Legal Hybridity in the Philippines: Lessons in Legal Pluralism from Mindanao and the Sulu Archipelago

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I. INTRODUCTION

"A tandem of legal co-existence is the very essence of a pluralistic society . . . ."[1]

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1. AMER M. BARA-ACAL & ABDULMAJID J. ASTIH, MUSLIM LAW ON PERSONAL STATUS IN THE PHILIPPINES, at v (1998).

We live in a world in which normative obligations do not always follow political boundaries. For a variety of political, economic, and social reasons, people may find themselves residents of a state they neither helped create nor voluntarily joined. In such situations, social contract theory seems to provide little guidance in answering difficult questions about the imposition of legal liabilities as a cost of citizenship. What allegiance do such people owe to the legal systems of the states to which they belong? Should they be permitted to adopt and follow proprietary legal codes that conform to cultural norms but exist distinct from national jurisprudential schemes? If so, should these proprietary codes be consent-based, or should they be permitted to impose demands as a cost of cultural or ethnic association in the same way that national schemes impose legal demands as a cost of political association?

For proponents of legal pluralism, such questions are not new. Under the headings of multiculturalism and cosmopolitanism, scholars of legal pluralism have grappled for some time with the nature of ethnic and cultural associations at the subnational and supranational levels to find a normative balance between territorial sovereignty, liberal rights, and community self-determination.[2] Implicit in legal pluralism is a descriptive acknowledgment that people belong—both willingly and unwillingly—to coexistent associations with overlapping norms that both accord and discord with sovereign territorial power.[3] Formal and informal associations based on politics, ethnicity, religion, geography, business, trade, and common interest all constitute "norm-generating communities," which may instill behavioral allegiances that exist within and across state boundaries,[4] and these communities, in turn, generate

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2. *See generally* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007) (exploring pluralistic approach to resolving hybridity of overlapping normative communities); Noah Feldman, Review, *Cosmopolitan Law?*, 116 YALE L.J. 1022, 1028 (2007) (reviewing the potential of cosmopolitanism to bridge normative obligations between distant communities); *see also* Vernon Valentine Palmer, *Mixed Legal Systems . . . and the Myth of Pure Laws*, 67 LA. L. REV. 1205, 1212-17 (2007) (discussing mixed legal systems in Roman, Ottoman, and European empires).

3. *See* Robert M. Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 7 (1983) ("The normative universe is held together by the force of interpretive commitments—some small and private, others immense and public. These commitments—of officials and of others—do determine what law means and what law shall be."). In this Article, I use the term "law" broadly to describe plural normative commitments, rather than the positive articulation of rule by a state-sanctioned entity. For a definitional discussion of law in the context of pluralism, see Berman, *supra* note 2, at 1177-78 (suggesting that pluralism frees scholars from debating what law "is" by allowing them to "treat[] as law that which people view as law").

4. *See* Feldman, *supra* note 2, at 1049-52 (discussing social contract theory of state political authority); Berman, *supra* note 2, at 1169-70 (noting that normative associations "include familiar political affiliations, such as nation-states, counties, towns" as well as "ethnic

practices and procedures that seek to advance common goals and provide proprietary legal remedies unavailable through positivist legal channels.[5] The social space shared by these overlapping obligations is necessarily filled with conflict, as competing imperatives among different communities strive for priority.[6] Though initially metaphysical, the battle sometimes turns physical. As Robert Cover has observed, "our apprehension of the structure of the normative world is no less fundamental than our appreciation of the structure of the physical world."[7]

As a general matter, legal pluralism seeks to provide a framework for managing the hybridity of competing and overlapping norms.[8] Inherent in the pluralist approach is the liberal conception that it is neither possible nor, in many situations, even desirable to "solve" legal hybridity by the hostile occupation of one normative scheme over another.[9] Rather, pluralism seeks to encourage the creation of mechanisms that manage normative conflict through provisional compromise whenever possible. As a conceptual approach, pluralism focuses more on refereeing rather than on winning,[10] bringing order to shared social space by acknowledging the inevitability of disorder.[11]

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groups, religious institutions, trade organizations, unions, Internet chat groups, and a myriad of other 'nor-generating communities'").

5. Berman, *supra* note 2, at 1169-70.

6. *See id.* at 1162 (characterizing spheres of overlapping authority as "sites of conflict and confusion").

7. Cover, *supra* note 3, at 5.

8. *See* Berman, *supra* note 2, at 1192 (arguing that legal pluralism "recognizes that normative conflict is unavoidable and so, instead of trying to erase conflict, seeks to manage it through procedural mechanisms, institutions, and practices that might at least draw the participants to the conflict into a shared social space"); Palmer, *supra* note 2, at 1206-07 (discussing M.B. Hooker's definition that "'legal pluralism refers to the situation in which two or more laws interact'" and describing "[a] mixed system [as] one in which two or more legal traditions, or parts thereof, are operating simultaneously within a single system").

9. *See* Berman, *supra* note 2, at 1177 (arguing that legal pluralism "encourages international law scholars to treat the multiple sites of normative authority in the global legal system as a set of inevitable interactions to be managed, not as a 'problem' to be 'solved'"). In this Article, I employ the term "legal hybridity" to describe normative obligations generally, including those outside the bounds of what we normally consider "law." *See id.* ("[T]he whole debate about law versus non-law is largely irrelevant in a pluralism context because the key questions involve the normative commitments of a community and the interactions among normative orders that give rise to such commitments, not their formal status."); Feldman, *supra* note 2, at 1025-30 (contrasting legal obligations arising from state and those arising from being "citizen of the world").

10. *See* Berman, *supra* note 2, at 1165 ("[O]ne thing that a pluralist approach will not do is provide an authoritative metric for determining which norms should prevail in this messy hybrid world. Nor does it answer the question of who gets to decide.").

11. While it may seem pessimistic, the inevitability of disorder represents a predictive approach to historic developments. Quoting Hector MacQueen, Vernon Palmer has observed:

Of course, the success with which pluralist methodology is able to manage normative conflict remains very much in question, as does its applicability in multivariant situations. Occasions may exist in which national norms prevent countenancing subnational or supranational norms that are fundamentally in conflict, as in the use of peyote in religious ceremonies,[12] the right to develop and maintain nuclear arsenals,[13] the tolerance of racially-motivated hate speech,[14] or the subjection of national citizenry to international criminal jurisdiction.[15] In these cases, territorial sovereigntists may reject hybridity because the firm and coercive assertion of state power is seen as the only means of securing essential state interests.[16] Conversely, situations also may exist in which national norms are inadequate for safeguarding individual norms that are seen as universal, as in the practice of childhood marriage[17] or the denial of basic due process, democratic participation, or free speech.[18] In these cases, proponents of universalism may reject

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> It is contrary to the spirit of mixed legal systems [to analyze their past] on the basis that one part of the mix is good and the other bad. Instead the mixed systems need to be evaluated on their own terms—that is as neither civil law nor common law—and analysis must accept that a mixed past means a mixed future.

Palmer, *supra* note 2, at 1211 (alteration in original) (footnote omitted).

12. *See* Employment Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) (upholding application of Oregon drug law to religious use of peyote); *see also* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1067-70 (9th Cir. 2008) (discussing *Smith*, the Religious Freedom Restoration Act, and pre-*Smith* case law addressing government limitations on First Amendment rights).

13. *See* Michael Duffy, *What Does North Korea Want?*, TIME, Feb. 21, 2005, at 22, *available at* http://www.time.com/time/magazine/article/0,9171,1027498,00.html (discussing U.S. policy against North Korea's development of nuclear technology); CarrieLyn Donigan Guymon, *The Best Tool for the Job: The U.S. Campaign To Freeze Assets of Proliferators and Their Supporters*, 49 VA. J. INT'L L. 849 (2009) (reviewing the authority of the United States to freeze assets of nuclear proliferators).

14. *See* Virginia v. Black, 538 U.S. 343 (2003) (upholding Virginia law banning cross-burning with intent to intimidate); Onder Bakircioglu, *Freedom of Expression and Hate Speech*, 16 TULSA J. COMP. & INT'L L. 1, 13-14 (2008) (contrasting hate speech laws in the United States with those in Europe).

15. *See* Megan E. Lantto, Note, *The United States and the International Criminal Court: A Permanent Divide?*, 31 SUFFOLK TRANSNAT'L L. REV. 619 (2008) (reviewing U.S. objection to jurisdiction of International Criminal Court).

16. *See* Berman, *supra* note 2, at 1180 ("For example, substate communities—whether separatist ethnic groups or local warlords—may so threaten the authority of the state that no viable legal order is possible without attempting to eliminate the alternative norm altogether.").

17. *See* Lynne Marie Kohm, *Suffer the Little Children: How the United Nations Convention on the Rights of the Child Has Not Supported Children*, 22 N.Y. INT'L L. REV. 57, 70-78 (2009) (applying the U.N. Convention on the Rights of the Child to childhood marriages).

18. *See, e.g.*, Seth Mydans, *Burmese Activist Receives New Term of House Arrest*, N.Y. TIMES, Aug. 12, 2009, at A10 ("President Obama said the sentence of [Burmese pro-democracy leader Aung San Suu Kyi] violated 'universal principles of human rights' . . . .").

hybridity in an effort to achieve a harmonious global system that acknowledges fundamental rights, encourages cosmopolitanism, and "seek[s] to erase normative differences altogether."[19]

The central question is whether the rejection of hybridity for either sovereigntist or universalist reasons is always preferable, or whether in some—if not most—cases the management of hybridity through legal pluralism is a more beneficial alternative. As Paul Schiff Berman writes in his involved article, *Global Legal Pluralism*, "instead of clinging to the vain hope that unitary claims to authoritative law can ever be definitive, pluralism recognizes the inevitability (if not always the desirability) of hybridity."[20] In recognizing this inevitability, pluralism offers a pragmatic framework for resolving legal conflicts that cannot be resolved through sovereigntist suppression or universalist emancipation.[21] What at first seems a concessionary effort to develop necessary—but nevertheless "regrettable"—solutions to the messiness of overlapping norms becomes instead a "best practices" approach with organic normative value.[22] While refraining from dictating normative outcomes, pluralism allows competing norms to share the same social space through structured settlements.[23] The external benefits of such hybrid settlements, such as the preservation of peace and cultural integrity, may very well outweigh the internal costs of compromise, such as the loss of efficiency and systemic predictability. Further, the value of the social space itself may be enhanced by the normative diversity of both individual and communal actors. Normative schemes are, after all, permeable, both giving and borrowing across competing centers of gravity. The management of hybridity thus may invite competitors to critically examine both the source and the expression of their own normative obligations.

In this Article, my aim is to explore the potential of legal pluralism to manage and, perhaps somewhat optimistically, even resolve the legal conflict inherent in overlapping normative obligations. I do so by engaging in a case study of the Philippines, a country that has been a hotbed of conflict for more than 400 years. Since the Spanish first arrived with colonial intentions in the sixteenth century, the predominantly Muslim inhabitants of the southern islands of Mindanao and the Sulu Archipelago have steadily confronted overlapping

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19. Berman, *supra* note 2, at 1189.

20. *Id.* at 1166.

21. *See id.* at 1192-96 (contrasting pluralism with "sovereigntist territorialism and universalism").

22. *See id.* at 1234-35.

23. *Id.* at 1235.

normative obligations based on a historical narrative that significantly differs from the one played out further north. With the formal adoption in 1977 of the Code of Muslim Personal Laws,[24] the Philippine government has taken a pluralist approach to addressing subnational conflict, striving to create a hybrid legal system that fulfills sovereigntist requirements while meeting the normative needs of its Muslim citizens.

In Part II, drawing on the Philippines' rich religious and cultural heritage, I address the mechanisms employed by Spanish and American colonizers in responding to normative conflict in Mindanao and the Sulu Archipelago. In Part III, I proceed to a discussion of the steps taken by the Philippine government to formally recognize Muslim normative obligations, including constitutional protection of cultural heritage and the adoption of Presidential Decree 1083, the Code of Muslim Personal Laws. Finally, in Part IV, I review the Philippine government's approach to legal hybridity in the context of four practices identified by Berman: dialectical discourse, margins of appreciation, jurisdictional redundancy, and limited autonomy regimes.[25] I conclude by suggesting that the Philippine government's approach, though less than fully realized, models the possible benefits of pluralism in a normatively complex and contentious hybrid society.

II. THE BEGINNINGS OF HYBRIDITY

A. The Arrival of Islam in the Philippines

As with other postcolonial states, the history of the Philippines is marked by political, religious, and cultural conflict, largely tied to the struggle of Muslims in the southern Philippines to regain the political and religious independence they enjoyed prior to the arrival of the Spanish in 1521.[26] Historically, it is this struggle that has driven efforts toward structured hybridity in the Philippines, and which continues to compel the Philippine government toward a pluralist resolution of normative legal conflict today.

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24. *See* Michael O. Mastura, *Legal Pluralism in the Philippines*, 28 L. & SOC'Y REV. 461, 463 (1994).

25. Berman, *supra* note 2.

26. For a thorough treatment of conflict in the Philippines, see THOMAS M. MCKENNA, MUSLIM RULERS AND REBELS (1998). *See also* ZACHARY ABUZA, MILITANT ISLAM IN SOUTHEAST ASIA 33-48 (2003); MARIA A. RESSA, SEEDS OF TERROR 11 (2003); GREG WILLIAMS, 13 DAYS OF TERROR 9-20 (2003); BARA-ACAL & ASTIH, *supra* note 1, at 9, 13-14; Mastura, *supra* note 24, at 461-75 (1994); Lowell B. Bautista, *The Historical Context and Legal Basis of the Philippine Treaty Limits*, 10 ASIAN-PAC. L. & POL'Y J. 1, 6 (2008); John Enriquez Andres, Note, *The Raiding of the Pearl: The Effects of Trade Liberalization on Philippine Labor Migration, and the Filipino Migrant Worker's Experience*, 10 RUTGERS RACE & L. REV. 523, 525 (2009).

