



Federalism and Multiculturalism

**Constitution, Rule of Law and
Human Rights in Federal States:**

*Learning from Asian
and Australian Experiences*

Katy Le Roy

Constitution, Rule of Law and Human Rights in Federal States

Learning from Asian and Australian Experiences

KATY LE ROY

Three central questions emanating from the theme 'Constitution, Rule of Law and Human Rights in Federal States' are addressed in this paper. The first section of the paper considers the question: what should constitutional delegates consider in drafting a federal constitution? Issues including the design of legislative and other institutions, distribution of legislative and executive powers, taxation powers and distribution of revenue, and the accommodation of diversity are examined, drawing upon experiences in other federal systems, principally in Asia and Australia. The second part of the paper looks at mechanisms for strengthening the rule of law that must be considered in federalisation. How can federalism preserve or enhance the rule of law? Powers of judicial review, the independence of the judiciary, and the legitimacy of the constitution are discussed in this context. The third section asks 'how can human rights be continually preserved in a federal Philippines?' Human rights provisions in some other federal systems are surveyed, and the issue of enforcement mechanisms examined. Access to justice and the justiciability of social and economic rights are discussed in this part. It should be noted that these theme questions are vast in scope, and cannot be exhaustively addressed in this paper. I propose therefore simply to provide an outline of the way these questions might be addressed,

Figure 8. Map of Australia



Source: Merriam-webster.com

including some references to the experience of the Indian, Malaysian and Australian federations where there might be relevant lessons to be learned or comparisons to be made.

I do not propose to devote much space to describing the essential structure of the three federal systems that comprise my main examples: Australia, India and Malaysia, except to say that they are all quite 'old' federations: over 100, 50 and 40 years old respectively. Australia is fairly homogenous but India and Malaysia are very diverse in terms of ethnicity, language and religion. All three are parliamentary democracies and so are all living examples of the type of federal system advocated by the Citizens' Movement for a Federal Philippines.¹

What Should Constitutional Delegates Consider in Drafting a Federal Constitution?

The question of what needs to be considered in drafting a federal constitution is rather a difficult one, as the complete answer will be extremely detailed and complex, and involve technical legal issues as well as political considerations. But it is possible to provide a preliminary answer based on a handful of key areas. The key areas I will touch on are the process of constitution making, the territory and institutions of the states, division of powers between the states and the centre and the degree of symmetry between states, local government, financial arrangements, judicial review, intergovernmental relations, procedures for amending the constitution, and the accommodation of diversity. Many people in the Philippines will already have considered the factors I am going to mention and arrived at their own conclusions,² but as was stated at the conference that gave rise to this publication, the process is still open and the draft is by no means set in stone,³ so there is still scope to consider or reconsider all aspects of the proposed federal constitution for the Philippines.

Constitution making process

Which brings me to my first consideration: first things first! An effective, legitimate constitution requires consultation with and participation of the people in the constitution making process. There might be obstacles (such as illiteracy, apathy, and the complexity of constitutional issues) as well as logistical challenges like the expense and time involved in enabling public participation, and selecting appropriate modes of education and communication. But in spite of these potential difficulties, the consultation and participation needs to be genuine rather than token, and needs to be seen to be genuine. A genuinely participatory process that leads to a legitimate constitution is particularly important for a country like the

Philippines that has different linguistic and cultural groups that can be prone to conflict and are seeking lasting mechanisms for peace and stability.

Of course public participation does not mean everyone will get what they want; a perfect consensus of views is impossible. But providing people with a real opportunity to be involved, taking their views into account, and facilitating an ongoing public dialogue that keeps the whole constitution making process clear, transparent and comprehensible is likely to result in a broadly accepted, effective and legitimate constitution. Dr. Abueva has written that ‘the case for charter change has been argued well by its various proponents, but has not yet reached many of our people’⁴ – so somehow those in the driving seat need to make sure it does, and the Consultative Commission⁵ appears to be a major step in that direction.⁶

Ideally there would be a comprehensive and independent information campaign prior to public consultation. People need to be armed with information about what the options are and what the implications might be, before they can form and express their opinions.

A properly designed process can also minimize the prospect of vested interests influencing decisions. We might question whether constitution makers can realistically be expected to be driven by concern for the public interest, rather than self-interest or some other motivating factor. This question is especially pertinent when we consider that incumbent politicians very often play a major role in constitution making. Self-interest might be avoided or minimized by an appropriately designed constitution making process. The task of drafting and debating the constitution might for example be given to a specially convened constitutional assembly or convention, rather than the ordinary parliament. Or we can look back to the example of the French

delegates of the 1789 Constituent Assembly, who adopted Robespierre’s proposal to enact a law that would make all delegates ineligible to run for election to the first legislature under the constitution they were creating, to protect themselves from institutional interest.⁷ There has been some debate in the Philippines about the relative merits of ConAss and ConCon as they are called, and in my view the ConCon is to be preferred.⁸

Figure 9. Map of Malaysia



Source: Merriam-webster.com

Once the process has been settled, what things need to be considered when drafting a federal constitution? Essentially we could break the issues down into a few key categories: How are powers to be divided between the states and the centre? What will be the financial arrangements between the states and the centre?; the design of state institutions and representation of the states in the federal parliament; intergovernmental relations; the territory of states; resolution of disputes between governments; and whether there are any particularly sensitive issues that need recognition. There are a number of other key choices that need to be made that are not confined to federal systems: will the system be presidential or parliamentary? How will executive power be limited and what will be the checks and balances generally? What form of electoral system will be adopted (although this is a detail often left to legislation)? How will the constitution be amended? What rights and duties are to receive protection and how will competing rights be balanced? But I will focus here on some of those federalism-specific considerations and choices.

State boundaries

Let us start with the territory of states themselves. How many constituent units or states will there be in the federation and how will their boundaries be determined? Also, will the constitution provide for the creation of new states, the merger of states and secession from the federation? Most federal constitutions provide for new states and for merger of states but not for secession, as this is seen to undermine federalism. There is also the question of whether it is appropriate and desirable to draw boundaries on ethno-linguistic or ethno-religious lines. The Indian Constitution 'stipulated an extremely flexible procedure for redefining internal boundaries, making variable geometry an integral part of the design'.⁹ This flexibility was used to reorganize state boundaries along ethno-linguistic lines, from 1953-1966.¹⁰ Re-drawing of boundaries according to language and ethnicity (and in the case of Punjab, religion) was done at the behest of the relevant ethno-linguistic groups, and is widely regarded as having enhanced the stability of the Indian federation¹¹ (or prevented its disintegration). Yet the question is often raised whether ethno-federalism is likely to maximize harmony or rather to exacerbate conflict by emphasizing ethnic identity and difference.¹² This is a question the Philippines will need to consider.

