

# ISLAMIC CONVERSION AS ALTERNATIVE TO CIVIL DIVORCE: ADDRESSING TENSIONS BETWEEN FREEDOM OF RELIGION AND THE INVIOABLE INSTITUTION OF MARRIAGE\*

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*'Haven't you read,' he replied, 'that at the beginning the Creator 'made them male and female,' and said, 'For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh'? So they are no longer two, but one. Therefore what God has joined together, let man not separate.'*

– Matthew 19:4-6<sup>1</sup>

*"Of all things allowed, divorce is the most hateful in the sight of Allah."*

– The Prophet Muhammad<sup>2</sup>

## I. INTRODUCTION

At the heart of a constitution are values shared by the people of a nation. The constitution, as the fundamental law, is the expression of the

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<sup>1</sup> *Matthew 19:4-6* (New International Version).

<sup>2</sup> BENSAUDI ARABANI, SR., COMMENTARIES ON THE CODE OF MUSLIM PERSONAL LAWS OF THE PHILIPPINES WITH JURISPRUDENCE AND SPECIAL PROCEDURE 425 (2<sup>nd</sup> ed. 2011), *citing* Sunan Abu Daud, XIII:3. *See also* AMIER BARA-ACAL & ABDULMAJID ASTIH, MUSLIM LAW ON PERSONAL STATUS IN THE PHILIPPINES 141 (1998).

sacred convictions of a body politic imbued with “legal guarantees”<sup>3</sup> in order to animate their deepest desires to achieve individual and collective freedom.

The 1987 Philippine Constitution regards religious freedom as a value of the highest order. It recognizes and guarantees the fundamental nature of the freedom of an individual to espouse a personal spiritual conviction and belief. The State is not only enjoined to respect religious freedom, but is required to hurdle the threshold of compelling interest in order to legitimately regulate this valued freedom. James Madison, the principal author and sponsor of the First Amendment of the United States Constitution,<sup>4</sup> articulated this fundamental right in this wise:

[W]e hold it for a fundamental and undeniable truth, ‘that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence.’ The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.<sup>5</sup>

Freedom of religion, however, exists with other values in the Philippine constitutional sphere. Any reasonable interpretation of this freedom must consider these other values, and its responsible exercise necessitates utmost regard to the demands of these values.<sup>6</sup>

The delicate interplay between religious freedom and other constitutional values serves as a backdrop for a careful scrutiny of a looming contemporary practice in the Philippines – the use of Islam as an alternative to civil divorce, whereby a male legally married under Civil Law converts to Islamic faith in order to contract another marriage. Islamic conversion in the contemporary practice has two overriding objectives: (1) to capacitate the male

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<sup>3</sup> Henry J. Abraham, *The Bill of Rights: Reflections on Its Status and Incorporation*, in *THE FIRST FREEDOM* 61-62 (James E. Wood, Jr. ed., 1990).

<sup>4</sup> The First Amendment of the United States Constitution is the provenance of the religious freedom guarantee in the 1987 Philippine Constitution. *See Estrada v. Escritor*, A.M. No. P-02-1651, 408 SCRA 1, 130, Aug. 4, 2003.

<sup>5</sup> David Little, *The Reformed Tradition and the First Amendment*, in *THE FIRST FREEDOM* 17, 21 (James E. Wood, Jr. ed., 1990), *citing* James Madison, Memorial and Remonstrance against Religious Assessments (1785).

<sup>6</sup> *See* Alan Brownstein, *Justifying Free Exercise Rights*, 1 U. ST. THOMAS L.J. 504, 506-507 (2003). *See also* LEO PEEFFER, *CHURCH STATE AND FREEDOM* 611-612 (rev. ed. 1967).

to remarry without any legal impediment and liability, and (2) to enable the male to contract a subsequent marriage that is legally recognized.

The contemporary practice of converting to Islamic faith in order to contract a subsequent marriage generates tensions between religious freedom and marriage, an inviolable social institution under the 1987 Philippine Constitution. This practice compromises the institution of marriage as it capitalizes on the protective mantle of the free exercise clause.

The absence of a *bona fide* intention to convert to Islamic faith highlights the abuse of the freedom of religion, while the creation of a subsequent marital bond undermines the institution of marriage. The contemporary practice also offends Islamic faith and the *Shari'a*, the very means utilized to achieve the anomalous ends of the practice.

Addressing these tensions is imperative, and an adequate response to the contemporary practice calls for a four-fold approach: (1) understanding the contemporary practice, (2) appreciating Islamic Law on marriage and divorce in the Philippines, (3) analyzing the legal tensions between the constitutional values of religious freedom and the institution of marriage, and (4) resolving the legal tensions through the benevolent neutrality approach applied in Philippine jurisprudence.

## II. THE CONTEMPORARY PRACTICE

### A. DIVORCE IN THE PHILIPPINES

The current state of domestic law on absolute divorce serves as the impetus for the emergence of the contemporary practice. The history and development of divorce law in the Philippines provides an analytical backdrop in understanding the basis and considerations of the contemporary practice.

#### 1) History of Divorce Law in the Philippines

The law governing divorce in the Philippines has undergone several major changes since the Spanish colonization. The first divorce statute was

embodied in the *Siete Partidas*,<sup>7</sup> a Castilian legal code made applicable in the Philippines by virtue of a Spanish Royal Decree issued in 1530.<sup>8</sup> The fourth *Partida* of the *Siete Partidas* provided for relative divorce,<sup>9</sup> or the juridical separation in bed and board without the dissolution of marriage.<sup>10</sup> The Spanish Civil Code of 1889 introduced additional grounds for relative divorce, thus liberalizing the divorce statute in the *Siete Partidas* wherein marital infidelity was the sole ground for divorce.<sup>11</sup> However, the relevant provisions on divorce were later suspended by then Spanish Governor-General Valeriano Weyler in an order published on 31 December 1889.<sup>12</sup>

The divorce statute in the *Siete Partidas* was subsequently repealed under the American regime. On 11 March 1917, the Philippine Legislature enacted Act No. 2710 or the Divorce Law.<sup>13</sup> This law abrogated relative divorce as provided in the *Siete Partidas*, and introduced absolute divorce or the complete dissolution of the bonds of matrimony, thereby capacitating the erstwhile husband and wife to remarry.<sup>14</sup> Section 1 of the Divorce Law provided two grounds for divorce, namely: “adultery of the wife or concubinage on the part of the husband.”<sup>15</sup> Section 8 of the Divorce Law further provided that “[a] divorce shall not be granted without the guilt of the defendant being established by final sentence in a criminal action.”<sup>16</sup>

The Divorce Law was repealed during the Japanese occupation in the Second World War. Pursuant to the authority and approval of the Commander-in-Chief of the Imperial Japanese Forces, the Chairman of the Philippine Executive Commission promulgated Executive Order No. 141 or the New Divorce Law on 25 March 1943.<sup>17</sup> The New Divorce Law provided eleven grounds for divorce, including the two grounds of adultery and

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<sup>7</sup> JAINAL RASUL, *COMPARATIVE LAWS: THE FAMILY CODE OF THE PHILIPPINES AND THE MUSLIM CODE* 110 (1994).

<sup>8</sup> Florida Ruth P. Romero, *Latin Humanism in the Legal System of the Philippines*, 73 PHIL. L.J. 643, 646 (1999).

<sup>9</sup> *Benedicto v. De La Rama*, G.R. No. 1056, 3 Phil. 34, 42, Dec. 8, 1903.

<sup>10</sup> ERNESTO PINEDA, *LEGAL SEPARATION IN THE PHILIPPINES* 1 (1990).

<sup>11</sup> Romero, *supra* note 8, at 649.

<sup>12</sup> *Id.*

<sup>13</sup> *Valdez v. Tuason*, G.R. No. 14957, 40 Phil. 943, 944, Mar. 16, 1920.

<sup>14</sup> PINEDA, *supra* note 10, at 16.

<sup>15</sup> *Valdez v. Tuason*, G.R. No. 14957, 40 Phil. 943, 948, Mar. 16, 1920.

<sup>16</sup> *Id.*

<sup>17</sup> *Baptista v. Castañeda*, C.A. No. 12, 76 Phil 461, 461-462, Apr. 6, 1946.

concubinage previously provided under the repealed Act No. 2710.<sup>18</sup> However, the New Divorce Law was short-lived, as Act No. 2710 was revived upon the liberation of the Philippines from Japanese occupation.<sup>19</sup> Executive Order No. 141 ceased to have any legal force and effect in the Philippines by virtue of the proclamation of General Douglas MacArthur on 23 October 1944.<sup>20</sup>

The institution of the Philippine Republic after the Second World War heralded a major shift in the domestic law governing divorce. Executive Order No. 48, issued by then President Manuel A. Roxas, established a Code Commission that aimed “to introduce amendments that would be more reflective of the customs and traditions, even idiosyncracies, of the Filipino People.”<sup>21</sup> The Code Commission proceeded to revise the antiquated Spanish Civil Code of 1889.<sup>22</sup> The resulting statute, Republic Act No. 386 or the Civil Code of the Philippines (hereinafter “Civil Code”), was approved on 18 June 1949 and took effect on 30 August 1950.<sup>23</sup>

One of the dominant themes evident in the Civil Code was the family as an institution.<sup>24</sup> The theme served as the policy basis for the elimination of absolute divorce in the statute, and was further reinforced by “the strong opposition from the Catholic population of the country.”<sup>25</sup> Thus, the Civil Code only permitted relative divorce.<sup>26</sup> It should be noted that the Civil Code, in line with the proposals of female advocates during the deliberations on the statute in the Philippine Congress, utilized the term “legal separation” instead of “relative divorce.”<sup>27</sup> The purpose was to prevent any possible association with the negative connotation of the term “divorce.”<sup>28</sup> Notwithstanding the difference in terminology, legal separation and relative divorce are identical with respect to legal effects and consequences.<sup>29</sup> Article 97 of the Civil Code

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<sup>18</sup> *Id.* at 462.

<sup>19</sup> RASUL, *supra* note 7, at 111.

<sup>20</sup> *Peralta v. Director of Prisons*, G.R. No. 49, 75 Phil. 285, Nov. 12, 1945.

<sup>21</sup> Romero, *supra* note 8, at 652.

<sup>22</sup> *Id.*

<sup>23</sup> *Lara v. Del Rosario*, G.R. No. 6339, 94 Phil. 778, 783, Apr. 20, 1954.

<sup>24</sup> Romero, *supra* note 8, at 652.

<sup>25</sup> ALICIA SEMPIO-DIY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES 94 (2006).

<sup>26</sup> CIVIL CODE, art. 97.

<sup>27</sup> I ARTURO TOLentino, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 313 (1990).

<sup>28</sup> RASUL, *supra* note 7, at 111.

<sup>29</sup> TOLentino, *supra* note 27.

provided two grounds for legal separation: (1) adultery on the part of the wife or concubinage on the part of the husband as defined in the Penal Code, and (3) an attempt by one spouse against the life of the other.

Executive Order No. 209 or the Family Code of the Philippines (hereinafter "Family Code") introduced significant changes to the Civil Code, and is the existing governing law in all matters relating to family relations.<sup>30</sup> The brief submitted by the Civil Code Revision Committee of the University of the Philippines (U.P.) Law Center to then President Corazon C. Aquino emphasized the rationale for the development of the Family Code:

Close to forty years of experience under the Civil Code adopted in 1949, and changes and developments in all aspects of Filipino life since then, have revealed the unsuitability of certain provisions of that Code, implanted from foreign sources to Philippine culture; the unfairness, unjustness, and gaps or inadequacies of others, and the need to attune them to contemporary developments and trends.<sup>31</sup>

The underlying framework of the Family Code is the recognition of marriage as an inviolable social institution.<sup>32</sup> This underscores the alignment of the Family Code with Section 2, Article XV of the 1987 Philippine Constitution, which expressly acknowledges marriage as an inviolable social institution and the foundation of the family.<sup>33</sup> In this light, the overriding policy is to provide no statutory room for absolute divorce, and retain relative divorce as the only recognized form of lawful divorce.<sup>34</sup>

It should be noted that the Family Code also uses the term "legal separation" instead of "relative divorce." Furthermore, Article 55 of the Family Code provides ten grounds for legal separation. This is in response to the "absurdity of limiting the grounds for legal separation to the antiquated two grounds under the Civil Code."<sup>35</sup>

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<sup>30</sup> The Family Code was signed by President Corazon C. Aquino on 6 July 1987 and took effect on 3 August 1988. SEMPIO-DIY, *supra* note 25, at xxxi.

