A. Dynastic Realms & Secular States

Legal Pluralism in the Philippines

Michael O. Mastura

Members of the Muslim minority in the Philippines have a distinctive legal culture whose rules and customs are grounded in Islam. To address this situation of legal pluralism, the government in 1977 enacted a Code of Muslim Personal Laws, which stands alongside the Philippines Family Code and Civil Code and officially recognizes the principle of plural legal regimes for at least one minority cultural and religious group within the general population. This article, written by a participant in the legislative process, explores the complexities of conceptualizing and drafting the Code. These complexities include the use of ethnographic descriptions of customary law within the Muslim community, the selection of rules from among the different schools of Islamic jurisprudence, and the harmonization of conflicts between the laws now applicable to Muslims and non-Muslims in the Philippines.

In Southeast Asia, pluralistic legal systems coexist with indigenous law. The development of legal pluralism can be seen in the different approaches taken by Southeast Asia national laws, as well as in the diversity of indigenous laws. Rather than put forward a theory of code harmonization for the mosaic patterns of cultural diversity in the whole region or even in one country, my aim is to examine how a particular example of legal pluralism—the regime of law in Muslim (Moro) society in the Philippines—was addressed through legislative reform. This process was shaped by historical antecedents and by experiential exigencies that required attention to similar reforms in Southeast Asia and in other countries with Muslim minority populations. In analyzing this process, I argue that for Moro society, national law needs to be harmonized—through the medium of religion, tradition, or theory of legal construction—with the divine ideal or, at the very least, with what Muslims consider authentic sources of justice.

Because legal pluralism itself requires a comparative approach to the study and practice of law, there is no need to try to

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formulate a single definition of the concept. If, however, we weave together the ideas of law in culture and society with the ideas of law in religion and politics, we can establish the basic elements of legal pluralism. As we consider these elements that give formal structure to the Moro legal system, general questions of law in religion, culture, and politics are bound to surface.

Muslim Personal Law

Certain sociolegal issues have helped frame Muslim personal law in the Philippines. As a consequence, the Code of Muslim Personal Laws (P.D. 1083), a special law, now coexists alongside the Family Code (E.D. 209) and the Civil Code (R.A. 386), the applicable law of the land. The creation of the Code of Muslim Personal Laws, and its legal and social implications in a predominantly Christian society where Muslims constitute approximately 5% of the population, are the subjects of this analysis.

The Common Code Question

The creation of a uniform civil code is not a legal decision so much as a policy decision to incorporate a plurality of laws into a unified legal system. The sociolegal issues can be reviewed in the work of Asaf Fyzee (1971), who addresses problems arising from the creation of a common code in the Indian subcontinent. For Fyzee, Muslim personal law is a discrete body of law and custom, varying considerably from the more formal rules of Shari'a, which is a code of law and morality derived from the Quran and expounded in numerous classical texts. Fyzee's understanding of the plural law situation focuses on a fundamental distinction: the Shari'a was administered by the religious head of Islam, the *khalifa* or the *imam*, but the personal law applicable to local Muslims is laid down under the Constitution. Because of this distinction between religious and secular enforcement, he concludes that Muslim personal law is applied as "a matter of policy"; it is not administered as "a matter of religion."[1] This last statement needs an explanatory analysis. Let us consider two points of reference arising from the plural law situation.

First, legal imperatives have political dimensions. In formulating some questions we must consider the links between political philosophy, cultural practice, and religious belief. Would Muslim personal law fit into the existing constitutional framework? Do Muslims want to adopt an integrated judicial system or would they rather be an exception to the general laws of the land?

[1] This theory of construction provided the groundwork for my own research approach.

