NEGOTIATING GUILT AND EGALITARIAN ASPIRATIONS: LEGAL PLURALISM, MUSLIM PERSONAL LAW AND MORO MUSLIM WOMEN'S RIGHTS*

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"Multiple sites of power require multiple sites and contexts of resistance."

- Sylvia Estrada-Claudio,
Professor and Political Activist

I. INTRODUCTION

Vivid images come to mind when considering the evolution of women's rights in the Philippines. On the one hand, there are images of "Filipino women who have broken through the glass ceiling long before others started to shake the foundations of traditional social structures."[1] Yet distorted images of weak women, subdued and oppressed in a patriarchal society, continue to persist. The

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[1] Remarks by the Delia Domingo Albert, *Women in the Global Economy* (International Convention with the Theme: "Women Living Up to the Challenges of the Global Economy," Makati City, May 17, 2004).

most commonly perceived victims of discrimination are the Moro[2] Muslim women, who face multi-layered sources of discrimination, including, but not limited to their gender, ethnicity, and religion.[3]

The promulgation of the Code of Muslim Personal Laws[4] (hereinafter "CMPL") in 4 February 1977, shortly after the signing of the Tripoli Agreement in 23 December 1976, was underscored by important political considerations. Recognizing the right of the Moro people to freely exercise their religion and to enjoy a certain degree of autonomy as a minority people,[5] the CMPL was intended to arrest the violent germination of a strong secessionist sentiment in the Mindanao region.[6] At the same time, it was a result of concessions among the participants in the codification process.[7]

Drawing from the Convention on the Elimination of All Forms of Discrimination[8] (hereinafter "CEDAW") and the constitutional mandate to ensure the fundamental equality before the law of women and men,[9] the Magna Carta of Women[10] (hereinafter "MCW") which became effective on 15 September 2009 creates a framework for national action to eliminate all forms of discrimination against women.[11] The MCW provides, among others, for equal treatment before the law, which includes the State's review and when necessary, the amendment or repeal of existing laws that are discriminatory to women.[12] One of the suspect laws

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2 The term "*moros*" refer to the population of Muslims in the Philippines.

3 UNIFEM, *Are Muslim Moro Women Going Cedaw?* in GOING CEDAW IN THE PHILIPPINES 75 (2009), available http://cedaw-seasia.org/docs/Philippines/goingcedaw/Going-CEDAWfinal_small.pdf (last visited February 20, 2011)

4 Pres. Decree No. 1083 (1977).

5 Joaquin Bernas, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1099 (2003). According to Bernas, the rationale for the establishment of autonomous regions is diversity of cultures, and that forming autonomous regions involves more than a question of privilege as it is a question of right.

6 H. BARRA, THE CODE OF MUSLIM PERSONAL LAW 5 (1988).

7 *Id.*

8 Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

9 1987 CONST., art. II, par.14.

10 Rep. Act. No. 7610 (1992).

11 Privilege Speech by Senator Jamby Madrigal, Fourteenth Congress Second Regular Session, Pasay City, August 5,2008, Committee Report No. 76 on Senate Bill No. 2396, Senate Journal Session No. 5 (2008).

12 *See* Senate of the Philippines, 15th Congress, "Pia: Laws that discriminate against women to be reviewed by Senate", published 11 August 2010, available at http://www.senate.gov.ph/press_release/2010/0811_cayetano1.asp. (last visited February 20, 2011) Currently, there are laws that are discriminatory like the definition of adultery and concubinage under the

is the CMPL[13], and the assailed provisions include those relating to polygamy[14], arranged marriages[15], and inheritance.[16] It will be noted that the language of the MCW is clearly authoritative and its intended scope echoes the universalist aspirations of the CEDAW: it accommodates the culture, traditions and institutions of Moro and indigenous women *only to the extent* that these cultural systems and practices are not discriminatory to women.[17]

Ostensibly, it seems that the Philippine legal system epitomizes the clash between two powerful normative legal orders: international human rights law[18] and the *Shari'ah*. However, I think the real clash we are confronted with is not one between competing universalist[19] aspirations in the Philippine social space. An initial point that needs to be made is that in the earlier clash between *sovereigntist territorialism*[20] on the part of the State and *Islamic universalism*[21] on the part of the Moro Muslims, the emerging compromise was the promulgation of the CMPL. Conflicting norms in the earlier context was manifested in the clash between State law and non-State law. The Philippines has since then accommodated the legal culture of *legal pluralism* by way of "legal exception."[22] On the other hand, the current debate involves a clash between *universalist constitutionalism*[23] – manifested by the universal character of the MCW, and *legal pluralism*[24] –evidenced by the continued force and effect of the CMPL.

Revised Penal Code, the grounds for legal separation under the Family Code, and the CMPL which allow polygamy, arranged marriages and the marriage of underage girls.

13 *Id.*; Note that although the Implementing Rules and Regulations (hereinafter "IRR") is silent on the specific provisions sought to be amended/repealed in the CMPL, the contentious provisions have already been filtered out by Senator Pia Cayetano as follows: Articles 16, 122, 162, and 180.

14 Pres. Decree No. 1083, art. 162. (1977).

15 Pres. Decree No. 1083, art. 16.(1977).

16 Pres. Decree No. 1083, art. 122.(1977).

17 Rep. Act. No. 7610, Sec. 28.

18 Universal Declaration on Human Rights G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), arts. 1 and 18; International Covenant on Civil and Political Rights 1966, 16 December 1966, 999 U.N.T.S 171, arts. 2, 18 and 27; International Covenant on Economic, Social and Cultural Rights 1966, 16 December 1966, 993 U.N.T.S 3, arts. 2 and 15.

19 I use the term "*universal*" in this sentence in its ordinary sense; *See* Merriam-Webster dictionary, defining the term "universal" as "including or covering all or a whole collectively or distributively without limit or exception".

20 *See* Part II, *infra.*

21 *Id.*

22 M. Mastura, *Legal Pluralism in the Philippines*, 28(3) LAW & SOCIETY REV., 461, 474 (1994).

23 *See* Part II, *infra.*

24 *Id.*

One might be inclined to argue the futility[25] of reconciling these conflicting paradigms. After all, the State has already set out its policy choices, and in the sovereigntist conflict-of-law paradigm, public policy prevails.[26] Furthermore, within the paradigm of public international law, the State has the sovereign right[27] to determine what is "necessary" for Philippine democratic society.[28] The MCW is one such policy choice: it subjects all existing economic, political and cultural structures to the primacy of international human rights law. However, I argue that beyond political or security concerns, it is important to consider the nature and efficacy of the MCW as it countervails with some principle from outside the municipal law – the *Shari'ah*. It will be noted that it is the *Shari'ah* – not international law or the Philippine Constitution – from which the CMPL derives much of its substantive elements and normative legitimacy among Moro Muslims.

Merely engaging in discourse involves the herculean task of finding a mutually-acceptable methodology for stakeholders.[29] The traditional conflict-of-law paradigm is insufficient in the face of powerful, clashing legal systems, both of which currently forms part of the Philippine legal system. However, discourse is the only alternative to the estrangement of Muslim women, the non-fulfilment of our international obligations and constitutional guarantees, or worse, the eruption of violent conflict arising from what may be perceived as the forcible imposition of alien norms.[30]

By way of caveat, I will not pretend to possess the necessary skill, knowledge or authority to engage in a re-interpretation of Qur'anic text or to infuse substance into the body of Moro Muslim's women's rights. Not being equipped with the qualifications for embarking on *ijtihad*,[31] any attempt on my part to design a Moro Muslim women's right scheme runs the risk of lacking the requisite "clear theory of what rights should mean in an Islamic context or

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25 *See* e.g., Speech by M. Namazie, *Racism, Cultural Relativism and Women's Rights* (Action Committee on Women's Rights in Iran and Amnesty International's Women's Action Network, Toronto, Canada, August 14, 2001), available at http://www.maryamnamazie.com/articles/racism_cultural_rel.html (last visited February 20, 2011).

26 *See Pakistan International Airline v. Ople*, G.R. No. 61594, September 28, 1990.

27 *See* Ian Brownlie, PRINCIPLES OF INTERNATIONAL LAW 249 (2003).

28 *Id.*

29 I refer to the State, human rights scholars and activists, scholars, Moro Muslims community, Moro Muslim women in particular.

30 *Infra* note 176.

31 *Infra* note 249.

principles for deriving their content from the Islamic sources in a consistent and reasoned manner,"[32] resulting in a work that is, at best, "oppositional and defensive or apologetic."[33] As Ziba Mir-Hosseini notes, much of the re-readings Muslim religious text are either "oppositional, because their agenda is to resist the advance of 'Western' values and lifestyles which were espoused by states and adopted by secular elites earlier in this century," or "apologetic, because they are attempting to explain the gender biases which are inadvertently revealed by going back to the *shari'a* texts."[34] The same observations are shared by Ann Elizabeth Mayer, i.e., that authors of Islamic human rights principles "must feel torn between a desire to protect and perpetuate principles associated with their own tradition – in many respects a premodern one – and anxieties lest that tradition be assessed as backward and deficient if Islam is not shown to possess the kind of 'advanced' institutions that have been developed in the West."[35]

Bearing the foregoing insights in mind, I shall proceed with a calibrated degree of prudence in this paper, focusing mainly on my proposed comprehensive methodology in managing the process of discourse, amendment and/or repeal of the provisions in the CMPL as well as the process of adjudication, in response to the all-pervading policy underlining the MCW. In Part II, I will explore the context within which the discourse between Philippine pluralistic values – manifested by the formal recognition of Muslim normative obligations – and the universalist aspirations – asserted by the recently passed MCW, takes place. In Part III, I argue that the 1987 Constitution, while being "embedded" with universalist principles[36], is underscored by a keen spirit of pluralist participation towards "communities of judgment."[37] I will also attempt to answer why the State and the Moro Muslims need to engage in discourse, before and during the process of legislation and adjudication itself, focusing on the substantive areas of concern in the CMPL. In Part IV, I advance pluralist constitutionalism as the framework for managing the overlapping normative obligations and aspirations of Moro Muslim women, laying

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32 A.E. Mayer, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 2ND ED., 45-6 (1997).

33 Z. Mir-Hosseini, *Stretching the Limits: A Feminist Reading of the Shari'a in Post-Khomeini Iran* in MAI YAMANI, FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES 285 (1996).

34 *Id.*

35 A.E. MAYER, *supra* note 32, at 45.

36 D.A. Desierto, *A Universalist History of the 1987 Philippine Constitution (I)*, 10 HISTORIA CONSTITUCIONAL 384, 389 (2010), Available at http://www.historiaconstitucional.com/index.php/historiaconstitucional/article/viewFile/277/244; *See* Part II(A), *infra.*

37 *Id.*; *See* Part IV(C), *infra.*

down the parameters for reform in Muslim Personal Law. In so doing, I draw from the applicable pluralist devices, lessons in Philippine experience in legal pluralism, Islamic approaches to pluralism. Finally, in Part V, I will attempt to "test" my proposed framework. The conclusion follows thereafter. Ultimately, my goal is to design a comprehensive framework that can lead future efforts to strengthen the areas of convergence and reconcile the areas of divergence between the contentious areas of conflict of the MCW and the CMPL, outside the traditional conflict-of-law paradigm. I entrust the future task of introducing the substance of a Moro Muslim women's right scheme to the State (the executive, the legislature and the judiciary), the *ulama*, the various women's groups, and other Moro Muslim women. The framework I advance in this paper is meant only as a humble starting point to the need to build a body of literature on Moro Muslim feminism, viewed through the lens of Philippine legal pluralism.

II. THE SHIFTING CURRENTS OF PERSONAL LAW DISCOURSE

As I have noted earlier, it is tempting to characterize the present controversy as one between competing claims to universality. However, I submit that the problem arises from the need to consider the Moro Muslim Women's right question as one of *lex specialis*.[38] I will develop my proposition based on three (3) main arguments. First, I will situate State sovereigntism as the general rule, premised on the State monopoly to define what constitutes "law". Second, I argue that the promulgation of the CMPL involved a process of carving out a legal exception for Moro Muslims as a policy choice. Finally, I will attempt to demonstrate how and why the current discourse should result in yet another policy choice of carving out another exception in the case of the Moro Muslim women, at the intersect of gender and religion.

The promulgation of the CMPL and the Philippine experience in legal pluralism was a consequence of the imposition of a foreign legal system shaped by our colonial history. As will be elaborated later, it had been easier for the State to carve out a "legal exception"[39] from the dominant system of state laws and to formally adopt the normative obligations of Moro Muslims – who were never

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38 *Lex specialis* is a latin phrase which means law governing a specific subject matter.

39 *Supra* note 22.

placed under colonial rule – than it was to consider: (1) the nature and content of the *Shari'ah;* and (2) its interplay, as a servient law, with the prevailing dominant law.

On the other hand, the passage of the MCW supposedly addresses remaining gender-discriminatory structures in Philippine society. The MCW overrides any claim on the basis of informal religious values and culture, or formally adopted customs and beliefs.[40] Its intention "to expunge our laws with the remnants of traditional patriarchal structures"[41] hails from universalist notions that are not confined to a particular polity, but "extends to all humans and all polities," in both their internal and external relations.[42] The black letter of the MCW does not make room for cultural relativism, nor does it address the possibility that some women themselves may resist emancipation for religious reasons.

We are therefore primarily confronted with an overarching imperative which Justin Holbrook characterizes as either *sovereigntist suppression* or *universalist emancipation.*[43] I submit that the problem is best resolved by focusing on processes and empowerment, rather than on the unilateral imposition of authority by means express legislation or through the adjudication process, within a conflict-of-law paradigm. Thus, the current discourse extends beyond comparative law, the regulation of conflict of laws between state law and a non-state law, or between dominant and servient law. It is not confined to the task of "drawing lines between what is and is not normatively fundamental to the preservation of state integrity"[44], or what is and is not fundamental to the exercise of religious belief.[45] We are only

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40 Sec. 2(a) Rep. Act. No. 7610 (1992).

41 *Supra* note 11.

42 *Supra* note 36 at 387.

43 J. Holbrook, *Legal Hybridity in the Philippines: Lessons in Legal Pluralism from Mindanao and the Sulu Archipelago*, 18 TUL. J. INT'L & COMP. L. 403, 407 (2010); See Part II(C), *infra.*

44 *Id.*, at 444.

45 *See*, e.g. Commission on Human Rights, Civil And Political Rights, Including The Question Of Religious Intolerance, Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, Sixty-second session, E/CN.4/2006/5, 9 January 2006, citing Human Rights Committee discussion on 24 July 1992, Summary Records of the 1166th meeting of the forty-fifth session, para. 48 (According to Rosalind Higgins, the determination of the content of a religion, whether a particular act constitutes worship, observance, practice or teaching, as well as the nature of the obligations of the worshippers, are best determined by the State itself, and not by the worshippers themselves); *Kokkinakis v. Greece*, (14307/88) [1993] ECHR 20 (25 May 1993), where the European Court of Human Rights distinguished true evangelism as a duty of Christians and the crime of proselytism, citing the 1956 Report of the World Council of Churches; *Estrada v. Escritor*, A.M. No. P-02-1651, August 4, 2003.

subsidiarily concerned with the internal harmonization of the CMPL, its harmonization with the MCW, and even with the Philippine Constitution. All these attempts to regulate or harmonize the conflicting issues follow from the resolution of the threshold issue of sovereigntist suppression or universalist emancipation.

Both sovereigntist territorialism and universalism usually clash with legal pluralism because both generally[46] reject the notion of hybridity of legal systems. When there is a plural assertion of norms, the common response of sovereigntist territorialism is to reject their legitimacy.[47] For instance, in the adjudication process, the consideration of non-state norms is considered illegal, and "in the discourse of conflict of laws[48] – jurisdiction, choice of law, and judgment recognition – rules for establishing legal authority are (and historically have been) demarcated along territorialist and statist lines."[49] On the other hand, universalism establishes a world law order that usually responds to the plurality of norms "by seeking to erase normative difference altogether.[50] This supposed paradigm draws from principles of natural law, international human rights or the law of merchants.[51]

Among supporters of *legal pluralism*, it is argued that the denial of the legitimacy of foreign, international and non-state authority in sovereigntist territorialism is "unlikely to be successful in a world of global interaction and cross-border territoriality"[52], while the elimination of diversity under the universalist worldview is suppressive of the constructive diversity among peoples and breeds a new hegemony.[53]

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46 *See* notes 199, 200 and 201 with accompanying text, *infra*. As will be seen later, both universalism and sovereigntist territorialism make legal exceptions to accommodate some form of pluralism, provided they are not "fundamentally incompatible" with their overarching rules.

47 P. Berman, *Global Legal Pluralism*, 80 CAL. L. REV. 1155, 1180 (2007).

48 *Id.*

49 *Id.*

50 *Id.*, at 1189.

51 *Id.*

52 *Id.*, at 1190.

53 *Id.*

A. THE GENERAL RULE: SOVEREIGNTIST TERRITORIALISM AND THE STATE MONOPOLY TO DEFINE WHAT CONSTITUTES "LAW"

Diane Desierto advances a reorientation in interpreting the 1987 Constitution, urging that *universalism*[54] is embedded in the Philippine constitutional system "through various avenues of its constitutional design" such as deliberate textualization, the incorporation clause, and the expanded judicial powers of the Supreme Court.[55] Indeed, the declared rights under the Bill of Rights of the Constitution are a deliberate textualization of the rights guaranteed under the various human rights instruments. Moreover, other generally accepted principles of international law are considered part of the law of the land *through* the incorporation clause[56] – a legal device which I consider to be a reflection of our adherence to sovereigntist territorialism. Furthermore, it reflects the Philippine adherence to *dualism*, i.e., that international law is distinct from domestic law.[57] Thus, through the prism of constitutionalism, the state wields monopoly within its territory in defining what constitutes "law."[58] Within Philippine borders, challenges to the supremacy of the Constitution cannot be fruitfully sustained; and a relativist claim for minority protection is only successful through constitutional sanction.[59] The 1987 Constitution asserts this principle in at least three provisions establishing the jurisdiction[60] and powers[61] of the Supreme Court and defining the nature of

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54 D. Desierto, *supra* note 36, at 388-89. *Universalism* as used by Desierto refers to the description of Armin von Bogdandy and Sergio Dellavalle [citations omitted]of the international law paradigm, that "order can . . . be extended all over the world," recognizing the existence of certain rights and values which are universal because they are shared by all individuals and peoples, as enshrined in the corpus of international public law.

