Congress as a Constituent Assembly: Examining the Extent of its Discretion in the Amendatory Procedure

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I. INTRODUCTION

An analysis of the past and present Philippine constitutions reveals that the fundamental law of the country is in reality, not that fundamental. Just like any ordinary statute, it is subject to change in order to adapt to changing

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times. Much can be said regarding the longevity of the Philippine Constitution.

The 1935 Constitution was seriously questioned only in the 1960s. In the case of the 1973 Constitution, it was under siege from the day of its birth. Today, the new Constitution is only 16 years old, but it is already under intense siege.[1] If one browses through the five-volume record of the 1986 Constitutional Commission, one will find that only a handful of provisions received unanimous approval. All the rest were products of compromises ratified by 78% of the electorate on 2 February 1987.[2]

Many believe that the 1987 Charter could stand much improvement in both substance and form. It was criticized for having been conceived in haste by a body hardly prepared for the task. There were a few impressive exceptions but the membership in general was neither distinguished nor was it equal to their vital task. Significantly, all the commissioners were appointed by the President and were not chosen directly by the people.[3]

Public discussion of the proposed draft was largely uninformed and far from spirited. Opposition thereto was disorganized and mostly sporadic. The Constitution was ratified not because of its merits, but out of the people's desire for stability after the overthrow of the Marcos dictatorship and the disarray of the EDSA Revolution. Many thought it was good for the time being but not forever.[4]

It was likewise attacked for its length. In this regard, Fr. Joaquin G. Bernas, S.J., one of the key framers of the present Constitution, has this to say:

> I agree with the critics on this point. But I must say that the length is also due partly to the desire of the writers to accomplish their task as speedily as possible. There were those among the writers who, consciously or unconsciously, approached the task as if it were a matter of writing statutes, or who wanted their favorite ideas to be immortalized in the document. The process of pruning these ideas, if pushed to a more satisfactory conclusion, would have taken a long time. Time was saved and the body succeeded in finishing the draft in five months when these ideas were allowed to enter unenforceable generalities or as commands conditioned by the phrase "as may be provided by law." The net effect is that, strictly

1. Joaquin G. Bernas, *A 10-year-old Constitution*, TODAY, Feb. 2, 1997, at 7 [hereinafter Bernas, *A 10-year-old*].
2. Joaquin G. Bernas, *Nonvirtues of '87 Charter*, TODAY, Sept. 28, 1997, at 9.
3. Isagani A. Cruz, *Flaws in the Constitution*, PHILIPPINE DAILY INQUIRER, Aug. 8, 1999, at 6 [hereinafter Cruz, *Flaws*].
4. *Id.*

speaking, these are not constitutional provisions. At some future date, when we have more time to spare, these should be pruned.[5]

Former Supreme Court Justice Isagani A. Cruz also points out that the present Constitution is replete with ambiguities and inconsistencies. A number of provisions demand rectification because they were not carefully considered or were lifted from past charters.[6]

The issue of amending the 1987 Constitution has preoccupied the nation as early as 1988. Then House Speaker Ramon Mitra Jr. was already spearheading a move to overhaul the charter with the objective of installing a parliamentary system of government. His efforts gained ground in the House of Representatives, which went to the extent of approving a joint congressional resolution for this purpose. However, the resolution stayed in the Upper Chamber as then Senate President Jovito Salonga frowned upon it on the suspicion that it was tailor-made for Mitra's ambition to become prime minister.[7]

In 1991, Senator John Osmeña launched a movement for the adoption of a federal system by the turn of the millennium. However, his initiative was halted when he became engaged in his ambition for higher office.[8]

In 1993, President Fidel Ramos and his congressional allies, led by then Speaker Jose de Venecia Jr., undertook a charter change campaign (ChaCha) in order to transform the bicameral Congress into a unicameral body due to Ramos' paranoia over an obstructionist, opposition-dominated Senate — a paranoia that soon proved to be unfounded.[9]

In 1997, still during Ramos' incumbency, efforts to amend the Constitution were initiated by Congress, with the filing of resolutions that sought to convene the Senate and the House of Representatives into a constituent assembly to consider constitutional amendments. One of which was House Resolution No. 40, which set the parameters for discussion between the Senate and the House, as a constituent assembly, on amendments to the Constitution. Another was Senate Concurrent Resolution No. 18, filed by then Senate Juan Ponce Enrile, which called for 11 amendments, including the lifting of term limits on the president and other elective officials and the shift to a parliamentary form of government.[10]

5. Bernas, *A 10-year old, supra* note 1.

6. Cruz, *Flaws, supra* note 3.

7. Fel V. Maragay, *Gloria Mum on Cha-Cha,* MANILA STANDARD, June 16, 2001, at 17.

8. *Id.*

9. *Id.*

10. Carlito Pablo, *JPE Files Charter Resolution in Senate*, PHIL. DAILY INQUIRER, Sept. 9, 1997, at 1.

Such resolutions, however, were later on relegated to the sideline. Moreover, who could not forget the People's Initiative for Reform, Modernization and Action (PIRMA) in 1997 — that grandiose and divisive attempt to lift the constitutional ban against Ramos' reelection?[11]

After emotional debates, the attempt for charter change during the Ramos administration proved to be a failure, mainly because there were indications that those who adverted to amend the Constitution simply wanted to perpetuate certain officials in power. Thus, the charter change movement was rejected and term limits were not lifted.

While previous proposals for amendment mainly had political objectives, Pres. Joseph Estrada was obsessed with economic reforms. Unveiling what he dubbed as Constitutional Corrections for Development (Concord), Estrada sought to do away with protectionist barriers that impede the inflow of foreign investments. After drafting a blueprint to liberalize foreign ownership of industries, the 30-man Preparatory Commission on Constitutional Reforms, chaired by retired Chief Justice Andres Narvasa, arrived at the conclusion that the most efficient option would be to convene Congress as a constituent assembly.[12]

However, the plan of some 117 lawmakers to include political provisions in the proposed charter amendments convinced Estrada that the convening of a constituent assembly would be dangerous. In 1999, he decided that he would go for a "bicameral constituent assembly," an idea proposed by then Senate Majority Leader Franklin Drilon during the 14 August 1999 edition of "Jeep ni Erap."[13]

In 2000, a group of 14 senators led by Senate President Aquilino Pimentel Jr. resurrected the federalism movement and battled for the convening of a constitutional convention. However, Senator Blas Ople expressed the view that a constituent assembly would be more economical and accountable to the people. He added that although the Senate was inclined to adopt the formula earlier proposed by Drilon (where proposed amendments are taken up just like a regular legislative bill), he believed that there was still a need for a joint resolution to enable Congress to convene itself into a constituent assembly. These proposals, however, were put on the back burner as the attention of Congress and the public shifted to the Estrada impeachment.[14]

11. *Id.*

12. *Id.*

13. Juliet Javellana and Gil Cabacungan Jr., *Erap Changes Tune on Cha-Cha*, PHIL. DAILY INQUIRER, Aug. 27, 1999, at 1.

14. *Id.*

Significantly, the move to amend the Constitution resurfaced after the 14 May 2001 elections. The proposed amendments were a rehash of old ideas debated long ago.[15]

In 2002, the charter change movement, having originated in the House of Representatives, gained steam at the grassroots level. Among 212 congressmen, 105 were in favor of constitutional amendments; only seven were against, and the rest were non-committal. ChaCha fever was over the Senate as well, even if Senate President Drilon was lukewarm to the proposal. A leading oppositionist, Senator Ople refuses to budge in the face of the ChaCha steamroller, saying that its proponents have other ideas in mind than what they peddle to the public.[16]

While most of our lawmakers have agreed on the need to amend the Constitution at this time, they are divided on how to carry out such changes. The senators are split on whether the amendments should be proposed through a constitutional convention or a constituent assembly.[17] Although President Gloria Macapagal-Arroyo is against ChaCha at this time, she says she may yet be convinced to give her support if there is really a strong public clamor for radical reforms.

The call for charter reforms assumes that the 16-year-old law of the land is riddled with flaws, which must be corrected if we are to move forward and face the challenges of modern times. The perceived need for change is thus addressed to the substantive aspects of the Constitution. A more pressing issue to be hurdled, however, concerns the procedural matter of charter amendment. In this respect, the 1987 Constitution has been criticized for its inadequacy and ambiguity.

There is an ongoing debate as to whether amendments should be introduced via a constitutional convention or by Congress directly. In respect to the latter, there is further discussion on whether the two houses of Congress should vote as one body or separately.

The problem stems from the fact that we have a bicameral Congress authorized to be a constituent assembly according to an amendatory provision that is more suitable for a unicameral assembly.[18] The Constitution states that "Any amendment to... this Constitution may be proposed by (1) The Congress, upon a vote of three-fourths of all its Member."[19] Is the

15. *Id.*

16. *New Twist in Cha-Cha*, MANILA STANDARD, Apr. 16, 2002, at 14.

17. Rey E. Requejo, *Senators Agree on Cha-Cha, Except on How it Will be Done*, MANILA STANDARD, Apr. 16, 2002, at 3.

18. Joaquin G. Bernas, S.J., *Amendments Possible Now*, TODAY, Apr. 17, 2002, at 8 [hereinafter Bernas, *Amendments*].

19. PHIL. CONST. art. XVII, § 1.

three-fourths vote to be gathered from each house of Congress, voting separately, or from both houses voting jointly as one body?

In 1997, in an intense talk about constitutional amendments, some members of the House of Representatives suggested that the two chambers of Congress call a joint session and thereafter decide on the issue by a joint vote. This stance is supported by former Justice Cruz.[20]

On the other hand, Fr. Bernas has ventured the view that the two houses of Congress vote separately when proposing amendments. He added that there is no necessity for Congress to formally convert itself into a constituent assembly meeting in joint session. Senator Drilon took this proposal a step further by suggesting that the proposed amendments can be run through the usual legislative mill all the way to a bicameral committee.[21]

Concededly, the 1987 Constitution's provision for a constituent assembly is a study of ambiguity. To reiterate, Article XVII, Section 1 does not specify whether the two houses of Congress must come together in joint session or not, or whether they should vote jointly or separately. In view of the failure of the Constitution to provide for these details, the following questions are raised:

1. Is the decision of Congress as to how it will sit down and vote on proposed amendments a political question?
2. Would Congress be committing grave abuse of discretion if it adopts the Drilon Formula? What if it implements the Cruz Formula?

These issues will be resolved with the end in view of determining the extent of the discretion of Congress in the amendatory procedure.

II. THE CONSTITUTIONAL AMENDATORY PROCESS

The Constitution, which was set down in writing and enacted at a particular time, ought to be rigid in character. Nonetheless, it is expected to last far into the future. It can be so only if it allows room for growth. For time brings about new conditions, new problems and demands possibly new solutions. There may be a clear and imperative need, therefore, for new constitutional provisions, even at times, an entirely new Constitution. This could be accomplished through amendment or revision. In the event that such changes in the fundamental law are not forthcoming, its provisions must be made adaptable through construction to altered social, economic and governmental conditions. A constitution, to paraphrase Justice Frankfurter, is an enduring framework of government for a dynamic society, not a code of lifeless forms. Thus, growth takes place formally through

20. This formula will be dubbed as the Cruz Formula.

21. This formula will be dubbed as the Drilon Formula.

amendments or informally through construction of its provisions, primarily by the judiciary whenever called upon to interpret constitutional provisions.[22]

One of the so-called essentials of a written constitution as to its content is a provision on the amending process. Such a process has to be availed of in order to make it responsive to new conditions. The alternative would be revolution. In this way, the article on amendments provides a safety valve.[23]

A. *The Constitution of Sovereignty*

The process laid down in the Constitution for amending the latter is called the "constitution of sovereignty," as distinguished from the "constitution of government" (the provisions on government structure and powers) and the "constitution of liberty" (the Bill of Rights). The amendatory provisions are called the constitution of sovereignty because it is through these provisions that the sovereign are allowed to express their will by canalizing the Constitution. It is through this provision that new changes are linked to the original expression of the will of the founders of the Constitution. Otherwise stated, the amendatory provisions are called a "constitution of sovereignty" because they define the constitutional meaning of "sovereignty of the people."[24]

The amendatory process thus echoes one of the basic principles that underlie our Constitution: "The Philippines is a democratic and republican state. Sovereignty resides in the people and all government authority emanates from them."[25] Sovereignty in this sentence can thus be understood as the ultimate legal authority. Since the ultimate law in the Philippine system is the Constitution, sovereignty, understood as legal sovereignty, means the power to adopt or alter a constitution. This power resides in the "people", understood as those who have a direct hand in the formulation, adoption, and amendment or alteration of the Constitution.[26]

Legal authority, however, is not always directly exercised by the people. It is normally delegated by the people to the government and to the concrete persons in whose hands the powers of government temporarily reside. In this connection, sovereignty of the people also includes the concept that government officials have only the authority given them by law and defined

22. ENRIQUE M. FERNANDO, THE CONSTITUTION OF THE PHILIPPINES 22-23 (1977).

23. *Id.*

24. JOAQUIN G. BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1162 (1996 ed.) [hereinafter BERNAS].

25. PHIL. CONST. art. II, § 1.

26. BERNAS, *supra* note 24, at 50.

by law, and such authority continues only with the consent of the people.[27] Thus, the power to amend our Constitution has been vested not only in the Filipino people directly through the process of initiative, but also in a constituent assembly which is of two types: Congress itself or a constitutional convention.[28]

Lastly, Sinco states that the amendatory process is both procedural and substantive in character:

> With respect to the first [procedural], such provisions serve as an orderly method of bringing about the most radical constitutional reforms that the people desire. Thus, they act as a safety valve against violent agitations which otherwise may result in revolution. With respect to the second [substantive], they offer an opportunity for the deletion of obsolete or ill-suited portions of the Constitution for the filling up of undesirable gaps which render the constitutional system inadequate. The existence of an amending process, therefore, constitutes an implied invitation for constructive criticisms that may be needed for a progressive improvement of the fundamental law.[29]

B. *Amendments and Revisions under the 1987 Constitution*

The Constitution, under Article XVII, prescribes the following procedure for amendments or revisions:

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

27. *Id.* at 51.

28. PHIL. CONST. art. XVII, § 1.

29. VICENTE G. SINCO, PHILIPPINE POLITICAL LAW: PRINCIPLES AND CONCEPTS 76 (1954 ed.) [hereinafter SINCO].

It is important to make a distinction between amendment and revision. As can be gleaned from Article XVII, Section 2, initiative and referendum can be used for amendments only but not for revision. Amendment contemplates an alteration of one or a few specific and separable provisions. It means isolated or piecemeal changes only. The guiding original intention of an amendment is to improve specific parts or to add new provisions deemed necessary to meet new conditions or to suppress particular portions that may become obsolete or that are judged to be dangerous. Revision, on the other hand, is a revamp or rewriting of the whole instrument. The guiding original intention and plan contemplates a reexamination of the entire document, or of provisions of the document which have overall implications for the entire document, to determine how and to what extent they should be altered.[30]

Because the 1987 Constitution, like its 1935 and 1973 counterparts, is of the rigid type, it provides for a prescribed method of enacting constitutional change different from the method of enacting ordinary legislation.[31] Two distinct steps are involved in the process of amending or revising the Constitution: the first is through proposal, and the second is through ratification.

The proposal is generally made either by Congress or by a constitutional convention. If it is to be made by Congress, the required vote is three-fourths of all its members. If it is by a constitutional convention, the convention, once organized, is free to decide the vote required to carry a proposal. Whatever the nature of the change contemplated the choice of the method of proposal is discretionary upon Congress, as enunciated in *Occeña v. COMELEC*.[32] However, should Congress wish, it may submit the matter of calling a constitutional convention to the vote of the electorate.

Another way of proposing amendments to the Constitution is through initiative. This is provided for in Article XVII, Section 2, which was introduced for the first time in the 1987 Constitution. The bulk of the discussion of the amendatory process in the 1986 Constitutional Commission was in fact devoted to this innovation. It is a method whereby the people themselves can directly propose amendments to the Constitution. The introduction of this mode of constitutional amendment is another attempt to constitutionalize the significance of direct action of the people as dramatically exemplified in the February 1986 revolution.[33]

30. BERNAS, *supra* note 24, at 1161.

31. *Id.* at 1164.

32. 104 SCRA 1 (1981).

33. BERNAS, *supra* note 24, at 1165.

While Congress as a constitutional convention may propose amendments and revisions, the electorate, through initiative, can only propose amendments. In addition, without implementing legislation, the right to propose amendments through initiative cannot be exercised. Until now, there is no implementing law that satisfies the requirements of the Constitution as interpreted by the Supreme Court. Thus, although this mode of amending the Constitution bypasses congressional action, in the last analysis, it is still dependent on congressional action. Congress, however, may not alter a proposed amendment passed through initiative.[34]

C. *A Procedural Ambiguity*

A problem area found in the constitutional amendatory process is the apparent ambiguity found in Article XVII, Section 1(1) with regard to the manner by which members of Congress shall deliberate and vote in directly proposing constitutional changes. The following questions are relevant: *First*, does Congress need to convene in joint session before proposing amendments? *Second*, should the members of both houses of Congress vote jointly or separately on the proposed amendments?

The problem is that there is a bicameral Congress authorized to be a constituent assembly according to an amendatory provision that is more suitable for a unicameral assembly. How did this happen?