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Should special rules of procedure be adopted for cases involving Muslim personal law?[2]

Second, legal issues have social implications. The distinctive social contexts and value frameworks of Muslim legal institutions must be taken into account. Should plurality in marriage be abolished by law? Should Muslim men have the freedom to pronounce divorce by saying *talaq* thrice, and should their wives be entitled to alimony? Do Muslim women have parity in property rights and inheritance shares? (See Fyzee 1971; Mastura & Buat 1977.) Such questions cannot be answered without a thoughtful consideration of social, cultural, and religious factors relevant to the Muslim people of the Philippines.

The introduction of the Drafts of the Administration of Muslim Law of 1974 into the House of Representatives, an effort in which I was involved as a member of the Congress, provided some answers in the Philippines context. The seminal phase of the work raised questions involving politics, a number of which are treated in the documentation of our work and need not be reviewed here.[3] It is the framework of Muslim personal law that I would like to discuss in more detail.

Personal Law and the Law of the Land

The Code of Muslim Personal Laws of the Philippines, which was promulgated as Presidential Decree No. 1083 in February 1977, was part of a legal reform in the judicial structure of the country. The committee that drafted the decree took as a guideline that although the Shari'a is a complete system of civil, commercial, criminal, political, international, and purely religious laws, only the Shari'a laws that are fundamentally personal would be codified.[4] The resulting code formally recognizes the Muslim legal system "as part of the law of the land" in the Philippines and thereby seeks to make Islamic institutions more effective. What are these Islamic institutions? This question did not seem as important at that time as the problematic idea of codification itself.

The codifiers approached the problem of legal pluralism first by making the Code of Muslim Personal Laws relatively autono-

[2] Questions reformulated here were raised originally on 22 July 1974 when the Supreme Court invited a number of Muslim lawyers including former Senator Mamintal Tamano, Michael O. Mastura, and Musib Buat to appear before the Judicial Code Committee. The meeting addressed the integration of the provisions of the Draft Code of Administration of Muslim Personal Law with the proposed Judiciary Code. Tamano had pushed for a general decree without need to provide implementing details, but the Research Staff disagreed with this approach.

[3] See Bentley 1981. The review of the Draft Code by a Presidential Code Commission did not precipitate a wedge between the research staff and the Majul Review Commission. Mastura was in fact appointed sub-chairman for substantive provisions of the Presidential Code Commission. See also Majul 1980 and Bautista 1977.

[4] See "Governing Principles in the Codification," in Presidential Commission 1975.

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mous. The committee considered it important to lay down the *fiqh* (i.e., general jurisprudential rules), a fundamental principle of legality that limits both delegated and vested authority. The code incorporates personal laws concerning acts whose practice is an absolute duty (*wajib*) under Muslim law, and it proscribes acts that are forbidden (*haram*) and demand unconditional punishment according to Muslim law. Under the code, Muslim personal law is considered to include all laws relating to personal status, marriage and divorce, matrimonial and family relationships, and property relationships between spouses as provided for in P.D. 1083 (art. 7, ¶ 1). But the canon of construction in Islamic law is more complicated than this provision might suggest. Codification necessarily entailed the selection of substantive legal rules (*hukum*) derived from the different schools of law (*madhab*) to the extent that these were intrinsic to the personal law system.

This process of selection is thus the second problem of legal pluralism faced by the codifiers, who set forth in the code itself a theory of construction and interpretation. The committee decided that no precept should be included unless it was based on the principles of Islamic law as expounded by all four (Sunni) schools. The problem of law selection is also addressed in provisions concerning the administration and enforcement of the code among Muslims (art. 2, ¶¶ b and c). Most Muslim jurists agree on the legal doctrine that broad rule-making policy (*siyasa al-shari'a*) forms the basis for competent authority to determine the manner in which Shari'a should be administered in contemporary legal systems. When cultural or policy norms dictate that a court apply a substantive rule that is not embodied in the Muslim personal law or one that is extrinsic to it, proof (*hujiyat*) of such sources is also required.