55 *Id.*, at 444.

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

57 *See* JOAQUIN BERNAS, I CONSTITUTIONAL STRUCTURE AND POWERS OF GOVERNMENT: NOTES AND CASES 33 (2005); *Also see* SHAW, INTERNATIONAL LAW 29 (6th ed., 2008). The monists claim that there is one fundamental principle underlying both national and international law, while the dualists emphasized the need for a States' consent.

58 "Law" here is used in the sense that it is binding and enforceable through the courts of law. *See* B. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global,* 30 SYDNEY L. REV. 370, 390 (2007). According to Tamanaha, "the characterization of what is 'law' or 'legal' depends on the perspective from which it is viewed. One approach focuses on the black letter of the law and the rights borne out of them. Another approach would look at its normative function, placing emphasis on its effects in controlling people's behavior."

59 *See* Box 2, *infra.*

60 CONST, art. VIII, §4 (2). : All cases involving the constitutionality of a treaty, international or executive agreement, or law, which shall be heard by the Supreme Court en banc, and all other cases which under the Rules of Court are required to be heard en banc, including those involving the constitutionality, application, or operation of presidential decrees, proclamations, orders, instructions, ordinances, and other

the judicial power[62]. Ultimately, to be considered as part of the "law" of the land, non-state laws must be *incorporated* into state law through the Constitution, the law and judicial interpretation, or *transformed* through deliberate or explicit legislative enactment.[63]

Legislation has allowed the *Shari'ah* to become part of Philippine law.[64] The CMPL stands as a codification of what the Drafting Committee considers to be "fundamentally personal" to the Moro Muslims.[65] Similarly, Mastura notes that the Philippine approach in the enactment of the CMPL was one of "adjustive by exception."[66] Mastura's highlights the Philippine tendency to make legal exceptions, if only to acknowledge and accept the existence of customary laws that actually control the behavior of the Moro Muslims.[67]

On the other hand, universal women's rights norms entered Philippine law by means of the bill of rights[68], treaty-making[69], the incorporation clause, and legislation.[70] Unlike the CMPL which is confined to the margins of national law by way of legal exception, the MCW is considered as an articulation of universal norms which are already part of the Philippine legal system.[71]

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regulations, shall be decided with the concurrence of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon.

61 CONST., art. VIII, §5 (2)(a),.: The Supreme Court shall have the following powers: x x x (2) Review, revise, reverse, modify, or affirm on appeal or certiorari, as the law or the Rules of Court may provide, final judgments and orders of lower courts in: (a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question; (b) All cases involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto; (c) All cases in which the jurisdiction of any lower court is in issue; (d) All criminal cases in which the penalty imposed is reclusion perpetua or higher; and (e) All cases in which only an error or question of law is involved.

62 CONST, art. VIII, §1, par. 2,.: Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

63 *Id.*

64 Pres. Dec. No. 1083, arts. 2(a), 5 and 6 (1977).

65 H. BARRA, *supra* note 6 at 58-59 (1988).

66 M. Mastura, *supra* note 22, at 472.

67 *Id.*

68 CONST, art. II, §14, .

69 Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

70 Rep. Act. No. 7610 (1992).

71 *Supra* note 11.

As will be elaborated later[72], Desierto's analysis of universalist constitutionalism supports the proposition that the Philippine Constitution functions as the gatekeeper for determining what constitutes "law." More importantly, her proposed re-reading of the Philippine Constitution invites us to the various avenues towards "global legal pluralism."[73]

B. A LEGAL EXCEPTION: LEGAL PLURALISM AND MUSLIM PERSONAL LAW AS "LAW"

Legal pluralism applied in the Philippine – Moro Muslims context was underscored, among others, by the attempt to harmonize the State law with the non-State norms adhered to by the Moro Muslims. The need for pluralistic laws under a unified legal system was defined by a recognition that Philippine law is molded by the Christian values as well as American democratic/secular values principle of separation of Church and State. Indeed, State personal and family laws are an amalgamation of Spanish civil law and Anglo-American jurisprudence. On the other hand, Muslims envision a society built on the universal, all-encompassing worldview emanating from a blend of the *Shari'ah* (Islamic law) and *'adah* (Customary law), tracing its origin from the early history with Arab missionaries.[74] It will therefore be observed that the earlier issues in legal pluralism in the Philippines are rooted in the fundamental clash between the theoretical underpinnings of two legal regimes – *sovereigntist territorialism* and *Islamic universalism* – a conflict that has been further obfuscated by political realities both in the international and domestic arena. In other words, the Philippine experience in legal pluralism, in the earlier context, was seen as a problematic state of affairs that had to be "solved."

The problem-solving process involved designing a legal system which are autonomous to Moro Muslims, while recognizing and respecting the values embodied in both State and Islamic sources of "law", and carefully calibrating the political and social impacts of code harmonization.[75] The codification process was particularly keen on harmonizing the contemplated law with "the divine ideal or, at

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72 *See* Part IV(C), *infra.*

73 D. Desierto, *supra* note 36 at 390.

74 M. Mastura and M. Buat, *The Introduction of Muslim Law into the Philippine Legal System* 51 (1977).

75 M. Mastura, *supra* note 22, at 461.

the very least, with what Muslims consider authentic sources of justice."[76] It should be noted, however, that while recognizing the all-encompassing scope of the *Shari'ah* – spanning civil, commercial, criminal, political, international, and purely religious laws– the Presidential Code Commission (hereinafter "Commission") decided that only *Shari'ah* principles that are "fundamentally personal" would be codified.[77] The Commission established the *fiqh* (general jurisprudential rules) as the "fundamental principle of legality limiting both delegated and vested authority."[78] As codified, Muslim personal law in the Philippines includes all laws on personal status, marriage and divorce, matrimonial and familial relationships, and property regimes between spouses. The significance of the passage of the CMPL was aptly described by Professor Bautista, a non-Muslim member of the Presidential Code Commission:

> "The Code is the triumphant culmination of a long struggle on the part of the Filipino Muslims to have their system of laws enforced in their communities and a major effort of the Government in its search for a solution to the persistent problem in the South. For scores of years these countrymen of ours who constitute a sizeable portion of our population had been made to feel that their most sacred and dearly-held beliefs, customs, traditions and institutions, which they have jealously guarded against invasion since colonial times, were being uprooted and replaced with totally new and alien ones which were being forced upon them. What was theirs by right under the laws cast in the mold of their peculiar culture they found unenforceable in the country's courts. Marriages they performed with all the rites and solemnities required by their religion and customs were of no effect under the nation's laws. And not a few of them underwent criminal prosecution and punishment for acts perfectly permitted or sanctioned by the most sacred book by which the live (spiritually, socially, and politically), the [Qur'an]."[79]

Expounding further, Hamid Barra noted how the Muslims took the passage of the CMPL as *partial* realization of their resolute struggle for religious and cultural freedom under the Philippine government.[80] Moreover, the Philippines became "a [proud] legatee of one of the world's most important legal systems, that

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[76] *Id.*

[77] REPORT OF THE PRESIDENTIAL COMMISSION TO REVIEW THE CODE OF FILIPINO MUSLIM LAWS 2-4 (1975).

[78] M. Mastura, *supra* note 22, at 464.

[79] E. BAUTISTA, AN INTRODUCTION TO THE CODE OF MUSLIM PERSONAL LAW 1 (1977).

[80] H. BARRA, *supra* note 6 at 58.

of the *Shari'ah*, as it has been equally proud of inheriting the other two, that of Roman law and of Anglo-American law which Spain and the United States bequeathed to her, respectively."[81]

Prodded by constitutional[82] and treaty[83] obligations, the CMPL intended to accomplish more than its title suggests. Thus, it is provided in Article 2 of the CMPL that it:

> (a) Recognizes the legal system of the Muslims in the Philippines as part of the law of the land and seeks to make Islamic institutions more effective;
>
> (b) Codifies Muslim personal laws; and
>
> (c) Provides for an effective administration and enforcement of Muslim personal laws among Muslims.

The foregoing provision in the CMPL reveals either an oxymoron or a potent possibility. While expressly limiting codification to those that were fundamentally personal to Muslims, Article 2(a) states that it "recognizes the legal system of the Muslims in the Philippines as part of the law of the land." Article 2(a) effectively opens a gateway through which the *Shari'ah* can enter the Philippine legal system other than what had been codified,[84] Thus, it has been argued that Article 2(a) "incorporates"[85] the *Shari'ah* (Islamic law) and the *adah* (customary law) into the Philippine legal system through its own rules of construction.[86] In other words, the *Shari'ah* and *adah* can be applied by *Shari'ah* courts to settle disputes in much the same way that they would use other laws passed by Congress,[87] subject to the Constitution like any other law in the Philippine legal system.[88]

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81 *Id.*

82 1973 CONST, art. XV, §11, mandates the State "to consider the customs, traditions, beliefs and interests of national cultural communities in the formulation and implementation of state policies."

83 *See*, e.g., Tripoli Agreement (23 December 1976); International Covenant on Civil and Political Rights 1966, 16 December 1966, 999 U.N.T.S 171 [hereinafter "ICCPR"], arts. 2, 18 and 27; International Covenant on Economic, Social and Cultural Rights 1966, 16 December 1966, 993 U.N.T.S 3 [hereinafter "ICESCR"], arts. 2 and 15.

84 Also see Article 2(b); Article 3, Pres. Dec. No. 1083.

85 *Supra* note 43.

86 Pres. Dec. No. 1083, art. 3.

87 See note 22, *supra.*

88 Pres. Dec. No. 1083, Articles 5 and 6.

However, the promulgation of the CMPL was a result of "experiential exigencies" and compromise among the participants in the drafting process,[89] and its promulgation left legal complexities and unresolved questions in the areas of law selection, law finding, gradation of rules of Muslim law, conflict of laws and rules of construction.[90] The lack of judges who meet the standard of expertise in the *Shari'ah* has led to the scarcity of instructive cases that could have addressed the textual ambiguities of the law.[91] Taken together, the mechanism for incorporating the *Shari'ah* through the Article 2(a) of the Code of Muslim Personal Code "failed to carry the day."[92]

C. SOVEREIGNTIST SUPPRESSION OR UNIVERSALIST EMANCIPATION?: THE MAGNA CARTA OF WOMEN AND THE CODE OF MUSLIM PERSONAL LAWS

Apart from the express Constitutional mandate to recognize the role of women in nation-building and ensure the fundamental equality of women and men before the law,[93] the Philippine government is obliged to introduce gender equality reforms by reason of its accession[94] to the CEDAW in 1981, and its explicit recognition of generally-accepted principles of international law as part of Philippine law[95] – one the principles is that "[w]omen's rights are human rights."[96]

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89 M. Mastura, *supra* note 22 at 461; Also see note 79, *supra*. As pointed out by Bautista, the guiding principles in the codification of the Code are the following: Of the Islamic Legal Systems, which is considered a complete system comprising civil, criminal, commercial, political, international and purely religious laws, only those that are fundamentally personal in nature were to be codified:

"1) Of the personal laws, those relative to acts the practice of which are absolute duties under Muslim law were to be included, and those which according to Muslim law are forbidden and demand unconditional punishment were to remain prohibited;

2) Where the provisions of the law on certain subjects were too complicated for a Code, only the fundamental principles were to be stated, and the details left to the judges for proper implementation;

3) No precept, fundamental though it might be, was to be incorporated in the Code where it appeared to be contrary to the principles of the Constitution of the Philippines; and

4) No precept was to be included unless it was based on the principles of Islamic law, as expounded by the four orthodox (Sunni) schools."

90 M. Mastura, *supra* note 22, at 463.

91 United Nations Development Programme, INSTITUTIONAL STRENGTHENING OF THE SHARI'AH JUSTICE SYSTEM (PHASE 1) 129 (2004).

92 E. BAUTISTA, *supra* note 79, at 2-3.

93 CONST., art. II, §14, .

94 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 26: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith;" and art. 11: "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

95 CONST, art. II, §2.

A movement that began with the founding of the *Associacion Feminista de Filipinas* (Feminist Association of the Philippines) in June 1905,[97] women's groups in the Philippines pushed for a gender equality law in the Philippines during Charter change momentum in the early 2000s.[98] Women's groups participated in the process by initiating the drafting of a women's agenda to provide inputs in the contemplated deliberations to amend the Constitution. The idea was to reflect or complement the provisions of the CEDAW, while remaining protective of the gender quality provision of the 1987 Constitution.[99] But when the movement for Charter reached a stalemate, the campaign to have a gender equality law turned to Congress.[100] Incidentally, a bill on the Magna Carta for Rural Women[101] had already making its way in the House of Congress since 2002.

Responding to the recommendations of the U.N. CEDAW Committee[102] and the parallel advocacy of various women's groups, the idea of a Magna Carta *for* Women was finally considered in one of the public hearings conducted in 2005 by the House Committee on Women and Gender Equality.[103] However, the bill was confronted by much opposition[104] eventually leading to its shelving. Fortunately, under the 14th Congress, with a significant number of women legislators, five

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[96] *See* e.g., Beijing Declaration and Platform for Action, Report of the Fourth World Conference on Women, Beijing, Sept. 1995, U.N. Doc A/CONF.177/20, para. 14, reprinted in 35 I.L.M. 401 (1996); World Conference on Human Rights, Vienna Declaration and Programme of Action, adopted on June 25, 1993, U.N. Doc. A/CONF.157/23, pt. I, para. 9. (1993), reprinted in 32 I.L.M 1661 (1993). Note that while the Beijing Declaration affirms that "women's rights are human rights," the statement is not embodied in the human rights section of the final Platform for Action.

[97] Philippine pre-colonial society was egalitarian in many aspects, with women enjoying the same privileges, rights, and opportunities as did men. Customary laws bestowed upon them equal rights with men, to own and inherit property and to engage in business. See Lorna S. Torralba Titgemeyer, *La Mujer Indigena - The Native Woman: A description of the Filipino Woman during Pre-Spanish Time*, available at http://www.univie.ac.at/Voelkerkunde/apsis/aufi/wstat/mujer.htm (last visited February 20, 2011).

[98] UNIFEM, Drafting and lobbying for a gender equality law: The progress so far in GOING CEDAW IN THE PHILIPPINES 36 (2009) available at http://cedaw-seasia.org/docs/Philippines/goingcedaw/Going-CEDAWfinal_small.pdf (Charter change was a recurring issue during the early 2000s. It was a major campaign platform during the 2004 re-election bid of President Gloria Macapagal-Arroyo, and part of her agenda after she had won.)

[99] *Id.*

[100] *Id.* (The 2005 political crisis and subsequent challenges to Arroyo's legitimacy led to the disengagement of many civil society organizations, as well as the shelving of the women's agenda.)

[101] *Id.* (While not based on the CEDAW, this bill sought to advance the rights of rural women.)

[102] *Id.* (In August 2006, the Philippines presented its progress report to the UN CEDAW Committee.)

[103] *Id.* (Again, the bill was not initially based on the provisions of the CEDAW since it was generally unknown then even among legislators.)

[104] *Id.* (For instance, the Alliance for the Family Foundation Philippines Inc. believes that the law hides an intension to hurt or destroy the traditional Filipino family, while the Isis International-Manila did not support the Magna Carta bill unless Congress kept the provisions on reproductive rights.)

versions of the bill were filed in the House (consolidated into House Bill 4273), while twelve bills were filed in the Senate (consolidated into Senate Bill 2396, or an Act Providing for the MCW).[105]

The MCW essentially aims to eliminate of all forms of discrimination against women. In so doing, the MCW adopts the CEDAW's definition of the term *discrimination against women*, thus:

> "[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field."[106]

The title of the law is itself telling. By "Magna Carta", the law is conceived as an "omnibus law that aims to eliminate discrimination against women and to recognize, respect, protect, fulfill and promote all human rights and fundamental freedoms of women, particularly the poor and marginalized. It also ensures that the rights of women embodied in the CEDAW are codified in Philippine laws."[107] Senator Jamby Madrigal, during her privilege speech as one of the co-sponsors of Senate Bill 2396, emphasized the import of naming the law as a "*magna carta*":

> "When we, the legislators of this land, take it upon ourselves to propose, deliberate on, and pass legislation we consider to be of great significance, we call the bill a *magna carta.* A Great Charter, in the mold of the Great Charter which the English barons extracted from John of England at Runnymede Meadow in 1215, and which then became, at first, a bill of rights for the nobility which, in turn, inspired the Bill of Rights in America and the Rights of Man legislated in Revolutionary France.
>
> By referring to a law as a Magna Carta, we point to our being inheritors of the Anglo-Saxon tradition and participants in the great march to freedom from the confines of absolute monarchy to the blessings of a liberal democracy.

