

# MUSLIM PERSONAL LAW AND ITS INCORPORATION INTO THE PHILIPPINE LEGAL SYSTEM: A CONSTITUTIONAL PERSPECTIVE

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The problem of national minorities in this country is a constitutional problem of prime importance.<sup>1</sup> This is so because the minority problem not only affects the political, economic, and cultural life of the state but also poses a serious threat to national security and national integration.

The Muslims in the Philippines constitute the largest of national cultural minorities. Regardless of ethno-linguistic differences, Filipino Muslims share a common historical, cultural and religious heritage, distinct and separate from that of the larger Filipino national community.<sup>2</sup> Since the turn of the century, efforts to integrate them into the mainstream of our national life proved to be a failure. In the recent past, the situation became even more critical, considering the rise of the Muslim rebellion in the South.

This paper attempts to discuss the constitutional and historical implications of P.D. No. 1083, otherwise known as the "Code of Muslim Personal Laws in the Philippines." It begins with a discussion on the problem of integrating the Muslims in the Philippines since the period of Western colonialism in the country; Islam as a legal system; the purpose and significance of P.D. No. 1083; and the constitutional bases of the Muslim Code.

## I. Muslim Minority and the Problem of National Integration.

The Muslims in the Philippines constitute a minority in the country's population. They are concentrated mainly in the two so-called "autonomous" regions in Southern Philippines. Since the inception of Philippine nationhood, the Muslims have always posed a problem that continue to beset efforts toward national integration.

### A. History

The problem of integrating the Filipino Muslims into the national body-politic has been a perennial one, whose origin dates back to the Spanish colonial period. It is the result of an age-old conflict which started in 1578 when the

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<sup>1</sup>CLAUDE, NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM 3 (1955).

<sup>2</sup>See MAJUL, CULTURAL DIVERSITY, NATIONAL INTEGRATION AND NATIONAL IDENTITY IN THE PHILIPPINES (1972); De Los Santos, *How Christian-Muslim Relations Affect Acculturation and Development*, 10 SILIMAN JOURNAL (1973).

Spaniards first attempted to colonize or subjugate the Muslims. For more than 300 years, the "Moro Wars"<sup>3</sup> were waged against them. Spain's effort to uproot their religion, tradition, customs and beliefs, however, were met with stubborn resistance and bloody armed struggle.

Islam, it must be noted, was introduced in the country centuries before the advent of Spanish colonialism. The spread of Islam was part of the general islamization process in Southeast Asia.<sup>4</sup> With the implantation of Islamic faith in the country, there came new ideas, a new system of laws, a novel concept of government, and a sophisticated culture. Thus, when Miguel Lopez de Legazpi arrived in 1565, the Muslims in the south had already established a highly developed political organization called the Sultanate. The Muslim communities were already socially and economically developed compared to other indigenous societies.<sup>5</sup>

The Spanish policy of assimilation was however a failure. A tragic historical consequences of this was that it created a rift between the *Indios* who were Christianized and brought under Spain's hegemony, and the *Moros*, who never were completely subjugated.<sup>6</sup> As a result of Muslim's isolation for centuries, they were able to preserve their culture, religion, traditional ways and practices.

Like their Spanish predecessors, the Americans also wanted to subjugate the Muslims and to exploit their natural resources. The policies adopted by the Americans took various forms, which ranged from extermination to attraction.<sup>7</sup> The Americans viewed the Muslim struggle as a problem that could best be solved by initial employment of strong military pressure. As it was, Muslim resistance to American rule was evident during the military period from 1899 to 1913.<sup>8</sup> During this period, the Moro Province was established as part of the American's pacification campaign in the Muslim areas. Although the Americans recognized the religious and cultural values of the Muslim people, "the policy of direct rule reflected an adverse American judgement on the social structure, customs and laws by which the Moros had lived for centuries."<sup>9</sup> American attitudes toward the Moros and their culture were generally negative.

In 1920, the Bureau of Non-Christian tribes was organized "to determine the most practicable means of bringing about the advancement in civilization and material prosperity of the Filipino Muslims" and to establish "mutual understanding and complete fusion of this group of Filipinos and the majority segment of the Filipino Christians."<sup>10</sup> Though the American's integration policy was to a certain

<sup>3</sup>See MAJUL, MUSLIMS IN THE PHILIPPINES (1973).

<sup>4</sup>See AL-ATTAS, PRELIMINARY STATEMENT OF THE GENERAL THEORY OF THE ISLAMIZATION OF INDO-MALAY ARCHIPELAGO (1969); Majul, *Theories of the Introduction and Expansion of Islam in Malaysia*, 11 SILIMAN JOURNAL 335-398 (1964).

<sup>5</sup>CONSTANTINO, THE PHILIPPINES: A PAST REVISITED 27 (1978).

<sup>6</sup>MAJUL, *supra* note 2.

<sup>7</sup>Tamano, *Problems of the Muslims: A National Concern*, in GOWING & MCAMIS, (Eds.) THE MUSLIM FILIPINOS 260 (1974).

<sup>8</sup>TAN, THE FILIPINO MUSLIM ARMED STRUGGLE: 1900-1972 71 (1977).

<sup>9</sup>GOWING, MUSLIM FILIPINOS: HERITAGE AND HORIZONS 36 (1979).

