in its ratification, or should a case arise similar to *Mabanag v. Lopez Vito*, in which Congress had certified that a resolution proposing a constitutional amendment had been passed by the requisite number of votes but this is disputed in a case, would judicial review be available for the settlement of the dispute? That, it seems to me, is a question that is still with us.

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⁶⁷ G.R. No. 2460, 81 Phil. 818, Oct. 26, 1948.

⁶⁸ G.R. No. 2821, 83 Phil. 17, Mar. 4, 1949.

⁶⁹ G.R. No. 10520, 103 Phil. 1051, Feb. 28, 1957.

⁷⁰ G.R. No. 18684, 3 SCRA 1, Sept. 14, 1961.