Of centenaries and centennials: a Filipino contribution to the Australian debate on a Bill of Rights

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WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established;

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian colonies and possessions of the Queen;

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preamble, *The Commonwealth of Australia Constitution Act 1900*

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.

Preamble, *The 1987 Constitution of the Republic of the Philippines*

Introduction

A tale of two countries could very well be about one century of constitutional development, albeit 100 years of solitude from each other. Both countries approach the millennium with their respective national celebrations of one century of nationhood. For Australia, 2001 will be the centenary of its Federation and its Constitution. For the Philippines, 1998 was the centennial of its independence (from Spain, not the US) while 1999 is the centennial of the First Philippine (for that matter

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Asian) Republic and its Constitution (the first of four major constitutions so far). Also, in 1999 Australia held a referendum on whether or not to become a republic, mainly framed on the Head of State question, but certainly not the only issue for constitutional change.[1] There is also talk of such change in the Philippines, which in the recent, typically irreverent, discourse is called 'Cha Cha' (for Charter Change).

If the effort were made, these two neighbours, who share the Western legal tradition and who 'both suffer from a sense of spatio-cultural dislocation — the former for its excessive Europeaness, the latter for its insufficient Asianess',[2] have much to learn from each other. 'Filipinos can teach Australians many lessons [positive and negative] about a substantive democracy rather than the bureaucratic version more commonly experienced in Australia'.[3] The Philippine experience has something to say about republicanism, indigenous peoples and ancestral domain, and a Bill of Rights: the Australian experience has something to say about federalism, aboriginal reconciliation and native title, and reluctance about a Bill of Rights. This paper will show that there are insights and lessons to be learned on and from both sides, not just on the Bill of Rights question but also on other relevant common concerns like citizenship, gender, international human rights, participation, non-government organisations (NGOs) and other subjects for rethinking.

In the Australian debate on a Bill of Rights, there has been an understandable exchange of notes with fellow common law countries like England, the US, Canada and, of course, close neighbour New Zealand. More recently, there has also been the proffer of European Community lessons for Australia.[4] The Philippines presents another, a different, perspective. In the spirit of exchange, this is not just a one-way contribution or input into the Australian debate. This is as much a learning experience for Filipinos to understand 'the Australian reluctance about rights'.[5] But we do not

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1 See generally information materials of the Constitutional Centenary Foundation, for example, its magazine *Round Table*. The referendum was held on 6 November 1999 and defeated.

2 Pertierra R 'The Philippines: Australia's invisible Asian neighbour' in Mathews P W and Fisher A (eds) *Directory of Filipinists in Australia and Bibliography* (3rd ed, Department of Political and Social Change, Australian National University and the Phillipines Studies Association, 1995) p 89.

3 Pertierra R 'The 4th International Philippine Studies Conference: A Personal Reflection' in Ileto R C and Sullivan R (eds) *Discovering Australasia: Essays on Philippine-Australian Interactions* (Department of History and Politics, James Cook University, 1993) p 198.

4 See especially Jones T H 'Legal Protection for Fundamental Rights and Freedoms: European Lessons for Australia?' (1994) 22 *Federal Law Review* 57. Several footnotes here make for a good list of the Bill of Rights debate literature.

5 Charlesworth H 'The Australian Reluctance About Rights' (1993) 31(1) *Osgoode Hall Law Journal* 195.

intend to make a restatement here of the Australian debate, of which it has been said that 'one suspects that all has been said'[6] and that 'Constitutional rights engender endless debate'.[7] The Australian debate will be resolved according to Australian terms of reference. In sharing the Philippine experience, some of those terms will be addressed.

As always, we are conscious of the difficulties, even dangers, of comparative law (and politics). As Professor Cheryl Saunders, Director of the Centre for Comparative Constitutional Studies, University of Melbourne, once said:

> While comparisons can be useful ... as both a source of new ideas and an incentive to lateral thinking, they can also be misleading unless properly based. Administrative law is inseparable from the broader context of the system of government, including its institutional structure, political culture and constitutional framework. Variations in important detail inevitably exist from system to system and will affect the validity of conclusions drawn unless they are understood and taken into account.[8]

Indeed, 'each country has its own history, culture and social forces',[9] a different 'order of social and economic relations',[10] different 'judicial ideologies,'[11] 'theoretical underpinnings'[12] or philosophies. In a word, context — as distinguished from text or lack of text — of a Bill of Rights.

The foregoing quotation is itself an illustrative occasion for some comparative legal terminology. Administrative law in Australia (in the sense or aspect of relationships between the citizen and the state, or government and governed,

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6 Patapan H 'Competing Visions of Liberalism: Theoretical Underpinnings of the Bill of Rights Debate in Australia' (1997) 21(2) *Melbourne University Law Review* 497.

7 Thomson J A 'An Australian Bill of Rights: Glorious Promises, Concealed Dangers' (1994) 19(2) *Melbourne University Law Review* 1020 at 1062. This review essay of Wilcox M R *An Australian Charter of Rights?* (1993) is mostly footnotes, a number of which, for example note 6, list (not review) 'the voluminous and expanding Bill of Rights literature'.

8 Saunders C 'Lessons and Insights from Other Common Law Countries' (1991) 27-28 *Administrative Review* 3, as cited in Rubenstein K 'Towards 2001: An Assessment of the Possible Impact of a Bill of Rights on Administrative Law in Australia - Part I' (1993) 1 *Australian Journal of Administrative Law* 13 at 15.

9 Rubenstein, above, note 8, at 14.

10 Bakan J 'Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)' (1991) 70 *Canadian Bar Review* 307 at 309.

11 Above, note 10.

12 Patapan, above, note 6.

especially concern for the rights of the individual for protection against abuse'[13] is the equivalent of constitutional law in the Philippines (which centres on the Bill of Rights). Constitutional law in Australia (in the sense of the structure and powers of government) is the equivalent of Philippine political law. Administrative law in the Philippines focuses on administrative agencies. The Philippine bar exam subject Political Law covers all of the above plus public corporations (mainly local governments), public officers, election law, and public international law.[14]

As a final introductory clarification, this paper uses 'Bill of Rights' in the sense of a provision or recognition of fundamental or basic rights, freedoms or liberties in a constitution, mainly stated together in one article, chapter or part thereof though some other rights may be provided or recognised elsewhere in the constitution — in short, a constitutional, not statutory, Bill of Rights. '[I]n order for a Bill of Rights to have any effect it needs to be entrenched'[15] in the constitution as part of this fundamental law superior to all other laws. Stated otherwise, it is of the essence of a Bill of Rights that it is at the level of fundamental law that serves as a check on (negatively) or framework for (positively) the legislators or parliament.

Broader context: system and philosophies

A. Sovereignty and democracy

The key to appreciating the present Philippine Bill of Rights is the most important principle in the *1987 Philippine Constitution*, Article II, s 1: 'The Philippines is a democratic and republican state. Sovereignty resides in the people and all government authority emanates from them.' This provision is the same as the one in the 1935 and 1973 Philippine Constitution, except for the addition in 1987 of the words 'democratic and'. The new word 'democratic' is explained by 1986 Constitutional Commissioner Joaquin G Bernas, SJ thus:

> In the view of the new Constitution the Philippines is not only a representative or republican state but also shares some aspects of direct democracy ... The word is also a monument to the February 1986 Revolution which re-won freedom through direct action of the people.[16]

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13 Rubenstein, above, note 8, at 14, with citations.

14 See generally Gupit F and Martinez D T *A Guide to Philippine Legal Materials* (Rex Book Store, 1993). This is a good recent reference with appendices including the various Philippine constitutions discussed in this paper.

15 Rubenstein, above, note 8, at 14.

16 Bernas J G SJ *The 1987 Philippine Constitution: A Reviewer-Primer* (3rd ed, Rex Book Store 1997) p 19. This is considered the best concise reference on the present Constitution.

Before considering that brief shining moment in Philippine history, it is important to consider the differences in the respective constitutional systems of the Philippines and Australia which necessarily effect the Bill of Rights question:[17]

1. The Philippines is a republic while Australia is still technically a constitutional monarchy with the Queen (of the UK but as 'Queen of Australia') as Head of State even as it is fully independent of the UK.[18]

2. The Philippines follows the principle of sovereignty of the people while Australia follows the principle of parliamentary sovereignty or supremacy, with the Queen as part of Parliament.[19]

3. The Philippines has a presidential form of government with the classic features of separation of powers and a system of checks and balances while Australia has a parliamentary form of government following the Westminster model.[20]

4. The Philippines has a unitary system while Australia has a federal system.

5. In terms of the whole legal system, not just the constitutional system, the Philippines has a mixed legal system with a prominent civil law tradition while Australia has a mono-cultural common law tradition.

The key conceptual difference is between the Westminster doctrine of parliamentary sovereignty or supremacy, on one hand, and the principle of people's or popular sovereignty and its manifestation as constitutional supremacy or constitutionalism,[21] on the other hand. 'In practice constitutionalism recognises a set of laws, the

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17 Drawing also from some of the constitutional differences between Australia and the US pointed out in Rubenstein, above, note 8, at 15-16, and Kirby M 'The Bill of Rights Debate' (1994) 29(12) *Australian Lawyer* 16. The latter article has the most concise summary of arguments for and against in the debate.

