THE INTRODUCTION OF MUSLIM LAW INTO THE PHILIPPINE LEGAL SYSTEM*

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It was Maulana Maududi, in 1948, who first dicussed the problem involved in the introduction of Islamic law in a practical and systematic way by making full use of the administrative machinery of the government. It is our intention to discuss the problem associated with the introduction and administration of Muslim law into the Philippine legal system.

We may begin with some introductory comment that a majority of the Filipino people have come to adopt the amalgam of Hispanic-civil system and Anglo-American legal jurisprudence. The 'Moros' who converted to Islam long before the advent of this western legal system, which is basically Roman in origin, have adopted and adhered to the blend of *Hukum shara* (Islamic or Muslim law), which is Arabic in origin, and the *Adat* (Customary law). Thus a conflict of law situations arises. Irreconcilable as some of the principles of these laws are, yet it is possible to administer them as component parts of the Philippine modern legal system. It raises, however, the question: how will it be introduced?

On July 22, 1974, the Judiciary Code Committee of the Supreme Court of the Philippines invited us to appear before the committee to discuss the matter of the integration of the provisions of the proposed Draft of the Administration of Muslim Law Code of 1974 to the Draft Judiciary Code which the committee has been deliberating for some time now. It was at that meeting that the Chairman of the Judicial Code Committee, Justice Fred Ruiz Castro, raised the follow-in questions:

1. If we do adopt your recommendations to the extent that it is feasible, would these recommendations fit within the framework of our present Constitution?

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*From *Solidarity*, X, 6 (July-August 1975), 47-58.

2. If my impression is correct – that you do not want a complete separate judicial system and I think you want to try to achieve an integrated judicial system to the judicial system that we have now – what is the extent of the integration that you propose?

3. There has been an impression all over the Committee, as well as among people who have read your thoroughly prepared Muslim Code, that you, gentlemen, who are Muslims, would rather secede than integrate.

4. What kind of rules of procedure do you want included in the Rules of Courts?

5. Would you want a separate penal system and if you do or do not, what is the precise law system that you want adopted?

6. And finally, while you mention something about appeals, you were not precise about the extent, nature, substantive aspect of the problem.

A Problematical Situation

To answer the questions raised by Justice Castro, on whether the proposed Code on the Administration of Muslim laws in the Philippines[1] come within the framework of our present Constitution, is to take up the issue of the feasibility of the "integration" of the Muslim legal system into the existing judicial system in the Philippines. The problematical situation has been aptly stated by a member of that Judiciary Code Committee as follows:

> When you really integrate this (Muslim) system of law, the basis of which is entirely different from ours, are we not asking to curb out an exception? As it is different, I think we can integrate or curb out exceptions. Now, if it is because of the system's non-integrative nature, then we really want an exception. If it is an exception, then there is necessarily a creation of peculiarity leading to the unavoidable consequence of divisiveness. I noticed that the code creates a rather complete system. Are we not again tending to have a state within a state?[2]

Interestingly enough, Director Froilan Bacungan of the U.P. Law Center and others have similarly raised the point to scrutinize the proposed Code so as "to prevent the development of a state

within a state, a situation which all of us do not wish to arise."[3] Let us develop the answer to this problem.

The Law of the Land and Personal Law System

We know from independent historical sources that something of these observations – or shall we say fears – comes through in modern state constitutions where the Muslim communities are not the dominant population. But it is a curious fact that in Muslim states or better still Islamic states,[4] where non-Muslims *(dzimmis)* constitute the protected minorities adhering to their own personal law system, these non-Muslims are governed without being regarded as an autonomous force or a "state within a state." Why? The case for the Muslims is stated by Sayyid Abul A'la Maududi in his authoritative book, *Islamic Law and Constitution:*

> In personal matters, every community is welcome to adopt its own personal law. Indeed, it is only Islam which guarantees this right in the most liberal manner to all the minorities living in an Islamic state. It is Islam which has taught to the modern world the real difference between the 'law of the land' and the 'personal law' and which enunciated the principle that in a multi-national state the personal affairs of a man should be settled according to his own Personal Law (1955: 1967: 70-71).

Our concern for the 'law of the land' and the 'personal law' system here is not a matter of exclusive definitions, but a useful means for examining relationships within the constitutional system; that is to say, between the state authority and the Muslim legal system that regulates the Muslim communities under the state authority. This, in the end, will enable us to arrive at the conclusion that we are not out to curve a "state" within the national state.