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105 *Id.*

106 CEDAW, *Supra* note 8, art. 1.

107 *Id.*

> We are also, all of us, heirs of Roman law and, in particular, of the landmark codification laws undertaken by Emperor Justinian and, a millennia later, by Emperor Napoleon. As senators, then, we derive our titles from the ancient Roman senate, as reinterpreted and established in the modern era by societies, including our own, that looked to replace tyranny with genuine self-government. It is not enough to have a profusion of laws; it is necessary to codify our laws, and to enshrine principles within a sturdy and enduring legal framework."[108]

Moreover, despite echoing rights that are supposedly universal and are already embodied in the 1987 Constitution, the passage of the MCW is still necessary, as explained by feminist lawyer Carolina Ruiz-Austria:

> "On one level, articulation of so-called rights into law or legal provisions does not really imbue the rights with more validity. However, enacting law assures us of practical options or remedies to either claim, assert or promote and protect rights. It also helps safeguard the enabling conditions for the exercise of so-called fundamental rights and freedoms.[109]

> Finally, the use of the preposition "of", instead of the original wording 'for', is itself pregnant with meaning. It recognizes that 'women are not reactive beneficiaries of whatever rights this proposed law bestows on them. Rather, through it, they are 'claiming and asserting the basic, fundamental rights that are due them.'"[110]

III. THE CRUX OF THE MATTER: MOTIVES AND SUBSTANCE OF THE PRESENT DISCOURSE

The MCW creates a framework for national action by means of "unambiguous and categorical provisions that combat discrimination and assert the substantive equality of women."[111] The MCW provides, among others, for (a) equal treatment before the law, including the State's review and when necessary amendment or repeal of existing laws that are discriminatory to women; and (b) equal rights in all matters relating to marriage and family relations. In the area of marriage and family relations, the law ensures the same rights of women and men to enter into and leave marriages, freely choose a spouse, decide on the number

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108 *Supra* note 11.
109 *Id.*
110 *Supra* note 98.
111 *Supra* note 11.

and spacing of their children, enjoy personal rights including the choice of a profession, own, acquire, and administer their property, and acquire, change, or retain their nationality. It also states that the betrothal and marriage of a child shall have no legal effect. The comprehensive legal framework of the law aims to establish gender parity, equality, equity, empowerment, and transformation as necessary objectives for the nation to embrace. It provides a mandate for all these in both the national and local government levels. [112]

The above-mentioned guarantees in the MCW immediately bring to mind the provisions of the CMPL. The Implementing Rules and Regulations of the MCW declares that the CMPL, *inter alia*, should be reviewed and when necessary, amended and/or repealed.[113] The language of the MCW is clearly authoritative and its intended scope echoes the universalist aspirations of the CEDAW – it accommodates the culture, traditions and institutions of Moro and indigenous women only to the extent that these cultural systems and practices are not discriminatory to women.[114]

At first glance, it would seem that two powerful normative legal orders are poised to clash: international human rights law and the *Shari'ah*. The divide has been characterized by Huntington as the "clash of civilizations", observing that "culture and cultural identities, which at the broadest levels are civilization identities, are shaping the patterns of cohesion, disintegration and conflict in the post-Cold War world."[115] Huntington had predicted that the clash of cultures will manifest itself not between states, but between civilizations – at the global, supranational, subnational, and local levels.[116] Translated in the Philippine experience, the challenge of Muslim women's rights in the Philippines – the perceived conflict between the MCW and the CMPL – may be considered as "falling within, or rather a reflection, of"[117] the clash between these two civilizations.

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[112] *Id.*

[113] IRR, Section 15.

[114] Rep. Act No. 7610, Sec. 28.

[115] S. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 20 (1996).

[116] *Id.*

[117] *Id.*

Thus, it has been asked:

> "In a world of diverse cultural traditions that is simultaneously distinguished by the widespread universalist claim that "human rights extend in theory to every person on earth without discriminations irrelevant to merit," the question thus unavoidably arises: **when, in international human rights decision-making, are cultural differences to be respected and when are they not?"** (Emphasis supplied)[118]

In the Philippines, feminist lawyer Carolina Ruiz-Austria, is clearly on point in clinching the following question:

> "How do we promote the exercise of rights and freedom in line with the pluralistic value written behind the principle of religious freedom?"[119]

I submit that the current debate is not one between competing universalist claims to the Philippine social space. On a theoretical dimension, the earlier debate in Muslim personal law may be seen as one between **sovereigntist territorialism** and **Islamic universalism**, which had culminated in the promulgation of the CMPL. By way of "legal exception"[120], the Philippines adopted the legal culture of legal pluralism – the Philippine Constitution being the *dominant* law, and all other laws, including the CMPL, as the *servient* laws.[121] Since then, legal pluralism has become – and has for some time remained – a concession between universalist Islamic norms and sovereigntist laws in the autonomous area of Moro Muslim personal law.

Within the same theoretical space, the current discourse involves a conflict between **universalism** and **legal pluralism**. The universal character of international human rights law coincides with the dominant, overarching system Philippine sovereigntist territorialism, while Muslim personal law is already

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118 B. Weston, *The Universality of Human Rights in a Multi-Cultured World: Toward Respectful Decision-Making* in THE FUTURE OF INTERNATIONAL HUMAN RIGHTS 66 (1999).

119 Speech by Carol Ruiz-Austria, The 'P' Dialogues: Politikal, Peminista, Progresibo (Political, Feminist, Progressive) – Conversations on Social Movement Building, Quezon City March 15, 2007, Available http://www.isiswomen.org/index.php?option=com_content&view=article&id=462:philippines-feminists-converse-on-social-movement-building&catid=20:intermovements&Itemid=231. [7] (last visited February 20, 2011).

120 M. Mastura, *supra* note 22, at 474.

121 M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS 454 (1975).

confined to the particular as a servient law. As one will observe, between the dominant Philippine Constitution and the servient laws, another tier was added: the MCW. All servient laws – the CMPL, the Revised Penal Code, the Family Code, etc. – *without distinction of any kind*, must likewise conform to the MCW. Hence, the CMPL confronts the possibility of amendment or repeal arising from the supposed fundamental incompatibility of some of its provisions with the overarching scheme of Philippine "universalist constitutionalism."[122]

The contentious areas in the CMPL have already been identified elsewhere,[123] and have been specifically discussed during the consultations held by the United Nations Development Fund for Women (hereinafter "UNIFEM") with Muslim Moro women.[124] These provisions supposedly clashes with important provisions in the CEDAW and the MCW. The relevant provisions of the MCW are embodied in Sections 2, 4 and 19 thereof, and are reproduced in full in the box below:

Box 1. Relevant Provisions in the MCW in relation to the Continued Force and Effect of the CMPL

SEC. 2. *Declaration of Policy.* –

The State condemns discrimination against women in all its forms and pursues by all appropriate means and without delay the policy of eliminating discrimination against women in keeping with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and other international instruments consistent with Philippine law. The State shall accord women the rights, protection, and opportunities available to every member of society.

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[122] See note 36, *supra*. According to Desierto, universalist constitutionalism subscribes to the idea that there are rights and values which are universal, and are embedded in the Philippine Constitution, textually and through judicial interpretation.

[123] *Supra* note 12.

[124] *Supra* note 3.

The State affirms women's rights as human rights and shall intensify its efforts to fulfill its duties under international and domestic law to recognize, respect, protect, fulfill, and promote all human rights and fundamental freedoms of women, especially marginalized women, in the economic, social, political, cultural, and other fields **without distinction or discrimination on account of** class, age, sex, gender, language, ethnicity, **religion**, ideology, disability, education, and status. (Emphasis supplied)

SEC. 4. *Definitions.* – For purposes of this Act, the following terms shall mean:

(b) "**Discrimination Against Women**" refers to **any gender-based distinction, exclusion, or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms** in the political, economic, social, cultural, civil, or any other field.

It includes **any act or omission, including by law, policy,** administrative measure, **or practice, that directly or indirectly excludes or restricts women in the recognition and promotion of their rights and their access to and enjoyment of opportunities, benefits, or privileges.**

A measure or practice of general application is discrimination against women if it fails to provide for mechanisms to offset or address sex or gender-based disadvantages or limitations of women, as a result of which women are denied or restricted in the recognition and protection of their rights and in their access to and enjoyment of opportunities, benefits, or privileges; or women, more than men, are shown to have suffered the greater adverse effects of those measures or practices.

Provided, finally, **That discrimination compounded by or intersecting with other grounds, status, or condition**, such as ethnicity, age, poverty, or **religion** shall be considered discrimination against women under this Act. (Emphasis supplied)

SEC. 19. *Equal Rights in All Matters Relating to Marriage and Family Relations.* –

The State shall take all **appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and shall ensure:**

(a) the same rights to enter into and leave marriages or common law relationships referred to under the Family Code without prejudice to personal or religious beliefs;

(b) **the same rights to choose freely a spouse and to enter into marriage only with their free and full consent. The betrothal and the marriage of a child shall have no legal effect;**

(c) the joint decision on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(d) the same personal rights between spouses or common law spouses including the right to choose freely a profession and an occupation;

(e) the same rights for both spouses or common law spouses in respect of the ownership, acquisition, management, administration, enjoyment, and disposition of property;

(f) **the same rights to properties and resources, whether titled or not, and inheritance, whether formal or customary**; and

(g) women shall have equal rights with men to acquire change, or retain their nationality. The State shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. Various statutes of other countries concerning dual citizenship that may be enjoyed equally by women and men shall likewise be considered.

Customary laws shall be respected: Provided, however, That they do not discriminate against, women. (Emphasis supplied)

In analyzing the provisions of the CMPL, the insights that were gathered from the consultations undertaken by the UNIFEM with Muslim Moro women may be considered relevant, to the extent that the MCW seeks to implement the provisions of the CEDAW. These insights are summarized in the Table below.

Box 2. Summary of Responses of Moro Muslim Women during the UNIFEM Consultation

- The participants in the consultations with Muslim Moro women were "naturally wary and cautious" about the effects of the CEDAW on their religious beliefs and practices which "outsiders" or non-Muslims perceive as discriminatory against Muslim women. However, the participants themselves did not perceive these practices as discriminatory.[125]

- Knowledge or awareness of the CEDAW is limited. However, the participants are happy to learn that there is an instrument they can use to demand from policymakers the enactment of laws that can improve their status.[126]

- One of the participants commented that the CEDAW did not consider the cultural norms and religious belief of women – not "contextualized."[127]

- Women defended the CMPL on the issue of whether the provisions relating to polygamy, divorce and succession were discriminatory to women, mainly because these were based on Qur'anic verses.[128]

- The participants welcomed the CEDAW as an instrument that will elevate their status, however they are uncomfortable with provisions that directly contradict Qur'anic verses.

125 *Id.* at 79.
126 *Id.* at 82.
127 *Id.* at 83.
128 *Id.*

One of the participants noted that the women will be more responsive in "women's rights" if they are told about their rights as mandated by their religion. It was said that "[t]hey are more interested to know their rights as women in Islam."[129]

A. SUBSTANTIVE AREAS OF CONCERN

1. Polygamy for Men, Monogamy for Women

The controversy concerning polygamy is readily apparent: Muslim men can take up to four wives, a situation that has been a "cause of constant distress for Muslim women."[130] Indeed, Moro Muslim women have admitted their difficulties with the polygamous institution: "It hurts us whether we are the first, the second, the third or the fourth wife."[131] Insofar as only Muslim men, and not Muslim women are allowed to take more than one spouse, the practice may be seen as a distinction on the basis of sex, conflicting with Section 4 of the MCW.

Indeed, polygamous marriages are recognized in the Qur'an. However, the permission on polygamy is said to be strictly defined by primordial considerations of "justice to women in general, and for widows and orphans, in particular."[132] Arguably, polygamy is not a right or a privilege,[133] and is reluctantly granted in view of the exigencies prevailing at the time of its revelation. According to the Qur'an:

> "And if you fear that you cannot do justice to orphans, marry such women as seem good to you, two, or three, or four; but if you fear you will not do justice, then (marry) only one or that which your right hand possess. This is more proper that you may not do injustice."[134]

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129 *Id.*
130 *Id.* at 80.
131 *Id.*
132 A. ENGINEER, THE RIGHTS OF WOMEN IN ISLAM 155 (1992).
133 *Id.*, at 101-2.
134 *Id.*, at 102, citing the QUR'AN 4:3.

Asghar Ali Engineer emphasizes that the foregoing verse must be read together with the preceding verses.[135] Thus, the first verse of the chapter concerns the equality of men and women, while the second verse speaks of giving orphans their property as is due. Finally, the third, concerning polygamy, begins with giving justice to orphans. Therefore, it is argued that the emphasis is not on marrying more than one woman, but on doing justice to the orphans. The proposition is supported in reference to the revelation of the verse after the drastic reduction of the male population in the Battle of Uhud.[136]

Another verse on polygamy in Qur'an states:

> "Any you cannot do justice between wives, even though you wish (it), but be not disinclined (from one) with total disinclination, so that you leave her in suspense. And if you are reconciled and keep your duty, surely Allah is ever Forgiving, Merciful."[137]

In short, a man is required to treat each of his wives with equal justice,[138] a stringent condition which has been carried into the CMPL, through Article 162 thereof:

> Art. 162. *Subsequent marriages.* — Any Muslim husband desiring to contract a subsequent marriage shall, before so doing, **file a written notice thereof with the Clerk of Court of the Shari'a Circuit Court** of the place where his family resides. Upon receipt of said notice, the Clerk shall serve a copy thereof to the wife or wives. Should any of them object, an **Agama Arbitration Council** shall be constituted in accordance with the provisions of paragraph (2) of the preceding article. If the Agama Arbitration Council fails to **obtain the wife's consent** to the proposed marriage, the Court shall, subject to Article 27, decide whether or not to sustain her objection. (Emphasis supplied)

Unfortunately, some Moro Muslim women have disclosed that although the Qur'an enjoins polygamous husbands to "deal with them with equal companionship and just treatment as enjoined by Islamic law and only in exceptional cases," the conditions are often disregarded by men contracting

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135 *Id.*

136 *Id.*

137 *Id.*, citing the QUR'AN 4:129.

138 *Id.*, at 103, citing Parvez, III Matalib al-Furgan 346 (1979).

subsequent marriages. [139] The safeguards are blatantly ignored,[140] and there is no consequence provided under the CMPL in case the article is violated. Worse, the wife is "always the last to know."[141]

2. Early or Arranged Marriages: 15 for him, 12 for her

On the issue of early marriage, it has been disclosed that "the practice [of betrothal and early marriage] cannot be taken away [from the Muslims]."[142] There are varying views on whether the Qur'an sanctions early marriage. For instance, an initial reading of 65:4 of the Qur'an seems to speak of marriage with a girl who has not reached the age of puberty:

> "And of those of your women who despair of menstruation, if you have a doubt, their prescribed time is three months, and of those, too, who have not had their courses."[143]

The phrase "who have not had their courses" has been interpreted under a different light, as referring to those who do not menstruate for some physiological reason, and not those who have not reached the age of menstruation.[144]

As codified in the CMPL, Article 16 allows Muslim males to marry at fifteen (15) years of age, while female Muslims may marry at the age of puberty, although never at an age less than twelve (12) years of age. Furthermore, every female is presumed to have attained puberty upon reaching the age of fifteen (15). Marriage through a *wali* by a minor below the prescribed ages is allowed, although it is considered as betrothal and may be annulled.

It will be observed that the minimum age for marriage is lower for females (12 years of age) compared to males (15 years of age), a distinction made on the basis of sex, in conflict with Section 4 of the MCW. Moreover, the provision allows the betrothal of a minor below the prescribed ages, conflicting with Section 19(b) of the MCW.

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139 *Supra* note 3, at 80.

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.*, citing the QUR'AN 65:4.

144 A. ENGINEER, *supra* note 132, at 99, citing Muhammad Asad, The Message of the Qur'an 873n1 (1980)

3. Unequal Inheritance: One for her, Double for him

Issues on inheritance relate to the unequal share received by male and female heirs. As Article 122 of the CMPL provides, a brother inherits "double the share of a sister." Likewise, the CMPL provision seems to be in direct conflict with Section 19(f) of the MCW. However, Moro Muslim women are reluctant to change this provision "because it is [supposedly] based on a Qur'anic verse."[145]

What is worth considering is that Moro Muslim women have their own understanding of this unequal inheritance, referring to the context of its revelation – a time when the burden of supporting the family rested only on men – and that men have to give dower while women receive dower.[146] In practice, Moro Muslims have formulated different sharing arrangements between brothers and sisters, in light of the different economic roles and financial responsibilities that men and women play today.[147]

B. A CALL FOR DISCOURSE

Although much of the rights included in the CEDAW fall within the more general framework of rights already recognized in various human rights instruments, Article 5 of the CEDAW specifically obliges State parties thereto to take all appropriate measures:

> "To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices with are based on the idea of the inferiority or the superiority of either of the sexes or on stereotypical roles for men and women."[148]

Darren O'Byrne observes that the "seemingly innocuous provision" contains an important additional recognition that the rights of women are very often violated "not in the civil and political sphere but in the realm of culture, of

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145 UNIFEM, *supra* note 3, at 81.
146 *Id.*
147 *Id.*
148 CEDAW, *supra* note 8, art. 5.

customs and practices."[149] This reality is reflected in the Philippine context by the very limited awareness of the CEDAW, much less the reliance thereon to influence the passage of gender equality laws.[150] Thus, two decades after becoming a state party to the CEDAW, women's rights as declared therein continues to remain elusive for Filipino women[151] - with archetypal patriarchal traditions both in the private and public spheres of life remaining persistent. This scenario may be explained by the feminist critique of human rights discourse noted by O'Byrne:

> "In so far as the discourse on human rights has struggled for some time with the inclusion of abuses which take place within the non-state (specifically, the cultural) sector, various areas of concern which are specific to women have served to highlight the need to intellectually incorporate these abuses within the wider framework. Indeed, among the many important issues raised by the feminist critique of human rights is that **the traditional discourse maintains distinction between the state and non-state, between public and private**."[152] (Emphasis supplied)

As noted at the outset, the MCW subjects all existing economic, political and cultural structures to the primacy of legal norms and standards enshrined in international human rights instruments; the CMPL has never really stood on the same podium of authority. The nature of CMPL, being a servient law, is not accorded such importance "except to the extent that its principles are considered valid by the dominant system"[153] – in this case, the Philippine Constitution, as supposedly reiterated by the MCW.

While the MCW stands as an authoritative policy choice, we cannot ignore that the promulgation of the CMPL also reflects a policy decision that extends beyond recognizing the right of the Moro people to exercise their religion or to a

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149 D. O'BYRNE, HUMAN RIGHTS: AN INTRODUCTION 369-70 (2003)

150 *See* note 98, *supra.* Several laws have in fact been passed addressing different issues affecting women after the Philippines signed and ratified the CEDAW. These include the Women in Development and Nation Building Act (Republic Act 7192); the Anti-Mail Order Bride Act (RA 6955), the Anti-Sexual Harassment Law (RA 7877), the Anti-Rape Law (RA 8353), the Rape Victims Assistance and Protection Act (RA 8505), the Anti-Trafficking Law (RA 9208), and the Anti-Violence Against Women and their Children Act (RA 9262). It has been noted, however, that the measures are inadequate in defining and covering a basic concept that is the core issue of CEDAW – discrimination. They also respond to specific concerns and do not provide a general framework for addressing discrimination against women in all aspects of their lives.

151 *Id.*

152 O'BYRNE, *supra* note 149 at 370.

153 M.B. HOOKER, *supra* note 121, at 6.

certain degree of autonomy.[154] It was part of larger plan to "solve" the "Moro Problem." As Barra points out, the "Moro Problem" is "the problem of failing to see and understand the Bangasamoro in their true and full perspective as a people with distinct beliefs, customs and traditions," the result of "forcing [the Moro Muslims] to think and feel in a manner antipathic to their faith and culture: of imposing upon them alien laws in life of and without due regard to the ones they have jealously guarded and zealously defended against foreign invasion for centuries."[155] Very likely, President Marcos was aware that "personal law is so interwoven with meanings that have to do with [Muslim] identity", that attempts at dismantling the law or even reforming it constitutes a threat to Muslim identity[156] – and a threat to national security.