<sup>10</sup>See GOWING, MANDATE IN MOROLAND: THE AMERICAN GOVERNMENT OF MUSLIM FILIPINOS 1899-1920 268 (1983). Note that the Bureau of Non-Christian Tribes was later replaced by the Department of Interior, Commission for Mindanao and Sulu. Comm. Act No. 75 (1936).

degree successful with regard to education and socio-economic programs, they unfortunately, "did little to close the gap created by the difference in culture and religion"<sup>11</sup> between the Filipino Muslims and Filipino Christians. The measures adopted by the Americans were meant to effect changes in Muslim culture according to Western standards, and to subsume the Muslims and the greater majority within a single body of law. This policy however, proved to be fatally defective.

The policies adopted during the early years of Philippine independent government did not basically change. Government's neglect of Muslim areas and the lack of understanding of their values, traditions and culture<sup>12</sup> added more fuel to the growing resentment of the Muslims. Conversely the latter saw a systematic attempt on the part of the government to denigrate their traditional political and social institutions.

In 1954, the situation in predominantly Muslim areas became so acute. There was social unrest and the peace and order situation deteriorated. Republic Act 1888 was signed on June 22, 1957 which created the Commission on National Integration. Its objective was to render "real complete and permanent the integration of all the National Cultural Minorities into the body politic." The CNI however did not do much to solve the problem in the South. It was no different from its precursors.

The rise of a Muslim separatist movement became imminent in the late 60's. This was exacerbated by a serious land problem brought about by the influx of Christian settlers in Muslim ancestral lands, and the widespread economic dislocation of thousands of Muslim families.<sup>13</sup> Muslim hostilities erupted in the early 70's which later led the national government to seriously re-assess its policies and programs.

On December 23, 1976, the Tripoli Agreement<sup>14</sup> was signed, which granted political autonomy to two Muslim regions in the South and gave recognition to their cultural values, traditions, and customary and Islamic laws, in the formulation of state policies.

#### B. Cultural Pluralism

It must be emphasized that the Muslims in the Philippines have a history and culture distinct and separate from that of the Christian majority. Any efforts at

<sup>11</sup>Tamano, *supra* note 7, at 261.

<sup>12</sup>Rahman, *Our Responsibilities toward the Cultural Minorities* 7 (U.P. Indigenous Law Collection, 1954).

<sup>13</sup>FERNANDO, PERSPECTIVE ON HUMAN RIGHTS: THE PHILIPPINES IN A PERIOD OF CRISIS AND TRANSITION 14-15 (1979): In addition to the conflict between inherited traditions and the novelty of change brought about by Western ways that did form part of the Philippine legal system, there was likewise the resentment arising from property disputes. The apprehension entertained by Muslim elements was that the laws would operate unjustly against their claim.

<sup>14</sup>The Tripoli Agreement, however, was never fully implemented. While it stipulated that a "mixed committee" shall be formed to be composed of representatives of the Philippine government and the MNLF to study the mechanics of implementation, such committee was never convened. President Marcos *unilaterally implemented* the Agreement in violation of its terms. See Pres. Decree No. 1618 (1979); Batas Pambansa Blg. 20 (1979); Pres. Decree No. 1843, 1843-A & 1844 (1982), and other related laws.

integration must therefore invariably take into consideration the cultural and religious values of the Filipino Muslims as constituting the most crucial variable in their integration.<sup>15</sup> The idea of equating national integration with having the cultural minority assimilated by the cultural majority especially in religious and moral matters must now be rejected.<sup>16</sup> The obliteration of the religion and culture of minority peoples is definitely not the only avenue to national unity.<sup>17</sup>

A national minority exists when a group of people within a state exhibits the conviction that it constitutes a nation, or a part of a nation, which is distinct from the national body.<sup>18</sup> The term minority is defined as a group of people who, because of a common historical, religious and cultural heritage which singles them out from the dominant cultural group, "fear that they may either be prevented from integrating themselves into the national community of their choice or be obliged to do so at the expense of their identity."<sup>19</sup> In the Philippines, the term 'National Cultural Minorities' is used to designate some members of the national community residing in various parts of the country who were least influenced by the religion, government, and culture brought over by Spain and the United States.<sup>20</sup>

The failure of the policies adopted for the Muslim minorities in the country since the turn of the century was basically a failure to recognize the existence of cultural pluralism. It needs to be noted that the Philippines is a society of diverse cultures and that difference in culture may pose an obstacle to mutual understanding. Integration in order to be viable must comprehend all the cultural experiences of the people, to attain common national goals. Where a culture of a group of people within the state is relegated to the national background, much less assimilated at the expense of losing its own identity, the problem of national discord and dissension is likely to emerge.

Thus, the efforts toward integrating the Muslim minorities in the Philippines must insure the preservation of their religion, customs and traditions, which they have successfully guarded against colonialism. Genuine integration efforts can only be acceptable to the Muslims if their traditions are respected and their culture and religion accorded dignity and value. Disregard of these considerations can be self-defeating which results often in violent resistance.<sup>21</sup>

### C. Islamic System of Law

The Philippines, it is said, has a unique jurisprudence resulting from the blending of the three world legal systems. These great streams of law are: (1) the Civil Law, a legacy of Rome to Spain; (2) the Common Law, inherited by the

<sup>15</sup>Lacar and Hunt, *Attitudes of Filipino Christian College Students toward Filipino Muslims and their Implications for National Integration*, 7 SOLIDARITY (1972).