It will be recalled that the government under the 1935 Constitution had a unicameral assembly. Matching such a unicameral assembly was an amendatory provision which said in part: "The National Assembly, by a vote of three fourths of *all its Members*, may propose amendments to this Constitution...."[35] Clearly, only one vote was needed because there was only one body.

Next came the amendment which provided for a bicameral Congress. Necessarily the amendatory provision had to be changed. Again, the 1935 Constitution was quite definite in the prescribed procedure, stating thus: "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...."[36]

Two steps were needed. First, Congress must decide to meet in joint session. Next, it was necessary to ask whether Congress, in joint session, should vote jointly or separately. The Constitution's answer was definite: they would vote separately. This was to emphasize that the body proposing

34. *Id.* at 1156.

35. 1935 PHIL. CONST. art. XIV, § 1 (superseded 1987) (emphasis supplied).

36. 1935 PHIL. CONST. art. XV, § 1 (superseded 1987) (emphasis supplied).

amendments was Congress, a bicameral body. Meeting in joint session did not mean that they became a unicameral body. Meeting in joint session did not mean that the two houses lost their individual autonomy in order to be submerged under one body. Thus, for instance, when Congress voted to propose the Parity Amendment, the two houses voted separately.[37]

Then came the 1973 Constitution which successively provided for three different legislative bodies: the National Assembly, the Interim Batasang Pambansa and the regular Batasang Pambansa. All were unicameral bodies. Matching this unicameral assembly was an amendatory provision suitable for a unicameral assembly: "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....*"[38]

Now we are back to a bicameral Congress. However, the language of the amendatory provision is an exact copy of the 1973 Constitution, which had a unicameral legislative body: "Any amendment to, or revision of, this Constitution may be proposed by: (1) The Congress, upon a vote of three-fourths of all its Members."[39]

The reason behind this was that the debates which ended with the approval of the amendatory process took place mainly on 8 and 9 July 1986, in the context of a unicameral assembly. Unicameralism pervaded the minds of the Constitutional Commission at that time. The debates, however, which took place mainly on 21 July 1986, ended with the approval, by a margin of one vote, of a bicameral Congress. However, the commission did not go back to the previously approved provision on amendments and revision. Hence, the problem.[40]

It will also be noticed that the present provision says nothing about a "joint session." Again, this may be because of the unicameral cloud in the minds of the commissioners. For the same reason, there is no mention of "voting separately."

Clearly then, there are outstanding preliminary questions. Should Congress convene in joint session or can the two houses do their thing as they are and where they are, following the procedure for bills? Thereafter, should they vote separately or jointly?[41]

37. Bernas, *Amendments, supra* note 18.

38. 1973 PHIL. CONST. art. XVI, § 1 (superseded 1987) (emphasis supplied).

39. PHIL. CONST. art. XVI, § 1 (emphasis supplied).

40. Bernas, *Amendments, supra* note 18.

41. Joaquin G. Bernas, *Amendment Preliminaries*, TODAY, July 28, 1999, at 8.

III. THE CONCEPT OF JUDICIAL REVIEW

A. *The Principle of Separation of Powers*

Basic to an understanding of the organization of our presidential system of government is the principle of separation of powers.

The present Constitution does not contain an express provision embodying the principle of separation of powers in categorical terms. There is no distributing clause specifically stating that the powers of government are vested in the executive, legislative, and judicial departments which should be separate from one another. Instead, the Constitution, in three successive articles, specifically provides that legislative power shall be vested in Congress, executive power in the President, and judicial power in one Supreme Court and such inferior courts as may be established by law. Evidently, there is a tacit adoption of the principle. It is obtained not through express provision but by actual division.[42]

The powers of government, by virtue of this principle, are entrusted to three coordinate departments: the executive, legislative, and the judicial. The three departments are not only coordinate; they are co-equal. Moreover, one branch is as important as the other. While interdependent, in the sense that each is unable to perform its functions fully and adequately without the other, they are nevertheless independent of each other. One department may not control or even interfere with another in the exercise of its specific functions, or with respect to acts done within the constitutional competence of the other where full discretionary authority has been delegated to such department by the Constitution. Each department has exclusive cognizance of matters within its jurisdiction and is supreme within its own sphere.[43]

The doctrine of separation of powers is observed in the country because it is regarded as a characteristic of republicanism. It is further intended to prevent a concentration of authority in one person or group of persons that might lead to an irreversible error or abuse of power, to the detriment of our republican institutions. The concentration of power in the same hand may rightly be pronounced as the very definition of tyranny. More specifically, the doctrine is intended to secure action, to forestall over-action, to prevent despotism, and to obtain efficiency.[44]

It is to be admitted, however, that the area that belongs to each department cannot be demarcated with precision and certainty. In the words of Justice Holmes:

42. Angara v. Electoral Commission, 63 Phil. 139, 156 (1936).

43. Tarlac v. Gale, 26 Phil. 338, 349 (1913).

44. ISAGANI A. CRUZ, PHILIPPINE POLITICAL LAW 69 (1991) [hereinafter CRUZ].

> The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. When we come to the fundamental distinctions, it is still more obvious that they must be received with a certain latitude or our government could not go on.... It does not seem to need argument to show that however we may disguise it by veiling words, we cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments were it ever desirable to do so which I am far from believing that it is, or that the Constitution requires.[45]

The principle of separation of powers, however, is not absolute. In *Planas v. Gil*,[46] the Supreme Court held that the classical separation of governmental powers is a relative theory of government. While it is desirable that there be a certain degree of independence among the several constitutional agencies, it is not in the public interest for them to deal with each other at arm's length or with a hostile jealousy of their respective rights as this might result in frustration of the common objectives of the government. The keynote conduct of the various agencies of the government under the doctrine of separation of powers, as properly understood, is not independence but *interdependence*.[47]

The intrusion by one department on territory belonging solely and exclusively to another is forbidden. There must be no absorption of one of these branches of government by another. Short of that, the merging or the blending of functions is allowable. For the three departments, while separate and coordinate, are not intended to be antagonistic. Thus, the principle may result in efficiency and, at the same time, guard against tyranny through undue concentration of power.[48]

What makes the doctrine of separation of powers especially workable is the corollary *system of checks and balances*, by means of which one department is allowed to resist encroachments upon its prerogatives or to rectify mistakes or excesses committed by other departments. The exercise of this authority is not itself an arrogation inasmuch as it is the Constitution itself that provides for this system of counteraction. The theory is that the ends of the government are better achieved through the exercise by its agencies of only

45. LORENZO M. TAÑADA & ENRIQUE M. FERNANDO, CONSTITUTION OF THE PHILIPPINES 706 (1953) (citing Government v. Springer, 50 Phil. 259, (1927)) (Holmes, J., dissenting) [hereinafter TAÑADA & FERNANDO].

46. 67 Phil. 62 (1939).

47. *See* Pangasinan Transportation Co. v. PSC, 70 Phil. 221, 227 (1940).

48. Abueva v. Wood, 45 Phil. 612, 629 (1924).

the powers assigned to them, subject to reversal in proper cases by those constitutionally authorized to do so.[49]

B. *The Role of the Judiciary*

1. Upholding Constitutional Supremacy

It is the judicial branch of government that sees to it that the constitutional distribution of powers among the several departments of government is respected and observed. But this does not mean that it is superior to the other departments. The correct view is that when the Supreme Court mediates to allocate constitutional boundaries or invalidates the acts of a coordinate body, what it is upholding is not its own supremacy but the supremacy of the Constitution.

The principle of supremacy of the Constitution states that the Constitution, as the direct enactment of the sovereign people, is the highest law of the land. It provides for the organization of the essential departments of the government, determines and limits their powers, and prescribes and guarantees the basic rights of the individuals. Should one branch act beyond the sphere of its assigned constitutional authority, or violate any of the basic rights of a person guaranteed in the Constitution, the people may resort to the judiciary as a remedy because it has the duty to determine the question and afford relief.[50]

From the very nature of a Republican Government, the solemn and inescapable obligation of interpreting the Constitution and defining constitutional boundaries is thrown upon the judicial department. In cases of conflict and overlapping of powers, functions, and duties between the several departments of the government, the judiciary is called upon to settle the matter.[51]

2. Judicial Power Defined

The Constitution defines the scope of the Judiciary's power as follows:

> The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
>
> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and

49. Cruz, *Flaws*, *supra* note 3, at 71.

50. Jose L. Escobido, *Judicial Review and National Emergency*, 50 PHIL. L.J. 457, 460 (1975) [hereinafter Escobido].

51. DAVID G. NITAFAN, PRIMER ON THE JUDICIAL POWER 61-62 (1991) [hereinafter NITAFAN].

enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.[52]

Jurisprudence has defined judicial power as the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. It is "the authority to settle justiciable controversies or disputes involving rights that are enforceable and demandable before the courts of justice or the redress of wrongs for violation of such rights."[53] The comprehensiveness of judicial power now extends to the power to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

3. The Concept of Judicial Review

Inherent in the judicial power is the function of judicial review. The concept of judicial review rests upon an extraordinarily simple foundation. The Constitution is the supreme law. It was ordained by the people, the ultimate source of all political authority. It confers limited powers on the national government. These limitations derive partly from the mere fact that these powers are enumerated — the Government cannot exercise powers not granted to it — and partly from certain express prohibitions upon its powers or upon the manner of their exercise. If the Government oversteps these limitations there must be authority competent to hold it in control, to thwart its unconstitutional attempt, and thus to vindicate and preserve inviolate the will of the people as expressed in the Constitution. The courts exercise this power. This is the beginning and the end of the theory of judicial review.[54]

> The power of constitutional review, to be exercised by some part of the government is implicit in the conception of a written constitution delegating limited powers. A written constitution would promote discord rather than order in society if there were no accepted authority to construe it, at least in cases of conflicting action by different branches of government or of constitutionally authorized governmental action against individuals. The limitation and operation of powers, if they are to survive, require a procedure of independent mediation and construction to reconcile the inevitable disputes over boundaries of constitutional power which arise in the process of government.[55]

52. PHIL. CONST. art. VIII, § 1.
53. Lopez v. Roxas, 17 SCRA 756, 761 (1966).
54. ROCCO J. TRESOLINI, AMERICAN CONSTITUTIONAL LAW 55-56 (1959) [hereinafter TRESOLINI].
55. Eugene v. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 195 (1952).

While some authorities regard judicial review as an indispensable mechanism in the republican scheme of government, others see it not merely as a right, authority or power, but as a duty. Speaking for the Supreme Court in *Tañada v. Cuenco*,[56] Justice Concepcion enunciated:

> In fact, whenever the conflicting claims of parties to a litigation cannot be settled without inquiring [into] the validity of an act of Congress or of either House thereof, the courts have, not only jurisdiction to pass upon said issue, but also the duty to do so, which cannot be evaded without violating the fundamental law and paving the way to its eventual destruction.[57]

But why should such a lofty function be vested in the Judiciary? Did not the people have faith in the Executive and Legislative branches of government? According to Black:

> We consider it a normal part, a vital part of the process by which law is applied to concrete cases, for judges to resolve these doubtful questions. It was a natural consequence of conceiving the constitution as law to assume that the uncertainties of the Constitution, like the uncertainties of law in general, were to be resolved by the courts, where the decision of cases regularly brought before the courts requires that the questions be decided.
>
> We entrusted the task of Constitutional interpretation to the courts because we conceive of the constitution as law, and because it is the business of the courts to resolve interpretative problems arising in law. A law which is to be applied by the court, but is not to be interpreted by a court, is a solecism unknown to our conceptions of legality and legal processes.[58]

It is the courts and not the legislature or the executive branch that should exercise the power of review because it is that branch that has the greatest institutional capacity to enforce the legal norms of the Constitution in a disinterested way. The political branches as policy makers have many more incentives than the judiciary to ignore constitutional limits on governmental power.

> The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution because it will be least in a capacity to annoy or infuse them. The executive not only dispenses the honors but holds the sword of the community. The legislative not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword nor the purse; no direction either of the strength or of the wealth of society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will* but merely

56. 103 Phil. 1051 (1965).
57. *Id.* at 1061.
58. Escobido, *supra* note 50, at 461 (citing BLACK JR., THE PEOPLE AND THE COURT 14 (1960)).

judgment and must ultimately depend upon the aid of the executive arm even for the efficiency of its judgments.[59]

Lastly, judicial review has been justified because the Court performs not only a checking function as when it strikes down as unconstitutional the acts of the other branches but also a legitimating function, such as when it validates acts within the purview of the Constitution.[60]

The power of judicial review, however, is not to be interpreted as an assertion of judicial supremacy. Justice Laurel made the following observation in *Angara v. Electoral Commission*:[61]

> The Constitution is a definition of the powers of government. Who is to determine the nature, scope and extent of such powers? The Constitution itself has provided for the instrumentality of the judiciary as the rational way. And when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them. This is in truth all that is involved in what is termed as "judicial supremacy" which properly is the power of judicial review under the Constitution.

Justice Labrador responded to the charge of judicial supremacy in *Montes v. Civil Service Board of Appeals*[62] in a similar manner, when he said that

> [t]he obligation to a judicial review of a [p]residential [a]ct arises from a failure to recognize the most important principle in our system of government, the separation of powers into three co-equal departments, the executive, the legislative and the judicial, each supreme within its own assigned powers and duties. When a presidential act is challenged before the courts of justice, it is not to be implied therefrom that the executive is being made subject and subordinate to the courts. The legality of his acts are under judicial review, not because the executive is inferior to the courts, but because the law is above the chief executive himself, and the courts seek only to interpret, apply or implement it.[63]

A comprehensive formulation of the power of judicial review was advanced in Philippine jurisprudence by Justice Johnson in the following

59. Carmelo V. Sison, *The Supreme Court and the Constitution*, 67 ATENEO L. J. 308, 309-310 (1993), (citing HAMILTON, FEDERALIST 78, THE FEDERALIST PAPERS 464, 465 (1961)) (emphasis supplied) [hereinafter Sison].

60. *Id.*

61. 63 Phil. at 158 (1936).

62. 101 Phil. 490, 492-93 (1957).

63. *Id.*

manner: "That the courts have jurisdiction to examine acts 'actually' taken by the executive or legislative departments of the government when such affect the rights, privileges, property, or lives of individuals."[64] The 1987 Constitution now puts it in this wise:

> The Supreme Court shall have the following powers:
>
> Review, revise, reverse, modify, or affirm on appeal or *certiorari* as the law or the Rules of Court may provide, final judgments and orders of lower courts in:
>
> (a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.
>
> (b) All cases involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto.[65]

Thus, the power of judicial review is the Supreme Court's power to declare a law, treaty, international or executive agreement, presidential decree, proclamation, order, instruction, ordinance or regulation unconstitutional. Notably, it also includes the power to declare unconstitutional the "application, or operation of presidential decrees, proclamations, orders, instructions, ordinances, and other regulations" even if the legal basis for the action is itself constitutional.[66] The exercise of the power of judicial review, however, is not without limitations.

First, there must be before the Court an actual case or controversy calling for the exercise of judicial power. There must be a litigation involving a real conflict of rights and interests between contending parties. The Court, therefore, cannot take the initiative in declaring a law unconstitutional. It is for this reason that the Court is precluded from rendering advisory opinions.

Second, the question before it must be ripe for adjudication, that is, the governmental act being challenged must have had an adverse effect on the person challenging it.

Third, the constitutional issue brought before the Court must be raised by a party having the requisite *locus standi*[67] to challenge it. A person has

64. Alejandrino v. Quezon, 46 Phil. 83, 88 (1910).

65. PHIL. CONST. art. VIII, § 5(3).

66. BERNAS, *supra* note 24, at 846.

67. Kilosbayan v. Guingona, 232 SCRA 110 (1994). The Court opines:

> An essential part of, and corollary to, this principle is the *locus standi* of a party litigant, referring to one who is directly affected by, and whose interest is immediate and substantial in, the controversy. The rule requires that a party

standing only if he has a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement.[68] But injury alone is not enough. To have standing, a legal right must be violated. A legal right is one of property, one arising out of contract, one protected against tortuous invasion, or one founded on a statute which confers a privilege.[69]

Fourth, the rule of *stare decisis*, or judicial precedent, theoretically limits the Supreme Court, since it means that previous decisions of the Court are binding upon it in cases which involve exactly the same issue. This is of course subject to the Court's prerogative to expressly overrule previous decisions.[70]

Fifth, the Court will not pass upon a constitutional question, although properly presented by the record, if there is some other ground upon which the case may be disposed of. This rule has found varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter issue.[71]

The Court will declare a law unconstitutional only if it clearly violates the Constitution. When there is doubt in the mind of a Justice regarding the constitutionality of a law, he should vote to uphold its validity. Further, it must be assumed that the law is valid unless proven otherwise.[72]

Finally, the Court will not decide "political questions" which are questions that must be resolved by the Executive or the Legislature, which together constitute the political branches of the government.[73] Below is a more comprehensive discussion on the political question doctrine.

must show a personal stake in the outcome of the case or an injury to himself that can be redressed by a favorable decision so as to warrant his invocation of the court's jurisdiction and to justify the exercise of the court's remedial powers in his behalf. If it were otherwise, the exercise of that power can easily become too unwieldy by its sheer magnitude and scope to a point that may, in no small degree, adversely affect its intended essentiality, stability and consequentiality.

