

A UNIVERSALIST HISTORY OF THE 1987 PHILIPPINE CONSTITUTION (I)¹

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“To be non-Orientalist means to accept the continuing tension between the need to universalize our perceptions, analyses, and statements of values and the need to defend their particularist roots against the incursion of the particularist perceptions, analyses, and statements of values coming from others who claim they are putting forward universals. We are required to universalize our particulars and particularize our universals simultaneously and in a kind of constant dialectical exchange, which allows us to find new syntheses that are then of course instantly called into question. It is not an easy game.”

- Immanuel Wallerstein in *EUROPEAN UNIVERSALISM: The Rhetoric of Power*³

“Sec.2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

Sec. 11. The State values the dignity of every human person and guarantees full respect for human rights.”

- art. II, secs. 2 and 11, 1987 Philippine Constitution⁴

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¹ With deep gratitude to my professor from the Xiamen Academy of International Law, Dr. Armin von Bogdandy, and Dr. Rudiger Wolfrum, both Directors of the Max Planck Institute of Comparative Public Law and International Law, in Heidelberg, Germany, for their guidance and supervision in enabling this research through a Research Fellowship (March-September 2008).

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³ The New Press, New York (2006), at pp. 48-49.

⁴ CONST., art. II, secs. 2 and 11.

3.3. American Colonial Law.– 3.4. Post-Independence Law and Political Structures.- CONCLUSION.

Abstract: This paper traces universalism --- the vision of international public order built upon rights and values shared by all individuals and peoples --- as a purposely-embedded ideology in the history and evolution of the Philippine Constitution. As the postcolonial and post-dictatorship founding document of the post-modern Philippine polity, the paper contends that 1987 Philippine Constitution enshrines nearly a century of constitutional text and practice which has led towards the present institutionalization of universalist rights-democratic theory in the Philippines' constitutional interpretive canon.

Key Words: Philippines, Constitutional History, Constitutional Ideology, Universalism

I. INTRODUCTION

Any legal scholar contends with several hazards in attempting to present a reorientation of our reading of the Philippine Constitution. Apart from the task of balancing usual tensions between formalist (*verba legis*) and teleological (*ratio legis*) schools of Constitutional interpretation, one has to surmount archaeological and analytical challenges. Constitutional intent must be rigorously discerned and situated alongside its contextual nexus to Constitutional norms and their application to specific controversies. Expectedly, “textual, historical, functional, doctrinal, prudential, equitable, and natural” methods, otherwise known as the traditional canons of Constitutional interpretation, will be used in this process to illuminate our Constitution’s normative moorings.⁵ More importantly, before departing from the primary reference to text and canon, the legal scholar must provide substantial theoretical validation to lend purchase to an ‘alternative’ Constitutional reading.

It is not my intention to attempt each of the foregoing intellectual tasks. That has already been more copiously and critically illuminated upon by a host of prominent (and certainly most authoritative) Philippine Constitutional scholars.⁶ I am more concerned with the last intellectual task --- deriving substantial theoretical

⁵ See “Principles of Constitutional Interpretation”, found at: http://www.constitution.org/cons/prin_cons.htm (last visited 20 April 2008); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: Textual Meaning, Original Intent, and Judicial Review (University Press of Kansas, 1999 ed.)

⁶ See VICENTE V. MENDOZA, FROM MCKINLEY’S INSTRUCTIONS TO THE NEW CONSTITUTION: Documents on the Philippine Constitutional System (1978 ed.); PACIFICO AGABIN, UNCONSTITUTIONAL ESSAYS (1996 ed.); JOAQUIN BERNAS, CONSTITUTIONAL STRUCTURE AND POWERS OF GOVERNMENT (2005 ed.).

validation --- to submit a reorientation in (if not a *redescription* of)⁷ Constitutional reading. As I emphasize later at the conclusion of this work, it is in the nature of a 'categorical imperative' to our cognitive process of constitutional balancing of individual rights and state power that we identify both our *implied* and articulated philosophies.⁸ Only after we have fully exposed the underlying logic of the Constitution can we make a credibly-informed critique of the scholarly empirical characterization of the Philippines as a "renewed constitutional republic" that is "probably stable and generally viewed as at or near the performance criteria" of a functioning constitutional democracy.⁹

I submit that the basis for a more open-textured reading of the Constitution rests on the theory and philosophy of *universalism* ---nomenclature that is unspecified in our Constitution but whose fundamental concepts are replete throughout its written text and corresponding jurisprudential practice. Both the historical evolution and subsequent interpretation of the postcolonial 1987 Philippine Constitution reflect many of the precepts of universalism---- from the emphasis on the centrality and fundamental equality of individuals, the primacy of rights discourse and the contractarian legitimacy of political institutions, to Kantian conceptions for perpetual peace.¹⁰ As I will show later, Kant's three 'Definitive Articles' for perpetual peace (republicanism, *foedus pacificum* or a pacific federation among states, and the establishment of a cosmopolitan law affirming the shared value of human dignity¹¹) are clearly reflected in the language and underlying philosophy of the Philippine Constitution. This result is expected, since even prior to its achievement of independence from colonial rule from Spain and the United States,¹² the Philippines had already been envisaged as a liberal and

⁷ As much as possible, I intend to make a mere descriptive re-drawing or recasting of constitutional space in light of the entry of universalist international legal norms in the Philippine Constitutional system. Analogizing from the 'is' and the 'ought', I deliberately locate international legal norms between the dichotomy of *lex lata* and *lex ferenda* to qualify the implications of 'entry' in the Philippine Constitutional system. See JURGEN HABERMAS, BETWEEN FACTS AND NORMS: Contributions to a Discourse Theory of Law and Democracy (Studies in Contemporary German Social Thought), (MIT Press, 1998 ed.).

⁸ Beschle, Donald E. "Kant's Categorical Imperative: An Unspoken Factor in Constitutional Rights Balancing", 31 Pepp. L. Rev., 949 (2004).

⁹ DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN (Cambridge University Press, 2006 ed.), at pp. 5-6.

¹⁰ Von Bogdandy, Armin and Sergio Dellavalle, "The Paradigms of Universalism and Particularism in the Age of Globalisation: Western Perspectives on Premises and Finality of International Law", 5 March 2008. (Lectures delivered at the Xiamen Academy of International Law in July 2007, Xiamen, People's Republic of China), see von Bogdandy, Armin and Sergio Dellavalle, "Universalism and Particularism as Paradigms of International Law", IILJ Working Paper 2008/3, New York University School of Law.

¹¹ See LUIGI CARANTI, ed., KANT'S PERPETUAL PEACE: New Interpretative Essays (2006 ed., LUISS University Press).

¹² I do not refer to the brief period of Japanese occupation of the Philippines during the Second World War as a form of 'colonization' as there was no consequent effective transmission of cultural, philosophical, or political norms and institutions from the governors to the governed, despite the

democratic republic. This intent and interpretation is consistently traceable to the genesis of the present 1987 Constitution from the 1899 Malolos Constitution (post-liberation from Spanish colonial rule), the 1935 Constitution (drafted during the Commonwealth period under American colonial rule) and even to the 1973 Constitution (which preserved many universalist norms in the Constitutional text, despite having been ratified shortly after the imposition of martial law under the regime of deposed president Ferdinand E. Marcos¹³).

What I find more salient and less rigorously explored in the literature is how the distinct language and orientation of the 1987 Constitution strongly entrenches democratic participation, individual autonomy guarantees, and executive accountability in the public order --- a decidedly 'legal' vigilance fueled by the experience of centuries of colonialism and recent decades of martial law rule. The 1987 Constitution, the longest to date with eighteen Articles and three hundred and six sections, already institutionalizes many universalist norms and conceptions. Apart from overt textualization, however, the Constitutional framers still provided for further entry of universalist norms in the Philippine legal system through the traditional mode of treaty-making, and more controversially, through the Incorporation Clause, where "generally accepted principles of international law form part of the law of the land". It is this latter provision that has been the mechanism by which customary international law and general principles of international law have been invoked (and with recent frequency) as actionable norms before Philippine courts.

With the continued exponential growth of international law norms to date, Philippine jurists increasingly function as 'explorers' seeking to 'discover' international law and its applicability within the domestic legal system. Formalists and positivists¹⁴ who rely on codified norms to govern conduct would likely oppose this increase of judicial discretion that simulates rule-making, in protest against the chaos of admitting the presence of *embedded* norms in the Philippine legal system. To adopt this intractable position, however, is to blind ourselves to the reality that our legal norms are the product of social perceptions, shared beliefs and values, and community processes of validation and legitimation.¹⁵ By repeatedly engaging in deliberative, cognitive, and interpretive exercises to winnow 'relevant' facts and 'pivotal' legal issues and thereby decide concrete cases, the judiciary is inevitably a

promulgation of a short-lived 'Constitution' in 1943 to advance the occupying force's goals of Japanization of the Philippines. See MARC FERRO, *COLONIZATION: A Global History*, (1997 ed., Routledge)

¹³ As borne out by historical events, many of these written universalist norms in the 1973 Constitution were known for their breach rather than observance by State organs controlled by the former dictator. See DAVID A. ROSENBERG (ed.), *MARCOS AND MARTIAL LAW IN THE PHILIPPINES*, (1979 ed., Cornell Univ. Press); PURIFICACION VALERA-QUISUMBING (ed.), *HUMAN RIGHTS IN THE PHILIPPINES*, (1977, University of the Philippines Press).

¹⁴ Understandably dominant in a civil law jurisdiction such as the Philippines.

¹⁵ See JOHN TASIOLAS (ed.), *LAW, VALUES AND SOCIAL PRACTICES*, (1997 ed., Dartmouth Publishing Co. Ltd.).

critical actor in the process of law-creation.¹⁶ As previously emphasized by noted Philippine Constitutional expert and law dean Pacifico Agabin, the judiciary is a “participant in the struggle for power by various groups and classes of society...because it cannot avoid it. The fact that it makes important decisions which impinge on the interests of the most powerful segments of society necessarily involves it in power politics.”¹⁷ While a wholesale admission of ‘embedded’ norms seems prohibitive to achieving the ‘neat’ demarcations of positivist legal solutions,¹⁸ neither can we afford to be completely insensitive to the Constitutionally-intended and Constitutionally-established presence of such norms. This is, therefore, a case for ‘demystifying the obscure’ within the contours of our constitutional system.¹⁹

I aim to show that universalism has simultaneously motivated and informed Philippine constitutional practice towards participation in the international legal order that is purposely inclusive rather than isolationist or particularist. By *universalism*, we refer to the description of Armin von Bogdandy and Sergio Dellavalle of the international law paradigm that “order can in principle be extended all over the world, i.e. to all humans and all polities not only in their internal relations --- as contended by supporters of the particularistic paradigm --- but also in their interaction beyond the borders of the single polities. In this understanding there are rights and values which are universal because they are shared by all individuals and peoples. They are enshrined in the set of rules which build the core of international public law.”²⁰ Universalism’s conception of shared primary values that transcend state borders and national loyalty symbols is, at its core, an orientation in contemporary ethics that calls upon us to rethink the breadth of our set of moral values and principles. Jürgen Habermas characterizes moral universalism as a value orientation towards individual rights whose existence is not dependent on the construct of nationhood:²¹

¹⁶ Holmes, Oliver Wendell, “The Path of the Law”, 10 Harv. L. Rev. 8 (1897); See JEROME FRANK, “Law as the Product of Court Decisions”, in LAW AND THE MODERN MIND (1963 ed., Doubleday New York), *excerpt in* SUSAN DIMOCK, CLASSIC READINGS AND CASES IN PHILOSOPHY OF LAW, (2007 ed., Pearson Longman Press) at pp. 42-51.

¹⁷ PACIFICO AGABIN, UNCONSTITUTIONAL ESSAYS, (“The Politics of Judicial Review Over Executive Action”), (1996 ed., University of the Philippines Press), at 168.

¹⁸ No doubt reminiscent of the “law-that-isn’t-there” objection of many positivists. See CAMPBELL, TOM and JEFFREY GOLDSWORTHY (eds.), JUDICIAL POWER, DEMOCRACY, AND LEGAL POSITIVISM, (2000 ed., Dartmouth Publishing Co., Ltd.).

¹⁹ Admittedly a less doctrinal approach, deliberately leaning more towards functionalism and/or legal process. See Calabresi, Guido. “An Introduction to Legal Thought: Four Approaches to the Law and to the Allocation of Body Parts”, 55 Stan. L. Rev. 2113 (June 2003).

²⁰ *Id.* at note 10, at p. 36; See RUDIGER WOLFRUM (ed.), STRENGTHENING THE WORLD ORDER: UNIVERSALISM V. REGIONALISM (Risks and Opportunities of Regionalization), (Papers from Symposium held on the occasion of the 75th Anniversary of the Institute of International Law Kiel, May 17 to 20, 1989), (1989 ed., Duncker & Humblot, Berlin.)

²¹ Ferry, Jean Marc. “Ethics, Politics and History: An Interview with Jurgen Habermas”, in DAVID RASMUSSEN (ed.), UNIVERSALISM VS. COMMUNITARIANISM: Contemporary Debates in Ethics, (1995 ed., MIT Press), at pp. 207-213.

“...nationalism has been drastically devalued as the basis of a collective identity...the overcoming of fascism constitutes the particular historical perspective from which a post-national identity, formed around the universalistic principles of the constitutional state and democracy, is to be understood...

...One can mention European integration, supra-national military alliances, worldwide economic interdependencies, economically motivated waves of immigration, the growing ethnic variety of the population. Beyond these there is the thickening of the network of communication that has sharpened the perception of, and sensitivity for, abridgements of human rights, for exploitation, hunger, misery, for the concerns of national liberation movements and so forth. That leads, on the one hand, to reactions of anxiety and defense. But simultaneously a consciousness also spreads that there is no other alternative to universalistic value orientations.

What then does universalism mean? Relativizing one's own form of existence to the legitimate claims of other forms of life, according equal rights to aliens and others with all their idiosyncracies and unintelligibility, not sticking doggedly to the universalization of one's own identity, not marginalizing that which deviates from one's own identity, allowing the sphere of tolerance to become ceaselessly larger than it is today --- all this is what moral universalism means today.”²²

In contrast, *particularism* is an ethical orientation resting on two fundamental assumptions: 1) order is possible “only within the *particular* polity; it cannot extend to humankind as a whole”; and 2) a polity is “viable only if *particular*: its internal cohesion depends upon something that is exclusively shared by all members.” Particularism is the ontological foundation for giving primacy to state-centered interests, the protection of which is imperative for the preservation of order in a polity. As explained by Armin von Bogdandy and Sergio Dellavalle, the international relations movements of realism, nationalism, and hegemonism have emerged as variants to the particularist paradigm, “mostly as a reaction to deep transformations which undermined the paradigm's persuasiveness”.²³

Thus, in the sense that universalism calls for our preservation and prioritization of what Myres McDougal, Harold Lasswell, and Lung-chu Chen call “human dignity values” of individuals as the precondition for public order,²⁴ (and

²² Id. at 210.

²³ Id. at note 10, p. 28.

²⁴ MCDUGAL, MYRES S., HAROLD D. LASSWELL, and LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980 ed., Yale University).

over and above the strong assertion of state prerogative) I am of the view that universalism has been an embedded philosophy prevalent throughout constitutional eras from the 1899 Malolos Constitution up to the present 1987 Constitution. As a mode of constitutional teleology, universalism has assumed a more distinct form under the reinvigorated conception of ‘popular sovereignty’ in the 1987 Constitution, which bears the parallel markings of the postcolonial transition to the liberal democratic predisposition towards individual rights, juxtaposed beside a post-martial law aversion to excessive concentration of power in the Executive Branch. We can find various manifestations of the *embedding* of universalism in the constitutional system through deliberate textualization, the Incorporation Clause, and the expanded judicial and rule-making powers of the Philippine Supreme Court. I think that these developments are not legerdemain or happenstance. Rather, these constitutional avenues to universalism simultaneously converge toward the Filipino people’s consensus of belief in the larger importance of empowering individuals towards meaningful participation in both national and international “communities of judgment”.²⁵ The translation and transmission of this belief into the policy, design, and orientation of the 1987 Constitution should therefore be heavily considered whenever Philippine courts are tasked to adjudicate the legality (and sometimes, determine the legitimacy)²⁶ of incursions by any of the components of the State apparatus.

I can admit that a Constitutional reading dependent on an *embedded topography* of universalist international legal norms in our constitutional system could very well start us on the slippery slope of indeterminacy. The processes of identification and recognition of what constitutes a ‘universalist’ international legal norm themselves create invitations to what formalists or positivists deplore as judicial rule-making. When we elevate this to the level of a Constitutional polemic between the executive’s assertion of constitutional power and a theoretical paradigm based on an *embedded topography* of universalism, it would indeed seem as if we are needlessly sacrificing legal precision to give lip service to porous ‘human rights’ platitudes and clarion calls, with no less than the judiciary as our mouthpiece.

I believe, however, that an intransigent insistence on the plain text of our 1987 Constitution would defeat its purpose as a “living document”²⁷ intended to

²⁵ For a discussion of Hannah Arendt’s unfinished lectures on this subject, see Nedelsky, Jennifer. “Communities of Judgment and Human Rights”, 1 *Theoretical Inquiries* L. 245 (July 2000).

²⁶ I deliberately distinguish between norm legality (observance or satisfaction of the legal norm) and norm legitimacy (satisfaction of the moral standard) because not all kinds of judicial decision-making significantly bear upon or influence our individual and community moral judgments. Judicial decision-making in cases involving violations of human rights, however, are certainly instances where courts can affect both states of legality and legitimacy. For an illustration of how courts have fulfilled both functions in civil liberties cases, see HARLOW, CAROL and RICHARD RAWLINGS, *PRESSURE THROUGH LAW*, (1992 ed., Routledge New York), at pp. 62-111.

²⁷ See LEARNED HAND, *THE BILL OF RIGHTS*, (1958 ed., Harvard University Press); See HERMAN BELZ, *A LIVING CONSTITUTION OR FUNDAMENTAL LAW? American Constitutionalism in Historical Perspective*, (1998 ed., Rowman & Littlefield).

bear significance and application for all times, contingencies and events faced by the Filipino people, unforeseen or otherwise. Our constitutional discourse is a dynamic process of continuing definition and redefinition of private right and public space.²⁸ What I attempt to elicit here is our conscious recognition of the vital role that universalist international legal norms indeed play in this continuous process. As our judges and jurists are repeatedly made to arbitrate the spatial lines between individual rights and state competencies, it is important that we do not shade international legal norms away as 'obscure' theoretical constructs irrelevant to our evolving constitutional understanding. Judicial sensitivity to universalism in the constitutional system is all the more urgent now, especially in recent years when executive discretion has led to particularist politics and suppression of individual civil liberties. Where the fundamental Constitutional value of human dignity is at stake, it would certainly be more useful to have at our immediate disposal as many theoretical tools that can help mark the acceptable parameters of executive conduct.

Nevertheless, I am mindful of Immanuel Wallerstein's warnings against carelessly "putting forward universals" and "statements of value" that mask misguided claims of the superiority of one civilization (e.g. the historicization of universal values and truths as supposedly deriving solely from 'Western' civilization) over all others --- a universalism of the 'powerful' and the 'inegalitarian':

"...In the end, the debate has always revolved around what we mean by universalism. I shall seek to show that the universalism of the powerful has been a partial and distorted universalism, one that I am calling 'European universalism' because it has been put forward by pan-European leaders and intellectuals in their quest to pursue the interests of the dominant strata of the modern world-system.

...If we are to construct a real alternative to the existing world-system, we must find the path to enunciating and institutionalizing **universal** universalism --- a universalism that is possible to achieve, but that will not automatically or inevitably come into realization.

