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1. This was delivered by Fr. Joaquin G. Bernas, S.J. at The Fifth Jaime V. Ongpin Annual Memorial Lecture on Public Service in Business and Government, 27 October 2006, Friday, 9:00 AM – 11:15 AM, Veritas, 4/F Ateneo de Manila University Professional Schools, 20 Rockwell Drive, Rockwell Center, Makati City.
2. Fr. Bernas said this was also published in two parts in a newspaper, the first half published before the JVO 5 lecture on 27 Oct, 2006, and the second half after the lecture.
3.

THE CHARTER CHANGE CHALLENGE
Process and Substance

J.G.Bernas, S.J.

Let me begin this discussion of charter change with a brief summary of our history of constitutional changes. We have already gone through the process three times before but perhaps not with as much divisiveness as now.

The first time was in 1934-35 when our leaders, under the leadership of Claro M. Recto, drafted the 1935 Constitution. The event was a much awaited moment in our colonial history when at last the Filipino people were allowed by the American masters to draft their own Constitution. However, there was something in the drafting of the Constitution which was later to rankle the feelings of nationalist hearts, namely the fact that, before the work of the Constitutional Convention could be presented to the Filipino people for ratification, it had first to be presented to the President of the United States for him to check whether the document conformed with the terms of the authorization given by the United states Congress. It was partly this fact which fed into the movement for a new Constitution by the late sixties.

Philippine Independence came on July 4, 1946. The Philippine Republic continued to operate under the Constitution formulated in 1934-1935. Many felt a certain unease in that an independent republic should continue to operate under what some called the Roosevelt Constitution. Gradually, therefore, the agitation for a thorough overhaul of the 1935 Constitution gathered momentum. Thus, on March 16, 1967, the Philippine Congress, pursuant to the authority given to it by the 1935 Constitution, passed Resolution No. 2 (later amended by Resolution No. 4 passed on June 17, 1969) calling

for a Convention to propose amendments to the Constitution. Election of Delegates to the Convention were held on November 20, 1970, and the 1971 Constitutional Convention began on June 1, 1971.

Before the Constitutional Convention could finish its work, however, martial law was imposed on the entire Philippines on September 21, 1972. Even as some delegates were placed under detention and others went into hiding or voluntary exile, the Constitutional Convention continued its deliberations under an atmosphere of fear and uncertainty. At any rate, on November 29, 1972, an enfeebled Convention approved its Proposed Constitution of the Republic of the Philippines. It became the law of the land by presidential fiat and was confirmed by a captive Supreme Court in *Javellana v. Executive Secretary*.

The 1973 Constitution ended the same way that it started -- unceremoniously. People Power ended it in February 1986.

President Aquino could have made herself subject to the provisions of the 1973 Constitution by allowing herself to be proclaimed by the Batasan. She chose instead to govern under a Provisional Constitution promulgated by her and designed to enable her to meet the people's challenge. At the same time she called for a Constitutional Commission to draft a new Constitution.

The 1986 Constitutional Commission convened on June 1, 1986 and finished its work on October 15, 1986. A plebiscite, held on February 2, 1987, overwhelmingly ratified the new Constitution by some seventeen million votes.

The 1987 Constitution has now been in operation for more than nineteen years. The government it set up has survived several coup attempts. Has the time come for us to retire the 1987 Constitution? Clearly there are elements who think so.

The first serious challenge to the 1987 Constitution happened during the presidency of Fidel Ramos. It was generally perceived that what politicians found most objectionable about the 1987 Constitution were the term limits imposed on both national and local elective officials. The instrument chosen for putting an end to term limits was the amendatory process found in the new Constitution which authorized amendment by initiative and referendum. However, the move to amend the Constitution fizzled out

when the Supreme Court, in *Defensor Santiago v. Comelec* ruled that, in the absence of an implementing law passed by Congress as required by the Constitution, initiative and referendum could not be used.

Defensor v. Santiago highlighted a major challenge that has plagued constitutional change so far – the challenge of interpreting the Constitutional provision on charter change. The challenge of interpretation has prevented a serious debate on the more important challenge – the challenge of substantive constitutional reform.

I shall discuss first the challenge of interpretation and second the substance of the constitutional change being proposed..

The Challenge of Constitutional Interpretation.

