

# Divided We Stand? An Islamic Case for an Islamic State in a Federal Philippines

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## I. INTRODUCTION

The struggle for identity is as old as the dawn of human history. We assert our right to be different through various affiliations, whether by religion, race, or nationality, even as we affirm the universal traits of humanity that underlie us all. As national and ethnic borders are torn down in this era of increasing mobility and interdependence, religion has remained to be “the last refuge of unadulterated difference.”<sup>1</sup> And yet the basic laws and

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institutions of most modern societies tend to presuppose a certain degree of homogeneity of the society it purports to bind. Most of the time, it seeks to assimilate, rather than to accommodate, and thus ignores legitimate demands for cultural and religious recognition of minorities within its midst.<sup>2</sup>

The increasing complexity of the question of religion in the public sphere has produced an infinite variety of intricate problems and equally checkered responses from all stakeholders. The transition from the constitutional design projects in Iraq and Afghanistan to the headscarf debates in Europe to the Islamist fundamentalist revival in Southeast Asia, the rise of religion, specifically Islam, to never-before-seen prominence since the Middle Ages and its visible impacts in a nation's social fabric, has confounded theorists and policymakers alike.

In the Philippines, the religious undertones of the Filipino Muslim struggle took center stage in 1997 as the Moro Islamic Liberation Front

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1. JURGEN HABERMAS, RELIGION AND RATIONALITY: ESSAYS ON GOD, REASON, AND MODERNITY 4 (2002).
2. John McGarry & Brendan O'Leary, *Iraq's 2005 Constitution: Liberal consociation as political prescription*, 5 INT'L J. CONST. L. 670 (2007).

When it comes to managing national and religious diversity, democracies have two broad choices: integration or accommodation. Integrationist states seek to construct a single overarching public identity. They believe that conflict results from group-based partisanship and recommend a state that is impartial, meritocratic and that promotes equal citizenship through a bill of individual rights. They also frown on any form of autonomy that is based on groups. Accommodationist democratic states recognize dual or multiple public identities through consociation. Consociation accommodates groups by, among others, involving all sizable communities in executive institutions provided they wish to participate. While integrationists mostly believe that identities are malleable, transformable, soft or fluid, consociationalists think that, in certain contexts — they may be resilient, durable and hard. From the latter's perspective, political prudence and morality require considering the special interests, needs and fears of groups so that they regard the state as fit for them.

(MILF)<sup>3</sup> led by the late al-Azhar University-educated scholar and ideologue Hashim Salamat eventually became the main representative of the Filipino Muslims, replacing its more secular-oriented predecessor, the Moro National Liberation Front (MNLF). While both advocated for an independent “Bangsamoro,” literally translated as Muslim nation, the MILF’s ideology, chiefly based on Islam, proved to be a more powerful rallying point than the nationalist agenda of the MNLF.

After 9/11, the struggle acquired geopolitical significance because of its strategic importance in the War on Terror initiated by the United States (U.S.). Strangely enough, the Philippines, the only Catholic nation in Asia, has now become one of the newest havens of terrorist activity in the region.<sup>4</sup> The long-running insurgency by the Muslims of Mindanao, for decades considered an internal affair by the Philippine government, has now become the focus of a national security concern, not only by the domestic government, but even by foreign governments such as the U.S. and Australia.<sup>5</sup> Foreign jihadis train in the inaccessible jungles of Mindanao, beyond any state control.<sup>6</sup> For the central government in Manila however, the importance of the issue is two-fold: first, its efforts to eradicate the terrorist threat are inextricably linked to the amount of badly-needed military and development aid from the U.S. government; and second, scarce resources are being expended to fight a seemingly endless war, thereby depriving the region of funds for rehabilitation and to spur economic development. More importantly, the insurgency and the economic neglect it has suffered from the central government has united the people of Mindanao

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3. The MILF is the main Muslim rebel movement in the Philippines with about 12,000 combatants. It started out as a breakaway faction of the MNLF in 1977.
  4. ZACHARY ABUZA, *MILITANT ISLAM IN SOUTHEAST ASIA: CRUCIBLE OF TERROR* 89-115 (2003); See MARIA RESSA, *SEEDS OF TERROR: AN EYEWITNESS ACCOUNT OF AL QAEDA’S NEWEST CENTER OF OPERATIONS IN SOUTHEAST ASIA* (2003). It is well-documented that Ramzi Yousef planned the 1993 World Trade Center bombing from the Philippines, and under Operation Bojinka, plotted to bomb 11 U.S. airlines and the assassination of Pope John Paul II who came to visit Manila in 1995.
  5. Malcolm Cook & Kit Collier, *Mindanao: A Gamble Worth Taking* (Lowy Institute for International Policy, Lowy Institute Paper, Nov. 2006), available at <http://www.lowyinstitute.org/Publication.asp?pid=511> (last accessed Apr. 27, 2009).
  6. Anthony Spaeth, *World, Rumbles in the Jungle*, TIME, Feb. 25, 2002, available at <http://www.time.com/time/world/article/0,8599,212723,00.html> (last accessed Apr. 27, 2009); Mark Bowden, *Jihadists in Paradise*, THE ATLANTIC, Mar. 2007, available at <http://www.theatlantic.com/doc/200703/bowden-jihad> (last accessed Apr. 27, 2009).

in its call for a political rather than military solution, with proposals ranging from more autonomy, federalism, and even to outright secession.

History is an inescapable component of many political conflicts.<sup>7</sup> It is not any different in this case. In the view of the Muslim insurgents, the Spanish colonizers never occupied Mindanao and the 1898 Treaty of Paris between Spain and the U.S. illegally included Mindanao in the transfer of sovereignty. The Americans then included Mindanao in the newly-independent Philippine Republic in 1945. Hence, Muslims did not identify with the new government. The armed struggle has continued ever since, exacerbated and reinforced by the poverty prevalent in the region.

Although this is certainly not a Muslim-Christian war,<sup>8</sup> at the heart of the conflict one will find an issue that nobody has tried to seriously address despite its glaring obviousness. Filipino Muslims frequently framed the struggle as a choice between following the Qur'an or the Philippine Constitution in the public consciousness<sup>9</sup> and yet the impact and role of Islam have only been marginally addressed in the ongoing peace negotiations. The long-standing belief that there is an inherent tension between an Islamic way of life that Filipino Muslims aspire for and a Western-style constitutional democracy with church-state separation to which the Philippines as a secular liberal democracy subscribes, has gone largely unnoticed.

The core issue in this conflict is to find a political and lasting solution to the Bangsamoro problem,<sup>10</sup> which is stated to mean "establishing a system of life and governance suitable and acceptable to the Bangsamoro people."<sup>11</sup>

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7. See Ilai Alon & Jeanne Brett, *Perceptions of Time and Their Impact on Negotiations in the Arabic-Speaking Islamic World*, 23 *NEGOTIATION J.* 55, 55-73 (2007).

8. SOLIMAN SANTOS, *MORO ISLAMIC CHALLENGE* 42 (2001).

9. See, e.g. Saaduddin Alauya, *Impact of Religion on the Negotiation by and between the Government and the MILF*, in *MUSLIM PERSPECTIVES ON THE MINDANAO CONFLICT* (Carmen Abubakar ed., 2003); SANTOS, *supra* note 8.

10. SANTOS, *supra* note 8, at 10 (citing Submission on Talking Point and Venue, First Joint Meeting of the Technical Committees, GRP-MILF Peace Talks (Jan. 7, 1997)); Jun Mantawil, Update on GRP-MILF Peace Talks to Solve the Bangsamoro Problem (Nov. 2007) (on file with author).

11. Nathan Quimpo, *Options in the Pursuit of a Just, Comprehensive, and Stable Peace in the Southern Philippines*, 41 *ASIAN SURVEY* 271 (2001); *Gov't asked to break talks standoff*, *MANILA BULLETIN*, Oct. 4, 2006, available at <http://www.articlearchives.com/international-relations/national-security/foreign>

Navigating this overarching issue involves three salient matters that will inevitably have to be addressed.

First, any realistic solution will involve a compromise between the Philippine government's insistence on absolute unitary sovereignty and the MILF's initial demand for independent statehood. Phrasing it as a suitable system for Bangsamoro aspirations renders it flexible enough to accommodate a variety of configurations while preserving territorial integrity. The historical claim of the Moros that they were a separate people with their own lands to begin with, while understandably cannot be made the starting point of the discussion, must be respected and given due consideration. The issue of territory is tricky business. In fact, the recent collapse of the peace talks was due to the disagreement over the size of the territory to be ceded by the national government to Moro self-rule.<sup>12</sup>

Second, it appears that only a highly-autonomous region within Philippine territorial sovereignty but one which is markedly different from the current autonomous arrangement in place, will suffice. The conflict with the MILF persists precisely because it deemed the so-called gains from the 1996 Peace Agreement as insufficient and the current setup a form of mere appeasement.<sup>13</sup>

Lastly, since the conflict is partly based on identity, there is also a demand for self-rule in accordance with the tenets of the Islamic Shari'a. While often mentioned, the literature on this has been lacking. As such, this will be the major focus of this Article.

The author's proposal for a Bangsamoro Federal Islamic State (BFIS) is an attempt to address all these issues while providing justifications by drawing from within the Islamic tradition. It recognizes that Islam has a special role in the resolution of this decades-long conflict. The author feels that this is a major lacuna in current peacemaking efforts. Above all else, it seeks to answer the question: Even if a new constitution is written, can this

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/747005-1.html (last accessed Apr. 27, 2009); A View from the MILF: Interview with Mohagher Iqbal, Apr. 1999, available at <http://www.c-r.org/our-work/accord/philippines-mindanao/mohagher-iqbal-interview.php> (last accessed Apr. 27, 2009).

12. *Philippine Peace Talks Falter*, ALJAZEERA.NET, Dec. 16, 2007, available at <http://english.aljazeera.net/NR/exeres/E5DEAC84-A170-4DC0-A7CB-970073B5CFF3.htm> (last accessed Apr. 27, 2009).

13. See Jacques Bertrand, *Peace and Conflict in the Southern Philippines: Why the 1996 Peace Agreement is Fragile*, 73 PAC. AFF. 37 (2000).

arrangement be allowed, much less, justified under Islam? In classical Islamic tradition, Muslims cannot be made subservient to a secular authority.<sup>14</sup>

An exhaustive discussion on federalism as a viable solution to the Moro problem is beyond the scope of this Article. The author simply offers general reasons for its suitability and justifiability. This proposal finds support in recent developments. Negotiators from both sides have pointed to some type of limited federalism as agreeable to all parties concerned.<sup>15</sup> Even President Gloria Arroyo agreed to propose to Congress a constitutional provision providing for such arrangement.<sup>16</sup>

Federal arrangements have long been the institutional arrangement of choice in post-conflict and divided societies.<sup>17</sup> This Article suggests the kind of federalism that Daniel Elazar has termed religious federalism,<sup>18</sup> the object of which is not merely to carve out separate political and territorial entities but more importantly to allow for religious diversity to flourish within a single nation-state. While federal systems have become a recent worldwide trend, the novelty of the proposed BFIS is that it will be an asymmetric federal region comprising of several Muslim-majority provinces within a federal secular republic. This would lend intellectual reinforcement to the concessions made by the MILF negotiators to abandon its calls for an independent state as a prerequisite to live out the Islamic way of life for Filipino Muslims.

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14. For a general discussion on objections to Muslims under non-Muslim authority, see Khaled Abou El Fadl, *Islamic Law and Muslim minorities: A Juristic Discourse on Muslim Minorities from Second/Eighth to the Eleventh/Seventeenth Century*, 1 ISLAM. LAW. SOC. 141 (1994) [hereinafter El Fadl, *Islamic Law and Muslim Minorities*].
  15. Mildred Galarpe, *Philippines seeks to amend Charter to allow Muslim federal region, official says*, SUNSTAR BREAKING NEWS, Jan. 9, 2008, available at <http://www.sunstar.com.ph/breakingnews/2008/01/09/rp-seeks-to-amend-charter-to-allow-muslim-federal-region-official-says-614-pm/> (last accessed Apr. 27, 2009).
  16. *Philippines to push for federal Islamic state in troubled south*, ASIA-PACIFIC NEWS, Jan. 9, 2008; *PGMA pushes federalism by 2012*, LA UNION NEWS, Oct. 16, 2007.
  17. See generally DANIEL ELAZAR, *FEDERALISM AND THE WAY TO PEACE* (1994) [hereinafter ELAZAR, *FEDERALISM*]; Will Kymlicka, *Federalism and Secession: At Home and Abroad*, 13 CAN. J.L. & JURIS. 207, 213 (2000).
  18. Daniel Elazar, *Religious Diversity and Federalism*, 53 INT'L SOC. SCI. J. 61, 63 (2001).

The author's principal claim is that from the vantage point of Islam, there is no irreconcilable contradiction in a constitutional configuration that features an Islamic state within a larger secular republic. There are several envisioned objections to this setup at the outset. From the Muslims, one plausible objection would be that the Qur'an, as God's revealed word, cannot be subjected to the Philippine Constitution, a man-made text. Framing the question this way, however, appears as if being Muslim makes it impossible for one to become Filipino. In many ways, this Article is a response to the challenge that these two are irreconcilable.<sup>19</sup> Scholars have long been engaged in the task of finding compatibilities between Islam and democracy.<sup>20</sup> They do so by identifying concepts and strands of thought from each system, which gives a plausible conclusion of one not necessarily being antithetical to another. Islam's democratic roots are almost always attributed to the existence of concepts such as *shura* (consultation), *ijma* (consensus), and *ijtihad* (independent effort) from within its sources and literature. A good deal of scholarship therefore dealt with investigating, and perhaps removing the exclusivist paradigm that causes the fragile tension which inevitably occurs whenever any comprehensive doctrine attempts to claim monopoly over most, if not all aspects of the public sphere.

This inquiry will draw heavily from the reformist Islamic tradition, thus perhaps opening itself to criticisms that it borders on the un-Islamic. This could not be farther from the truth. Islam, by its very essence, thrives on diversity of interpretation.<sup>21</sup> The reality is that although the focus of public perception in the West has been on radical or fundamentalist Islamic thought, majority of Muslims everywhere adhere to principles which Charles Kurzman has termed as "liberal Islam."<sup>22</sup> This is a strand of thought within Islam that traces its roots to the 18th century,<sup>23</sup> and perhaps even arguably as far back as the twelfth century during the time of famous Hanbali jurist Ibn

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19. SANTOS, *supra* note 8, at 13-20.

20. See, e.g. JOHN ESPOSITO & JOHN VOLL, ISLAM AND DEMOCRACY (1996); UNDER SIEGE: ISLAM AND DEMOCRACY (Richard Bulliet, ed., 1994); NOAH FELDMAN, AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY (2003); KHALED ABOU EL FADL, ISLAM AND THE CHALLENGE OF DEMOCRACY (2004) [hereinafter EL FADL, ISLAM AND DEMOCRACY].

21. *Al-Baqara* 2:148.

22. Charles Kurzman, *Liberal Islam: Prospects and Challenges*, 3 MIDDLE E. REV. INT'L AFF. 11, 11 (1999), available at <http://meria.idc.ac.il/journal/1999/issue3/kurzman.pdf> (last accessed Apr. 27, 2009).

23. Abdou Filali-Ansary, *The Sources of Enlightened Muslim Thought*, 14 J. DEMOCRACY 19 (2003).

Taymiyya.<sup>24</sup> The idea is to show the multivocality of Islam as a religious tradition, thus arriving at a different set of conclusions while drawing from the same texts and sources.

At the end of the day, the challenge is to present this claim in a coherent and justifiable argument which would contribute to an informed debate on this discussion, one which would be readily accessible to policymakers and ultimately, the real stakeholders in this debate — the Filipinos who will have to harmoniously coexist with one another.

## II. SEPARATE PEOPLE IN A NEW NATION: THE MORO STRUGGLE AND THE ILLUSION OF AUTONOMY<sup>25</sup>

### *A. Pre-independence*

The long-running Muslim insurgency in the southern Philippines started out as a successful resistance against the invading Spanish colonizers in the 16th century.

Prior to Spanish arrival on Philippine shores, the various ethnic communities in Mindanao, the second largest island of the Philippine archipelago, has already been Islamized as early as the first half of the 14th century.<sup>26</sup> Islam was propagated by Muslim traders and missionaries from neighboring countries, mostly from Indonesia, Borneo, and Brunei, a large number of whom married into the local population and settled locally.<sup>27</sup> Though the region was far from homogenous,<sup>28</sup> Islam became a central

24. See generally DAVID COMMINS, *ISLAMIC REFORM: POLITICS AND SOCIAL CHANGE IN LATE OTTOMAN SYRIA* (1990).

25. Taken from the title of a chapter in CESAR ADIB MAJUL, *THE CONTEMPORARY MUSLIM MOVEMENT IN THE PHILIPPINES* (1985). For a comprehensive account of the Moro struggle, see, e.g. MOSHE YEGAR, *BETWEEN INTEGRATION AND SECESSION: THE MUSLIM COMMUNITIES OF THE SOUTHERN PHILIPPINES, SOUTHERN THAILAND AND WESTERN BURMA* (2002); SALAH JUBAIR, *BANGSAMORO: A NATION UNDER ENDLESS TYRANNY* (1999); PETER GOWING, *MANDATE IN MOROLAND* (1977).

26. YEGAR, *supra* note 25, at 187.

27. *Id.*

28. There is no consensus regarding the number of Muslim groups in the south. Estimates vary from six to 10 ethnic language groups, each having their own socio-economic and religious cultures. The Tausugs of Sulu are the oldest Muslim community and considered the most orthodox.

unifying element amongst them. Pagan and animist practices gave way to Islamic ones, although some remnants of indigenous customs and beliefs managed to coexist. Their code of law, for instance, was based on a combination of Shari'a law and local customs called *adat*.<sup>29</sup> Despite varying degrees of differences, Islam still provided a common way of life.