No historical analysis of the status of the Muslim communities in the Philippines will be attempted here. Suffice it to say that in consitutional thoughts,[5] treaties and conventions,[6] and legal theory,[7] the existence of such system and its peculiarity to the Muslim population in the country has been a fact recognized, and thus, obviously needs no support from any source of authority.

Needless to point out, the Muslim communities in the Philip-

pines, as a minority group, comes within the definition of the United Nations Sub-commission on Prevention and Protection of Minorities:

> . . . . 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.[8]

Must we equally refute the thesis of those who reject the proposition that the type of society which our development has reached is a pluralistic one? We consider this to be the foundation of our plural society, *ubi societas, ibi jus:* "Whenever developed communities are brought in contact with each other, judicial relation must sooner or later be formed not mainly by necessity of the case, but partly from the same causes as those which working internationally create States." For as a people the Filipinos are bound by an agreement, the Constitution, under which:

> The state shall consider the customs, beliefs and interests of national cultural communities ih the formulation and implementation of state policies. (Art. XV, Section 11).

In the sponsorship of this new provision we have argued elsewhere that the framers of our constitution are alive to the mosaic pattern of the Philippine cultural pluralism. That is why we have seen fit to provide a constitutional fiat upon which policy-makers may often rely should the need for special arrangements and reasonable adjustments arise in dealing with the rights and obligations of the minorities.

Customs, Beliefs and Interests

Here again, the question we face is, what are these customs and beliefs? What consists the interest of our national cultural communities? It is plain that the word "interest" is pregnant with meaning.

In relation to the Proposed Code on Administration of Muslim law which we propose to examine in the light of Section II of Article XV now, we should subject these interest to a formal legal analysis. Implicit in this regard is a related principle of the political process that customs hardening in time into laws must be ascertained and regulated. Even before the inception of the present provision of the Constitution, this is a principle in law that we have recognized. Thus

customs must be proven as a fact (Art. 12, New Civil Code) and that they must not be contrary to public policy, public order or morals (Art. II, NCC). Be that as it may, these criteria boil down to a viewpoint that is determined largely by the standard of the dominant state of mind and as dictated by the Roman-Christianity experience or value of the majority. That is why the explanatory reason may be given that Section 11 of Article XV is what we might call a "countervailing provision" to state policies of Hispanic-Christian orientation that would tend to characterize the national level of life.

Since the advent of the New Consitution, the President of the Philippines has enunciated and directed policy statements with the above provision in mind. One statement must engage our attention:

> The Muslim heritage is part of the heritage of the nation. Their laws should be part of the law of the land. That is why I have ordered the codification of Muslim laws and researches on the Agama Courts (See RAD Mindanao Report, 1973: 33).

Then the President of the Philippines subsequently elaborated this policy statement saying that:

> Studies are going on for the adoption of laws of (Muslim) marriage and divorce, the agama courts, and other traditional customs of the cultural minorities as basis for a code of government (quoted from *Times Journal,* June 23, 1973).

The proposed Code derives its authority, just as the other laws of the land do from the State authority. For in pursuance of the aforecited statement of policy, Memorandum Order 370, dated August 1, 1973 entrusted the following to a research staff:

1. To survey, collect and gather materials on Muslim laws from all available sources with particular emphasis on current Philippine laws affected by Islamic laws;
2. To collate and reconcile Philippine laws with Muslim laws; and finally
3. To prepare a preliminary draft of the Proposed Code of Philippine Muslim Laws *(shariah, fiqh, adat,* etc.) and its implementing agencies.

The proposed Code is precisely an attempt to set out a systematized administration of Muslim law and customary law *(adat),* in

order to allow the Muslim legal institution to operate within the framework of the New Constitution. How else and what better means can the regulatory powers of the State come in the matter of Muslim legal system which has sustained the test of time but has otherwise remained outside the bounds of the national judicial system? Can it be called a "state within the state," an institution that seeks to bring in the coercive power of state authority as far as practicable?