18 See generally the convenient fact sheets of the Constitutional Centenary Foundation.

19 See, for example, Saunders C 'Governments, Legislatures and Courts: Striking a Balance' in Ellinghaus M E, Bradbrook A J and Duggan A J (eds) *The Emergence of Australian Law* (Butterworths, 1989) p 296.

20 See, for example, Chapter 4 on 'Constitutional Law and the Westminster System of Government' in Parkinson P *Tradition and Change in Australian Law* (Law Book Company, 1994) p 95. This is an excellent book for a deeper, especially historical, understanding of Australian law but more importantly for its dialectical theme and its challenge of inclusion.

21 Fernando E M *The Constitution of the Philippines* (Central Lawbook Pub Co, 1974) p 32. This is considered the authoritative textbook on the 1973 Constitution.

constitution, whose authorship belongs to the sovereign people for which reason it is superior to rulers and laws passed by rulers'.[22] Thus, in this conception, a democratic constitution is not only a 'charter of government' (defining its form and powers) and a 'charter of sovereignty' (defining the manner of its amendment by the people) but most importantly, a 'charter of liberty' (defining individual rights as guarantees against government action).[23] An American constitutionalist put it this way: 'the Constitution, in the neat phrase of the Iowa court, is the protector of the people against injury by the people.'[24]

One of the main arguments against an Australian Bill of Rights is the consistent concern that it would mean transferring too much power (the final word on even political and moral issues around rights) from the elected Parliament to the unelected courts, thereby disturbing the delicate power balance between politicians/legislators and judges.[25] From a Filipino perspective, a question is where are the people in all this discourse about power? Stated otherwise, in the approach to governance, where is power placed, especially in securing civil liberties?

Of course, Parliament consists of the elected representatives of the people. This is representative government and, at its best, responsible government which has been part of Australia's common legal inheritance from English constitutionalism.[26] What the Filipino perspective is saying is that constitutional democracy should be not only representative democracy but also direct democracy. To use a trite expression, governance is too important to be left to the representatives of the people. The people must take a direct hand themselves in governance (which is not just government). This does not mean taking the law into their own hands. The people also have to be protected 'against injury by the people'. Thus, there must be a democratic constitution. The power balance is not just among the legislative, executive and judicial departments of government. It is also the power balance between the government and the people as elements of the state.

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22 Bernas, above, note 16, p 1.

23 From lectures of Atty Luis General Jr on Philippine Political Law at the College of Law, University of Nueva Caceres, Naga City, Philippines, June 1978. I owe to this late professor of mine, my interest in constitutional law.

24 Schwartz B *The Powers of Government* (1963) vol 1, p 16.

25 See, for example, Brennan F *Legislating Liberty: A Bill of Rights for Australia?* (University of Queensland Press, 1998) pp 1, 44. This appears to be the latest book in the debate.

26 Patapan, above, note 6, at 499; and Jones T J, above, note 4, at 62.

It has been said that under a written constitution, 'The people can do no act, except make [that is, ratify] a new constitution [or amendments to the old] or make revolution', the latter also called direct state action.[27] But in between revolutions or ratifications, direct democracy can be enhanced as everyday democracy or grassroots democracy by a Bill of Rights, especially one containing civil and political rights. In addition, a constitution can, as does the *1987 Philippine Constitution*, provide for or recognise various mechanisms of direct democracy, such as:

(1) initiative and referendum, whereby the people can directly propose and enact laws (Article VI, s 32);

(2) recall, initiative and referendum for local governments (Article X, s 3);

(3) participation of people and people's organisations at all levels of social, political and economic decision-making (Article XIII, s 16);

(4) adequate consultation mechanisms (Article XIII, s 16); and

(5) initiative for the people to directly propose amendments to the Constitution (Article XVII, s 2).

These are the kinds of mechanisms that Frank Brennan SJ criticises as 'populist'[28] but which would better be characterised as 'popular', not just as a matter of semantics.

B. Judicial review

Going back to the power balance question, judicial review of legislative and executive fidelity to a Bill of Rights is not really a new doctrine of judicial supremacy or 'sovereignty of the judiciary'.[29] The late Philippine Supreme Justice and former Dean of the University of the Philippines (UP) College of Law Irene R Cortes addressed this concern, prefacing it in terms familiar to the Australian debate:

> Five non-elective tenured men and women of the Supreme Court can thus declare null and void a law passed by the elective representatives of the people in two houses of the Congress and approved by a nationally elected President.

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27 See especially discussions in Sinco V G *Philippine Political Law: Principles and Concepts* (11th ed, Community Publisher, 1962). This is the classic textbook on the 1935 Constitution.

28 Brennan, above, note 25, p 9.

29 Ison T G 'The Sovereignty of the Judiciary' (1985-86) 10 *Adelaide Law Review* 1.

> It can be said when this happens, that it is not an assertion of the superiority of the Supreme Court over the two political branches of government, but of the supremacy of the Constitution over a statute, treaty or presidential act, which violates the Constitution.[30]

Perhaps there is more common legal thinking than is imagined between the two countries when one finds Justice Gordon Samuels saying 'judicial review is as much a part of the democratic system of government as election of people's representatives. Elected representatives recognise that the courts are there to ensure obedience to the constitution in the way in which he or she casts his or her vote in the legislature'.[31]

To have any effect, especially as it involves a Bill of Rights, judicial review must not be limited to the executive and should also cover the legislature. After all, it is the legislature, which makes the laws which the executive merely implements. The greater power, with policy and far-reaching effects, is with the legislature. Consider, for example, the power to tax, which is relevant to the Australian debate on a goods and services tax:

> In fact, it is the strongest of all the powers of government. But for all its plenitude, the power is not unconfined as there are restrictions. Adversely affecting as it does property rights, both due process and equal protection clauses of the Constitution may properly be invoked to invalidate in appropriate cases a revenue measure. If it were otherwise, there would be truth to the 1903 dictum of Chief Justice Marshall that 'the power to tax involves the power to destroy.' The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr Justice Holmes' pen, thus: 'The power to tax is not the power to destroy while this Court sits.' 'So it is in the Philippines.'[32]

Judicial review in the US has been criticised for having become too wide or open-ended as a result of the Bill of Rights.[33] However, experience in the Philippines shows that it need not be a loose cannon. Even the Supreme Court can, of course, be limited by the Constitution. In the *1987 Philippine Constitution*, Article VIII, s 1 defines judicial power with mention of rights:

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30 Cortes I R 'The Supreme Court and the Political Departments' (1993) 67 (3) *Philippine Law Journal* 293 at 295.

31 Samuels G 'A Bill of Rights for Australia?' (1979) 51(4) *Australian Quarterly* 91 at 96-7.

32 Bernas, above, note 16, pp 260-1, citing two Philippine Supreme Court decisions: *Sison v Ancheta* (1984) 130 SCRA 655 and *Obillos Jr v Commissioner of Internal Revenue* (1985) 139 SCRA 439.

33 Cortes, above, note 30, 294; and Sison C V 'The Supreme Court and the Constitution' (1993) 67(3) *Philippine Law Journal* 308 at 309.

> 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 Government.

In subsequent provisions, Article VIII, ss 4(2) and 5(2)(a), judicial review is the power of the Supreme Court to review the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, order, instruction, ordinance or regulation. 'Judicial review applies not only to acts of the two political branches of government ... but also to the exercise of rights reserved by the sovereign people to themselves',[34] such as the aforementioned mechanisms of direct democracy, except of course revolution and properly ratified constitutional change. There is also the established rule that courts have no jurisdiction over 'political questions', defined in the Philippine jurisprudence as:

> ... 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 government. It is concerned with issues dependent upon the wisdom, not legality of a particular measure.[35]

In the Philippine case 'judicial review has both checking and legitimating aspects'.[36] It need not only strike down legislative or executive acts; it may also raise them up with the blessings of a well-respected High Court. In this way the measures in question gain legitimacy, credibility and public support. So, who's afraid of judicial review?

C. Majorities and minorities

A Bill of Rights is indeed a check or limitation on the political branches of government, and it is a necessary guarantee to at least secure civil liberties, even in what are imagined to be the most democratic countries. Beyond that, it can also be a guide for more pro-active or affirmative action, especially with the inclusion of second and third-generation international human rights. As Peter Bailey has commented: 'It would be preferable to give the courts, and indeed the legislators,

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34 Cortes, above, note 30, at 293.

35 See, for example, *Javellana v Executive Secretary* (1973) 50 SCRA 30; and *Tanada v Cuenco*, G R No L-10520, 28 February 1965.

36 Fernando E M 'The Supreme Court and the Constitution: The Function of Judicial Review' (1993) 67(3) *Philippine Law Journal* 287 at 288.

some clear principles to guide them'.[37] By combining representative and direct democracy, the promotion of human rights becomes not only 'an intersection of judicial, legislative and executive action'[38] It also becomes the job of civil society, empowered by those very rights.

There are refreshing ideas in the Australian debate on a Bill of Rights that go beyond to 'a new, non-utilitarian notion of democracy'.[39] Or as Justice Michael Kirby puts it:

> The modern notion of democracy is more subtle than the primitive idea of according full power to the transient majorities of Parliament by a transient vote in a periodic election, accompanied by media jingles and superficial election slogans.[40]

He could very well have been speaking about the Philippines. If there is less in common between judges of Australia and the Philippines, there is more in common between politicians of the two countries.[41] Democracy in the Philippines is still, especially in its representative form and substance, dominantly an elite democracy, as distinguished from popular democracy. The elite are necessarily a minority and do not necessarily represent the interests of the majority who formally vote them into power. This is the *realpolitik* of it, the other half of the law-politics dialectic[42] that completes the picture of text and context.