<sup>31</sup> *Id.*, citing Brief of the Civil Code Revision Committee of the U.P. Law Center.

<sup>32</sup> Alicia Sempio-Diy, *Major Changes Introduced by the New Family Code*, 15 J. OF THE INT. BAR OF THE PHIL. 13, 13 (1987); See also FAMILY CODE, art. 1.

<sup>33</sup> Sempio-Diy, *supra* note 32.

<sup>34</sup> *Id.*

<sup>35</sup> SEMPIO-DIY, *supra* note 25, at xxxii, citing Brief of the Civil Code Revision Committee of the U.P. Law Center.

## 2) Absolute Divorce in Contemporary Philippines

On 29 July 2011, the predominantly Roman Catholic state of Malta enacted a divorce law.<sup>36</sup> This leaves the Philippines and the Vatican City as the two remaining states without any statute providing for absolute divorce.<sup>37</sup> The following statement outlines the status of absolute divorce across different jurisdictions and contextualizes the state of absolute divorce in the Philippines:

Of the 195 countries in the world, only [two] do not currently allow for divorce . . . This total includes all 53 countries in Africa, 52 out of the 53 in Asia, [all] 48 in Europe, all 13 in South America, and all 7 in Central America. Each of these incredibly diverse countries—whether Christian, Muslim or Buddhist, democracy or dictatorship—have adopted some form of divorce law except for the Philippines and Vatican City.

Included among the vast majority of countries is Italy, the home base of Roman Catholicism, which amended its Civil Code on December 1, 1970 to permit the granting of divorces. Also included is Spain, the country which brought Christianity to the Philippines, which passed a divorce law in 1981. Ireland, the country that has sent more Catholic priests to the Philippines than perhaps any other country, prohibited divorce in its 1937 Constitution but repealed this prohibition in 1995.

All over the world, people and nations have accepted the wisdom and justice of providing for some form of dissolution of a state-sanctioned marriage except understandably for Vatican City, the eternal bastion of total male superiority which will never need to pass a divorce law for its assorted priests, bishops, cardinals, and its Holy Father Pope. And, inexplicably, for the Philippines, which has

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<sup>36</sup> *President Signs Divorce Law*, Jul. 30, 2011, available at [http://www.mccv.org.au/index.php?option=com\\_content&view=article&id=195:maltese-parliament-passes-divorce-law-by-a-huge-majority-&catid=65:news&Itemid=50](http://www.mccv.org.au/index.php?option=com_content&view=article&id=195:maltese-parliament-passes-divorce-law-by-a-huge-majority-&catid=65:news&Itemid=50) (last visited Apr. 6, 2011). See also *MPs in Catholic Malta Pass Historic Law on Divorce*, BBC NEWS, Jul. 25, 2011, available at <http://www.bbc.co.uk/news/world-europe-14285882> (last visited Apr. 6, 2012).

<sup>37</sup> Carlos Conde, *Philippines Stands All but Alone in Banning Divorce*, NEW YORK TIMES, Jun. 17, 2011, available at <http://www.nytimes.com/2011/06/18/world/asia/18iht-philippines18.html> (last visited Apr. 6, 2012).

had two women presidents and where women comprise the majority of its population.<sup>38</sup>

The strong Roman Catholic influence in the Philippines is a significant factor in the exclusion of absolute divorce in the Civil Code and the Family Code.<sup>39</sup> Furthermore, the constitutional framework on marriage as an inviolable social institution functions as the paramount consideration in excluding absolute divorce as a permissible mode of dissolution of marital bonds.

### 3) Article 36 of the Family Code

While absolute divorce is not a recognized mode of dissolution of marriage in the Family Code, an alternative to such form of divorce has been incorporated in the statute. Article 36 of the Family Code deals with psychological incapacity as a ground for the declaration of a marriage as inexistent from the beginning or void *ab initio*. Article 36 provides:

A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage, shall likewise be void even if such incapacity becomes manifest only after its solemnization.

Article 36 of the Family Code was patterned after Canon 1095 (3) of the New Code of Canon Law.<sup>40</sup> According to Canon 1095 (3), “[t]hose who, because of causes of a psychological nature, are unable to assume the essential obligations of marriage” are incapacitated to contract marriage.<sup>41</sup> The Civil Code Revision Committee, responsible for the completion of the draft of the Family Code, specified three reasons for the incorporation of Canon 1095 (3) as an additional ground for the declaration of nullity of marriage.

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<sup>38</sup> Rodel Rodis, *Divorce, Philippine-Style*, PHIL. DAILY INQUIRER, Jun. 12, 2009, available at <http://globalnation.inquirer.net/mindfeeds/mindfeeds/view/20090612-210067/Divorce-Philippine-style> (last visited Apr. 6, 2012).

<sup>39</sup> SEMPIO-DIY, *supra* note 25, at 43.

<sup>40</sup> *Id.* at 42.

<sup>41</sup> *Id.* at 42-43, *citing* The New Code of Canon Law, Book IV, Part I, Title VII, Chapter IV, Canon 1095.



First, Article 36 of the Family Code functions as a “substitute for divorce,” in view of the antagonism and adverse sentiment of the Roman Catholic Church and the predominantly Catholic population toward the institutionalization of absolute divorce in the Philippines.<sup>42</sup> Consequently, the article furnishes a ground for the dissolution of marriage that is aligned with Canon Law. The following statement of Justice Flerida Ruth P. Romero, in her concurring opinion in *Santos v. Court of Appeals and Bedia-Santos*,<sup>43</sup> elucidates the first reason for the incorporation of Article 36:

[C]onsidering the Christian traditional concept of marriage of the Filipino people as a permanent, inviolable, indissoluble social institution upon which the family and society are founded, and also realizing the strong opposition that any provision on absolute divorce would encounter from the Catholic Church and the Catholic sector of our citizenry to whom the great majority of our people belong, the two Committees in their joint meetings did not pursue the idea of absolute divorce and *instead opted for an action for judicial declaration of invalidity of marriage based on grounds available in the Canon Law*. It was thought that such an action would not only be *an acceptable alternative to divorce* but would also solve the nagging problem of church annulments of marriages on grounds not recognized by the civil law of the State.<sup>44</sup> (emphases supplied)

Second, Article 36 of the Family Code provides a viable remedy to the anomaly resulting from marriages that have been annulled by the Roman Catholic Church but remained subsisting under Civil Law.<sup>45</sup> Justice Romero described the anomaly in this wise:

Such so-called church “annulments” are not recognized by Civil Law as severing the marriage ties as to capacitate the parties to enter lawfully into another marriage. The grounds for nullifying civil marriage, not being congruent with those laid down by Canon Law, the former being more strict, quite a number of married couples have found themselves in limbo—freed from the marriage bonds in the eyes of the Catholic Church but yet unable to contract a valid

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<sup>42</sup> *Id.* at 43.

<sup>43</sup> G.R. No. 112019, 240 SCRA 20, Jan. 4, 1995.

<sup>44</sup> *Santos v. Court of Appeals*, G.R. No. 112019, 240 SCRA 20, 40, Jan. 4, 1995 (Romero, J., *concurring*).

<sup>45</sup> SIMPIO-DIY, *supra* note 25, at 43.

civil marriage under state laws. Heedless of civil law sanctions, some persons contract new marriages or enter into live-in relationships.<sup>46</sup>

Finally, the Civil Code Revision Committee envisioned Article 36 of the Family Code as a statutory remedy available to parties bound by marital ties that exist merely in legal designation, but in reality broken by separation due to the incapacity of either or both to fulfill the essential marital obligations.<sup>47</sup>

In *Republic v. Court of Appeals and Molina*,<sup>48</sup> the Philippine Supreme Court outlined several key guidelines and principles in the interpretation of psychological incapacity in Article 36 of the Family Code. Among the key guidelines and principles are the following:

- a. The incapacity should not be physical in nature but rather psychological, although the manifestations or symptoms of the incapacity may be physical.
- b. The incapacity must be shown to exist at the time of the celebration of the marriage.
- c. The incapacity must be proven to be medically or clinically permanent or incurable.
- d. The incapacity must be sufficiently grave as to disable a party to fulfill the essential marital obligations. The incapacity should not be equated to refusal, neglect, difficulty, or ill will.<sup>49</sup>

The Philippine Supreme Court, however, emphasized in *Ngo Te v. Yu-Te* that the interpretation of Article 36 of the Family Code should be “on a case-to-case basis; guided by experience, the findings of experts and researchers in psychological disciplines, and by decisions of church tribunals.”<sup>50</sup> The Court underscored the principle that “each case must be judged, not on the basis of *a priori* assumptions, predilections or generalizations but according to its own facts.”<sup>51</sup>

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<sup>46</sup> *Republic v. Court of Appeals*, G.R. No. 108763, 268 SCRA 198, 218, Feb. 13, 1997 (Romero, J., *separate*).

<sup>47</sup> SEMPIO-DIY, *supra* note 25, at 43.

<sup>48</sup> *Republic v. Court of Appeals*, G.R. No. 108763, 268 SCRA 198, Feb. 13, 1997.

<sup>49</sup> *Id.* at 209-211.

<sup>50</sup> *Ngo Te v. Yu-Te*, G.R. No. 161793, 579 SCRA 193, 228, Feb. 13, 2009.

<sup>51</sup> *Id.*

## B. THE CONTEMPORARY PRACTICE

In addition to Article 36 of the Family Code, another alternative to divorce has emerged in the Philippines: conversion to Islam. Males that have subsisting valid marriages under Civil Law purposely convert to Islamic faith with the sole intention of contracting another marriage that is legally recognized. The contemporary practice capitalizes on the permissibility of polygamy in Islam, whereby the act of conversion to Islamic faith capacitates the male to contract a subsequent marriage.

The contemporary practice is characterized by two overriding objectives on the part of the male. First, the male aspires to possess the capacity to remarry without any legal impediment and liability. Second, the male seeks to contract another marriage that is legally recognized. Islamic conversion proves to be a viable means of achieving these overriding objectives.

It is critical to underscore the dearth of published reports concerning the contemporary practice. By its very nature, the reason for the lack of reports is readily apparent—the practice is carried out with a considerable degree of secrecy to mask the real intentions of the male converting to Islam. In this light, interviews are necessary to provide actual accounts that attest to the existence of the practice and reveal its underlying considerations.

### 1) Summary of Interview with Arnulfo<sup>52</sup>

Arnulfo is a Roman Catholic. In 1981, he married Carina in a church wedding in Manila. After a year, the marriage was blessed with a child. Arnulfo admits to having several extra-marital relations after the wedding, but stated that none was of a serious nature. However, after 22 years of marriage, he developed a serious relationship with Marissa. Marissa was single, and younger than Arnulfo by 21 years.

In 2004, the marriage of Arnulfo and Carina experienced severe strain primarily due to financial difficulties. Incessant quarrels with Carina over financial matters provided an aperture for Arnulfo to contemplate on leaving

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<sup>52</sup> Interview with Arnulfo in Manila, Phil. (Dec. 7, 2009). Arnulfo is not the real name of the interviewee. The interviewee has agreed to the interview on condition of anonymity. Furthermore, as part of the condition, all the other names stated in the summary of the interview are not the real names of the personalities involved.

his wife. He thereafter started losing affection for Carina. On the other hand, his relationship with Marissa flourished and their commitment to each other strengthened. Arnulfo regards Marissa as the love of his life, and considers his relationship with Marissa as an emotional sanctuary.

Arnulfo and Marissa seriously considered living together, and explored the possibility of solemnizing their relationship. They started discussing possible options. Arnulfo suggested that a marriage under Muslim Law was a practical alternative. He apprised Marissa of the effect of conversion to Islam and the validity of a subsequent marriage under Muslim Law, stressing that conversion will allow him to contract another marriage without being held liable for the crime of bigamy. Furthermore, Arnulfo stated that the subsequent marriage would be legitimate under Muslim Law.

In 2005, Arnulfo finally decided to leave Carina. He left the conjugal home and secretly lived with Marissa. Subsequently, Arnulfo and Marissa decided to marry, with the agreement that Arnulfo will convert to Islam and that the marriage will be contracted under Muslim Law. He converted to Islam and soon thereafter married Marissa under Islamic rites. According to Arnulfo, the conversion and marriage transpired without the knowledge and consent of Carina.

Notwithstanding his conversion and subsequent marriage, Arnulfo continues to adhere to the Catholic faith. He regularly hears Sunday masses with Marissa. He also observes Catholic traditions, including Advent and Holy Week.