<sup>16</sup>MAJUL, *supra* note 2, at 7.

<sup>17</sup>GOWING & MCAMIS, *THE MUSLIM FILIPINOS* ix (1974).

<sup>18</sup>CLAUDE, *supra* note 1, at 3.

<sup>19</sup>LAPONCE, *THE PROTECTION OF MINORITIES* 6 (1960).

<sup>20</sup>Report on the Problems of Philippine Cultural Minorities, Senate Committee on National Minorities (1963).

<sup>21</sup>Rahman, *supra* note 12, at 11. See also Saber, *Problems of Community Development Among Cultural Minorities* 8 PHIL. SOCIOLOGICAL REV. (1960).

United States from England and amplified by American written laws; and (3) the Islamic Law, which was introduced in the Philippines long before the arrival of the Spaniards in the country.<sup>22</sup> While the first two — civil law and common law — have merged and blended together forming the bulk of our national legal system, the Islamic law which, until recently remained outside the scope of the national laws, is still being observed by millions of Muslims in the South.

There is no better way to understand the Muslim problem in the South than to know the religion of the Muslims. But in order to know the religion of a Muslim, one must understand Islamic law. For religion in Islam is intimately connected with its laws.<sup>23</sup>

#### 1. Islam as a religion

Islam, the religion of the Muslims, is an Arabic word which means submission to the Will of God. Historically, Islam is the youngest of the world's major religions, which originated in the 7th century with the life and mission of Prophet Muhammad. The conceptual roots of Islam are part of and traceable to the monotheistic tradition of Judaism and Christianity.<sup>24</sup> Today, there are about 800 million Muslims,<sup>25</sup> from Nigeria to the Soviet Union, from Senegal to China, including some two million Americans as well. In the Philippines, there are about 4 to 5 million Muslims.

Islam is not a religion in the Western meaning of the word, confining itself to the private life of man. Thus, it is said:

Islam is 'not merely a religion.' It is a total and unified way of life, both religious and secular; it is a set of beliefs and a way of worship. It is a vast and integrated system of law; it is a culture and a civilization; it is an economic system and a way of doing business; it is a policy and a method of governments. . . It is a spiritual and human totality, *this-worldly* and *other-worldly*.<sup>26</sup>

#### 2. Shariah (Law)

The *Shariah* or Islamic law to a Muslim is the embodiment of the Divine Will.<sup>27</sup> It is the totality of God's commands that regulates every aspect of his life. It is the core and kernel of Islam itself.

It has been said that one of the most important bequests which Islam has transmitted to the civilized world is its religious law, the *Shariah*.<sup>28</sup> Islamic law is not comparable to western legislation. It is a phenomenon so different from all

<sup>22</sup>GAMBOA, INTRODUCTION TO PHILIPPINE LAW 52 (1975).

<sup>23</sup> *The fountainhood of both law and religion in Islam is God* in FYZEE, MODERN APPROACH TO ISLAM 57 (1963).

<sup>24</sup>LIPPMAN, UNDERSTANDING ISLAM 6 (1983).

<sup>25</sup>*Id.*, at 11.

<sup>26</sup>JANSEN, MILITANT ISLAM 17 (1979).

<sup>27</sup>NASR, IDEALS AND REALITIES OF ISLAM 93 (1966).

<sup>28</sup>SCHACHT, THE LEGACY OF ISLAM 393 (1974).

other forms of law that its study is indispensable in order to appreciate the full range of possible legal phenomena.<sup>29</sup>

The notion of law in Islam is opposite of the prevalent western conception of law. Prof. Anderson<sup>30</sup> observes that the basic distinction between Western law and Islamic law is that Western law is essentially secular, whereas Islamic law is essentially religious. It is so, because Islamic law is an integral part of religion. Another difference is that, Islamic law is enormously wider in scope than Western law. Islamic law covers the whole field of human conduct.

It must be stated that in Islam, there is no distinction between the Church and state. Christ's injunction to "render unto Caesar the things that are Caesar's and to God the things that are God's" is alien to Islam. Such dichotomy has no equivalent in Islam and "was unknown in. . . Muslim society and unarticulated in the. . . Muslim mind."<sup>31</sup> The reason for this is that, Islam holds itself out not just as a religion but a source of law, guide to statecraft, and arbiter of social behavior for its adherents. Muslims believe that every human endeavor is within the purview of the Faith.<sup>32</sup>

There is also the absence of 'Church' in Islam in the sense that there is no organized religion or sacerdotal power. Theoretically, Islam is a faith without clergy, saints, hierarchy or sacraments. No man stands between the believer and God.

The absence of priesthood in Islam does not mean strictly that there is no mediation between God and man. If for the Christians, the link is the person of Christ, to the Muslims, the link is righteousness. In the ultimate analysis, it is the *Shariah*, the Islamic law that mediates between God and man.<sup>33</sup>

## II. The Muslim Code: Its Incorporation into the National Legal System

Presidential Decree No. 1083, otherwise known as the "Code of Muslim Personal Laws in the Philippines," was signed into law on January 4, 1977. The

SCHACHT, *Id.*, at 396.