Other than political or security concerns[157], I argue that within the particular locality to which the CMPL has been confined, it is important to consider its nature, as it reflects "a meeting of two or more cultures at a point – the law – where a conflict in principle is only too common."[158] As M.B. Hooker points out, the issue does not so much involve comparative law, as it does the consideration of the "admissibility or otherwise of some principle from outside the municipal law."[159] Such principle takes the form of the *Shari'ah*, in this present discourse, from which the CMPL derives much of its substantive elements and legitimacy among Moro Muslims. Jaclyn Ling-Chien Neo is clearly on point that the divergent views on Islamic practices necessitates internal discourse and cross-cultural dialogue *within* Islam as well as *between* Islam and human rights.[160] Ling-Chien Neo encourages:

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154 *See* note 5, *supra.*

155 H. BARRA, *supra* note 6 at 3.

156 C. Choudhury, *(Mis)Appropriated Liberty: Identity, Gender Justice, and Muslim Personal Law Reform in India*, 17 COLUMBIA JOURNAL OF GENDER AND LAW 46 (2008).

157 *See* Articles on State Responsibility, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Annex, Agenda Item 162, U.N. Doc. A/RES/56/83, art. 25. National security concerns may be considered essential state interests justifying non-compliance with one's international obligations.

158 M.B. HOOKER, *supra* note 121, at 6.

159 *Id.*

160 J. Ling-Chien Neo, *"Anti-God, Anti-Islam and Anti-Quran": Expanding the Range of Participants and Parameters in Discourse over Women's Rights and Islam in Malaysia*, 21 UCLA PAC. BASIN L.J. 29, 40-41 (2003); Also see Abdullahi Ahmed An-Na'im, *State Responsibility to Change Religious and Customary Laws* in REBECCA J. COOK (ED.), HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 167, 174-185 (1994)

> "[D]iscussions on controversial issues implicating Islamic values and human rights norms, rejecting notions that dominant views on what Islam requires are absolute or final, or that any one person can claim to have the one true teaching. As internal dialogue frees up space for discussion, Muslims are able to address features of Islam that are negative or hostile to human rights norms with a view to bring about a symbiosis between the two. For women activists, the goal is to articulate a solid Muslim feminist jurisprudential basis that clearly shows that Islam need not oppress Muslim women nor deprive them of their rights."[161]

The distinction between suppression and emancipation is blurry. As Megan O'Dowd argues, religious women must be engaged in open discourse and dialogue to empower them in finding the true meaning of freedom and equality, to avoid the recognized pitfalls of failing to engage in a participative discourse:

> (1) Marginalization of concerned women and coercion to decide on the binary choice between egalitarianism and religiosity;[162]
> (2) Victimization and disempowerment of women by failing to recognize and legitimize the enjoyment of their religious obligations;[163]
> (3) Imperialistic tendencies by extrapolation of religion and secularism;[164]
> (4) Loss of constructive diversity;[165]
> (5) Intrusiveness by failing to position oneself as a limited outsider;[166] and
> (6) Misplaced reliance on cultural relativism arising from a fear of political backlash.[167]

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161 *Id.*, at 41.

162 M. O'Dowd, *Secular Gender Essentialism: A Modern Feminist Dilemma*, 3 THE CRIT: CRITICAL STUD. J. 104 , 109-10 (2010)

163 *Id.*, at 110-12.

164 *Id.*, at 112-13.

165 *Id., at* 113-14.

166 *Id.*, at 114-15.

167 *Id.* at 110-12, 115-16.

Indeed, a delicate consideration of the inner struggle of the Moro Muslims, particularly the Moro Muslim women, will reveal that the justification for the MCW, which is supposedly couched on the universality of human dignity, is plagued with an internal dissonance. Moro Muslim women are often trapped between conflicting commitments to their religious belief and a desire for greater freedom and equality as women within their communities. Resistance to the conservative interpretations of Islam are denounced as disloyal and seriously casts doubt on their very identity as Muslim women, while faithful adherence to Islamic interpretations and principles that are "clearly gender-biased" calls into question their commitment to emancipation and gender justice.[168] Indeed, religion permeates and inspires both conscience and conduct, and "women who are deeply religious do not want to act in contradiction to their faith":[169] a Moro Muslim woman aspiring for equality with men struggles within her own Islam, i.e., Islam as *her* complete way of life. That said, the aim of full emancipation of Moro Muslim women from an unjust and gender discriminatory family law can only be realized if the process of reform addresses their unique position at the intersection of gender and religion.[170]

The provisions of the MCW itself recognize the need to engage affected women in a participative process.[171] Also, if any meaning will be given to the title of the law – "Magna Carta *of* Women" as opposed to its original version "Magna Carta *for* Women"[172] – the process of reform should involve the Moro Muslim women themselves, and its substantive elements fuelled by the distinct experiences and aspirations of Moro Muslim women. In other words, the legal treatment of the rights of Moro Muslim women is one of *lex specialis*: as members of the Filipino people, they stick out as Moro Muslims; yet as members of the Moro Muslim community, they share the same aspirations as most Filipina women. Against this background, the question arises: How can the aspiration of Moro Muslim women to be free from all forms of discrimination be realized?

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168 C. Choudhury, *supra* note 156 at 46.

169 N. SHAH, WOMEN, THE KORAN AND INTERNATIONAL HUMAN RIGHTS LAW 16 (2006).

170 C. Choudhury, *supra* note 156 at 46.

171 Rep. Act. No. 7610, Sec. 2: the State reaffirms the right of women in all sectors to participate in policy formulation. planning, organization, implementation, management, monitoring, and evaluation of all programs, projects, and services; and Sec. 3: All people have the right to participate in and access information relating to the decision-making processes that affect their lives and well-being. Rights-based approaches require a high degree of participation by communities, civil society, minorities, women, young people, indigenous peoples, and other identified groups.

172 *See* note 110 and accompanying text, *supra.*

IV. PLURALIST CONSTITUTIONALISM: A PROMISING AREA OF CONVERGENCE

Mehol Sadain maintains that *Shari'ah* implementation in the Philippines should fall within the bounds of the existing Philippine legal system.[173] For Sadain, the guiding precept on the part of the policymakers should be "legal reform of Philippine law towards a more pluralistic approach", whereas for the Muslims, it should be "resolution of long-standing problems in their areas."[174] Both the Philippine government and the Muslims should recognize the need for concessions, respecting and recognizing the inherent uniqueness of their different legal systems.[175]

Hooker had predicted that the formalization of Muslim law in the Philippines is tentative, and evolving political realities[176] will determine the implementation of the CMPL.[177] Indeed, such an impetus for change has emerged in the form of universal human rights, specifically, women's rights.

Likewise, the MCW should be seen – as our very own Constitution is – a living document subject to the ebb and flow of contemporary issues and conditions. One must be mindful of Javate-de Dios' warnings against tenacity in the women's rights movement:

> "[A] social movement [that] is not bound by fixed boxes, by fixed categories. It is a *movement* that is grounded on diversity, tolerance, non-conformity. It is a movement that is **not afraid to question itself and sometimes even to subvert itself in search of its own identity**."(Emphasis supplied)[178]

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173 M. Sadain, The Prospect of a Full Implementation of Shari'ah in the Philippines, 5 (1999).

174 *Id.*

175 *Id.*

176 *See* e.g., A. Reid, *Muslims and Power in a Plural Asia*, in A. REID AND M. GILSENAN (EDS.), ISLAMIC LEGITIMACY IN A PLURAL ASIA 1 (2007): Radical movements opposed to the distorting effects of globalization are reviving long-conceded simplifications that scriptural authority contemplates a dualistic worldview – dar al-Islam vis-à-vis dar al-harb. Moreover, the recent withdrawal of the Philippine government from the MOA-AD signing which had served as a beacon of hope for the Muslim struggle for self-determination in Mindanao, and the Supreme Court decision striking it down as unconstitutional, resulted in the outrage of the Moro Islamic Liberation Front (MILF) and certain members of the Muslim community; a widespread confusion and distrust among Muslim and non-Filipino Muslims alike; and international attention and criticism.

177 M. Mastura, *supra* note 22, at 466.

178 Closing Speech by A. Javate-de Dios, The 'P' Dialogues: Politikal, Peminista, Progresibo (Political, Feminist, Progressive) – Conversations on Social Movement Building, Quezon City March 15, 2007, available at

The transiency of these laws and their supposed ability to adapt to the changes in society are a leverage in designing a legal framework that will fully emancipate Moro Muslim women. The question now turns to the process of reform inasmuch as any reform that will be introduced, though relatively autonomous to Moro Muslim women and aimed the upliftment of their status as such, will reverberate throughout the entire Philippine legal system, and will inevitably be challenged by other stakeholders. Specifically, engaging in discourse contends with various issues that either obstruct, limit, or subvert the goals of discourse. Some of these issues include:

(1) Closing the classical gates of discourse;[179]
(2) Restricting discourse by claiming monopoly and imposing rules on standing; [180]
(3) Ceilings on ideas through opposition or denials; [181]
(4) Avoidance caused by genuine faith[182] and binary choices; [183]
(5) Individual versus group protection;[184]
(6) State distinction between public and private spheres; [185]

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http://www.isiswomen.org/index.php?option=com_content&view=article&id=462:philippines-feminists-converse-on-social-movement-building&catid=20:intermovements&Itemid=231. [7]

179 J. Ling-Chien Neo, *supra* note 160 at 69. (Ling-Chien Neo refers to the "risk that freeing up space for dialogue may open the door to irresponsible and disruptive propaganda.")

180 *Id.*, at 70-71. (Ling-Chien Neo draws attention to the asserted monopoly of the *ulama* in matters, who have sought to exclude Muslim human rights scholars and accusing them of promoting "false" Western perspectives of Islam, or of not being "Islamic enough" to question or engage in the dialogue on Islam.)

181 Mir-Hosseini, *supra* note 33, at 285. (Mir-Hosseini characterizes many Islamic discourses as highly oppositional Western and secular values and lifestyles, or apologetic, returning to the shari'ah sources to argue that there is no incompatibility between Islam and women's rights); Also see Jaclyn Ling-Chien Neo, *supra* note 160 at 71-72, and A.E. MAYER, see note 32, *supra.*

182 J. Ling-Chien Neo, *supra* note 160 at 73. ("Faith and religion pervade the innermost reaches of our belief systems and consequently it is not easy to change these beliefs even if they can be objectively proven wrong.")

183 *See* note 160, *supra.* (O'Dowd notes that when secular feminists identify religion as the source of inequality for religious women, they impose an inadequate binary choice between religion and equality. Similarly, the religious community may impose the same binary choice upon women who aspire equality with men.)

184 V. Narain, *Women's Rights and the Accommodation of "Difference": Muslim Women in India*, 8 S. CAL. REV. L. & WOMEN'S STUD. 43, 57 (1998). Narain notes that women's rights and the rights of the community have been presented as mutually exclusive. She argues, however, that the two need not be so. She maintains that that the recognition of power relations within religious communities does not lead to a rejection of culture or of cultural identity, but to a rejection of those practices that oppress women, and an understanding that "culture" and "religion" are selectively deployed to serve particular interests.

185 *Id.*, at 61-64. (Narain examines State secularism in understanding what it means in terms of accommodating religious difference, and in drawing a distinction between the public and the private spheres of human life. She argues that a rejection of the public/private dichotomy enables women to demand State action in addressing inequalities.)

I submit that the Philippine legal framework will regress from what it has so far achieved in the area of minority rights protection if either the CMPL or the MCW merely supersedes the other, the surviving norm operating as an exception to the suppressed norm, an ostensible form of emancipation, or a matter of expedient policy. Regression, furthermore, is an understatement in light of the continuing volatility of the Moro Muslim situation. Yet as Soliman Santos maintains, there is room for genuine discourse within the Philippine constitutional framework, as well as within the contours of the *Shari'ah*.[186] Moreover, outside Philippine borders, the currents of global legal pluralism are gaining strength, and we will see in the succeeding discussion how parallelisms can be drawn between and among the principles and processes of international law, constitutional law, and the *Shari'ah*. For instance, Abdullahi an-Na'im's works exemplify how coherent methodology or processes, emanating from Islamic values and principles, are essential to a coherent Islamic human rights discourse.[187]

A. GLOBAL LEGAL PLURALISM AND PHILIPPINE PLURALIST CONSTITUTIONALISM

Before even attempting to introduce a process for harmonizing the CMPL with the universalist character of women's rights articulated in the MCW, I draw attention to the dissonance inhering between and within these two laws. For instance, the promulgation of the CMPL manifests a normative commitment to the principles of freedom of religion and the right to self-determination under the human rights system. The recent passage of the MCW, on the other hand, is a product of the Philippines' commitment as a State party to various international human rights instruments, particularly, the CEDAW. As one will see, either can be justified from the vantage of human rights. However, the international human

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[186] S. Santos, Jr., Constitutional Accommodation of a Moro Islamic System in the Philippines: Constitutional Comparative and International Law Aspects of the Islamic Challenge and the Peace Process in the Continuing Mindanao Conflict in Southern Philippines, Minor Thesis Submitted in Partial Fulfillment of the Requirements for a Master of Laws by Coursework and Minor Thesis, University of Melbourne 58 (September 1999).

[187] A.E. MAYER, *supra* note 32, at 46, citing the following works of Abdullahi an-Na'im: *A Modern Approach to Human Rights in Islam: Foundation and Implications for Africa* in CLAUDE WELCH, JR. AND ROLAND MELTZER (EDS), HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 75-89 (1984); English translation with introduction on USTADH MAHMOUD MOHAMED TAHA: THE SECOND MESSAGE OF ISLAM (1987); TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS AND INTERNATIONAL LAW (1990).

rights system upholds the principle of equality of human rights, thereby creating a unique challenge of balancing conflicting human rights commitments. Resort to universal international human rights principles, therefore, cannot readily solve the question of hierarchical ordering of human rights commitments.

As will be seen later, the harmonization process can be expedited by applying the various mechanisms constructed into the pluralist legal framework for negotiating overlapping norms. This brings us to the question of whether the Philippine constitutional framework, which is generally inclined towards *sovereigntist territorialism* and *universalism*, makes room for procedural legal pluralism beyond legal exceptions or pragmatic considerations. It is important to illuminate the constitutional dimensions of procedural legal pluralism inasmuch as the employment of pluralist devices may be challenged by other stakeholders, particularly those who staunchly adhere to the emancipation of women along secular claims. Does the employment of pluralist devices deviate from the spirit of Philippine constitutionalism?

In locating the role of legal pluralism within the larger framework of Philippine constitutionalism, I premise my analysis on two of Alex Sweet's propositions: *First*, that **basic questions about the organization of legal norms and the defense of normative hierarchies are "inherently constitutional questions"**; and *second*, that **legal pluralism is not necessarily "antithetical" to constitutionalism.**[188] The adoption of these points is but a realist take of the Philippine geo-polity as an overlapping space of normative obligations, which may or may not share the same substantive elements (or sources) as state law.

Brian Tamanaha outlines six systems of normative ordering in social arenas which relates to a series of issues: (1) official legal systems; (2) customary/cultural normative systems; (3) religious/cultural normative systems; (4) economic/capitalist normative systems; (5) functional normative systems; (6) community/cultural normative systems.[189] As Holbrook points out, the social

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[188] *See* A. Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 IND. J. GLOBAL LEGAL STUD., 621-45 (2009). (Sweet's arguments pertain to the design of an international constitutional order. However, his propositions for a international constitutional framework may be applied within the context of Philippine constitutionalism, since these were derived from his analysis of the dynamics between constitutionalism and pluralism of France, Germany, Italy and Spain, both in their own and then in relation to European law.)

[189] B. Tamanaha, *supra* note 58 at 496.

space shared by these overlapping obligations is "necessarily filled with conflict, as competing imperatives among different communities strive for priority," and the battle sometimes ignites violence. [190]

Yet legal pluralism does not necessarily invite conflict or lead to an impasse, a matter that could have been resolved by the traditional problem-solving tools within the conflict-of-law paradigm. Sweet observes that legal pluralism inheres even within highly developed national legal orders and may remain quite robust. This fact "fatally undermines the idea that pluralistic orders are qualitatively different than constitutional orders."[191] Rather, legal pluralism reflects "a descriptive acknowledgment that people belong – both willingly and unwillingly – to coexistent associations with overlapping norms that both accord and discord with sovereign territorial power."[192] Indeed, various norm-generating communities[193] may impose behavioral commitments that exist within and across state boundaries.

B. PLURALIST APPROACHES IN MANAGING HYBRIDISM

As a practical matter, legal pluralists have studied those situations in which various normative systems share the same social space and must negotiate the plurality of overlapping norms.[194] The continuing discourse among adherents of legal pluralism have thus shaped practices which eventually formed a pluralist framework for managing the hybridity of competing and overlapping norms. Implicit in legal pluralism is the liberal principle that it is "neither possible nor, in many situations, even desirable to 'solve' legal hybridity by the hostile occupation of one normative scheme over another."[195] The pluralist approach encourages the creation of mechanisms that manage normative conflict through provisional compromise whenever possible, focusing on "refereeing rather than winning", and introducing some form of order to the shared social space by acknowledging "the inevitability of disorder."[196]

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190 *Id.*; Also see, J. Holbrook, *supra* note 43 at 405-6.

191 *Supra* note 188 at 233.

192 *Id.*, citing Robert M. Cover, The Supreme Court, 1982 Term: Foreword: Nomos and Narrative, 97 HARV. L. REV. 4, 7. (Sweet used the term "law" broadly to describe plural normative commitments, rather than the positive articulation of rule by a state-sanctioned entity.)

193 *Supra* note 47.

