THE CODE OF MUSLIM PERSONAL LAWS FOR MUSLIM MINORITIES: PROBLEMS AND PROSPECTS

Dr. Mariam Saidona Tagoranao

Abstract

Many people believed that the Muslim Personal laws had been codified and implemented in the Philippines, the only Catholic country in Asia, because of the pressure in looking for solutions to the unending bloody war between the Government and the Muslim minorities in the South. There are groups of legal intellectuals who argued that some of the provisions are not in accordance with the Islamic law but a reproduction of the provisions of the Civil Code of the Philippines. There are few individuals, who claimed that whatever the reasons behind its codification and despite the imperfection of its provisions, the implementation of the Muslim personal laws was a good beginning for a secular state to incorporate the Islamic law in its national laws. This paper, as the title suggests, seeks to examine some of the problems before and after the implementation of the Muslim Code. With this, the findings will reveal not only the deficiencies and weaknesses of this Code but also to determine its prospects for reformation.

Introduction

Every state itself has an obligation to promote and foster the rights of the minority groups as peace and internal security can only be guaranteed by providing same dignity and the same equality before the law. A state has its set of laws which are meant in part to be applied to respect the religious and cultural rights of all those for whom the state has responsibilities. These rights have been enshrined in many international and national declarations.
Religious freedom is clearly protected under the Universal Declaration of Human Rights passed by the United Nations while minorities’ right of culture has been promoted under Article 40 of International Covenant on Civil and Political Rights (ICCPR) 1966.

Over the last three decades, some countries with Muslim minorities lived an active persuasion in the area of implementing the Muslim Personal Laws. However, in some cases, particularly in the West, these demands have failed. Philippines is part of the various versions of what we called modern secular states having no official state religion, but successfully enacted the Muslim Personal Laws for the Muslim minorities. The Philippines has been criticized for being so ingrained in applying the Anglo-American legal theory or the so called “separation of church and state”. But at least, it greatly differs from the constitutional policy adopted by U.S.S.R for Muslim minorities by creating an anti-religious state. It also differs with the rights of the Muslim minorities in India as the Indian Constitution under Article 44 provides for an operative uniform civil law, theoretically, not religious.

The Presidential Decree 1083, known as the Code of Muslim Personal Laws has been enacted due to the pressure from the Muslim leaders appealing to the government to recognize the personal laws, custom and traditions of the Muslim Filipinos. It has been alleged that this Decree was one of the government’s instruments to demonstrate its constructive concern for Muslims in the South. Some viewed the codification as a way to “heal the wounds” caused by prejudiced and discrimination from the national government and the Christian populace to Muslim minorities. But the upshot of all this, was to search for painless concession in order to prevent the violent confrontation between the two factions, the government and the Mujahideen who were fighting for independence. With this, it has been argued that the problems and deficiencies on the provisions of the Code are due to the government’s insincerity.
Importance of Muslim Personal Laws for Muslim Minorities

Every Muslim believer has a clear choice to be governed by the personal law of his own religion in lieu of secular laws. This is based on the Muslims belief that Islam is a complete code of life actualized by the Prophet Muhammad (s.a.w). As Muslims, we consider ourselves as failure in fulfilling our religion when we are prevented from obeying the law of the Almighty. We do not feel the peace with our conscience or the environment in which we live and this will lead to disenchantment. J.W. Anderson enumerates the importance of family law in Islam as follows:

a. “Family law represents the very heart of Shariah for it is this part of the law that is generally regarded by Muslims as entering into the very wrap and woof of their religion.

b. By the same token, it is the family law that has been basic to Islamic society down the centuries.

c. Generally speaking, it is the law of family law alone that the Shariah is still applied to some hundred million Muslims.

d. It is precisely in regard to the law of marriage and divorce that the battle is joined today between the forces of conservation and progress in the Muslim world…”