<sup>29</sup>Elaborating on this point, Schacht states:

The central feature which makes Islamic religious as what it is, which guarantees its unity in all its diversity, is the assessing of all human acts and relationships. . . from the point of view of the following concepts: *obligatory, recommended, indifferent, reprehensible, forbidden*. Law proper has been thoroughly incorporated in this system of religious duties that these fundamental concepts permeate the juridical subject matter as well . . . Islamic law is part of a system of religious duties, blended with non-legal elements. But though it was incorporated into that system, legal subject-matter was not completely reduced to and expressed in terms of religious and ethical duties; the sphere of law retained a technical character of its own. . . (emphasis supplied).

As to where positive legal norms come into play, Anderson observes:

It is only in regard to the middle category (i.e. those things which are left legally indifferent) that there is in theory any scope for human legislation.

ANDERSON, ISLAMIC LAW IN THE MODERN WORLD 4 (1959).

<sup>30</sup>ANDERSON, *supra* at 2-3.

<sup>31</sup>LIPPMAN, *supra* note 24, at 72.

<sup>32</sup>*Id.*, at x.

<sup>33</sup>SMITH, ISLAM IN MODERN HISTORY 20 (1957).

codification of Muslim personal law system is considered as a major step toward the integration of the Filipino Muslims into the national community. It is to be noted that Executive Order No. 442, creating the Presidential Commission to review the Code of Filipino Muslim laws, stated that "the realization of the aspiration of the Filipino Muslims to have their system of laws enforced in their communities will reinforce the just struggle of the Filipino people to achieve national unity."

The Muslim Code was promulgated pursuant to the Constitutional provision which declares that the state shall consider the customs, traditions, beliefs and interests of national cultural communities in the formulation and implementation of state policies.<sup>34</sup> For its purpose, the Muslim Code principally addresses three concerns: (1) it recognize the legal system of the Muslims in the Philippines as part of the law of the land and seeks to make Islamic institutions more effective (2) it codifies Muslim personal laws; and (3) it provides for an effective administration and enforcement of Muslim personal laws among Muslims.<sup>35</sup> Thus, the promulgation of the legal system of the Filipino Muslims as part of the law of the land means that it can now be enforced with the full sanction of the state.

#### A. Historico-legal Precedents

The codification of Muslim Personal Law in the country is not devoid of historical significance. Historically it is not a new idea in the Philippines.<sup>36</sup>

As early as August 20, 1899, in the Bates Treaty, the U.S. government already recognized, at least diplomatically, the existence of the "government of the Sultan," and its jurisdiction over crimes committed by Muslims against Muslims. The U.S. government also recognized the existence of Muslim religious (Agama) courts and the enforcement of Muslim law. Then, in the Carpenter Treaty, the U.S. government likewise recognized the validity of the Islamic customary legal system in the effective administration of laws to attain social order.<sup>37</sup>

Immediately after the organization of the Moro Province in 1903, a careful study was made of the laws and customs of the "moros" with a view of determining whether "a consistent, sensible, and humane code of law" could be put in force. On June 1, 1903, by authority of the United States, the Philippine Commission enacted Act No. 787 which provided that it shall be the duty of the Legislative Council of the Moro Province "to enact laws which shall collect and codify the customary laws of the Moros."

On June 13, 1905, by authority of the United States, the Philippine Commission passed Act No. 1283 Section 6 (b) of Act 1283 amended Sec. 13 (j) of Act 787: which reads as follows:

To enact laws amending and modifying the substantive civil and criminal law of the Philippine Islands to suit local conditions among the Moros and other

<sup>34</sup> CONST., art xv, sec. 8.

<sup>35</sup> MUSLIM CODE, art. 2 (1977).

<sup>36</sup> Explanatory note, Proposed Draft of the Administration of Muslim Code of 1974.

<sup>37</sup> Abbas, *The Historical, Political, Social and Legal Justification for the Codification and Enforcement of Muslim Laws and Adat Laws* in TIAMSON (ED.). STUDIES ON MUSLIM LAWS (SHARIAH) AND CUSTOMARY LAWS (ADAT). 184 (1976).

non-Christian inhabitants of the province, to cause such laws to conform, when practicable to the local customs and usages of such inhabitants.

Furthermore, on April 3, 1915, the Philippine Commission enacted Act No. 2520. This Act provides, thus:

Mohammedan laws and Customs — Judges of the Court of First Instance and Justice of the Peace deciding civil cases in which the parties are Mohammedans or pagans, when such action is deemed wise, may modify the application of the law of the Philippine Islands, taking into account local laws and customs, provided that such modification shall not be in conflict with the basic principles of the laws of the United States of America.

In brief, the foregoing provisions clearly show that a recognition was given to the Islamic (Sharish) law and customary (Adat) laws of the Muslims in the South during the American period.<sup>38</sup> The Americans, who were well aware of the shortcomings of their Spanish predecessor, later saw the necessity of giving respect to local customs and mores of the Muslim inhabitants. It was an acceptance of the historic fact that the Muslim fought the Spaniards for 333 years in defense of their Islamic ideology and traditional homeland.

#### B. Significance of the Code

Prior to the promulgation of the Muslim Code, a source of past discontent among Muslims was their belief that the existing national laws were meant to eventually do away with Islamic family law.<sup>39</sup> The traditional causes of conflict in Muslim south were, among others, based on the Muslims' fear that the government policies were designed to alienate them from their religion and estrange them from their traditional laws, customs and cherished values.