There are three ways in which constitutional change can be proposed to the people for ratification: through a Constitutional Convention, through Congress, and through initiative and referendum. None of these, however, can begin without the initial participation of Congress. It is Congress that calls a Constitutional Convention. Congress by itself can also propose constitutional change. Initiative and referendum cannot get going unless Congress passes an implementing law. All three present constitutional interpretation problems.

Two days ago the Supreme Court resolved the first major interpretation issue through *Lambino v. Comelec.* I believe that you are all familiar with the general outline of the controversy revolving around the issue whether the shift to a unicameral parliamentary form of government may be achieved through initiative and referendum.

The main opinion was written by Associate Justice Antonio Carpio. In the opening salvo in the opinion Justice Carpio pointed to the fatal defect of *Sigaw*: "The Lambino Group miserably failed to comply with the basic requirements of the Constitution for conducting a people's initiative."

Let me just summarize the main points made by Justice Carpio.

First, the Lambino group failed to satisfy the basic requisite of Section 2 of Article XVII. "The essence of amendments 'directly proposed by the people through initiative upon a petition' is that the entire proposal on its face is a petition by the people. This means two essential elements must be present. First, the people must author and thus sign

the entire proposal. No agent or representative can sign on their behalf. Second, as an initiative upon a petition, the proposal must be embodied in a petition." This was not followed by the Lambino group. Instead the proposal was drafter by Lambino and company but it was not presented in full for the people to affix their signature.

As a consequence, the people who signed could not have known the hidden and deceptive provisions. For instance, they could not have known that (1) The term on members of the legislature would be lifted and thus members of Parliament could be re-elected indefinitely; (2) that The interim Parliament would continue to function indefinitely until its members, who are almost all the present members of Congress, should decide to call for new parliamentary elections; thus, the members of the interim Parliament would determine the expiration of their own term of office; (3) and that within 45 days from the ratification of the proposed changes, the interim Parliament should convene to propose further amendments or revisions to the Constitution.

Second, Carpio said that initiative could not be used for revision but only for amendment and that what was being proposed was a revision. "By any legal test and under any jurisdiction, a shift from a Bicameral-Presidential to a Unicameral-Parliamentary system, involving the abolition of the Office of the President and the abolition of one chamber of Congress, is beyond doubt a revision, not a mere amendment. On the face alone of the Lambino Group's proposed changes, it is readily apparent that the changes will radically alter the framework of government as set forth in the Constitution."

Carpio also summed up the reason for not allowing revision to be done by initiative and referendum: "Since a revision of a constitution affects basic principles, or several provisions of a constitution, a deliberative body with recorded proceedings is best suited to undertake a revision. A revision requires harmonizing not only several provisions, but also the altered principles with those that remain unaltered. Thus, constitutions normally authorize deliberative bodies like constituent assemblies or constitutional conventions to undertake revisions. On the other hand, constitutions allow people's initiatives, which do not have fixed and identifiable deliberative bodies or recorded proceedings, to undertake only amendments and not revisions."

Third, having said all of the above, Carpio did not think it necessary to revisit the1997 case of *Santiago v. Comelec* witch had said that R.A. 6735 was not a sufficient law for implementing amendment by initiative and referendum. "This Court must avoid revisiting a ruling involving the constitutionality of a statute if the case before the Court can be resolved on some other grounds. Such avoidance is a logical consequence of the well-settled doctrine that courts will not pass upon the constitutionality of a statute if the case can be resolved on some other grounds."

So far, Justice Carpio. But all the Justices, except two, wrote separate opinions. Varied reasons were used by the eight who voted to dismiss the petition: namely that Lambino and his group were not the proper parties to raise the issue, that R.A. 6735 is not a sufficient law for enabling initiative and referendum, that the petitioners did not show to the people the entire revision they were advocating, that the proposal is a revision not proper for initiative and referendum, that the proposal violates the one-subject rule required by R.A. 6735, that the Comelec did not abuse its discretion when it dismissed the *Sigaw* petition, that the 12% and 3% requirement were not proven to have been satisfied, and that with all these defects there is no point in remanding the case to the Comelec. Not all of these arguments, however, were taken up by each of the eight.