As a nation state, the Philippines is a loose collection of 7100 islands cradled by Indonesia to the southwest, Malaysia to the west, the Southeast Asia mainland to the northwest, and Japan to the north.[27] Long before colonialism reached its shores, the Philippines' central location enabled its inhabitants to enjoy a vibrant sea trade with neighboring countries,[28] which, in turn, opened the door for an inflow and outflow of ideas and traditions.[29] As early as the fourteenth century, the first Muslim traders arrived in the Tawi-Tawi region of the Sulu Archipelago, and by the fifteenth century, Muslim missionaries had arrived throughout Sulu.[30] Islam reached the shores of Mindanao, the largest island of the Sulu Sea, in 1475, eventually penetrating into the interior of Mindanao to the shores of Lake Lanao.[31] Unlike in other areas of the world, Islam spread through the southern Philippines through trade and marriage rather than conquest, merging almost organically with existing customary law.[32] Later to be known as "Moros," Philippine Muslims claimed and celebrated then—and continue to do so today—a hereditary line extending back to the Prophet Mohammed himself.[33] In Mindanao, this hereditary line was established through Sarip (*sharif* in its original Arabic form) Kabungsuwan, son of a Melaka princess and a direct descendent of the Prophet.[34]

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27. *See* Andres, *supra* note 26, at 525.

28. *See* Bautista, *supra* note 26, at 6; David G. Scalise and Patricia J. de Guzman, *Foreign Investment in the Philippines*, 29 GEO. WASH. J. INT'L L. & ECON. 145, 145 (1995).

29. *See* WILLIAMS, *supra* note 26, at 9.

30. *See* BARA-ACAL & ASTIH, *supra* note 1, at 13. Others place the arrival of Islam in the Philippines as early as the 13th century. *See* ABUZA, *supra* note 26, at 34.

31. *See* BARA-ACAL & ASTIH, *supra* note 1, at 13.

32. *See* RESSA, *supra* note 26, at 11; *see also* Vincent J.H. Houben, *Islam: Enduring Myths and Changing Realities: Southeast Asia and Islam*, 588 ANNALS AM. ACAD. POL. & SOC. SCI. 149, 153-54 (2003) ("The expansion of Islam [in Southeast Asia] was largely a peaceful process, and conversion was no great obstacle to the ordinary people. The continuation of local pre-Islamic ritual practices was accepted . . . .").

33. *See* MCKENNA, *supra* note 26, at 49; *see also* Houben, *supra* note 32, at 153 (observing that "Southeast Asian rulers produced genealogies in which they claimed to be direct descendants of the Prophet through Saiyid or Sharif (descendants of Mohammad's grandsons)").

34. *See* MCKENNA, *supra* note 26, at 49; BARA-ACAL & ASTIH, *supra* note 1, at 13. In approaching legal hybridity from a standpoint of legal pluralism, present mechanisms must account for past perspectives. In the Philippines, this means that structured legal settlements must consider the views and presence of those with historic ties to nobility. As McKenna notes:

> Both proponents and opponents of Muslim separatism tend to assume that ordinary Muslims reverence their highborn leaders (or datus) for their sacred ancestry and could not imagine politics without them. In this view, any political arrangement to enhance Muslim self-determination in Cotabato [on the island of Mindanao] must include prominent consideration of the role of the traditional nobility.

MCKENNA, *supra* note 26, at 46.

Prior to the coming of Islam, localities throughout the southern Philippines were organized into communities known as *bangsa* (or *barangay*), each operating autonomously or semi-autonomously.[35] Although they had no written law,[36] the *bangsa* chieftains (*datus*) held certain rights in land on the basis of ancestral association and exercised local and provincial authority.[37] Their authority evolved into general aristocratic privilege with the arrival of Islam,[38] whose proponents ushered in an era of sultanates throughout Mindanao and the Sulu Archipelago.[39] The principal sultanates in Maguindanao and Sulu functioned like "mini-states," with governments possessing both administrative and judicial powers.[40] *Agama* courts applied Moro customary law, or *adat*, as well as shari'a law,[41] adopting a hybrid model similar to that later used by some colonial powers in superimposing civil legal regimes over local custom.[42] Indeed, one Muslim scholar has noted that it was Islam that led the way in utilizing legal pluralism to forge a relationship with those of different beliefs.

> In personal matters, every community is welcome to adopt its own personal law. Indeed, it is only Islam which guarantees this right in the most liberal manner to all minorities living in an Islamic state. It is Islam which has taught to the modern world the real difference between the 'law of the land' and the 'personal law' and which enunciated the principle that in a multi-national state, the personal affairs of a man should be settled according to his own personal law.[43]

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35. *See* MCKENNA, *supra* note 26, at 47-48; Brynna Connolly, *Non-State Justice Systems and the State: Proposals for a Recognition Typology*, 38 CONN. L. REV. 239, 265 (2005); COUNTRY PROFILE: PHILIPPINES, LIBRARY OF CONGRESS—FEDERAL RESEARCH DIVISION (Mar. 2006) [hereinafter PHILIPPINES COUNTRY PROFILE], *available at* http://memory.loc.gov/frd/cs/phtoc.html.

36. *See* BARA-ACAL & ASTIH, *supra* note 1, at 13.

37. *See* MCKENNA, *supra* note 26, at 48.

38. *See id.*

39. Houben, *supra* note 32, at 161.

40. BARA-ACAL & ASTIH, *supra* note 1, at 2. Three sultanates in the Mindanao area united into the Sultinate of Maguindanao in 1619. *See* ABUZA, *supra* note 26, at 34.

41. *See* BARA-ACAL & ASTIH, *supra* note 1, at 6-7 ("Nonetheless it was theorized that as early as the middle of the 15th century, elements of Shari'ah were continually introduced and implemented side by side with the customary laws by the Moros."); TRUDY RING ET AL., INTERNATIONAL DICTIONARY OF HISTORIC PLACES: ASIA AND OCEANA 403 (1996).

42. For a discussion of colonial legal hybridity, see *infra* Part II.B.

43. BARA-ACAL & ASTIH, *supra* note 1, at 11 (quoting Syed Abul A'la Maududi). Bara-Acal and Astih report that the Prophet Mohammed once resolved a case involving two Jews who committed adultery by prescribing a punishment from the Torah, underscoring the principle that associative communities should be entitled to apply their own personal law. *Id.* Scholars elsewhere have observed that mixed legal systems, particularly those based on empire, have existed since antiquity. *See* Palmer, *supra* note 2, at 1213-16.

In the realm of personal law, precolonial Muslims in the Philippines possessed the right to divorce, remarry, and share conjugal earnings and child custody when separated.[44]

Further north, in Manila on the island of Luzon, emigrants from Indonesia and the Malay Peninsula had similarly settled into *barangays* headed by local *datus*, who over time consolidated power and governed as *rajas*.[45] Unlike the southern Philippines, Islam did not reach Manila until 1565, well after the Spanish first arrived with colonial intentions.[46] As a result, the northward march of Islam through the Philippine islands was largely halted by the late sixteenth century,[47] creating a religiously segmented society with a predominantly Christian population in the North and a predominantly Muslim population in the South.[48] This religious segmentation, later fueled by colonial discrimination and Christian migration, would become the main driver for pluralistic recognition of legal hybridity in the Philippines.

B. Colonialism, Conflict, and Customary Law

In 1521, Ferdinand Magellan landed in the Philippines while circumnavigating the globe, claiming the island chain for Spain based on the then-valid, though nevertheless inchoate, doctrine of discovery.[49] As part of a broader wave of European colonization of Africa and Asia, in which the British, Dutch, French, Germans, Belgians, Portuguese, and Italians also participated,[50] the Spanish began to colonize the Philippines in 1565, naming the islands "Filipinas" in 1571 in recognition of King Philip II of Spain.[51] Christianization accompanied colonization,[52] although neither missionaries nor early colonizers had much success in gaining a lasting foothold in the predominantly Muslim areas in the

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44. *See* Aurelia Miller, Comment, *"Until Death Do Us Part?": A Proposal for the Philippines to Legalize Divorce*, 24 CONN. J. INT'L L. 181, 184 (2008).

45. *See* RING ET AL., *supra* note 41, at 565; WILLIAMS, *supra* note 26, at 9.

46. *See* RING ET AL., *supra* note 41, at 565; PHILIPPINES COUNTRY PROFILE, *supra* note 35, at 2.

47. *See* RING ET AL., *supra* note 41, at 565; ABUZA, *supra* note 26, at 34.

48. *See* BARA-ACAL & ASTIH, *supra* note 1, at 9. Although Islam is the predominant religion in the Southern Philippines, Muslims only account for 5% of the total population. *See* PHILIPPINES COUNTRY PROFILE, *supra* note 35, at 9. The remainder of the population is 83% Roman Catholic, 9% Protestant, and 3% Buddhist and other. *See id.*

49. *See* Bautista, *supra* note 26, at 12 n.68 (discussing the doctrine of discovery as an inchoate enunciation of then-existing international law).

50. *See* Palmer, *supra* note 2, at 1216.

51. *See* Bautista, *supra* note 26, at 12.

52. *See* MCKENNA, *supra* note 26, at 82; WILLIAMS, *supra* note 26, at 11.

South.[53] Some of the southern coastal areas were eventually colonized, including for a time Zamboanga on Mindanao and the island of Sulu itself, but the predominance of Islam prevented serious inroads and enabled the sultanates to retain a measure of power well into the twentieth century.[54] In fact, while Spain sparred with other colonial powers in the centuries following initial colonization, the sultanates in Sulu and Mindanao periodically flourished as trading centers, drawing ships from throughout the world.[55]

The process by which a common Moro identity emerged during the period of Spanish colonization remains a matter of debate. Given that the southern Philippine islands are composed of ethnically diverse populations,[56] Philippine Muslim scholars have contended that three hundred years of Spanish colonization created the fire from which a common Moro identity was forged.[57] For example, jurist Amer Bara-Acal observes: "Centuries of Spanish intrusion into the local shores have dismally failed to subjugate the Moros who fought fiercely against the invading force. . . . The so-called 'Muslim Problem' is the result of centuries-old iniquities and misunderstanding caused by Western colonization."[58] While it is true that Muslims resisted Spanish encroachment, even mounting armed attacks against Manila at times,[59] anthropologist Thomas McKenna refutes the notion of a unified Muslim resistance to Spanish subjugation, countering that "the three hundred-year conflict was primarily a cold war consisting of extended periods of mostly peaceful coexistence with the Spanish colonial intruders in the

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53. *See* BARA-ACAL & ASTIH, *supra* note 1, at 9; RING ET AL., *supra* note 41, at 403; Houben, *supra* note 32, at 161-62.

54. *See* RING ET AL., *supra* note 41, at 403-04; MCKENNA, *supra* note 26, at 78-79.

55. *See* RING ET AL., *supra* note 41, at 404; MCKENNA, *supra* note 26, at 77. Though the Spanish occasionally blockaded the Southern Philippines, sporadic trade continued. *Id.* In the 1840's, Englishman Spencer St. John remarked that Jolo (Sulu) was "by far the most beautiful island I have ever seen," but the people, though "manly," were "not too cunning." RING ET AL., *supra* note 41, at 404. Interestingly, in Joseph Conrad's novel *Lord Jim*, the character named "Brown" is taken by the Spanish to a settlement off the coast of Mindanao that "never came to anything in the end." JOSEPH CONRAD, LORD JIM 254-55 (1900). Zamboanga is mentioned twice in *Lord Jim*. *Id.*

56. *See* MCKENNA, *supra* note 26, at 104 (discussing application of the term "Moro" to "thirteen ethnolinguistic groups of the Philippines"); Houben, *supra* note 32, at 161 ("Moros is the name for a dozen different ethnic groups of Muslims, currently numbering around 4 million people, who live in the southern Philippines.").

57. *See* MCKENNA, *supra* note 26, at 80-85.

58. BARA-ACAL & ASTIH, *supra* note 1, at 5, 9. Agreeing with this view, others have observed that Spanish oppression "caused the people to identify more close[ly] with Islam and undoubtedly helped to ensure their survival through the centuries as a virtually independent people." RING ET AL., *supra* note 41, at 403.

59. *See* RING ET AL., *supra* note 41, at 568.

North coinciding with intersultanate rivalry in the South."[60] According to McKenna, the term "Moro" was initially a pejorative label applied by the Spanish to indigenous Muslims as a carryover from the Spanish Reconquista of Muslim Spain, and was only appropriated by Filipino Muslim nationalists in the twentieth century as a symbol of collective identity.[61]

For our purposes, it is unnecessary to resolve this debate. The important point is that the Moros in the South were able to resist significant Spanish encroachments even as their non-Muslim neighbors to the north were Christianized and assimilated into Spanish colonial life.[62] Thus, when Spain ceded the Philippines to the United States in 1898 following the conclusion of the Spanish-American War,[63] the Muslims of the southern Philippines still retained considerable religious and political independence.[64] Busy with quelling the revolutionaries in the North who had declared independence from Spain just before the Spanish-American War ended, the United States initially adopted a policy of legal hybridity in the southern Philippines, similar to that of British Malaya and the Dutch East Indies. In 1899, they entered into a formal treaty "with the Sultan of Sulu in which the Americans promised not to interfere in Sulu religion, law, and commerce . . . in exchange for the sultan's acknowledgment of United States sovereignty."[65] Elsewhere in "Moroland," as the United States termed the Muslim South, the United States and local leaders entered into similar, though less formal, agreements.[66]

Within a few years, however, the United States abandoned its policy of legal pluralism in favor of integration. In 1904, it abrogated its treaty with the Sultan of Sulu and, in 1914, imposed a uniform law that disregarded Muslim customary law (*adat*).[67] The American justification

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60. MCKENNA, *supra* note 26, at 83.

61. *See id.* at 80-81.

62. *See id.* at 88 (observing that in the Mindanao city of Cotobato, "Spanish colonial control consisted almost exclusively of the establishment and maintenance of military garrisons, with little attempt made to administer the native population").

63. *See* Bautista, *supra* note 26, at 8-9.

64. *See* MCKENNA, *supra* note 26, at 89-91.

65. *Id.* at 90. The treaty is generally known as the Bates Agreement of 1899. *See id.*; Houben, *supra* note 32, at 162. Among other things, it provided for the acceptance of local customary law. *See* ABUZA, *supra* note 26, at 35.