The Muslims could not understand why the bulk of national laws, apparently Christian in outlook, was being imposed upon them. That the basic laws of the Philippines are essentially Christian-oriented is "a summary description of an obvious condition of our institution."<sup>40</sup> Consequently, the imposition of a legal system which is entirely alien to the Muslims was considered a "graphic form of cultural oppression,"<sup>41</sup> which works against their religion and traditional ways

<sup>38</sup>*Id.*, at 188.

<sup>39</sup>See art. 78 of the New Civil Code (approved, June 18, 1949). The second paragraph of the above mentioned article was subsequently amended by Rep. Act. No. 6268 (approved, June 19, 1971). It now reads:

However, thirty years after the approval of this Code, all marriages performed between Muslims and other non-Christians shall be solemnized in accordance with the provisions of this Code. . .

In other words, marriages performed in accordance with the Muslim practice, ritual or custom were allowed only until 1979. Clearly, the intent of the law was not recognition of Muslim personal law but only *toleration* for a temporary period with the objective of supplanting it with the applicable general laws. Art. 78 of the New Civil Code however has now been superseded by the Muslim Code.

See also Majul, *General Nature of Islamic Law and Its Application in the Philippines* 52 PHIL. L.J. 382 (1977).

<sup>40</sup>SINCO, *PHILIPPINE POLITICAL LAW* 679 (1969) quoting the U.S. case of *Mohney V. Cook* 26 Pa. 67 Am. Dec. 419.

<sup>41</sup>Cardenas, *The Significance of the Codification of Philippine Muslim Laws*, in TIAMSON (Ed.) *STUDIES ON MUSLIM LAWS (SHARIAH) AND CUSTOMARY LAWS (ADAT)* 7 (1976).



of life. This had the effect of separating or alienating the Muslims from the rest of the population.

The codification of the Muslim Personal Law is, therefore, a "concrete step in the legal sphere toward establishing real peace and harmony"<sup>42</sup> with the Muslim Filipinos. It is the "triumphant culmination of a long struggle on the part of the Filipino Muslims"<sup>43</sup> to observe and enforce their personal laws without interference from the State. That a sizeable portion of Muslim Personal Laws has now become part of the law of the land cannot be overemphasized.<sup>44</sup> What needs to be pointed out, moreover, is that the codification of Muslim law, "reveals some emerging tendencies"<sup>45</sup> in our society among which is the acceptance of the legitimacy of cultural pluralism as a crucial consideration in national integration.

### C. Scope and Application

The code does not, however, incorporate the entire legal system of Islam. It expressly codifies only the Muslim Personal Law system. A major characteristic of the Code is that it makes a distinction between the legal system of the Muslims (Shariah) and those significant Muslim personal laws being codified.<sup>46</sup> In its substantive aspect, the Code deals mainly with aspects of personal and family law — like personal status, marriage and divorce, property relations between husband and wife, paternity, guardianship, support and maintenance and inheritance.

In marriage and divorce, the provisions of the Muslim Code apply wherein both parties are Muslims, or where only the male party is a Muslim, and the mar-

<sup>42</sup>J.B.L. Reyes in his message before the Sixth Annual Seminar of Islam in the Philippines and Asia, September 20-23, 1973 at Davao City said:

Both the 1935 and the 1973 Constitutions have Filipino unity as one of their basic tenets, and to fully achieve that union, it is imperative that Muslim and Christian laws be harmonized and applied side by side. Had this been done early enough, many of the conflicts between Christian settlers and Muslim natives would have been avoided, but which violence could never have solved.

<sup>43</sup>BAUTISTA, AN INTRODUCTION TO THE CODE OF MUSLIM PERSONAL LAW 1-2 (1977).

<sup>44</sup>Batas Pambansa Blg. 129 (Judiciary Reorganization Act of 1980), sec. 45. This Law states:

Sec. 45. Sharia Courts — Shari'a Courts to be constituted as provided for in Presidential Decree No. 1083, otherwise known as the "Code of Muslim Personal Laws of the Philippines," shall be included in the funding appropriations so provided in this Act.

<sup>45</sup>Majul, *supra* note 39, at 385.

<sup>46</sup>MUSLIM CODE, art. 4 reads:

Art. 4. Construction and interpretation — (1) In the construction and interpretation of this Code and other Muslim Laws, the court shall take into consideration the primary sources of Muslim law.

(2) Standard treatises and works on Muslim law and jurisprudence shall be given persuasive weight in the interpretation of Muslim law.

Mastura observes that by virtue of the above cited provision, some form of "eclectic selection" was devised. This refers to a rule of interpretation based on the methodology of reform. See Mastura, ADMINISTRATION OF MUSLIM PERSONAL LAW SYSTEM IN A MUSLIM-MINORITY COUNTRY (1984).

riage is solemnized in accordance with the Muslim code or Muslim law in any part of the Philippines.<sup>47</sup> In case of a marriage between a Muslim and a non-Muslim, solemnized not in accordance with Muslim law or (the Muslim) Code, the Civil Code of the Philippines shall apply.<sup>48</sup>

Lastly, the Code must be understood as a special form of legislation which applies only to Muslims or, in cases covered by its provisions. It does not, however, mean that it is an independent piece of legislation<sup>49</sup> that will exist and operate without regard to other laws of the country. The Code does not remove the Muslims from all other laws of the Philippines.<sup>50</sup> Like other laws, the Muslim Code is subject to the limitations of the Constitution. Except in so far as it relates to persons and family relations and succession, the Civil Code and all other laws of general application will continue to be applied to Muslims.