In such a context, the text of a Bill of Rights is all the more valuable for the majority lower and middle classes (in the Philippines, this majority includes 'the poor, the powerless and the marginalised')[43] as well as for what Father Brennan calls 'unpopular minorities'.[44] While both sides of the Australian debate consistently characterise a Bill of Rights as anti-majoritarian,[45] this US discourse is hardly

37 Bailey P '"Righting" the Constitution Without a Bill of Rights' (1995) 23 *Federal Law Review* 1 at 34.

38 Bayne P 'The Protection of Rights — An Intersection of Judicial, Legislative and Executive Action' (1992) 66 *Australian Law Journal* 844.

39 Charlesworth, above, note 5, at 232.

40 Kirby, above, note 17, at 21.

41 Gibbs H 'Eleventh Wilfred Fullagar Memorial Lecture: The Constitutional Protection of Human Rights' (1982) 9 *Monash University Law Review* 1 at 5.

42 See especially Charlesworth, above, note 5, at 226-30; and generally Sturgess G and Chubb P *Judging the World: Law and Politics in the World's Leading Courts* (Butterworths, 1988).

43 Brennan, above, note 25, p 46.

44 Brennan, above, note 25.

45 See, for example, Brennan, above, note 25, pp 36-7, 187; and Rubenstein, above, note 8, pp 19, 21, 23.

articulated in the Philippines. In the Philippines, the common sense is that the Bill of Rights is for all, especially for the majority poor, deprived and oppressed who need it more. Be that as it may, we do not view this as being mutually exclusive with its value for unpopular minorities. This is because majorities and minorities are seen more in terms of social classes, sectors or ethnic groups rather than the balance of power among political parties of the same elite in Congress. And this is also because Parliament is not always the decisive arena. Sometimes it is the Presidential Palace in a highly centralised presidential form of government. Sometimes it is the Supreme Court and sometimes it is the 'parliament of the streets' where people 'vote with their feet' — 'People Power', a Filipino contribution to the world.

To be sure, the premises of the anti-majoritarian characterisation of a Bill of Rights are being challenged in Australia itself and elsewhere. In this characterisation, representative and responsible parliamentary government, which represents the majority, which has entrusted it with 'all legislative power, substantially without fetter or restriction',[46] is the ultimate guarantee of justice and individual rights.[47] This would be undermined by a Bill of Rights, 'the value of (which) is in setting limits on the exercise of legislative power by the representatives of the majority so as to protect the interests of minorities'.[48]

Regarding majoritarian democracy, Sir Anthony Mason, then Chief Justice of the High Court of Australia, points out that:

> ... for various reasons (which include unequal voting rights and distorting political structures and practices) parliamentary decisions often fail to coincide with majority opinions. Sometimes they reflect the narrow goals of particular interest groups, including the bureaucracy itself.[49]

Professor Saunders describes the system as 'sometimes rather arrogantly called responsible government',[50] showing the real balance of power has shifted from Parliament as an institution to the executive government because of the influence of strong political parties. She notes 'how small a percentage of the Australian population belongs to a political party and the lack of any effective mechanism for party accountability to the wider community'.[51] Majoritarian?

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46 Dixon O *Jesting Pilate and Other Papers and Addresses* (Law Book Company, 1965) p 102.

47 Menzies R *Central Power in the Australian Commonwealth* (Cassell, 1967) p 54.

48 Brennan, above, note 25, pp 36-7.

49 Mason A 'A Bill of Rights for Australia?' (1989) 5 *Australian Bar Review* 79 at 81.

50 Saunders, above, note 19, p 297.

51 Saunders, above, note 19, p 301.

D. Tradition and theory

After representative and responsible parliamentary government, the other constitutional structure that has made a difference in the Australian debate on a Bill of Rights is its federal system. In a clear example of 'constitutional choices'[52] with the same US Constitution as a model, Australia chose the American federal system but not the Bill of Rights, while the Philippines chose the other way around. There are several excellent discussions of Australian federalism vis-à-vis civil liberties and human rights, which also cover the ideology, politics and organisation of federalism, including the question of 'power, substantially without fetter or restriction' or at least a relative autonomy or sovereignty of the States vis-à-vis the Commonwealth.[53] We will just highlight here a historical fact acknowledged both by present-day proponents and opponents of a Bill of Rights, such as Justice Kirby:

> A proposal for a Bill of Rights was put forward in the Constitutional Conventions. Mr Richard O'Conner advocated the idea. It was opposed by Mr Isaac Isaacs QC of Victoria. The proposal was lost 19 votes to 23. Fear was expressed that a due-process provision in such a Bill of Rights would undermine some of the discriminatory provisions of the law at that time, including those laws and practices which disadvantaged Aboriginal people and the Chinese in Australia.[54]

And Father Brennan:

> One need not subscribe to black armband views of history to affirm that the Australian Constitution was founded on racism ... Many Convention members were opposed to a United States-style bill of rights and the guarantees of due process and equal protection which were inserted in the United States constitution after the Civil War to protect Negroes in the southern states. Our founding fathers still wanted to be able to discriminate against some groups on the basis of race.[55]

One might argue that a federal system, a parliamentary form of government, and a constitutional monarchy do not necessarily translate into reluctance about a Bill of Rights. There are the contrary examples of the US, Canada, New Zealand and lately though still reluctantly, England. Incidentally, all of which, like Australia, belong to

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52 Tribe L H *Constitutional Choices* (Harvard University Press, 1985).

53 See especially Patapan H 'The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25 *Federal Law Review* 211 at 213-20; Patapan, above, note 6, at 499-500; and Charlesworth, above, note 5, at 213-15, 218-23.

54 Kirby, above, note 17, at 16.

55 Brennan, above, note 25, p 25.

the common law tradition, with a 'common legal inheritance'.[56] The tradition of relying on common law protection of rights, despite modern-day indications of some inadequacies,[57] appears to have lived on stronger in Australia than with its common law colleagues, including the 'Mother of All Common Law', England. The 'traditionality of law' is particularly strong in Australian law, sometimes more English than the English.[58] Timothy H Jones sums it up succinctly thus: 'the Anglo-Australian tradition has been to place faith in the common law, supplemented by legislation in specific areas, together with responsible and representative Parliamentary government, as the best means by which fundamental rights can be protected'.[59] To advocate an Australian Bill of Rights is almost like arguing against tradition and success.

Both Jones[60] and Haig Patapan[61] dissect the legal philosophies or theories underlying that tradition. Jones traces reliance upon common law to British conservative philosophy of the 18th and 19th centuries, particularly Edmund Burke who viewed rights as those prescribed by previous social orders found in their precedents and not in the philosophy of abstract natural rights. He traces the principle of responsible and representative Parliamentary government to a second strand of British legal philosophy — pragmatic utilitarianism — which assesses the practical consequences of actions in terms of the securing of the greatest happiness of the greatest number (thus majoritarianism) in contrast to natural rights theory with its starting point being the individual.

Patapan points to this utilitarianism (more John Stuart Mill than Jeremy Bentham) as the dominant view among a number of philosophical traditions in English constitutionalism, of which Australian constitutionalism is a continuation and development as a powerful orthodox constitutionalism without a Bill of Rights (a paradox for those who view a Bill of Rights as integral to constitutionalism). This theoretical perspective tends to show 'an inherent incompatibility between English constitutionalism and the changes represented by the entrenchment of a Bill of Rights' and the implications of an Australian Bill of Rights representing a change in Australian constitutionalism. Patapan considers this problem 'more fundamental than the question of the best means for securing civil liberties'.[62] We will return to this point later.

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56 Jones, above, note 4, at 59.

57 See especially Wilcox, above, note 7, at 219-23; Charlesworth, above note 5, at 201-4; and Jones, above, note 4, at 60-2.

58 Parkinson, above, note 20, pp 10-18.

59 Jones, above, note 4, p 59.

60 Jones, above, note 4, at 60-65.

61 Patapan, above, note 6 and above, note 53, at 231-2.

62 Patapan, above, note 6, at 498.

Notwithstanding their common legal inheritance, England and the US parted ways in their philosophical choices of legal positivism and natural rights, respectively, and consequently in their constitutional choices. Much earlier, notwithstanding their common Western legal tradition, the common law and the civil law took divergent paths. The explanations for these and other divergences are to be found in political history.[63] And so we now turn our attention to the historical development of the Philippine Bill of Rights.

Historical development of the Philippine Bill of Rights

Overview

Philippine constitutional development may be divided into six periods[64] corresponding to those in Philippine political history:

1. Revolutionary Period (1896-99)

This is marked by the Philippine Revolution of 1896 against Spanish colonial rule (1565-1898) and the Declaration of Independence on 12 June 1898. It covers the 1897 Biak-na-Bato Constitution, the 1898 Makabulos and Ponce Constitutions, and most notably the 1899 Malolos Constitution of the First Philippine Republic.

