Position Paper of Faculty Members of the UP Department of Political Science on the Congressional Initiative to Undertake Constitutional Revision

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INTRODUCTION

The undersigned faculty members of the Department of Political Science thank the House Committee on Constitutional Amendments, particularly its Chair, the Honorable Rufus Rodriguez, for the invitation to comment on the bills proposing to amend the 1987 Constitution. We acknowledge the continuing effort of the Committee to listen to different sectors, including members of the academe, as Congress ponders these bills related to amending and/or revising the Constitution. Our last engagement with the Committee was on 12 February 2020 before the lockdown due to COVID-19.

Constitutional revision is an arduous task requiring care and rigor as it has long-lasting effects on our development trajectory as a nation, with consequences that may both be intended or unintended. In making this presentation, our intent is to share critical insights, to draw attention to issues that we hope the respective committees in Congress as a whole, and in the Executive Branch, would consider as they contemplate charter change and amendments as well as electoral and political reforms.

Our position paper responds to the series of questions posed by the Committee in its invitation. Certain parts of this position paper were also presented to the House of Representatives' Committee on Constitutional Amendments during its public hearing on 16 November 2016, the Senate Committee on Constitutional Amendments during its public hearing on 8 December 2016, and the Senate Committee on Electoral Reforms and People's Participation on 17 January 2018. At the outset, while we acknowledge that the current draft bills and resolutions pertain more on matters of procedural mechanisms, we also believe that by addressing both the process and substance of constitutional change, the House of Representatives and the Senate must be more inclusive and transparent by informing and engaging with their constituents on this very important issue.

PART 1
ON THE NEED TO AMEND OR REVISE THE CONSTITUTION

A. Issue of Scope of Changes

Historically, Philippine initiatives to change the constitution were made to break from the immediate past and usher in a new political order. For instance, the 1935 Constitution provided the transition and vision of a post-American colonial regime in the Philippines. The 1973 Constitution institutionalized one-man rule. The 1987 Constitution dismantled the dictatorship, and offered solutions to heightened social injustices that authoritarian rule had engendered, furthermore institutionalizing democratic checks and balances across the executive, legislative and judicial branches of government as well as civil society's power in relation with the state. Simply put, the overarching change envisioned in the current constitutional reform process must articulate the nature of the break that it wishes to achieve. It must also be crystal clear that the problems the charter revision wishes to address cannot be done through constitutional amendment, regular legislation, and/or executive action. Our people need to hear from the political leadership answers that are based on grounded and evidence-based claims. Our people deserve no less.

B. Issue of Timing

While constitutional amendments may not require any special historical moments, revisions in practice were usually undertaken after some major upheavals like revolutions, coups, postcolonial wars, democratic uprisings, post-peace agreement managed transitions, or after a regime change such as when left-leaning governments were elected into power in several Latin American countries.

Since 2016, several proposed resolutions in both chambers of Congress, including those favoring the federal shift or a charter change, claim that there is a "public clamor" for the shift or change. Opinion polls belie this. A June 2018 Pulse Asia survey showed that around 67% are against changing the charter during the time the survey was conducted (with 37% against it "now and in the future" while 30% are against it "now but may be open to it sometime in the future") while 18% "support charter change now" and 14% are undecided.

The same survey shows that 74% of Filipinos have little, almost no, or no knowledge of the country's Constitution, with 69% of respondents having a low level of knowledge about the federal system being proposed at that time. In Pulse Asia's surveys on most urgent national concerns, top responses usually include controlling inflation, improving/increasing workers' pay, fighting criminality, creating more jobs, and fighting graft and corruption in government. Since 2016, not more than 2 to4% of the respondents consider changing the Constitution as urgent. In a September 2022 Pulse Asia survey, charter change was not in the list of urgent national concerns. Any attempt to amend the constitution or change the charter requires prior consultative and deliberative processes involving a genuinely informed citizenry. The claim that there is public clamor for constitutional change remains unsubstantiated.

