



Charter Change and the Threats to Our Democratic Institutions¹

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It is an honor to be your resource person in today's TALAB. I am sorry that Senate President Koko Pimentel begged off.

You asked me to talk about "Charter Change and the Threats to our Democratic Institutions" in relation to the Sustainable Development Goals (SDG), particularly on no. 16: "to promote peaceful and inclusive societies for sustainable development, provide justice for all and build effective, accountable institutions at all levels."

WHY CHARTER CHANGE?

The PDP-Laban³ draft Federal Constitution summarizes the reason:

...Through time, the disadvantages of a unitary system (imposed by Spain and the United States) became apparent in the country. The system concentrated political and economic power in the "center" and thus, development was limited in areas close to Manila and stifled elsewhere. Not surprisingly, in a country of more than 100 million people, sixty-two percent (62%) of the country's GDP comes from Metro Manila, Central Luzon, and Calabarzon, while the rest of the country is suffering from underdevelopment and low investment. Our system of government has resulted in a grave imbalance in the distribution of resources among regions and local government units. Unfortunately, this inequality has led to social unrest, with various groups (especially in Mindanao) arming themselves to fight against the system. Clearly, there is a need for change.

The problem, we submit, is our highly-centralized form of government and the solution, we believe, is the adoption of the federal system. We believe that the only way to bring about equitable

¹ The opinions expressed by Atty. Monsod are not necessarily those of JJCICSI.

² TALAB is an activity of the Ateneo de Manila University "that seeks to engage students and the wider community in a discussion of critical social issues." JJCICSI sponsored this talk by Atty Monsod.

³ *Partido Demokratiko Pilipino - Lakas ng Bayan*

and widespread development in our country is for the central government to share power—political and economic—with the regions and LGUs.⁴

THE DUTERTE AGENDA FOR CHARTER CHANGE

President Rodrigo Roa Duterte encapsulates it in the term “Imperial Manila.” From his various statements or those of his chief lieutenants or allies, his charter change agenda consists of the following:

First, a shift to a federal system of government.

Second, a shift from a presidential to a parliamentary system.

Third, as a concession to business, a wholesale transfer of power from the Constitution to the Congress on determining the foreign ownership and management limitations in six areas, namely land, natural resources, public utilities, advertising, media and education.

Fourth, a watering down of certain social reform programs, such as agrarian reform, reportedly a concession to the formidable landowner vote in the House.

And fifth, a Constitution that would allow the president to declare martial law when he believes that it necessary to “save the country”. This would mean a weakening of the new safeguards against martial law (Article VII, Section 18) and the institutions in the check and balance system that are a basic feature of our constitutional design.

THE CHALLENGES TO DUTERTE AS “ENDS”

The analytical frame I will use in this talk asks the question—**do we have 100 million problems or 100 million solutions** because we cannot succeed in anything until we as a nation agree on the ends? And it is the ends that drive the means, and not the other way around. Federalism, parliamentarism, impeachment, martial law are issues of governance which are just the “means”. The ends are what we want to achieve as a society where every Filipino is a participant—a country with 100 million solutions.

If I were to put the vision and promise of the Constitution in one phrase, it would be a “just and progressive society”. And since we want to unbundle it into more specifics, we can start with the three challenges posed to candidate Duterte during the election campaign, which he promised to address, namely:

1. the five everyday problems of ordinary people, namely criminality, the drug problem, corruption, efficiency in the delivery of government services, and the traffic problem;
2. the peace problem, primarily in Muslim Mindanao and the National Democratic Front (NDF);
3. the challenge of inclusive development and the twin problems of mass poverty and inequality.

⁴ Jonathan E. Maglaya, “The PDP Laban Model of PH Federalism: An Executive Summary,” 28 September 2017; available from <http://www.iag.org.ph/index.php/blog/1503-the-pdp-laban-model-of-ph-federalism-an-executive-summary>.

These everyday concerns of people are not even about social change. These are only a cry for help by those who suffer the most from the insecurities of daily existence. And I believe that these can be addressed with the powers of government, both central and local, under the present Constitution.

In fact, there is no better example than Davao City where, we are told, all it took was a strong leader with political will to get the job done.

How has he performed on these everyday problems? The farmers I work with believe that his heart is genuinely pro-poor, with which I can concur, based on the policy directions on agrarian reform (free irrigation, free distribution of land, cancellation of conversions, etc.) and the environment (suspensions and cancellations of mining operations violating the environment, ban on open-pit mining, removal of fishpens in Laguna de Bay, etc.) and the prompt responses to such matters as the recent killing of our farmer leader in Coron by a security guard of the Department of Agriculture-Bureau of Animal Industry (DA-BAI).

They say that even if corruption practices at the ground are still around, he himself is honest and there is hope. There are also improvements in the delivery of government services and significant drops in drug use and criminality in their *barangays*.