The Lambino group for their part also offered various arguments for their dissent, generally the opposite of what the majority was saying, namely that the petitioners were the proper parties, that the issue is a political question which should be left to the people to decide, that R.A. 6735 is a valid law for enabling initiative and referendum, that what is being proposed is not a revision but a mere amendment, that the proposal does not violate the one subject rule found in R.A. 6735, that the Comelec abused its discretion in dismissing the *Sigaw* petition, that the Comelec should decide whether the 12% and 3% requirements have been satisfied, and that therefore the case should be remanded to the Comelec instead of being dismissed.

When all is said and done, however, the important element is the majority vote to dismiss the petition. This constitutes the decision of the Court. While the eight in the majority did not all use the same arguments, they nevertheless arrived at the common conclusion that the case should be dismissed. You might call the decision something

similar to the "totality approach" which the Supreme Court used in reaching a majority decision that Joseph Estrada had vacated the presidency permanently. Each had a reason of his or her own, but the conclusion was the same: dismissal.

However, all was not lost for the Lambino group. Significantly, a majority of the justices held that R.A. 6735 was a sufficient enabling law for amendment of the Constitution through initiative and referendum.

I myself have held in my earlier columns that the Supreme Court should have upheld the sufficiency of R.A. 6735 in the 1997 *Santiago* case. Now, if I read the decision correctly, the Supreme Court is saying, "Yes, Virginia, we already have an enabling law for initiative and referendum." The Comelec, therefore, can proceed to formulate implementing rules and regulations. Once this is done, those who wish to propose amendments through initiative and referendum can more safely avoid the pitfalls into which *Sigaw* fell.

The fault of the Lambino group was that they used the provision of the Constitution on initiative and referendum as well as R.A. 6735 not only incorrectly but also sloppily. I would even say in a deceptive manner. I will say more about this shortly.

There is, however, an element in almost all the dissenting opinions which needs special attention. It is related to the view of some, notably Speaker Joe de Venecia, that six million or so signatures constitute the voice of the people who are the ultimate sovereign. The implication is that even if the signatures are constitutionally trash they should be honored as the expression of the sovereign will.

The dissenting justices were careful to avoid saying that the people, right or wrong, should be followed. Not in so many words, anyway. But running through most of the dissents is an emphasis on the need to respect the sovereign will.

Properly understood, the argument is impeccable. It is good to remember, however, that a limit on popular sovereignty is found in Article XVII which is aptly called the Constitution of Sovereignty. What Article XVII means is that it is the sovereign will of the people, manifested through the overwhelming ratification of the Constitution in 1987, that any change in the Constitution should be done within the framework of the Article

XVII process. As Justice Carpio pointed out, the real sovereign for the purpose of this case are the millions of people who ratified Article XVII of the 1987 Constitution.

What this also means is that Article XVII contains a statement of legal sovereignty. It has reference to the electorate or to that segment of the political community which can establish or alter the fundamental law. By ratifying this provision in 1987, the people consented to limit their otherwise plenary sovereignty. This is the concept of sovereignty as auto-limitation, which, in the succinct language of Jellinek, "is the property of a state-force due to which it has the exclusive capacity of legal self-determination and self-restriction." A sovereign then, if it chooses to, may restrain the exercise of what otherwise is unlimited competence. This is what Article XVII does and it is the duty of the Supreme Court to ensure that the will of the people expressed in Article XVII is respected.

Of course, the sovereign people might choose to break out of this auto-limitation. This is what happens in a revolutionary situation when the people choose to defy the constitutional restraints they imposed upon themselves through a Constitution. This is not the situation today. The petitioners are not saying that they want to defy the Constitution. To the contrary, they are claiming that they are merely implementing the Constitution. And since they clearly wish to follow the Constitution, it is the duty of the Court to tell them what following the Constitution means. This the majority of the Court has done in the *Sigaw* case.

The Substantive Content of the Proposed Changes

Let me now say a brief word about the substance of the changes being proposed. If you listen to the advocates of change, what you will hear are predictions of doom if we fail to pass the constitutional changes they are advocating. We hear phrases like, “This is our last chance,” “We will never make progress if we fail to achieve change,” “We will be the next Bangladesh if we stay with the present system.” I believe that the best way of dealing with this type of rhetoric is to look at the concrete changes they are proposing and to see whether these will lead us to the Promised Land.