The concepts of human rights and democracy, the superiority of Western civilization because it is based on universal values and truths, and the inescapability of submission to the 'market' are all offered to us as self-evident ideas. But they are not at all self-evident. They are complex ideas that need to be analyzed carefully, and stripped of their noxious and nonessential parameters, in order to be evaluated soberly and put at the service of everyone rather than a few. Understanding how these ideas came to be asserted

²⁸ See Nagel, Thomas, "Personal Rights and Public Space", in KOH, HAROLD HONGJU and RONALD C. SLYE (eds.), DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS, (1999 ed., Yale University Press), at pp. 33-60.

originally, by whom and to what ends, is a necessary part of this task of evaluation...”²⁹

In this topographic search for the fundamental human dignity values embedded by universalism in our constitutional system, I attempt a “historicization of our intellectual analysis”, something which Wallerstein suggests is the initial step towards espousing a ‘truly universal’ universalism.³⁰ It is my hope that this will contribute to promoting a genuine dialectical exchange on the universals and particulars of our constitutional analysis, by inducing us, in Wallerstein’s words, to “place the reality we are immediately studying within the larger context: the historical structure within which it fits and operate”, knowing that “if an analytic understanding of the real historical choices is not at the forefront of our reasoning, our moral choices will be defective, and above all our political strength will be undermined.”³¹ By no means, certainly, do I intend or presume this proposed ‘alternative’ to constitutional reading to be the sole authoritative scholarly work on this subject. But it is a beginning nonetheless.

A final word before I proceed to our theoretical mapping. I think the experience of the last twenty years under the 1987 Philippine Constitution has much to tell us about the evolutions and revolutions in our constitutional understanding, so much so that we must be emboldened to extricate careful nuances to constitutional text in relation to (un)articulated intent. Hannah Arendt observes that the “modern concept of revolution” is “inextricably bound up with the notion that the course of history suddenly begins anew”, and quoting Condorcet, “[t]he word ‘revolutionary’ can be applied only to revolutions whose aim is freedom”.³² Sensitivity to embedded universalism in our constitutional system is, to some degree, a form of fealty towards our broader constitutional origins. As Donald Lutz observes, “constitutions were created *initially to specify the limits placed by the people on the executors of their will*, and only later as a means of placing public limits on popular sovereignty as well.”³³

The 1987 Philippine Constitution is the culmination of an historical struggle for independence from colonial fetters and non-violent revolution from dictatorship rule. This history speaks throughout our constitutional canon, and more so in the manner by which we seek to continue the critique and scrutiny of the spaces of our individual autonomy and personal freedoms. As Arendt notes, “...the idea of freedom and the experience of a new beginning should coincide. And since the current notion of the Free World is that freedom, and neither justice nor greatness, is the highest criterion for judging the constitutions of political bodies, it is not only

²⁹ Id. at note 3, at Introduction.

³⁰ Id. at note 3, at p. 82.

³¹ Id. at note 3, pp. 82, 84.

³² HANNAH ARENDT, ON REVOLUTION (1963 ed., Viking Press, New York), at p. 21.

³³ Id. at note 9, p. 51.

our understanding of revolution but our conception of freedom, clearly revolutionary in origin, on which may hinge the extent to which we are prepared to accept or reject this coincidence.”³⁴

II. REFLECTIONS OF UNIVERSALISM: *IDEOLOGICAL CURRENTS AND THE HISTORICAL GENESIS OF UNIVERSALIST CONCEPTIONS IN THE 1987 CONSTITUTION*

The Philippines has had at least four distinct constitutional epochs: 1) the *1899 Malolos Constitution*,³⁵ framed by Philippine revolutionaries as the newly independent Philippines’ organic law upon the termination of three centuries of Spanish rule; 2) the *1935 Constitution*,³⁶ drafted through a Constitutional Convention during the Philippine Commonwealth government under the United States; 3) the *1973 Constitution*,³⁷ which was written and promulgated during the martial law rule of Ferdinand E. Marcos, and had established a parliamentary form of government (one that was never implemented but maintained vast executive and legislative powers in the hands of Marcos); and (4) the present *1987 Constitution*,³⁸ which was promulgated after the ouster of Marcos and the nonviolent EDSA revolution that propelled Corazon Aquino to the presidency. The distinguished jurist and former law dean, Philippine Supreme Court Justice Irene R. Cortes characterized post-war Philippine constitutionalism early on as having drawn from the colonial influence of American principles of political theory and institutions.³⁹

³⁴ Id. at p. 22.

³⁵ Formally promulgated on 21 January 1899. See Zafra, Nicholas, “The Malolos Constitution”, in AUGUSTO CESAR ESPIRITU (ed.), PHILCONSA READER ON CONSTITUTIONAL AND POLICY ISSUES (1979 ed., University of the Philippines Press), at pp. 85-100.

³⁶ The Philippines was an unincorporated territory of the United States of America. See VICENTE G. SINCO, PHILIPPINE POLITICAL LAW: PRINCIPLES AND CONCEPTS, (1954 10th ed., Community Publishers Inc., Manila), at pp. 79-96; Araneta, Salvador, “Reminiscences of the (1934) Constitutional Convention”, in AUGUSTO CESAR ESPIRITU (ed.), PHILCONSA READER ON CONSTITUTIONAL AND POLICY ISSUES (1979 ed., University of the Philippines Press), at pp. 110-123.

³⁷ Feliciano, Myrna, “The Philippine Constitution: Its Development, Structures, and Processes”, reproduced in CARMELO V. SISON (ed.), CONSTITUTIONS AND LEGAL SYSTEMS OF ASEAN COUNTRIES, (1990 ed., University of the Philippines), at pp. 173-250. Feliciano notes the promulgation of a short-lived 1943 Constitution during the brief occupation of the Philippines by Japanese forces in the Second World War.

³⁸ In *Lawyer’s League for a Better Philippines v. Aquino*, G.R. Nos. 73748, 73972, and 73900, May 22, 1986, the Philippine Supreme Court affirmed the legitimacy of Aquino’s ascension to power through the EDSA revolution as having created both a *de facto* and *de jure* government.

³⁹ Cortes, Irene R., “Constitutionalism in the Philippines --- A View From the Academe”, 59 Phil. L.J. 338 (1984).

As provided in the 1987 Constitution, the Philippines is a republican and democratic state,⁴⁰ with a tripartite system of government composed of a bicameral legislature (a Senate composed of twenty-four nationally-elected Senators, and a House of Representatives constituted by over two hundred representatives elected according to legislative districts), an independent judiciary, and an executive branch whose powers are exercised singularly by an elected president. In her classic treatise on Philippine executive power, Justice Cortes noted that “the Philippine constitution establishes a highly centralized unitary system of government and distributes its powers among three departments but assigns to the president the dominant role in that governmental scheme.”⁴¹

As I will show in the following subsections, the historical background and ideological currents underlying each of the four constitutional epochs leading to the present 1987 Constitution are fairly consistent in reflecting universalist concerns and aspirations. The constitutional debates (from the Malolos Congress up to those of the Constitutional Commission that drafted the 1987 Constitution) illustrate how tenets of universalist philosophy were articulated both as constitutional objective and as political prescription. Universalism thus acquired constitutional dimensions in two ways --- the strong popular sovereignty emphasis on individual rights and autonomy guarantees over the excessive (and potentially abusive) powers of ‘big government’, as well as the liberal democratic consciousness of pacific internationalism in Philippine relations with other states in world public order. As manifestations of universalist thought, both of these constitutional strands found their apex in the present 1987 Constitution. I am of the view that there was a critical political ferment in each of the constitutional epochs that presaged our acceptance and articulation of universalism. But first we must explain what universalism really means, how it entered public order epistemology, and, after the intermediations of various institutions and historical events, found its way to shape our international legal and political relations vocabularies.

2.1. A Universalist Exegesis, and its Ideological Distinctions from Particularism and Cultural Relativism

2.1.1. The Evolution of Universalism

Contrary to its seeming connotations, universalism is not a static or absolutist concept. It is a mode of human rationality that makes certain human dignity values the primordial foundation for how individuals and their respective communities form judgments and legitimate their decisions.⁴² Respect for dignity, according to

⁴⁰ CONST., art. II, sec. 1.

⁴¹ Referring to the 1935 Constitution. IRENE R. CORTES, *THE PHILIPPINE PRESIDENCY: A STUDY OF EXECUTIVE POWER*, (1966 ed., University of the Philippines College of Law), at 3.

⁴² DONNELLY, J. *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (2nd ed., 2003), at pp. 89-106. See Eyskens, Mark, “Particularism versus Universalism”, in KAREL WELLENS, *INTERNATIONAL LAW THEORY AND PRACTICE* (Essays in Honor of Eric Suy), (1998 ed., Nijhoff Publishers), at pp. 11-23.

Arthur Chaskalson, “implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner.”⁴³ As originally coined by the Stoics in the Latin phrase *dignitas hominis* and later developed by Immanuel Kant, dignity is “inherent in the rational persona” recognizing the worth of the human individual in the state of nature.⁴⁴

The preservation and promotion of these ‘human dignity values’ are inseparable to our conceptions of the good life, and corollarily, to how we envision the public ordering of our private relations and socio-political existence. Thus, while universalism shares common ground with elements of the “rule of law” concept (e.g. state power cannot be exercised arbitrarily; law applies to the sovereign and instruments of the State, with an independent institution such as a judiciary to apply the law to specific cases; law applies to all persons equally, without prejudicial discrimination),⁴⁵ universalism has a transformative ethical dimension that influences substantive legal content, something that is usually not ventured into by “rule of law” theory. Universalism, therefore, does not only affect the *process* through which we arrive at our individual and collective political decisions in a functioning democracy, but more substantially, universalism shapes the moral-ethical directions of these decisions. These substantive and processual choices are as dynamic as the individuals making them and the respective polities to which individuals belong. As Martha Nussbaum clarifies, “we want universals that are facilitative rather than tyrannical, that create spaces for choice rather than dragooning people into a desired total mode of functioning...For it is all about respect for the dignity of persons as choosers. This respect requires us to defend universally a wide range of liberties, plus their material conditions; and it requires us to respect persons as separate ends, in a way that reflects our acknowledgment of the empirical fact of bodily separateness, asking how each and every life can have the preconditions of liberty and self-determination.”⁴⁶

Universalist rationality nonetheless recognizes that the search for human dignity values cannot be excessively atomistic to the particulars of state interests and domestic concerns. Armin von Bogdandy and Sergio Dellavalle explain that universalism is the evolution of public law to a modern normative objective of cosmopolitan democracy. Under this cosmopolitan view of public law, the

⁴³ Chaskalson, Arthur, “Human Dignity as a Constitutional Value”, in pp. 133-144 of KRETZMER, DAVID and ECKART KLEIN (eds.), *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE*, (2002 ed., Kluwer Law International).

⁴⁴ Hubert Cancik presents a thorough historical exploration of the concept of human dignity, citing the impact of Cicero, and other Stoics on Immanuel Kant’s concept of the ‘dignity of man’. Cancik, Hubert, “Dignity of Man and Persona in Stoic Anthropology: Some Remarks on Cicero, *De Officiis* I 105-107”, in pp. 19-37 of KRETZMER, DAVID and ECKART KLEIN (eds.), *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE*, (2002 ed., Kluwer Law International).

⁴⁵ See Chesterman, Simon, “An International Rule of Law?”, 56 *Am. J. Comp. L.* 331 (Spring 2008), at 342.

⁴⁶ Nussbaum, Martha C., “In Defense of Universal Values”, 36 *Idaho L. Rev.* 379 (2000), at 402.

international realm is 'democratized' where "the constitutions of the established democratic nation States are sometimes also conceived as guiding lights of a global order".⁴⁷ This informal 'federalism' or plurality of universalist states will not result in the realist anarchy of hegemonic power relations, but rather, a network ('federation') of intense cooperation among nation States that have adopted liberal democratic principles such as human rights, representation, popular sovereignty, and government accountability. Universalism is thus not the tyrannical 'erasure of diversity' that Paul Schiff Berman demonizes, but is actually more attuned to Berman's paradigm of global legal pluralism.⁴⁸ In von Bogdandy and Dellavalle's characterization of public order and universalism, "there cannot be a democratic world federation, but there can be a world of closely and successfully cooperating democracies".⁴⁹

Significantly, von Bogdandy and Dellavalle attribute the development of universalism to two intellectual strands: 1) a metaphysical tradition dating back to the legacy of Christianity and the theory of the natural universal sociability of humans;⁵⁰ and 2) the contractarian theory of political institutions initially articulated by Immanuel Kant. In the first strand, increasing political diversity within the ever-expanding Christian communities (finding its apotheosis in the consolidation of the Holy Roman Empire) necessitated the concept of a *jus inter gentes*, or an "international law conceived as a set of rules governing the interactions between peoples on the basis of shared principles". Christianity's paradoxical espousal of exclusivity, however, ultimately led to its decline as an ontological basis for the universalism of international law. In lieu of the theoretical vacuum created by this decline, Hugo Grotius and later theorists would posit the conception of the general

⁴⁷ Id. at note 10, at p. 23.

⁴⁸ Berman, Paul Schiff, "Global Legal Pluralism", 80 S. Cal. L. Rev. 1155 (September 2007), at 1189-1191.

⁴⁹ Id. at note 10, at p. 26.

⁵⁰ Sundhaya Pahuja calls for a refounding of human rights that is cautionary against claims to universality because "it is necessary to explore the relationship between the concept of universality itself and the byzantine reinforcements of colonial power and knowledge, not to mention its relationship to Christianity". He stresses that the search for foundations of the normative content of universality is itself a "search for authority", the narrative of which has the effect of being "authoritative and authorizing". See Pahuja, Sundhya. "The Postcoloniality of International Law", 46 Harv. Int'l. L. J. 459, at 467-468 (Summer, 2005). I therefore note parallel work examining human dignity values across civilizations, such as in Xiarong Li, "Asian Values and the Universality of Human Rights", Institute for Philosophy and Public Policy, Vol. 16, No. 2, Spring 1996; Peerenboom, Randall. "Beyond Universalism and Relativism: The Evolving Debates About 'Values in Asia'", 14 Ind. Int'l. & Comp. L. Rev. 1 (2003), at 9-14; Subedi, Surya P. "Are the Principles of Human Rights 'Western' Ideas? An Analysis of the Claim of the 'Asian' Concept of Human Rights from the Perspectives of Hinduism", 30 Cal. W. Int'l. L.J. 45 (Fall 1999); PANNIKAR, "Is the Notion of Human Rights A Western Concept?", *excerpt reproduced* in H.J. STEINER, and P. ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS (2nd ed., 2000), at pp. 383-389.

human disposition towards sociability as a substitute metaphysical foundation for the universalism of international law.⁵¹

On the other hand, with respect to the second strand of universalist development, von Bogdandy and Dellavalle summarize the contractarian version of universalism in the global order to the following key precepts: “1) the centrality of individuals; 2) some essential assumptions about the equality of humans; 3) the cognizance of mutual interdependence; 4) the awareness that individual long term self-interest is in building a common society; 5) the conviction that we can pursue self-fulfillment only in peace and in a global interaction based on freedom and justice; 6) the principle that the definition of the rules binding all members of any society has to be based on inclusive procedures; and 7) the commitment to create institutions and procedures in order to put the previous cognitive tenets into practice.”

The most visible contemporary ‘offspring’ of universalist scholarship, according to von Bogdandy and Dellavalle, is international constitutionalism, which “strives for a global legal community that frames and directs political power in light of common values and a common good.”⁵² Fernando Teson carries this theme even further to insist on a redefinition of sovereignty that depends upon domestic legitimacy, arguing in Kantian terms that “the principles of international justice must be congruent with the principles of internal justice”, such that any exercise of state power becomes morally legitimate only “when it is the result of political consent and respects the basic rights of the individuals subject to that power”.⁵³ Kant’s First Definitive Article to Perpetual Peace (*‘the civil constitution of every state shall be republican’*) implies that peace can be secured only if states possess the elements of a liberal state (the freedom of individuals; the principle of independence or having all legal acts deriving from a common legislation; legal equality; and representative mechanisms for effectively channeling popular will to government decision-making).⁵⁴ Teson explicates this normative argument with the strong assertion that the universal requirement of human rights and democracy is “grounded in the purity of its origin, a purity whose source is the *pure concept of right*”. Due to this ‘pure’ concept of right, “the only way in which international law can be made fully compatible with the freedom of individuals to pursue and act upon rational plans of life is if it contains a strong obligation for governments to

⁵¹ HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS, (1950 ed., Steven & Sons Ltd., at pp. 114-141. See O’Sullivan, Declan, “The History of Human Rights Across the Regions: Universalism vs. Cultural Relativism”, International Journal of Human Rights, Vol. 2, No. 3 (Autumn 1998), pp. 22-48; Id. at note 10.

⁵² Id. at note 10, pp. 37-42.

⁵³ FERNANDO R. TESON, A PHILOSOPHY OF INTERNATIONAL LAW, (1998 ed., Westview Press), at pp.1-2.

⁵⁴ Caranti, Luigi, “Perpetual War for Perpetual Peace? Reflections on the Realist Critique of Kant’s Project”, in LUIGI CARANTI (ed.), KANT’S PERPETUAL PEACE: NEW INTERPRETATIVE ESSAYS, (2006 ed., Luiss University Press), at pp. 21-22.

respect human rights.”⁵⁵ John Rawls would later stress these Kantian foundations in his *A Theory of Justice*, contending that the fundamental right to liberty is an inevitable auxiliary to man’s nature as an autonomous agent.⁵⁶

Proceeding from his republican thesis, Kant’s Second Definitive Article (*‘liberal republics will progressively establish peace among themselves by means of the pacific federation or union in the foedus pacificum’*) and his Third Definitive Article (*‘the establishment of a cosmopolitan law to operate in conjunction with the pacific union’, where such cosmopolitan law would be ‘limited to conditions of universal hospitality’*) both establish universalism as an attainable objective for the international legal order. Territorial borders and state lines thus become largely immaterial to the universalist rationality’s emphasis on prioritizing human dignity values in governmental measures and political judgment-making. It is in this sense that universalism fluidly permeates legal and ethical discourse in both spheres of the domestic and the international,⁵⁷ in a much-variegated manner that shows how our conceptions of human dignity “overarch politics, ideology, and culture in the bedrock of human experience.”⁵⁸

Notably, Kant does not do away with the existence of states as enabling institutions for attaining universalist aims. Kant’s ‘cosmopolitan law’ in his Third Definitive Article bred various streams of interpretation,⁵⁹ none of which call for the abandonment of nation states in favor of a world government. Cosmopolitanism as an expression of universalist rationality does not advocate the rejection of our existing political associations and traditional sources of legal obligation. Rather, as a theory for a “communicative community concerned with universal moral values”,⁶⁰ cosmopolitanism provokes us to widen our comprehension of the actual

⁵⁵ Id. at note 64, at p.14.

⁵⁶ See Beck, Gunnar, “Immanuel Kant’s Theory of Rights”, *RATIO JURIS* 1988, Vol. 19 (2006) 4, S. 371-401.

⁵⁷ See Khaled Abou El Fadl, “The Unique and International and the Imperative of Discourse”, 8 *Chi. J. Int. L.* 43 (Summer 2007); Higgins, R. *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT.* (1995 ed.), at 96:

“... I believe, profoundly, in the universality of the human spirit. Individuals everywhere want the same essential things: to have sufficient food and shelter, to be able to speak freely; to practice their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial. I believe there is nothing in these aspirations that is dependent upon culture, or religion, or stage of development. .”

⁵⁸ Wilson, Jr., Thomas W., “A Bedrock Consensus of Human Rights”, in ALICE H. HENKIN (ed.), *HUMAN DIGNITY: THE INTERNATIONALIZATION OF HUMAN RIGHTS*, (1979 ed., Aspen Institute for Humanistic Studies), at pp. 47-63.

⁵⁹ Anderson-Gold, Sharon, “Cosmopolitan Right --- Kant’s Key to Perpetual Peace”, pp. 137-147 in LUIGI CARANTI (ed.), *KANT’S PERPETUAL PEACE: NEW INTERPRETATIVE ESSAYS*, (2006 ed., Luiss University Press); Koskenniemi, Martti, “Legal Cosmopolitanism: Tom Franck’s Messianic World”, 35 *N.Y.U. J. Int’l L. & Pol.* 471 (Winter, 2003).