### III. Constitutional Bases of the Muslim Code

#### A. Protection of Cultural Rights

The Code refers to Section II, Article XV of the Philippine Constitution as its legal basis. Said provision declares that:

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

Corollary to this provision is Section 9 (2) of the Constitution which provides that:

Filipino culture shall be preserved and developed for national identity. . . .

The first provision stated above recognizes constitutionally the existence of the national cultural communities.<sup>51</sup> The second provision recognizes the need for preserving and developing a more conscious national identity through knowledge and appreciation of our native culture.<sup>52</sup>

The term "national cultural communities" includes the minority groups as defined by the United Nations Subcommission on Prevention and Protection of Minorities. It means those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population. In the Philippines, it

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<sup>47</sup> MUSLIM CODE, art. 13(1).

<sup>48</sup> MUSLIM CODE, art 13(2).

<sup>49</sup> BAUTISTA, *supra* note 43, at 3.

<sup>50</sup> Kasad, *Comments on the Muslim Code: A Paper on P.D. No. 1083*, 52 PHIL. L.J. 119 (1977).

<sup>51</sup> DE LEON & LUGUE, JR., TEXTBOOK ON THE NEW PHILIPPINE CONSTITUTION 454 (1984).

<sup>52</sup> ARUEGO & ARUEGO-TORRES, THE NEW PHILIPPINE CONSTITUTION EXPLAINED 88 (1979).

refers to those who are somewhat outside the orbit of the Hispanic-Christian culture which has characterized the majority of inhabitants of the Philippines.<sup>53</sup> The Muslim minority groups fall under this category.

Section 11, Article XV, may be interpreted as a direction to enact corresponding legislation especially for the Muslims in certain cases, because of their customs, traditions, beliefs, and interests. It can be an exception in their favor to general legislation on State policies.<sup>54</sup>

Thus, as a special provision in the Constitution, it is intended to authorize special treatment of those Filipinos comprising the cultural minorities in the country. The clear intent, in the context of the Constitution viewed in its entirety, is to create an exception to the rule of uniformity of treatment under law mandated under the standard of "equal protection of the laws."<sup>55</sup> Moreover, differential treatment accorded to cultural minority groups is justified when it is exercised in the interest of their welfare and the development of the national community as a whole.<sup>56</sup>

In the efforts toward national integration, Muslim cultural identity cannot be sidestepped. Recognition of their peculiar cultural values and their rich historical heritage is necessary for national unity and harmony. Indeed, national integration can only have a meaning where "ethnic and cultural groups are allowed to freely borrow cultural traits from one another and where no cultural trait of any one group is forced on or legislated for the other."<sup>57</sup> The most important thing to ensure, it has been said, is that:

Minority or different religious and ethnic groups within the State should have the opportunity and freedom to preserve their cultural identity. If this can be achieved within a political framework which promises to keep intact those cultural elements in which they differ from other groups, more specifically the majority group, then separate cultural groups may be prepared to merge into a large political and national community as an integral and distinguishable part of it. But if the minority feels that this is not possible, then internal pressures will irresistibly drive them towards an insistence on their separate nationhood, coming to demand self determination in their own right.<sup>58</sup>

#### B. Guarantee of Religious Freedom

Apart from the constitutional provision on the protection of national cultural communities, the Muslim Code is also justified on the ground of religious freedom.

<sup>53</sup> Committee on National Integration Report No. 1, Annex B-1, p. 1, Feb. 2, 1972, cited by DE LEON & LUGUE, JR., *supra* note 51, at 456.

<sup>54</sup> ARUEGO & ARUEGO-TORRES, *supra* note 52, at 229.

<sup>55</sup> The need to protect and safeguard the interests of cultural communities is warranted by the principle of *parens patriae*, which is deeply imbedded in Philippine legal tradition. See Fernandez, *The Legal Recognition and Protection on Interests in Ancestral Land of Cultural Communities in the Philippines* HUMAN RIGHTS AND ANCESTRAL LANDS: A SOURCEBOOK (1983).

<sup>56</sup> LAPONCE, *supra* note 19, at 5.

<sup>57</sup> MAJUL, *supra* note 2, at 7.

<sup>58</sup> Hyder, *Pre-Independence Movements which have used Culture as a part of the Struggle for Independence* 2 UNESCO (1972).

Section 8, Article IV of the Constitution provides:

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

Religious freedom as guaranteed by the Constitution has two aspects: (1) the separation of Church and State; (2) the freedom of religious profession and worship. The above provision not only expressly forbids the establishment of a state religion, but also guarantees religious worship or profession.<sup>59</sup>

Religion, in its broadest sense, includes all forms of belief in the existence of superior beings exercising power over human beings and imposing rules of conduct with future state of rewards and punishments.<sup>60</sup> It has reference to one's views of his relations to his creator, and to the obligations they impose of reverence for His being and character, and of obedience to His will.<sup>61</sup> It is the "profession of faith to an active power that binds and elevates man to his Creator."<sup>62</sup> Religious freedom, although not unlimited, is a fundamental personal right and liberty. It is designed to protect the broadest possible liberty of conscience, to allow each man to believe as his conscience directs, to profess his beliefs, and to live as he believes he ought to live, consistent with the liberty of others and with the common good.<sup>63</sup>

The principle of the separation of church and state is implied from the Constitutional prohibition that "no law shall be made respecting an establishment of religion." Under the 1973 Constitution, this principle is now expressly embodied in Section 15, Article XV. This has been interpreted to mean that neither a state nor the federal government can set up a church, and neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.<sup>64</sup> The state should adopt a position of neutrality. There is to be no preference accorded to any religion or sect.