68. JOAQUIN G. BERNAS, CONSTITUTIONAL STRUCTURE AND POWERS OF GOVERNMENT: NOTES AND CASES 533 (1997 ed.) [hereinafter BERNAS, CONSTITUTIONAL].

69. TRESOLINI, *supra* note 54, at 61.

70. *Id.* at 59.

71. *Id.* at 59-60.

72. TAÑADA & FERNANDO, *supra* note 45, at 1144.

73. *Id.*

C. *The Political Question Doctrine*

Justice Concepcion once said that except only so much as the Constitution confers upon some other agency, the grant of judicial power to the courts is absolute, total, and unqualified. The cases that belong to the exception are those properly referred to as "constitutionally non-justiciable controversies."[74] Among the areas which the court may, under the exercise of judicial power, not pass upon and determine because of the operation of the principle of separation of powers are the so-called "political questions." However, before proceeding with a discussion on such class of non-justiciable controversies known as political questions, an understanding of what "justiciable" controversies are is pertinent.

According to Justice Makasiar, "a purely justiciable question implies a given right, legally demandable and enforceable, an act or omission violative of such right, and a remedy granted and sanctioned by law, for said breach of right."[75] Assuming that the proper residuary of the governmental power in question has been ascertained on the basis of a valid constitutional grant, the power of the Judiciary to review official action is not necessarily terminated because it could be that the act in question had not been performed in accordance with the rules laid down by the Constitution. The Judiciary in such cases would not be encroaching upon the exclusive functions of another department as it is the particular role of the courts to ensure proper observance of the norms of actions prescribed by the Constitution.[76] But where the matter falls under the *discretion* of another department or especially in the people themselves, the decision reached is in the category of a political question and consequently may not be the subject of judicial review.[77] Justice Bengzon, made the following relevant observation in *Vera v. Avelino*:[78]

> Let us not be overly influenced by the plea that for every wrong there is a remedy, and that the judiciary stands ready to afford relief. Let us likewise disabuse our minds form the notion that the judiciary is the repository of remedies for all political or social ills. There are undoubtedly many wrongs [which] the judicature may not correct, for instance, those involving political questions. [79]

Finkelstein endeavors to explain the political question doctrine in terms of the court's apprehension about the ineffectiveness of its decisions:

74. *Id.* at 91 (citing Lopez v. Roxas, 17 SCRA 756 (1966)).

75. Casibang v. Aquino, 92 SCRA 642, 656 (1979).

76. CRUZ, *supra* note 44, at 75.

77. *Id.*

78. 77 Phil. 192 (1946).

79. *Vera*, 77 Phil. at 205.

There are certain cases which are completely without the sphere of judicial interference. They are called, for historical reasons, 'political questions.' What are these political questions? To what matters does the term apply? It applies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction. Sometimes this idea of expediency will result from the fear of the vastness of the consequences that a decision on the merits might entail. Sometimes it will result from the feeling that the court is incompetent to deal with the particular type of question involved. Sometimes it will be induced by the feeling that the matter is 'too high' for the courts. But always there will be a weighing of considerations in the scale of political wisdom.[80]

The hairline distinction between what is a political question and what is not was clearly elaborated by Willoughby in the following manner:

Elsewhere in this treatise the well-known and well-established principle is considered that it is not within the province of the courts to pass upon *the policy* of legislative or executive action. Where, therefore, *discretionary* powers are granted by the Constitution or by statute, the *manner* in which those powers are exercised is not subject to judicial review. The courts, therefore, concern themselves only with the question as to the *existence* and *extent of these discretionary powers.*

As distinguished from the judicial, the legislative and executive departments are spoken of as the *political* departments of government because in very many cases their action is necessarily dictated by consideration of public or political policy. *These considerations of public or political policy of course will not permit the legislature to violate constitutional provisions, or the executive to exercise authority not granted him by the Constitution or by statute,* but, *within these limits,* they do permit the departments, separately or together, to *recognize that a certain set of facts exists or a given status exists,* and these determinations together with the consequences that flow therefrom may not be traversed in the courts.[81]

An American case discussed the nature of political questions as follows:

What is generally meant, when it is said that a question is political, and not judicial, is that *it is a matter which is to be exercised by the people in their primary political capacity,* or that it has been specifically delegated to some other department or particular officer of the government, *with discretionary power to act*....Thus the *Legislature may in its discretion* determine whether it will pass a law or submit a proposed constitutional amendment to the people. The Courts have no judicial control over such matter, not merely because *they involve political questions,* but because they are matters which the people have by the Constitution delegated to the Legislature. The Governor may exercise the power delegated to him, free from judicial control, *so long as he observes the laws and acts within the limits of the power conferred.* His *discretionary* acts cannot be controllable, not primarily because they are of a political nature, but because the Constitution and laws have placed the particular matter under his control. *But every officer under a constitutional government must act according to law and subject him to the restraining and controlling power of the people, acting through the courts, as well as through the Executive or the Legislature.* One department is just as representative as the other, and the *judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action.*[82]

80. *Political Questions,* 38 HARV. L. REV. 295, 296 (1925) (citing Maurice Finkelstein, *Judicial Self-Limitation,* 37 HARV. L. REV. 338 (1924)).

81. NITAFAN, *supra* note 51, at 95 (citing WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES 1326 (1910)) (emphasis supplied).

After considering the foregoing authorities, the Supreme Court, through Justice Concepcion, formulated a definition of "political questions", *viz:*

In short, the term "political question" connotes, in legal parlance, what it means in ordinary parlance, namely a question of policy. In other words, in the language of Corpus Juris Secundum, it refers to 'those questions, which, under the Constitution, are to be *decided by the people* in their sovereign capacity, or in regard to which *full discretionary authority* has been delegated to the legislative or executive branch of the government.' It is concerned with issues dependent upon the *wisdom,* not legality, of a particular measure.[83]

The term "political question" concerns the wisdom, justice, policy, advisability, or expediency, not the legality, of a particular law or action. The term is not susceptible of exact definition, since precedents and authorities are not always in full harmony as to the scope of the restrictions on the courts to meddle with the actions of the political departments of the government.[84]

The difficult question which the Court is frequently called upon to answer is whether a question is one "in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government." Lengthily argued majority opinions, concurrences and dissents characterize the cases where the political question doctrine has been invoked.[85] *Baker v. Carr*[86] has attempted to formulate some guidelines for ascertaining whether a question is political or not:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without

82. *Id.* at 96 (citing *In re* MacConaughy 119 N.W. 408 (1909)) (emphasis supplied).

83. Tañada v. Cuenco, 100 Phil. 1051, 1067 (1965) (emphasis supplied).

84. Mabanag v. Lopez-Vito, 78 Phil. 1, 4 (1947).

85. BERNAS, *supra* note 24, at 859.

86. 369 U.S. 186 (1962).

> expressing lack of the respect due to coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.[87]

Fr. Bernas summarized the six phases of the political question doctrine enumerated in the case of *Baker v. Carr* into three, each representing a way of approaching constitutional law problems. First is the *textual* approach which poses the question: What does the letter of the constitution say? Second, is the *functional* approach which asks: Are we capable of resolving the problem posed? Last is the *prudential* or *political* approach which inquires on whether there are overriding considerations which prevent the court from entering the thicket.[88]

The case of *Barcelon v. Baker*[89] arrived at a "political question" conclusion on a combination of all three approaches. *Textual* is when the law grants discretionary authority to a person to be exercised upon his opinion of certain facts, he alone is judge of the existence of those facts. *Functional* is when the Executive and Legislative departments have the machinery for verifying the existence of those facts whereas the courts do not. *Prudential* is when inference by the courts in the decision can result in tying the hands of those charged with maintaining order.[90]

Again invoking *Baker v. Carr*, Fr. Bernas divides the various kinds of political questions mentioned in *Baker* into two groups. The first group he calls "real political questions:" (1) where there is "a textually demonstrable constitutional commitment of the issue to a political department;" (2) or where there is "a lack of judicially discoverable and manageable standards for resolving it;" and (3) where there is the "impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion."[91]

The second group he calls "prudential political questions" or "inter-departmental courtesy," where there is "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the

87. *Id.* at 217.

88. JOAQUIN G. BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES 404 (1987).

89. 5 Phil. 87 (1905).

90. *Id.*

91. Joaquin G. Bernas, *Constitutionalism and the Narvasa Court,* 43 ATENEO L.J. 325, 357 (1999) [hereinafter Bernas, *Constitutionalism*].

potentiality of embarrassment from multifarious pronouncements by various departments on one question."[92]

1. Political Questions under the 1987 Constitution

It is noteworthy that under the present Constitution the scope of the political question appears to have been considerably constricted because of the new definition of judicial power, which now "includes the duty... to determine whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[93] The language suggests quite clearly that this duty and power is available even against the Executive and Legislative departments in the exercise of their discretionary powers.[94]

Does this have the effect of nullifying the ancient doctrine on political questions as being beyond the pale of judicial review? No. This partial definition of judicial power made by the new Constitution has for its purpose to emphasize the principle that when "grave abuse of discretion" is committed even by the highest executive authority, the judiciary should not hide behind the political question doctrine.[95] The expanded concept of judicial power simply mandates that courts determine whether the limits or conditions set by law or the Constitution were in fact complied with.

D. Grave Abuse of Discretion

The Constitution provides that:

> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.[96]

The use of the word "includes" connotes that the provision is not intended to be an exhaustive list of what judicial power is. But the more significant addition is the clause "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government." This addition was made to preclude the Court from using the political question doctrine as a means to avoid having to make decisions simply because they are too

92. *Id.* at 358.

93. PHIL. CONST. art. VIII, § 1.

94. CRUZ, *supra* note 44, at 82.

95. BERNAS, CONSTITUTIONAL, *supra* note 68, at 589.

96. PHIL. CONST. art. VII, §1.

controversial, displeasing to the President or Congress, inordinately unpopular, or which may be ignored or not enforced.[97]

The framers of the Constitution believed that the free use of the political question doctrine allowed the Court during the Marcos years to fall back on prudence, institutional difficulties, complexities of issues, momentousness of consequences or a fear that it was extravagantly extending judicial power in the cases where it refused to examine and strike down an exercise of authoritarian power. The Constitution was accordingly amended. Thus, the Court is now precluded by its mandate from refusing to invalidate a political use of power through a convenient resort to the political question doctrine, and is now compelled to decide what would have been non-justiciable under previous court decisions interpreting earlier fundamental charters.[98]

The meaning and significance of the second paragraph of Article VIII, Section 1, was aptly expounded by former Chief Justice Concepcion, a member of the 1986 Constitutional Commission:

> Fellow members of this Commission, this is actually a product of our experience during martial law. As a matter of fact, it has some antecedents in the past, but the role of the judiciary during the deposed regime was marred considerably by the circumstance that in a number of cases against the government, which then had no legal defense at all, the Solicitor General set up the defense of 'political questions' and got away with it. As a consequence, certain principles concerning particularly the writ of *habeas corpus*, that is, the authority of courts to order the release of political detainees, and other matters related to the operation and effect of martial law failed because the government set up the defense of 'political question.' And the Supreme Court said: 'Well, since it is political, we have no authority to pass upon it.' The Committee on the Judiciary feels that this was not a proper solution of the questions involved. It did not merely request an encroachment upon the rights of the people, but, in effect, encouraged further violations thereof during the martial law regime. I am sure the members of the Bar are familiar with this situation.[99]

Chief Justice Concepcion then enumerated occasions of misuse or non-use of judicial power during the martial law regime to clarify the real meaning of political questions. He pointed out that the misuse of the "political questions" doctrine led to the Judiciary's evasion of its duty to settle matters by claiming that such constitute political questions. Thus, "the [J]udiciary is the final arbiter on the question whether or not a branch of government or any of its officials has acted without jurisdiction or in excess

97. *Id.* at 508 (citing Marcos v. Manglapus, 177 SCRA 668 (1989)) (Gutierrez, J., dissenting).

98. *Id.*

99. JOAQUIN G. BERNAS, THE INTENT OF THE 1986 CONSTITUTION WRITERS 497-98 (1995) (citing 1 RECORD OF THE 1986 CONSTITUTIONAL COMMISSION 434-36).

of jurisdiction, or so capriciously as to constitute an abuse of discretion amounting to excess of jurisdiction or lack of jurisdiction."[100]

Although the said paragraph was introduced because of the frequency with which the Supreme Court had appealed to the "political question" doctrine during the period of martial law, it is not meant to do away with the political question doctrine itself. In reply to Fr. Bernas' query, Commissioner Concepcion stated: "It definitely does not do away with the fact that truly political questions are beyond the pale of judicial review."[101]

It is not clear, however, what discretionary acts are subject to judicial review outside of those mentioned in the Constitution. Following past decisions, these may be where the power conferred is hedged by limitations and conditions provided for by law and the Court's intervention consists merely in determining whether the political departments acted arbitrarily, as the facts and the provisions conferring power would warrant.[102]

It must be remembered, however, that not every abuse of discretion gives the Court the opportunity to intervene under its constitutional mandate of judicial review. It must be "grave abuse of discretion amounting to lack or excess of jurisdiction." This latter phrase is defined by jurisprudence as follows:

> By grave abuse of discretion is meant such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. The abuse of discretion must be patent and gross as to amount to an evasion of positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility.[103]

Noting that the standard adopted by the Supreme Court in determining grave abuse of discretion cases is the "test of reasonableness," Sison makes the following observation:

> In judging whether the political branches had committed grave abuse of discretion, the Court seems to have adopted as criterion the test of reasonableness because grave abuse has been characterized as 'capricious and whimsical exercise of discretion.' If past decisions are to be followed, this entails a determination of whether the means employed have a reasonable relation to the ends sought to be achieved. This essentially is the rational relationship test employed in due process and equal protection cases. While the judicial power may have the appearance of having an open texture or being open-ended, it does not give the Supreme Court blanket authority to

100. *Id.* at 498.

101. BERNAS, *supra* note 24, at 831 (citing 1 RECORD OF THE 1986 CONSTITUTIONAL COMMISSION 443).

102. Sison, *supra* note 59, at 320.

103. Sinon v. Civil Service Commission, 215 SCRA 410, 416-17 (1992).

adopt its own policy choices. The 1987 Constitution, unlike the United States Constitution, has three categories of provisions: One concerns the separation of powers, distributing the authority granted to the government among the legislative, executive, and judicial branches, and the Constitutional Commissions; the second consists of guarantees of individual liberty; and the third concerns expressly enunciated values, principles and policies, all of which limit governmental power....The third category refers to constitutional value choices which the Court is obliged in deciding a case to use as ends or goals, it only remains for the Court to judge whether the means employed by the political branches are reasonable necessary for their accomplishment. Because of this, the Court's scope of discretion in making its own policy choices would be considerably lessened. Its fidelity to its constitutionally assigned task could thus be measured and the legitimacy of its decisions would then be properly judged.[104]

IV. THE CONSTITUENT POWERS OF CONGRESS

A. *Origin of Constituent Power*

Sinco observes that the practice of vesting constituent power or constitution-making in the people originated from New England. It arose from the democratic doctrine that the ultimate source of political authority is the people. The Puritans who settled in the English colonies in New England, having brought with them these ideals of popular rule, put them into practice in the colonies. Their concept that a community should be formed by a compact among the people therein was developed into the political theory of the social contract. It was under this theory that American constitutions during the Revolutionary Period were formed, the most notable of which being that adopted in Massachusetts in 1780.[105] The French writer Charles Borgeaud, commenting on this constitution, said:

> It was by virtue of the formula which Jean-Jacques Rousseau has rendered famous, but which the Anglo-Saxons had not learned from him, that this constitution was submitted to all the citizens of the State. It could not, of course, receive their unanimous approval. A majority vote was therefore substituted. The fiction, according to which the will of the majority is binding upon the minority, a fiction, moreover, long established by the practice of local self-government, thus received the approval of the new State. The constitution, in theory, a social compact, thus became in reality the sovereign decree of the people. This transformation was absolutely essential to the realization of the idea, to its incorporation into the domain of facts.[106]

104. Sison, *supra* note 59, at 320-21.

105. SINCO, *supra* note 29, at 43.

106. *Id.* (citing BORGEAUD, ADOPTION AND AMENDMENT OF CONSTITUTIONS 138-39 (1989)).

B. *Constituent Powers Defined*

The Supreme Court in *Gonzales v. COMELEC*[107] expressed in unequivocal terms the nature of the amendatory power that is reposed in Congress. Thus:

> Indeed, the power to amend the Constitution or to propose amendments thereto is not included in the general grant of legislative powers to Congress. It is part of the inherent powers *of the people* — as the repository of sovereignty in a republican state, such as ours — to make, and hence, to amend their own Fundamental Law. Congress may propose amendments to the Constitution merely because the same explicitly grants such power. Hence, when exercising the same, it is said that the Senators and Members of the House of Representatives act, *not* as members of *Congress*, but as component elements of a *constituent assembly*. When acting as such, the members of Congress derive their authority from the Constitution, *unlike the people*, when performing the same function, for their authority does *not* emanate from the Constitution — they are *the very source* of all powers of government, *including the Constitution itself.*[108]

Congress, in proposing amendments to the Constitution, is therefore not acting strictly in the exercise of ordinary legislative power.[109] Congress is instead exercising what are known as constituent powers.