It is interesting to note that the number and boundaries of proposed states being put forward by the CMFP has changed over time, suggesting that there are no obvious lines of demarcation. The current proposal of the CMFP envisages 11 states, and a provision that 'the *Estados* have the power to adjust their respective boundaries amongst themselves, by mutual agreement of the State Assemblies concerned and such agreement shall take

effect upon the ratification of the voters in the affected States'.¹³ This is an interesting proposal, when compared to Australia where the Commonwealth Parliament requires the approval of a State Parliament as well as a State referendum before it can alter the limits of a state,¹⁴ and India where the federal parliament can alter the limits of a state without the consent of the relevant states.¹⁵

Representation of states at the federal level – Bicameralism

Scholars of federalism often write about federalism as a combination of 'self-rule' and 'shared rule', and the same terminology is adopted by proponents of federalism in countries seeking to move from a unitary to a federal system of government. But what does it actually mean and why is it significant? It means not only that territorially-defined groups are given some autonomy (self-rule), but also that those same groups share in the rule of the federal entity that unites them (shared rule of the nation state). And shared rule means more than simply permitting citizens of all states to vote in national elections, it means that the states themselves need to be represented in some way at the national level.

In almost every federation,¹⁶ this is achieved by having two houses of parliament. Whilst there is great variation in the design of bicameral parliaments, the most common model is a lower house that represents citizens more or less on the principle of one vote one value, and an upper house that seeks in some way to ensure that the interests of the states will be protected at the national level, and that the smaller states will not be trampled on. The upper house almost invariably weights representation in favor of small states or significant minorities, so that they have a disproportionate number of representatives relative to their population. In Australia and the United States, all states are represented equally in the Senate, regardless of population, and Senators are directly elected. In India, members of the Council of States are elected by state legislatures, and there are a small number of additional members, being distinguished persons nominated by the President. The Council of States reflects a federal character by representing the Units of the federation. But it does not follow the American principle of equality of State representation in the Second Chamber. In India, the number of representatives of the States to the Council of States varies from 1 (Nagaland) to 31 (Uttar Pradesh).¹⁷

The Malaysian Senate is made up of members elected by state legislatures (60% of Senate members, with equal allocation of membership for each state) and members appointed to represent special minorities (40%).¹⁸

Federalism is often spoken of as the institutional embodiment of the principle of 'unity in diversity'. Therein lay another clue to the significance

of bicameralism for federalism. Not only is federalism designed to accommodate diversity, it is also necessarily a *union* of its component parts. In most federal systems the component parts preceded the federal state, and together agreed to unite in a federal state. For a federal system to function properly and remain stable, 'all must believe that the [state] governments will not try to take advantage of one another and that the center will not try to usurp power from the [states]'.¹⁹ One of the ways this can be achieved is through a bicameral parliament with a 'states house' in which states are represented in a manner which they can agree is tolerably fair. Although the Philippines would be moving from a unitary system to a federal system, rather than being a collection of many unitary entities agreeing to federate, hopefully the provinces will have sufficient voice in the making of the federal constitution for the design of the central institutions and the representation of states at the federal level to be achieved consensually.

The model proposed by the CMFP includes a Senate composed of two or three Senators for each state, depending upon the relative voting population of each state, to be elected by the state assemblies mostly from among their members. The current Speaker of the House of Representatives however is proposing a federal Philippines with a unicameral system. For the reasons outlined above, amongst others,²⁰ this would be ill-advised. There is much scope for debate about how the Senate should be composed, what its powers should be relative to the lower house, whether it should be elected or appointed or some combination. But to simply abandon bicameralism, in the absence of any of the special circumstances of the handful of federations that are unicameral, would be most extraordinary and probably politically untenable.

Allocation of powers

Of course one of the major issues in federal design is the question of how powers are to be divided between the states and the centre. This is really also a question of the degree of centralization or decentralization in the federal system. Clearly there are many different ways in which powers can be divided, and different ways to express the division in the constitution, including one, two or three lists of powers, and allocation of residual powers either to the centre or the states. In Australia the constitution lists the legislative powers of the Commonwealth Parliament only. States may legislate on any matter that is not exclusively federal. That is, for most matters in the Commonwealth list the states share concurrent power, and they also have residual power over anything not listed. In both India and Malaysia the constitutions set out three lists of powers: federal, state and concurrent. The model proposed for the Philippines also includes three lists of powers, with any residual powers being vested in the federal parliament.²¹

Delegates can consider the 'optimal' degree of centralization or decentralization, but the experience of other federations shows that the system will usually change over time. India was conceived as a very centralized 'union' of states, but has become more decentralized over time, notwithstanding the extraordinary powers of the federal government in India to intervene in the governance of states.²² In Malaysia and in Australia there has been greater consolidation of central power over time. The point is that constitutions tend to take on a life of their own, and the real practice that will grow out of a constitutional text can rarely be predicted.

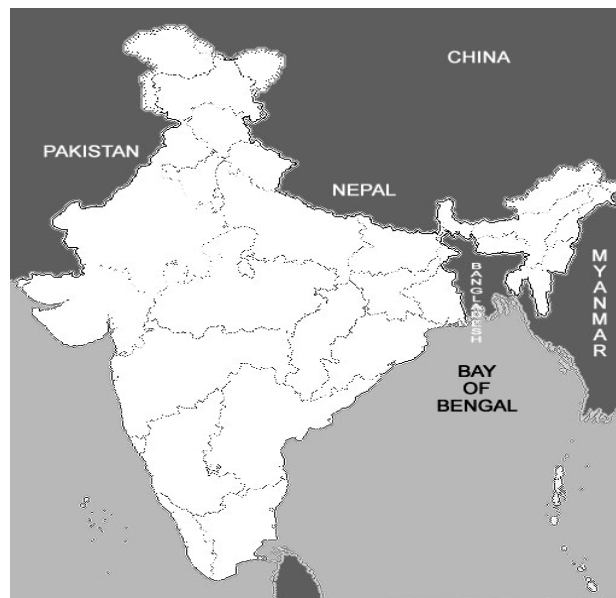
A further consideration is the degree of *flexibility* in the allocation of powers. In Malaysia both levels of government have the power to delegate their powers to the other level through executive agreements. According to Means, 'this feature has made the federal system flexible over time and amenable to the enhancement of federal authority'.²³ In the Australian Constitution, section 51(xxxvii) ('the reference power') provides for some flexibility in the allocation of powers by enabling states to refer legislative powers to the Commonwealth. Some use has been made of this provision, usually in cases where the states have entered an intergovernmental agreement on the implementation of a national scheme on a matter over which the Commonwealth does not have legislative power. The CMFP draft