## 2) Summary of Interview with Bernardo<sup>53</sup>

Bernardo is a Roman Catholic. He married Luz in 1969. At the time of the marriage, Bernardo was only 16 years old and Luz was 21 years old. After 5 years of marriage, the frustration of Bernardo loomed, as the marriage was still not blessed with a child.

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<sup>53</sup> Interview with Bernardo in Quezon City, Phil. (Oct. 27, 2009). Bernardo is not the real name of the interviewee. The interviewee has agreed to the interview on condition of anonymity. Furthermore, as part of the condition, all the other names stated in the summary of the interview are not the real names of the personalities involved.

In 1974, Bernardo was introduced to Nita. Bernardo admits to having felt an instant attraction to Nita, and consequently pursued her. Bernardo eventually developed an extra-marital relationship with Nita.

The marriage of Bernardo and Luz, on the other hand, continued to be filled with disappointment. The spouses have not been blessed with a child, despite resort to all available medical and spiritual means in order for Luz to conceive. The frustration of Bernardo resulted in a bitter gap in the marriage, while his relationship with Nita provided hope for his aspiration of becoming a father.

Nita eventually became pregnant. According to Bernardo, the pregnancy of Nita was the turning point in his marriage. He felt a strong desire to leave Luz and start a new life with Nita. This was reinforced by a feeling of responsibility to provide a genuine sense of family to Nita and their unborn child. In 1976, Bernardo eventually left the conjugal home and lived with Nita. At this time, he proposed to Nita and revealed his plan of marrying her under Muslim Law. He explained to Nita the importance of attaining legitimacy with respect to their relationship and the status of the child. Thus, Bernardo converted to Islam and thereafter married Nita under Islamic rites. The conversion and marriage transpired without the knowledge and consent of Luz.

Bernardo continues to practice the Catholic faith despite his conversion to Islam and his subsequent marriage under Muslim Law. He likewise raised his child with Nita according to Catholic traditions.

### **3) Legal Considerations of the Contemporary Practice**

The preceding interviews bring to light the two overriding objectives on the part of the male: (1) to possess the capacity to remarry without any legal impediment and liability, and (2) to contract another marriage that is legally recognized. These overriding objectives reveal several legal considerations of the contemporary practice involving the interplay between three statutes: the Family Code, the Revised Penal Code,<sup>54</sup> and the Code of Muslim Personal Laws of the Philippines<sup>55</sup> (hereinafter “Muslim Code”).

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<sup>54</sup> The Revised Penal Code is Act No. 3815 (1930).

<sup>55</sup> The Code of Muslim Personal Laws of the Philippines is Pres. Dec. No. 1083 (1977).

Article 35 (4) of the Family Code provides that bigamous marriages are void from the beginning.<sup>56</sup> A bigamous marriage is one that “would have been valid were it not for the subsistence of the first marriage.”<sup>57</sup> In light of the overriding objective of the male to contract another marriage that is lawful, the provision on subsequent marriage in the Muslim Code is of utmost importance to the contemporary practice. Article 27 of the Muslim Code expressly recognizes the permissibility of polygamy in Islam subject to specified conditions. Marriages falling within the ambit of Article 27 are exempted from the coverage of Article 35 (4) of the Family Code. Article 27 provides:

Notwithstanding the *rule of Islamic law permitting a Muslim to have more than one wife but not more than four at a time*, no Muslim male can have more than one wife unless he can deal with them with equal companionship and just treatment as enjoined by Islamic law and only in exceptional cases. (emphasis supplied)

However, conversion to Islamic faith is essential for the Muslim Code to apply. Furthermore, where only the male converts to Islam and the female remains a non-Muslim, the marriage must have been solemnized in accordance with the Muslim Code or with Muslim Law to render operative and applicable the pertinent provisions of the Muslim Code. Otherwise, the Family Code shall apply to the marriage of a Muslim male and a non-Muslim female if it is not solemnized in accordance with the Muslim Code or with Muslim Law.<sup>58</sup> Article 13 of the Muslim Code states:

- (1) The provisions of *this Title [Title II. Marriage and Divorce]* shall apply to marriage and divorce wherein both parties are Muslims, or

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<sup>56</sup> Family Code, art. 35(4) – “The following marriages shall be void from the beginning: ... (4) Those bigamous or polygamous marriages not falling under Article 41; ....”

Family Code, art. 41 – “A marriage contracted by any person during subsistence of a previous marriage shall be null and void, unless before the celebration of the subsequent marriage, the prior spouse had been absent for four consecutive years and the spouse present had a well-founded belief that the absent spouse was already dead. In case of disappearance where there is danger of death under the circumstances set forth in the provisions of Article 391 of the Civil Code, an absence of only two years shall be sufficient.

For the purpose of contracting the subsequent marriage under the preceding paragraph, the spouse present must institute a summary proceeding as provided in this Code for the declaration of presumptive death of the absentee, without prejudice to the effect of reappearance of the absent spouse.”

<sup>57</sup> *People v. Mora Dumpo*, G.R. No. 42581, 62 Phil. 246, 248, Oct. 2, 1935.

<sup>58</sup> *BARA-ACAL & ASTIH*, *supra* note 2, at 27. *See also* *ARABANI*, *supra* note 2, at 311.

*wherein only the male party is a Muslim and the marriage is solemnized in accordance with Muslim law or this Code in any part of the Philippines.*

- (2) *In case of a marriage between a Muslim and a non-Muslim, solemnized not in accordance with Muslim law or this Code, the Civil Code of the Philippines<sup>59</sup> shall apply.*
- (3) Subject to the provisions of the preceding paragraphs, the essential requisites and legal impediments to marriage, divorce, paternity and filiation, guardianship and custody of minors, support and maintenance, claims for customary dower (*mahr*), betrothal, breach of contract to marry, solemnization and registration of marriage and divorce, rights and obligations between husband and wife, parental authority, and the property relations between husband and wife shall be governed by this Code and other applicable Muslim laws. (emphases supplied)

With respect to the overriding objective of the male to possess the capacity to remarry without legal impediment and liability, the Muslim Code expressly provides an exemption to the penal provision against bigamy. Article 349 of the Revised Penal Code penalizes bigamy as follows:

The penalty of *prisión mayor* shall be imposed upon any person who shall contract a second or subsequent marriage before the former marriage has been legally dissolved, or before the absent spouse had been declared presumptively dead by means of a judgment rendered in the proper proceedings.

The elements of bigamy, as provided for in Article 349 of the Revised Penal Code, are the following:

- 1) that the offender is legally married
- 2) that the first marriage has not been legally dissolved

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<sup>59</sup> The Family Code expressly repealed the provisions of the Civil Code governing family relations. FAMILY CODE, art. 254 – “*Titles III, IV, V, VI, VII, VIII, IX, XI and XV of Book I of Republic Act No. 386, otherwise known as the Civil Code of the Philippines, as amended, and Articles 17, 18, 19, 27, 28, 29, 30, 31, 39, 40, 41 and 42 of Presidential Decree No. 603, otherwise known as the Child and Youth Welfare Code, as amended, and all laws, decrees, executive orders, proclamations, rules and regulations, or parts thereof, inconsistent herewith are hereby repealed.*” (emphases supplied)

- 3) that he contracts a second or subsequent marriage
- 4) that the second or subsequent marriage has all the essential requisites for validity.<sup>60</sup>

On its face, the contemporary practice satisfies all the elements of bigamy. However, Article 180 of the Muslim Code, in relation to Article 27 thereof, provides a clear exemption to the application of Article 349 of the Revised Penal Code. Article 180 specifically states that “[t]he provisions of the Revised Penal Code relative to the crime of bigamy shall not apply to a person married in accordance with the provisions of this Code or, before its effectivity, under Muslim law.”

### III. THE ISLAMIC LEGAL FRAMEWORK ON MARRIAGE

The current practice of using Islam as an alternative to divorce creates seemingly irreconcilable tensions between the constitutional values of religious freedom and the inviolable institution of marriage. Addressing these tensions requires an appreciation of Islamic Law governing Muslim marriages in the Philippines, as this legal system uniquely exists within a constitutional and statutory framework that generally prohibits the dissolution of marital ties by means of divorce, considers bigamous marriages as void *ab initio*, and penalizes the crime of bigamy.

#### A. ISLAM AS CONVERGENCE OF THE REALMS OF THE SPIRITUAL, MORAL AND LEGAL

The religious tradition of Islam is unique in that spiritual and moral norms are intricately integrated with legal rules, thus creating a system that shapes the contours of religious dogma into one that is ‘legally enforceable’ – the *Shari’a* or Muslim Law.<sup>61</sup> As then Minister of Justice Ricardo C. Puno aptly put it, the Islamic faith “is inextricably intertwined with the legal system, the unique character of an all-encompassing religion which permeates every aspect of the life of its followers.”<sup>62</sup> The constitutional principle of the separation

<sup>60</sup> LUIS B. REYES, THE REVISED PENAL CODE: CRIMINAL LAW 917 (2001).

<sup>61</sup> BARA-ACAL & ASTIH, *supra* note 2, at 1; ARABANI, *supra* note 2, at 56-58.

<sup>62</sup> BARA-ACAL & ASTIH, *supra* note 2, at 1, *citing* Ricardo C. Puno, Shari-ah Courts—An Integral Part of the Justice System, at 12 (Aug. 1983). *See also* Steven Houchin, Comment, *Confronting the Shadow: Is Forcing a Muslim Witness to Unveil in a Criminal Trial a Constitutional Right, or an Unreasonable Intrusion?*, 36 PEPP. L. REV. 823, 832 (2009).



between the Church and State, including the adjunct doctrines pertaining to the non-establishment clause and religious freedom, are foreign to Islamic tradition.<sup>63</sup>

Islamic faith has two principal legal pillars: (1) the Qur'an, and (2) the Sunna. The Qur'an contains the commandments of Allah, while the Sunna pertains to prophetic traditions. The two principal legal pillars are the foundations of the norms, rules of conduct, and regulations comprising the *Shari'a*.<sup>64</sup> Philippine Muslim jurists Amer M. Bara-acal and Abdulmajid J. Astih explain that "[t]hese inspired laws were sufficiently expounded by early Muslim legists to cover every social phenomenon, and all that lies ahead is for modern men to codify and implement deduced jural rules in their respective environment."<sup>65</sup>

With respect to laws governing personal status, political units adhering to the Islamic faith have historically established statutes that are grounded on the *Shari'a* and the two principal legal pillars.<sup>66</sup> In the Philippine context, "the state 'communalizes' [Islamic] religion by according its authorities and institutions semi-autonomy from the national legal regime, the latter under the direct control of the state."<sup>67</sup> As such, there are two legal spheres concerning laws governing personal status in the Philippines, "one under the direct control of the state, and the other based on religion (and/or custom) and semi-autonomous from the state's legal authority."<sup>68</sup> The Civil Code and the Family Code are the principal statutes of general application, while the Muslim Code is of special application based on the *Shari'a* and local customs. Article 3 (Conflict

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<sup>63</sup> Michael Mastura, *The Introduction of Muslim Law into the Philippine Legal System*, in *MUSLIM FILIPINO EXPERIENCE: A COLLECTION OF ESSAYS* 199, 203 (1984).

<sup>64</sup> SAADUDDIN ALAUYA, SR., *QUIZZER IN MUSLIM PERSONAL LAW WITH LEGAL OPINION RENDERED* 222 (4<sup>th</sup> ed. 2007). See also Seema Saifee, Note, *Penumbras, Privacy, and the Death of Morals-Based Legislation: Comparing U.S. Constitutional Law with the Inherent Right of Privacy in Islamic Jurisprudence*, 27 *FORDHAM INT'L L.J.* 370, 373-374 (2003).

<sup>65</sup> BARA-ACAL & ASTIH, *supra* note 2, at 5.

<sup>66</sup> Macrina Adjerol Morados, *Muslim Divorce Law Under P.D. 1083: An Analysis of Its Application to Selected Cases Decided at the Sulu Shari'ah Circuit Courts* 11 (2003) (unpublished thesis for M.A. Islamic Studies, University of the Philippines, Diliman, on file with the Institute of Islamic Studies, University of the Philippines, Diliman).

<sup>67</sup> Lisa Hajar, *Domestic Violence and Shari'ah: A Comparative Study of Muslim Societies in the Middle East, Africa and Asia*, at <http://www.law.emory.edu/ifa/thematic/Violence.htm> (last visited Apr. 19, 2012).