66. *See* MCKENNA, *supra* note 26, at 90; *see also* BARA-ACAL & ASTIH, *supra* note 1, at 5 ("In the early part of American rule, an attempt was made to recognize Moro customary laws. A law was passed which ordained 'to enact laws which shall collect and codify the customary laws of the Moros.'").

67. *See* MCKENNA, *supra* note 26, at 91; BARA-ACAL & ASTIH, *supra* note 1, at 2, 5-6; ABUZA, *supra* note 26, at 35.

for doing so stands in stark contrast to the pluralist ideals that later would gain constitutional protection in the Philippines. Writing to an English friend in 1904 while serving as the first governor of the Moro Province, General Leonard Wood noted:

> You [the English] are quite content to maintain rajahs and sultans and other species of royalty, but we, with our plain ideas of doing things, find these gentlemen outside of our scheme of government . . . . Our policy is to develop individualism among these people and, little by little, to teach them to stand on their own two feet independent of petty chieftains.[68]

To Hadji Butu of Sulu, General Wood commented: "We realize that the Moros have laws and customs very different from ours. We want new laws to be such that the Moro people can live under them and so [can] the American people."[69] Focused on integration, the United States ceased recognizing the sultanates or their indigenous legal systems,[70] promoting instead the development of Western institutions intended to prepare the Philippines for eventual independence.[71]

Although systemically uniform, civil courts during this period retained the authority to reference local laws and customs in resolving disputes. In 1915, the Philippine Commission enacted Act No. 2520, which provided:

> *Mohammedan Laws and Customs*—Judges of the Court of First Instance and Justice of the Peace deciding civil cases in which the parties are Mohammedans or pagans, when such action is deemed wise, may modify the application of the law of the Philippine Islands, taking into account local laws and customs, provided that such modification shall not be in conflict with the basic principles of the laws of the United States of America.[72]

The willingness of early courts to embrace customary law is seen in a 1922 case issued by the Supreme Court of the Philippines, *Adong v.*

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68. *See* MCKENNA, *supra* note 26, at 90-91.

69. BARA-ACAL & ASTIH, *supra* note 1, at 5-6.

70. *See* MCKENNA, *supra* note 26, at 104.

71. PHILIPPINES COUNTRY PROFILE, *supra* note 35, at 3-4. Like the Spanish, the United States occasionally clashed with Philippine Muslims. Between 1903 and 1906, American forces killed more 3,000 Philippine Muslims, including 600 men, women, and children in the battle of Bud Dajo in Sulu in 1906. *See* MCKENNA, *supra* note 26, at 88-89. In 1913, when "Muslim rebels who kidnapped Christians were refusing to disarm," American forces led by General John J. Pershing fought with Philippine Muslims at Mount Bagsak in Jolo, killing 1,000 Muslim men, women, and children. James Brooke, *A Nation Challenged: The Philippines; Echoes of an Era: Pershing Was Here*, N.Y. TIMES, Jan. 27, 2002, *available at* http://www.nytimes.com/2002/01/27/world/a-nation-challenged-the-philippines-echoes-of-an-era-pershing-was-here.html; *see also* RING ET AL., *supra* note 41, at 405.

72. BARA-ACAL & ASTIH, *supra* note 1, at 6 (citing Act No. 2520 (1915)).

Cheong Seng Gee.[73] In *Adong*, the Philippine Supreme Court considered the validity of Philippine marriages performed in accordance with Muslim customs.[74] Drawing on principles of religious freedom embodied in both the Treaty of Paris, in which Spain had ceded the Philippines to the United States,[75] and the colonial policies of Spain and the United States, including Act No. 2520, the Supreme Court observed:

> The purpose of the government toward the Mohammedan population of the Philippines has, time and again, been announced by treaty, organic law, statutory law, and executive proclamation. . . . Various responsible officials have so oft announced the purpose of the Government not to interfere with the customs of the Moros, especially their religious customs, as to make quotation of the same superfluous.[76]

The Supreme Court accordingly held that "marriages performed according to the rites of the Mohammedan religion" were valid under civil law.[77]

Critics of the American integrationist policy have commented that it was one of "tolerance, not recognition."[78] While the Supreme Court's holding in *Adong* partially refutes this claim, it nevertheless remains that legal hybridity existed only in the scope of law the courts were willing to apply, not in the structure of the courts or the law itself. In this sense, Muslims in the Philippines enjoyed less legal independence than Muslims in nearby Indonesia, where the colonial Dutch employed the doctrine of *receptio in comlexu* to develop a hybrid system in which Islamic courts applied shari'a in adjudging issues of marriage, inheritance, and *wakaf* (religious endowment).[79]

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73. G.R. No. L-18081 (S.C. Mar. 13, 1922) (Phil.), *available at* http://www.lawphil.net/judjuris/juri1922/mar1922/gr_1-18081_1922.html.

74. *Id.*

75. *See* Bautista, *supra* note 26, at 8, 16-19. As a condition of transfer, the United States paid Spain twenty million dollars, creating the view among some that the United States "purchased" the Philippines from Spain. *Id.* at 17.

76. *Adong*, G.R. No. L-18081.

77. *Id.*

78. BARA-ACAL & ASTIH, *supra* note 1, at 7.

79. *See id.* at 2-3; Hikmahanto Juwana et al., Sharia *Law as a System of Governance in Indonesia: The Development of Islamic Financial Law*, 25 WIS. INT'L L.J. 773, 793 n.74 (2008). Interestingly, McKenna notes that the Dutch purpose in maintaining local customs was "to de-emphasize Islam by 'constituting local particularisms in customary law [and] favoring the traditional authority structures linked to them.'" MCKENNA, *supra* note 26, at 112 (citation omitted). American administrators, conversely, encouraged—sometimes actively—adherence to Islam by its Muslim allies in the Southern Philippines to "enhance their abilities as 'Mohammedan' leaders." *Id.*

As part of its transition to full independence, the Philippines became a commonwealth in 1935,[80] adopting a constitution that recognized religious freedom but did not provide for formal recognition of Moro cultural identity or shari'a law.[81] World War II then swept the Philippines into its turmoil, with the Japanese bombing the Philippines only ten hours after attacking Pearl Harbor on December 8, 1941.[82] War-torn, the Philippines finally achieved complete independence from the United States on July 4, 1946,[83] although its continuing reliance on the United States meant that "[i]ndependence did not significantly alter the structure of local and provincial politics in the Philippines."[84]

From the perspective of legal pluralism, the main lesson drawn from the Philippine colonial era is the challenge of attempting to resolve normative conflict through a one-size-fits-all sovereigntist approach. When normative values are culturally and religiously fundamental, systemic subjugation threatens to widen the divide that sovereigntism hopes to close. As the president of Ateneo ze Zamboanga, a Catholic University in Mindanao, observed when American forces arrived in Mindanao in 2002, "The big, old communal memories have come surging back . . . . You are hearing again that these Muslims are low class, violent and treacherous. You are hearing that all these Christians are an oppressive group who tried to take our lands."[85] The divide between the two, deepened over the course of nearly four hundred years of colonial rule, would prove a significant obstacle for the new Philippine government as it struggled for national unity.

C. Hybridity in the Early State

From 1946 to 1968, the legal relationship between the Philippine government and its minority Muslims citizens was generally one of tolerant indifference, with Christian politicians in Manila paying scant attention to the need for legal hybridity in the southern Philippines, even as Muslim Filipinos gained a growing self-consciousness of their own

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80. *See* MCKENNA, *supra* note 26, at 114; RING ET AL., *supra* note 41, at 569; PHILIPPINES COUNTRY PROFILE, *supra* note 35, at 3-4.

81. *See* CONST. (1935), Art. III, (Phil.), *available at* http://www.chanrobles.com/1935 constitutionofthephilippines.htm (last visited Jan. 18, 2010); *see also* Estrada v. Escritor, A.M. No. P-02-1651, Part IX (S.C. Aug. 4, 2003) (Phil.) (en banc), *available at* http://sc.judiciary.gov.ph/jurisprudence/2003/aug2003/am_p_02_1651.htm (engaging in wide-ranging discussion of religious freedom in the United States and the Philippines, including the 1935 Philippine Constitution).

82. WILLIAMS, *supra* note 26, at 14.

83. *Id.*; MCKENNA, *supra* note 26, at 113.

84. MCKENNA, *supra* note 26, at 113.

85. Brooke, *supra* note 71, at 114.

religious affiliation and identity.[86] Economically, the central government in Manila expanded its policy of Christian migration and multinational corporate presence in the South, resettling hundreds of thousands of Christians into Mindanao, dislocating Muslim farmers, and generally marginalizing the voice of Muslim Filipinos.[87] For example, during the period of American colonization, U.S. administrators had established a Bureau of Non-Christian and Tribal Groups composed of elected leaders from Philippine minority communities "as a voice for their needs and grievances."[88] Following establishment of the commonwealth in 1935, the Philippine government disbanded the Bureau altogether.[89]

Despite the government's integrationist policies, Muslim marital rights continued to be honored. Among the laws passed following independence was Republic Act No. 241, which extended an earlier marriage law formally exempting "Mohammedans and pagans" from formal civil marriage requirements.[90] The 1949 law provided a twenty-year window in which marriages could be performed in accordance with Muslim (or, for those without a religion, tribal) rites.[91] It also authorized the President of the Philippines to require Muslims to conform to civil marriage requirements before the expiration of the twenty-year window "when the state of culture and civilization of the Mohammedan or pagan inhabitants of said provinces shall warrant it."[92] A similar law provided a twenty-year window in which Muslim divorces, which were otherwise prohibited under Philippine law, would be recognized.[93] Both measures were patently paternalistic, focused on eventually integrating Muslim

86. *See* MCKENNA, *supra* note 26, at 132-37; ABUZA, *supra* note 26, at 33, 36.

87. *See* RING ET AL., *supra* note 41, at 406; MCKENNA, *supra* note 26, at 136-37. The policy of resettling Christians into the Muslim South began during the American colonial period. *See* ABUZA, *supra* note 26, at 35-36.

88. RING ET AL., *supra* note 41, at 406.

89. *See id.*

90. An Act To Amend Section Twenty-Five of Act Numbered Thirty-Six Hundred and Thirteen, Otherwise Known as "The Marriage Law," by Extending the Period of the Exemption from the Formal Requirements of Marriage Granted Therein to Mohammedans and Pagans, Rep. Act No. 241, § 1, 44:9 O.G. 3143, (June 12, 1948) (Phil.), *available at* http://www.chanrobles.com/republicacts/republicactno241.html.

91. *Id.* § 1.

92. *Id.* § 2.

93. *See* An Act Authorizing for a Period of Twenty Years Divorce Among Moslems Residing in Non-Christian Provinces in Accordance with Moslem Customs and Practices, Rep. Act No. 394, § 1, 45:9 O.G. 3755, (June 18, 1949) (Phil.), *available at* http://www.chanrobles.com/republicacts/republicactno394.html; Malang v. Moson, G.R. No. 119064, (S.C. Aug. 22, 2000) (Phil.), *available at* http://sc.judiciary.gov.ph/jurisprudence/ 2000/aug2000/119064.htm.

Filipinos into the mainstream of Christian Filipino society, rather than recognizing their normative differences.[94]

Eventually, the mounting tension between the two sides became physical. A smattering of violent skirmishes in the 1960s between Muslims and the Philippine military culminated in the 1968 Jabidah Massacre, a watershed event in which at least fourteen Muslim military service members were summarily executed by Christian Filipino officers for allegedly "protesting the conditions of their training."[95] While the details surrounding the event remain unclear, it coalesced Muslim Filipinos into a separatist movement that eventually led to the formation of the militant Moro National Liberation Front (MNLF), an armed guerilla group organized to liberate the Moro homeland.[96] In 1972, President Ferdinand Marcos declared martial law, partly because of the "Muslim 'secessionist movement' in the Philippine South."[97] Martial law only heightened the conflict, however, and by 1977 fighting in the Southern Philippines had displaced as many as one million civilians.[98]

D. The Tripoli Agreement

By 1976, the high number of civilian casualties, the aggregate financial cost of the conflict to the Philippine government, and increasing international pressure combined to bring the Philippine government and the MNLF to the negotiating table.[99] In December 1976, members of the government and the MNLF met in Libya (which had been supplying weapons to the MNLF) to reach a cease-fire agreement.[100] Among other things, the Tripoli Agreement "provided the general principles for Muslim autonomy in the Philippine South"[101] and authorized the establishment of Islamic courts in Mindanao.[102] It also crystallized Marcos' earlier efforts to address "the Moro problem" by implementing certain conciliatory reforms.

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94. *See* MCKENNA, *supra* note 26, at 139, 142 (discussing anti-Muslim sentiment in Philippine government postindependence policy). Some efforts were made to address the growing grievances of the Muslim minority community, such as the creation of the Commission on National Integration in 1957. *See* ABUZA, *supra* note 26, at 36.

95. *See* RING ET AL., *supra* note 41, at 406; MCKENNA, *supra* note 26, at 140-41, ABUZA, *supra* note 26, at 37.

96. *See* MCKENNA, *supra* note 26, at 155; ABUZA, *supra* note 26, at 38.

97. MCKENNA, *supra* note 26, at 156.

98. *See id.*

99. *See* ABUZA, *supra* note 26, at 38.

100. *See* MCKENNA, *supra* note 26, at 157, 167.

101. *Id.* at 167 (internal quotation marks and citation omitted).

102. *See* ABUZA, *supra* note 26, at 39.