Law finding is the third problem of legal pluralism faced by the framers of the code. They adopted the principle of the gradation of rules of Muslim law. In some instances, the provisions of Muslim law were too complicated to be set forth in the new code. In these cases, only the fundamental principles were stated and the details were left to judges for proper implementation. Legal complexities are not made simple by statutory construction and interpretation alone, for applying the law must also involve the proper categorization of rules of decision when laws conflict. The code states simply that when Muslim law and adat (customary law) are not embodied in the code, they must be "proven in evidence as a fact" (art. 5). This is essential to determine their validity as sources of supplementary law. In other words, the task of the judges may entail finding further Muslim laws, as well as customary laws having the force of law. No adat that is contrary to the Constitution, to the code of Muslim law, or to public order,

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public policy, or public interest, however, shall have legal effect (art. 5).

Schools of Islamic Law

Muslim jurists are said to be pioneers in developing the theory of ranking legal rules. The application of a graduation of rules is a key tool in understanding the roots of jurisprudence, or *usul-fiqh*. It is a sound basis for judicial decision. Muhammad ibn Idris ash-Shafi'i, in his *Risala*, states this principle neatly: "For everything that befalls a Muslim there is an obligatory *hukum* [legal rule] and a guide to lead him on the way."[5] In the absence of codal provisions pertaining to the substance of Islamic law, judges are expected to rely on the views of a majority of the schools of law (*madhahib*—plural form of *madhab*) for their legal interpretations.

According to the Code of Muslim Personal Laws, should there be any conflict among the Sunni Muslim schools of law, that which is in consonance with the Constitution of the Philippines, the code, public order, public policy, and public interest shall be given effect (art. 5). What is a school of Islamic law? Article 7, ¶ (e) defines it as any of the four orthodox (Sunni) schools of Muslim law. For purposes of the code, these are the Hanafi, the Hanbali, the Maliki, and the Shafi'i schools. Reference to the Sunni schools is made more specific in article 134, where the code says that the court shall take into consideration the madhab (legal school) of the decedent in the settlement of estates. If the decedent's madhab is not known, the Shafi'i school of law may be given preference.

Let us consider in particular how the court may take into consideration the primary source of Muslim law (art. 4, para. 1), and illustrate how standard works of Muslim law and jurisprudence are given persuasive weight in the process of judicial interpretation (art. 4, ¶ 2). In actual practice, when a case comes up for hearing, a certain procedure is followed. Here is how Fyzee (1971) outlines it:

Judicial Task	*Law Finding*
1. "[W]e look up Tyabji, Mulla . . . or Amir Ali; we then refer to the cases mentioned by them, or the cases which we ourselves noted . . ."	Standard Works
2. "[W]e also try to discover whether the case is governed by . . the Dissolution of Muslim Marriages Act or the Special Marriage Act . . ."	Personal Laws

[5] Trans. by author; cf. translations by Khadduri 1961:288 and Schacht 1967:127.

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3. "If all this search is fruitless, or if on some point we wish to delve into the deep sea of the *fiqh,* we then turn to an expert for texts of authority from the *Hedaya.*"	Jurisprudence
4. "It is only in very rare cases that an advocate or solicitor needs to consult an *alim* [pl. *ulama*] for unknown principles, arguments or illustrations. The question of using the Koran or *hadith,* for all practical purposes, comes last, unless an author wishes to fortify his exposition by Arabic tests, or a judge wishes to examine the first principles for himself."	Quran or Hadith

Fyzee contends that the last method, use of the Quran, is rarely necessary nowadays because of the wealth of case law. It would be wrong for the court, moreover, to attempt to put its construction of the Quran in opposition to the express ruling of commentators of such great antiquity and high authority.