It will be recalled that the election of delegates to the 1971 Constitutional Convention occurred in 1970, with the purpose of revising the 1935 Constitution, a document made under the tutelage of the Americans. But as early as 1967, in the middle of Ferdinand Marcos, Sr.'s first term, charter change efforts had already gained ground. It was the political opposition that initially proposed charter change. When Carlos P. Garcia died, Diosdado Macapagal, Marcos Sr.'s opponent in the 1965 elections, headed the Convention. However, the dictator hijacked the process and established Martial Law. The rest is history.

Moreover, the claim[1] that the clear majority vote received by President Ferdinand Marcos Jr. is tantamount to a greenlight from the citizenry to proceed with moves to change the constitution is a misplaced presumption rather than a compelling fact. For one, amending the constitution was not a significant part of President Marcos Jr.'s election campaign platform or legislative agenda. Further to the contrary, President Marcos Jr. himself pointed out the difficulty in terms of the public acceptability and legitimacy to change the constitution, saying that Charter Change would be taxing and tedious to push as an agenda because the public believes that lawmakers are merely pushing this to extend their terms: "*Sa palagay ko, napakahirap ngayon na buksan ang saligang batas dahil ang tao ayaw nila. Ang suspetya nila, ang mga pulitiko mageextend lang o magka-cancel ng eleksyon*".[2] We cannot proceed with Charter change without the genuine buy-in of an informed public, let alone its absence in the presidential legislative agenda.

This prospect raised by President Marcos Jr. regarding the legitimacy to endeavor the change of the constitution becomes even more dismal when we take into account the context of a Philippine economy that is reeling from the effects of COVID-19, high inflation, poor public infrastructure, and confronting the challenges to implement the Mandanas-Garcia ruling and full devolution under Executive Order 138 (a concern the two Houses of Congress must prioritize and address). The realities of the fiscal and logistical demands required to roll-out credible and substantive processes to change the constitution make it an even more problematic pursuit, especially in the face of more urgent and immediate local and national problems.

C. Deliberative and Dialogic Process

Constitution-making should be a national endeavor. We ask Congress to reflect on the following process questions in order to ensure a democratic process with democratic outcomes. How and at what stages can broader participation take place in the drafting process? Should (and how might) the following mechanisms be put in place:

- a national dialogue process managed independently by a commissioned or designated body;

[1] Joint Resolution No. 1 introduced by Representative Aurelio Gonzales Jr, 30 June 2022, (2nd page)

[2] https://newsinfo.inquirer.net/1544985/federal-govt-system-fits-ph-but-cha-cha-difficult-marcos-jr and https://pcij.org/blog/3582/marcos-chair-of-partido-federal-ng-pilipinas-silent-on-cha-cha-during-first-sona

- surveys to inform the dialogue process and drafting;
- online sites and other modes to receive proposals and submissions; or
- a Constitutional Convention of elected and, possibly, appointed delegates, the design for which would guarantee the election and selection of qualified citizens other than members of traditional political clans?
- How would the authorities that will be put in-charge of the whole endeavor, process and synthesize the inputs from these participatory mechanisms? How would these processes be funded?

We urge Congress to fully lay down its plans before the people so that the people may know and be encouraged to participate from the beginning.

D. Reiteration

In closing Part 1 of our intervention, we reiterate the need, on the part of the proponents, for articulation on the following process concerns:

- The need for the political leadership to fully articulate the objectives and the vision for initiating constitutional revision.
- The need to fully conceptualize the process and time frame.
- The need to define responsibilities and leadership of the process.
- The need for broader participatory mechanisms and effective consolidation, synthesis and integration of inputs.
- The need to come up with safeguards against misinformation and undemocratic practices.

PART 2
ON THE PARTS OF THE CONSTITUTION TO BE AMENDED OR REVISED

In the first part, we posed the question: What is in the current political, economic and social dispensation that would warrant a major constitutional overhaul?