### 1. Separation of Church and State in the Philippines

The principles of separation of church and state was introduced in the Philippines through two historic documents:<sup>65</sup> (1) the Treaty of Paris concluded between the United States and Spain on December 10, 1898 and (2) the Malolos Constitution, promulgated on January 22, 1899. The latter provides "liberty and equality of all religion in the same manner as the separation of Church and State."<sup>66</sup>

<sup>59</sup>SINCO, *supra* note 40, at 670-674.

<sup>60</sup>TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA 1 (1948).

<sup>61</sup>Davis v. Beason, 133 U.S. 333 (1890).

<sup>62</sup>Aglipay v. Ruiz, 64 Phil. 206 (1937).

<sup>63</sup>Victoriano v. Elizalde Rope Workers Union, G.R. No. 1-25246, Sept. 12, 1974, 59 SCRA 54 73.

<sup>64</sup>Everson v. Board of Education, 330 U.S. 1 (1947). See also Lazaro, *Separation of Church: farce or reality* 21 PHIL. LAW GAZ. No. 5 (1984).

<sup>65</sup>COQUIA, CHURCH AND STATE LAW IN THE PHILIPPINES 47 (1959).

<sup>66</sup>MALolos CONST. Art. V.

This principle was reiterated in President McKinley's Instruction to the Philippine Commission, reaffirmed in the Philippine Bill of 1902, restated in the Autonomy Act of 1916, and finally embodied in the Constitution of the Philippines.<sup>67</sup>

It can therefore be said that the principle and practice of 'separation of Church and State' did not exist during the Spanish period in the country.

## 2. Constitutionality of the Muslim Code

Impliedly, the Code was enacted in accordance with the spirit of religious liberty. While the religious freedom provision in our Constitution is divided into two principal clauses, the first one, however, relating to the 'no-establishment' clause, evidently provokes some questions on the validity of the Code. The first clause of Section 8, Article IV, provides that:

No law shall be made respecting an establishment of religion. . . .

This principle is also explicitly and unequivocally embodied in Section 15, Article XV. It states:

The separation of Church and State shall be inviolable.

Admittedly, the incorporation of Muslim Personal laws, thru P.D. No. 1083, is a phenomenon of first impression in our legal history. Although some laws affecting Muslims have been passed before, they were nevertheless of limited scope and of minor significance. The Muslim Code covering related provisions on personal and family relations, has now become binding and enforceable in all parts of the country with the full sanction of the State.<sup>68</sup>

Initially, doubts have been raised on the constitutionality of this Muslim Code. It is argued by some quarters that the Code constitutes an infringement on the constitutional principle of separation of Church and State. The argument goes on that by recognizing Muslim personal laws, the State has not only passed a discriminatory law but has shown favor or preference for one religion over another or others. Hence, it is argued that the Code is violative of the 'non-establishment' clause.

The contention however is not well-founded. At the outset, the argument definitely overlooks the fact that the Muslim Code was promulgated as a historical necessity in our national life. The Code is legally justified in accordance with the State's policy to maintain national unity and public order, considering the realities of the Muslim secessionist movement in the South.

The incorporation of the Muslim laws into the national legal order may be justified by at least three considerations. First, it is noteworthy to consider that by implementing the Muslim Code, the State or the government did not in any manner establish an official religion. What it gives is simply a *legal recognition* of Muslim personal laws which the Filipino Muslims in the South have persistently followed and observed.

<sup>67</sup> *Aglipay v. Ruiz*, 64 Phil. at 205-206.

<sup>68</sup> MUSLIM CODE, *see* Preamble.

Second, it must be pointed out that, in Islam, there is no separation of 'Church' and 'State'. This principle is alien to the Muslims. Unlike Christianity, Islam has no 'Church' in the sense of an organized religious institution; there is no sacerdotal authority or power to speak of that tends to rival or prejudice the interest of the State. The bifurcation between sacred and secular, while common in western jurisprudence, does not exist in Islam. Consequently, the oft-repeated fear — that if Muslims were allowed to be governed by their own law, they might constitute a "State within a state" — is unfounded. There could be no risk of a theocratic state developing among Muslims since there is no clerical hierarchy which might be turned into an organization for secular political purposes.<sup>69</sup>

Third, the separation of Church and State cannot be interpreted as absolute.<sup>70</sup> It admits of an exception. The provision does not say that in every and all respects there shall be a separation of Church and State. Rather, it only defines the manner, or the specific ways, in which there shall be no concert or union, or dependency of one on the other.<sup>71</sup> This is so because the line demarcating the spheres of the State and religion is often blurred. But it has also been said that this provision was not designed to keep religion entirely separated from the State. Jefferson's "wall of separation" must not be taken literally. That there shall be no law respecting an establishment of religion simply means that there shall be a religious liberty and equality of religious faith before the law.<sup>72</sup>