Personal law is deemed as a small part of the Shariah. However, the issue on its implementation becomes a crucial concern for Muslims as it can ease the amount of difficulties face by every Muslim residing in non-Muslim countries. Issues relating to marriage, divorce, custody, maintenance and, in some cases, the distribution of their estates and inheritance in terms of Islamic law are the common problems that need to be accommodated by the national laws. Failure to implement the Muslim Personal Laws may resort to a dual legal identity for Muslim minorities in pursuing their conduct of

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affairs - an Islamic or secular legal system. It happens in a secular un-Islamic state that children failed to receive the proceeds of inheritance or other insurance policies in the event of the demise of their parents who were legally married in terms of Islamic law and not in terms of the secular laws. There are many divorce cases that the wives rejected the Islamic injunctions and fight for custody of the children as well as claim maintenance by using non-Islamic rulings of the state to gain financial advantages which Islam does not consider to be their rights. These are issues and legal battles that show complications concerning the Islamic and secular legal jurisdictions that can cost a great lost to a pluralistic society as it promotes pain within its inner harmony.

The application of Muslim Personal Laws guarantees a variety of advantages to a secular non-Islamic state. Its recognition in the Philippine provides a full record of Muslim marriages that resulted to less number of matrimonial disputes. In addition to that, the children who were considered as illegitimates are now classified as legitimates.

The application of Muslim Personal laws constitutes as a challenge and severe test to the preservation of Islamic law in a secular non-Islamic state. The Philippine’s Government recognized that Muslim minorities could hardly abandon their customs and religious personal laws. It never happened and is indeed, unlikely to happen for a Muslim community in this world to completely ignore and disregard their Islamic cultural practices whether it is recognize or not recognized by the state.

**Position of the Islamic Law under the Philippine’s Constitution**

The legal status of Muslim Personal laws is not only a subject of study in itself but a means to evaluate the position of Islamic law within a secular-non-Islamic society. This brings us to the question on how sincere the government in recognizing the Muslim personal law. With the changing perception of the West on Islam, we find a situation of unusual awareness and complexities from secular states. We are awed by the diversity of events and issues affecting every Muslim community.
The position of Muslim Code in the Philippines does not remove the Muslims from all other laws of their own country as it covers only the Muslim personal laws. All other parts of the Philippines’ Civil Code still apply to them. With the exception of “bigamy” the Revise Penal Code remains its force over the Muslim Filipinos. The same true with all other laws and regulation in the country whenever applicable.

The Code of Muslim Personal Laws in the Philippines has been codified based on Article XV, Section 11 of the 1973 Philippines’ Constitution which provides that,

“The State shall consider the customs, traditions, beliefs and interests of the national cultural communities in the formation and implementation of State policies.”

This provision has been interpreted as empowering the State to draft any law on the cultural communities and so do most of other legal authorities who have commented on the subject. A back up to the above mentioned article that makes the Code stands on a strong constitutional base is raised in Article XVII, sec. 3(2) of the same Constitution, which reads:

“All ...decrees... promulgated, issued, or done by the incumbent President shall be part of the law of the land, and shall remain valid, binding and effective even after the lifting of martial law...”

The constitutional rights of the minorities to adhere to its religious belief, practices and culture has been made in accordance with in Article 18 of the Universal Declaration for Human Rights as follows:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice worship and observance.”
This article can be exercised based on the conditions that it will not impair public order, health and safety. Promotion of human rights resulted not only for religious freedom but also goes further in implementing the minorities’ right of culture. Article 40 of International Covenant on Civil and Political Rights (ICCPR) 1966 clearly provides in Article 27 that,

“In those states in which ethnic, religious, linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language.”

Here, we are bound to point out the meaning of the right to culture as found in this Covenant. Culture has been defined during the Cultural Rights as Human Rights Conference at UNESCO as it comprises all forms of expressions, thought and action peculiar to a given community. It includes the belief, institutions and techniques which impose the same style of living on the members of a society. It ensures the unity and stability, while undergoing the transformations of that society- transformation to which moreover it continually contributes.”