In 1571, the fall of Manila to Spanish hands halted the spread of Islam in the north and ushered in the start of three centuries of Spanish Catholic rule over the islands. Fueled by their own battles for independence against the Moors in the Iberian Peninsula, the Spaniards sought to subjugate the Muslims in Mindanao and claim the entirety of the newly-colonized archipelago with no success. Spanish generals fell one after another against the highly-organized Moros who proved to be resistant to the foreign intrusion. As they were unable to gain any religious or political foothold in the region, only the islands of Luzon and Visayas were successfully converted into Christianity and became subjects of Spanish sovereignty.

The demise of the Spanish empire culminated in the signing of the Treaty of Paris in 1898.<sup>30</sup> The Treaty ended the Spanish-American war and included a provision, among others, for Spain to cede possession of the Philippines, including Mindanao, to the U.S. in exchange for 20 million dollars.

The Filipino Muslims — or the Moros<sup>31</sup> — vigorously opposed their inclusion, saying that Spain could not contractually transfer to the United States a sovereignty that was never theirs to begin with. They mounted a fierce but ultimately futile resistance against the new American occupiers.<sup>32</sup> Notably, the declaration of U.S. President Theodore Roosevelt at the end of

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29. YEGAR, *supra* note 25, at 192.

30. Treaty of Peace between the United States and Spain, Dec. 10, 1898; *See generally* ROBERT BEISNER, *TWELVE AGAINST EMPIRE: THE ANTI-IMPERIALISTS: 1898-1900* (1968).

31. The terms “Muslim” and “Moro” have been used interchangeably to refer to the various ethno-linguistic groups in the southern Philippines. Whereas the term Muslim refers to a universal religious identity, the term Moro denotes a political identity distinct to the Islamized peoples of Mindanao and Sulu. The Spanish colonizers originally used the term for peoples of Mindanao who shared the religion of the Moors who had once colonized Spain. The term “Moro” was used in the same derogatory way as the epithet “Indio” for Filipinos whom they converted to Christianity. Modern Muslims transformed the term into a proud symbol of collective identity.

32. The .45 caliber revolver was invented to stop the determined Moros as the previously used .38 caliber proved to be ineffective during the Moro Rebellion. *See also* YEGAR *supra* note 25, at 216-17; MAJUL, *supra* note 25, at 20.

the Philippine insurrection in 1901 did not include the geographic areas which the Moros inhabited. Although the Moros remained neutral during the Philippine-American war,<sup>33</sup> the new colonizers subsequently turned their attention and military operations towards Mindanao with a view to integrating it, even forcibly, with the rest of the archipelago. A Moro province, comprising of “the territory of the Philippines lying south of the eight parallel of latitude, excepting the island of Palawan and the eastern portion of the northwest peninsula of Mindanao”<sup>34</sup> was created and separately administered by American military officials, including then Brigadier General John J. Pershing. By 1913, all serious Muslim armed resistance had been eliminated.

The U.S. colonial authorities consequently embarked on a state-sponsored migration program that effectively brought Christian settlers from Luzon and Visayas to Mindanao. At this time, 98% of Mindanao’s population was Muslim.<sup>35</sup> The program had several purposes: (1) to alter the demographics and consolidate U.S. control over the three major islands of the Philippines; (2) to get assistance in harnessing the rich natural resources of the area; (3) so that the Moros and other tribal groups would benefit from the example of the technologically-advanced Christian migrants; and (4) to tie Mindanao closely to Manila and thereby act as a counterweight to the Moro link with neighboring Muslim nations.<sup>36</sup> The U.S. policy viewed the Philippine Islands as a singular entity and sought to administer it as such with the end goal of producing a country capable of self-rule. The result was that Muslims became displaced from their ancestral lands and were dispossessed of

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33. See Bates-Kiram Treaty, Appendix B, in GOWING, *supra* note 25. The Bates Treaty, signed between Sultan Jamalul Kiram II and Brigadier General John Bates, recognized the Sultan of Sulu’s sovereignty to administer the internal matters of the Moro. It was unilaterally set aside by President Theodore Roosevelt upon the recommendation of Governor-General Leonard Wood on Mar. 2, 1904.

34. VICTOR HURLEY, *SWISH OF THE KRIS: THE STORY OF THE MOROS* (1934); GOWING, *supra* note 25.

35. Aijaz Ahmad, *Class and Colony in Mindanao*, in *REBELS, WARLORDS, AND ULAMA: A READER ON MUSLIM SEPARATISM AND THE WAR IN SOUTHERN PHILIPPINES 4* (Eric Gutierrez ed., 2000); See also SANTOS, *supra* note 8, at 208.

36. W.K. CHE-MAN, *MUSLIM SEPARATISM: THE MOROS OF SOUTHERN PHILIPPINES AND THE MALAYS OF SOUTHERN THAILAND 25* (1990).

their erstwhile communal property rights,<sup>37</sup> as a result of the introduction of the system of private land ownership.<sup>38</sup> The Muslims felt that they were the true and only holders of these lands and felt bitter at the numerous Christian agricultural communities that were established. They had always assumed that their right to the land they cultivated would never be challenged, that it belonged to Allah and was held therefore in trust for future generations as part of dar-al-Islam.<sup>39</sup> The issue of land ownership would later become a point of major contention in the present-day peace talks between the MILF rebels and the Philippine government. Fearful of losing their religion at every turn, the Muslims viewed American-created institutions as secularizing — and that was indeed the American intention — and therefore an affront to their culture and way of life and a means to convert them to Christianity. However, initial resistance eventually changed into acquiescence to American leadership. Pursuant to the U.S. Filipinization policy which sought to unify all the regions into one cohesive political entity as preparation for independence, the insular government, now dominated by Christian Filipino leaders, extended its jurisdiction over Moro lands. The Moros then became more wary of the Christian leaders. In the intervening years before the Tydings-McDuffie Act, which granted the Philippines commonwealth status, was signed, Filipino Muslims repeatedly asked the U.S. not to include Mindanao in the soon-to-be independent Philippine Republic.<sup>40</sup> This request fell on deaf ears.

The Commonwealth government put an end to the special treatment Mindanao received under American rule. For instance, the National

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37. Peter Chalk, *Militant Islamic Extremism in the Philippines*, in ISLAM IN ASIA: CHANGING POLITICAL REALITIES 188 (2002).

38. A number of public land laws were enacted during the early years of the American occupation. Public Land Act No. 718 nullified all land grants made by Moro sultans and *datus* without authority of the state, while Public Act 926 provided that all unregistered lands were deemed public lands and therefore available for homestead, sale, and lease. The Cadastral Act of 1907 allowed acquisition of new landholdings; Acts 2254 and 2280 created the agricultural colonies which encouraged migration to Mindanao; and Public Land Act No. 2874 provided for the manner of acquiring land ownership.

39. YEGAR, *supra* note 25, at 225.

40. It is of record that a petition was sent to the U.S. Congress in 1924 by Moro leaders who expressed their intention to declare themselves an independent Moro nation should the U.S. grant independence to the Philippines without retaining Moroland under American rule. The Bacon Bill, filed by Congressman Robert L. Bacon of New York, proposed that Mindanao and Sulu be retained under the American flag. See CHE-MAN, *supra* note 36, at 57.

Assembly repealed the Administrative Code for Mindanao and Sulu<sup>41</sup> which had given the Moros certain exemptions from national laws, and abolished the Moro Board,<sup>42</sup> which was established to settle some Moro disputes according to Islamic and traditional laws. It also ended official recognition of the civil titles of nobility which were traditionally held by the Moros in their social system. Thus, when Sultan Jamalul Kiram II died in 1936, the government declared that the Sultanate system expired with him.<sup>43</sup> The intentions of the Commonwealth government were laudable. They sought to integrate Moros as citizens of a larger and single national community. But the Moros could not consider themselves Filipinos<sup>44</sup> even as they realized that resistance was pointless and grudgingly accepted structural integration with the rest of the country.

*B. From Independence to the 1976 Tripoli Agreement*

The postcolonial years after the Second World War saw a general resurgence of Islam across the Muslim world. The Moros in the Philippines were exposed to the same intensity that brought out increased religious and cultural awareness from Muslims all over. Foreign preachers came from the Middle East to strengthen the Islamic commitment of the Moros, mainly because majority of the Muslims in Southeast Asia still adhered to certain pre-Islamic practices which were considered as not fully compatible with Islam.<sup>45</sup> Students were given scholarships to study at Islamic institutes of

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41. *Id.* at 55.

42. T.J.S. GEORGE, REVOLT IN MINDANAO: THE RISE OF ISLAM IN PHILIPPINE POLITICS 89 (1980).

43. *Id.*

44. The term Filipino can only refer to a segment of our people who bowed in submission to the might of Spain. Certainly, the Muslims do not fall under the category of Filipino ... [b]ecause when the word Filipino is applied to a segment of our people, the implication is that the word Filipino was derived or at least named in honor of King Philip II from whom the Philippines was named after. Insofar as the Muslims are concerned, the appellation Filipino does not have any meaning to them. CHE-MAN, *supra* note 36, at 57 (citing ALUNAN GLANG, MUSLIM SECESSION OR INTEGRATION 21 (1969)); *See also* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1991).

45. *See* GOWING, *supra* note 25; CHE-MAN, *supra* note 36, at 57; *See generally* FRED VON DER MEHDEN, TWO WORLDS OF ISLAM: INTERACTION BETWEEN SOUTHEAST ASIA AND THE MIDDLE EAST (1993).

learning in Egypt and Saudi Arabia while Moro leaders participated in international conferences of various Muslim organizations. The increased religious awareness also starkly distinguished the Moros from the Christian Filipinos. They preferred to be called Muslim, and referred to the central government in Manila as the Christian government.<sup>46</sup> Efforts by the national government to promote Filipinism failed and did not attract any interest from the Moros.

Apart from religion however, what deepened the feeling of unrest and sense of alienation of Moros from the rest of the country was economic deprivation. The migration and resettlement wave<sup>47</sup> brought negative socio-economic consequences to the Moros. Displaced Moros resented the Christian settlers for benefiting more from the resources of the region and the resulting disparity was apparent. Inevitably, violent hostilities erupted between the two. These antagonisms eventually grew into a full-fledged separatist movement which brought it to the attention of the national leadership. What further fueled Muslim hostility was the perceived government support for the Christian paramilitary groups called the Ilagas which engaged in armed attacks against the Muslim Blackshirts.

In 1968, around 30 young Moro recruits undergoing guerilla warfare training were massacred by members of the Philippine Army. Only one member survived to tell the tale. The training was allegedly a secret preparation for Philippine military operations in Sabah, a territory subject of a continuing dispute with Malaysia. They were executed for defying an order of Marcos to launch attacks on Sabah. Dubbed the Jabidah massacre, it was the single event credited with precipitating unified Moro outrage at the Marcos government and led to the creation of the Muslim independence movement.

When Marcos declared martial law in 1972, Muslim groups rebelled against the Philippine government. Radicals appealed for broad support by harking back to the Moro resistance during Spanish rule and framed it as a battle to preserve Islam. At the height of the war, almost two million Muslims were left homeless and landless.<sup>48</sup> The rebellion was eventually extinguished by the military however and the rebels withdrew into the hills. During the tumultuous period of the Marcos dictatorship, several secular-educated student activists formed the MNLF. With financial assistance and arms supplied by Libya and Sabah, the MNLF took charge of the armed

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46. CHE-MAN, *supra* note 36, at 57.

47. By 1990, Christians made up more than 80% of the region's population. See SANTOS, *supra* note 8, at 208.

48. Ahmad, *supra* note 35, at 26.

conflict against the Philippine government,<sup>49</sup> and converted these sporadic skirmishes into a conventional war. Marcos promoted divisions within the Moro leadership by co-opting the traditional aristocratic leaders and gave them ostensible support to secure local positions. Their demand for autonomy however was not met with optimism by Marcos. In 1975, the MNLF gained recognition from the Organization of the Islamic Conference (OIC) as the representative of Muslims in the Philippines.

With the intercession of Libya and the OIC, the Tripoli Agreement of 1976 (Tripoli Agreement) was signed between the MNLF and the Philippine government. It is considered to be the mother of all agreements, and is still frequently referred to even in present-day peace negotiations. The parties agreed that areas of autonomy for Muslims would comprise of 13 provinces in the southern Philippines. Among others, the agreement mandated that Muslims shall have the right to set up their own courts which will implement Islamic Shari'a laws, and that Muslims shall be represented in all courts including the Supreme Court.<sup>50</sup> In the main, it reserved foreign policy and national defense powers to the central government while it left the running of internal affairs to a regional administrative body.

The success was short-lived, however. Marcos never intended to live up to his part of the bargain. He insisted on holding a plebiscite on which provinces would become members of the autonomous region.<sup>51</sup> When the plebiscite produced a result he expected, Marcos implemented the Tripoli Agreement as he chose, in the process encouraging splits from within MNLF leadership, and intensifying capitalist development in Mindanao. In response, the MNLF made an official declaration that it was going back to its original position of self-determination and independence at the Third Summit of the Islamic Heads of State in Mecca, Saudi Arabia in 1981. The ceasefire then

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49. *Id.*

50. See Agreement between the Republic of the Philippines and the Moro National Liberation Front with the Participation of the Quadpartite Ministerial Commission Members of the Islamic Conference and the Secretary General of the Organization of Islamic Conference, Dec. 23, 1976, available at [http://www.seasite.niu.edu/Tagalog/Modules/Modules/MuslimMindanao/tripoli\\_agreement.htm](http://www.seasite.niu.edu/Tagalog/Modules/Modules/MuslimMindanao/tripoli_agreement.htm) (last accessed Apr. 27, 2009) [hereinafter Tripoli Agreement].

51. A sham referendum announced that 95% of southerners rejected the creation of the autonomous region.

collapsed and fighting resumed. By this time, Hashim Salamat led a breakaway faction of the MNLF to form the nascent MILF.

After Marcos was deposed and forced into exile in a four-day bloodless revolution in 1986, the new government under President Corazon Aquino sought to negotiate an end to the protracted Moro war. The new president met with the MNLF leaders, led by Chairman Nur Misuari and a ceasefire was promptly implemented. After a series of talks held in Jeddah, Saudi Arabia by emissaries of both sides, the Second Jeddah Accord was reached, entertaining a proposal for the grant of full autonomy to Mindanao, Basilan, Sulu, Tawi-Tawi, and Palawan — a total of 23 provinces, subject to democratic processes. Later on, the MNLF asked that the newly-formed Constitutional Commission suspend its deliberations on the proposed creation of an autonomous region in Muslim Mindanao to allow it to undertake consultations with its constituents. President Aquino, preoccupied with the quick restoration of democracy after the grim authoritarian experience, did not approve, and let the Commission finish its work. Article X of the new 1987 Constitution provided for the creation of an autonomous region within the framework of the Constitution, national sovereignty and territorial integrity, and which is subject to a plebiscite in the proposed region.<sup>52</sup> Observers viewed this as a unilateral attempt by the Aquino government to implement the Tripoli Agreement. Throughout this period, the MILF distanced itself from the MNLF and rejected any form of autonomy short of independence. Interestingly, there was a deliberate effort by the new administration to recast the conflict as a purely internal one. It avoided any explicit references to the Tripoli Agreement and did not consider any assistance from the OIC or other Muslim countries. Two years later, Congress passed Republic Act No. 6734 creating the Autonomous Region of Muslim Mindanao (ARMM) in order to implement the constitutional mandate. The ensuing plebiscite however saw only four out of 13 provinces voting to join the region. Nevertheless, elections for regional offices were held shortly thereafter.

### *C. The 1996 Final Peace Agreement and the Rhetoric of Autonomy*

The most significant peace accord since the Tripoli Agreement was reached during the administration of President Fidel Ramos. The new government focused on improving the socio-economic conditions of the Mindanao region and created the office of the Presidential Adviser for the Peace Process to come up with a cohesive national peace policy. Several exploratory talks and meetings were held between the MNLF and the government during the first half of the Ramos presidency. In 2 September

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52. PHIL. CONST. art. X, § 15.

1996, the Final Agreement on the implementation of the 1976 Tripoli Agreement between the Government of the Republic of the Philippines and the MNLF (Final Peace Agreement) was signed. It was, in the words of the Tripoli Agreement, supposed to be the final result of the “searching for a just and peaceful political solution to the problem of the Muslims in the South of the Philippines through negotiations.”<sup>53</sup> The key provision of the Agreement was the creation of a new autonomous region in southern Philippines with a territory to be determined by plebiscite and with features very much aligned to the 1987 Constitution and the existing organic act on the ARMM which was mandated by the Constitution. The Final Peace Agreement also provided for a three-year transitional period where the newly-created Southern Philippines Council for Peace and Development (SPCPD) would be given administrative charge of a zone consisting of fourteen provinces representing the Bangsamoro’s historical claim. MNLF Chairman Nur Misuari was appointed to head the council. The aim of the Final Peace Agreement was an autonomous Muslim region well-integrated into the Philippine national and social fabric. The reality however is that the SPCPD was for all intents and purposes, only a consultative body with no significant powers and even less in financial resources.<sup>54</sup> Worse, it was put under the charge of the Office of the President — betraying the idea of autonomy which is the essence of the Agreement.

The promises of autonomy never materialized. The Agreement was essentially a form of carrot diplomacy where the MNLF leaders accepted jobs and benefits from the government in exchange for the peace settlement.<sup>55</sup> The ARMM became a gigantic employment bureau for MNLF members and their families.<sup>56</sup> Its success was also contingent on several factors, namely: (1) an amended Organic Law passed by Congress;<sup>57</sup> (2) a

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53. Tripoli Agreement, *supra* note 50.