⁶⁰ Id. at p. 146.

spaces for normative political behavior, in a manner that permits us to recognize the intersubjectivities of our collective judgments.⁶¹ As Noah Feldman explains, this cosmopolitan conception of law is justified “insofar as it may be understood as a species of natural duty,” even if it is not promulgated by states (which traditionally hold the monopoly on violence and legal coercion). In relation to the pursuit of universal moral values, Feldman posits a ‘minimalist legal cosmopolitanism’ that focuses on the moral legitimacy of ‘the summed set of all operating legal systems around the world’, such as would avoid the morally arbitrary accident of a person being “off the grid”, as seen in accidental or locational *non liquet* situations in international law. In this, Feldman’s ‘minimalist legal cosmopolitanism’ shares the rights-capabilities approach pioneered by Amartya Sen⁶² (also adopted by Martha Nussbaum⁶³) to measure moral legitimacy. The moral legitimacy of any institution for political association therefore depends ultimately on “whether individuals are being treated according to morally adequate legal standards”.⁶⁴

Universalism as a theory for public order thus belongs to what Martti Koskenniemi categorizes as a ‘normative theory of general principles’, where general principles of international law are treated as norms whose existence is grounded in the “universality of the human condition”.⁶⁵ This universality is most powerfully translated to rights discourse, where, as Yash Ghai contends, the universality of human rights is conditioned on premises that: “a) there is a universal human nature; b) this human nature is knowable; c) it is knowable by reason; and d) human nature is essentially different from other reality. This centrality of the human being elevates the autonomy of the individual to the highest value; rights become essentially a means of realizing that autonomy.”⁶⁶ Pierre-Marie Dupuy stresses that this appeal to universal values (as integrated in positive norms of international law) is part of the “common heritage of mankind”,

⁶¹ Taraborrelli, Angela, “The Significance of Kant’s Third Definitive Article”, pp. 149-159 in LUIGI CARANTI (ed.), *KANT’S PERPETUAL PEACE: NEW INTERPRETATIVE ESSAYS*, (2006 ed., Luiss University Press).

⁶² AMARTYA SEN, *DEVELOPMENT AS FREEDOM*, (2000 ed.), pp. 54-86.

⁶³ MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP*, (2006 ed., Harvard University Press).

⁶⁴ Feldman, Noah, “Cosmopolitan Law?”, 116 *Yale L.J.* 1022, (March 2007), at pp. 23-25.

⁶⁵ As opposed to the ‘descriptive theory’ which holds that principles of international law are not, by definition, ‘rules’, and thus are not conceived as actual binding commands of sovereign states. The descriptive theory holds that international law principles emerge as “inductive generalizations from individual rules, undertaken for systematic or didactic purposes but remain devoid of independent legal content.” See Koskenniemi, Martti, “General Principles: Reflexions on Constructivist Thinking in International Law”, at pp. 360-399, MARTTI KOSKENNIEMI (ed.), *SOURCES OF INTERNATIONAL LAW*, (2000 ed., Dartmouth Publishing Company, Ltd., England).

⁶⁶ Yash Ghai, “Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims”, 21 *Cardozo L. Rev.* 1095 (February 2000), at 1096.

and such universal values are not the provenance of any particular regional or cultural tradition.⁶⁷

Thus, universalism draws us to a sort of 'bottom-up' paradigm, where our conception of public order must be seen first and foremost from the prism of the individual's fundamental autonomy, together with the human dignity values that operate as intrinsic guarantees of the continuation of such autonomy. It is from this individualist prism that we devise an external ordering of our social interactions and community relations in an organic structure, political form, or governmental design that most meaningfully enriches, preserves, and engages individual autonomy. Thus, as a conception of public order, universalism calls upon all individuals to act and form judgments from notions of moral legitimacy derived from our 'common' heritage of human dignity values, above and beyond any constructed political superstructure or supposedly inherited national-cultural tradition.

2.2. Universalism vis-à-vis Particularism

In contrast, *particularism* as a theory for public order directs us to the nation-State as the locus of initial inquiry for the rationality of our individual and collective judgments. The German conception of nationhood developed by Johann Gottfried von Herder sees one's belonging to a nation as a "question of solidarity determined by birth", and not through rational choice or free will. As the embodiment of this solidarity, "the nation thus became the affirmation of individuality, the characteristic traits, the specific qualities, the difference from others, of the particular nature and inequality of nations."⁶⁸ Georg Wilhelm Friedrich Hegel is said to have believed that statehood was the inevitable destiny of nationhood, noting that the "nation-state is mind in its substantive rationality and immediate actuality and is therefore the absolute power on earth."⁶⁹ From this Hegelian strain, Thomas Franck asserted that a common human destiny (a

⁶⁷ Dupuy, Pierre-Marie, "Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi", 16 Eur. J. Int'l. L. 131 (February 2005), at 135.

⁶⁸ Eyskens, Mark, "Particularism Versus Universalism", in KAREL WELLENS (ed.), INTERNATIONAL LAW: THEORY AND PRACTICE (Essays in Honour of Eric Suy), (1998 ed., Kluwer Law International), at pp. 11-23.

⁶⁹ Franck, Thomas M., in "Clan and Superclan": Loyalty, Identity, and Community in Law and Practice", pp. 5-30 in ROBERT J. BECK and THOMAS AMBROSIO (eds.), INTERNATIONAL LAW AND THE RISE OF NATIONS: THE STATE SYSTEM AND THE CHALLENGE OF ETHNIC GROUPS, (2002 ed., Chatham House Publishers, Seven Bridges Press LLC). Franck acknowledges, however, that since national identities are highly mutable, an individual's identity references are in reality more numerous and diverse than expected. While there does not appear to be a global trend towards what he calls a 'rampant tribal nationalism', neither is there a 'rampant centripetal globalism'. Instead, there are elements of both these tendencies present in the dynamic of the international system, simultaneously leading to a "loss of centred identity", but also potentially liberating the individual towards a sense of belonging to "concentric circles of identity and community".

'federation of humankind') based on a transnational consciousness of everyone's humanity is nothing but a "modern liberal myth", and one that is unsupported by historical or sociopolitical evidence.⁷⁰

Post-Westphalian Europe (and the subsequent classical era of state sovereignty which developed before the First World War) typifies the emergence of a deep nation-state structure throughout the international system.⁷¹ The ensuing emphasis on sovereign states as the primary constitutive actors in the international system would later influence normative legal discourse towards a more statist perspective.⁷² Since the nation-State acts as the primary vector for the realization of the goals and ends of all individual members of the collective polity, the validity and legitimacy of rational judgments in the public order is therefore established from some notion of a threshold 'rationality' of the nation-State. Realists in international relations theory alternatively depict this nation-State 'rationality' as interest-driven, power-oriented, and strategy-dependent.

Generally building on Hobbesian premises about the state of nature⁷³ and other classical works from intellectual precursors such as Thucydides, Niccolo Machiavelli, Jean Jacques Rousseau, and Carl von Clausewitz,⁷⁴ realists perceive the international system to be in a state of anarchy (or simply put, the absence of centralized authority). Sovereign states as rational unitary actors could be analogized to a "billiard ball" configuration in the international system, where asymmetries of information, wealth, and power determine the balance of power.⁷⁵ Realism became the prevailing orthodoxy in international relations scholarship, initially dominated by the classical works of E.H. Carr, Hans Morgenthau, John Herz, and later by 'neo-realists' such as Kenneth Waltz, Robert Gilpin, Robert Keohane and John Nye.⁷⁶

⁷⁰ Id. at p. 12.

⁷¹ Id.; Fowler, Michael Ross and Julie Marie Bunck, "The Nation Neglected: The Organization of International Life in the Classical State Sovereignty Period", pp. 38-60.

⁷² See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF MODERN INTERNATIONAL LAW, 1870-1960*, (2002 ed., Cambridge University Press); Id. at note 81, Barkin, J. Samuel and Bruce Cronin, "The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations", pp. 61-82.

⁷³ THOMAS HOBBS, *LEVIATHAN*, (1996 ed., Meiner Press).

⁷⁴ Id., *reproducing relevant excerpts from* Thucydides, "The Melian Dialogue", pp. 100-110; Rousseau, Jean Jacques, "The State of War: Confederation as Means to Peace in Europe", pp. 111-127; and Machiavelli, Niccolo, "On Princes and the Security of Their States", pp. 105-110.

⁷⁵ See PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS*, (1989 ed., First Vintage Books).

⁷⁶ See HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE*, (2006 ed., McGraw-Hill); EDWARD HALLETT CARR, *THE TWENTY YEARS' CRISIS: 1919-1939 (AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS)*, (1948 ed., Macmillan London); JOHN HERZ, *POLITICAL REALISM AND POLITICAL IDEALISM: A STUDY IN THEORIES AND REALITIES*, (1951 ed., Univ. of Chicago Press); KENNETH WALTZ, *MAN, THE STATE, AND WAR: A THEORETICAL ANALYSIS*, (1959 ed., Columbia Univ. Press);

Realism stands on particularist foundations. Since the analytical focus is on the political grouping (best exemplified by the state) rather than the individual, realists study the political struggle for power in a multi-linear and eclectic manner -- - whether as rooted in human nature, in various social strata, or more structurally, in prevailing authority systems.⁷⁷ The dynamics of state power are said to mirror the human condition, showing us how values of self-interest and security animate and justify hierarchical behavior in institutional settings. Accordingly, rational judgments of a realist state would prioritize national interest above any individual selectivities, and more so over any claim to a nebulous 'ideal' of universality.

The impact of particularist thought on conceptions of public order in the international system translates to skepticism of international law's obligatory force, coupled with a narrower view of international institutions' binding capacities. von Bogdandy and Dellavalle see this skepticism to have been largely engendered by "American Neocons" (including Jack Goldsmith and Eric Posner⁷⁸), also pointing to hegemonism as a variant of the particularist paradigm that "appears to be most in tune with the challenges of globalization" by seeking to "extend the reach of the polity beyond the nation for pursuing its interests or even values without ending in the impasse of colonialism or in a web of international governance".⁷⁹ Because nation-states act solely upon considerations of strategic interest, international law has little, if any, suasion over the processes of rational choice and judgment-forming. This interest-driven thread of reasoning has given rise to various game-theoretic approaches (mainly comparative static analysis in the form of prisoner's dilemma games) for evaluating international agreements, state behavior, and normative developments in the international system.⁸⁰

Particularist infusions in hegemonism are driven not by claims to universal values, but rather, by strategic interactions to maximize security and wealth. As von Bogdandy and Dellavalle discuss, Carl Schmitt's hegemonist vision of public order in distinct spheres of influence would treat values as "always something relative, not universal."⁸¹ von Bogdandy and Dellavalle later show how Robert

ROBERT GILPIN, *WAR AND CHANGE IN WORLD POLITICS*, (1981 ed., Cambridge Univ. Press);
KEOHANE, ROBERT and JOHN NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS
IN TRANSITION*, (1977 ed., Little, Brown & Co.).

⁷⁷ Buzan, Barry, "The Timeless Wisdom of Realism?", pp. 47-65, in STEVE SMITH, KEN BOOTH, MARYSIA ZALEWSKI (eds.), *INTERNATIONAL THEORY: POSITIVISM AND BEYOND* (1996 ed., Cambridge University Press).

⁷⁸ GOLDSMITH, JACK and ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW*, (2005 ed., Oxford University Press).

⁷⁹ *Id.* at note 10, p.31.

⁸⁰ See Guzman, Andrew, "The Design of International Agreements", 16 *Eur. J. Int'l. L.* 4, (2005), at 579-612; PIERRE ALLAN, *GAME THEORY AND INTERNATIONAL RELATIONS*, (1994 ed., Aldershot).

⁸¹ *Id.* at note 10, p.35.

Kagan refines this hegemonist vision in the context of the United States as the postmodern era's remaining superpower, on the premise that "[l]iberty being a value shared, in principle, by all humans, the United States can reasonably claim to act globally."⁸² With this conception of defending liberal values throughout the international arena, American Neocons plainly "seek to legitimize the global rule of the superpower and its right to intervention."⁸³

Ironically, it says much about the (un)enduring currency of particularist reasoning that there seems to be a growing legion of scholars that draw on strains of universalist rationality (considering fundamental human dignity values to evaluate the moral legitimacy of state choices and judgments) to assess the legitimacy of American hegemony in the postmodern international system.⁸⁴ For example, while Lea Brilmayer presents a particularistic model offering three permutations of popular consent (*'contemporaneous consent'*, *'ex ante consent'*, and *'hypothetical consent'*) transplanted to the international arena to evaluate the legitimacy of American hegemonic acts, she nonetheless acknowledges a fourth basis for normative evaluation. This fourth basis is the claim of *substantive morality*, which, unlike Brilmayer's consent justifications, rests on conceptions of values that are inherent in our common humanity.⁸⁵ The logic she employs to explain this fourth basis for justification is undoubtedly universalist: "[i]f we believe in inalienable human rights, then surely they must be protected from abuses even when the violators have been consistent in refusing to recognize them or provide for their enforcement."⁸⁶ In this sense, Brilmayer appears to concede certain norms of substantive morality as being too vital to our just regulation of state conduct, rightly insulating these norms from the liberal requirement of popular consent. She acknowledges that American hegemony can be contained by *jus cogens* norms that are "so deeply rooted that they cannot be pushed aside by contrary state agreement", and even makes a brief critique of cultural relativist

⁸² *Id.* at note 10, p. 36.

⁸³ *Id.*

⁸⁴ MICHAEL BYERS (ed.), *UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW*, (2003 ed., Cambridge University Press); See TONY EVANS, *US HEGEMONY AND THE PROJECT OF UNIVERSAL HUMAN RIGHTS*, (1996 ed., Macmillan Press), at pp. 101-118. Evans describes the tensions between the United States' role in negotiating a human rights regime and the domestic threat caused by the proposed Bricker Amendment to the US Constitution. (Various versions of the Bricker Amendment sought to regulate the binding effect of treaty law to the sole exercise of Congressional power by requiring enabling legislation before treaties could have the force of law in US jurisdiction.) Evans concludes that the tensions resulted in a political compromise ("the price paid for defeating Bricker was the [Eisenhower] administration's promise to withdraw from further meaningful negotiations on the development of a strong human rights regime") that, in the end, sacrificed the moral legitimacy of the United States' hegemonic authority to establish a strong human rights regime.

⁸⁵ LEA BRILMAYER, *AMERICAN HEGEMONY: POLITICAL MORALITY IN A ONE-SUPERPOWER WORLD*, (1994 ed., Yale University Press), at pp. 141-166.

⁸⁶ *Id.* at p.146.

claims.⁸⁷ To recast this seeming reference to universalist rationality back to particularist lines, however, she asserts that “the protection of human rights from state oppression is no more a violation of liberal principles internationally than it is a violation of liberal principles domestically. Liberal democrats expect that some norms will be entrenched against interference by democratic processes; because they are central liberal values, however, this does not offend liberal politics.”⁸⁸ Clearly, this is reasoning that turns universalism on its head, and brings us back to von Bogdandy and Dellavalle’s earlier characterization that the American Neocons’ seeming appeal to universal values is singularly intended to entrench global rule for the remaining superpower.

Such inconsistencies in particularist reasoning have also led to some universalist critiques on the theoretical integrity of several basic particularist assumptions. If we are to rigorously probe human rationality and the actual contours of public order especially in the postmodern era, can the assumption of the state as the central “rational unitary actor” still hold in the face of increasingly diverse bases of authoritative decision-making? Perhaps not without wreaking some havoc on our understanding of postmodern international relations. As McDougal, Lasswell, and Chen persuasively observe in relation to the global constitutive process of authoritative decision-making, “humankind as a whole today presents...both the aspect and fact of a global community, entirely comparable to the internal communities of lesser territorial groupings, in the sense of interdetermination and interdependencies in the shaping and sharing of all values.”⁸⁹ In a postmodern era marked by ever-increasing horizontal and vertical normative interactions between nation-states, international institutions, regional groupings, multinational corporations, individuals, lobbyist groups, and civil society organizations,⁹⁰ we can more tenably assert that nation-states no longer hold the monopoly of participation in the international authoritative decision-making process. Given this reality, one’s fictive dependence on the theoretical construct of the nation-state (as the primary locus for rational judgment) becomes all the more questionable.

Even granting the particularist assumption of states as ‘rational unitary actors’, however, is it still discursively meaningful and consistent with our understanding of the international system to depict state actions as nothing but mere self-interest strategies? Joining critical positions taken by other scholars, von Bogdandy and Dellavalle respond to this question in the negative, contesting the purported purism of game-theoretic techniques and their inadequacy in

⁸⁷ Id. at p. 148.

⁸⁸ Id. at p. 146.

⁸⁹ Id. at p. 161.

⁹⁰ See RAINER HOFMANN (ed.), *NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW*, (1999 ed., Duncker & Humblot).

describing human rationality.⁹¹ In this, von Bogdandy and Dellavalle expose the inherent contradiction between the particularist leanings for supposed ‘scientific parsimony,’ and the particularist result of having to sacrifice the very same analytical rigor for which particularists aspire:

“Goldsmith and Posner assert that the assumption is nonetheless justified by the particular shape of the international arena, where states are normally perceived as acting as a unitary whole, and because the ‘billiard ball’ approach, considering every single state as a unity, albeit ‘far from perfect’ would be simply ‘parsimonious’ in the sense that it would allow to usefully reduce number and complexity of the analyzed phenomena in order to concentrate on the most significant among them. This argument, however, has little content in the face of one of the most relevant trends of our times: *the de-structuring of state unity and the progressive development of private and public networks*. Ignoring these new developments would not provide for a healthy reductionism in scientific analysis, but rather for a *misunderstanding of the present reality*. Furthermore, either rationality should be understood in a more than purely instrumental sense, or, even if it is conceived as a mere instrument for the achievement of particular goals, it does not necessarily find its highest self-fulfillment in the *immediate* maximization of short-sighted payoffs. From a more far-reaching point of view, it also might be argued that the creation of norms, rules, and solid international institutions to secure their compliance is, already in itself, a better achievement of instrumental reason insofar as it guarantees higher benefits in the long-term.”⁹²

Kal Raustiala also advances an important critique of the particularist assumption of state actions as self-interest strategies. Apart from joining the scholarly critique on the at-times simplistic use by particularists of rational-functional tools, Raustiala draws our attention to the dynamics of international cooperative behavior.⁹³ A critical examination of the proliferation of international agreements and international institutions in the past two decades, according to Raustiala, undermines the particularist insistence that states conclude agreements

⁹¹ Id. at note 10, p. 33, *citing* Berman, Paul Schiff, “Seeing Beyond the Limits of International Law”, 84 Tex. L. Rev. 1265 (2006); Guzman, Andrew T., “The Promise of International Law”, 92 Va. L. Rev. 533 (2006); Hathaway, Oona A. and Ariel N. Lavinbuk, “Rationalism and Revisionism in International Law”, 119 Harv. L. Rev. 1404 (2006); Vagts, Detlev F., “International Relations Looks at Customary International Law: A Traditionalist’s Defense”, 15 Eur. J. Int’l. L. 1031 (2004); van Aaken, Anne, “To Do Away with International Law? Some Limits to the ‘Limits of International Law’”. 17 Eur. J. Int’l. L. 289 (2006).

⁹² Id. at note 10, pp. 33-34. Emphasis supplied.

⁹³ Raustiala, Kal, “Refining the Limits of International Law”, 34 Ga. J. Int’l & Comp. L. 423 (Winter 2006).

merely under scenarios of “shallow cooperation”.⁹⁴ He posits that beyond the limited self-interest of nation-states, various normative forces can also propel international behavior towards cooperation and international compliance, namely: 1) the reputational concerns of nation-states vis-à-vis both public and private actors; 2) the nation-states’ delegation of decision-making processes whether to institutional structures (such as tribunals) or through lock-in clauses in international agreements; and 3) structural changes that can be literally brought about by international agreements that mandate institutional action. In Raustiala’s analysis, the conflation of these normative forces is far more consistent with the postmodern view of the international legal order as a multilayered network of forces and actors.⁹⁵

Considering the relative theoretical strengths and weaknesses of universalism vis-à-vis particularism, von Bogdandy and Dellavalle support the universalist thesis for public order, but caution that universalism’s conceptual foundations “should not resort to religious or metaphysical assumptions,” and should precipitate a “search for institutional solutions capable of conciliat[ing] the need for global values and rules with respect for the equal sovereignty of peoples”.⁹⁶ (Interestingly, this latter prescription appears to embrace John Rawls’ tolerance for ‘nonliberal’ hierarchichal states in his *Law of Peoples*, so long as these ‘nonliberal’ states observe fundamental human rights. As I will discuss in the next subsection, this Rawlsian view of the international order could be construed as an argument favoring a certain degree of cultural relativism, which, as Fernando Teson has previously held, appears to dilute Rawls’ own arguments for the individual-oriented appeal to common human values in his *A Theory of Justice*.)

