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LEGAL PLURALISM: THE PROSPECTS FOR CONFLICT RESOLUTION IN THE PHILIPPINES

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ABSTRACT

The PCID Occasional Papers Series is pleased to present as its inaugural issue the paper on legal pluralism by Atty. Mehol Sadain.

In this paper, Atty Sadain, who served as Commissioner of the Commission on Elections (COMELEC), argues that legal pluralism can become an important tool for resolving the protracted conflict that has long characterized the relation between the majority Christians and minority Muslims in the Philippines. He asserts that the introduction of Islamic Law into Philippine law (for instance, through the adoption of the Code of Muslim Personal Laws) where demographic and religious heterogeneity prevails would most likely succeed in addressing the varying legal requirements of specific population groups.

His paper begins with a conceptual discussion of legal pluralism referring to it as the variety of forms of law functioning within any given social field. He then situates legal pluralism within the context of the framework of the Philippine Constitution that recognized the multiplicity of social and ethnic dimensions of the country.

He further asserted that the promulgation of CMPL and the establishment of Amanah bank during the Marcos regime were steps in the right direction. But both efforts did not progress as the CMPL is now in dire need of revisions and the Amanah bank has failed to live up to its promise. He also took to task the Regional Government and its Regional Legislative Assembly "which could have pushed for, and enacted enabling laws to implement Moro empowerment provisions in the Regional Autonomous Law (Republic Act No. 9054, March 31, 2001).

In his conclusion, Atty. Sadain batted for a comprehensive study and review of the CMPL and the ARMM Organic Law "to enliven and revitalize the concept of legal pluralism in the Philippines and turn it into a conflict resolution tool by giving importance to the valuable role of law in enhancing the socio-economic and political benefits that can considerably improve the condition of the Muslim minority in the Philippines."

ABOUT PCID

Established in 2002, PCID is an independent non-government organization dedicated to the study of Islamic and democratic political thought and the search for peace, democracy and development in Muslim communities.

PCID was the result of concerned discussions on the compatibility of Islam and democracy among young Muslim intellectuals that included Ms. Amina Rasul, a former Cabinet member under the Pres. Fidel Ramos, Atty. Nasser Marohomsalic, former Human Rights Commissioner, and, the late Abraham Iribani, a former spokesperson of the Moro National Liberation Front (MNLF). Their concern on the future of democracy in Muslim Mindanao stemmed from the growing popularity of the discourse that somehow Islam and democracy are not compatible.

PCID, which made the transition from Council to Center in June 2010, was therefore an attempt to counter that narrative; to give emphasis to the idea that any attempt to address the problems of Muslim Mindanao should include and should occur within the context of democracy.

Today, PCID is seen as an objective and independent party with a track record of bringing together all sectors in the democratic dialogue for peace and development. The convenors of the PCID include politicians, civil society leaders, government, educators, ulama, feminists, media, military, *Balik-Islam*, business leaders coming from all the Muslim dominant provinces of Mindanao as well as from the Muslim *diaspora* of Luzon.

PCID's work includes advocacies on democratization and electoral reforms in Muslim Mindanao, strengthening research and scholarship among Muslim intellectuals, empowering Muslim religious leaders (the ulama and aleemat), peace education, engaging non-Muslims in a discourse of Muslim issues, engaging policymakers and other stakeholders on the peace process, democracy and development in Mindanao.

PCID's work has been recognized through awards received by Ms. Amina Rasul including the Muslim Democrat of the Year award in 2007 from the Washington-based Center for Islam and Democracy and the Mindanao Peace Champion award from the United Nations Act for Peace Program in 2010.

ABOUT KAS

Freedom, justice and solidarity are the basic principles underlying the work of the Konrad Adenauer Stiftung (KAS). The KAS is a political foundation, closely associated with the Christian Democratic Union of Germany (CDU). As co-founder of the CDU and the first Chancellor of the Federal Republic of Germany, Konrad Adenauer (1876-1967) united Christian-social, conservative and liberal traditions.

