TOWARDS A DEFINITION OF NATIONAL POLICY ON RECOGNITION OF ETHNIC LAW WITHIN THE PHILIPPINE LEGAL ORDER*

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Let me begin with a brief statement of the thesis of this lecture. We can take as given, the commitment of our people to development of a democratic society. This is reflected not only in our historical struggle, but also in many of the institutions of our political life, including the various constitutions that have been adopted. Today, there is no denying the force, if not the reality, of the democratic spirit in both collective actions and collective aspirations. The principle of populist control of government is not denied, although the institutional measures for effectuating such control have yet to be activated and invigorated. The principle of popular welfare underlies many programs of Government, even if there are also programs that are elitist in their impact and over-all effect. When we turn to law, which is concededly among the most, if not the most, conservative of social institutions, we even find promising ferment in terms of populist accommodation. We see beginnings not only in the assimilation of indigenous law but in administration of the law as well. We now find that the norms evolved within the Muslim population have been accorded the status of law, through the Muslim Code. We also find that, for certain types of neighborhood disputes, there is grassroots participation in the administration of justice, through the medium of the barangay courts. We must mark as significant for the democratization of our society, not so much the specific content of these measures, as their character or status as pioneering institutions in non-traditional directions for participation of our people in the legal processes of Philippine society.

It is the thesis of this lecture that if the evolution of our people into a democratic society is to *proceed democratically,* that is to say, if our people as a whole are to participate fully in the task of continuing democratization, we must incorporate in our national policy, specific strategies for the recognition of indigenous or ethnic law, within the Philippine legal order.

Immediately, it must be pointed out, so as to minimize the confusion that arises from misunderstanding, that the traditional processes of democratic participation, as reflected in our political institutions, should continue

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and should be strengthened. There is no intention whatsoever to detract from the continuing validity, necessity, and utility of republicanism, as the traditional process of democratic participation is commonly known, in the quest of our people for a democratic society. The representative institutions of government are not only established traditional modes of popular participation, they provide the most acceptable and stable methods for articulation of the national will, regardless of the well-known imperfections that attend its expression. My first lecture as holder of this Chair on Jurisprudence, developed at some length this particular point. The very conception of a society presupposes a method for reconciling differences among members of the society not only over values, but also over strategies, so as to permit a stable co-existence between the dominant group, who control government, and the minority or minorities. It has been a common-place of modern analysis since Kant, that fundamental values are incommensurable, and science cannot mediate in the competition between ultimate ends. The use of force as the ultimate arbiter is both natural and logical, as history shows time and again. But as history also shows, an alternative must be accepted, if society is not to be torn apart in civil war. It is republicanism's great gift to civilization, that through the method of democratic elections, political majorities, hence, governments, may change without wholesale slaughter. This is authenticated not only by our own experience but also by the experiences of countries where republican institutions hold sway. It is this very success of the republican method that argues for continued reliance. If the political process under republicanism has tended to reflect, more or less, popular majorities, then the legal processes will tend to reflect popular values and aspirations. The republican system of government, then, as a whole is itself the agency for the democratization of law, in the sense that popular control will reflect over time more and more the populist element in the law. Accordingly, the traditional process may be safely trusted to effect democratization of the law. If this be granted, there simply would be no need to use other methods. Republicanism by itself will ensure that, over time, law will reflect both populist values and popular participation.

This whole argument rests on the efficacy of political representation in translating or transforming populist values and aspirations into appropriate institutions within the legal order. Such situation, of course, underlies the very idea of democracy. The government of the people must reflect in its law the values and the will of the people. But this aspiration is not often realized. It could have been that in the republics of the ancient world, such as Athens, or even Rome, the law reflected the substance of the values of each commodity. The probability is high that the Jus Quiritium was the public expression of patrician morality. But the homogeneity characteristic of ancient city-states is no more. In its place is a prevalent heterogeneity, differentiation, and diversity. Within many modern republics, we find peoples of different races, languages, religions, and customs. So compelling

is the force of cultural diversity, as to generate its replica in the political field, in the form of subsidiary autonomous units of government within the same society. These are exemplified by the component units of the federal states, such as the United States, India, Switzerland, and the U.S.S.R. In each of these societies, we find a number of political subdivisions enjoying a large measure of self-rule, with their own system of government and their own legal orders.