As a mode of human rationality and a foundation for constructing public order, von Bogdandy and Dellavalle then operationalize the universalist thesis to concrete terms of governance by referring us to Christian Tomuschat’s inverted-agency model for state behavior (as one among many possible paradigms). In Tomuschat’s theoretical conception, international law functions as the ‘common

⁹⁴ Id. at 427-428: “Goldsmith and Posner’s analysis of international agreements goes something like this: Agreements can provide information about which actions count as cooperation or coordination; they clarify expectations and thereby allow states to converge on a particular equilibrium. Agreements work best in coordination situations, and, they argue, coordination is what a large fraction of international law is about. Agreements work worst in n-person prisoner’s dilemmas, because in these situations there remains a serious problem of enforcement. If a state defects from a multilateral accord, what happens? Enforcement itself faces severe collective action problems—who will take action against the violator? Treaties cannot solve this, they claim, without some irreducibly bilateral method of enforcement. The result is that we see some meaningful agreements that operate through reciprocity, but many that simply ratify the status quo, creating what George Downs and others have dubbed “shallow cooperation.”

⁹⁵ See Raustiala, Kal, “Transgovernmental Networks and the Future of International Law”, 43 *Virg. J. Int’l. L.* 1962 (2002).

⁹⁶ Id. at note 10, at p.42. See Tan, Kok-Chor, “The Problem of Decent Peoples”, pp. 76-94 in MARTIN, REX and DAVID A. REIDY (eds.), *RAWLS’S LAW OF PEOPLES: A REALISTIC UTOPIA?*, (2006 ed., Blackwell Publishing).

law of humankind', and states are the agents called upon to promote universalist values.⁹⁷ As such, "the core principles of international law assume a foundational, rather than a merely supplementary, function" for nation-states and their constitutions. It would therefore be unsurprising that the universal values enshrined in international human rights law would, likewise, find expression in the fundamental rights codified across domestic constitutions that prescribe the limits of domestic public power. Precisely because there is a unified rationality driven by universal human dignity values, there are far less opportunities for disjuncture between domestic assertions of state power and international governance. Under this conception, both domestic and international assertions of power would be subordinated to the greater authority of our fundamental human dignity values.

Consistent with Kant's Definitive Articles, a universalist public order therefore would not cause the obliteration of nation-states, which remain an uncontested factual reality. Rather, as von Bogdandy and Dellavalle characterize Tomuschat's paradigm, universalism would result in embracing the phenomenon of entrenchment of fundamental human dignity values, so much so that "international obligations [become altogether] fundamental for municipal legal orders and, may, therefore, be considered as performing a constitutional function for the entire world."⁹⁸ The multidirectional flow of universalist human dignity values across various constitutional systems in the world ultimately serves as a form of 'common' underlying regulation for state conduct in relation to individuals, fellow nation-states, and other international actors. This result more closely adheres to the Kantian vision of cosmopolitan public order, where our common rational consciousness (governed by fundamental human dignity values) reigns supreme over the public structures that only serve to execute individual will.

2.3. Universalism's Persuasive Appeal in a Postmodern Era

I close this universalist exegesis with a brief explanation for my use of this methodology throughout the rest of this work in reorienting our reading of embedded international norms throughout the Philippine constitutional system. For one, the 1987 Philippine Constitution is a *postmodern* and *postcolonial* document, and I believe that we cannot aspire to interpretative accuracy without a theoretical platform that accommodates both of these aspects of intellectual thought and historical experience. I believe universalism more rigorously addresses these aspects than either particularism or cultural relativism, for the simple reason that it does not incur (or at least, not in the same degree) the thorny problem of mutability inherent in fictive constructs such as 'nation-state' and 'culture'. Universalism's appeal is that it embraces both of these constructs within its discursive ideology, without according them the primacy of status that usually spells their persuasive (and normative) doom.

⁹⁷ Id. at note 10, at pp. 43-55.

⁹⁸ Id. at note 10, p. 47.

More importantly, I am of the intuition that the tenets of universalism acquired particular significance in drafting the 1987 Philippine Constitution because of the Filipino people's well-founded fears of entrenchment of public power in formal and informal institutional structures of the state (e.g. strong executives, political dynasties, economic oligarchies, among others). Taken in this light, universalism in the Philippine Constitution (with its emphasis on fundamental human dignity values that inform human rationality), appears to be an inevitable extension from the Filipino people's desire to restore the status of the Filipino citizen as the principal source of public will and authority. The historical motivations behind this ideological desire are the subject of my discussion in the next section.

III. IDEOLOGICAL CURRENTS OF UNIVERSALISM IN THE HISTORY OF THE PHILIPPINE CONSTITUTION

As an archipelago of 7,107 islands strategically positioned as a gateway to both East and West, the Philippines has had a largely more chequered political history than that of its Southeast Asian neighbors. With more than a hundred ethnic-cultural communities, a growing and diverse population of over eighty-six million to date, over one-hundred and seventy languages (Filipino and English are the official languages), over three hundred years of Spanish colonial rule and about forty (40) years of American colonial rule, it is unsurprising that Philippine political ideology is a veritable fusion of parallel streams of Oriental and Occidental thought.⁹⁹

Philippine legal history therefore bears witness to diverse intellectual influences. I observe four eras in Philippine legal history that served as precursors to our constitutional epochs: 1) *Pre-colonial Law*, which is not a fully discrete body of law, being largely the work of reconstitution by legal historians from a motley assemblage of texts and documents traced to various political-ethnic communities; 2) *Spanish Colonial Law*, through which the civil law tradition entered Philippine legal thought and experience, heavily steeped in conceptions of natural law and Roman law; 3) *American Colonial Law*, which brought in various elements of common law reasoning and jurisprudential analysis, and to which Philippine political structures are more closely related; and 4) *Post-Independence Law and Political Structures*, where a concrete conception of Philippine public institutions evolved under a more or less stable idea of Philippine political structure. It is from

⁹⁹ See "Philippines", Encyclopaedia Britannica 2008, Encyclopaedia Britannica Online, 12 May 2008, found at <http://www.britannica.com/eb/article-214501> (last visited 12 May 2008); "Ethnologue Report for the Philippines", at http://www.ethnologue.com/show_country.asp?name=PH (last visited 2 May 2008); RENATO CONSTANTINO, A HISTORY OF THE PHILIPPINES: FROM THE SPANISH COLONIZATION TO THE SECOND WORLD WAR, (1975 ed., Monthly Review Press, USA); HILARIO U. JARENCIO, PHILIPPINE LEGAL HISTORY, (1964 ed., copy of text at Max Planck Institute for Comparative Public Law and International Law); See also Santos-Ong, Milagros (Director, Library Services, Supreme Court of the Philippines), "UPDATE: Philippine Legal Research", December 2007, found at <http://www.nyulawglobal.org/globalex/Philippines1.htm> (last visited 2 May 2008).

Post-Independence law and Political Structures that I will proceed to discuss the ideological currents of universalism as manifested in the political-intellectual dialectic that underlay each of our four constitutional epochs (the 1899 Malolos Constitution, the 1935 Constitution, the 1973 Constitution, and the 1987 Constitution).

I purposely do not employ a chronological account for each of the four subsections on eras of Philippine legal history. Not only has this been attempted by a host of obviously more competent eminent Philippine historians,¹⁰⁰ but it would be a far less responsive approach to the ideological question on Philippine legal thought. The thrust of the (precolonial to postmodern) historical narrative in this section is simply to show encounters between political developments and intellectual thought in the Philippines,¹⁰¹ and how much of these encounters show perceptible threads of universalism's core ideas on the importance of fundamental human dignity values that inform rationality. This is less a strict determinist or evolutionary functionalist approach (e.g. viewing legal history through an "objective, determined, progressive social evolutionary path") as it is a *descriptive* critical exposition of law's capacity for reflective ideology.¹⁰² My categorization of Philippine legal history into four eras is an assignment for descriptive convenience, which is not in any way intended to imply that the Philippines' historical development has been at all unilinear or discrete, or 'determined' by some 'uniform' evolutionary path. This is only a meager sampling of an attempt to historicize consciousness (other Philippine legal history scholars have done far more extensive work¹⁰³) of the interests, structures, and ideologies that antedated

¹⁰⁰ See among others TEODORO AGONCILLO, HISTORY OF THE FILIPINO PEOPLE, (1990 ed., Garotech Publishing, Quezon City, Philippines); LUDOVICO CRUZ LACSAMANA, PHILIPPINE HISTORY AND GOVERNMENT, (1990 ed., Phoenix Publishing House, Philippines); ONOFRE D. CORPUZ, ROOTS OF THE FILIPINO NATION, (2005 ed., University of the Philippines Press); ONOFRE D. CORPUZ, AN ECONOMIC HISTORY OF THE PHILIPPINES, (2000 ed., University of the Philippines Press); RENATO CONSTANTINO, THE PHILIPPINES: A PAST REVISITED, (1975 ed., Tala Publishing, Manila); RENATO CONSTANTINO, THE PHILIPPINES: A CONTINUING PAST, (1978 ed., Foundation for Nationalist Studies, Quezon City); AMADO GUERRERO, PHILIPPINE SOCIETY AND REVOLUTION, (1971 ed., Tala Publishing, Manila).

¹⁰¹ See Tomlins, Christopher, "Framing the Field of Law's Interdisciplinary Encounters: A Historical Narrative", 34 Law & Soc'y. Rev. 911 (2000). I purposely analogize the thematic method used by Christopher Tomlins, which exemplifies some of the features of functionalist sociological legal history (e.g. description of law in terms of functional responsiveness to social needs; and law's adaptation to changing social needs.)

¹⁰² See Gordon, Robert W., "Critical Legal Histories", 36 Stan. L. Rev. 57 (January 1984), at 61, 94-95.

¹⁰³ See among others Fernandez, Perfecto V. "The Philippine Legal System and its Adjuncts: Pathways to Development", 67 Phil. L.J. 21-52 (1992); Mendoza, Vicente V. "The Origin and Development of the Philippine Constitutional System", in FROM MCKINLEY'S INSTRUCTIONS TO THE NEW CONSTITUTION (1978); Lynch, Jr., Owen, "Land Rights, Land Laws, and Land Usurpation: The Spanish Era", 63 Phil. L. J. 82 (1988); Agabin, Pacifico A. "Law and Economic Power: How Interest Groups Influence Legal Development", in UNCONSTITUTIONAL ESSAYS (1996 ed.), pp. 3-45; Balane, Ruben F. "The Spanish Antecedents of the Philippine Civil Code", in

our present Philippine institutions, and is only undertaken here to, as much as possible, guide our understanding of the ideological currents that overlaid much of the discursive process.

3.1. Pre-colonial Law

Pre-colonial Philippines was a loose agglomeration of cultural groups forming political units called *barangays* or 'baranganic' societies. Renato Constantino deplores most of the proto-anthropological observations made by Spanish clerical chroniclers in relation to these societies, pointing out various methodological factors that impaired the scientific value of such observations (e.g. lack of training in social anthropology; descriptive perspective as tending to justify the religious missionary presence; inability to evaluate an Asian society on its own terms). Among the various linguistic groups that inhabited the Philippines at the time of Spanish conquest, Constantino points to the Muslims in the South as having "the most developed social organization".¹⁰⁴ In any event, the *barangays* were small communities ranging from around thirty individuals to exceptional cases of two thousand individuals. Baranganic communities were regarded more as social communities of kinship rather than political units, "in various levels of transition from the primitive communal state to an Asiatic form of feudalism in the Muslim South." The administration of *barangays* was politically dependent on a form of social stratification with the barangay chief (*datu*) at its head. While the chief was the hereditary 'administrative leader' who discharged executive, judicial, and military duties, his authority was "limited by a traditional body of customs and procedures", and he still remained as much a farmer as any other barangay member. Following the chief and his family in social rank were: 1) freemen (*maharlika*), who usually assisted the chief in military, naval, and agricultural tasks for the barangay; 2) the majority of 'commoners' (*timawa*) who comprised the bulk of the baranganic community; and 3) dependents (*alipin*) called 'debt peons' (usually captives of war or those who failed to pay private debts or legal fines) any of whom could be released from dependence through payment since barangay stratification was not at all rigid. (Constantino maintains that it is a "misnomer" to term these peons as slaves in the sense and meaning ascribed by European anthropologists.)

Former Manila trial court Judge and professorial lecturer Hilario Jarencio points to three sources of known legal codes during this period: 1) the *Maragtas*, promulgated around 1200 A.D.; 2) the *Code of Kalantiaw*, promulgated in 1433 A.D.; and 3) the *Moro/Islamic Codes*, which are written codes promulgated by Islamic chiefs in the South of the Philippines (Mindanao and Sulu).¹⁰⁵ The

CIVIL CODE READER (2005 ed.), pp. 253-304. Agabin, Pacifico A. "Philosophy of the Civil Code", in CIVIL CODE READER (2005 ed.), pp. 221-249.

¹⁰⁴ Id. at note 144, p.24-25; See Romualdez, Norberto, "Rough Survey of the Pre-Historic Legislation in the Philippines", 1 Phil. L. J. 149.

¹⁰⁵ Id. at note 144, pp. 4-15.

existence of these supposedly written “codes” has been soundly refuted by historian W. Henry Scott in his seminal work, *Prehispanic Source Materials for the Study of Philippine History*.¹⁰⁶ Despite the disputed historical provenance, however, these codes continue to be cited, and in an isolated instance, would be referred to in a separate concurring opinion to a relatively recent decision of the Philippine Supreme Court.¹⁰⁷

In any case, what stands to be of interest from these “codes” as remaining specimens (albeit disputed) of pre-colonial law are conceptions of freedom, autonomy, and personal dignity in transition. As seen from Judge Jarencio’s translations in his work *Philippine Legal History*, in the *Maragtas*, only the industrious can be deemed ‘free’ men in an indigenous (and glaringly patriarchal) society closely-knit by common social needs, and only those who reap a greater share in the fruits of industry can take on additional social or filial responsibilities.¹⁰⁸ The (fictitious) *Kalantiaw* appears to contain several

¹⁰⁶ WILLIAM HENRY SCOTT, *PREHISPANIC SOURCE MATERIALS FOR THE STUDY OF PHILIPPINE HISTORY* (1984 ed., New Day Publishes, Quezon City).

¹⁰⁷ See full text of “Code of Kalantiaw”, with note on disputed origin, at http://www.chanrobles.com/codeofkalantiaw.html#NOTE_TO_CODE_OF_KALANTIAW (last visited 27 April 2008); Cruz et al. v. Secretary of Environment and Natural Resources et al., G.R. No. 135385, December 6, 2000 (en banc), and (Puno, J., separate concurring opinion):

“Laws were either customary or written. Customary laws were handed down orally from generation to generation and constituted the bulk of the laws of the barangay. They were preserved in songs and chants and in the memory of the elder persons in the community. (citing Rafael Iriarte, *History of the Judicial System, the Philippine Indigenous Era Prior to 1565, unpublished work submitted as entry to the Centennial Essay-Writing Contest sponsored by the National Centennial Commission and the Supreme Court in 1997*, p. 103, citing Perfecto V. Fernandez, *Customs Laws in Pre-Conquest Philippines*, UP Law Center, p. 10 [1976].) The written laws were those that the chieftain and his elders promulgated from time to time as the necessity arose. (citing Teodoro A. Agoncillo, *History of the Filipino People*, p. 41 [1990]) The oldest known written body of laws was the Maragtas Code by Datu Sumakwel at about 1250 A.D. Other old codes are the Muslim Code of Luwaran and the Principal Code of Sulu. (citing Amelia Alonzo, *The History of the Judicial System in the Philippines, Indigenous Era Prior to 1565, unpublished work submitted as entry to the Centennial Essay-Writing Contest sponsored by the National Centennial Commission and the Supreme Court in 1997*.) Whether customary or written, the laws dealt with various subjects, such as inheritance, divorce, usury, loans, partnership, crime and punishment, property rights, family relations and adoption. Whenever disputes arose, these were decided peacefully through a court composed by the chieftain as “judge” and the barangay elders as “jury.” Conflicts arising between subjects of different barangays were resolved by arbitration in which a board composed of elders from neutral barangays acted as arbiters. (citing Agoncillo at 42.)”

¹⁰⁸ Id. at note 144, pp. 5-7:

“I. Deliberate refusal to work in the fields or to plant anything for daily subsistence is one of the gravest of mortal sins which deserves a severe punishment.

a) The lazy one shall be detained and sold to the rich to serve as a slave and to learn the lesson of service and the work in the house and in the fields.

b) Later, when he has been trained for the work he loves it, he shall be returned to his family and he shall no longer be considered as belonging to the inferior class, but as a free man who has been regenerated to live by the fruits of his labor.

rudimentary prescriptions (and corresponding consequences) against deprivation of life, liberty, and property.¹⁰⁹ As to the *Luwaran* (Islamic/Moro codes), Judge Jarencio states that they are “selections from old Arabic law and were translated and compiled for the guidance and information of the Mindanao datus, judges, and panditas who were not well-versed in Arabic.” Another code promulgated at “almost the same time as the *Luwaran* was the *Code of Sulu*”, which was a “guide for the proper execution of the duties of office in accordance with the law and rules of the country...where all subordinate officers of the state were requested to exercise all care in administering justice...and ordered to adhere to the seven articles of the Mohammedan law and to deliberate in their just application.”¹¹⁰ Former Mindanao lawyer and legislator Michael O. Mastura describes both the *Luwaran* and the *Code of Sulu* as “rule-governed and should be viewed as part of the extended framework of Muslim law even when their religious derivation is not explicit.”¹¹¹

Finally, it should be stressed that the *baranganic* societies of precolonial Philippines were distinct in that their concept of property was *communal trusteeship* rather than private or individualistic.¹¹² This belief system has been carried over to current indigenous populations in the Philippines. Jose Mencio Molintas characterizes the indigenous community’s kinship to its ancestral lands as

c) If much later, it is found out that he has not reformed in every way and he wastes his time in idleness, he shall be ejected again by the community and sent to the woods. He shall not be allowed to associate with the rest of the community because he is a bad example.

II. Robbery of any sort shall be punished severely. The finger of the thief shall be cut.

III. Only those who can support a family or several families can get married more than once and have as many children as they can.

a) The poor family cannot have more than two (2) children because it cannot support and bring up properly in the community a greater number of children.

b) The children who cannot be supported by their parents shall be killed and thrown into the river.

IV. If a man had had a child by a woman and runs away from her, his child by this woman shall be killed because it is difficult for a woman without a husband to support a child.

a) The parents of the woman shall disinherit her.

b) The village authorities shall look for the man and when they catch him and he still refuses to marry her, he shall be executed before the child of the woman he has abandoned. Father and child shall be buried in the same tomb.”

¹⁰⁹ *Id.* at note 144, pp. 7-13.

¹¹⁰ *Id.* at note 144, pp. 13-15.

¹¹¹ Mastura, Michael O., “Legal Pluralism in the Philippines”, *Law & Society Review*, Vol. 28, No. 3, *Law and Society in Southeast Asia*, (1994), pp. 461-476.

¹¹² *Id.* at note 144, pp. 31-39. See also Weir, Frasier, “A Centennial History of Philippine Independence”, found at <http://www.ualberta.ca/~vmitchel/> (last visited 27 April 2008).

intrinsic to the formation of group and individual identities, and the preservation of indigenous peoples' sense of autonomy, culture, and traditions.¹¹³

3.2. Spanish Colonial Law

From the arrival of Spanish *conquistadores* (colonizers) in 1521 to about three hundred and fifty years of Spanish colonial rule over the Philippine islands, Spanish colonial policy was a more or less consistent embodiment of Spain's rigid ideological conservatism. Such conservatism not only insulated Spain's imperial aspirations and policies from the general course of European governance and political affairs, but it delayed the spread of liberal ideas to Spanish colonies in favor of a more theistic conception of public order. At the time of conquest, Spain had just concluded over eight centuries of struggle with Moors and had built its national identity on the foundations of its struggle.¹¹⁴ The result, according to Frank Blackmar, was a rigidly conservative and imperialist-oriented national ideology which likewise found expression in Spain's governance of its colonies:

“...For the struggle of Spain with the Moors over eight centuries drew away the nation from other enterprises which would have given it a larger life. The life of the nation was developed through the reconquest and expulsion of a dominant foreign race. It was this struggle on a common basis of liberty that unified the various elements of the Spanish nation into a common central government. At an early period of this national existence the liberties of the people were entrusted to the Cortes, composed of the clergy, the greater barons, the lesser barons, the deputies of the towns, except in Aragon and Castile where it was composed of the nobility, the clergy and the representatives of the cities. In the beginning of the sixteenth century the Cortes was a powerful body and assumed to dictate to kings who were mindful of their decrees. Also whole provinces had privileges granted them from time to time which they cherished as marks of freedom. Spain thus had all of the elements of constitutional liberty in her national foundation. Ordinarily the normal outcome would have been the development of enlightened government of the people. But the monarch representing national unity, continually augmented his power at the expense of the liberties of the people. The ‘time honored institutions’ gave place to centralized power --- to imperialism. More than anything else, the destiny of Spain rests in the fact that in securing national unity the rights and privileges of the people were lost.

