

TRANSPLANTED CONSTITUTIONALISM: THE PHILIPPINE DEBATE ON THE SECULAR STATE AND THE RULE OF LAW*

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SUMMARY

The Philippines borrowed American doctrine on the separation of Church and State, and codified the Free Exercise and Establishment clauses into its Constitution. Yet this hundred-year old constitutional experiment has yielded different results, because these doctrines, born out of a religiously pluralistic community, were being applied to a nation that is predominantly Roman Catholic, whose hierarchy has close ties to a feudal-minded elite, and which historically has played a decisive role in its secular politics.

At the same, there has been some backlash from competing groups: a forty-year Islamic rebellion in the southern island of Mindanao; a tightly knit indigenous Christian group that commands block voting among its flock; and an assertive community of evangelical Christians.

Hence a highly politicized Church-State doctrine. Despite the separation clause, Catholic rituals are held routinely in government offices, and politicians shamelessly seek the blessings of religious leaders. At the same time, the constitution has carved out exceptions to recognize the Islamic minority. From all directions, therefore, Church-State doctrine is under assault in the Philippines from the assertive explicitness of competing religiosities.

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I. THE SEPARATION CLAUSE IN PHILIPPINE CONSTITUTIONAL HISTORY

The separation of Church and States holds a special place in Philippine history. The 1898 revolution for independence against Spain was, in the popular imagination, an "Anti-Monastic" revolution, a rebellion against the abuses by the friar orders under a "unity of Church and State." By the end of the 19th century, the Spanish empire was crumbling. In the colonial metropolis in Madrid, liberal ideas had begun to take hold. In the periphery, in the colonies, however, the state remained authoritarian; the irony was that, in the Philippines, Spain maintained its conquest "by the Sword and the Cross", and enlisted the help of the friar orders both for indoctrinating the natives and, having so succeeded, in controlling them.

The irony is that at the moment of triumph, the revolutionaries enshrined the separation doctrine into their brand-new constitution (the Malolos Constitution), and proceeded to write it inside a church (the Barasoain Church) – apparently the only building big and solemn enough for the occasion (and which I call the "original sin" of Church-State doctrine in Philippine legal history).

The next irony is that the separation clause won by a very slim minority, despite the near unanimity of the revolutionary cause, and that the President of the new Republic (Emilio Aguinaldo) proceeded to suspend the effectivity of the clause, upon advice by his legal adviser, widely acknowledged to be liberal and progressive (Apolinario Mabini).¹

The reason was historically compelling: the Spanish-American war had broken out, Admiral Dewey had defeated the Spanish Armada at Manila Bay, and the fledgling Philippine Republic was again at war. The reasoning was that the government could ill afford the "divisive effect" of the separation clause.

The Philippine-American war ensued, and Philippines became the first, and only, American colony, and remained so until the US gave it independence on the 4th of July 1946.

From 1899 onwards, religious liberty was codified into every charter of government in the Philippines. There have been three major constitutions since: the independence constitution drafted in 1935, the Marcos constitution adopted in 1973, and the 1987 constitution adopted under Corazon Aquino. All of these constitutions contained the stock clauses to guarantee Church-State separation, as demonstrated by the current constitution.

¹ CESAR AJIB MAJUL, *POLITICAL AND CONSTITUTIONAL HISTORY OF THE MALOLOS CONSTITUTION* (1967) at 137, 144.

The separation of Church and State shall be inviolable.²

No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.³

No public money or property shall be appropriated, applied, paid, or employed, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or system of religion, or of any priest, preacher, minister, or other religious teacher, or dignitary as such, except when such priest, preacher, minister, or dignitary is assigned to the armed forces, or to any penal institution, or government orphanage or leprosarium.⁴

Charitable institutions, churches and parsonages or convents appurtenant thereto, mosques,... and all lands, buildings, and improvements, actually, directly, and exclusively used for religious, charitable, or educational purposes shall be exempt from taxation.⁵

At the option expressed in writing by the parents or guardians, religion shall be allowed to be taught to their children or wards in public elementary and high schools within the regular class hours by instructors designated or approved by the religious authorities of the religion to which the children or wards belong, without additional cost to the Government.⁶

II. DILEMMAS IN TRANSPLANTATION

A. A NON-PLURALISTIC, NON-LIBERTARIAN MILIEU

When you read the separation clause in the Philippines, the first fact you must acknowledge is the actual context in which it will apply, namely, a society which is predominantly Roman Catholic, estimated at 81% of the population; that the Muslims are 5% of the population and the various Christian sects constitute more than 13%.⁷

² CONST. art. II, §6.

³ CONST. art. III, §5.

⁴ CONST. art. VI, §29(2).

⁵ CONST. art. VI, §28(3).

⁶ CONST. art. XIV, §3(3).

⁷ See The CIA World Factbook page on the Philippines, available at <https://www.cia.gov/cia/library/publications/the-world-factbook/geos/rp.html> (last visited 1

This pie-chart, so to speak, can be misleading. Modern anthropologists have called it a “split-level Christianity.” In the popular mind, the critique suggests nominal, non-practicing members of the faithful. More specifically, however, the critique actually assumes that the flock are bona fide believers and participants, but have segregated a part of their lives as beyond the control of Catholic doctrine, e.g., Saturday night party animals who are Sunday morning worshippers, or on the other extreme, radical Catholics whose apostolic work is waging revolution through liberation theology.

In other words, we have imported to the Philippines a constitutional doctrine that privileges one kind of association – organized worship – on epistemological grounds (that religious belief is especially protected because it cannot be proved to be either true or false, and that what controls is the test of “sincere belief”). Yet in many ways, that church’s power to command loyalty from its faithful lies less in the compelling power of its beliefs (say, its unique interpretation of scripture), and more in a culturally conditioned attitude toward organizations, hierarchy and personal loyalties.