Among these reforms were an extension of the law recognizing marriages performed in accordance with Muslim rites,[103] implementation of the Southern Philippines Development Authority, establishment of the Islamic Studies Center at the University of the Philippines, and construction of a mosque in Manila.[104] Although the revised constitution of 1973 did not contain any provisions specifically for the Muslim minority, it was officially published in Arabic.[105] It also required the state to "consider the customs, traditions, beliefs, and interests of national cultural communities in the formulation and implementation of State policies."[106] Additionally, President Marcos created a Presidential Task Force for the Reconstruction and Development of Mindanao, which was tasked with drafting a code of Muslim Filipino law.[107] It was this Muslim code that would later become Presidential Decree 1083, the Muslim Code of Personal Laws.[108]

Unfortunately, the promise of political and legal autonomy in the Tripoli Agreement failed to materialize. Discussions over implementation broke down and "the MNLF realized that Marcos had no real intention of granting the Regional Autonomous Government the autonomy that he had promised in the accord."[109] Marcos did establish two "autonomous" regions in the southern Philippines, but these were "essentially hollow, and productive of cynicism, frustration, and resentment."[110] Thomas McKenna has observed:

> The governing bodies of the nominally autonomous regions were cosmetic creations with no real legislative authority and no independent operating budget. They were headed by martial law collaborators and rebel defectors, many of whom were datus and all of whom were absent from the province more often than not, usually in Manila pursuing separate careers or looking after business interests.[111]

As a result, sporadic fighting continued. The revolutionary movement, however, had lost much of its momentum, and the MNLF soon splintered into another, more fundamentalist separatist organization, the Moro

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103. *See* Malang v. Moson, G.R. No. 119064, (S.C. Aug. 22, 2000) (Phil.), *available at* http://sc.judiciary.gov.ph/jurisprudence/2000/aug2000/119064.htm. Philippine civil law did not, however, sanction multiple marriages, even among Muslims. *Id.*

104. *See* ABUZA, *supra* note 26, at 38.

105. CONST. (1973), Art. XV, § 3, (Phil.), *available at* http://www.chanrobles.com/1973constitutionofthephilippines.htm.

106. *See id.* § 1; *see also* BARA-ACAL & ASTIH, *supra* note 1, at 15.

107. *See* BARA-ACAL & ASTIH, *supra* note 1, at 8.

108. *See id.*

109. ABUZA, *supra* note 26, at 39.

110. MCKENNA, *supra* note 26, at 168 (internal quotation marks and citation omitted).

111. *Id.*

Islamic Liberation Front (MILF).[112] Throughout the remainder of Marcos' tenure, the Muslim South looked very much the same after the Tripoli Agreement as it had before the fighting began.[113] Still, the move toward an official hybrid system had begun.

III. PRESIDENTIAL DECREE 1083 AND THE MUSLIM CODE OF PERSONAL LAWS

In the preceding Part, I provided a historical perspective from which to view President Marcos' decision in 1977 to establish a separate code of personal law for Muslim Filipinos. Because normative obligations flow from personal and communal narratives, they are fundamentally historical, tethering present-day action to historical antecedent to create legal hybridity. In the Philippines, it was at least partly the tendency of colonial and early government policies to marginalize and devalue Muslim normative obligations that led to four hundred years of armed conflict. Only when this conflict threatened to destabilize the majority regime did Muslim normative obligations garner formal expression in a hybrid legal system. In this Part, I consider that hybrid legal system, beginning with Presidential Decree 1083, the Muslim Code of Personal Laws. I then review the structure of shari'a courts in the Philippines. I also briefly discuss the establishment in 1990 of the Autonomous Region in Muslim Mindanao (ARMM) and its impact on legal hybridity in the Philippines.

A. Presidential Decree 1083

Presidential Decree 1083 (P.D. 1083) grew out of an effort by President Marcos to conciliate Muslim Filipinos by providing a body of Muslim law that acknowledged personal normative obligations without seriously undermining Philippine civil law.[114] The foundation for P.D. 1083 had been laid during the Constitutional Convention of 1971, when Muslim delegates were successful in inserting language requiring the government to consider the customs and beliefs of "national cultural communities" in implementing government policies.[115] That effort was

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112. *See* ABUZA, *supra* note 26, at 39; MCKENNA, *supra* note 26, at 170.

113. *See* MCKENNA, *supra* note 26, at 168-69.

114. A Decree To Ordain and Promulgate a Code Recognizing the System of Filipino Muslim Laws, Codifying Muslim Personal Laws, and Providing for Its Administration and for Other Purposes, Pres. Dec. No. 1083, (Feb. 4, 1977) (Phil.), *available at* http://www.chanrobles.com/PRESIDENTIAL%20DECREE%20NO.%201083.pdf.

115. CONST. (1973), Art. XV, § 11, (Phil.), *available at* http://www.chanrobles.com/1973constitutionofthephilippines.htm.

followed by a February 17, 1973, memorandum by Philippine Senator Mamintal Tamno urging President Marcos "to issue a decree recognizing Muslim personal laws."[116] As previously noted, President Marcos submitted the matter to a special task force, which, in 1974, produced a draft Muslim code for the consideration of a Presidential Commission.[117] Although the Commission submitted a final draft of the proposed code to President Marcos on August 29, 1975, it was not until February 4, 1977, two months after signing the Tripoli Agreement, that President Marcos finally signed P.D. 1083 into law.[118] For Philippine Muslims, the event was one of profound significance. As one Muslim Filipino commentator stated, "The concern for the implementation of the Islamic way of life . . . under the modern state apparatus has been, and will always be, a resuscitation of our status as Muslims; that is to say, in the state of submission (Islam) to God *Al Malik ul-Mulk*."[119]

P.D. 1083 is divided into five books and generally covers six substantive legal areas: (1) marriage, divorce, and parental authority; (2) wills and estates; (3) establishment and structure of shari'a courts; (4) Muslim holidays; (5) transfer of real and personal property; and (6) conversion to Islam.[120] P.D. 1083 also provides for the establishment of a system of shari'a courts[121] and an Office of Juriconsult in Islamic Law.[122] While a full discussion of P.D. 1083 is beyond the scope of this Article, three areas—objectives, jurisdiction, and conflict of laws—merit immediate attention because of their value in understanding P.D. 1083's pluralist bent.

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116. BARA-ACAL & ASTIH, *supra* note 1, at 7.

117. *See id.* at 8.

118. *See id.*

119. *Id.* (quoting Michael O. Mastura).

120. A Decree To Ordain and Promulgate a Code Recognizing the System of Filipino Muslim Laws, Codifying Muslim Personal Laws, and Providing for Its Administration and for Other Purposes, Pres. Dec. No. 1083, bks. 1-5, (Feb. 4, 1977) (Phil.), *available at* http://www.chanrobles.com/PRESIDENTIAL%20DECREE%20NO.%201083.pdf. That P.D. 1083 limits the jurisdiction of shari'a courts to areas of personal law continues to disappoint some Muslim Filipino jurists. For example, Bara-Acal observes: "Sadly to state, the administration and enforcement of the entire Muslim legal system is lacking the needed administrative machineries to perform justiciable functions. Only part of the Muslim legal system—what is known as Muslim personal laws, has been given sustainable machinery to run itself . . . ." BARA-ACAL & ASTIH, *supra* note 1, at 17. P.D. 1083 does not include criminal laws, an omission criticized by some Muslim leaders. *See* U.S. DEP'T OF STATE, PHILIPPINES—INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008, http://www.state.gov/g/drl/rls/irf/2008/108421.htm (last visited Apr. 6, 2010).

121. Pres. Dec. No. 1083 art. 137.

122. *Id.* art. 164.

1. Objectives of Presidential Decree 1083

Article 2 of P.D. 1083 sets forth three general objectives: "[T]his Code: (a) Recognizes the legal system of the Muslims in the Philippines as part of the law of the land and seeks to make Islamic institutions more effective; (b) Codifies Muslim personal laws; and (c) Provides for an effective administration and enforcement of Muslim personal laws among Muslims."[123] The important point about these objectives is that Muslim jurists have read them broadly to support a general regard for Islamic tradition beyond mere personal law. Amer Bara-Acal observes:

> [P.D. 1083] therefore actually does more than what its name indicates, a point raised during the Code Commission's deliberations but which failed to carry the day. As a result of its recognition as part of the law of the land, the *Filipino Muslims' entire legal system*, not just what are known as personal laws, must be observed, whenever and wherever it may apply, throughout the country and may now be enforced, like other Philippine laws, with the full sanction of the State.[124]

This argument is additionally supported by P.D. 1083's incorporation of Muslim law generally. For example, article 4 requires shari'a courts construing P.D. 1083 and "other Muslim law [to] take into consideration the primary sources of Muslim law."[125] Two points are immediately obvious: first, that shari'a courts may consider "other Muslim law" (principally found in the Qu'ran and Hadith) not embodied in P.D. 1083;[126] second, that in construing such law, shari'a courts will draw from the standard works of Islamic jurisprudence, which are to "be given persuasive weight in the interpretation of Muslim law."[127] From a practical standpoint, article 4 thus extends the legal reach of P.D. 1083 far beyond its textual prescriptions, incorporating the teachings of the

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123. *Id.* art 2.

124. BARA-ACAL & ASTIH, *supra* note 1, at 15-16.

125. Pres. Dec. No. 1083 art. 4(1). Additionally, article 5 of P.D. 1083 provides that "Muslim law and 'ada [customary law] not embodied in this Code shall be proven in evidence as fact," thus making it clear that shari'a courts may apply Muslim law beyond that expressly captured in P.D. 1083. *Id.* art. 5. In this sense, Muslim law and customary law function in ways not wholly dissimilar to English common law. Moreover,

> [i]f the law is silent, obscure or insufficient, the judge is free to apply any rule which is in harmony with the Philippine Constitution, the Code, public order, public policy, public interest and morals, to include customs, decisions of foreign courts on similar issues, opinions of persons of high authority, and rules of statutory construction.

BARA-ACAL & ASTIH, *supra* note 1, at 20.

126. Pres. Dec. No. 1083 art. 7(h).

127. *Id.* art. 4(2). Bara-Acal observes that Muslim Filipino jurists apply the Sunni school of law, which principally is composed of four sub-schools: Hanafi, Maliki, Shafi'i, and Habali. The presumption is in favor of the Shafi'i school. BARA-ACAL & ASTIH, *supra* note 1, at 22.

Qu'ran, the Hadith, and their historic interpretive texts. If accurate, this means that Muslim law in the Philippines is bounded not by the positive rules articulated in P.D. 1083, but only by the points at which it conflicts with the Philippine civil legal regime.[128] As discussed in Part IV *infra*, Philippine courts have generally concurred with this broad reading, an indication of the Philippine judiciary's willingness to apply pluralist principles to the mechanisms of hybridity adopted in P.D. 1083.[129]

2. Jurisdiction and Presidential Decree 1083

In addition to its far-reaching objectives, P.D. 1083 establishes personal jurisdiction boundaries that include Muslims and, in some cases, non-Muslims as well. Article 3 of P.D. 1083 states: "The provisions of this Code shall be applicable only to Muslims and nothing herein shall be construed to operate to the prejudice of a non-Muslim."[130] At first blush, this language seems to provide a blanket exclusion for non-Muslims. However, P.D. 1083 authorizes shari'a courts to exercise subject matter jurisdiction over Muslim marriages in which only the male is Muslim, as long as the marriage is solemnized in accordance with "Muslim law or this Code in any part of the Philippines."[131] Two things are particularly interesting about this language. First, a non-Muslim woman may be subject to personal jurisdiction in shari'a court if she has married a Muslim man in the Philippines in accordance with Muslim rites. Presumably, the authority for exercising jurisdiction over the marriage is grounded in the woman's decision to marry according to Muslim law, thereby submitting herself to the subsequent jurisdiction of shari'a courts on issues regarding marriage, divorce, and children. Second, the language requires that the marriage be solemnized in accordance with either "Muslim law or this Code," thus recognizing, as noted above, that

128. Even then, Muslim law may prevail. Article 5 of P.D. 1083, Proof of Muslim Law and 'ada, states, "Muslim law and 'ada not embodied in this Code shall be proven in evidence as a fact. No 'ada which is contrary to the Constitution of the Philippines, this Code, Muslim law, public order, public policy or public interest shall be given any legal effect." Pres. Dec. No. 1083 art. 5. The absence of Muslim law as the subject of the second sentence indicates that it may be given effect even when in conflict with the civil legal regime.

129. *See infra* Part IV.

130. Pres. Dec. No. 1083 art. 3(3).

131. *Id.* arts. 13(1), 137; *see also* BARA-ACAL & ASTIH, *supra* note 1, at 17-18 ("Nevertheless, whenever appropriate, the provisions of the Muslim Code shall apply to even non-Muslims. For example, a non-Muslim married to a Muslim male has to be governed by the Muslim law.").

Muslim law exists wholly independent from P.D. 1083.[132] P.D. 1083 operates as a codex of certain personal laws within the Philippine civil legal regime, but does not appear to preempt Muslim law in other or overlapping areas.

P.D. 1083 also authorizes areas of both exclusive and concurrent subject matter jurisdiction.[133] Within shari'a courts' exclusive jurisdiction are cases involving Muslim marriage, divorce, child custody, guardianship, legitimacy, distribution of communal property, probate of wills, and actions arising from customary contracts between Muslims that otherwise do not contain a choice of law provision.[134] Shari'a courts share concurrent original jurisdiction with civil courts in cases involving petitions by Muslims for "the constitution of a family home, change of name and commitment of an insane person to an asylum," personal and real customary contracts "wherein the parties involved are Muslims except those for forcible entry and unlawful detainer," and "[a]ll special civil actions for interpleader or declaratory relief wherein the parties are Muslims or the property involved belongs exclusively to Muslims."[135]

By virtue of these jurisdictional provisions, litigants may find themselves in shari'a court even when they would prefer to be in civil court. The purpose of mandatory jurisdiction is relatively straightforward: if jurisdiction were based solely on consent, Muslim litigants invariably would engage in forum-shopping, only consenting to shari'a court jurisdiction when it favored them. For this reason, even Muslims who are married in accordance with civil rather than religious rites may be hailed into shari'a court. To provide otherwise would, in the words of one commentator, "allow Muslims [to] make a mockery of the law by avoiding its application to them on [the] simple expedient of having their marriage solemnized not in accordance with Muslim rites."[136] From a pluralist perspective, shari'a law in the Philippines is not merely an optional forum in which disputes can be resolved. It is a separate law that, when applicable, carries the full force of the state.

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132. Section 3 of article 13 similarly states that the requirements of marriage and divorce "shall be governed by this Code and other applicable Muslim laws." Pres. Dec. No. 1083 art. 13(3).

133. *See id.* art. 143.

134. *Id.* art. 143(1).

135. *Id.* art. 143(2). In the case of concurrent jurisdiction, "the proper court is where [the action] was first filed to the exclusion of others." BARA-ACAL & ASTIH, *supra* note 1, at 26.