2. American and Commonwealth Period (1900-46)

This was the period of American colonial rule, including the Commonwealth transition starting with the 1935 Constitution up to the grant of independence on 4 July 1946. Before the 1935 Constitution, the Philippines was governed by a series of organic laws promulgated by US authorities: President McKinley's Instructions to the Second Philippine (Taft) Commission in 1900, the Spooner Amendment in 1901, the Philippine Bill of 1902, and the Philippine Autonomy Act (Jones Law) of 1916.

3. Japanese Period (1942-45)

This was the period of Japanese Occupation, establishing a Second Republic, during

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63 See, for example, Van Caenegem R C *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge University Press, 1987).

64 Nolledo J N *The New Constitution of the Philippines Annotated* (1975) 3-7; Sinco, above, note 27, pp 78-94; and Santos S M Jr et al *Shift* (Ateneo Center for Social Policy and Public Affairs, 1997) pp 13-15. The latter book focuses on another debate in the Philippines: parliamentary v presidential.

the Second World War, which interrupted the Commonwealth period. It covers the 1943 Constitution.

4. Republican Period (1946-72)

This was the period of the independent Third Republic interrupted by the Marcos proclamation of martial law on 21 September 1972. The 1935 Constitution was still in force during this period.

5. Marcos Dictatorship (1972-86)

This covers the 1973 Constitution also known as the Marcos Constitution, with major amendments in 1976, 1980, 1981 and 1984.

6. Post-EDSA Period (1986-present)

This is the period of restored democracy after the Epifanio de los Santos Avenue (EDSA) 'People Power' Revolution which ousted Marcos and installed Cory Aquino as President in February 1986. This covers the 1986 'Freedom Constitution', a transitory constitution leading to the 1987 Constitution, which is the present Constitution.

For current purposes the four most important or significant constitutions will be discussed: the 1899 Malolos Constitution; the 1935 Constitution; the 1973 Constitution; and the 1987 Constitution. It is noteworthy that each of these contained a Bill of Rights. There was no debate on whether or not to have a Bill of Rights. That was a given.

It is important to note that two (1899, 1987) of those four constitutions were acts of a truly free people, while the two others (1935, 1973) were not, having been forged under US colonial rule and the Marcos dictatorship, respectively. But the presence of a Bill of Rights even under colonial rule or dictatorship precisely proves or shows its indispensability in Philippine constitutional discourse. In fact, the 1899 Malolos Constitution was forged under martial law-type wartime conditions, in between a revolution against Spain and a war with American imperialism. Thus, this was the only one among those four constitutions, which was not submitted to a plebiscite or referendum for ratification by the people.

In contrast the one and only Australian Constitution, although the product of a decade-long (1891-1901) democratic process of conventions and referendums of a virtually free people in six colonies of the British empire, was passed as an Act of the British Parliament, the *Commonwealth of Australia Constitution Act 1900*, coming into effect 1 January 1901. The Australian Constitution was s 9 of this British Act. Of

course, much later, the Australian Commonwealth passed the *Australia Act 1986* to bring constitutional arrangements into conformity with its status 'as a sovereign, independent and federal nation', formalising such status already achieved by 1942 at the latest.[65] One cannot help but note the proximate, if not identical, years marking milestones in the parallel constitutional developments in Australia and the Philippines.

What Patrick Parkinson has said about the characteristics of the Australian legal tradition in general, apply just as well to the Australian Constitution in particular: 'received rather than indigenous, the product of evolution not of revolution, and mono-cultural rather than multicultural' to which he adds 'a patriarchal tradition?'[66] Of the Philippine legal tradition and four major constitutions, we might say: mainly received but increasingly Filipino, the product of revolution in the cases of at least two constitutions, definitely not mono-cultural but not yet fully multicultural, and only less patriarchal because of a 'matriarchal society'.

The backdrop at the advent of Philippine constitutional development towards the end of the 19th century included the civil law tradition and several liberal constitutions received from Spain. Part of the civil law tradition itself, one of its sub-traditions, was 'the revolution' which was, more fundamentally, an intellectual revolution with these tenets: secular natural law, separation of governmental powers, rationalism, bourgeois liberalism, anti-feudalism, statism, and nationalism. Ironically, this revolution in the West began in a common law country, the US, with its revolution and its Declaration of Independence against the mother common law country England in 1776.[67]

1899 Bill of Rights

The 1899 *Malolos Constitution*[68] was the product of the 1898 Malolos Congress, a revolutionary constituent assembly of the representatives of the Filipino people who had declared independence from Spain. In the *Act of Declaration of Independence* of 12 June 1898,[69] one finds a litany of certain abuses of Spanish domination: arbitrary

65 Constitutional Centenary Foundation, *The Australian Constitution* (2nd ed, Constitutional Centenary Foundation, 1997).

66 Parkinson, above, note 20, pp 3-10.

67 Merryman J H *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (2nd ed, Stanford University Press, 1985) 6 pp 14-18.

68 Appendix J of Gupit and Martinez, above, note 14, pp 727-46.

69 Appendix 1 of Perdon R *Brown Americans of Asia* (The Manila Prints, 1998) pp 145-50. This book is about current images and historical issues between Australia and the Philippines.

arrest; shooting of those placed under arrest; unjust deportations; trial without hearing; the unjust firing-squad execution of national hero Rizal; trampling upon the Penal Code; arrest without trial and without any spiritual aid; and the hanging of the three innocent priest-martyrs Burgos, Gomez and Zamora. It is no wonder then that the Bill of Rights in the Malolos Constitution, found in Title III (Of Religion) and Title IV (Of the Filipinos and Their National and Individual Rights), contained many provisions on the rights of arrested, detained and accused persons under criminal procedure. The Bill of Rights comprised nearly 30 per cent of the text of the Constitution.[70]

The 1899 Bill of Rights included: freedom of religion; freedom from arbitrary arrests and imprisonment, supported by an equivalent of a right to a writ of *habeas corpus*; security of the domicile and of papers and effects against arbitrary searches and seizures; inviolability of correspondence; freedom to choose one's domicile; due process in criminal prosecutions; security of property, with the reservation of the government's right of eminent domain; prohibition of the collection of taxes not lawfully prescribed; freedom of association; right of peaceful petition for the redress of grievances; free popular education; freedom to establish schools; guarantee against banishment; prohibition of trial under special laws; prohibition of the rights of primogeniture; prohibition of the entailment of property; prohibition of the acceptance of foreign honours, decorations, or titles of nobility; and of the granting of such honours by the Republic.[71]

Dr Cesar A Majul finds 'most interesting' Article 28: 'The enumeration of the rights granted in this title does not imply the prohibition of any others not expressly stated.' For him, this suggests that the framers believed in natural rights, including other rights not expressly stated in positive law.[72] This is similar to the Ninth Amendment in the US Bill of Rights: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' This shows the same natural rights philosophy.

But the US Constitution was not the model for the Malolos Constitution, notwithstanding the references in the Declaration of Philippine Independence to the protection lent by the US to the nascent Filipino nation. The models for the Filipino

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70 Majul C A *The Political and Constitutional Ideas of the Philippine Revolution* (revised edition, University of Philippines Press, 1967) p 179. This is still the classic work on the matter, originally a doctoral dissertation at Cornell University.

71 Bernas J G *A Historical and Juridical Study of the Philippine Bill of Rights* (1971) pp 11-12. This is the authority on the matter up to the advent of the 1971 Constitutional Convention, originally a doctoral dissertation at New York University.

72 Majul, above, note 70, p 180.

framers were Spanish Constitutions, such as those of 1812 (the Cadiz Constitution), 1869 and 1876.[73] The Malolos Bill of Rights were 'in the main, literal copies of articles of the Spanish Constitution', particularly that of 1869.[74] Spanish constitutional history began in 1808, and the Spanish Constitution was effective in the Philippines only during three short periods (1810-13, 1820-23 and 1834-37) but there was no extension of constitutional rights, which was in fact one of the demands of the reform/propaganda movement preceding the revolution.[75]

The Malolos Bill of Rights 'may be viewed as an attempt to legalise aspirations derived from certain philosophical convictions and decisions of Filipino intellectuals ... the recognition of those rights which were believed essential to man's well-being and self-respect ... the all-pervading influence of the doctrine of natural law'.[76] Through limited and delayed exposure to Spanish liberalism hampered by absolute monarchy, Filipino political thinkers received the ideas of the 18th century Enlightenment (particularly those of Francois Marie Voltaire, Jean-Jacques Rousseau and Thomas Paine).[77] There was also the influence of Spanish Masonry which, unlike French Masonry which pursued Comte's positivism, stuck to the Enlightenment and its republican tradition but, like French Masonry, was decidedly anti-clerical.[78] As Dr Majul had shown in his dissertation, it was the ideas of Filipino political thinkers before the end of the 19th century – Jose Rizal, Marcelo H del Pilar, Andres Bonifacio, Emilio Jacinto and Apolinario Mabini – that provided the bulk of the political and constitutional ideas of the Philippine Revolution.[79] By then, for example, there was already an indigenous or native Filipino concept of justice.[80]

The Malolos Constitution has been described as the first important Filipino document ever produced by the people's representatives. Its preamble implores the aid of the 'Sovereign Legislator of the Universe' while Article 3 states that

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73 Bernas, above, note 71, 5, pp 10-12. Reference to the Cadiz Constitution of 1812 is found in Constantino R *The Philippines: A Past Revisited* (Tala Publishing Service, 1975) pp 133-4.