Separation of Church and State Not a Muslim Experience

It is understandable, of course, that anyone with a background on the national system, which is so ingrained in Hispanic-American legal theory, would tend to look at the introduction of the Muslim personal law system as the creation of a miniature "state." The lack of understanding of the significance of *Shariah* (Islamic law) among the western-trained jurists springs from the position taken by the American constitutional model that the whole system is built upon a framework or working relationship between two originally competing institutions, e.g. the Church and the State.

In this case the ideal becomes to aspire for "the law" or "legal system" that promotes a realm of "secularism" and, in consequence, an operative uniform legal institution that is theoretically not religious.

The dichotomy, "Render therefore unto Caesar the things which are Ceasar's" (Luke, XX: 25), indicates the Christian view or Western view, where Christianity is the dominant religion, on what the law is – the positive law that governs man socially and politically. But Sir Mohammad Iqbal in his treatise, "The Reconstruction of Religious Thought In Islam," has the observation that Christianity was founded not as a political or civil unit. In conclusion he has written:

> The result of this was that when the State became Christian, State and Church confronted each other as distinct powers with interminable boundary disputes between them. Such a thing could never happen in Islam for Islam was from the very beginning, a civil society, having received from the Qur'an a set of simple legal

> principles which, like the twelve tables of the Romans carried, as experience subsequently proved, great potentialities of expansion and development by interpretation. The Nationalists theory of state, therefore, is misleading inasmuch as it suggests a dualism which does not exist in Islam (1934: 155).

In its applicability to the Muslim situation in the Philippines, can it be said, then, that a "theocracy of the Muslim communities" will ever happen?This is the question, perhaps, addressed and alluded to as a "state within the state" by the U.P. Law Center Director and by the Secretary-Recorder of the Judiciary Code Committee.

The answer is no. The proposed Code does not propose to establish Islam as a state religion. The fact is that sovereignty in the Islamic sense is attributed to God but at the same time Islam allows the locus of sovereignty, in another sense, on a constitutional office or vice-regency *(Khalifa),* by virtue of which may be assigned the authority to interpret and apply the *Shariah.* We shall return to this point shortly but first let us refer to the "Political and Legal Theories of Muhammad Abduh and Rashid Ride":

> The locus of sovereignty on the secondary plane thus becomes crucial, for it is here that the character of the constitutional and legal systems as functional instruments will be determined. The assertion that Islam provides for a 'theocracy' is true in the ultimate sense, but meaningless in the practical sense, for in the latter 'theocracy' signifies the rule of a priestly or other supposedly divinely inspired (see Malcolm Kerr, 1966:4).

This, in brief, is a cardinal point we cannot repeat too often: There is no priesthood in Islam because Islam does not recognize sacerdotal authority. Every Muslim or believer in Islam can perform the functions which, let us say, in Christianity are exercised by ordained priest and ministers.

If we are admittedly clear in what we have been saying, it would be erroneous to consider the proposed Code as legislating to fuse the church and state. The Muslims have no church in the hierarchical sense of the word nor have they the religious bureaucracy that can seek transcendental line with any supreme religious authority – something Christianity has in relation to the Holy See. Neither would it be accurate to consider that public funds would be appropriated,

laws and customs of family relations founded on their Islamic experience and traditional life. Great weight may be given to the family relationship of the Muslim Filipinos where *adat* (customary law) has reinforced it with the legal maxim that, "disputes among Muslim families are the province of the elder." Hence, the importance of the law as a social institution.[11]

How does the state propose to implement laws on family relations? The Civil Code provides:

> The law governs family relations. No customs, practice or agreement which is destructive of the family shall be recognized or given effect. (Art. 218, NCC).

We submit that it is far from the intention of the law to build social institutions within the Christian social orbit or in the light of Catholic morals and values solely as a norm. This would push the non-Christian population to a predicament, exemplified by the moralizing and condescending nature of past policies that rendered them the object of a slow and subtle process of civilization and evangelization.

The Civil Code of the Philippines formally recognized this unformable fact, and provided for certain provisions relating to Muslim family institutions particularly marriage (Art. 73, NCC), and solemnization of marriage (Art. 79 and 92 NCC; R.A. No. 241, for cross reference). We have R.A. No. 394 in our statute books covering divorce. But the bases of these laws can be found in the philosophy behind the transitory nature of its applicability, which to our mind springs from a wrong premise. The impression was that sooner or later, within the timetable set by the state, these non-dominant elements of the population will have conformed to the norms and values of the dominant majority. This is and has been the national integration goal.