¹¹³ See Molintas, Jose Mencio, “The Philippine Indigenous Peoples’ Struggle for Land and Life: Challenging Legal Texts”, 21 Arizona J. Int’l. & Comp. L. 1 (2004), at 269-306.

¹¹⁴ See Moses, Bernard, “Colonial Policy with Reference to the Philippines”, Proceedings of the American Political Science Association, Vol.1, First Annual meeting, (1904), pp. 88-116, at 88-89.

The evil was greatly augmented by the religious element that entered into national structure. That the reconquest of Spain and national unity were obtained through a religious war had a life-long influence on the destinies of Spain. It set the type of national politics forever, for the church became the instrument through which kings were wont to exercise their arbitrary power. The close union of church and state made political and religious unity identical. Thus did the conservatism and authority of the church become a strong ally to the imperialism of the crown and religious and civil liberty of the people went out together. It is necessary to refer to the inquisition because at home and abroad it was used to perpetuate imperialism and suppress the natural development of government..."¹¹⁵

John Leddy Phelan framed the ideological debate underlying the Spanish conquest of the Philippines from the threshold question of political legitimacy. Influential Spanish theologian and international lawyer Francisco de Vitoria had revived a controversy when he challenged the legal justification for establishing and widening the Spanish overseas empire.¹¹⁶ Vitoria had articulated misgivings about the legitimacy of a 'civilizing' mission for alleged 'cultural inferiors' as the principal justification for Spanish rule in the Philippines, a thread of reasoning echoing Bartolome de Las Casas in his decisive Valladolid debate with Juan Gines de Sepulveda.¹¹⁷ Vitoria questioned the right of the Pope to indiscriminately

¹¹⁵ Blackmar, Frank W., "Spanish Colonial Policy", Publications of the American Economic Association, 3rd Series, Vol. 1, No. 3, Essays in Colonial Finance by Members of the American Economic Association, (Aug., 1900), pp. 112-143.

¹¹⁶ Phelan, John Leddy, "Some Ideological Aspects of the Conquest of the Philippines", The Americas, Vol. 13, No. 3, (Jan. 1957), pp. 221-239.

¹¹⁷ Id. at note 3, pp. 3-12. In 1550, Charles V convened a special juridical panel of the Consejo de Indias to meet in Valladolid on the theological and ideological positions of Las Casas and Sepulveda in relation to Spanish duties and responsibilities over indigenous peoples of the New World. In *Democrates Segundo*, Sepulveda would argue that: 1) the Amerindians are "barbarians, simple, unlettered, and uneducated, brutes totally incapable of learning anything but mechanical skills, full of vices, cruel and of a kind such that it is advisable they be governed by others"; 2) "the Indians must accept the Spanish yoke, even if they don't wish to, as rectification and punishment for their crimes against divine and natural law with which they are tarnished, especially idolatry and the impious custom of human sacrifice"; 3) Spain is obliged by divine and natural law to "prevent the harm and the great calamities [the Indians] have inflicted --- and which those who have not yet been brought under Spanish rule continue today to inflict --- on a great number of innocent people who are sacrificed each year to idols"; and 4) Spanish rule facilitates Christian evangelization by allowing Catholic priests to preach "without danger, and without being killed by rulers and pagan priests". Las Casas had written the *Brevissima relacion de la destruccion de las Indias* in 1552, which met Sepulveda's arguments thus: 1) There is a rough moral equivalence between all known social systems, such that there is no natural hierarchy among them that would justify colonial rule. Sepulveda had erroneously generalized the behavior of a (supposedly 'barbarous') minority to an entire people or political structure, which behavior is also found in more civilized groups such as the ancestors of Spaniards; 2) Spain had no jurisdiction to punish indigenous peoples for 'idolatry' when these peoples had never even heard of Christian doctrines; 3) An obligation to liberate innocents does not exist when there is someone "more suitable" to liberate them, and liberation must be carefully done in accordance with the principle of minimal damage ('although we recognize

transfer political sovereignty over indigenous peoples to Christian sovereigns, a legal position that imperiled the legality of Spain's acquisition of the Philippines. Las Casas would ostensibly resolve this question by stating that the Pope could intervene in secular affairs "only to promote spiritual ends", and, in view of the papal bulls of Alexander VI donating the New World to Spanish rulers, the "imperial" sovereignty of the Spanish monarch (Charles V) in the New World was only consistent with his supreme jurisdiction in Western Christendom as the Holy Roman Emperor. (Eventually, however, the significance of the Alexandrian donation would be minimized in favor of the right of prior discovery to establish Spain's 'just title' to the New World.) Spain's Ecclesiastical Junta of 1582 revived the legitimacy debate with respect to Spain's conquest of the Philippines, when the Junta reaffirmed the Papacy's right to depose native rulers who hindered missionary activity, and, consistent with Vitoria's position, stressed that "natives could not be deprived of their political, property, or individual rights founded in natural law and the law of nations unless they positively interfered with the preaching of the Gospel".¹¹⁸ In reifying the 'universal overlordship' of the Spanish monarch over the Indies, Dominican bishops Domingo de Salazar and Miguel de Benavides would dichotomize between "*natural sovereignty*" (the administration of justice and defense of subjects, such form of sovereignty being a free and voluntary election on the part of the natives or as a consequence of a just war) and "*supernatural sovereignty*" (leading men to eternal salvation, the exercise of which is best seen in the Alexandrian 'donation' of the New World to Spanish monarchs conditioned on the task of evangelization).¹¹⁹ As subsequent colonial administrative practices would bear out, however, this was a 'dichotomy' which only subsisted within blurred lines of authority.

The ensuing Spanish colonial administration, according to Sol Iglesias, was a system providing for "centralized colonial authority" which "left the administration of the countryside to *encomenderos* who were given *encomiendas*, parcels of land, as gifts. The *encomenderos* collected tribute, enforced corvee labour, and arbitrarily usurped ownership over land. This later gave way to the *provincias* (provinces), *pueblos* (municipalities), and *cabildos* (cities)."¹²⁰ Phelan contextualizes the debate over the tribute system against the growing tensions

that the Church has the obligation to prevent the unjust death of innocents, it is essential it be done with moderation, taking care that a greater harm not be done to the other peoples which would be an impediment to their salvation and make unfruitful and unrealized the passion of Christ.); and 4) It was not licit for the Spaniards to punish Indians for the sins they might have committed against innocents since it is 'the great hope and presumption that such infidels will be converted and correct their errors...they do not commit such sins obstinately, but certainly, because of their ignorance of God.'" Men can only be brought to Christ through their free will, never by coercion.

¹¹⁸ Id. at note 161, pp. 222-223.

¹¹⁹ Id. at note 161, pp. 229-230.

¹²⁰ Iglesias, Sol, "Colonial and Indigenous Influences on Local Power Structure in the Philippines", *Asia Europe Journal* (Spring 2003) 1: 541-549. *For a more detailed discussion of common threads in Spanish colonial administration, see ROSCHER, WILHELM and EDWARD GAYLORD BOURNE, THE SPANISH COLONIAL SYSTEM, (1944 ed., G.E. Stechert, New York).*

between the 'sacred' (Spanish friars) and 'secular' (Spanish *encomenderos*) --- and who among these authorities could better enforce the aims and objectives of the tribute system. *Encomenderos* were delegates of the Spanish monarch who collected tributes on his behalf, and assumed the feudal obligation of rendering military service to the Spanish monarch during emergencies. They were "obligated to defend the life and property of his wards and to give them a modest amount of religious instruction in the absence of a priest".¹²¹ Since these latter duties were more honored in breach than in their observance, the Ecclesiastical Junta of 1582 had justification to publicly outlaw the abuses of the *encomenderos*. Phelan narrates that the dispute over the administration of the tribute system would be carried over into the public controversy between civil authority (exemplified by Governor Gomez Perez Dasmariñas) and religious authority (exemplified by Spanish friars led by the Dominicans). The friars would claim that their authority was derived from the "Church's overriding commitment to defend the rights of the natives", while Dasmariñas suspected that this position was a mere "pretext for ecclesiastical aggrandizement in the secular sphere". The compromise eventually reached (and ratified by the Spanish monarch) is seen from the Ordinance of 1591, which maintained the authority of the *encomenderos* to collect tributes, but regulated the same through a uniform rate that did not penalize nor reward natives who lacked religious instruction.¹²²

Mindful of the tenuous position of basing Spanish sovereignty over the Philippines on a "supernatural" form of sovereignty that was dependent on religious support, Spain under Philip II therefore sought a Vitorian way out of papal authority. Phelan describes the adoption of an *ostensibly- contractarian model for political legitimacy*, where "the natives [were] induced to request voluntarily Castilian [Spanish] sovereignty":

"In the Manila provinces and in the provinces of Ylocos, Laguna de Bay and Pangasinan the native chieftains, the *cabezas de Barangay*, and their followers, the *timaguas*, were assembled in the presence of representatives of the Spanish and civil and ecclesiastical authorities. Large delegations of native chieftains solemnly elected the Castilian king as their natural lord and sovereign. They based their voluntary submission on the contractual promise that the king and his subjects render each other certain services. In these documents the conquest was interpreted as a 'liberation'. In overthrowing the pagan cults the Spaniards were said to have liberated the Filipinos from the enslavement of the devil as well as freed them from the oppressive and tyrannical government of their rulers. The positive benefits that the king promised to render were religious instructions, the administration of justice, and protection against their enemies (Japanese, Chinese, Mohammedan pirates, and hostile infidel neighbors)...

¹²¹ Id. at note 161, p. 231.

¹²² Id. at note 161, pp. 234-237.

The amount of real freedom of choice that these notables did have under these circumstances was probably negligible...the legitimacy of the conquest was founded on the alleged injustices and tyrannies of the pre-Hispanic regimes, a concept first spelled out by Sepulveda....It provided a formula for legitimizing the conquest and for reconciling the Filipinos to the new order of things.”¹²³

It is against this ideological controversy that Spain administered its Philippine colony and restructured its political-economic institutions. Spain superimposed a political regime “upon the foundations of already deep-rooted institutions,” with *baranganic* societies and their respective chiefs (*datus*) correspondingly forming the smallest unit of local government (*cabezas*) under the *cabezas de barangay*. M.N. Pearson notes that the effect of Spanish conquest would be to reify “existing authority relationship[s] in the Philippines in that an alien power imposed a common sovereignty (and religion)”. This would impact on Filipino conceptions of public order in the following ways:¹²⁴

- 1) While in the 16th century, northern Philippines would be “for the first time unified under one political authority [the Spanish central authority in Manila]”, it would not affect authority structures at the local level other than to put the Spanish colonial rulers at the top of the hierarchy;
- 2) Filipinos’ subsistence orientation towards communal labor and land administration would be displaced by capitalist dislocations through forced labor (the *polo* system and the *reducciones* policies), tributes and other exactions (seemingly justified by religion), increased openness to trade (as seen in the Manila Galleon trade system) and conceptions of individual land ownership;
- 3) Accordingly, the shift in the conception of the nature of property (in lieu of ‘stewardship’ or ‘trusteeship’ over community resources) would yield a parallel shift in the measurement of wealth. Henceforth, wealth (and to some degree, social mobility) would be determined by one’s control over labor resources. The *principalia*, or the class of former chiefs now entrusted with governance of the *cabezas*, would remain wealthy and influential relative to the rest of the Filipino population. Among the forms of labor exploitation used by the Spaniards with the cooperation of the *principalia* would be debt peonage and sharecropping, service to the *encomenderos*, the *polo* system (compulsory service of Filipino males for various Spanish commercial and military activities for 40 days a year), and the *vandala* system (forced ‘sale’ of produce to the government which

¹²³ Id. at note 161, pp. 238-239.

¹²⁴ Pearson, M.N., “The Spanish ‘Impact’ on the Philippines, 1565-1770”, *Journal of the Economic and Social History of the Orient*, Vol. 12, No. 2, (Apr. 1969), pp. 165-186.

ultimately resulted in highly inequitable transactions for the Filipino villager); and

- 4) Basic structural changes wrought by agriculture and trade would entrench the *principalia's* political and economic dominance over the rest of the Filipino population. The *principalia's* basis of political power and support would extend from access to labour to access to capital.

These colonial and indigenous influences on local power structure would, in turn, transpose the power structure inequality to political processes. Sol Iglesias observes that the elite domination of electoral office (traceable to Spanish colonial rule through the *principalia*), was “historically assured” by limiting suffrage to the educated and the landowners.¹²⁵

Such a history of hierarchy, both foreign and local, understandably provoked a sustained clamor for freedom, individual autonomy, and fundamental equality of persons in the Philippines. However, none of these conceptions were at all new. The infusion of the Spanish civil system to the Philippines (resulting in a highly-conservative and natural-law driven legal orientation), was, in turn, a transmission of concepts of Roman law and influences of Greek philosophy. Dean Pacifico Agabin notes that the study of the philosophy of the Philippine Civil Code is “to go back to the history of Spain for our Civil Code is founded on the laws of Spain. But to go back to the history of Spain is not enough, for we find that the laws of Spain were based largely on Roman law, dating as far back as the Institutes of Justinian. So we go back to the corpus juris civilis only to find out that this tome of rigid conservatism is merely an accumulation of old Roman law, as modified by the tenets of orthodox Christianity. Going back to the old Roman law does not end our quest for the starting point of the philosophy of our Civil Code, as we find that Roman law was greatly influenced by Greek philosophy.”¹²⁶ Similar derivational influences to Roman law and Greek philosophy would also surface in other fields of Philippine law.¹²⁷

The entry and proliferation of Spanish legal conceptions would later precipitate critical comparison from the members of the Philippine *intelligentsia* (intellectuals), most of whom had gained some exposure to European political thought and structures of governance. Absorption of Enlightenment liberalism would be delayed in the case of Spain and her colonies, but not for the European-educated *ilustrados* who propagated Enlightenment ideas of liberty and

¹²⁵ Id. at note 165, pp. 541-543.

¹²⁶ Id. at note 148, also published as Agabin, Pacifico A., “The Philosophy of the Civil Code” (Paper submitted to the First Conference on the Civil Code Revision sponsored by the University of the Philippines Law Center Institute of Government and Law Reform), 66 Phil. L. J. 1.

¹²⁷ See RAMON C. AQUINO, REVISED PENAL CODE, Volume I, (1997 ed., Central Professional Book Co.); Balane, Ruben F. “The Spanish Antecedents of the Philippine Civil Code”, in CIVIL CODE READER (2005 ed.), pp. 253-304; JOAQUIN BERNAS, A HISTORICAL AND JURIDICAL STUDY OF THE PHILIPPINE BILL OF RIGHTS, (1971 ed., Ateneo University Press).

fundamental equality to other key Philippine thinker-activists who held similar beliefs.¹²⁸ This ideological transition would prove decisive for the revolutionary/reformist process of articulation of, and struggle for, the fundamental values of human dignity:

“Spanish laws and codes were extended to the Philippines either expressly by royal decrees or by implication through the issuance of special laws for the islands. Among the prominent of these laws and codes were the *Fuero Juzgo*, *Fuero Real*, *Las Siete Partidas*, *Las Leyes de Toro*, *Nueva Recopilacion de los Leyes de Indias*, which contained all the laws then in force in the Spanish colonies, and the *Novisima Recopilacion* which compiled all the laws from the fifteenth century up to 1805. Although a Spanish constitution was promulgated in 1812, this was not implemented in the case of the Philippine colony. Thus, the notion of constitutionalism did not take root until 1869 when the libertarian ideas from Europe found their way to the country through the Propaganda Movement led by Marcelo del Pilar, Jose Rizal, Mariano Ponce, Graciano Lopez Jaena and other expatriates. This led to a continuing and resolute struggle to gain fundamental political and civil liberties through demands made of the Spanish authorities peacefully or by violent means.

From 1896, the Filipino people's own ideas of the type of government they wanted began to be reflected in several constitutional plans and revolutionary governments such as the Kartilla of the Katipunan, the Provisional Constitution of Biak-na-Bato, the Provisional Constitution prepared by Mariano Ponce, the Constitution of Makabulos and the Constitutional Program of the Republic of the Philippines prepared by Apolinario Mabini. The revolution spread so rapidly that the independence of the Philippines was proclaimed on June 12, 1898, by General Emilio Aguinaldo. A revolutionary Congress was convened on September 15, 1898 and on January 20, 1899, the Malolos Constitution was approved.”¹²⁹

The eminent Philippine historian and political philosopher, Cesar Adib Majul concluded that it was liberal ideology of the 18th century Enlightenment era that drove the Philippine revolution against Spain in 1898. In his seminal work, *The Political and Constitutional Ideas of the Philippine Revolution*, Majul shows that the writings of key Philippine revolutionaries such as Jose Rizal, Emilio Jacinto, Apolinario Mabini, Felipe Calderon, among others, were consistent in affirming the revolutionary advocacy for constitutional republicanism (ideas that also pivotally spurred the American and French revolutions) as the foundation of representative

¹²⁸ CESAR ADIB MAJUL, *MABINI AND THE PHILIPPINE REVOLUTION*, (1960 ed., University of the Philippines Press).

¹²⁹ *Id.* at note 45, pp. 182-183.

government in the Philippines. Most importantly, Majul presents historical evidence that convincingly shows a profound transition in Philippine conceptions of public order at the time of the Philippine revolution --- to one that recognizes the basic dignity and equality of all persons, the primacy of fundamental individual human rights over governmental assertions of power, and corollarily, the need for executive checks through democratic processes most attuned to the Enlightenment conception of popular sovereignty.¹³⁰

Consistent with Majul's findings, Vincente Pilapil affirms that "[t]he real cause of the Philippine revolution was the political maturation and the national awakening" of Filipinos, coupled with the "stirrings of liberalism". Significantly, he attributes Philippine political maturation to factors such as religious ideology; education; increased communication and travel; the constitutionalization of Enlightenment ideology in the Spanish constitution; clerical stratification between Spanish and Filipino priests; and the socioeconomic divide between *peninsulares*, *insulares*, *ilustrados* and the general mass of Filipinos.¹³¹

- **Religious Ideology.** For Pilapil, Philippine acceptance and advocacy of "notions of nationalism and liberty" emerged from Catholic doctrines that "preach the worth and dignity of the human person --- the same destiny which the Heavenly Father prepared for all men regardless of accidental differences. " The Filipino people's felt experiences of inequality would thus awaken ideological questions on the practical incoherence of Spanish-fostered teaching of core Catholic doctrine.
- **Education.** Education provided Philippine revolutionaries and heroes (such as national hero Dr. Jose Rizal) "new vistas of thought and desires" that stimulated the "search for other realities" apart from the daily dominance of foreign colonization.
- **Increased communication and travel.** The introduction of the printing press in the Philippines was a critical discursive tool for expediting the popularization of Enlightenment ideas of liberty and fundamental equality. Similarly, swifter means of travel enabled Filipinos to apprehend various other forms of political and socio-economic life that lent concreteness to their reformist/revolutionary philosophies.
- **Constitutionalization of Enlightenment ideology in the Spanish constitution.** The textualization of the democratic principle of

¹³⁰ CESAR ADIB MAJUL, THE POLITICAL AND CONSTITUTIONAL IDEAS OF THE PHILIPPINE REVOLUTION, (1967 ed., University of the Philippines Press).