In our European and international cooperation efforts we work for people to be able to live self-determined lives in freedom and dignity. We make a contribution underpinned by values to helping Germany meet its growing responsibilities throughout the world.

We encourage people to lend a hand in shaping the future along these lines. With more than 70 offices abroad and projects in over 120 countries, we make a unique contribution to the promotion of democracy, the rule of law and a social market economy. To foster peace and freedom we encourage a continuous dialog at the national and international levels as well as the exchange between cultures and religions.

We are guided by the conviction that human beings are the starting point in the effort to bring about social justice and democratic freedom while promoting sustainable economic activity. By bringing people together who embrace their responsibilities in society, we develop active networks in the political and economic spheres as well as in society itself. The guidance we provide on the basis of our political know-how and knowledge helps to shape the globalization process along more socially equitable, ecologically sustainable and economically efficient lines.

We cooperate with governmental institutions, political parties, civil society organizations and handpicked elites, building strong partnerships along the way. In particular we seek to intensify political cooperation in the area of development cooperation at the national and international levels on the foundations of our objectives and values. Together with our partners we make a contribution to the creation of an international order that enables every country to develop in freedom and under its own responsibility.

KAS has been active in the Philippines since the late 1960s. From 1998 to the present, the main activities of the KAS in the Philippines have focused on Social Market Economy, Institutional and Political Reform, and Peace and Development in Mindanao.

ABOUT THE AUTHOR



Attorney Mehol K. Sadain is a convenor and trustee of the Philippine Center for Islam and Democracy. He is also a board member and vice chairman of First Asia Financial & Productivity, Inc., where he drafted *An Act Providing for the Issuance of Securities by the Regional Autonomous Government in Muslim Mindanao*, which was submitted to the office of the Regional Governor of ARMM in 2008. He has written several books and essays on Islam in the Philippine context, and is also a published poet.

From 2000 to 2006, Atty. Sadain served as a commissioner of the Commission on Elections. He has been Dean of the Institute of Islamic Studies in the University of the Philippines, and chairman of the Special Shari'ah Bar Examination Committee of the Supreme Court. He is currently a professorial lecturer at the College of Law at the University of the Philippines, and also lectures at the Philippine Judicial Academy of the Supreme Court of the Philippines.

He graduated Valedictorian, Gerry Roxas Leadership Award recipient and Insular Life Awardee from Ateneo de Zamboanga High School, Zamboanga City (Secondary, 1972).

He finished his Bachelor of Arts in Islamic Studies under a scholarship grant from the Institute of Islamic Studies, University of the Philippines, Diliman, Quezon City (College, 1978).

He passed the Philippine Bar in 1987 after having graduated 16th in the Class of 1986 of the University of the Philippines College of Law, Diliman, Quezon City. He completed the Shari'ah Training Course sponsored by the Office of Muslim Affairs at U.P. PCID, Diliman, Quezon City in 1992.

LEGAL PLURALISM: THE PROSPECTS FOR CONFLICT RESOLUTION IN THE PHILIPPINES

By MEHOL K. SADAIN

John Griffiths¹ elaborates on the concept of legal pluralism by associating it with society, as follows:

“Legal pluralism is an attribute of a social field and not of law or of a legal system. A descriptive theory of legal pluralism deals with the fact that within any given field, laws of various provenances may be operative. It is when in a social field more than one source of law, more than one legal order, is observable, that the social order of that field can be said to exhibit legal pluralism.”

Griffiths goes on to cite the attendant dynamism in the law required by a situation where not all “law and legal institutions” can be “subsumable within one system”:

“Legal pluralism is a concomitant of social pluralism: the legal organization of society is congruent with its social organization. Legal pluralism refers to the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping, semi-autonomous social fields, which it may be added, is in practice a dynamic condition.

“A situation of legal pluralism --- the omnipresent, normal situation in human society --- is one in which law and legal institutions are not all subsumable within one ‘system’ but have their sources in the self-regulatory activities of all the multifarious social field present, activities which may support, complement, ignore or frustrate one another, so that the law which is actually effective on the ground floor of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism and the like.”