As for the foul language, it does not appear to be a problem. After all, that's the kind of gutter language one hears among ordinary people, including ourselves. What is important to the poor is what he does rather than what he says.

There are, however, increasingly, questions such as why did he not protect his good people like Environment Secretary Gina Lopez, Agrarian Reform Secretary Paeng Mariano, and Health Secretary Jeanne Ubial from the machinations of vested interests, given his control of the Congress? Where is the promise of an independent commission to investigate the circumventions of the Comprehensive Agrarian Reform Program (CARP)? Why the statement that CARP should be terminated because it has benefitted only the landowners?—a perverse argument that he did not explain.

With regard to martial law, the farmers are supportive as long as human rights are respected, and they say that the military has been disciplined in the checkpoints and careful about human rights.

In sum, the current situation with the poor is that they still perceive Duterte as an agent of change, which means, for those who are thinking about it, they will not rise up against him at this time, despite deepening reservations about extrajudicial killings (EJKs), especially in urban areas, because the victims come mainly from the poor.

The second challenge is peace. Do we need federalism or a parliamentary system to pass a new Bangsamoro Basic Law (BBL)? Or to forge a peace agreement with the National Democratic Front (NDF). I don't think so.

The NDF has not taken a hard line on charter change especially with the promise of free distribution of land. But the negotiations are dead in the water on issues of process, not substance (although there may be continuing back-channeling).

On Bangsamoro, it is already mandated in the Constitution and only needs to be fully implemented. **The president is right that a new BBL takes precedence to federalism and should be a template for others** and he should stay that course.

Since he is familiar with the political terrain at the ground and personally knows the key figures both in Bangsamoro and the NDF, he should succeed on achieving peace on both fronts. But he should take notice of the reported increase in the armed components of both the NDF and Muslim extremists during his watch.

And there is urgency to the process. The young Muslims are drifting to the Muslim caliphate world view across nationalist lines, as exemplified by the Marawi armed conflict. Both the Moro Islamic Liberation Front (MILF) and the Moro National Liberation Front (MNLF) do not hew to the caliphate concept, but the political capital of their leaders has been seriously eroded by the peace initiatives that failed under the last two administrations. And the Duterte administration must do something about the overly long time to pass the BBL, which has added to the restlessness of the young Muslims.

That leaves us with the third challenge, that of inclusive development and its twin problems of mass poverty and inequality. Thirty years after EDSA and the promise of a new social order, we still have mass poverty and one of the highest inequality in our part of the world. The social reform programs are underperforming, and the social divides have not changed. In fact, I submit that **the biggest divide among our peoples is not culture or identity or territory, but the divide between the rich and the poor**, whether among Christians, Muslims, and indigenous peoples' communities or within our nation as a whole.

The latest report of the International Commission on Transitional Justice on Bangsamoro pointed out that Muslim families allied with the Marcos dictatorship were favored with vast tracts of land while the poor Muslims were dispossessed of theirs.

This is a failure of development, defined as a sustained high growth rate plus equitable distribution. More precisely, we have so far failed in human development which is **“the process that widens the range of people’s choices to lead a long and healthy life, to be educated and knowledgeable and to enjoy a decent standard of living. It includes political freedom, guaranteed human rights and self-respect”**. (UNDP 1990:10) Our worst failure of development is Muslim Mindanao.

We are told by a number of studies that certain factors account for our laggardness on human development--initial conditions, natural resources, geography, demography, but foremost of all, flawed policies and weak institutions (see Jeffrey Sachs, Asian Development Bank Study) that are rooted in a feudalistic system that has been impervious to change for generations and its companion evil--corruption.

“...Perhaps in no other country in South Asia is political dishonesty so widely recognized, accepted and talked about as a part of the political game...”

– Gunnar Myrdal describing the Philippines in *Asian Drama* (1968)

and 45 years later:

“The Philippines, in short, has never moved on from the colonial era and the patterns of amoral elite dominance that it created.”

- Joe Studwell in *How Asia Works: Success and Failure in the World’s Most Dynamic Region* (2013)

IS A SHIFT TO FEDERAL-PARLIAMENTARY THE ANSWER?

The shortest definition of federalism is self-rule with shared-rule.⁵

A federation historically happens through either of two processes—-independent states getting together to form a stronger union or strong components of an existing union splitting up but continuing to “hold together” with a redistribution of powers. The key to a successful federalization is the existence of these strong components who want a federal union or are avoiding secession, from the benefits of peace or of cooperation and coordination within the federation, or from the advantage that a bigger political entity can provide in a competitive international order.

The existence of regions capable of standing on their own is not present in the Philippines today. Former Finance Undersecretary Milwida Guevara has a study on the fiscal capability of regions. Based on the 2014 regional GDPs and an estimated minimum expenditure of ₱91 billion, only three regions are financially viable, namely, National Capital Region (NCR), Central Luzon, and Calabarzon.

