THE GENERAL NATURE OF ISLAMIC LAW AND ITS APPLICATION IN THE PHILIPPINES *

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First of all, I would like to thank Director Froilan M. Bacuñgan of the U.P. Law Center and the Planning Committee of the Commission on Bar Integration of the Supreme Court, the Integrated Bar of the Philippines and the U.P. Law Center for this singular honor of addressing you as the eighth lecturer in honor of former Chief Justices of the Supreme Court. I do not believe that I can be equal to the occasion for the reason that I am neither a lawyer nor an expert in Islamic jurisprudence. Probably, I was invited to address you because I happened to be appointed as Chairman of the Presidential Commission which drafted the "Code of Muslim Personal Laws of the Philippines". This work, with minor amendments in its administrative provisions, was signed into law by President Marcos on February 4, 1977 as Presidential Decree No. 1083. It is probable, likewise, that the President appointed me Chairman of that Commission because I am the Dean of the Institute of Islamic Studies, Philippine Center for Advanced Studies, University of the Philippines, and because I have written a great deal on the history and institutions of the Muslims in the Philippines. Moreover, in my own way, as a student of Islam and its institutions for the last so many years, I have gained an acquaintance, albeit modest, with the nature and genesis of Islamic law. Every student of Islamics, by the nature of the courses he has to study, cannot but be exposed to the basic elements of Islamic law and jurisprudence. Every Muslim child, even in the elementary level of the Islamic school or *madrasah,* is likewise exposed to these elements. And the faithful is similarly exposed, as nearly every sermon (*khutbah*) delivered in the Friday congregational prayers touches on aspects of the law and jurisprudence of Islam. The reason is that the *Shari'a* or Islamic Holy Law, unlike law in the Western sense, covers practically every aspect of the life of the Muslim individual as well as that of his community. It is no exaggeration to say that a person cannot truly understand Islam unless he has a good background in Islamic law. Islamic law covers all actions a Muslim is obliged to do, obliged to refrain from, and recommended or not recommended to do. It also provides for those actions, called

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"indifferent" (*mubah*), which do not fall under any of the above-mentioned four categories. Thus, a young Muslim is expected to know when and how to fast, whom he can or cannot marry, when and how to divorce, who can or cannot inherit, how to perform properly the rites of the pilgrimage, and so on. Many details on these topics often take no small measure in Friday sermons. This does not mean, however, that every Muslim is expected to be a jurist. This is something else.

I would like to discuss Islamic Law in the Philippines in the following order: (a) the general nature of law and jurisprudence in Islam, its classical expression, and historical development; (b) its manifestation among Philippine Muslims as well as Muslim aspirations and expectations regarding them; (c) the government response to such aspirations and expectations; and (d) details regarding Presidential Decree No. 1083 in relation to basic Islamic premises.

I

Muslims use the term *"Ash-Shari'a"* to refer to the law. It literally means "The Way" and is found in the Qur'an in the verse where Allah says to the Prophet Muhammad: "And now We have set thee in the right way concerning (Our) commandment. . . ."[1]

The *Shari'a* is basically divine law, and obedience to it on the part of Muslims is a religious duty. Although absolute in the sense that it represents a Divine command, it does not, however, claim universal applicability since it is fully binding only on Muslims. Muslim scholars are wont to speak of the validity of other laws relative to those communities that adhere to them. This view is based, among others, on the Qur'anic verse: "For each We have appointed a divine law and a traced-out way. Had Allah willed He could have made you one community."[2] As is well-known, Islam had never claimed a monopoly on Divine Revelation. This point is very specific in numerous verses in the Qur'an.

Muslim jurists have divided the *Shari'a* into five general categories: (1) Beliefs (*I'tiqadat*) — these consist of the six articles of the Islamic faith; (2) Moralities (*Adab*) which deal with moral excellences or virtues; (3) Service to Allah or devotions (*'Ibadat*) as expressed in the so-called Five Pillars of Islam; (4) Transactions (*Mu'amalat*), which deal with the duties between individuals in society and cover transactions, securities, partnership as well as all the elements that fall under personal and family law such as marriage, dower, divorce, inheritance, etc.; and (5) Punishments (*'Uqubat*) relating to theft, adultery, slander, etc.[3]

These five divisions clearly reveal the oft-mentioned comprehensive scope of Islamic Law, that Islamic Law encompasses the whole of human

[1] XLV, 18.
[2] V, 48.
[3] *Cf.* HUGHES, A DICTIONARY OF ISLAM, 285-286 (1964).

conduct — at least in its classical formulation. That the religious aspect permeates the whole of it is evidenced by the following qualifications of acts: obligatory (*fard, wajib*), which can be either individual or collective; recommended (*sunna, mandub, mustahabb*); indifferent (*mubah*); reprehensible or disapproved (*makruh*); and forbidden (*haram*). Pegged to or corresponding to this list of qualifications is a scale of legal validity where certain contracts or transactions can be considered as valid, disapproved, defective, and invalid. To be mentioned in passing is that Islam, in general, emphasizes obligations rather than rights. The latter is more or less a corollary of the former.

It is important to note that what is now understood as Islamic Law with all of its details contains a great deal of what was the result of historical development. What is meant in particular is that it took succeeding generations after the death of the Prophet to supply additional details to the Law as well as to make more operative some of its provisions. This leads us to a discussion of the sources of Islamic Law.

The first fundamental source of Islamic Law is the Qur'an which Muslims believe and affirm contains Allah's Revelations to His Prophet Muhammad (c. 570-632 A.D.). In the Qur'an, Allah speaks in the first person. The Qur'an is essentially a code of Divine and moral exhortations. It deals with Faith as well as general ethical prescriptions like compassion, kindness, truthfulness, bravery, etc. It is not a history book or a law journal. Nevertheless, it does contain some prescriptions or injunctions in answer to certain legal problems that arose during the life of the Prophet and the beginnings of the Islamic community. However, it has been pointed out by some scholars that its legal prescriptions, stated in verses, are relatively few. A rough estimate gives the following figures: 70 injunctions on family law; 70 on civil law; 30 on penal law; 13 on jurisdiction and procedure; 10 on constitutional law; 25 on international relations; and 10 on the economic and financial order.[4] Clearly, then, the Qur'an did not specify details for every legal problem that a social organization could potentially generate. This brings us to the *Hadith* (pl. *ahadith*) or Prophetic traditions as the second fundamental source of Islamic Law.