54. The SPCPD was abolished in 2002.

55. BENEDICTO BACANI, *BEYOND PAPER AUTONOMY: CHALLENGES IN THE SOUTHERN PHILIPPINES* 31 (2004).

56. *Id.* The ARMM became a bloated bureaucracy filled with non-performing political appointees. In fact, the number of people outpaced the budget.

57. The amending Organic Law lapsed into law without the signature of President Gloria Arroyo on Mar. 31, 2001.

An Act to Strengthen and Expand the Organic Act for the Autonomous Region in Muslim Mindanao, Amending for the Purpose Republic Act No. 6734, Entitled “An Act Providing for the Autonomous Region in Muslim Mindanao,” As Amended, Republic Act No. 9054, art. XVIII, § 19 (2001).

successful plebiscite; (3) a mini-Marshall plan from the national government; and (4) the capability of MNLF rebel leaders-turned-administrators to make good on the Agreement's promises. By and large, the Agreement, while purporting to be a road map to autonomy and development, was a vague blueprint subject to the whims and caprices of politicians both in the regional and national governments. The ARMM became an example of how not to run an autonomous government.

After the 1996 Agreement with the MNLF was reached, the government turned its attention to the MILF. President Ramos recognized that the MNLF, at that point, was no longer the sole representative of the Moros, and that for peace to be fully achieved, it has to likewise reach an agreement with the other major rebel group, the MILF. Indeed, during its first meeting with government negotiators, the MILF submitted a lone talking-point: solving the Bangsamoro problem. The group refused to recognize the 1996 Agreement on the grounds that it neither satisfied fundamental Muslim aspirations nor provided for the creation of an independent Islamic state.<sup>58</sup>

The difference between the two groups is apparent from their orientation. On one hand, the MNLF's orientation is nationalist and secular even as they advocated for an independent Bangsamoro homeland. The MILF's ideology, on the other hand, is Islam. Hashim Salamat, its religious-educated aristocrat founder, firmly emphasized his group's Islamic leanings. The official MILF position was the creation of an independent and sovereign Moro Islamic state and the Islamization of all aspects of life of the Bangsamoro people.<sup>59</sup>

But behind the veneer of this hard-line rhetoric, the MILF, in some occasions, showed openness to further communication and alternatives. It explicitly rejected, however, any form of autonomy resembling the current ARMM setup.<sup>60</sup> Elaborating on its sole talking point, the MILF perceived the problem as an amalgamation of several factors which are social, cultural, economic, and political that included but was not limited to recognizing the Moros's ancestral domain, their displacement, reparations to war victims, human rights violations, etc. It stated its hope for a "political and long-lasting

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58. Chalk, *supra* note 37, at 199.

59. "Perhaps the Moro struggle for freedom and self-determination is the longest and bloodiest in the entire history of mankind," Interview with MILF Leader Sheikh Salamat Hashim, *available at* <http://www.fas.org/irp/world/para/docs/ph2.htm> (last accessed Apr. 27, 2009) [hereinafter Interview with MILF Leader Sheikh Salamat Hashim].

60. Chalk, *supra* note 37, at 201.

solution to this problem ... with the end in view of establishing a system of life and governance suitable and acceptable to the Bangsamoro people.”<sup>61</sup> This can be easily reconciled with the pragmatic view of Al-Haj Murad, then MILF military chief, who indicated that the group may be amenable to an alternative whereby the Moro people could enjoy their own system of life and government.<sup>62</sup>

During the period 1996–2000, several meetings and consultations were held and minor organizational agreements were concluded. No major substantive agreement was however reached. The government was prepared to offer everything except the independence that the MILF wanted. But there will be no concessions when it came to the territorial integrity of the Philippine State. In 2000, then President Joseph Estrada pursued an all-out war policy against the MILF and in the process razed the MILF headquarters, Camp Abubakar as Siddique,<sup>63</sup> to the ground. The disastrous government offensive<sup>64</sup> resulted in the suspension of the peace process, the shift towards guerilla warfare by the MILF rebels, and the declaration of *jihad* against the Philippine government by MILF Chairman Hashim Salamat.<sup>65</sup>

In 2001, President Estrada stepped down from office and Gloria Arroyo, then Vice-President, was immediately sworn in as President. Two months after her assumption to office, she immediately called for a ceasefire and the return of both sides to the negotiating table. The key areas of disagreement were the return of the MILF camps overrun by government troops during the all-out war and the decision of the government to conduct the talks within the parameters of the Philippine Constitution and the national

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61. SANTOS, *supra* note 8, at 10.

62. Chalk, *supra* note 37, at 199.

63. *Camp Abubakar falls to government forces*, ASIAPACIFICUNIVERSE.COM, July 10, 2000, available at [http://asiapacificuniverse.com/Jul1020/asia\\_pacific\\_news1.htm](http://asiapacificuniverse.com/Jul1020/asia_pacific_news1.htm) (last accessed Apr. 27, 2009).

64. According to a UNDP report, from January to August 2000, 218 soldiers and militiamen, 357 civilians, and 456 from the MILF were killed. More civilians died in the evacuation centers than in combat bringing the total civilian deaths to over 700. The fighting also destroyed 6,000 homes and displaced over 300,000 people.

65. Nash Maulana, *MILF Chief Cries Jihad*, PHILIPPINE DAILY INQUIRER, July 12, 2000, available at <http://www.afrim.org.ph/Archives/2000/Philippine%20Daily%20Inquirer/July/12/MILF%20chief%20cries%20jihad.txt> (last accessed Apr. 27, 2009).

territorial integrity. In June 2001, another peace agreement was signed by both government and MILF negotiators in Tripoli, Libya, agreeing on security and rehabilitation issues but leaving the discussion of the issue of ancestral domain for a later date, thereby setting the stage for another round of talks.

The 9/11 attacks on the U.S. altered the configuration of the negotiating landscape altogether. Heightened international interest in violent Islamist groups across the world brought the MILF and the smaller but more violent Abu Sayyaf Group (ASG) into foreign spotlights. A string of terror activities were credited to these two groups. Eventually, their international linkages with Al-Qaeda and its Southeast Asian terror offshoot, Jemaah Islamiyah, were unraveled, along with the assassination plot against Pope John Paul II in 1995.<sup>66</sup> Although the MILF disclaimed association with any foreign terror group or with the ASG, evidence showed that foreign terrorists have been trained in MILF camps.<sup>67</sup> Nevertheless, the MILF was kept off the U.S. terrorist list<sup>68</sup> — unlike the ASG — through explicit overtures of the Philippine government, to avoid any derailment of the ongoing peace negotiations because it was still seen as a key group in the effort to secure peace and stability in the region. Thus, ending the protracted conflict became a matter of concern both for the national government and foreign countries alike. Millions of foreign military and development aid, primarily from the U.S., came pouring into the government coffers since then.

#### *D. Current Status*

This Article stands against the backdrop of stalled peace negotiations between the government and the MILF after the aborted signing of the Memorandum of Agreement on the Ancestral Domain (MOA-AD) which the Philippine Supreme Court declared as unconstitutional.<sup>69</sup> While the

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66. Patrick Goodenough, *Links between al-Qaeda and Filipino militants probed*, CNS NEWS, Sep. 19, 2002, available at <http://www.cnsnews.com/ForeignBureaus/Archive/200209/FOR20020919a.html> (last accessed Apr. 27, 2009); See generally TERRORISM AND VIOLENCE IN SOUTHEAST ASIA: TRANSNATIONAL CHALLENGES TO STATES AND REGIONAL STABILITY (Paul Smith ed., 2005).

67. See RESSA, *supra* note 4, at 7-11; HANDBOOK OF TERRORISM AND INSURGENCY IN SOUTHEAST ASIA (Andrew Tan ed., 2007).

68. *Id.* at 11.

69. *The Province of North Cotabato v. The Government of the Republic of the Philippines*, 568 SCRA 402 (2008). Generally, the Court stated that the provisions in the MOA-AD go beyond what the present Constitution allows, e.g., powers envisioned for the Bangsamoro Juridical Entity (BJE) go beyond

issues stated in the MOA-AD decision will not be discussed in this Article, they provide the impetus to think about possible solutions to the conflict in an unorthodox manner.

Despite recent developments however, there is still some cause for optimism. The protracted conflict's long history of mistakes and disappointments provide a rich treasure-trove of lessons and experience from which to draw upon for this new experiment. As Majul presaged in 1985,

but bloodshed would not be necessary if the non-Muslim majority would accept the diversity inherent in their country's cultural makeup. In a truly pluralistic society, different cultural groups, while maintaining their cultural identities, all share in the national power and in spite of criss-crossing loyalties, all are held together by a common loyalty to a wider community — that of the nation.<sup>70</sup>

The proposal for a federal Bangsamoro Islamic state seeks to be an avenue to make possible the hope that it could be an agreement that preserves the territorial integrity of the Republic and more importantly, establishes a homeland, finally, for Filipino Muslims.

### III. ISLAM AND MODERNITY:

#### TWO APPROACHES OF REFORMIST ISLAMIC LEGAL THOUGHT

##### *A. Islam and Modernity*

The author examines the theoretical lenses from the Islamic viewpoint for justifying the constitutional reform project the author will propose.

The call to reform Islam, to update it, so to speak, in light of contemporary conditions, is not new.<sup>71</sup> There is a vast body of literature on

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those possessed by local governments and by the ARMM. Moreover, the MOA-AD speaks of the relationship between the BJE and the Philippine government as “associative,” thus implying an international relationship and therefore suggesting an autonomous state.

70. MAJUL, *supra* note 25, at 105-06.

71. In fact, as early as the 13th century, the prominent and controversial Hanbali jurist Ibn Taymiyya has initiated attempts at comprehensive reform. *See generally* EIGHTEENTH CENTURY RENEWAL AND REFORM IN ISLAM (Nehemio Levtzion & John Voll eds., 1987); DANIEL BROWN, RETHINKING TRADITION IN MODERN ISLAMIC THOUGHT (1996); COMMINS, *supra* note 24; Filali-Ansary, *supra* note 23.

Islam and modernity from all currents of thought.<sup>72</sup> Unsurprisingly, up to a certain point, the answers these questions are meant to elicit are not the same for every group participating in the debate. Michel Hoebnik called this the dilemma of renewal and authority.<sup>73</sup> This dilemma has generated three kinds of responses: modernism, fundamentalism, and traditionalism.<sup>74</sup> In a nutshell, Islamic modernism emphasizes continuous reinterpretation of the normative texts, namely the Qur'an and the Sunnah (practices of the Prophet) in accordance with the demands of the times. Thinkers in this mold generally argue for continuous refinement and addition to the existing body of *fiqh*. Fundamentalism rejects this and holds the all-encompassing normative value of the texts as eternal and unchanging for all times. Lastly, traditionalism permits reinterpretation but once this has happened, and in fact, it did already during the period of the early Islamic jurists, then no further reinterpretation should occur.<sup>75</sup> For this Article, the author will propose a reading of Islamic injunctions according to the modernist strand of thought, or as Charles Kurzman termed it, liberal Islamic legal thought.<sup>76</sup>

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72. Basheer M. Nafi, *The Rise of Islamic Reformist Thought*, in ISLAMIC THOUGHT IN THE TWENTIETH CENTURY 28 (Suha Taji-Farouki & Basheer M. Nafi eds., 2004). The author says:

The Islamic intellectual arena during the twentieth century was a reflection of the late nineteenth century intellectual rupture. Issues of identity, women, the state, tradition and renewal, text and reason and Islam and the West, which dominated the Islamic intellectual scene in the twentieth century, had their roots in the discussion of reform and revival that erupted as never before in late 19th-century Cairo, Damascus, Istanbul, Tehran, Delhi and elsewhere.

See also William Shepard, *The Diversity of Islamic Thought: Towards A Typology*, in ISLAMIC THOUGHT IN THE TWENTIETH CENTURY, at 61; See generally ISLAM IN TRANSITION: MUSLIM PERSPECTIVES (John Esposito ed., 2007); BROWN, *supra* note 71.

73. See Michel Hoebnik, *Thinking about Renewal in Islam: Towards a History of Islamic ideas on Modernization and Secularization*, 46 ARABICA 29 (1999).

74. *Id.* at 29-32.

75. Whether the gates of *ijtihad* (independent reasoning) have been closed at all is still the subject of numerous debates. See Wael Hallaq, *On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad*, 63 STUDIA ISLAMICA 129 (1986).

76. LIBERAL ISLAM: A SOURCEBOOK (Charles Kurzman ed., 2003) (As Professor Kurzman notes in his introduction, there is no contradiction intended in the use of this term. The emphasis on reason for interpreting revelation has been in use since the eighth century when the rationalist school of the Mu'tazila first came into existence. Contemporary revival of this method views the Qur'an as a

After 9/11, the debate on Islam and modernity has been the subject of reinvigorated debate as threatening images of terrorism became identified with Islam. In the wake of the rise of Islamic fundamentalist thinking, Samuel Huntington's clash of civilizations appeared to be a self-fulfilling prophecy.<sup>77</sup> The necessity of finding answers became more apparent in the face of new nation-building activities in the Middle East, such as in Iraq and Afghanistan. For the most part, the questions remain the same: how should Muslims face the challenge of modernity? What role should traditions play in the social and political order? The highly heterogeneous nature of postcolonial societies and the increasing porousness of national borders have challenged traditional Islamic dogma and inevitably introduced complex configurations to old questions. First, can Islam adapt and still remain authentic? Should it even? Second, how will the Shari'a work in a globalized and increasingly secularized world? The challenge for any comprehensive doctrine is to maintain its relevance and thus, continue exercising its authority. For Islam in particular, it is not so much to continue its authority but more of a self-renewal effort in order to enable itself and its worldwide community of adherents to meet the demands of contemporary times, such as economic progress, equality rights, democratic institutions, etc. without losing any of its traditions or beliefs.<sup>78</sup> It likewise includes forms of reorientation Islam must take as it travels across different cultural and historical contexts. In order to do so, such doctrine must be flexible and open to continuous adaptation and interpretation in relation to an environment that is in a constant state of flux.

### 1. An Overview of 20th Century Reformist Islamic Legal Thought

Reformist Islamic legal thought<sup>79</sup> arose as part of efforts to keep Islam relevant to modern times and as an opposing strand to the puritan pull

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necessary source of basic moral themes but not as final blueprint for human society imagined by Islamists.); See generally RICHARD C. MARTIN & MARK R. WOODWARD, *DEFENDERS OF REASON IN ISLAM: MU'TAZILISM FROM MEDIEVAL SCHOOL TO MODERN SYMBOL* (1997).

77. See *THE NEXT THREAT: WESTERN PERCEPTIONS OF ISLAM* (Jochen Hippeler & Andrea Lueg eds., 1995); SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND REMAKING OF A NEW WORLD ORDER* (1996).

78. The literature on this is voluminous. See, e.g. *ISLAM IN TRANSITION*, *supra* note 72.

79. See Hamid M. Khan, *Nothing is Written: Fundamentalism, Revivalism, Reformism, and the Fate of Islamic Law*, 24 *MICH. J. INT'L L.* 273 (2002).

towards the restoration of the pristine form of Shari'a advocated by Islamists and conservative thinkers. For Islamic liberals, divine revelation is both text and context. It is based on four principles: 1) *tawhid* (oneness of God) which is the essence of Islam, 2) the return to the sacred texts — the Qur'an and the Sunnah, 3) the importance of the role of reason, and 4) renewed *ijtihad* (independent reasoning). The key is to decipher the spirit of the Qur'an and the Prophetic traditions, rather than to insist on its literal adherence at all times. Thus, the formative period of Islam, to this day, must continue to serve as both source and inspiration for solutions to modern-day problems, and as source of guidelines for evolving circumstances.

Islam, as a comprehensive doctrine, presupposes the fusion of law and theology. The dynamic between divine revelation<sup>80</sup> and human reason lies at the core of Islamic legal thought. Wael Hallaq described *usul ai-fiqh* (the study of Islamic jurisprudence) as one possessing a dualist character, encompassing both theological and positive legal questions.<sup>81</sup> The central question is how human interpretation can once again engage in a reformulation of Islamic notions which will support the needs and aspirations of modern life.

An easier way to understand it is to imagine it as two concentric circles, with divine revelation occupying the inner circle and jurists's interpretation (*fiqh*) on the outside circle. While divine revelation is considered immutable and timeless, and there is no room for interpretation in cases of clear Shari'a injunctions, such as in matters of worship (*al-ibadat*), when it comes to social duties, transactions, and contracts (*mu'amat*) for instance, human interpretation of the divine texts vary. After the death of the Prophet Muhammad, there was a proliferation of legal schools to as many as 19 in the 10th century,<sup>82</sup> indicating the divergence of thought as new complexities arose in the face of a growing civilization. Analogous to this concentric circle paradigm is the Theory of Limits formulated by Syrian liberal Muhammad Shahrur.<sup>83</sup> Briefly stated, the Theory of Limits is an approach within *ijtihad* (independent reasoning/Islamic interpretation) which specifies the inviolable parameters that God has set down, leaving a wide open space for *ijtihad*. This

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80. Divine revelation is comprised of (1) the Qur'an as the final revealed word of God and (2) the *Sunnah* (way of the Prophet) which provides insight into the life of the Prophet Muhammad as the model of conduct all Muslims must strive to emulate as dictated by the Qur'an.

81. WAEL HALLAQ, HISTORY OF ISLAMIC LEGAL THEORIES 256 (1997).

82. See HAMEEDULLAH KHAN, THE SCHOOLS OF ISLAMIC JURISPRUDENCE (1991). The schools or *madhahib* agree on the fundamental principles but differ from each other in terms of methodology and interpretation.