Federalism invokes the principle of subsidiarity (Article XII, Section 6, draft PDP-Laban Constitution)—that power must be devolved to as close to the people as possible, which they say:

- empowers and motivates local communities;
- generates more accountability of local officials;
- hastens development with competition among the regions.

The problem with the subsidiarity argument is its inductive reasoning. It is based on the probabilities of good results at each stage of the chain of reasoning that will lead to the desirable objective.

⁵ Forms or systems of government are about the distribution of powers. The vertical distribution of power is between a unitary vs federal form of government. The horizontal distribution of power is between a parliamentary vs. presidential form where there is a fusion of the Executive and Legislative Departments. We have a unitary presidential system, the United States a federal presidential system. England a unitary parliamentary system, and Germany a federal parliamentary system. Federalism is about sharing sovereignty, powers, and resources by the central government with the federal states that are created based on economic feasibility, cultural identity, contiguous territory, and, please note - with administratively capable local government units (LGUs) and strong civil society organizations (CSOs) in the various localities. That’s the self-rule part. The shared rule, among other features, is the participation of the federal regions in a second legislative body at the federal level, like the U.S. Senate. Typically, under federalism, the federal government is responsible for foreign affairs, fiscal policy, immigration, debt management, social security, national defense, national economic planning, trade promotion, construction and maintenance of national roads, science promotion, energy development, the judiciary system, elections for the legislature, and the operations of executive offices. On the other hand, the states are responsible for delivering basic services to their communities, such as construction and maintenance of public infrastructure, education, health, internal security, agriculture, and protection of the environment.)

In the continuum of power systems, we start with a pure unitary system with all powers monopolized by a central government; next is unitarism with decentralization of functions; next is unitarism with devolution not just of functions but of powers; next is unitarism with special autonomous regions like the Autonomous Region in Muslim Mindanao (ARMM); and last is the system of federal states. Beyond federalism is secession. The difference between federalism and the unitary system is that the sovereign powers of the federal states are not derived from the central government as its agents but directly from the sovereign people of each federal state.

Moreover, the principle of subsidiarity must co-exist with the principle of solidarity—where it is the duty of the State to promote distributive justice and to intervene when the common good so requires (also provided in Article XII, Section 6 of the Constitution).

There is unanimity among experts that federal countries (about 27) reflect the characteristics of their context and thus every country system is a hybrid of some kind. The same with unitary systems (about 160) where **the Philippines is considered a unitary hybrid** because the 1987 Constitution provides for a unitary system with two autonomous regions and autonomy for local governments.

EXPERTS: SHIFT TO FEDERALISM FRAUGHT WITH DIFFICULTIES AND UNCERTAINTIES

The experience of countries, based on the writings of experts,⁶ both domestic and international, and from the recent Global Forum on Autonomy and Governance held at the Dusit Hotel last October 20 to 22, 2016 with some 50 foreign experts and diplomats, provides us with food for thought before we make that shift:

First, the recommendation of experts is for governments with functioning systems to first consider **reform and refinements rather than an overhaul of the system** because there is no consensus on the superiority of a federal to a unitary system, and vice-versa, particularly on long-term outcomes.

Second, the process of federalization needs a **long transition period**, involves complex processes, and is essentially asymmetric. It will also be costly because it creates new layers and new offices of governance. Do the regions have the people capable of this big jump in the scope and size of their governments?

The Duterte proposal envisages an “equalization fund” from the wealthier regions to help the poor regions until they are competitive. Why will rich areas share their surplus indefinitely with the poor regions rather than with their people who created it? Without an equalization fund, the poor areas will become poorer. Moreover, in trying to compete, the less endowed and less capable regions can go overboard on investment incentives that are counter-productive to their development.

Third, a clear understanding and acceptance of federalism is a necessary feature for any shift. That is not our case today, where 73% of the people do not even know anything about the present Constitution. Yet our proposed process is a decision from above (by a constituent assembly).

Moreover, an incremental process is already provided in our Constitution--Article X, Section 13. The two Negros provinces wanted to do that at a cost of ₱19 billion annually, which the central government refused to fund. And this is only for two provinces.

Four, since federalism reflects the historical, sociopolitical, economic, and cultural characteristics of its context and there are existing inequalities, it tends to serve the interest of existing dominant groups in the federated states. And it does not necessarily follow that the greater powers given to the local government units (LGUs) will end up with an empowered

⁶ Such as: (1) Prof. Rosario Manasan’s talk on Federalism and Fiscal Issues at the Galing Pook Forum on Nov. 11, 2016; (2) Prof. Gene Lacza Petilla’s 15th Jaime V. Ongpin Lecture on Federalism which cites many international studies and sources; (3) *Rethinking Federalism - Citizens, Markets, and Governments in a Changing World*, edited by Karen Knop et al, which contains many articles by experts on developments on federalism up to 1995.

people. On the contrary, it can result in a misuse or hijacking of the powers and resources by the existing power holders. The international experts at the recent Global Forum, when made aware of our unique problem of feudalism, suggested that we first consider a reversible “special kind of autonomy”.