constitution for the Philippines appears to contemplate the possibility that the federal parliament may via legislation expressly authorize the states to legislate on matters otherwise within the exclusive power of the federal parliament. Unlike the Australian and Malaysian provisions which have tended to enhance federal power, this provision for flexibility seems to enable greater empowerment of the states, although it is a provision that may never be invoked.

Symmetry and asymmetry

In drafting a federal constitution, delegates may also wish to consider the degrees of symmetry or asymmetry that would be most suitable for the Philippines. All federal countries will be asymmetrical in some ways, such

Figure 10. Map of India



Source: Merriam-webster.com

as varying demographics and resource levels between different states. But some federations are also asymmetrical in a formal sense, in that the constitution treats states differently. As Ron Watts has pointed out, 'some federations have found that the only way to accommodate the varying pressures for regional autonomy has been to incorporate asymmetry in the constitutional distribution of powers'.²⁴

In India for example, the state of Jammu and Kashmir has been accorded special status, and is the most autonomous state.²⁵ Jammu and Kashmir is situated in the far north of India, bordering Pakistan, and whilst Jammu has a Hindu majority, Kashmir has a predominantly Muslim population. The territory of Jammu and Kashmir has long been contested, and parts of Jammu and Kashmir are occupied by Pakistan and by China. Unlike other Indian states, Jammu and Kashmir was allowed to draft its own constitution, and gives the Chief Minister more effective power than the Governor. Jammu and Kashmir also has much broader legislative powers than other states within the Indian federation, and whilst in the rest of India, residual legislative powers are held by the union, in Jammu and Kashmir residual powers are held by the State.²⁶ Arora writes that 'India's experimentation with asymmetry can... be viewed as an extended discovery of the minimum degree of uniformity necessary for maintaining a coherent union'.²⁷

The Borneo states of Sabah and Sarawak in Malaysia also have special status relative to other states, as a result of concessions made when they joined the Malaysian federation in 1963.²⁸ These states have more extensive legislative powers than other states, including powers over native laws, culture, communications, shipping and fisheries. The greater autonomy granted to Sabah and Sarawak is due in part to their geographic separation from the other Malaysian states,²⁹ and to ethnicity: these islands are more ethnically diverse than the Malay states.³⁰

The necessity or possibility of some constitutional asymmetry, especially in relation to Muslim Mindanao and the Cordillera regions which already have special status, might usefully be considered when designing a federal constitution for the Philippines.

State institutions

Another consideration is the design of state institutions. How much autonomy should states have? In India states have governors appointed by the President on advice of the Prime Minister, and in Malaysia, in those states that are not headed by sultans, a governor is appointed by the Paramount Ruler at the federal level on advice of the Prime Minister. However in both countries the state executives are effectively run by the chief ministers. Still,

the question of whether the centre should have any say in state appointments is an important and potentially sensitive one. In Australia, the federal government has no say in the selection of either the state premiers or state governors.

Consideration will also need to be given to whether state legislatures are to be unicameral or bicameral. There are examples of both systems in the three countries at hand. In Malaysia all states have a single legislative chamber. In India most states have unicameral legislatures, although some of the larger states have bicameral legislatures. And in Australia, all state parliaments are bicameral with the exception of Queensland. The original rationale for bicameral state (or colonial, as they then were) legislatures in Australia was the provision of a conservative check on the democratic will of the majority as represented in the lower houses of parliament. As state upper houses have evolved, they have usually tended to become less conservative than originally foreshadowed, and now serve – with varying degrees of efficacy – as houses of review. The way in which state upper houses fulfill their role as houses of review varies between states, and depends on factors such as the electoral rules and consequent patterns of party representation, as well as the strength and nature of the parliamentary committee systems. The Legislative Council in Tasmania has never been controlled by a government party or any political party, whereas it has not been unusual for a government to control both houses in the Victorian Parliament.³¹ Just as federal governments have often been critical of the power of the Senate, state executives have a history of attacking and seeking to weaken (or abolish) upper houses of state parliaments. The powers of some upper houses have been somewhat weakened by constitutional changes.³² But it has also been argued that strong upper houses, in both the federal and state parliaments, are a fundamental check on governments and the only part of the system that really undertakes deliberative review of legislation.³³

Local government

Should there be constitutional recognition of local government? Guaranteed autonomy? There is no recognition of local government in the Australian constitution and therefore no constitutional protection.³⁴

The current constitution of the Philippines, on the other hand, already provides in the Declaration of Principles and State Policies that ‘the State shall ensure the autonomy of local governments,’³⁵ and includes more detailed provisions on local government in Article X which provides that local governments are entitled to a share of national taxes, shall also have the power to create their own sources of revenue, and that Congress shall enact a local government code.³⁶ The draft federal constitution proposed by the

CMFP retains some of these existing provisions, as well as including in the constitution some parts of the *Local Government Code 1991* and borrowing or adapting provisions on local government from other jurisdictions. In the CMFP draft, State legislatures would have power to legislate on local government, including the creation, merger, amalgamation, abolition or alteration of boundaries of local governments, but changes to boundaries would require approval by voters in the affected local areas.³⁷

India included recognition of local government in its constitution fairly recently, and the significance of local government has since grown quite dramatically. Attempts in the 1980s to include local government in the constitution failed, but in 1993 constitutional amendments came into effect that recognized rural and urban local bodies as 'institutions of self-government.'³⁸ The increase in local democratic representation that these changes effected has been remarkable, and some have described India as moving from the usual two-tiered federal system toward a multi-level federal system, with local bodies becoming the third tier in the federation.³⁹

Financial arrangements

One of the most difficult and usually contentious aspects of federal design is the financial arrangements. That is, the division of taxation powers and therefore revenue raising capacity between the states and the federal government; the sharing of revenue between the centre and the states; and fiscal equalization between the states. Sharing of resources is a major cause of friction in all federal countries, and certainly in India, Malaysia and Australia. In India, although the political power of regional governments has increased, their fiscal dependence on the centre has also increased.