Furthermore, the validity of the Muslim Code is also reinforced by well-established principles or rules in our jurisprudence. These rules may be stated as follows.

a) Incidental benefit rule

The rule followed with regard to the non-establishment clause is that a law protecting a valid secular interest is not invalid merely because it also incidentally benefits one or more or all religions, or because it incidentally enhances the capability of religion or religious institutions to survive in society.<sup>73</sup>

As applied in our jurisdiction the Court said: The government should not be

The government should not be embarrassed in its activities simply because of incidental results, more or less religious in character, if the purpose had in view is one which could legitimately be undertaken by appropriate legislation. The main purpose should not be frustrated by its subordination to mere incidental results not contemplated.<sup>74</sup>

<sup>69</sup>Bentley, *Islamic Law in Christian Southeast Asia: The Politics of Establishing Sharia Courts in the Philippines* 29 PHIL. STUDIES 58 (1981) citing Mastura, *The Introduction of Muslim Law into the Philippine legal System* 10 SOLIDARITY 47 (1975).

<sup>70</sup>Mr. Justice Powell, speaking for the U.S. Supreme Court, said:

Yet, despite Madison's admonition and the "sweep of the absolute prohibitions" of the clauses, this Nation's history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation.

Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 761 (1973).

<sup>71</sup>Zorach v. Clauson 343 U.S. 683 (1952).

<sup>72</sup>COQUILA, *supra* note 65, at 54.

<sup>73</sup>See for e.g., *Everson v. Board of Education* 330 U.S. 1 (1947); *Meek v. Pittenger* 421 U.S. 349 (1975); *Lemon v. Kurtzman* 403 U.S. 602 (1971).

<sup>74</sup>*Aglipay v. Ruiz* 64 Phil. at 209-210.

b) Excessive entanglement rule

Given the fact that the interests of government and religion sometimes incidentally coincide, the rule is that the government may "accommodate" religion and religious institutions as long as the end results of the accommodation do not excessively entangle government in the affairs of religion.<sup>75</sup> In order to determine whether a government entanglement with religion is excessive, a court must examine the character and purpose of the institutions that are benefited, the nature of the aid that the State provides and the resulting relationship between the government and the religious authority.<sup>76</sup>

c) Rule of impartiality

The State shall not prefer one religion over another. It should take a position of neutrality.<sup>77</sup> It does not select any one group or any type of religion for preferred treatment, but puts them all in the same position. Thus in *Adong v. Cheong Seng Gee*,<sup>78</sup> the Supreme Court has accorded recognition, in accordance with the principle of state impartiality, to marriages performed in conformity with the rights of the Mohammedan (Muslim) religion. In this case, the Court stated: "We regard the evidence as producing a moral conviction of the existence of the Mohammedan marriage. We regard the provisions of section IX of the Marriage Law as validating marriages performed according to the rites of the mohammedan religion."<sup>79</sup>

IV. Summary and Some Conclusions

1. The "Code of Muslim Personal Laws of the Philippines," is an important historic piece of legislation that the state has evolved for the Muslims in the Philippines. Its incorporation into the national legal system is a monumental step towards the attainment of real and genuine national integration.

For centuries, the Muslims have successfully resisted all attempts to colonize them. Since colonial times, integration efforts have miserably failed because these ignored the historic reality that Muslims in this country have, by and large, a distinct cultural, historical and religious heritage, separate from the larger national community. Consequently, efforts to subject the Muslim minorities under a single body of law have received negative, if not violent, reactions and more so when the laws being imposed on them are basically Christian in outlook.

<sup>75</sup> *Lemon v. Kurtzman* 403 U.S. at 606; *Walz v. Tax Comm'n* 397 U.S. 664 (1970).

<sup>76</sup> *Lemon v. Kurtzman* 403 U.S. at 615.

<sup>77</sup> In the case of *Zorach*, the Court set the principle thus:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of the government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.

<sup>78</sup> 43 Phil. 43 (1922).

<sup>79</sup> 43 Phil. at 57-58.

The Muslim Code, therefore, which grants recognition to Muslim personal and family laws, is an assurance that the government protects the religion and culture of the Muslims as an integral part of the Filipino nation.

2. The promulgation of P.D. No. 1083, or the Muslim Code is valid and constitutional. Explicitly, its enactment is in pursuance to the constitutional guarantee on the protection of national cultural minorities and the right to culture. It is also based on the religious freedom provision embodied in our constitution.

Doubts regarding its validity are not well-founded and must hence be clarified. The Code, must not only enjoy the presumption of constitutionality, also the spirit of religious liberty and right to cultural identity ought to prevail. The separation-of-Church-and-State principle is not violated. The Muslim Code, obviously, is not intended to establish a State religion or to sponsor one particular religion. What it simply contemplates is a mere legal *recognition* of Muslim personal laws which the Muslim have actually observed and practiced, regardless of such recognition. Since the doctrine of separation of 'Church and State' is alien to Muslims culture, it cannot be validly imposed on the Muslims or much less provide a basis to hold them guilty of its violation. As a special legislation, the Muslim Code seeks to correct or remedy historical and cultural discrimination. It is also a response to the practical problem of national integration or national identity. Like any other laws, however, the Muslim Code is subject to the limitations imposed by the Constitution.