Fifth, a federalized state need not be democratic. A Russian kind of federalism does not necessarily foster or strengthen democracy.

Sixth, federalization may not lead to unifying communities but to their unraveling because self-determination has its domino effect, such as the existence of minorities within a minority, such as the case of indigenous peoples in Muslim Mindanao.

Seventh, if a federal constitution shares sovereignty with the federated regions, this means that it cannot be changed solely by popular vote and makes the shift virtually irreversible. **A “messed up” reform by legislation can be corrected; “a messed up” constitutional shift is almost impossible to unravel and may lead to the ruin of our democracy.**

Eighth, on accountability, there are also big differences among our regions on the existence of a strong civil society, especially in poor areas, which can stand up to the political dynasties, landed elites, and warlords with the power and money to dominate not only the politics but also the economy and the media of these areas. Hence, the absence as well of strong opposition political parties in these areas.

Ninth, if with a parliamentary system, the pre-conditions for its adoption, per a study of the House of Representatives, are a strong party system, an established credible electoral system, and a strong bureaucracy. Do these preconditions exist in the Philippines? Clearly not.

Under these circumstances, if we shift to a federal-parliamentary system, do we have 100 MILLION PROBLEMS or 100 MILLION SOLUTIONS?

THE ALTERNATIVE OF REFORM THROUGH ORDINARY LEGISLATION

The Local Government Code (LGC), although considered a landmark legislation, has turned out to be inadequate on devolution, and many of its provisions are not being implemented fully or correctly.

There are acknowledged fiscal experts, such as Prof. Rosario Manasan and former Finance Usec Milwida Guevara, with instructive insights on the amendments to the LGC and other laws and reforms to devolve real powers to administratively capable LGUs, whether on education, health, infrastructure, raising their own funds, or resources, that will enable them to achieve meaningful self-determination, **without need of federalization.**

Manasan cites how many so-called devolved national government agencies (NGAs) make full use of Section 17(f) of the LGC and Executive Order (EO) 53 to justify their continuous involvement in the delivery of devolved services. This is when the Department of Budget and Management (DBM) works with legislators directly rather than with the development councils from the *barangay* up, and which is the mother lode of the pork barrel system.

Manasan also cites the three national consultations in Luzon, Visayas, and Mindanao in 2014 to 2015 that resulted in a consensus on some 30 amendments to the fiscal provisions of the LGC covering seven areas: (i) functional/ expenditure assignment, (ii) revenue assignment and LGU revenue-raising powers, (iii) intergovernmental transfers, (iv) LGU borrowing, (v) creation of

LGUs, (vi) interlocal alliances and cooperation, and (vii) local fiscal administration. The amendments include an increase in the internal revenue allotment (IRA) of LGUs, say from 60-40 to 50-50.

On education, Guevara says that inequitable access to quality education can be addressed immediately by just two reforms.⁷

With regard to economic zones which are expected to proliferate in the regions, the *Philippine Human Development Report 2012/2013* points out that human development is about the welfare of people, not the development of places. The nature of economic development is uneven. It is not about bringing jobs to people but about closing the distance between the people and the jobs by giving people the capability and mobility to choose where to go. But the principle is different when it comes to quality education and quality health care. Breaking the vicious cycle of poverty of the young means bringing these services to wherever they are regardless of the cost. That is what human development is about.

Today, we are on the cusp of decisions that have far-reaching consequences to our future—the immediate one being—is it necessary to overhaul our Constitution to address the challenge of development?

I submit that we have failed in human development, not because of the Constitution, but because we have not fully implemented it, especially its provisions on social justice and human rights and on local autonomy. The Constitution is not the problem, it is part of the solution.

We are told that an ignorant people can never remain a free people because democracy cannot survive for long with civic ignorance. And if we do not do anything about it and prefer to live with our frustrations about who is accountable for things that go wrong, someone will eventually come and say, I will solve all your problems, if you give me total power. And we will give it to him. And that's how democracy dies. This was the warning of a former U.S. Supreme Court justice⁸ about five years before Mr. Trump appeared in the horizon.

That warning resounds in our situation today. I contend that **the Constitution already provides the framework and compelling principles to address the challenge of human development with its twin problems of mass poverty and inequality. But how can the Constitution be properly implemented or even debated if there is pervasive ignorance of it? About 73% of our people admit to not knowing anything about the Constitution.** The civic education of our people is a responsibility of government. And a government fails in that regard when it tells the people to trust their officials totally and engages in partisan political propaganda rather than a truthful account of our history and the content of the Constitution.

⁷ Amend Sec. 98 of the Local Government Code on the creation, composition of Local School Boards to broaden the membership of Boards to include CSOs, business sector, religious groups, among others; and, to broaden the functions of the Local School Board to include policy formulation on students' welfare, finance of activities which the locality needs, institution of a performance incentive scheme for schools, among others.

