

STATEMENT OF FORMER JUSTICE VICENTE V. MENDOZA
BEFORE THE SENATE COMMITTEE ON CONSTITUTIONAL
AMENDMENTS, REVISION OF CODES AND LAWS, ON
DECEMBER 11, 2006, ON S. NO. 2 AND S. NO. 2209 BOTH
CALLING FOR A CONSTITUTIONAL CONVENTION AND ON
H. CT. RES. NO. 26 AND P. S. RES. NO. 580 BOTH SEEKING TO
CONVENE CONGRESS TO PROPOSE AMENDMENTS TO OR
REVISIONS OF THE CONSTITUTION OF THE PHILIPPINES

The Need for Continuity and Change

The amendment or revision of the Constitution exemplifies the creative element of law, enabling it to serve as anchor while itself subject to change. For though law must be stable, it cannot stand still. No one has articulated this basic dilemma with greater force and cogency than Alfred North Whitehead who, in his study of symbolism, said:

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

Amendment Clause An Essential Part of the Constitution

To be sure, there are two ways by which the Constitution may be changed: **formally** through its amendment or revision as provided in Art.

¹ ALFRED NORTH WHITEHEAD, *SYMBOLISM, ITS MEANING AND EFFECT* 88 (1927), *quoted in* PAUL A. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 176 (1961)

XVII, or **informally** through judicial interpretation of its broad and open ended provisions which results without a single word being altered. Our concern at the moment is with the formal method of change.

As is true of any written constitution, the amendment clause is an essential part thereof for two reasons. First, 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. Second, the clause serves as a safety valve against violent change or even revolution by providing a procedure for orderly change.

Formal Amendment Process, Neither Impossible Nor Easy

The text Amendment Clause (Art. XVII) reads:

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.

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.

~~The purpose of the Amendment Clause is to provide a procedure for the orderly change of the Constitution.~~ As Professor Dellinger has written, "the formal amendment process represents a domestication of the right to revolution."² At the same time, the Amendment Clause functions as a safeguard against the frenzy of the moment by requiring the vote of extraordinary majorities and popular ratification for amending or revising the Constitution.

Stages of the Amendment Process

² Walter Dellinger, *Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 431 (1983).

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.

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.

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.

Our present concern is with the proposal stage and to that stage of the amendment process I will devote the rest of my statement.

Modes of Proposing Amendments and/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.

1. Congress as a Constituent Assembly

Art. XVII, Sec. 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 does not say how the two houses of Congress shall sit (whether jointly or separately) nor how the vote of three-fourths "of *all* its Members" shall be determined if the two houses sit together. 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 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 Art. XVII, Sec. 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 to the people 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.³ This interpretation blithely ignores the fact that ours is intended 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.⁴

(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.⁵

(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.⁶

³ *Legislated Cha-cha Eyed*, THE PHILIPPINE STAR, May 18, 2006, at 1.

⁴ Art. VI, Sec. 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."

⁵ Art. VII, Sec. 9: "Whenever there is a vacancy in the Office of the Vice President during the term for which he was elected, the President shall nominate a Vice-President from among the Members of the Senate and the House of Representatives who shall assume office upon confirmation of a majority vote of all the Members of both Houses of the Congress, voting separately."

⁶ Art. VII, Sec. 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."

(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.⁷

(5) In determining whether the President, who has declared himself unable to discharge the duties of his office and later desires to resume office but his cabinet objects, is now fit to discharge the powers and functions of his office.⁸

In contrast, where Congress is legislating, the two houses are required to sit and vote separately. This is clear even in the case of Art. VI, Sec. 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."

⁷ Art. VII, Sec. 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."

⁸ Art. VII, Sec. 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."

“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. It is distinguishable from the language of Art. XVII, Sec. 1 (1) that Congress may propose any amendment or revision of the Constitution “upon the vote of three-fourths of all its members.”

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. As has been held, “Senators and members of the House of Representatives act, *not as members of Congress*, but component elements of a constituent assembly.”⁹ Indeed, 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. The only reason why the voting must be kept separate is to prevent Senators from being outvoted due to their small number by the more numerous Representatives.

Additional light on what procedure the Constitutional Commission would have adopted had its attention been called to the problem is thrown by

⁹ *Gonzales v. Comelec*, 21 SCRA 774, 785 (1967); *Tolentino v. Comelec*, 41 SCRA 702, 714 (1971) (emphasis added).

the history of the amendment clause. The amendment clause of the present Constitution was copied from the corresponding provision of the 1973 Constitution, which provided for a unicameral legislative body. This provision read:

ARTICLE XVI

AMENDMENT

SECTION 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.¹⁰ 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 22.¹¹ Accordingly, the draft articles on the Legislative and on the Executive

¹⁰ 2 RECORD 47:43 (July 21, 1986).

¹¹ *Id.* at 69.

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 Art. XV of the 1935 Constitution which read:

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, 1986,¹² 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.

¹² 1 RECORD 412 (July 9, 1986).

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

MR. SUAREZ. The Commissioner is right.

MR. REGALADO. Thank you.¹³

A bicameral legislative body was finally adopted, but the ~~Committee on Amendment and Transitory Provision failed to revise~~ the draft Amendment Clause. ~~It seems clear~~ *It seems clear, however,* that it only escaped the attention of the framers of the Constitution to specify that, when acting as a constituent assembly, the two houses of Congress should act "in joint session assembled" and that since they are performing a non-legislative function, the two houses should vote separately. It seems that for once Homer nodded!

Comments and Observations

H. Ct. Res. No. 26, which simply provides for "[t]he convening of Congress to propose amendments to, or revision of, the 1987 Constitution," fails to address the question as to how the two houses of Congress should convene, whether in joint session or separately, and, if in joint session, whether they should vote jointly or separately. *It thus only succeeds in perpetuating the problem arising from the ambiguity of that Amendment Clause.*

I find P. S. No. 580 to be in accordance with the Constitution as properly read by providing that "the Senate of the Philippines together with the House of Representatives, convene as a Constituent Assembly to propose amendments to or revision of the Constitution of the Republic of the

¹³ *Id.* at 375.