194 *Id.*

195 J. Holbrook, *supra* note 43, at 405.

196 *Id.*

Holbrook is aware that the success of pluralist approaches in managing normative conflict is only relative, and its applicability in multifarious situations is not guaranteed.[197] Fundamental conflicts will necessarily arise along subnational, national and supranational lines. Holbrook further observes that there will always be instances when "territorial sovereigntists may reject hybridity because the firm and coercive assertion of state power is seen as the only means of securing essential state interests,"[198] as may be seen in the controversial MOA-AD case.[199] On the other hand, in instances where national norms do not contain adequate safeguards in protecting universal norms, universalists may also reject pluralism in the hope to achieve a uniform and harmonious world order, where fundamental rights are respected.[200] In the Philippines, this response may be seen, for instance, in the fundamental protection of due process[201] and freedom of speech.[202]

In some cases, the rejection of hybridity through sovereigntist suppression or universal emancipation may indeed be plausible. However, rejection of plurality is ill-advised in situations where the decision or policy choice has broader repercussions, such as the number of individuals or groups whose present and future conduct, rights and freedoms stand to be directly and immediately affected by the limiting scope of the measure taken. Furthermore, rejection of plurality or diversity in the name of universal human rights becomes self-defeating when competing rights or values may be justified from the same source of authority – in this case, international human rights law.

Holbrook frames the issue very clearly, and advances the pluralist approach as the most workable formula in addressing conflicting norms:

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197 *Id.*, at 406.

198 *Id.*

199 *See North Cotabato v. GRP*, G.R. No. 183591, October 14, 2008; *Also see* V.V. Mendoza, *The Legal Significance of the MOA on the Bangsamoro Ancestral Domain*, 83 PHIL. L.J. 488 (2008); and S. Santos, Jr., *A Critical View of the Supreme Court Decision on the MOA-AD from the Perspective of the Mindanao Peace Process,* 84 PHIL. L.J. 255 (2009).

200 J. Holbrook, *supra* note 43, at 406.

201 *See*, e.g. *Tampar v. Usman* (G.R. No. 82077, August 16, 1991), wherein the Supreme Court ruled that the procedural rule allowing the Shari'a court to decide cases on the basis of *yamin* violated their due process right to be heard. But see, S. ALAUYA, ISLAMIC PROCEDURE AND EVIDENCE 21-27 (1999).

202 *MVRS Publications, Inc., et al. v. Islamic Da'wah Council of the Philippines, Inc., et al.* (G.R. No. 135306), affirming the decision of the Regional Trial Court, which dismissed the complaint for damages filed by the respondent against the petitioner. The Supreme Court upheld the right of the petitioners to free speech, holding, *inter alia*, that the validity of religious beliefs are outside the sphere of the judiciary.

> "The central question is whether the rejection of hybridity for either sovereigntist or universalist reasons is always preferable, or whether in some—if not most—cases the management of hybridity through legal pluralism is a more beneficial alternative . . . [I]n recognizing this inevitability, pluralism offers a pragmatic framework for resolving legal conflicts which cannot be resolved through sovereigntist suppression or universalist emancipation. **What at first seems a concessionary effort to develop necessary but nevertheless regrettable solutions to the messiness of overlapping norms becomes instead a "best practices" approach with organic normative value.** While refraining from dictating normative outcomes, pluralism allows competing norms to share the same social space through structured settlements. **The external benefits of such hybrid settlements, such as the preservation of peace and cultural integrity, may very well outweigh the internal costs of compromise, such as the loss of efficiency and systemic predictability.** Further, **the value of the social space itself may be enhanced by the normative diversity of both individual and communal actors.** Normative schemes are, after all, permeable, both giving and borrowing across competing centers of gravity. The management of hybridity thus may invite competitors to **critically examine both the source of and the expression of their own normative obligations.**"[203] (Emphasis supplied)

Of course, the current debate is not concerned with the absolute suppression of the CMPL, perhaps only the amendment, repeal or harmonization of the conflicting norms between the MCW and the CMPL. However, I submit that such processes require a consideration of the framework within which the harmonization of universalist aspiration of egalitarianism should take place, to ensure that the MCW is both reasonable and effective. The recent success in the employment of pluralist devices, as shown by Holbrook, reveal a system that is clearly a more beneficial alternative to the "forceful imposition of normative hegemony."[204] These devices are consistent with universalist constitutionalism, and are expressly recognized, if not mandated, by the 1987 Constitution.

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[203] J. Holbrook, *supra* note 43, at 407.

[204] *Id.*

C. LEGAL PLURALISM IN THE PHILIPPINE CONSTITUTIONAL FRAMEWORK

Arguably, the immediate notion which the title of Desierto's article ("A Universalist History of the 1987 Philippine Constitution") suggests is the staunch adherence to universalist ideals, which in turn conveys the idea of a "harmonious global system that acknowledges fundamental human rights, encourages cosmopolitanism, [but] seeks to erase normative differences."[205] A faithful reading of her article, however, reveals that Desierto's analytical process takes into account the dangers in "carelessly 'putting forward universals' and 'statements of value' that mask misguided claims of the superiority of one civilization ... over all others – a universalism of the 'powerful' and the 'inegalitarian'."[206] In the process, Desierto avoids the dangers of taking extreme ends of the pluralist – universalist continuum described by Sweet:

> "The view that, for any given system, any measure of legal pluralism is inversely proportional to any measure of constitutional order has several implications. **At the pluralist extreme, there might be no legal "system" at all beyond the facts of pluralism. At the other extreme, one might find a hierarchically-constructed legal system where pluralism has been extinguished beyond how the constitution itself recognizes diversity and distributes lawmaking discretion to various organs.** It is not clear to me how one might construct a continuum between these two poles. The pluralist-constitutionalist dichotomy might constitute **different ways of describing measures of the same variable, or they may need to be decoupled** insofar as they comprise separate variables with the potential to interact with one another." (Emphasis supplied)[207]

The decoupling of universalism and pluralism can be read into Desierto's discourse. For Desierto, the opposite end of universalism is not plurality, but ***particularism***.[208] Expounding on this continuum, Desierto posits that universalism recognizes that the search for human dignity values cannot be

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205 *Id.*

206 D. Desierto, *supra* note 36, at 390.

207 A. Sweet, *supra* note 188, at 631-632.

208 D. Desierto, *supra* note 36, at 389. Desierto defines *particularism* as "the ontological foundation for giving primacy to state-centered interests, the protection of which is imperative for the preservation of order in a polity." Particlarism, according to Desierto, rests on two fundamental assumptions: "1) order is possible 'only within the *particular* polity; it cannot extend to humankind as a whole'; and 2) a polity is 'viable only if *particular*: its internal cohesion depends upon something that is exclusively shared by all members.'"

"excessively atomistic" to the particulars of state interests and domestic concerns.[209] Rather, Desierto subscribes to the idea of universalism as "**a network of intense cooperation**" among liberal democracies[210], an idea that coincides with what Sweet characterizes as genuine constitutionalism. For Sweet, the notion that "the more pluralistic the juridical authority structure of the system, the more difficult or impossible it will be to argue that the system has a constitutional basis" is problematic, and the most important factor is determining **whether the tensions that inhere in systemic pluralism trigger processes that produce a meaningful constitutionalization of the system.**[211]

In much the same way, Desierto refers to constitutional processes in highlighting the importance of individual empowerment towards meaningful participation in both national and international "communities of judgment," an end which is achieved in the Philippine context by the simultaneous convergence of the various constitutional avenues to universalism.[212] Indeed, as Desierto herself argues, universalist constitutionalism is not the "tyrannical erasure of diversity", but one that closely approximates Alex Sweet and Paul Berman's idea of "global legal pluralism."[213]

1. Diversity, Minority Protection, and Pluralist Processes in the Philippine Constitution

Soliman Santos squarely relies on constitutional law principles that facilitate discourse:

> "Even under the 1973 Marcos Constitution, the greatest Filipino human rights lawyer, the late Jose W. Diokno, pointed to certain constitutional provisions: '**Equality (equal protection), social justice, respect for cultural minorities** – these are potent weapons for an activist policy by Bench and Bar to promote the well-being of tribal and Muslim Filipinos: for their welfare is also the nation's welfare.' The 1987 Aquino Constitution has added a few more weapons for waging peace in the Philippines, which may mitigate the opposing paradigms and judicial tradition we discussed earlier. Among the

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209 *Id.*, at 394.
210 *Id.*, at 395.
211 *Id.*
212 D. Desierto, *supra* note 36, at 389.
213 *Id.*, at 395.

> new constitutional provisions are those on **direct democracy, human rights, rights of indigenous cultural communities, expanded social justice, peace, and the right to self-determination.** There are, of course, the well-established provisions on **international law, due process, equal protection and religious freedom.".**[214] (Emphasis supplied)

It would not be amiss to turn to the textual constitutionalization of these principles and processes that manage systemic pluralism in Philippine society (See Box 3 below). These provisions cut across various dimensions – beginning with the declaration of relevant principles and human rights, and then moving on to general frameworks for their enablement through governance, culture, and family autonomy. Together, these provisions breathe some form of authority and structure into what would otherwise be a naïve invocation of "unity amidst diversity."

Box 3. Textualization of Discursive and Participative Processes for the Protection of Religious, Cultural and Autonomous Rights of Minorities towards "Communities of Judgments"

ARTICLE II – DECLARATION OF PRINCIPLES AND STATE POLICIES

Section 11. The State values the **dignity of every human person** and guarantees full respect for **human rights.**[215]

Section 12. The State recognizes the **sanctity of family life** and shall protect and strengthen the family as a **basic autonomous social institution**. . . The **natural and primary right and duty of parents in the rearing of the youth** for civic efficiency and the **development of moral character** shall receive the support of the Government.[216]

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[214] See note 186, *supra.*

[215] CONST, art. II, §11.

[216] CONST, art. II, §12, . Bernas notes that the reference to the family as a "basic" social institution is an assertion that the family is anterior to the state and is not a creature of the state. The characterization of the family as "autonomous" is meant to protect the family against the instrumentalization of the state. BERNAS, *supra* note 5 at 84; Also see IV RECORD OF THE CONSTITUTIONAL COMMISSION 808-809; V RECORD OF THE CONSTITUTIONAL COMMISSION 54-55.

Section 22. The State shall recognize and promote the **rights of indigenous cultural communities within the framework of national unity and development.**[217] (Emphasis supplied)

ARTICLE III – BILL OF RIGHTS

Section 5. 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. [218] (Emphasis supplied)

ARTICLE X – LOCAL GOVERNMENT

Section 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.[219]

Section 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 multi-sectoral bodies. The organic act shall define the basic structure of government for the region consisting of the executive department and legislative assembly, both of which shall be elective and representative of the

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[217] CONST, art. II, §22.

[218] CONST, art. III,§5,. Bernas notes that the 1935 Constitution effectively transplanted the American provision and earlier Philippine organic law and jurisprudence. BERNAS, *supra* note 5, at 318-9.

[219] CONST, art. X, §15; See e.g. *Abella v. Commission on Elections*, 201 SCRA 253, 169-173 (1991); also *see* BERNAS, note 5, *supra.*

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.**

The creation of the autonomous region shall be effective when approved by majority of the votes cast by the constituent units in a plebiscite called for the purpose, provided that only provinces, cities, and geographic areas voting favorably in such plebiscite shall be included in the autonomous region. [220]

Section 20. Within its territorial jurisdiction and subject to the provisions of this Constitution and national laws, the organic act of autonomous regions shall provide for legislative powers over:

(1) Administrative organization;
(2) Creation of sources of revenues;
(3) Ancestral domain and natural resources;
(4) **Personal, family, and property relations;**
(5) Regional urban and rural planning development;
(6) Economic, social, and tourism development;
(7) Educational policies;
(8) **Preservation and development of the cultural heritage**; and
(9) Such other matters as may be authorized by law for the promotion of the general welfare of the people of the region. [221] (Emphasis supplied)

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[220] CONST, art. X, §18,. Only the Autonomous Region of Muslim Mindanao (ARMM) has been established; See *Ordillo v. Commission Elections*, 192 SCRA 100 (1990), for an account of the plebiscite held in the Cordilleras.

[221] CONST, art. X, §20. In case of conflict between a local law promulgated by the ARMM and the Constitution, Bernas posits that the Constitution will prevail, arguing that although religious considerations may be one of the major foundations for the creation of an autonomous region, the region cannot be exempted from the provisions on free exercise and non-establishment of religion in Article III, §5 of the Constitution. However, if the conflict is between a local law and a national law, the question is not easily resolved because national laws themselves are subject to the Constitution, which recognizes the autonomy of local governments. BERNAS, *supra* note 5, at 1106.

ARTICLE XIV – EDUCATION, SCIENCE AND TECHNOLOGY, ARTS, CULTURE AND SPORTS EDUCATION

Section 7. For purposes of communication and instruction, the official languages of the Philippines are Filipino and, until otherwise provided by law, English.

The regional languages are the auxiliary official languages in the regions and shall serve as auxiliary media of instruction therein.

Spanish and **Arabic** shall be promoted on a voluntary and optional basis. [222]

Section 8. This Constitution shall be promulgated in Filipino and English and shall be translated into major regional languages, **Arabic**, and Spanish. [223]

Section 14. The State shall foster the **preservation, enrichment, and dynamic evolution of a Filipino national culture** based on the principle of **unity in diversity** in a climate of free artistic and intellectual expression. [224]

Section 17. The State shall recognize, respect, and protect the **rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions.** It shall **consider these rights in the formulation of national plans and policies**[225] (Emphasis supplied)

ARTICLE XV – THE FAMILY

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[222] CONST., art.XIV, §7,. Bernas opines that the optionality of Arabic is an affirmation of the affinity of large segments of the South to the said language. BERNAS, *supra* note 5, at 1258.

[223] CONST., art. XIV, §8.

[224] CONST., art. XIV, §14. According to Bernas, Article XIV, sections 14 to 18 of the Constitution are of little significance as constitutional law, but express a national policy and are an affirmation of the Philippines' attempt to understand and articulate its own cultural identity. BERNAS, *supra* note 5, at 1261.

[225] CONST., art. XIV, §17.

> Section 3. The State shall defend:
>
> (1) The **right of spouses to found a family in accordance with their religious convictions** and the demands of responsible parenthood; x x x
>
> (4) The **right of families or family associations to participate in the planning and implementation of policies and programs that affect them.** [226] (Emphasis supplied)
>
> ARTICLE XVI – GENERAL PROVISIONS
>
> Section 12. The Congress may create a **consultative body** to advise the President on **policies affecting indigenous cultural communities**, the majority of the members of which shall come from such communities.[227] (Emphasis supplied)

A cursory reading of these constitutional provisions reflects an inclusive and constructive (or non-destructive) approach towards diversity and minorities, managed by democratic processes that are both participative and consultative. The question of their actual application, as well as the issue of whether or not each of these provisions are self-executing, is yet another matter that deserves lengthy research, a task that I will not embark upon in this paper. Suffice it to say at this point that Philippine universalist constitutionalism contemplates inherent systemic pluralism, both in theory and in express terms, and provides for processes to facilitate the same.

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[226] 1973 CONST., art . XV, §3. The right of the spouses to found a family in accordance with their religious convictions have already been discussed in note 216 above. As to the right of the families or family associations to participate in the planning and implementing of policies affecting them, Bernas submits that the same is analogous to that of people's organizations referred to in CONST., art. XIV, §15 and 16. BERNAS, *supra* note 5, at 1265.

[227] CONST., art. XVI, §12.

2. Best Practices in Philippine Legal Pluralism

The Philippine experience in legal pluralism has already been studied and analyzed extensively by Mastura and Holbrook. Mastura's work focuses on the rules of decision-making and code harmonization as a policy approach to what he identified as a problem in Philippine legal pluralism.[228] Mastura concludes that Philippine legal history has leaned towards creating legal exceptions, recognizing the existence of normative customary obligations.[229] On the other hand, Holbrook analyzed the Philippine approach to legal hybridity in the context of four practices identified by Berman: dialectical discourse, margins of appreciation, jurisdictional redundancy, and limited autonomy regimes.[230] These devices were analyzed in the context two Philippine Supreme Court cases: (1) the case of *Bondagjy v. Bondagjy I*,[231] wherein the main question asked was whether a Christian woman who converted to Islam before her marriage to a Muslim under Islamic rites, and converted back to Catholicism upon their separation, was still bound by the moral laws of Islam in the determination of her fitness to be the custodian of her children; and (2) its sequel, *Bondagjy v. Bondagjy II*,[232] involving evidentiary and other procedural matters (e.g., *res judicata*) in relation to the filing of a divorce by *faksh* by the wife against her husband after she had converted back to Christianity, alleging acts of non-performance of marital obligations under Muslim law.

Holbrook's analysis showed the relative success in the various approaches adopted by the Philippines. For Holbrook, the Philippine approach, "though less than fully realized, models the possible benefits of pluralism in a normatively complex and contentious hybrid society, one that fulfils sovereigntist requirements while meeting the normative needs of its Muslim citizens."[233] Holbrook's conclusion is particularly instructive:

> "First, conflict arising from entrenched legal hybridity is **unlikely to be solved through either sovereigntism or universalism**. In trying to extinguish normative conflict by imposing alien norms, non-accommodating approaches may actually serve as incendiary agents for additional conflict...

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228 M. Mastura, *supra* note 22, at 462-463, 474.
229 *Id.*, at 474.
230 J. Holbrook, *supra* note 43 at 432-438.
231 G.R. No. 140817, December 7, 2001.
232 G.R. No. 170406, Aug. 11, 2008.
233 J. Holbrook, *supra* note 43 at 408.

Second, pluralism's structured framework for resolving hybridity, though messy, at least appears **no messier than an unstructured framework in which overlapping norms are expressed informally**...

Third, a pluralist approach may lead to a **normative cross-flow in which competing communities are mutually enriched**, enhancing the value of the social space they share. In the southern Philippines, participants in ecumenical interfaith councils, for example, may find not only a forum for discussing differences, but also, by thoughtfully engaging their normative competitors, an appreciable enrichment of their own normative commitments...

Fourth, well-constructed frameworks for engaging in dialectical discourse and applying margins of appreciation **can effectively manage competing normative obligations**. In *Bondagjy* and *Bondagjy II*, as well as other Supreme Court cases I reviewed, the Philippine Supreme Court displayed a willingness to engage and occasionally defer to Muslim norms, analyzing Muslim law in general and P.D. 1083 in particular with due regard and obvious respect....

Fifth, **pluralist mechanisms provide a means of managing legal hybridity for those willing to ascribe to pluralist values, but are less useful elsewhere**. MILF leaders who reached a cease-fire with the Philippine government in the 1990's and, in turn, received significant development assistance in Mindanao were, in their own view, 'simply using the government to fund development projects and . . . had no intention of being seduced into a quid pro quo.' As a result, despite development assistance and repeated negotiations, conflict in the South continued...