In the absence of an explicit Qur'anic provision that could apply to a new legal problem cropping out of an emerging social circumstance, the very earliest Muslim jurists had recourse to the example and actions of the Prophet, that is, the *sunna* of the Prophet. In time, a great deal of this *sunna* were formally placed into writing to be known collectively as *Hadith*. There are various collections of *ahadith*, some of which are considered to be more authoritative than others. In order to ensure that only authentic traditions would be accepted, a strict discipline for determining the degree of their veracity was developed. Among other things, the recourse to the

[4] RAMADAN, ISLAMIC LAW: ITS SCOPE AND EQUITY, 43 (2d Ed. 1970).

Hadith accomplished at least two purposes: it checked the individual opinion (*ra'y*) of judges (*qadi*) as well as moderated some of the legislative functions of the Umayyad khalifs in Damascus. (Some religious scholars thought that the khalifs in Damascus had somewhat strayed away from the examples of the first four khalifs who had been actual Companions of the Prophet and who had presumably been better if not intimately acquainted with the *sunna* of the Prophet.)

With the spread of the Islamic Empire in the seventh century and the subsequent rise of Islamic cities it was to be expected that there would emerge different groups of jurists whose function, among many others, was to see to it that the so-called legal matters would fall within the scope of religious and moral precepts. In effect, what was called the consensus of the community or *ijma'* was the consensus of the learned scholars or jurists. The *ijma'* decided on the interpretation of the Qur'an as well as what *ahadith* were to be accepted. It served as a sanction for many legal provisions. It became the third source of law.

In time another source of the law came to be. This was *qiyas* or reasoning by analogy. An example of one type of *qiyas* is as follows: Drinking wine is explicitly forbidden in the Qur'an. The Arabic word used for wine is *khamr* and connotes intoxication. Therefore, all intoxicating drugs and liquors are prohibited.

These then are the four principal sources of Islamic Law: Qur'an, *Hadith, Ijma'*, and *Qiyas*. However, there were three supplementary sources. The first of these is *istihsan* or juristic preference. It is a departure from *qiyas* in that it accepts a rule on the basis of what is believed to constitute a more relevant legal reason. Another is *istislah* or taking public interest or welfare into account. The last is *'urf* or custom provided it does not go against the Qur'an and *Hadith*. Actually, some jurists have considered *'urf* as separate from the system of Islamic Law. Historically, not all jurists have accepted all of these three supplementary sources of law.

The existence of different groups of scholars in different parts of the Islamic world eventually generated different schools of Islamic law. These schools (*madhhab*, pl. *madhahib*) were basically centered on some famous juristic personalities. In effect, the thought of these schools was initially based on the works or lectures of these famous jurists as well as on the labors of their disciples. Although Islamic law had already acquired its most important features in the first decades of the Islamic era, the concretization of these schools took place about a hundred years later. Four of these schools which have survived and are considered "orthodox" at present are the following: the Hanafi, the Maliki, the Shafi'i, and the Hanbali.[5]

[5] The Hanafi *madhhab* is named after Al-Nu'man Abu Hanifa (81-150 A.H., 700-767 A.D.) who was of Persian ancestry and flourished in Kufa, Iraq. The Maliki

There are differences among these schools. For example, regarding juristic techniques, the Shafi'i school does not look favorably on *istihsan* or juristic preference. This is unlike the Malikis and the Hanafis who utilize it with *istislah* or the consideration of public welfare. There are also differences in details regarding marriage, divorce, guardianship, etc., as for example in the ages of the children the divorced mother may be allowed to keep in her custody, in the number of grounds upon which a woman could base her claims for a divorce from her husband, in the testamentary disposal of one-third of the estate of a man who has no legal heirs who might claim the fixed shares stipulated by the Qur'an, and so on. Nevertheless, Muslim scholars do not tire pointing out that all the schools agree on the essentials and that differences occur only on the secondary particulars. This agreement on the essentials is to be expected since all postulate the Qur'an and the *Hadith* as the two primary and fundamental sources of the Law. In any case, Islamic legal philosophy had declared that the four schools are all orthodox and whatever differences they may have merely reflect various facets of the same essence. Instead of the phrase "conflicting opinions" between the schools, it prefers to state "latitude of interpretation and elaboration". The principle guiding these declarations is the *hadith* of the Prophet: "Differences of opinion among my community is a mercy from Allah."

Actually, in their incipiency, there was intense rivalry among the different schools. In time, however, and under the general Islamic spirit of tolerance, the schools began to look at one another as equally valid. But what is significant to note here is that, in general, the acceptance of the orthodoxy of the schools was due to the fact that the Muslim peoples had so decided on the matter. In brief, it became part of Islamic tradition to accept the orthodoxy of the four schools. This was the *ijma'* or consensus of the Muslims who were also guided by the principle enunciated in another *hadith* of the Prophet: "My community will never unanimously agree in error."

Incidentally, there had been other schools in the past; but they had disappeared mostly for want of followers. There is also at present the Shi'a school of law which, in turn, is divided into sub-schools. Except for some provisions having to do with political leadership, the Shi'a school agrees with the four orthodox schools regarding fundamentals.

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madhhab is named after the Imam Malik Ibn Anas (c. 94-179 A.H., c. 712-795 A.D.), an Arab from Medina, Arabia. The Imam Abu 'Abdullah Muhammad Al-Shafi'i (150-204 A.H., 767-820 A.D.) was the founder of the Shafi'i *madhhab*. He was an Arab of the tribe of Quraish and distantly related to the Prophet. He was also a student of Malik and died in Egypt. The Hanbali *madhhab* is named after Ibn Hanbal (164-241 A.H., 780-855 A.D.), an Arab jurist born in Baghdad. He was a student of Al-Shafi'i. It might be important to point out that none of the above four jurists consciously intended to found a school and Malik, for one, refused to have one of his works become a general legal code in spite of the khalif's proposal.

Crucial to note is that, in general, adherence to a school was mostly based on its ritual provisions or requirements. In matters of litigation, Muslims have accepted the jurisdiction of courts using the tenets of another school. Although a Muslim can always claim to be governed by the school he adheres to, there is nothing to prevent him from transferring his allegiance to another school. The reason for this is that the *ijma'* allows it.