136. BARA-ACAL & ASTIH, *supra* note 1, at 27. For additional discussion of personal jurisdiction, see *infra* text accompanying notes 210-231 (discussing whether someone who has renounced Islam may still be subject to Muslim law).

3. Conflict of Laws and Presidential Decree 1083

The drafters of P.D. 1083 understood its provisions would invariably conflict with those of the civil legal regime.[137] Two clear examples are polygamy and divorce, which Muslim law allows but the civil and criminal codes of the Philippines prevent.[138] P.D. 1083 addresses this conflict in two ways. First, it establishes a preferential scheme that distinguishes between Muslim laws, general laws, and special and local laws. Article 3 states:

> (1) In case of conflict between any provision of this Code and laws of general application, the former shall prevail. (2) Should the conflict be between any provision of this Code and special laws or laws of local application, the latter shall be liberally construed in order to carry out the former.[139]

Article 187 provides additional clarification: "The Civil Code of the Philippines, the Rules of Court and other existing laws, insofar as they are not inconsistent with the provisions of this Code, shall be applied suppletorily."[140] Second, at least with respect to polygamy, P.D. 1083 specifically provides a religious-based exemption to prosecution under the criminal code. Under article 180, "The provisions of the Revised Penal Code relative to the crime of bigamy shall not apply to a person married . . . under Muslim law."[141]

The significance of the conflict of law provisions in P.D. 1083 is the commitment they reflect by the drafters to not merely tolerate—but actually to recognize—the competing normative values held by Muslim Filipinos. As discussed in Part IV.A *infra*, the Philippine government conceded a portion of its normative territory through a dialectical discourse that distinguished sovereigntist normative imperatives from sovereigntist normative interests. In doing so, the government created room within its shared social space for competing normative expressions, managing rather than unilaterally extinguishing normative conflict.

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137. *See* BARA-ACAL & ASTIH, *supra* note 1, at 17 (discussing conflict of laws under P.D. 1083); *see also infra* text accompanying note 183 (discussing the Organic Act of 1989 that also addressed conflict between national law and Muslim law).

138. *See* Miller, *supra* note 44, at 186-87 (comparing Family Code prohibition on divorce with Muslim law); BARA-ACAL & ASTIH, *supra* note 1, at 68 (comparing the criminal law prohibition of bigamy with Muslim law).

139. Pres. Dec. No. 1083 art. 3.

140. *Id.* art. 187.

141. *Id.* art. 180.

B. The Shari'a Court System

In addition to codifying certain Muslim laws, P.D. 1083 establishes a shari'a court system of fifty-one circuit (lower) courts and five district (upper) courts under the administrative supervision of the Philippine Supreme Court.[142] The circuit courts have limited subject matter jurisdiction, mostly confined to marriage, divorce, and disposition of communal property.[143] The district courts hear all other cases, including appeals from the circuit courts.[144] Although the circuit and district courts are geographically configured in the southern Philippines, "[a]ll actions involving Filipino Muslims under the Muslim Code are triable before the Shari'a District/Circuit Courts, regardless of the place of abode or location of the subject of litigation anywhere in the Philippines."[145] All shari'a court judges must be appointed by the President of the Philippines.[146] District court judges must also be members of the Integrated Bar of the Philippines and "learned in Islamic law and jurisprudence."[147] Circuit court judges need not be members of the Integrated Bar, but must be "natural-born citizen[s] of the Philippines, at least twenty-five years of age, and [must have] passed an examination in the Shari'a and Islamic jurisprudence (fiqh) to be given by the Supreme Court for admission to special membership in the Philippine Bar to practice in the Shari'a Courts."[148]

Although shari'a courts were provided for in P.D. 1083, they were not officially established until near the end of the Marcos administration. In accordance with article 140 of P.D. 1083, the Philippine Supreme Court organized the first Shari'a Bar Examination in 1983, which

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142. *Id.* art. 137. Since P.D. 1083 took effect, provisions have also been made for a shari'a appellate court, although they are functionally nonexistent. *See infra* text accompanying notes 181, 192 (discussing creation of appellate courts in 1989); *see also* BARA-ACAL & ASTIH, *supra* note 1, at 8-9 (discussion provision for shari'a appellate courts in the Organic Act of 1989 but noting that "this appellate court is up to now not yet organized, nay, not even any positive attempt was made to do so"). As a result, appeals from the shari'a district court are taken directly to the Supreme Court through a special civil action or petition for certiorari. *See* SUPREME COURT OF THE PHIL., ANNUAL REPORT 2008, at 73 (2008), *available at* http://sc.judiciary.gov.ph/publications/reports/SC_Annual_08.pdf [hereinafter 2008 SUPREME COURT REPORT]; In the Matter of Petition to Authorize Sharia'h District Court Judges to Appoint Shari'a Lawyers as Notaries Public, Atty. Royo M. Gampong, Petitioner, Bar Matter No. 702, (S. Ct. May 12, 1994) (Phil) [hereinafter Bar Matter], *available at* http://www.lawphil.net/courts/bm/bm_702_1994.html (discussing the distinction between civil and shari'a courts and the process for Supreme Court review).

143. Pres. Dec. No. 1083 art. 155.

144. *Id.* arts. 137-44.

145. BARA-ACAL & ASTIH, *supra* note 1, at 26.

146. Pres. Dec. No. 1083 arts. 139, 151.

147. *Id.* art. 140.

148. *Id.* art. 152.

initially only 14 out of more than 100 applicants successfully passed.[149] Two years later, the shari'a courts were officially organized and the first shari'a judges were appointed.[150]

Unfortunately, both the effectiveness and legitimacy of the shari'a courts remain in question. Nearly 100 million people live in the Philippines, of which 5 million are Muslim.[151] Yet, like Philippine civil courts generally, the shari'a court system faces shortfalls in both staffing and funding. Of the 2290 judicial positions authorized in the Philippines, only 56 (or 2.5%) are slotted for positions in shari'a courts.[152] All five of the district court judgeships are currently vacant, and eighteen of the circuit court judgeships are vacant.[153] Part of the problem may lie in the low passage rate for the shari'a bar. During the eleventh Special Bar Examination for the Shari'a Courts held on November 9 and 16, 2008, 133 candidates sat for the examination, but only 35 passed.[154] Although these figures are a slight improvement over the initial passage rate from 1983, they indicate that the Supreme Court still has much work to do in training Islamic jurists who are "learned in Islamic law and jurisprudence."[155] Additionally, the caseflow in the shari'a courts is a trickle compared to that of the civil courts. In 2008, 333,597 new cases were filed in the lower Philippine courts (including shari'a district and circuit courts).[156] Of these, only 263 originated in the shari'a courts.[157] At the end of 2008, the docket of current and prior year active cases in the shari'a system was 404 cases, a fragment of the 642,649 pending cases for all lower courts combined.[158]

Moreover, not all Muslims accept the legitimacy of the shari'a courts. McKenna notes that the MILF, which splintered off the MNLF and continues actively to oppose the Philippine government's assertion of authority, labeled one of the shari'a courts in Mindanao a "fake Islamic

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149. *See* BARA-ACAL & ASTIH, *supra* note 1, at iii.

150. *See id.*; PHILIPPINES COUNTRY PROFILE, *supra* note 35, at 20.

151. CIA WORLD FACTBOOK—PHILIPPINES, https://www.cia.gov/library/publications/the-world-factbook/geos/countrytemplate_rp.html (last visited Jan. 21, 2010).

152. SUPREME COURT OF THE PHIL., *supra* note 142, at 61.

153. *Id.* at 35.

154. *See* James C. Bitanga, *Successful Shari'a Bar Candidates Take Their Oath*, BENCHMARK ONLINE, Sept. 19, 2009, http://sc.judiciary.gov.ph/publications/benchmark/2009/06/060917.php.

155. A Decree To Ordain and Promulgate a Code Recognizing the System of Filipino Muslim Laws, Codifying Muslim Personal Laws, and Providing for Its Administration and for Other Purposes, Pres. Dec. No. 1083, art. 140, (Feb. 4, 1977) (Phil.), *available at* http://www.chanrobles.com/PRESIDENTIAL%20DECREE%20NO.%201083.pdf.

156. *See* 2008 SUPREME COURT REPORT, *supra* note 142, at 35.

157. *Id.*

158. *Id.* at 35-36.

court."[159] McKenna found in his research that that particular shari'a court, located in Cotabato, "was very little used by Cotabato Muslims."[160] Of course, it is the MILF that has been accused of bypassing the shari'a courts altogether and applying their own version of Islamic law, including capital punishment.[161] This points to another problem for both civil and shari'a judges: safety. In its 2008 Annual Report, the Supreme Court of the Philippines highlighted the fact that its capital outlays had increased 239.85% over the prior year.[162] "The increase is attributed [in part] to provision of guns and ammunition in support of the Judiciary Protection Program and as part of security measures to counter threats on the lives of justices, judges and other personnel . . . ."[163] Sadly, the threat to judges is real. Since 1999, seventeen judges have been killed in the Philippines,[164] including a shari'a court judge who was shot by unidentified gunmen in Sulu in September 2009.[165]

In an effort to strengthen the shari'a court system, Senator Loren Legarda introduced a bill in November 2008 to amend P.D 1083 to increase the number of shari'a district courts from five to eleven and the number of shari'a circuit courts from fifty-one to eighty-eight.[166] Importantly, the bill recognized that while shari'a courts are statutorily located in the southern Philippines, significant populations of Muslims live elsewhere, including the Visayas, Luzon, and Metro Manila.[167] The bill therefore provided for the establishment of shari'a courts in these areas as well.[168] As of the time of this writing, final action had not yet been taken on the bill.

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159. MCKENNA, *supra* note 26, at 230.

160. *Id.*

161. *Id.* at 225-30.

162. SUPREME COURT OF THE PHIL., *supra* note 142, at 31.

163. *Id.*

164. *See* Jay B. Rempillo, Supreme Court of the Phil., PhP1Million Reward for Informants, Witnesses in Judge's Killings; Security Training for Judges Continues (Dec. 11, 2008), http://sc.judiciary.gov.ph/news/courtnews%20flash/2008/12/12110801.php.

165. *See* Abigail Kwok, *Shariah Court Judge in Sulu Shot Dead*, INQUIRER.NET, Sept. 17, 2009, http://newsinfo.inquirer.net/breakingnews/regions/view/20090917-225655/Shariah-court-judge-in-Sulu-shot-dead.

166. An Act Establishing the Shari'a District Court System in the Autonomous Region in Muslim Mindanao (ARMM) and in the Areas Outside the Said Autonomous Region, Amending for the Purpose Presidential Decree No. 1083 Otherwise Known as the Muslim Code of Personal Laws of the Philippines, Providing Funds Therefor and for Other Purposes, S. 2863, 14th Cong. (2008) (Phil.).

167. *Id.*, Explanatory Note.

168. *Id.* §§ 1-3.

C. The Autonomous Region in Muslim Mindanao

In 1983, Senator Benigno Aquino was assassinated.[169] Aquino, a popular Christian senator who had been "strongly supportive of Muslim aspirations for self-determination,"[170] was the first to inform the Philippine Senate in 1968 about the Jabidah Massacre.[171] He also met with MNLF leadership in Damascus in 1981 for a series of peace talks following the Marcos administration's failure to fully implement the Tripoli Agreement.[172] Aquino's assassination proved a destabilizing force for the Marcos administration and, in 1986, Marcos fled the country after trying to steal the presidential election from Aquino's widow, Corazon Aquino.[173] The so-called "People Power Coup" not only ushered Corazon Aquino into the presidency, it also kindled the hopes of Filipino Muslims waiting for the Tripoli Agreement to be fully implemented.[174]

Among the Aquino administration's first initiatives was a revised constitution, one that, among other things, provided for the creation of an autonomous Muslim region.[175] Article X of the 1987 Constitution states:

> There shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.[176]

For each autonomous region, the new Constitution also required the Philippine Congress to enact an organic act that (1) defined the structure of the autonomous region's executive and legislative branches and (2) "provide[d] for special courts with personal, family, and property law jurisdiction consistent with the provisions of [the] Constitution and national laws."[177]

Accordingly, on August 1, 1989, Congress passed Republic Act No. 6734, the Organic Act for the Autonomous Region in Muslim Mindanao

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169. *See* MCKENNA, *supra* note 26, at 236.
170. *See id.* at 235.
171. *See id.* at 140.
172. *See id.* at 242.
173. *See id.* at 236.
174. *See id.* at 235.
175. *See* CONST. (1987) (Phil.), *available at* http://www.chanrobles.com/philsupremelaw2.html.
176. *Id.* art X, § 15.
177. *Id.* § 18; *see also* BARA-ACAL & ASTIH, *supra* note 1, at 8.

(Organic Act).[178] The Organic Act authorized thirteen provinces and nine cities in the southern Philippines to hold a special plebiscite to determine whether they wanted to be part of the ARMM.[179] The Act also provided for significant executive and legislative autonomy, although it clearly stated that the ARMM "shall remain an integral and inseparable part of the national territory of the Republic of the Philippines as defined by the Constitution and existing laws."[180] Further, the Organic Act created a Shari'a Appellate Court,[181] established a system of tribal (nonreligious) courts,[182] and clarified that "[i]n case of conflict between the Muslim Code and the Tribal Code, the national law shall apply."[183]

Most commentators concede that, for various reasons, the ARMM has fallen short of its full potential. During the plebiscite in November 1989, only four provinces—Sulu, Tawi-Tawi, Maguindanao, and Lanao del Sur—voted to join the ARMM.[184] In 2001, Republic Act No. 9054 authorized another plebiscite,[185] but only the island of Basilan (with the exception of Isabela City) and Marawi City on Mindanao reversed their earlier decision and joined the ARMM.[186] Despite receiving some 27 billion pesos from the Philippine government and millions of dollars from foreign sources, the ARMM continues to struggle economically. One commentator observed in 2003 that "[t]he region is as impoverished and strife-torn as it was in 1996, and it remains the poorest region in the country."[187] Part of the blame arguably lies with Muslim leaders, who have squandered ARMM monies, failed to attract foreign investment, and engaged in internal disagreement and rivalries.[188] Additionally, active fighting in the region has continued, with the MILF, communist rebels,

178. An Act Providing for an Organic Act for the Autonomous Region in Muslim Mindanao, Rep. Act No. 6734, (Aug. 1, 1989) (Phil.), *available at* http://www.chanrobles.com/republicactno6734.html.