> In *sensu strictiore*, when the legislative arm of the state undertakes the proposals of amendment to a Constitution, that body is not in the usual function of lawmaking. It is not legislating when engaged in the amending process. Rather, it is exercising a peculiar power bestowed upon it by the fundamental charter itself....While ordinarily, it is the business of the legislating body to legislate for the nation by virtue of constitutional conferment, amending of the Constitution is not legislative in character....[110]

At this juncture, it is essential to make a distinction between constituent and legislative powers. Constituent powers are the powers of the legal sovereign to determine the character, organization, jurisdiction, and mode of procedure of the Government which shall act for it in the actual conduct of state affairs. They are original, inherent, and unlimited. They are exercised by a principal in creating and fixing the powers and conduct of an agent.[111]

On the other hand, legislative powers are those possessed by a particular organ or organs of the Government to which the legal sovereign has entrusted the authority of enacting subordinate legal regulations required for

107. 21 SCRA 774 (1967).

108. *Id.* at 786-87 (emphasis supplied).

109. 16 AM JUR. 2d *Constitutional Law* § 20 (1979).

110. Sanidad v. COMELEC, 73 SCRA 333, 364-65 (1976).

111. JUAN F. RIVERA, THE CONGRESS OF THE PHILIPPINES: A STUDY OF ITS FUNCTIONS AND POWERS AND PROCEDURES 26 (1962).

carrying out is functions. They are derived, delegated, specified and limited. They refer to the powers to frame rules of conduct possessed by an agent, and hence they must be exercised in strict compliance with the manner laid down in the grant authorizing their exercise.[112]

C. *The Constituent Assembly*

A constituent assembly is nothing more than a body of men and women, either elected or appointed, officially empowered by the people through the Constitution to propose amendments to or revision of the Constitution.[113] The term "constituent assembly," therefore, refers to Congress when it performs the task under Article XVII, Section 1 of the Constitution, which states that Congress, upon a vote of three-fourths of all its Members, may propose any amendment to, or revision of the Constitution.

It must be remembered that a constituent assembly does not amend or revise the Constitution. It merely formulates and proposes amendments or revision. Until the proposals are ratified by the electorate in a plebiscite, they remain just that — proposals. However, it is good to remember that a proposed amendment or revision is hardly ever rejected by the electorate. Hence, both the formation of the constituent assembly and the deliberations of the constituent assembly are of crucial significance for constitutional development.[114]

The term "constituent assembly" can likewise refer to a constitutional convention. A constitutional convention has been described as a body assembled for the express purpose of either framing a constitution, revising the existing constitution, or formulating amendments thereto.[115]

The assembly that drafted the Malolos Constitution, the 1935 and 1973 Constitutional Conventions, the 1987 Constitutional Commission, and the Congress that proposed amendments for a bicameral legislature in 1940 and parity rights in 1946, were all constituent assemblies.

D. *Jurisprudence on Proposal of Amendments*

Since the adoption of the 1935 Constitution, the Supreme Court has, on a number of occasions, dealt with questions involving the amendatory process. Of these questions, perhaps the most fundamental is the question of the relationship between the Supreme Court, on the one hand, and the constituent assembly, on the other. A constituent assembly, after all, is a

112. *Id.*

113. Joaquin G. Bernas, *Congress as a Constituent Body*, TODAY, Aug. 15, 1999, at 8.

114. *Id.*

115. SINCO, *supra* note 29, at 41.

legislative body of the highest order to which, to a certain extent, the attribute of sovereignty is sometimes ascribed. Hence, the query is posed as to whether the actions of a constituent assembly relative to the amendatory process are subject to judicial review. Otherwise stated, is the proposal of amendments a political question or not?[116]

The first case involving the amendatory process is *Mabanag v. Lopez Vito*.[117] The case involved a petition to prevent the enforcement of a resolution of both Houses of Congress from proposing an amendment to the Constitution. The said amendment would grant corporations and citizens of the United States the same rights over the natural resources of the country and in the operation of public utilities as those enjoyed by Filipino citizens. The petition was anchored on the fact that the resolution in question did not receive the necessary three-fourths vote of all the members of the Senate and of the House of Representatives, voting separately, as constitutionally required. It appeared that three Senators and eight Representatives, who had not been allowed to sit on account of alleged irregularities in their election, were not included in the computation of the required three-fourths affirmative votes. Thus, the validity of the resolution was questioned.

The Supreme Court was then met with the threshold question of whether or not it sould assume jurisdiction over the case; it was answered in the negative. In the words of Justice Tuason, who wrote for the majority, "[i]t is a doctrine too well established to need citation of authorities, that political questions are not within the province of the judiciary, except to the extent that the power to deal with such questions has been conferred upon the courts by express constitutional or statutory provisions."[118] In holding that the proposal of constitutional amendments is a political question, Justice Tuason remarked:

> If ratification of an amendment is a political question, a proposal which leads to ratification has to be a political question. The two steps complement each other in a scheme intended to achieve a single objective. It is to be noted that the amendatory process as provided in section I of Article XV of the Philippine Constitution "consists of (only) two distinct parts: proposal and ratification." There is no logic in attaching political character to one and withholding that character from the other. Proposal to amend the Constitution is a highly political function performed by the Congress in its sovereign legislative capacity and committed to its charge by the Constitution itself. The exercise of this power is even independent of any intervention by the Chief Executive. If on grounds of expediency scrupulous attention of the judiciary be needed to safeguard public interest,

116. BERNAS, *supra* note 24, at 1167.

117. 78 Phil. 1 (1947).

118. *Id* at 4.

there is less reason for judicial inquiry into the validity of a proposal than into that of a ratification....[119]

The ruling in *Mabanag*, however, was repudiated in *Gonzales v. COMELEC*[120] and in *Tolentino v. COMELEC*,[121] and later on, in *Sanidad v. COMELEC*.[122]

Gonzales was among the several cases spawned by the movement to reexamine the 1935 Constitution in the 1960s.[123] The subject of the case were three resolutions passed by Congress acting as a constituent assembly. Resolution No. 1 concerned a proposal that Article VI, Section 5 of the Constitution be amended so as to increase the membership of the House of Representatives from a maximum of 120 to 180, to be apportioned among the several provinces. Resolution No. 2 called a convention to propose amendments to said Constitution. Lastly, Resolution No. 3 proposed that Article VI, Section 16 of the Constitution be amended so as to authorize Senators and members of the House of Representatives to become delegates to the aforementioned constitutional convention, without forfeiting their respective seats in Congress. Republic Act No. 4913 was subsequently enacted, providing that the amendments to the Constitution proposed in the above Resolutions be submitted for approval by the people at the general elections to be held on 14 November 1967.

It was contended that the three Resolutions were null and void based on the following grounds:

1. The members of Congress, which approved the proposed amendments, as well as the resolution calling a convention to propose amendments, at best, *de facto* Congressmen;
2. Congress may adopt either *one* of two alternatives — propose amendments or call a convention therefor — but may not avail of both at the same time;
3. The election, in which proposals for amendment to the Constitution shall be submitted for ratification, must be a *special* election, *not* a *general* election; and
4. The election in which the proposals for amendment shall be submitted to the people for ratification must be held under such conditions as to give the people a reasonable opportunity to

119. *Id.* at 4-5.

120. 21 SCRA 774 (1967).

121. 41 SCRA 702 (1971).

122. 73 SCRA 333 (1976).

123. BERNAS, *supra* note 24, at 1170.

have a fair grasp of the nature and implications of said amendments.

Significant was the issue of the Court's jurisdiction over the case. It was contended that the Court was devoid of such, on the ground that the subject matter of the petition merely political as held in *Mabanag v. Lopez Vito*. Arguing that the case presented a justiciable and not a political question, thus vesting the Court with proper jurisdiction, Chief Justice Concepcion declared:

> It is true that in *Mabanag v. Lopez Vito*, this Court in characterizing the issue submitted thereto as a political one, declined to pass upon the question of whether or not a given number of votes cast in Congress in favor of a proposed amendment to the Constitution — which was being submitted to the people for ratification — satisfied the three-fourths requirement of the fundamental law. The force of this precedent has been weakened, however, by *Suanes v. Chief Accountant of the Senate* [81 Phil. 818 (1948)], *Avelino v. Cuenco* [83 Phil. 17 (1949)], *Tañada v. Cuenco* [103 Phil. 1051 (1957)], and *Macias v. COMELEC* [58 O.G. (51) 8388].
>
> Since, when proposing as a constituent assembly, amendments to the Constitution, the members of Congress derive their authority from the Fundamental Law, it follows necessarily, that they do not have the final say on whether or not their acts are within or beyond constitutional limits. Otherwise, they could brush aside and set the same at naught, contrary to the basic tenet that ours is a government of laws, not of men, and to the rigid nature of our Constitution. Such rigidity is stressed by the fact that, the Constitution expressly confers upon the Supreme Court, the power to declare a treaty unconstitutional, despite the eminently political character of treaty-making power.
>
> In short, the issue of whether or not a Resolution of Congress — acting as a constituent assembly — violates the Constitution is essentially justiciable, not political, and hence, subject to judicial review, and to the extent that this view may be inconsistent with the stand taken in *Mabanag v. Lopez Vito*, the latter should be deemed modified accordingly. The Members of the Court are unanimous on this point.[124]

Concurring in the main decision, Justice Bengzon made the following observation:

> Since observance of constitutional provisions on the *procedure* for amending the Constitution is concerned, the issue is cognizable by this Court under its powers to review an Act of Congress to determine its conformity to the fundamental law. For though the Constitution leaves Congress free to propose whatever constitutional amendment it deems fit, so that the *substance* or *content* of said proposed amendment is a matter of policy and wisdom and thus a political question, the Constitution nevertheless imposes requisites as to the *manner* or *procedure* of proposing such amendments, *e.g.*,

124. *Id.* at 787.

the three-fourths vote requirement. Said procedure or manner, therefore, far from being left to the discretion of Congress, as a matter of policy and wisdom, is fixed by the Constitution. And to that extent, all questions bearing on whether Congress in proposing amendments followed the procedure required by the Constitution, is perforce justiciable, it not being a matter of policy or wisdom.[125]

Next came *Tolentino v. COMELEC*,[126] which was decided in 1971. The case involved a petition for prohibition to restrain COMELEC from holding a plebiscite on 8 November 1971, wherein the proposed constitutional amendment reducing the voting age to eighteen years would be submitted for ratification by the people pursuant to Organic Resolution No. 1 of the Constitutional Convention of 1971 and its subsequent implementing resolutions.

The validity of Organic Resolution No. 1 and its implementing resolutions were challenged insofar as they provided for the holding of a plebiscite coincident with the election of eight senators and all city, provincial and municipal officials. It was alleged that: first, the calling and holding of such a plebiscite, is, by the Constitution, a power lodged exclusively in Congress, as a legislative body, and may not be exercised by the Convention; and second, under Article XV, Section 1 of the Constitution, the proposed amendment cannot be presented to the people for ratification separately from each and all of the other amendments to be drafted and proposed by the Convention.

As a preliminary matter, the question of jurisdiction was raised. It was contended that the issue before the Court was a political question and that the Convention being a legislative body of the highest order was sovereign, and as such, its impugned acts were beyond the control of Congress and the courts. In response to this contention, the Court said:

> There should be no more doubt as to the position of this Court regarding its jurisdiction *vis-a-vis* the constitutionality of the acts of the Congress, acting as a constituent assembly, and for that matter, those of a constitutional convention called for the purpose of proposing amendments to the Constitution, which concededly is at par with the former. A simple reading of Our ruling in that very case of *Gonzales*[*v. COMELEC*] relied upon by intervenors should dispel any lingering misgivings as regards that point....
>
> True it is that once convened, this Convention became endowed with extraordinary powers generally beyond the control of any department of the existing government, but the compass of such powers can be co-extensive only with the purpose for which the convention was called and as it may propose cannot have any effect as part of the Constitution until the same are duly ratified by the people, it necessarily follows that the acts of convention, its officers and members are not immune from attack on constitutional grounds. The present Constitution is in full force and effect in its entirety and in everyone of its parts, the existence of the Convention notwithstanding, and operates even with the walls of that assembly. While it is indubitable that in its internal operation and the performance of its task to propose amendments to the Constitution it is not subject to any degree of restraint or control by any other authority than itself, it is equally beyond cavil that neither the Convention nor any of its officers or members can rightfully deprive any person of life, liberty, property without due process of law, deny to anyone in this country the equal protection of the laws or the freedom of speech and of the press in disregard of the Bill of Rights of the existing Constitution. Nor, for that matter, can such convention validly pass any resolution providing for the taking of private property without just compensation or for the imposition or exacting of any tax, impost or assessment, or declare war or call the Congress to a special session, suspend the privilege of the writ of habeas corpus, pardon a convict or render judgment in a controversy between private individuals or between such individuals and the state, in violation of the distribution of powers in the Constitution.
>
> Accordingly, we are left with no alternative but to uphold the jurisdiction of the court over the present case. It goes without saying that We do this not because the court is superior to the Convention or that the Convention is subject to the control of the Court, but simply because both the Convention and the Court are subject to the Constitution and the rule of law....[127]

125. *Id.* at 809 (emphasis supplied).

126. 41 SCRA 702 (1971).

Under the 1973 Constitution, the doctrine that the proposal of amendments is not a political but a justiciable question subject to judicial review, was reaffirmed in *Sanidad v. COMELEC*.[128] The primordial question raised in this case related to the power of then President Marcos to propose amendments to the Constitution in the absence of the interim National Assembly which had not been convened. On 2 September 1976, President Marcos issued P.D. No. 991, which called for a national referendum on 16 October 1976 for the Citizens Assemblies to resolve, among other things, the issues of martial law, the interim assembly, its replacement, and the length of the period for the exercise by the President of his present powers.

Twenty days after, or on 22 September 1976, the President issued P.D. No. 1031, amending the previous P.D. No. 991, declaring that the provisions of P.D. No. 229 providing for the manner of voting and canvass of votes in Citizens Assemblies were applicable to the national referendum-plebiscite of 16 October 1976. On the same date, the President issued P.D.

127. *Id.* at 715-16; 720-21.

128. 73 SCRA 333 (1976).

No. 1033, stating the questions to be submitted to the people in the referendum-plebiscite. The Decree stated in its whereas clauses that the people's continued opposition to the convening of the interim National Assembly evinced their desire to have such body abolished and replaced through a constitutional amendment, providing for a new interim legislative body, which will be submitted directly to the people in the referendum-plebiscite.

Petitioners commenced suit for prohibition seeking to enjoin the Commission on Elections (COMELEC) from holding and conducting the referendum-plebiscite on 16 October, and to declare without force and effect P.D. Nos. 991 and 1033, insofar as they proposed amendments to the Constitution, as well as Presidential Decree No. 1031, insofar as it directed the Comelec to supervise, control, hold, and conduct the referendum-plebiscite scheduled on 16 October 1976. Petitioners contended that under the 1935 and 1973 Constitutions, the incumbent President was not granted the power to exercise the constituent power to propose amendments to the new Constitution. Hence, the scheduled referendum-plebiscite was devoid of constitutional or legal basis.

Replying Solicitor General's query as to whether or not the question at bar was a purely political one, lying outside the domain of judicial review, the Court declared in explicit terms:

> The amending process both as to proposal and ratification, raises a judicial question. This is especially true in cases where the power of the Presidency to initiate the amending process by proposals of amendments, a function normally exercised by the legislature, is seriously doubted. Under the terms of the 1973 Constitution, the power to propose amendments to the Constitution resides in the interim National Assembly during the period of transition (Sec. 15, Transitory Provisions). After that period, and the regular National Assembly in its active session, the power to propose amendments becomes ipso facto the prerogative of the regular National Assembly (Sec. 1, pars. 1 and 2 of Art. XVI, 1973 Constitution). The normal course has not been followed. Rather than calling the interim National Assembly to constitute itself into a constituent assembly, the incumbent President undertook the proposal of amendments and submitted the proposed amendments thru Presidential Decree 1033 to the people in a Referendum-Plebiscite on October 16. Unavoidably, the regularity of the procedure for amendments, written in lambent words in the very Constitution sought to be amended, raises a contestable issue. The implementing Presidential Decree Nos. 991, 1031, and 1033, which commonly purport to have the force and effect of legislation are assailed as invalid, thus the issue of the validity of said Decrees is plainly a justiciable one, within the competence of this Court to pass upon....The Supreme Court has the last word in the construction not only of treaties and statutes, but also of the Constitution itself. The amending, like all other powers organized in the Constitution, is in form a delegated and hence a limited power, so that the Supreme Court

> is vested with that authority to determine whether that power has been discharged within its limits.
>
> Political questions are neatly associated with the wisdom, not the legality of a particular act. Where the vortex of the controversy refers to the legality or validity of the contested act, that matter is definitely justiciable or non-political. What is in the heels of the Court is not the wisdom of the act of the incumbent President in proposing amendments to the Constitution, but his constitutional authority to perform such act or to assume the power of a constituent assembly. Whether the amending process confers on the President that power to propose amendments is therefore a downright justiciable question. Should the contrary be found, the actuation of the President would merely he a brutum fulmen. If the Constitution provides how it may be amended, the judiciary as the interpreter of that Constitution, can declare whether the procedure followed or the authority assumed was valid or not.
>
> We cannot accept the view of the Solicitor General, in pursuing his theory of non-justiciability, that the question of the President's authority to propose amendments and the regularity of the procedure adopted for submission of the proposals to the people ultimately lie in the judgment of the latter. A clear Descartes fallacy of *vicious circle.* Is it not that the people themselves, by their sovereign act, provided for the authority and procedure for the amending process when they ratified the present Constitution in 1973? Whether, therefore, that constitutional provision has been followed or not is indisputably a proper subject of inquiry, not by the people themselves — of course — who exercise no power of judicial review, but by the Supreme Court in whom the people themselves vested that power, a power which includes the competence to determine whether the constitutional norms for amendments have been observed or not. And, this inquiry must be done *a priori* not *a posteriori, i.e.,* before the submission to and ratification by the people.[129]

E. Some Observations

It is apparent from the foregoing jurisprudential survey that the Supreme Court treated the amending process as a justiciable question only insofar as it involved determining whether or not the procedure laid down in the Constitution for amending the same was followed. In the cases of *Garcia, Tolentino,* and *Sanidad,* the Court observed that the procedure or manner of amending the fundamental law, far from being left to the discretion of Congress as a matter of policy and wisdom, is fixed by the Constitution. It is to that extent that all questions bearing on whether Congress in proposing amendments followed the procedure required by the Constitution, is perforce justiciable, not being a matter of policy or wisdom. However, where the Constitution does not lay down the amendatory procedure with

129. *Id.* at 359-61.

specificity — as when it fails, for instance, to indicate how Congress is to vote when considering amendment proposals — can it be said that the matter is something to which full discretionary authority had been given to Congress, as a matter of policy and wisdom?