<sup>68</sup> *Id.*

of Provisions) of the Muslim Code enumerates the following rules governing personal status of Muslims:

- (1) In case of conflict between any provision of this Code and laws of general application, the former shall prevail.
- (2) Should the conflict be between any provision of this Code and special laws or laws of local application, the latter shall be liberally construed in order to carry out the former.
- (3) The provisions of this Code shall be applicable only to Muslims and nothing herein shall be construed to operate to the prejudice of a non-Muslim.

## B. RELIGIOUS PRINCIPLES OF ISLAMIC MARRIAGE

The institution of marriage is of sacred relevance to Islam.<sup>69</sup> Every intendment of the *Shari'a* is for the protection and cultivation of marital life. Marriage in Islam finds direct scriptural foundation in the Qur'an, which provides:

And among His signs  
Is this, that He created  
For you mates from among  
Yourselves, that ye may  
Dwell in tranquility with them,  
And He has put love  
And mercy between your (hearts):  
Verily in that are signs  
For those who reflect.<sup>70</sup>

The significance of marriage in Islam does not solely rest on the existence of the aforesaid verse in the Qur'an, but is more importantly strengthened by the recognized spiritual and practical benefits of the sacred institution.

The prophetic traditions of Islam, which inform the legal structure of Islamic marriage, recognize the invaluable role of marriage in the development

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<sup>69</sup> Morados, *supra* note 66, at 2.

<sup>70</sup> ALAUYA, *supra* note 64, at 6, *citing* QUR'AN, Surah XXX,21.

of religious life. According to these traditions, an individual who chooses to enter marital life “completes half of his religion,” and dutifully follows the way of life of the Prophet Muhammad.<sup>71</sup>

In addition, Islam recognizes the institution of marriage as a means of attaining peace in society through the curtailment of fornication, adultery, and all other forms of sexual perversion.<sup>72</sup> Islam strictly discourages celibacy and enjoins individuals in faith to follow the consecrated teachings of the Prophet Muhammad:

There is no monkery in Islam . . . I am the one who fears Allah the most among you, yet I fast and break it, I pray and then sleep, and I marry women. He who turns away from my practice is not of us.<sup>73</sup>

Marriage in Islam serves as a viable institution to express the sexual desires of an individual, and the Islamic Faith rejects the notion of leading a life of celibacy in order to realize spiritual life and spurn the pursuits of the human flesh.<sup>74</sup> In other words, the Islamic faith recognizes the inherent biological needs of an individual and incorporates such reality in the spiritual life. This has been expressly ordained by the Qur'an:

O ye believe. Forbid not the  
Good things which Allah hath  
Made lawful for you and  
Transgress not. Lo' Allah  
Loveth not transgressors.<sup>75</sup>

Furthermore, Islam accords an important societal role on marriage and recognizes the benefits of this institution to family and society. With respect to the family, Islam acknowledges the critical role of marriage as a catalyst for strengthening the basic unit of society. Marital life is at the heart of a Muslim family, and nurturing marital bonds significantly contributes to the quality of family life.<sup>76</sup> More importantly, Islam views marriage as the foundation of

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<sup>71</sup> BARA-ACAL & ASTIH, *supra* note 2, at 41.

<sup>72</sup> RASUL, *supra* note 7, at 45.

<sup>73</sup> BARA-ACAL & ASTIH, *supra* note 2, at 41.

<sup>74</sup> IBRAHIM JUBAIRA, *THE MOSLEM HERITAGE* 25 (1981).

<sup>75</sup> BARA-ACAL & ASTIH, *supra* note 2, at 42, *citing* QUR'AN, Surah al-Mai'dah: V,87.

<sup>76</sup> JUBAIRA, *supra* note 74.

society, ensuring societal development by nurturing the core of the basic unit of society.<sup>77</sup>

The importance of the institution of marriage in the spiritual framework of the Islamic faith thus reveals a common ideological thread with the 1987 Philippine Constitution and the Family Code. Section 2, Article XV of the 1987 Philippine Constitution states that “[m]arriage, as an *inviolable social institution*, is the *foundation of the family* and shall be protected by the State.”<sup>78</sup> Article 1 of the Family Code provides:

Marriage is a special contract of permanent union between a man and a woman entered into in accordance with law *for the establishment of conjugal and family life*. It is the *foundation of the family* and an *inviolable social institution* whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this Code. (emphases supplied)

### C. MARRIAGE UNDER THE MUSLIM CODE

Within the context of Islamic Law in the Philippines, marriage is regarded as a civil contract and a social institution.<sup>79</sup> Its nature, consequences, and incidents are governed by the Muslim Code and the *Shari’a*, except that marriage settlements may regulate the property relations of the spouses.<sup>80</sup>

The Muslim Code enumerates four essential requisites of marriage, namely:

- (a) legal capacity of the contracting parties;
- (b) mutual consent of the parties freely given;
- (c) offer (*ijab*) and acceptance (*qabul*) duly witnessed by at least two competent persons after the proper guardian in marriage (*wali*) has given his consent; and
- (d) stipulation of customary dower (*mahr*) duly witnessed by two competent persons.<sup>81</sup>

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<sup>77</sup> ARABANI, *supra* note 2, at 316.

<sup>78</sup> Emphasis supplied.

<sup>79</sup> MUSLIM CODE, art. 14.

<sup>80</sup> MUSLIM CODE, art. 14.

<sup>81</sup> MUSLIM CODE, art. 15.

Although a valid marriage under the Muslim Code gives rise to several rights and obligations between spouses,<sup>82</sup> there are other recognized effects that are distinct from that of the traditional civil law conception on the effects of a valid marriage. Among those listed in the *Fatawa Alamgiri* are the following effects of a valid Muslim marriage:

- (1) subjection of the wife to the power of restraint of the husband within reasonable bounds;
- (2) legalization of sexual intercourse;
- (3) imposition of the wife's submission to the husband when summoned to the couch;
- (4) the grant of the power of correction to the husband in the event that the wife is disobedient or rebellious; and
- (5) creation of the right to just treatment and equal companionship among wives.<sup>83</sup>

#### **D. SUBSEQUENT MARRIAGE UNDER THE MUSLIM CODE**

There are definite bounds that circumscribe the issue of subsequent marriage under Islamic Law in the Philippines. The Muslim Code outlines three instances where an individual is legally permitted to contract a subsequent marriage.

The first instance pertains to a subsequent marriage contracted by a husband. Under the Code, it is permissible for a husband to have as many wives as he wishes, subject to strict conditions.<sup>84</sup> The first condition refers to the allowable number of wives at a given time, the limit being not more than four wives at a time.<sup>85</sup> In addition, a husband is only permitted to contract a subsequent marriage if it can be established that he has the capacity to "deal with them with equal companionship and just treatment."<sup>86</sup> The Qur'an, which expressly sanctions this type of marriage subject to the aforesaid conditions, states:

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<sup>82</sup> See MUSLIM CODE, arts. 34-36.

<sup>83</sup> *BARA-ACAL & ASTIH*, *supra* note 2, at 58-59, *citing* Abdul Kadir v. Salima, 8 Allahabad 149 (1886).

<sup>84</sup> MUSLIM CODE, art. 27.

<sup>85</sup> MUSLIM CODE, art. 27.

<sup>86</sup> MUSLIM CODE, art. 27.

If ye fear that ye shall not  
Be able to deal justly  
With the orphans,  
Marry women of your choice,  
Two, or three, or four;  
But if ye fear that ye shall not  
Be able to deal justly (with them),  
Then only one, or (a captive)  
That your right hands possess.  
That will be most suitable,  
To prevent you  
From doing injustice.<sup>87</sup>

A subsequent marriage contracted by a widow is the second instance where a subsequent marriage is permitted under the Muslim Code. A widow may lawfully contract a subsequent marriage, provided she has complied with the requisite *'idda* or waiting period. The statute provides for a waiting period of four (4) months and ten (10) days, to be counted from the date of the death of the husband, before the widow may contract a subsequent marriage.<sup>88</sup> However, the *'idda* is modified with respect to a pregnant widow, and the subsequent marriage should only be contracted within a reasonable time after the delivery of the child.<sup>89</sup>

The final instance where a subsequent marriage is legally permitted is by means of prior divorce. Generally, an individual whose previous marriage has been dissolved by means of divorce is allowed to contract a subsequent marriage. Women, however, are required to observe an *'idda* of three monthly courses from the date of divorce.<sup>90</sup> In the event that the woman is pregnant at the time of the divorce, she may only contract a subsequent marriage after the delivery of the child.<sup>91</sup> The Muslim Code further provides that the woman is not required to observe the *'idda* if it has been indisputably established that the previous marriage has not been consummated at the time of the divorce.<sup>92</sup>

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<sup>87</sup> ALAUYA, *supra* note 64, at 40, *citing* QUR'AN, Surah IV,3.

<sup>88</sup> MUSLIM CODE, art. 28.

<sup>89</sup> MUSLIM CODE, art. 28.

<sup>90</sup> MUSLIM CODE, art. 29 (1).

<sup>91</sup> MUSLIM CODE, art. 29 (1).

<sup>92</sup> MUSLIM CODE, art. 29 (3).

### E. DISSOLUTION OF MARRIAGE THROUGH DIVORCE UNDER THE MUSLIM CODE

Divorce is a valid and legal means of extinguishing marital ties under Islamic Law. Article 45 of the Muslim Code defines divorce as “the formal dissolution of the marriage bond.” There are seven (7) modes of effecting divorce under the Code, namely:

- (a) *Talaq*, or repudiation of the wife by the husband;
- (b) *Ila*, or vow of abstinence by the husband;
- (c) *Zihar*, or injurious assimilation of the wife by the husband;
- (d) *Li'an*, or acts of imprecation;
- (e) *Khul'*, or redemption by the wife;
- (f) *Tafwid*, or exercise by the wife of the delegated right to repudiate; or
- (g) *Faskh*, or judicial decree.<sup>93</sup>

In contrast with the Family Code, which does not recognize divorce as a valid means of dissolving marital bonds, Islamic Law acknowledges the necessity of divorce as a “safety valve in cases where the spouses can no longer live harmoniously, and when the very purpose of marriage would be defeated if they remained together.”<sup>94</sup>

### F. MIXED MARRIAGES

Generally, marriage must be between Muslims. Islamic Law, however, accommodates differences in religious beliefs provided the male spouse is Muslim. A Muslim male may validly contract marriage with a non-Muslim woman, provided the latter belongs to a “revealed religion” or “People of the Book,” such as Jews or Christians.<sup>95</sup> On the other hand, a Muslim woman may only contract marriage with a Muslim male.<sup>96</sup>

In the event that a Muslim woman desires to contract marriage with a non-Muslim male, the latter must first convert to Islamic faith before

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<sup>93</sup> MUSLIM CODE, art. 45.

<sup>94</sup> Morados, *supra* note 66, at 2.

<sup>95</sup> ARABANI, *supra* note 2, at 314.

<sup>96</sup> *Id.* See also Kathleen Portuán Miller, *The Other Side of the Coin: A Look at Islamic Law as Compared to Anglo-American Law—Do Muslim Women Really Have Fewer Rights than American Women?*, 16 N.Y. INT'L L. REV. 65, 79 (2003).

solemnizing the marriage bond.<sup>97</sup> It is critical to underscore, however, that the purpose of conversion by the non-Muslim male must be his utmost aspiration “to submit himself to the will of Allah” and not “his love for and desire to marry the Muslim woman.”<sup>98</sup>

### G. THE MISCONCEPTION ON PLURALITY OF WIVES AND DIVORCE IN ISLAM

Non-Muslims have viewed the practices of contracting subsequent marriages and severing marital ties by means of divorce as being specifically encouraged by Islamic Law.<sup>99</sup> However, a careful scrutiny of Islamic Law would reveal a regime of tolerance for these practices, and at once uncovers a religious and legal framework that aims to contain such practices within reasonable bounds.

With regard to subsequent marriages, particularly the practice of maintaining several wives, Islamic Law simply permits Muslim males to have more than one wife, but does not in any way promote such practice. Islamic Law seeks to advance a culture of monogamy, and in fact proscribes Muslim women from having more than one husband.<sup>100</sup> Polygamy has always been the exception in Islam, and exacting restrictions and safeguards have been imposed to curb its objectionable effects and consequences.<sup>101</sup> Under the Muslim Code, a Muslim male can have more than one wife only if “he can deal with them with equal companionship and just treatment as enjoined by Islamic law and only in exceptional cases.”<sup>102</sup>

Furthermore, Article 162 of the Muslim Code expressly provides the following strict requirements for a subsequent marriage to be validly effected:

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

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<sup>97</sup> LUIS LACAR, MUSLIM-CHRISTIAN MARRIAGES IN THE PHILIPPINES 20 (Luz Ausejo & Fern Babcock Grant eds., 1980).