M. B. Hooker (1984:233) observes that the Code of Muslim Personal Laws relies on a tripartite scheme of classification: Muslim law (Shari'a), Muslim personal law specifically incorporated into the code, and other applicable Islamic laws. He sees the code's reference back to orthodox Islamic legal sources (and away from a "generalized 'Muslim ethos' " as a development in Islamic legal formalism. When Islamic precepts were embodied in codal form and their administration in national courts was provided for, "the authority of law had been transformed from (purely) religious ethic to State fiat" (ibid., p. 245). This fundamental change has placed Muslim Filipinos on the same footing as their co-religionists in Malaysia, Indonesia, and Singapore. Yet, because of uncertainties about how these laws will actually be administered, Hooker regards the formalization of Muslim law in the Philippines as tentative. Evolving political realities in the Muslim autonomous region will shape the implementation of the Code and lead to a more predictable standard.

Legal Complexities and Unresolved Questions

The construction of the Code of Muslim Personal Laws poses some legal complexities. These are explicated in the seminal works of Cesar Adib Majul (1977), M. B. Hooker (1984), and Mastura (1984; Mastura & Buat 1977). Majul observes that in the three stated aims of the code a distinction is drawn between "the legal system of the Muslims," or Shari'a, and those Muslim laws now codified. Similarly, article 4 distinguishes the code from "other Muslim law." Majul interprets these distinctions to mean that the code is not exclusive in its details regarding Muslim personal laws. He explains that recourse to the Shari'a itself must be made where the code is silent. This means applying "other appli-

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cable Muslim laws" over and above the codal provisions that may be brought to bear in a particular case. As for adat (customary law) as a possible source of "other Muslim law," Majul suggests that the code clearly subordinates adat to the Shari'a in this regard (Majul 1977:374–94).

Hooker questions the workability of the Code of Muslim Personal Laws given the ethnographic data on which it is grounded. Following Najeeb Saleeby's lead in *Studies in Moro History, Law and Religion* (1905), and relying on the ethnographic fieldwork of Thomas Kiefer (1972), Hooker concludes that the Moro concept of law is essentially relational for both source and content, as contrasted with the positive law approach of the code. Hooker 1984:223–24) does, however, qualify his pessimistic conclusion about the future of the code:

> [F]irst, legal ethnographies do tend by their nature to produce descriptions of law which are highly particular, so that in the Moro case the particularity due to ethnographic method must be kept separate from the particularities arising out of Moro legal thought. . . . Second, legal thought is at the heart of Islam and the main tenets of that law are known (in outline at least) to the more learned classes of Moro society, so that the particularity of Moro law is counterbalanced by the existence of a stable doctrine of general application. The definition of Moro law lies in the interaction and relationship between these elements.

Hooker's analysis concentrates on the importance of non-Islamic elements in Moro sociolegal practices, yet he acknowledges the complex relationship between customary law (adat) and Islamic law as they are "localized" in particular cultural contexts.

We have proposed another way of looking at the legal culture of Moro society that allows us to categorize rule systems (Mastura 1985:65, 70). Why should adat be described as a non-Islamic element rather than as a supplementary source within the system of Islamic jurisprudence? When Hooker analyzes the contents of 18th- and 19th-century Moro law texts from the southern Philippines (the Maguindanao *Luwaran* and Sulu codes), he tries to demonstrate that "direct religious [i.e. Islamic] derivation is not obvious" and that "a derivation from fiqh [Islamic jurisprudence] is [not] common" (Hooker 1983:163). Yet his approach fails to apply the methodology of the "selection" process in Muslim law to the problem of legal complexity. Such Moro law texts are, after all, rule governed and should be viewed as part of the extended framework of Muslim law even when their religious derivation is not explicit. The following discussion will suggest how customary law (adat) and traditional Moro law texts can be analyzed within the process of law selection and law finding described above.

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Empirical Evidence of the Link between Customary Law and Islamic Law

In Kiefer's legal ethnography the Tausug concept of law is not unitary but assumes that legal thought is a complex of diverse elements. Thus, the Tausugs, a Muslim group in the Sulu islands of the southern Philippines, recognize several classes of law: (1) *sara kurran,* or rules stated in the Quran; (2) *sara agama,* or interpreted religious precepts; and (3) *sara adat,* or the uncodified traditions and customs of the community. The *sara agama,* as codified and promulgated by the Sultan of Sulu in written texts, is called *diwan.* Tausugs do not regard these various types of law as contradictory but as part of a single, variegated conceptual system. Within this system, in practice, there is much room for modification and accommodation among the different elements (Kiefer 1972:88–89).