¹³¹ Pilapil, Vincente R., "The Cause of the Philippine Revolution", The Pacific Historical Review, Vol. 34, No. 3, (Aug. 1965), pp. 249-264.

sovereignty in Article III of the Spanish Constitution (1812) rippled throughout Spain's colonies, including the Philippines to which this 1812 Spanish Constitution had been extended. Filipinos' history of underrepresentation (and more frequently, outright non-representation) in the Spanish Cortes in Madrid, along with the beginnings of revolt, independence, and secessionist movements in Spain's Latin American colonies, would both contribute to a popular acceptance of liberal Enlightenment ideology. When liberalism triumphed in Spain in 1869, basic guarantees of individual freedoms were, in turn, codified in the ensuing liberal constitution, and by extension, experienced under the two-year administration of the liberal governor-general Carlos Maria de la Torre. Thus, when the conservative royalists returned to power in Spain, it ultimately became more difficult for Spanish colonial governors to reorient the Philippine colony away from the lived experience of liberal governance.¹³²

- **Clerical stratification between Spanish and Filipino priests.** Pilapil observes that the conflict between the "regular (Spanish) and the secular (Filipino) clergy...expanded into a general Spanish-Philippine race fight". Philippine priests --- masters of Catholic doctrine who witnessed abuses to their parishioners firsthand --- were the first to agitate against un-Christian treatment by Spanish friars and colonial governors.¹³³ The execution of prominent Filipino priests Gomez, Burgos, and Zamora would have a lasting effect on awakening the nationalist consciousness of Philippine revolutionaries and reformists.

¹³² See Gray, William H., "The First Constitution of the Philippines", *The Pacific Historical Review*, Vol. 26, No. 4, (Nov. 1957), pp. 341-351.

¹³³ *Id.* at note 176, pp. 257-258. It is quaint that Pilapil cites the pithy observations of Governor-General Primo de Rivera:

"Hence the native priest, having the Christian spirit, educated in the seminary, enlightened by the friar ordinarily living with him, is probably the most hostile and most dangerous of those who confront us. And this is as it should be. When you instruct a man and give him a superior education; when you ordain him, train him in the gospels; when he has become familiar with the teaching of Jesus; when he has become expert in his sacred ministry and has been ordered to preach everywhere good doctrines, that man can be no one's servant. He will look as equal on the men who exercise analogous functions, and he will hold himself the superior, if he knows more. He will hate with all his soul those who would oppose his enjoyment of the rank of which he has dreamed, and he will breathe forth hate and vengeance from every pore if he has been humiliated, or believes himself offended.

This is the position of the native priest; he is a sort of servant to the friar, paid properly or improperly, but paid for the work of the native priest. That is when he is a coadjutor. When he is given a parish, it must be a very poor one, since the religious orders keep those which produce anything. This explains the outcry for the expulsion of the friars, and that in every reactionary programme a different distribution of the parishes and pre-bends from the present one, figures."

- **Socioeconomic divide between *peninsulares*, *insulares*, *ilustrados*, and the general mass of Filipinos.** *Peninsulares* were Spaniards born in the Iberian peninsula, mostly composed of conservative and liberal high government officials and friars who “brought with them into the [Philippine] archipelago the political divisions they had at home”. *Insulares* were Spaniards born in the Philippines and comprised a critical minority that resented the migration of *peninsulares* and the latter’s erosion of *insulares*’ commercial interests and political bases of power. *Ilustrados*, however, was a relatively open and mobile middle class of Filipinos distinguished by “high learning and education” --- and who, after foreign education and travel to Spain, were demystified with Spanish colonial rule after witnessing “the decadence of Spanish power and glory” firsthand. (It is not coincidental that Philippine propagandists and reformists usually emerged from the *ilustrados*.) Finally, the general mass of Filipinos suffered the brunt of socioeconomic inequality --- bereft of both economic means as well as higher education (that could have enabled some social mobility). These socioeconomic lines of demarcation bred discontents that fueled alternative political solutions such as reform, autonomy, secession, revolution, and independence.

Against this convergence of political, ideological, and socioeconomic factors, it is perhaps altogether expected (if not inevitable) that Philippine constitutionalism in the form of the 1899 Malolos Constitution¹³⁴ would embrace core principles of universalist reasoning ---- from the primacy of fundamental human dignity values of the individual to a vision of public power governed by such values through the mechanisms of representative government (e.g. a copious list of individual personal and civic rights and duties, free elections, among others). The constitutional debate would largely revolve around the question of degree of public power to be entrusted to any specific branch of government. The 1899 Malolos Constitution would later give broader authority to a popularly-elected and more-representative Legislative branch.¹³⁵

¹³⁴ Noted Philippine constitutionalist Fr. Joaquin Bernas refers to the 1897 ‘Provisional Constitution’ of Andres Bonifacio’s revolutionary government (Bonifacio, leader of the foremost revolutionary group *Katipunan*, would later dissolve any ties with revolutionary leader Emilio Aguinaldo). Fr. Bernas observes that this ‘Provisional Constitution’ (otherwise known as the “Constitution of Biak-na-Bato”), with a projected life-span of two years, was “almost a carbon copy of the Cuban Constitution of Jimaguayu”, differing only with four (4) additional articles to its Bill of Rights. See JOAQUIN BERNAS, A HISTORICAL AND JURIDICAL STUDY OF THE PHILIPPINE BILL OF RIGHTS, (1971 ed., Ateneo University Press).

¹³⁵ See Titles I to V, and Titles VII to VIII, of the 1899 Malolos Constitution. *Full text at* <http://elibrary.supremecourt.gov.ph/index7.php?doctype=Constitutions&docid=a45475a11ec72b843d74959b60fd7bd64558fa4aec832> (last visited 5 May 2008).

When Philippine revolutionary leader (and later first Philippine president) Emilio Aguinaldo convened the Malolos Congress on September 15, 1898, three constitutional plans were presented --- a draft from Apolinario Mabini (called the 'Mabini True Decalogue and Constitutional Program'), a draft from Felipe Calderon (a political moderate and lawyer who obtained help from jurist Cayetano Arellano), and still another from Pedro Paterno (president of the Malolos Congress).¹³⁶ Noted Philippine constitutionalist Fr. Joaquin Bernas narrates the ideological and historical influences on each of the three plans:

“...Three drafts were submitted for the consideration of the committee: that of Pedro Paterno, that of Apolinario Mabini, and Felipe Calderon’s own.

Paterno, the negotiator of the Pact of Biak-na-Bato, had earlier drawn up a scheme with the express purpose of winning over the Filipinos to the side of Spain after Admiral Dewey’s crushing victory on May 1, 1898. His scheme envisioned an autonomous Philippine government under the sovereignty of Spain. It was strongly influenced by the Spanish Constitution of 1868 [1869?], according to the historian Teodoro Agoncillo. With respect to government structure and affirmation of individual liberties, it has been assumed that Paterno’s scheme was substantially the same as his plan for Philippine autonomy under Spain. The *cuestiones* which he included in this plan embodied the primary aspirations of the writers of the Propaganda Movement. Among them were: equality of rights for Spanish subjects resident in Spain and in the Islands, extension to the Philippines of the guarantees of the Spanish Constitution protecting freedom of the press and of association, the right of petition, freedom of religion, academic freedom, freedom to pursue any profession, and security of property and of domicile. Now, however, Paterno submitted his plan with revisions, calling for a completely independent Philippines.

The plan submitted by Apolinario Mabini, General Aguinaldo’s chief adviser, was embodied in an elaborate *Programa Constitucional* which, according to Agoncillo, was also greatly influenced not only by the Spanish Constitution of 1868 [1869?] but also by the General Statutes of Universal Masonry. The document contained a very detailed Bill of Rights. It covered the protection of property from arbitrary confiscation, reserving to the government the power of eminent domain; freedom of religious belief and worship, limited by the requirement of a license for public manifestations of religion; freedom of speech and of the press; right of peaceful petition for the redress of grievances; freedom to form

¹³⁶ Regala, Roberto, “Three Constitutional Conventions”, pp. 64-75 in AUGUSTO CESAR ESPIRITU (ed.), PHILCONSA READER ON CONSTITUTIONAL AND POLICY ISSUES (An Anthology of Writings from the Official Publications of the Philippine Constitution Association Concerning the National Polity), (1979 ed., University of the Philippines Press).

associations but requiring official approval of their statutes and prohibiting the existence of religious orders whose Superiors General were under the immediate authority of the Pope; due process in criminal prosecutions; freedom from arbitrary arrests and imprisonments, supported by an equivalent of the right to a writ of *habeas corpus*; security of the domicile and of papers and effects from arbitrary searches and seizures.

In the end, the draft which won the approval of the Committee, and, subsequently, of the Revolutionary Congress, was Calderon's. It became the Malolos Constitution. By his own admission, Calderon based his plan on the constitutions of South American Republics, particularly those relating to the organization of the government. But, as Malcolm notes, the provisions of Calderon's Bill of Rights were, 'in the main, literal copies of articles of the Spanish Constitution'. This is clear even from a cursory comparison of the Malolos provisions with those of the Spanish Constitution of 1869. The 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; free exercise of civil and political rights; freedom of expression; 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 establishment of rights of primogeniture; prohibition of the entailment of property; prohibition of the acceptance of foreign honors, decorations, or titles of nobility, and of the granting of such honors by the Republic. In addition, Article 28 stated: 'The enumeration of the rights granted in this title does not imply the prohibition of any others not expressly stated'. Thus, there was a suggestion that natural law was the source of these rights."¹³⁷

Alongside the above (universalist) concern for constitutionalizing the primacy of individual dignity and fundamental rights was an equally-considerable and significant clamor for restraining and checking governmental power, especially that of the executive.¹³⁸ Nicolas Zafra contends that the dominant position assigned to

¹³⁷ Id. at note 179, at pp. 10-12.

¹³⁸ See Pacis, Donel B., "Malolos Constitution: Harbinger of the Philippine Republic", pp. 76-84 of AUGUSTO CESAR ESPIRITU (ed.), PHILCONSA READER ON CONSTITUTIONAL AND POLICY ISSUES (An Anthology of Writings from the Official Publications of the Philippine Constitution Association Concerning the National Polity), (1979 ed., University of the Philippines Press).

the National Assembly was a deliberate preference of the members of the Malolos Congress for the “embodiment of popular sovereignty” in the legislature:¹³⁹

“The readiness with which the Malolos Congress accepted Calderon’s plan of government, with its distinctive features, was understandable. It reflected the Filipino attitude prevailing at the time towards the Spanish colonial administrative system. The members of Congress knew well enough, both from personal experience and from their knowledge of their country’s history, that the pattern of government which Spain established in the Philippines was undesirable. That system with a governor and captain general endowed with almost unlimited powers, proved to be oppressive and tyrannical. Under that system the Filipinos did not have adequate protection in the enjoyment of their rights to life, liberty, and the pursuit of happiness. The members of the Congress strongly believed with Calderon that a pattern of government dominated, not by a powerful executive but by a national assembly responsive to the needs and desires of the people, was more conducive to the well-being and happiness of the people.”

The adoption of a constitution following these contours of popular sovereignty and organized government bore a vestige of consciousness of Philippine participation in the international community of sovereign states. It was urgent for its principal author, Felipe Calderon, who had insisted on the adoption of such a constitution to shore up the Philippines’ claim for recognition in the international community. Calderon took the position that a Philippines “duly constituted as a sovereign state...with a constitution duly adopted and laws approved regulating its internal affairs”, could present a powerful argument for international recognition.¹⁴⁰

The result, therefore, is a vision of public order in the 1899 Malolos Constitution that contains discernible threads of universalist rationality. As the first republican constitution in Asia, it was momentous for having elevated the primary values of individual autonomy, freedom, and human dignity to the highest legal and political status of constitutional rights,¹⁴¹ and for recasting public power from

¹³⁹ Zafra, Nicolas, “The Malolos Constitution”, at pp. 94-95, pp. 85-100 of AUGUSTO CESAR ESPIRITU (ed.), PHILCONSA READER ON CONSTITUTIONAL AND POLICY ISSUES (An Anthology of Writings from the Official Publications of the Philippine Constitution Association Concerning the National Polity), (1979 ed., University of the Philippines Press).

¹⁴⁰ *Id.* at note 184, pp. 90-91.

¹⁴¹ Title IV of the 1899 Malolos Constitution is denominated as “Of the Filipinos and their National and Individual Rights”, and specifies various rights of Filipinos strongly prohibiting governmental encroachment (e.g. freedom of expression, freedom from arbitrary arrests and imprisonment, security of domicile and the prohibition against arbitrary searches and seizures, privacy of correspondence, due process in criminal proceedings, free exercise of civil and political rights, among others.)

the platform of popular sovereignty,¹⁴² instead of the theistic or natural law justifications for authority in the public order.

Most importantly for our analysis, however, is the progressive espousal of liberal consciousness by the members of the Malolos Congress. By providing for *unenumerated* or *untaxualized* rights, in Article 28 of the 1899 Malolos Constitution (“The enumeration of the rights granted in this title does not imply the prohibition of any others not expressly stated.”), it appeared that the 43 lawyers, 18 physicians, 5 pharmacists, 7 businessmen, 4 agriculturists, 3 soldiers, 3 educators, 2 engineers, 2 painters, and 1 priest that formed the Malolos Congress had a distinct conception of status of the individual and the rights inherent in the nature of his/her humanity.¹⁴³ What this implied was that the progenitors of Philippine constitutionalism had the foresight to recognize that *the individual could possess inherent rights even if these rights were not formalized into Constitutional text*. Clearly, this was already a form of normative embedding (albeit rudimentary and incipient) that paved the way for universalist philosophy to settle into the Philippine constitutional system.

3.3. American Colonial Law

The 1899 Malolos Constitution had only been in effect for two months when Spain signed the Treaty of Paris on April 11, 1899, “ceding” its sovereignty over the Philippines to the United States of America. The Philippine Republic under Emilio Aguinaldo’s presidency was thus short-lived. Barely a year later, American military forces would defeat the Philippine Republic’s army (causing many of its members to disband as guerrilla units), and compel Aguinaldo to take an oath of allegiance to the United States.

¹⁴² See Titles I and II of the 1899 Malolos Constitution:

“TITLE I

Of the Republic

ARTICLE 1. The political association of all the Filipinos constitutes a nation, whose states is called the Philippine Republic.

ARTICLE 2. The Philippine Republic is free and independent.

ARTICLE 3. Sovereignty resides exclusively in the people.

TITLE II

Of the government

ARTICLE 4.The Government of the Republic is popular, representative, alternative, and responsible, and is exercised by three distinct powers, called the legislature, the executive, and the judicial. Two or more of these powers shall never be vested in one person or corporation; neither shall the legislative power be intrusted to a single individual.”

¹⁴³ *Id.* at note 175, at p. 179.

America's acquisition of the Philippines was not, in any appreciable way, a 'straightforward' cession of territory from one international power to another. The United States did not undertake its war with Spain under any expansionist objective in relation to the Philippines. US naval historian Paolo Coletta states that President William McKinley's use of force against Spain in Cuba was "prompted by humanitarian, commercial, and strategic considerations, and his refusal to annex that island, in keeping with the Teller Amendment, led many Americans and Filipinos to believe that similar self-denial would be practiced with respect to other Spanish possessions."¹⁴⁴ McKinley later took the expansionist route, according to Coletta, for several reasons: 1) military necessity (destruction of Spanish ships and military outposts in the Philippines would deter attacks on the west coast of the United States); 2) his decision to use the army after receiving Dewey's cable that he did not have enough men to "hold" Manila committed him to the occupation of Manila;¹⁴⁵ and 3) he chose expansionist commissioners for the Paris Peace Conference with Spain who ensured that his subsequent instructions (to demand the cession "in full right and sovereignty" of the entire archipelago) would be carried out.

McKinley justified taking the entire Philippine archipelago (instead of the island of Luzon where the Spanish naval outposts were located) on various US interests: 1) US commercial interests in expanding trade to the Asian markets; 2) the archipelago's strategic location for establishing military bases; 3) a sense of 'duty' to British allies to maintain the international balance of power in the imperial initiatives of the great powers; 4) the allegedly-humanitarian principle of the 'benevolent assimilation' and 'manifest destiny' doctrines (where claims of morality supposedly required that the United States "assume responsibility for a people who could not be returned to cruel Spain, were judged incapable of self-government, would fall prey to other powers if simply freed from Spain, and would provide fertile fields for American missionaries"); and 5) public opinion in the United States which embraced the expansionist rhetoric of "altruism, national honor and pride, economic advantage, and racial superiority".¹⁴⁶

According to Abraham Chapman, American policy in the Philippines from the beginning of acquisition of the archipelago was a sequence of vacillations between dependence under the framework of an American colonial empire, and independence managed by a stable form of Filipino government and US

¹⁴⁴ Coletta, Paolo E., "McKinley, the Peace Negotiations, and the Acquisition of the Philippines", *The Pacific Historical Review*, Vol. 30, No. 4, (Nov. 1961), pp. 341-350.

¹⁴⁵ *Id.* at note 189, p. 343. Coletta would observe that American occupation of Manila was "not necessary to achieve the objectives for which the United States went to war", but that McKinley's 'Instructions' to Dewey and the US naval fleet "solidified the military situation and started a chain reaction that foreshadowed later policy."

¹⁴⁶ *Id.* at note 189, pp. 345-347. See also Tuason, Julie A., "The Ideology of Empire in National Geographic Magazine's Coverage of the Philippines, 1898-1908", *Geographical Review*, Vol. 89, No. 1, (Jan. 1999), pp. 34-53.

'protection' from external interference or imperialist designs.¹⁴⁷ McKinley's April 7, 1900 'Instructions' (issued pursuant to the US president's war powers) to the Second Philippine Commission would reflect such a vacillation of policy. When the First Philippine Commission led by Jacob Schurman¹⁴⁸ reported that Filipinos desired "a guarantee of those fundamental human rights which Americans hold to be the natural and inalienable birthright of the individual but which under Spanish domination in the Philippines had been shamefully invaded and ruthlessly trampled upon", McKinley's Instructions accordingly mandated the Second Philippine Commission under William Howard Taft to establish civil government in the Philippines "for the happiness, peace, and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government".

While the United States lagged behind the European powers in the experience of central colonial administration,¹⁴⁹ however, there was a lasting effect in the American transmission of a coherent legal system, democratic philosophy, and political institutions to the Philippines.¹⁵⁰ Fr. Joaquin Bernas indicates that McKinley's Instructions called for liberal democratic principles of government to prevail in the American vision of civil government for the Philippines, particularly the 'inviolable rules' of civil liberties and fundamental freedoms under the first to ninth amendments, and the thirteenth amendment, of the US Constitution. These 'inviolable rules' would be reenacted and literally reproduced in the Philippine Bill of 1902, and the Philippine Autonomy Act of 1916 (the "Jones Law"), which, together with McKinley's Instructions, extended the basic libertarian guarantees of the US Constitution's Bill of Rights to the Philippines.¹⁵¹

¹⁴⁷ Chapman, Abraham, "American Policy in the Philippines", *Far Eastern Survey*, Vol. 15, No. 11, (June 5, 1946), pp. 164-169.

¹⁴⁸ Schurman derided the existence of any 'genuine' Philippine Republic (and omits any mention of the 1899 Malolos Constitution), claiming that the Philippines was populated by divided peoples and groups who did not fight a war for independence against Spain, but merely for 'reforms'. See Schurman, Jacob G., "The Philippines", 9 *Yale L. J.* 5, (March 1900), pp. 215-222.

¹⁴⁹ Pomeroy, Earl S., "The American Colonial Office", *The Mississippi Valley Historical Review*, Vol. 30, No. 4, (Mar. 1944), pp. 521-532.

¹⁵⁰ *Id.* at note 159, p. 96. American political scientist Bernard Moses would flippantly quip that while the Spaniards "taught Filipinos the forms of enlightened society", the Americans "are expected to give them an opportunity to acquire its open-minded, liberal, and humane spirit".