Now we reverse this question and pose fundamental counter-questions. The questions are:

- Could we instead envision an evolutionary transformation of our institutions?
- Specifically, could the perceived problems of our current national milieu be addressed instead through several constitutional amendments, regular legislation, and/or executive action?
- Should we tread the path of constitutional reform in careful and measured ways, instead of fast tracking a constitutional overhaul?

We also humbly remind our honorable decision makers that constitutional change is NOT the "silver bullet" or the holy elixir to cure our country's problems. It is not a panacea to remedy our socio-economic ills or the only means to accomplish our national desires and aspirations.

Reforms can be accomplished through an appropriate mix of legislation and policy interventions, and not simply through constitutional amendments or even institutional overhaul. Existing laws can be reviewed and amended (e.g. Local Government Code; Omnibus Election Code) and processes and practices safeguarded and improved (e.g. preserving the integrity of the Judicial and Bar Council and selection process of nominations and appointments of justices and judges without interference from politicians while maintaining transparency and accountability).

For instance, consider the following observations in reaction to some of the proposed changes in the Constitution:

1. *Proposed amendment on Provision on restrictive economic provisions in the Constitution*
    - Infrastructure development is more important in improving the economy than changing the ownership rules. Constitutional amendments on economic provisions are insufficient to 'attract' more investors.
2. *Proposed "designated survivor" law*
    - By selecting a successor from the legislature instead of the Cabinet (as in the case of the United States, for example) this proposal undermines separation of powers. In other words, the president is head of the Executive branch of government and so succession should come from within the same branch until a new election.
3. *Proposals on the joint election of the President and Vice President / changes in term limits*
    - Considering that the constitution is silent on the joint election of the President and the Vice-President, a constitutional amendment is not required to reform the election rules and include a provision for tandem voting for candidates on a common ticket
    - Moreover, as a principle, electoral reforms should be implemented and exhausted first before making changes on laws for re-election. The anti-dynasty law, as provided for in the 1987 Constitution, should be in place first. There is also a more urgent need to strengthen political parties to make tandem voting meaningful. As it stands, the bill's justification for joint election of the top executives is more inclined toward the continuity of programs rather than for accountability. Finally, the proposal would re-open the possibility for reelection–removing the 1987 Constitution's imposition of a single term limit as a safeguard against tyranny. In other democracies, leaders can be re-elected at least once so that–in theory–they have the incentive to perform well in order to be re-elected or for their party to be returned to power. In democracies where political party system institutionalization is strong, re-election can act as an accountability mechanism. However, given that our political parties are weak in the Philippines, expanding re-election (or lengthening political terms for that matter, as some proposals would have it) will tend to prolong elite capture of political office.

Aside from consultations with constituents and stakeholders of these proposed changes in the Constitution, we urge the two Houses of Congress to look into empirical studies already done by academic institutions, think tanks, and civil society organizations reviewing the Constitution and other laws, looking at major issues confronting the country, and the urgent and necessary reforms. Members of the UP Department of Political Science, for example, have conducted and published studies in constitutional performance assessment of the 1987 Constitution as well as participated in the University of the Philippines Diliman's Task Force on a Blueprint for Building the Nation (#PILIpiLUNAS2022) which conducted a number of multisectoral webinars on the pressing issues confronting the Philippines and provided recommendations, including constitutional amendments, amendments of existing legislation, new legislation, improvements in government practices and policies, and greater advocacy, information dissemination and involvement of civil society and the citizenry.

PART 3
ON THE MODE OF AMENDING OR REVISING THE CONSTITUTION

A. Who is in charge?

It is notable that the post-Marcos constitutional revision agenda was always executive-driven – the shift to a parliamentary system under the Ramos and Arroyo administrations; and then the shift to federalism under the Duterte administration.

In this regard, it is essential that the current executive leadership define where it stands on constitutional revision and the process it envisions as well as identify the responsible authorities who will oversee it. Meanwhile, should it decide to constitute itself as a Constituent Assembly, Congress has to ensure that it will complete the process without taking time and resources away from other legislative priorities.