Sixth, **the effectiveness of pluralist mechanisms is diminished greatly when they are employed insincerely or deployed inadequately**. Despite the Constitution, P.D. 1083, and the Organic Act, the southern Philippines remains impoverished and embattled, the ARMM is seen as unchallenged by manpower and resource shortfalls. The continuing conflict in the South could be ascribed to pluralism's shortcomings, or could simply be the result of a less than full-hearted attempt by both the national government and Muslim Filipinos to pluralistically share the same social space."[234] (Emphasis supplied; Citations omitted.)

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[234] *Id.*, at 447-448.

Inasmuch as Holbrook's study showed the potential of legal pluralism to manage and, "perhaps somewhat optimistically," resolve the legal conflict inherent in overlapping normative obligations,[235] I adopt his approach, which in turn applies Berman's construction of global legal pluralism, in designing a framework for managing the discourse on the Moro Muslim women's rights question.

D. ISLAMIC PLURALISM

There are certain Islamic principles and processes, manifested in its revealed as well as non-revealed sources, which reinforce the ability of Islam to engage in discourse and adapt to new circumstances. The principles identified by Soliman Santos include: (1) *Dar al-sulh* (Territory of peace); (2) *Muwada'a* (Treaty); (3) Islamic pluralism; (4) *Shura* (Consultation); (5) *Khilafut* (vicegerency of man); and (6) *Ijtihad* (creative reasoning).[236]

1. Tolerance, Reason, and Pluralism in Islamic Thinking

With the decline of the political-military supremacy of the Islamic *Ummah* (the supranational community of Islam established by Prophet Muhammad, premised on a fundamental idea of life, with an all-encompassing approach to execute this idea in life)[237], the sharp dualistic division of the world into *dar al-Islam* (abode of Islam) and *dar al-harb* (abode of war)[238] likewise underwent a re-thinking to reflect the contemporary realities. From the late ninth century following the end of the powerful early Abbasid caliphs, the unified *dar al-Islam* began to disintegrate. Muslim tribes began competing with one another over territory and power, the Umayyads established their own emirate in Spain in 756, and over time, other Muslim emirates and caliphates emerged and forged alliances and treaties with neighboring powers. These developments led to the blurring of boundaries between the *dar al-Islam* and *dar al-harb*, until the idea of an "abode of Islam," in the form of a unified caliphate, no longer existed, by the eleventh century.[239]

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235 *Id.*, at 407.

236 S. Santos, Jr., *supra* note 186 at 72-78.

237 A.G. Muslim, *Survival of the Ummah*, PAKISTAN JOURNAL OF HISTORY & CULTURE 27(2), 13.

238 *Id.*, at 9. During the height of Islamic hegemony, *fiqh* thinking constructed a dichotomy of the world into *dar al-Islam* and *dar al-harb* (or dar al-kufr), which originated with the expansion of Islam immediately after the death of Prophet Muhammad. Under this worldview, it is argued that *dar al-Islam* and *dar al-harb* are two distinctly identifiable geopolitical units.

239 A. Saeed, *Muslims under Non-Muslim Rule: Evolution of a discourse*, in A. REID AND M. GILSENAN (EDS.), ISLAMIC LEGITIMACY IN A PLURAL ASIA 14 (2007) [citations omitted].

Eventually, new terms were coined to reflect the contemporary ways of perceiving non-Muslim territories. For instance, areas like ***dar-ul-mua'hada*** (land of compact) and ***dar-ul-sulh*** (land of treaty) referred to secular countries which maintained peaceful and cooperative relations with Muslim States, having been bound to each other by treaty or agreement. ***Dar-ul-aman*** (land of order), on the other hand, referred to secular countries which accorded freedom of religion for Muslims.[240] It will also be noted that the terms *dar-ul-mua'hada* and *dar-ul-sulh* were both used in the Memorandum of Agreement on the Ancestral Domain (MOA-AD) Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001 in Kuala Lumpur, Malaysia.[241]

Absent Islamic hegemony, Muslims all over the world were forced to contemplate the existence of multiple or different legal systems within the same geographic plane in which they live. Muslims living in non-Islamic states would face the co-existence of State law, *Shari'ah* and customary law within their respective independent states; and even Islamic states are faced with the co-existence of the *Shari'ah* with public international law, which in turn recognizes the plurality of independent nation-state sovereignties.

Abu Sulayman observes that many contemporary Muslim scholars no longer insist on Islamic universalism or the immediate establishment of the unified supra-national Islamic *Ummah*.[242] A large number of contemporary Muslim scholars today accord legitimacy to Muslim residency under non-Muslim rule, provided that these Muslims enjoy religious freedom, personal safety and security. [243]

In fact, the Qur'an itself recognizes the existence of diversity, and exhorts Muslims to strive towards harmony notwithstanding:

> "To each among you have We prescribed a Law and an Open Way. If Allah had so willed, He would have made you a single [legal] People (Ummah), but (His Plan is) to test you in what He hath given you: so strive as in a race in all

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240 *North Cotabato v. GRP*, G.R. No. 183591, October 14, 2008, citing C. Majul, *The General Nature of Islamic Law and its Application in the Philippines*, lecture delivered as part of the Ricardo Paras Lectures, a series jointly sponsored by the Commission on Bar Integration of the Supreme Court, the Integrated Bar of the Philippines and the U.P. Law Center, September 24, 1977.

241 MOA-AD, Terms of Reference.

242 A.H. ABU SULAYMAN, THE ISLAMIC HISTORY OF INTERNATIONAL RELATIONS: ITS RELEVANCE, PAST AND PRESENT 180-192 (1973).

243 *Id.*

> virtues. The goal of you all is to Allah; It is He that will show you the truth of the matters in which ye dispute."[244]

It should be emphasized that "there is no necessary opposition between Islam and constitutionalism"[245], and there have in fact been many members of the *ulama* who worked with liberal and reformist movements, favoring the adoption of constitutions.[246] Thus, despite arguing against negotiating within the framework of the Philippine constitution, MILF Chairman Hashim envisions "a genuine Islamic system based on three principles: (1) Consultation, (2) Justice and (3) Equality."[247] Notably, his ideals correspond to Philippine constitutional principles of direct democracy, social justice and equal protection.[248]

It is true that in classical Islamic law and jurisprudence, there are only four (4) major sources of the *Shari'ah*: the Qur'an, the *Sunnah* (the model behavior of the Prophet Muhammad), *ijma* (scholarly consensus of opinion) and *qiyas* (judgment based on juristic analogy).[249] These sources have been classified into two types: revealed and non-revealed. The revealed sources are the Qur'an and the *Sunnah* forming the *nass* (core) of the *Shari'ah*, while the other two, *qiyas* and *ijma* are the non-revealed sources, and are resorted to in deriving law from the *nass* through the use of *ijtihad*.[250] While the *Shari'ah* is the divinely ordained "path" which only God knows perfectly and encompasses the sources of Islamic Law and Islamic Law itself, *fiqh* pertains to the science of knowing the law, or how the law has been interpreted and understood by the jurists.[251] *Fiqh* can be translated into English legal vernacular as jurisprudence or discernment. [252]

On the other hand, the seminal beginnings for *ijtihad* arose after the death of Prophet Muhammad (PBUH), when it became incumbent upon the Muslim community to make laws within the framework of Islam to address new experiences. Literally, *ijtihad* means "striving", and as a term of jurisprudence it

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244 QUR'AN 5:48

245 A.E. MAYER, *supra* note 32, at 44.

246 *Id.*

247 S. Santos, Jr., *supra* 186 at 18, citing an Interview with Salamat Hashim, MILF Chairman, Maguindanao (8 February 1999).

248 *Id.*, at 72.

249 M. AS-SADR, LESSONS IN ISLAMIC JURISPRUDENCE 10 (2005).

250 SHAH, *supra* note 169 at 70.

251 *Id.*

252 *Supra* note 249.

refers to the maximum effort exerted by a jurist "to master and apply the principles and rules of legal theory for the purpose of discovering God's law." This process may involve: *ijma*, *qiyas*, *istihsan* (the deviation on a certain issue from the rule of precedent to another rule for a more relevant legal reason that requires such deviation), and *istislah* (the unprecedented judgment motivated by considerations of public interest to which neither the Qur'an or the Sunnah explicitly refer).[253] *Urf* (customs, in speech and action, of a particular society that are considered when formulating legal judgments) is also considered. [254]

It has been pointed out that the founders of the classical Islamic schools of law "never claimed finality for their reasonings and interpretations,"[255] and such an important rule (that closing of the gates of *ijtihad*), if indeed true and unweilding, would have been mentioned in the books of *usul* (rules) on Islamic law.[256] One observation supporting the continuity of *ijtihad* is worth noting:

> "If the interpretation of the Holy Qur'an by the commentators who lived thirteen or twelve hundred years ago is considered as the last word on the subject, then the whole Islamic society will be shut up in an iron cage and not allowed to develop along with the time. It will then cease to be a universal religion and will remain a religion confined to the time and place when and where it was revealed."[257]

More importantly, the orthodox view that the doors of Islamic discourse are closed cannot be successfully sustained, in view of the clear Qur'anic directive, encouraging the deep reflection over what it intends to convey:

> "Do they not then earnestly seek to understand the Qur'an, or are their hearts locked up by them?" [258]

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253 *Id.*

254 *Id.*

255 SHAH, *supra* note 169 at 81, citing M. IQBAL, RECONSTRUCTION OF RELIGIOUS THOUGH IN ISLAM 159 (1934).

256 *Id.*, at 81, citing F. RAHMAN, ISLAMIC METHODOLOGY IN HISTORY 149 (1965).

257 *Id.*, at 83, citing R. BEGUM, ALL PAKISTANI LEGAL DECISIONS 1142 (1960).

258 *Id.*, citing the QUR'AN 47:24.

As Niaz Shah urges, the Qur'an responds to the needs of society and its message of universality militates against the closing of the gate of *ijtihad*.[259] These circumstances are evidenced by the Qur'an itself, such as during the time of war, wherein soldiers are allowed to pray on the back of the horse,[260] or the exception allowed in ablution (washing certain parts of the body) during travel and lack of availability of water.[261]

From the foregoing, we begin to see that there is space for Islamic discourse to address emerging needs of society. In the following paragraph, we will find that Islamic discourse, when maximized to its full facility, yields meaningful understanding of contemporary society, while remaining faithful to the foundational beginnings of Islamic philosophy.

2. Best Practices in Islamic Pluralism

Within the context of post-revolutionary Iran, Ziba Mir-Hosseini posits that a genuine renegotiation of women's rights can be realized when "Islam is no longer part of the oppositional discourse in national politics."[262] She argues that once the custodians of the *Shari'ah* are in power, they are confronted with a tension between two main agenda: to "uphold the family and restore women to their 'true and high' status in Islam", and to promote men's *shari'ah* goals.[263] Furthermore, Mir-Hosseini surmises that while *ijtihad* is just as needed in instances where Muslims are called on to justify the underlying wisdom for religious practices when confronted by secularization, it is in the context of tension between and among Islamic principles that genuine Islamic discourse flourishes.[264] Within this form of discourse, scholars are not concerned with rationalizing gender inequalities, but on challenging the hegemony of the orthodox interpretative process, allowing the "women's question" to be fully discussed within the bounds of the *Shari'ah*.[265] Views are defined not in opposition to the West, but in opposition to patriarchal interpretations of the *Shari'ah*.[266]

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259 *Id.*, at 85.
260 *Id.*, citing the QUR'AN 2:239
261 *Id.*, citing the QUR'AN 4:43
262 Mir-Hosseini, *supra* note 33, at 285.
263 *Id.*, at 286.
264 *Id.*
265 *Id.*, at 291.
266 *Id.*

A similar idea has been advanced by Ann Elizabeth Mayer, that comparing Islamic human rights concepts with international law does not mean judging "an institution of a definite traditional culture by alien Western standards."[267] Rather, it entails an examination of "Muslims' reactions to imported legal concepts and to transplants already in place in national legal systems."[268] In so stating, Mayer was arguing against the *cultural relativist* stance, which wrongly assumes that there is "an authoritative, identifiably 'Islamic' cultural position on rights issues corresponding to official rationales offered for opposition to rights," warning against the dangers of "*a priori* generalizations about an Islam necessarily opposed to human rights" as these are not based on "empirical investigation of how Muslims actually think about rights."[269]

The evolution of post-revolutionary Iranian *fiqh* discourse has been summarized as follows:

> "First, by reviewing the divergent positions of the Muslim jurists, the issue is introduced and placed in context; then diverse opinions of the jurists are scrutinised in the light of the Qur'an, *hadith*, *ijma'*, reason and the practice of their time; finally, those which are contrary to the writer/s' position are refuted and those which are not are elaborated. Among the juristic and logical devices that *Zanan's* writer/s use/s, the following can be singled out: distinctions between the divine Law Giver (*Shar'-i Islam*) and the mundane law maker (the Islamic Republic), and between primary and secondary sources of *shari'a*. While primary sources are subjected to innovative interpretations, the secondary sources are debated and at times refuted by the aid of the former. It is argued that time and politics are among the decisive factors in upholding or modifying any *shari'a* rule, even if it is rooted in explicit Qur'anic injunctions, which are in turn divided into two categories: *ilzami*, binding, and *irshadi*, guiding. At the same time the classical divide in the *fiqh* rules between moral and legal is challenged, and jurists are urged to give legal force to the former; finally they are reminded that the time for radical *ijtihad* has come. In this way, *Zanan's* writer/s is/are gradually but surely turning the classical texts on their head, using their own style of reasoning and argumentation."[270]

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267 A.E. MAYER, *supra* note 32, at 10.

268 *Id.*

269 *Id.*, at 9.

270 Z. Mir-Hosseini, *supra* note 33 at 305.

The experience of post-revolutionary Iran perhaps illustrates one of the best modern Islamic approaches to discourse. I am aware that the current discourse is situated in legal pluralism where the CMPL is confined to the particular, while post-revolutionary Iranian discourse occurred in a context of Islamic hegemony. However, there is much to learn from the post-revolutionary Iranian discourse, drawing from at least one parallel between the Philippine and the post-revolutionary Iranian discourses: both arise from debates that are generated by state initiatives to change Muslim personal law to advance women's rights.

E. PARAMETERS FOR REFORMING MUSLIM PERSONAL LAW

While pluralist constitutionalism may provide the processes for managing the hybridity in the Philippine legal system, it is just as important – arguably, even more important – for Muslim women to determine their own rights within a framework that is acceptable to their Islamic beliefs and practices. If one is indeed sincere in fully emancipating them from an unjust and gender discriminatory family law and if relevance will be given to the title, "Magna Carta *of* Women," the reform process should involve the Moro Muslim women themselves, and its substance fuelled by their distinct experiences and aspirations

There are a few Muslim women writers who have "declared their own *jihad* against religious interpretations and histories that they consider to be harmful to Muslim women."[271] Whether consciously or unconsciously, these women situate themselves as *Islamic feminists*.[272] The common thread among these Muslim women is a concern with the empowerment of their gender within a rethought Islam,[273] "[s]aying no to those who claim to speak for them."[274] As Abdullahi an-Na'im argues, it is important for advocates of women's rights that "their own understandings of culture prevail, rather than allow others to impose their understandings,"[275] but within the contours of Shari'ah, both as to the assumptions, methodology, and content.[276]

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271 M. COOKE, WOMEN CLAIM ISLAM: CREATING ISLAMIC FEMINISM THROUGH LITERATURE 57 (2001): Cooke gives an account of the life and works of the notable Islamic feminists Assia Djebar, Fatima Mernissi, Nawa El Saadawi, and Zaynab al-Ghazali, at 64-79.

272 *Id.*

273 M. YAMANI, FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES 1 (1996).

274 *Supra* note 271.

275 A. AN-NA'IM, TOWARD AN ISLAMIC REFORMATION 56 (1995)

276 *Id.*

The term *Islamic feminist* embodies what it means "to have a difficult double commitment: on the one hand, to a faith position, and on the other hand, to women's rights both inside the home and outside."[277] The term *Islamic feminist* has been seen as "oxymoronic",[278] in the sense that it draws together "two epithets whose juxtaposition describes the emergence of a new, complex self-positioning that celebrates multiple belongings."[279] For this reason, Islamic feminists are condemned by conservative Muslims as "being servile imitators of the West who are disloyal to the Islamic tradition."[280]

Notable Islamic feminists critique the global, local and domestic institutions which they consider as harmful to them "as women, as Muslims, and as citizens of their countries and of the world, while remaining wary of outsider's desires to co-opt their struggle."[281] Many Islamic feminists do not feel a need of Western examples of feminism, which they see as alien and exploitative. Contrarily, they see their own path to liberation by returning to the sources of Islam.[282] Specifically, Islamic feminists believe that "[I]slamic dicta bestow complementarity on women, as human beings, as partners to men, and as mothers and daughters . . ."[283]

Shah's survey of various Islamic approaches to human rights[284] reveals the merits of the **interpretative approach** to human rights. She argues that the **secularist approach** ignores pervasive Islamic norms and relinquishes the freedom of religion recognized by international human rights law itself.[285] Moreover, the insistence of a secular approach imposed from the "outside" will not liberate the majority of Muslim women who are deeply religious.[286] The **conservative/non-compatible** *approach*, which disregards the international human rights regime totally, is neither tenable as it ignores the existence of the many areas of compatibility between Islamic human rights standards and

277 M. COOKE, *supra* note 271, at 59.

278 *Supra* note 271.

279 *Id,* at 59.

280 A.E. MAYER, *supra* note 32, at 97.

281 M. COOKE, *supra* note 271 at 61.

282 H. Afhsar, *Islam and Feminism: An Analysis of Political Strategies* in M. YAMANI, FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES 200 (1996).

283 *Id.*

284 SHAH, *supra* note 169, at 3-15. (Shah discussed the four different approaches towards human rights in the Islamic tradition and its relation to the international human rights regime: secular, non-compatible, reconciliatory and interpretive and arguing the merits of the interpretative approach).

285 *Id.*, at 4.