In many Third World countries with a long colonial past, however, such as the Philippines, it is understandable that the highly centralized form of government imposed and developed by colonial powers should prevail. For the colonizer, the unitary form of government is essential for effective administration of the colony; after independence, this type of government has persisted partly out of institutional inertia, partly because of successful political conditioning of the ruling elite, and partly because a centralized government is appropriate, if not indispensable, to the requirements of post-colonial development.

Whatever be the causes, and they are many and complex, the Philippines today is undoubtedly under a government of the unitary type, administering a national legal order, with subsidiary systems of local legislation in the form of ordinances. In the light of its republican institutions and its democratic aspirations, the Philippines should be evolving a legal order permeated with populist values, and administered with a wide participation by the people. Examined and analyzed in such terms, however, it is immediately obvious that Philippine law has grievous shortcomings. In content, it is mostly foreign in origin or derivation. This is true not only in public law, but in private law and in remedial law as well. In administration, its institutions and techniques are likewise of foreign derivation. This is not to say that the rules and institutions adopted from foreign jurisdictions are not suitable to our needs as a people; it is merely to emphasize that our law is mostly of foreign origin or derivation, and has not been drawn from indigenous sources. Also the question of their adequacy or degree of fitness is a wholly different matter, and not within the scope of the present paper. Tentatively, I am of the view that we should strive to reexamine our major legal institutions and bodies of law, for the purpose of making them more attuned and harmonious with the common values, standards and aspirations of our people. However, we are not now concerned with the national legal order as such, in terms of its contents and institutions. This matter, which is transcendental in its significance for our striving towards Nationhood, must be left to other occasions and other forums. Our concern for the present is an entirely different one, and we may state it thus. Granted that the present legal order of the Philippines reflects populist values only in a limited way, and permits popular participation in its administration only in very exceptional situations, what avenues

are open towards expanding, within the existing legal order, such content and such participation, in furtherance of our democratic aspirations?

I shall discuss two avenues for continuing and expanding incorporation of populist values and methods of popular participation into the Philippine legal order. The primary avenue is republicanism itself, which is the *traditional* method for peaceful evolution towards a truly democratic society. In this regard, the approach is to strengthen representative institutions, so that the mechanisms of popular control can operate effectively, and accelerate the infusion of popular values into the legal order and the adoption of more measures for popular participation in the administration of law.

The other avenue is the subject of this lecture, which is to institute, within the framework of a definite national policy, measures for the recognition of indigenous bodies of law as subsidiary systems within the legal order, and for popular participation in the administration of such subsidiary systems.

I wish to emphasize that the primary avenue for expanded assimilation of populist values and popular participation in the administration of law is the method of representative government itself. Theoretically, representative government moves according to the will of the people; there should then be coincidence between what the people want and what the government ordains by law. Between theory and practice, however, there is great divergence; and this is so in the case of the Philippines. There are formidable barriers to the efficacious translation of populist value and aspirations into official law and policy. There is, first of all, that latent friction and inefficiency within the machinery of government itself, which requires great pressures and much time in turning out modest results. There is the inevitable push and pull of conflicting interests by which results are forged through qualification and compromise. There is the barrier to easy reconciliation of widely divergent interests wrought by segmentation of Philippine society. The great divisions into the elites and the *tao;* into the traditional, and the urbanized sectors; into the affluent and the impoverished; and into the educated and the illiterate, all stand in the way of enacting law congenial to all interests. All too often, the enactments reflect special interests associated with elitist sectors who hold and control the machinery of government. While there is every reason to hope and expect that increasingly, representative government will respond with law and policy conformable to populist values and aspirations, this situation can only come about after long struggle and great effort.

Even as the struggle continues for the upgrading of performance and delivery on the part of representative government, alternative methods must be devised and instituted for great accommodation of populist values and popular participation within the national legal order. This brings us to our subject, which is definition of national policy for the recognition of

bodies of indigenous law as subsidiary systems of the national legal order, and for popular involvement in the administration of such system.