In simple terms, legal pluralism is manifested by the variety of forms of law functioning within any given social field, and necessitated by the

¹ Quotes from John Griffiths, “What is Legal Pluralism” from http://law.gsu.edu/jjuergensmeyer/spring08/bonilla_session1_Griffiths.pdf

heterogeneous legal conditions in such single social field. *The implication is for law to function normally and normatively it should be able to adequately respond to all the legal requirements and heterogeneous elements of society.* A legal system that is able to do this harbors a strong potential of regulating society and resolving attendant conflicts.

The Constitutional Framework of Legal Pluralism in the Philippines

The functional framework of legal pluralism in the Philippines finds support in the broad constitutional recognition and promotion of “the rights of indigenous cultural communities within the framework of national unity and development”², as well as the recognition, respect and protection accorded “the rights of indigenous cultural communities to preserve and develop their cultures, traditions and institutions” which shall be considered “in the formulation of national plans and policies”.³

The 1987 constitutional provisions’ reference to indigenous cultural communities (ICCs) has generated debates on terminological minutiae, specifically on whether the term ICC equally applies to Moros or Muslims in view of the apparent difference in legislative consideration between the ICCs and the Moros. This is not, however, our concern here.

After all, the Code of Muslim Personal Laws (CMPL) was crafted in the seventies on the basis of a similar provision in the 1973 Constitution which mandated the State to “consider the customs, traditions, beliefs and interests of national cultural communities in the formulation and implementation of state policies,”⁴ at that time, collectively referring to the Moros and the ICCs as national cultural communities. Enacted into law on February 4, 1977, the CMPL was a landmark in legislated legal pluralism in the Philippines, enunciating the following purposes:

- “a) [Recognizing] the legal system of the Muslims in the Philippines as part of the law of the land and (seeking) to make Islamic institutions more effective;
- b) [Codifying] Muslim personal laws; and
- c) [Providing] for an effective administration and enforcement of Muslims personal law among Muslims.”⁵

² Article II, Section 22, 1987 Constitution

³ Article XIV, Section 17, 1987 Constitution

⁴ Article XV, Sec. 11, 1973 Constitution

⁵ Art. 2, Presidential Decree No. 1083 or the Code of Muslim Personal Laws

In his introduction to the copy of the Code printed by the Office on Muslim Affairs, former Congressman Datu Michael Mastura, then Assistant Secretary/Project Director of the Philippine Shari'ah Institute reiterated the "fundamental criteria" which guided the work of the Presidential Code Commission that reviewed the Draft Code for Administration of Muslim Personal Laws, to wit:

"1) Of the Islamic legal system, which is considered a complete (legal) system... only those that are fundamentally personal in nature were to be codified;

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

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

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

"5) No precept was to be included unless it was based on the principles of Islamic law, as expounded by the four orthodox (Sunni) schools."⁶

The criteria illustrate the imperative for law to maintain flexibility and an ability to adapt to delimiting elements in legal systems for legal pluralism to operate. In the case of the CMPL, its integration into the Philippine legal system meant recognizing the Philippine constitution and judicial system --- something which would have been unthinkable in a predominantly Muslim country.

A related issue in this regard, therefore, would be the extent of tolerance and legal niceties of Islamic law to a pluralistic treatment of its precepts in a legal system where Muslims are in the minority. It would be intellectually challenging to deal, in the future, with this issue on the basis of *fiqh* (jurisprudence) concepts of *darura* (necessity) and *dar ul-amn* ('house' of

⁶ From the Report of the Presidential Code Commission, August 29, 1975

safety) or *dar ul-ahd/sulh* (house of truce/treaty) as categories in the classification of the Islamic world, each with corresponding legal ramifications.⁷
Highlighting the Practical Purpose of Legal Pluralism in the Philippines

If legal pluralism is to be first and foremost attributable to interacting social fields, then the varying social systems existing in our country should account for both the rationale and implementing mechanism for legal pluralism. Without a doubt, Philippine society exhibits layers of ethnic and religious variances that heavily influence the demographic stratification of its diverse population; hence, the importance of legal pluralism in our country.