V. Interpreting Article XVII, Section 1(1): Two Approaches

A. *The Drilon Formula:*[130] *A Bicameral Approach*

On the 14 August 1999 edition of "Jeep ni Erap," Senator Franklin Drilon expressed his view on how Congress can properly propose amendments to the charter pursuant to Article XVII, Section 1(1) of the 1987 Constitution which states that Congress, upon a vote of three-fourths of all its Members, may propose any amendment to, or revision of, the Constitution. Drilon's proposal attempts to provide a possible resolution of the issue on how Congress is to function as a constituent assembly.

The elements of said proposal are the following:

1. Congress makes proposals in the course of its lawmaking functions.

Congress can propose amendments to the Constitution using the regular lawmaking procedures. However, in so doing, it is not exercising its legislative power but its constituent power vested in it by the Constitution. Thus, a Senator or Member of the House of Representatives may file a measure proposing an amendment in a manner that is similar to the procedure by which any legislative measure is filed in Congress, pursuant to the Rules and Procedures in each House. The moment the Senate or the House takes cognizance of such measure[131] and starts the process of acting on such proposal, then *ipso facto,* it starts to exercise the constituent power vested in it by the Constitution. The Senators and Congressmen are then no longer acting as legislators, but as component elements of a constituent assembly.

2. A joint session, as well as a resolution or enabling law, are not required for Congress to make proposals.

A concurrent resolution providing that the Senate and the House hold a joint session for the purpose of considering proposed amendments to the Constitution is unnecessary. Thus, Congress need not physically convene in

130. Franklin M. Drilon, The Drilon Formula for Amending the Charter (1999) (unpublished manuscript, on file with Senator Franklin Drilon) [hereinafter Drilon].

131. In this case, it should appropriately be a joint resolution.

joint session for the exercise of its constituent powers. The only requirement of Article XVII, Section 1(1) is that three-fourths of the Members of Congress propose such amendment.

According to Drilon, this conclusion is grounded on the fact that Article XVII, Section 1(1) of the 1987 Constitution is worded differently from Article XV, Section 1 of the 1935 Constitution which requires Congress to assemble in joint session to be able to propose any amendment. The 1935 provision reads, "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."

3. In determining the three-fourths vote, the two houses shall vote separately.

The Drilon approach would result in a modified form of a constituent assembly. Instead of Congress jointly assembled and sitting as one body, the proposed method would, in effect, call for a bicameral constituent assembly, with each Chamber taking cognizance of and deliberating on each and every proposed amendment filed in their respective chambers. Each and every proposed amendment filed will be referred to a particular committee or to a committee of the whole, which then conducts public hearings, prepares committee reports and then submits it to the floor for debates and deliberations. It is then submitted for second reading, after which the third reading and final voting comes. The required number of affirmative votes is three-fourths of all the members of each chamber. Should there be differences in the versions passed by the two Chambers, a bicameral committee is formed to come out with a common version, which must be approved by each Chamber by a three-fourths vote.

4. The proposals made by Congress will still be subject to ratification by the people in a plebiscite.

Drilon opines that, in the final analysis, what is important in the process of amending the Constitution, is that it is the people's will that shall prevail. Thus, aside from fulfilling the requirement that the number of votes be qualified to three-fourths, rather than a mere majority vote, the proposed amendments must thereafter be submitted to a plebiscite for ratification by the people.

B. *The Cruz Formula: A Unicameral Approach*

Justice Cruz argues for a joint session and a joint vote. The Cruz formula reads: (1) Whenever any vote is "of all the Members" without further qualification, this should be a vote based on total membership; (2) If it is a

vote "of both Houses," each House votes where it is, as it is.[132] He claims that the framers either intended the distinction, or carelessly copied the 1973 provisions which governed a unicameral system.[133]

VI. AN ANALYSIS

It has been settled that the matter of proposing amendments to the Constitution, particularly the manner by which Congress undertakes such task, pursuant to its constituent powers, constitutes a justiciable question insofar as it involves the determination of whether or not the procedure mandated in the Constitution for carrying out the same has been complied with. To reiterate:

> Since observance of constitutional provisions on the *procedure* for amending the Constitution is concerned, the issue is cognizable by this Court under its powers to review an Act of Congress to determine its conformity to the fundamental law. For though the Constitution leaves Congress free to propose whatever constitutional amendment it deems fit, so that the *substance* or *content* of said proposed amendment is a matter of policy and wisdom and thus a political question, the Constitution nevertheless imposes requisites as to the *manner* or *procedure* of proposing such amendments, *e.g.*, the three-fourths vote requirement. Said procedure or manner, therefore, far from being left to the discretion of Congress, as a matter of policy and wisdom, is fixed by the Constitution. And to that extent, all questions bearing on whether Congress in proposing amendments followed the procedure required by the Constitution, is perforce justiciable, it not being a matter of policy or wisdom.[134]

But does the same ruling of justiciability apply to those matters of procedure in which the Constitution is silent? The present Constitution, for instance, does not indicate how Congress is to deliberate and vote when considering amendment proposals. With this in mind, the question to be asked now is whether or not the manner by which Congress is to sit down and vote when proposing constitutional amendments is a political question.

We have seen from an earlier discussion, that pursuant to the expanded concept of judicial power under the 1987 Constitution, the courts are now authorized to pass upon questions, even though political in nature, but only to determine whether or not grave abuse of discretion amounting to lack or excess of jurisdiction has been committed by the concerned instrumentality or branch of the government. Hence, the next question to be asked is would Congress be committing grave abuse of discretion if it adopts the Drilon

132. Edsel F. Tupaz, *The Sticky Problem of Amending the Constitution*, SUNSTAR, Nov. 25, 1999, at 3.

133. *Id.*

134. Gonzales v. COMELEC, 21 SCRA 774, 809 (1967) (Bengzon, J., concurring).

formula? What if it opts for the Cruz formula? The answers to these queries will lead to a determination of the extent of Congress' discretion in the amendatory process.

A. A Political Question?

Examining the manner by which Congress is to propose constitutional amendments under Article XVII involves a consideration of two things: (1) whether or not both houses of Congress must convene in joint session, and (2) whether or not the two houses of Congress must vote jointly or separately. As to the first query, the proponent advances the view that the same constitutes a political question. The second issue, however, is a justiciable question. Before tackling the arguments in support of the above propositions, a review of the political question doctrine is in order. Central to a discussion of the political question doctrine are the guidelines articulated by Justice Brennan in *Baker v. Carr.*

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.[135]

American constitutionalist Laurence Tribe notes that even this definitive statement of the political question doctrine contains strands of at least three different theories of the role of the Court with regard to the other branches of government. A *classical* view would impose on the Court the requirement of deciding all cases and issues before it, unless the Court finds, purely as a matter of constitutional interpretation, that the Constitution itself has committed the determination of the issue to the autonomous decision of another branch or agency of government.[136] Justice Brennan invokes this classical concern when he said that a case poses a political question if there is

135. 369 U.S. 186, 217 (1962).

136. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 366 (2000) [hereinafter TRIBE].

"a textually demonstrable constitutional commitment of the issue to a political department."[137]

It has been suggested that only a constitutional commitment to an issue regarding the autonomous discretion of another branch of the national government would justify a court in declining the exercise of its jurisdiction. Some commentators believe otherwise. For them, the Judiciary cannot, even if it so chooses, review the matter, regardless of the existence of an issue pertaining to another branch of government. Justice Brennan's statement in *Baker v. Carr* supports this view, describing the Supreme Court as the "ultimate interpreter of the Constitution."[138] Perhaps the most appropriate resolution of this issue is to recognize that under the classical approach, there are subjects which are charged primarily to the discretion of either the executive or the Congress, but that the identification of the subjects so charged and the constitutionality of the exercise of the discretion given remains subject to judicial review.[139]

A *functional* approach to the role of the Court would consider such factors as the difficulties in gaining judicial access to relevant information, the need for uniformity of decision, and the wider responsibilities of the other branches of government when determining whether or not to decide a certain issue or case.[140] Thus, Justice Brennan would either have courts determine whether there is "a lack of judicially discoverable and manageable standards for resolving [the question]," or have them consider "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion."[141]

A *prudential* view of the Court's role would treat the political question doctrine as a means to avoid passing on the merits of a question when reaching the merits would force the Court to compromise an important principle or would undermine its authority.[142] Prudential considerations are reflected in Justice Brennan's references to "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government," "an unusual need for unquestioning adherence to a political decision already made," or "the

137. JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 58 (1990) [hereinafter BARRON & DIENES].

138. 369 U.S. 186 (1962).

139. BARRON & DIENES, *supra* note 137, at 58-59.

140. TRIBE, *supra* note 136.

141. BARRON & DIENES, *supra* note 137, at 59.

142. TRIBE, *supra* note 136.

potentiality of embarrassment from multifarious pronouncements by various departments on one question."[143]

1. Joint or Separate Session?

It is the author's considered view that the question of whether or not Congress is obliged to assemble in joint session when proposing constitutional amendments is a political question following the three strands of the political question doctrine embodied in *Baker v. Carr*. In other words, Congress is free to decide to come together or not to come together in joint session.

Under the *classical* view, it is submitted that the Constitution's silence regarding the need for a joint session must be interpreted as a "textually demonstrable constitutional commitment of the issue" to the legislative department.

Article XVII, Section 1(1) of the 1987 Constitution states: "Any amendment to, or revision of, this Constitution may be proposed by [t]he Congress, upon a vote of three-fourths of *all its Members*." The problem with this provision stems from the fact that the Philippines has a bicameral Congress authorized to be a constituent assembly according to an amendatory provision which is more fitting for a unicameral assembly. Article XVII, Section 1(1) is a duplication of the amendatory provision under the 1973 Constitution, during which time the government had a unicameral legislature. Thus the 1973 provision reads: "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*...."[144] Clearly, no provision for a joint session was necessary as there was only one body.

This is in sharp contrast to the provision under the 1935 Constitution, as amended in 1940, which ordained a bicameral Congress. The 1935 Constitution was quite definite in the prescribed procedure, stating that: "The Congress *in joint session assembled*, by a vote of three-fourths of all the Members of the Senate and of the House of representatives voting separately, may propose amendments to this Constitution."[145]

Thus, the 1987 Constitution, while expressly vesting in Congress the power to propose amendments to, or a revision of, the Constitution, upon a three-fourths vote of all its Members, is silent as to the method by which Congress must deliberate on the same. Must the two houses meet in joint session?

143. BARRON & DIENES, *supra* note 137, at 60.

144. 1973 PHIL. CONST. art. XVI, § 1 (superseded 1987) (emphasis supplied).

145. 1935 PHIL. CONST. art. XV, § 1 (superseded 1987) (emphasis supplied).

It is a rule in the construction of constitutional provisions that where the means for the exercise of a granted power are given in a constitution, no other or different means can be implied as being more effectual or more convenient. Where a power is expressly given by the Constitution, and the mode of its exercise is prescribed, such mode is exclusive of all others. With reference to the exercise of specifically granted powers, it is to be presumed that a constitution has been carefully made and that every word in it has been carefully chosen to express the intention of the constitutional convention, as well as any limitation on a power granted by it.[146]

But what happens when the constitution grants an express power to a political branch of the government without limitation or prescription of the mode of its exercise? Would there still be an occasion for judicial review of the propriety of the exercise of such power, or should the matter be left to the prerogative of the concerned political department? At this juncture, a review of the concept of judicial review is pertinent.

The early case of *Avelino v. Cuenco*[147] cautiously tackled the scope of the Court's power of judicial review insofar as it involved an interpretation or application of a provision of the Constitution or the law. Within this scope falls the jurisdiction of the Court over questions on the validity of legislative or executive acts that are political in nature, whenever the tribunal "finds constitutionally imposed limits on powers or functions conferred upon political bodies."[148] In the aforementioned case, the Court initially declined to resolve the question of who was the rightful Senate President, since it was deemed a political controversy falling exclusively within the domain of the Senate. Upon a motion for reconsideration, however, the Court immediately assumed jurisdiction mainly because the resolution of the issue hinged on the interpretation of the constitutional provision on the presence of a quorum to hold a session and therein elect a Senate President.

In *Tañada v. Cuenco*,[149] the Supreme Court endeavored to define political questions as:

> [T]hose questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government. It is concerned with issues dependent upon the *wisdom*, not legality, of a particular measure.[150]

146. 16 AM JUR. 2d *Constitutional Law* § 109 (1979).

147. 83 Phil. 17 (1949).

148. Santiago v. Guingona, 298 SCRA 756, 770-71 (1998), (citing Avelino v. Cuenco, 83 Phil. 17 (1949).

149. 103 Phil. 1051 (1957).

150. *Id.* at 1068 (citing 10 C.J.S., 413) (emphasis supplied).

The Court ruled that the validity of the selection of members of the Senate Electoral Tribunal by the Senators was not a political question. The choice of these members did not depend on the Senate's "full discretionary authority," but was subject to *mandatory constitutional limitations*.[151] Thus, the Court held that not only was it clearly within its jurisdiction to pass upon the validity of the selection proceedings, but it was also its duty to consider and determine the issue.

In the landmark case of *Lansang v. Garcia*,[152] Chief Justice Concepcion wrote that the Court "had authority to and should inquire into the existence of the factual bases required by the Constitution for the suspension of the privilege of the writ of *habeas corpus*."[153] But the Chief Justice cautioned: "the function of the Court is merely to *check* — not to *supplant* — the Executive, or to *ascertain* merely whether he has gone beyond the constitutional limits of his jurisdiction, *not to exercise the power vested in him* or to determine the wisdom of his act."[154]

The eminent Chief Justice aptly explained later in *Javellana v. Executive Secretary*[155]

> One of the principal bases of the non-justiciability of so-called political questions is the principle of separation of powers — characteristics of the presidential system of government....Within its own sphere — but *only within* such sphere — each department is supreme and independent of the others, and each is devoid of authority not only to encroach upon the powers or field of action assigned to any of the other departments, but also to inquire into or pass upon the advisability or *wisdom* of the acts performed, measures taken or decisions made by the other departments — provided that such acts, measures or decisions are *within* the area allocated thereto by the Constitution....[156]
>
> Accordingly, where the grant of power is qualified, conditional or subject to limitations, the issue of whether or not the prescribed qualifications or conditions have been met, or the limitations respected is justiciable or non-political, the crux of the problem being one of *legality* or *validity* of the contested act, *not* its wisdom. Otherwise, said qualifications, conditions or limitations — particularly those prescribed by the Constitution — would be set at naught. What is more, the judicial inquiry into such issue and the settlement thereof are the *main* functions of the courts of justice under the presidential form of government adopted in our 1935 Constitution, and the system of checks and balances, one of its basic predicates....This explains

151. *Id.* at 1067.

152. 42 SCRA 448, 480 (1971).

153. *Id.* at 480.

154. *Id.* (emphasis supplied).

155. 50 SCRA 30 (1937).