The transitory nature of this arrangement traces its step to the Jones Law of 1916 which prohibited "the contracting of polygamous or plural marriage" and stated that "no law shall be construed to permit polygamous or plural marriage" (Section 3). Realizing the conflict with the practices of Muslims and non-Christian tribes, dispensation was made for a period of 20 years by special legislation. At the end of that period conditions did not much more change and so an extension was granted. About the time that the new Civil Code was under study, it became necessary to provide for an accomodation

applied or used to support Islam in violation of Art. VIII, Section 18 (2) of the Constitution. Nor could the proposed Code be interpreted to be a preference to Islam because *aqzaf* is a special preserve of *Shariah* not to be tampered with the legislative appropriation.

Lacking as we are for words to convey secularism, the proposed Code delineates functions arising from act of worship *(ibadat)* and social transactions *(Mu'amalat).*[9] It is precisely to the latter that the proposed Code addresses its application. At any rate, a closer examination of the provisions on charitable trust *(waqf)* reveals that this area is imbued with social interdependence of the Muslim communities. For even the Catholic Church in contemporary political theory while recognizing its autonomy and independence from the political community (the State) asserts that both the Church and State,

> . . . under different titles, are devoted to the personal and social vocation of the same men. The more that they foster sounder cooperation between themselves with the consideration for the circumstances of time and place, the more effective all their service be exercised for the good of all. For man's horizons are not limited only to the temporal order; while living in the context vocation.[10]

On the Question of Integration

This brings us to a crucial issue: Do we want to integrate or secede? The greater aspect of this problem is a political one. Because this is not the proper form to give a political answer we shall offer a juridical position.

For the Muslims in the Philippines, we take it that they can be loyal citizens of our Republic so long as they enjoy full religious and civil liberty. That is why there never is any doubt that the Muslim communities have to preserve the critical portions of their personal law. Here it is a relevant question to pose why personal law cannot be entrusted to our existing civil courts. The answer is as obvious as can be gleaned from the defined jurisdiction of our civil courts, albeit, the special Juvenile and Domestic Relations Court, in comparison to the special nature of family relationship in Islam that the *Shariah* courts may competently pass upon.

It is a fact recognized that Muslims are governed by their own

to the customary practices of the Muslims and other non-Christian tribes.

It is clear that there were similarities and differences in the policies pursued by the Spaniards and Americans toward the non-Christian inhabitants of the Philippines. Both, however, basically agreed that what these so-called "uncivilized tribes" should be made to accept as fundamental elements of civilization is the European standard. This policy was effective and valid among the other non-Christian tribes who were neither non-Muslims because they embraced Christianity eventually; but not so among the Muslim population where the interaction between Islamic civilization and European civilization was contrasting.

Importance of Family Law in Islam

While we are on the subject of contrasting civilization we may relate our experience to the observation of J.W. Anderson in his *Islamic Law in the Modern World,* where he furnishes reasons for the importance of the family law in Islam. We may arbitrarily adopt his paragraphs as our own:

"First because . . . it is the family law that has always represented the very heart of *Shariah* for it is this part of the law that is generally regarded by Muslims as entering into the very warp and woof of their religion.

"Second, because by the same token, it is the family law that has been basic to Islamic society down the centuries.

"Third, because it is, generally speaking, in the law of family alone that the Shariah is still applied to some four hundred million Muslims, for it is virtually Nigeria (not to mention Southeast Asia) that *Shariah* is applied today as much, outside the sphere of family relations and personal status.

"Fourth, because it is precisely in regard to the law of marriage and divorce that the battle is joined today between the forces of conservation and progress in the Muslim world . . ."

And speaking of our own experience, it is well to recall the words of General Tasker H. Bliss, one of the Governors of the Moro Province, when he wrote his report for September 10, 1907:

> The case of the Moro (Muslim) is not settled by civilizing him. All the agencies and results of western civilization may be accepted by the Oriental without bringing him one

> step nearer to western ideas. The civilized Malay Mohammedan (sic) will in all certainty be, at his best, like the civilized Mohammedan (sic) of India. If this view be justified by experience in the East, it is a question whether or not it is our duty to try to absorb the Oriental spirit to anticipate as far as possible (if possible at all) the views of the coming civilized Moro and begin for him the preparation of a code of law which will be in accord with a civilized interpretation of his religion, and at the same time be sensible and humane. I believe that such a sensible and humane code could be formed, which would thoroughly accomplish its purpose even though in many respects it would be repugnant to western ideals.