179. *Id.* art. II, § 1(2).

180. *Id.* art III, § 1.

181. *Id.* art. IX, § 2.

182. *Id.* art. IX, § 14.

183. *Id.* art. IX, § 17(2).

184. *See* ABUZA, *supra* note 26, at 41; MCKENNA, *supra* note 26, at 334 n.24. As a result, the ARMM includes "12,000 square kilometers, roughly 4 percent of Philippine territory." ABUZA, *supra* note 26, at 41.

185. An Act To Strengthen and Expand the Organic Act for the Autonomous Region in Muslim Mindonau, Amending for the Purpose Republic Act No. 6734, Entitled 'An Act Providing for the Autonomous Region of Muslim Mindanao,' as Amended, Rep. Act No. 9054, art. I, § 1, (Mar. 31, 2001) (Phil.), *available at* http://www.congress.gov.ph/download/ra_11/RA09054.pdf.

186. GMA News, ARMM History and Organization (Aug. 11, 2008), http://www.gmanews.tv/story/112847/ARMM-history-and-organization.

187. ABUZA, *supra* note 26, at 42.

188. *See id.*

and other separatist groups attacking both civilian and military targets.[189] Critics note, however, that the national government also shares part of the blame. ARMM leaders criticize the government for failing, yet again, to grant the full autonomy promised.[190] Further, "[d]espite 'autonomy,' the ARMM still remits 60 percent of its revenue to the central government and in turn gets only 10 percent back."[191] Also, as previously discussed, the shari'a courts face significant challenges. The Shari'a Appellate Court provided for in the Organic Act has yet to be established,[192] numerous judicial vacancies exist in the district and circuit courts,[193] the docket indicates the courts are less than fully utilized,[194] and even some Muslims question the shari'a courts' legitimacy.[195]

IV. Toward a Pluralist Resolution of Conflict

In 1973, Justice J.B.L. Reyes, the first president of the Integrated Bar of the Philippines and retired Associate Justice of the Philippine Supreme Court, commented on the need for a pluralistic approach to legal hybridity in the Philippines. Speaking of the legal problems then confronting the country, he noted:

> One of them, apparently neglected up to [this point], is the need for a thorough study of the legal rules of Islamic law, as applied and observed by their own judges and jurists. A thoughtful contrast thereof with our own basic tenets could delineate the areas where Islamic law may be left to govern those professing Muslim faith without endangering national unity, thus effectively answering the claim of our brothers from the South that they are a [sic] discriminated against by a general application of jural rules of Christian origin. The experience of countries with large Moslem minorities, like the Lebanese Republic, deserves careful observation, for we may derive from them lessons in legal co-existence that may contribute to the pacification of certain regions in Mindanao.[196]

Similarly, in 2008, Senator Loren Legarda commented, in her Explanatory Note to Senate Bill No. 2863, that the Muslim Code of Personal Laws demonstrated "an inkling towards a pluralistic approach to

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189. *See id.*

190. *See id.* at 43.

191. *See id.*

192. SUPREME COURT OF THE PHIL., *supra* note 142, at 73. In its 2008 Annual Report, the Supreme Court noted that, in discussing the shari'a circuit courts, "[t]heir decisions are appealable to the Shari'a Appellate Court, which . . . is yet to be organized." *Id.*

193. *Id.* at 61.

194. *Id.* at 35-36.

195. *See supra* text accompanying note 158.

196. BARA-ACAL & ASTIH, *supra* note 1, at 11 (quoting J.B.L. Reyes, 1 INTEGRATED B.J. (1973)).

laws of personal application."[197] It may be tempting to superimpose a normative notion of fundamental fairness on the Philippine government's embrace of pluralism, and, indeed, a sense of normative equivalency may have motivated some actors, but as the preceding history indicates, pragmatism appears to have been the central driving force. In referring to "the pacification of certain regions in Mindanao," Justice Reyes underscored the Philippine government's overarching motivation in striving for structured legal hybridity: a resolution of the ongoing conflict in the southern Philippines.[198]

In this Part, I review the Philippine government's approach to pluralism in light of four mechanisms for managing legal hybridity identified by Berman: dialectical discourse, margins of appreciation, jurisdictional redundancy, and limited autonomy regimes.[199] Using the 1987 Constitution, P.D. 1083, and the case of *Bondagjy v. Bondagjy*[200] as backdrops, I discuss how the Philippine government has employed a range of pluralistic mechanisms in an effort to reduce normative conflict and recognize the normative needs of Muslim Filipinos. I conclude by suggesting that the Philippine government's approach ambulates toward the possible benefits of pluralism, but a good deal of work remains.

A. Dialectical Discourse

From a pluralist perspective, dialectical discourse involves a continuing conversation between normative communities, which "is neither the direct hierarchical review traditionally undertaken by appellate courts, nor simply the dialogue that often occurs under the doctrine of comity."[201] Rather, competing communities, despite retaining normative independence, practice mutual accommodation by allowing each other's norms to influence their own normative interpretations. Two examples put forward by Berman illustrate the point. First, at the supranational level, the European Court of Human Rights (ECHR) serves in principle as the "arbiter of European human rights" for

197. An Act Establishing the Shari'a District Court System in the Autonomous Region in Muslim Mindanao (ARMM) and in the Areas Outside the Said Autonomous Region, Amending for the Purpose Presidential Decree No. 1083 Otherwise Known as the Muslim Code of Personal Laws of the Philippines, Providing Funds Therefor and for Other Purposes, S. 2863, 14th Cong. (2008) (Phil.).

198. BARA-ACAL & ASTIH, *supra* note 1, at 11 (quoting Reyes, *supra* note 196).

199. *See* Berman, *supra* note 2.

200. G.R. No. 140817, (S.C. Dec. 17, 2001) (Phil.), *available at* http://sc.judiciary.gov.ph/jurisprudence/2001/dec2001/140817.htm.

201. Berman, *supra* note 2, at 1197.

European constitutional courts.[202] Although state courts may decline to follow the ECHR, citing constitutional independence, they nevertheless account for and integrate ECHR rulings in relevant domestic decisions. "The picture that emerges is one in which domestic courts and the ECHR engage in a series of both informal and interpretive mutual accommodation strategies to maintain a balance between uniformity and dissension."[203] At the subnational level, Berman considers the approach of Canada, where the Canadian Constitution "explicitly contemplates a dialectical interaction between national courts and provincial legislatures concerning constitutional interpretation."[204] Section 33 of the Canadian Charter of Rights and Freedoms contains a clause permitting the legislature to authorize a law's continuing operation for a limited period *after* the law has been struck down by a court.[205] Though rarely invoked, Berman theorizes section 33 may nevertheless have a "disciplining effect on the court and [may] encourage[] a more nuanced iterative process in working out constitutional norms."[206]

Similarly, both the Philippine Constitution and P.D. 1083 require policy makers to engage in a dialectical discourse that considers the normative needs of Muslim Filipinos. Section 17 of article XIV of the Constitution provides: "The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies."[207] Referring to "National Cultural Communities," P.D. 1083 dictates that "the State shall consider their customs, traditions, beliefs and interests in the formulation and implementation of its policies."[208] While not mandating specific policies, these documents establish a dialectical structure that reinforces pluralist principles, encouraging both lawmakers and courts to incorporate pluralistic considerations into the decision-making process.[209]

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202. *Id.* at 1198-99.
203. *Id.* at 1199.
204. *Id.*
205. *See id.*
206. *Id.*
207. CONST. (1987), Art. XIV, § 17, (Phil.), *available at* http://www.chanrobles.com/philsupremelaw2.html.
208. A Decree To Ordain and Promulgate a Code Recognizing the System of Filipino Muslim Laws, Codifying Muslim Personal Laws, and Providing for Its Administration and for Other Purposes, Pres. Dec. No. 1083, Preamble, (Feb. 4, 1977) (Phil.), *available at* http://www.chanrobles.com/PRESIDENTIAL%20DECREE%20NO.%201083.pdf.
209. Sections 15 and 16 of article XIII similarly establish mechanisms for dialectical interaction with informal subnational peoples organizations. *See* CONST. (1987), Art. XIII, §§ 15-16, (Phil.).

The Philippine Supreme Court is also a participant in this dialectical process. For example, in *Bondagjy v. Bondagjy* the Philippine Supreme Court considered whether a woman who had converted from Catholicism to Islam, married a Muslim man, and then converted back to Catholicism after having children was subject to Muslim law regarding parental fitness.[210] In late 1987, Sabrina Artadi converted from Catholicism to Islam.[211] Four months later she married Fouzi Bondagjy in Muslim rites in Manila.[212] The couple soon moved to Saudi Arabia, had two children, and eventually moved back to Manila.[213] In 1995 they separated, and, in 1996 Ms. Artadi had the children baptized as Christians.[214] Prior to their baptism, Mr. Bondagjy filed an action in the shari'a district court in Marawi City, Mindanao seeking custody of his children.[215] Ms. Artadi filed a motion to dismiss for lack of jurisdiction, arguing that both she and her estranged husband were residents of Manila.[216] In the alternative, she requested a change of venue to the shari'a court in Zamboanga City, which also is on the island of Mindanao but "was more accessible by plane."[217] The Marawi City shari'a court retained jurisdiction but approved the transfer of venue.[218] The Zamboanga City shari'a court then entertained a number of procedural motions over the next several months while Ms. Artadi filed a parallel action in civil court in Metro Manila seeking "nullity of marriage, custody, and support."[219] The civil court eventually issued an order "to maintain the status quo until further orders from the [civil] court."[220] Meanwhile, the shari'a court also issued an order "to allow [Mr. Bondagjy] to exercise his right of parental authority over [the] minor children . . . in accordance with article 71, of P.D. 1083, the Code of Muslim Personal Laws."[221]

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210. G.R. No. 140817, (S.C. Dec. 17, 2001) (Phil.), *available at* http://sc.judiciary.gov.ph/jurisprudence/2001/dec2001/140817.htm.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. Mr. Bondagjy, who was a resident of Manila on the island of Luzon, appears to have filed in Marawi City on the island of Mindanao because of the lack of shari'a courts on Luzon. *See id.* For a discussion of Senator Loren Legarda's effort to serve the Muslim population in Metro Manila by establishing shari'a courts there, see *supra* text accompanying notes 165-167.

216. *Bondagjy*, G.R. No. 140817.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

Three years later, in 1999, with the children still in Ms. Artadi's custody, Ms. Artadi filed another motion with the shari'a court to dismiss for lack of jurisdiction, arguing that P.D. 1083 applied only to Muslims and she now was a Christian.[222] Mr. Bondagjy opposed the motion, presented *ex parte* evidence of his wife's unfitness as a parent, and eventually was awarded custody of his children by the shari'a court.[223] The evidence against Ms. Artadi included allegations that she "was seen with different men at odd hours in Manila, and that she would wear short skirts, sleeveless blouses, and bathing suits."[224] Mr. Bondagjy further alleged that she would "let their children sweep the neighbor's house for a fee of P40.00 after the children [came] home from school."[225] Finally, Mr. Bondagjy claimed she made it difficult for him to see his children. In awarding Mr. Bondagjy custody of the children, the shari'a court stated:

> A married woman, and a mother to growing children, should live a life that the community in which she lives considers morally upright, and in a manner that her growing minor children will not be socially and morally affected and prejudiced. It is sad to note that [Ms. Artadi] has failed to observe that which is expected of a married woman and a mother by the society in which she lives. . . . The evidence of this case shows the extent of the moral depravity of the respondent, and the kind of concern for the welfare of her minor children which on the basis thereof this Court finds respondent unfit with the custody of her minor children. . . .
>
> Under the general principles of Muslim law, the Muslim mother may be legally disentitled to the custody of her minor children by reason of '*wickedness*' when such wickedness is injurious to the mind of the child, such as when she engages in 'zina' (illicit sexual relation); or when she is unworthy as a mother; and, a woman is not worthy to be trusted with the custody of the child who is continually going out and leaving the child hungry.[226]

Following the shari'a court's decision, Ms. Artadi filed an appeal with the Philippine Supreme Court.[227]

The line of reasoning adopted by the Supreme Court in settling the matter is instructive on the issue of dialectical discourse. Although the Court could have simply overturned the shari'a court's holding on the jurisdictional basis that Ms. Artadi was no longer a Muslim, it instead

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222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*

adopted a deferential approach that attempted to accommodate both Christian and Muslim normative interests. With respect to Ms. Artadi's parental fitness, the Court found "that the evidence presented by [Mr. Bondagjy] was not sufficient to establish [Ms. Artadi's] unfitness according to Muslim law *or* the Family [Civil] Code."[228] Although the Court then applied the Family Code's standard for parental fitness because Ms. Artadi was no longer a Muslim, it softened its reasoning by stating: "Indeed, what determines the fitness of *any* parent is the ability to see to the physical, educational, social and moral welfare of the children . . . ."[229] Importantly, the Court refrained from commenting, either negatively or positively, on the shari'a judge's finding of Ms. Artadi's "moral depravity" under Muslim law.