At present, the Hanafi school is found in the Middle East, Afghanistan, Pakistan, and North India. At one time, it was the official school in Turkey. The Maliki school predominates in North, West, and Central Africa. In Islamic Spain, the Maliki school once held sway. The Shafi'i school is found in East Africa parts of South Arabia and in Southeast Asia, including the Philippines. The Hanbali school is restricted to Saudi Arabia. The Shi'a school, considered by the majority of Muslims as not belonging to the four orthodox schools, is predominant in Iran, and it is found in some small communities in Syria, India, and Pakistan. Nearly one-half of the people in Iraq and North Yemen also adhere to the Shi'a school.

What happened in the history of Islamic Law was that when the teachings of the schools became part of orthodoxy, juristic speculation slowed down. This is what is meant by the oft-repeated phrase that the doors of *ijtihad* (literally, effort or the use of individual reasoning) had closed. This began to happen at around the tenth or eleventh century A.D. In brief, the *ijma,* or consensus of one given instant or generation became accepted as binding on, and unquestioned by, the next generation. Consequently, Islamic Law began to appear, especially before the eyes of Westerners, as something rigid or inflexible and thus unable to cope with new social situations. To moderate this inflexibility, Muslim jurists in the last century as well as in the beginning of this century had begun to use at least two methods: *takhayyur,* which represents a selection of rules from the various schools to apply to different problems; and *talfiq* which combines elements of different rules from different schools to apply to a specific problem.

The fact that most Islamic countries fell under Western dominance affected the sway of Islamic law in them. The present tendency to codify elements in personal law in some Muslim countries could be due to French influence; although, it must be pointed out that this did not affect the nature of the substance of the law. Penal law became progressively autonomous and influenced substantially by Western law with traditional punishments made inoperative as being judged too harsh by the colonizers or imperialists. Another Western influence is seen in the institution of something like a Court of Appeals. During medieval times, the court of the judge (*qadi*) represented the sole judicial organ. But again, this influence is restricted to the procedure of the law and not to its substance. But one thing which the Western colonizers never dared to touch in Islamic law, was that aspect pertaining to family law. Now, with independence, this

family law has come to the fore with different attempts to codify it or make it more receptive to modern conditions. What is noticeable now in Muslim countries, in varying degrees or intensities, is the reopening of the doors of *ijtihad*. Exemplified by a well reasoned and disciplined judgment on the part of the individual specialist, *ijtihad* is often combined with an *ijma'* or consensus of the opinion of the learned.[6] Actually, there is a move to differentiate the Qur'an and *Hadith* on the one hand from *qiyas, istihsan,* and *istislah* on the other. The Qur'an and *Hadith* are asserted to be, just as it was during the early days of Islam, the two fundamental sources and the core of, if not identical to, the *Shari'a;* while the other so-called sources are viewed as mere juristic techniques. A corollary assertion is that these techniques represent the source of the accumulated heritage of various influences (historical, cultural, etc.) on Islamic society. All juridical works or achievements after the life of the Prophet can therefore, be reconsidered to face new challenges.[7] All these imply that there will always be a hard core of Islamic principles in Islamic law, guaranteeing that it will remain truly Islamic while allowing it to deal with emerging or changing conditions in life and society within certain limits set by divine ordinances. Thus, subsidiary particulars in the law might suffer modification; but, indeed, such modifications must be justified by theological principles.

In ending this section dealing with Islamic Law, its nature, and development, I would like to point out that Islamic Law is not the result of the work of a group of state legislators who sat down together to draw up the Law. Neither was it the result of the will of a human sovereign acting on his own capacity. Islamic Law originated with principles believed to have come from Allah Himself; however, its development, systematization, and coherence were the result of the work of jurist-scholars (*faqih,* pl. *fuqaha'*) who did their best to see to it that all legal rules in Muslim society fell within the purview of Islamic religious principles. These jurists set out to discover what good Muslims were obliged or forbidden to do as well as when and what to obey or not to obey in government. In its classical and ideal form, government was there to protect and help make operative Islamic Law to which it was subject.

II

The implantation of Islamic institutions in the Philippine South was a slow but progressive process. The Sulu sultanate was established in the middle of the 15th century, followed by those of Maguindanao and Buayan in the next century. The establishment of these political institutions imply that a great number of inhabitants had already adopted Islam. It may be speculated that elements of the *Shari'a* were continually being introduced

[6] See S. 'Ali Raza Naqvi, *Problems in the Codification of Islamic Law,* in INTERNATIONAL ISLAMIC CONFERENCE, FEBRUARY 1968, Islamic Research Institute, Islamabad, Pakistan, 42-45.

[7] RAMADAN, *op. cit.,* p. 36 & 40. Also cf. S. 'Ali Raza Naqvi, *op. cit.,* pp. 42-43.

and implemented side by side with the customary law (*'ada*), even while some elements of the latter were being replaced for being palpably against the spirit of Islam. The *madhhab* that eventually came to predominate in the Philippines was that of *Shafi'i*. An easy explanation for this is the fact that this school already predominated in the surrounding Indonesian islands which already had an older history of Islam. It may also be pointed out that the maritime contacts between the Muslims in the Philippines and those in the neighboring islands were quite intimate.

In general, it can be said that the sultan was the protector of the Shari'a, while the datus or lesser chieftains stood for the integrity of the *'ada*. In any case, both laws came to be mainly applied by the judges or *kalis* (Arabic, *qadi*) who were appointed or confirmed by the sultan. For the guidance of the judges as well as that of the ordinary man for whom customary law and the Holy Law in some areas were intertwined without much distinction, sultans tried to codify some selective aspects of the personal laws. It is said that 'Azim-ud-Din, a learned sultan of Sulu, tried such a codification around the 1740's. But no evidence of this work seems to have survived. Certainly, the Sulu Sultan Pulalun (Fadl) around 1850 had one prepared which adhered closely to the classical texts — especially on punishments. His successor Jamal-ul-'Azam (reigned 1862-1881) had another code prepared where the punishments were relatively more moderate.[8] This code was accepted by the leading datus and other officials of the state in 1878 A.D.[9] Another code based on this was drafted in 1902; but it appears that it was not, for many political and social reasons, ever operative.[10] At this time, the power of the sultan was waning on account of the American Occupation. The datus, moreover, did not support the proposed code.