This is the time to take note of an interesting observation made by Secretary Justice Abad Santos that "the code allows the practice of polygamy" in his letter to us October 7, 1974. This appears repugnant to the "western idea" indeed. As a rule, let us now explain that Islam recognizes only the union of one man and one woman as a valid form of marriage so that plural marriage, and not without conditions, are allowed.

The emphasis of the proposed Code on the question of plural marriage is not to declare as unlawful those marriages contracted in accordance with the Qur'an; for in Islam such marriages under certain conditions are religiously permissible and therefore legally valid. The authority is expressed in the following verse:

> And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two and three and four; but if you fear that you will not do justice between them, then (marry) only one or what your right hand possess (IV: 3).

The absolute prohibition of polygamy, such as positive law would like us to believe, is out of the question here.

However, the proposed Code may be used as a valid instrument for social change by stressing the procedure more than the substance of remodelling our Muslim pattern of life. We have settled for action in plural marriages that have become juridically relevant; that is, they are considered appropriate matter for litigation and judicial determination. Thus when parties to a projected plural marriage are taken as "judicially relevant" we can apply another Muslim law

founded on the verse:

> And if you fear a breach between them (man and wife) appoint an arbiter from his family and an arbiter from her family. If they desire reconciliation Allah will make them of one mind. For Allah is ever all knowing (IV: 35).

Our approach then to this social problem is positive and does not erode the religious sensibilities of the Muslim community because the Arbitration Council is anchored on the verse in the Qur'an aforecited. It is desirable to mention that this is in keeping with the philosophy behind the constitution of family council under the Civil Code (Art. 252, NCC). Its pragmatic value lies in the fact that it would allow the arbiters *(hukum)* who naturally know the idiosyncracies of both parties and their families the chance to intervene. The total effect is naturally to discourage thoroughly polygamous marriages. On the balance, it should be evident that the Muslim communities do not seek to impose their ways upon the non-Muslim population just as it is of utmost importance to realize that the case for the Muslim communities is not a pure question of continuity and change. On the local levels of thought and action it is more than an issue of tradition and modernity.

Therefore, the ways of the Filipino Muslims must be looked upon as a source of strength in the relationship of the Muslim communities to the state rather than a case of institutional isolation. Related to this concern at the national level of our government is the drive to remove and arrest the casual factors responsible for the alienation of our Muslim population. In no small measure, the proposed Code is a response to the call for institutional manifestation of our nationhood.

The Scope of Muslim Legal System and Procedure

There are views which favor the integration of Shariah courts and civil courts. Others suggest that we accord the existing Agama Court legitimacy and allow their separate existence; this would create a dual legal system.[12] These issues are not as simple as they are stated. That is why we have solicited the comments of Muslim Ulamas, the U.P. Law Center, the Integrated Bar and the Judiciary Code Committee.

We shall not state our position by correlating it with Questions No. 4, No. 5 and No. 6. Our discussion can be conveniently presented under three headings; (1) structure of the Shariah courts; (2) procedure in the Shariah courts; and (3) administration of substantive Muslim law or customary law.

The proposed Code is explicit as to the nature of the Shariah courts. It is hardly necessary to state that they are specialized inferior courts with defined jurisdiction and generally have to do with Muslim family relations and inheritance or some domestic offenses. It is a matrimonial and family relations court. It is a unique specialized court, because although it should not be classified as an ecclesiastical court, it cannot, by the nature of the laws it applies, keep out of touch with the religious communities in Islam. Consideration has been given in conformity with the Constitution that the Shariah court will fall under the administrative supervision of the Supreme Court to the extent that it does not interfere in matters touching religion. It will be difficult to perceive this structure without some illustration.

It will be noted that some corollary instrumentalities (e.g. Majlis, the Mufti or Board of Ulamas) have to be established, for no other reason than that to render authoritative opinions *(fatwa)* upon *Shariah* and *adat* cases require competent knowledge in those fields. This must be coupled with the consensus *(ijma)* of the learned on points of the authority of their sources. This practice is sustained by the Prophetic tradition, "My community shall never agree in error." However, this is not to be taken as a political expression of the legislative will in the western sense, no more than it is admitted in the axiomatic statement prevailing in the United States and the Philippines that "the law is what the Supreme Court says." To deduce from this principle of consultation *(shura)* and consensus of the learned, furthermore, authority for verifications, in case the judge is in doubt, of what the Muslim law is lies in them who enjoy the competence of lucidity in *Shariah* or *adat.* This is where a *fatwa* or legal opinion becomes essential.