It is pointless and perhaps unfair at this moment to look at what Congress might be contemplating. The reason is that Congress is still struggling with what to propose. At

the moment there are two contending versions of change, one drafted by Congressman Jaraula and the other drafted by Congressman Pichay. Members of the House are also debating about whether they can do the proposing by themselves if the Senate does not cooperate and whether, if the Senate decides to cooperate, whether the two Houses should vote jointly or separately. There will be time enough to examine these should initiative and referendum fail.

But the advocates of initiative and referendum do have a draft even if mangled beyond recognition by Justice Carpio. They attached it to their petition submitted first to the Comelec and now to the Supreme Court. It is not clear, however, whether the version they submitted to the Comelec and the version they submitted to the Supreme Court is the same as the one they asked the people to affix their signatures to in those places where they had a signing exercise. Very few people know what was presented to the people during the signature collection period. In fact, Atty. Lambino admitted on oral argument that they printed only 100,000 copies. For purposes of my talk, however, I shall consider the draft that has been attached to the Supreme Court petition. We will assume that this is the draft the people affixed their signatures to. This is the draft which they claim will save the nation from perdition.

I have been teaching Constitutional Law for about thirty-five years now and I think my readers will credit me at least with possessing some facility in reading constitutional law literature. When I try to figure out what Sigaw ng Bayan's draft for a new Constitution is saying – a draft which Sigaw is proposing to saddle us with – I must confess that I have great difficulty in navigating through it. If I am having problem figuring it out, how much more problematic it will be for the ordinary Filipino who does not eat Constitutional Law for breakfast, lunch and dinner like I do.

The draft is very brief but rich in duplicity. I suspect that the authors of the proposal were aware that initiative and referendum as a mode of changing the Constitution is allowed to handle only amendments and not revision; but I believe they were also aware that what they were proposing was not a simple amendment but a revision. Hence, they had to look for a way of packaging their proposal in a manner that they hoped could disguise the revision being proposed as a mere amendment. They did this by attempting

to give the impression that all they wanted was to change Article VI, the article on the Legislature, and article VII, the article on the Executive Department. No other Article is mentioned except Transitory Provisions.

If they had spelled out completely what they wanted, the cat would have jumped out of the bag. So what did they do in their attempt to keep the cat from jumping out? They decided not to produce a complete document. Rather they drafted mainly instructions for revising the present Constitution towards a unicameral parliamentary system with the aid of scissors and paste.

Essentially the proposal is for the dismantling of the presidential system in favor of a parliamentary form of government and the contraction of the two houses of Congress into one legislative assembly. As is usually said, the devil is in the details. They tried to keep the devil in check by equivalently saying in Section 2 of their draft: "Ladies and gentlemen, take out your scissors and paste and open to Article VI. Cut out Sections 18 and 24, retain everything else, but wherever the words 'Senate,' or 'House of Representatives' or 'House of Congress' appear, replace them with 'Parliament.' Next, if you find any reference to 'Member of Congress' or 'Senator' or 'Member of the House of Representatives,' replace it with 'Member of Parliament.' Retain everything else, but – and this is important -- if you find anything 'inconsistent with the Parliamentary system of government . . . they will be amended to conform with a unicameral and parliamentary form of government.'"

But you might ask, "Who will identify the possible inconsistencies with a parliamentary system and who will do the amending?" The answer to this question is Section 4(2) of the proposed Transitory Provisions which says: "Within forty-five days from ratification of these amendments, the interim Parliament shall convene to propose amendments to, or of revisions of, this Constitution consistent with the principles of local autonomy, decentralization and a strong bureaucracy.[SEP]" In other words, what is being proposed is not yet the final document. So, what have we been fighting about? Moreover, we know from *Tolentino v. Comelec*, a 1971 decision, that the Constitution does not allow proposal of an incomplete document.

The instruction continues this way in Section 3: "Ladies and gentlemen, open you copy of the Constitution to Article VII, hold on to your scissors and paste, cut out Sections 7, 8, 9, 10, 11, and 12, retain everything else, but wherever the words 'President' or 'Acting President' appear, replace them with 'Prime Minister.' But if you think that any of any of what remains is inconstant with a parliamentary system, it will be amended."