The Maguindanao judges were guided by the *Luwaran*. Consisting of 85 "articles" (some consisting of various "sections"), its bulk represented translated selections from Arabic law books (one of them being a 15th century law manual) but amended in some details to make them practical in the context of local situations and customs. Attached to most of these provisions are about 100 Arabic marginal quotations taken from four Arabic law manuals adhering to the Shafi'i *madhhab*. The intention was to make these quotations serve as authoritative props to the provisions. (Incidentally, these Arabic works were quite popular in other parts of Malay lands). Najeeb Saleeby calculated that the *Luwaran* was compiled in the middle of the eighteenth century.[11] It was quite universal in the Maguindanao or

[8] An English copy of this 1878 code is found in N. SALEEBY, STUDIES IN MORO HISTORY, LAW AND RELIGION 98-104 (1976).

[9] *Ibid.*, p. 99.

[10] For this 1902 CODE, see *ibid.*, pp. 104-111. The system of fines in this 1902 CODE as well as in the earlier codes appear to favor and serve as sources of revenue to the sultan and chief datus.

[11] *Ibid.*, p. 68.

Cotabato area.[12] Its provisions deal mainly with property, slaves, transactions, partnerships, debts, nature of oaths, testimony, homicide, marriage, divorce, adultery, gifts, inheritance, wills, fines and punishments. It does not deal with other aspects of Islamic law such as rituals and moralities.

Many of the articles of the *Luwaran* can be immediately recognized as Islamic Law. Others are purely local in character with some of them appearing to moderate the harsh punishments provided in the standard texts. The system of fines is quite novel or purely local and has no parallel in the classical texts. Saleeby observed that, in practice, not all of the laws on murder, adultery, and inheritance, especially the last one, were strictly complied with.[13] From this point of view, a great deal of the *Luwaran* stood as an ideal. However, Islamic scholars or jurists would have easily distinguished between what was Islamic or non-Islamic in actual practice. Indeed, in the long run, the operation of Islamic law is a function of the learning of the religious leaders as well as the Islamic consciousness of the generality of the Muslims.

It can be stated categorically that at present the Muslims in the Philippines, regardless of ethno-linguistic differences, are greatly guided by Islamic family law. This is not to deny that many of them often believe that some elements of the customary law are Islamic — a belief not shared by the learned. In any case, Muslims in the South have been and are marrying and divorcing along Islamic lines — regardless of the fact that the national government had not recognized divorces in the Philippines in the last so many years.

Family law had always been the stronghold of the *Shari'a*.[14] As mentioned earlier, Muslim countries which fell under Western domination had given way to Western influences regarding commercial transactions and penal law; but one aspect where they resisted interference and which the imperialists had not dared to trespass was the Islamic domain in family law. For various reasons, Muslim religious duties had been quite intertwined with their family law.

In the Philippines, a source of past discontent among Muslims was their belief that the existing national laws meant to eventually do away with Islamic family law. It was not hard for them to recognize that many national laws were based on Christian moral principles — principles which they maintained were not necessarily superior to those of Islam. They could not understand why other moral values were being imposed upon them. To Muslim religious leaders, the problem was one of the preservation of Islam; to Muslim lawyers who had graduated from the schools of Manila, the problem was also one that involved the principle of religious freedom

[12] *Ibid.*, p. 69.
[13] *Ibid.*, p. 70.
[14] N. J. COULSON, A HISTORY OF ISLAMIC LAW 161 (1964).

and tolerance. The executive orders of Presidents extending temporarily the validity of Muslim marriages was interpreted as not only a grudging concession on the part of the government but as an expedient measure preparatory to their final prohibition. A problem among the Muslims was that they could not really push a united effort to present their case to the government. On the other hand, the Muslim scholars (*'ulama*) were mostly learned in Islamic law but quite unaware of the national laws; on the other hand, Muslim lawyers, while fully-trained in the national law which was Western in spirit, were at the same time ignorant of Islamic law and jurisprudence. Meanwhile, leaderless, the bulk of the Muslim population stood aside, if not alienated from, at least indifferent to, the national stream.

The Muslim secessionist movement as first expressed in the Muslim Independence Movement (MIM) (later changed to Mindanao Independence Movement) launched by a former Cotabato Governor in 1968, was premised on the principle that Muslims in the Philippines needed an independent state in order that Islam could be safeguarded for them. This, too, is the same premise postulated by the Moro National Liberation Front (MNLF). It is important to emphasize that even Muslim non-sympathizers of the MNLF or those who have always associated themselves with the Philippine national community also point out the necessity of preserving Islamic values as well as the Islamic way of life. This includes the application of Islamic personal and family laws.

Responsive to genuine Muslim aspirations, the New Society had decided to go a long way to satisfy them. It was within the spirit of religious freedom as well as cultural diversity in a unitary state that President Marcos on August 13, 1973, signed Memorandum Order 370 creating a Research Staff to come up with a draft on a proposed Code of Philippine Muslim Laws. The Research Staff completed and submitted its work to the President on April 4, 1974. Subsequently on December 23, 1974, the President signed Executive Order No. 442 creating the Presidential Commission to Review the Code on Filipino Muslim Laws. Noteworthy about this Executive Order was that it considered the codification as "one of the priority projects identified for the reconstruction and development of Mindanao and Sulu" and that "the realization of the aspiration of the Filipino to have their system of laws enforced in their communities will reinforce the just struggle of the Filipino people to achieve national unity..."[15]

[15] The eleven (11) members of the Presidential Commission were: Atty. Ide C. Tillah (representing the Department of Justice), Justice Ramon O. Nolasco (representing the Integrated Bar of the Philippines), Atty. Esteban B. Bautista (representing the U.P. Law Center, University of the Philippines), former Senator Mamintal A. Tamano and Judge Saaduddin A. Alauya (representing Muslim lawyers), Ustadh Ibrahim R. Ghazali and Ustadh 'Ali Abdul Aziz (members of the *'ulama*), Con-Con Delegate Michael O. Mastura (Project Officer of the Research Staff for the Codification of Filipino Muslim Laws), Bishop Bienvenido Tudtud (representing the Catholic Hierarchy of the Philippines), Dr. Agapito I. Cruz (representing the Supreme Court and Vice-Chairman), and Dr. Cesar A. Majul (Dean, Institute of Islamic Studies, PCAS, and Chairman). However, Ustadh 'Ali Abdul Aziz and Bishop Tudtud did not participate in any of the sessions or activities of the Commission.