Further support for this view can be found in the legal views and practices of another group of Muslim people in the southern Philippines. The Maguindanao classification of law (Arabic, *kitab*) has the same features as that of the Tausug. In the first category are the *hukum sara,* or Quranic laws. The second category—*hukum adia* or datu rule—is represented by the Luwaran code as a selection of rules derived from Shafi'i textbooks. "Datu rule" is an indigenous form of polity which locates the source of law in a combination of fiqh and local customs. The traditional Luwaran texts (which also encode local customs) are contextually related to the Shafi'i Arabic texts that appear as marginal quotations for their validation. A form of customs and usages called *adat betad* constitutes the third category. The legal significance of these customs and usages is expressed in terms of a set of procedures that determine when and how they will be applied. Thus the Maguindanao, like the Tausug, view law as a complex mixture of interconnected elements ranging from local customs and practices to the Quran itself.

Elena Ontok (1989) has conducted an empirical study of Maguindanao adat on inheritance and its conformity with and dissimilarity to the Quran and the Prophetic traditions (hadith). Her study supports the idea that adat is a supplementary source of law within the Muslim legal tradition rather than a non-Islamic element. Ontok measured conformity to adat rules in terms of the customary law encoded in the Luwaran (the traditional Moro law text discussed above). In her case-study sample analysis, she examines 270 respondents. The degree of variance in legal behavior is measured against 12 variables: sex, marital status, age, educational attainment, literacy, occupation, annual income of the family, position in the community, number of years of residence in Maguindanao, number of years of residence in the municipal and barangay area, and interference of the civil courts in

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the question of inheritance. Her data analysis helps answer questions that have been a central concern for legal ethnography. She finds that more than 50% of adat practices on inheritance conform to the Quran and the hadith. Literacy is the most significant predictor of the conformity of adat to Islamic law in inheritance. Degree of acculturation has not affected the adat of the Maguindanao respondents who stayed longer in the local barrios than in the urban centers. Ontok's study thus provides further evidence that adat law and Islamic law, while not identical in all respects, are inextricably linked.

Proof of Adat as Customary Law

Muslim law specifies the conditions under which adat is valid. A system of proof for adat as customary law has long engaged the attention of jurists who have endeavored to locate its textual authority. The drafters of the Code of Muslim Personal Laws approached this problem by defining adat as customary law (art. 7). The adat laws contained in the code provide for the following: (1) customary dowries (art. 13); (2) customary contracts involving property (art. 175); (3) communal property, including heirlooms, ancestral property, and charitable trust property (art. 173); (4) offenses against customary law for settlement by an agama arbitration council (art. 163).

How does the code define the grounds for invoking adat as a legal precept? It falls within the original jurisdiction of the Shari'a district court to decide all actions arising from customary contracts in which the parties are Muslims, if they have not specified which law shall govern their relationship (art. 143, ¶ d). As for offenses against customary law, the Shari'a circuit court, in cases that can be settled without a formal trial, may at its discretion direct the Shari'a clerk of court to constitute a council of not fewer than two or more than four members, with the clerk as chair, to settle the case amicably (art. 163).

Code Harmonization

Pluralism in the Philippine legal system needs a principle by which laws can be harmonized with social, cultural, and religious norms and practices. The principle of code harmonization—as distinguished from the conflicts-of-law principle in statutory construction—derives from an assumption that the common good is itself a unified category despite differences among various groups in society, and thus, the different codes (i.e., moral, legal, and ethical) are considered specific aspects of this broader conception of the social good. This theme will be discussed in connection with the Islamic legal theory of the "unspecified interest

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of the common good" (*maslaha al-mursala*), which is harmonious with the objectives of the Shari'a.