- 37% of schools have no School Governing Councils, 46% have organized their SGCs but are not functional, and, less than one percent involves their SGCs in planning and program implementation. Thus, parents and communities have little knowledge of the schools' performance and have no ownership of school programs. RA 9155, the Governance of Basic Education Act of 2001, should be amended to mandate the establishment of School Governing Councils with powers to formulate and implement policies and programs on students' welfare and school improvement programs.

⁸ Former Supreme Court Justice David Souter

THE 1987 CONSTITUTION

Our Constitution is considered one of the most progressive in the world alongside that of South Africa. We already have the provisions that many countries are trying to install in theirs in the search for peace and development.

The 1987 Constitution was the first time that we spoke to the world as a truly independent and democratic Filipino nation. It is a document that had not been imposed on us by any colonial power or by a dictatorship.

We could have completely overhauled our system and form of government **but in our national consultations**, the people overwhelmingly preferred the stability of familiar structures—a democratic, representative, presidential system, with checks and balances and separation of powers. And, overwhelmingly, they wanted the power to directly elect their president.

The Constitution also innovated with three central themes. **Firstly**, the heart of the Constitution is social justice and human rights (primarily Article XIII but also provisions in other articles), with **the poor as the center of our development**. **Secondly**, never again to any authoritarian government. Hence, the strict limitations and conditions for declaring martial law with new provisions, including in the Bill of Rights, to protect citizens against abuses by the State. And **thirdly**, the national destiny must firmly and safely rest on Filipinos themselves. Never again amendments similar to that of the 1935 Constitution that gave Americans equal rights to our patrimony and foreign military bases, and economic policies where even our exchange rate after independence could not be changed without the approval of the U.S. president.

It also cut the umbilical cord of the 1935 and 1973 constitutions to the United States Constitution, which gives primacy to civil and political rights because it is a country of immigrants who all started from the same position and only wanted to be free from autocracy.

Our Constitution gives social and economic rights **equal primacy** with civil and political rights because we are a country of inequalities from the colonial days to the present where the starting positions of the rich and the poor are not equal. **Social justice is about the adjustment of these starting positions.**

To fulfill that vision, the State can use its police powers such as income distribution programs (primarily quality education and quality health care) and asset distribution programs for the poorest of the poor (agrarian reform, urban land reform and housing, ancestral domain and fisheries reform.

This is the Constitution that the Duterte Administration wants to overhaul.

THE ECONOMY – FOREIGN DIRECT INVESTMENT (FDI) AND THE PHILIPPINE DEVELOPMENT PLAN

Advocates say that there is a need to transfer the power to determine foreign ownership limitations in six areas—land, natural resources, public utilities, media, advertising and education—from the Constitution to the Congress (or Parliament), for flexibility to respond to economic conditions. Because, they say, restrictions on foreign ownership stifle the investment climate, resulting in lost employment and growth opportunities, and that such restrictions are, therefore, anti-poor.

The truth about FDI is closer to what Prof. Emeritus Michael Meyer of Wharton School pointed out in a *Business World* article (9/24/14) that the **“ethos of capitalism is you operate for your shareholders rather than for the whole people.”** Moreover, transferring the power to determine ownership limitations to the Congress would open the door to transactional legislation involving really big money—more than the pork barrel.

Another argument for FDI is that any investment “at least contributes something” and “everything helps.”

But the empirical evidence is clear—FDI does have a role to play in development, but what counts **is not the quantity but the quality of the investment.** And to determine quality, we need to make a full accounting not just of its benefits but also of its costs and such long-term considerations as brownfield versus greenfield investment, its contribution to raising the trajectory of our technological development and downstream plants for our minerals that increase the value added in the country.⁹

It is no longer debatable in economic theory that a sustained high growth rate is necessary for poverty alleviation and that growth does not result in development without an equitable distribution of its benefits.

Those who invoke the 2014 Organisation for Economic Co-operation and Development (OECD) **rankings on restrictiveness** where the Philippines is #1, for lifting the constitutional restrictions on foreign equity, do not mention that China is #2, Indonesia #5, and Vietnam #10 in the rankings of 60 countries, yet get considerably more FDIs. And Singapore is the top investment destination for reasons other than land or mineral resources. The question thus begs to be asked: **Is the Constitution the real hindrance to FDI?**

According to the World Investment Report and other reports, the factors that affect investment decisions are:

- adequate infrastructure;
- skill levels (human capital);
- quality of the general regulatory framework;
- clear rules of the game;
- fiscal determination;
- the relative absence of graft and corruption.

Other surveys include low levels of criminality and political instability.

The **World Bank does not put lifting restrictions on reserved areas for local control as a priority condition to attract FDI.** They know that it is a fact of public policy in most developing countries, as it was for developed countries when they were themselves developing.