In other words, the basis of the constitutional privileging – i.e., that religious belief is epistemologically off-limits to law’s usual devices to prove the truth – has nothing to do with the actual operation of the organized churches, which mobilizes its flock not really because its beliefs are compelling, but because its believers are, culturally, Filipinos, that is to say, bound up by bonds of kin-like loyalties, personal ties that cut across the substantive beliefs in politics or faith.

This underscores the non-libertarian context in which the religion clause applies in the Philippines. The original American milieu of the religious freedom assumes that the rights-bearer is the believing individual who is free to join and to disaffiliate, to be baptized or to disown. In the Philippine milieu, however, the individual is by and large expected to keep to his baptized faith, one that is never to be disowned but only to be stretched and expanded as one goes through life. Hence popular participation in “prayer rallies” by evangelical churches, not all of them bearing the imprimatur of the Philippine Catholic clergy and most of them engaging in new forms of worship that, to say the least, form no part of the sacraments of Catholic belief.

In Western societies which have deep liberal roots, the liberty of the individual to believe or not to believe is paramount, and the individual in turn is held strictly to maintain that belief. In Philippine society with only a tenuous liberal tradition, the liberty of the individual is subsumed to larger familial, societal expectations, and the individual in turn is given much leeway to custom-tailor his religious beliefs even if it means relaxing established doctrine. Thus the rise of lay

May 2008), providing the following breakdown: Roman Catholic, 80.9%; Muslim, 5%; Evangelical, 2.8%; Iglesia Ni Kristo, 2.3%; Aglipayan, 2%; other Christians, 4.5%; others, 1.8%; unspecified, 0.6%; none, 0.1%.

religious groups that are only marginally adherents of strict Catholic doctrine. As I have said elsewhere, the Filipino Catholic thinks that God is a Filipino, who sees church doctrine as eternally malleable, elastic and adaptable, and treats church loyalties as no different from the secular claims of group loyalty.

B. THE CLERGY AND BUSINESS

The second fact is that the Church hierarchy in the Philippines is historically tied up to social and economic elites. The Catholic Church came to the shores of the country with the *conquistadores*, who no sooner divided up the entire archipelago in the name of the Crown and gave landed estates to the friar orders and the church hierarchy. Indeed, the first project of the independent Republic was to confiscate the friar lands. Until today, the Church itself remains an economic actor, with landed and financial interests of its own.

This was early acknowledged by the American colonialists upon their arrival in the Philippines, and they recognized not just the vastness of the friar estates – and what this means in a land-based agrarian economy – but as well the political difficulties that arise when, despite the ascendancy of the anti-monastic underpinnings of the incipient revolutionary movement, the friars remain entrenched economically in their proprietary capacity.⁸

Thus the first civilian American Governor-General of the Philippines, William Howard Taft, in fact went on a mission to Rome to convince the Vatican to allow the wholesale purchase – not expropriation – of the friar lands. His instructions from US President William McKinley were explicit, namely, that his was a business, not political, mission, and that he was going to Rome solely as a representative of the buyer (i.e., the Philippine insular government) to negotiate a purchase with the owners (i.e., the Catholic friar orders), and to assure them that there were ample funds to cover the purchase price.

C. THE CLERGY AND SECULAR POLITICS

⁸ Charles H. Cunningham, *Origin of the Friar Lands Question in the Philippines*, 10 THE AMERICAN POLITICAL SCIENCE REV 465 (1916); JOHN P. MCANDREW, URBAN USURPATION: FROM FRIAR ESTATES TO INDUSTRIAL ESTATES IN A PHILIPPINE HINTERLAND (1994); MARCELO H. DEL PILAR, FRAILOCRACY IN THE PHILIPPINES (1889); TEODORO AGONCILLO, THE HISTORY OF THE FILIPINO PEOPLE (1990).

The third fact is that the Church is politically influential. The late Cardinal Jaime Sin led the democratic movement that ousted President Ferdinand Marcos. He used the legitimating power of the Church to give sanctuary to human rights activists. But he also used its vast network of parish priests and community-based nuns to reach out to the people and to spread the word about torture and disappearances. That network includes the Catholic schools – in a country where the best and most expensive schools are Catholic schools. Cardinal Sin took the lead as well in ousting President Joseph Estrada in January 2001.

President Gloria Macapagal-Arroyo has just survived an impeachment complaint; she was caught on tape conspiring with an election commissioner to cheat in the last elections, intimidate a witness by kidnapping her family, and ensure that she won by “at least one million votes”, upon her request and as poll results would eventually show. The complaint has been thrown out on a technicality, but significantly Arroyo found solace in the statement by the Catholic bishops, who said that what she did was morally reprehensible but not legally culpable.

1. De facto ban on artificial contraception in Manila hospitals

In Philippine politics, the litmus test of Church-State independence is the ban on family planning programs and limits on reproductive rights. The constitution sets forth a delicate balance:

The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception.⁹

The State shall defend [t]he right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood;¹⁰

The drafting history of this clause shows that its intention was to maintain the ban on abortion, which is a crime under the Revised Penal Code.¹¹ At the same

⁹ CONST. art. XI, §12.

¹⁰ CONST. art. XV, §3(1).

¹¹ Art. 256. Intentional abortion. — Any person who shall intentionally cause an abortion shall suffer:

1. The penalty of reclusion temporal, if he shall use any violence upon the person of the pregnant woman.
2. The penalty of prision mayor if, without using violence, he shall act without the consent of the woman.

time, this text leaves room for a couple to decide how many kids they would have, and what birth control method they would follow. This is fundamentally important for the Philippines, with a population of 82 million, where unemployed couples living in squalor have 6 to 8 children. Filipino politicians steer clear of what is euphemistically called “population planning”, lest they be chastised from the pulpit of every church in their district.