The first plenary session of the Commission was held on May 23, 1975 at the Philippine Center for Advanced Studies, University of the Philippines. Of the nine members who met, six were Muslims. The Chairman pointed out that the success of the work would signify that the Muslims would be more committed to a national community that was sensitive to and respected their religious sentiments. He added that a more institutionalized or systematic implementation of Islamic law among the Muslims would heighten their Islamic sophistication, increase their sense of security, and regulate their lives further in such a manner that they would become better citizens. He concluded that the success of the work of the Commission would signify "one of the most enduring contributions of President Marcos and the New Society to the well-being of the Muslims in the Philippines." The Commission adopted a work plan and divided itself into two committees: one to study the administrative aspects and the other to study the substantive aspects of the proposed code. On June 20, 1975, the Commission had a meeting with about fifteen (15) Muslim lawyers, most of whom were either judges or fiscals or had held high government positions in the past. The meeting was primarily one of consultation. Noteworthy about the meeting was that most if not all of the lawyers present demonstrated deep appreciation for the work of the Commission and hoped that it would complete its work as soon as possible.

Likewise, on July 23-24, the Commission held a two-whole-day sessions with at least twenty (20) of the most prestigious members of the Muslim *'ulama* — many of whom were teachers or religious leaders in their respective communities. The idea was for the Commission to ascertain the feelings and attitudes of persons who were acquainted with Islamic law regarding the code and to learn from them. The Commission received numerous suggestions from them and learned from the many lengthy discussions held. Nevertheless, unlike the disciplined group of Muslim lawyers, some members of the *'ulama* questioned the composition of the Commission. They wanted to be members of it themselves or come up with their own draft. However, the majority expressed their appreciation of the act of President Marcos and their gratitude for their having been invited. The Commission then met at various times to evaluate the results of the meeting with the Muslim lawyers and *'ulama* as well as to coordinate the work of its two subcommittees. On August 28, 1975 the Commission reviewed its final draft and presented it on August 29 together with its final report to the President. Except for the first plenary meeting, all meetings of the Commission were held at the U.P. Law Center which provided other facilities as well. The work of the Commission, except for some amendments to its provisions regarding the number of its *Shari'a* Courts and the nature or procedure for appeal, was signed into law as Presidential Decree No. 1083 on February 4, 1977 by the President. There was no amendment or change in the substantive provisions of the Code prepared by the Commission.

A major significance of this Presidential Decree is that a sizeable portion of that aspect of the *Shari'a* pertaining to family law has now become part of the national laws of the Philippines. Probably, the Philippines is the only country in the world with a majority Catholic or Christian population that has taken such a step. But this is just fair since, in most countries where the majority of the population are Muslim, the minority religious communities are allowed to be governed by the bulk of their religious family law. The move of the Philippine government furthermore reveals some emerging tendencies of the New Society. Among this is the acceptance in the country of the legitimacy of cultural pluralism. Here, different cultural groups, while preserving their cultural identities, all participate in the national processes and benefits; yet, despite of crisscrossing loyalties, all are held together by a common loyalty to a wider community — the national community. It is submitted that loyalty to a cultural group can be complementary to that of the nation. To go further, loyalty to a nation can often be in direct proportion to the recognition of cultural integrity and religious tolerance.

Undoubtedly, the existence of a different code of family law to be applicable to, say, about eight percent of the population will create additional problems for the judicial system in the country. Moreover, to many lawyers, deeply influenced by Roman law with its canon of universality, such a separate code will appear as a deviation from what is conceived as a well-ordered and well-thought out system applicable to all citizens. At the very least, too, to have a separate code might appear as an inconvenience. But inconveniences and a departure from one's past and only legal training and habits are not much to pay for the sake of the happiness of a sizeable population of our country and the preservation of national unity.

III

This section will deal with the general nature of Presidential Decree No. 1083, the relation of some of its provisions with Islamic principles and institutions, its limitations, and future implications.

The Preamble of the Decree states as one of the reasons for the Code that the Constitution of the Philippines provides that the State shall consider the customs, traditions, beliefs and interests of the National Cultural Communities in the implementation of its policies. It goes on to say that the enforcement, with the full sanction of the State, of the legal system of the Filipino Muslims would enable them to have a more ordered way of life as well as strengthen them. In this manner, they can better contribute to national solidarity. To effect these aims, the Code accomplishes at least three things: "(a) Recognizes the legal system of the Muslims in the Philippines as part of the law of the land and seeks to make Islamic law more effective; (b) Codifies Muslim personal laws and (c) Provides for

an effective administration and enforcement of Muslim personal laws among Muslims."[16]

To be pointed out immediately in these three stated aims is an already existing distinction between "the legal system of the Muslims" or *Shari'a* and those "Muslim personal laws" now codified. In particular, this means that the Code explicitly assumes the existence of "other applicable Muslim laws" over and above the provisions of the Code which may be used to bear on a particular case.[17] Its Article 4 clearly makes a distinction between "this Code" and "other Muslim laws". In other words, the Code did not codify all the elements of Islamic law that apply to personal and family law; it codified only those which are believed to be the most important or significant. In brief, the Code is not exclusive in its details regarding Muslim personal laws. To illustrate, a rule in the Qur'an states that a marriage between two persons breast fed by the same foster-mother or between the foster-mother and the man who had been suckled at her breast is prohibited.[18] Now, Article 26(1) of the Code only mentions specifically the prohibition between the foster-mother and the youth; it make no specific reference to two persons having been breast fed by the same foster-mother. However, the next and last paragraph of the same Article provides that the prohibition on marriage by reason of consanguinity shall also apply to persons related by fosterage within the same degree, subject to exceptions recognized by Muslim law. Although this second paragraph of Article 26 covers the prohibition of a marriage between two persons breast fed by the same foster-mother, it does not specify the exceptions. For this, the judge must consult the jurists or standard law books on the matter which, however, may not all fully agree with one another.