But, again, who will identify the possible inconsistencies and who will do the amending? The answer to this question is again Section 4(2) of the proposed Transitory Provisions which says: "Within forty-five days from ratification of these amendments, the interim Parliament shall convene to propose amendments to, or of revisions of, this Constitution consistent with the principles of local autonomy, decentralization and a strong bureaucracy." This is another indication that what is being proposed is not yet a complete document, something already anathemized by *Tolentino v. Comelec.*

Now let us consider the fact that this proposal, which is really a set of instructions, is the document which was supposed to have been presented to the people for their evaluation. This is the proposal which is supposed to have been approved by more than six million voters. Presumably too this is the proposal which will be presented in a plebiscite, should a plebiscite b authorized. What this means is that at the place of voting or of signing the petition there should have been a copy of the existing Constitution which the instructions were supposed to mangle. Moreover, we would have to assume that the voters know enough of what is consistent or inconsistent with a parliamentary system to be able to guess what were inconsistent and how they should be amended. If I, after having taught constitutional law for 35 years, must guess what the instructions can mean, how much more difficult would it be for farmers and tricycles drivers.

With these two instructions you now have the core, an incomplete core, of a unicameral parliamentary system. Let us take a closer look at both the parliamentarism and unicameralism being proposed.

[[[Parliamentarism and unicameralism can be discussed separately. Neither requires the other. You can have a parliamentary form of government with a bicameral

legislature. That is what the British system has. Bicameralism is also what Japan has. It is what France and Germany have.]]]

What is the essence of parliamentalism? The essence of a parliamentary system is the vesting of both the executive and the legislative powers in Parliament. The Parliament chooses the Prime Minister from among themselves. The Parliament chooses the Cabinet from among the Members. The Prime Minister and the Cabinet remain as long as they enjoy the confidence of Parliament.

In the standard parliamentary systems, the Prime Minister may be removed by Parliament through a no confidence vote. In the initiative proposal, there is mention of the election of a Prime Minister but there is no mention of a no-confidence vote. We do not therefore know how a Prime Minister may be removed once he is elected. Perhaps this too will be solved by the provision already quoted which says: "Within forty-five days from ratification of these amendments, the interim Parliament shall convene to propose amendments to, or of revisions of, this Constitution consistent with the principles of local autonomy, decentralization and a strong bureaucracy.[SEP]" This is another indication of the incompleteness of the document.

[[So much about parliamentarism. Now a brief word about unicameralism. You will recall that the original 1935 Constitution provided for a unicameral National Assembly. It did not take long, however, before this was transformed into a bicameral Congress. But again the 1973 Constitution opted for a unicameral National Assembly and later Batasang Pambansa which to a large extent was a rubberstamp for the wishes of President Marcos. When the time came for the drafting of the present Constitution, the original thinking was for a unicameral body. The supposed advantages of unicameralism were simplicity of organization resulting in economy and efficiency, facility in pinpointing responsibility for legislation, avoidance of duplication, and strengthening of the legislature in relation to the executive. The arguments for bicameralism were the traditional ones which say that (1) an upper house is a body that looks at problems from the national perspective and thus serves as a check on the parochial tendency of a body elected by districts, (2) bicameralism allows for a more careful study of legislation, and (3) bicameralism is less vulnerable to attempts of the executive to control the legislature.

In the end, however, the Constitutional Commission by a vote of 23-22 opted for a bicameral Congress.

It must be said that both parliamentarism and presidentialism, and unicameralism and bicameralism are tried and tested systems which can and have worked. But whether they will work or fail depends very much on the political and sociological culture of a people. I have always maintained myself that for our society success or failure depends not so much on the system as on the people running the system. It is easy to write a Constitution; it is more difficult to make a Constitution work.

The proposal of *Sigaw* now says that "a shift from the present bicameral-Presidential government to a unicameral Parliamentary system will effect a more efficient, more economical and more responsive government. The shift from a bicameral to a unicameral legislature will do away with the time-consuming duplication of legislative functions and strengthen responsibility and accountability in legislative work in government. The parliamentary system will ensure harmony between the legislative and executive branches of government, promote greater consensus and provide faster and more decisive governmental action."