The City Mayor of Manila has issued an Executive Order¹² declaring that the city promotes responsible parenthood and upholds natural family planning. Although he does not prohibit city hospitals from prescribing the use of artificial methods of contraception, the result is that both public and private clinics, including those operated by NGOs, have desisted from dispensing family planning counsel and distributing condoms.

2. Proposed Reproductive Health Act of 2004

In the past Congresses, then Aurora Rep. Bellaflor Angara-Castillo and Sen. Rodolfo Biazon had dared to explode the myth of the Catholic vote, and filed bills advancing reproductive health. Most recently, Albay Rep. Edcel Lagman has proposed the Reproductive Health Act of 2004.

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3. The penalty of prision correccional in its medium and maximum periods, if the woman shall have consented.

Art. 257. Unintentional abortion. — The penalty of prision correccional in its minimum and medium period shall be imposed upon any person who shall cause an abortion by violence, but unintentionally.

Art. 258. Abortion practiced by the woman herself or by her parents. — The penalty of prision correccional in its medium and maximum periods shall be imposed upon a woman who shall practice abortion upon herself or shall consent that any other person should do so.

Any woman who shall commit this offense to conceal her dishonor, shall suffer the penalty of prision correccional in its minimum and medium periods.

If this crime be committed by the parents of the pregnant woman or either of them, and they act with the consent of said woman for the purpose of concealing her dishonor, the offenders shall suffer the penalty of prision correccional in its medium and maximum periods.

Art. 259. Abortion practiced by a physician or midwife and dispensing of abortives. — The penalties provided in Article 256 shall be imposed in its maximum period, respectively, upon any physician or midwife who, taking advantage of their scientific knowledge or skill, shall cause an abortion or assist in causing the same.

Any pharmacist who, without the proper prescription from a physician, shall dispense any abortive shall suffer *arresto mayor* and a fine not exceeding 1,000 pesos.

¹² Executive Order No. 003, Series of 2000 issued by the Office of the Mayor of the City of Manila on 29 February 2000.

Significantly, it promotes reproductive health education as the best way to minimize the harm of induced abortions, estimated by the U.P. Population Institute at close to 400,000 a year, at least 100,000 of which result in hospitalization due to post-abortion complications. Studies have shown that countries with the freest access to contraceptives and reproductive health care also have the lowest abortion rates.

The bill also aims to advance women's health, and penalizes hospitals that refuse to give medical care to victims of botched backstreet abortions, and turn away women suffering from bleeding caused by post-abortion complications, seen apparently as the just wages of sin.

3. "Conscientious Objections" to contraceptive use and practice

House Bill 3773 or the proposed Responsible Parenthood and Population Management Act aims to prevent abortions, recognizing that unplanned and unwanted pregnancies are the main cause of abortions, and that global data have shown that abortion rates are lowest in countries where family planning information is most widely accessible. It places the Philippine Catholic Church hierarchy in a bind. Church doctrine bans abortions (as does the Revised Penal Code), and yet the clergy now opposes a concrete measure that will demonstrably prevent that painful act of desperation. In the heat of the ensuing debate, one clause in particular has drawn fire. The bill punishes "health care service providers"-doctors, nurses and health officials-who withhold information about family planning methods or who refuse to perform "voluntary sterilization and ligation" on patients of legal age.

The bill thus includes a "conscientious objector" clause: a health professional may validly refuse to perform what for him are irreligious acts, except in medical emergencies where, say, the patient's life is in jeopardy. The Philippine bill reflects a liberal position and recognizes conscientious objectors based broadly on "ethical and religious grounds." Indeed, the bill does not require the health officer to perform any substitute service, merely to "immediately refer" the patient to another, easily accessible health professional.

Health officers may claim the conscientious objector exception if they "refuse to extend quality health care services and information." This protects doctors and nurses who claim conscientious objector status should they refuse to perform certain medical procedures contrary to their faith. I cannot imagine though how this same privilege can be invoked by health officers who refuse to even tell couples all the medically available options. It is a deliberate breach of professional duty to withhold or distort medical information about family planning, and to

pick and choose which method to discuss on the basis not of science but of religion.

4. Tax exemption under the 1987 Constitution

The Constitution exempts churches from real property taxes for property used "actually, directly and exclusively" for religious purposes:

Charitable institutions, churches and personages or convents appurtenant thereto, mosques, non-profit cemeteries, and all lands, buildings, and improvements, actually, directly, and exclusively used for religious, charitable, or educational purposes shall be exempt from taxation.¹³

There have been recent proposals to limit this exemption and tax church income derived from profit-earning activities and gift taxes for receiving donations.

But the proposal is fraught with difficulty. It cannot touch the tax exemption enjoyed by religious schools from real property and income taxes as "non-stock, non-profit educational institutions", because the mere fact that a school earns profit does not destroy its tax-exempt status, though this "protective mantle" cannot insulate schools that deviate from purely academic work and descend from its high pedestal of tax immunity to the level of any ordinary business.

The drafting history of our Constitution, however, is most revealing. When these tax exemptions were being debated in the Constitutional Commission, it was in fact an activist Catholic nun who objected to exempting the church! Sr. Christine O. Tan expressed her "honest bewilderment" at why "churches owned by some religious who are very wealthy would be tax exempt. [Why would] a poor laborer pay taxes on land [while] the religious [do not?]" At this period of our national recovery, I think we should all be paying because we are bankrupt."¹⁴

¹³ CONST. art. VI, §28(3).

¹⁴ II Records of the Constitutional Commission No. 36. The discussion occurred on July 22, 1986:

SR. TAN: My third one is just an honest bewilderment, and that is on Section 28, page 10. The paragraph has some provisions on churches, convents and the religious. I am bewildered that churches owned by some religious who are very wealthy would be tax exempt. I cannot understand why the poor laborer would pay taxes on land but the religious does not pay taxes. I am bewildered about that. I am just talking about the Catholic Church, of course. Also, at this period of our national recovery, I think we should all be paying because we are bankrupt.