⁹ A brownfield investment is a form of FDI in which a company purchases or leases existing production facilities in a receiving country to launch a new production activity. A greenfield investment is a form of FDI in which a parent company builds its operations in a receiving country from the ground up. Downstream plants are those involved in domestically refining raw materials which might otherwise simply be exported to foreign markets.

Besides, the country is already open for the purposes of FDI in long-term land leases, mining (Article XII, Section 2 and the La Bugal case), and power generation with the Electric Power Industry Reform Act of 2001 (EPIRA), and in the supermajority voting requirements in corporations.

In the latest Report of the World Bank on the Philippines, October 2017, there is no mention of opening up the economy. Instead it says that the critical external threat to our growth is the increasing protectionist policies of developed countries, like the United States.

The Philippine Development Plan 2017-2022, with a planning horizon up to 2040, does not mention the word “federalism” at all in any of its 436 pages. How can federalism be central and critical to our development and our future when it has no place in our Development Plan?

Does the president know what’s going on, other than his anti-drug campaign?

Under the PDP-Laban federal constitution, the central theme is not social justice and the poor, but the agenda of business. Who really benefits from federalization? Has the president read the PDP-Laban proposal? No reaction?

So I ask the again: **Is it necessary to overhaul our Constitution to address the challenge of development and in particular the problem of “Imperial Manila”?**

WHERE DO WE GO FROM HERE?

Since the decision of the Supreme Court (SC) on martial law, which amounted to an abdication of its duty and power to determine the sufficiency of the factual basis for the declaration of martial law¹⁰, one would think that the president may not deem it necessary to weaken the

¹⁰ The issue of martial law (ML) centers on Section 18 of Article VII that we refer to as the Commander-in-Chief (CIC) provision of the 1987 Constitution. Our president is not only the chief executive of the country but is also the commander-in-chief of all its armed forces. The 1935 Constitution allowed Mr. Marcos full discretion to proclaim ML and to suspend the writ of habeas corpus. In 1972, the Supreme Court ruled that the proclamation of ML is a “political question” that is beyond its jurisdiction. Marcos called his system “constitutional authoritarianism”, presented as the third way for developing nations and not as a compromise between dictatorship and democracy, but the disciplined way to democracy.¹⁰ President Duterte is openly nostalgic about the Marcos ML regime.

The CIC provision in the 1935 Constitution consisted of one paragraph, to wit: “Section 10 (b). The president shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of habeas corpus, or place the Philippines or any part thereof under Martial Law” (emphasis supplied).

The 1987 Constitution removed “insurrection” and “imminent danger thereof”, and added procedural and substantive safeguards against a repeat of the Marcos constitutional authoritarianism¹⁰, or so we thought until the recent SC decision, Section 18 allows the CIC three powers: (1) to call the armed forces to prevent or suppress lawless violence, rebellion or invasion; (2) to suspend the privilege of the writ of habeas corpus ; and (3) to declare ML-when there is an actual rebellion or invasion and when public safety requires it. The “calling power” does not require an actual rebellion or invasion and is not subject to the review of either Congress or the SC. However, the proclamation of ML requires actual rebellion and is supposed to be the instrument of last resort because, once in place, it has the most potential for the abuse of human rights. In the case of David vs. Executive Secretary, May 2006, the Supreme Court discussed the various theories on the dangers of military rule and concluded: “Our Constitution has fairly coped with this problem. Fresh from the fetters of a repressive regime, the 1986 Constitutional Commission, in drafting the 1987 Constitution, endeavored to create a government in the concept of U.S. Supreme Court Justice Robert H. Jackson’s “balanced power structure.” Executive, legislative, and judicial powers are dispersed to the president, the Congress, and the Supreme Court, respectively. Each is supreme within its own sphere. But none has the monopoly of power in times of emergency. Each branch is given a role to serve as limitation or check upon the other. This system does not weaken the president, it just limits his power, using the language of U.S. constitutionalist Charles Howard McIlwain. In other words, in times of emergency, our Constitution reasonably demands that we repose a certain amount of faith in the basic integrity and

constitutional safeguards against martial law. In fact, the PDP-Laban draft has no amendments that weaken the powers of the Supreme Court or the safeguards against martial law, and it retains the Office of the Ombudsman and the Commission on Human Rights. Maybe the new agenda is to keep the institutions but to appoint people like Justice Secretary Vitaliano Aguirre to head them, and then extend the terms of the Duterte appointees. The PDP-Laban Summary mentions a federalism transition period of 5 to 10 years. But we won't know the "cross-over" provisions until the Article on Transitory Provisions, still in writing, is known.

The assumption of this paper is that President Duterte is an "enigma" with his own contradictions, just like the rest of us, rather than one afflicted with a "narcissistic personality disorder" (NPD) who when "faced with crisis will lack the judgment to respond rationally." The quote comes from a review of a new book, *The Dangerous Case of Donald Trump*, where 27 recognized mental health experts analyze US President Trump's mental frame and behavior and its effects on the United States.