We cannot within the confines of the present lecture, do more than sketch the main contours of our subject. Allow me then without further ado, to present an outline of a national policy on recognition of ethnic law within our national legal order. There are five parts of such outline. First is the foundation or basis of the national policy on such recognition, as provided in the Constitution. A firm constitutional basis would settle any question of validity of specific measures articulating such national policy, and would lend the character of implementation to such measures. The second part is concerned with techniques of recognition, directed to the scope or generality of the operation of ethnic law, and to the matter of order of preference to be given the operation of ethnic law in different situations. Specifically, this part is concerned with the different kinds of rules in ethnic law, in relation to national policy, and the type of response which may vary from preferential recognition to rejection and suppression. The third part is concerned with special recognition of rules affecting property, within the ancestral domain of non-Christian tribes. The fourth part deals with administration of ethnic law as recognized, including involvement of the communities concerned.

Let us now proceed to the constitutional basis of a national policy of recognition of ethnic law. For our purpose, ethnic law refers to the body of customs and usages of the various cultural communities within the Philippines. The distinctive characteristic of ethnic law is that it is not enacted at any particular date but evolved over a long period of time, and that it is binding only among members of a particular cultural community. With such defining criteria, it will readily be seen that ethnic law will embrace all the indigenous legal orders evolved by all tribal/linguistic groupings in the Philippines. These will include not only the non-Christian tribes, and the Muslim tribes, it will also include linguistic/tribal groupings among Christian Filipinos, such as the Tagalogs, Ilocano, Cebuano, Bicol, Pampango, etc. The term "cultural community" should be taken in its widest sense, as comprising any human group within Philippine territory, sharing the common bonds of language, customs and traditions, distinctive culture traits, and also physical contiguity in that the group or large numbers thereof live within a definite area of territory.

The case for recognition, as a matter of national policy, of ethnic law is founded on the principle of self-determination, which is recognized not only in the international sphere of relationships but within the national spheres as well. Broadly understood, the principle of self-determination embraces the major ideas of civility and liberty, because it supports the concept of Nationhood as well as the concept of Local Autonomy, as well as the concept of collective freedom, which is Democracy, as well as the concept of individual freedom, which is Liberty. It is submitted that our

national commitment to Democracy, which is essentially collective participation by the people in the making of the laws that will govern them, compels adoption of a national policy on recognition of ethnic law.

The highest postulate of democratic theory is that each man shall be governed in accordance with his own will. Two interrelated but distinct spheres for the operation of such will are recognized. One is the sphere of the collectivity, in which individual citizens participate through prescribed procedures in the creation of the Social Will. The manifestation of such Social Will is State Law. The other is the sphere of the Individual, in which his will enjoys Liberty. The manifestation of the Liberty of the individual will is the whole body of private acts and enactments of private rules which for lack of a better name, we may call Contract Law. Within this sphere of Liberty, in which the individual will manifests itself in Contract Law, two distinct social situations persist, each with its own type of private rules. The first social situation is relatively of an enduring type, which we may call associative, exemplified by marriage, family, adoption, and in the business sphere by partnership, corporation, joint venture and the like. These private organizations set up their own private governments, and in time develop their own private codes of conduct. The second social situation looks to exchange of things or services, which is limited to occasions of need. Such exchanges are transactions, such as barter, sale, lease, loan, and similar contracts.

It should be stressed that within both the spheres of State Law and Contract Law, there is established and continuing recognition of bodies of rules developed and elaborated by collectivities within Philippine society. In the sphere of Social Will, we find as part of State Law, distinct and separate systems of municipal law, consisting of ordinances enacted in behalf of the people within each city or municipality. In the sphere of Liberty, we find as part of Contract Law recognized by the State, distinct and separate bodies of private law enacted by private governments representing private associations or collectivities known as corporations, schools, labor unions, churches, etc.

If we find, consistently with the spirit of self-determination, recognition of municipal legislation, which is founded on a territorial bond, or of corporate legislation, which is founded on an economic or property bond, or of church legislation, which is founded on the bond of religion, etc., there is truly no reason why, also in the spirit of self-determination, we cannot recognize the indigenous or ethnic law elaborated by traditional communities existing on the basis of cultural and ethnic bonds. There is no express ban or prohibition in our fundamental law against such recognition. On the contrary, we have a declaration of State policy, which may well be deemed a directive or mandate for such recognition. In Article XV of the Constitution, particularly in Section 11 thereof, we find stated:

> The State shall consider the customs, traditions, beliefs, and interests of national cultural communities in the formulation and implementation of state policies.

We may then say that in terms of the principles or spirit underlying our Charter, as well as by positive declarations therein, there exists adequate basis for the adoption of a national policy on recognition of ethnic law as a subsidiary system within the national legal order.