In the draft proposal of the CMFP, most taxes would be the responsibility of the states, which I presume is proposed in an attempt to make revenue raising powers commensurate with spending responsibilities. But it should also be noted that some people argue that vertical fiscal imbalance is both inevitable and desirable.⁴⁰ Sato has written that careful consideration needs to be given to revenue decentralization (as opposed to spending decentralization) because of the 'open nature of regional economies in which people and resources freely move.'⁴¹ There are different views about whether tax competition between states is on balance positive or negative.

However if states do not have the power or the capacity to raise sufficient revenue to meet their spending responsibilities, federal transfers will be required, and here it must be said that conditional or specific purpose grants from the federal government to states are used in many federal systems as a means by which the federal level can increase its own powers and interfere in matters of state competence. Constitutional delegates in the Philippines

could strive to find an acceptable way to balance these competing considerations.

A related consideration is whether and to what extent there will be horizontal fiscal equalization between the states, and if so how equalization payments are to be calculated. In a federal Philippines, especially in view of the disparate levels of development and revenue-raising capacity between regions, there will need to be some equalization, so the question is: how is it to be calculated? In Malaysia the states' share of federal revenue is calculated according to population and road mileage.⁴² In Australia, equalization payments are made on the basis of per capita relativities calculated and recommended by the independent Commonwealth Grants Commission. The Commission's advice is based on the principle of fiscal equalization which states that 'each State should be given the capacity to provide the average standard of State-type public services, assuming it does so at an average level of operational efficiency and makes an average effort to raise revenue from its own sources.'⁴³ There is of course some resentment of the equalization formula amongst those states that receive the lowest equalization payments. This is a perennial issue with fiscal equalization in many jurisdictions, and something the Philippines will need to consider carefully in designing its federal system.

Dispute resolution and judicial review

In federal systems, because there are different levels of government, with different powers and functions and revenue raising entitlements, there will inevitably be disputes between governments. These disputes need to be adjudicated by a competent court. The type of disputes that might arise includes those about the scope and exercise of legislative powers, and disputes about the character and constitutionality of certain taxes. The concept of judicial review is foreign to most unitary systems, but is required in federal systems in which the powers of parliaments and governments at both levels are limited by the constitution. Federal constitutional courts are therefore empowered to invalidate legislation if it contravenes the constitution. A federal constitution would usually assist in the resolution of some types of dispute by specifying for example that federal laws will be paramount in the event of any inconsistency.⁴⁴ Constitutional delegates in the Philippines may wish to consider whether it is desirable to make other provisions guiding the resolution of disputes between governments or specifying remedies or standing requirements.

Intergovernmental relations

Intergovernmental relations is another area for consideration. Different levels of government need to communicate and work together on various

issues. Often this is not expressly provided for in the text of federal constitutions, but rather left to evolve. Constitutional delegates in the Philippines might consider whether the federal constitution ought to include special institutions for intergovernmental relations.

In India, a number of institutions were created by the constitution to promote or regulate inter-governmental relations, including the Finance Commission which distributes revenues among the Union and the States, an inter-state tribunal for water disputes,⁴⁵ and an Inter-State Council to resolve disputes between states, discuss matters of common interest and make recommendations on policy coordination.⁴⁶

The Australian Constitution makes some provision for intergovernmental financial arrangements,⁴⁷ but most other intergovernmental arrangements are relatively informal. 'While there is a vast network of intergovernmental ministerial councils, with one partial exception, none is specifically authorized by the Constitution. The exception is the Australian Loan Council, through which government borrowing is coordinated in Australia and which is established by an intergovernmental agreement authorized by section 105A of the Commonwealth Constitution.'⁴⁸ Other intergovernmental ministerial councils are established by legislation, by exchange of letters at the Heads of Government level, or by informal agreement between levels of government. Many of these Ministerial Councils were established or consolidated in the early 1990s as part of the federal Labor government's 'New Federalism.' Parallel to the network of Ministerial Councils there is a system of intergovernmental senior officials' meetings, where a great deal of detailed work on intergovernmental schemes and negotiations is carried out. Ministerial councils have often proven to be an effective mechanism for negotiation and collaboration between levels of government on matters including the effective exercise of concurrent powers, and reference of powers by the states to enable consistent national legislative schemes in some areas. However there are concerns about lack of transparency of intergovernmental forums and lack of government accountability for intergovernmental policies and decisions.⁴⁹

Amending the constitution

Constitutional delegates should also consider this question: should the procedure for amending the constitution be changed to provide for special majorities or state agreement where changes affect states or the federal character of the constitution? Both the Indian and Australian constitutions contain such requirements,⁵⁰ whereas in Malaysia the constitution can be amended by a two thirds majority of parliament without any involvement of the states. Because the federal government in Malaysia has always had more than a two thirds majority, constitutional amendments have been frequent

and have served to further centralize power.⁵¹ The draft constitution of the CMFP published in Prof Abueva's recent book does not cover amendment procedures, but notes that amendments or revisions will be among the subjects dealt with in a forthcoming full 'Draft Constitution.'⁵²

Accommodating diversity

Finally, there should be general consideration of best ways to accommodate diversity in a federal Philippines. As we have seen, federalism by its very nature 'is based on the presumed value and validity of combining unity and diversity and of accommodating, preserving and promoting distinct identities within a larger political union.'⁵³ But aside from provision for basic features of federalism such as autonomous state government and representation of states (and possibly special minorities) in parliament, and human rights protections, delegates might consider whether there is also a need for 'special' provisions designed specifically to fit the cultural and linguistic diversity within the Philippines. Such provisions might include acknowledgement of special issues or grievances in the preamble, or some kind of constitutional asymmetry (discussed above), or special institutions for multiculturalism, or extensive and explicit protection of languages and cultures. This question is closely related to the next two parts of this paper, dealing with the rule of law and human rights, in particular the discussion of group rights in part three.

What Mechanisms for Strengthening the Rule of Law Must Be Considered in Federalization?