Michael O. Mastura begins his paper on 'Legal Pluralism in the Philippines' by writing that "(i)n Southeast Asia, pluralistic legal systems coexist with indigenous law. The development of legal pluralism can be seen in the different approaches taken by Southeast Asia national laws, as well as in the diversity of indigenous laws." According to Mastura, his aim "is to examine how a particular example of legal pluralism --- the regime of law in Muslim (Moro) society in the Philippines --- was addressed through legislative reform."⁸

The seminal work of Mastura on Philippine legal pluralism, together with the earlier writings of the late and former U.P. Institute of Islamic Studies Dean, Cesar Adib Majul, are to be appreciated for their trailblazing dissection of the dynamics of the legal relationship between the Muslim minority and Christian majority in a secular Philippines. Majul considers the introduction of Islamic law in the Philippines as part of "the government response to (the Muslim) aspirations and expectations."⁹ This statement should be viewed in the context of the historical fact that the Muslims of the Philippines have, from the 15th century an institution of governance in the Sultanates, and a set of law to govern their constituents.

When the Americans came and annexed the unconquered areas of Mindanao and Sulu by virtue of the questionable Treaty of Paris, the Moro Province was created as an implicit acknowledgment by the Americans of an identity and tradition of the Moros separate and distinct from those of the natives from the Spanish-occupied islands of Luzon and the Visayas.

⁷ *Dar ul Amn* describes the situation of the Muslims living in the west or in non-Muslim societies while *Dar ul Ahd or Sulh* refers to a Muslim society's status in connection with states or societies with whom it has entered into a treaty of peace or truce. *Darura* is a state of extreme and urgent necessity which Islamic jurisprudence considers as a justifying factor for legally tolerating the commission of an act which will otherwise be *haram* or forbidden.

⁸ Mastura, Michael. "Legal Pluralism in the Philippines", *Law & Society Review*, Vol. 28, No. 3, Law and Society in Southeast Asia (1994), Blackwell Publishing. p. 461.

⁹ Majul, Cesar Adib. "The General Nature of Islamic Law and its Application in the Philippines", *Philippine Law Journal*, Vol. 52, 1977, p. 375.

For this reason, when the Americans “filipinized” the governorships in Sulu, Cotabato and Lanao in 1920, the Moros of Sulu reacted by writing the U.S. Government a petition on June 9, 1921, asserting that the Moros have been independent for 500 years and rejecting governance by the Filipinos.

On February 1, 1924, another petition signed by more than a hundred Moro leaders was sent to the U.S. Congress, declaring: “In the event the U.S. grants independence to the Phil. Islands without provision for our retention under the American flag, it is our firm intention and resolve to declare ourselves an independent Constitutional Sultanate to be known as the Moro Nation.”

The protestations by the Moros bore fruit when Congressman Robert L. Bacon of New York sponsored a bill (House Bill No. 12772) in the U.S. House of Representatives seeking to retain Mindanao and Sulu as an American colony even as the rest of the Philippines were to be granted independence. However, the Moro efforts and the bill of Congressman Bacon went to naught due to the strong lobby mounted by Filipino nationalists headed by Manuel L. Quezon.

These historical developments had lasting effects on the legal consciousness of the Moros and, hence, on the deterioration of law and order in the Muslim areas. The imposed westernized government structure along with its judicial system and laws were strange and alien to the Moros; and complemented by deep-seated feelings of suspicion and antagonism on the northern Filipinos, the Moros all the more resisted and defied all extraneous laws that were supposed to govern the entire Philippines, including the Moroland. Traces of the persistence of that resistance and defiance against imposed law can still be seen in the weak institutions of law and order among the Moros in the southern Philippines.

The Philippine legal system must, therefore, have a practical visage to counter the social ill effects of legal apathy and defiance that have so characterized Moro society in the country. As a phenomenon that affects both the social field and the legal system, it behooves us to turn to legal pluralism as a key to remedying the social malaise of legal dysfunction.