We now turn to the second part of our outline, which is the precise technique or method of recognizing ethnic law. In dealing with this matter, we must be governed in our choice by the precise end in view. Certainly, we cannot have wholesale, indiscriminate incorporation of ethnic law. In cases of all subsidiary systems of rules that we presently recognize in our law, such as municipal regulations, constitution and by-laws of labor unions, articles and by-laws of corporations, church regulations, etc., recognition is generally limited only to the extent that they do not conflict with the prohibitory or mandatory provisions of the national law. This should be the outer limit or boundary of our recognition of ethnic law, with possible accommodations in special situations where application of ethnic law would cause no serious social harm.

Within the sphere or area thus delimited by the aforestated outer limit or boundary, we must determine and classify specific subjects within each body of ethnic law according to the following categories:

1. Those in which the norms prevailing would affirmatively promote or effectuate the realization of national values or objectives; in the discussion below, this will be referred to as the Preferred Sector.

2. Those in which the norms prevailing, although not specifically in support of national values or objectives, are nevertheless congenial thereto, or at least neutral in their over-all effect; in the discussion below, this will be referred to as the Acceptable Sector.

3. Those in which the norms prevailing, although opposed to or conflicting with national values, or national objectives, would if applied within the particular cultural community, bring about only minor or minimal injury to national interests; in the discussion below, this will be referred to as the Tolerable Sector.

4. Those in which the norms prevailing, would not only run counter to national values or objectives, but would also, even within the limited sphere of operation, create substantial harm to such national values or objectives. In the discussion below, this will be referred to as the Unacceptable Sector.

For the Preferred Sector, recognition would clearly be in the national interest, hence, the norms coming within such Sector must enjoy priority in operation. Matters involving members of the same cultural community,

which come within the purview of such Sector, shall be subject thereto without qualification. Thus, the norms of such Sector are accorded Mandatory Jurisdiction. This means simply application without exception.

For the Acceptable Sector, which can cause no substantial harm to national interest, the norms have immediate public permissive application, in that through common consent, the parties thereto, may choose or elect to be governed by the national law, in lieu of such applicable ethnic law. In other words, the norms in the Acceptable Sector are of immediate application, and will apply unless the parties exercise the above stated option. Thus, the norms of such Sector are accorded Primary Jurisdiction, which the parties may avoid, however, by electing to come under the national law.

For the Neutral Sector, which can cause minimal harm to the national interest, the law of immediate application shall be the national law, but because the harm is only minimal, hence, tolerable, the parties are allowed to elect or choose the applicable of the norms of such Sector to their dispute. Thus, the norms therein are accorded Permissive of Elective Jurisdiction, because they can apply only upon specific request of the parties concerned.

For the Unacceptable Sector, the substantial harm to national interests that they can cause, places them beyond the outer limit or boundary we have mentioned above. Instead of recognition, the response must be negative, ranging from denial of recognition by declaring either the rules themselves invalid, or the outcome of their operation invalid, or both, to repression through criminal prohibition of what such norms may allow or recognize.

It will readily be seen that the operation of ethnic law, to the extent recognized or permitted as above discussed, must be founded on a concept analogous to the principle of nationality in conflicts of law situations. Here the jurisdictional foundation must be the fact of membership of the parties to the dispute, to the particular cultural community whose ethnic law is invoked. Unless both parties are members, the ethnic law can have no application. Exceptions can, of course, be recognized, as will be pointed out below.

The jurisdictional requirement as above pointed out, can create difficulties or complications. Because of migration and mobility, a question may arise as to the fact of membership in a particular cultural community, especially in the case of the Christian groups. To obviate the difficulty, a secondary test should apply whenever such question is raised. It should be enough that the party is a permanent resident in a place where members of the cultural community concerned are preponderant in numbers, and that at the same time, the subject of the dispute has its situs in such place.

In regard to the specific matters that should be considered for coverage by ethnic law, the scope should be restricted only to subjects and matters within the area of private law. These should include:

1. Marriage, and the relations or incidents arising therefrom;

2. Family relations, including paternity and filiation, custody and support of children, parental authority, etc.;

3. Transactions relating to property other than immovables; and

4. Succession and successional rights.

It must be stressed that the above list is highly tentative, and the matter, or inclusion or exclusion of matters, for recognition must necessarily be dependent, with respect to any particular body of ethnic law, (a) whether such matter is treated at all therein; and (b) if so, whether the prevailing norms relating thereto should be recognized, according to the considerations of national policy above discussed.