<sup>98</sup> *Id.*

<sup>99</sup> JUBAIRA, *supra* note 74, at 24.

<sup>100</sup> BARA-ACAL & ASTIH, *supra* note 2, at 64.

<sup>101</sup> JUBAIRA, *supra* note 74, at 26.

<sup>102</sup> MUSLIM CODE, art. 27.



thereof to the wife or wives. Should any of them object, the *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.

In effect, therefore, the consent of the wife or wives is a requirement in order for the Muslim male to contract a subsequent marriage.<sup>103</sup> The process of arbitration is resorted to in the event of an objection, and the *Shari'a* Circuit Court shall rule on the objection if the *Agama* Arbitration Council is not able to obtain the consent of the objecting wife or wives.

With respect to divorce, Islam has continually regarded such as a remedy of last resort.<sup>104</sup> Divorce has been accommodated in Islamic Law in order to address the undesirable circumstance of maintaining marital ties despite the unspeakable sufferings endured because of the relationship. The Muslim Code also imposes strict requirements for divorce to be validly effected. First, divorce may only be granted once every avenue for resolving the conflict between the spouses has been explored.<sup>105</sup> Moreover, the following procedure must be complied with in order to effect a valid divorce:

- (1) Any Muslim male who has pronounced a *talaq* shall, without delay, file with the Clerk of Court of the *Shari'a* Circuit Court of the place where his family resides a written notice of such fact and the circumstances attended thereto, after having served a copy thereof to the wife concerned. The *talaq* pronounced shall not become irrevocable until after the expiration of the prescribed *'idda*.
- (2) Within seven days from receipt of notice, the Clerk of Court shall require each of the parties to nominate a representative. The representatives shall be appointed by the Court to constitute, together with the Clerk of Court as chairman, an *Agama* Arbitration Council. The *Agama* Arbitration Council shall submit to the Court a report on the result of the arbitration, on the basis of which and such other evidence as

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<sup>103</sup> BARA-ACAL & ASTIH, *supra* note 2, at 66; ARABANI, *supra* note 2, at 380; RASUL, *supra* note 7, at 102.

<sup>104</sup> ALAUYA, *supra* note 64, at 109.

<sup>105</sup> MUSLIM CODE, art. 45.

may be allowed, the Court shall issue the corresponding order.<sup>106</sup>

In addition, Article 183 of the Muslim Code provides for penal sanctions in the event of any violation of the statutory procedures to effect a valid divorce.<sup>107</sup>

#### IV. LEGAL TENSIONS GENERATED BY CONTEMPORARY PRACTICE

The contemporary practice generates legal tensions between two constitutional values, religious freedom and the institution of marriage. These values are of the highest order in the Philippine legal sphere. Constitutional, statutory, and jurisprudential protections have been extensively accorded to protect their preferred status.<sup>108</sup>

The contemporary practice places these two constitutional values at odds. It capitalizes on the protective mantle of the free exercise clause to achieve its two overriding objectives: (1) to possess the capacity to remarry without any legal impediment and liability, and (2) to contract another marriage that is legally recognized. The contemporary practice fundamentally relies on the preferred status of the freedom of religion, and its claim of exemption from statutory regulation rests on the classification of conversion and marriage as valid exercises of religious belief.<sup>109</sup>

In the process, however, the contemporary practice places a serious strain on the natural bonds established through marriage.<sup>110</sup> The contemporary practice leaves the prior marriage in a state of uncertainty. The lack of consent of the wife forces on her and the family a different legal and social status, that of a *first* wife and a *first* family. The wife and children inevitably shoulder the

<sup>106</sup> MUSLIM CODE, art. 161.

<sup>107</sup> MUSLIM CODE, art. 183 – “Offenses relative to subsequent marriage, divorce, and revocation of divorce. – A person who fails to comply with the requirements of Articles 86, 161, and 162 of this Code shall be penalized by *arresto mayor* or a fine of not less than two hundred pesos but not more than two thousand pesos, or both, in the discretion of the court.”

<sup>108</sup> See *Republic of the Philippines v. Court of Appeals*, G.R. No. 108763, 268 SCRA 198, 209-210, Feb. 13, 1997. See also *Ebralinag v. Division Superintendent of Schools of Cebu*, G.R. No. 95770, 219 SCRA 256, 271-273, Mar. 1, 1993.

<sup>109</sup> See, generally, *Sherbert v. Verner*, 374 U.S. 398, 403-404 (1963).

<sup>110</sup> See Cristina Eagan, *Attachment and Divorce: Family Consequences*, available at <http://www.personalityresearch.org/papers/eagan.html> (last visited Apr. 7, 2012).

negative effects of the broken bond.<sup>111</sup> The wife is inescapably faced with the various emotions and reactions that result from a fractured marital relation, including the feeling of isolation, disappointment, anger, and loneliness.<sup>112</sup> The effects of the contemporary practice are expectedly more pronounced with respect to children of the prior marriage.<sup>113</sup> The sense of loss is often amplified as children “lose a degree of contact with one of their very few attachment figures.”<sup>114</sup> In light of this, marriage as an inviolable social institution is compromised.

### A. PREFERRED STATUS OF RELIGIOUS FREEDOM

Freedom of religion is enshrined in the 1987 Philippine Constitution. The fundamental law does not only proscribe statutes that favor a particular religion or place one at a disadvantage, it further forbids laws that prevent the free exercise of religion.<sup>115</sup> Section 5, Article III of the 1987 Philippine Constitution states:

*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. (emphasis supplied)*

Religious freedom consists of two integral components, namely the establishment clause and the free exercise clause. The first half of Section 5 embodies the establishment clause, which states that “[n]o law shall be made respecting an establishment of religion.” The establishment clause refers to the impermissibility of State actions that aid or inhibit a particular religion.<sup>116</sup> On the other hand, the free exercise clause is expressed in the second part of Section 5, which provides that “[n]o law shall be made . . . prohibiting the free

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<sup>111</sup> *Id.*

<sup>112</sup> See *Effects of Divorce*, available at [http://app.syariahcourt.gov.sg/syariah/frontend/AbtDivorce\\_EffectsOfDivorce\\_E.aspx](http://app.syariahcourt.gov.sg/syariah/frontend/AbtDivorce_EffectsOfDivorce_E.aspx) (last visited February 26, 2010).

<sup>113</sup> See George Dent, *Traditional Marriage: Still Worth Defending*, 18 *BYU J. PUB. L.* 419, 430-431 (2004). See also *Effects of Divorce*, *supra* note 112.

<sup>114</sup> Eagan, *supra* note 110. See also Dent, *supra* note 113.

<sup>115</sup> See PAUL G. KAUPER, *RELIGION AND THE CONSTITUTION* 118 (1964).

<sup>116</sup> LYNN R. BUZZARD & SAMUEL ERICSSON, *THE BATTLE FOR RELIGIOUS LIBERTY* 55 (1982).

exercise [of religion].” The free exercise clause encompasses the freedom to believe and the freedom to act according to one’s belief.<sup>117</sup>

In analyzing the legal tensions generated by the contemporary practice, the free exercise clause is of particular importance. The contemporary practice involves conversion and marriage, acts that are in pursuance of a religious belief.<sup>118</sup> The practice does not relate to the advancement or suppression of a religious institution, but instead involves the accommodation of religious acts that may otherwise be subject to laws of general application.<sup>119</sup> The free exercise clause therefore serves as the protective mantle of the contemporary practice.

The preferred status of the free exercise clause emanates from a specific interpretative approach espoused by the 1987 Philippine Constitution—benevolent neutrality. This approach safeguards “religious realities, tradition and established practice with a flexible reading of the principle.”<sup>120</sup> The fundamental thrust of the approach is to extend accommodation to the free exercise of religion whenever warranted.<sup>121</sup> In *Estrada v. Escritor*, the Philippine Supreme Court elucidated on the benevolent neutrality approach in this wise:

By adopting the above constitutional provisions on religion, the Filipinos manifested their adherence to the *benevolent neutrality* approach in interpreting the religion clauses, an approach that looks further than the secular purposes of government action and examines the effect of these actions on religious exercise. *Benevolent neutrality* recognizes the religious nature of the Filipino people and the elevating influence of religion in society; at the same time, it acknowledges that government must pursue its secular goals. In pursuing these goals, however, government might adopt laws or actions of general applicability which inadvertently burden religious exercise. *Benevolent neutrality* gives room for *accommodation* of these religious exercises as *required* by the Free Exercise Clause.... *We here lay down the doctrine that in Philippine jurisdiction, we adopt the benevolent neutrality approach not only because of its merits as discussed above, but more importantly, because our constitutional history and interpretation indubitably*

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<sup>117</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). See HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM AND THE COURT* 235-236 (7<sup>th</sup> ed. 1998).

<sup>118</sup> See *Reynolds v. United States*, 98 U.S. 145, 161 (1878).

<sup>119</sup> *Id.*

<sup>120</sup> *Estrada v. Escritor*, A.M. No. P-02-1651, 408 SCRA 1, 113, Aug. 4, 2003.

<sup>121</sup> *Id.* at 149.

*show that benevolent neutrality is the launching pad from which the Court should take off in interpreting religion clause cases. The ideal towards which this approach is directed is the protection of religious liberty "not only for a minority, however small – not only for a majority, however large – but for each of us" to the greatest extent possible within flexible constitutional limits.*<sup>122</sup>

In line with this approach, the State is specifically enjoined to respect "the free exercise of the chosen form of religion."<sup>123</sup> It should be noted, however, that the benevolent neutrality approach does not afford blanket accommodation to every claim of free exercise.<sup>124</sup> Certain governmental interests are necessarily accorded due consideration.<sup>125</sup> However, only an interest of a compelling nature will "permit encroachments upon this liberty."<sup>126</sup> The Philippine Supreme Court, in *Victoriano v. Elizalde Rope Workers' Union*,<sup>127</sup> stated that "not every conscience can be accommodated by all the laws of the land; but when general laws conflict with scruples of conscience, exemptions ought to be granted unless some 'compelling state interest' intervenes."<sup>128</sup>

The free exercise clause in Section 5, Article III of the 1987 Philippine Constitution may therefore only be regulated if a compelling state interest exists. In *Sherbert v. Verner*,<sup>129</sup> the United States Supreme Court explained the

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<sup>122</sup> *Id.* at 167-168. In *Estrada v. Escritor*, the Philippine Supreme Court acknowledged the developments in United States jurisprudence. It recognized the 1990 ruling of the United States Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith* (494 U.S. 872) wherein the compelling state interest test was rejected. However, the Philippine Supreme Court ruled that "[the] *Smith* [case] is dangerous precedent because it subordinates fundamental rights of religious belief and practice to all neutral, general legislation." The Philippine Supreme Court pronounced that "it is the *strict scrutiny-compelling state interest* test which is most in line with the *benevolent neutrality-accommodation* approach." The Philippine Supreme Court stressed that the "*benevolent neutrality-accommodation*, whether mandatory or permissive, is the spirit, intent and framework underlying the Philippine Constitution." *Estrada v. Escritor*, A.M. No. P-02-1651, 492 SCRA 1, 49-66, Jun 22, 2006.

<sup>123</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

<sup>124</sup> BUZZARD & ERICSSON, *supra* note 116, at 65.

<sup>125</sup> *Victoriano v. Elizalde Rope Workers' Union*, G.R. No. 25246, 59 SCRA 54, 75, Sep. 12, 1974.

<sup>126</sup> *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 895 (1990) (O'Connor, J., *concurring*).

<sup>127</sup> *Victoriano v. Elizalde Rope Workers' Union*, G.R. No. 25246, 59 SCRA 54. Sep. 12, 1974.

<sup>128</sup> *Id.* at 75.