83. HALLAQ, *supra* note 81, at 246.

conception lends support to the liberal claim that Islam can change and still be relevant at all times by illustrating the dichotomy between God's revealed word as constant and the concomitant human interpretations, otherwise compiled as classical traditions, as dynamic and flexible. Shahrur calls these the constant movement (*istiqamah*) and the dynamic and flexible movement (*hanifiyah*). This provides the necessary analytical framework to understand how Islam will be able to keep up with changing external circumstances.

Muhammad Iqbal, considered the spiritual father of Pakistan and one of the most influential Islamic reformers, articulated the liberal line of legal thought early in the twentieth century.<sup>84</sup> He stated that the eternal reveals itself in variety and change as it occurs in temporal life, saying, "[E]ternal principles when they are understood to exclude all possibilities of change which according to the Qur'an, is one of the greatest signs of God, tend to immobilize what is essentially mobile in nature."<sup>85</sup> His main line of thought is that eternal principles are essential in that they regulate temporal activity,<sup>86</sup> and "finds its opportunities in the natural, the material and the secular."<sup>87</sup> The implication is that the application of these principles must necessarily evolve according to the changing realities on the ground. The principal mechanism, he proposes, by which to apply eternal principles to fluctuating realities is *ijtihad*, which he called as the "principle of movement in the structure of Islam." He cited the example of the Berberization of the Qur'an, and the prayers said in Berber, for the sake of the illiterate Berbers during the rule of Muhammad Ibn Tumart, the Mehdi of Muslim Spain, and a Berber by nationality, over Mawahidin.<sup>88</sup> The elasticity of Islamic thought, he said, is justified by the fact that there was no written law of Islam until the time of the Abbasids,<sup>89</sup> and that there were several legal schools which espoused diverse Islamic views.<sup>90</sup> Indeed, even today, the remaining four major

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84. See MUHAMMAD IQBAL, THE RECONSTRUCTION OF RELIGIOUS THOUGHT IN ISLAM (1930); Muhammad Iqbal, *The Principle of Movement in the Structure of Islam*, in LIBERAL ISLAM, *supra* note 76, at 256 [hereinafter Iqbal, *Principle of Movement*].

85. Iqbal, *Principle of Movement*, *supra* note 84, at 256.

86. *Id.* at 259.

87. *Id.* at 256.

88. *Id.* at 261.

89. *Id.* at 263.

90. *Id.* (The issue of who is authorized to exercise *ijtihad*, or of whether the gates of *ijtihad* was ever closed is still a matter of debate up to this day.); See Wael

recognized Sunni schools have several points of contention and debate. This indicates that further evolution is possible.

Providing inspiration to Iqbal's writings were the ideas of Shah Wali Ullah, an 18th century advocate for the independence of northern India (modern-day Pakistan) who likewise maintained that social life should be constructed in the light of "ultimate principles."<sup>91</sup> His emphasis was the nature of the context surrounding the divine revelation. The prophet, Shah argued, takes special notice of the habits, ways and peculiarities of the people to whom he is specifically sent.<sup>92</sup> The objective is the enunciation of universal principles of social life in the light of how it is applied in the specific conditions of the people immediately before him.<sup>93</sup> He envisioned his task as explaining that "God's pedagogical method is to reveal His law in a concrete form within the context of a particular people."<sup>94</sup> In the Qur'an itself, references are made to the Prophet's relationship to the people around him and the response of the people to his message.<sup>95</sup> It refers to the places, times, customs, norms, values, and practices of the people surrounding the Prophet at that time. Thus, the focus is on how an eternal and changeless divine law must take particular concrete forms which differ according to the customs of the people to whom they are revealed.<sup>96</sup> The Qur'an, written in the language of Mecca and its surrounding regions, dynamically interacted with the daily existence and the social fabric throughout the Prophet's lifetime. Hence, it cannot be divorced from the constant changes that took place throughout the Prophet's lifetime or from the socio-historical framework from which it arose. It must not be treated as a basis of abstract formulations but rather of human conduct in actual reality.<sup>97</sup> It can be said that whatever custom or value was in force at that time of the revelation was the one adopted in the Qur'an. Since the Shari'a is an expression of belief toward God and such expression can only be made in a way which

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Hallaq, *Was the Gate of Ijtihad Ever Closed?*, 16 INT'L J. MIDDLE EAST STUD. 3 (1984) [hereinafter Hallaq, *Gate of Ijtihaa*].

91. Iqbal, *Principle of Movement*, *supra* note 84, at 265.

92. *Id.*

93. *Id.* at 266.

94. BROWN, *supra* note 71, at 24.

95. See ABDULLAH SAEED, INTERPRETING THE QUR'AN: TOWARDS A CONTEMPORARY APPROACH (2006).

96. The dialectical relationship between revelation as a text and the human reality that gives rise to it is indispensable for the interpretation of the Qur'an. Hallaq, *Gate of Ijtihaa*, *supra* note 90.

97. *Id.* at 89.

corresponds to a society's peculiar culture at the time it was adopted, it follows that it can be compatible with progress and the ever-changing requirements of human existence. A contrary approach would prevent Muslim efforts to deal with fast-changing developments in the modern age and would erode the dynamism of Islam itself as a universal and eternal belief system.

One of the foremost proponents of this approach is Pakistani intellectual Fazlur Rahman. He emphasized the consideration of the sociological factors that surrounded the specific rulings enunciated from general principles contained in the Qur'an and the Sunnah, i.e., a distinction between normative and historical Islam.<sup>98</sup> The proper procedure, he says, is to rationally interpret tradition and draw conclusions from it for the contemporary situation.<sup>99</sup> In *Islamic Modernism*, he outlines the steps as follows:<sup>100</sup> first, the Qur'an should be studied in chronological order; second, there must be a distinction made between Qur'anic legal dicta and the purposes these laws are expected to serve; and third, the objectives of the Qur'an must be understood and fixed, keeping in full view the sociological setting from which it arose in order to avoid subjective and whimsical interpretations. According to Rahman,

it is strange, however, that no systematic attempt has ever been made to understand the Qur'an in the order in which it was revealed, that is, by setting the specific cases of the *shu'un al-nuzul* (occasions of revelation), in some order in the general background that is no other than the activity of the Prophet and its social environment. If this method is pursued, most arbitrary and fanciful interpretations will at once be ruled out, since a definite enough anchoring point will be available.<sup>101</sup>

This line of reformist thinking shows a consistent theme. The Qur'an, in a sense, although eternal, addresses a specific social community at a specific time. Further, Rahman states that it is important to understand the reasons

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98. Professor Rahman specifically argues that there must be a distinction between normative and historical Islam. Fazlur Rahman, *Islamic Modernism: Scope, Method & Alternatives*, 1 INT'L J. MIDDLE EAST. STUD. 317 (1970).

99. *Id.* at 324.

100. *Id.* at 329.

101. Fazlur Rahman, *Islam and Modernity*, in LIBERAL ISLAM, *supra* note 76, at 311 [hereinafter Rahman, *Modernity*] (where he argues that it is through the reform of Islamic education that religion can be saved from the vagaries of day-to-day politics and that there would be a correct envisioning of priorities).

for certain ethical and legal rulings in order to draw out the most appropriate general principles.<sup>102</sup> The idea is to combine all these factors to yield a comprehensive interpretation squarely based upon the divine texts. For Rahman, *ijtihad* means it is possible that a text can be generalized into a set of principles, and that these principles can be formulated as new sets of rules. It implies that the tradition in question can be judged according to the normative meanings under which the tradition arose.<sup>103</sup> However, Hallaq cautions that Rahman's methodology might not be capable of proving a sufficient outline to provide modern Muslims the means to solve problems entirely different in character from those he cites,<sup>104</sup> in cases where there is no information available on the socio-historical backdrop of a particular revelation. The point, however, is that Islam, by and large, as interpreted, is a form of historical expression. It is, in the words of Khaled Abou El Fadl, "a product of human experience and constructed normative understandings."<sup>105</sup> For El Fadl, like Rahman, one cannot take a Qur'anic norm at face value and as such, it is imperative to analyze the historical circumstances in which specific Qur'anic ethical norms were negotiated. Understanding it this way makes it possible to come up with genuine contemporary readings of an eternal text.<sup>106</sup>

## 2. Two Approaches: Historicity & Contingency of Islam

The common theme from the abovementioned theories centered on the two characteristics of Islam: its historicity and contingency. The two, while closely related, have subtle differences.

On the one hand, historicity refers to the nature of Islam as dynamic and not static, as one meant to evolve according to the changing needs of the times. This does not negate the eternal nature of the divine revelation but paradoxically in fact, precisely affirms it, by making it applicable for all times and places. The Qur'anic injunctions, for instance, on social affairs and familial obligations were adopted at a certain point in time when these practices were the norm. For instance, the infamous amputation of hands as punishment for the crime of theft as inscribed in the Qur'an was a common

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102. HALLAQ, *supra* note 81, at 243.

103. Rahman, *Modernity*, *supra* note 101, at 111.

104. HALLAQ, *supra* note 81, at 255.

105. KHALED ABOU EL FADL, THE PLACE OF TOLERANCE IN ISLAM 14 (2002) [hereinafter EL FADL, TOLERANCE]; See also KHALED ABOU EL FADL, AND GOD KNOWS THE SOLDIERS (2001).

106. For a more detailed and elaborate discussion on the relationship between revelation and interpretation, see SAEED, *supra* note 95.

form of punishment in seventh century Arabia. But these may not necessarily be applicable in modern times. Hence, the author argues that this practice can be deemed anachronistic. Nasr Abu Zaid goes so far so as to say that, “if we elevate historical aspects of the Qur’an to divine status, we violate the Word of God. God’s Word becomes twisted when we freeze it in a specific time and space.”<sup>107</sup> The implication is that this leaves the door of *ijtihad* wide open, thus enabling the reinterpretation of rules that would allow the Islamic prescriptions to evolve according to the vicissitudes of time.

Contingency, on the other hand, refers to the contextualized nature of Islam, which necessarily means it must be flexible as it travels from one location to another. It also means that Islam can never remain as an abstract doctrine and should not be studied as such. It can only be understood as it is practiced in concrete situations. This proposition finds support in the various kinds of practices one would find throughout the Islamic world. Noah Feldman states this flexibility is evident in “Islam’s capacity to maintain its core beliefs while adapting to the languages, family structures, economic systems and cultural values of peoples all over the world and over an extended period of time.”<sup>108</sup> While the heart of Islam is in the Middle East, Muslims everywhere else have hybrid Islamic practices as a result of Islam’s assimilation of local culture upon its arrival and spread throughout these regions. It does not mean they are any less Muslim than the Muslims in the Arab world. Although the central creed remains the same, the ways of approaching it and following it differ from one locale to another. This lends credence to Islam’s universality and mobility.

In Africa, Abdullahi An’Naim states that:

Islam energized, enlivened and animated life in African communities, and at the same time, Islam has been molded by its African settings. As a result of the interaction between Muslim and African civilizations, the advance of Islam has profoundly influenced religious beliefs and practices of African societies while local traditions have Africanized Islam.<sup>109</sup>

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107. Nasr Abu Zaid, *The Nexus of Theory and Practice*, in *NEW VOICES OF ISLAM* 155 (Mehran Kamrava ed., 2007).

108. FELDMAN, *supra* note 20, at 35 (where he makes the same characterization for democracy).

109. ABDULLAHI AN’NAIM, *AFRICAN CONSTITUTIONALISM AND THE ROLE OF ISLAM* 109 (2006).

In the same vein, Southeast Asian Muslims also have idiosyncratic practices that one will not find among Muslims in Europe or in the Middle East, or even much nearer to it, in South Asia. In the Philippines, for instance, there are *datu*s in addition to the sultans.<sup>110</sup> This refers to a title of nobility for tribal chieftains which existed even in the pre-Islamic era but which have been carried over to the present times. They are deemed second in authority to the sultans. In Indonesia, Feldman also describes the Islam practiced there as incorporating customs and practices that predate the spread of Islam and is famous for its relaxed style.<sup>111</sup> It includes an amalgam of quasi-Islamic practices which incorporates Hindu and mystic influences. Hence, to understand Islam in Southeast Asia, one must examine it in its local and regional context. From this perspective, the diffusion of Islam into Southeast Asia looks more richly distinctive.

### 3. Islam in a Secular State

The Islamic world, like Islam, the religion itself, is not a monolith. Although much of the literature on Islam in the modern world have been set in the context of Muslim states in the Arab world, a significant number of today's Muslims live in secular states, particularly in Asia.<sup>112</sup> Thus, to the extent that the questions are shaped by its accompanying context, the challenges these Muslims face require us to look beyond this unitary characterization of the Islamic identity from an Arab Middle East viewpoint and draw out conclusions unique to this particular setting.<sup>113</sup>

Many would claim how secularism answers many of the problems posed by competing systems of beliefs or comprehensive doctrines. Indeed, it appears to easily solve that tyranny of the majority dilemma that inevitably

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110. *Datus* were measured by the number of their followers. In return for tribute and labor, the *datu* provided aid in emergencies and advocacy in disputes with other communities, through the *agamat*. A *datu* is basic to the smooth functioning of the Filipino Muslim society. He was a powerful authority figure who may have as many as four wives but in modern times usually has only one. In the old days, they led raids on other villages. See generally JUBAIR, *supra* note 25.

111. FELDMAN, *supra* note 20, at 115.

112. The country with the biggest Muslim population is Indonesia with more than 200 million Muslims.

113. Though Southeast Asian Islam has around 300 million believers, it is not uncommon for scholars to identify Islam with the Middle East and to regard Southeast Asia as intellectually and institutionally derivative of Middle Eastern Islam at best. See *ISLAM IN AN ERA OF NATION STATES: POLITICS & RELIGIOUS RENEWAL IN MUSLIM SOUTHEAST ASIA* (Robert Hefner & Patricia Horvatic eds., 1997).

occurs when one religion is held out as dominant over others.<sup>114</sup> Each and every religion is accorded space in the metaphorical marketplace of beliefs, free to win over new adherents and to practice their divinely-inspired ways and traditions. In the context of Islam, some writers have given Islamic justifications for a secular state,<sup>115</sup> such as Turkey. The problem, however, with having a secular state with a Muslim-majority population quickly surfaced with the Leyla Sahin case,<sup>116</sup> where the European Court of Human Rights upheld a ruling by Turkish courts against Sahin for wearing a headscarf in a university on grounds of religious belief as contrary to its much avowed principles of secularity and equality. Can a secular state promote religious freedom by suppressing its expression? Degrees of secularity of course matter in this context. Jurgen Habermas states that “the liberal state must not transform the requisite institutional separation of religion and politics into an undue mental and psychological burden for its citizens who follow a faith.”<sup>117</sup> In secular countries which have strong institutional arrangements for selective accommodation of religious beliefs such as India, Israel, and Singapore, Muslim minorities have largely benefited from being able to both live in a secular state and thus be able to profess their beliefs in their own ways and traditions out of conviction and free choice. They can opt to go to Shari’a courts to have their disputes adjudicated and send their children to Islamic schools. In these places, Islamic culture is not relegated to the periphery of the national life but is in fact a valuable thread that runs through the social fabric. This affirms that the secular nature of the state does not necessarily require the suppression of the expression of a religious identity. The question then turns to the justifiability of this arrangement from an Islamic viewpoint.

#### 4. Islamic Citizenship in a Secular State

There are two dimensions to the question of permissibility of Islam in a secular state from within Islamic legal discourse. The first is simply

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114. See, e.g. Ahmed T. Gaili, Note, *Federalism and the Tyranny of Religious Majorities: Challenges to Islamic Federalism in Sudan*, 45 HARV. INT’L L.J. 503 (2004).

115. ABDULLAHI AN’NA-IM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI’A (2008); Mustafa Akyol, *The Islamic Case for a Secular State*, TURKISH DAILY NEWS, Oct. 4, 2007, available at <http://www.turkishdailynews.com.tr/article.php?newsid=85131> (last accessed Apr. 27, 2009).

116. *Leyla Sahin v. Turkey*, Eur. Ct. H.R. 44774/98, §§ 53-57, June 29, 2004.

117. Jurgen Habermas, *Religion in the Public Sphere*, 14 EUR J. PHILOS 1, 9 (2006).

citizenship in a secular, liberal state by a Muslim.<sup>118</sup> Andrew March enumerated the traditional objections to this, drawn from classical sources and presently advanced by fundamentalist thinkers. These are largely hinged on the following arguments: (1) that Muslims must not be subject to non-Muslim laws; (2) that Islam and Muslims must not be put in a position of inferiority to non-Muslims; (3) that Muslims must avoid aiding or increasing the strength of non-Muslims; (4) that Muslims are forbidden from forming bonds of friendship or solidarity with non-Muslims; (5) that Muslims are required to avoid environments of sin or indecency; (6) in non-Muslim environments, it will be more difficult to prevent sin or the loss of religiosity in subsequent generations.<sup>119</sup> March equally drew on traditional sources to refute these arguments and to establish that “not only is it permitted to reside in a non-Muslim polity but also it is permitted to do so while being subject to and obeying non-Muslim law,”<sup>120</sup> to perform obligations of citizenship such as loyalty to the state<sup>121</sup> and even to perform military duties.<sup>122</sup>

His inquiry was precipitated however by a concern for “the possibility that Muslim jurists will insist on religious freedom for Muslim communities through some form of communal autonomy with substate institutions of

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118. See Andrew March, *Islamic Foundations for a Social Contract in non-Muslim Liberal Democracies*, 101 AM. POLI. SCI. REV. 235 (2007) (where Prof. March offers Islamic doctrines of citizenship to justify Muslim citizenship in a non-Muslim liberal state).

119. *Id.* at 240.

120. *Id.* at 243 (citing Rashid Rida who wrote: “Migration is not required for those who are able to practice their religion free from seduction away from it, that is, coerced abandonment of religion or the prohibition on performing religious duties.”).