It is difficult to identify a precise and agreed meaning of the rule of law. For present purposes let us suppose that the rule of law must at the very least entail government under law, and freedom of the judiciary from interference by the executive; a system of laws in which the community *and* the government are subject to the laws. The rule of law is described by Allan as 'an amalgam of standards, expectations and aspirations,'⁵⁴ and by Finnis as 'the state of affairs in which a legal system is legally in good shape.'⁵⁵ Raz defines the rule of law as comprising or demanding: that laws be prospective, open, clear, and relatively stable; that the making of specific orders or directives should be guided by open, clear, stable and general rules; that the independence of the judiciary be guaranteed; that the principles of natural justice be observed and that courts should be accessible, and have the power to examine the actions of other branches of government; and that 'the discretion of law-enforcement agencies should not be allowed to pervert the law'.⁵⁶ It is important to note that the rule of law is only ever present in degrees and is not fully and ideally realized in any legal system.⁵⁷ But let us consider how the rule of law might be *strengthened* in federalizing the Philippines.

Legitimacy and public confidence

As the Chief Justice of Australia, Murray Gleeson, has noted, the rule of law 'depends upon public confidence in lawfully constituted authority.'⁵⁸ Some of the purported benefits of federalism are that it brings government closer to the people and enables greater participation in public life. It is also claimed by proponents of federalism in the Philippines that it would have greater legitimacy and public acceptance than the current centralized presidential system, and would help remedy corruption and the monopolization of political power. If these claims for federalism are true, then federalization of the Philippines will necessarily enhance the rule of law as understood by Gleeson. As discussed in part one of this paper, the process by which the constitution is made is also significant for the legitimacy of the constitution, and can enhance public confidence and therefore the rule of law, if the process is sufficiently open and inclusive.

Accountability and culture of constitutionalism

The rule of law can be strengthened by improving mechanisms for government accountability. It could be argued that federalism by definition enhances accountability because it entails dispersal of power, checks and balances between levels of government, and the necessity of constitutionalism. In the words of Max Frenkel: '[one] element of federal political culture is the readiness not to consider politics as a zero-sum game where the only alternatives are complete power and total powerlessness'⁵⁹ – this requires willingness to compromise and share power and follow the rules of the game – the constitution. In his book on federal theory, Frenkel describes this constitutionalism as 'a basic policy orientation favoring limited power and calculable procedures.'⁶⁰

Constitutional delegates in the Philippines might consider establishing or enhancing concrete accountability mechanisms, such as the right to information and an enforceable leadership code that includes penalties for breach. Strengthening the administrative law framework is certainly one of the most effective ways to enhance the rule of law. Australia developed a comprehensive administrative law system in the 1970s, that includes freedom of information legislation, and administrative and judicial review of administrative decisions. The Indian Parliament has recently passed the *Right to Information Act 2005*, although it contains wide exceptions for cabinet papers and documents of certain government agencies.⁶¹ The Philippines might usefully borrow or adapt administrative law provisions from other jurisdictions, and could consider whether accountability measures should be entrenched in the constitution or left for the Parliament to provide.⁶²

Fiscal decentralization is expected not only to make the public sector more efficient but also be more *accountable* because it is *closer* to the people. There are complex arguments for and against this proposition but to the extent that it is true then it is another way of protecting the rule of law.

Judicial independence

Judicial independence is a crucial component of the rule of law. The current constitution of the Philippines already provides protection for judicial independence, by providing security of tenure and salary, and fiscal autonomy for the judiciary.⁶³ The draft constitution proposed by the CMFP contains almost identical provisions. But such written protections are not always adequate to fully protect judicial independence. Judicial independence has been seriously undermined in Malaysia with consequent depletion of the rule of law. The Prime Minister has had 'disagreeable' judges impeached and according to Means 'the courts now give extraordinary deference to federal authorities in the interpretation of laws and the constitution.'⁶⁴ In some parts of India there are reports of the judiciary being clogged by a backlog of cases and the legal system being 'largely paralyzed by delay and corruption.'⁶⁵ The Philippines might consider how it can design a constitution that minimizes the possibility of such problems, and more vigorously protects the rule of law.

How Can Human Rights Be Continually Preserved in the Philippines?

The Philippines already has strong human rights provisions in the 1987 constitution. The draft put forward by the CMFP proposes to keep the same Bill of Rights, to slightly amend the Declaration of Principles and State Policies, and to add a new article called a 'Bill of Duties and Obligations' (Art V of the draft). The aim of the new Bill is to balance the concern for individual rights with 'corresponding individual, collective and communitarian duties and obligations.'⁶⁶

Australia does not have a Bill of Rights in the Constitution, but relies on the institutions of government and the common law to protect rights.⁶⁷ The Indian Constitution contains an extensive list of Fundamental Rights that protects essentially the same civil and political rights as those contained in the Philippines' Bill of Rights including freedom of religion, freedom of expression and assembly, and the right to form trade unions. In addition, the Indian Constitution provides for freedom from discrimination on the grounds of religion, race, sex, caste or place of birth; for equality of opportunity in public employment, and for the express prohibition of traffic in human beings and forced labour. Social, economic and cultural rights are also included in

the Constitution of India, however they fall into the category of 'directive state principles' and are non-justiciable.

The Constitution of Malaysia contains protection for Fundamental Liberties, which covers most of the civil and political rights found in international human rights instruments. However it may be instructive to reflect on the restriction of rights in Malaysia, especially the restriction of freedom of speech. Following a crisis in late 1960s and early 1970s, the *Sedition Act* was amended 'to make it unlawful for anyone, including MPs, to discuss or criticise the power or status of Malay rulers, citizenship rights, Malay special rights, the status of Islam as the official religion and Malay as the national language.'⁶⁸ Means has written that 'preventive detention and the *Sedition Act*... have given virtually unbridled powers to the PM to restrict individual rights and freedoms.'⁶⁹ Preventive detention is provided for in the *Internal Security Act 1960* and has been widely used to curb political dissent and trade unionists.⁷⁰ This is possible because of the extremely qualified nature of the liberties in the Constitution. The liberties are not guaranteed and are subject to a number of express qualifications in the Constitution, and also to ordinary law.⁷¹

Individual vs. Group rights

In addition to fundamental individual rights, India's Constitution also recognizes and protects the rights of linguistic minorities (including rights over their language and education), Anglo-Indians, and scheduled castes and tribes.⁷² In the Malaysian Constitution there are special protections for the group rights of Malays, including 'arrangements... for the reservation of land, for quotas for permits and for quotas for employment in the public services of the states.'⁷³ These provisions were deemed necessary because Malays were economically and educationally disadvantaged, relative to the rest of the Malaysian population.⁷⁴