Exploring the Conflict Resolution Aspect of Legal Pluralism

I would now like to go a little further from the pioneering discourses of Majul and Mastura, by looking into the introduction of Islamic Law into Philippine law as a tool for resolving the protracted conflict that has long characterized the relation between the majority Christians and minority

Muslims in the Philippines. I advance this functionality aspect of Islamic Law in conflict resolution based on the following observations:

1. The task of the law, regardless of its system and origin, when applied on a particular community, is to forge order among individuals, and in what John Griffith calls the 'social field'.
2. Law, to be an effective tool for forging order and enhancing harmony must be cognizable and identifiable to its 'social field'.
3. A population that identifies with its laws, particularly those that had evolved from and with the people and society, is more likely to abide by, rather than violate, these laws. The converse is also true.
4. Viewed this way, a rationalized and well-crafted law that emanates from the people, whether indigenous or exogenous, is likely to be responsive to the people's needs and problems.
5. In the Philippines, where demographic and religious heterogeneity prevails, a policy of adopting different legal systems and incorporating them into the national legal system will most likely succeed in addressing the varying legal requirements of specific population groups.

We now determine what can be done for the foregoing observations to be realized, and the potential problems as well as rewards in undertaking such a task.

Admittedly, the martial law Marcos government was in the right track in promulgating the Code of Muslim Personal Laws and in creating the Amanah Bank (Presidential Decree No. 264, August 2, 1973 as amended by P.D. No. 542, August 20, 1974) that was supposed to be the progenitor of Islamic banking in the Philippines. Presently however, the CMPL remains in dire need of amendments to revitalize its judicial structures and rectify or elaborate on vague provisions, and the Amanah Bank has been renamed to Al-Amanah Islamic Investment Bank of the Philippines by Republic Act No. 6848, but has deteriorated into a mere adjunct of the Development Bank of the Philippines.

In short, the functional promise of legal pluralism for the Muslims in the Philippines has retrogressed rather than gained progress.

Partly to blame is the ineffectiveness of the Regional Autonomous Government and its Regional Legislative Assembly which could have pushed

for, and enacted enabling laws to implement Moro empowerment provisions in the Regional Autonomous Law (Republic Act No. 9054, March 31, 2001); as well as the failure of the Moro National Liberation Front in monitoring the compliance by both sides with the GRP-MNLF Final Peace Agreement on the Implementation of the Tripoli Agreement (September 2, 1996).

To cite several examples:

The CMPL contains provisions which can be implemented and expanded by providing the details in enabling legislations. Article 173 (c) of the CMPL, for instance, provides for “charitable trust property” as among the communal properties recognized by the Code, and therefore, part of Philippine law. The institution of *waqf*,¹⁰ a very vital financial instrument for advancing the welfare of the Muslim community, is considered as charitable trust property, and can therefore be formally established in the Philippines on the basis of such recognition. What remains to be done is to craft a law (either by Congress or the Regional Legislative Assembly (RLA) of the ARMM, to provide for its implementing details. A well-managed *waqf* property can benefit the Muslims and therefore become part of the solution to the problem of poverty.

A similar provision is the institution of *rihan* or Islamic mortgage under Art. 175 of the CMPL, which provides that “any (onerous) transaction whereby one person delivers to another any real estate, plantation, orchard or any fruit-bearing property by virtue of *sanda, sanla, arindao* or similar customary contract, shall be construed as a mortgage (*rihan*) in accordance with Muslim law.”

The idea behind this provision is to 1) remove the element of *riba* or usury from contracts involving loans and collaterals; and 2) transform the onerous and sinful customary contracts mentioned above into that of a legitimate and *riba*-free, and therefore, Shari’ah-compliant mortgage transaction, a *rihan*, allowed under Islamic law. Unfortunately, a resort to Art. 175 of the CMPL can only be effectively made once there is a law outlining the legal details of the *rihan*.