Similarly, the Court adopted a hybrid approach in dividing custody between the parents, drawing on both the Family Code and P.D. 1083 as it applied a variation of the "best interests of the child" test:

> The welfare of the minors is the controlling consideration on this issue. . . . Article 211 of the Family Code provides that the father and mother shall jointly exercise parental authority over the persons of their common children. Similarly, P.D. 1083 is clear that where the parents are not divorced or legally separated, the father and mother shall *jointly exercise just and reasonable parental authority* and fulfill their responsibility over their legitimate children.[230]

Noting that it did "not doubt the capacity and love of both parties for their children, such that they both want to have them in their custody," the Supreme Court awarded primary physical custody to Ms. Artadi with weekly visitation by Mr. Bondagjy.[231]

Of course, its consideration of P.D. 1083 notwithstanding, it could be argued that the Court actually disregarded the normative values expressed by the shari'a court regarding what is and is not appropriate moral conduct for a Muslim mother, cloaking a sovereigntist outcome in pluralistic language. Two counterbalancing points merit consideration. First, by at least discussing P.D. 1083, the Court rejected normative hegemony in favor of a dialectical methodology that in and of itself, "presupposes acceptance of certain values."[232] If the Court's only concern was in reaching a certain normative outcome, it could have chosen to

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228. *Id.* (emphasis added).
229. *Id.* (emphasis added).
230. *Id.*
231. *Id.*
232. Berman, *supra* note 2, at 1193 (quoting CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 168 (2000) (internal quotation marks omitted)).

disregard the dialectic altogether. Instead, it conducted an overlapping discussion of both the Family Code and P.D. 1083, thereby indicating its acceptance of "the principles underlying the values of . . . pluralism itself."[233] Second, it should be remembered that a pluralist approach to legal hybridity does not mandate a particular normative outcome, or require participants to suppress their own normative beliefs. As Berman states, "the claim is only that the independent values of pluralism should always be factored into the analysis, not that they should never be trumped by other considerations."[234] In *Bondagjy*, the Supreme Court acknowledged that Christians and Muslims share the same social space, engaged in equivalent discussions of both the Family Code and the Muslim Code (even though it ultimately found the Family Code more applicable because Ms. Artadi was no longer a Muslim), and sought to reach a normative outcome that embraced the values (if not the desired ends) of both normative communities.

B. Margins of Appreciation

The margins of appreciation doctrine acknowledges the need for a hierarchal legal supervisor (such as an appellate court or supranational judicial panel) to retain oversight authority while providing "space for local variation" in implementing supervisory norms.[235] Within the context of pluralism, it encourages legal hybridity by allowing subordinate jurists to adapt governing norms to local custom and allowing legal supervisors to give deference to local adaptations which are not fundamentally incompatible with the overarching scheme.[236] As an example, the ECHR employs the margins of appreciation doctrine "to strike a balance between deference to national courts and legislators on the one hand, and maintaining 'European supervision' that 'empower[s the ECHR] to give the final ruling' on whether a challenged practice is compatible with the Convention, on the other."[237] The width of the margin depends on multivalent factors, such as the degree of local consensus over the contested norm.[238] Among other things, the doctrine encourages legal supervisors to move forward incrementally, waiting for

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233. *Id.* at 1193.

234. *Id.* at 1165.

235. *Id.* at 1201; *see also* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 316-17 (1997) (discussing margins of appreciation in the context of supranational hybridity).

236. *See* Helfer & Slaughter, *supra* note 235, at 316.

237. Berman, *supra* note 2, at 1201 (quoting Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 36 (1979)) (internal quotations marks omitted).

238. *Id.*

consensus to build before issuing definitive normative prescriptions.[239] It thus encourages legal subordinates to function as a kind of normative laboratory, creating novel local approaches to legal hybridity during periods of transition.

In the Philippines, elements of the margins of appreciation doctrine are embodied in both the 1987 Constitution and P.D. 1083, which, as previously discussed, require the government to consider the rights of indigenous communities in formulating and implementing national policies.[240] Within the judicial branch, these mechanisms arguably encourage the Supreme Court to give latitude to shari'a courts in adapting national norms to local custom and practice. Though less visible than dialectical discourse, the decisions of the Philippine Supreme Court appear to provide shari'a courts with a recognizable margin of appreciation in rendering judicial decisions.

For example, in the successor case to *Bondagjy*, the Supreme Court again considered the continuing marital dispute between Mr. Bondagjy and Ms. Artadi.[241] *Bondagjy II* concerned a complaint for divorce by *faskh* filed by Ms. Artadi in shari'a circuit court in 2005. Ms. Artadi claimed that Mr. Bondagjy had failed to provide for his dependents or perform his marital obligations for ten years.[242] As an affirmative defense, Mr. Bondagjy argued the action was barred by the doctrine of res judicata because a similar shari'a action filed in 1996 by Ms. Artadi had been dismissed.[243] In fact, it was the dismissal of this action by the shari'a circuit court in 1996 that caused the civil court in 1998 to also dismiss, under the doctrine of res judicata, Ms. Artadi's civil complaint for nullity of marriage.[244] Agreeing with Mr. Bondagjy's argument, the shari'a circuit court, considering the 2005 action, dismissed Ms. Artadi's complaint.[245] Ms. Aratadi then appealed to the Fourth Shari'a District Court, which reversed by finding res judicata inapplicable for lack of

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239. *See id.*

240. *See* CONST. (1987), Art. XIV, § 17, (Phil.); A Decree To Ordain and Promulgate a Code Recognizing the System of Filipino Muslim Laws, Codifying Muslim Personal Laws, and Providing for Its Administration and for Other Purposes, Pres. Dec. No. 1083, Preamble, (Feb. 4, 1977) (Phil.), *available at* http://www.chanrobles.com/PRESIDENTIAL%20DECREE%20NO.%201083.pdf.

241. Bondagjy v. Artadi, G.R. No. 170406, (S.C. Aug. 11, 2008) (Phil.), *available at* http://sc.judiciary. gov.ph/jurisprudence/2008/august2008/170406.htm.

242. *Id.*

243. *Id.*

244. *Id.* In addition to modeling the benefits of legal hybridity, this case also models the complexities introduced by a hybrid system.

245. *Id.*

identity between the 1996 and 2005 causes of action.[246] Mr. Bondagjy then appealed to the Supreme Court.[247] After reviewing the prior courts' decisions, the Supreme Court observed that the shari'a circuit court had dismissed Ms. Artadi's complaint without a hearing on the merits.[248] Though perhaps procedurally permissible, the Supreme Court found that the circuit court's findings were "at best superficial . . . given the distinctiveness of Shari'a Court procedures."[249] The Supreme Court then embarked on a discussion of testimonial evidence as a form of proof under Muslim law, agreed with the Fourth Shari'a District Court that the case was not res judicata, and also upheld the Fourth Shari'a District Court's conclusion regarding application of the procedural rules.[250] The Supreme Court remanded the case back to the shari'a circuit court for consideration.

Two elements of *Bondagjy II* reflect application of the margins of appreciation doctrine. First, the Supreme Court willingly considered Muslim law and the "distinctiveness of Shari'a Court procedures" in reaching its final decision. In doing so, the Court implicitly acknowledged shari'a courts' need to customize evidentiary hearings to Muslim normative requirements. Second, the Supreme Court observed that in 1998 the civil court had applied res judicata to the civil action on the basis of the earlier shari'a action. Although a margin of appreciation of a different sort, the civil court's willingness to bar a civil action (nullity of marriage) on the basis of an adjudicated shari'a action (divorce by *faskh*) arguably demonstrates an appreciation of local variation in resolving marital disputes.

Before moving on, I note that the margins of appreciation doctrine does not give shari'a courts unbounded discretion. In the case of *Tampar v. Usman*, the Supreme Court considered whether a shari'a circuit court's dismissal of a case on the basis of *yamin*, or holy oath, taken by the defendant violated general principles of due process.[251] The plaintiffs claimed that the defendant, Mr. Usman, had forged their signatures on a deed of sale for a parcel of real property.[252] Because they had no witnesses, they demanded (in accordance with the shari'a court's rules of

246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. G.R. No. 82077, (S.C. Aug. 16, 1991) (Phil.), *available at* http://www.lawphil.net/judjuris/juri1991/aug1991/gr_82077_1991.html.
252. *Id.*

procedure) that Mr. Usman take an oath that he had *not* forged the deed.[253] The defendant eventually agreed, stating:

> I, Esmael Usman, swear in the name of Allah Most Gracious, most Merciful and upon the Holy Quran that I bought the land in question from the plaintiffs; that I have not forged or falsified the signatures of the plaintiffs; and that God will curse me if I am not telling the truth.[254]

On the basis of Mr. Usman's oath, the shari'a court dismissed the case.[255] The plaintiffs then appealed to the Supreme Court, arguing that the procedural rule allowing the shari'a court to decide cases on the basis of *yamin* violated their due process right to be heard (even though, ironically, they had demanded Mr. Usman take the oath).[256] The Supreme Court concurred:

> The Court shares the concern of petitioners in the use of the yamin in this proceeding, and for that matter, before Philippine Shari'a courts. Section 7 of the Special Rules of Procedure prescribed for Shari'a courts aforecited provides that if the plaintiff has no evidence to prove his claim, the defendant shall take an oath and judgment shall be rendered in his favor by the Court. On the other hand, should defendant refuse to take an oath, plaintiff may affirm his claim under oath, in which case judgment shall be rendered in his favor.
>
> Said provision effectively deprives a litigant of his constitutional right to due process. It denies a party his right to confront the witnesses against him and to cross-examine them. It should have no place even in the Special Rules of Procedure of the Shari'a courts of the country.[257]

The Court went on to state that "[t]he possible deletion of this provision from the [shari'a court] rules should be considered."[258] Thus, while the Court acknowledged the distinctiveness of the shari'a courts' rules of procedure, it nevertheless affirmed that they were bounded by the overarching right to due process, drawing a clear outer limit on the margin of appreciation.

C. Jurisdictional Redundancy

Jurisdictional redundancy arises when multiple communities possess jurisdictional authority over the same actors.[259] Because of this

253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.* (footnote omitted).
258. *Id.*
259. *See* Berman, *supra* note 2, at 1210.

overlap, system actors face a number of legal conundrums, including conflicting normative obligations, questions of choice of forum, and uncertainty as to final resolution of the ultimate issue.[260] Rather than viewing such redundancy as a weakness of legal hybridity, Berman invites us to view it as a strength, arguing jurisdictional redundancy is an "adaptive feature" of pluralism that "leads to a nuanced negotiation—either explicit or implicit—between or among the various communities making those claims."[261] Berman then echoes the reasoning adopted by Robert Cover in the context of U.S. federalism, who identified among the benefits of jurisdictional redundancy "a greater possibility for error correction, a more robust field for norm articulation, and a larger space for creative innovation."[262]

Applied to the Philippines, *Bondagjy* and *Bondagjy II* seem to exemplify the problems created by jurisdictional redundancy. Competing normative claims, overlapping jurisdictional schemes, repeated forum shopping, and opposing judicial orders are all present at one point or another. Between 1996 and 2008, the two cases involved no less than two shari'a circuit courts, one shari'a district court, one civil regional trial court, and (on two separate occasions) the Philippine Supreme Court. If anything, *Bondagjy* and *Bondagjy II* appear to model the inherent problems of hybridity.

But it is equally worthwhile to ask whether they also display the benefits of jurisdictional redundancy discussed by Berman. In *Bondagjy*, Mr. Bondagjy was awarded custody of his children by the shari'a court even though he travelled often and had not seen them regularly (supposedly because of Ms. Artadi) for several years. The basis of the shari'a court's decision was Ms. Artadi's "moral depravity." Ms. Artadi then successfully appealed to the Supreme Court to remain the children's primary physical custodian. From her perspective, and perhaps the perspective of the children who had primarily lived with her, jurisdictional redundancy certainly allowed for "a greater possibility for error correction."[263] Similarly, in both *Bondagjy* and *Bondagjy II*, the courts found that Ms. Artadi was a properly named party in the shari'a court actions, even though she had re-converted from Islam to Christianity. In *Bondagjy*, Mr. Bondagjy chose the forum. In *Bondadgjy*

260. *See id.*
261. *Id.*
262. *Id.*
263. *Id.* (citing Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981)). Whether the Supreme Court's decision was an "error correction," of course, depends on one's normative persuasion.

II, Ms. Artadi initiated the complaint. In both cases, however, Mr. Bondagjy might concede that the overlapping system provided "a more robust field for norm articulation" in which his normative values—though perhaps not victorious—were at least heard and considered along the way. Finally, on a more theoretical level, one can imagine that the judges sitting in both the civil and shari'a courts, faced with litigants who chose to proceed in one forum but also had actions pending in the other, at least implicitly considered the normative scheme of the competing jurisdiction in rendering decisions they intended to be binding.

Of course, the conflict of law provisions in P.D. 1083 aim to eliminate many of the conundrums created by jurisdictional redundancy by designating both priority among competing authorities and exclusive and concurrent zones of original jurisdiction.[264] Additionally, article 145 of P.D. 1083 contains a "finality" provision, which states: "The decisions of the Shari'a District Courts whether on appeal from the Shari'a Circuit Court or not shall be final. Nothing herein contained shall affect the original and appellate jurisdiction of the Supreme Court as provided in the Constitution."[265] Unfortunately, as evidenced by *Bondagjy* and *Bondagjy II*, the second provision of article 145 sometimes swallows the first, allowing litigants to appeal from the shari'a district court. In other instances, however, the Supreme Court has invoked the finality of rulings by the shari'a district court in refusing to hear an appealed case.[266]

D. Limited Autonomy Regimes

A fourth, and, for our discussion, final mechanism for addressing "different normative orders that can neither ignore nor eliminate the other" are regimes of limited autonomy, which are classically seen in states with diverse religious or ethnic populations.[267] The purpose of such regimes is to mediate conflict by endowing minority populations with some measure of shared state power. In *Global Legal Pluralism*, Berman draws upon Henry Steiner to identify three types of limited autonomous regimes: (1) regimes of "territorially-concentrated ethnic, religious, or linguistic minority group[s]" who retain provisional executive,

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264. For a discussion of the conflict of law provisions in P.D. 1083, see *supra* text accompanying notes 136-140.

265. A Decree To Ordain and Promulgate a Code Recognizing the System of Filipino Muslim Laws, Codifying Muslim Personal Laws, and Providing for Its Administration and for Other Purposes, Pres. Dec. No. 1083, art. 145, (Feb. 4, 1977) (Phil.), *available at* http://www.chanrobles.com/PRESIDENTIAL%20DECREE%20NO.%201083.pdf.

266. *See* Bar Matter, *supra* note 142 (discussing distinction between civil and shari'a courts and process for review by Supreme Court).

267. *See* Berman, *supra* note 2, at 1203.

legislative, and judicial autonomy; (2) power-sharing regimes in which minority normative communities are assured representation in executive, legislative, or judicial councils, or endowed with certain powers and prerogatives in the decision-making process; and (3) regimes that recognize the personal law of members of minority normative communities "regardless of [their] territorial location."[268] Berman notes that with this third type of limited autonomy region, "state law may seek to create what are essentially margins of appreciation to recognize forms of autonomy for these identities."[269] Berman then ties margins of appreciation to limited autonomy regimes, writing:

> Today, particularly in countries with a large minority Muslim population, many states maintain space for personal law within a nominally Westphalian legal structure. These nation-states—ranging from Canada to Egypt to India to Singapore—recognize parallel civil and religious legal systems, often with their own separate courts. And civil legal authorities are frequently called on to determine the margin of appreciation to be given to such personal law.[270]

The essential point is that limited autonomy regimes that recognize the personal laws of certain citizens inherently embrace margins of appreciation. By design, they allow local variation of overarching norms, making explicit that which is inherent by recognizing competing normative schemes.