Again, Article 38 states that "The property relations between the spouses, in the absence of any stipulation to the contrary in the marriage settlements or any other contract, shall be governed with this Code, and in a suppletory manner, by the general principle of Islamic law and the Civil Code of the Philippines." This Article specifies that recourse to the *Shari'a* be made by the judge to apply it to details where the Code is silent. There are similar cases to this throughout the Code.[19] A consequence of all this is that the judges will have to know much more of Islamic Law than what is provided by the Code. They will have to be well-read on the most important texts of the various schools as well as be acquainted with the techniques of the Muslim jurists. They might even have to keep abreast with contemporary legislation in other Muslim countries.

Another peculiarity of the Code is that it does not entirely ignore the *'ada* or customary law of the Muslims who, incidentally, belong to different

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[16] Art. 2.
[17] Art. 13(3).
[18] IV, 23.
[19] E.g., Articles 4, 5, 13(2), 18(b), 26(2), 27, 38, 44(e), 52(g), 53(e), 166, 174(1), 175, 178, 186(2), etc.

ethno-linguistic groups living in different areas and may not all have the same *'ada.* (It will be recalled that some Muslim jurists, in the past, had considered *'ada* or *'urf* as one of the sources of Islamic Law). In the Code, Article 5 provides that "Muslim law and *'ada* not embodied in this Code shall be proven in evidence as a fact. No *'ada* which is contrary to the Constitution of the Philippines, this Code, Muslim law, public order, public policy or public interest shall be given any legal effect." Furthermore, Article 174(1), dealing with the administration of communal property, states that: "Except as otherwise provided in this Code, communal property shall be administered or disposed of in accordance with Muslim Law, *'ada,* and special provisions of law." Indeed, the Code gives some concessions to customary law but clearly subordinates it to the *Shari'a.* From a certain point of view, this subordination is well and good for the simple reason that a great deal of the agitation in the South had been verbally launched in the name of Islam and not on behalf of specific ethno-linguistic groups. In any case, among sophisticated Muslims there had always been the conscious effort to allow the *'ada* to give way to the *Shari'a.* Incidentally, the provision of Article 5 mentioning the principle of public interest, called *maslaha* by the Muslim jurists, will make many of you recall the technique of *istislah* used by the Hanifis and especially the Malikis as a source of law.

Now, in its substantive or non-administrative aspect, the Code deals mainly with aspects of personal and family law like personal status, marriage, divorce, paternity, guardianship, and inheritance. Except for a few minor provisions regarding fines, a provision regarding customary contracts and another on communal property, and those relative to holidays and conversions, it has nothing to do with penal law and other fields of law. It is, therefore, understood that Muslims, like all other citizens of the Philippines, are subject to laws of general application — parts of the civil law not in conflict with it as well as the penal, commercial, tax, and other public laws.

There are many interesting and important differences between the Code of Muslim Personal Laws and Philippine Civil Code. Atty. Esteban Bautista has written an important and instructive article which touches on the most significant differences.[20] I cannot improve on his work on the matter. However, I would like to make some observations on the Code's provisions on divorce (*talaq*). First of all, the subject of divorce usually occupies one of the largest sections in any of the Islamic legal texts. There are *'ahadith* stating that: "Of all the things which Allah had permitted, that which he dislikes most is divorce"; and "The thing which is lawful but disliked by God is divorce." Thus divorce is intended to be the final recourse where all efforts at marital reconcilation have failed. However, many husbands have abused the permission to divorce. While it had been relatively easy for husbands to divorce, it had not been easy, in the past,

[20] Esteban B. Bautista, "The Muslim Code: Towards National Unity in Diversity". Mimeographed copy published by the U.P. Law Center, 1977.

for women to claim a divorce from their husbands. A wife cannot divorce her husband although she can demand a divorce from him or secure a judicial dissolution of her marriage. In spite of the fact that the Qur'an and the Prophet exhort kindness and justice in dealing with divorced women, some husbands have taken advantage of their right to divorce extra-judicially, and they have often exploited wives desiring a divorce by putting some conditions, like having them give up their dowries. On account of these, some of the different schools of law had stipulated various grounds whereby a woman could claim a divorce from her husband or petition the courts to grant her a divorce. Among the Hanafis, practically the only reason for a woman to petition for divorce was the sexual impotence of the husband such that he could not consummate the marriage. Among the Shafi'is, cruelty was a good ground for divorce; while among the Hanbalis, desertion or lack of support as well as certain stipulations in the marriage contract were practically the only reasons. Among the Malikis, however, the wife could have many reasons: the husband's desertion, lack of support, cruelty, sexual impotence that had developed even after marriage, and incurable or chronic diseases which can harm the wife or family. Now, the Code in Articles 50 to 53, if I am not mistaken, takes into consideration all the different grounds given by the four different schools, with some additional causes not found elsewhere, by which a married woman could petition a court for a judicial divorce. In this, the Presidential Commission, in consonance with modern tendencies of legislation in Islamic countries, had recourse to the technique of *takhayyur,* mentioned earlier, where different desirable provisions of the different schools are combined. In this age of female emancipation, the Commission showed great sensitivity to emerging social expectations.

However, not all Muslim women, especially those who have graduated from Manila universities, and the University of the Philippines in particular, might be happy with Article 27 which states: "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." The Presidential Commission had received letters as well as heard the opinions of many Muslims on the problem of polygamy. There were a few Muslims who insisted that the proposed Code should contain an expressed provision prohibiting outrightly multiple marriages. The Commission resisted this pressure for the simple fact that it could not and did not dare to prohibit what the Qur'an, the fundamental source of Islamic Law, had allowed. Furthermore, no member of the Filipino *'ulama,* none of whom appear to have more than one wife, had even dared to suggest putting the prohibition. However, the Code in Article 162 provides that a Muslim husband desiring to contract a subsequent marriage must file in writing a notice to the *Shari'a* Circuit Court where his family resides. The Court

will then serve a copy to his wife or wives. If any of them should object, an Agama Arbitration Council, as provided in Article 161(2), would be constituted. If this Council does not get the complainant's consent, the Court shall, subject to Article 27, decide whether or not to sustain her objection. Needless to say, should a wife have good reasons to object to her husband's subsequent marriage and cannot prevent it, she can probably petition for a divorce.