The third topic deals with the special situation of non-Christian tribes, in regard to their ancestral or tribal lands. Because the preservation of such lands is essential, if not indispensable, to the physical existence and survival of such cultural communities, appropriate policies should be instituted for the adequate protection of the interests of each community in such lands.

In regard to such lands, the customs, traditions and usages of each non-Christian tribe must be recognized as valid and binding, insofar as these would establish and/or reinforce the status of such lands as follows:

1. That the lands belong to the tribe as a community and are not susceptible of individual or private ownership.

2. That should such lands be susceptible of private and individual ownership, that such lands are not alienable to those who are not members of the tribe.

3. That should they be susceptible of private and individual ownership, as well as of alienation to outsiders, that such lands are subject to legal redemption by any member of the tribe, from owners who are outsiders.

Any deficiency of ethnic law in regard to these protective and conserving measures regarding tribal or ancestral lands, should be supplemented by equivalent rules of the national law, in order to maintain and preserve such status of the lands. Appropriate proclamations should define the limits, extent and boundaries of the ancestral lands of every non-Christian tribe.

Within the territories thus delimited and defined, the ethnic law of each tribe, insofar as not in conflict with national policy, may be allowed

sway. Thus, transactions within such territory may be governed by ethnic law, so long as one of the parties is a member of the non-Christian tribe. The underlying principle would be akin to *lex loci celebrationis*.

We now come to the fourth topic of our outline, which is concerned with popular participation in the administration of ethnic law, as recognized and given effect by national policy. Self-government or democracy is simply the making of law by the people for their own governance. The various processes of what we call government, are simply forms or methods for making different kinds of law. The fundamental law or the constitution is simply the ground rules adopted by the Constituent Power, which in our system consists of proposals by representative bodies, and ratification in a plebiscite. Other forms of law are created through Representatives. We have statutes enacted by popular assemblies, executive orders or decrees enacted by the Executive, and judgments enacted by the courts and other tribunals, and ordinances enacted by municipal bodies. Because virtually all forms of law-making or law-creating are done in our System through Representatives, ours is rightly called Representative Democracy or Republic. But if democracy is self-rule or self-government, we must increasingly expand or intensify popular or citizen participation in the processes of government, so that more and more, the law in its various forms will reflect popular values and aspirations. It is in this light that we must consider administration of ethnic law, by the very cultural communities themselves.

Among the non-Christian tribes, which have their own institutions and procedures for the application or administration of their ethnic law, our approach should be to recognize these institutions and procedures. Changes should be proposed and interjected only to ensure the minimum standards of procedural due process. In the case, however, of the Christian groups, whose counterpart institutions and procedures have been wiped out or eliminated by the colonial governments that dominated them for over four hundred years, national law must provide the institutions for such participation by the cultural communities. It is here, perhaps, that we must build on the *barangays*. It might be feasible to develop collegial structures, equivalent to the jury in Western societies, which would be entrusted with the tasks of investigating, conciliating, mediating, and even arbitrating disputes subject to the governance of ethnic law.

The end of our outline now brings to the fore the very condition presupposed in the discussion, that is, that we know or that we can know given some time and study, the content of ethnic law. This is a large problem, but not a difficult one. In the case of non-Christian tribes, there are many studies of scholars which provide us the basic contents of ethnic law. In the case of the Christian groups, there are voluminous government reports and studies, which supplemented by field studies of our social scientists, would provide us the basic contents of their ethnic law. For

orderly recognition and application of ethnic law, the following approaches should be considered:

1. A national institute of indigenous law should be set up, perhaps attached to the Law Center and jointly administered with social science staffs of the other units of the University.

2. Upon certification of such Institute, after energetic and thorough studies, that the ethnic law of a particular tribe or group has been compiled, a proclamation should be issued declaring such ethnic law recognized, subject to specified conditions and restrictions, with the compilation as prima facie evidence thereof.

3. The Institute shall endeavor, through comparative law techniques, to work out the principles, precepts and standards common to all bodies of ethnic law, and when promulgated, the same shall be resorted to in case of deficiency or silence of any particular body of ethnic law.