On the procedural aspect, a much needed amendment of some provisions on the Shari’ah District Courts (Arts. 138 to 149) and the Shari’ah Circuit Courts (Arts. 150 to 159) is required to make the institutions more responsive to the litigation needs of Muslims not just in Mindanao (where these Courts are established by the CMPL), but more importantly, in Luzon and the Visayas

¹⁰ *Waqf* is a form of religious trust and socio-economic institution whereby the ownership of private property is reverted to God by its Owner (the Trustor), and the same is administered by a Trustee in favor of identified Beneficiaries or for the socio-economic welfare of the Muslim community. Once the *waqf* property is reverted to God, it can no longer be alienated and must be devoted to accomplishing the purpose for creating the *waqf*.

where there are now sizeable Muslim populations, and the customary institutions for settling family disputes are not readily available.

Republic Act 9054 or the Organic Act for the ARMM also suffers from various implementation problems, some of them due to complete neglect and others, due to a lack of enabling law which could have been enacted by the RLA. In need of enabling laws are the establishment of the Shari'ah Appellate Court provided for in Art. VIII, Sec. 7 of R.A. 9054; the power of the Regional Autonomous Government to float bonds and other treasury bills under Art. IX, Sec. 10; the transformation of the regional economy and patrimony into that which is responsive to the needs of the region under Art. XII, Sec. 1; the grant of incentives to investors in the ARMM under Art. XII, Sec. 3; the grant of franchises and concessions under Art. XII, Sec. 5 (d); and the regulation of the exploration, utilization, development and protection of natural resources in the ARMM under Art. XII, Secs. 8 and 9, among many others.

The list is long, but it will not entail a difficult study and review of the CMPL and the ARMM Organic Law¹¹ to enliven and revitalize the concept of legal pluralism in the Philippines and turn it into a conflict resolution tool by giving importance to the valuable role of law in enhancing the socio-economic and political benefits that can considerably improve the condition of the Muslim minority in the Philippines.

A helpful methodology would be to classify the provisions in the pertinent laws as follow:

1. Provisions that can be immediately implemented --- which cover most of the provisions in the CMPL and the Organic Law. Conversely, this will also enable us to identify implementable provisions that are not being implemented.
2. Provisions that need enabling regional or national legislation for them to be implemented. These provisions can immediately be referred to Congress or the RLA, and public pressure must be exerted for these two legislative institutions to do their work. This is of course subject to various factors, among them, the numbers needed for legislation and the quality of the legislators themselves.
3. Provisions that need amendment/s in the law because these are not responsive to the condition of the ARMM and the Moros; and

¹¹ *Editor's Note:* The legal panels of the MNLF and the Philippine government (GPH) have initialed a draft bill that seeks to amend Republic Act 9054, which was in theory an act to "strengthen and expand" the Organic Act for ARMM by amending the original Autonomy Act or RA 6734.

4. Provisions that need constitutional amendment/s for their implementation.

The foregoing methodology and guidelines are designed to lubricate, in a manner of speaking, the wheels of plural legalism, and turn it into a viable vehicle for social and political change in the ARMM. By way of yet another analogy, the seeds of legal pluralism having grown in Philippine legal soil, the sapling has proven that it is capable and deserving of being nurtured into full growth.

Conclusion

Legal pluralism as a concept, having been integrated into the Philippine legal system, and accepted as a way of addressing demographic and legal plurality in Philippine society, is now pregnant with possibilities and the promise of hope for the Philippine Muslim population. It may not be a direct solution to the problems of the Muslims as the multi-faceted aspects of these problems preclude a direct legal approach that does not consider education, technology, culture and people's attitude. Neither is it the only solution as the problems have mutated into a multi-headed hydra that can only be slain by cutting off its various heads. Most likely, the solutions will be multi-disciplinary and their application gradual and scaled, and legal pluralism will mainly clear legal complexities like a scythe cutting down the thickets, or build strong legal foundations like a mason fortifying shaky edifices. The success of legal pluralism will ultimately boil down to how enacted laws are responsive to the needs of the people so that they will eventually command reverential respect instead of mere fearful obedience; and the ends of law are the people's welfare instead of the leaders' vanity.