We don't have such a book on our president, but his mental health is the elephant in the room that we cannot ignore. He was analyzed as having NPD by a mental health expert, during his annulment proceedings from his wife, with a "pervasive tendency to demean, humiliate others

wisdom of the Chief Executive but, at the same time, it obliges him to operate within carefully prescribed procedural limitations.

The SC in 2006 said it correctly, although *obiter dicta*. But the present Court did not carry out its part as one of two new checking mechanisms in our system of checks and balances with regard to ML. The other is the Congress, and neither did it perform its duty.

The proceedings in the SC case against ML were precisely about factual issues, an extraordinary process because the SC is not traditionally a trier of facts. By overly deferring to the president on the determination of the "facts", the Court thereby abdicated its duty to determine the sufficiency of the actual basis for martial law. (a) Firstly, it said that "it has no machinery or tool to ably and properly assess the ground conditions" (ignoring that it has powers of subpoena and contempt to seek and validate "facts".) In other words, it said that it did not have the capacity to fully carry out its fact-finding duty. (b) Secondly, it limited itself to reviewing whether the facts in the president's possession prior to and at the time of the declaration or suspension were sufficient to convince him to declare martial law—thereby deferring "sufficiency" to the president's judgment. (c) Thirdly, while saying that the Court should look into the full complement or totality of the factual basis, it then limited itself to reviewing Proclamation 216 and the president's Report to the Congress, then deferred to the president as CIC the "sole discretion to determine what to include and what not to include in the Proclamation and the written Report taking into account the urgency of the situation as well as national security". (d) Finally, it said that it cannot expect absolute correctness of the facts as the president could not be expected to verify the accuracy and veracity of all facts reported to him due to the urgency of the situation, and their only concern was "sufficient facts" to warrant the proclamation. But it was silent about the fact that it was not subject to the same urgency in validating the "facts".

The Court then defined "rebellion" as "a crime of masses or multitudes, involving crowd action that cannot be confined *a priori*, within predetermined bounds" and "consists of *many* acts. And invoking the theory of absorption and the spillover effects of Marawi invoked by the president, the SC came to the conclusion that martial law need not be limited to the area of Marawi and can be proclaimed in the whole of the Philippines or any part of it. I believe that in trying to make the case for full presidential discretion in an emergency situation, the Court failed to consider that Proclamation no. 55 of September 2016 that "called on" the armed forces to address the situation in the whole of Mindanao was sufficient for the purpose, even if there was actual rebellion in Marawi, based on the principles of necessity and proportionality in that presidential discretion. The Court virtually portrayed martial law as the first option (rather than the last resort as contemplated by the Constitutional Commission) and the most effective measure to address the Marawi "problem" in the totality of its ramifications, forgetting the totality of the Constitution to address the root causes of rebellion—social and economic injustice and historical oppression—that includes social justice, human development, peacemaking in Bangsamoro, the need to dismantle feudalism, etc., and even Proclamation no. 55. Moreover, in making the case for martial law, the Court may have raised the status of the Maute group from terrorists and ordinary criminals to "rebels" in a non-international armed conflict, with its implications on their rights and the duties of government under international and domestic humanitarian laws.

All this and many more aspects of the SC decision effectively rendered inutile, or at the least neutralized, the safeguards in the Constitution not only for the incumbent but also for all future presidents. In view of the foregoing, the Court's assertion that it performed its constitutional duty by conducting the "appropriate proceedings" sounds hollow.

and violate their rights and feelings”, and the whole country is witness to his language and behavior along the lines mentioned in the book.

What do we make of the impeachment moves against Chief Justice Ma. Lourdes Sereno, who has her own internal problems in a court that appears to be already deferential to him, as in its decisions on the burial of Marcos and on martial law? Why the rants and threats of impeaching Ombudsman Conchita Carpio-Morales, who is retiring next year? Why the “control” of the moves of Commission on Elections Chair Andres Bautista, who is already compromised? Then there is the Supreme Court’s dismissal of the petition of Sen. Leila de Lima on her detention based on the “appointing power” of each justice, except for one—Associate Justice Antonio Carpio. The president also seems to have a thing against strong women who are not easily cowed. Are these the moves of a rational tactician or one afflicted with NPD? Or are these the work of allies of the president acting on their own to consolidate his power, or to “settle old scores” (like former president Gloria Macapagal-Arroyo and the allies of former Chief Justice Renato Corona in the SC)? Even his dominance of the House and the Senate can be ascribed more to our brown-nosing political culture that is at work at the start of every administration, rather than to his political skills. And that can change.

If indeed the president has NPD, then all bets are off because he is too dangerous to be president. The situation would call for aggressive action against every move towards authoritarianism short of trying to bring him down now, which is bound to fail because he still enjoys a very good trust rating, despite its downward trend.