<sup>129</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

nature of this interest and stressed that “no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, ‘(o)nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation’.”<sup>130</sup>

The stance of the Philippine Supreme Court has been to uphold the benevolent neutrality approach, and to extend accommodation within constitutional bounds.<sup>131</sup> The preferred status of the free exercise clause finds realization in the judicial process of “*carving out an exemption or upholding an exemption to accommodate religious exercise where it is justified.*”<sup>132</sup>

Decisions of the Philippine Supreme Court prior to *Estrada v. Escritor* demonstrate adherence to the benevolent neutrality approach. In *Ebralinag v. Division Superintendent of Schools of Cebu*,<sup>133</sup> the Philippine Supreme Court ruled in favor of the free exercise of religious belief with respect to the issue of participation in the flag ceremony of public academic institutions. The petitioners in the case were students enrolled in the grade school and high school levels of the public school system in the Province of Cebu. These students, as members of the religious group Jehovah’s Witnesses, refused to salute the Philippine flag, sing the national anthem, and recite the patriotic pledge as mandated by Republic Act No. 1265 and by Department Order No. 8 of the Department of Education, Culture and Sports. The refusal of the students was an exercise of their religious belief, as the Jehovah’s Witnesses regard the acts required by the statute as violative of their duty to worship one God.<sup>134</sup> The public school authorities, however, expelled the students for noncompliance with the statutory requirements. In annulling the orders of expulsion, the Philippine Supreme Court expressly recognized the primacy of religious belief and declared that “[r]eligious freedom is a fundamental right which is entitled to the highest priority and the amplest protection among human rights, for it involves the relationship of man to his Creator.”<sup>135</sup>

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<sup>130</sup> *Id.* at 406 (1963), *citing* *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 323, 89 L.Ed. (alteration in original)

<sup>131</sup> *Estrada v. Escritor*, A.M. No. P-02-1651, 408 SCRA 1, 149, Aug. 4, 2003, *citing* JOAQUIN BERNAS, CONSTITUTIONAL RIGHTS AND SOCIAL DEMANDS: PART II 314 (1996).

<sup>132</sup> *Id.*

<sup>133</sup> G.R. No. 95770, 219 SCRA 256, Mar. 1, 1993.

<sup>134</sup> *Id.* at 263.

<sup>135</sup> *Id.* at 270.

The Court accommodated the religious belief of the Jehovah's Witnesses and carved out an exemption to the requirements of the law. It emphatically pronounced that "[f]orcing a small religious group, through the iron hand of the law, to participate in a ceremony that violates their religious beliefs, will hardly be conducive to love of country or respect for duly constituted authorities."<sup>136</sup>

Subsequently, the Philippine Supreme Court had occasion to examine the scope of religious expression in *Iglesia Ni Cristo v. Court of Appeals*.<sup>137</sup> The case involved a television program of the petitioner entitled "Ang Iglesia ni Cristo." The petitioner Iglesia ni Cristo, a religious organization, submitted videotapes to the Board of Review for Movie and Pictures Television for purposes of classification. The episodes contained in the videotapes were given x-ratings, thus indicating that the episodes were not fit for public consumption. The Board concluded that the episodes were derogatory and hostile toward other religions, and were therefore statutorily proscribed.<sup>138</sup> The Philippine Supreme Court annulled the ratings of the Board, and declared that all forms of prior restraint on religious speech are inconsistent with the 1987 Philippine Constitution.<sup>139</sup> Furthermore, the Court impliedly acknowledged the benevolent neutrality approach in holding:

Vis-a-vis religious differences, the State enjoys no banquet of options. Neutrality alone is its fixed and immovable stance. In fine, respondent board cannot squelch the speech of petitioner Iglesia ni Cristo simply because it attacks other religions, even if said religion happens to be the most numerous church in our country. The bedrock of freedom of religion is freedom of thought and it is best served by encouraging the marketplace of dueling ideas.<sup>140</sup>

## B. MARRIAGE AS AN INVIOABLE SOCIAL INSTITUTION

The 1987 Philippine Constitution unequivocally recognizes marriage "as an inviolable social institution."<sup>141</sup> It further recognizes marriage as "the

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<sup>136</sup> *Id.* at 271-272.

<sup>137</sup> G.R. No. 119673, 259 SCRA 529, Jul. 26, 1996.

<sup>138</sup> *Id.* at 535.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 547.

<sup>141</sup> CONST. art. XV, § 2.

foundation of the family”<sup>142</sup> and the core of the “basic autonomous social institution.”<sup>143</sup> It is the constitutional duty of the State to protect marriage and ensure its inviolability.<sup>144</sup> According to Justice Jose C. Vitug, “the constitutional mandate on marriage and the family has not been meant to be simply directory in character, nor for mere expediency or convenience, but one that demands a meaningful, not half-hearted, respect.”<sup>145</sup>

Statutes governing family relations visibly embrace the constitutional framework on marriage. Section 1 of the Family Code states:

Marriage is a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the *foundation of the family* and an *inviolable social institution* whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this Code. (emphases supplied)

The Muslim Code is likewise aligned with the constitutional framework. Article 14 of the Code provides:

Marriage is not only a civil contract but *a social institution*. Its nature, consequences and incidents are governed by this Code and the *Shari'a* and not subject to stipulation, except that the marriage settlements may to a certain extent fix the property relations of the spouses. (emphases supplied)

The Philippine Supreme Court has firmly adhered to the constitutional framework on marriage with respect to cases involving Article 36 of the Family Code on the nullity of marriage based on psychological incapacity. In line with the principle of inviolability, the Court has generally resolved doubts in favor of the validity of marriage.<sup>146</sup>

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<sup>142</sup> CONST. art. XV, § 2.

<sup>143</sup> CONST. art. II, § 12.

<sup>144</sup> CONST. art. XV, § 2. *See* Republic v. Court of Appeals, G.R. No. 108763, 268 SCRA 198, 226, Feb. 13, 1997 (Vitug, J., *concurring*).

<sup>145</sup> Republic v. Court of Appeals, G.R. No. 108763, 268 SCRA 198, 227, Feb. 13, 1997 (Vitug, J., *concurring*).

<sup>146</sup> *Id.* at 209.



In *Santos v. Court of Appeals and Bedia-Santos*,<sup>147</sup> the petitioner Leouel Santos sought a declaration of absolute nullity on the ground of psychological incapacity of his wife Julia. The petitioner asserted that the failure of his wife to return to the conjugal home and to maintain correspondence during her five year absence evinced the incapacity of his wife to fulfill the essential obligations of marriage. The Court commenced the resolution of the issue by stating that “[m]arriage is not just an adventure but a lifetime commitment.”<sup>148</sup> The Court ultimately denied the petition in the following manner:

The factual settings in the case at bench, in no measure at all, can come close to the standards required to decree a nullity of marriage. Undeniably and understandably, Leouel stands aggrieved, even desperate, in his present situation. Regrettably, neither law nor society itself can always provide all the specific answers to every individual problem.<sup>149</sup>

In *Republic v. Court of Appeals and Molina*,<sup>150</sup> the Philippine Supreme Court granted the petition of the Solicitor General to declare the marriage of Roridel Olaviano Molina and Reynaldo Molina as valid and subsisting. The respondent Roridel Olaviano Molina filed a petition for the declaration of nullity on the basis of psychological incapacity of her husband Reynaldo. The Court ruled that the evidence failed to prove the existence of psychological incapacity, and that the difficulty experienced by the spouses was due to conflicting personalities.<sup>151</sup> The Court recognized the constitutional framework thus:

Any doubt should be resolved in favor of the existence and continuation of the marriage and against its dissolution and nullity. This is rooted in the fact that both our Constitution and our laws cherish the validity of marriage and unity of the family. Thus, our Constitution devotes an entire Article on the Family, recognizing it "as the foundation of the nation." It decrees marriage as legally "inviolable," thereby protecting it from dissolution at the whim of the parties. Both the family and marriage are to be "protected" by the state.<sup>152</sup>

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<sup>147</sup> G.R. No. 112019, 240 SCRA 20, Jan. 4, 1995.

<sup>148</sup> *Id.* at 35.

<sup>149</sup> *Id.* at 36.

<sup>150</sup> *Republic v. Court of Appeals*, G.R. No. 108763, 268 SCRA 198, Feb. 13, 1997.

<sup>151</sup> *Id.* at 207.

<sup>152</sup> *Id.* at 209-210.

The Philippine Supreme Court further upheld the constitutional framework on marriage in *Marcos v. Marcos*.<sup>153</sup> The petitioner Brenda Marcos sought to declare her marriage void on the ground of psychological incapacity of respondent Wilson Marcos. She averred that her husband did not provide financial support and had abandoned his family. She further claimed that her family suffered physical abuses in the hands of the respondent. The Court acknowledged the factual assertions of the petitioner as against her husband, but proclaimed that “the totality of his acts does not lead to a conclusion of psychological incapacity on his part.”<sup>154</sup>

### C. ACCOMMODATION OF RELIGIOUS BELIEF VIS-À-VIS MARRIAGE

The Philippine Supreme Court has ruled on two cases that directly involved the constitutional values of religious freedom and marriage, namely *Sulu Islamic Association of Masjid Lambayong v. Malik*<sup>155</sup> (hereinafter “*Malik*”) and *Estrada v. Escritor*.<sup>156</sup> The first case involved permissive accommodation,<sup>157</sup> wherein the Court upheld a statutory exemption that accommodated religious exercise of a Muslim. In the second case the Court extended mandatory accommodation,<sup>158</sup> and accordingly carved out an exemption for religious exercise of a member of Jehovah’s Witnesses.

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<sup>153</sup> G.R. No. 136490, 343 SCRA 755, Oct. 19, 2000.

<sup>154</sup> *Id.* at 764.

<sup>155</sup> A.M. No. MTJ-92-691, 226 SCRA 193, Sep. 10, 1993.

<sup>156</sup> The case involved two actions of the Philippine Supreme Court. The first action remanded the administrative complaint to the Office of the Court Administrator in order to give the Solicitor General the opportunity to intervene (*Estrada v. Escritor*, A.M. No. P-02-1651, 408 SCRA 1, Aug. 4, 2003). After the intervention of the Solicitor General, the second action resolved the administrative complaint with finality (*Estrada v. Escritor*, A.M. No. P-02-1651, 492 SCRA 1, Jun. 22, 2006).

<sup>157</sup> Permissive accommodation pertains to those circumstances wherein “the Court finds that the State may, but is not required to, accommodate religious interests.” *Estrada v. Escritor*, A.M. No. P-02-1651, 492 SCRA 1, 61, Jun. 22, 2006.

<sup>158</sup> Mandatory accommodation refers to instances where “the Court finds that accommodation is **required** by the Free Exercise Clause, i.e., when the Court itself carves out an exemption.” *Estrada v. Escritor*, A.M. No. P-02-1651, 492 SCRA 1, 61, Jun. 22, 2006.

## 1. Marriage and Morality

In the aforesaid cases, the respondents were charged with immorality by maintaining illicit relations. In *Malik*, the respondent contracted a subsequent marriage during the subsistence of a prior marriage.<sup>159</sup> In *Estrada v. Escritor*, the respondent maintained a relationship with a male that had a subsisting marriage.<sup>160</sup>

At first glance, the governmental interest weighed against religious freedom is morality. However, considering the nature of the immoral acts involved in the two cases, it becomes evident that marriage is at the heart of the issue of morality. The charges of immorality rest on the inviolability of marriage. In his separate opinion in *Estrada v. Escritor*, Justice Vitug elucidated on marriage and morality in this wise:

Marriage is one area where law and morality closely intersect. The act of respondent Escritor of cohabiting with Quilapio, a married man, can only be called "immoral" in the sense that it defies and transgresses the institution of marriage. Society having a deep interest in the preservation of marriage, adultery is a matter of public, not merely private, concern, that cannot readily be ignored. This deep-seated interest is apparent in our Civil Code so replete with rules as in defining the parties' legal capacity to marry, in laying down the essential requisites of the union, in regulating the rights and duties of the spouses, even their property relations, and in protecting the rights of children.<sup>161</sup>

In *Malik*, the Court discussed the charge of immorality in light of the permissibility of polygamous marriages in Islam.<sup>162</sup> In *Estrada v. Escritor*, the Court explicitly recognized the governmental interest of protecting the basic social institutions of marriage and family.<sup>163</sup> In this light, the paramount considerations in the two cases are the constitutional values of religious freedom and the institution of marriage.

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<sup>159</sup> *Malik*, 226 SCRA 193, 199, Sep. 10, 1993.

<sup>160</sup> *Estrada v. Escritor*, A.M. No. P-02-1651, 408 SCRA 1, 50, Aug. 4, 2003.

<sup>161</sup> *Id.* at 219, (Vitug, J., *separate opinion*).

<sup>162</sup> *Malik*, 226 SCRA 193, 197-198, Sep. 10, 1993.

<sup>163</sup> *Estrada v. Escritor*, A.M. No. P-02-1651, 492 SCRA 1, 25, 82-85, Jun. 22, 2006.