According to the code harmonization approach, "[A]ll codes converge on the broader ideal of the public good" (Rein 1976:59). The ideal of the public good appears in a different light, however, when approached with a particular code in mind. We then find moral imperatives to accept abatement from the specific requirements of other codes whether written or unwritten, in a pluralistic society. Social scientists and lawyers have grappled with this dilemma of fact-value analysis within the common-good parameter.

The process of harmonizing legal systems by court action necessarily involves analytic complexities that go far beyond a simple value framework. It may nonetheless be useful to give a broad outline of how courts approach this problem.

1. Where the codes conflict and there is no way to harmonize the conflicts, the solution applied by courts is not harmonization but differentiation. That is, different rules are applied to different groups in particular situations.
2. Where the system of law is formalistic, the courts tend to avoid harmonizing conflicting moral and legal rules. That is, courts are more attentive to rule application and interpretation than to broad, flexible pronouncements about the public good.

Despite the pressures of legal formalism, the imperative for harmonizing moral and legal systems has exercised the courts because human and ethical values have increasingly been introduced into social legislation. As a consequence, the courts have found themselves unavoidably engaged in code harmonization and in establishing the validity of normative rules for equity and social justice.[6]

The Problem of Code Harmonization

The principle of harmonization can be viewed more expansively as an ordering system of values—namely, the balance between rights and public interest. In the Philippines, legal theory was originally founded on the Spanish concept of *orden publico,* which, in turn, can be traced to the French application of the requirements of *ordre public.* In practice, the courts have been receptive to the idea of placing limitations on freedom of contractual agreement in the name of "public morals" as when the spheres of morals and good customs overlap.

Now, the central problem in code harmonization is how to reconcile, and by whose normative standards, varying conceptions of (1) law, (2) morals, (3) good customs, (4) public order, and (5) public policy. In his annotation of the Civil Code, Am-

[6] I discuss the concept in Mastura 1986.

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brosio Padilla (1956:vol. 3) refers to these as the "pentagonal parameters" of limitation. There are, fortunately, new statutory provisions in both the civil code and the Code of Muslim Personal Laws covering these value priorities in the Philippines legal system.

1. *On customs.* Article 11: "Customs which are contrary to law, public order or public policy shall not be countenanced."
2. *On the effects of laws.* Article 17: "Prohibitive laws concerning persons, their acts or property, and those which have for their object public order, public policy and good customs, shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon in a foreign country."
3. *On human relations.* Article 21: "Any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage."
4. *On contracts.* Article 1306: "The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy."
5. *On conflict in Muslim law.* Article 6 (1): "Should there be any conflict among the orthodox (Sunni) Muslim schools of law (Madhab), that which is in consonance with the Constitution of the Philippines, this Code, public order, public policy and public interest shall be given effect."

For the present discussion we are concerned only with public order, a term with a very specific meaning in the civil code. The Supreme Court of the Philippines has differentiated the term "public order" from the actual keeping of the public peace and has used it to signify the public weal: "["Public order"] is the equivalent, as here used and as defined by Manresa, of the term "public policy" as used in the law of the United States" (*Ollendorff v. Abrahamson,* 38 Phil. 590). Public order is construed more narrowly than "peace and order" which may refer not only to public policy but also to considerations that are moved by the common good (Presidential Commission 1975:134).

In *Ferrazzini v. Gsell,* the Supreme Court quoted the Spanish commentators to elucidate this point:

> Public policy (orden público)—which does not here signify the material keeping of public order—represents in the law of persons the public, social and legal interest, that which is permanent and essential of the institutions, that which, even if favoring an individual in whom the right lies, cannot be left to his own will. It is an idea which, in cases of the waiver of any right, is manifested with clearness and force (34 Phil. 709–10).