¹⁵¹ *Id.* at note 179, pp. 14-15, *citing excerpt from McKinley's April 7, 1900 Instruction*:

"...At the same time the Commission should bear in mind, and the people of the Islands should be made plainly to understand, that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their Islands for the sake of their liberty and happiness, however much they may conflict with the

Despite the extension of such guarantees, however, the Philippines remained an unincorporated territory of the United States.¹⁵² At the time of McKinley's Instructions, the Philippine Commission was charged with the tasks of administration and legislation. After termination of the period of military occupation, the United States Congress assumed full control of the Philippines and retained plenary powers of legislation over the Philippines, limited only by "those fundamental principles for the protection of the life, liberty, and property of the individual which are the basis of all free governments." The Spooner Amendment of 1901 provided for such assumption of control by the US Congress. A year later, the Philippine Bill of 1902 would temporarily provide for the administration of civil government (continuing the existing government organized under McKinley's Instructions and executive orders), and make a formal commitment to the Filipino people that a Philippine Assembly (a legislative body composed of Filipinos' own representatives) would be convened after the establishment of complete peace in the archipelago. The Philippine Assembly would be organized on October 16, 1907, and with the Philippine Commission as its upper house, formed the Philippine Legislature invested with authority to legislate for all parts of the Philippines except non-Christian provinces. Nearly a decade later, the 1916 Philippine Autonomy Act (the "Jones Law") would constitute the principal organic act of the Philippines, containing a preamble, a bill of rights, provisions on the organization and powers of government and corresponding limitations, the electorate, and other administrative matters.¹⁵³

The US Congress expressly denied a general and unqualified extension of the Constitution and laws of the United States to the Philippines. Theodore Roosevelt Jr. states that the 'purchase' of the Philippines (with an American payment of US\$20 million to Spain under the Treaty of Paris) was not intended for a "clear-cut policy of incorporation". Instead, he defines American policy towards the Philippines as "holding [the Philippines] in trust until [it was] qualified for

customs or laws of procedure with which they are familiar. It is evident that the most enlightened thought of the Philippine Islands fully appreciates the importance of these principles and rules, and they will inevitably within a short time command universal assent. Upon every division and branch of the government of the Philippines, therefore, must be imposed these inviolable rules..."

¹⁵² Malcolm, George A., "The Status of the Philippines", 14 Mich. L. Rev. 7, (May 1916), pp. 529-550. It is clear that American legal conceptions paid no heed to the Philippine Republic and its 1899 Malolos Constitution when (later US Supreme Court justice) Malcolm claims at 537:

"Testing the status of the Philippines by our definition of 'state', we find this resultant proposition: The Philippine Islands are not a sovereign or semi-sovereign state, because, while they may be composed of a people permanently occupying a fixed territory bound by common laws, habits, and customs into one body politic, yet they do not exercise through the medium of organized government independent sovereignty and control over all persons and things within their boundaries and are not capable of making war and peace and of entering into international relations with the other communities of the world. xxx"

¹⁵³ VICENTE SINCO, PHILIPPINE POLITICAL LAW, (1954 ed., Community Publishers Inc., Manila), at p. 86, citing *Balzac v. Puerto Rico*, 258 U.S. 298, 66 L.ed. 627; *In re Allen*, 2 Phil. 630; *People v. Santiago*, 43 Phil 120.

independence”.¹⁵⁴ Contrary to the tenor of ‘temporariness’ in American political policy in the Philippines, however, American economic policy spoke otherwise, since, in Roosevelt Jr.’s words, the US had “proceeded to build [the Philippines] into [its economic] structure.”¹⁵⁵ Harold Bradley observes that it was only when various trade and economic policies failed to realize American commercial expectations about the Philippines that the independence question gained political momentum among US policymakers.¹⁵⁶ President Woodrow Wilson’s administration would be the first to question the ‘desirability of indefinite occupation’ of the Philippine archipelago, and accordingly, US congressional debates subsequent to the passage of the Philippine Autonomy Act or the “Jones Law” would consistently reflect these economic motivations.¹⁵⁷

Despite the failure of the American economic programme for the Philippines, its political-legal project was crucial for having given concrete form (as well as for having reified universalist and liberal democratic philosophy), to Philippine conceptions of public order. The Philippine Independence Act of March 24, 1934 repealed all previous organic laws (with the exception of provisions on the

¹⁵⁴ Roosevelt Jr., Theodore, “The Philippines and Our Asiatic Position”, *Annals of the American Academy of Political and Social Science*, Vol. 198, Present International Tensions, (Jul. 1938), pp. 133-142.

¹⁵⁵ *Id.* at note 199, p. 136.

¹⁵⁶ Bradley, Harold W., “Observations Upon American Policy in the Philippines”, *The Pacific Historical Review*, Vol. 11, No. 1, (March 1942), pp. 43-53, at 48:

“It has been inescapable that the possession of the Philippines should have had a modifying effect upon the broader problem of American policy in East Asia. We had undertaken to govern and protect an archipelago which was extremely valuable and equally vulnerable. We had also gained a foothold in the Far East, from which American merchants might expect to take a more active part in the exploitation of the fabled riches of the East. These were the hopes and problems of American occupation during the early part of this century. But it should be noted that, until very recently, the protection of the Islands has not placed an onerous burden upon the American people, while the glittering prospects of an expanded trade with Asia have proved illusory. There is no agreement as to whether the occupation of the Philippines has been an asset or liability for the United States, but there has been a growing conviction in this country that it has not produced the commercial advantages which had been anticipated. It is not surprising, therefore, that the American people generally have acquiesced in the proposal to confer independence upon the Philippine Islands --- a policy which has included the hauling down of the American flag and an ostensible retreat from East Asia.”

¹⁵⁷ *Id.* at note 201, at p. 51:

“... there can be little doubt that economic forces loomed large in the formation of American policy toward the Philippines or that Congress was often influenced by such considerations. At no time was this more apparent than in the debates which preceded the passage of the Philippine independence measures of 1933 and 1934. In abandoning the deferred independence program of three successive Republican presidents in favor of an early grant of complete autonomy, Congress frankly was motivated primarily by a desire to end the competition from such Philippine products as coconut oil, sugar, and labor rather than by a sudden conversion to the ideal of self-determination of peoples. This was bluntly charged and readily confessed in the course of the long Congressional debates which preceded the adoption of the Hare-Hawes Cutting Act of January, 1933, and the Tydings-McDuffie Act of 1934.”

jurisdiction of the United States Supreme Court) upon inauguration of the Philippine Commonwealth Government on November 15, 1935. With greater powers over local affairs preparatory to conversion as an independent state, the Philippine Commonwealth Government bore, in Dean Vicente Sinco's words, a 'unique status unparalleled in the constitutional history of the United States':

"...On the one hand, the Philippines remained under the dominion of the United States. Citizens of the Philippines and officers of the Commonwealth Government owed allegiance to the United States. Citizens and corporations of the United States in the Commonwealth were given all the civil rights to which the citizens and corporations of the Philippines were entitled. The United States retained direct supervision and control over the foreign affairs of the Commonwealth. The President of the United States had direct participation in many of its governmental affairs. The Supreme Court of the United States continued to exercise final jurisdiction over important cases decided by the courts of the Commonwealth. A sort of general supervisor over Philippine affairs was placed by the United States in the Commonwealth, his title being that of High Commissioner. In Washington, D.C., the Philippines was represented by a Resident Commissioner who was given a seat in the House of Representatives of the United States but without a right to vote."

The combination of the experience of direct self-government through (more or less) democratic political institutions, and a predisposition towards the recognition of liberty and the fundamental dignity of the human individual (a predisposition arguably traceable to the formation of the first Philippine Republic under its 1899 Malolos Constitution), would potently press Filipino claims for independence. As early as 1927 (and long before the establishment of the Commonwealth Government in 1935), Vicente G. Bunuan (then Director of the Philippine Press Bureau of the Washington Office of the Philippine Commission for Independence) would passionately argue that the 'framework of popular government' had already been established in the Philippines, accompanied by the widespread exercise of the right of suffrage, economic ability to support an independent government, a foreign policy orientation towards pacific internationalism, and opportunities for social improvement and mobility through education and property. In Bunuan's strong language, the Philippines already had a 'lasting democracy without superficialities'.¹⁵⁸

¹⁵⁸ Bunuan, Vicente G., "Democracy in the Philippines", *Annals of the American Academy of Political Science*, Vol. 131, Supplement. *Are The Filipinos Ready for Independence?*, (May 1927), pp. 22-29, at 28:

"...The American, no matter how good-intentioned and how wise he may be, cannot profess to know the Filipino better than he knows himself. Much of the friction, unpleasantness, and mistakes in the administration of the Philippine government today would be avoided, were there not too much interference in the shaping of the local and intimate affairs of our body politic by

Emilio Abello contends that when Filipinos were “permitted” by American colonial rulers to draft and approve their own Constitution in accordance with their own political-legal ideas, “the intention was evident that it was to be a Constitution for both the Commonwealth and for the Republic once we were independent.”¹⁵⁹ This intent is attested to by Jose M. Aruego, a distinguished member of the 1934 Constitutional Convention, who carefully documented the Convention debates and proceedings in his landmark work, *The Framing of the Philippine Constitution*.¹⁶⁰

Aruego confirms that the 1935 Philippine Constitution had its roots “in the past of the Filipino people”, their “political institutions” and “political philosophies”. For Filipinos who had long been politically organized with their own developed institutions, national traditions, and collective historical experience, the 1935 Constitution would provide for institutions and philosophies ‘with which almost every Filipino is familiar’:

America. In this connection, may I cite one of your greatest, if not your greatest living statesman, Elihu Root...:

‘The organization of independent nations is the outgrowth of progress in civilization which leads people to shape their local self-government according to their own ideas. Whatever may be the form of local governments, there can be no tyranny so galling as the intimate control of local affairs of life by foreign rulers. National independence is an organized defense against that kind of tyranny. Probably the organization of nations is but a stage of development, but it is the nearest that mankind has yet come towards securing for itself a reasonable degree of liberty with a reasonable degree of order.’

Our position is clear. The framework is already established, we now ask to be permitted to build the superstructure; nay, may you not, permit me to be frank and say that we would have the basic elements of your democracy but none of the superficialities of that democracy, the virile elements of American civilization but none of the strappings and by-products of that civilization...”

¹⁵⁹ Abello, Emilio, “Constitution under the Commonwealth and under the Republic”, pp. 16-24 in AUGUSTO CESAR ESPIRITU (ed.), PHILCONSA READER ON CONSTITUTIONAL AND POLICY ISSUES (An Anthology of Writings from the Official Publications of the Philippine Constitution Association Concerning the National Polity), (1979 ed., University of the Philippines Press), at 17-18:

“This was our understanding, as it was also of the Congress and the President of the United States. This accounts for the provision in the Tydings-Mcduffie Law which required us to provide in the Constitution that would be drafted and submitted to the President of the United States certain specific provisions, effective as of the date of the proclamation of the President of the United States recognizing the independence of the Philippines. We, on our part, included in our Constitution Article XVI, entitled ‘Special Provisions effective upon the Proclamation of the Independence of the Philippines’ and Article XVII, entitled ‘The Commonwealth and the Republic’ which declares that ‘The government established by this Constitution shall be known as the Commonwealth of the Philippines. Upon the final and complete withdrawal of the sovereignty of the United States and the proclamation of Philippine independence, the Commonwealth of the Philippines shall thenceforth be known as the Republic of the Philippines’.”

¹⁶⁰ JOSE M. ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION, Volumes I and II, (1949 ed., University Publishing Co. Inc., Manila).

“...The Constitution drew rather heavily from the different organic acts under which the Filipino people had been governed for the last three and a half decades, particularly the Jones Law enacted by the Congress of the United States on August 29, 1916. Where Philippine precedents were lacking, rather than attempt to set up institutions or follow political philosophies never set up or adopted before in any other country, the Convention considered precedents of American origin that might with advantage be incorporated into our political system; and this, with reason, in view of the fact that our political heritage was largely dominated by American political thought. But, even in this case, the Convention carefully considered the precedents from the point of view of their adaptability or suitability to Filipino psychology and traditions.

But while the dominating influence was American, the Constitution bears traces, in some respects, of the influence of the Malolos Constitution of the ephemeral Philippine Republic, the German Constitution, the Constitution of the Republic of Spain, the Mexican Constitution, and the Constitutions of several South American countries, and the English unwritten constitution --- all of which had been frequently consulted during the Convention days.”¹⁶¹

Drawing from the above influences, Aruego shows that the 1935 Constitution is founded on several fundamental principles:¹⁶²

- **Popular sovereignty.** The republican government serves as political agents of the people, and is based on the political equality of all Filipino citizens.
- **Strong but Limited government.** The unitary model of government is vested with a general grant of powers, “subject to certain limitations for the protection of the fundamental rights to personal life, liberty, and property”. Aruego notes, however, that “these rights, by express and implied provisions of the Constitution, must yield in certain cases to the superior right of the State to preserve itself”. Necessarily, the “rights of persons to life, liberty or property guaranteed in the bill of rights are likewise subject to the inherent overruling trinity of powers of the State --- the police power, the power of eminent domain, and the power of taxation.”
- **Separation of Powers.** This principle (mandating that all three branches of government be equal to, coordinate with, and independent of, each other) was an underlying feature of Philippine

¹⁶¹ Id. at note 205, Vol. I, p. 94.

¹⁶² Id. at note 205, Vol. II, pp. 715-725.

government long before the 1935 Constitution. Aruego states that the Convention incorporated this principle in the Constitution “in order to prevent the emergence and rise of arbitrary and perhaps tyrannical government with the accompanying insecurity of personal life and liberty, resulting from the concentration of powers in the hands of a single person or of a group of persons.” Thus, the principle of separation of powers was “*intended as a doctrine of liberty* and not of efficiency”.

- **Independence of the Judiciary.** As a ‘consecrated tradition’ long before the 1935 Constitution, the Convention introduced various provisions on appointment, term of office, fiscal autonomy and judicial autonomy to help secure independence for the judiciary.
- **Strong Executive Power.** Aruego narrates that the “powers of government are distributed in the Constitution in such a way as to make the executive power strong, representing as it is the arms of the government to maintain and preserve internal peace and order, to execute the laws, to defend the country from foreign aggression, and to represent it in foreign relations.”
- **Nationalization of Natural Resources and Public Utilities.** It was the intention of the Convention to ensure conservation and development of national patrimony as a “manifestation of the strong nationalistic sentiment.”
- **Public Service Morality.** Considering Philippine experience with misuses of power in various instances of its colonial history, the Convention was concerned that public officers “should not make use of [their] offices as an instrument or agency for the protection or enhancement of private fortunes.” The 1935 Constitution textualized the concept of public office as a “personal public trust created for the benefit of the public, not of the person who may happen to be its incumbent.”
- **National Solidarity.** The 1935 Constitution purposely employs language that shows Filipino identity, language, and political aspirations.
- **Promotion of Individual and Social Welfare.** For the Convention, the state “is not an end in itself for the glorification of which the life, liberty, property or happiness of the individual may in all cases be sacrificed as if though it were everything and the individual nothing. Neither is it a means for the realization of the best life only by the individual, for which the group may at all times, if necessary, be staked. It is an instrument to enable more both the individual and

society together to attain their greatest happiness, progress, and welfare.”

- **Social Justice.** The Convention conceptualized social justice as a necessary precondition to the well-being and economic security of the Filipino people. Thus, it was of Constitutional importance that the common man’s lot be improved by emancipating him from social injustices, in order to truly secure to the Filipino people “the blessings of independence under a regime of justice, liberty, and democracy.”

Thus, while the 1935 Constitution carried strains of a universalist rationality by upholding the importance of fundamental human dignity values, it understandably structured government and public order along more *particularist* lines. In the heyday of Philippine emergence from colonial rule to sovereignty as an independent nation-state in the international community of nations, it was fathomable that Philippine constitutionalism would reflect the ‘distinctiveness’ or ‘uniqueness’ of Philippine public order. Reminiscent of Hegelian philosophy, nationhood in the Philippines was a reflexive ideology that affirmed a definite Filipino identity. As such, it was important then that the constitution provide for a strong executive apparatus that could solidify and support the *particular* Philippine public order. This statist position translated to some hesitation in according constitutional primacy of status to individual rationality over that of the state. Even the bill of rights in the 1935 Constitution, according to Aruego, would appear ‘conservative’ in its orientation.¹⁶³ In this sense, while the 1935 Constitution had

¹⁶³ Id. at note 205, at pp. 149-152:

“The provisions of the bill of rights was largely a reproduction of the provisions of the bill of rights of the Jones Law, which in turn were borrowed from American constitutions. Other provisions of the committee report were drawn from the Malolos constitution and from the constitutions of the Republic of Spain, Italy, and Japan.

The report was struck on a philosophy of conservatism, the same philosophy that pervaded the debates on the same in the Convention. In submitting its draft of the bill of rights to the President of the Convention, the committee on bill of rights said:

‘Adoption and adaptation have been the relatively facile work of your committee in the formulation of a bill or declaration of rights to be incorporated in the Constitution of the Philippine Islands. No attempt has been made to incorporate new or radical changes. Radicalism, no matter how democratic, may prove detrimental. It were better that we ‘keep close to the shore: let others venture on the deep’.

The enumeration of individual rights in the present organic law (Acts of Congress of July 1, 1902, August 29, 1916) is considered ample, comprehensive, and precise enough to safeguard the rights and immunities of Filipino citizens against abuses or encroachments of the Government, its powers or agents. Your committee, therefore, has not been allured by attractive innovations that are found in some modern constitutions, lest our Constitution suffer from the defect of an admixture of ‘declaration and declamations’ in the enunciation of constitutional dogmas.

Modifications or changes in phraseology have been avoided, wherever possible. This is because the principles must remain couched in a language expressive of their historical

the *consciousness* of universalist tenets, it was not designed to comprehend the universalism of public order.

Notwithstanding the more particularist public order structure, however, it is most remarkable for universalist constitutional understanding that the Article II, Section 3 of the 1935 Constitution provided for the incorporation of international legal norms, and likewise expressed a pacifist internationalist policy consonant with international law on the use of force. (*"The Philippines renounces war as an instrument of national policy and adopts the generally accepted principles of international law as a part of the law of the Nation."*) Aruego reports the Convention's intent in relation to this provision, which apparently affirms the universalist orientation towards fundamental human dignity values and the Philippines' responsible participation in international public order:

"This declaration of principle embraces two parts --- (1) the renunciation of war as an instrument of national policy; and (2) the adoption of the generally accepted principles of international law as a part of the law of the Nation.

The first part of this declaration was inspired by the famous Kellogg-Briand Pact, already signed by almost all the countries of the world, which had also been embodied in Article 6 of the Constitution of the Spanish Republic, one of the constitutions that influenced the content and philosophy of the fundamental law....

The provision regarding the renunciation of war as an instrument of national policy was consequently adopted by the Convention with the intention to make it applicable only to aggressive war, but never to war in self-defense. It was for this reason that this portion of the third declaration of principle was considered consistent with the second declaration of principle and with the other provisions of the Constitution referring to war.

background, nature, extent and limitations, as construed and expounded by the great statesmen and jurists that have vitalized them.'

...

The Convention was generally conservative in its consideration of the bill of rights, avoiding insistently the inclusion of any provision whatsoever not tested in the crucible of experience of the Filipino people and opposing attempts even only to recast the phraseology of well-known provisions of the bill of rights under which Filipinos had lived.

...

...the Convention was firm in its conservative attitude to retain the phraseology of well-known provisions of the Jones Law because of the jurisprudence that had been built up about them. xxx The debates throughout the remaining period taken up for the bill of rights were carried on under the influence of the philosophy of conservatism struck in the report of the committee on bill of rights and pounded upon repeatedly by Delegate Laurel in defense of the same report."

The second part of this declaration of principle --- the adoption of the generally accepted principles of international law as a part of the law of the Nation --- was borrowed from section 4 of the German Constitution and section 7 of the Constitution of the Republic of Spain.

The intention of the framers of the Constitution was to incorporate expressly into the system of municipal law the principles of international law, *the observance of which would be necessary to the preservation of the family of nations* which the Philippines was expected to join at the expiration of the Commonwealth period in the Tydings-McDuffie Law.

This provision is *a formal declaration of what is considered to be the primordial duty of every member of the family of nations, namely, to adjust its system of municipal law so as to enforce at least within its jurisdiction the generally accepted principles of international law.*"¹⁶⁴

As I will discuss in more detail later in the subsequent *Part II* of this Article, there was significant genius in the textualization of the above Incorporation Clause under Article II, Section 3 of the 1935 Constitution, one that similarly prevailed in the first Philippine Republic under Article 28 of its 1899 Malolos Constitution (which recognizes the possibility of unenumerated or unspecified inherent rights of the individual). Both these norms presaged the status and importance of *embedded* or *untaxualized* norms in defining individual rights in constitutional space. These would constitute progressive avenues to constitutional acceptance of 'evolving' rationalities for governing and shaping public order. In the case of the Incorporation Clause (and its historical, comparative, and jurisprudential meanings), Philippine courts have been empowered to interpret constitutional space with Janus-like dynamism --- both in reference to the Convention's intent to ensure Philippine enforcement of generally accepted principles of international law as part of its duty as a member of the community of nations, as well as to the evolving content of such principles.