74 Malcolm G A *Constitutional Law of the Philippine Islands* (2nd ed, 1926) p 117, as cited in Bernas above, note 71, p 11.

75 Malcolm G A 'Constitutional History of Philippines' (1920) VI(4) *American Bar Association Journal* 109 at 109-10.

76 Majul, above, note 70, pp 192-3.

77 Agoncillo T A *A Short History of the Philippines* (New American Library, 1969) p 71.

78 Majul, above, note 70, pp 189-90.

79 Majul, above, note 70, p 190.

80 Diokno J W 'The Filipino Concept of Justice' in Lumbera C N and Maceda C N (eds) *Rediscovery: Essays on Philippine Life and Culture* (revised edition, National Book Store, 1983) p 467.

'Sovereignty resides exclusively in the people'. —a reprise of *vox populi, vox dei.* It provides for the Republic and the Government as follows:

> Article 1 — The political association of all Filipinos constitutes a nation, whose state is called the Philippine Republic.
>
> Article 2 — The Philippine Republic is free and independent.
>
> Article 4 — The government of the Republic is popular, representative, alternative, and responsible ...

It indicated the willingness and capacity of the Filipino people to promulgate and respect fundamental law.[81] Unfortunately, this would be interrupted and delayed by the Filipino-American war and US colonial rule. But the Philippine independence movement was persistent.

1935 Bill of Rights

The 1935 *Philippine Constitution*[82] was the product of the 1934 Constitutional Convention which was called for by the *Philippine Independence Act (Tydings-McDuffie Law)* of 1934[83] providing for a transitory Commonwealth Government. This Act of the US Congress dictated the character of the constitution, mandatory provisions, submission to the US President for approval, and submission to the Filipino people for ratification. The first mandatory provision, s 2(a), provides that 'The constitution formulated and drafted shall be republican in form, shall contain a Bill of Rights ...'. Under the circumstances, there was no constitutional choice but to use the US model. Even without the mandatory provision, just three decades of exposure to American constitutional law had already displaced whatever remained of Spanish political law from more than three centuries of colonial rule in the Philippines. As a Filipino law professor, Atty Luis General Jr, once explained it, Philippine political law is 'a civil law bottle with a common law content', meaning largely informed by American constitutional law but retaining the Spanish term 'political law'.[84]

As time went by, especially after independence in 1946, that political law became

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81 Agoncillo T A *History of the Filipino People* (8th ed, RP Garcia, 1990) pp 205-9.

82 Appendix P of Gupit and Martinez, above, note 14, pp 809-28.

83 Appendix O of Gupit, and Martinez, above, note 14, pp 798-808.

84 Atty Luis General, above, note 23.

more and more Philippine. The 1934 Constitutional Convention may have been 'too deeply under the spell of the American system to give much thought to any alternative', in the words of its own President, the nationalist Claro M Recto.[85] But an American justice in the Philippine Supreme Court, George A Malcolm, an authority on Philippine constitutional law at that time, pointed out that some elements of the Malolos Bill of Rights found their way into the 1935 Bill of Rights: right of domicile; freedom of correspondence and communications; and the right to form associations.[86]

The US Bill of Rights was the most obvious model though because most of it, except notably the right to jury trial and the right to bear arms, were already extended to the Philippines through the early organic acts: *President McKinley's Instructions to the Second Philippine Commission*[87] in 1900, the *Philippine Bill* of 1902,[88] and the *Philippine Autonomy Act* of 1916.[89] Winfred Lee Thompson argues 'that the application of Bill of Rights guarantees and protections was a central theme in the transplanting of American law to the Pacific archipelago'. The attention to the procedural requirements of the criminal justice system 'evidences the extent to which Americans see political liberty as dependent upon (it)' but also 'was one way of reassuring the American people that the imperial purpose was benevolent' in order to 'legitimate the American rule'.[90]

The 1935 Philippine Bill of Rights had the following common provisions as those of the US Bill of Rights, with a few variations or refinements: due process; equal protection; security against unreasonable searches and seizures; just compensation; freedom of religion, speech, press, assembly and petition; no titles of nobility; non-impairment of obligations; no *ex post facto* law or bill of attainder; no involuntary servitude; privilege of the writ of *habeas corpus;* rights of the accused, including against self-incrimination, no excessive fines or cruel and unusual punishment, no double jeopardy; and (in a separate Article) suffrage.

The omitted US provisions were the right to bear arms and against soldier quartering

85 Nolledo, above, note 64, p 511.

86 Majul, above, note 70, p 180.

87 Appendix L of Gupit and Martinez, above, note 14, pp 753-9.

88 Appendix M of Gupit and Martinez, above, note 14, pp 760-83.

89 Appendix N of Gupit and Martinez, above, note 14, pp 784-808

90 Thompson W L *The Introduction of American Law in the Philippines and Puerto Rico 1898-1905* (University of Arkansas Press, 1989) pp 6, 35, 225, 227-8.

in any house, the right to a jury indictment or trial, and the catch-all other rights 'retained by the people'. The non-US provisions in the 1935 Philippine Bill of Rights were the liberty of abode, privacy of communication, freedom of association, non-imprisonment for debt or poll tax, and free access to the courts.

Before leaving the American period, it may be noted that the First Philippine (Schurman) Commission of 1900, in its report to US President McKinley, quaintly described the Filipino aspiration for a Bill of Rights as 'the magna charta they want, like that which the English barons wrested from King John ...'. Father Bernas, in his dissertation, highlighted the passage in the Schurman Report containing that quotation, and himself said that 'these aspirations were very basic and, like the terms of the English Magna Carta ...'. [91] Likewise, Philippine political law authority Vicente G Sinco wrote 'the idea of a charter of individual liberty, buttressed against the action of rulers, is derived from the legal and political documents of the English people, particularly the Bill of Rights enacted by the English Parliament in the first year of the reign of William and Mary in 1689'.[92]

But, as Jones pointed out in the context of the Australian debate, the Magna Carta of 1215 and the Bill of Rights of 1689 'remain, but they have a limited field of operation and are inadequate as modern statements of fundamental rights'.[93] Besides, as already discussed above, they have a different underlying philosophy from that of the US Bill of Rights and the Philippine Bill of Rights.

1973 Bill of Rights

The 1973 *Philippine Constitution*[94] was drafted by the 1971 Constitutional Convention but was finally the product of the Marcos dictatorship installed through martial law on 21 September 1972. It was initiated by the clamor for change, reflected in a new revolutionary movement born of the 1960s, but was finished by a counter-revolution which Marcos called a 'revolution from the center' with the 1973 Constitution as the 'Institutionalisation of the Revolution'.[95] By claiming to 'save the Republic' from a leftist rebellion and to 'build a New Society' reformed from a rightist oligarchy, Marcos was able to perpetuate himself in power 13 years beyond the 1973 end of his term under the 1935 Constitution. He did this by using that same Constitution's

91 Bernas, above, note 71, pp 1-2, 289.

92 Sinco, above, note 27, p 72.

93 Jones, above, note 4, p 59.

94 Appendix R of Gupit and Martinez, above, note 14, pp 847-75.

95 Marcos F E *Notes on the New Society of the Philippines* (Marcos Foundation, 1973) pp 165-74.

commander-in-chief provision (Article VII, s 11(2)) which allowed the President to place the Philippines under martial law 'in case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it.' US-style constitutional democracy had given birth to Filipino-style constitutional authoritarianism.

The 1935 commander-in-chief provision was lifted from the preceding organic laws, the Philippine Bill of 1902 and the *Philippine Autonomy Act* of 1916. Similar provisions were found in the organic laws of the US for Puerto Rico, Hawaii and Alaska.[96] Marcos had done his constitutional law homework. The lawyer in him could not also ignore the Philippine legal tradition of a Bill of Rights. So, the Marcos Constitution had one, if only as a fig leaf. Be that as it may, the 1973 Bill of Rights was an improvement over the 1935 Bill of Rights. This can be attributed not only to the revolutionary mood of the early 1970s in the Philippines but also to the experience and developments during the 25 years or so as an independent Third Republic as well as to international developments like the adoption of the 'international Bill of Rights': the *Universal Declaration of Human Rights* in 1948 and both the *International Covenant on Civil and Political Rights* and the *Covenant on Economic, Social and Cultural Rights* in 1966.

Jose N Nolledo, 1971 Constitutional Convention Delegate, enumerated the following substantial changes or new concepts in the 1973 Bill of Rights (all not found in the text of the US Bill of Rights):

- Aside from the judge, 'other responsible officers as may be authorized by law' may issue warrants.
- Inadmissibility of evidence obtained from an unreasonable search, a violation of the privacy of communication, a coerced confession, or an uncounselled statement.
- Liberty of travel.
- Right to public information and access to official records.
- Refinement of the conditions for the suspension of the privilege of the writ of *habeas corpus*.
- Right to speedy disposition of all judicial, quasi-judicial or administrative cases.
- Right of an accused to the production of evidence in 'his' behalf.