MR. AZCUNA: I will just comment on that, Madam President. The main reason this was taken from the 1935 Constitution is that the power to tax is the power to destroy. If we want to promote the separation of Church

D. COUNTERVAILING RELIGIOSITIES

The fourth fact is that the competing churches have learned their lessons, and play the same political and economic game at which the Roman Catholic clergy has so excelled, and in style.

The Islamic rebellion was begun in the 1970s by the Moro National Liberation Front (MNLF), now co-opted by government and succeeded by the Moro Islamic Liberation Front (MILF) and splinter groups. The constitution has offered autonomy to the Muslim areas of the island of Mindanao, and has in fact officially recognized the applicability of shari'ah laws and the jurisdiction of shari'ah courts. The constitution therefore expressly carves out exceptions to the principle of state neutrality to religion, in favor of the Muslim minority.¹⁵

The indigenous Iglesia ni Kristo (literally, the Church of Christ) was founded by a Filipino, whose command over the loyalty of his flock translates into block voting in favor of his chosen candidate. Hence his hold over national and local politicians.

and State and prevent the State from destroying the Church, we have to exempt the Church from taxation. That is the philosophy behind it.

SR. TAN: I think it is a very weak reason.

MR. AZCUNA: Yes, that is the philosophy because the power to tax can really destroy.

SR. TAN: Thank you.

¹⁵ CONST., art. X, §15. There shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.

CONST., art. X, §18. The Congress shall enact an organic act for each autonomous region with the assistance and participation of the regional consultative commission composed of representatives appointed by the President from a list of nominees from multisectoral bodies. The organic act shall define the basic structure of government from the region consisting of the executive department and legislative assembly, both of which shall be reflective and representative of the constituent political units. The organic acts shall likewise provide for special courts with personal, family, and property law jurisdiction consistent with the provisions of this Constitution and national laws.

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See also Presidential Decree No. 1083 otherwise known as the "Code of Muslim Personal Laws of the Philippines" and Batasang Pambansa Bilang 129 (The Judiciary Reorganization Act of 1980) regarding the constitution of Shari'ah courts (Sec. 45).

Finally, the evangelical Christian groups have emerged as genuine power brokers in Philippine politics. They have amassed a wide following among disaffected Catholics, demonstrating both the failure of their baptized faith to respond to their spiritual longings, and the persistent search for a responsive religious belief (in contrast to other countries where the disaffected turn to secular beliefs instead). That following is well-organized and funded, now in the manner of the Catholic clergy: they own TV and radio stations, lease out buildings, organize cooperatives for low-income housing, etc. Presidents periodically publish their photo-ops being blessed and "prayed over" by the leaders of these groups. Even the Roman Catholic church has studiously avoided an open clash with the larger groups, despite theological debates on fine points of church doctrine.

III. THE "DISJUNCT" BETWEEN CONSTITUTIONAL DOCTRINE AND EXPLICIT RELIGIOSITY: EXAMPLES FROM SUPREME COURT DECISIONS

A. *GOBITIS* IN THE US, *GERONA* IN THE PHILIPPINES

The best way to demonstrate the transplantation of US doctrine to the Philippines is through the parallel between *Minersville School District v. Gobitis*,¹⁶ and *Gerona v. Secretary of Education*.¹⁷ Both cases involved the power of state schools to compel school children belonging to the Jehovah's Witnesses to take part in flag ceremonies, despite their protestations that this was contrary to their faith. Indeed in *Gerona*, the author of the majority opinion, a Roman Catholic, even chastised the Jehovah's Witnesses for erroneous reading of the bible, saying that the verse about "no graven images" did not, in his considered view, cover flag ceremonies not realizing that unless he was an ordained minister of a religion, he had no business interpreting their scripture for them. It took the Philippine Supreme Court until 1993 to reverse itself in *Ebralinag v. Division Superintendent of Schools of Cebu*.¹⁸

Recently, in *Marcelino C. Arias v. University of the Philippines*, then a law student filed suit against classroom prayer. He was an evangelical Baptist, and he complained that his professor prayed before class an ecumenical prayer that actually offended his beliefs. (The University Code already prohibits classroom prayer.) The case is pending before a trial court.

¹⁶ 310 U.S. 586 (1940).

¹⁷ 106 Phil. 2 (1959).

¹⁸ G.R. No. 95770, 219 SCRA 256, Dec 29, 1995.

B. NEUTRALITY TO CATHOLIC BELIEFS

In a non-pluralistic context, it is my contention that the Court must be especially vigilant in applying the Establishment Clause, although the Philippine Supreme Court had, in one rather difficult case, actually undermined the Free Exercise clause.

In *Pamil v. Teleron*,¹⁹ the Court did not strike down an outright violation of the “no religious test” provision and thus the Free Exercise clause as well. The Administrative Code made ecclesiastics ineligible for any elective or appointive office. However, the Court reviewed the long history of the separation clause and recognized the dangers of allowing the “unity” of Church and State.

To allow an ecclesiastic to head the executive department of a municipality is to permit the erosion of the principle of separation of Church and State and thus open the floodgates for the violation of the cherished liberty of religion which the constitutional provision seeks to enforce and protect.²⁰

The Court did not muster enough votes to strike down the prohibition, and the law stood in the books until the new Administrative Code repealed it in 1987.

The principle of strict neutrality was tested most recently in *Estrada v. Escritor*.²¹ This was an administrative disciplinary action against a court employee on the ground of immorality. She had been estranged from her husband for more than twenty years, and during that period began a new family with another man with the blessings of their church. (Divorce is not allowed Philippines.)

The Court did not in that case dismiss her from the service, lest it condemn as immoral a practice and belief by a minority religion, by applying the standards of the majority religion. The Court began by looking back to history.