286 *Id.*, at 16.

international human rights norms and values, and refuses the possibility of attaining greater compatibility in areas of conflict.[287] I would add that the conservative approach is impractical in view of the increasing international pressure from international bodies and other states. Finally, the **reconciliatory approach** may not be well received by Muslims because of competing claims to universality, which cannot be sufficiently addressed through a "cross-cultural dialogue."[288]

1. The Interpretative Approach

As Haleh Afshar observes, "[a]lthough different women's groups have fought on different fronts and taken up different issues, without doubt the most successful have been those who have located their political action in the context of Islam and its teachings."[289] The advantages of the interpretative approach are discussed by Shah in the following manner:

> "First, it is an Islamic approach and should be acceptable to Muslims and any result emerging from it will be implementable in Muslim states. It is an internal evolutionary drive, not an alien imposition. To put it simply, it is an '**insider strategy**'. Second, this approach provides answers to the challenges posed by Islamic relativists and supports the universalists' drive. **It accommodates the views of the relativists who argue that every culture and religion has its own rights system, as the change would come from within Islamic culture. The theme of reconciliation to international standards in this approach advances the argument of the universalists as to the universal application of human rights.** The foremost advantage of the interpretive approach is that **it is achievable because Islamic law can be reformed through the mechanism of *ijtihad*** . . . It is practical and has the virtue of realism. Muslims will listen to and follow what is based on the Koran and the Sunnah."[290] (Emphasis supplied)

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287 *Id.*, at 15.

288 *Id.*

289 *Supra* note 282..

290 SHAH, *supra* note 169, at 16.

In committing Nietzchean philosophy to the task of re-interpreting the "soul"[291] of Islam through the Qur'anic text, Jackson makes the following observations:

> "To determine the soul of Islam is so important, for it addresses the very essence of what it means to be a Muslim and, as a consequence of that, how Muslims should respond to the world they find themselves in. More than that, however, it is important for the non-Muslim to respond to *that* Islamic response! When two worlds, two souls, confront each other there is always potential for conflict, likewise there is always potential for mutual understanding. . . The crux of the issue is the extent to which the 'two worlds' are perceived to be so incompatible that conflict is more likely than peace. In such a case we are confronted with a series of options: **first, to accept the inevitability of conflict** (an option that is surely the least desirable). **Second, to accept that the differences are great and that communication and cooperation is, at best, extremely difficult, resulting in maintaining a respectful distance. Third, to attempt to find those areas in which there is some commonality—for example, in doctrinal matters such as the belief in one God, or common ethical codes—and focus on those. Fourth, to consider the possibility that although religious differences may make inter-faith dialogue a challenging prospect, this should not result in political conflict as this has little to do with how the *faiths* engage in dialogue.** It is this fourth option that I will argue is most in line with the psyche of Islam." [292] (Emphasis supplied)

The interpretative approach addresses the need to locate a justification for human rights from within the sources of the *Shari'ah* (the Qur'an, the *sunna* and the *hadith*), recognizing that "most [Muslim] women tend to be highly religious and would not want to act in contradiction to their faith."[293] Indeed, the theological foundations of the inferior treatment of women in Islamic society and law must be adequately dealt with, otherwise Muslim women cannot be freed from the burden of guilt and fear arising from the power and depth of religion.[294] Thus, Shah posits

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[291] R. JACKSON, NIETZSCHE AND ISLAM 28 (2007). By "soul", Jackson is referring to the Nietzschean concept of essence or psyche.

[292] *Id.,* Jackson's observations are premised on the argument that Friedrich Nietzsche is not the standard bearer of atheism. Contrarily, Jackson sees Nietzsche and his philosophy as deeply imbued with religiosity. Jackson also observes that although Nietzsche rarely spoke specifically on Islam, his admiration for it as a religion is in sharp contrast to his criticism of Christianity.

[293] SHAH, *supra* note 169, at 16.

[294] *Id.*.

that the way to resolve the internal conflicts among these women is to build a solid Muslim feminist ideology which clearly shows that "**Islam not only does not deprive them of their rights, but in fact demand these rights for them.**"[295]

Shah's main argument is centered on the goal of achieving greater compatibility between Islamic conception of human rights and international human rights law by means of re-interpreting Qur'anic verses (which form the foundation of state-practised gender discriminatory legal principles) within their proper context, and reforming gender-biased Islamic statutory laws to such re-interpretation.[296] What does the re-examination of religious text with history mean? As Miriam Cooke succinctly explains:

> "It entails **study of the life of the Prophet, of the many strong women around him, and of his found *umma*** in the seventh century, and also **direct engagement with the foundational texts, rather than merely reaction to their interpretations**. It involves **looking at the context in which the Qur'an was revealed and these texts were written**. Finally, it means **applying this understanding to the present so as to question the ways in which Islamic knowledge has been produced.**"[297] (Emphasis supplied)

Shah summarizes the task into three intersecting dimensions:

1) 7th century historical context [of Islamic hegemony];
2) social context (Arab society); and
3) the Qur'anic context.[298]

A re-interpretation of Qur'anic context, in turn, turns to a two-fold inquiry:

1) When and why was a verse revealed?; and
2) What is the overall approach (intention) of the Koran towards women?[299]

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[295] *Id.* (One might note that Shah's proposition is similar to the connotation attached to the title of the Magna Carta of Women. It has been advanced that the use of the preposition "of" instead of "for" as it was originally proposed, demonstrates that the rights guaranteed under the said law are not bestowed upon the women, but are claimed by women as a matter of right.)

[296] *Id.*,at 14.

[297] M. COOKE, *supra* note 271 at 62.

[298] SHAH, *supra* note 169, at 14.

In sum, pre-Islamic conceptions of gender and sexuality must be re-examined in order to understand the foundation of Qur'anic revelations.[300] The re-reading of these scriptures is fuelled by the need to search for solutions or "Islamic alternatives" for a modern problem, i.e., the changed status of women and the need to accommodate their egalitarian aspirations. Briefly, one will discover, for instance, that the Qur'an's disposition on women considerably lean towards the enhancement of their rights, status, and dignity against an environment where women were devalued.[301] Among the notable reforms are the prohibition on female infanticide, restriction on polygamy, curbing of abuses of divorces by husbands, recognition of the right of women to inherit and to own the dower.[302] It will also be seen that the Prophet accorded respect and received much support from strong women in his life. For instance, Khadija, the first convert to Islam and the first wife of the Prophet, represents a powerful representative of independence as well as being a supportive wife. She had first employed the Prophet as her trade representative and later asked him to marry her. A'isha, on the other hand, is renowned among Sunnis as one of the most reliable interpreters of Islamic law. She is also known for her political leadership and remarkable warriorship. Thus, it has been said that if fundamentalism meant returning to the golden age of Islam, Muslim women are quick to add that "they have much reason for optimism and much room for [maneuver]."[303]

As Shah keenly observes:

> "The intention of the Koran was to uplift the status of woman gradually, not to relegate women to social and legal subordination as believed and legally practised in much of the Islamic world today. To achieve gender equality, this Koranic spirit and intention must be recaptured through the re-analysis of the pertinent verses of the Koran in their proper context."[304]

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299 *Id.*

300 B. Stowasser, *The Status of Women in Early Islam*, in FREDA HUSSAIN, MUSLIM WOMEN 11-43 (1984); Freda Hussain and Kamelia Radwan, *The Islamic Revolution and Women: The Quest for the Qur'anic Model*, in FREDA HUSSAIN, MUSLIM WOMEN 44-70 (1984); Also *see* the historical approach of LEILA AHMED, WOMEN AND GENDER IN ISLAM: HISTORICAL ROOTS OF A MODERN DEBATE (1992), FATIMA MERNISSI, WOMEN AND ISLAM: AN HISTORICAL AND THEOLOGICAL ENQUIRY (1991).

301 A.E. MAYER, *supra* note 32, at 94, citing Faslur Rahman, The Status of Women in the Qur'an in Guity Nashat (ed.), Women and Revolution in Iran 38 (1983); Also see JAN GOODWIN, PRICE OF HONOR: MUSLIM WOMEN LIFT THE VEIL OF SILENCE ON THE ISLAMIC WORLD 30 (1995).

302 *Id.*, citing Faslur Rahman, The Status of Women in the Qur'an in Guity Nashat (ed.), Women and Revolution in Iran 38 (1983).

303 H. Afhsar, *supra* note 282 at 199-201.

304 SHAH, *supra* note 169, at 14.

Thus, an interesting question has been asked: "How is it then that Islam, the only religion to outline formally the protection of women's rights, is also the faith most perceived to oppress women?"[305] I believe answering this question is the first step towards fully emancipating Moro Muslim women.

2. Defending the Interpretative Approach

Any attempt to suggest an alternative interpretation of the Qur'an contends with several oppositions. Apart from the challenge of balancing the universalist claims of secularists and the adherents to the classical Islamic schools of Qur'anic interpretation, one has to surmount the *transhistorical* worldview of Islam and extensively analyze the *historical* Islam[306] to substantiate the process.

I am aware of the universalist argument that religious scriptures can be interpreted in many different ways, and the emerging schools of thought may lead to a conflict, leading to an impasse.[307] Jackson characterizes the resulting danger as *convenient subjectivism* and elaborates the concept as follows:

> "If it is *convenient* to interpret Islam as democratic, then it is democratic, if it is *convenient* to interpret Islam as supporting women's rights, then it is supporting women's rights. On the other hand, going down the fundamentalist road in the search for singular truths lacks intellectual credibility.
>
> How much freedom do we have to interpret the meaning of a tradition? The temptation is strong, as an intellectual exercise, to pluck out a few selective *ayats* from the Qur'an, a few convenient *hadiths,* a series of historical precedents and then build up an argument for, say, Islam's compatibility with animal rights. It would certainly be a *hard* task but not, one suspects, impossible."[308]

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305 J. GOODWIN, *supra* note 301 at 34.

306 *See* note 291, *supra.* According to Jackson, "transhistorical Islam" refers to those societies that perceive themselves to be moving towards a pure Islamic state, and therefore see any attempt to move towards the secular as an enemy in this cause. "Historical Islam," on the other hand, recognizes the impossibility, or the impracticality, or the undesirability of either the two extremes of pure Islamic state, or the secular state, and seeks for something 'in-between'. It is therefore the "transhistorical Islam" that confronts any attempt to suggest a re-orientation in reading the Qur'an.

307 SHAH, *supra* note 169, at 16.

308 JACKSON, *supra* note 291 at 73.

However, as Jackson posits, one may argue that the universalist view of international human rights standards itself advances a conception of a singular truth, one that is and can be the subject of multiple interpretations.[309] It can also be argued that it is precisely the universalist insistence on imposing international human rights standards upon Muslims that poses greater probability of intensifying the conflicting claims to universality and stifles any genuine attempt to harmonize the two legal orders.[310] Moreover, the universalist argument suffers from internal dissonance inasmuch as international human rights law itself recognizes the choice of Muslims to live by Islamic standards.[311]

The argument that the interpretative approach leans towards fundamentalism[312] is neither compelling, considering that the approach is driven by a strong feminist sentiment to claim rights which are due to women by Islam itself.[313] Neither can it be successfully argued that the commitment to divine scriptures amounts to a "tacit consent to patriarchy."[314] Contrarily, the reinterpretation "dismantles patriarchy and attempts to build a solid feminist basis for an Islamic tradition of women's rights."[315] As Abdullahi an-Na'im maintains:

> "**Islamic laws are not top-bottom and unwielding; rather, they are democratic, emerging out of a community consensus** that is built upon individual appreciation of God's word, without discrimination as to the identity or status of the individual interpreter."[316] (Emphasis supplied)

Likewise, the process of reinterpretation has to contend with fundamentalists. Fundamentalism, for the twentieth-century Islamists, is "a return to the roots and a recapturing of both the purity and the vitality of Islam as it was at its inception."[317] For these revivalists, "[i]t is in the domain of interpretation and adjustments to history that Islam is deemed to have become degraded."

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309 *Id.*
310 *Id.*
311 *Id.*
312 SHAH, *supra* note 169, at 16 citing Ghazala Anwar (1999).
313 *Id.*
314 *Id.*
315 *Id.*
316 A. AN-NA'IM, *supra* note 275 at 56.
317 H. Afhsar, *supra* note 282 at 197, citing M. MOMEN, AN INTRODUCTION TO ISLAM: THE HISTORY AND DOCTRINES OF TWELVER SHI'ISM (1985).

It will be noted that the reinterpretation of the Qur'an is not a new undertaking. The Qur'an has been interpreted and re-interpreted from the time of Revelation to the present. While most interpretation were undertaken by male *ulama*, women have likewise been active in their own right, commonly drawing attention to important female figures in pre- and early Islamic polity.[318] Ultimately, the task of urging a revival of Islamic scholarship is necessary, in order to address the unique position of Moro Muslim women at the intersection of gender and religion.

As Jackson opines, Islam can only be re-imagined from the inside:

> "**The threat to Islam does not come from the West, nor from secularisation. It comes internally, from its own perception of itself.** By creating a Transhistorical Islam, a vision of Islam as pure, pristine and all-encompassing, an ideological wall is formed which can only be broken down from the inside. We have seen how a number of Muslim scholars are beginning to call for an 'Islamic Reformation', of the **need to realise that the Transhistorical is damaging, impractical and ultimately 'un-Islamic'.** (Emphasis supplied)[319]

As one will see, the strong opposition towards a reinterpretation of Islamic principles can itself be interpreted within the context of transhistorical Islam.

V. TESTING THE FRAMEWORK: PLURALIST CONSTITUTIONALISM AND MORO MUSLIM WOMEN'S RIGHTS

I refer to Holbrook's work as a valuable starting point of my analysis of how selected pluralist devices can be used to benefit women, both Muslim and non-Muslim, in line with the mandate of the MCW to eliminate all forms of discrimination against women. In so doing, I will present a different analysis of the *Bondagjy* cases and introduce some insight on other cases. For these purposes I will consider only three of Berman's nine identified pluralist devices: dialectical legal interactions, margins of appreciation, and jurisdictional redundancy.

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318 M. YAMANI, *supra* note 273 at 2.

319 JACKSON, *supra* note 291 at 135.

A. DIALECTICAL LEGAL INTERACTIONS

Sadain's proposition noted earlier[320] as well as the Islamic principles of *Shura* (Consultation) and *Khilafut* (vicegerency of man) approximate the dialectical legal interaction identified by Berman and analyzed by Holbrook in the Philippine approach to legal pluralism. This practice is underlined by genuine interactions between various state actors that takes on "a dialectical character rather than hierarchical or formal", such as those undertaken under principles of comity.[321]

In relation to the present issue, dialectical discourse would involve – at least at the first level – an extensive consultation with the *ulama* and the Moro Women. The UNIFEM is definitely on track, having already engaged in discursive consultations with Moro Muslim women[322], even before the promulgation of the MCW. In fact, one might surmise that the MCW and the identification of the problematic substantive areas in the CMPL was partly inspired by the dialectical discourse with Moro Muslim women.

The process of drawing insights for purposes of legislation or adjudication should likewise involve dialectical discourse on two levels: internal and cross-cultural. For internal discourse, An-Nai'm believes that internal validation is necessary in all cultural traditions. [323] As to cross-cultural discourse, An-Nai'm opines that "from a methodological point of view, all participants in their respective internal discourse can draw on each other's experiences and achievements."[324] Moreover, cross-cultural dialogue will "enhance understanding of, and commitment to, the values and norms of human dignity shared by all human cultures, thereby promoting a common moral and political foundation for international human rights standards."[325] An-Nai'm emphasizes that:

> "[T]he proposed approach is **methodological and not substantive**: it prescribes a **methodology of internal discourse and cross-cultural dialogue on reciprocal, dynamic, and sensitive terms**, but it does not otherwise anticipate or restrict the arguments to be used, or the manner in

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320 *Supra* note 173.

321 P. Berman, *supra* note 47 at 1197; J. Holbrook, *supra* note 43, at 432.

322 *Supra* note 3.

323 A. An-Na'im, *State Responsibility to Change Religious and Customary Laws* in REBECCA J. COOK (ED.), HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 167, 174 (1994)

324 *Id.*

325 *Id.*

> which discourse(s) and dialogue(s) are to be conducted in each situation."[326] (Emphasis supplied)

Dialectical legal interaction, however, is not limited within the arena of participative processes in legislation or execution. It also finds application in the judicial process of consulting and applying the different substance and sources of law. In Holbrook's analysis, he made the following observations in the manner in which the Supreme Court decided *Bondagjy I*:

> "The line of reasoning adopted by the Supreme Court in settling the matter is instructive on the issue of dialectical discourse. Although the Court could have simply overturned the shari'a court's holding on the jurisdictional basis that Ms. Artadi was no longer a Muslim, it instead adopted a deferential approach that attempted to accommodate both Christian and Muslim normative interests. With respect to Ms. Artadi's parental fitness, the Court found "that the evidence presented by [Mr. Bondagjy] was not sufficient to establish [Ms. Artadi's] unfitness according to Muslim law or the Family [Civil] Code." Although the Court then applied the Family Code's standard for parental fitness because Ms. Artadi was no longer a Muslim, it softened its reasoning by stating: 'Indeed, what determines the fitness of any parent is the ability to see to the physical, educational, social and moral welfare of the children...' Importantly, the Court refrained from commenting, either negatively or positively, on the shari'a judge's finding of Ms. Artadi's "moral depravity" under Muslim law."[327]

Similarly, the Court adopted a hybrid approach in dividing custody between the parents, drawing on both the Family Code and P.D. 1083 as it applied a variation of the "best interests of the child" test. As analyzed by Holbrook:

> "The welfare of the minors is the controlling consideration on this issue. . . . Article 211 of the Family Code provides that the father and mother shall jointly exercise parental authority over the persons of their common children. Similarly, P.D. 1083 is clear that where the parents are not divorced or legally separated, the father and mother shall jointly exercise just and reasonable parental authority and fulfill their responsibility over their legitimate children."

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326 *Id.*, at 174-75.

327 J. Holbrook, *supra* note 43, at 435.

> Noting that it did "not doubt the capacity and love of both parties for their children, such that they both want to have them in their custody," the Supreme Court awarded primary physical custody to Ms. Artadi with weekly visitation by Mr. Bondagjy.