96 Marcos, above, note 95, p 180.

- Trial in absentia of an accused whose failure to appear is unjustified.
- Right to remain silent and to counsel, and to be informed of such right.
- Addition of the qualification 'impartial' to (the right to) speedy and public trial.[97]

From this enumeration, one immediately recognises the incorporation of the ruling of the US Supreme Court in the 1966 case of *Miranda v Arizona*[98] on the required warnings ('You have the right to remain silent ...') in custodial investigations and the corresponding exclusionary rule (inadmissibility of evidence) in case of violation. While theoretically the US Supreme Court can overturn *Miranda*, the Philippine Supreme Court cannot overturn or even modify the rule's constitutional incorporation. The civil libertarian activism of the US Supreme Court is appreciated more in the Philippines than in the US and Australia. Immediately after the above enumeration, Nolledo stated that 'the existence of the Bill of Rights is one of the characteristics of a republican form of government'.[99] This might be food for thought as Australia grapples with the model for a republic.

Hilary Charlesworth's last word in her piece on the Australian reluctance about rights is: 'our present complacency about the protection of human rights in Australia is our greatest weakness'.[100] Better not to forget the warning of the staunchest advocate of an Australian Bill of Rights, Justice Lionel Murphy of the Australian High Court shortly before he died in 1986, his dying declaration as it were:

> Civil liberties in Australia are being eroded more rapidly than many people realise. It is truer than ever that each generation has to fight to preserve its civil liberties. What is happening in other parts of the world is likely to happen here, and soon. There are many signs of the emergence in Australia, as well as in the United States, of a new form of fascism which Bertram Gross has described as 'friendly fascism' in his book by that name. It is important that those who wish to preserve our freedom, understand precisely what is happening and organise and speak out.[101]

97 Nolledo, above, note 64, pp 109-10.

98 384 US 436 (1966).

99 Nolledo, above, note 64, p 110.

100 Charlesworth, above, note 5, p 232.

101 Statement by Justice Murphy at a public meeting in tribute to him by the Victorian Council for Civil Liberties, 16 September 1986, as cited in Sturgess and Chubb, above, note 42, p 222.

Organise and speak out are precisely what many Filipinos eventually did against the Marcos dictatorship and its evils, predominantly human rights violations. The 1973 Bill of Rights did not prevent the dictatorship from committing these violations. But the Bill of Rights, national and international, was invoked to take action against those violations and the dictatorship itself. For did not the Universal Declaration say 'that human rights should be protected ... if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression'? The anti-dictatorship movement was in significant part a human rights movement.[102] The Bill of Rights became an instrument of activism, judicial and extra-judicial.

G L Peiris probes the responses of the Philippine Supreme Court 'during its time of testing from 1973 until 1986' on at least eight critical issues and landmark cases affecting the Marcos dictatorship, which 'serves to inform us of the strengths and weaknesses of the judicial role in the domain of constitutional adjudication'.[103] Although the Marcos majority in the Court upheld constitutional authoritarianism, Peiris in his conclusion highlights the legacy of the dissenting minority and the role of the Bill of Rights:

> The legacy they have left behind is less a technical achievement, in the sense of an adroit use of legal mechanisms, than a moving faith in constitutional ideals. They have looked beyond the immediate crisis to broader values infusing their constitutional role. This spirit is captured admirably by Munoz-Palma J who was later to preside over the Constitutional Commission appointed by President Corazon Aquino: 'Legal precepts which are to protect the basic fundamental rights and liberties of an individual must be laid down not only for the present but for all times and all conditions. The Bill of Rights must remain, indestructible and unyielding to all forms of pressure for, like Mount Sinai of Moses, it can be the only refuge of a people in any crucible they may suffer in the course of their destiny.'[104] This resolve, which permeates the most courageous judicial pronouncements of the period, augurs well for the future of freedom under law in beleaguered nations of Asia and the Pacific.

In the end, it was extra-judicial activism, 'People Power' in their 'parliament of the streets', particularly EDSA (separating Camp Aguinaldo and Camp Crame), which struck down the Marcos dictatorship and restored constitutional democracy in 1986.

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102 See, for example, *Human Rights Forum* Vol VI, No 2 January-June 1997 focus issue on 'The Philippine Human Rights Movement: Looking Back, Looking Forward'.

103 Peiris G L 'Judicial Activism and Civil Disorder: The Philippine Experience in Retrospect' (1991) 16 (2) *University of Queensland Law Journal* 151.

104 *Aquino v Military Commission* (No 2) (1975) 63 SCRA 546, 666 .

Present Philippine Bill of Rights

Background

Though still part of the historical development of the Philippine Bill of Rights, the present one in the form of the 1987 *Philippine Constitution*[105] deserves a separate section not only because of a greatly expanded Bill of Rights but also because the Constitution itself is the first truly free and independent Filipino charter that has survived (unlike the Malolos Constitution a century after its introduction). Like the Malolos Constitution, the 1987 Constitution was occasioned by a people's revolution, with its own revolution of rising expectations.

The EDSA 'People Power' Revolution of February 1986 ushered in the 'revolutionary government' of President Corazon C Aquino. One of her first proclamations was Proclamation No 3[106] declaring a national policy to implement the reforms mandated by the people, protecting their basic rights, adopting a provisional constitution, and providing for an orderly transition to a government under a new constitution. The *Provisional Constitution*,[107] known as the 'Freedom Constitution,' superseded the 1973 Constitution, especially as far as the political branches of government (the legislative and executive) were concerned, but retained or adopted several Articles in toto, including Article IV on the Bill of Rights. Aquino had no reservations about the Marcos Bill of Rights during the provisional period wherein she continued to exercise legislative power, just as Marcos had once done.

Proclamation No 3 also provided for a Constitutional Commission to be appointed by the President, mandated to 'complete its work within as short a period as may be consistent with the need both to hasten the return of normal constitutional government and to draft a document truly reflective of the ideals and aspirations of the Filipino people.' There were 48 appointees to the 1986 Constitutional Commission, representing a broad political spectrum from left (for example, a militant peasant leader) to right (for example, a Marcos Cabinet-Secretary) but mainly centre. It also conducted extensive public multi-sectoral consultations around the country. The people overwhelmingly ratified the proposed Constitution on 2 February 1987.

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105 Appendix S of Gupit and Martinez, above, note 14, pp 876-935.

106 Proclamation No 3 together with its Provisional Constitution are reproduced in the introduction of Bernas J G *The Intent of the 1986 Constitution Writers* (1987) pp 2-7. This book is a convenient reference to the deliberations of the 1986 Constitutional Commission as it finalised the provisions of the 1987 *Philippine Constitution*.

107 Above, note 106.

The present Philippine Bill of Rights in the 1987 Constitution is found not only in Article IV (Bill of Rights) and Article V (Suffrage) but also in Article XIII (Social Justice and Human Rights) and portions of Article II (Declarations of Principles and State Policies), Article XIV (Education, Science and Technology, Arts, Culture and Sports), and Article XV (The Family). This whole menu will have to be taken in several courses or bites. It is relevant to the Australian debate not only on whether to have a Bill of Rights but also on what rights to include, if any.

The Bill of Rights proper

The 1986 Constitutional Commission, particularly its Committee on the Bill of Rights led by its Vice-Chair Father Bernas, insisted that Article IV be limited to the traditional freedoms of liberal constitutionalism: civil liberties, political freedoms, and economic freedoms. These are guarantees and protections against the State, including limits on the legislature that do not need further implementation action by the legislature. As for the social and economic rights, these were principally the concern of the Committee on Social Justice (Article XIII). These new rights were not rights in the strict sense but rather more properly claims or demands on the State which still need implementing legislation to be judicially enforceable.[108] In effect, this presented a hierarchy of rights.

This was the subject of some debate in the Commission between Father Bernas and the activists.[109] The latter, like Atty Rene V Sarmiento, felt that 'it would not matter' to lump those two sets of rights but yielded to the 'dominant voice' of Father Bernas who believed it would matter.[110]

Atty Sarmiento points to Articles IV and XIII as:

> ... the megamall listing of the first generation civil and political rights, the second generation economic, social and cultural rights and the third generation children and women's rights. The Article on Bill of Rights is the domestic version of the International Covenant on Civil and

108 Bernas, above, note 106, pp 163-5.

109 Pangalangan R C (Comment as Reactor) in Martin C S (ed) in *The Continuing Revolution: Human Rights and the Philippine Constitution (An Assessment of the Current State of Human Rights in the Light of the 1987 Constitution)* (Institute of Human Rights and University of the Philippines Law Centre, 1996) pp 41, 44. I am grateful to this fraternity brother of mine, a young Associate Professor at the UP College of Law with an LIM and an SJD from Harvard Law School, for some pointers, ideas and leads that have been useful.

110 Sarmiento A (Open Forum) in Martin, above, note 109, p 60.

Political Rights and the Article on Social Justice and Human Rights is the domestic version of the International Covenant on Economic, Social and Cultural Rights'.[111]

Other activists refer to Article IV as the 'First Bill of Rights' and Article XIII as the 'Second Bill of Rights' with the latter being what distinguishes the 1987 Constitution from previous Philippine constitutions.[112]

It has already been shown that the Marcos Bill of Rights was an improvement over the 1935 Bill of Rights (itself already an improvement over the US Bill of Rights). The present Philippine Bill of Rights is, in turn, an improvement over 1973. These are the changes (reflected in the indicated sections of Article IV, 1987):

- Only the judge (no other responsible officer) may issue warrants for which he or she must personally determine probable cause. (s 2)

- Necessity for a law to prescribe when public safety or order requires violation of privacy of communication. (s 3(1))

- Freedom of expression in addition to the freedoms of speech, press, assembly and petition. (s 4)

- Liberty of changing abode in addition to liberty of abode and travel. Necessity for a law to prescribe the limits. (s 6)

- Addition of government research data in the access to official records. (s 7)

- The expansion of freedom of association as a right of the people and as including unions for those employed in the public and private sectors. (s 8)

- Moving down from s 2 to s 9 in the hierarchy the eminent domain clause (just compensation for the taking of private property for public use).