Marriage up to a maximum of four wives at the same time is clearly permitted by the Qur'an which also prescribes the husband to treat all of his wives equally and not marry more than one wife if he cannot do so. Actually, multiple marriages in Islam although allowed is not really enjoined. Historically, it had been allowed for an important reason.[21] I dare say that monogamy is the ideal form of marriage in Islam. The Muslim jurists have all recognized this. This explains why in the Hanbali school, there can be a stipulation in the first marriage contract prohibiting a second marriage. The Malikis often interpreted their concept of "prejudicing the interest of the wife" as wide enough to include a second marriage on the part of the husband.[22]

The tendency now in Muslim countries is to make polygyny difficult. In Syria, for example, in an explanatory memorandum to its 1953 *Law of Personal Status,* husbands are enjoined "not to take additional wives unless they were financially capable of duly supporting them." Its Article 17 provides that the judge may withhold the permission for a second marriage when it has been established that the husband cannot support both wives. Violation of this would make the parties liable to statutory penalties —

[21] The Qur'anic verses allowing polygyny while recommending monogamy are as follows:

> And if you fear that you cannot do justice to orphans, marry of the women, who seem good to you, two or three or four; and if you fear that you cannot do justice (to so many) then one (only) .... (IV, 3)
>
> You will not be able to do justice between (your) wives, however much you wish (to do so). But turn not altogether away (from one), leaving her as in suspense. (IV, 129).

The first verse has to do with the results of the battle of Uhud in 625 A.D. where about seventy or ten percent of the Muslim warriors fell fighting the invading Meccans. The idea was for surviving Muslims to marry the widows of their companions who had died. In this manner they would be obliged to provide for the orphans as well as administer their properties. Clearly, the term "justice" used, as in the Arabic (*'adl, qist*) has a very wide and rich connotation. But regardless of the historical circumstances attending the first verse, it had been taken by Muslim scholars as a general rule potentially applicable to other cases. Important to mention is that various Qur'anic commentators have differed in their interpretation of the first verse. Consequently, it is to be expected that there would be differences in its translation. It should be added that some jurists have limited the term "justice" in the above verses to the favors which a husband has control of but not to the emotional inclination of the heart.

[22] COULSON, *op. cit.*, p. 207.

although the marriage is not invalid.[23] In Iraq, the judge can withhold permission if he believes the husband cannot treat them equally or that he cannot support both.[24] The radical one is the Tunisia 1957 *Law of Personal Status* which prohibits polygamy outright on the principle that under modern social and economic conditions an impartial treatment of wives, as prescribed by the Qur'an, is no longer possible.[25] Article 30 of the 1958 Moroccan Code of Personal Status provides that polygamy is to be prohibited if injustice to co-wives will ensure and that a wife whose husband contracts a second marriage can refer her case to the Court to consider the injury to her.[26] The Code of Muslim Personal Laws in the Philippines is within the spirit of all the above. It insists that the Court apply the rule that a Muslim cannot have more than one wife unless he can deal with them "with equal companionship and just treatment as enjoined by Islamic Law". Its further qualification that such marriages, too, are to be allowed "only in exceptional cases" demonstrate that the members of the Presidential Commission had exercised some form of *ijtihad,* albeit modest. How "exceptional" a case is will depend on the interpretation of the Court as well as its sensitivity to rising expectations in a modern society. In any case, a very small percentage of Filipino Muslims actually have more than one wife at a time. To be speculated, too, is that with increased opportunities for Muslim women to become more educated and thereby become employed, they would have have less reason to be forced to become a second or third wife for purely economic reasons. It must be emphasized that if a woman nowadays becomes a second or third wife, it is because she allows it.

Reference had been made to the Agama Arbitration Council. This is provided for in Article 160. It is an *ad hoc* body formed by the *Shari'a* Courts to deal mainly with cases involving divorce, subsequent marriage, and offenses involving *'ada.*[27] Its function is to bring about a conciliation or amicable settlement between contesting parties. The religious sanction for such a Council as found in the Qur'an are as follows:

> And if you fear a breach between both of them (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind. (IV, 35).
>
> If a woman fears ill-treatment from her husband, or desertion, it is no sin for both of them if they make terms of peace between themselves. Peace is better. (IV, 128).

The Agama Arbitration Council is thus meant primarily to settle domestic issues. Its other function regarding *'ada* is just an additional one.

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[23] *Ibid.,* pp. 208-209.
[24] *Ibid.,* p. 212.
[25] *Ibid.,* p. 210.
[26] J.N.D. ANDERSON, ISLAMIC LAW IN THE MODERN WORLD 50 (1959).
In their attempt to codify aspects of Islamic family law, the Arab countries had borrowed ideas from each other. Their aim is to eventually have a uniform code for all Arab countries.
[27] Esteban B. Bautista, *op. cit.,* p. 12.

This does not mean that the *'ada* involved may not have to do with marriage problems. In effect, with the proper Court involvement, the Agama Arbitration Council can enable women to know what their rights are while moderating some of the effects of the unilateral discretion of a husband or his extra-judicial right to divorce his wife or take a second wife. It has been pointed out by some Western scholars that the so-called plight of Muslim wives come not on account of the nature of Islamic Law but because the women do not know their rights. Alleviating the plight of Muslim wives is therefore a matter of greater education for women. It is interesting to add, incidentally, that the institution of having a sort of arbitration council to settle differences appears to be part of Filipino indigenous tradition.

Another important aspect of the Code is that of Civil Registry. Here the Clerk of Court of the *Shari'a* District Court as well as that of the Circuit Court has to register Muslim marriages, divorces, revocation of divorces, and conversion within the territorial jurisdiction of said Courts.[28] This provision parallels what has been legislated in Muslim countries in the last few decades. Registration is important. Among other things, it facilitates future recourse to the courts for judicial relief, especially on the part of wives.