Of course, this is precisely the framework established by the Philippine government in enacting P.D. 1083, which formally established shari'a courts as an instrument of the judiciary and provided for Muslim personal law in areas of marriage, divorce, child custody, property, and estate. Though conceived territorially, the efforts of Senator Legarda to broaden the reach of shari'a courts to Luzon and the Visayas acknowledges that Muslims are now located throughout the Philippines, remain governed by P.D. 1083 wherever they are located, and should have access to local shari'a courts in areas outside of the southern Philippines. *Bondagjy* is a clear example of the reach of normative autonomy granted to Muslim Filipinos. Both Mr. Bondagjy and Ms. Artadi lived in Metro Manila but were subject to the jurisdiction of shari'a courts in Mindanao. In fact, it was because Zamboanga City was "more accessible by plane"

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268. *Id.* at 1203-04 (citing Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1541-43 (1991)).

269. *Id.* at 1204.

270. *Id.* at 1206 (footnote omitted).

from Manila that Ms. Artadi initially moved for a change of venue from the shari'a court in Marawi City.[271]

The ARMM is another example of the Philippine government's efforts to employ limited autonomy as a mechanism for resolving the conflict in legal hybridity. As previously discussed, the ARMM functions as a semi-autonomous regional body with executive and legislative authority. The autonomy granted by the Philippine government in the Organic Act includes (1) administrative organization; (2) revenue generation; (3) management of ancestral domains; (4) use and preservation of natural resources; (5) oversight of personal, family, and property relations; (6) urban and rural planning and development; (7) economic development; (8) tourism; (9) education; (10) preservation of cultural heritage; and (11) all other "[p]owers, functions and responsibilities now being exercised by the department of the National Government" except those specifically retained (for example, foreign affairs, national defense, coinage, postal service, customs and tariffs).[272] Although the Organic Act expressly requires the ARMM to function "within the framework of the Constitution and national sovereignty,"[273] the breadth of power delegated to the ARMM stands as an "official recognition of essential hybridity that the state cannot wish away."[274]

E. Progress Through Pluralism

My intent in the preceding sections of this Part was to explore the various mechanisms of hybridity utilized by the Philippine government in managing a conflict that is more than 400 years old. From colonial suppression and recognition to national marginalization and integration, sovereign entities in the Philippines have taken a number of approaches to Muslim normative obligations. For the past thirty years, the Philippine government has embarked on a path of pluralism, hoping to preserve national unity by acknowledging normative disunity. The challenge, as Justice Reyes noted, lies in drawing lines between what is and is not normatively fundamental to the preservation of state integrity: "[A] thoughtful contrast thereof with our own basic tenets could delineate the

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271. *See* Bondagjy v. Bondagjy, G.R. No. 140817, (S.C. Dec. 17, 2001) (Phil.), *available at* http://sc.judiciary.gov.ph/jurisprudence/2001/dec2001/140817.htm.

272. An Act Providing for an Organic Act for the Autonomous Region in Muslim Mindanao, Rep. Act No. 6734, art. V, § 2(9), (Aug. 1, 1989) (Phil.), *available at* http://www.chanrobles.com/republicactno6734.html.

273. *Id.* pmbl.

274. Berman, *supra* note 2, at 1207.

areas where Islamic law may be left to govern those professing the Muslim faith *without endangering national unity* . . . ."[275]

Today, the government's pluralist approach is apparent at all levels of government. The 1987 Constitution explicitly endorses pluralist considerations in the development and implementation of state policies. P.D. 1083 implements Muslim personal law and establishes a system of shari'a courts with areas of exclusive jurisdiction. And the Organic Act authorizes the creation of a territorially based autonomous region for those who chose by plebiscite to join. Other efforts toward pluralism include the establishment of an Office on Muslim Affairs and its subsidiary programs, including the Halal Development Program, Legal and Community Services Support, Muslim Child Advocacy, Muslim Cooperative Development Program, and the Pilgrimage and Endowment Development Program.[276]

What is less apparent is whether thirty years of pluralist effort have been successful in managing the conflict created by competing normative obligations that share the same social space. On the one hand, the secessionist efforts that generated widespread conflict in the 1960s and 1970s have, for the moment, largely abated. To a great extent, the MNLF now functions as a legitimate organization, controlling executive and legislative positions within the ARMM and engaging in peaceful debate at the national level.[277] Also, Mindanao and the Sulu Archipelago remain under Philippine territorial sovereignty, and there are no widespread clamors for outright independence. In this sense, the Philippine government's pluralist mechanisms have been a success. Overlapping normative obligations, though still present, are being managed.

On the other hand, sporadic violent conflict remains a fact of life in the southern Philippines, and has even increased in recent years. The Moro Islamic Liberation Front has continued to engage in armed resistance, seeking "no less than an independent (sovereign) Moro Islamic state."[278] In August 2008, peace talks between the MILF and the Philippine government in Kuala Lumpur led to a tentative agreement on new territorial boundaries for an autonomous Moro homeland,[279] but

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275. BARA-ACAL & ASTIH, *supra* note 1, at 11 (emphasis added).

276. Office of the President, Office on Muslim Affairs, OMA Programs, http://www.oma.gov.ph/site/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=7&MMN_position=7:7 (last visited Jan. 21, 2010).

277. *See* Abuza, *supra* note 26, at 39-41.

278. *Id.* at 44 (quoting Salamat Hashim, NIDA'UL ISLAM MAG. (Apr.-May 1998).

279. *See* Joint Statement Issued by GRP and MILF (Aug. 27, 2008), *available at* http://news.abs-cbn.com/research/08/27/08/grp-milf-moa-ancestral-domain. For a helpful timeline of the Philippine government and MILF negotiations, see Leilani Chavez, Timeline: GRP-MILF

before the agreement could be signed, the Philippine Supreme Court issued a temporary restraining order, ultimately finding the proposed Memorandum of Agreement on Ancestral Domain unconstitutional.[280] As a result of the breakdown in negotiations, MILF insurgents launched a wide scale attack in Mindanao, displacing some 130,000 people.[281] In addition, another splinter group, the Abu Sayyaf, has continued to engage in separatist violence, including kidnappings and bombings.[282] As recently as August 2009, a clash between Abu Sayyaf rebels and the Philippine military resulted in the deaths of twenty Abu Sayyaf members and twenty-three Philippine soldiers in the South.[283] And there is no promise the fighting will end anytime soon. According to Julkipli Wadi, who teaches Islamic studies at the University of the Philippines, "massive poverty in the south, and perception of injustice against the minority Muslims made it easy for the Abu Sayyaf to continue with its recruitment efforts. . . . To the young Muslim, they are not terrorists, but a resistance force against any form of subjugation."[284]

For some, the solution to the conflict may be economic. For example, some Muslim Filipinos complain "that the Government has not made sufficient efforts to promote their economic development," causing them to "suffer[] from economic discrimination."[285] Others note the ARMM continues to send the lion's share of its revenues to the national government and that the southern Philippines itself remains "impoverished and strife-torn."[286] Yet perhaps it is overlapping normative commitments—not economics—that continue to cause conflict. As a MILF spokesman, referring to the differences in perception between the MILF and the Philippine government over the meaning of the conflict, stated several years ago, "The government views the Moro problem in an economic light."[287] According to Abuza, a senior MILF political advisor concurred that while the Moro problem is an economic matter, "Islam

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Peace Process (Aug. 15, 2008), http://news.abs-cbn.com/nation/08/15/08/timeline-grp-milf-peace-process.

280. Province of N. Cotabato v. Gov't of the Republic of the Phil. Peace Panel on Ancestral Domain, G.R. No. 183591, (S.C. Oct. 14, 2008), (Phil.) *available at* http://sc.judiciary.gov/ph/jurisprudence/2008/october2008/183591.htm.

281. Peter Ritter, Philippines' Uneasy Peace Broken, Aug. 21, 2008, http://www.time.com/time/world/article/0,8599,1834473,00.html.

282. *See, e.g.*, Abuza, *supra* note 26, at 48; Christopher Shay, *A Brief History of Abu Sayyaf*, TIME, Oct. 1, 2009, http://www.time.com/time/world/article/0,8599,1927124,00.html.

283. *See* Agence France-Presse, Abu Sayyaf Still RP's Most Brutal Terror Group (Aug. 14, 2009), http://news.abs-cbn.com/nation/08/13/09/abu-sayyaf-still-rps-most-brutal-terror-group.

284. *Id.* (internal quotation marks omitted).

285. *See* U.S. DEP'T OF STATE, *supra* note 120.

286. ABUZA, *supra* note 26, at 42.

287. *Id.* at 46 (quoting Eid Kabalu).

has a spiritual view. The government's way of looking into the problem is fixed—but it is wrong."[288] Keeping with this line of reasoning, Muslims engaged in conflict for spiritual reasons may find anything less than normative autonomy simply unacceptable.

Nevertheless, drawing on the experience of the Philippines, several lessons in managing legal hybridity through a pluralist methodology emerge. First, conflict arising from entrenched legal hybridity is unlikely to be solved through either sovereigntism or universalism. In trying to extinguish normative conflict by imposing alien norms, nonaccommodating approaches may actually serve as incendiary agents for additional conflict. Second, pluralism's structured framework for resolving hybridity, though messy, at least appears no messier than an unstructured framework in which overlapping norms are expressed informally. In the cases of *Bondagjy* and *Bondagjy II*, for example, we might reasonably conclude that it is better to have the overlapping conflict out in the open where it can be managed, than effectively marginalized and tucked away in an informal proceeding that then applies its own, nonreviewable version of law. Third, a pluralist approach may lead to a normative cross-flow in which competing communities are mutually enriched, enhancing the value of the social space they share. In the southern Philippines, participants in ecumenical interfaith councils, for example, may find not only a forum for discussing differences, but also, by thoughtfully engaging their normative competitors, an appreciable enrichment of their own normative commitments. Fourth, well-constructed frameworks for engaging in dialectical discourse and applying margins of appreciation can effectively manage competing normative obligations. In *Bondagjy* and *Bondagjy II*, as well as other Supreme Court cases reviewed in this Article, the Philippine Supreme Court displayed a willingness to engage and occasionally defer to Muslim norms, analyzing Muslim law in general and P.D. 1083 in particular with due regard and obvious respect. Fifth, pluralist mechanisms provide a means of managing legal hybridity for those willing to ascribe to pluralist values, but are less useful elsewhere. MILF leaders who reached a cease-fire with the Philippine government in the 1990s and, in turn, received significant development assistance in Mindanao were, in their own view, "simply using the government to fund development projects and . . . had no intention of being seduced into a quid pro quo."[289] As a result, despite development assistance and repeated negotiations, conflict in the South continued.

288. *Id.*
289. *Id.*

Sixth, the effectiveness of pluralist mechanisms is diminished greatly when they are employed insincerely or deployed inadequately. Despite the Constitution, P.D. 1083, and the Organic Act, the southern Philippines remains impoverished and embattled, the ARMM is seen as under-resourced and ineffective, and shari'a courts are challenged by manpower and resource shortfalls. The continuing conflict in the South could be ascribed to pluralism's shortcomings, or could simply be the result of a less than full-hearted attempt by both the national government and Muslim Filipinos to pluralistically share the same social space.

No doubt other lessons exist from the Philippine experience in pluralism that would assist policymakers and community leaders in the Philippines and elsewhere in structuring shared social spaces. Also, it may be that I have approached the issue of conflict too narrowly, focusing only on legal hybridity as an expression of normative obligation when a dozen other hurdles to conflict resolution in the Philippines exist. My intent, however, has been to explore whether and to what extent legal hybridity may be beneficially managed through pluralist mechanisms that are adopted to resolve subnational conflict. Certainly, as the continuing conflict in the southern Philippines demonstrates, the experience of the Philippines is by no means a perfect pattern of pluralism. However, it does model a number of pluralistic mechanisms that, to one extent or another, have fruitfully moderated overlapping normative obligations between Muslim Filipinos and the national government. To ask more is, perhaps, asking too much of any methodology, especially when the conflict is as old and deep as the one in the Philippines.

V. CONCLUSION

As the approach to pluralism in the Philippines teaches, pluralistic methodologies are not a panacea for fundamental normative conflict. While pluralism refrains from dictating normative outcomes, it nevertheless requires normative competitors to ascribe to "the principles underlying the values of procedural pluralism itself."[290] As a result, its usefulness is necessarily limited. For those insistent on expressing their normative aspirations to the exclusion of others sharing the same social space, pluralism may hold marginal value. For those willing to engage in provisional compromise by ascribing to a mutually accommodating, give-and-take framework, pluralism holds real promise for successfully managing overlapping normative obligations.

290. Berman, *supra* note 2, at 1193.

In the Philippines, glimmers of this promise may be seen. Thirty years ago, Muslim Filipinos lacked constitutional recognition of their normative values, had no state-sanctioned method of resolving personal matters according to Muslim law, and retained little of the autonomy they had once enjoyed as independent sultanates. With the 1987 Constitution, P.D. 1083, and the establishment of the ARMM, they now have multiple points of entry to ensure their normative obligations are at least considered—even if not always accommodated—at the national level. Admittedly, the task is far from over. As the failed peace talks between the government and the MILF in 2008 demonstrate, much remains to be done to bridge the normative gap that currently exists between Muslim Filipinos and the national government. Total resolution of normative conflict, however, is not pluralism's goal. Rather, pluralistic mechanisms seek to bring order to shared social spaces, managing—rather than suppressing—normative conflict. The Philippine experience demonstrates that these mechanisms, while far from perfect, at least provide a more beneficial alternative than the forceful imposition of normative hegemony, benefiting both Muslim and non-Muslim Filipinos as they resolve past differences by managing their overlapping normative futures.