By contrast, under the Civil Code the absence of law on a given matter does not preclude the judge from rendering a decision. There is only an admonition to make the proper recommendation to the legislature that such matter should be subject of a legislation (see Art. 9, NCC). Islamic law on the other hand has allowed the remedy through *ijtihad,* or disciplined judgment of jurist, and *istihsan,* or

juristic preference.

In essence, it may be stated that the Shariah courts established under the proposed Code are not religious courts, although the cases heard will be subject to the religious law of the parties. This is a valid arrangement in Islam. The institutionalization of "deliberated agreement" based on *ijma* has been sustained by Abdor Razak as Sanhuri who was responsible for the codification of the civil code in Egypt.[13]

On the penal law system, we submit that the Code does not propose to reconstruct our existing penal law system. We have settled barely for offense of a domestic nature such as *zina* (fornication), *sumbang* (illicit intercourse) and *saradat* (customary offenses), because the elements of these offenses are not covered by the Revised Penal Code. As for crimes against chastity in general and offenses such as bigamy, adultery, seduction, abduction or oral defamation, these are imbued with familial relationship and the settlement of which the government has no special interest. This is in fact distinguished from the cases, the disposition of which bears upon the general public. Besides, the standard of public morals affected which form the basis of judgment in Muslim communities differ substantially from those of the non-Muslim population.

What appears as the advantage of this arrangement finds support in the experience that offenses of this nature tend to expand into family or factional feuds; hence these are better and expeditiously settled according to the traditional sanctions of community life in the locality. The theories of retribution and restitution do not much apply in the perspective of the Revised Penal Code, but the sense of justice of the community comes into play, which is communally oriented.

We now come to the question of procedure. The difference between the rules prescribed under the proposed Code for the prosecution of cases under Muslim law and the Rules of Court promulgated by the Supreme Court is evident from perusal.

Obviously the former is less technical and cumbersome for the litigants. Conduct of hearing at *agama* (shariah courts) is essentially inquisitorial in form and points of law are resolved with ease by consultation with the *wazirs* (experts in law). In many respects its simplicity avoids the rigorous technicalities that would invariably drag on in a civil court. We have precisely argued against the subjection of Muslim litigants to the kind of "cultural shock" that they face from

the civil court formalities.

But the more important consideration should be that the Shariah courts may also function as a quasi-administrative body discharging the following procedural but non-litigational functions: validation of marriages, determination of legitimacy and conciliatory role. Some cases may not even be contentious as in the case of affirmation of distribution of estates or reconciliation after a divorce or *talak*. This inter-relations of functions and admixture of judicial process are not the province of a regular court envisioned under the Rules of Court. At any rate, we have considered it expedient to make the Rules of Court a suppletory and ancillary authority to obviate procedural insufficiency of the rules prescribed in the proposed Code.

The perspective we have taken in the administration of Muslim law is one that emphasizes the procedural rather than the substantive aspect, except those essentially operative under the chapter on marriage and divorce. Are we then to imagine seriously that there can be an adjective legislation without the accompanying substantive law that it presupposes to enforce? Former Justice Jose B.L. Reyes and now President of the Integrated Bar of the Philippines has raised a significant point:

> In the absence of authoritative declaration or codification of substantive Muslim law and the school of interpretation thereof that should be followed, it would seem the better part of prudence to suspend the operation of Chapters IV (Marriage and Divorce) and V (Property and Inheritance). These chapters, although primarily concerned with the administrative and procedural aspects, necessarily assume the existence of certain legal rules that may not be embodied in the final Code of Substantive Muslim Law, or fully in harmony with it, in which event it will become the present Draft. Every adjective legislation presupposes an established legal system of substantive law that the former enforces, and it would appear to be improper to provide for the enforcement of laws, rights and duties that are still to be defined at an uncertain future time.