121. *Id.* at 244. Such cited Tariq Ramadan who wrote:

Contracts determine our status, fix our duties and rights and direct the nature and scope of our actions. Once agreed, the terms of a covenant should be respected and if there is a point which seems to work against Muslim rights — or even their conscience as believers — this has to be discussed and negotiated because Muslims are unilaterally not allowed to breach a treaty.;

See also *An-Nahl* 16:91 (“Fulfill God’s covenant when you have entered into it and break not your oaths after asserting them, for you thereby make God your guarantor.”).

122. March, *supra* note 118, at 246.

authority competent to enforce Islamic family, commercial and certain criminal codes.”<sup>123</sup>

Nonetheless, needs differ across the Islamic world, each of which is equally driven by diverse motivations. Although this is intended to be a general discussion on the position of Muslim minorities in traditional Islamic thought, such discourse may find strongest resonance in the present-day case of Muslim minorities in Europe. However, the author argues that what might be sufficient for one may not be sufficient for another. In the Philippine case, the overarching theme of the Moro struggle is a battle against forced assimilation. For centuries, they have tried to divorce themselves from an imagined nation they never considered as their own, without success. To simply say that they are justified by Islamic law to reside in such a polity without taking into account their need to assert an Islamic identity and to have it reflected in their social institutions does not solve the problem. One must take it further. Highlighting the nature of Islam as historical and contingent will help find an adequate justification, and subsequently, an equally adequate institutional response.

### *B. Islamic Political Entity in a Secular State*

#### *1. Islam and Democracy*

Any discussion on Islam and democracy in any setting must begin with the fundamental contradictions that its respective adherents claim is inherent with the two. The author starts with this aspect because the reasons offered by the late Salamat as to why the MILF cannot negotiate within the framework of the existing Philippine Constitution is unsurprisingly very much along the lines of thinking that contemporary Islamist thinkers espouse. Inevitably, the same tension will come to fore even under the banner of a new Constitution. Such objections are no stranger to an avid reader of Islam-and-democracy literature. To put it simply, if the basic Islamic precept is that God is the sovereign, how can democracy, which gives sovereignty to the people, be reconciled with Islam?

The core of these objections to any possible synthesis between Islam and democracy centers on the apparently irreconcilable dichotomy between sovereignty of man and sovereignty of Allah. As such, it is common to find

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123. *Id.* at 243 (Although the Islamic political imagination can certainly include a call for some communal autonomy within non-Muslim states, for some theorists the weaker condition of a liberal conception of free practice as sufficient.).

reductionist debates on man-made constitutions versus the sacred Qur'an, and the authority of people versus the rule of God.

The assumption in classical Islamic legal discourse is that rights and obligations are determined and revealed by God, and that therefore He — or the divine law that He reveals — is the ultimate sovereign. The revealed law must in turn be interpreted and applied by qualified individuals, and in the secondary sense, they are sovereign.<sup>124</sup> The attribution of ultimate sovereignty to God, of course, in itself is of no practical significance until some agency is identified that can authoritatively decide what God's decrees are. Thus, the assertion that Islam provides for a theocracy is true in the ultimate sense but meaningless in the practical sense. Human agency is inevitable.

Islam, the religion is unique in that it is a comprehensive worldview which seeks to regulate all aspects of human activity. Hence, when we speak of normative Islam, we speak of the entire field of Islamic law which is understood to cover both the primary (Shari'a) and subordinate sources (fiqh). The Shari'a, which means "the way," the source from which all principles of Islamic law and life flows, is comprised of both the Qur'an and the Sunnah. Qur'an is the final revealed word of God, while the Sunnah provides insight into the life of the Prophet Muhammad (peace and prayer be upon him) as the model of conduct all Muslims must strive to emulate as dictated by the Qur'an. *Fiqh*, literally meaning understanding, represents scholars' interpretation of the divine ordinations and is more commonly referred to as Islamic jurisprudence. The jurists or scholars arrive at these readings through the methods of *qiyas* (analogy) and *ijtihad* which allow them to formulate legal rules. In formulating these rules, an important distinction is made between what is considered as first-order and second-order principles. While there is no divergence of opinion on what constitutes the frame of reference of Islamic law, as *fiqh* is human intellectual effort, necessarily, on *furu* (secondary issues), there will be varying, if not conflicting, results.<sup>125</sup> Nonetheless, as one popular hadith repeated in

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124. See MUHAMMAD ASAD, *THE PRINCIPLES OF STATE AND GOVERNMENT IN ISLAM* (1961).

125. The four *Sunni* schools of Islamic law were developed from the different interpretations that arose. All interpretations are regarded as orthodox. See JANIN HUNT, *ISLAMIC LAW: THE SHARIA FROM MUHAMMAD'S TIME TO THE PRESENT* 51 (2006); EL FADL, *TOLERANCE*, *supra* note 105, at 110. ("The important issue is to determine what might be called the hierarchy of Islamic values and to ensure that a derivative or secondary value does not end up abrogating or voiding a primary value."); See also Clark Lombardi, *Does Constitution with Shari'a Threaten Human Rights?*, 21 AM. U. INT'L L. REV. 379

numerous works states, it is the effort to arrive earnestly at the right interpretation which counts.<sup>126</sup>

These two, the Shari'a and the *fiqh*, governs not only God-human relations but also everyday interpersonal activities. But while the Qur'an has particular prescriptions on areas as diverse as personal morality, familial relationships and public welfare, it does not purport to prescribe all rules imaginable for human existence. Indeed, it has been an oft-cited reading that there must be room for human intellect in the context of man's viceregency.<sup>127</sup> Man must be provided with enough space for his freedom to choose and decide for himself in the context of improving his life on earth.<sup>128</sup> Asad espouses this same view by saying that, "it is reasonable to assume that the Law-Giver never intended the Shari'a to cover in detail all conceivable exigencies of life."<sup>129</sup> Hence, silence of the Qur'an can be reasonably taken to mean that God left such unaddressed matters to the good sense of believers, in light of the basic and unchangeable principles He has thus revealed. In the end, the Qur'an states that every believer is accountable for his earthly actions to no one but Allah.<sup>130</sup> Islamic thinkers have used concepts such as *ijma*, *ijtihad*, *bay'ah* and *shura* in order to develop the viceregency argument, and to state that democracy is not a concept totally alien to Islam. These have become, in a sense, Islamic terms for erstwhile democratic principles as they are understood in the West. *Shura* became

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(2006) (where Lombardi basically states out how the Egyptian Supreme Constitutional Court distinguishes between first-order and second-order principles in its Article 2 jurisprudence).

126. A famous *hadith* says that whoever does *ijtihad* to the best of his ability may get a single or double reward in heaven. If he performs *ijtihad* to the best of his ability and makes a mistake, he will get a reward because of his effort. If he performs *ijtihad* and he is right, he gets a double reward, once because of his *ijtihad* and once because he was right.

127. Nurcholish Madjid, *Islamic Thought and Religious Understanding*, in LIBERAL ISLAM, *supra* note 76, at 286.

128. *Id.*

129. ASAD, *supra* note 124, at 12.

130. *Al-Baqara* 2:284. Such states:

To Allah belongs whatever is in the heavens and whatever is in the earth. And whether you manifest what is in your minds or hide it, Allah will call you to account according to it. So He forgives whom He pleases and chastises whom He pleases. And Allah is Possessor of power over all things.

popular representation; *ijma* became political participation, while *bay'ah* became universal suffrage.<sup>131</sup> The similarity is more of approximation rather than strict equivalence, since all these terms arose out of a particular context. They remain proof however, that Islam and democracy need not necessarily be the antithesis of each other.

The slogan “sovereignty of God above all”<sup>132</sup> must therefore be distilled to what it really means. The idea is that the rule of the people acting towards the ends of justice, mindful of the hierarchy between sacred command and human law, can be reasonably understood as expressing God’s authority. As the principle of justice is a paramount divine imperative in Islam,<sup>133</sup> any democratic institution which seeks to effectuate this principle in a myriad of ways to serve daily human needs is in effect following God’s command. The pursuit of a just social order is nothing more but a divine task which has been entrusted to human hands.

The problem with democracy as a concept is that it comes with the so-called baggage of Western hegemony and cultural imperialism, that is, it is not seen as a neutral idea. While it is difficult to conceive of it as something which is devoid of any particular connotations, and in all probability we cannot, as Feldman argues, its non-Islamic provenance should not prevent the Muslims from making use of it to advance their own interests. The result of such synthesis — the Islamization of democracy and the democratization

131. REZA ASLAN, *NO GOD BUT GOD: THE ORIGINS, EVOLUTION AND THE FUTURE OF ISLAM* 258 (2005).

132. In fact, Feldman says that in the *fatwa* of popular preacher, moderate conservative and Al-Jazeera host, Yusuf al-Qaradawi, on Islam and democracy, al-Qaradawi believes that “sovereignty of God” must be understood in two senses. The first is God’s sovereignty as creator of the universe while the second is the sovereignty of legislation in specifying the prohibited and the permitted. See Noah Feldman, *Shari’a and Islamic Democracy in the Age of Al-Jazeera*, in *SHARI’A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT* 104 (Frank Griffel & Abbas Amanat eds., 2007).

133. *Aal-E-Imran* 3:135. Such states:

O ye believe! Stand out firmly for justice as witnesses to God, even as against Yourself, or your parents or your kin and whether it be against rich or poor; for God can best protect both. Follow not the lusts of your hearts, lest you swerve, and if ye distort justice, or decline to do justice, verily God is well acquainted with all that you do.;

See Gudrun Kramer, *Justice in Modern Islamic Thought*, in *SHARI’A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT*, *supra* note 132, at 20, 23 (“[T]hat what Islam is all about and what Shari’a represents, are basic values such as justice, freedom, and equality, consultation, and accountability.”).

of Islam — is an Islamic democracy which is entirely different from its component ideas,<sup>134</sup> but one that, the author would add, paradoxically remains true to them.

Another facet of Islamic objections to the Western-style democratic constitutional setup is the church-state separation commonly found in these societies. In *Islamic Constitution*, Maududi categorically states that “the function of religion is to direct the affairs of life. Therefore its domain is life in its entirety, and not any specific aspect of it.”<sup>135</sup> Citing Qur’anic verses, he says that Islam does not confine itself within the private life of the believer and does not recognize any separation between public and private spheres.<sup>136</sup> Religion, in other words, must provide the guidance for both public and private lives. Nonetheless, in practice, the Islamic tradition recognizes a de facto separation between the religious and temporal spheres. In fact, the Shari’a itself makes a distinction between God-human relations (matters of worship) and inter-human relationships (social affairs).<sup>137</sup> The existence of such categorizations lend basis to this claim. Abdulaziz Sachedina expounds on this, saying that “whereas God-human relations are founded on individual autonomy as regulated by divine jurisdiction, inter-human relations are within the jurisdiction of human institutions founded on political consensus with the purpose of furthering social justice and equality.”<sup>138</sup>

Moreover, contrary to popular notions, church-state separation is not an essential feature of any constitutional democracy. Outside of the U.S., France, and Turkey where the strict separation/secularist model is at work, other democracies showcase various arrangements. In countries such as England, Norway, or Finland, there is an established state Church and the state sovereign is also the head of the Church. In India, Israel, and South Africa, there is selective accommodation of religion, usually in the realm of personal and family laws. The point is that democracy is a malleable concept which adapts to the pertinent circumstances of the polity where it is being put to work.

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134. Feldman, *Shari’a and Islamic Democracy in the Age of Al-Jazeera*, *supra* note 132, at 117-18.

135. SAYYID ABUL ALA MAUDUDI, *ISLAMIC LAW AND CONSTITUTION* 3 (1977).

136. *Id.* at 4.

137. ABDULAZIZ SACHEDINA, *THE ROOTS OF DEMOCRATIC PLURALISM IN ISLAM* 5 (2000).

138. *Id.*

## 2. The Government in Islam: Justifying an Islamic Entity in a Secular State

The Qur'an does not prescribe a particular form of government. One rationale could plausibly be that Islam's suitability for all times and places require that matters which are susceptible to evolution must be left for the human agent to shape, within the framework that Islam has dictated as expressed in the Shari'a. As such, Islamic governments throughout history, while acknowledging the supremacy of the Shari'a, have accommodated themselves to any political system.<sup>139</sup>

There is nothing in the divine texts that renders a federal arrangement under a secular constitution impermissible. The circumstances, location and culture of a particular Muslim community plays an operative role in determining under what arrangement they will be able to live out their Islamic ideals and way of life.<sup>140</sup> Thus, any form of government that allows its citizens to manifest their Islamic identity, in an Islamic polity which espouses the Shari'a and promotes the values identified by the Qur'an as central to an Islamic state, identified by Abou El Fadl as follows:<sup>141</sup> 1) pursuing justice through social cooperation and mutual assistance; 2) establishing a non-autocratic, consultative method of governance; and 3) institutionalizing mercy and compassion in social interactions, can be considered an Islamic one. The Shari'a is to be the path that will facilitate the human mission to realize justice on earth.<sup>142</sup>

The previous discussion on the historicity and contingency of Islam is useful in that makes it possible to create a framework that is responsive to the universal demands of modern times and specifically, to the needs of the Moros. Without this kind of understanding, it is doubtful whether Islam could continue to be applied to Muslims in different countries where Islam had spread and where their diverse social, economic and other pertinent

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139. NATHAN BROWN, *CONSTITUTIONS IN AN UNCONSTITUTIONAL WORLD* 169 (2002); *See also* NASR ABU ZAID, *REFORMATION OF ISLAMIC THOUGHT* 37 (2003) ("There is no political system with a specific Islamic label."); EL FADL, *ISLAM AND DEMOCRACY* *supra* note 20, at 5; ASAD, *supra* note 124, at 22.

140. *Id.*

141. *Id.* (Maududi also recounts that the Qur'an lays down this directive as the purpose of an Islamic state: "Muslims are those who, if we give them power in the land, establish the system of *salat* and *zakat*, enjoin right and virtue and forbid wrong and evil." *Al-Hajj* 22:41).

142. The oft-cited rationale is that a just life for a Muslim is only possible under the Shari'a, which in turn is only possible in an Islamic polity dedicated to the Shari'a.

circumstances would have effected changes in the political system.<sup>143</sup> Reading Islamic law in this way not only allows for an Islamic political entity which is governed by Islamic law, but also establishes equal citizenship rights for Muslims and non-Muslims, equality between men and women, freedom of belief, and political pluralism. For instance, there is no reason to claim that the secular setup in India, Malaysia, Nigeria, or Turkey does any violence to the Islamic beliefs of the Muslim members of its population. The same setup is true with Nangroe Aceh Darussalam in relation to the secular and unitary Indonesian state. These various arrangements are products of cultural, historical, and political developments.

It also allows what Rashid Ghannouchi calls as “participation in non-Islamic government.”<sup>144</sup> Ghannouchi cites the example of *hifl ai-fudul*<sup>145</sup> (alliance of *ai-fudul*) in concluding that:

the community of believers may participate in an alliance aimed at preventing injustice and oppression, at serving the interests of mankind, at protecting human rights, at recognizing the authority of the people and at rotating power-holding through a system of elections. The faithful can pursue all these noble objectives even with those who do not share the same faith or ideology.<sup>146</sup>

If participation in a non-Islamic government not based on Shari’a is permissible, then how can a federal Islamic state, uniquely governed by laws based on Shari’a, although subject to the national secular constitution, be any less so? Even in the pre-modern juristic discourse on the position of Muslim minorities in non-Muslim lands, the resulting implication is that if Muslims can reside in a non-Muslim polity where they will be able to manifest Islam, then Muslims are permitted to remain in that society.<sup>147</sup> In this spirit, what the author proposes is a creative arrangement that finds support in Islamic

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143. See MUHAMMAD SALIM AWWA, *ON THE POLITICAL SYSTEM OF THE ISLAMIC STATE* (1980).

144. Rashid Ghannouchi, *Participation in Non-Islamic Government*, in *LIBERAL ISLAM*, *supra* note 76, at 89.

145. *Id.* (This was an agreement among several pre-Islamic Arab tribes to support the wronged, maintain close relations with relatives and take good care of them. The Prophet stressed that any good and noble contract made in *jahiliya* (pre-Islamic era/also called the Age of Ignorance) is automatically endorsed by Islam.).

146. *Id.* at 93.

147. See El Fadl, *Islamic Law and Muslim Minorities*, *supra* note 14.

traditions and holds out hope that one can both be devout Muslim and loyal citizen in the age of nation-states.

#### IV. THE BANGSAMORO FEDERAL ISLAMIC STATE<sup>148</sup>

##### *A. Federalism as Peace by Design*

##### 1. The Federal Proposal

The past three decades saw one autonomous experiment fail after another and the conflict, despite pockets of progress, seemingly as intractable as ever. One of the claims this Paper makes is that these arrangements did not take seriously into account religious and cultural factors which by and large formed the core of the separateness of the Moro identity. They focused instead on self-government and economic development, both of which were not even effectively attained as envisioned in the 1996 Peace Agreement. It is not implausible to argue that the disregard of such constitutive characteristics, together with the economic inequality prevalent in the region, forms part of the reason why this conflict still persists and why there is an Islamic resurgence in the first place.

The proposal for a federal solution to the conflict is not new. As early as the 1990s, it has been part of a plethora of choices<sup>149</sup> considered as a solution to the Moro rebellion. But inasmuch as the conflict is in part sustained by the disregard of the Islamic factor, the author reintroduces the federalism

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148. Bangsamoro literally means Moro nation. The author proposes this solution with the understanding that Islamic thought allows such an arrangement, and thus removes the option of secession as the only means to fulfill aspirations of self-determination. The author also does not intend to design a whole federal framework for the entire Philippine Republic. The solution simply limited to a single Islamic federal enclave, made up of several Muslim provinces, within a unitary nation-state governed by a national secular constitution. The other provinces and territorial entities that currently make up the rest of the Philippines are assumed to maintain their status quo. Even as President Arroyo calls for a transition to a federal system of government, one of the pitfalls envisioned if federalism is implemented in its conventional national scope, is that it may unintentionally lose the necessary focus in solving the Moro problem, e.g., scarce resources would have to be divided up among many provinces turned federal states.