But group rights raise special questions – are they consistent with individual rights and if not how are they to be balanced and reconciled? Kymlicka argues that rights must be equal *between* groups and *within* groups, and says therefore 'the liberal conception of minority rights cannot accommodate all the demands of all minority groups.'⁷⁵ But he also says it is important not to prejudge the illiberal nature of a minority culture. This issue may be important when giving autonomy to a Muslim minority for example, although there seems in the Philippines to be a commitment to consistent application of human rights norms regardless of what form the federation and states ultimately take. Kymlicka also argues, convincingly, that 'minority rights cannot be subsumed under the category of human rights', and that it is necessary 'to supplement traditional human rights principles

with a theory of minority rights.⁷⁶ Constitutional delegates might consider whether there are minorities in the Philippines that require special group rights, and how these are to be balanced with other human rights.

Social and economic rights and cultural rights

Delegates could also consider whether there is a place for social, cultural and economic rights in a new federal constitution. The Philippines already has qualified provision for social and economic rights in Articles XIII and XIV of the 1987 Constitution, including housing, health, and quite strong protection of the right to quality and accessible education. The Constitution also contains some protection of languages, arts and culture, and provides that 'The State shall foster... a Filipino national culture based on the principle of unity in diversity.'⁷⁷ Delegates might ask themselves whether the protection of social and economic rights should be further enhanced and strengthened, made clearer and fully justiciable, given that equitable development and poverty alleviation are amongst the aims of the proposed Charter Change. The Constitution of India contains extensive provisions on social and economic rights, however these are enumerated in a list of 'guiding principles' to which government institutions are supposed to have regard in carrying out their functions, and are non-justiciable. . But certainly there is room to consider the *degree* of recognition and protection of these rights in a new federal constitution.

Enforcement mechanisms and access to justice

Thought will also need to be given to the manner in which the constitution will provide for enforcement of rights and access to justice, to enable rights to be protected and enforced in practice and not just in theory. Delegates will need to consider who will have standing to enforce rights and against whom they can be enforced: against the State and public officials only, or also between individuals? Will the constitution provide for enforcement of rights against state public officials in same way and to same extent as federal public officials?

In terms of enforceability of human rights, delegates might ask whether the Commission on Human Rights is adequately empowered and resourced to fulfil its mission, which includes investigating human rights violations and recommending appropriate actions thereon, and monitoring government compliance with its international treaty commitments. Does it need greater powers or 'bigger teeth'? It might be useful for the Philippines to look at the example of the Indian Human Rights Commission which brings actions against the government or to challenge legislation on behalf of affected members of society where there are human rights concerns. The Malaysian

government created the Malaysian Commission on Human Rights in 1999, but it is widely criticized for an apparent pro-government bias that is said to result from political appointments to the Commission.⁷⁸ The proposed Charter Change in the Philippines provides an opportunity not only to expand on the number and types of rights that receive constitutional protection, but also to devise or improve mechanisms to ensure that rights infringements can be remedied.

Conclusion

This paper has provided a cursory overview of some of the main issues that will need to be considered in drafting a federal constitution for the Philippines, as well as some thoughts on how the rule of law and protections for human rights can be further strengthened in a federal Philippines. In addressing these questions themselves, constitutional delegates may gain some useful insights from other federal systems, including the three that I have focussed on: India, Malaysia and Australia, but will ultimately need to craft a document that fits the people and character of the Philippines. The shift from a unitary model of government to a federal system does raise some complex questions and choices unique to federations, and this paper has attempted to touch upon what some of those questions are and some examples of the different ways in which they can be approached.

* * * *

KATY LE ROY is the Assistant Director of the Centre for Comparative Constitutional Studies (CCCS). Together with Dr. Cheryl Saunders, Katy is co-editor of The Rule of Law published in 2003 by the Federation Press. From April 2002 to April 2003, Katy was a Research Fellow in the Law School and served as Assistant Director of the Institute for Comparative and International Law. Katy is a barrister and solicitor of the Supreme Court of Victoria, and practiced briefly in Melbourne in the field of personal injuries law. She has also worked in Germany as a legal adviser to a major investment fund company. She completed her BA (Hons) (major in Political Science), LLB (Hons) at the University of Melbourne in 1997 and is a PhD candidate at the same university.

Endnotes

- ¹ For a detailed exposition of the constitutional model advocated by the Citizens' Movement for a Federal Philippines, see Jose Veloso Abueva, *Charter Change for Good Governance – Toward a Federal Republic of the Philippines with a Parliamentary Government* (2005).
- ² As evidenced for example, by the draft constitution already referred to, *ibid*, as well as the alternative model being proposed by the Coalition for Charter Change Now!, briefly referred to in *ibid*.
- ³ Comment made by Professor Abueva, day 1 of the International Conference on Federalism and Multiculturalism, 3-4 October 2005, Manila.
- ⁴ Jose Veloso Abueva, above n 2, 4.
- ⁵ The Consultative Commission was created by the President of the Philippines by Executive Order No.453 and comprises members selected by the President. The Commission's mandate is to conduct consultations and studies and propose amendments and revisions to the 1987 Constitution. The Commission is chaired by Professor Abueva. It commenced work on 28 September 2005 and has three months to conclude its work.
- ⁶ I say it is a step in the right direction in terms of public participation in the constitution making process, because the Commission is instructed to 'hold nationwide consultations with various sectors of society, such as farmers, fishermen, workers, students, lawyers, professionals, business, military, academic, ethnic, and other similar groups, including the different leagues of Local Government Units and members of Congress and the Judiciary.' However, I note that the creation of the Commission, or at least the manner in which it was created, has not been universally welcomed: see for example the comment made by former Senator Francisco Tatad, on day 1 of the International Conference on Federalism and Multiculturalism, 3-4 October 2005, Manila, that 'President Arroyo has no business creating a consultative commission.'
- ⁷ Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 354, 385.
- ⁸ The Constitution of the Republic of the Philippines provides in article XVII that amendment or revision of the constitution may be proposed by Congress (sitting as a Constitutional Assembly ('ConAss'), upon a vote of three-fourths of its members) or a specially convened Constitutional Convention ('ConCon'). Any amendment passed by a ConAss or ConCon must then be ratified by a majority of votes cast in a plebiscite. Constitutional amendments can also be directly proposed by the people through a petition of at least 12% of registered voters.
- ⁹ Balveer Arora, 'Adapting Federalism to India: Multilevel and Asymmetrical Innovations' in Balveer Arora and Douglas Verney (eds), *Multiple Identities in a Single State – Indian Federalism in Comparative Perspective* (1995) 74.