156. *Id.* at 84 (emphasis supplied).

why in Miller v. Johnson [92 Ky. 589, 18 SW 522, 523], it was held that courts have a '*duty*, rather than a *power*,' to determine whether another branch of the government has 'kept *within constitutional limits*.'[157]

From the above pronouncements of the Supreme Court, it is evident that the Court, in the exercise of its power of judicial review, steps in only to determine whether a branch of government has exceeded the limits of its authority as prescribed by the Constitution. Thus, where the Constitution has laid down in express terms limitations of a specifically granted power, it is the Court's duty to ascertain whether a particular governmental act has complied with these constitutionally mandated limitations. Again, quoting the Supreme Court's ruling in *Javellana*, "where the grant of power is qualified, conditional or subject to limitations, the issue of whether or not the prescribed qualifications or conditions have been met, or the limitations respected is justiciable or non-political, the crux of the problem is the *legality* or *validity* of the contested act, *not* its wisdom."[158]

Conversely, where the grant of power is not qualified or subject to limitations, or without prescription as to its mode of exercise, the issue of whether or not the power was properly exercised is a political one, involving as it does the *wisdom* of the questioned act: "When a power vested in said officer or branch of the government is absolute or unqualified, the acts in the exercise of such power are said to be political in nature, and consequently, non-justiciable or beyond judicial review."[159]

Since the Constitution is silent as to whether there is a need for a joint session, there remains no standard by which to test the validity or legality of whatever Congress will decide on, be it to hold a joint session or not to call for one. Herein lies the *functional* approach on the political question doctrine, where there is a manifest "lack of judicially discoverable and manageable standard" for resolving the issue. In such case the Court will be confronted with an issue dependent upon the *policy or wisdom*, not legality, of a particular measure. Otherwise, it would be impossible to decide the case without determining its initial policy determination.

Having thus determined that the issue of joint session is purely a matter to be left to the discretion of Congress following the classical and functional views, the courts are prevented from passing judgment on the same on *prudential* considerations, there being an impossibility of a court's undertaking independent resolution without demonstrating lack of the respect due to coordinate branches of government, an unusual need for unquestioning adherence to a political decision already made, or the potentiality of

157. *Id.* at 87 (emphasis supplied).

158. *Id.* (emphasis supplied).

159. *Id.*

embarrassment from multifarious pronouncements by various departments on one question.

The situation we are presently confronted with must be distinguished from the circumstances obtaining in previous Supreme Court rulings to the effect that "all questions bearing on whether Congress in proposing amendments followed the procedure required by the Constitution, is justiciable, it not being a matter of policy or wisdom."[160] These cases were decided in light of existing amendatory procedures laid down in the Constitution, and the Court was merely tasked to determine whether or not the questioned acts of Congress in the amendatory process were in conformity with the prescribed constitutional standards.

The power of judicial review extends only to determining what the fundamental law ordains. Beyond that, as to those matters which the Constitution no longer provides for, the courts cannot interfere. To do so would be an encroachment on the powers of a co-equal department of government, in violation of the principle of separation of powers.

Thus, in *Osmeña v. Pendatun*,[161] the Supreme Court refused to interpose itself in the matter of the suspension of Sergio Osmeña, Jr. for a speech he had delivered on the floor of Congress. The issue in this case revolved around the interpretation of the meaning of "disorderly behavior" and the legislature's power to suspend a member. The 1935 Constitution did not define "disorderly behavior" nor did it specify the procedure for the imposition of the penalty of suspension. The matter, therefore, was something in regard to which full discretionary authority had been given to the legislature. Justice Bengzon stated thus:

> On the question whether the delivery of speeches attacking the Chief Executive constitutes disorderly conduct for which Osmeña may be disciplined, many arguments pro and con have been advanced. We believe, however, that the House is the judge of what constitutes disorderly behavior, not only because the Constitution has conferred jurisdiction upon it, but also because the matter depends mainly on factual circumstances of which the House knows best but which cannot be depicted in black and white for presentation to, and adjudication by the Courts. For one thing, if this Court assumed the power to determine whether Osmeña's conduct constituted disorderly behavior, it would thereby have assumed appellate jurisdiction, which the Constitution never intended to confer upon a coordinate branch of the Government. The theory of separation of powers fastidiously observed, by this Court, demands in such situation a prudent refusal to interfere. Each department, it

160. Gonzales v. COMELEC, 21 SCRA 774 (1967).

161. 109 Phil. 863 (1960).

has been said, has exclusive cognizance of matters within its jurisdiction and is supreme within its own sphere.[162]

In the later case of *Santiago v. Guingona,*[163] at issue was the validity of then Senator Teofisto Guingona's recognition as the Senate minority leader on the basis of a resolution submitted by seven members of the Lakas-NUCD-UMDP Party electing Senator Guingona as the minority leader of the Senate. The case revolved around the question of how the Senate majority leader and the Senate minority leader were to be chosen. In ruling that the matter is to be left to the Senate for determination, Justice Panganiban stated:

> While the Constitution is explicit on the manner of electing a Senate President and a House Speaker, it is, however, dead silent on the manner of selecting the other officers in both chambers of Congress. All that the Charter says is that "[e]ach House shall choose such other officers as it may deem necessary." To our mind, the *method* of choosing who will be such other officers is merely derivative of the prerogative conferred by the aforequoted constitutional provision. Therefore, such method must be prescribed by the Senate itself, not by this Court.... In this regard, the Constitution vests in each house of Congress the power "to determine the rules of its proceedings."[164]

Hence, as in those cases where the Court treated as political questions the matters in regard to which the Constitution is either silent or ambiguous, the proponent maintains that the issue on joint session, which is not addressed by the Constitution, must likewise be considered as a matter left to the discretion of Congress.

2. Joint or Separate Voting?

While it is maintained that the matter of coming together in joint session is a political question, the manner of voting on proposed constitutional amendments constitutes a justiciable question. Although the present Constitution is likewise silent on the method by which the requisite three-fourths vote is to be obtained, it is contended that there exists a standard by which the courts can be guided in resolving this issue. This standard is to be found in the "constitutional structure and the architecture of the government established by the Constitution, and the inferences to which these give rise."[165]

162. *Id.* at 871-72.

163. 298 SCRA 756 (1998).

164. *Id.* at 780 (citing PHIL. CONST. art. VI, §16(1) ¶ 2).

165. TRIBE, *supra* note 136, at 31.

According to Tribe, the Constitution's "structure" is that which the text *shows* but does not directly *say*. Quoting Justice Rehnquist's dissent in *Nevada v. Hall,*[166] Tribe maintains that when the Constitution is ambiguous or silent on a particular issue, the Court has often had to rely "on notions of a constitutional plan — the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the framers."[167] He further states that "the tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning."[168] Acknowledging that the Eleventh Amendment's text does not itself assure the sort of state sovereignty for which he was arguing in *Nevada v. Hall,*[169] Justice Rehnquist noted how prior cases had protected principles beyond the Constitution's literal terms and concluded that the Court should get beyond literalism and protect important concepts of sovereignty, which are of constitutional dimension because their derogation would undermine the logic of the constitutional scheme.[170]

Tribe adds that structural analysis is appropriate not only in order to flesh out the contours and content of limits on the national government or to fill in the elements of the separation of powers, but also in order to give shape and substance to "unenumerated" rights.[171]

Following this structural approach, it submitted that the governing standard by which courts can be guided in determining how Congress is to vote on amendment proposals is the bicameral structure of Congress. This structure is ordained by the 1987 Constitution in Article VI, Section 1 which provides that "[t]he legislative power shall be vested in the *Congress* of the Philippines which shall *consist of a Senate and a House of Representatives.*"[172]

Admittedly, the present Constitution fails to indicate not only whether Congress must convene in joint session or not, but also whether the two houses must vote jointly or separately. But while the necessity or permissibility of joint session is a political question, the manner of voting is a justiciable one. Why the difference?

166. 490 U.S. 410 (1979) (emphasis supplied).

167. TRIBE, *supra* note 136, at 410.

168. *Id.*

169. *Id.*

170. *Id.* at 41-42 (citing Nevada v. Hall, 490 U.S. 410 (1979)).

171. *Id.* at 42.

172. PHIL. CONST. art. VI, § 1 (emphasis supplied).

As pointed out earlier, there exists a standard by which the courts can be guided in determining the matter of voting, and that standard is the bicameral structure of Congress. In keeping with the bicameral nature of Congress, the rule must be separate voting. On the other hand, the same standard of bicameralism cannot be used in determining whether a joint session is required or not. Why is this so?

According to Fr. Bernas, the distinction lies in the fact that Congress does not shed its bicameral nature by the mere fact of assembling in joint session. It is the operative act of two houses voting separately on an issue that gives bicameralism its essence. The autonomy or independence of each house is preserved by separate decision-making regardless of how the preliminary act of deliberating is done.

B. Grave Abuse of Discretion?

Unlike our previous Constitutions, the 1987 Constitution is explicit in defining the scope of judicial power. The present Constitution now fortifies the authority of the courts to determine in an appropriate action the validity of the acts of the political departments. It speaks of judicial prerogative in terms of *duty*.[173]

Eminent jurists would argue that the aforequoted constitutional provision expanded and sharpened the checking powers of the judiciary *vis-à-vis* the executive and legislative departments of government by allowing courts to penetrate the political question shield, authorizing the courts to review acts of any branch or instrumentality of the government to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction.[174] *Thus, the Court is now under mandate to assume jurisdiction over, and to undertake judicial inquiry into, what may even be deemed political questions provided, however, that grave abuse of discretion — the sole test of justiciability on purely political issues — is shown to have attended the contested act.*[175]

There is no hornbook rule by which grave abuse of discretion may be determined. The provision was evidently couched in general terms to make it malleable to judicial interpretation in the light of any contemporary or emerging milieu. But courts have frequently held that where no provision of the Constitution or the laws has been clearly shown to have been violated, disregarded or overlooked, grave abuse of discretion cannot be imputed to a

173. PHIL. CONST. art. VIII, § 1, ¶ 2 (emphasis supplied).

174. Arroyo v. De Venecia, 277 SCRA 268, 312 (1997) (Puno, J., concurring and dissenting) (emphasis supplied).

175. *Id.* at 330 (Vitug, J., concurring) (*see* note 91, supra, for definition of grave abuse of discretion) (emphasis supplied).

department of government for acts done within the latter's competence and authority.[176]

Assuming that the Court will later on exercise its power of judicial review over the manner by which Congress will propose amendments under Article XVII, Sec. 1(1), it is necessary to ask the following question: how will the Drilon formula and the Cruz formula fare under the test of grave abuse of discretion?

In light of the propositions advanced earlier as to the political character of the question on the need for a joint session, and the justiciability of the question on the manner of voting, the following conclusions are drawn: First, since the issue on joint session is a political question, Congress is free to choose between convening in joint session or not. Since Congress is thereby given full discretionary authority on the matter, it is submitted that no grave abuse of discretion can be imputed to Congress should it decide on either option. Second, since the issue on voting is a justiciable question, the controlling standard being the bicameral structure of Congress, the rule is necessarily separate voting. It would, thus, be grave abuse of discretion for Congress to insist on a joint vote. Hence, an evaluation of the Drilon formula and the Cruz formula based on the foregoing conclusions would yield the following results:

TABLE I

Formula	*Elements*	*Grave Abuse of Discretion?*
Drilon	Separate Sessions	No
	Separate Voting	No
Cruz	Joint Session	No
	Joint Voting	Yes

Having thus determined that no grave abuse of discretion can be ascribed to Congress should it decide on *separate sessions* and *separate voting* under the Drilon formula, or a *joint session* under the Cruz formula, the proponent shall proceed to an exposition of the legal arguments than can be raised in support of these three (separate session, separate voting, joint session). With respect to *joint voting* under the Cruz formula, which cannot be pursued without grave abuse of discretion, the proponent shall likewise present the arguments advanced in its favor, but which arguments shall thereafter be debunked by the proponent. These shall all be dealt with by discussing the Drilon formula first (under which *separate session* and *separate*

176. Santiago v. Guingona, 298 SCRA at 796-97 (1998) (Vitug, J., separate opinion).

voting are subsumed), and the Cruz formula next (under which *joint session* and *joint voting* fall).

Before undertaking an analysis of the Drilon and Cruz formulae, it is important to make the following considerations: (1) textualism — the determined and primary focus on constitutional language; (2) the effort to discern meaning through constitutional structure and the architecture of government established by the Constitution, and through the inferences to which these give rise; (3) the supplementation of text and structure with historical considerations, including various forms of inquiry into original meaning or original intent; and (4) the elucidation of meaning through attempts to discern which interpretation best accords with the ethos or moral and political character and identity of the nation.[177]

C. *The Drilon Formula*

The following are the arguments favoring separate sessions and separate voting, all of which the proponent subscribes to:

1. On Separate Sessions

Drilon espouses the view that a joint session, as well as a resolution or enabling law, are not required for Congress to make proposals. How is this stance justified?

Under the plain meaning rule or the *verba legis* rule, when the words and phrases of the law are clear and unequivocal, their meaning must be determined from the language employed and the statute must be taken to mean exactly what it says. Hence, what is not clearly provided in the law cannot be extended to those matters outside its scope. In construing such provision, one cannot speculate as to the probable intent of the law different from that expressed in the words of the law.[178] The courts apply to constitutional provisions the declared rule of statutory construction that if the effect of the words used is not absurd they will not give a provision other than their plain meaning.[179]

The present Constitution, unlike the 1935 Constitution, does not require Congress to physically convene in joint session to exercise its constituent power under Article XVII, Section 1(1). Thus, it is not necessary that there be a concurrent resolution providing that the Senate and the House of Representatives hold a joint session for the purpose of considering proposed amendments to the Constitution. The only requirement of Article XVII, Section 1(1) is that three-fourths of the Members of Congress propose such amendment.[180]

177. TRIBE, *supra* note 136, at 31.

178. Drilon, *supra* note 130, at 3.

179. 16 AM JUR. 2d *Constitutional Law* § 111 (1979).

It is a general principle that the intention to be given force is that which is embodied and expressed in the constitutional provisions themselves. When the words express the meaning plainly, distinctly, and perfectly, there is no occasion to have recourse to any other means of interpretation. The duty and function of the court is to construe, not to adopt or to rewrite constitutional provisions, and a constitutional restriction is, within its defined limits, to be enforced according to its letter and its spirit.[181] The courts, therefore, in construing a constitutional enactment, is usually said to be limited to the language of the enactment itself.[182] It is their responsibility and duty to ascertain the meaning of the Constitution as written, neither adding to nor subtracting from it, neither deleting nor distorting it.[183]

Thus, according to Drilon, where the Constitution does not provide that Congress must convene in joint session, Congress is not authorized to convene as such. Absent such a command, the meaning is clear: they do their thing the way they normally do their thing — separately, as two autonomous bodies.[184]

When the Constitution wants them to meet in joint session, the Constitution should provide for the same either expressly or implicitly. The Constitution expressly commands them to meet in joint session when they vote to declare a state of war and when they canvass the votes for President and Vice-President; implicitly the Constitution also commands them to meet in joint session when they listen to the President's report on the state of the nation and when they must vote "jointly" to override either a declaration of martial law or a suspension of the privilege of the writ of *habeas corpus*. Thus, under the present Constitution, the two Houses of Congress should do so as they are and where they are.[185]

Drilon adds that prior to the exercise of its constituent powers, it is not necessary for Congress to pass an enabling law to that effect. Fr. Bernas argues that since the Constitution, which is the source of the authority of Congress, already makes Congress a constituent assembly through Article XVII, it is no longer necessary for Congress to pass an enabling law for the exercise of its constituent powers. What may be needed is not an enabling

180. Drilon, *supra* note 130, at 4.

181. 16 AM JUR. 2d *Constitutional Law* § 105 (1979).

182. *Id.*

183. HECTOR DE LEON, PHILIPPINE CONSTITUTIONAL LAW: PRINCIPLES AND CASES 15 (1999) [hereinafter DE LEON].

184. Joaquin G. Bernas, *Congress' Vote on the Charter*, TODAY, June 9, 1999, at 8.

185. *Id.*

act but a congressional act or resolution, such as an administrative measure, setting down how each house proposes to proceed in the exercise of the constituent power it already possesses without confusing it with ordinary legislative power. Such an act or resolution will ensure that constituent acts will not be confused with ordinary legislative acts.[186]

2. On Separate Voting

Having resolved that Congress is not required to convene in a joint session when proposing constitutional amendments, Drilon proceeds to argue for a separate vote, *in keeping with the bicameral nature of Congress.* This view may be substantiated by the following precepts of statutory construction as regards constitutional provisions:

> In construing a constitutional provision, it is the duty of the court to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision. Every statement in a constitution must be interpreted in the light of the entire document, rather than as a sequestered pronouncement; it must be regarded as consistent with itself throughout, and because fundamental constitutional principles are of equal dignity and none must be so enforced as to nullify or substantially impair the other, the court should harmonize them if this can be done reasonably and without distorting the meaning of any provision.[187]

> It is an established canon of constitutional construction that no one provision of the constitution is to be separated from all the others, to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. Frequently, the meaning of one provision of a constitution standing by itself may be obscure or uncertain, but is readily apparent when resort is made to other portions of the same instrument. It is often necessary to interpret the constitutional provision with an eye to their relation to other provisions.[188]

The foregoing rules embody what Tribe describes as the structural approach to constitutional interpretation. To reiterate, Tribe states that the Constitution's structure is that which the text *shows* but does not directly *say*. Diction, word repetitions, and documentary organizing forms, for example, all contribute to a sense of what the Constitution is about that is as obviously "constitutional" as are the Constitution's words as such.[189]

Thus, an examination of the entire Constitution will reveal that when Congress exercises its right to vote, separate voting is the general rule. Below

186. Joaquin G. Bernas, *Joker's Concern about Cha-Cha*, TODAY, Sept. 8, 1999, at 8.

187. 16 AM JUR. 2d *Constitutional Law* § 100 (1979).