149. The options included a federal Bangsamoro state, Islamic Autonomous Region, independent statehood for Mindanao and Sulu, and enhancement of existing autonomy arrangement by amending the ARMM Organic Law. See BACANI, *supra* note 55, at 112.

concept through the lens of religious diversity, and as earlier justified from within the Islamic tradition, hence the term, religious federalism.<sup>150</sup>

In the face of the need to recognize such diversity, together with the need to preserve political and national integrity, federalism appears to be an attractive solution for several reasons. First, it provides for a constitutionally-enshrined power-sharing arrangement. Second, in doing so, it enables two peoples to chart a common national destiny while preserving their organic differences. And third, it brings government closer to the people by providing for self-government in particular areas. It is certainly a compromise between the absolute sovereignty position of the Philippine Government and that of independent statehood for the MILF.

Federalism is normally understood as a form of political structure and organization which provides for several layers of authority in a polity.<sup>151</sup> What is often overlooked is that it is also a normative value concept. It is an expression of how humans, as autonomous beings, understand their relationships with each other and translate those into a workable societal governance structure. Hence, federalism must “involve both a set of attitudes and a set of institutions that, through constitutional means, can establish those means to transform those attitudes into instruments of self-government.”<sup>152</sup> To be federal, in other words, is to embody that mindset and commitment to recognize and accommodate diversity while pursuing a common project, and to have it reflected in the structures of government. There must have been a prior commitment that difference should be recognized and accommodated. Without it, the citizen confronts a choice between identifying and professing loyalty to the central government as citizen and to his community as a believer.<sup>153</sup> This arrangement precisely allows an avenue for these divided loyalties to be manifested and be made to complement with each other. A Moro identity does not necessarily have to be divorced from Filipino citizenship.

The autonomy narrative, of which federalism is a part, has become a familiar one throughout the world. Governments have fiercely resisted calls

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150. Daniel Elazar coined the term “religious federalism;” *But see Gaili, supra* note 114 (He says this is a recipe for majoritarian tyranny).

151. ELAZAR, *FEDERALISM, supra* note 17, at 5.

152. *Id.*

153. Edward Rubin & Malcolm Feeley, *Federalism and Interpretation*, 38 *PUBLIUS* 167 (2008) (claiming that federalism is a matter of political identity).

for autonomy from minorities within its midst, fearing it will be one step down towards the slippery slope of disintegration of the nation-state. Indeed, in 1999, East Timor rejected the offer of autonomy by the Indonesian government and sought independence instead. On this matter, the prevailing Kymlickan view on autonomy and self-government is illuminating.<sup>154</sup> While it is potentially socially destabilizing, the alternative — a denial of such self-government rights — is also equally fraught with possibilities of destabilization. The argument cuts both ways, it appears. On the one hand, autonomy and cultural/religious differentiation operate to minimize allegiance to the state on the part of the particular community by seemingly emphasizing regional interests and distinctiveness. On the other hand, the continuing denial of such right also leads to the same consequences, and in fact, fuels separatist tendencies further. Thus, federalism can be seen as a practical structural and political response to the reemergence and reassertion of long-standing differences.<sup>155</sup>

Federalism is simply defined as the combination of self-rule and shared rule.<sup>156</sup> Today, more than 40% of the world's population lives in a federal state of some sort.<sup>157</sup> This principle has been applied to a wide variety of relationships. For instance, it has been used to accommodate varying kinds of differences such as linguistic in Belgium and Canada, ethnic in Nigeria, India, Spain, and Malaysia, religious in Sudan<sup>158</sup> or it is simply used to support local liberties vis-à-vis the central government as in Switzerland. Driven by the necessity of meeting these and a myriad of other cross-cutting cleavages and identities, other forms subsumed under the term federal arrangement have emerged in the twentieth century. Elazar conditions the use of the term on the existence of a “formal agreement between the entities involved that takes on constitutional force as a result of the striking of a

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154. See Kymlicka, *supra* note 17.

155. See Richard Simeon & Christina Murray, *Recognition without empowerment*, 5 INT'L J. CONST. LAW 722 (2007) (“The primary constitutional device for empowering minorities (provided they are geographically concentrated) is federalism.”).

156. DANIEL ELAZAR, EXPLORING FEDERALISM 12 (1987) [hereinafter ELAZAR, EXPLORING FEDERALISM].

157. *Id.*; See also DANIEL ELAZAR, FEDERALISM: AN OVERVIEW (1995); Forum for Federations, Introduction to Federalism, available at <http://www.forumfed.org/en/federalism/introduction.php> (last accessed Apr. 27, 2009).

158. See Gaili, *supra* note 114; See generally OMER AWADELLA ALI GASMELSEID, FEDERALISM AS CONFLICT-MANAGEMENT DEVICE FOR MULTIETHNIC AND MULTICULTURAL SOCIETIES: THE CASE OF SUDAN (2006).

bargain that guarantees their respective integrities as specified.”<sup>159</sup> In practice, this refers to a constitutionally enshrined arrangement that infuses federal principles and practices into what would otherwise be a unitary structure. Under this category of quasi-federalisms would be found autonomous regions,<sup>160</sup> consociations, and other asymmetrical federal setups such as federacies,<sup>161</sup> associated states<sup>162</sup> and condominiums.<sup>163</sup> Although there are subtle differences, all these arrangements imply some form of greater internal autonomy wielded by the smaller territory in relation to the larger state. Federacy arrangements, in particular, offer more flexibility in fitting special demands for self-government into the constitutional architecture of the larger polity. Federal principles are thus flexible enough to meet the unique circumstances of each polity struggling to address internal differences in an effort to achieve political integration and preserve the territorial integrity of the nation-state. For this Article, the author uses the term federal solution to refer to a federacy arrangement which accurately captures the asymmetric federal setup which the author proposes as the Bangsamoro Islamic state. The author’s main motivation for this proposal is that a conventional federal setup may lose the necessary focus in solving the conflict, as for instance, scarce resources would have to be divided among many provinces or regions turned federal states.

The desirability of federalism as a means to accommodate diversity and possibly end cultural/religious conflicts is clearly seen from the proliferation of such federal arrangements in recent decades. A key feature of second-

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159. ELAZAR, *EXPLORING FEDERALISM*, *supra* note 156, at 46 (“[N]ot all ineffective centralization is the equivalent of federalism.”).

160. Examples of autonomous regions include the ARMM in the Philippines, Aceh and Papua in Indonesia, and Hong Kong in China.

161. Examples of federacy include Iraqi Kurdistan in Iraq, Puerto Rico and Northern Marianas in the U.S., Faroe Islands and Greenland in Denmark, Isle of Man in the United Kingdom, Kashmir in India and Madeira Islands in Portugal.

162. Examples of associated states are Netherlands Antilles in the Netherlands, San Marino in Italy, Monaco in France, Liechtenstein in Switzerland and Federated States of Micronesia in the U.S.

163. Condominiums are rare in practice due to difficulty of ensuring cooperation between the sovereign powers. Example of a present condominium is Pheasant Island, a river island located in northern Spain, with France and Spain sharing sovereignty.

order constitutions,<sup>164</sup> or those adopted with a view to achieving pragmatic ends especially in divided societies, the federal setup was one of the crucial components of both the recently-crafted Afghan and Iraqi constitutions.<sup>165</sup> Constitutions in this tradition are bargains arising out of necessity.<sup>166</sup>

Juan Linz posits that multinational federalism appears to be the result of an effort to hold together within the state, territories within which an old or new national sentiment or identity exists or has emerged and becomes incompatible with a unitary state.<sup>167</sup> In the Philippine context, this rationale speaks to the historical claim of the Moros that they were never part of the Philippine republic to begin with. But even without conceding the historical basis argument, there is simply no reason to deny autonomy of some form to a clearly distinct political and religious community with a manifest desire for self-government and self-determination. Compelling moral and political reasons allow territorially concentrated national minorities to a degree of real self-determination, and with this, a right to determine their national “selves,” through a federal system.

One particular reason why federalism is a more feasible solution is that it provides a more rigid structural framework which does not require either side to continually possess “bargaining chips” short of the threat of secession or violence in order to secure concessions or look after its own particular interests.<sup>168</sup> This rigidity is characterized by a relationship that is generally fixed in some form that is resistant to change as it is inscribed in a constitution which is subject to strict revision requirements. Autonomy arrangements, compared to federal setups, as both the Aceh and ARMM situation show,<sup>169</sup> are vulnerable to reversals and other similar efforts to

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164. These are also known as compromise constitutions. The constitutions of South Africa, Canada, Spain, Iraq and Afghanistan fall under this category. See generally AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* (1977); DONALD HOROWITZ, *ETHNIC GROUPS IN CONFLICT* (2000); Donald L. Horowitz, *Conciliatory Institutions and Constitutional processes in Post-Conflict States*, 49 WM. & MARY L. REV. 1213 (2008).

165. This is an example of the more prevalent holding-together type of federalism as opposed to the classic coming-together type of federalism that characterized polities such as the United States and Switzerland.

166. See RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* (1999).

167. JUAN LINZ, *DEMOCRACY, MULTINATIONALISM, AND FEDERALISM* 17 (1997).

168. Rubin & Feeley, *supra* note 153, at 176-77.

169. See Rodd McGibbon, *Secessionist Challenge in Aceh and Papua: Is Special Autonomy the Solution?* (East-West Center Washington, Policy Studies No. 10,

undermine it. Unlike the autonomy regime currently in place in the Philippines, funding, for instance, will not be dependent on the whims and caprices of the officials in the national government. To illustrate, in 2001, over 95% of ARMM revenues came from the central government.<sup>170</sup> Also, in the aftermath of his all-out war against the MILF, deposed former President Estrada bypassed the ARMM regional government and sent local development aid and rehabilitation funds directly to the local government units. Republic Act No. 9054 (R.A. No. 9054), the principal governing law of the ARMM, also failed to establish fiscal independence, despite the grant of limited powers of taxation and revenue-sharing arrangements with the central government.<sup>171</sup> It also did not give ARMM officials any control over budgetary planning and disbursement, further entrenching the culture of dependence and mendicancy to the beneficence of the political players in Manila.<sup>172</sup>

More importantly, the rigid external boundaries owing to its constitutional roots and the enhanced internal autonomy inherent in a federal setup allow religious diversity to flourish. At present, there are impediments even to the application of Islamic family law in the Philippines, flowing from the legal effects of the secular principles enunciated in the Constitution.<sup>173</sup> Federalism offers a unique “opportunity for self-fulfillment and self-development for the minority through institutions it controls while maintain the ability of both the majority and the minority groups to pursue common goals.”<sup>174</sup> It creates that political and cultural space for minorities to pursue their religious aspirations and development strategies and to counteract imposition of majority views. Contrasted with the notion of pluralism ensuring its own existence, the constitutional bases of the federal compact guarantees this existence and does not, in the words of Elazar, “leave so vital a task to chance, that is to say, to the possible existence of

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2004), available at <http://www.eastwestcenter.org/stored/pdfs/PS010.pdf> (last accessed Apr. 27, 2009); See BACANI, *supra* note 55.

170. Astrid Tuminez, *This Land is Our Land: Moro Ancestral Domain and its implications for Peace and Development in the Southern Philippines*, 27 SAIS REVIEW 82 (2007).

171. *Id.*

172. See BACANI, *supra* note 55, at 85-86.

173. See Anshari Ali, *The Legal Impediments to the Application of Islamic Family law in the Philippines*, 27 J. MUSLIM MINORITY AFF. 93 (2007).

174. LIPJHART, *supra* note 164, at 3.

cultural or social phenomena which, within the right environment, manifest themselves politically as pluralism.”<sup>175</sup>

An oft-repeated rationale and goal for federal systems is the motto “unity in diversity.” The key to making the system work is to strike the right balance in this paradox, as reflected in institutional structures and practices. This asymmetric federal arrangement carries the possibility of addressing the problems identified with previous autonomous regimes, such as the issue of ancestral domain for the Moros, inability to live out their Islamic aspirations, in-existent economic development, and failure to take into account the welfare of both Muslims and non-Muslims in the autonomous regions thereby entrenching opposition by non-Muslims to any long-term solution. At the same time, it makes for a realistic site of negotiations concerning the interests of both the Philippine government and the Moro people. First, it holds together otherwise disparate, if not, clashing, communities with shreds of commonality within a single nation-state. Second, it fulfills the right to self-determination of distinct minority communities, specifically the Moro people, by allowing self-government within a federal framework, and thus satisfy legitimate claims of these communities and third, within this federal framework, it institutionalizes legal pluralism and allows the enactment of religion-based laws which would be enforced within these territorial boundaries.

While federalism per se cannot be deemed a panacea to the Moro problem, comparative experiences of other jurisdictions<sup>176</sup> and failed experiences of the past offer hope that it is a path that might be worth pursuing.

## 2. A Federal Islamic State?

Edward Rubin and Malcolm Feeley wrote that “a people’s individual commitments in the political realm, their sense of who they are and where they belong, will determine the descriptive reality and the prescriptive necessity of federal arrangements.”<sup>177</sup> The author’s proposal for a federal Islamic state seeks to connect this Islamic identity to the need for a structure that will best address a conflict characterized by identity differences and by the resulting economic disparities that arose.

The use of the term Islamic to describe a state might strike some as problematic, however, especially as it is used in the context which the author

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175. ELAZAR, *FEDERALISM*, *supra* note 17, at 25.

176. *Id.*

177. Rubin & Feeley, *supra* note 153, at 203.

is proposing here, namely, an Islamic state under a secular republic. But what is an actual Islamic state?<sup>178</sup> To be certain, it cannot be the Islamic state during the Prophet's time, for the Prophet is no longer with us. It is also not disputed that what could pass as the classical Islamic state disappeared upon the fall of the Ottoman Empire in 1924, and with it, the abolishment of the caliphate. In fact, historical evidence would even point that there has been no single Islamic model for state and religious institutions in the past.<sup>179</sup> Even Maududi's conception of a truly Islamic state fused Western-style constitutional structures with Islamic principles.<sup>180</sup> Hence, the author argues that in contemporary times, it is left for modern nation-states who declare themselves as Islamic to define what the term means and entails. That is what has actually happened. The result is a diverse set of arrangements, primarily seen from their constitutional provisions and in country-specific practices. Despite the misleading nature of the term as singularly manifesting Islam, the reality is that there are a lot of variations as you move along the Islamic state spectrum, as local cultural contexts and particular historical circumstances come into play. The bottom line then is that designing an Islamic state is a matter of comparative exercise.<sup>181</sup>

Notwithstanding the debates on the nature of Shari'a as state-enacted positive law, today, a state described as Islamic, by and large, generally refers to a state which enshrines the Shari'a either as: 1) a basis of laws; 2) as a standard by which legislation is measured against; or 3) as source of laws itself. The term may also apply to those states which simply declare Islam as their official religion and nothing more, although this is debated in some places.<sup>182</sup> This is often inscribed in the state's constitution no less. A large

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178. For a historical discussion on the Islamic state, see NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* (2008); compare AN'NA-IM, *supra* note 115, at 35, 45. Feldman states that an Islamic state is unworkable and that Muslim states are not as Islamic as the ideal prescribed by Islam in its foundational sources.

179. IRA LAPIDUS, *HISTORY OF ISLAMIC SOCIETIES* (2002).

180. MAUDUDI, *supra* note 135, at 314-25.

181. See generally Tad Stahnke & Robert Blitt, *Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 36 *GEO. J. INT'L L.* 947 (2005), available at [http://www.uscirf.gov/images/stories/pdf/Comparative\\_Constitutions/Study0305.pdf](http://www.uscirf.gov/images/stories/pdf/Comparative_Constitutions/Study0305.pdf) (last accessed Apr. 27, 2009).

182. It is uncertain if declaring Islam as religion of the state suffices to make the state an Islamic one without the constitutionalization of the Shari'a as basis or source of law. In Malaysia, proponents of secularism emphasize that the constitutional

number of Muslim states are increasingly declaring themselves as Islamic at present.<sup>183</sup> Although they all incorporate structures of Western liberal constitutional democracies, they are far from homogenous. Varying degrees of relations between Islam and the state can be seen in differing state constitutions and practices.

Thus, Iraq, while declaring Islam as the state religion and the Shari'a as basis for the country's laws,<sup>184</sup> making it a truly Islamic state, also provides for freedom of religion and of thought,<sup>185</sup> and guarantees equality of rights for everyone without regard to gender, race, religion, color, creed, belief or opinion, or economic and social status.<sup>186</sup> Afghanistan, a declared Islamic state, guarantees the freedom of belief for believers of other faiths in the exercise and performance of their religious rituals,<sup>187</sup> and guarantees the fundamental rights to equality of every individual.<sup>188</sup> Closer to home, Malaysia, while declaring Islam as the official religion of the federation, under Article 11, also guarantees the right of every person to profess and practice his own religion. The caveat is that the state may control or restrict the propagation of any religion, doctrine or belief among persons professing the Muslim religion.<sup>189</sup> This is in order not to induce apostasy on the part of Malaysian Muslims. Nevertheless, non-Muslims are free to carry on missionary work among other non-Muslims. In Tunisia, which boasts of the first Arab constitution written in 1861, Islam is declared the state religion and the President must be a Muslim.<sup>190</sup> However, it does not have Shari'a courts, polygamy is outlawed, and extrajudicial divorce (*talaq*) is prohibited. Its constitution also provides for freedom of religion and belief although it is subject to the necessities of public order.<sup>191</sup> It does not permit the establishment of political parties on the basis of religion and prohibits efforts to proselytize Muslims, as in Malaysia. Until a court ruling last year, the

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declaration of Islam as the official religion of the federation is for ceremonial purposes only but that does not make Malaysia an Islamic state. *But see* Joseph Fernando, *The Position of Islam in the Constitution of Malaysia*, 37 J. SOUTHEAST ASIAN STUD. 249 (2006).