As the saying goes, the devil is in the details or in the lack of details.. If you will look at it closely, the key argument is promotion of efficiency – getting things done with the least possible obstacle. The Executive will not be an obstacle to Parliament because the executive and the legislature are one. One House will not be an obstacle to the other because there will be only one Housel. The results will come out faster. What is important, however, is whether what will come out faster are what is needed by the nation. I adhere to the proposition that the primary purpose of a Constitution in the democratic tradition is not so much to achieve efficiency as to avoid tyranny in its various varieties. The founders of the American Constitution provided for check and balances as a safeguard against monarchic tyranny.

The parliamentary system works well with the British government. We should ask why. It works well for the British government and for other states with a working parliamentary system. In the British system, there is no check and balance between executive and legislature, but the check and balance is supplied by a working and healthy

party system. We, however, do not have real political parties. We only have groups drawn together by common interests that are not always selfless. The movement from one political party to another is dictated not so much by principle as by convenience. For as long as this is our situation, it will make no difference wheter the system is presidential or parliamentary. Selfish interests will prevail. If selfish interests prevail now, there is no reason for thinking that it will not prevail in a parliamentary system for as long as our political parties remain the way they are. Again, it is good to remember that the purpose of a Constitution is not primarily to promote efficiency but especially to prevent tyranny in its various forms.

So much about the core of the proposed unicameral parliamentary system. Let me now shift to the rest of the Proposed Transitory Provisions. Should the *Sigaw* proposal eventually receive the approval of the Court on reconsideration -- which God forbid -- and later of the people in a plebiscite, it will not mean a shift to a complete parliamentary system right away. There are certain preliminary steps that will still take place and we are not sure how long these preliminary steps will last.

First, after the amendments are ratified, Gloria Macapagal Arroyo will not step down from the presidency. She will remain in office as President until June 30, 2010, unless sooner impeached. But the draft does not say how the impeachment process will go since nothing is said about Article XI in the draft.

Second, there will be an interim Parliament consisting of the present Members of the Senate and of the House of Representatives. The interim Parliament will continue until the Members of the regular are elected. There is no indication of when the electing will take place. Conceivably therefore the interim Parliament can last beyond June 30, 2010. But here is the catch: former Senators will have to step down by June 30, 2010. This means that after June 30, 2010 the Members of the interim Parliament will only be the former Members of Congress.

Third, an as already mentioned, within forty-five days from ratification of proposed changes, the interim Parliament will convene to propose amendments to, or of revisions of the newly ratified Constitution. There is no indicating of when the work of the second phase of the revision will be completed.

Fourth, Gloria Macapagal Arroyo will nominate an interim Prime Minister who, once elected by the interim Parliament, "shall oversee the various ministries and shall perform such powers and responsibilities as may be delegated to him by the incumbent President."[1] In other words, the interim Prime Minister will not be Prime Minister.

Fifth, after the members of the regular Parliament are elected, they will elect a Prime Minister. But the elected Prime Minister will not be a real Prime Minister until after Gloria Macapagal Arroyo leaves office.

Finally, the draft assures us that the proposed amendments have been earlier substantially endorsed and proposed by the House of Representatives Committee on Constitutional Amendments, and substantially recommended by the Abueva Commission. This is very consoling.

In the light of all this the petitioners ask that a plebiscite be held on the following quostion:

> "DO YOU APPROVE OF THE AMENDMENT OF ARCTICLES VI AND VII OF THE 1987 CONSTITUTION, CHANGING THE FORM OF GOVERNMENT FROM THE PRESENT BICAMERAL-PRESIDENTIAL TO A UNICAMERAL-PARLIAMENTARY SYSTEM OF GOVERNMENT, AND PROVIDING AN ARTICLE XVIII AS TRANSITORY PROVISIONS FOR THE ORDERLY SHIFT FROM ONE SYSTEM TO THE OTHER?"

When will all of this happen, or will these happen? The vote in the Lambino case was a narrow 8-7. Since the current administration is obviously interested in reversing that decision, you can be sure that the main lawyer of the government, the Solicitor General, will lead the charge in a motion for reconsideration. As in the *Binay* case, government defenders are now saying it ain't over until it is over. I do not think will know the final outcome earlier than one month from now. Meanwhile, *in patientia possidebitis animas vestras.* That means suffer a little bit longer!

Nothing follows.