Before our country fell under American rule, the blanket of Catholicism covered the archipelago. There was a union of church and state and Catholicism was the state religion under the Spanish Constitution of 1876. Civil authorities exercised religious functions and the friars exercised civil powers.²²

The Court then proceeded to conclude:

¹⁹ G.R. No. 34854, 86 SCRA 413, Nov20, 1978.

²⁰ *Id.* at 480. (Makasiar, J., *concurring*)

²¹ 408 SCRA 1, A.M. No. P-02-1651, Aug 4, 2003.

²² *Id.* at 129.

Accommodation is distinguished from strict neutrality in that the latter holds that government should base public policy solely on secular considerations, without regard to the religious consequences of its actions.²³

Note however that in another marriage-related case, the Court upheld the state's power to license persons authorized to solemnize marriages. Petitioners contended that whether the "church, sect or religion of the applicant for license to perform marriage operates in the Philippine Islands and is in good repute," is unconstitutional on the ground that it in effect empowered the Director to enquire into the organization and doctrine of the church or sect.

The duty thus conferred is not one of inquiry into the organization or doctrine of a particular church or religion, but a duty to distinguish and discriminate between a legitimately established religion or church and one that pretends to be as such, as a prerequisite to the issuance of a certificate of authority. The law, therefore, in no sense prohibits nor impairs the free exercise of any religion. On the contrary, it purports to protect every legitimately established religion from the imposture of pseudo or spurious religious organizations which ostensibly appear to be dedicated to the practice of religion and the exercise of particular faith but which in reality are mere marriage agencies.²⁴

C. NEUTRAL APPLICATION OF "CLEAR AND PRESENT DANGER" TEST

When anti-Marcos protesters wanted to demonstrate, they chose – with some mischief – to hold a protest mass in of all places the St. Jude Thaddeus Church, which was right next door to the Presidential Palace. In *Geman v. Barangan*,²⁵ the Court upheld the refusal of city authorities to allow the protest, despite the constitutional guarantee of freedom of assembly. The Court relied on the religion-neutral application of the "clear and present" danger test.

More recently, the Catholic Church – this time more sympathetic to the sitting President – had asked the police to prohibit political protests at the Edsa Shrine, site of the peaceful uprising that ousted Marcos in 1986 and a favorite of political opposition groups.

Over the years, church authorities have blown hot and cold on whether the area can be used for political protests, and fully-armed police have indulged the owners' wishes. However, the owners' property rights are limited to the property itself, but cannot extend to the adjacent sidewalk, which is either outside the

²³ *Id* at 121.

²⁴ *People v. Fabillar*, 68 Phil. 584 at 587 (1939)

²⁵ G.R. No. 68828, 135 SCRA 514, Mar. 27, 1985.

property line, or is subject to an "easement" for public use. One of those allowable uses is for freedom of assembly, in which is especially potent here because the premises surrounding the Shrine is a historic place, is actually a major thoroughfare, and is therefore a "public forum."

But the Shrine presents a unique problem. It is not a secular emblem, but a place of religious worship. Freedom of speech is special in constitutional law, but even more special is the "free exercise" clause. Worshippers can claim that their access to their church is cramped, or that their rituals are hampered by the noise, or the solemnity desecrated by the tension outside.

Nothing trumps religious freedom in the Bill of Rights. Except, that is, when Church authorities themselves furnish the exception: they had welcomed politics before. How many times has the Shrine hosted supposedly spiritual gatherings with overt political activities? When the Shrine's clergymen allow some speech and ban others, why lend the sword of Caesar to enforce religious caprice? Constitutional law calls it the test of "good faith belief."

Finally, the Court has applied the "clear and present danger" test when it upheld the sanctions against the Iglesia ni Kristo for maligning the Catholic Church.²⁶

D. CLERGY IN POLITICS

In *Velarde v. Society for Social Justice* ²⁷(or SJS), several lawyers petitioned a Manila trial court to declare that when religious leaders endorse political candidates, they violate the constitutional separation of Church and State. The trial judge obliged, in a well-researched decision, and the case was elevated to the Supreme Court. (The Court remanded the case to the trial court for further findings of fact.)

What is the usual line of defense for politicized men of the cloth? The stock lawyerly answer is that the Constitution constrains only the state but not private persons from violating the individual's freedom of belief and from favoring one organized religion over another. Government may not intercept the mandates of heaven, but religious leaders are free to take part in the affairs of the earth.

That smug answer would have been correct if we were reading the American constitution, from which we originally borrowed lock, stock and barrel our Church/State separation doctrine. In their history, the main protagonist was

²⁶ *Iglesia ni Cristo v. Court of Appeals*, G.R. No. 119673, 259 SCRA 529, 544 Jul. 26, 1996.

²⁷ G.R. No. 159357, 428 SCRA 283 Apr. 28, 2004.

the state – theirs was a community of refugees fleeing religious persecution in the Old World, and their constitution is custom-tailored to guard against the danger of the state coercing non-believers or rewarding true believers.

But in Philippine history, the main protagonists have been the powerful churches (academics will say “hegemonic”), namely, at the outset, the Roman Catholic Church and, more recently, the *Iglesia ni Kristo* and evangelical groups that have filled the vacuum in the souls of those who have ceased to be moved by their baptized faiths. The true constitutional intent in the Philippines is to keep the modern-day friars from seizing the levers of state power and using the state for self-aggrandizement, spiritual or otherwise. The narrowly legalistic line of defense betrays that intent.

Ironically, *Velarde v. Social Justice Society* stood before a Supreme Court that has itself adopted what it calls an Ecumenical Prayer for the Courts. It was carefully worded to be ecumenical alright, but is sometimes recited by the overzealous who wouldn't give it a thought if they began with the Sign of the Cross, or ended with the Our Father.