The comment above contained in a letter to the project leader on May 31, 1974 underlines the question of approach to the introduction of Muslim law into the existing legal system. Indeed, whether it is an appropriate act to seek for the administration of Muslim law

without first coming up with some codified form of substantive law has been the focus of comment also by former Senator Mamintal A. Tamano. Is it therefore the case of the "cart coming after the horse"? Senator Tamano has maintained that we should attend to the substantive aspect first before we go into administration.

Seemingly conflicting views on the approach to the administration of Filipino Muslim law is more apparent than real. It would be inexact to think that an adjective legislation such as the proposed Code cannot enforce Muslim law without some codified substantive law to start with. This is missing the point that we have heretofore been arguing, that administration of Filipino Muslim law merely seeks for the executory legislation or enabling act from the State because the application of Muslim law and customs is essentially procedural. Procedure in this sense should be thought of as the process of determination of the source of authority. In short it is the legitimation of the application of Muslim law.

Concept of Codification and Appeal

Generally speaking, Muslim law may already be found in its codified and systematized form. This development was completed in about three centuries which the great books of law and the schools of thought *(madzhabs)* were written. In the first place, the essence of Muslim law is drawn from the principle of law contained in the Qur'an. These principles of law have been expounded and explained in the prophetic traditions *(hadith* and *sunnah)* which, together, constitute the other basic sources of Muslim law. The latter were understood by the conduct of authority obtained through consensus of the learned and analogical human reasoning *(qiyas).* That is why the latter are closely associated with the functions of *ulamas* (Muslim scholars) who are authorities in Muslim law.

With respect to customary law *(adat)* one should not give considerable thought to the so-called "code" as understood in the modern sense. The "Luwaran of Maguindanao" and "Diwan of Sulu" are the principal sources of authorities which were selected from the *Shariah.* This is relatively speaking a product of modern (18th century) work, although the marginal annotations to these compilations were largely drawn from the Shariah proper or *hukum sharah.* The fact that they have survived indicates only that they are still

resorted to as sources of right action; for the provisions are selections from the sources of Muslim law. However, one should be careful in reading meaning to the provisions for in many respects some provisions have become obsolete by reason of modernizing influence and non-usage. This is where the suggestion of Senator Tamano to constitute a Code Commission is most tenable. But this is not to say that the administration of Muslim law must merit the codification of substantive law for the latter work is a continuing legal education and study.

As already mentioned, to insist on resolving the question of which should come first – the enabling legislation or the substantive legislation – is missing the whole point. The full significance of the position we have taken in deference to the Tamano position may be better appreciated in the celebrated issue: Can the gates of *ijithad* and *ijma* be opened to legislative activity and men who possess no knowledge of "the subtleties of Muslim Law"?

Whatever may be the constitutional theory on this matter the only possible arrangement is that the supervision of the legislative activity should be participated in by a Majlis with its Legal Committee such as we have provided in the proposed Code. In fact, Maulana Idbal once suggested that the *ulamas* should form a vital part of the Muslim legislative assembly to help and guide free discussions on questions relating to law. In a state such as ours where the study of jurisprudence and legal thought is based on the western law system, it becomes more than necessary to keep watch for misinterpretations and misapplication of legislative intents. In the event that some formal legislation is made affecting the substantive aspect of Muslim law there is nothing to prevent its modification by another positive legislation. This explains why even countries that are advanced in the recognition of *Shariah* have done it on piecemeal legislative provisions. The better judgment seems to be to keep the substantive aspect within the province of juridical interpretation rather than legislative interpretation; hence the need for an enabling act.

Here again we are bound to meet some complications in the matter of appeal on difficult questions of law. How are we to resolve this without depriving the Supreme Court of its constitutional prerogative of review and appeal?

We have defined the formal relationship of appellate and first instance Shariah court as follows:

> An appeal shall lie to the Shariah Court of Appeal on the ground that the findings of fact are not supported by substantive evidence, or that the case involves a question of substance not heretofore determined by the court, or that the decision has been rendered in a way not in accordance with Muslim law or the applicable *fatwa* or *fiqh* (Section 64 of the Proposed Draft).

In another Section (62), the Proposed Code provides:

> The decision of the Shariah Court of Appeals in such cases shall be final: Provided, however, that the Supreme Court in its discretion may, in cases involving constitutional issues, questions of jurisdiction, or in petitions for the issuance of writ of certiorari, prohibition, and mandamus at the instance of the party aggrieved by the decision or not, require that the record be certified to it for review and determination, as if the case had been brought before it on appeal. (Revised Proposed Code).