Thus, while members of the Constitutional Convention appear to have been deeply concerned that the 'governing dynamic' for Philippine public order should be most attuned to Filipino sensibilities, they did not adopt a rigidly particularist orientation in the 1935 Constitution. Despite provisions for extensive entrenchment of public power, the 1935 Constitution itself reflects a postcolonial Filipino consciousness of the duties of membership in the international community of nations. However, it would take nearly two decades of the felt experience of dictatorship rule (under a 1973 Constitution that was just as statist in orientation, if not more so, as the 1935 Constitution), and much later, the political uniqueness of non-violent revolution, before the postmodern consciousness of universalist

¹⁶⁴ Id. at note 205, Vol. I, pp. 142-145. Emphasis supplied.

individual rationality and public order would find implicit and explicit expression in the present day 1987 Philippine Constitution.

3.4. Post-Independence Law and Political Structures

The 1935 Constitution would bear witness to eight presidential administrations,¹⁶⁵ and itself be amended three times throughout its existence.¹⁶⁶ After over thirty-five years of lived political experience under the 1935 Constitution, fissures would arise from the broad scope of executive power. As Dean Vicente Sinco observed, “[a] promise of not seeking reelection is an attractive gesture but no man could be fully trusted to remain true to such promise after he has tasted the near-dictatorial authority vested by our Constitution in the President. The only way to prevent a second term is to prohibit it by constitutional provision. And even in this case, a popular President could still get out of it by having it amended to permit a second term.”¹⁶⁷

Dean (later Supreme Court Justice) Irene Cortes would likewise advocate constitutional reform in *The Philippine Presidency: A Study of Executive Power*, her groundbreaking analysis of executive power under the 1935 Constitution:

“...The case for constitutional changes may be summed up in this manner. First: It is pointed out that the instrument was adopted before the Philippines became a sovereign state. The convention that framed it had to observe restrictions imposed by an act of the United States Congress and their handiwork was subject to the approval of the President of the United States. They were not free to adopt the kind of constitution they would have chosen if no outside authority had placed restraints on their deliberations. Therefore, it is claimed that the constitution they formulated fails to truly reflect the highest ideals and aspirations of an independent Filipino nation. Second: After three decades, certain weaknesses in the constitution have been revealed. Times have changed, new needs have

¹⁶⁵ Or seven if we take into account the brief 1943 Constitution under the short-lived Japanese-sponsored republic under the presidency of Jose P. Laurel.

¹⁶⁶ *Id.* at note 45, p. 184. Associate Dean Myrna Feliciano narrates that the amendments resulting from the plebiscites of October 24, 1939, June 18, 1940, and March 11, 1947 were: “1) Sections 1(5) and 3 of the Ordinance appended to the Constitution in accordance with the requirements of the Tydings-Koscialkowski Act which liberalized the onerous economic provisions of the Tydings-McDuffie Law; 2) the establishment of a bicameral legislature, change in the terms of office of the President and Vice-President so that they could be eligible for a second four-year term of office, and the creation of a separate Commission on Elections; and 3) the so-called Parity Rights Amendment which gave the Americans equal rights with the Filipinos in the exploitation of their natural resources and the operation of public utilities.”

¹⁶⁷ Sinco, Vicente G., “The Need for Constitutional Revision”, pp. 25-27 in AUGUSTO CESAR ESPIRITU (ed.), *PHILCONSA READER ON CONSTITUTIONAL AND POLICY ISSUES* (An Anthology of Writings from the Official Publications of the Philippine Constitution Association Concerning the National Polity), (1979 ed., University of the Philippines Press).

developed and the constitution must be changed to meet those needs...

The convention provided for a powerful executive, and gave him more specific powers than the framers of the United States constitution saw fit to give the American president. Even so, gaps in the Philippine design for the presidency have been revealed. Certain weaknesses have been shown to exist..."¹⁶⁸

The fundamental weaknesses Dean Cortes identified were: 1) *presidential tenure* (upon President Manuel Quezon's political maneuvering, the 1935 Constitution had been amended to permit the president to run for reelection, which amendment, according to Dean Cortes, exposed a reelection-minded president to incessant partisan political demands); 2) *presidential disability* (being a literal copy of the US Constitution's corresponding provisions on this subject, the 1935 Constitution also carried the latter's defects on the procedure to be followed in the event of presidential disability); 3) *the vice-presidency* (Dean Cortes advocated that the vice-president should also serve as a member of the cabinet to administratively and politically prepare him/her in the event of transition to the presidency); 4) *the need to establish a constitutional electoral tribunal* (to pass upon protested elections of constitutional officers); 5) *the president's power of certification of urgency of bills* (which, by allowing the president to bypass the requirement of printing in final form three calendar days before the congressional vote, created an additional leverage for the executive); 6) *presidential supervision over local governments* (which undermined the practical development of local autonomy); 7) *power over habeas corpus and martial law* (the president on his/her own entirely determined the need for and duration of the suspension of the writ of *habeas corpus* and/or the establishment of martial law, greatly threatening constitutionally guaranteed individual rights); and 8) *emergency powers* (the vague terminology of which became the basis for the virtual surrender of all legislative powers to the president in times of emergency).

With considerable irony, the 1899 Malolos Constitution had given greater public power to the popularly-elected and more-representative National Assembly in order to avoid the experienced hazards of entrenchment of executive power --- only to have the 1935 Constitution purposely incur such hazards throughout its constitutional text.¹⁶⁹

¹⁶⁸ Id. at note 47, pp. 275-288. See also Sumulong, Lorenzo, "The Constitution: A Pragmatic Appraisal", pp. 28-35 in AUGUSTO CESAR ESPIRITU (ed.), PHILCONSA READER ON CONSTITUTIONAL AND POLICY ISSUES (An Anthology of Writings from the Official Publications of the Philippine Constitution Association Concerning the National Polity), (1979 ed., University of the Philippines Press).

¹⁶⁹ Noted constitutionalist and later Philippine Supreme Court Chief Justice Roberto Concepcion would also join the clamor for constitutional reform on similar observations. See Concepcion, Justice Roberto, "The Constitution and the Proposed Amendments Thereto", pp. 42-50 in AUGUSTO CESAR ESPIRITU (ed.), PHILCONSA READER ON CONSTITUTIONAL AND POLICY

Responding to the clamor for constitutional reform, therefore, the Philippine Congress adopted a Resolution on March 16, 1967, calling for a Constitutional Convention to propose amendments to the 1935 Constitution. The Resolution was implemented by Republic Act No. 6132, and pursuant to the latter's provisions, 310 delegates were elected on November 10, 1970. The Constitutional Convention would meet on June 1, 1971. However, while the Constitutional Convention was in session, then President Ferdinand Marcos issued the infamous Presidential Proclamation No. 1081 on September 21, 1972, placing the Philippines under Martial Law.¹⁷⁰ Associate Dean Myrna Feliciano chronologically synthesizes the political-legal incidents that followed:

“...On November 29, 1972, the Constitutional Convention completed its work. The next day, the President issued Presidential Decree No. 73, submitting to the Filipino people for ratification or rejection the constitution proposed by the 1971 Constitutional Convention as well as setting a plebiscite on January 15, 1973. Subsequently, several cases were filed contending that the calling of a plebiscite and appropriating funds therefore were powers lodged exclusively in Congress by the Constitution. There was no proper submission to the people of said proposed constitution as there was no freedom of speech, press and assembly, and there was not sufficient time to inform the people of the contents thereof. While the said cases were being heard, however, on January 17, 1973, the President of the Philippines issued Proclamation No. 1102 which announced the ratification of the proposed constitution through citizens' assemblies. The validity of this proclamation was questioned in five petitions often referred to as *Javellana v. Executive Secretary et al.*, which is a landmark case in constitutional interpretation. A majority of the members of the Supreme Court concurred that the challenged ratification complied neither with the requirements of the 1935 Constitution nor with those of the proposed charter. However, the Court dismissed the petitions and indicated in the dispositive portion [of its decision] that 'there is no further judicial obstacle to the new Constitution being considered in force and effect'. Despite this, subsequent cases still questioned its ratification.”

Former Philippine Supreme Court Chief Justice Enrique M. Fernando had optimistically declared the 1973 Constitution a 'triumph for moderation', since the 'forces of gradualism' had prevailed when the members of the 1971 Constitutional Convention 'heeded the counsel of realism' and the supposed need to strengthen

ISSUES (An Anthology of Writings from the Official Publications of the Philippine Constitution Association Concerning the National Polity), (1979 ed., University of the Philippines Press).

¹⁷⁰ Id. at note 45, pp. 185-186.

governmental power in the face of insurgency.¹⁷¹ The 1973 Constitution had established a parliamentary form of government and introduced the merger of executive and legislative powers. The office of the President was, in the main, largely symbolic, since executive and legislative power was ultimately wielded by the Prime Minister (who could dissolve the National Assembly and call for a general election). The Bill of Rights (Article IV of the 1973 Constitution), however, did not substantially depart from its predecessor 1935 Constitution. As Chief Justice Fernando discussed, the Bill of Rights contemplated various forms of liberty: 1) *liberty and property* (the limits imposed by police power, taxation, eminent domain, and the safeguards of due process, equal protection, and non-impairment clauses); 2) *intellectual liberty* (religious freedom, free speech and press including assembly and petition, and freedom of association); and 3) *physical liberty* (the privilege of the writ of habeas corpus, freedom of the person, home and possession, and the rights of an accused).

The 1973 Constitution's parliamentary form of government, however, would never be implemented as intended by the 1971 Convention. Constitutional amendments in October 1976 would maintain and augment the powers of then President Marcos and create an *Interim Batasang Pambansa* (interim National Assembly) to function as the legislature. The powers of the President and the Prime Minister under the 1973 Constitution were then merged in then President Marcos, who also became a member of the *Interim Batasang Pambansa*. Under Amendment No. 6 to the 1973 Constitution, however, then President Marcos was authorized to continue to exercise legislative powers until martial law 'shall have been lifted', and if, in his judgment, 'there exists a grave emergency or threat or imminence thereof, or whenever the *Interim Batasang Pambansa* or the regular National Assembly fails or is unable to act adequately on any matter for any reason that in his judgment requires immediate action, he may, in order to meet the exigency, issue the necessary decrees, orders, or letters of instructions which shall form part of the law of the lands'. Subsequent amendments to the 1973 Constitution in 1980 and 1981 would further entrench the powers of then President Marcos.

By the time Martial Law was lifted on January 17, 1981, it was an altogether-different political landscape from that initially envisaged under the reformist clamor that inspired the 1973 Constitution.¹⁷² As bluntly described in the Report of Missions for the International Commission of Jurists, Martial Law under Marcos was democracy in decline --- where "[t]he Executive rules by decree. There is no legislature, no elections, and very little judicial review. The people are not allowed

¹⁷¹ ENRIQUE M. FERNANDO, *THE CONSTITUTION OF THE PHILIPPINES*, (1977 ed., Central Lawbook Publishing Inc., Quezon City, Philippines), at pp. 16-17.

¹⁷² *Id.* at note 45. See Abueva, Jose Veloso, "Filipino Democracy and American Legacy", *Annals of the American Academy of Political and Social Science*, Vol. 428, pp. 114-133, (Nov. 1976).

to choose their representatives. Citizens languish in jails without charge, many since Martial Law was declared. Military authority is supreme.”¹⁷³

Political opposition against the Marcos dictatorship soon consolidated after the August 21, 1983 assassination of opposition senator Benigno Aquino Jr., which triggered massive public demonstrations throughout the country. In 1984, further amendments to the 1973 Constitution would be introduced, including the establishment of a different mode of presidential succession. After elections for the new legislature (the 200-member *Batasang Pambansa*) were held on May 14, 1984, fifty-seven opposition members of the *Batasan* filed an impeachment complaint against President Marcos, which was dismissed by the majority-led *Batasan's* Committee on Justice. On November 3, 1985, President Marcos declared that he was calling a ‘special’ presidential election (‘snap elections’) set for February 7, 1986.¹⁷⁴ 1986 Constitutional Commission member and economist Bernardo Villegas recalls in detail how the chain of political events rapidly led to Marcos’ ouster under the non-violent 1986 EDSA Revolution:

“Corazon Aquino’s [Benigno Aquino Jr.’s widow] decision to run for president in the ‘snap’ elections was the factor that finally forged an alliance, temporary though it was, among the different opposition parties. At the eleventh hour, the Opposition was finally able to put its act together and the solid Aquino-Laurel slate soon gained momentum. Gradually, Mrs. Aquino unveiled her economic and socio-political program to refute allegations by her critics that she was running on no clear platform. Meanwhile, the National Movement for Free Elections (NAMFREL), the poll watchdog in the 1984 *Batasan* elections, was reaccredited as the citizen arm of the Commission on Elections (COMELEC). Later, COMELEC and NAMFREL negotiations concerning the counting of ballots collapsed and each resolved to conduct its own Operation Quick Count (OQC). Support for Mrs. Aquino’s candidacy overflowed like a river that had burst its banks. It was only the Left that boycotted the elections.

Elections proceeded as scheduled on February 7, marked by blatant cheating and violence. According to NAMFREL, at least 3.3 million people were systematically kept from exercising their right to vote. All in all, election-related violence cost 91 lives. As COMELEC proceeded with the count, 30 OQC tabulators walked out claiming that they were being told to cheat Mrs. Aquino of her votes. On February 15, President Marcos and running mate Arturo Tolentino were proclaimed victors by the *Batasan Pambansa*, after a hasty

¹⁷³ WILLIAM J. BUTLER, PROFESSOR JOHN P. HUMPHREY, G.E. BISSON, *THE DECLINE OF DEMOCRACY IN THE PHILIPPINES*, (1977 ed., International Commission of Jurists, Geneva, Switzerland).

¹⁷⁴ *Id.* at note 45.

examination of the Certificates of Canvass. Coinciding with this was the arrival of special envoy Philip Habib and the issuance of a pastoral letter by the Catholic Bishops' Conference of the Philippines (CBCP) deploring the massive fraud and cheating in the elections. The pre-EDSA Revolution scene ended with the 'Tagumpay ng Bayan' [Triumph of the People] rally at Luneta where Mrs. Aquino spelled out her seven-point Non-Violent Protest Program, and with the symbolic rejection of Marcos' new mandate by countries like Canada, New Zealand, and Indonesia.

On February 22, the unexpected finally happened. Defense Minister Juan Ponce Enrile and AFP (Armed Forces of the Philippines) Vice Chief of Staff Lt. Gen. Fidel Ramos, in a press conference at Camp Aguinaldo, announced their resignation and withdrawal of support from the Marcos government. Not long after, people began surrounding Camp Aguinaldo to protect the 'rebels' from the expected attack. Archbishop Jaime Cardinal Sin also went on the radio to ask the people to help the rebels. Three hours later, President Marcos appeared on television to denounce an aborted coup d'etat masterminded by Enrile, Ramos, and the Reform the AFP Movement (RAM). In a span of 15 hours, President Marcos presented four alleged conspirators in the aborted coup. The following three days witnessed the grand defection of troops to the rebels' side, the resignation of Marcos' lackeys, and the media battle waged over Radio Veritas (later sabotaged) and MBS-Channel 4. Assaults on Camp Aguinaldo failed to pierce the massive human barricade or even if they did, the attackers refused to fire. In the famous dawn attack on the 24th, Sikorsky helicopters, dispatched to strafe Camp Crame, joined the rebels instead. Defections continued as a state of emergency was declared by President Marcos. On the 25th, Corazon Aquino and Salvador Laurel took their oaths of office and inaugurated a provisional government. Marcos, too, proceeded with his scheduled induction at Malacanang, but television coverage was cut off precisely at the moment he was to take the oath. In the evening of the same day, Marcos surreptitiously fled Malacanang.

The revolution was ended. A dictator was deposed with a minimum of bloodshed, thanks to the unique blending of the Malay penchant for 'smooth interpersonal relations' and the Roman Catholic faith."¹⁷⁵

The overthrow of the Marcos dictatorship through the non-violent EDSA revolution did not lead the Philippines to revolutionary or militarist government, as

¹⁷⁵ Villegas, Bernardo M., "The Philippines in 1986: Democratic Reconstruction in the Post-Marcos Era", *Asian Survey*, Vol. 27, No. 2, *A Survey of Asia in 1986: Part II*, (Feb., 1987), pp. 194-205.

in the case of Haiti, Iran, and Nicaragua. Mark Thompson states in his comparativist analysis of Philippine democratization that a key variable to explain this phenomenon was the Philippines' long history of liberal democratic traditions. Filipino oppositionists clung to democratic conceptions of popular sovereignty in directly exhorting the mass of the 'governed' Filipino electorate not to follow Marcos, the patently illegitimate 'governor'.¹⁷⁶ Later, President Corazon Aquino's Proclamation No. 3 would explicitly affirm the direct exercise of popular sovereignty: "the new government was installed through a direct exercise of the power of the Filipino people assisted by units of the New Armed Forces of the Philippines...in defiance of the provisions of the 1973 Constitution as amended."¹⁷⁷

Proclamation No. 3 also promulgated the Provisional ('Freedom') Constitution, which repealed and abrogated all existing laws, decrees, executive orders, proclamations, letters of instructions, and previous executive issuances of the former administration until the establishment of a new Constitution. Proclamation No. 3 declared that the Aquino government, pending the establishment of a new Constitution, would guarantee that "the government will respect basic human rights and fundamental freedoms". Both the Incorporation Clause in the Declaration of State Principles and Policies and the Bill of Rights in the 1973 Constitution would be adopted as part of the Freedom Constitution.

Aquino then created a Constitutional Commission¹⁷⁸ to draft the new Constitution. After one hundred and thirty-two days (132) of work by the forty-eight (48) member Commission, the final draft of the proposed new constitution consisted of a Preamble, eighteen (18) articles, and three hundred and twenty-one (321) sections.¹⁷⁹ It heralded a return to the 1899 Malolos Constitution's policy of constitutionalization of individual rights and fundamental human dignity values. More than that, however, the 1987 Constitution amplified constitutional recognition of the primacy of the Filipino individual in the architecture for public order, by

¹⁷⁶ Thompson, Mark R., "Off the Endangered List: Philippine Democratization in Comparative Perspective", *Comparative Politics*, Vol. 28, No. 2, (Jan. 1996), pp. 179-205, at 186:

"... While Nicaraguan opposition politicians remained doubtful about the utility of elections, Filipino oppositionists were confident they could build an antidictatorship movement around the ballot box. This 'moralist' side of Philippine politics has been neglected in many studies of clientelism and warlordism in electoral campaigns. When oppositionists were widely outspent and violently intimidated by incumbents before martial law, they utilized their underdog position to make direct moral appeals to the electorate. Drawing on US models of urban reform movements, they advocated, not populist politics against a corrupt elite, but rather a multiclass struggle 'to save democracy' from abusive incumbents. Such campaigns drew on popular beliefs about good government and could even override the greater material rewards offered the electorate by the party in power."

¹⁷⁷ Proclamation No. 3, March 25, 1986, 82 Official Gazette 1567; Proclamation No. 1, March 3, 1986, 82 Official Gazette 1236.

¹⁷⁸ Proclamation No. 9, April 23, 1986, 82 Official Gazette 1887.

¹⁷⁹ See Guingona, Justice Serafin V.C., "Retrospect: The 1986 Constitutional Convention", at <http://www.mb.com.ph/issues/2005/04/10/OPED2005041032362.html#> (last visited 10 May 2008).

providing for copious accountability checks and popular restraint mechanisms on government's assertion of public power. While providing for numerous negative and positive individual human rights, the 1987 Constitution also signified a greater consciousness of Philippine responsibilities in the international legal order.

CONCLUSION

The 1987 Constitution, therefore, is unique as organic law for Philippine public order in that, in many respects, it was ideologically and politically led to mirror universalist philosophy and orientation through various avenues of its constitutional design. With the Philippines' postcolonial and post-dictatorship legal tradition and ideological history, it could not have been otherwise.