This is not the first time that the Court is faced with challenges to state neutrality to religion. In *Aglipay v. Ruiz* ²⁸, it allowed the postal service to issue a stamp commemorating the International Eucharistic Congress in Manila, provided the new design was adopted which excised the explicitly religious symbols. In *Garos v. Estenzo*,²⁹ the Court faced the problem of a *Santacruzán*, a traditional village fiesta honoring Constantine's conversion to the faith. Both religious and village authorities were fighting over a religious statute purchased from private donations. The Court found that the ritual had been sufficiently indigenized and thus shorn of its secular character.

The 1987 Constitution itself, when it provided for alternative modes of electing legislators, reserved seats for party-list representatives, subject to the express exclusion of religious groups.

The party-list representatives shall constitute twenty per centum of the total number of representatives including those under the party list. For three consecutive terms after the ratification of this Constitution, one-half of the seats allocated to party-list representatives shall be filled, as provided by law, by selection or election from the labor, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector.³⁰

Despite this, evangelical groups have openly fielded party-list groups, barely disguised as their fronts, and in fact in the most recent May 2007 elections,

²⁸ 64 Phil. 201 (1937).

²⁹ G.R. No. 53487, 104 SCRA 510, May 25, 1981.

³⁰ CONST. art. VI §5 (2).

the party-list Buhay (representing Mike Velarde's El Shaddai) ranked first nationwide and is the only party-list group that won the maximum allowable three seats in Congress.

IV. THE BILL OF RIGHTS IN A POPULIST DEMOCRACY: SAME CONTENT, NEW CONTEXT FOR RELIGIOUS FREEDOM

Traditional legal analysis focuses on the content of rights-guarantees contained, for instance, in the Constitution's Bill of Rights. More recent scholarship, however, prefers to situate the "right" in relation to the rights-bearers or constituents, the "vector" or direction in which the discourse over a right "tilts", or the "norms" that a right is supposed to embody.

When religious freedom was transplanted to Philippine constitutional, it retained its original content in American law. The "free exercise" and "Establishment" clauses were adopted, lock-stock-and-barrel. However, our context is radically different, and transforms as well the content of the doctrines.³¹

The free exercise clause is effectively transformed by the specific Filipino reinterpretation of the rights-bearer. As earlier discussed, the individual is only nominally the rights-bearer. In the language of communitarian critiques of liberalism, the Filipino "self" is not the "unencumbered self" on which classical liberalism is built. Rather it is the "situated self" – "inseparable from its goals and aims" and bound up in communities that define the substantive commitments and allegiances of that self – that reigns among Filipinos. To be a Filipino Catholic is as much constitutive of that self as it is to be a Filipino Protestant.

In such a context, the notion of the freely choosing individual, free to join or resign from religious commitments, simply cannot work in a society where one's baptized faith – chosen for him or her by his parents – is inseparable from one's identity, with or without formal strictures on apostasy. Yet the believer-as-free-agent is the cornerstone of the free exercise clause, and that is why religious belief is strictly off-limits to state regulation, namely, because that choice is so intimate, so personal, so unreviewable by any of the usual legal tests for truth or validity, that when a person has chosen, that choice binds all.

In other words, we have privileged religious liberty for reasons that do not apply to the Filipino, and the result is that choices that are secular in their core, (that

³¹ Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1-39 (1989).

is to say, made on the basis of family or village allegiances), appear in religious form and automatically enjoy a preferred status.

Next, having thus privileged the right, the "Establishment" clause then commands state neutrality to religions. The Philippine Supreme Court has adopted the controlling test laid down in *Lemon v. Kurtzman*³²:

- (a) The government's action must have a legitimate secular purpose;
- (b) The government's action must not have the primary effect of either advancing or inhibiting religion;
- (c) The government's action must not result in an "excessive government entanglement" with religion.

The most difficult doctrinal dilemma in Philippine constitutional law is the test of "excessive entanglement." First, the presence of the Catholic Church is all-pervasive and ubiquitous, given that it includes 85% of the population. Second, that presence is encompassing, especially since Catholic doctrine has expanded its reach beyond the temples and into "apostolic missions" to exercise "a preferential option for the poor." Third, the "entanglement" is inevitable, because the Philippine Constitution is in effect a welfare state constitution, that has expanded the functions of the state well beyond the traditional "nightwatchman" functions of running the police, the courts and the jails, and now minister to basic social needs like health, education and shelter. In other words, both the state and the church have extended their functions into the social sphere, and will inevitably overlap. Finally, that entanglement is in many ways actually desirable in the Philippines, in ways more compelling than the rationale of George W. Bush's much-criticized White House-endorsed "faith-based initiatives." The success of Gawad Kalinga – a Catholic group affiliated with the most widespread charismatic group and which enlists volunteers and donors to help build housing for the poor – demonstrates the good that the most numerous church in the country can harness. (Indeed, the August 2007 schism between the Gawad Kalinga and its parent group, the Couples for Christ, was in fact formalized in a resolution issued by the Catholic Bishops' Conference of the Philippines, demonstrating unmistakably the control of the church hierarchy over these organizations, and reminding us that the strictures against entanglement must remain ever relevant to Gawad Kalinga despite its noble work.)

³² 403 U.S. 602 (1971). See *Victoriano v. Elizalde Rope Workers Union*, 59 SCRA 54 (1974). It cited *Board of Education v. Allen*, 392 US 236 (1968), in saying that "in order to withstand the strictures of constitutional prohibition, [the statute] must have a secular legislative purpose and a primary effect that neither advances nor inhibits religion." See also *Aglipay v. Ruiz*, 64 Phil 201 (1937); *Basa, et al. v. Federacion Obrera de la Industria Tabacquera y Otros Trabajadores de Filipinas*, 61 SCRA 93 (1974); *Anucension v. National Labor Union, et al.*, 80 SCRA 350 (1977); *Gonzales, et al. v. Central Azucarera de Tarlac Labor Union*, 139 SCRA 30 (1985).