183. See Stahnke & Blitt, *supra* note 181.

184. IRAQ CONST., art. 2.

185. IRAQ CONST., art. 2.

186. IRAQ CONST., art. 14.

187. AFGHANISTAN CONST., art. 2 (2).

188. AFGHANISTAN CONST., art. 22.

189. MALAYSIA CONST., art. 11 (1).

190. TUNISIA CONST, Chap. 3, art. 38.

191. TUNISIA CONST, Chap. 1, art. 5.

wearing of Islamic headscarves was limited in government offices and is discouraged at certain public gatherings.<sup>192</sup>

Other Muslim-majority countries which provide a constitutional guarantee of freedom of religious belief are Albania, Bangladesh, Turkey, and Sudan. Of course, actual practice may vary from what is written on the constitution, as in the case of Sudan where there are reports of widespread discrimination against non-Muslims despite the constitutional provision to the contrary,<sup>193</sup> but a constitution at least sets a fundamental agreement to what ought to be the rules of the political order, and as such serves a normative function to achieve a desired future.

The 2005 Comparative Study of Muslim Constitutions released by the U.S. Commission on International Religious Freedom summed up its observations as follows: a) countries in which Islam is the declared state religion may provide constitutional guarantees of the right to freedom of religion or belief that compare favorably with international legal standards;<sup>194</sup> b) countries with Islam as the declared state religion may maintain constitutional provisions protecting the related rights to freedom of expression, association, and assembly or the rights of equality and non-discrimination with regard to, *inter alia*, religion and gender which compare favorably with international standards;<sup>195</sup> and c) a number of constitutions of predominantly Muslim countries incorporate or otherwise reference international human rights instruments and legal norms.<sup>196</sup>

These findings, together with the previous discussion on reading Islam, or specifically Islamic *fiqh*, as time and place-bound (historicity and contingency lenses) illuminates for us how an Islamic state which will

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192. *Tunisia's Hijab Ban Unconstitutional*, TURKISH WEEKLY, Oct. 11, 2007, available at <http://www.turkishweekly.net/news.php?id=49443> (last accessed Apr. 27, 2009).

193. See Liv Tønnessen & Anne Sofie Roald, *Discrimination in the Name of Religious Freedom: The Rights of Women and Non-Muslims after the Comprehensive Peace Agreement in Sudan* (Chr. Michelsen Institute (CMI), CMI Report No. R2007:5, 2007), available at <http://bora.cmi.no/dspace/bitstream/10202/22/1/Report%20R%202007-5.pdf> (last accessed Apr. 27, 2009).

194. See Stahnke & Blitt, *supra* note 181.

195. *Id.*

196. *Id.*

entirely be consistent with freedom of belief, protection of non-Muslims and women's rights can be constructed.

*B. Some Salient Issues in the Bangsamoro Federal Islamic State (BFIS)*

The constitutional design of a federal arrangement mainly involves clarifying the realms of self-government. This involves demarcating the territory to be included in the region, the division of power and the rules for resolving disputes between the layers of government. But equally important is what will be the system employed within the smaller entity and its relation to the federal government. For this Article, the author focuses on the second aspect.

What makes an Islamic state Islamic is the application of Shari'a or Islamic law. This is presumably part of what the MILF meant when they stated that a comprehensive approach to the Bangsamoro problem involves establishing "a system of life and governance suitable and acceptable to the Bangsamoro people."<sup>197</sup> This is also consistent with their previous calls for an independent Islamic state. Given the reality that Moros are discriminated against even in Mindanao and are deprived of opportunities for self-advancement, the BFIS is an attempt to equate political borders with cultural and religious ones, thus providing a meaningful context for political and economic choices.<sup>198</sup>

The most popular conception of Shari'a, however, is limited to its high-profile injunctions such as the veiling of women or harsh criminal penalties. Indeed, the mere mention of an Islamic state conjures fearsome imagery of theocratic rule, of harsh and unequal laws, and especially discriminatory treatment of women and non-Muslims.<sup>199</sup> In fact, when the 1996 Final Peace Agreement providing for the creation of the autonomous regions was signed, Christian residents feared the imposition of these "repressive" laws on non-Muslims.<sup>200</sup> The stereotype of an Islamic state for most Filipinos is

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197. SANTOS, *supra* 8, at 11.

198. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995) (Will Kymlicka says that it is only through membership in their own societal culture which enables meaningful individual self-choice. A person selects from a range of options determined by his cultural heritage and this provides salience to his choices.).

199. For this very reason, Ahmed Gaili argues that religion-based federalism does not offer protection to the minority from majoritarian tyranny in the Sudanese context. See Gaili, *supra* note 114.

200. The stereotype of an Islamic state for most Filipinos is that of Saudi Arabia, where the Wahhabist brand of Islam is practiced and where a great number of Filipino overseas workers are employed. Stories of amputation and death by

that of Saudi Arabia, where the Wahhabist brand of Islam is practiced and where a great number of Filipino overseas workers are employed. Stories of amputation and death by beheading abound in Filipino popular consciousness. This presumably contributed to the resulting lack of support from the Christian majority and was also one of the principal reasons why the autonomous arrangement did not work.<sup>201</sup>

True, classical *hadd* penalties are severe. Theft, for instance, is punished with amputation of the hand. Adultery is punished with death by stoning. What gets lost in the cacophony are the *fiqh* injunctions that an Islamic state should not claim immediate and scrupulous enforcement of crimes meriting *hadd* punishment until it has fulfilled its obligations towards the community of ensuring social justice and civil rights.<sup>202</sup> Moreover, the application of these penalties has usually been limited by extraordinarily strict rules of evidence. For instance, fornication (*zina*) can only be punished after testimonies by four upright male Muslims, who have personally witnessed the sexual act taking place. Otherwise, a voluntary confession is necessary.<sup>203</sup> An explanation given for this is that since *hudud* crimes are deemed offenses against God and since God is omnipotent and merciful, then He does not need to have all His claims satisfied. Another explanation is that these harsh penalties are simply meant to be threats to enforce acceptable social behavior.<sup>204</sup>

These and other concerns are certain to come up in the creation of the BFIS. But the author argues that it is simply a matter of harmonizing what traditional Islamic doctrine allows with the exigencies presented by the

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beheading as told by countless overseas workers abound in Filipino popular consciousness. See, e.g. *Filipino, Yemeni, beheaded for Saudi murders: 33 other OFWs on death row*, PHILIPPINE DAILY INQUIRER, June 13, 2007, available at [#](http://globalnation.inquirer.net/news/news/view_article.php?article_id=71122) (last accessed Apr. 27, 2009).

201. See Benedicto Bacani, *The Mindanao Peace Talks: Another Opportunity to Resolve the Moro Conflict in the Philippines* (U.S. Inst. of Peace, Special Report No. 131, Jan. 2005), available at <http://www.usip.org/pubs/specialreports/sr131.pdf> (last accessed Apr. 27, 2009).

202. Walif Saif, *Sharia and Modernity*, in RELIGION, LAW AND SOCIETY: A CHRISTIAN-MUSLIM DISCUSSION 11 (Tarek Mitri ed., 1995).

203. HUNT, *supra* note 125, at 44.

204. *Id.*

modern-day Filipino Muslim situation, the ultimate goal of which is a space to manifest their Islamic identity.

1. Freedom of belief and treatment of non-Muslim minorities

The first question associated with, and arguably the primary challenge to any plans to introduce or implement the Shari'a or any religious law for that matter in a specific territory deals with the right of minorities who will inevitably find themselves residing inside the BFIS. It is important to point out at the outset that enshrining Islam as the official religion of the region does not necessarily mean second-class citizenship for non-Muslims or forced coercion in an Islamic culture and way of life.<sup>205</sup>

a. *Dhimmi status*

The concept of *dhimmis* in classical Islam has been the subject of many writings.<sup>206</sup> Critics have labeled it as proof that Islam treats non-Muslims as lower in stature than its own adherents.<sup>207</sup> *Dhimma* refers to a covenant of protection between Muslims and non-Muslims who live in a single community. According to this covenant, a non-Muslim enjoys all rights and privileges in a particular society including a guarantee of security in person and property, except for holding posts of a religious nature in exchange for the payment of *jizya* (poll tax).<sup>208</sup> If non-Muslims engage in defending a community alongside fellow Muslim citizens, then they are exempt from paying the *jizya*. The expansion of Islam during its formative years followed a narrative of war and conquest. Understandably, the distinction between *dar-al-harb* (abode of war) and *dar-al-Islam* (abode of Islam) still held significance.<sup>209</sup> In such a setting, non-Muslim peoples, specifically Christians and Jews, residing in lands acquired through Muslim conquest receive the status of *dhimmi* upon payment of the *jizya*. While they did not enjoy the

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205. Cf. Abdullahi An-Na'im, *Religious Minorities under Islamic Law and the Limits of Cultural Relativism*, 9 HUM. RIGHT Q. 1 (1987).

206. See, e.g. Nasim Hasan Shah, *The Concept of Al-Dhimmah and the rights and duties of Dhimmis in an Islamic State*, 9 J. MUSLIM MINORITY AFF. 217, 217-22 (1988); Bert Breiner, *Islamic Sharia and the status of non-Muslims in RELIGION LAW & SOCIETY: A CHRISTIAN-MUSLIM DISCUSSION* (Tarek Mitri ed., 1995); ABDUL RAHMAN AWANG, *THE STATUS OF THE DHIMMI IN ISLAMIC LAW* (1994); DAVID LITTMAN, *PROTECTED PEOPLES UNDER ISLAM* (1976).

207. See, e.g. ROBERT SPENCER, *MYTH OF ISLAMIC TOLERANCE: HOW ISLAMIC LAW TREATS NON-MUSLIMS* (2005).

208. See HUGH KENNEDY, *THE PROPHET AND THE AGE OF THE CALIPHATES: THE ISLAMIC NEAR EAST FROM THE SIXTH TO THE ELEVENTH CENTURY* (2004).

209. See generally El Fadl, *Islamic Law and Muslim Minorities*, *supra* note 14.

same rights accorded to Muslims, they were not given the same obligations. The criticism against *dhimmitude* fails to take note of this practical and historical context. Moreover, it can also be argued that the notion of citizenship is wholly a modern-day construct.<sup>210</sup> Thus, it cannot be considered “second-class citizenship” even by modern standards. Since the *umma* both functioned as a religious and political community, and therefore membership was exclusively based on adherence to Islam as prerequisite, non-Muslims did not qualify. But citizenship, rather than religion, as derived from the constitution, has now become the basis of rights. A more apt contemporary analogy would be of that between citizens and resident aliens. Abdullahi An-Na’im nevertheless asserts that “non-Muslim minorities within an Islamic state did not enjoy rights equal to those of the Muslim majority” as a result of this classical tradition, as do Gaili, saying that, at least in theory, in enshrining Islam as the religion of the state, classical jurisprudence on the treatment of non-Muslims is still preserved as a potential source of law.<sup>211</sup>

On this note, it is helpful to look at contemporary examples for guidance. The Malaysian constitution, for instance, specifies Islam as the religion of the state, but other religions are equally recognized and protected.<sup>212</sup> Like all other constitutions, it is ultimately a contract that will serve not only its Muslim constituents, but non-Muslims as well. This is especially important in the BFIS since there are not only Christians but also a considerable population of Lumads (indigenous peoples in Mindanao) who will have to coexist with the Moros.<sup>213</sup> In fact, today, no Muslim country recognizes dhimmi status any longer.<sup>214</sup>

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210. Classical Islam, strictly speaking, did not know citizenship. See Nawaf A. Salam, *The Emergence of Citizenship in Islamdom*, 12 ARAB LAW Q. 124 (1997).

211. Gaili, *supra* note 114, at 523.

212. MALAYSIAN CONST., Part I, § 3 (3). Islam is the religion of the federation but other religions may be practiced in peace and harmony in any part of the Federation.

213. SANTOS, *supra* note 8, at 44.

214. In Saudi Arabia, all citizens are required to be Muslims. The public practice of non-Muslim religions is prohibited so the concept of *dhimmiude* is likewise non-existent.

*b. Freedom of Religion & Apostasy*

It is likewise a well-known Qur'anic injunction that "there shall be no compulsion in religion."<sup>215</sup> Religious liberty and diversity finds strong textual support in the Qur'an and the Sunnah. One of the verses clearly states, "If your Lord had wished, all of those on earth would have surely believed. Do you then coerce people until they become believers?"<sup>216</sup> Or another which states, "If your Lord had wished, He would have made people into one nation."<sup>217</sup> More than a few also speak positively of diversity of tribes, sects, nations and peoples, including natural differences in the intellectual and physical capabilities of human beings.<sup>218</sup> The bottom line is that there is no need for any coerced unity. In the same vein, even the act of leaving the Islamic faith is also, under the modernist school of thought, a matter of freedom of belief. Mohamed Adil writes that "a mere renunciation from the religion of Islam without contemptuous attack on the religion of Islam is free from worldly punishment as he will be punished in the hereafter."<sup>219</sup> The rationale for this is that the right to freedom of religion in Islam is absolute, as humankind is bestowed with a choice whether to accept or reject Islam. The onus is on the believer if he chooses to reject the guidance offered by the Qur'an, since it will be his own misfortune to bear the suffering once he has gone astray.

*C. Built-in Protection in the Federal Constitution*

Moreover, although a federal state with autonomous powers in certain areas, the BFIS is still subject to the Philippine Constitution, which would guarantee individual freedoms including freedom of belief. Islamic rights and duties will be qualified by constitutional provisions. A federal Bill of Rights would still apply to both Muslims and non-Muslims throughout the country, and ensure that certain individual rights are protected. The Supreme Court shall be the final guardian of these rights. This is the same setup followed in the Malaysian Constitution which guarantees this freedom although its federal states are free to implement Shari'a in accordance to their specific needs.<sup>220</sup> In India, another secular country, the constitutional freedom of

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215. *Al-Baqara* 2:256.

216. *Yunus* 10:99.

217. *Al-Maeda* 5:48.

218. SACHEDINA, *supra* note 137, at 86.

219. Mohamed Adil, *Freedom of Religion and Law of Apostasy in Malaysia*, 2 ASIAN J. COMP. L., art. 6 (2007).

220. For instance, the state of Negeri Sembilan even allows Muslims to officially convert from Islam upon application to the Shari'a court and after consultation with a *Mufti*. SACHEDINA, *supra* note 137, at 86.

religion also ensures that Muslims can either stay as Muslim or embrace another religion without being punished for it.

Perhaps the greatest source of optimism comes from within the Moro community itself. In a roundtable discussion facilitated last year by the U.S. Institute of Peace, young Moro leaders from all over the country agreed that “a Moro homeland ruled by Islam should include rights for minorities, protection of non-Muslims, women’s rights, the rule of law, participation by youth and a potential religious advisory council who will offer advice to the Bangsamoro Chief Executive.”<sup>221</sup> This is indeed a hopeful vision for the BFIS.

#### 1. Shari’a Courts in the BFIS

Muslim courts and judges are integral to a society governed by Islamic law. Thus, even in the classical period, as a matter of practical necessity, Muslims residing in non-Muslim territories acknowledged the reality that Muslim judges may be appointed by non-Muslims.<sup>222</sup>

Shari’a courts already exist in the current Philippine judicial structure. It was provided for in the Philippine Code of Muslim Personal Laws<sup>223</sup> (CMPL) which was decreed by President Marcos in 1977, as part of his unilateral implementation of the Tripoli agreement, and in pursuant to the mandate of the 1973 Constitution to “consider the customs, traditions, beliefs and interests of national cultural communities in the formulation and implementation of state policies.”<sup>224</sup> It recognized the legal system of Muslims as part of the law of the land, established Shari’a courts and codified the rules for civil and family relations. These courts have jurisdiction over

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221. Astrid Tuminez, *The Bangsamoro Future: Prospects and Challenges* (U.S. Inst. Of Peace, Young Moro Leaders Forum, Special Report, June 11, 2007), available at [http://www.usip.org/philippines/reports/yml\\_forums.pdf](http://www.usip.org/philippines/reports/yml_forums.pdf) (last accessed Apr. 27, 2009).

222. El Fadl, *Islamic Law and Muslim Minorities*, *supra* note 14, at 151.

223. A Decree to Ordain and Promulgate A Code Recognizing the System of Filipino Muslim Laws, Coifying Muslim Personal Laws, and Providing for its Administration and For Other Purposes [CODE OF MUSLIM PERSONAL LAWS OF THE PHILIPPINES], Presidential Decree No. 1083 (1977).

224. During the Martial Law period from 1972-1983, presidential decrees operated with the same force as bills passed as laws by Congress.

family and personal status law for Filipino Muslims, only in the Muslim communities in 10 provinces and six cities.<sup>225</sup>

Under the Code, there are two kinds of Shari'a Courts: 1) the Shari'a District Courts and 2) the Shari'a Circuit Courts.<sup>226</sup> Shari'a District Courts have exclusive original jurisdiction over cases involving offenses defined and punished under the CMPL and all civil actions and proceedings between parties who are Muslims or have been married according to the provisions of the Code. These actions and proceedings involve disputes relating to marriage, divorce, breach of contract to marry, customary dower, disposition and distribution of property upon divorce, maintenance and support, restitution of marital rights, and all cases involving disputes related to communal properties. The District Court also exercises appellate jurisdiction over decisions by the Shari'a Circuit court.<sup>227</sup> Its decisions are final and not subject to any appeal except on purely questions of law which is directly appealable to the Supreme Court. Shari'a courts are part of the Philippine court system, and are subject to the administrative supervision of the Supreme Court.<sup>228</sup>

Admittedly, most of the problems identified with this setup involve matters of implementation. In a recent survey<sup>229</sup> conducted on the state of the Shari'a law in the Philippines, some of the major concerns included: 1) the wide gap between the actual number of existing Shari'a courts compared with the number mandated by law; 2) low-level of awareness on the nature and function of Shari'a courts among the Muslim community; and 3) failure of local government units to appropriate funds for local Shari'a courts. A federal setup could theoretically address fiscal independence for these courts, and enable the growth of support institutions for training and education.