- ¹⁰ Ibid. Note that this was the major period of reorganization, but there has been further alteration of state boundaries since then, and according to Wadhwa Nagpur, *Dr Burga Das Basu Introduction to the Constitution of India* (19th ed, 2003), 'the process of reorganisation is still continuing and the recent trend is towards conceding the demands of smaller units which were previously Part B states, Union Territories or autonomous parts of States, by conferring upon them the status of a 'State', eg, Nagaland, Meghalaya, Himachal Pradesh, Manipur, Tripura, Mizoram, Goa.'
- ¹¹ See for example Daniel J Elazar, *Federal Systems of the World* (2nd ed, 1994) 104.
- ¹² See for example Cheryl Saunders, 'Federalism, Decentralisation and Conflict Management in Multicultural Societies' in Raoul Blindenbacher and Arnold Koller (eds), *Federalism in a Changing World: Learning from Each Other* (2003); and Mwangi S Kimenyi, 'Harmonizing Ethnic Claims in Africa: A Proposal for Ethnic-Based Federalism' (1998) 18 *Cato Journal* 43, 61.
- ¹³ Abueva, above n 2, 69, 83, Article II section 2 and Article XIII section 4. This proposal is adapted from the Constitution of United Mexican States.
- ¹⁴ This is similar to the Philippines' proposal in that states have significant autonomy, however in the Australian case the Constitution contemplates the actual change being effected by the Commonwealth Parliament, not by the states acting independently. See s123 of the Australian Constitution.
- ¹⁵ See Art 3-4 of the Constitution of India, and Nagpur, above n 11, 70-71.
- ¹⁶ The only federations that do not have bicameral parliaments are Ethiopia, United Arab Emirates ('UAE'), Federated States of Micronesia ('FSM') and St Kitts and Nevis. Ethiopia has a unicameral parliament, but there are reserved seats in parliament for minority nationalities and peoples. Ethiopia also has a House of the Federation, made up of representatives of 'nations, nationalities and peoples', which whilst not being a legislative chamber as such, has wide-ranging powers, including the power to interpret the constitution, to determine the distribution of revenues derived from joint federal-state taxes and federal subsidies to the states, and to settle disputes between states (see Art. 61 and 62 of the Constitution of the Federal Democratic Republic of Ethiopia); The UAE achieves equality of state representation through its Supreme Council, made up of the rulers from each of the seven emirates. The Supreme Council is the top policy making body in the UAE. The President and Vice-President are elected from among the members of the Supreme Council; Both FSM and St Kitts and Nevis have unicameral parliaments primarily because of their tiny populations (100,000 and 40,000 respectively) but their unicameral parliaments include extra members to represent states or regions: In the FSM, 10 members are elected from single member constituencies defined by population for a 2 year term, and one member from each of the four states for a four-year term; in St Kitts and Nevis 11 members are elected from single member constituencies based on population, and 3 'Senators' are appointed by the Governor-General.

- ¹⁷ Nagpur, above n 11, 204.
- ¹⁸ Ron Watts, *Comparing Federal Systems* (2nd ed, 1999) 94.
- ¹⁹ Jenna Bednar, William Eskridge and John Ferejohn, *A Political Theory of Federalism* (1999) <http://www-personal.umich.edu/~jbednar/Pubs/befwbib.pdf> at 1 October 2005, 2.
- ²⁰ It is desirable to have an upper chamber, differently constituted to the lower chamber, that can act as a house of review and as a check on the power of the lower house; See also Roger Congleton, 'On the Merits of Bicameral Legislatures: Policy Stability within Partisan Politics (2002) at <http://rdcl.net/forthcoming/BICAMEURO#.PDF> who, after an empirical study concluded that 'the process of compromise within bicameral institutions has desirable effects on the course of public policy in a wide range of political environments and within a variety of government structures.'
- ²¹ CMFP draft constitution, above n 2, Art VII, ss 1, 2, 3 and 8. Note that in both Australia and Malaysia, residual powers belong to the states, whereas in India (like the CMFP proposal) residual powers belong to the Union.
- ²² The Indian Constitution provides that the federal parliament can under certain circumstances make laws on matters in the state list (Art.249 and 250), and that the central government can directly take over the government of a state (Art 356). President's rule 'has been imposed over states more than 100 times since 1950' – George Mathew, 'India' in Ann Griffiths (ed), *Handbook of Federal Countries, 2005* (2005) 166, at 169.
- ²³ Gordon P Means, 'Malaysia' in Griffiths, *ibid*, 184, at 185.
- ²⁴ Watts, above n 19, 68.
- ²⁵ Elazar, above n 12, 113-115; and Nagpur, above n 11, 34.
- ²⁶ For a more detailed explanation of the extremely complicated history and constitutional position of Jammu and Kashmir see Nagpur, *ibid*, 255-264, and Govinda Rao and Nirvikar Singh, 'Asymmetric Federalism in India,' Department of Economics UCSC Paper 567 (2004) at <http://repositories.cdlib.org/ucscecon/567>.
- ²⁷ Arora, above, n 10, 77. This author also notes that there are now in India effectively two categories of states: half 'major' and half smaller, and that they are treated differently.
- ²⁸ Watts, above n 19, 66.
- ²⁹ Sabah and Sarawak are on the island of Borneo, to the east of the Malay peninsula where the 11 Malay states are located.
- ³⁰ Elazar, above n 12, 138. Elazar writes that Sabah and Sarawak 'possess greater autonomy as a means of safeguarding their special "non-Malayan" interests,' at 139.
- ³¹ Although the 2003 reforms are likely to make it difficult for either of the major parties to gain a majority in the Victorian Legislative Council.