- Addition of quasi-judicial bodies and adequate legal assistance to free access to the courts. (s 11)

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111 Sarmiento R V 'Human Rights and Human Wrongs (The Civil and Political Rights Situation and the 1987 Constitution)' in Martin, above, note 109, pp 5, 5-6.

112 Rosales L A P 'The Implications of Charter Changes on Human Rights' in *Human Rights Forum*, above, note 102, pp 121, 126-7.

- Addition of the qualifications 'competent', 'independent' and 'preferably of his own choice' to the right to counsel which is to be provided even if the person cannot afford one. No waiver of rights except in writing and with counsel. (s 12(1))

- Addition of prohibitions on torture, secret detention places, solitary, *incommunicado* or other similar forms of detention. (s 12(2))

- Legal provision for penal and civil sanctions for violations and compensation and rehabilitation of victims. (s 12(4))

- Release on recognizance as alternative to bail. Right to bail not impaired by suspension of the privilege of the writ of *habeas corpus*. (s 13)

- Removal of insurrection and imminent danger as grounds for the writ suspension. (s 15)

- No detention solely for political beliefs. (s 18(1))

- Replacement of 'unusual' by 'degrading or inhuman' as qualifications of prohibited punishment. Abolition of the death penalty unless Congress provides so for heinous crimes. (s 19(1))

- Legal provision against physical, psychological or degrading punishment of prisoners and against substandard penal facilities. (s 19(2))

One can easily infer that the martial law experience informed many of these new civil and political rights. It was, of course, a Philippine experience. In the same way, that there was a Filipino-style constitutional authoritarianism, there is now a truly Filipino-style Bill of Rights. In the case of Australia, it goes without saying that it will have to be 'a distinctively Australian approach', to use Father Brennan's words, in justifying his opposition to a constitutional Bill of Rights.[113]

The Philippine Bill of Rights, even just the civil and political rights, is not found or addressed in only one Article of the Constitution. We now point out these other constitutional rights or recognitions.

113 Brennan, above, note 25, p 2.

Other Constitutional Rights

We take first the 'Second Bill of Rights', Article XIII on Social Justice and Human Rights, of the 1987 Philippine Constitution which includes the following:

- The right of all the people to human dignity (s 1).

- The rights of all workers to self-organisation, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike; security of tenure, humane conditions of work, and a living wage; participation in policy and decision-making processes affecting their rights and benefits; and just share in the fruits of production (s 3).

- The right of enterprises to reasonable returns on investments, and to expansion and growth (s 3).

- The right of farmers and regular farm workers, who are landless, to own directly or collectively the lands they till; and of irregular farm workers to receive a just share of the fruits thereof (s 4).

- The right of small landowners to reasonable retention limits under an agrarian reform program (s 4).

- The rights of farmers, farmworkers, and landowners, as well as co-operatives, and other independent farmers' organisations to participate in the planning, organisation, and management of the agrarian reform program (s 5).

- Homestead rights of small settlers (s 6).

- The rights of indigenous communities to their ancestral lands (s 6).

- The rights of subsistence fishermen to the preferential use of the communal marine and fishing resources; and of fishworkers to receive a just share in the enjoyment of these resources (s 7).

- The rights of small property owners (s 9).

- Urban or rural poor dwellers not to be evicted except in accordance with law and in a just and humane manner; no resettlement without adequate consultation (s 10).

- The right of the people and their organisations to effective and reasonable participation at all levels of social, political, and economic decision-making (s 16).

- Article XIII, Section 17(1) also created the Commission on Human Rights which is mainly concerned with civil and political rights (s 18(1)).

Next comes Article XIV on Education, Science and Technology, Arts, Culture, and Sports including the following:

- The right of all citizens to quality education at all levels (s 1).
- Academic freedom in all institutions of higher learning (s 5(2)).
- The right of every citizen to select a profession or course of study (s 5(3)).
- The right of teachers to professional advancement (s 5(4)).
- The exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations (s 13).
- The rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions (s 17).

Then, there is Article XV on the Family which includes the following:

- The right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood (s 3(1)).
- The right of children to assistance and special protection (s 3(2)).
- The right of the family to a family living wage (s 3(3)).
- The right of families or family associations to participate in the planning and implementation of policies and programs that affect them (s 3(4)).

Finally, to round it out, we go back to Article II on Declaration of Principles and State Policies. Found here are the following:

- The State guarantees full respect for human rights (s 11).
- The natural and primary right and duty of parents in the rearing of the youth (s 12).
- The fundamental equality before the law of women and men (s 13).

- The right to health of the people (s 15).
- The right of the people to a balanced and healthful ecology (s 16).
- The rights of workers (general) (s 18).
- The rights of indigenous cultural communities (general) (s 22).
- Equal access to opportunities for public service (s 26).

Even in the Philippines, the full implications of this 'megamall listing' of first, second, third and perhaps already fourth generation rights have yet to sink in, much less be maximised. There are not only new rights but also new concepts or underlying philosophies that have yet to be fathomed — much like Patapan has done on the theoretical underpinnings of the Australian reluctance about rights.

There is the notion not only of individual rights (a traditional notion) or even of collective (for example, group and people) rights but also of refinements like various sectoral rights, the rights of enterprises, co-operatives, organisations, communities, spouses, families and parents. And then, directly opposite the traditional notion of rights as protection against State abuse is the notion of rights to protection by the State. For example, we did not even list constitutional provisions like the following: 'The State shall afford full protection to labor' (Article XIII, s 3); 'The State shall protect working women' (Article XIII, s 14); and `It shall equally protect the life of the mother and the life of the unborn from conception' (Article II, s 12). Rethinking rights is also rethinking State. The rights of State bear on the state of rights.

The State is both abuser and protector, problem and solution. Stated (pun intended) otherwise, the State is both is and is not. 'To be and not to be', reflects the Filipino or Asian way of thinking in contrast to the Western European (English or Danish?) 'to be or not to be'. Notice also the juxtaposition within one constitutional provision of the rights of workers and enterprises, the rights of landless tillers and small landowners, the rights of settlers and indigenous communities, the rights of small property owners and urban poor dwellers, the rights of parents and children, and the equality of women and men. This is perhaps more oriental *yin* and *yang* than it is Western liberal balancing of interests. There is after all a Filipino legal philosophy but it has yet to decisively break through the hegemony of Western legal philosophy in the Philippines.[114]

Justice Malcolm wrote prophetically in 1920:

> Notwithstanding the long Spanish dominion over the Philippines, and notwithstanding the shorter, although more influential, American control, native traditions and customs, in their essentials, have remained unaffected. Outward form has changed, but inward thought has not changed. The Filipino has neither been transmuted into a Spaniard nor an American. What we might term the Filipino Soul has survived the centuries of contact with foreign races ...
>
> In the future, it can well be expected that in the formulation of a constitution, and in its amendment and construction, the Filipinos will be influenced by past Spanish and American, and possibly Japanese, experience, but will reject as much thereof as is incompatible with the continuance of Philippine nationalism.[115]

This is not, of course, the end of history. But it is a good note on which to end the presentation of the historical development of the Philippine Bill of Rights. After the text or theory, comes the practice. The present Bill of Rights has been around for almost a decade. What has been the state of rights?

State of Rights

The present Philippine Bill of Rights and the 1987 Constitution have lived through two presidential administrations, Aquino and Ramos, already. Fortunately, we can refer to a recent study on the independence and impartiality of the judiciary and human rights in the Philippines from 1986 to 1997.[116] We can only highlight here the important trends in human rights and due process after EDSA (alas, that brief shining moment did not lead to 'Camelot'):

1. As a result of the restoration of formal elite democracy, politically-inspired human rights violations by state agents like the military were increasingly restricted to acts committed against communist insurgents and those branded as their supporters after the collapse of peace talks in 1987. Generally speaking, the Aquino administration was not successful in stopping these violations due to the kind of military it inherited from Marcos and due to its balancing act between upholding human rights and ensuring political survival, with the latter logic prevailing.

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114 Mercado L M SVD *Legal Philosophy: Western, Eastern & Filipino* (Divine Word University Publications, 1984) pp 101-57. This is a pioneering study on Filipino legal philosophy, aside from providing a convenient recapitulation of Western and Eastern legal philosophies.

115 Malcolm, above, note 75, at 112.

116 Bakker J W *The Philippine Justice System: The Independence and Impartiality of the Judiciary and Human Rights from 1986 till 1997* (Centre for the Independence of Judges and Lawyers, 1997). This part of the essay draws heavily from this book.