If the jurisdiction of these Shari'a courts is not modified to include criminal jurisdiction, the new federal setup would involve minimal changes to the judicial structure currently in place. Decisions of Shari'a Circuit Courts as courts of first instance would be appealable to the Shari'a District Courts. A federal Shari'a court could be established which would hear appeals from both lower courts. Decisions of the federal Shari'a court would not be appealable to the Supreme Court, but its judges can still remain

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225. CODE OF MUSLIM PERSONAL LAWS OF THE PHILIPPINES, art. 137.

226. *Id.* art. 144.

227. *Id.* arts. 138, 150.

228. PHIL. CONST., art. VIII, § 6.

229. See ISABELITA SOLAMO-ANTONIO, THE SHARI'A COURTS IN THE PHILIPPINES: WOMEN, MEN & MUSLIM PERSONAL LAWS (2003).

subject to the administrative powers of the Supreme Court for disciplinary purposes, pursuant to the present setup in place.

## 2. Qualifications of Shari'a Judges

For obvious reasons, Shari'a court judgeships may plausibly be restricted to Muslims. As to other qualifications, the CMPL currently prescribes that the general qualifications of regular court judges in the country apply to Shari'a court judges, in addition to knowledge of Islamic law and jurisprudence.<sup>230</sup> Shari'a District Court judges in particular require that the applicant must have passed the regular bar examinations and have been engaged in the practice of law in the Philippines for at least 10 years. This excludes the ulama who, even after having served as judge in the Circuit Court, is still ineligible for appointment unless they have passed the regular bar examinations. For Shari'a Circuit Courts, the CMPL requires only membership in the Shari'a bar which is achieved by passing an examination in Shari'a and Islamic jurisprudence. These examinations are open to holders of a law degree or graduates of Islamic law and jurisprudence from recognized universities. Moreover, high school graduates (*thanawi*) from any institute (*ma'had*) in the country can take the examination provided he or she has completed a 45-day Shari'a training seminar conducted by the Office on Muslim Affairs. Compared to the legal training and qualifications of Shari'a judges in other Muslim countries, these qualifications do not seem to indicate sufficient intention to elevate the quality and prestige of the Philippine Islamic judiciary.

Lastly, the CMPL does not bar a Muslim woman from being appointed as a judge.<sup>231</sup> This, the author believes, is a good idea to preserve for the new BFIS judiciary. Islamic history is full of stories of women wielding major powers and responsibilities. It is also certainly in keeping with advancing progressive rights for Muslim women. This also seems to be a welcome trend in judiciaries in Middle Eastern countries. In Egypt, 31 female judges were appointed to the Egyptian judiciary last year alone.<sup>232</sup> In 2003, a woman was also sworn in its Supreme Constitutional Court as the

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230. CODE OF MUSLIM PERSONAL LAWS OF THE PHILIPPINES, art. 140.

231. *Id.*

232. *Egypt appoints 31 female judges despite conservative opposition*, JURIST, Mar. 14, 2007, available at <http://jurist.law.pitt.edu/paperchase/2007/03/egypt-appoints-31-female-judges-despite.php> (last accessed Apr. 27, 2009).

nation's first female judge.<sup>233</sup> Although some critics framed it as an affront to Islam, most people, including influential sheiks at al-Azhar, held that there was nothing in the Qur'an which prevents them from serving in such capacities. In conservative Emirates, the president appointed a woman, Juwan Al-Dhahiri, to sit on Abu Dhabi's Judiciary Department as its first-ever female judge very recently.<sup>234</sup> Indonesia has permitted women to serve as Islamic court judges since 1964<sup>235</sup> while Singapore recently followed suit this year.

It is clear that many challenges remain in the process of modernizing the Islamic judiciary. Apart from jurisdiction and qualification of judges, the other key issue that will have to be addressed is the education component for such a system to be effective and practicable. This includes improved quality of legal education of the members of the Shari'a bar, greater awareness of Islam and Islamic law beyond the traditional *madaris*,<sup>236</sup> and the upgrading of the Islamic system of education in general.

That this is going to be one of, if not the most crucial institution in the BFIS, brings up an urgent imperative to learn from the shortcomings of the present system in order to construct a more responsive judiciary.

### 3. Islamic Governance

The overarching significance of an Islamic state is to view the state as an instrument in the realization of the teachings and values that Islam

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233. *Egypt's first woman judge says responsibility is great*, ARABICNEWS.COM, Jan. 29, 2003, available at <http://www.arabicnews.com/ansub/Daily/Day/030129/2003012926.html> (last accessed Apr. 27, 2009).

234. *UAE appoints first female judge*, USATODAY.COM, Mar. 27, 2008, available at [http://www.usatoday.com/news/world/2008-03-27-1176124424\\_x.htm](http://www.usatoday.com/news/world/2008-03-27-1176124424_x.htm) (last accessed Apr. 27, 2009).

235. Mark Cammack, *The Indonesian Islamic Judiciary*, in ISLAMIC LAW IN CONTEMPORARY INDONESIA: IDEAS AND INSTITUTIONS 154 (R. Michael Feener & Mark Cammack eds., 2007).

236. *Madaris*, which do not incorporate basic education subjects and do not use English as a medium for instruction as prescribed by the Department of Education, are not accredited. Thus, Filipino Muslims in Mindanao are compelled to choose between going to a *madrasa* or a secular school for education. One solution offered is to accredit traditional *madaris* or to mainstream *madrasa* education by integrate the teaching of Islamic language and culture into the basic education curriculum. Another could be to encourage the offering of introductory courses in Islamic law in colleges and universities. For other recommendations and proposals on Islamic education in the Philippines, see BACANI, *supra* note 55, at 90.

proclaims.<sup>237</sup> The goals of Shari'a (*maqasid al-sharia*) are twofold: first, to establish and live out one's faith and second, to secure one's well-being on earth.<sup>238</sup> The late Hashim Salamat has always maintained that the establishment of a genuine Islamic system of government is one of the main aims of the MILF armed movement.<sup>239</sup> Indeed, it is essential to a system or way of life that will fulfill Bangsamoro aspirations. But what is it exactly? If Islam does not require a particular form of government, what model could we turn to for the BFIS? It might be helpful to identify first what values an Islamic state, and consequently, an Islamic government, seeks to promote. The concurrent bases and aims of an Islamic government are the principles of consultation, justice and equality. The first society at Medina provides a helpful window into the dynamics of the early Muslim community, and is still looked upon by many contemporary thinkers as a model for Islamic communities. In that society, Muslim, Jewish, and pagan Arab tribes coexisted peacefully through an agreement, the Constitution of Medina, which provided for the rights and obligations of the different tribes. The document, while not a political constitution in the modern sense of the word, offers justification that plural coexistence is possible, if not mandated, by a practice sanctioned by the Prophet himself.<sup>240</sup>

Since the Qur'an left room for much latitude on the matter of political affairs, rulers are permitted to adopt the most effective means for the realization of Muslim well-being, keeping in the mind these goals. Whatever the form adopted, the principle of *shura* (consultation) is considered the most important element in Islamic governance.<sup>241</sup> But while it is a principle derived from the Qur'an, it does not ordain a specific form of governance. What it simply presupposes is that the government is representative of the

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237. *Aal-E-Imran* 3:103-104; An Islamic state is not a goal or an end in itself but only a means. See ASAD, *supra* note 124, at 30.

238. See Tariq Ramadan, *The Way (Al-Sharia) of Islam*, in *NEW VOICES OF ISLAM* (Mehran Kamrava ed., 2006); Walid Saif, *Shari'a and Modernity*, in *RELIGION, LAW, AND SOCIETY: A CHRISTIAN-MUSLIM DISCUSSION* (Tarek Mitri ed., 1995).

239. Interview with MILF Leader Sheikh Salamat Hashim, *supra* note 59; See SANTOS, *supra* note 8.

240. For readings on the first Islamic society at Medina, see Anver Emon, *Reflections on the Constitution of Medina*, 1 *UCLA J. ISLAMIC & NEAR E.L.* 103 (2002); Ali Bulac, *The Constitution of Medina*, in *LIBERAL ISLAM*, *supra* note 76.

241. *Aal-E-Imran* 3:159; OBAIDULLAH FAHAD, *ISLAMIC SHURA: RELIGION, STATE AND DEMOCRACY* 86 (2007).

people's choice,<sup>242</sup> and therefore it is the mechanism by which democratic governance, in the form of consultation between the leader and the people, is realized. The Qur'anic mandate of participatory politics lends legitimacy to the Islamic government, and rules out any justification for arbitrary or despotic rule. The legislative assembly or the *majlis-i-shura* is then tasked to enact laws which have not been regulated in terms of law by the Qur'an or the Sunnah, in other words, to provide for the demands of everyday life in accordance to the needs of society.

One way to operationalize this in the BFIS is for a State Assembly (perhaps patterned after the present ARMM Regional Legislative Assembly) to function as a *majlis-i-shura*. Keeping in mind the demographic landscape of Mindanao,<sup>243</sup> at least in the areas being considered for inclusion in the BFIS,<sup>244</sup> it would also be a good idea to set a fixed number of seats for minority representation in the State Assembly, for Christians and Lumads.

#### 4. Comprehensive Shari'a: Beyond Islamic Family Law

Given the amount of Qur'anic verses regulating it, family and personal status laws are considered a prime locus of Islamic identity.<sup>245</sup> As such, in most countries, including non-Muslim majority countries, this is where Islamic law finds the most common application. In order to give fruition to what is

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242. ASAD, *supra* note 124, at 45. It is evident from the context that the expression among themselves in the Qur'anic ordinance under consideration refers to the whole community: hence, the legislative assembly must be truly representative of the entire community, both men and women.

243. SANTOS, *supra* note 8, at 44.

244. Under the Tripoli Agreement, this comprises of thirteen provinces. But this is a matter of contention in present-day peace negotiations. See generally Tuminez, *supra* note 170.

Nathan Quimpo also makes the suggestion that it might be more fruitful to avail of an interest-based approach when it comes to resolving the issue of territory and ancestral domain, i.e., fixed use of Tripoli Agreement as frame of reference. In an interest-based approach, the focus is not on the opposed positions of the contending parties but on the interests that lie behind these positions. The parties try to explore each others' interests—their needs, wants, fears, and concerns. See Quimpo, *supra* note 11, at 286.

245. JACOB NEUSNER, *GOD'S RULE: THE POLITICS OF WORLD RELIGIONS* 177 (2003). ("As the heart of the Shari'a and the basis for a strong, Islamically oriented family structure and society, Islamic family law has remained intact in most Muslim countries."). Since it was perhaps the one domain which was least affected by colonialism and necessities of modernization, Muslims are reluctant to reform it.

termed as the “Bangsamoro way of life,” presumably to be governed according to Islamic ideals, would also be helpful to consider expanding the scope of Islamic law to be applied in this region. This suggestion is not without precedent. R.A. No. 9054 gave the ARMM the power not only to establish Shari’a courts in addition to those provided under the CMPL but also to determine the direction of Shari’a implementation in the Philippines. It also mandated the ARMM Regional Legislative Assembly, in consultation with the Supreme Court, and consistent with the Constitution to formulate a Shari’a based legal system which encompasses not only personal status law but also includes Islamic commercial, criminal and election laws.<sup>246</sup> To date, all of these have not been implemented.

However, the author would caution that it would be more productive to postpone such expansion until after a more thorough and exhaustive study on the implications and consequences of such a move. Needless to say, this can be done even after the BFIS has been constituted.

#### *D. On State-enforced Shari’a and the Future of BFIS*

The consensus that has emerged from the debates and discussions on the relationship between state-enacted/positive law and the Shari’a is that there will always be a need for positive legislation but that it must operate within the boundaries set by Shari’a.<sup>247</sup> Codification necessarily requires the fixing of these norms, devoid of context and history, and absent any historical institutions that made it work in the past. Any effort therefore to fix Islamic values in a statute must be carefully considered in order not to lose an idea of the world it was first conceived in. Anver Emon writes that “the extent to which the liberal multicultural society can recognize the distinctiveness of Muslims and their embrace of Shari’a, depends on what both Muslims and non-Muslims understand Shari’a to be.”<sup>248</sup> To come up with some strands of common understanding would therefore be crucial and this is where codified Shari’a might be most useful. This is the trend nowadays with most Islamic states. In many ways therefore, codification is also an instrument of reform,

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246. R.A. No. 9054, art. 3, § 5; See also BACANI, *supra* note 55, at 62.

247. Nathan Brown, *Sharia and the State in the Modern Middle East*, 29 INT. J. MIDDLE EAST STUD. 371 (1997).

248. Anver Emon, *Conceiving Islamic Law in a Pluralist Society: History, Politics and Multicultural Jurisprudence*, SING. J. LEGAL STUD. 331, 352 (2006).

in order to meet the exigencies of contemporary times<sup>249</sup> while still keeping within divine bounds.

To this end, the BFIS is an opportunity to showcase to Filipino Muslims and non-Muslims, and perhaps even to the world at large, that a Shari'a based society can exist within a liberal, democratic constitutional framework, and where cross-cutting religious and national identities, respectful of each, can exist through a constitutional and governmental structure attuned to their needs.

## V. CONCLUSION

The author ends with an Aristotelian caveat.<sup>250</sup> The proposal is offered only as a closest approximation to full political justice that one can achieve under the prevailing circumstances, the paramount considerations being practicality and the will of the people involved. If at some point, Filipino Muslims decide that they may well live under the secular status quo, that shall be respected. Political unity must not be overvalued at the expense of peace and the well-being of a people.

To that end, it is recognized that reconciling these ideological and abstract contradictions is merely the first step towards forging a lasting solution to this decades-long conflict. It is hoped, however, that this Article contributed somewhat to the understanding of an oft-cited, but never elaborated on federal Bangsamoro Islamic state option.<sup>251</sup>

The first question that would come to the mind of any sensible reader would be: how realistic is it? The answer is that reformist Islam in the Philippine context is not an illusion. The Islam that produces rejectionist viewpoints is the same Islam that produces modernist perspectives. The realization that Islam is not simply an ahistorical system of social and political

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249. Rudolph Peters, *From Jurists' Law to Statute Law or What happens when the Shari'a is codified*, in SHAPING THE CURRENT ISLAMIC REFORMATION 82 (B.A. Roberson ed., 2003).

250. See ARISTOTLE, POLITICS IV.11. (Aristotle criticizes the ideal city-state set forth in Plato's Republic on the grounds that it overvalues political unity, embraces a system of communism that is impractical and inimical to human nature, and it neglects the happiness of the individual citizen. In Politics, he investigates the second-best constitution. He says that if the population lacks the capacities and resources for complete happiness, the lawgiver must be content with fashioning a suitable constitution.)

251. For a sampling of the literature suggesting but not elaborating on the federal Bangsamoro Islamic state option, see SANTOS, *supra* note 8; BACANI, *supra* note 55; MUSLIM PERSPECTIVES ON THE MINDANAO CONFLICT, *supra* note 9.

regulation frees up space for cultures and nations to lay the foundations of collective identity in their own contexts. And yet, despite the historicity and contingency of the Islamic tradition, it nevertheless points to the eternal divine and therefore serves as inspiration and guidance.<sup>252</sup>

But more importantly, just as we try to find these conceptual spaces in Islam for it to accommodate the demands of modernity, so must liberal democracy find spaces for Islam. It is simply unjust that the Filipino Muslim must be unwittingly made to choose between, in the words of Nancy Rosenblum, the obligations of citizenship and the demands of faith.<sup>253</sup> A genuine recognition of and commitment to diversity is essential to any state that purports to be democratic and republican. The importance of identity, religious identity in particular, is especially most striking in an age of porous borders and mobile citizens. It provides an essential backdrop for meaningful self and group choices as they chart their own futures. To insist on homogeneity when there is none, on integration rather than accommodation, is to disregard an important source of dignity and autonomy for the affected communities. The history of the Moro peoples has shown how indifference to their Islamic identity throughout time has contributed to their marginalized social and economic status today. Though difference necessarily connotes a particularist worldview, the reality is that human beings need to live together in mutual respect and cooperation to achieve the goals of a just society. What the author has attempted to do in this Article is to allow this possibility by finding strands of thought useful or compatible with the ethical imperatives of both Islam and democracy in the context of Philippine society. It appears to the author that this lack of attention to the religious undertones in the ongoing peace negotiations does not help in addressing the core issues in this conflict.

The federal proposal will not translate to peace overnight. Long-drawn conflicts have a multitude of reasons for its continuing existence. But this Article simply attempts to suggest a paradigm shift in the way we understand possible solutions to the conflict, and in the way we understand religious traditions, through a plausible discourse on how there are no inherent contradictions in Islam in a liberal democracy. The alternative is to continue with a constricted set of options, and to enjoy mere pockets of peace in a sea of war.

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252. Filali-Ansary, *supra* note 23, at 32.

253. See OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST SOCIETIES (Nancy Rosenblum ed., 2000).

In the end, the claim is that Filipino Muslims need not choose between the state and the *umma*. They can be both believer and citizen at the same time. The rest of the Filipino nation must give them the opportunity to do so.