## 2. *Sulu Islamic Association of Masjid Lambayong v. Malik*

The free exercise of religious belief was upheld in *Malik*. The Philippine Supreme Court recognized a legislative exemption for the crime of bigamy on the basis of religious freedom. The respondent Nabdar Malik, a judge in the Municipal Trial Court of Jolo, was charged with immorality for contracting a second marriage during the subsistence of a prior marriage. The respondent belonged to the tribal group Tausug and adhered to the Islamic faith. In dismissing the charge of immorality, the Court upheld the statutory accommodation of polygamous marriages in Islam. It recognized the exemption provided under Article 180 of the Muslim Code. The Court stated:

Mrs. Marina Malik consented to her husband's wish to contract, a second marriage because he does not neglect to support her children. Three of them are in college. She has no ill-feelings against Malik's second wife, who married her husband under Muslim law. Since Art. 180 of P.D. No. 1083, otherwise known as the Code of Muslim Personal laws of the Philippines, provides that the penal laws relative to the crime of bigamy "*shall not apply to a person married . . . under Muslim Law,*" it is not "immoral" by Muslim standards for Judge Malik to marry a second time while his first marriage exists.<sup>164</sup>

## 3. *Estrada v. Escritor*

In *Estrada v. Escritor*, the Philippine Supreme Court carved out an exemption to accommodate the free exercise of religious belief. The respondent Soledad Escritor, a court interpreter in the Regional Trial Court of Las Piñas City, was administratively charged with immorality for maintaining a relationship with a male who had a subsisting marriage. In response to the administrative complaint, the respondent openly admitted "that she has been living with Luciano Quilapio, Jr. without the benefit of marriage for twenty years and that they have a son."<sup>165</sup> However, the respondent put forth a claim of exemption based on religious freedom. She averred that the relationship was in conformity with the precepts of the religious group Jehovah's Witnesses, of which she and her male partner were members in good standing. By the tenth year of their relationship, the respondent and her male partner both executed a

<sup>164</sup> Malik, 226 SCRA 193, 199, Sep. 10, 1993.

<sup>165</sup> Estrada v. Escritor, A.M. No. P-02-1651, 408 SCRA 1, 51, Aug. 4, 2003.

public Declaration of Pledging Faithfulness. This pertains to a religious document wherein the declarant accepts his or her partner in marital relationship, and acknowledges the union as a “binding tie before ‘Jehovah’ God and before all persons to be held to and honored in full accord with the principles of God’s Word.”<sup>166</sup> The Declaration of Pledging Faithfulness provides religious recognition of a relationship that suffers from a legal impediment due to the subsistence of a prior marriage.<sup>167</sup> The Jehovah’s Witnesses sanctions and validates such relationships, provided the spouse from the prior subsisting marriage has committed adultery. It is the religious belief of the group that the commission of adultery by the spouse from the prior subsisting marriage enables the offended spouse who is a member of the group to enter into another relationship.<sup>168</sup>

After evaluating the report of the investigating judge, the Office of the Court Administrator found the claim of religious exercise unacceptable. It recommended to the Supreme Court the suspension of the respondent on the ground of immorality, with a concomitant warning that “a repetition of a similar act will be dealt with more severely in accordance with the Civil Service Rules.”<sup>169</sup>

The Court, however, denied the recommendation of the Office of the Court Administrator. The Court observed:

The Jehovah’s congregation requires that at the time the declarations are executed, the couple cannot secure the civil authorities’ approval of the marital relationship because of legal impediments. It is thus standard practice of the congregation to check the couple’s marital status before giving imprimatur to the conjugal arrangement. *The execution of the declaration finds scriptural basis in Matthew 5:32 that when the spouse commits adultery, the offended spouse can remarry.* The marital status of the declarants and their respective spouses’ commission of adultery are investigated before the declarations are executed.<sup>170</sup> (emphasis supplied)

The Court confirmed the compliance of the respondent and her male partner with their religious group’s requirements and procedures for the

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 54.

<sup>169</sup> *Id.* at 62.

<sup>170</sup> *Id.* at 58.

execution of the Declaration of Pledging Faithfulness, as attested to by a presiding minister of the religious group.<sup>171</sup> Within the realm of religious belief of the Jehovah's Witnesses, the relationship of the respondent Soledad Escritor and her male partner Luciano Quilapio, Jr. was not immoral.<sup>172</sup>

In dealing with the issue of granting an exemption based on the free exercise clause, the Court employed the compelling state interest test from a benevolent neutrality approach. The test consists of three stages:

*First:* Has the statute or government action created a burden on the free exercise of religion?

*Second:* Is there a sufficiently compelling interest to justify this infringement of religious liberty?

*Third:* Has the state in achieving its legitimate purposes used the least intrusive means possible so that the free exercise is not infringed any more than necessary to achieve the legitimate goal of the state.<sup>173</sup>

As regards the first stage, the Court found that the respondent's religious freedom was indeed burdened. She was left with two conflicting and diametrical choices – her employment or her family and religious belief.<sup>174</sup> The Court further noted that the respondent hurdled the requirement of sincerity of religious belief necessary for the first stage of the test. The Court stated:

She did not secure the Declaration only after entering the judiciary where the moral standards are strict and defined, much less only after an administrative case for immorality was filed against her . . . . Ministers from her congregation testified on the authenticity of the Jehovah's Witnesses' practice of securing a Declaration and their doctrinal or scriptural basis for such a practice. As the ministers testified, the Declaration is not whimsically issued to avoid legal punishment for illicit conduct but to make the "union" of their members under respondent's circumstances "honorable before God and men." . . . Respondent's request for exemption from the flag ceremony shows her sincerity in practicing the Jehovah's Witnesses' beliefs and not using them merely to escape punishment. She is a

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> BUZZARD & ERICSSON, *supra* note 116, at 68-69.

<sup>174</sup> Estrada v. Escritor, A.M. No. P-02-1651, 408 SCRA 1, 188-189, Aug. 4, 2003.

practicing member of the Jehovah's Witnesses and the Jehovah ministers testified that she is a member in good standing.<sup>175</sup>

With respect to the second stage, the government failed to prove the existence of a compelling state interest that would warrant regulation of the respondent's religious belief. The Solicitor General claimed that the State has a compelling and overriding interest to preserve the inviolability of marriage and family.<sup>176</sup> Furthermore, the Solicitor General contended that the Declaration of Pledging Faithfulness undermined the basic social institution, and is therefore at variance with the constitutional framework on marriage.<sup>177</sup> The Court, however, concluded that the evidence presented by the Solicitor General failed to demonstrate an interest of a compelling nature. The Court stressed that "*the government must do more than assert the objectives at risk if exemption is given; it must precisely show how and to what extent those objectives will be undermined if exemptions are granted.*"<sup>178</sup>

With regard to the third and final stage, the Court stated that the government did not demonstrate that the means utilized to achieve its legitimate interests was the least intrusive.<sup>179</sup> In light of the compelling state interest test, the Court carved out an exemption to accommodate the religious belief of respondent Soledad Escritor.

## V. ADDRESSING THE LEGAL TENSIONS GENERATED BY THE CONTEMPORARY PRACTICE

The contemporary practice has seemingly mounted an impregnable wall grounded on the claim of religious freedom to prevent governmental regulation of the subsequent marriage, thereby circumventing the provision of the Family Code governing void marriages and the provision of the Revised Penal Code on the crime of bigamy. The contemporary practice capitalizes on the two kinds of accommodation recognized by the Philippine Supreme Court: (1) permissive accommodation in *Malik*, and (2) mandatory accommodation in *Estrada v. Escritor*. In *Malik*, the Court upheld the legislative accommodation

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<sup>175</sup> *Id.* at 189-190.

<sup>176</sup> *Estrada v. Escritor*, A.M. No. P-02-1651, 492 SCRA 1, 25, 82-83, Jun. 22, 2006.

<sup>177</sup> *Id.* at 25, 83.

<sup>178</sup> *Id.* at 84-85.

<sup>179</sup> *Id.* at 82.

under the Muslim Code with respect to subsequent marriages. In *Estrada v. Escritor*, the Court carved out an exemption to accommodate relationships that would otherwise be subject to regulation were it not for a claim of religious freedom.

However, it is imperative to resolve the legal tensions generated by the contemporary practice. At its core, the contemporary practice is an affront to religious freedom, Islam and the institution of marriage. The interviews reveal the absence of a *bona fide* intention to convert to Islamic faith. Conversion is simply utilized as a convenient means to achieve the overriding objectives of the contemporary practice, as conversion is the operative act that makes the subsequent marriage possible.

The contemporary practice abuses the protective mantle of the free exercise clause. Religion is simply employed as tool to attain the two overriding objectives of the contemporary practice, that is to possess the capacity to remarry without any legal impediment and liability, and to contract another marriage that is legally recognized. In effect, the contemporary practice perpetuates a culture of invoking religion “as a cheap excuse for every conceivable form of self indulgence.”<sup>180</sup> Furthermore, the contemporary practice is an affront to Islam, the very means used to achieve its objectives. It is important to underscore that conversion to Islamic faith must be based on the utmost aspiration “to submit himself to the will of Allah” and not “his love for and desire to marry.”<sup>181</sup> Most importantly, the contemporary practice undermines the institution of marriage. The contemporary practice does not provide a genuine sense of closure within legal bounds. The prior marriage is thrust into a state of uncertainty, as the lack of consent of the wife forces on her and on the family a different legal and social status, that of a *first* wife and a *first* family.

The legal tensions must be resolved to address these abuses. The permissive and mandatory accommodations recognized by the Philippine Supreme Court must be reassessed to regulate the subsequent marriage contracted through the contemporary practice.

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<sup>180</sup> BUZZARD & ERICSSON, *supra* note 116, at 69.

<sup>181</sup> LACAR, *supra* note 97.



### A. DENYING PERMISSIVE ACCOMMODATION

Article 27 of the Muslim Code expressly recognizes the permissibility of polygamy in Islam. Furthermore, Article 180 of the Muslim Code explicitly provides an exemption to the application of the penal provision on bigamy with respect to marriages contracted “in accordance with the provisions of [the Muslim Code] or, before its effectivity, under Muslim law.” The Philippine Supreme Court in *Malik* upheld this permissive accommodation.<sup>182</sup>

However, a subsequent marriage under Article 27 is subject to the strict conditions provided in Article 162 of the Muslim Code. Recall the following requirements provided under Article 162:

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, the *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)

In light of this, the consent of the wife or wives is a requirement in order for the Muslim male to contract a subsequent marriage.<sup>183</sup> Arbitration is resorted to in the event of an objection, failing which the *Shari'a* Circuit Court will decide the matter. In other words, the consent of the wife, or the permission of the *Shari'a* Circuit Court if the wife refuses to give consent, is a condition *sine quo non* with respect to the subsequent marriage.<sup>184</sup> In point of fact, the Philippine Supreme Court in *Malik* acknowledged the consent of the first wife with respect to the subsequent marriage of respondent Nabdar Malik.<sup>185</sup>

Absent such prior consent or permission, the exemption provided in Article 180 of the Muslim Code will not be applicable. The statutory

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<sup>182</sup> *Malik*, 226 SCRA 193, 197-199, Sep. 10, 1993.

<sup>183</sup> ARABANI, *supra* note 2, at 380.

<sup>184</sup> RASUI, *supra* note 7, at 102; ARABANI, *supra* note 2, at 380; BARA-ACAL & ASTIH, *supra* note 2, at 66.

<sup>185</sup> *Malik*, 226 SCRA 193, 199, Sep. 10, 1993.

exemption applies only to subsequent marriages contracted “in accordance with the provisions of [the Muslim Code] or, before its effectivity, under Muslim law.” A subsequent marriage contracted without the prior consent or permission will be subject to the penal provision on bigamy.<sup>186</sup>

The contemporary practice patently violates the requirement under Article 162 of the Muslim Code. The interviews with Arnulfo and Bernardo show that the subsequent marriage in the contemporary practice is contracted without the knowledge and consent of the wife from the prior subsisting marriage. The lack of knowledge of the wife from the prior subsisting marriage does not only deprive her of the opportunity to consent or object, but also prevents the *Shari’a* Circuit Court from ruling on any objection. The subsequent marriage therefore fails to satisfy the requirement of prior consent or permission under Article 162. It is subject to the penal provision on bigamy for it is not contracted “in accordance with the provisions of [the Muslim Code] or, before its effectivity, under Muslim law.” Thus, the permissive accommodation upheld by the Philippine Supreme Court in *Malik* does not extend to the contemporary practice.