188. *Id.*

189. TRIBE, *supra* note 136, at 40-41.

is a table of the manner by which Congress votes in the enumerated instances provided by the 1987 Constitution:

TABLE 2

Occasion	*Manner of Voting*
Declaration of state of war[190]	▪ Separately
Breaking tie in Presidential Election[191]	▪ Separately
Voting for substitute Vice-President[192]	▪ Separately
Declaring incapacity of President[193]	▪ Separately
Revocation/ Extension of martial law[194]	▪ Jointly

Hence, with the exception of the instance wherein Congress votes to revoke or extend martial law, the general rule is that Congress votes separately. This is logically so because the Constitution today ordains a bicameral legislature.

> Bicameralism means two houses acting autonomously of each other and occasionally checking each other. This is a fundamental principle in our Constitution. The two houses work separately. That is the general rule. The larger house may not swallow the lower house. When fusion is to be allowed at all, the Constitution says so. And whenever the Constitution says that two houses meet together, the Constitution is careful to dispel any notion that autonomy is thereby being put aside. On such occasions — as when declaring a state of war or acting as a board of canvassers for presidential and vice-presidential elections — the Constitution is careful to warn that, even in joint session, they should vote separately. Similarly, under the 1935 Constitution, since the Constitution said that when proposing amendments Congress should be 'in joint session assembled,' the Constitution was careful to specify that, even then, the two houses should vote 'separately.'[195]

With respect to the single instance in which the Constitution provides for a joint vote by Congress, that is, when revoking or extending the

190. PHIL. CONST. art. XVI, § 23 (1).

191. PHIL. CONST. art. XII, § 4.

192. PHIL. CONST. art. XII, § 9.

193. PHIL. CONST. art. XII, § 11.

194. PHIL. CONST. art. XII, § 18.

195. Joaquin G. Bernas, *Separate Voting, No Joint Session*, TODAY, Aug. 20, 1997, at 6.

proclamation of martial law or suspending of the privilege of the writ of *habeas corpus*, the same is justified by the extraordinary circumstances surrounding said proclamation or suspension. Thus, in response to Commissioner Francisco Rodrigo's remark during the deliberations of the 1986 Constitutional Commission that a bicameral Congress must always vote separately, Fr. Bernas had the following to say:

> I quite realize that that is the practice and, precisely, in proposing this, I am consciously proposing this as an exception to this practice because of the tremendous effect on the nation when the privilege of the writ of *habeas corpus* is suspended and then martial law is imposed. Since we have allowed the President to impose martial law and suspend privilege of the writ of *habeas corpus* unilaterally, we should make it a little more easy for Congress to reverse such actions for the sake of protecting the rights of the people.[196]

It can hardly be said that the same exigency exists in the matter of proposing amendments to, or a revision of, the Constitution.

Having thus upheld the validity of the Drilon formula insofar as separate voting is concerned, it would be worthwhile to delve into the history and spirit of the 1987 Constitution to shed more light on the soundness of a bicameral reading of the amendatory process under Article XVII, Section 1(1).

The 1987 Constitution was framed following the conclusion of the 1986 EDSA Revolution and as a reaction to decades of dictatorial rule wherein one man wielded nearly all powers of government. With the Marcos administration and people power fresh in the minds of the people, the members of the 1986 Constitutional Commission took pains to ensure limited powers for the president, checks and balances among the three branches of government, and the mechanism to prevent a president from exercising power to perpetuate himself/herself in office. Being a reaction to the Marcos dictatorship, the 1987 Constitution was borne of the conviction that the excesses of government can be effectively checked.

It is in this context that a bicameral legislature was adopted by the 1986 Constitutional Commission. The debates of said Commission reveal the following advantages of bicameralism: (1) an upper house would be more directly representative of the overall interest of the people; (2) two houses would produce a healthy check upon each house regarding hasty legislation; (3) abuse of power is more unlikely to be done and two houses would be less vulnerable to attempts of the executive to control the legislature. The Senators, having a nationwide mandate, can therefore face a strong Executive with an equal strength, and a balance and harmony between the two departments can be truly achieved.[197]

196. 2 RECORD OF THE 1986 CONSTITUTIONAL COMMISSION 493 (1986) [hereinafter 2 RECORD].

The existence of an upper chamber serves as a check on the passage of haphazard legislation. Admittedly, it requires thorough deliberation and caution in the consideration of proposed measures, thus avoiding hasty and rash legislation. With the existence of only one chamber in any legislative body, it is safe to presume at times that measures are passed, not only in the height of passions, caprice and intrigues by the party to which the proponent of the measures belongs, but also on purely personal considerations. In view of the surrounding circumstances which lead to the passage of any proposed measure under a unicameral system, it will be found that the measure thus passed is defective or else unwise, something which would not have happened in the majority of cases were there a second chamber modifying, retarding and checking the actions of the other chamber, thus permitting time for reflection, conscientious study and deliberation of any proposed measure.[198]

Bicameralism will protect the individuals from the tyranny and despotism of only one chamber. Legislative bodies are bent on accumulating powers in their hands at the risk and expense of the other governmental organisms of the State. This tendency can only be overcome by the existence of another chamber, as the ambition of one against the other serves as a balance to temper the course of human events. An imposition of tyranny upon the people could be frustrated as any move to this effect would require the approval of the two houses instead of only one.[199]

Because of the system of checks and balances inherent in a bicameral set-up, a bicameral approach to the Congressional exercise of constituent powers will prevent hasty and ill-considered proposals for constitutional amendment before the same is submitted to the electorate for approval, especially considering that, as Fr. Bernas himself recognizes, a proposed amendment or revision is hardly ever rejected by the electorate. This is shown by the Philippines' constitutional history where the people have always ratified whatever is presented to them for their approval. The people's participation in the plebiscite is oftentimes limited to the mere casting of votes in favor of or against the proposal presented.

Hence, making Congress a bicameral constituent assembly and requiring a separate vote will safeguard the abovementioned values that it strives to protect and will curtail the evils that bicameralism seeks to prevent.

197. *Id.* at 4.

198. 5 RECORD OF THE 1934 CONSTITUTIONAL CONVENTION (1934).

199. *Id.*

D. *The Cruz Formula*

Below are the arguments in support of a joint session and joint voting. Regarding the former, this author agrees, but with the latter, it is submitted that said arguments favoring joint voting are weak, in light of the bicameral set-up of Congress.

1. On Joint Session

Article XVII, Section 1 of the 1987 Constitution provides that any amendment to, or revision of, this constitution may be proposed by congress upon a three-fourths vote of al its members. The provision was merely lifted from the text of the 1973 Constitution which provided in its Article XVI, Section 1:

> Any amendment to, or revision of, this Constitution may be proposed by the Batasang Pambansa by a vote of three-fourths of *all its Members*, or by a constitutional convention. The National Assembly 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.[200]

The said provision did not have to require that Batasang Pambansa assemble in joint session due to the fact that it was a unicameral body.

The provision on constitutional amendment under the 1973 Constitution was similar to the amendatory provision contained in the original 1935 Constitution which provided for a unicameral legislature, reading thus:

> The National Assembly, by a vote of three fourths of *all its Members*, 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.[201]

Again, the Constitution did not have to specify the manner by which the National Assembly was to deliberate on proposed amendments, the same being one body.

In 1940, the 1935 Constitution was amended to provide for a bicameral Congress. Necessarily the amendatory provision had to be changed. The new provision stated:

> 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.[202]

200. 1973 PHIL. CONST. art. XVI, § 1 (superseded 1987) (emphasis supplied).

201. 1935 PHIL. CONST. art. XVI, § 1 (superseded 1987) (emphasis supplied).

It will then be observed that when the legislature is of a unicameral nature, the Constitution mandates only a three-fourths vote of all its Members for purposes of proposing amendments to the Constitution, without further mention of *how* said body is to sit down and deliberate on the same. This is the natural consequence due to the existence of only one body. On the other hand, when the Constitution provides for a bicameral legislature, the same charter sets forth in specific terms that Congress shall assemble in joint session due to the existence of two chambers.

However, the amendatory provision in the present Constitution, as worded, does not specifically indicate if Congress is to jointly assemble. The provision merely requires a three-fourths vote of *all* the members of Congress, a directive peculiar to constitutions which provide for a unicameral legislature. But the present Constitution ordains a bicameral legislature, hence an ambiguity presents itself.

Since Article XVII, Section 1(1) of the present Constitution does not specify if Congress is to convene in joint session when proposing constitutional amendments, it may be argued that silence evinces an intention on the part of the framers of the 1987 Constitution to authorize a joint assembly of both houses of Congress in the same manner that the Batasang Pambansa was to convene in joint session under the 1973 Constitution.

The validity of a joint session is also supported by the fact that Congress does not cease to be bicameral by the mere act of coming together in joint session, as opined by Fr. Bernas. The two chambers of Congress are not stripped of their autonomy by simply convening in joint session to deliberate on charter amendments. In fact, the present Constitution provides for certain cases in which Congress is to meet in joint session, such as in declaring a state of war or in canvassing the votes for President and Vice-President. In these instances, the Congress does not lose its bicameral nature, for the Constitution is always quick to provide that the two houses vote separately.

The deliberations of the 1986 Constitutional Commission as to the amendatory procedure provide another basis for arguing in favor of a joint session. The Report of the Committee on Amendments and Transitory Provisions of the 1986 Constitutional Commission contained the following proposal for what was to become Article XVII of the 1987 Constitution:

> ARTICLE ___

202. 1935 PHIL. CONST. art. XV, § 1 (superseded 1987) (emphasis supplied).

AMENDMENT OR REVISION

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

a. *by the National Assembly upon a vote of three-fourths of all its members;* or

b. by a constitutional convention; or

c. directly by the people themselves thru initiative as provided for in Article __ Section __ of the Constitution.

Section 2. The National Assembly 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.

Section 3. Any amendment to, or revision of this Constitution shall be valid when ratified by a majority of the votes case in a plebiscite which shall be held not earlier than sixty days and not later than ninety days after the approval of such amendment or revision.[203]

Commissioner Florenz Regalado expressed his observation that Sections 1 and 2 of the proposal is grounded on the assumption that the Commission would decide on a unicameral legislature similar to that ordained in the 1973 Constitution. In response to this observation, the members of the Committee clarified that in the event that the 1986 Constitutional Commission settle for a bicameral system, the Committee on Amendments and Transitory Provisions prepared contingency proposals or resolutions to the effect that the proposal will be made to read that the voting of the two chambers will be made in joint session assembled.

It may not be remiss to quote the deliberations of the 1986 Constitutional Commission on this matter:

MR. REGALADO: With respect to this clause which says:

[O]r by a majority vote of all its Members, submit the question of calling such a convention to the electorate. [W]ould this be in the nature of a referendum?

MR. SUAREZ: It could partake of the character of a referendum, except that the word "electorate" would point to the system of election.

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 propose to include the words IN JOINT SESSION ASSEMBLED.*

203. 1 RECORD OF THE 1986 CONSTITUTIONAL COMMISSION 371 (emphasis supplied).

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

MR. SUAREZ: The Commissioner is right.[204]

The debates which ended with the approval of the amendatory process took place mainly on 8 and 9 July 1986, in the context of a unicameral assembly. However, the debates which took place mainly on 21 July 1986, ended with the approval of a bicameral Congress composed of a Senate and a House of Representatives. The final version of the provision that was approved and ratified by the people in the plebiscite of 2 February 1987 reads:

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

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

(2) A Constitutional Convention.[205]

The phrase "in joint session assembled" cannot be found anywhere in the final version. The "contingency" mentioned by Commissioner Suarez during the deliberations of the 1986 Constitutional Commission on the draft of said provision failed to materialize. But since it is a matter of record that a bicameral Congress was subsequently adopted by the Commission, it may be argued that the contingency proposal that Congress be made to convene in joint session assembled – should bicameralism be approved – must be deemed to be the controlling intent of the framers.

2. On Joint Voting

Those who favor a joint vote would invoke the principle that the intent of the framers and of the people in adopting the Constitution is to be found from a study of the document itself. The court, therefore, in construing a constitutional enactment, is usually said to be limited to the language of the enactment itself. It may not be governed by what the framers may have meant to say, but is of necessity controlled by what they actually said.[206] It is their responsibility and duty to ascertain the meaning of the Constitution as written, neither adding to nor subtracting from it, neither deleting nor distorting it.[207]

Based on these rules, advocates of joint voting would thus posit that the wording of the amendatory provision as finally embodied in Article XVII, Section 1(1) of the present Constitution, sans an express indication that Congress shall vote separately, evinces an intent to retain the essence of the

204. *Id.*

205. PHIL. CONST. art. XVII, § 1 (emphasis supplied).

206. 16 AM JUR. 2d *Constitutional Law* § 105 (1979).

207. DE LEON, *supra* note 183, at 15 (citing Ranking v. Love 232 P. 2d, 998).

same amendatory provision as contained in the 1973 Constitution from which the present amendatory provision was lifted. And under the 1973 Constitution, a joint vote was contemplated pursuant to the unicameral nature of the legislature, the idea of a separate vote finding no application in a unicameral set-up. Hence, the 1973 Constitution merely had to provide that the Batasang Pambansa may introduce constitutional amendments upon a three-fourths vote of *all its Members.*

As distinguished from the 1973 provision, the 1935 Constitution[208] expressly provided that the Congress shall go about proposing constitutional amendments upon a three-fourths vote of the two Houses, voting separately, in light of the bicameral system of government then existing. The 1935 Constitution necessarily had to indicate how a legislature with two houses was to undertake its task of suggesting constitutional amendments.

Pursuant to this pattern in constitution writing, the proponents of joint voting would then say that it would have been expected of the drafters of the 1987 Constitution to specify the method in which the Congress, a bicameral body, is to exercise its constituent powers in the same manner that the 1935 Constitution so specified. But the events that transpired during the 1986 deliberations of the Constitutional Commission reveal a failure to include a provision on joint assembly and joint vote in the present text of Article XVII, Section 1(1), despite the fact that the matter was passed upon during the deliberations of 8 July 1986. This circumstance is then made to trigger the applicability of the following principles in constitutional construction:

> A court has no right to insert any clause in the Constitution which is not expressed and cannot be fairly implied. And if inconsistent intention is to be avoided in construing the express provisions of a constitution, it is certainly not permitted to imply an intention that conflicts with a definite and express intention. An implication will not be read into a constitutional amendment where prior similar amendments contain express provisions regarding the matter in question.[209]

In the interpretation of a constitutional provision, the omission of a particular phrase is a circumstance to be considered, in ruling against the meaning the phrase would give the provision, particularly where such phrase is used in other constitutional provisions.[210] In this regard, the supporters of joint voting would point out that while Article XVII, Section 1(1) of the present Constitution does not specify if the two Houses of Congress shall vote jointly or separately, the voting rules on other matters in the same Constitution are quite explicit.

208. The amendment was made in 1940.

209. 16 AM JUR. 2d *Constitutional Law* § 107 (1979).

210. *Id.*

Thus, Article VI, Section 23 (1) provides that "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."[211]

Under Article VII, Section 4, in case two or more presidential or vice-presidential candidates "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 both Houses of the Congress, *voting separately*."[212]

Article VII, Section 9 also states that "[w]henever 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*."[213]

In addition, Article VII, Section 11 reads: "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."[214]

Lastly, Article VII, Section 18 provides that when the President proclaims martial law or suspends the privilege of the writ of *habeas corpus*:

> [T]he 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 aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it.[215]

It is opined, however, that the controlling standard for resolving the question on how Congress is to vote on amendment proposals is the bicameral structure given by the Constitution to Congress. The arguments given in favor of a joint vote work are founded mainly on the silence of the Constitution on the matter. Hence, resort was made to such tools for construction as the constitutional text *vis-à-vis* the intent of the framers. But these arguments are weak in the face of the constitutional structure and

211. PHIL. CONST. art. VI, § 3(1) (emphasis supplied).

212. PHIL. CONST. art. VII, § 4 (emphasis supplied).

213. PHIL. CONST. art. VII, § 9 (emphasis supplied).

214. PHIL. CONST. art. VII, § 11 (emphasis supplied).

215. PHIL. CONST. art. VII, § 18 (emphasis supplied).

architecture of the government which, according to Tribe, are those which the text *shows* but does not directly *say*.

As earlier discussed, the present Constitution ordains a bicameral legislature under Article VI, Section 1 which states that "...the Congress of the Philippines...shall consist of a Senate and a House of Representatives." Consistent with the bicameral design of Congress are constitutional provisions mandating a separate vote by the two chambers of Congress when deciding an issue, such as declaring a state of war, breaking a tie in Presidential elections, voting for a substitute Vice-President, and declaring the incapacity of the President. Hence, with the exception of the case wherein Congress votes to revoke or extend martial law, it is apparent that the structure of the Constitution itself reveals that separate voting is the general rule.

A joint vote would obviously violate the bicameral nature of Congress as established by the Constitution. Such repugnancy to the Constitution constitutes grave abuse of discretion, for bicameralism means two houses acting autonomously of each other and occasionally checking each other. It means separate decision-making.

Although the author is still of the firm belief that a joint vote is not warranted by the Constitution and the bicameral structure of Congress, the following exposition on the merits of a unicameral approach, as would be espoused by the advocates of joint voting, based on the history and spirit underlying the present Constitution, is worth glossing over.