- ³² The NSW Legislative Council has not had the power to block supply since 1929. The power of the Victorian Legislative Council to block supply was removed by the 2003 reforms.
- ³³ See for example Bruce Stone, 'Bicameralism and Democracy: The Transformation of Australian State Upper Houses' (2002) 37 *Australian Journal of Political Science* 267.
- ³⁴ Referendums to amend the Constitution to include a reference to local government were held in 1974 and 1988 and both were unsuccessful. Local government is covered in, and given limited protection in, state constitutions. However states retain the power to change their constitutional provisions dealing with local government, and so have the power to change the powers, composition and boundaries of local government more or less as they please. Queensland cannot abolish local government without a referendum.
- ³⁵ Article II, sec. 25.
- ³⁶ The code provided for in Article X sec. 3 was enacted by the Philippines Congress in 1991, and written by Senator Pimentel – *Local Government Code of 1991*.
- ³⁷ This provision in the CMFP draft constitution was inspired in part by the Constitution of Queensland, Australia. See Abueva, above n 2, 90.
- ³⁸ Mathew, above n 23, 173.
- ³⁹ See for example *ibid*.
- ⁴⁰ See for example Motohiro Sato, 'Fiscal Decentralization in Asia Revisited: A Theoretical Foundation,' paper presented at the International Symposium on Fiscal Decentralization in Asia, Hitotsubashi University, Tokyo, 5-6 November 2004, available at http://www.econ.hit-u.ac.jp/~kokyo/APPPsympo04/PDF-papers-nov/Sato-Theory_Revised2.pdf , 37.
- ⁴¹ *Ibid*.
- ⁴² Means, above n 24, 189.
- ⁴³ Commonwealth Grants Commission website: www.cgc.gov.au
- ⁴⁴ The constitutions of India and Malaysia, as well as the draft constitution proposed by the CMFP, contain provisions based closely on section 109 of the Australian Constitution, which provides 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.' See Article 254(1) of the Indian Constitution, section 75 of the Constitution of Malaysia, and Art VII section 5 of the CMFP draft constitution.
- ⁴⁵ Created by Parliament pursuant to Art 262 of the Indian Constitution which states that Parliament may provide for the adjudication of such disputes.
- ⁴⁶ The possibility of a Inter-State Council is provided for in Art 263 of the Indian Constitution, but it was not in fact created until 1990, and has proven to be quite ineffective.

- ⁴⁷ See ss. 94, 96, 105 and 105A of the Australian Constitution.
- ⁴⁸ Cheryl Saunders, 'Australia' in John Kincaid and Alan Tarr (eds), *Global Dialogue on Federalism in the 21st Century Theme 1 Handbook: Constitutional Origins, Structure and Change in Federal Democracies* (forthcoming).
- ⁴⁹ Cheryl Saunders and Katy Le Roy, 'The Allocation of Powers in Politically Decentralised Countries – A Study; Australia' published in Spanish in Enric Argullol Murgadas (ed), *Federalismo y autonomia* (2004); See also Cheryl Saunders, 'Commonwealth-state relations' in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (2001).
- ⁵⁰ Section 128 of the Australian Constitution requires a referendum for any constitutional change, and for any proposed amendment to succeed it must receive a majority of votes cast, as well as majorities in at least four out of six states; Article 368 of the Indian Constitution provides that Parliament may amend the constitution by a two thirds majority vote, except that changes to certain provisions relating to the federation including representation of the states in parliament, and state and concurrent legislative powers, must first be ratified by the legislatures of at least one half of the states.
- ⁵¹ Means, above n 24, 188-189.
- ⁵² Abueva, above n 2, 94.
- ⁵³ Watts, above n 19, 6.
- ⁵⁴ T.R.S. Allan, *Law, Liberty and Justice* (1993) 22.
- ⁵⁵ John Finnis, *Natural Law and Natural Rights* (1980) 270.
- ⁵⁶ List of desiderata proposed by Raz as discussed in G. Walker, *The Rule of Law* (1988) 21-22.
- ⁵⁷ See Finnis, above n 56, 270 ('it is a matter of degree') and Randall Peerenboom, 'Let one hundred flowers bloom, one hundred schools contend: debating the rule of law in China' (2002) 23 *Michigan Journal of International Law* 471, (we must accept 'that implementation of the rule of law is always a matter of degree') 512. I note also that the rule of law, constitutionalism, and liberal democratic institutions can only really work if the essential beliefs and values that underpin them have been internalized by the members of society. These concepts evolved very gradually in Western societies and yet they are now expected to be instantly adopted by countries with different historical traditions. But in his survey of South East Asian constitutional developments, Kevin Tan concluded that 'the democratic impulse that began with decolonization in this part of the world is finally beginning to take root in the soils of South East Asia', Kevin Tan, 'The Making and Remaking of Constitutions in Southeast Asia: An Overview' (2002) 6 *Singapore Journal of International Law* 1, 41.
- ⁵⁸ Murray Gleeson, 'Courts and the Rule of Law' in Cheryl Saunders and Katy Le Roy (eds), *The Rule of Law* (2003) 192.
- ⁵⁹ Max Frenkel, *Federal Theory* (1986) 156.

⁶⁰ Ibid.

⁶¹ <http://www.freedominfo.org/news/india/20050524.htm>

⁶² The Philippines constitution already provides for judicial review of government actions (Art VIII ss 1, 5), as does the draft proposed by the CMFP Art XVII s1); the Constitution also provides for the right to information on matters of public concern, Art III s 7.

⁶³ The 1987 Constitution of the Republic of the Philippines, Article VIII ss 2, 3 and 10.

⁶⁴ Means, above n 24, 190.

⁶⁵ Pranab K Bardhan, 'Political-Economy and Governance Issues in the Indian Economic Reform Process', paper delivered at the ANU, Canberra, 25 March 2003, 9.

⁶⁶ Abueva, above n 2, 71.

⁶⁷ There are a handful of 'rights' in the Australian Constitution, including the right to trial by jury for indictable federal offences, and to be justly compensated if property is compulsorily acquired, but no bill of rights.

⁶⁸ Means, above n 24, 187.

⁶⁹ Ibid, 189.

⁷⁰ Poh-Ling Tan, 'Human Rights and the Malaysian Constitution Examined through the Lens of the Internal Security Act 1960,' Paper delivered at the Research School of Pacific and Asian Studies, Australian National University, Canberra, 2001, at http://rspas.anu.edu.au/pah/human_rights/papers/2001/Tan.pdf.

⁷¹ Ibid.

⁷² Watts, above n 19, 106.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Will Kymlicka, *Multicultural Citizenship* (1995) 153.

⁷⁶ Ibid, 4-5.

⁷⁷ Article XIV, s 14.

⁷⁸ Tan, above n 71.