Many see him as a conundrum because of inconsistent messages and behavior, language that civil society does not accept, inability to dialogue because he is not a good listener, and muddled governance because of ad hoc or case-to-case decisions,

He is an “enigma” because he seems to be genuinely pro-poor and his agenda may be correct, but the means by which he wants to achieve it are questionable, if not wrong. And he should know that the use of fear and force in governance may work in Davao but is not sustainable in the whole of the country. The Marcos regime, even with its total powers, was a disaster for the country.

But he appears willing to expend his political capital with a federal system that is a leap of faith on a slippery slope that is virtually irreversible. Even where there is the alternative of corrective legislation to devolve more power and resources to the LGUs that is **consistent with the constitutional mandate of local self-determination, without federalization**. Does he have promises to keep with his dynastic and warlord allies?

Is a referendum being planned for May 2018, which assumes the passage of a federal constitution by March? Which means that we must start working now to secure the vote of at least seven senators to derail the constituent assembly.¹¹

What if federalism is adopted and it is “messed up”? And results in political fiefdoms of political dynasties, landed elites, and warlords?

Beyond the issue of federalism, we cannot fulfill the vision of a new social order until we have both a transformational leader and a transformational people. And we must be willing to share responsibility for the present state of things.

¹¹ Any amendment to, or revision of, the Constitution may be approved by the Congress, upon a vote of three-fourths of its members (voting as separate houses). The Senate now has twenty-three members, three fourths of which is seventeen. A vote of seven against is enough to abort it.

Are we up to that challenge? Because, while the president is an enigma, it is ourselves as a Filipino people that is also an enigma,¹² if not more so. How else does one explain that we:

- elected a former movie actor as president, deposed him from power for plunder, sentenced him to life in prison, accepted his pardon and still elected him as mayor of the country's premier city for two terms?
- overthrew a dictator, forced him to exile, then allowed him to be buried as a hero in the National Heroes' Cemetery?
- fail to see that we, the citizens, are the "principals" and government leaders are our "agents", and then we elect a leader whose thoughts and behavior we cannot often decipher but still overwhelmingly entrust him with our future?

Can we overcome our contradictions in the same way that we are asking our leaders to overcome theirs? Which means some things have to be done.

First, listen to the poor. The poor are not asking for equality, but only for equity and for justice. A major finding of the Davide Commission that investigated the coup attempts during the first Aquino administration is that the poor can even stand poverty but they cannot stand injustice. We must therefore reorient our policies and institutions with the lens of social justice.

Second, try to persuade the president that constitutional authoritarianism is not the way to meaningful change, which can be done with ordinary legislation. He may be open to compromises because losing six cabinet members in fifteen months may mean an erosion of control which necessitates new allies.

Third, network, network, network—especially in social media, to challenge the "alternative facts", "fake news", and "post-truth" that preoccupy many postings. And we must conduct regular dialogues with the military.

Fourth, we must work to change our development paradigms that have not worked, like trickle-down economics, the notion that it is possible to address poverty without addressing inequality and that it is enough to provide "equality of opportunity" and a "fair process" without being too concerned about "outcomes".

Fifth, we must advocate to expand our commons, and restore programs like military training for a citizens' army, so that our children can play together, and our young adults can train together to defend our country. Money does not count in a foxhole, what counts is a deep trust in each other.

Sixth, church, business, professionals and civil society must commit our resources and expend our social and political capital to promote the agenda of the poor. Those in power and wealth must reduce themselves today to pave the way to inclusive development that will be beneficial to all in the long run.

Seventh, we may have to fight for our freedoms again. We have done it before. We fought five of the last six presidents on issues of principle and won all of them.¹³ We have the power. As Pulitzer

¹² The enigma analysis is based on the writings of Dr. Benjamin Lozare, Ph.D, of John Hopkins University

¹³ (1) Ferdinand Marcos's dictatorship, (2) Fidel V. Ramos's Pirma campaign, (3) Joseph Ejercito Estrada's Concord campaign, (4) Arroyo's Sigaw ng Bayan campaign, and (5) Benigno S Aquino III's Hacienda Luisita case.

awardee Alice Walker says, “the most common way that people lose their power is when they think that they don’t have any.”

Eighth, but not the least, we must nurture a new generation of leaders from the poor, starting with the coming *barangay* elections. This is an enormous responsibility that we are asking our millennials to assume. But I believe that they are more concerned about our country and more committed to its future than we were at their age. And they will do much better than we have done.

Clearly there is a lot of work and coordination required from all of us and there is never a good time to start than now.

On that note, may I close with two quotations:

- the insight of Michael Sandel in his book on *Justice: What’s the Right Thing to Do?* “**until there is a larger purpose to what we do, when citizens finally bring the habits of the heart to public life and find a way to cultivate civic virtue,**” we cannot speak of solidarity and of ourselves as one nation; and
- a paraphrase of what Albert Camus said when he received the Nobel Peace Prize: “**We should put ourselves at the service, not of those who make history but of those who suffer it.**”

Thank you.