Of course, its consideration of P.D. 1083 notwithstanding, it could be argued that the Court actually disregarded the normative values expressed by the shari'a court regarding what is and is not appropriate moral conduct for a Muslim mother, cloaking a sovereigntist outcome in pluralistic language. Two counterbalancing points merit consideration. First, by at least discussing P.D. 1083, the Court rejected normative hegemony in favor of a dialectical methodology that in and of itself, "presupposes acceptance of certain values." If the Court's only concern was in reaching a certain normative outcome, it could have chosen to disregard the dialectic altogether. Instead, it conducted an overlapping discussion of both the Family Code and P.D. 1083, thereby indicating its acceptance of "the principles underlying the values of . . . pluralism itself." Second, it should be remembered that a pluralist approach to legal hybridity does not mandate a particular normative outcome, or require participants to suppress their own normative beliefs. As Berman states, "the claim is only that the independent values of pluralism should always be factored into the analysis, not that they should never be trumped by other considerations." In Bondagjy, the Supreme Court acknowledged that Christians and Muslims share the same social space, engaged in equivalent discussions of both the Family Code and the Muslim Code (even though it ultimately found the Family Code more applicable because Ms. Artadi was no longer a Muslim), and sought to reach a normative outcome that embraced the values (if not the desired ends) of both normative communities.[328]

Although I agree, to a large extent, with Holbrook's analysis, I draw attention to the legal problem presented by the Supreme Court's application of the Family Code in the *Bondadgy I*, in view of Article 179 of the Code of Muslim Personal Law, which regulates the effect of change of religion on existing obligations and liabilities, thus: "[t]he change of religion by a Muslim shall not have the effect of extinguishing any obligation or liability whatsoever incurred prior to said change." Although the provision pertains to obligations and liabilities,

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328 *Id.*, at 436-7.

arguments against the Supreme Court's decision can be built on the premise that parental authority is not only a right, but also an obligation, especially as it relates to the "best interest" of a child. However, this is an issue that deserves a different discussion outside the scope of this paper, and does not detract from the clear import of Holbrook's discourse – that dialectical legal interaction is a pluralist device that can be employed to help improve the status of women (even though the case is not concerned with a Muslim woman, as Artadi had already converted back to Catholicism).

I also find *Bondagji I* valuable in illustrating the different conceptions of morality as well as of the definition of the "best interest of the child" in the determination of the case. In this case, the main issue was whether a Christian woman who converted to Islam before her marriage to a Muslim under Islamic rites, and converted back to Catholicism upon their separation, was still bound by the moral laws of Islam in the determination of her fitness to be the custodian of her children. The Shari'ah District Court found petitioner unworthy to care for her children, declaring that:

> "Under the general principles of Muslim law, the Muslim mother may be legally disentitled to the custody of her minor children by reason of 'wickedness' when such wickedness is injurious to the mind of the child, such as when she engages in '*zina*' (illicit sexual relation); or when she is unworthy as a mother, and a woman is not worthy to be trusted with the custody of the child who is continually going out and leaving the child hungry."

The Supreme Court granted custody to the mother, applying the standards laid down under the Family Code, "in the best interest of the children" and also, since she was then no longer a Muslim. The Court stated that:

> "Under the Family Code, the standard in determining fitness of any parent is "the ability to see to the physical, educational, social and moral welfare of the children, and the ability to give them a healthy environment as well as physical and financial support taking into consideration the respective resources and social and moral situations of the parents."

It will be observed that the Supreme Court's silence on the manner in which the Shari'ah Court defined the standards of morality for a mother in Islam was indirectly addressed by turning to standards that do not define the morality of a

woman, but focuses on the role of parents – mother and father alike – in rearing a child. Although custody was eventually granted to the mother, the decision was based on egalitarian standards.

B. MARGINS OF APPRECIATION

The doctrine of *margin of appreciation* is premised on the idea that "each society is entitled to certain latitude in balancing individual rights and national interests, as well as in resolving conflicts that emerge as a result of diverse moral convictions."[329] According to Malcolm Shaw, the principle of "margin of appreciation" is an approach commonly applied by the European Court of Human Rights (ECtHR) in according state parties the latitude to interpret its own obligations as party to the European Convention on Human Rights.[330] Under this approach, the ECtHR retains a supervisory role and exercises restrain in matters falling within domestic spheres.[331] For Berman, the doctrine of margin of appreciation accommodates a limited range of pluralism. Although it is does not allow domestic courts to altogether disregard the supranational decision, it allows a certain degree of local variation.[332] Margins of appreciation enhances legal pluralism "by allowing subordinate jurists to adapt governing norms to local custom", while at the same time "allowing legal supervisors to give deference to local adaptations which are not fundamentally incompatible with the overarching scheme."[333]

Margins of appreciation, in the present discourse, will involve a margin of leeway on the part of the State in interpreting the nature of its undertakings under international human rights law and constitutional law – whether in the area of women's rights, minority protection or right to self-determination of the Moro Muslims. Margins of appreciation in the context of the process of amending the Code of Muslim Personal Law would also mean extensive consultation on the part

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329 O. Bakircioglu, The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases, 8 GERMAN L.J. 712 (2007), citing E. Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards,* 31 INT'L LAW AND POLITICS 843 (1999).

330 M. SHAW, *supra* note 57, at 356.

331 *Id.*

332 P. Berman, *supra* note 47, at 1202.

333 J. Holbrook, *supra* note 43, at 437, citing L. Helfer & A. Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 316 (1997).

of the policymakers, and the drafting and proposal of amendments, with due regard to the Muslim Moro women's own appreciation of their rights in Islam.[334] Ultimately, it will be the legislature – the supranational decision-making body – that will enact the final version of the amendments, but the approach would allow a "local variation" or a customized version of the egalitarian rights of Muslim women as dictated by Islam itself.

The principle of margin of appreciation also involves judicial discretion, both as to the Shari'ah judges, as well as the appellate courts and the Supreme Court itself. As Bakircioglu maintains:

> "[T]he doctrine is **analogous to the concept of judicial discretion**, where a judge, in line with certain constraints prescribed by legislation, precedent or custom, could decide a case within a range of possible solutions. The role of discretion is indispensable not only for bridging the gap between the law and changing realities of dynamic social organisms, but also for **answering the particular questions of a given case in the absence of overall enacted or case law**. In other words, judges are entitled to exercise discretion to make fair decisions in a specific case, without being locked into a formula that might not be applicable to every scenario. (Emphasis supplied)[335]

I submit that the foregoing concept of margin of appreciation applied in the adjudication of Muslim personal law cases should be carried out alongside, within, or as part of the Islamic creative process of reasoning: *Ijtihad.* According to Mastura, conflicts of law inhere in legal pluralism, imposing upon courts the challenge of determining which of several bodies of law controls in a particular case.[336] In fact, under Section 4 of the CMPL, *Shari'ah* judges who are charged with the construction, interpretation and application of the CMPL enjoy a broad leeway of discretion in considering the primary sources of Muslim law, and in consulting the standard treatises and works on Muslim law and jurisprudence. Likewise, the Civil Code states that "[n]o judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the law."[337] Holbrook cautions,

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334 *See* CONST., art. 14, §15 and 16 of the on the participative role of people's organizations in the formulation of policies and plans affecting them.

335 *See* note 329, *supra.*

336 M. Mastura, *supra* note 22, at 473.

337 CIVIL CODE, art. 9.

however, the element of discretion as exercised should not be fundamentally incompatible with the overarching legal scheme.[338]

Yet as Mastura points out, the canon of construction in Islamic law is more complicated than Section 4 of the Code suggests.[339] Indeed, *Shari'ah* judges are empowered to resolve questions relating to jurisdiction, choice of applicable law, rules of construction, conception of public policy and common good, and to resort to other sources of Muslim law may be answered.[340] However, the lack of qualified lawyers and judges resulting from the weak education system on Islamic Jurisprudence has weakened the efficiency and effectiveness of the *Shari'ah* courts.[341] Significantly, this institutional deficiency undermines the effective pursuance of *ijtihad,* which is essential to the application and development[342] of the *Shari'ah* in the Philippines.

For instance, in an administrative complaint against the presiding judge of the First Shari'ah Circuit Court of Jolo, Sulu, Judge Mustafa was found guilty of gross inefficiency by the Supreme Court, for his failure to resolve or decide the case submitted to him for decision within three (3) months, as mandated by the Constitution. Judge Mustafa reasoned that his delay was caused by the difficulty he encountered in reconciling the provisions of the Code of Muslim Personal Law, and those of the Qur'an and the *hadith.* He explained that it took him a considerable period of time to reflect, ponder, inquire, and seek assistance from *ulama* who adhere to the basic teachings of the Holy Qur'an, on the one hand, and fellow judges of the Shari'ah Courts and regular Courts who were more inclined to follow the dictates of the Code.[343]

On the flip side, the exercise of judicial discretion was demonstrated in the case *Malang v. Moson.*[344] In that case, the Supreme Court exercised its sound discretion in not considering the custom of *sapancharian* on property acquired

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338 J. Holbrook, *supra* note 43, at 437.

339 M. Mastura, *supra* note 22, at 464.

340 See, e.g., *Montaner v. Shari'ah District Court*, GR. No. 174975, where the Supreme Court upheld the jurisdiction of the Shari'ah District Court and its authority to determine whether it has jurisdiction, which required an *a priori* determination that the deceased was a Muslim.

341 *Supra* note 91.

342 CIVIL CODE, art. 8: "Judicial decisions applying or interpreting the laws shall form a part of the legal system of the Philippines."

343 *Arap v. Mustafa*, A.M. No. SCC-01-7, March 12, 2002.

344 G.R. No. 119064, August 22, 2000.

through the joint efforts of the husband and wife, judicially recognized by the Muslim courts of Malaysia and Singapore and also allegedly practiced as custom by Muslims in Mindanao. Instead, the Supreme Court ruled that the Civil Code shall apply. Though not explicit, one can surmise from the over-all tone and reasoning of the Supreme Court in that case (e.g., reliance on precedent criminal cases of bigamy) that the Supreme Court intended not to sanction the multiple marriages of the deceased whose estate was then under dispute. After all, it will be noted that the customs of Muslims have the binding force of law, falling under Article 37 of the CMPL.[345] Granting that the Civil Code were in fact the applicable law, the Supreme Court seems to have characterized the multiple marriages of the deceased as a custom that is "contrary to law", and which was not countenanced, pursuant to Article 11 of the Civil Code.[346] As can be seen from this example, margins of appreciation can be used to advance policy objectives that benefit marginalized women.

C. JURISDICTIONAL REDUNDANCIES

Jurisdictional redundancies arise when more than one legal authority claim jurisdiction over the same act or actor.[347] It is often viewed as a problem, from which questions of jurisdiction, forum shopping and *res judicata* may arise.[348] However, jurisdictional redundancy may also be seen as "a necessary adaptive feature of a multivariate, pluralist legal system," which allows a controversy to be resolved through a **"nuanced negotiation – either explicit or implicit"**[349] – between the competing legal systems, thereby facilitating "a greater possibility for error correction."[350]

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[345] Pres. Dec. 1083, art. 37: "How governed. — The property relations between husband and wife shall be governed in the following order: (a) By contract before or at the time of the celebration of marriage; (b) By the provisions of this Code; and (c) By custom."

[346] CIVIL CODE, art. 11. Customs which are contrary to law, public order or public policy shall not be countenanced.

[347] P. Berman, *supra* note 47 at 1210; Also see J. Holbrook, *supra* note 43, at 441.

[348] *Id.*

[349] P. Berman, *supra* note 47 at 1210.

[350] *Id.*, citing Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 Wm. & Mary L. Rev. 639 (1981).

This "error correction" device is illustrated by *Bondagjy II*. In that case, Artadi made three attempts to dissolve her marriage: divorce by *faksh* in the Shari'ah Circuit Court of Isabela, Basilan; declaration of nullity of marriage in the Regional Trial Court of Muntinlupa City; and another divorce by *faksh* in the Shari'ah Circuit Court of Marawi City. The Regional Trial Court dismissed the action for declaration of nullity of marriage on the grounds of lack of jurisdiction over the persons of the parties, they being Muslims at the time of the marriage, and *res judicata* in view of the above-said dismissal order of the Third Shari'a Circuit Court.[351] The Supreme Court eventually found that the later divorce by *faksh* does not constitute *res judicata*, due to different causes of action arising from different periods of time contemplated. For analogous reasons, the earlier divorce by *faksh* does not constitute *res judicata* to the declaration of nullity of marriage, because the remedies are intended to address different causes of action.[352] It is interesting to note that the difference in causes of action and the resultant jurisdictional redundancy arose from the very fact that different legal regimes are involved – the Family Code on one hand, and the CMPL on the other hand. Sabrina Bondagjy was therefore allowed to pursue the remedies against her husband in both civil and Shari'ah Courts.

Another notable example of jurisdictional redundancy is the case of *Tamano v. Ortiz*.[353] In this case, the Supreme Court ruled that the Regional Trial Court was

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[351] I agree with the Regional Trial Court's dismissal of the case on the ground of lack of jurisdiction over the persons of the parties, inasmuch as they were Muslims at the time of the marriage. However, the dismissal on the ground of *res judicata* is rather problematic. The Supreme Court, in deciding that case, also considered whether or not respondent wife failed to adduce documentary evidence to prove her claim that petitioner husband failed to perform his obligations as required under Muslim law, the Supreme Court stated that "under Muslim Procedural Law, the Shari'a court is mandated to adhere to sources of Muslim Law relating to the number, status or quality of witnesses, and evidence required to prove any fact, and to apply the Rules of Court only suppletorily." The Court went on to say that "[b]y and large, jurisprudence on Muslim Law recognizes three kinds of evidence: first, *shahadah* or testimonial evidence; second, *igrar* or admission; and third; *yamin* or oath. Documentary evidence is considered outside the mode of proofs . . . but at times accepted as substitute for oral testimony." The Court then applied Muslim procedural law which places a premium on testimonial evidence as mode of proof and held that petitioner's contention that respondent failed to adduce documentary evidence to prove her claim did not lie. What the Court failed to appreciate, however, is that in Muslim law, the *shahadah* is accorded the highest evidentiary weight, because of the underlying assumption that no Muslim would utter a lie under pain of Allah's wrath. As the wife was no longer a Muslim at the time of the presentation of evidence, the fear of Allah's wrath is no longer present, and consequently, the probative value of her testimony should not have been appreciated under the Muslim rule on evidence.

[352] But see *Malion v. Alcantara*, G.R. No. 141528, October 31, 2006.

[353] *Tamano v. Ortiz*, G.R. No. 126603, June 29, 1998.

not divested of its jurisdiction to hear and try the case despite the allegation that Zorayda Tamano and the deceased were likewise married in Muslim rites. In so doing, the Supreme Court effectively allowed Zorayda Tamano to pursue the civil complaint for the declaration of nullity of her deceased husband's marriage to Estrellita Tamano.

In both cases, it will be seen that jurisdictional redundancy promoted the benefit of the woman in a Muslim marriage.

VI. CONCLUSION

I have sought to demonstrate the need to accord Moro Muslim women *lex specialis* treatment, inasmuch as they are vulnerable to at least two layers of discrimination: gender and religion. Their distinct experiences, beliefs and aspirations cannot be muted in the name of emancipation. The idea itself is self-defeating, and confines Moro Muslims to the margins both as women and as Muslims. The amendment and/or repeal of the CMPL also implicates wider religious and political concerns. The Muslim religious community (to which Moro Muslim women is a part), the *ulama*, and their political leaders will inevitably oppose any form of intrusion in what they consider as falling within the religious sphere and/or the right to self-determination. On the other hand, the State has a duty to ensure that the exercise of Islam and the propagation of the Moro culture do not impinge upon the fundamental human rights of the minority – the Moro Muslim women.

I could have attempted to design a Moro Muslim woman's right scheme within the contours of Islamic philosophy, one that mirrors, complies, or at least approximates, universal human rights standards. To be candid, I am limited in knowledge, skill and authority to embark upon such a grand endeavour, and I do not wish to undermine the rigid process I am advancing by scraping-off the tip of the wrong iceberg. My *caveat* is not a useless apology; rather, it reflects an important premise in my paper: that Moro Muslim women are confronted with an intense tug-of-war between guilt and egalitarian aspirations, and a Moro Muslim woman's rights scheme cannot easily be fuelled by substantive ideas by means of extensive borrowing or an apologist stance. This dilemma plagues the harmonization process and the harnessing of constructive diversity, and stunts the

full emancipation of Moro Muslim women. Moreover, it is precisely my thesis that the starting point of any reform in the area of religious and customary law is discourse. The traditional conflict-of-law paradigm of conflict resolution – a methodology that does not take into account the substantive conflict of law beyond legal exceptions – is clearly insufficient. Furthermore, the notion of sovereignty, which can be used to justify the sovereign right to determine its own policy choices, is clearly ineffective when juxtaposed against what can be considered a larger, more pervasive Sovereign that Moro Muslims are probably willing to die for: Allah (God).

In this paper, I have set forth a methodology, or at least some devices, for managing the process of discourse of legislative and judicial reform in the appreciation, interpretation and application of the provisions of the CMPL, in light of the overarching policy pronouncements in the MCW. This discourse occurs within the context of the countervailing claims of sovereigntist territorialism and universalism on one hand, and legal pluralism on the other hand. In charting the process of reform, it should be emphasized that all these legal cultures contemplate some form of "communities of judgment", "consensus", or "consultation." It is in this common ground that I advance the concept of "pluralist constitutionalism," a framework that allows legal pluralism to flourish, diversity to be managed, and systemic errors to be corrected through the various pluralist devices of a constitutional democracy. The idea does not so much detract from Desierto's idea of "universalist constitutionalism", which she considers to be an approximation of Sweet's "global legal pluralism." Further, the pluralist devices find some form of parallelism with Islamic principles and processes. It is therefore submitted that the devices of pluralist constitutionalism, when genuinely adopted and adhered to, will facilitate a rich discourse – both internal and cross-culture – which will hopefully create a meaningful understanding of what Islam itself demands for Muslim women. To empower Moro Muslim women, the process should be fuelled by their own distinct experiences and beliefs.

Admittedly, the discourse will be complex, and the process will inevitably be ignored, obstructed, limited, or subverted by various stakeholders. Despite difficulty, discourse is the only alternative to the estrangement of Muslim women, the non-fulfilment of our international obligations and constitutional guarantees, or worse, the eruption of violent conflict arising from what may be perceived as the forcible imposition of alien norms.

As Holbrook points out, a pluralist framework can only be effective if the parties to the process ascribe to pluralist values and are sincere in their efforts to reach a mutually-acceptable compromise. On this note, I emphasize the need for the participants involved in the reform of the CMPL to embrace pluralist constitutionalism, an idea that remains faithful to the universalist principles embedded in the 1987 Constitution, and finds sanction within Islam itself.

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