B. On the Appropriate Drafting Body

Congress fashioning itself into a Constituent Assembly is indeed less costly. However, studies of the International Institute for Democracy and Electoral Assistance (IDEA) raise the following dangerous drawbacks to such a body:

- The assembly may seek to advance its institutional interests at the disadvantage of other institutional actors.
- The political parties that dominate the assembly may lack internal democratic structures.
- The parties may tend to favor electoral systems that distort the distribution of representation and power.
- Excluded parties may resort to violence or not own the process.
- What measures can be undertaken to guard against these dangers?

At the same time, should the process be executive-directed as was the case during the first half of President Rodrigo Duterte's term, the revisions may unduly favor the executive as far as the allocation of powers is concerned and the institutional design in general.

Another alternative to a Constituent Assembly is a Constitutional Convention. According to the Institute for Political and Electoral Reform (IPER), members of a Constitutional Convention are more focused on their job of revising the charter having been elected for that specific purpose. Likewise, the process through a Constitutional Convention can be more democratic, transparent, and deliberative (IPER 2004). However, a Constitutional Convention may not necessarily be more inclusive than a Constituent Assembly.

Delegates elected solely for the purpose of constitution rewriting are not necessarily better than appointed ones. A case in point is the 1986 Constitutional Commission which produced a Constitution that will now enter its 36th year, only two years short of the longevity of the 1935 Constitution. While the 1987 Constitution has been described by some critics as superfluous, it undoubtedly has very strong democratic credentials.

In sum, the Constituent Assembly and Constitutional Convention both have advantages and disadvantages. A Constituent Assembly has the following advantages: (1) less costly and inexpensive; (2) consists of skilled, experienced lawmakers; and (3) likely lead to speedy and swift period of constitutional amendments. However, its disadvantages are: (1) limited participation of other sectors; (3) lawmakers' vulnerability to self-interest; and (3) popular legitimacy may be found wanting and lacking. On the other hand, the Constitutional Convention has the following advantages: (1) encourages more participation of other actors; (2) likely promotes diversity and pluralistic views and opinions: and (3) delegates selected through popular elections. Its disadvantages include: (1) much larger expenses entailed by electing delegates and separate deliberations; (2) possibly more time-consuming process of preparation, deliberation and finalization of proposed amendments or revisions; and (3) possible lack of accountability mechanism unlike representatives in Congress.

At the end of the day, choices on the appropriate mechanisms have to be made in favor of generating greater legitimacy for the constitutional reform process. The decision must be based on careful study and supplemented by empirical evidence, not on impressions and short-term objectives. In the case of the Philippines, the Constitutional Convention appears to be more appropriate should there be a strong public demand for constitutional revision, provided that it will be more representative than the current composition of the two Houses of Congress, including experts, sectoral representatives, civil society, and those not belonging to political dynasties.

PART 4
ON VOTING JOINTLY OR SEPARATELY IN CASE OF A CONSTITUENT ASSEMBLY

Voting separately supports the current bicameral nature of the Philippine Congress and establishes checks and balances between two institutions representing two different constituencies: national and congressional district constituencies. Voting jointly renders bicameralism and the principle of checks and balances irrelevant and meaningless. In addition, allowing Congress to vote jointly would put the Senate in a disadvantaged position because they can easily be outnumbered and dwarfed by their counterparts in the House of Representatives who have the numbers in the context of constitutional change and amendments. On the other hand, voting together may be more efficient but it invites distrust and attempts to stifle minority or critical views.

PART 5
ON THE POWERS OF THE CONSTITUENT ASSEMBLY OR CONSTITUTIONAL CONVENTION

Can Congress pass a resolution limiting the power of the Constituent Assembly or Constitutional Convention, or are their powers plenary? A resolution should simply declare that it is convening as a Constituent Assembly or call for elections for members of a Constitutional Convention. The Constitutional Convention should be free to define what parts of the Constitution, once convened, should be changed in consultation with the people; a Congressional Resolution should not dictate what is the direction of the revisions or amendments. The plenary powers of Congress are different from the powers of the Constituent Assembly.

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