It goes to show that rights of culture can be the right of a group of people or community to maintain their cultural integrity and other privileges to enjoy their style and strategy of living. Therefore, Muslim community has the right to maintain the Islamic culture as its own way of life, such as religious beliefs, practices and moral values. To achieve this right, the Muslims, as they belong to the minority groups need some guarantees and protections to be provided to them by the government to maintain peace and harmony to the whole nation.

These two fundamental principles, religious freedom and the right to culture as human rights can be the basis for a peaceful demand for the application of Muslim personal laws to Muslim Filipinos. The demand can

be meaningful and operative if there is a guarantee and a commitment from the government regardless of what legal system or ideology it professes. At least, Philippines opted not only for religious tolerance but also for an accommodation to various cultures and religious influences. This is based on a mind that is open and desirous of knowing better the cultural heritage of the minority groups for the common good of the nation.

The Muslim Code: Its Recognition and Application to Muslim Filipinos

The Proposed Code of Philippine Muslim Laws was drafted by the Research Staff which was created under Memorandum Order 370 on August 13, 1973. The Draft was submitted on April 1974 to the Office of the President. As a result, the President issued Executive Order No. 442 on December 23, 1974 creating a Presidential Commission to Review the Code on Filipino Muslim Laws. The Presidential Commission provided for 11 members representing different government agencies. There were seven Muslim members and the rest were non-Muslims.

In reviewing the Draft Code, conferences, meeting and seminars were held by the Code Commission for consultations. The participants particularly, Muslim lawyers and religious leaders, were encouraged by the Commission to express their views and opinions in order to improve the Draft. The final report on the Proposed Code of Muslim Personal Laws was finally submitted to the Office of the President for approval on August 29, 1975. It was only signed into law on February 4, 1977 through Presidential Decree 1083. This law clearly emphasized that the government has the intense desire to strengthen all the ethno-linguistic communities in the Philippines within the context of their respective ways of life in order to bring about a cumulative result satisfying the requirement of national solidarity and social justice.

In the implementation and application of the Code, the primary sources of the Islamic law, the Qur’an and the Sunnah are to be consulted and the standard treatises thereon have to be given persuasive effect. The application of Islamic law as provided in this Code is in practice limited to matters of family law such as marriage, divorce, and succession. The Code has nothing to do with criminal law except on some related Islamic offences like imposing fines. Thus, Muslims are still governed by the national secular laws of general application.

Problems Confronting the Application of the Muslim Code

The application of Muslim Personal laws constitutes as a challenge and severe test to the preservation of Islamic law in a secular non-Islamic state. The Philippine’s Government recognized that Muslim minorities could hardly abandon their customs and religious personal laws, altogether, in order to practice only the secular state’s laws. But in spite of this recognition, people believed that the government was not sincere in recognizing the application of the Muslim personal laws to the Muslim minorities. The government had been criticised on the membership of non-Muslims in reviewing the final draft of the proposed code on Muslim Personal laws. But according to the Chairman of the Code Commission, the appointment of a Catholic to the Commission to represent the religious majority in the country was intended to dramatize the fact that there was national unity behind the move to give the Muslims the legal right to be governed by the personal laws of the Shariah. He added, that the idea of having the non-Muslim members from the government legal institutions was to see to it that the Muslim Personal laws can fit within the Philippine’s Constitution.

Majority of the Muslim Filipinos belonged to the Sunni and they adhered to the teachings of Imam Shafii. However, most of them are not aware

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4 Article 4, Muslim Code.
that the principles of Shafii are not strictly observed in the Muslim Code. It is expressly provided that, “Should there be any conflict among the orthodox (Sunni) Muslim schools of law, that which is consonance with the Constitution of the Philippines, this Code, public order, public policy and public interest shall be given effect.” However, for the settlement and partition of estate, Article 134 (par.2) of the Code provides that, “If the decedent’s madhhah is not known, the Shafii School of Law may be given preference together with the special rules of procedure adopted pursuant to this Code.