2. The Supreme Court in important decisions involving human rights most controversially reproduced this balancing act with the 1990 case of *Umil v Ramos*[117] on warrantless arrests. To be sure, as it was in the Marcos years, there was always a valiant dissenting minority. The leading human rights lawyers group castigated the Philippine Government in these terms: 'While it claims adherence to democratic goals and ideals, boasts of the most progressive Bill of Rights in the world, in reality, democratic rights are 'paper rights,' not readily enforceable by the people.'[118]

3. Under Ramos whose term began in 1992, politically-inspired human rights violations progressively diminished as a result of the marginalisation of the communist insurgency and of increasing political stability. The Ramos project to attain newly-industrialised country status for the Philippines by 2000 resulted in a new human rights concern for violations in the context of economic policies, termed 'development aggression'. The new violations include forced resettlement of rural and urban poor to make way for infrastructure projects, massive conversion of agricultural land into industrial sites, mining company incursion into the ancestral domain of indigenous tribes, environmental destruction, and repressive labor policies.

4. It is the resurgence of criminality, however, that has brought forth what is currently the most important source of human rights violations: violations of due process in crime-fighting. The frustration with criminality and crime-fighting has led some to blame present due process rules in the Bill of Rights. It has even been said that criminal suspects enjoy 35 specific rights in the Filipino justice system, whereas victims can only invoke one.[119] While some unworkable rules might need amendment, the real problem lies with inadequate law enforcement and police integrity and competence. The latter, however, are only one pillar of a whole criminal justice system which depends also on the quality of the judiciary and simple access to justice for all citizens.

5. A note might be made on the constitutionally created Commission on Human Rights, one of the institutions aside from the judiciary reflecting the human rights bias of the 1987 Constitution. The Commission has retained a credibility problem with a reputation of docility towards the military, in spite of the fact that various commissioners and employees have taken a bold stand on a number of specific

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117 (1990) 187 SCRA 311 and (1991) 202 SCRA 251.

118 Diokno M S I and Sanidad A V 'Justice and the Rule of Law in the Philippines' (Paper presented at the Solidarity Seminar on Justice, Manila, 1990) p 7, as cited in Bakker, above, note 116, p 55.

119 Sinfuego R C *Manila Bulletin* 8 June 1995, cited in Bakker, above, note 116, p 63.

issues. In 1995, the Commission came up with the *Philippine Human Rights Plan: 1996-2000*, which adopted a sectoral approach and has drawn some NGO encouragement but also scepticism as 'another one of those master plans'.[120] Bakker himself has noted a tendency among Filipinos to be good in planning but weak in implementation.

We return briefly to the 1986 debate between Father Bernas and the activists on the dichotomy between first and second-generation rights on the basis of necessity of legislation for judicial enforceability, especially in relation to the new human rights violations under 'development aggression'. Atty Sarmiento points to at least two cases showing that, at least in the Philippines, some of these second and third generation rights in the Constitution are actionable and justiciable.[121] One case he handled, *Suriao v Juan Angara Memorial High School* involving the right to education, was filed with and acted upon by the Court of Appeals. The other case he points to is the 1993 landmark decision of the Supreme Court in *Oposa v Factoran*[122] involving the constitutional right of the people to a balanced and healthy ecology. That this recognises an enforceable right has now been pointed out by Father Bernas himself.[123]

A forum at the UP College of Law on the *Oposa* decision was an occasion for former Chief Justice Enrique M Fernando to expound on the Malcolm activist approach.[124] In another symposium on judicial review, he upheld the Malcolm model of judicial restraint in general but judicial activism where civil liberties are concerned.[125] In recent years under Ramos, the Supreme Court's judicial activism on economic policy which culminated in the 1997 decision in *Manila Prince Hotel v Government Service Insurance System*[126] involving the constitutional concept of national patrimony, has come under attack from the State (government) and the market (big business)[127] —

120 Dimalanta M C (ed) *The Philippine Human Rights Plan: A Public Forum* (University of the Philippines Law Centre, 1996).

121 Sarmiento A (Open Forum) in Martin, above, note 109, pp 60-3.

122 (1993) 224 SCRA 792. See especially the *Philippine Law Journal* Vol 69 No 2 (December 1994) Environmental Law Issue.

123 Bernas, above, note 16, 26.

124 Fernando E M 'The Constitution and Environmental Law: The Relevance of the Malcolm Activist Approach' (1994) 69(2) *Philippine Law Journal* 117, at 125-6.

125 Fernando, above, note 36, pp 290-2.

126 (1997) 267 SCRA 408 .

127 See, for example, the *Philippine Law Journal* Vol 67 No 3 (March 1993) Special Issue on 'Symposium on the Supreme Court and the Constitution: The Function of Judicial Review'.

raising criticisms and objections much like those of opponents of an Australian Bill of Rights. Bakker's recommendation on judicial review in his study of the Philippine justice system might also be relevant to the Australian debate:

> Judicial review should be boldly and extensively applied in the area for which it was primarily meant to function: the protection of fundamental civil and political liberties. The judiciary should exercise appropriate restraint in using the review for settling economic and political disputes, in which these fundamental liberties are not clearly at stake ...
>
> The primary meaning and scope of judicial review could be further specified and clarified through constitutional amendments in the future. However, this needs to be handled with extreme care, lest the scope of judicial review becomes too narrow. Philippine history shows that judicial checks against potential abuse of people's rights are invaluable.[128]

In the final analysis, there is no substitute for civil society's extra-judicial activism, for making 'People Power' permanent. The active growth of people's and non-governmental organisations in the Philippines over the past decade — the most vibrant in Asia — is perhaps the best evidence of the value of the present expanded Bill of Rights.

There is also the lesson on social change from the Canadian Charter of Rights and Freedoms, as pointed out by Joel Bakan:

> There may be a role for the Charter in social struggles, especially in co-ordination with other forms of political strategy, but understanding what the role is requires the Charter be approached with caution and realism, not with a false optimism about what it could or might be, if it were not what it is.[129]

Conclusion

It should be evident from the foregoing discussion of the broader context and historical development of the Philippine Bill of Rights — in dialogue of sorts with the Australian debate — that there are lessons, insights and possible future directions for both countries which, have so far had a century of parallel constitutional development but without the salutary exchange of notes that one expects between good neighbours who may have more in common than they think. Or more in common that they have to rethink. Even the basics like sovereignty, democracy, republicanism, constitutionalism,

128 Bakker, above, note 116, pp 108-9.

129 Bakan, above, note 10, at 328.

judicial review, majorities, minorities, rights, the state and governance. We hope that this essay is a meaningful contribution not so much to the Australian debate as to an Australian-Philippine exchange in the field of law, justice and human rights.

What we have discussed so far is just the tip of a titanic iceberg. In the remaining part of this conclusion allow us to thaw it a little more. In the early part of this paper, particularly under a heading on tradition and theory, reference was made to Patapan's 1997 *Melbourne University Law Review* essay on the theoretical underpinnings of the Bill of Rights debate in Australia and the point therein that 'more fundamental than the question of the best means for securing civil liberties' is the apparent incompatibility between Australian constitutionalism and a Bill of Rights and a 'theoretical concern' that the latter would transform or change the nature of the former.[130] The 'theoretical concern' is important, of course, but it surely is not 'more fundamental' than the welfare of the people (*salus populi est suprema lex*) in terms of civil liberties — or even, to use the terminology of pragmatic utilitarianism, the greatest good of the greatest number in terms of human rights. This recalls some ideological debates of the recent past where perhaps it would have made a difference if the starting point was not the ideology but the people. And how does one argue against tradition?

Fortunately, this has been argued, and by Australians quite eloquently. Consider Parkinson's position that:

> ... a legal tradition must constantly undergo adaptation and renewal in order to meet the changing needs of society. In particular, it faces continually the challenge of inclusion ... to encourage a sense that the Australian legal tradition is one which 'belongs' to all parts of the community ... In coping with the tension between tradition and change it is essential to identify and hold onto those core values, principles and beliefs which are at the heart of the tradition.[131]

A Bill of Rights 'would be symbolic of shared community values'.[132] Justice Kirby commented: 'I do not accept it is beyond the wit, will, imagination and moral strength of the people of Australia to find, define, state and accept those fundamental rights'.[133] One century of 'one indissoluble Federal Commonwealth' (not 'One Nation') should be enough basis to make the constitutional choices.

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130 Patapan, above, note 6, at 498, 513.

131 Parkinson, above, note 20, pp 18-19.

132 Sturgess and Chubb, above, note 42, p 70.

133 From his interview in the videotape *Millennium Dilemma: Opportunities for Constitutional Change in Australia*, Vol 4 'Rights & Wrongs' (13 August 1997).

Further, Justice Murray R Wilcox writes:

> Commentators have made the point that the enactment of a constitutional Charter of Rights gives the courts the opportunity to make a fresh start in the protection of human rights, enabling them to draw free of the shackles of precedent and do whatever is necessary to give effect to the listed rights... I agree with Dr Charlesworth that a major advantage of an Australian Bill of Rights is 'that it would restructure a legal tradition'... It would provide the springboard from which the judges could continue to develop the law, step-by-step and case-by-case, in the manner rightly commended by those who treasure our common law heritage'.[134]

Last, two final points from the Philippine side. Professor Pangalangan:

> I would like to conclude with a plea to restore the place of the heart in human rights discussions — a discourse which has hitherto been dominated by the cold logic of law.[135]

In the end, we go back to the beginning of this essay, to the quoted preamble of the 1987 *Philippine Constitution* — the only preamble in the world with the word 'love'.[136] That should count for something. ●

134 Wilcox, above, note 7, p 230.

135 Pangalangan, above, note 109, pp 46-7.

136 Thanks to Thio Li-ann, Lecturer, Faculty of Law, National University of Singapore, for reminding me of this.