Therefore, the Code Commission set limits on the breadth of its public order provisions, recognizing that moral wrongs fall be-

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yond "human foresight to provide for adequate legal remedy in the statutes" (Presidential Commission 1975:40).

Unspecified Interest of the Common Good

Questions of the public good have been addressed in Muslim law in ways that are relevant to the codification process in the Philippines. The Shafi'i school of law has a long tradition of legal theory on maslaha al-mursala, the unspecified interest of the common good. What is the common good in the context of Islamic legislation? In the terminology of basic jurisprudence, maslaha al-mursala means any interest of the common good that is not textually specified in Quranic or Sunni sources and for which no legal reference is available to consider or neglect" (Jubeir 1980:63). In other words, it concerns legally unsettled questions of common interest.

This dilemma for a theory of justice was approached by the 12th-century Shafi'i jurist Imam Muhammad al-Ghazali in the context of his "theory of the protected interest." For him, obtaining benefit and preventing injury are human aims; he is concerned with human welfare only in human terms. He puts it nicely in these much-quoted lines:

> Obtaining benefit and preventing injury are human aims, concerned with human welfare only in human terms, whereas what we mean by interest [*maslaha*] is conservation of the aims of the shari'a. The aim of the shari'a . . . is fivefold: to conserve their religion, life, reason, offspring, and wealth. That which protects the conservation of these five elements is an interest, and that which jeopardizes them is corruption [*mafsada*] the prevention of which constitutes al-maslaha. The preservation of these five interests falls within the category of necessities—the utmost in interests.[7]

Al-Ghazali's theory pivots on the universal aims of the Shari'a. In one of his works, he operationalizes the concept of "common interest" by distinguishing between cases of necessity or need (*darurat wa hajat*) and cases in which only improvements and embellishments (*tahsinat wa tazyinat*) are in question.

Sensitive to the traditions of Philippine secular law and to Muslim legal traditions, article 6 of the code, cited above, clarifies the circumstances under which consideration of the common good may be given effect to resolve conflicts among different Muslim schools of law. Elsewhere, the code permits the Shari'a court in appropriate cases, to constitute an agama (customary) arbitration council (arts. 160–63) in order to draw upon traditional competence as an extralegal means to exercise normative authority.

[7] Al-Ghazali 1937:vol. 1:286 [trans. by author]; cf. Kerr 1966:93).

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Conflicts of Law

We now leave the abstract level of analysis to address the more practical questions of conflicts of law. Conflicts of law are another manifestation of legal pluralism, requiring courts to apply rules by which they can determine which of several bodies of law controls a given case. This discussion will address statutory provisions and other relevant rules of decision that are to be used to resolve conflict of law questions arising under the Code of Muslim Personal Laws.

Rules of Construction

The first category of rules govern situations in which provisions in the Code of Muslim Personal Laws conflict with other laws outside the Code (see Table 1, sec. 1). The second category governs conflicts in juristic views including code provisions and Islamic schools of law (see Table 1, sec. 2). The third conflict of law category focuses on overlaps between the code (P.D. 1083) and the Organic Act for Muslim Mindanao (R.A. 6734), which applies only to Muslims and other members of the indigenous cultural communities in Mindanao (see Table 1, sec. 3). A fourth conflict of law category may be added in regard to procedural law for adjudication and extralegal proceedings in indigenous dispute settlements (see Table 1, sec. 4).

Renewed research interest in indigenous law and adjudication since 1978 has provided reliable data on customary and traditional practices in various regions of the Philippines. The Barangay Justice Law (P.D. 1508) became the earliest innovative decree for legal indigenization and provides, among other things, for traditional mediation procedures. The provisions of this law have to yet be reconciled with the provisions of the Code of Muslim Personal Laws.