It has been noticed that the language used in all the provisions of the Muslim Code is similar with the corresponding provisions in Philippine Civil Code. Aside from the similarities of the language, the substance is quite the same. At any rate, from a careful examination of the terms used as understood in the Muslim Code, their concepts appear to be closely related to one another. An example of this is article 109 of the Muslim Code which provides that, “The invalidity of one of several provisions of a will shall not result in the invalidity of any other, unless it is to be presumed that the testator would not have made such other provisions if the first invalid provisions had not been made.” This provision is just a reproduction of article 792 of the Civil Code of the Philippines which was taken from article 2085 of the German Code, which provides as follows: “The nullity of one of the dispositions contained in a will shall not result in the nullity of the others, unless it can be admitted that the deceased would not have made the latter without the former.”

The general provisions of the Code are far from being a perfect laws for the Muslims in the Philippines because anything to be perfect must be complete in all its parts, not only in the sense that it must include all the parts that properly belong to it, but also in the sense that it must exclude all those parts which are beyond its scope.

6 Article 6, Muslim Code.
7 Art. 109, Muslim Code.
The Muslim Personal laws has been criticized for having a limited jurisdiction as it is applicable to Muslims only and also it does not cover any criminal matter. The *Shariah* court has been alleged as an impoverished institution that lacks the essentials to administer the law. On the finality of *Shariah* court decision, Article 145 of the Muslim code provides that, “nothing herein contained shall affect the original and appellate jurisdiction of the Supreme Court as provided in the Constitution”. It shows that the final decision will be decided by the members of the Supreme Court, majority of them are not Muslims and without sufficient knowledge in Islamic law. For many years, the same with other parts of the judicial systems in the country, the *Shariah* courts suffered from a large number of unfilled positions, including the office of the *Mufti*.

**Prospects for Reformation**

The Code of Muslim Personal Law in the Philippine is not an absolute piece of legislation. Like any other law, it is subject to amendment, modification and can be repealed. The constitutionality of any of its provisions is subject to the approval of the law makers. The only apparent advantage is, it is a special law, and it has an express mandate that in case of conflict with any other law, the latter shall be liberally construed in order to carry out the Muslim law. As clearly provided under the General provisions of the Muslim Code that, “(1) In case of conflict between any provisions 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.”

The law making body must be strongly persuaded to amend some of the provisions with deficiencies. In other words, provisions which are not in accordance with the Islamic law but taken from the Civil Code should be amended. Islam is flexible and adaptable in meeting challenges and other reforms. The idea of amending the Muslim personal law should be pursued,
although, its realization will meet many obstacles. In fact, the Muslim Code shows its readiness to adopt any of the interpretations of the Islamic schools not contrary to the principles of the Constitution of the Philippines based on the following articles:

“In the construction and interpretation of the Muslim Code and other Muslim laws, the court shall take into consideration the primary sources of Muslim Law. Standard treatises and works on Muslim law and jurisprudence shall be given persuasive weight in the interpretation of Muslim law.”  

“Should there be any conflict among the Orthodox (Sunni) Muslim schools of law (Madhahib), that which is in consonance with the Constitution of the Philippines, this Code, public order, public policy and public interest shall be given effect. The Muslim schools of law shall, for purposes of this Code, be the ḥanafī, the ḥanbali, the Malikī and the Šafī‘ī.”

**Conclusion**

The implementation of the Muslim Code is nothing more than the grant of legal recognition to the long-standing personal practices of the Muslim Filipinos. Although, it is far from being a complete personal law, it appears that it contains almost all the basic rules which properly belong to the law of marriage, divorce and succession. Its preservation and continued existence to make it in accordance with the Islamic law will go a long way. Its reformation can be realized if the Muslim leader and ulama’ can be unified and make a move through a new resolution before Congress to amend the provisions of the Muslim Code and make it fully in accordance with the Islamic law. But the success of this, depends on the sincere and full commitment of the government and the cooperation of Muslim political and religious leaders.

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8 Art. 4, Muslim Code.
9 Art. 6, Muslim Code.
References


Statutes:
The Code of Muslim Personal laws in the Philippines (Presidential Decree No. 1083)
The Civil Code of the Philippines
German Civil Code, 1878