## B. DENYING MANDATORY ACCOMMODATION

The Philippine Supreme Court in *Estrada v. Escritor* extended mandatory accommodation based on a claim of free exercise of religious belief. Mandatory accommodation should not be extended in favor of the contemporary practice. In this particular context, regulating the subsequent marriage through Article 35 (4) of the Family Code<sup>187</sup> and Article 349 of the Revised Penal Code<sup>188</sup> hurdles the three stages of the compelling state interest test.

### 1. First Stage: Burden on Religious Freedom

The first stage of the compelling state interest test involves determining whether or not the governmental action has placed a burden on

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<sup>186</sup> RASUL, *supra* note 7, at 102.

<sup>187</sup> Under Article 35 (4) of the Family Code, bigamous marriages are void from the beginning. *See supra* Part II, sec. B, subsec. 3.

<sup>188</sup> Under Article 349 of the Revised Penal Code, the crime of bigamy is penalized. *See supra* Part II, sec. B, subsec. 3.

religious freedom.<sup>189</sup> The inquiry involves an evaluation of the sincerity of the religious belief and the centrality of such religious belief.<sup>190</sup> The contemporary practice fails to satisfy these two elements.<sup>191</sup>

*a. Sincerity of Religious Belief*

An inquiry on sincerity is imperative “in order to avoid the mere claim of religious belief to escape mandatory regulation.”<sup>192</sup> In evaluating sincerity of religious belief, “individual conscience should count for more than personal convenience.”<sup>193</sup> In *Estrada v. Escritor*, the Philippine Supreme Court discussed two cases to illustrate an inquiry on sincerity of religious belief. In *Wisconsin v. Yoder*, the consistent protestation of the Amish community with respect to the enrollment of children in the public high school system was viewed as evidence of sincerity.<sup>194</sup> In *Dobkin v. District of Columbia*, a male did not appear in court on a Saturday based on a claim that it was against his religious belief as a Sabbatarian.<sup>195</sup> The claim was denied upon evidence that he habitually engaged in business on Saturday.<sup>196</sup> The Philippine Supreme Court also evaluated the sincerity of belief of respondent Escritor, as evidenced by the Declaration of Pledging Faithfulness and the request for exemption from flag ceremony.<sup>197</sup>

The interviews with Arnulfo and Bernardo reveal an absence of sincerity of religious belief in the contemporary practice. Despite his conversion to Islamic faith and subsequent marriage under Muslim Law, Arnulfo continuous to adhere to the Catholic faith.<sup>198</sup> He regularly hears Sunday masses with Marissa, and observes Catholic traditions such as Advent

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<sup>189</sup> *Estrada v. Escritor*, A.M. No. P-02-1651, 408 SCRA 1, 126-127, Aug. 4, 2003.

<sup>190</sup> *Id.* at 127. See Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1417 (1990). Compare *Estrada v. Escritor*, A.M. No. P-02-1651, 408 SCRA 1, 127 Aug. 4, 2003, with *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 886-887 (1990).

<sup>191</sup> See BUZZARD & ERICSSON, *supra* note 116, at 69.

<sup>192</sup> *Id.*

<sup>193</sup> *Estrada v. Escritor*, A.M. No. P-02-1651, 408 SCRA 1, 127, Aug. 4, 2003, citing Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 775 (1992).

<sup>194</sup> *Id.* citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

<sup>195</sup> *Id.* citing *Dobkin v. District of Columbia*, 194 A.2d 657 (D.C. Ct. App. 1963).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 189-190.

<sup>198</sup> See *supra* Part II, sec. B, subsec. 1.

and Holy Week.<sup>199</sup> Similarly, Bernardo continuous to uphold the Catholic faith. He has also raised his child with Nita according to Catholic traditions.<sup>200</sup> These acts reveal the absence of a *bona fide* intention to convert to Islamic faith and are clear indications of the lack of sincerity of religious belief in the contemporary practice.

*b. Centrality of Religious Belief*

An inquiry on the centrality of religious belief determines whether or not a practice is “core of the belief” or merely “peripheral and incidental.”<sup>201</sup> The Philippine Supreme Court in *Estrada v. Escritor* discussed two cases involving inquiries on centrality of religious belief. In *Wisconsin v. Yoder*, the constant opposition of the Amish community regarding public high school education was “central to their way of life and faith.”<sup>202</sup> In *Sherbert v. Verner*, the Seventh Day Adventists’ proscribed any form of labor on Saturdays.<sup>203</sup> An exemption from work on Saturdays was granted on the basis that the belief was a “cardinal principle.”<sup>204</sup>

With respect to the contemporary practice, the interviews show that polygamy is not central to the belief of the males converting to Islam. The subsequent marriage in the contemporary practice is contracted for reasons other than the pursuit of religious belief. Furthermore, polygamy is not central to Islamic faith.<sup>205</sup> Monogamy has always been the general rule, and polygamy has been the exception.<sup>206</sup> Strict limitations have been statutorily imposed to curtail the negative effects and consequences of polygamy, as provided under Articles 27 and 162 of the Muslim Code.<sup>207</sup>

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<sup>199</sup> See *supra* Part II, sec. B, subsec.1.

<sup>200</sup> See *supra* Part II, sec. B, subsec. 2.

<sup>201</sup> BUZZARD & ERICSSON, *supra* note 116, at 70.

<sup>202</sup> *Estrada v. Escritor*, A.M. No. P-02-1651, 408 SCRA 1, 127, Aug. 4, 2003, *citing* *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>203</sup> BUZZARD & ERICSSON, *supra* note 116, at 70-71, *citing* *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>204</sup> *Estrada v. Escritor*, A.M. No. P-02-1651, 408 SCRA 1, 127, Aug. 4, 2003, *citing* *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>205</sup> RASUL, *supra* note 7, at 103.

<sup>206</sup> ARABANI, *supra* note 2, at 379.

<sup>207</sup> *Id.* at 380.

## 2. Second Stage: Compelling State Interest

The second stage involves the determination of a sufficiently compelling state interest that would warrant an intrusion in the free exercise of religious belief. A balancing of interests is carried out in the second stage of the test, wherein the governmental interest is weighed against religious freedom.<sup>208</sup> It is critical to underscore that the process of balancing interests is contextual, whereby the compelling nature of the interest is evaluated “under the particular set of facts.”<sup>209</sup>

With regard to the contemporary practice, the governmental interest is evidently the protection of marriage as an inviolable social institution. In *Estrada v. Escritor*, the Philippine Supreme Court has expressly recognized the legitimacy of this particular governmental interest.<sup>210</sup> The Court ruled therein that “in this particular case and under these distinct circumstances,” the government failed to demonstrate the compelling nature of the interest relative to religious freedom.<sup>211</sup>

It should be noted, however, that the resolution of the Court in *Estrada v. Escritor* was within the context of a particular set of facts. The sincerity of respondent Soledad Escritor’s religious belief was clearly established in the case, thus warranting an exemption to accommodate the free exercise of religious belief.<sup>212</sup> In contrast, it has been shown that there is an absence of sincerity of belief in the contemporary practice. Islam is merely used as a tool of convenience to achieve the overriding objectives of the contemporary practice, that is to possess the capacity to remarry without any legal impediment and liability, and to contract another marriage that is legally recognized. It has also been established that there is an absence of centrality of belief in the contemporary practice, as polygamy is not central to the belief of the males converting to Islam. In addition, polygamy is not central to Islamic faith.<sup>213</sup>

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<sup>208</sup> *Estrada v. Escritor*, A.M. No. P-02-1651, 408 SCRA 1, 128, Aug. 4, 2003.

<sup>209</sup> *Id.* See also BUZZARD & ERICSSON, *supra* note 116, at 72.

<sup>210</sup> *Estrada v. Escritor*, A.M. No. P-02-1651, 492 SCRA 1, 84, Jun. 22, 2006.

<sup>211</sup> *Id.* at 91.

<sup>212</sup> *Estrada v. Escritor*, A.M. No. P-02-1651, 408 SCRA 1, 189-190, Aug. 4, 2003.

<sup>213</sup> RASUL, *supra* note 7, at 103.

The institution of marriage is gravely compromised in light of the absence of sincerity and centrality of belief. The State has an overwhelming interest in protecting the inviolable institution of marriage against any self-serving assertion of religious freedom.<sup>214</sup> In the context of the contemporary practice, the governmental interest of protecting the inviolable institution of marriage is of a compelling and paramount nature.

### 3. Third Stage: Least Intrusive Means

The third and final stage of the compelling state interest test evaluates the means by which the government is pursuing its legitimate interests, and determines whether or not such means are the least intrusive.

Article 35 (4) of the Family Code and Article 349 of the Revised Penal Code regulate bigamous marriages. However, the statutes do not indiscriminately regulate subsequent marriages contracted in accordance with the Muslim Code or Muslim Law. For the Family Code and the Revised Penal Code to apply to subsequent marriages, a least intrusive means is employed through the strict requirements imposed in Article 162 of the Muslim Code. The Family Code and the Revised Penal Code will only regulate subsequent marriages that do not comply with the requirements in Article 162. As provided in Article 162, the prior consent of the wife, or the permission of the *Shari'a* Circuit Court if the wife refuses to give consent, is a condition *sine quo non* in order to contract a subsequent marriage.<sup>215</sup> Without the prior consent or permission, the subsequent marriage is not solemnized in accordance with the Muslim Code or Muslim Law.

It should be recalled that in a marriage where “only the male party is a Muslim and the marriage is solemnized in accordance with Muslim Law or [the Muslim Code],” the provisions of the Muslim Code apply.<sup>216</sup> However, the Family Code shall apply to the marriage of a Muslim male and a non-Muslim female if it is not solemnized in accordance with the Muslim Code or with Muslim Law.<sup>217</sup> The interviews show that the subsequent marriage in the

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<sup>214</sup> See PFEFFER, *supra* note 6, at 702-703.

<sup>215</sup> RASUL, *supra* note 7, at 102; ARABANI, *supra* note 2, at 380; BARA-ACAL & ASTIH, *supra* note 2, at 66.

<sup>216</sup> MUSLIM CODE, art. 13(1).

<sup>217</sup> MUSLIM CODE, art. 13(2). See BARA-ACAL & ASTIH, *supra* note 2, at 27. See also ARABANI, *supra* note 2, at 311.

contemporary practice is contracted without the knowledge and consent of the wife from the prior subsisting marriage. The subsequent marriage in the contemporary practice fails to satisfy the requirements in Article 162 of the Muslim Code. It is thus governed by the Family Code since it is not “solemnized in accordance with Muslim Law or [the Muslim Code].” Pursuant to Article 35 (4) of the Family Code, the subsequent marriage in the contemporary practice is bigamous and void from the beginning.

Furthermore, the exemption from the penal provision on bigamy in Article 180 of the Muslim Code does not apply to the subsequent marriage in the contemporary practice. The subsequent marriage in the contemporary practice is not contracted in accordance with the Muslim Code or Muslim Law. Article 349 of the Revised Penal Code may validly regulate such subsequent marriage.<sup>218</sup>

## VI. CONCLUSION

The contemporary practice generates legal tensions between the constitutional values of religious freedom and the institution of marriage. It capitalizes on the protective mantle of the free exercise clause to achieve its overriding objectives. In the process, marriage as an inviolable social institution is compromised. At its core, however, the contemporary practice is not only an affront to the institution of marriage, but also undermines religious freedom and Islam.

In addressing these legal tensions, it has been argued that the permissive accommodation and mandatory accommodation upheld by the Philippine Supreme Court do not extend to the contemporary practice. It remains subject to governmental regulation that seeks to protect and preserve the institution of marriage.

Ultimately, understanding the contemporary practice and addressing the legal tensions should bring to light the human aspect of an issue that is at once legal and intimately personal. At the heart of the legal tensions resulting from the contemporary practice are real families. This reality should breathe life into the analysis and the resolution of the legal tensions. The statement of Chief Justice Roberto R. Concepcion illuminates the significance of this reality:

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<sup>218</sup> RASUL, *supra* note 7, at 102.

After all, the family epitomizes everything that is dearest to each one of us, and no man can normally be expected to strive for his country and his fellowmen more than what he would strive for his own family. Nothing has a greater and more lasting influence upon one's moral character and general attitude than his life at home or the atmosphere prevailing therein. In the word[s] of Pliny: "Home is where the heart is." Indeed, John Clark has added "Home is home, *though it be never so homely*." Hence, the cohesion, the strength and the efficiency of the family, as a unit of society, constitute the key to and the measure of the greatness of a nation.<sup>219</sup>

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<sup>219</sup> Roberto R. Concepcion, *The Importance of the Family*, in II THE JUDICIAL LEGACY OF CHIEF JUSTICE ROBERTO CONCEPCION 135 (2003).