The same can be said of election reform and the work of the *Parish Pastoral Council for Responsible Voting* (PPCRV), a national parish-based, non-partisan citizens' movement for responsible voting and clean elections. Finally, in terms of corporate social responsibility, a pioneering partnership has been the Bishops-Businessman's Conference.

The groups I have mentioned could credibly and creditably pass themselves off as public interest, secular organizations, and yet – especially given the impasse between Gawad Kalinga and the Couples for Christ – the rationale for church-state separation remain ever so relevant.

V. EXPLICITNESS, RATHER THAN NUMBERS

The continuing power of religious endorsements – and conversely, the hostage-like power of clergy over aspiring politicians – shows the core dilemma of separation doctrine in the Philippines, namely, that it operates in a democracy governed by the rule of the majority where the majority are Roman Catholic. Epistemologically, to bring the “constitution [back to] the actual human being, the actual people”³³ will also bring it perilously close to native shamanic impulses that cheapen the faith and degrade our politics. Sociologically, to read the “non-Establishment” clause as requiring absolute neutrality among competing faiths is to ignore that they do not compete on a level playing field, and that, to use another metaphor, the dice is loaded.

In American constitutional law, the main threat to religious freedom was the state; theirs was a community of refugees fleeing religious persecution in the Old World, and they custom-tailored their constitution to guard against the danger of secular kings coercing non-believers and rewarding true believers, and thus, the “free exercise” and “Establishment” clauses.

In contrast, in Philippine history, the main protagonists have been the powerful churches. The original and truly hegemonic is the Roman Catholic Church, but it has spawned countervailing threats, e.g., the *Iglesia ni Kristo*, the evangelical groups that have now fielded party-list candidates, and the Islamic rebels.

The true constitutional intent of the secular state in the Philippines is to keep the modern-day friars from seizing the levers of state power and

³³ SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY AND A CRITIQUE OF IDEOLOGY* (2000).

using the state for self-aggrandizement, spiritual or otherwise. A narrowly legalistic reading of the separation clause betrays that intent.

Conversely, it is the explicitness, the "in-your-face" quality of religious expression in the Philippines today, that undermines the separation doctrine. The problem lies instead in the failure of political movements to command that same allegiance from the Filipino people. The clout of evangelical preachers may be seen as an indictment of the established churches that have ceased to inspire but they indict as well the political movements that have ceased to lead.

In the end, the real wonder is not why high priests preach on non-spiritual matters but why we Filipinos listen. It shows a people bereft of hope and starved of guidance, seeking leaders they can trust, and finding their most genuine sense of community not in the traditional institutions of governance but in the warm fellowship of communal worship. It used to be that we found our "public sphere" in government, and turned to the temples for private worship. Today we see government as nothing more than an arena for private profit-making, and turn to the temples to affirm our communal-and yes, in Aristotle's loftiest sense-our political selves.

What should the secular state, *laïcité*, mean in Philippine constitutional law? It means, as an irreducible minimum, the absolute respect in law for the "free exercise" clause, the guarantee that each individual is free to believe and to profess whatsoever church he fancies. Needless to say, ensuring absolute respect in life – in day-to-day practice, situated in Filipino culture – is yet another matter. That in fact is the easier part.

Beyond that, the real difficulty is to ensure that the "non-Establishment" doctrine both ensures that the majority church does not end up using state power to promote its own agenda (e.g., against population control) while still enabling the members of that majority church to operate freely, as is only proper in a democracy, to advance its welfare causes. In other words, *laïcité* requires that the state be neutral to all faiths, and provide a level playing field to all religions. However, historically in the Philippines, either by sheer force of numbers or due to progressive reinterpretation of Catholic doctrine, the Catholic Church has provided both the manpower and the organizational framework for social reform projects. The non-Establishment clause can very well serve to block such critical initiatives, and the challenge is to allow public-private partnerships without running afoul of the non-entanglement doctrine.

Therein lies the crux of the church-state dilemma in Philippine constitutional law. The American dilemma under the separation clause is the tension between the individualism inherent in the free exercise clause and the organized worship inherent in the Establishment clause. In the Philippines, the tension is actually internal to the Establishment clause, because the majority church has, over the years, carved out constitutional exceptions to state neutrality that enabled it to benefit from partnerships with the state. Those exceptions are now

effectively being invoked by its competitors, and which the state is of course obligated to extend to all other faiths as well. It has politicized the doctrine of separation, and has weakened the capacity of the state to resist the recurring pressures to dilute and erode the secular state altogether.

VI. POLICY CONCLUSIONS

This paper works on certain assumptions that, I concede, rely on generalizations about culture, and which I posit in these discussions solely to give structure to our debates. Various peoples in Asia have found, on their own and by their own lights, a yearning for religious belief and practice, and in varying degrees seek to secure religious liberty through legal guarantees. Elsewhere in the world, liberal systems have evolved constitutional mechanisms to preserve the secular state. In Asia however, the roots of liberal traditions are not deep, and *laïcité* as an ideal is pursued either in different contexts.

There are the redemocratizing socialist states, where long-suppressed religious yearnings are slowly re-emerging and where increasing material prosperity through market-style economics only magnify the spiritual emptiness that is best filled by religion-type beliefs. There are liberal democracies, where what I call “explicit religiosity” is aggressively pushed by fundamentalist believers, Christian and Muslim alike. Then there are the predominantly Muslim states barely able to conceal the state religion and its intolerance for nonbelievers.

Yet today in the 21st century all these countries have increasingly accepted the language of human rights law. They struggle to reconcile their peculiar attitudes to faith-based groups and practices with their entrenched ideological biases and political fears. What are the challenges that they face in Southeast Asia?