It should be noted that the new government of then Pres. Corazon Aquino was installed through the people's power — both in its active essence expressed by the actual demonstration of people's support during the revolution, and in its passive essence, manifested by the general affirmation, acquiescence and allegiance of the people. Thus, this Government was of revolutionary origin. The Government was established by the people, and to which the vast majority of the citizenry owed their allegiance, giving truism to the principle that the only sovereign in a democratic state is the people, and it is only from them that government authority emanates.[216]

With the collapse of the Marcos administration, a new administration based on more democratic traditions was founded upon the leadership of President Aquino. The new government was described by Neptali Gonzales as a "civil government, revolutionary in origin and nature, democratic in essence and transitory in character."[217] The new government is also a constitutional government even by the definition of noted constitutionalists. Malcolm says, "a constitutional government is one whose fundamental rules

216. ALEXANDER P. AGUIRRE, A PEOPLE'S REVOLUTION OF OUR TIME 79 (1986).

217. CESAR P. POBRE, PHILIPPINE LEGISLATURE: 100 YEARS 272 (2000).

or maxims not only locate the sovereign power in individuals or bodies designated or chosen in some prescribed manner, but also define the limits of its exercise so as to protect individual rights, and shield them against the assumption of arbitrary powers."[218]

It was thus in the spirit of "people empowerment" and democracy that the 1987 Constitution was subsequently framed, as a reaction to 20 years of oppressive dictatorship under the Marcos regime. The thrust was then towards giving more meaning to the sovereignty of the people.

In this connection, the 1987 Constitution contains the following preamble:

> We, the *sovereign Filipino people*, imploring the aid of Almighty God, in order to build a just and humane society and establish a Government that shall embody our ideals and aspirations, promote the common good, conserve and develop our patrimony, and secure to ourselves and our posterity the blessings of independence and *democracy* under the rule of law and a regime of truth, justice, freedom, love, equality, and peace, do ordain and promulgate this Constitution.[219]

In addition, the present Constitution declares as a basic governmental policy that "[t]he Philippines is a democratic and republican state. Sovereignty resides in the people and all government authority emanates from them."[220] Since the ultimate law in the Philippine system is the Constitution, sovereignty, understood as legal sovereignty, means the power to adopt or alter a constitution. This power resides in the "people," understood as those who have a direct hand in the formulation, adoption, and amendment or alteration of the Constitution.[221]

The Constitution thus institutionalized people power in a more concrete manner through the methods of initiative and referendum, as well as recall. The EDSA Revolution restored the reality that the people's might is not a myth.[222]

Learning from the bitter lesson of completely surrendering to Congress the sole authority to make, amend or repeal laws, the present Constitution concurrently vested such prerogatives in the electorate by expressly recognizing their residual and sovereign authority to ordain. Thus, the Supreme Court itself declared:

218. AGUIRRE, *supra* note 216, at 79-80.

219. PHIL. CONST. Preamble (emphasis supplied).

220. PHIL. CONST. art. II, § 1.

221. BERNAS, *supra* note 24, at 50.

222. Garcia v. COMELEC, 227 SCRA 100 (1993).

> For the first time in 1987, the system of people's initiative was thus installed in our fundamental law.... [T]he framers of our 1987 Constitution realized the value of initiative and referendum as an ultimate weapon of the people to negate government malfeasance and misfeasance and they put in place an overarching system. Thus, thru an initiative, the people were given the power to amend the Constitution itself [Sec. 2, Art. XVII]. Likewise, thru an initiative, the people were also endowed with the power to enact or reject any act or law by congress or local legislative body [Sec. 1 and 32, Article VI]. [223]

On the other hand, recall, which is a mode of removal of a public officer by the people before the end of his term of office, is expressly provided under Article X, Section 3 of the 1987 Constitution.[224] It has been said that the people's prerogative to remove a public officer is an incident of their sovereign power. It is frequently described as a fundamental right of the people in a representative democracy.[225]

The supporters of joint voting would maintain that a unicameral reading of Article XVII, Section 1(1) is more consistent with the spirit of the 1987 Constitution which institutionalized people power, popular sovereignty and direct democracy. They invoke the merits of a unicameral system of government, and thus find the following discourse by Fr. Bernas enlightening:

> I would like to place our discussion of unicameralism or bicameralism in the context of an ongoing revolution. We have been called to this Commission by a revolutionary government to the extent that it is a government that is a product of the February revolution. And very much in the air these days are phrases like 'people power,' 'revolutionary Constitution,' 'social justice,' 'those who have less in life have more in law,' 'decentralization.' Therefore, what we are trying to formulate here is a constitution that will set up the structures capable of continuing the goals of the revolution.
>
> It is commonly said that the revolution of February was primarily a political revolution. It was a revolution that released us from the political oppressions that were institutionalized under the old regime; and last week we completed what may be characterized as the most liberal Bill of Rights this nation has ever had and to that extent, it was a further affirmation of the solid ground upon which the success of the political revolution rests. But it is also said that we still have to complete a social revolution.

223. Garcia v. COMELEC, 237 SCRA 279 (1994).

224. The provision states:

> The Congress shall enact a local government code which shall provide for a more responsive and accountable local government structure instituted through a system of decentralization with effective mechanism of recall, initiative, and referendum....

225. *Garcia*, 227 SCRA at 108.

> And if we look at the Bill of Rights and the many proposals that are being made in this Commission, we will see that, among the political guarantees, we find guarantees which by themselves are self-executory. But when it comes to the guarantees of social and economic rights, the farthest we can go is to set goals for future legislatures to attain. And therefore, what we are looking for is a legislature that will be capable of attaining the social and economic goals precisely because we, as a Constitutional Commission, cannot legislate fully effective means for attaining these social and economic goals. In order for this legislature to be able to push these social and economic goals, it must be a legislature that is not insulated from the pressures of people power, and the more than 70 percent of the underprivileged masses.
>
> If we look at a legislative body and the nation, essentially, the Upper House is a House that is insulated from the pressures below. It is generally a House that is protective of moneyed interests and propertied interests. And if we look at the formation itself of the federal government of the United States, the shift from isolated stage to a federated government was a move among the propertied classes to move government away from the people so that it could be less subject to the pressures from below, from the poor, the farmers and the debtors.
>
> We have had a social justice provision in our Constitution since 1935. We amended the social justice provision in 1971. We are again going through a process of formulating social justice provisions, but I think this Commission will not legislate. It will only set social justice goals. And so we must give our nation a legislature that is susceptible to the pressures of people power. And they will be susceptible to the pressures of people power, if they are forced to interact with their constituency so that if they lose in one constituency, they cannot recoup their gains in another constituency, where they will not be well known. In that sense, a unicameral body can be more democratic, more capable of achieving this economic and social revolution which we want to attain....
>
> If I may summarize, I would put it this way: What we need today is the completion of a peaceful social and economic revolution. Therefore, what we need is a body that is not removed from those who will benefit from this revolution. And a unicameral body, representative of the people and elected by constituencies, is in a better position to reflect the sentiments of the masses of the underprivileged. [226]

In view of the foregoing discussion by Fr. Bernas, the proponents of joint voting would hold that proposals for constitutional amendments obtained through a joint, unicameral vote would better reflect the sentiments of the Filipino people since a majority of the votes would be obtained from members of the House of Representatives who represent identified areas of

226. 2 RECORD, *supra* note 196, at 57-58. This discourse was delivered on July 21, 1986 during the debate that ensued in the discussion of the Constitutional Commission as to whether a unicameral legislature was to be adopted.

the country and are more attuned to local problems. In this sense, the unicameral vote is said to be more democratic and more responsive to the desires of the people.

The advocates of joint voting would stress that the power of Congress to introduce amendments to or revisions of the Constitution is merely derivative, and that constituent power is part of the inherent powers *of the people* — as the source of sovereignty in a democratic government such as ours — to make, and hence, to amend their own fundamental law. It is then argued that it is necessary to find some sort of people's participation for every mode of introducing amendments to, or revision of the Constitution if we are to adhere to the principle that in a democratic and republican state such as ours, sovereignty resides in the people and all government authority emanates from them.

Note first the following provisions of the 1987 Constitution on amendments and revision in Article XVII thereof:

> SECTION 1. Any amendment to, or revision of, this Constitution may be proposed by:
>
> (1) The Congress, upon a vote of three-fourths of all its Members; or
>
> (2) A constitutional convention.
>
> SECTION 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 each legislative district must be represented by at least three *per centum* of the registered votes 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.
>
> SECTION 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.
>
> SECTION 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 in Elections of the sufficiency of the petition.

As above provided, there are three modes of proposing constitutional amendments, namely, by the Congress, by a constitutional convention, and by people's initiative. Observe from the aforequoted provisions that for each of these three modes, introducing amendments involves a two-step process:

1. If by Congress, (a) a three-fourths vote of *all its Members* is to be obtained, then (b) the amendment/revision is to be ratified by a majority of the votes cast in a plebiscite.
2. If by constitutional convention, (a) Congress may call the same by a two-thirds vote of *all its Members*, or by a majority vote of *all its Members*, submit to the electorate the question of calling such a convention, then (b) the amendment/revision is to be ratified by a majority of the votes cast in a plebiscite.
3. If by initiative, (a) a petition of at least twelve *per centum* of the total number of registered voters, of which each legislative district must be represented by at least three *per centum* of the registered voters therein, is to be obtained, then (b) the amendment/revision is to be ratified by a majority of the votes cast in a plebiscite.

If the separate voting by both Houses of Congress in the first method is upheld, supporters of the joint vote would reason out that we would in effect be converting the matter of introducing amendments into a three-step process, that is: (a) obtaining a three-fourths vote from the House of Representatives, (b) obtaining a three-fourths vote from the Senate, (c) ratifying the proposed amendments via plebiscite. If this process is to be followed, there are more chances of frustrating the will of the sovereign as represented by Congress, because of the need to gather the required number of votes from not just one but two bodies: the Senate and the House of Representatives. In the event that the requisite number of votes is not procured in one House, the desire of the people to change the charter is thereby frustrated.

They observe further that of the three modes of proposing constitutional amendments or revision, it is Congress as a constituent assembly – the first mode – that has the least element of people participation. The participation of the people herein is limited to mere attendance and participation in the public hearings conducted at the committee level of consideration of a proposal and to ratifying whatever proposals are approved by Congress. The recommendations embodied in the position papers submitted during the public hearings are merely recommendatory and may even be discarded by the Committee concerned.[227] Likewise, their participation in the ratification of the approved proposals is limited to accepting or not accepting said

227. Dehlma Rhizza S. Patriarca, *Examining the Drilon Proposal: Congress as a Bicameral Constituent Assembly* 63-64 (2000) (unpublished J.D. thesis, Ateneo de Manila University School of Law) (on file with the Ateneo Professional Schools Library).

proposals. It is then with more reason that the sovereign will be expressed more easily and more effectively, and this can be achieved by requiring a joint vote rather than a separate vote which will entail more delay and will admit more possibility of a deadlock.

It is opined, however, that the bicameral structure of Congress as enshrined in the Constitution, is a standard higher than historical considerations or the political identity of the nation. For a resort to the structure of Congress as an aid in interpreting Article XVII, Section 1 of the Constitution is actually a resort to what the same Constitution expressly provides, which is bicameralism. And the Constitution, lest we forget, is the supreme law of the land. It is the highest authority in the Philippine legal system. Since the text of the Constitution is clear on this point, there is no need to invoke external aids to construction such as the history and spirit behind the Constitution.

VII. CONCLUSION

It is inevitable that changes to the present Charter will be introduced. As to when this will take place, however, is still a matter left to speculation. As far back as 1988, the movement to amend the 1987 Constitution already seized the minds of our lawmakers, but to this day none of their efforts have materialized. But if charter change is to be successfully undertaken, a clarification of some procedural preliminaries must first be accomplished.

One such issue to be hurdled is the proper method by which Congress is to exercise its constituent functions. The problem is that we have a bicameral Congress authorized to be a constituent assembly according to an amendatory provision that is more suitable for a unicameral body. Article XVII, Section 1(1) of the 1987 Constitution provides: "Any amendment to, or revision of, this Constitution may be proposed by Congress, upon a vote of three-fourths of *all its Members*." The provision is but an exact copy of the amendatory provision in the 1973 Constitution which ordained a unicameral legislature. In contrast, the 1935 Constitution's version of the amendatory procedure that was apt for a bicameral body is as follows: "The Congress *in joint session assembled*, by a three-fourths vote of all the Members of the Senate and of the House of Representatives, *voting separately*, may propose amendments to this Constitution."

Unlike the 1935 Constitution, our charter today says nothing about a "joint session" nor is there a mention of "voting separately." The following issues are thus addressed in this study of proposing amendments to the Constitution. First, must Congress meet in joint session? And second, how is Congress to vote?

Conflicting opinions on this matter have arisen. As early as 1997, Sen. Franklin Drilon argued in favor of separate sessions and separate voting.

Former Supreme Court Justice Isagani Cruz, on the other hand, espouses a mandatory joint session and a mandatory joint vote.

This Note holds the position that whether or not Congress must convene in joint session when considering amendment proposals is a political question. On the other hand, whether or not Congress should vote jointly or separately is a justiciable question.

The question on joint session is political in nature following the three strands of the political question doctrine laid down in *Baker v. Carr*, known as the textual approach, the functional approach, and the prudential approach.

Under the *textual* approach, which is applied when there is a "textually demonstrable constitutional commitment of the issue to a political department," it is submitted that the silence of the Constitution regarding the necessity or permissibility of a joint session evinces an intention to leave the matter to the determination of Congress. The reason for this is that where the Constitution grants a specific power without any qualification or limitation, or without prescription as to its method of exercise, the manner by which the concerned department of government chooses to exercise said power is a matter involving the wisdom, not legality, of the questioned governmental act. Consequently, the matter is beyond the ambit of judicial review.

Under the *functional* approach, which considers the "lack of judicially discoverable and manageable standards for resolving the question," the author maintains that since the Constitution is silent as to whether there is a need for a joint session, there remains no standard by which to test the validity of whatever Congress will decide on, be it to come together in joint session or not.

Having thus determined that the issue on joint session is purely a matter to be left to the discretion of Congress following the classical/textual and functional views, the courts are prevented from passing judgment on the same on prudential considerations, there being an impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government, or an unusual need for unquestioning adherence to a political decision already made, or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The proponent advances that while the matter of coming together in joint session is a political question, the question as to how Congress must vote on proposed constitutional amendments is a justiciable one. Although the present Constitution is likewise silent on the method by which the requisite three-fourths vote is to be obtained, it is contended that there exists a standard by which the courts can be guided in resolving this issue. This

standard is to be found in the *constitutional structure* and the *architecture of the government* established by the Constitution.

Following this structural approach, it submitted that the governing standard by which courts can be guided in determining how Congress is to vote on amendment proposals is the bicameral structure of Congress. This bicameral structure is ordained by the 1987 Constitution in Article VI, Section 1 which provides that "[t]he legislative power shall be vested in the *Congress* of the Philippines which shall *consist of a Senate and a House of Representatives.*"

It is true that the Constitution is silent both as to the manner by which Congress is to conduct its sessions and the manner by which it is to vote on amendment proposals. But while the necessity/permissibility of joint session is a political question, the manner of voting is a justiciable one. Why the difference? As pointed out earlier, there exists a standard by which the courts can be guided in determining the matter of voting, and that standard is the bicameral structure of Congress. Using this standard, it then follows that in keeping with the bicameral nature of Congress, the rule must be separate voting. On the other hand, the same standard of bicameralism cannot be used in determining whether or not a joint session is required or not. For these reasons, the question that ought to be asked is why the distinction?

According to Fr. Bernas, the distinction lies in the fact that Congress does not cast off its bicameral nature by the mere fact of assembling in joint session. It is the operative act of two houses voting separately on an issue that gives bicameralism its essence. The autonomy or independence of each house is preserved by separate decision-making regardless of how the preliminary act of deliberating is done. The hallmark of bicameralism is separate decision-making, not necessarily separate discussion or deliberation.

In view of the propositions advanced as to the political character of the question on the need for a joint session and the justiciability of the question on the manner of voting, the author makes the following conclusions: *First*, since the issue on joint session is a political question, Congress is free to choose between convening in joint session or not. Since Congress is thereby given full discretionary authority on the matter, it is submitted that no grave abuse of discretion can be imputed to Congress should it decide on either option. *Second*, since the issue on voting is a justiciable question, the controlling standard being the bicameral structure of Congress, *the rule is necessarily separate voting*. It would thus be grave abuse of discretion for Congress to insist on a joint vote.

Following the above conclusions, the Drilon formula and the Cruz formula are evaluated as follows: The twin elements of *separate sessions* and *separate voting* under the Drilon formula are both acceptable approaches to Congress' exercise of its constituent powers under Article XVII, Section 1(1)

of the Constitution. With respect to the Cruz formula, the element of *joint session* is sound whereas the element of *joint voting* is not.

The issues laid down in this note involve constitutional interpretation and, until we get a definitive ruling from the Supreme Court, the matter will remain unresolved. This Note has attempted to anticipate how the Supreme Court will rule on the issue, and has endeavored to provide standards by which the Court may be guided should it be tasked to review the procedural dilemma herein presented.