Another important and sizeable section of the Code deals with inheritance and wills and other related topics — a total of 47 articles.[29] Muslim jurists consider the law of inheritance to be one of the most difficult and intricate part of the *Shari'a.* I do not intend to get lost in its labyrinth. It will suffice to give its general character in Islam. In Islam, a person while alive can dispose of his property in the manner he desires; but he cannot just will his property in a similar manner. The Qur'an specifies that there are legal heirs who are entitled to fixed or proportionate shares. There is no such thing as disinheriting these heirs unless they are murderers of the deceased and for other specific reasons. The power regarding testamentary disposition is limited to only one-third of the property and provided, according to some schools, that it is not in favor of one who is already entitled to a fixed share in the inheritance. It must be pointed out that although all schools of law agree on the above general principles, they differ on many details which are indeed not trivial. These differences usually come when dealing with the so-called residuaries who represent a class of persons who are entitled to inherit when a residue is left after those entitled to the fixed shares have gotten their share or have previously passed away. And if there are no persons who could belong to either of these two groups, the law provides that the distant kindred shall have shares.

As mentioned by some modern Muslim jurists, the law of inheritance among all Muslims (whether Sunnis or Shi'as) proceeds generally from the

[28] Art. 81-88.
[29] Art. 89-136.

assumption of intestacy. Thus the *Shari'a* lays the details on who gets what and how much from the testate of the deceased. The Muslim Code deals in great detail with inheritance. It does not confine itself solely to the interpretation of any one school, but hopefully represents something that will give some order to succession in a manner acceptable to all Filipino Muslims. A factor to be considered is that the *'ada* on inheritance is still prevalent in varying degrees among the Muslims.

The Code also provides for the office of the Jurisconsult in Islamic Law. The Jurisconsult is what is called in Arabic the *Mufti*. He is a jurist well-versed in the Qur'an, *Hadith* and the great works on jurisprudence. As such he is an authority on Islamic Law. In the old days, there were muftis attached to the courts and whose function was to answer the questions on personal and family law submitted to him by the judges.[30] The formal answer of the mufti is called a *fatwa* (pl. *fatawa, fatawi*). It is said that a Mufti should not exercise his individual judgment but adhere closely to the Texts. Actually, what a mufti did was to make the practice of Muslims consistent with the religious ideals. Consequently, the so-called concessions, if any, of the muftis had been reluctantly given. In any case, since muftis have always dealt with very practical situations, the collections of their *fatawi* had always been deemed very important and studied carefully. Historically speaking, muftis, like the judges, were appointed by sultans or political authorities. There were also cases where there was a grand Mufti to distinguish him from the other muftis. The grand Mufti was the one consulted by the highest state officials regarding the *Shari'a*. At present, many Muslim countries have at least one state-appointed Mufti. The Code specifies his qualifications and provides that he be appointed by the President of the Philippines for a term of seven (7) years without prejudice to re-appointment and that his office be under the Supreme Court. It also provides that the Jurisconsult keep a compilation and cause the publication of all his legal opinions.[31] Needless to say, his published opinions may enrich Muslim jurisprudence in the Philippines and establish precedents in *Shari'a* Courts.

A last point I would like to mention regarding certain provisions of the Code is the wide leeway a judge has in certain cases. What is meant, in particular, is that he can, in the absence of specific provisions of the Code, choose what school of law he might decide to apply to a given case. While it is true that regarding the settlement and partition of estates, Article 134 provides that the Court should take into consideration the school of law adhered to by the deceased and that in the absence of information to this effect that the *Shafi'i* be given preference, there is nothing

[30] When the British eliminated the old system of judges among the Muslims in India by magistrates, they had to appoint Muslim learned men to assist the magistrates. These assistants, although not designated as muftis, actuallly served as such.

[31] Articles 164-168 deal with the Jurisconsult and his office.

to prevent the Court from applying the precepts of other schools if this will help expedite matters to the satisfaction of the petitioners.

By its very nature, this lecture cannot cover everything in the Code. Actually, there is no substitute for reading the Code itself. Nevertheless, I hope I have related the Code to some historical events and Islamic institutions in the Philippines and other Muslim countries.

IV

To conclude, allow me to anticipate certain possibilities if and when the Code on Filipino Muslim Personal Laws becomes fully operative.

The early Muslim jurists, during the height of the Muslim Empire, tended to divide the world into two: *dar-ul-Islam* (the Abode of Islam or Peace) and *dar-ul-harb* (the Abode of War). The former was conceived to refer to those lands where Islamic laws held sway, while the latter denoted those lands where Muslims were persecuted or where Muslim laws were outlawed or made ineffective. Some jurists held that it was a duty of the political and military leaders to expand the *dar-ul-Islam*. However, with the decline of the Empire and its breaking up into many principalities as well as the fact that the frontiers of Islam had reached their limits and had actually receded in some areas, the idea of expansion was relegated to past ideals. In the last century after Moghul power had disappeared in India, the question was raised by Muslims as to whether they were in *dar-ul-Islam* or *dar-ul-harb*. Considering that the British sovereign was a Christian but one who allowed the application of Muslim Personal Laws, some Muslim jurists called the land *dar-ul-aman,* that is, a land where Muslims were secure and the protection of their laws was on the hand of a sovereign as a trust (*amanah*). Lately, in a secular state where there was no persecution of Muslims as such but where there was religious freedom, the land came to be called *dar-ul-hiyad* or the land of neutrality.

I would like to think that the Philippines represents a combination of both elements of *dar-ul-aman* and *dar-ul-hiyad* in terms of the above two definitions. For whereas the country is a secular state which guarantees religious freedom, the guarantee that Muslims can be governed by their personal laws is a trust or *amanah* in the hands of the government. Be it as it may, it has been the view of some Hanafi and Shafi'i muftis, that any land where Muslims live can even be considered *dar-ul-Islam* as long as the Muslims there are allowed to be governed by their personal and family laws in safety.[32] In such an area, therefore, it is expected that the Muslims ought to be loyal to a government that protects and helps to implement their laws.

In time, Muslims in the Philippines will hopefully feel more secure and there will be every reason for them to support and strengthen it. It is

[32] See "Dar-ul-Harb" and "Fatwa" in HUGHES, *op. cit.*, pp. 69-70 and p. 127, respectively, for the views of these *muftis* in Mecca.

hoped, too, that Muslim judges, lawyers and jurists in the Philippines will eventually develop a jurisprudence that will be part of the jurisprudence now being developed in our country. Finally, it is not gainsaying to anticipate that there is no reason why Islamic jurisprudence developed here cannot in the future contribute to the Islamic jurisprudence of the world in a manner that other Muslim countries can be helped to accelerate their progress towards modernization and a happier and more ordered life under Islamic principles.