One price for this forumla is that it offers and suggests flexibility. The proposed Code insists on the "juridical relevance," defined earlier in the discussion, as a convenient tool for the application of *Shariah*, and yet it leaves room for the constitutional theory of appeal lodged constitutionally with the Supreme Court.

A Question of Change and Continuity

It is too early to make conclusion on how far-reaching and evolutionary the incipient administration of Muslim law is on a formal basis. It follows nonetheless that the points raised here imply the question of change and continuity for the Philippine legal system only insofar as it admits the Muslim legal system, *inter alia*, as a reinforcing and not competing institution. As for the Filipino Muslim communities it is no mere idealization but a reassuring experience and adaptation that can ease the tense integration existing between a non-Islamic and an Islamically-oriented structure of law and authority.

NOTES

1. The Proposed Draft of the Code of Administration of Muslim laws is a project proposal submitted to President Ferdinand E. Marcos on April 4, 1974. The research staff, of which we were the project leaders, prepared the draft; it was created under Memorandum Order No. 370. A Presidential Commission to review the draft code was created on December 23, 1974 with eleven members.

2. Ricardo Romulo, tsn., Conference p. 32.

3. Letter to Project Director, dated April 16, 1974.

4. The difference between a Muslim state and an Islamic state lies in the fact that in the latter, **Shariah** is accepted as the State Law, whereas, in the former, Shariah is merely accepted as the personal law of the dominant Muslim majority. In either case the **dzimmis** (non-Muslim minorities) are governed in their matrimonial, family and inheritance affairs by their own personal law system.

5. The respect for the Muslim religion and customary law of the Moro (Muslim) population is reflected in the Instruction of President McKinley to the Philippine Bill of 1902, Act 787, creating the Moro Province and the Mindanao and Sulu Code.

6. In the series of treaties between the Moro Sultanates and European Powers from 1837 to as late as 1889 (Bates Treaty) the religion and customs of the Mulims in the Philippine Archipelago have been respected. In the Carpenter Agreement of 1915 ecclesiastical and spiritual authority was recognized to be vested on the Sultan of Sulu, though Islam has not developed into an ecclesiastical organization.

7. In jurisprudence, see Andong vs. Cheong Seng Gee, 43 Phil. 113; also Insular Government vs. Cariño, 7 Phil. 132.

8. Note the difference between the conception of Divine Law in Islam and Christianity. According to Sayyid Hossein Nsr, this can be seen in the way the word "canon" (Qanun) is used: "This word was borrowed in both cases from the Greek. In Islam it has come to denote a man-made law in contrast to the Shariah or divinely inspired Law. In the West the opposing meaning is given to this world in the sense that canonical law refers to laws governing the ecclesiastical organization of the Catholic and Episcopal churches, and has a definitely religious colour" (see **Ideals and Realities of Islam**, 1966; 94).

9. In the Malay states as well as the Strait settlements where extensive research work has been done on the blending of **Shariah** and **Adat**, Wilkinson, Winstedt, and Maxwell, to name but a few, have shown that the jurist must turn to anthropology and sociology because the traditional statements are often related to the structure of society.

10. Quoted from "The Church in the Modern World," Vatican II encyclical.

11. See Report of the Governor of the Moro Province for fiscal year September 10, 1907. Under Act No. 787 of the Philippine Commission it was enjoined that it shall be the duty of the Legislative Council of the Moro Province "to enact a law which shall collect and codify the customary adat laws of the Moros"; see Section 13 (j).

12. Peter Gowing observes in his **Mosque and Moro: A Study of the Muslims in the Philippines** that the state of legal dualism is as follows: If he (the Muslim litigant) chooses against the National Laws, he seeks the protection of his group; but if he chooses against the law and customs of his group, he just as readily seeks the aid and protection of the civil authorities (1964: 40-41).

13. In Egypt, at the beginning of 1956, religious courts were abolished including those of non-Muslim minorities. Cases are now heard in "civil" courts, but still according to the religious law of the litigants; see G.N. Sfeir, "The Abolition of Confessional Jurisdiction in Egypt," in **Middle East Journal**, vol. X 1956: 248-256.