A. DEVELOPING A LEGAL FRAMEWORK

First. The first challenge is that of “transplanted doctrine.” We apply the “free exercise” and “state neutrality”/“Establishment” doctrines in a non-pluralistic and non-libertarian milieu. The problem therefore is that to speak of absolute state neutrality to religion will, in effect, further entrench the majority religion purely through the facially neutral operation of law, of the market, and of the democratic process. In other words, while in the West, legal formalism embodies neutrality, in Asia, it excuses and ratifies hegemony.

In this context, the free exercise clause must prevail over the Establishment clause. Though this has already been the settled formula in constitutional law, it poses a challenge in the Asian context, because free exercise is at its core a claim of the individual believer, while Establishment is a claim of organized worshippers. In other words, the formula does not merely fix a hierarchy between two doctrines. It likewise fixes a hierarchy between two sets of rights-bearers, and gives preference to the individual believer over organized churches – which leads us to the next problem.

Second. In many Asian societies, individuals are subsumed in webs of family and kin-like obligations, intermediate level communities several layers below the State. The individualist premise of the liberal state – that we are a nation of citizens owing no loyalty except to the state and subject to smaller levels of community only to the extent that we voluntarily submit to their power – is absent. The rights-bearer is not the individual believer who is free to join and to disaffiliate, to be baptized or to disown. Rather, it is the “situated” individual, who is by and large expected to keep to his faith of his parents, a faith to which one is born into, not a faith that one chooses – and indeed some faiths have rules that expressly curtail that choice.

The problem then is that to focus all legal protection on the individual might be self-defeating because the Asian individual is inextricably bound up in commitments not of his own choosing and which he is truly not at liberty to disavow.

Third. The third is that if, conversely, we focus on the establishment claims – that is to say, the principle of state neutrality to organized churches – we distort the normative basis for the Establishment clause. Liberal constitutions privilege one kind of association – organized churches – on epistemological grounds (that religious belief is especially protected because it cannot be proved to be either true or false, and that what controls is the test of “sincere belief”). Yet traditional group worship in Asian communities is different. Anthropologists have called it a “split-level” religiosity, where followers are not necessarily believers – not merely in the sense that they are nominal, non-practising members of the faithful – but that their allegiance is more to an organization rather than to a body of beliefs.

In other words, the basis of constitutional privileging – i.e., that religious belief is epistemologically off-limits to law’s usual devices to prove the truth – has nothing to do with the actual operation of the organized churches, which mobilizes its flock not really because its beliefs are compelling, but because its believers are socially organized to compel the obedience of its loyal multitude – which then brings us to the next problem.

Fourth. The fourth is the overlap between the power of the organized clergy and the power of secular leaders. In states with hegemonic religions, the influence of the clergy is politically significant, whether it is for winning elections or fostering peace negotiations. Moreover, their followers (or in the Philippines, the

church organization itself) have immense control over resources that give them a greater stake in earthly politics.

From this standpoint, it is the Establishment doctrine that poses the true problem, not the free exercise clause. In other words, if the problem is political intrusiveness by the clergy, the constitutional challenge is that the Establishment clause is asymmetrical. It is a one-way street; it insulates the clergy from political control, but leaves the politicians vulnerable to clerical manipulation. Conversely, if states resist religious freedom because they are afraid of earthly clerics, they may be loathe to recognize the Establishment clause but be more welcoming of the free exercise clause. In other words, political leaders will only too happily welcome individual believers for as long as they don't march under the banner of one charismatic religious leader.

Fifth. Finally, there are the proxy issues, or issues that provide a religious terrain for otherwise secular debates and which, for unique historical reasons, have emerged as the litmus test for believers. They purport to present fundamental issues of doctrine (for the believers) or fundamental constitutional barriers (for the nonbelievers).

For the Philippines, for instance, that will be population control, family planning and the use of contraception (long opposed by the Roman Catholic Church) and the ban on divorce (same opposition). Conversely, note how Filipinos – Christian and non-Christian alike – have valued high-quality Catholic schools and, in fact, have carved constitutional exceptions allowing religious instruction in public schools. In both cases, religion becomes the proxy for morality campaigns: against sexual promiscuity (in the case of contraceptives), in favor of the family (in the case of divorce), or in favor of ethical instruction (in the case of religious schools).

For other countries, perhaps the real threat posed by religious freedom comes not from the solitary individual worshiper who simply wishes to be left alone to pray in the temples of his faith. For those countries, possibly the true threat comes when this worshiper worships together with 10,000 others in say, Tienanmen Square. In other words, the state's paranoia really has nothing to do with religion. Whether the 10,000 gather to do taichi or to meditate or to pray, it is the fact that they are 10,000 who can be mobilized to do at the same time and the same place. In this case, religion is but an accidental factor, because the state would have been alarmed when 10,000 people amass regardless of whether they do so for religious or for ideological reasons.

Finally, for others, perhaps the threat comes from the fact that organized religions have foreign links, and that the attitude that prevails is not really anti-religion but rather anti-foreigner. In these cases, the state's true concern is not religious proselytizing but treason.

What I am saying is that by identifying the proxy issues for each country, we can accommodate religious freedom in the maximum possible way for worshippers while staying clear of the intractable issues for which law offers no real solutions anyway.

For the Philippines today, religious belief is the only remaining body of thought that has endured and given the helplessness of the Filipino poor, it is indeed faith alone that sustains many. In the lens of constitutional law, it must be seen as an ideology, privileged to be sure because it is epistemologically off-limits to earthly Caesars, but no less secular and political in that it responds to Holmes's "felt needs of the times." Religious belief has persisted by default, not by clashing with secular ideologies of liberalism or communism, but by letting each ideology fall by its own weight. The persistence of religion-based power merely shows the failure of a secular politics that marshals political loyalists but offers no compelling vision to match the dreams of their people.

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