This new situation could bring additional legal complexity and tension, for legal precepts derived from customary law rather than from legislative provisions figure in indigenous law practice. By institutionalizing indigenous procedures, such legislation calls into question the intricate structure of customary, religious, and secular legal authority discussed in this article. But the movement for the indigenization of law also offers popular access to law forums and practical adjustments of legal issues at the local level.

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Table 1. Statutory Provisions and Decision Rules for Resolving Conflict of Law Questions

1. Situation of Conflict	*Construction*
a. The code and laws of general application	The code prevails
b. The code and laws of local application	Construe the laws liberally to carry out the code
c. The code and special laws	Construe the laws liberally to carry out the code
2. Gradation of Authority	*Construction*
a. The code and other Muslim laws	Consider the primary sources of Muslim law
b. The standard treatises on Muslim law and jurisprudence	Give them persuasive weight in the interpretation of Muslim law
c. The orthodox (Sunni) schools of Hanafi, Hanbali, Maliki, and Shafi'i and applicable Islamic law	Give effect to the schools in consonance with the Constitution, the code, public policy, and public interest
d. The code and customary law (adat)	Give no legal effect to adat if it is contrary to the Constitution, the code, Muslim law, public order, public policy, or public interest
3. Nature of Conflict	*Interpretation*
a. Conflict between the Code of Muslim Personal Laws and the tribal code	Apply national law
b. Conflict between the code and tribal code vis-à-vis national law	National law prevails
4. Nature of Conflict	*Interpretation*
a. Conflict between barangay (barrio) justice adjudications and agama (customary) arbitration proceedings	Apply summary proceedings
b. Conflict between the Rules of Court and Special Shari'a Court Rules of Procedure	The Rules of Court apply in a supplementary manner

Conclusion: Toward a Rule of Decision

Having looked at code harmonization as a policy approach to the problem of legal pluralism, we are ready to suggest that political expression of the law in Islam in relation to lawlike adat and civil law takes the following shapes. It is *adjustive by exception* in the Philippine experience. In comparison, it is *receptive* in the Indonesian case and *adaptive* in the Malaysian model of legal pluralism.[8]

The legal history of the Philippines throughout the 20th century provides examples of a tendency to make legal *exceptions*, to acknowledge and accept the existence of customary laws that may have controlling force in certain situations.

The earliest statement relating to legal dualism appears in section 13 of Act No. 787 of 1903. Similarly, the Civil Code of 1950 (R.A. 386), has not closed the legal system to adat. In its

[8] Elsewhere I have traced the chronology of personal law in four countries where Muslims are in the minority (Mastura 1984).

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article 218, the policy and attitude of the regime of law is stated thus: "No custom, practice or agreement which is destructive of the family shall be recognized or given any effect." This legal policy is carried into article 149 of the new Family Code. In this sense, the approach in the Philippines in a number of different contexts has been to make adjustments in uniform law codes where exceptions are necessary and are consistent with national law and policy.

The policy developed by the Dutch in Indonesia provides a useful comparison and an example of adjustment by *reception*. There, a principle of equalization of levels between Western law and adat law was applied. According to this principle, colonial law received and absorbed indigenous laws such as adat and Muslim law.

The British in Malaya, Ceylon, and India found another approach to legal pluralism, and provide an example of adjustment by *adaptation*. In the British systems, known as the Trichotomy Rules of Decision (Mahmood 1977:3), laws enforced by the state were kept supreme, but religious and customary laws could be recognized as relevant to the formulation of case law. In civil cases, the court rendered decisions on the basis of (1) custom and usage established as having the force of law; (2) religious civil laws verified in written sources; and (3) laws of general application enforceable by the government.

In the Philippines, the court gives effect to the Code of Muslim Personal Laws as part of the national statutory law. Conceptual pluralism is given shape by exceptional legal imperatives applicable to a particular population group. The position of custom and usage (adat) relative to Muslim personal law in the Philippines thus adheres to Islamic jurisprudence, which accepts adat only insofar as it satisfies juristic standards for the interpretation and application of legal rules.

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